

**REALIZING SOCIAL JUSTICE IN KENYA THROUGH THE
IMPLEMENTATION OF THE SPECIAL ECONOMIC ZONES
ACT OF KENYA**

BY

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degree of Master of Laws (LLM) at the University of Nairobi**

2020

DECLARATION

I, **Stephen Yona Mudibo**, do hereby declare that the work presented is my original work and has not been submitted for a degree in any other university.

Signed

Stephen Yona Mudibo

Dated

This thesis has been submitted for examination with my approval as the university supervisor.

Signed

Dr. Jackson Bett

Dated

DEDICATION

This work is dedicated to my parents Edward Mudibo and Jenipher Mudibo and my siblings for their faith, belief, and commitment to my studies without which the endeavor would never have been possible.

Much dedication also goes out to the victims of injustice in a socio-economic capacity to which this research moves to support their voices in the realization of social justice in Kenya.

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TABLE OF DOMESTIC LEGISLATIONS

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Copyright Act 2001

Export Processing Zones Act (Chapter 517) 1990

Finance Act 2017

Foreign Investments Protection Act 2012

Industrial Property Act 2001

Kenya Revenue Authority Act 2018

Special Economic Zones Act 2015

Special Economic Zones Policy 2015

The Investment Disputes Convention Act 1966

The Investment Promotion Act 2009

Trade Marks Act 1994

TABLE OF REGIONAL AND INTERNATIONAL LEGISLATION

Policy on the Development of Special Economic Zones in South Africa 2012

The East African Community Customs Management Act 2004

The Malaysian Industrial Co-ordination Act 1975

TABLE OF INTERNATIONAL CONVENTIONS

ICSID Convention, Rules and Regulations 2006

International Covenant on Civil and Political Rights

International Covenant on Economic, Social and Cultural Rights

LIST OF ABBREVIATIONS

BAIC	Beijing Automobile International Corporation
BEPS	Base Erosion Profit Shifting
CDC	Coega Development Corporation
CSF	Cabinet Secretary Finance
CSTI	Cabinet Secretary Ministry of Trade and Industrialization
DFI	Development Finance Institute
DTI	Department of Trade and Industry South Africa
EAC	East African Community
ECDC	Eastern Cape Development Corporation
ECER	East Coast Economic Region of Malaysia
EPZ	Export Processing Zone
EPZA	Export Processing Zones Authority
FDI	Foreign Direct Investment
FEZ	Free Economic Zone
FTZ	Free Trade Zone
GCI	Global Competitiveness Index
GDP	Gross Domestic Product
HICOM	Heavy Industrial Corporation of Malaysia
ICA	Industrial Development Act (Malaysia)
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IMF	International Monetary Fund
IMP	Industrial Master Plan
KIA	Kenya Investment Authority

MIDA	Malaysian Investment Development Authority
SAPS	Structural Adjustment Programmes
SEZ	Special Economic Zone
SEZA	Special Economic Zones Authority
UK	United Kingdom
USA	United States of America
USD	United States Dollars

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ABSTRACT

This study is inspired by the realization that although the Special Economic Zones Act has provided criteria for the designation of Special Economic Zones and with emphasis on the need for SEZs to have proximity to resources, population centers and infrastructure and as well the licensing of SEZs, the same practice is skewed and contrary to the provisions of the Act. This study is, therefore important since it gives insight on how the implementation of the Special Economic Zones (SEZ) program through the SEZ Act and lessons drawn from Malaysia and South Africa's SEZs will enable the realization of social justice in the economy. This research is a gap filler in the area of social justice and its implementation in Kenya as it draws on lessons and best practices of how SEZs from other countries have been implemented effectively to enable sustainable social justice.

Kenya rolled out the Special Economic Zones Act in the year 2015 after realizing that its economy was lagging in terms of development owing to unemployment, corruption, unequal distribution of resources and poverty. Thus, the SEZ program was initiated to remedy the ills of the previous export processing regime and foster development in the economy. Globally with the new phase of law and development, nations are called upon to consider social justice as an end result for sustainable development. This study is premised on the hypothesis that the current implementation of the Special Economic Zones program is subjected to political interference. This study will move in support of the effective implementation of SEZs in Kenya.

Through the reliance on sociological jurisprudence, legal interpretivism and justice as fairness, the study establishes that state interference is requisite by state actors in the equitable distribution of wealth and resources through its development projects. However, the harsh reality is that the state actors' actions have contributed to the decline in social justice due to the

deliberate in-the operationalization of the zones and skewed administrative processes within the zones.

The study relied on a qualitative based research model and employed primary and secondary data with the primary sources, including the Constitution of Kenya, 2010 and both national and international policies. Secondary data sources came from reports, journals, textbooks, periodicals, newspapers and magazines. It is upon critical analysis of this data that the research questions on this subject were formulated.

The study made key findings where it noted that a coherent legal framework is essential for economic prosperity. The findings have also observed that Kenya needs more regulation in the operationalization of SEZs. It was also established that political interference resulted in the in-operationalization of SEZs and the effects of these have slowed down development for three years since the coming into force of the SEZ Act. It is a further finding of this study that reliance on the hegemonic style of development has contributed to the failed progress in development in Kenya over the years resulting in the decline in social justice.

Based on the above findings, the study concludes that more political goodwill and strengthening of the legal and institutional frameworks need to be effected for the implementation of the program to succeed in enhancing social justice.

The study contributes significantly to scholarly knowledge and the people at large by recommending the best procedures to attaining social justice. Importantly the research recommends that zone programs be prioritized and integrated into Kenya's long-term trade, industrial development and wider economic growth be prioritized. It also recommends the use of political goodwill and commitment by leaders to realize the SEZ dream. In the academic

area, the study supports the philosophical considerations of social justice as a tool for law and development and supports various theories of law.

CHAPTER ONE

1.1 INTRODUCTION AND BACKGROUND

Previously Kenya was operating under the Export Processing Zone (EPZ). As much as the Export Processing Zones Act (EPZA) was useful in establishing free trade, it however, was lacking in providing wealth and diversity of markets and this resulted in the introduction of the SEZ. The SEZ's primary advantage was that it offered a wide variety of SEZ types such as enterprise zones, industrial estates and free trade zones amongst others. However, as the SEZ Act is now in place, there's a problem of implementation as part of the criteria spelled out in the Act are being overridden by inappropriate political decisions. This is evident through the in-operationalization of designated SEZs and arbitrary designation of areas as SEZs with no explanation on how such decisions were arrived.¹

Many countries have successfully used SEZs as industrial policy tools. Kenya made strides to establish Export Processing Zones in the year 1990. With the coming into force of the Export Processing Zones Act, the activities of EPZ enterprises were limited to manufacturing, commercial and service activities. In contrast, the Special Economic Zones Act of Kenya 2015 gives a list of extensive activities that entities can choose from. Kenya moved in the way of establishing Special Economic Zones as an attempt to encourage industrialization and this move was geared towards meeting its vision 2030.²

¹ Otiato Kamau, 'Is Kenya Overbanking On New Special Economic Zones To Drive Growth?' (*The Standard*, 2017) <<https://www.standardmedia.co.ke/business/article/2001249043/is-kenya-overbanking-on-new-special-economic-zones-to-drive-growth>> accessed 27 December 2017.

² Vision 2030 is Kenya's national flagship economic development program that seeks to transform Kenya into a middle-income economy by 2030. See Kenya Vision2030, 'About Vision 2030' (Kenya Vision 2030, 2017) <<http://www.vision2030.go.ke/about-vision-2030/>> accessed 26 November 2017.

In Sub Saharan Africa, it is evident that SEZs have failed to live up to expectation with a few exceptions in Mauritius, Madagascar and Lesotho³ and just recently Rwanda. Despite there being three decades of SEZ activities in Africa, analysis of the performance of economic zones globally has been haphazard as there is an overemphasis on case studies from a handful of economic zones.

Report by World Bank has shown that more often than not, the location of zones is more so determined by political factors as opposed to commercial or economic considerations.⁴ This same occurrence is no different in Kenya. Recent developments have shown that licenses given to entities and the location of Special Economic Zones have benefitted regime friendly zones. Despite there being the SEZ, its regulations and SEZA, political authority nevertheless seems to render the functions of the Authority useless as the executive arm of the government declares its rule on it. This is a recipe for a failed zone integration.

By their nature, SEZs are considered as national development projects. To maximize their potential, SEZs are operated in clusters where much synergy is obtained. Most SEZs are decentralized and specifically in Kenya supported by the Constitution, SEZs stand a great chance to help the country achieve social justice. Moreover, the Constitution allows for public participation where citizens can contribute towards the development of legislation such as SEZ amongst others. The SEZ in Kenya also aligns itself with vision 2030 as the national development plan, which seeks to eradicate poverty and provide for equitable resource distribution. Studies have also shown that devolution which the Kenyan Constitution provides

³ Just to note, Lesotho has been effective in combining policy implementation and its instruments to support export manufacturers. This has been used to remedy its shortfall of a zone program.

⁴ Thomas Farole, *Special Economic Zones in Africa : Comparing Performance and Learning from Global Experience* (The World Bank 2011).

for has the potential to reduce patronage-based development. It is for these reasons that this study seeks to explore the legal and institutional frameworks supporting the establishment of the SEZ. This study will be supported by lessons from the studies of other successful SEZ projects in trying to identify whether the same can lead to the attainment of social justice.

1.2 THE STATEMENT OF THE PROBLEM

The Special Economic Zones Act came into force on 15th December 2015 with a major aim of regulating the operations of SEZs in Kenya through the various constituted bodies and its appointed officials. The Act provides for the criteria for designating Special Economic Zones⁵ and the licensing of private entities operating around these zones.⁶ These criteria conform with best practices in the industry and are established based on objectivity through the lessons learned from the operations of the EPZ regime, amongst others.

In an ideal situation, it would be expected that the operations and licensing of SEZ be coordinated through the SEZ Authority (SEZA) and the designation of SEZs be done through consultations between the Cabinet Secretary Ministry of Trade and Industrialization (CSTI), Cabinet Secretary Finance (CSF) and the Special Economic Zones Authority (SEZA).⁷

However, in as much as the SEZ Act establishes criteria for designation of Special Economic Zones and with emphasis on the need for SEZs to have proximity to resources, population centers and infrastructure and as well the licensing of SEZs, the harsh reality on the ground is

⁵ Special Economic Zones Act 2015, s 5.

⁶ Special Economic Zones Act 2015, s 27.

⁷ Special Economic Zones Act 2015, s 4.

that the process is skewed and contrary to the provisions of the Act.⁸ This is more so evident through the issuance of licenses through the Ministry of Industrialization to individuals arbitrarily.⁹ This effect is also seen through the in-operationalization of some zones where despite the Cabinet Secretary of Trade granting 3 billion in the 2015/16 budget for industrialization and SEZ development, no tangible action is evident on the ground.¹⁰ With this, the Ministry of Industrialization and the SEZA's functions are rendered useless as their duties and authority are subject to manipulation by the political class.

This study, therefore, seeks to address the prevailing challenges by looking at the extent to which the legal and institutional frameworks establishing the SEZ and its implementation process can be applied effectively to achieve social justice.

1.3 RESEARCH QUESTIONS

1. What are the policy, legal and institutional structures establishing both the Kenyan EPZ and the SEZ and how will the understanding of the SEZ structure contribute towards the realization of social justice?
2. What are the inadequacies of the EPZ and how have they resulted in the transitioning to the SEZ?

⁸ Special Economic Zones Act, 2015, s 5(e). *See* also the functions of SEZA as provided under section 11 of the SEZ Act.

⁹ Kamau Macharia and Guguyu Otiato, 'Is Kenya Overbanking on New Special Economic Zones to Drive Growth?' (*Standard media*, 2017) <<https://www.standardmedia.co.ke/article/2001249043/is-kenya-overbanking-on-new-special-economic-zones-to-drive-growth>> accessed 26 June 2019.

¹⁰ Moses Odhiambo, "'Dead" Trade Hubs Blur Uhuru's Industrialisation Plan' *The Star Newspaper* (Nairobi, 16 March 2019) <<https://www.the-star.co.ke/news/2019-03-16-dead-trade-hubs-blur-uhurus-industrialisation-plan/>> accessed 24 June 2019.

3. What are some of the best practices from Malaysia and South Africa on the management of SEZs that Kenya can learn in order to ensure success in its own SEZ and the realization of social justice?
4. What recommendations can be drawn from the analysis of the current SEZ frameworks and their implementation?

1.4 RESEARCH AIM

To analyze the law and establish the extent to which the SEZ Authority is successfully implementing the provisions of the Act in creating regional hubs that promote social justice as required by the constitution.

1.5 OBJECTIVES OF THE STUDY

1. To analyze the Export Processing Zone regime in Kenya and its legal structures in comparison with that of the Special Economic Zones of Kenya.
2. To understand how the SEZ structure contributes towards ensuring justice in terms of wealth distribution, opportunities and privileges within the Kenyan Society
3. To analyze the inadequacies of the Kenyan Export Processing Zone and how they have resulted in the transitioning to the SEZ.
4. To utilize lessons on SEZ management as applied in Malaysia and South Africa and how they can impact on Kenyan SEZs and their ability to achieve equitable resource distribution.
5. To make recommendations and identify areas of further research towards realizing social justice in Kenya.

1.6 HYPOTHESES

This research proceeds on the assumption, which will be tested in this thesis that:

1. Whereas there exist legal and institutional frameworks governing the implementation of SEZs, the current implementation of SEZs in Kenya is subjected to political interference resulting in its implementation delay.
2. The inadequacies of the previous EPZ regime contributed less towards achieving social justice, thus resulting in the transitioning to SEZ.

1.7 JUSTIFICATION OF THE STUDY

This research is justified on the basis that although the SEZ Act has provided for the criteria for designating SEZs in Kenya, the implementation of such laws is still skewed as there is arbitrariness in the designation of certain areas as SEZs and licensing of operators in Special Economic Zones owing to political interference. Hence this research will give insight as to how implementation of these laws will enable the attainment of social justice.

This research is important because it will analyze the functions of the SEZ Authority (SEZA) and explain how the Authority's functions can be used to establish regional balance through strategic implementation of regional SEZs. This will be done through identifying with the hurdles of implementation through assessing the economic and political challenges and recommending methods of achieving sustainable social justice through learning from best practices from Malaysia and South Africa. This research is also useful as it will help the relevant stakeholders such as investors, to make informed decisions before investing in the zones. It will also aid legislators in drafting and implementing better laws that will encourage investor apathy and growth in the Special Economic Zones.

1.8 THEORETICAL FRAMEWORK

1.8.1 Introduction

The focus of this project is to propound ways on how social justice can be achieved through the establishment of sustainable Special Economic Zones. Kenya has been on the epitome of tribal division since its independence, a phenomenon that was initiated by the first post-independent government where the distribution of economic resources was initiated based on tribal affiliations amongst other opportunities within the social spheres of Kenya. In this research, we shall focus on theories such as Sociological School, Legal Interpretivism and Justice as fairness and the proponents of these theories that will support this thesis.

1.8.2 Sociological Jurisprudence

This theory was postulated by Roscoe Pound, who believed that laws were being expended in ways that didn't meet society's needs after he published his famous book on Sociological Jurisprudence.¹¹ Pound further believed that two new components of law are introduced by sociological jurisprudence, that is, sociological jurisprudence seems to reorganize law in order to alleviate poverty and secondly, the law seeks to enable the attainment of as many individual interest as can be.¹² Pound also believed that the task of lawyers and legislators is social engineering. This theory is thought to extend to social welfare. Ehrlich contends that the theory of justice is one in which the law as a living law is focused on the attainment of social justice.

¹¹ Roscoe Pound, 'The Need of a Sociological Jurisprudence' (1907) 30 Annu. Rep. ABA 911 <<https://heinonline.org/HOL/LandingPage?handle=hein.journals/anraba31&div=45>>.

¹² Louis H Masotti and Michael A Weinstein, 'Theory and Application of Roscoe Pound's Sociological Jurisprudence: Crime Prevention or Control?' (1969) 2 University of Michigan Journal of Law Reform 433 <<https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2450&context=mjlr>>.

Further, Roscoe Pound believed that the “sociological approach should ensure that making, interpretation and application of laws take account of social facts.”¹³ This research will move in support of this theory extensively. It applies this theory to show the importance of the application of the SEZ legislation and its framework as a development tool in achieving social justice.

1.8.3 Legal Interpretivism¹⁴

This school of thought propelled by Ronald Dworkin offers a more robust explanation of how institutions practice is affected by certain principles that dictate its role. To Dworkin's, state interference is requisite by state actors if wealth and resources are to be redistributed equally. Further, he formulates two types of equality, that of welfare and the other of resources.¹⁵ In the first instance, he considers certain conceptions of welfare to be paramount to contend an adequate ideal of equality of welfare. He later acknowledges that none of the notions provides a proper ideal. Dworkin considers that resource division will only be equal when it is complete and that no one would prefer another bundle of resources to his or her own. As against rights, liberty isn't fundamental and with equality being before liberty, this means that a citizen is at least equal before the law. Equal enough to participate in the common good of all. Therefore, adherence to equal respect and treatment is effective in attaining social ends. This research will move in support of legal interpretivism. We shall use this theory to show how the implementation of the legal framework and the support from state actors can be used in the attainment of social ends equitably.

¹³ Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory* (3rd edn, Oxford University Press 2012).

¹⁴ Nicos Stavropoulos, 'Legal Interpretivism', *Stanford Encyclopedia of Philosophy* (Summer2014 edn, Metaphysics Research Lab, Stanford University 2014) <<https://plato.stanford.edu/entries/law-interpretivist/>> accessed 25 July 2020.

¹⁵ Wacks (n 13) 131.

1.8.4 Justice as fairness

This theory, as postulated by John Rawls, describes a system where citizens are cooperating in an egalitarian economic environment while still holding up to basic rights that are equal.¹⁶ He coined the two principles of justice as fairness and how they should be integrated into society. In the first principle, he considers that Individuals are to have an equal right to the most extensive total system of equal basic liberties that aligns with a similar system of liberty for all. In the second principle, he considered that ‘two conditions would need to be in place to satisfy social and economic inequality.

- a. “They are to be attached to offices and positions open to all under conditions of *fair equality of opportunity*;
- a. They are to be to the greatest benefit of the least-advantaged members of society (*the difference principle*).”¹⁷

Through these principles, he considered liberties to be paramount as against equality. “In his conception of society, Rawls believed that social institutions are to be fair to all cooperating members of society, regardless of religion, race, class of origin, gender amongst others.”¹⁸ This study is guided by the theory as it helps to inform on how social institutions and structures are to be utilized in order to achieve equality in development. It hence supports the use of state power and machinery to achieve social justice.

¹⁶ ‘John Rawls (Stanford Encyclopedia of Philosophy)’ <<https://plato.stanford.edu/entries/rawls/>> accessed 21 November 2020.

¹⁷ *ibid.*

¹⁸ *ibid.*

1.9 RESEARCH METHODOLOGY

This research is doctrinal in nature and it will help to analyze in greater detail the SEZ phenomena and how it can be used to attain social justice. This research will employ two data collection methods that is the primary and secondary data. The primary sources will include the Constitution of Kenya 2010, relevant national legislation and policies and case laws. The secondary sources of information on this subject are from journals, textbooks, periodicals, legal reports, legal encyclopedias, newspapers and magazines. Published and unpublished University of Nairobi literal works shall also be consulted.

These research materials are mainly sourced from the internet, bookshops, libraries such as the University of Nairobi Library, Jomo Kenyatta Memorial Library, the UNON library. Internet as a major repository source shall be used majorly in analyzing reports and scholarly articles from successful economies on Special Economic Zones. The materials obtained from this research will be used in identifying the legal, policy and institutional structures informing the formation of the SEZ. The materials will also help in identifying with lessons from Malaysia and South Africa that inform on best practices of running the Kenyan SEZ.

1.10 LITERATURE REVIEW

Kenya, as other African countries, has acknowledged the importance of introducing Special Economic Zones in an attempt to power its economy through attracting investment and growing exports. Generally, all Special Economic Zones have a common characteristic. They have single management of administration, they are geographically delimited, they provide for certain investor benefits and finally, they have a dedicated customs area or offer a tax free

incentive and the customs procedures are often streamlined.¹⁹ They also primarily offer two main benefits, generation of employment and acting as a source of foreign exchange earnings.²⁰

Cheesman divided the literature on SEZs into two broad themes. The first being ‘zone theory,’ where a theoretical analysis of zone functionality is done in a plot to understand key relationships and processes. The second is the ‘zone analysis’ where various analyses are used to arrive at objective assessments of zone functionality.²¹ Cheesman believes that the zone theory has had a rough time in attaining real-world implementation. He believes that in the 1980’s a methodical body of theory emerged but remained trivial in the 1990’s many years after the first zones were developed. This research will move in support of Cheesman’s ‘zone analysis’ theory as it presents an objective analysis of how zones function within the Kenyan landscape.

Grubel set to determine the economic and development implications for different types of free zones through his analysis of developed world zones.²² Through Grubel, critical elements in future zone analysis were developed, most important of them being ‘zone secondary catalytic effects.’ Grubel believed that local economic activity interactions would further develop this concept.²³ Grubel’s view of zones as catalysts developed scholarly knowledge to which

¹⁹ Akinci Gokhan and Crittle James, ‘Special Economic Zones Performance, Lessons Learned, And Implications For Zone Development’ <<http://documents.worldbank.org/curated/en/343901468330977533/pdf/458690WP0Box331s0April200801PUBLIC1.pdf>> accessed 29 October 2017.

²⁰ Douglas Zhihua Zeng, ‘Building Engines for Growth and Competitiveness in China’ 4 <<http://documents.worldbank.org/curated/en/294021468213279589/pdf/564470PUB0bui110Box349496B01PUBLIC1.pdf>> accessed 29 October 2017.

²¹ Andrew Cheesman, ‘Special Economic Zones and Development: Geography and Linkages in the Indian EOU Scheme The Bartlett Development Planning Unit’ (2012) 145 <www.bartlett.ucl.ac.uk/dpu> accessed 15 June 2019.

²² Herbert G Grubel, ‘Towards a Theory of Free Economic Zones’ (1982) 118 *World Economic Archive* 39 <<https://www.jstor.org/stable/40439002>> accessed 15 June 2019.

²³ Cheesman (n 21) 21.

scholars such as Miyagiwa believed through his interpretations of zones as the process of development to mean that zones have the potential for welfare-production in their process of development.²⁴

Johansson believes that industrial spillovers resulted in the emphasis on zone developmental effects. This, he believes, was also catapulted by the spotlight from international developmental organizations.²⁵ Thus many nations had kick-started the process of development and broadened the discussion on procedures and policies of zone development in earnest.²⁶ Today, most zone policies emphasize and support development – inducing secondary effects.²⁷ This research agrees with Grubel, Miyagiwa and Johansson's beliefs on zone secondary catalytic effect. The research from these scholars is essential to this study as they relate with the expectations of Special Economic Zones and their advantages of creating spillovers and various agglomerations which all support development inducing effects.

²⁴ Kaz F Miyagiwa, 'A Reconsideration of the Welfare Economics of a Free-Trade Zone' (1986) 21 *Journal of International Economics* 337 <<https://www.sciencedirect.com/science/article/pii/0022199686900450>> accessed 15 June 2019.

²⁵ Helena Johansson, 'The Economics of Export Processing Zones Revisited' (1994) 12 *Development Policy Review* 387 <<http://doi.wiley.com/10.1111/j.1467-7679.1994.tb00075.x>> accessed 15 June 2019.

²⁶ Moises Chenery, Hollis; Syrquin, 'Patterns of Development 1950-1970 (English) | The World Bank' (1975) <<http://documents.worldbank.org/curated/en/482491468328816108/Patterns-of-development-1950-1970>> accessed 15 June 2019.

²⁷ Aradhna Aggarwal, 'Export Processing Zones In India: Analysis Of The Export Performance' (2004) 148 <www.icrier.res.in> accessed 15 June 2019.

Kenyan SEZs, amongst others, formulate policies with several aims²⁸ Lin and Wang hold the views from economies that SEZs can achieve Industrialization more efficiently and effectively. They contend that such investment, as proved by other economists, can provide a lot.²⁹ Thus, the zones can be a great bet to safeguard the environment, develop cities that are environmentally safe. They can also be a great source to generating income and creating jobs.³⁰ This research agrees with Lin and Wang's views on the effect of industrialization that zones can bring. Nevertheless, it is also believed that development ought to be considered in the context of social welfare and social justice. Hence this research will bring in the social aspect of development and how that can be achieved through SEZs.

Many countries perceived that SEZs have more linkages with the local economy, and offer less reliance on incentives. China being an example, declared Shenzhen one of its regions as a city in order to test market-oriented economic reforms. This resulted in a catalytic effect on the growth of China and other Asian tigers. In Africa, the story is different apart from Mauritius and Rwanda, the other African countries such as Lesotho, Ethiopia have seen modest achievements. This is an indication of a reduced impact on transformation as expected. Successful zones align effectively with the host countries specific situation and advantages as they compare.

²⁸ Dorsati Madani, *A Review of the Role and Impact of Export Processing Zones* (The World Bank 1999) <<http://elibrary.worldbank.org/doi/book/10.1596/1813-9450-2238>> accessed 29 October 2017. See also Jean Cling and Gaëlle Letilly, 'Export Processing Zones: A Threatened Instrument for Global Economy Insertion?' [2001] *Développement, Institutions & Analyses de Long terme* 39.

These policies aim at achieving Direct Foreign Investment, reforming economic strategy, employment provision and experimenting on new sustainable policies and approaches.

²⁹ This includes: providing public amenities and services in an area that is compacted geographically; facilitate cluster of development; proper urban development where education and living conditions are conducive; and increased government efficiency in spending and funding.

³⁰ Y Yifu Lin, J. and Wang, 'China-Africa Win-Win Strategy for Job Creation and Transformation' [2014] *GREAT Insights Magazine* 4 <<http://ecdpm.org/great-insights/emerging-economies-and-africa/china-africa-win-win-strategy-job-creation-transformation/>> accessed 29 October 2017.

“Zeng holds that lessons from China’s Economic Zones have shown that SEZs have contributed significantly to national GDP, employment, exports, and attraction of foreign investment. SEZs have also played essential roles in bringing new technologies to China and in adopting modern management practices.”³¹ Several factors played a role in the success of SEZs in China. Key among them was the government support and commitment, land reforms and investment incentives and China’s open-door policy that reduced interference from opposition and set-backs and resulting in a stable macro-economic environment. The coordinated effort between the central and local government as a result of the decentralized system of government also contributed to the success of the zones. This research agrees with Zeng’s view on decentralized and the knowledge transfer that zones bring on an economy. This scholarly knowledge will impact my research by presenting best practices on zone management from other jurisdictions.

Farole showed through a World Bank study on SEZs in Africa that in six African Zone programs³² in comparison with four non-African countries,³³ African zone success is attributed to a small number of countries that offer better results. The same results have shown that a weak business environment is what has necessitated the fall in African countries. Research has also shown that despite being a sufficient legislative framework for the management of SEZs, African states still fail to establish successful SEZs, an example being Ghana.³⁴ Unlike Ghana, Senegal was faced with a hurdle in developing an effective investment climate. This ultimately caused the failure of their SEZs. Here in Kenya, the situation is no different. The top brass in

³¹ (Yifu Lin, J. and Wang n.d.) 4.

³² These countries include Senegal, Nigeria, Ghana, Lesotho, Tanzania and Kenya.

³³ These countries include Vietnam, the Dominican Republic, Bangladesh and Honduras,

³⁴ Ghana’s situation is that the country has a sound free zone legislation. However, challenges posed by the disputes between the government and private developers has seen reduced infrastructure delivery especially around the Tema Zone, resulting in the reduced development in the zone.

government subdue the established Authority under the SEZ Act and arbitrarily declare certain regions as Special Economic Zones while issuing out licenses to regime friendly entities. This creates a likelihood of inequality through bias.

Studies by Dr. Adelhelm Meru from Tanzania have shown that Tanzania was faced with a similar situation like Kenya, which they overcame by establishing regional SEZs.³⁵ However, the system dwindled because of uncertainty upon investors on Tanzania's regulatory framework. Moreover, in China, unlike Kenya, the country's SEZ operated on an open-door policy that encouraged public participation and reduced opposition conflict hence helping to focus on the success of the zones. This research agrees with the above literature from Dr. Adelhelm and through our studies, we will demonstrate the importance of having a proper regulatory framework in achieving sustainable development by analyzing case studies from other jurisdictions.

The literature in this study is limited in that none of the comparisons in Africa bring out the development of SEZs as a tool to achieve social justice, as is considered to be with the new phase of development globally.³⁶ This research will look into that shortcoming and address ways to achieve social justice through the implementation of the SEZ legislation and comparing it with best practices from Malaysia and South Africa.

1.11 THE SCOPE AND LIMITATIONS OF THE STUDY

The scope of this study will be to establish the role played by the government, institutions and authorities such as the Special Economic Zones Authority in implementing best practices that

³⁵ 'Getting Special Economic Zones to Work in Tanzania'
<http://fsi.stanford.edu/sites/default/files/sez_in_tanzania_final_logo-1.pdf> accessed 29 October 2017.

³⁶ Gary Craig, *Handbook On Global Social Justice*. (Edward Elgar 2018).

will guarantee success and, ultimately social justice within Kenya. The limitations of this research are that the literature review in this area of Special Economic Zones in Kenya is a bit thin as the implementation stage is still in its infancy and the analysis of the same is also hard.

1.12 CHAPTER BREAKDOWN

CHAPTER 1

This study comprises five chapters. Chapter 1 discusses the broad overviews of the research. This chapter covers the introduction aspects and background of study, problem statement, justification of the research, the research objectives, hypotheses, the underlying theoretical frameworks, literature review, methodology of research, and the study limitations. The study also discusses the summary of my research work and also gives a sneak peek on what is expected in the other chapters. It further explains the background of the research, statement of the problem and its justification. It also lays down the research questions and the hypothesis that is already formulated. It elucidates the preferred methodology, literature review and theoretical framework. Finally, it provides a breakdown of all chapters in the thesis.

CHAPTER 2

This chapter discusses the structure of the Export Processing Zone and the Special Economic Zone, looking into the history and the legislative and institutional frameworks that have informed the establishment of the EPZ and later the SEZ. It further makes a comparison of the legislative and institutional frameworks of these two structures. It also explains how the SEZ understanding can be used to achieve social justice.

CHAPTER 3

This chapter discusses the inadequacies of the Export Processing Zone of Kenya. It looks to determine whether these inadequacies have been addressed through the SEZ regime. It further analyses the current implementation of the SEZ Act and the challenges that it faces. It also tries to make a case on why the SEZ is better placed to achieve social justice as compared to the previous EPZ regime.

CHAPTER 4

This chapter gives a benchmark of lessons drawn from studying the Malaysian and South African (Coega) SEZ's and addresses thematic topics of importance that shed light on the challenges and inform on the lessons that Kenya can learn on the management of its SEZs in order to achieve social justice.

CHAPTER 5

This chapter summarizes all that has been discussed from the other chapters. It addresses the findings from the studies of these chapters in general. It makes recommendations on best practice in terms of law and policy formulation that the Kenyan government can adopt in enabling success in its SEZ regime.

CHAPTER TWO

A BRIEF ON THE HISTORY, LEGISLATIVE AND INSTITUTIONAL FRAMEWORKS GOVERNING THE KENYAN EXPORT PROCESSING ZONES AND THE SPECIAL ECONOMIC ZONES

2.1 Introduction

This chapter addresses the history, legislative and institutional frameworks governing the Kenyan Export Processing Zone and the Special Economic Zones. This chapter will discuss the principles informing Economic Zones development, historical background of the EPZ and SEZ. It will look at the principles behind establishing Special Economic Zones under the philosophical concept of right to development. It will observe preferential zones and then relate with the Kenyan idealism behind the need for development as postulated through the Constitution and other Conventions. It will further analyze the legislative and institutional frameworks governing the EPZ and SEZ and how they differ from each other. Lastly, it discusses how the understanding of SEZ will lead to the attainment of social justice in the economy.

2.2 PRINCIPLES BEHIND ZONE DEVELOPMENT

Zone development has been one of the development tools applied in the late 20th and early 21st century amongst developing nations. The concept behind zone development and the idea of preferential treatment can be considered a mechanism for ensuring regional development and socio-economic development. This whole idea is behind a universal principle on the right to development as encapsulated by the United Nations Declaration on the Right to

Development.³⁷ It is further generalized in the Universal Declaration of Human Rights. This concept arose in the mid-1960s owing to a widespread perception of priorities, needs and developmental problems. It developed as a concern to consider the development concept in a way that is far broader than just the consideration of economic growth. It is this consideration that led the United Nations General Assembly through a resolution 2027 (XX) to consider the need to promote human rights both nationally and internationally. The same emphasis was laid through the ‘Declaration on Social Progress and Development adopted in 1969 by the Assembly in its resolution 2542 (XXIV).’³⁸

The Commission on Human Rights resolution 4 (XXXIII) seems to impliedly recognize certain terms more so, the right to development. The Charter of the United Nations and the International Bill of Human Rights provide the legal norms on the right to development. In the international arena, other covenants have merged to solidify the right to development. One of the covenants is the International Covenant on Civil and Political Rights (ICCPR)³⁹ without forgetting the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁴⁰ Notably, Article 1 of the ICCPR states that all people have the right of self-determination and it is by this right that they have the will to freely determine status and pursue their economic, social and cultural development.

Kenya’s Constitution builds on this concept on the right to development. In particular, Article 2 (6) of the Constitution of Kenya adopts all International laws that Kenya has ratified as

³⁷ ‘A/RES/41/128. Declaration on the Right to Development’ (*United Nations*, 1986) <<https://www.un.org/documents/ga/res/41/a41r128.htm>> accessed 1 July 2019.

³⁸ United Nations, *Realizing the Right to Development*, vol 31 (United Nations Publication 2013) <http://www.ohchr.org/Documents/Publications/RightDevelopmentInteractive_EN.pdf>.

³⁹ International Covenant on Civil and Political Rights 1966.

⁴⁰ Mashood A Baderin and Robert McCorquodale, ‘The International Covenant on Economic, Social and Cultural Rights’ [1966] United Nations.

forming part of Kenyan laws. Further, the Constitution provides for Economic and Social Rights.⁴¹ The SEZ is seen as a qualifying developmental project that impacts on development in a greater sense. Through this, it is expected that SEZs will help in achieving social justice and economic goals effective for the development of the Kenyan economy.

2.3 A BRIEF HISTORY OF THE EXPORT PROCESSING ZONES OF KENYA

Export Processing Zones have been considered over the years as tools for the promotion of non-traditional exports.⁴² The original idea behind the creation of Export Processing Zones was to re-export materials already imported without having to pay taxes.⁴³ Just like other developing nations, Kenya embarked on its venture to attract investment and spur economic growth. The Export Processing Zones program in Kenya was established in 1991 after the promulgation of the Export Processing Zones Act⁴⁴ in 1990. The EPZ Act provides for the establishment of the EPZA⁴⁵, which has the objective of development of all aspects of the “Export Processing Zones, the regulation and administration of approved activities within the EPZ and the protection of government revenues and foreign currency earnings.”⁴⁶

The commencement of the EPZ Act was made possible by the Kenyan government industrial policy documents, namely Sessional Paper No.1 of 1986 on Economic Management for

⁴¹ Constitution of Kenya 2010, Art 43.

⁴² Donald C Hambrick and David Lei, ‘Toward an Empirical Prioritization of Contingency Variables for Business Strategy’ (1985) 28 *Academy of Management Journal* 763
<<http://journals.aom.org/doi/10.5465/256236>> accessed 16 June 2019.

⁴³ Munyao Gregory, ‘The Impact of the Location of Export Processing Zones on the Local Communities: The Case Study of Athi River’ (University of Nairobi 2013)
<[http://erepository.uonbi.ac.ke/bitstream/handle/11295/60061/Munyao_The impact of the location of export processing zones on the local communities.pdf?sequence=3&isAllowed=y](http://erepository.uonbi.ac.ke/bitstream/handle/11295/60061/Munyao_The%20impact%20of%20the%20location%20of%20export%20processing%20zones%20on%20the%20local%20communities.pdf?sequence=3&isAllowed=y)> accessed 16 June 2019.

⁴⁴ Export Processing Zones Act (Chapter 517) 1990.

⁴⁵ Export Processing Zones Act (Chapter 517) 1990, s 3.

⁴⁶ Export Processing Zones Act (Chapter 517) 1990, s 9 (1).

Renewed Growth,⁴⁷ Sessional Paper No. 2 of 1996 on Industrial Transformation to the year 2020,⁴⁸ and Kenya Vision 2030.⁴⁹

2.3.1 Sessional Paper No.1 of 1986 on Economic Management for Renewed Growth

The failure of Kenya's import substitution policy brought the birth of Sessional Paper No.1 of 1986 on Economic Management for Renewed Growth. The policy document was instrumental in proposing a number of fiscal and monetary policy reforms to open up the economy. It is hailed for being the necessary document that established the institutional and structural changes in the marketplace aimed at liberating the economy and opening it up to privatization.

Through the Sessional paper, the government was invited to offer incentives to encourage industries to produce exports. This policy led to the removal of price controls, import licenses, tariff reductions, privatization of public enterprises, liberalization of foreign exchange markets and civil service reforms.⁵⁰ These reforms were a shift in the government policy to introduce privatization in order to spur economic development.⁵¹

2.3.2 Sessional Paper No.2 of 1996, on Industrial Transformation to the year 2020

This policy was set up to further industrialization through a process of structured encouragement to various industries in Kenya to leverage on producing goods for export in

⁴⁷ Republic of Kenya, Sessional Paper No.1 of 1986 on Economic Management for Renewed Growth, (Nairobi: Government Printer, 1986).

⁴⁸ Republic of Kenya, Industrial Transformation to the year 2020. Sessional Paper No.2 (Nairobi Government Printer, 1997).

⁴⁹ Republic of Kenya, Kenya vision 2030. (Nairobi: Government Printer, 2008)

⁵⁰ Njuguna Ng'ethe, *From Sessional Paper No. 10 to Structural Adjustment : Towards Indigenizing the Policy Debate* (Institute of Policy Analysis & Research 1997) <<https://www.worldcat.org/title/from-sessional-paper-no-10-to-structural-adjustment-towards-indigenizing-the-policy-debate/oclc/46672838>> accessed 17 June 2019.

⁵¹ *ibid.*

order to increase the potential for employment. It further looked to ensure the private sector leads industrialization.⁵² The policy noted that at the onset manufacturing firms setting up in the region would benefit from pre-fabricated buildings and space for setting up industries. At that time, the private sector wasn't ready to provide the same due to the high cost of credit. This was an impediment to small and medium-sized enterprises to the EPZ facility due to capital constraints.⁵³ However, the government committed to supporting institutions such as the Export Promotion Council and EPZA.⁵⁴

2.3.3 The Kenya Vision 2030⁵⁵

As previously stated, this is the flagship program that reintroduced Kenya's development plan from the years 2008-2030. The vision is anchored on four medium-term plans with the implementation commencing under the *First Medium Term Plan 2008-2012*. It is aimed at gender equity, creation of jobs, reduction of poverty, improved income distribution, gender and social justice.⁵⁶

2.4 THE LEGAL FRAMEWORK GOVERNING EPZs IN KENYA

As discussed earlier, the policy paper on the EPZ sought to introduce the primary legislative framework governing the EPZ, that being the Export Processing Zones Act.⁵⁷ The EPZ regime is also supported by the East African Community Customs Union Regulations and the Kenyan

⁵² Eric E Ronge and Hezron O Nyangito, 'A Review of Kenya's Current Industrialization Policy' (2000) <<https://pdfs.semanticscholar.org/cdb9/4422bb0cb806b873da9e14da49c4ce67a7d1.pdf>> accessed 17 June 2019.

⁵³ Kipchirchir Patrick, 'Export Processing Zones (EPZ) in Kenya, "A Race to the Bottom" A Critical Analysis of the Legal, Policy and Institutional Framework.' (University of Nairobi 2011).

⁵⁴ *ibid.*

⁵⁵ *ibid* (n 2). See also (n 45).

⁵⁶ *ibid.*

⁵⁷ Export Processing Zones Act (Chapter 517).

Constitution. This isn't exhaustive as other laws touch base on the EPZs legal framework: Foreign Investment Protection Act,⁵⁸ Investments Promotion Act,⁵⁹ Investments Disputes Convention Act, Kenya Revenue Authority Act⁶⁰ and Customs and Excise Duty Act amongst others.⁶¹

2.4.1 The Constitution of Kenya

The new Constitution was promulgated on 27th August 2010. It is the supreme law of the land and any inconsistencies to it render a particular law void to the extent of its inconsistencies. The Constitution affects the EPZs in areas of land and environment,⁶² leadership and integrity⁶³ and devolved government systems.⁶⁴

It is noteworthy that the EPZ Act preceded the Constitution of Kenya 2010. In that regard, the EPZ didn't cater for a devolved system of government. It is also seen to fall short of the principles of public finance under the Constitution, where it is believed that the Act contradicts the Constitution provisions on taxation, which states that the burden of tax shall be shared fairly.⁶⁵ It is also thought that overlaps within the statute can impede its success; hence there is a need to harmonize the Act to meet the Constitution's provisions.⁶⁶

⁵⁸ Foreign Investments Protection Act 2012.

⁵⁹ The Investment Promotion Act 2009.

⁶⁰ Kenya Revenue Authority Act 2018.

⁶¹ See Treaty for the establishment of East African Community Act and Industrial Property Act.

⁶² Constitution of Kenya.

⁶³ Chapter 6 of Constitution of Kenya 2010.

⁶⁴ Chapter 11 of Constitution of Kenya 2010.

⁶⁵ Article 201(a) (i) of Constitution of Kenya 2010.

⁶⁶ *ibid* (n 58).

2.4.2 The Export Processing Zones Act

The Export Processing Zones Act is regarded as the primary legislation governing the operations of the EPZ and its Authority. Through its long title, the Act seeks to provide for the establishment of the EPZ, EPZA, promotion of investments geared towards exports and the establishment of an enabling environment.⁶⁷ Additionally, the EPZ is governed by the East African Community Customs Union Protocol⁶⁸ and its regulations.⁶⁹

2.5 Incentives under the EPZ

2.5.1 Tax incentives

The EPZ program in Kenya benefitted licensed companies by giving them the following tax incentives as established by the EPZ Act: “Exemption from registration under the Value Added Tax Act;⁷⁰ exemption from payment of the excise duties as specified in the Customs and Excise Act (Cap. 472);⁷¹ exemption from income tax for the first 10 years from the date of first sale as an EPZ enterprise except for the limitation of the income tax rate to 25 percent for the ten years following the expiry of the exemption granted;⁷² ten years Withholding Tax Holiday on-resident remittances (except for commercial enterprises);⁷³ stamp duty exemption;⁷⁴ quotas exemption or other restrictions on import or export trade with the exception of trade in firearms, military equipment or other illegal goods⁷⁵ amongst others.”⁷⁶

⁶⁷ Export Processing Zones Act (Chapter 517).

⁶⁸ The protocol establishes key principles to guide export-promotion under the EAC

⁶⁹ The regulations are introduced to ensure a fair and transparent process among the partner nations in the implementation of the EPZ provisions.

⁷⁰ Export Processing Zones Act (Chapter 517) 1990, s 29(a).

⁷¹ Export Processing Zones Act (Chapter 517) 1990, s 29(b).

⁷² Export Processing Zones Act (Chapter 517) 1990, s 29(c).

⁷³ Export Processing Zones Act (Chapter 517) 1990, s 29(d).

⁷⁴ Export Processing Zones Act (Chapter 517) 1990, s 29(e).

⁷⁵ Export Processing Zones Act (Chapter 517) 1990, s 29(f).

⁷⁶ See further ss 29 (g) - 29 (i) of the Export Processing Zones Act (Chapter 517) 1990.

Under the East African Community Customs Union Protocol, the partner states agree to allow the tax relief on EPZ. As such, entry into the EPZ allows investors to benefit from tax relief on imported goods that are to be used for export. Further, the regulations incentivize enterprises, developers and operators from taxes and duties from existing customs regulations. This regulatory provision is made exclusively on all EPZ imports in the eligible business activities.

2.6 OTHER RELEVANT LAWS GOVERNING EPZs IN KENYA

2.6.1 Revenue Collection and Tax laws

The EPZ program is covered by several revenue collection laws, which include: the Kenya Revenue Authority Act, the East African Community Customs Management Act and Customs and Excise Act. The EPZ Act exempts the Application of Customs and Excise Act except where it is relevant in providing guidelines on how to handle goods inside and outside the EPZs. The East African Community Customs Management Act⁷⁷, as stated in its long title, is established for the management of customs and other related matters. The Kenya Revenue Act (KRA) is the well-known revenue collection Act in Kenya. It defines and provides a framework for collection, assessment, administration and enforcement of laws relating to revenue.

2.6.2 Investment Promotion Laws

The Investment Promotion Act, 2004, is the statute that establishes the Kenya Investment Authority. The objective of the Act is to enable the growth of investment in Kenya through facilitating the obtaining of licenses for investors that are necessary to invest. It also provides other assistance and incentives. It has established an Authority, the Kenya Investment Authority (KIA), through which investors apply for an Investment Certificate. The Authority

⁷⁷ The East African Community Customs Management Act 2004.

has a pivotal mandate to promote investment in Kenya and is responsible for facilitating the implementation of new investment projects, “providing After Care services for new and existing investments, as well as organizing investment promotion activities both locally and internationally.”⁷⁸

Other Acts include the Foreign Investment Protection Act⁷⁹ and the Investments Disputes Convention Act.⁸⁰ Section 3 of the Investments Disputes Convention Act also recognizes and confers status on the International Centre for Settlements of International Disputes (ICSID) and its convention⁸¹. Further, these two Acts provide dispute resolution mechanisms among foreign investors and the Government of Kenya. The laws properly canvass the rights of investors, detailed investment procedures, application for investment approval amongst others

2.6.3 Intellectual Property Acts

Kenyan Intellectual Property laws include the Trade Marks Act,⁸² The Copyright Act⁸³ and The Industrial Property Act.⁸⁴ The Industrial Property Act is more relevant in the regulation of EPZs as it deals with the registration, enforcement and exploitation of Industrial designs, patents and utility models. It is also important in the EPZ programme as it deals with licensing and production of export products whose designs are protected under the Act.

⁷⁸ ‘Who We Are - Kenya Investment Authority’ <<http://www.invest.go.ke/who-we-are/>> accessed 25 June 2019.

⁷⁹ Foreign Investments Protection Act.

⁸⁰ The Investment Disputes Convention Act 1966 269.

⁸¹ ICSID Convention, Rules and Regulations 2006.

⁸² Trade Marks Act 1994.

⁸³ Copyright Act 2001.

⁸⁴ Industrial Property Act 2001.

2.7 THE INSTITUTIONAL FRAMEWORK GOVERNING EPZ'S IN KENYA

2.7.1 The Ministry of Trade and Industrialization

The Ministry for Trade and Industrialization serves as the primary institutional framework governing the EPZ Authority. It is established under section 3 of the EPZ and holds that the responsibility of declaring an EPZ is vested on the EPZA in consultation with the Ministry of Trade and Industrialization and the Ministry of Finance. For a zone to be declared, it must be gazetted and should define the limits. The president can only do the revocation of an existing zone.⁸⁵

2.7.2 The Export Processing Zones Authority (EPZA)

It is the foremost regulatory institution established to manage EPZs in Kenya. The Authority's role is spearheading EPZ developments primarily and regulating and approving activities within EPZ. It is also tasked with protecting government revenues and foreign currency earnings.⁸⁶ The EPZA is a driving force with key responsibilities, including advising the Ministry on developmental matters affecting the EPZ. A currency data regulating the programmes performance within the EPZ is also an additional responsibility required of the EPZA. It is equally tasked with processing licenses by the EPZ developers, operators and enterprises and issuing the same.

⁸⁵ Export Processing Zones Act (Chapter 517), s 15(1).

⁸⁶ *ibid* (n 42).

The EPZA is also mandated to facilitate the export of products from EPZs.⁸⁷ It is further empowered to preside over administrative duties regarding the designation of EPZs as would normally be performed by Local Authorities. It is also an enforcer where it enforces compliance procedures and requirements for preventing unauthorized use of designated EPZs and its enterprises. The EPZ has established a general fund for the operation of EPZA. It is a requirement by law that all funds necessary to pay for the operations of the Authority be drawn from the general fund.⁸⁸

2.8 THE POLICY, LEGAL AND INSTITUTIONAL FRAMEWORKS GOVERNING SEZs IN KENYA

2.9 Background

The Special Economic Zones was introduced as part of the flagship programs of the Vision 2030.⁸⁹ The need for the same was introduced to foster economic growth and sustainable development. It is generally agreed that Kenya is experiencing socio-economic challenges such as high poverty and insecurity levels and unequal distribution of wealth resources.⁹⁰ The formation of the SEZ was attributed to the studies conducted that showed that Kenya ranked low in the annual global competitive ranking.⁹¹ The overarching goal of the SEZ program was to contribute to the transformation of the country's economic base in order to achieve greater

⁸⁷ *ibid.*

⁸⁸ Export Processing Zones Act (Chapter 517) s 11.

⁸⁹ Empowering Women, Ameenah Gurib-fakim and Laetitia Rispel, 'April 2015' [2015] Policy on the Special Economic Zones 1.

⁹⁰ *ibid.*

⁹¹ The 2008/2009 World Economic Forum annual global competitiveness report ranked Kenya 93rd out of 134 countries. This showed that Kenya is less competitive than her African counter parts, such as South Africa Egypt and Mauritius, and who were ranked 81st, 57th and 45th respectively in 2008/9. Further on the same in the Global Competitiveness Report of 2013/2014 Kenya was ranked 129 out of 144 countries

sustainable development, job creation and poverty reduction.⁹² The SEZ is targeted at helping the country achieve and maintain its planned economic growth of 10% annually to 2030 as part of achieving the Vision 2030.⁹³

2.10 POLICY ON THE SPECIAL ECONOMIC ZONES

A quality legislative and regulatory framework is governed by a sound policy framework and its ability to truncate or precede the law. The SEZ was conceived into the Medium-Term Plan Vision 2030 for the years 2008-2012. For the SEZ regime to be implemented, there was a need to develop a policy⁹⁴ and a legal framework.⁹⁵ The SEZ policy framework is a breakdown of the proposed legislative and institutional frameworks that will help the implementation of the SEZ regime. Adoption of the Vision 2030 and the promulgation of the Constitution of Kenya 2010,⁹⁶ made it necessary to align the general framework of the two with SEZ policy.

2.11 THE LEGAL FRAMEWORK GOVERNING SEZs IN KENYA

2.11.1 Constitutional impacts on the Special Economic Zones

The Constitution of Kenya is the supreme law of the land established to govern the laws of Kenya. It is the quintessential source of law through which other laws derive their authority. One of the provisions of the Constitution through its Bill of Rights is the equitable distribution

⁹² Women, Gurib-fakim and Rispel (n 89). See further other objectives; Attracting both local and foreign investment; expanding and diversifying the production of goods and services for export and domestic markets; promoting added value; promoting local business growth; enhancing innovation and the advancement of technology; and promoting national industrialization.

⁹³ The vision 2030 is the national development blueprint.

⁹⁴ Specifically, the policy sets out instructions, management frameworks, incentives and action plans for implementing the country's SEZ program.

⁹⁵ Special Economic Zones Act 2015.

⁹⁶ Article 10(2)(b) of the Kenya 2010 Constitution lays down national values and governance principles, including: human dignity, fairness, equality, social justice, inclusiveness, human rights, non-discrimination and the security of the oppressed

of resources.⁹⁷ In its devolved structure, the Constitution specifies that nationally generated revenue must be divided equitably between national and county governments.⁹⁸ As a consequence of the economic inequalities within and across counties and the need to have them remedied, the Constitutional provision arose.⁹⁹ It is believed that the general framework of the Constitution is geared to address the many inequalities that have bedeviled the economy.

In regards to the Special Economic Zones, the Constitution does impact on the SEZs in certain parts namely: Article 27 on Equality and freedom from discrimination; Chapter 5 on land and environment; Chapter 6 on integrity, Chapter 11 on devolved government and Chapter 12 on Principles and Frameworks of Public Finance. The previous EPZ regime was governed by a centralized system of government, which made accountability and bureaucratic procedures relevant, resulting in the detriment of economic progress. As a result, the legislative and institutional frameworks were lacking in their coherence.

The SEZ regime is structured with the new Constitution and the devolved government system to foster social and economic growth and also ensure the equal distribution of national resources across Kenya, as supported by the Constitution.¹⁰⁰ In addition, the Constitution specifies that nationally generated revenue be split equitably between national and county governments.¹⁰¹ It further submits that expenditure, by making special provisions for disadvantaged groups and regions, facilitates the equitable development of the country.¹⁰²

⁹⁷ Constitution of Kenya 2010, Art 27.

⁹⁸ Constitution of Kenya 2010, Art 202 (1).

⁹⁹ Thomas Szazz, 'Tackling Inequality Within and Across Counties: Policy Recommendations' [2007] World Futures 1 <<https://www.ieakenya.or.ke/downloads.php?page=Futures-Bulletin-17th-Edition...>>.

¹⁰⁰ Constitution of Kenya 2010., Art 174.

¹⁰¹ Constitution of Kenya 2010, Art 201 (b) (ii).

¹⁰² Constitution of Kenya 2010, Art 201 (b) (iii).

The two provisions from the devolved system and the principles of public finance speak in one accord towards development and resource distribution throughout the economy. These two provisions resonate well with the objectives of the Special Economic Zones. The major problem as seen from the EPZ program and as stated before was lack of a deliberate policy on developing industrial clusters. Through the Constitution and also through its policy, the SEZ offers such a framework with the goal of transforming the economic base of the country to achieve greater sustainability, employment and poverty reduction.¹⁰³ This is considered a positive step towards achieving social justice.

2.11.2 Special Economic Zones Act

The primary legislative framework for the Special Economic Zones is the Special Economic Zones Act. This Act makes specific provisions for the management of SEZs. As previously stated, section 4 governs the declaration of Special Economic Zones.¹⁰⁴ The Act is also fruitful in its declaration of special economic zones. The scope of zones is extended by the Act to include both single and multisector sectors and can include, and not be limited to, free trade zones; industrial parks; ICT parks; business service parks; science and technology parks; free ports; agricultural zones; visitor and leisure zones; and livestock zones. This broadened scope is an attraction to private investors as they now can undertake their ventures at varied lengths.

2.12 THE INSTITUTIONAL FRAMEWORK GOVERNING SEZS IN KENYA

¹⁰³ Special Economic Zones Policy 2015.

¹⁰⁴ Special Economic Zones Act, 2015., s 4

2.12.1 Special Economic Zones Authority (SEZA)

The SEZ Act also establishes a Special Economic Zones Authority (SEZA), which is a body corporate with the function of making recommendations to the Cabinet Secretary of Trade and Industrialization on approval, establishment, designation, regulation and operation of Special Economic Zones amongst others.¹⁰⁵ The Board of Directors of SEZA is composed of the Chairperson, the Chairperson of the National Land Commission, the Principle Secretary for Industrialization, the Commissioner General of the Revenue Authority of Kenya, the Principal Secretary of the Treasury, four other directors appointed by the Private Sector Cabinet Secretary or some other public agency, and the Chief Executive Officer.¹⁰⁶ The board composition seems to be conclusive and brings into perspective the views from the private sector and binds the experts with Chapter 6 of the Constitution on integrity.

The inclusion of the experts from the private sector with integrity to the Board is a plus, as this will ensure industry interests are properly canvassed. This inclusiveness is also welcomed as it brings all partners into the development arena and ensures that development is sustainable enough to achieve social and economic equity. This makes SEZ a proper tool to achieve social justice and remedies the shortfalls of the EPZ. The framework is also all-inclusive as it allows for public participation as provided by the Constitution.¹⁰⁷

The Authority is also empowered to license operators and enterprises within the zone. The Act does require that any person carrying on business within the zone be licensed. The Authority has to receive the applications for licensing within a prescribed form. Issuance of license is

¹⁰⁵ Special Economic Zones Act, 2015., s10.

¹⁰⁶ Special Economic Zones Act 2015., s12.

¹⁰⁷ Constitution of Kenya 2010, Art 201(a).

done in consultation with the Commissioner of Customs.¹⁰⁸ It further gives the qualifications for Special Economic Zone developers and operators.¹⁰⁹ The Act also mandates SEZA to keep a register of licenses for current holders of the license.¹¹⁰

SEZ enterprises and developers also enjoy certain exemptions and benefits accruing from Special Economic Zones. Most of these incentives come in the benefit of tax exemptions. In comparison to the EPZ Act, the SEZ Act doesn't give time limitations to certain exemptions on income tax. As discussed earlier, these time limits were inadequate in that they presented a loophole where foreign investors could circumvent the process. Corporations could be formed and dissolved within the first ten years of their operation.¹¹¹

2.13 HOW THE SEZ UNDERSTANDING LEADS TO THE ATTAINMENT OF SOCIAL JUSTICE

2.13.1 Equity in development, a concept

It should not go unmentioned, addressing the understanding of SEZ and how it contributes to social justice without concentrating on the notion of equality in development. The concept of equity in development is based on the understanding of moral equality and that individuals should be regarded as equal.¹¹² It also means that development processes within a nation should ensure that fairness is ascribed in the reallocation of goods and services as provided by the state to the members of society. However, three areas of significant consensus and priority are

¹⁰⁸ Special Economic Zones Act 2015., s 27.

¹⁰⁹ Special Economic Zones Act 2015, s 28.

¹¹⁰ Special Economic Zones Act 2015, s 30.

¹¹¹ Patrick (n 53) 50-71.

¹¹² William Huitt and Courtney Dawson, 'Social Development: Why It Is Important and How To Impact It' (2011).

defined in the implementation of these egalitarian principles by equality of life chances, equal consideration for the needs of citizens and meritocracy.¹¹³ There is also a new consensus on equality of rights and living conditions.¹¹⁴

At the national level, there exist five core principles for addressing equity that is:

1. Social protection that ensures no member of society is below the minimum standards of social protection;
2. Focus on marginalized groups: Here the government has a role in empowering disadvantaged groups;
3. Providing universal public services: To ensure fair treatment, governments need to improve the quality and delivery of public services and to strengthen the underlying institutions;
4. Redistribution: This can be achieved through redistribution and prioritization of taxes or other state resources downstream to the disadvantaged communities; and
5. Addressing power imbalances: Nations need to consider addressing historically embedded power imbalances that affect society.¹¹⁵

Several sources have argued that equity should be a central concern for development in developing countries since it provides intrinsic value, which is valued worldwide. Equity is also a co-constitutive of progress where it helps to define positive growth, development and good social change. Lastly, equity as a causal link to long term changes.¹¹⁶

¹¹³ *ibid.*, 5-7.

¹¹⁴ Naciones Unidas, *Social Justice in an Open World: The Role of the United Nations* (2006). See further the Copenhagen Declaration on Social Development.

¹¹⁵ Huitt and Dawson (n 112).

¹¹⁶ *ibid.*

2.13.2 The ideal SEZ structure

The SEZs framework aligns itself with the elements of equity in development. As previously stated, the establishment of SEZs is primarily to spur economic growth through attracting Foreign Direct Investment, create employment and promote regional development. The three pillars of an ideal SEZ policy are: adoption of a country-specific approach to zones, promoting spillovers from FDI and monitoring and evaluation as the third pillar.¹¹⁷ In the first pillar, it is debatable what the effects of countrywide approaches have had on employment; however, in Honduras and the Dominican Republic, employment generation has increased by 10 - 15 times per capita than Ghana.¹¹⁸

An ideal SEZ structure should have an industrial strategy that dictates the type of SEZ to be built. It is argued that a more critical role is established for firms in the global value chain than FDI firms using the resources from the local markets to serve the domestic market when there are good infrastructure and streamlined customs procedures.¹¹⁹

It is also argued that the success of SEZs and the provision of spillovers can only work when there's a vast number of built zones. Regarding policy, there's no consensus on an ideal policy that works in creating spillovers. However, it is believed that policymakers can promote SEZ spillovers by concentrating on the two main channels which they arise: Supplier linkages and on the job training.¹²⁰

¹¹⁷ Matei Alexianu and others, 'Doing Special Economic Zones Right: A Policy Framework' [2019] Synthesis brief 1 <https://www.theigc.org/wp-content/uploads/2019/11/WEB_SEZ-synthesis-paper-2019.pdf>.

¹¹⁸ *ibid.*

¹¹⁹ *ibid.*

¹²⁰ *ibid.*

As with any major developmental project, monitoring and evaluation is a crucial tenet for its success. Monitoring and evaluation are essential in enabling policymakers enforce regulation, measure performance of zones against its objectives and informs policy decisions to improve on SEZ policy. For example, in South Africa, the SEZ framework establishes an SEZ Advisory Board which is responsible for overseeing monitoring and evaluation procedures, which are then relayed to the Ministry of Trade and Industry for further use in the assessment of their future policy. Later on, the same ministry forwards the performance report to parliament and published on the website of the Trade and Industry Department website.¹²¹

Having looked at the idea behind equity in development and SEZ policies, this research moves in support of the current legal and institutional frameworks approach in attaining social justice. Through the legislative and institutional frameworks stated in this chapter, the Kenyan frameworks do provide a mechanism for equitable resource distribution. Firstly, as seen through the provisions in Article 118 of the Constitution on public participation in legislative matters, Article 174 on devolved processes and Article 201 on financial matters, the Constitution anticipates public participation in a decentralized system and national projects such as an SEZ. Here members of the public can voice their concern on effective ways of redistributing equitably revenues generated via the SEZs and participation in other legislative and public finance processes.

Secondly, the SEZ structure is organized in a way that zones are decentralized throughout the country. Through the SEZA, which, as previously stated, oversees the coordination and issuance of licenses and designation of SEZ, the SEZ programs are established in various parts

¹²¹ *ibid.*

of the country when they meet the minimum criteria. As it stands, projects have been established in Uasin Gishu, Kisumu and Dongo Kundu in Mombasa and Lamu¹²². This aligns well with the cluster system as anticipated in an ideal SEZ structure, which is believed to generate spillover effects.

In addition, the decentralized system of SEZ designation is fully supported by the Constitution through devolution. Kenyan Scholars have attributed the effects of devolution to a decline in patronage-based development, which on the flip side, supports the cause for social justice in development.¹²³ As a development tool, SEZ supports this cause and implementation of the same will result in the rectification of historical challenges such as equity, ethnic inequalities, inclusion, and service delivery, and mainly reduction in ethnic-based conflict.

Lastly, the SEZ structure is ideal because it aligns itself with the national development plan under the vision 2030. This ensures that SEZ is a component for the reduction of poverty, equitable resource distribution, job creation and empowerment of marginalized communities as intended through the vision 2030.

2.14 Conclusion

This chapter was tasked with looking into the history of the EPZ and SEZ and their legislative and institutional frameworks. Through this chapter, it has been established that the culmination of the EPZ was a compromise between the government of Kenya and developmental programs

¹²² Commission on Revenue Allocation, 'Survey Report on Marginalised Areas/Counties in Kenya' (2012) <<https://www.crakenya.org/wp-content/uploads/2013/10/SURVEY-REPORT-ON-MARGINALISED-AREAS-COUNTIES-IN-KENYA.pdf>> accessed 18 July 2020. Lamu is one of the most marginalized regions in the country and with the establishment of proper infrastructure LAPSET, supporting the formation of the SEZ in the region, there is hope for social justice within the region which has long been forgotten.

¹²³ Karuti Kanyinga, 'Devolution and the New Politics of Development in Kenya' (2016) 59 *African Studies Review* 155 <https://www.cambridge.org/core/product/identifier/S0002020616000858/type/journal_article> accessed 18 July 2020.

namely IMF and the World Bank under the SAPs. The chapter has also compared the Institutional and Legislative frameworks governing both the EPZ and the SEZs. It has also elucidated how the understanding of the SEZ structure helps in attaining social justice. In the next chapter, we shall discuss the inadequacies of the EPZ regime and why it failed to live up to its expectation resulting in the transition to the SEZ. We shall also make a case why SEZ is better placed to achieve social justice.

CHAPTER THREE

THE INADEQUACIES OF THE EXPORT PROCESSING ZONES OF KENYA AND THE TRANSITION TO THE SPECIAL ECONOMIC ZONES OF KENYA

3.1 Introduction

This chapter draws from the previous chapter, where we looked into the history of the EPZ and the legal and institutional framework informing its setup. This chapter builds on the last chapter by discussing in detail the inadequacies emanating from the EPZ program. We shall dissect the legislative and institutional frameworks and informing the EPZ regime and see how they fell short of meeting the EPZ objectives leading to the SEZ transition.

3.2 The inadequacies of the EPZ Policy in Kenya

A test for any policy is how best the policy addresses the underlying factors and the objectives it set to attain. Kenya had risen in earnest on the call by its development partners, the World Bank and the IMF to implement the Structural Adjustment Programme (SAPs). It was through a compromise that the EPZ was developed. As such, the culmination of the EPZ was a compliance with the SAPs.¹²⁴ As noted, the program was given little thought on how it would best ensure economic development in the country.¹²⁵ The program was short on its feasibility studies that would ensure the policy and infrastructural frameworks are aligned to support the EPZ programme. It was also noted that the program didn't contextualize the Kenyan model.¹²⁶

¹²⁴ Patrick (n 53) 50-71.

¹²⁵ International Federation of Human Rights, 'Economic Development or Human Rights? Assessing the Impact of Kenya's Trade and Investment Policies and Agreements on Human Rights International Fact-Finding Mission' <[https://tbinternet.ohchr.org/Treaties/CESCR/Shared Documents/KEN/INT_CESCR_NGO_KEN_41_9389_E.pdf](https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/KEN/INT_CESCR_NGO_KEN_41_9389_E.pdf)> accessed 17 June 2019.

¹²⁶ *ibid.*

Kenya sought to incentivize its private sector through the EPZ program. It has however been argued that incentivization is insufficient because it pays no attention to product quality and cost structure issues that are paramount in any competitive society. As a result, the EPZ was unable to compete effectively in the international market and therefore, the sector became unsustainable.

The policy framework was noted to be misplaced in its developmental approach in the country.¹²⁷ It limited the government's involvement, especially in guaranteeing an investment climate that is conducive to export-oriented growth. It was noted that the government didn't offer an export insurance scheme to exporting firms. This presented itself as counter-productive as small and medium-sized enterprises (SME's) at then were risk-averse.

The other limitation was that there was no clear framework for regular policy review and consultation. This meant that members in the private sector were limited from infusing their private sector input in the overall EPZ policy framework in Kenya.¹²⁸ This policy shortfall is a remedy to a stifled economic progression that rendered a big blow to the EPZ regime.

Finally, it was noted that the EPZ programme and its goals didn't mirror the industrialization policy. The industrialization policy addressed the EPZ as an export promotion programme. Secondly, the EPZ program was set up to focus on labor-intensive industries, but the analysis showed that the programme matured and outlived its time.¹²⁹ Through all these inadequacies,

¹²⁷ Patrick (n 53) 50-71.

¹²⁸ *ibid.*

¹²⁹ *ibid.*

it was noted that the EPZ had come of age, and the government needed to find better ways of incentivizing its private sector investors. Thus, it was thought that the Special Economic Zones was a better solution to put Kenya in the global competitive radar.¹³⁰

3.3 The inadequacies of the EPZ Legislative Framework in Kenya

The EPZ has had a tumultuous time trying to live up to its expectations, and the incoherence in its structure has necessitated the inadequacies in its primary legislative framework, the EPZ Act. Primarily the EPZ Act sought to introduce the fiscal benefits that would attract foreign investors. As discussed previously, the EPZ under section 29 sought to introduce tax incentives. Still, it so happened that these incentives failed to live up to their expectations as events have overcome them. It is also noteworthy that the tax benefits have been unable to bind the EPZ investors to invest in the local community. As suggested, it would be beneficial if the raw materials used in developing the regions would be obtained from the EPZ to benefit the local community and the country.

Secondly, it has been thought that the EPZ incentives don't provide a safeguard against unscrupulous investors.¹³¹ Ideally, the 10 year tax holiday and 25% tax holiday are considered to be easy to circumvent. For instance, it is believed that this loophole can allow an existing company within the EPZ to be liquidated before the expiry of the 10-year period and a new one incorporated after that, thus circumventing the anticipated effects of the tax holidays. It is believed that these time-bound incentives encourage unfair practices.¹³²

¹³⁰ *ibid.*

¹³¹ *ibid.*

¹³² *ibid.* See also "Export Processing Zones (EPZs) in Namibia: A success story?" A research Brief Prepared for the international Labour Resource and Information Group (ILRIG)

The EPZ also suffers from targeted investments. As put out by various scholars, an incentive given to an EPZ is enough to attract the anticipated investment in a country where a country enjoys a comparative advantage in the production of a given commodity.¹³³ This has rendered useless the idea of SEZs being in preferential areas.

As stated before, EPZs operate only on places gazetted by the Minister for Trade, now considered as the Cabinet Secretary for Trade and Industrialization. The zones are unique in that they offer incentives and a cap was set up at 20% on the sale of goods to the local market as the EPZ is thought of as targeted more for exports. The toxic nature of this setting is that firms continued to depend heavily on foreign supplies.¹³⁴ As a result, EPZs have long been isolated as the domestic and international firms remain delinked from each other.

As observed, the EPZ lacked proper and efficient entry requirements caused by ineffective administrative procedures. Most of the legislation established by the EPZ does not make bond or restrict the number of foreign entrants. This means that there are no restrictions on foreign technical and managerial employees entering the zone. The underside of the same is that foreign companies would bring in expatriates to handle the technical and managerial jobs while Kenyan workers were relegated to doing menial jobs. This limits transfer of knowledge as the country remains heavily dependent on expatriates' expertise.¹³⁵

¹³³ Dorsati Madani, 'A Review of the Role and Impact of Export Processing Zones' (1999) <http://siteresources.worldbank.org/EXT/EXPCOMNET/Resources/2463593-1213887855468/11_A_Review_of_the_Role_and_Impact_of_EPZs.pdf> accessed 15 April 2018.

¹³⁴ Alan C Swan and Peter T Muchlinski, 'Multinational Enterprises and the Law.' (1996) 90 *The American Journal of International Law* 232 <<https://www.jstor.org/stable/2203706?origin=crossref>> accessed 18 June 2019.

¹³⁵ Patrick (n 53) 50-71.

Lastly, the EPZ was a compromise between the International Monetary Fund (IMF) the World Bank and the Kenyan government in what is known as the SAPs program.¹³⁶ Because of this compromise, Kenya was forced to adapt to a hegemonic development plan that was far misplaced. This approach didn't contextualize the current social and economic situation in Kenya; hence the fiscal and legal mechanisms put in place were doomed to fail at the onset.

3.4 The inadequacies of the EPZ Institutional Framework in Kenya

As previously stated, the EPZ Authority is a parastatal and the majority of its board members serve under the Ministry of Trade and Industrialization as such most of its role requires government approvals or involve making recommendations to the Cabinet Secretary of Industrialization who makes the final decision. In essence, this limited SEZA's independence and at times, it was viewed as contributing to political interference.¹³⁷

Secondly, apart from licenses and rentals, the EPZ program was thought of as unable to sustain itself. Moreover, the program incurred unnecessary costs engaging in activities such as property development and promotion, which aren't profitable. Such ventures should have been privatized and save taxpayers money.

Further, the EPZ system was marred by bureaucracy emanating from the government. This form of bottleneck was thought of as limiting to Kenya's competitiveness in the global market. With the government also comes political interference. Bureaucracy played a backdrop to

¹³⁶ Structural Adjustment Programs is the name assigned by the Bretton Woods Institutions (the World Bank and the International Monetary Fund (IMF)) to the collection of 'free market' economic policy reforms levied on developed countries as a condition for the receipt of loans.

¹³⁷ Patrick (n 53) 50-71 .

progressiveness in a competitive environment as such approvals and other forms of corruption settled in.

Another inadequacy is that the amendments made to the Act have rendered the Authority and its administration of incentives ineffective. Changes such as the requirement to license commercial activities only after consultation with the Commissioner-General and KRA.¹³⁸ As was also noted, the program levied a 2.5 per cent duty surcharge on EPZ products sold on the domestic market, with the requirement that they be authorized by the Cabinet Secretary for trade. This was viewed as a bureaucratic means and over-regulation of the industry.

3.5 Implementation of the SEZ Framework and its challenges

In most developing nations, implementation plays a vital role in the realization of sustainable economic development. It is no different in Kenya. While it is still too early to critique the implementation of the SEZ, the many challenges facing the SEZ in its early stages of implementation is through the licensing of enterprises and operators within the SEZ. Indeed, the current news on the SEZ is that there has been arbitrariness in the issuance of licenses within the SEZ.

As of March 2019, the Kenyan media was reporting that the designated SEZs in Nakuru, Eldoret, Mombasa, Makueni and Kisumu have not been operationalized despite the program being rolled out in 2016. The Star newspaper, which is a well-known media source in Kenya, reported that the current designated SEZs are riddled with infrastructure problems, including one in Eldoret where at least 14 firms are building plants in readiness to roll out the SEZ

¹³⁸ *ibid.*

operations.¹³⁹ The Cabinet Secretary for Treasury did allocate Ksh 3 billion in the 2015/16 budget for industrial development, which included the SEZs, but to date, no actual SEZ operation has been realized. As it stands, the star media reports that the County of Mombasa's committee formed to steer the work comprising of the Ministry of Trade, Kenya Ports Authority and Mombasa County is inactive. The County complained of its lack of involvement in the committee's activities and the operations of the SEZ program in the region.¹⁴⁰ All these challenges do not auger well will the objectives of the SEZ Act on solving socio-economic difficulties. As it stands, they only help to abate the current implementation stage and weaken the government's big 4 agenda.¹⁴¹

Another criticism of the implementation of the SEZ Act is that it provides a Carte blanche possibility for foreign companies investing in the zones, provided that SEZA grants a license to operate within the SEZ if the application meets the objectives of the Kenyan SEZ Act and four additional conditions.¹⁴² It further holds that "the business enterprise is incorporated in Kenya whether or not it is one hundred percent foreign-owned; proposes to engage in any activity or activities eligible to be undertaken by a Special Economic Zone enterprise in the Special Economic Zone; does not harm the environment or engage in activities impinging on national security or presenting a health hazard."¹⁴³ This presents an element of Base Erosion and Profit Shifting BEPS and possible dominance. The risk is that over liberalization or limited regulation would mean that foreign entities fail to benefit the local communities as the revenues generated from the zones would be repatriated to foreign jurisdictions. The move is an outright

¹³⁹ Moses Odhiambo (n 10).

¹⁴⁰ *ibid.*

¹⁴¹ The big 4 agenda is the governments flagship programme for economic development and prosperity under the government as led by president Uhuru Kenyatta's ruling party, Jubilee .

¹⁴² Special Economic Zones Act 2015, s 29.

¹⁴³ *ibid.*

departure from the aims of SEZ, which, when established, hoped to counter the loss of revenue from the economy by foreign entities, a thing that was experienced with the EPZ.¹⁴⁴ Ultimately this does not inspire equitable resource distribution as the state plays second fiddle to the foreign entities in the regulation of SEZ to the detriment of society.

As Kenya matches on to liberate itself from unemployment and an inequitable society, it is prudent to have proper governing structures that are objective in their pursuit and live towards the realization of the Kenyan dream. Social justice is an important necessity for development and proper governance structures and political goodwill can foster social-economic development. As noted earlier, the SEZ framework is inclusive and comprehensive and far more objective than the EPZ. Kenya should optimize from best practices globally in order to capitalize on this opportunity and foster sustainable development.

3.6 The Political Economic dimensions of SEZs and its successes in attaining Social Justice¹⁴⁵

SEZs have succeeded in several countries, while in others, they have failed in promoting economic growth. It is wise to remember that the majority of SEZs are located in developing countries.¹⁴⁶ As previously noted, through various mechanisms, SEZ can spur economic

¹⁴⁴ Ame Rebecca Chimbombi, 'The Possibility of Base Erosion and Profit Shifting through Special Economic Zones: A Critique of the South African and Kenyan SEZ regimes Based on BEPS Action 5' <https://open.uct.ac.za/bitstream/handle/11427/23787/thesis_com_2016_chimbombi_ame_rebecca.pdf?sequence=1> accessed 21 August 2018.

¹⁴⁵ Finn Tarp, Page John, *The Practice of Industrial Policy: Government—Business Coordination in Africa and East Asia* (2017).

¹⁴⁶ Connie Carter and Andrew Harding, *Special Economic Zones in Asian Market Economies* (Routledge 2010).

growth. Establishment of firms in Zones is essential as zones can form clusters that can benefit from networking and economies of scale.¹⁴⁷ Other scholars affirm the same.¹⁴⁸

The political-economic dimensions of SEZs present different aspects of consideration. In Nigeria's SEZ, a row was sparked between the zone and the customs authorities who refused to give up their revenues by implementing lower tariffs.¹⁴⁹ For Senegal, the SEZ was a protective value for domestic businesses.¹⁵⁰ The first aspect is that there exists a knowledge problem in governments and their policy implementation. The introduction of policies plays a crucial role in the progress of SEZs and the realization of social justice is undisputed. The fact that governments in these regions do not adopt beneficial policies nationwide is linked to tracing back the problems of ineffective SEZs. It may be argued that the effects of certain policies are not known by these governments and in establishing SEZs, they get a good testing ground to try them out.¹⁵¹ Knowledge problem in policymaking in SEZs is as a result of the distance between the decision-makers and those with market knowledge.¹⁵²

Secondly, the knowledge problem in decision making transitions us to a new challenge, that being a centralized political decision-making process.¹⁵³ This centralized system presents a disastrous knowledge problem than a decentralized system. In a politically decentralized

¹⁴⁷ Michael E Porter, 'Clusters and the New Economics of Competition Harvard Business Review' (1998) <<https://pdfs.semanticscholar.org/023e/5f637eb66b89cc27e3e1180d9b6eb60bbc5d.pdf>> accessed 1 November 2018.

¹⁴⁸ Bennett Harrison, 'Industrial Districts: Old Wine in New Bottles?' (1992) 26 *Regional Studies* 469 <<http://www.tandfonline.com/doi/full/10.1080/00343409212331347121>> accessed 1 November 2018.

¹⁴⁹ Lotta Moberg, 'The Political Economy of Special Economic Zones' (George Mason University).

¹⁵⁰ *ibid.*

¹⁵¹ Victor FS Sit, 'The Special Economic Zones Of China: A New Type Of Export Processing Zone?' (1985) 23 *The Developing Economies* 69 <<http://doi.wiley.com/10.1111/j.1746-1049.1985.tb01092.x>> accessed 1 November 2018.

¹⁵² Moberg (n 149) 8-30.

¹⁵³ *ibid.*

system, different models can be experimented and lead the potential of reducing the fallout of SEZs. A case study conducted on China and Ghana's SEZ showed that Ghana had all the requisites of a successful SEZ but still failed to live up to its expectations. This is because the decision to have an SEZ came from the top as opposed to local demand. The central government in Ghana wanted an SEZ but not for economic liberalization.

In contrast, China's SEZ was decentralized both fiscally and politically and was initiated out of political disagreements.¹⁵⁴ It follows that the implementation of SEZs will eventually lead to national policy changes in a decentralized framework, as the success of one SEZ leads to the catapulting success of another.¹⁵⁵ Decentralization of the SEZ system, whether politically or through private SEZs, has the potential to improve the SEZ performance and can improve the institutional context of SEZs.¹⁵⁶

Thirdly, private decision making plays a crucial role in addressing the knowledge problem as they help to close the gap that is created by policymakers distancing from the market dynamics.¹⁵⁷ This problem can also be solved when government players allow private investors to determine which industries they want to be developed within the zones. It is believed lavish spending on infrastructure can result in misappropriation of resources and may not meet the intended results of the SEZ framework. Thus, governments should require the payment of infrastructure and facilities by private sector players. This will benefit the economy with less spending and a better cost-benefit effect as private players will only choose zones that have the

¹⁵⁴ Chenggang Xu, 'The Fundamental Institutions of China's Reforms and Development' (2011) 49 *Journal of Economic Literature* 1076.

¹⁵⁵ Moberg (n 147) 8-30.

¹⁵⁶ *ibid.*

¹⁵⁷ *ibid.*

potential for growth that will impact their businesses and, ultimately, the economy. In case of a failed zone program, the taxpayers don't lose money. Moving forward, the government can provide more incentives and channel regulation towards private zones that show potential to promote development and equitably provide more social welfare projects, hence contributing to social justice.

Fourthly, there exists an incentive problem. Many government officials in developing countries will only approve projects where they would get incentives in the form of bribes, higher titles and more leisure. In a proper SEZ set up, the self-interest is transformed into greater good through pursuing policies that promote growth. A decentralized system isn't necessarily the solution since many layers of corrupt agencies are likely to be created by a corrupt regime. Popular within the Kenyan scenario, the corruption-riddled institutions only create a higher risk of many corrupt layers being established. However, more accountability needs to be in place to safeguard the greater interest of a decentralized system and its quest to attain social justice.

The fifth opportunity can arise through a democratic solution as opposed to a non-democratic one. A great institution has the potential to solve the incentive problem. If there's clarity between the political and economic outcomes, then public officials have the potential to enact good policies. It is believed that a democratic process is a solution to this linkage.¹⁵⁸ Such a process would be ideal in enabling the development of social justice in the economy through government projects such as the decentralized SEZ. Notably, SEZs can be used as tools for spurring low-level corruption through policy.¹⁵⁹

¹⁵⁸ *ibid.*

¹⁵⁹ Shang-Jin Wei, 'Special Governance Zone: A Practical Entry-Point for a Winnable Anti-Corruption Program' (1999) <<https://www.brookings.edu/wp-content/uploads/2016/06/20000924.pdf>>.

The last aspect can rise through private SEZs, acting as a remedy to the knowledge problem. Private SEZs are believed to provide the best cost-benefit analysis as compared to public ones. In contrast to the government officials, private SEZs incentivize companies looking to join differently from how government officials do when attracting companies. Their investment results are long-term and sustainable and other studies attribute a better record from private SEZs than public zones on environmental and social indicators.¹⁶⁰

In the Kenyan context, it is important to use the right political and institutional framework to support the growth of SEZs. Corrupt institutions, as they currently stand in Kenya, are allowing contracts and licenses to those offering the highest bribes. Hence it is not uncommon for most zone operators in Kenya to be Chinese.¹⁶¹ Kenya seeks to better its performance in the SEZs. In the wake of new legislation, the SEZ Act, the political-economic landscape is to be a key pillar to the success. SEZ studies in Russia have shown the consequences of a corrupt SEZ climate, where the legal environment has become more volatile for investors than other parts of the world.¹⁶²

A graft free SEZ with good political and economic infrastructure will ensure that the system is transparent for investors. An open system ensures equality in the distribution of resources hence attainment of social justice. A combination of a decentralized SEZ structure offers both the opportunity and the capacity for local authorities to ensure that corruption in all quarters is

¹⁶⁰ Akinci Gokhan and Crittle James (n 19).

¹⁶¹ 'How Israel, China Firms Bribe Kenyan Officials' (*Business Daily*, 2018) <<https://www.businessdailyafrica.com/news/Israel-China-firms-bribe-Kenyan-officials/539546-4776676-aivirg/index.html>> accessed 1 November 2018. To note is that the Chinese have a reputation of bribing African leaders in acquiring lucrative contracts.

¹⁶² Moberg (n 149) 8-30.

curtailed. Corruption being one of the root causes of inequality, will ultimately subside to some degree. Eventually, SEZs will emerge as a source of solving low-level corruption, which has been known to curtail development and in doing so, social justice will prosper.

3.7 Conclusion

This chapter discussed the inadequacies of the previous EPZ regime, which transitioned into the formation of the Special Economic Zones. The analysis led to the conclusion that the incentives presented by the EPZ were far inadequate and encumbered by bottlenecks that made the legislative and institutional frameworks in disarray from each other. Ultimately the commencement of the EPZ was seen as a remedy as it aligned itself to the vision 2030 and the Constitution's provisions of governance and equitable distribution of government revenue. Despite the same, the SEZ Act aligns itself with international best standards, but the implementation stage is still a challenge owing to political interference.

Despite the current challenges, the provisions of the SEZ Act can spur sustainable economic development. Social justice is paramount to the realization of social-economic sustainability and it is only in the implementation of the policy and legal frameworks that we can be able to achieve it.

CHAPTER FOUR

CASE STUDY OF SPECIAL ECONOMIC ZONES OPERATIONS IN OTHER ECONOMIES

4.1 Introduction

Globally, SEZs have been used as effective tools to effect structural and industrial transformation. These transformations have been effective only when implemented well. In many case studies conducted, certain economies have been exceptional in their approach to realizing growth and development through the applications of best practices in the Special Economic Zones. In this research, we shall examine Malaysia and South Africa's Coega Special Economic Zones and the lessons learned.

4.2 A CASE STUDY OF SOUTH AFRICA'S COEGA SPECIAL ECONOMIC ZONES

South Africa came from a hard-fought apartheid regime. "After the 1994 elections, the government in place had to deal with various challenges affecting its society, namely unemployment, limited foreign direct investment, amongst others. To address these issues, the South African government launched its own Industrial Development Zone (IDZ) resulting in the demarcation of the following Industrial Development Zones namely: Richards Bay IDZ in Richards Bay, Kwa Zulu - Natal; Coega IDZ in Port Elizabeth London, Eastern Cape; East London IDZ in East London, Eastern Cape; and Oliver Tambo International Airport IDZ in Kempton Park Gauteng."¹⁶³

¹⁶³ Coenrad Scheepers, 'A Case Study for Special Economic Zones in South Africa as a Means of Attracting Foreign Direct Investment' (University of Pretoria 2012)
<<https://repository.up.ac.za/bitstream/handle/2263/30028/dissertation.pdf?sequence=1>>.

The consequences of globalization led the South African Government to enact the IDZ policy in the year 2000 through the Manufacturing Development Act. The aim of the program was to draw FDI and encourage the export of value-added commodities. South Africa realized the limited geographical nature that the IDZ presented with the limitation excluding other potential regions in the country. This limitation was the culmination of the Special Economic Zones as an inclusive industrial facilitation model with the capability of utilizing a wide range of instruments.¹⁶⁴

In 2012, the South African government rolled out a bill, the SEZ Bill seeking to introduce the SEZ program. The program had an objective of accelerating Industrial Development, attracting FDI, unlocking regional economic development, enhancing economic opportunities, job creation and improving the socio-economic welfare of the society.¹⁶⁵ The new program was to improve on IDZs, which were thought of having enjoyed mixed success since their inception.¹⁶⁶

4.3 Challenges of the IDZ resulting in the formation of South Africa's SEZ

Just like the Kenyan EPZ, the South African IDZs were subject to certain geographical and commercial limitations that portrayed difficulties in attracting FDI.

The design of South African SEZ presented a challenge. The limiting nature of the IDZ meant that the scope of SEZ operation was limited to only a single one type of SEZ while excluding others. As a result, harnessing other types of SEZs was difficult and the realization of growth in the programme was unrealistic. It was also the nature of IDZs to be located along

¹⁶⁴ *ibid.*

¹⁶⁵ Policy on the Development of Special Economic Zones in South Africa 2012.

¹⁶⁶ Scheepers (n 163) 32.

seaport or international airports. This limited many potential zones that did not fit into the description of an IDZ but still had the potential to contribute to economic growth.¹⁶⁷

Secondly, the IDZ support structure was shuddered in a biased nature. The IDZ program blinded itself to supporting only out-of-zone activities particularly those critical to the success of in-zone enterprises and the sustainability of the zone.¹⁶⁸ This was far behind the ideology of an SEZ, which borders on the formation of various support structures necessary for sustainable development.

Proper governance is key to the success of any government program. The challenge of insufficient guidance concerning arrangements organized for the management of the IDZ eloped a problem in the regulatory framework at then in South Africa. This resulted in the untimely oversight in the strategic plans and operations of the IDZs.¹⁶⁹ Moreover, this caused overlaps and uncoordinated activities amongst government agencies, which meant that fiscal incentives didn't see the light of day.

The other challenge presented was on the short-term nature of the IDZ financing arrangement. IDZs were dependent on government funding, which is subject to the availability of funds in the successive Medium-Term Expenditure Framework (MTEF) of national and provincial governments. The financial arrangement of IDZs was short term and caused uncertainties in the development of long-term plans. In addition, no provision was made for the funding coming through the Development Finance Institution (DFI).¹⁷⁰

¹⁶⁷ *ibid.*

¹⁶⁸ *ibid.*

¹⁶⁹ *ibid.*

¹⁷⁰ *ibid.*

Lastly, uncoordinated government agency operations also presented a challenge. An uncoordinated effort among government agencies hampered the IDZ regime. Services were rendered separately, and this reduced synergy levels. As a result, many resources were used that didn't bring the expected success within the Zones.¹⁷¹ This was a recipe for disaster that South Africa wanted to remedy.

4.4 Coega Special Economic Zone

As stated above, all the IDZ programs were incorporated as part of the new South African SEZ program. Coega being one of them, was conceived in order to address social inequality in the Eastern Cape of South Africa. The province, as it stood, was the poorest in the country with an employment rate of 24.7%. It was also compounded by unskilled workers who were marginalized in the economy.¹⁷² The government approved the IDZ in 1999 within which it was co-owned by the Department of Trade and Industry (DTI) and the Eastern Cape Development Corporation (ECDC) while being operated by the Coega Development Corporation (CDC). It covered an area of 110 km². With the failures and challenges, the government found it fit to customize the Coega IDZ into the SEZ program. The program was organized into several five-year development plans, namely: 2005-2010 Revenue Growth plan, 2010-2015 diversification strategy plan and currently the 2015-2020 sustainable goal strategy plan.

¹⁷¹ *ibid.*

¹⁷² 'General Household Survey, South Africa', vol P0318 (2010).

4.5 Success of the Coega IDZ in the SEZ program

As reported by the 2015/16 Integrated Annual Report by the CDC, Coega SEZ had an excellent investor apathy attracting 17 additional investors valued at R26.99 billion resulting in 36 operational investors in the IDZ.¹⁷³ As reported, the CDC created 18,366 jobs in its SEZ, with 7,174 being operational jobs and 11,192 being construction jobs.¹⁷⁴

Secondly, Coega SEZ has been instrumental in the creation of jobs to reduce the level of poverty along the Eastern Cape of South Africa's Port Elizabeth. In 2018 community service, construction manufacturing and business services contributed largely to the employment increase from 9.78 million in December 2017 to 9.83 million in March 2018.¹⁷⁵

Thirdly, Coega has managed to attract investors to whom much pledges on infrastructural development have emerged. "Currently, the zone is establishing a plastic moulding plant for packaging in the automotive and other industries. Beijing Automobile International Corporation (BAIC), as it is known, is expected to be the biggest automotive investment in Africa in the last 40 years and is hoped to create over 10,000 jobs in the country. These projects are geared towards contributing to human capital and small business development."¹⁷⁶

The other success comes in the Coega's Corporate Social Investment (CSI). In 2016 through its budget, the CDC donated 4% of its investment to the community as part of its outreach

¹⁷³ Ayanda Vilakazi, 'Coega Integrated Annual Report 2015/16' (2016) <<http://www.coega.co.za/DataRepository/Documents/NgincCRYOIT7U8KCy1Xz2Kt6C.pdf>> accessed 21 June 2019.

¹⁷⁴ *ibid.*

¹⁷⁵ 'Rankings & Ease of Doing Business Score' (*World Bank*, 2018) <<http://www.doingbusiness.org/en/rankings>> accessed 23 June 2019.

¹⁷⁶ Ayanda Vilakazi (n 173).

program. The programmes for social responsibility focus on skills, training and human development and are structured to address the shortcomings and needs found in the Eastern Cape. The CDC ensures that its CSI programmes have high impact and long-lasting initiatives, rather than just short-term charitable donations.¹⁷⁷ Some of the programmes include the Coega Maths and Science Programme, Women Empowerment Programme, disability affirmative programme amongst others.

Lastly, the coming into effect of the SEZ Act has enabled the diversification of the trade. Investors in Coega are heterogeneous and produce both for export and domestic market.¹⁷⁸ Some of the investors are from the African region and this has seen an increase in the intra - African trade between other African countries and South Africa. This approach is very trendy and welcomed on the African continent.

4.6 Factors for the success of the Coega SEZ

As attributed by the Annual Financial Report 2016/17, the CDC has effective governing structures supported by the national government. The CDC has a diverse body of personnel. The Board Membership is significantly selected for their specialist expertise and knowledge. It is also chosen on the basis of the complexity of the participants to understand major projects and their understanding of the socio-economic growth problems of the Eastern Cape of South Africa. In addition, the CEO, Chairperson and the Chair of the Manufacturing Development Board have a wealth of experience spanning 20 years leading the program. This knowledgebase ensures that the proper governing structures are in place.

¹⁷⁷ *ibid.*

¹⁷⁸ Crispin Chinguno, 'South Africa's Experience with Special Economic Zones' (Centre for Development and Enterprise 2011).

Secondly, the location of Coega is ideal for development. Coega is located near a deep-water port, Ngquka, a modern multi-user deep-water port established by the National Ports Authority of South Africa.¹⁷⁹ The location is also surrounded by other resources that complement infrastructural needs.

Thirdly, learning from the shortcomings of its IDZ, South Africa reinvigorated its legal framework with the coming of the SEZ Act. This framework has enabled coherence in the administrative process. As such, there is more organization with governance, planning, implementation, management and operation. The Act has also made regulation easier and has enabled coherence amongst government agencies.

Lastly, the new legislative framework has made it possible for Coega zone projects to work as a unit. Coordination between the CDC and the Ministry of Trade and Commerce of South Africa has been essential to the growth of the program. As previously witnessed, the IDZ programs weren't in sync with the vision of the zone. As it is now, the zone has enabled the cohesion and coordination of development projects and resulted in solving some of the socio-economic problems that the SEZ Act sought to address.

4.7 A CASE STUDY OF MALAYSIA'S SPECIAL ECONOMIC ZONE

In the global context, Malaysia is often used as an example of the successful use of an SEZ to achieve sustainable economic growth. Malaysia is relevant to Kenya's socio-economic background and its need to redress imbalances between its ethnic groups.

¹⁷⁹ 'Coega Development Corporation: Coega Special Economic Zone'
<<https://www.coega.co.za/Content2.aspx?objID=84>> accessed 24 June 2019.

4.8 Policy Context

Malaysia was geared towards achieving greater socio-economic prosperity, as was witnessed by the newly independent states back then. Its approach was focused on the domestic market led by an import substituted strategy, but this did not succeed. As a result, the country faced significant unemployment problems, insufficient capital investment and low growth.¹⁸⁰

Following the May 13th, 1969 riots emanating as a concern of ethnic tensions and weak economic growth in which an estimated 2000 people were killed, the Malaysian government sought to change its course by introducing the New Economic Policy (NEP). The NEP was initiated by the National Operations Council and acted as the emergency government of the day between the periods 1969-1971, during which the Malaysian parliament was suspended.¹⁸¹ Thus, the NEP became the mainstream policy document for Malaysia's approach to socio-economic development. By then, the economic disparities in Malaysia were evident with the Chinese and Indian minorities as well as foreign interests controlling most of the economy, leading to income disparities. As noted, ethnic Malays owned about 2.4% of the economy in 1970.¹⁸²

The NEP sought to re-organize the income distribution gap in favour of the native Malaysians by changing the ratio of 2.4% to the Malays, 33% to Chinese Indian's and 63% foreigners in a ratio of 30:40:30. The government's initiative at that time was to pursue overall national income redistribution through increasing the size of the economy and allocating preference to the

¹⁸⁰ Claude Baissac, 'SEZs for South Africa by Claude Baissac - Issuu' (2010) <https://issuu.com/claudebaissac/docs/sezs_for_south_africa_-_2010> accessed 23 June 2019.

¹⁸¹ *ibid.*

¹⁸² *ibid.*

established Malays through affirmative action programmes. It was intended in theory that no ethnic or business groups were made worse off.

As viewed by the government of the day, industrial development was chosen to provide the necessary economic growth required for the strategy to work. The government sought to rely on the experience of successful late industrializers such as Japan to move its economy and this meant that Malaysia would turn to export processing zones to fulfill its strategy.

4.9 The dual-track strategy - Initial Export Processing Zones

In the late 1960s to the early 1970s, the framework for attracting investment and fostering industrial development evolved rapidly. By 1968 the Initial Investments Act provided the initial legislation without the restriction of ownership. The year 1972 saw the first EPZ coming into force along the Penang Island. It experienced rapid success in attracting FDI geared towards exports. This attracted the American Investors who utilized the opportunity to locate their industries in the labor-intensive electronic assembly industry.¹⁸³

4.9.1 The Industrial Coordination Act 1975 (ICA)

In 1975, the promulgation of the Industrial Coordination Act¹⁸⁴ brought changes in the regulatory environment. The new Act introduced equity restrictions in keeping with the objectives of NEP. Through the Act, a licensing requirement was needed for manufacturing activities as well as capital ownership requirements for ventures which had an investment greater than Ringgit (RM) 100,000. It was also the case that Malaysian firms were obligated to provide at least 30% of the capital to Bumiputra¹⁸⁵ interests. Similarly, regulated the foreign-

¹⁸³ *ibid.*

¹⁸⁴ The Malaysian Industrial Co-ordination Act 1975.

¹⁸⁵ Bumiputra is a term used to describe indigenous people of Malaysia.

owned firm's investment by requiring that they provide at least 70% of their capital to Malaysian interests, of which 30% was to be rendered to Bumiputra.¹⁸⁶

The regulation back then was geared towards harnessing and protecting the local economy by incentivizing foreign firms through a 100% foreign equity provided the firms exported at least 80% of their production and ensured that some of their production inputs were sourced from the domestic market. Through the ICA, the state was brought in as a key development factor for income and wealth redistribution through growth by mandating equity distribution in existing and new businesses. As a result, the domestic and operating environment became increasingly restrictive, forcing the government to create a liberal EPZ environment allowing foreign firms to freely invest and operate in the export-oriented sector of the economy.¹⁸⁷

Malaysia then adopted the dual-track economic development strategy, which saw the protectionism domestic government working in conjunction with an enclaved export sector. This led to an ambivalent phenomenon where:

- The EPZ growth spurred in the 1970s and 1980s which resulted in the creation of an industrial cluster around electronics assembly industry-leading to the dramatic increase in exports and manufacturing employment and the share of the sector in the economy;
- There was increased capital flight from Chinese and foreign investors between the years 1977-1984 as a result of the restrictive investment regime in the domestic economy. The economy lost USD 12 billion by then.
- Failed redistribution of income and economic resources among the Malaysians as foreigners fled owing to the restrictive Act.

¹⁸⁶ Claude Baissac (n 176) 50-85.

¹⁸⁷ *ibid.*

4.10 1980s industrial drive

Following the unsuccessful nature of the dual-track approach, Malaysia embarked on a massive industrialization strategy. Malaysia's objective then was to complement the export-oriented sector with a domestic heavy industrial base focused on continuous growth and achieving the goals of redistribution. The Malaysian government took over as the key driver of this new project and created the Heavy Industrial Corporation of Malaysia (HICOM) in 1981. This drive created an increase in the dual-track approach, with the newly set up heavy industries being highly protected from external competitors.¹⁸⁸

Once again, Malaysia failed through its program. Protectionism increased significantly and this effect was so high for the motor vehicle industry that this industry wasn't viable without it. The country's external debt increased from 9.5 % of Gross National Product in 1980 to about 42.4% in 1986.¹⁸⁹ Surprisingly the EPZ continued to perform well and later on the government changed track.

4.11 The second export-oriented drive

In 1985, the government changed track and saw the need to improve its macro-economic performance and decrease the national debt. In 1986 the government established a 10-year Industrial Master Plan (IMP). This saw Public enterprises being privatized partially or fully. The trade and investment rules were substantially opened. A new Act, the Promotion of Investments Act, came into force and replaced the 1968 Investments Incentives Act in 1986 with a set of targeted incentives geared towards supporting the IMP and encouraging the

¹⁸⁸ *ibid.*

¹⁸⁹ *ibid.*

creation of small and medium enterprises SMEs that would compete in the international markets. Licensing requirements and ceilings were significantly relaxed. Also, investments in labour force training were made possible through vocational training schemes. The strategy was successful and Malaysia continued its high growth from the mid-1980s onwards and attracted global manufacturing companies from Japan, Taiwan, the USA and other countries.

4.12 Impact of the Malaysian SEZ on the Economy

The EPZs experienced rapid economic growth at 13.3% per annum, of which seven are dedicated to the electronics industry. This growth enabled the government to solve regional disparities and contributed to the realization of socio-economic equality in society.¹⁹⁰ To date, Malaysia still benefits from its SEZ development and its economic growth.

The other impact is on employment creation. Through the SEZ program, the region employed approximately 1 million people of which a third were created in the electrical and electronics industries followed by slightly less than 100,000 in the textile industry, which is about 800,000 in the wood products industries and then around 55,000 in the food manufacturing and rubber industries each.

The other impact is that technological advancements saw the increase in tech companies and this contributed to the country's economic growth whereby in 1990, manufacturing accounted for 27% of GDP, about 59% of total exports and about 20% of total employment. To date, Malaysia has attracted some of the best technology companies that impact on its economy.

¹⁹⁰ *ibid.*

The Malaysian SEZ regime has also benefitted from FDI. As observed, the exports rose from 1% - 57.5% in 1990. The FDI also increased from USD 94 million to over USD 4 billion. This also continued to grow under the new SEZ regime in 2009. Manufacturing exports also doubled between 1996-2000 and the share of the electronics industry in those exports kept rising.

Lastly, the Malaysian economy reduced its regional disparities through its SEZ programs. As observed, the culmination of the SEZ saw a dramatic change in the operations of the economy. Through several policies and with a failed attempt twice, Malaysia sought to reinvigorate its development plan and finally, in the third attempt, it succeeded. This drop also saw the reduction in disparities and attraction of manufacturers from Japan, the United States of America, amongst other countries.

4.13 Factors for the success of Malaysia's SEZ program

Malaysia has had challenges in its SEZ regime, especially under the ICA and the import substitution domestic market orientation. Through the lessons learned from these legal instruments, the government sought to better its policies and legal frameworks. It is then that the government established the IMP, which brought massive changes that sparked economic growth and solved economic disparities.

Secondly, Malaysia considered the potential of human resource development to impact on its economy. Human resource was placed as a driving factor in industry competitiveness. As of July 2011, the Malaysian population was at 28,728,607 people, with a workforce of 12,693,000. The Malaysian SEZs have been a driving force in building up industrial capacity,

which eventually provides a positive impact on creating jobs.¹⁹¹ For example, 560,00 new jobs were created by the East Coast Economic Region (ECER), a Malaysian SEZ through the ECER Master Plan (East Coast Development Council, 2009). By 2010 Malaysia Human Development Index had surpassed that of China, Thailand and Indonesia to be ranked at 57th globally. It has been the effort of the Malaysian government to give permits to foreign entities that enable the transfer of knowledge to its citizens.¹⁹²

Thirdly, as noted through previous studies on the benefits of industrial clusters to enhance competitive advantages,¹⁹³ Malaysia implemented a cluster-based manufacturing strategy that involved value addition at either end of the chain through movements along the value chain and value addition at every point along the value chain attributed to a higher level shift of an entire value chain.¹⁹⁴ This proved critical in the development of Malaysia.

Infrastructure has bolstered the growth of Malaysia's industry despite its lack of natural resources. Besides, Malaysia has been persistent in scaling up its infrastructure. Malaysia has invested heavily in infrastructure and has excellent transport, which saw Malaysia rank 23 out of 125 countries in the Global Competitive Index (GCI) in 2007.¹⁹⁵ Other physical infrastructures include the highway networks international airports, seaports, industrial parks that are developed and amongst other infrastructure. Also, the administrative infrastructure in

¹⁹¹ Anom J Wahyuni, Sari; Anoviar, Alia N.; Santoso, 'The Key Success Factors of Penang as the Silicon Valley of the East' [2012] Management 34.

¹⁹² *ibid.*

¹⁹³ Among the successful clusters have been those of Silicon Valley in California or the automotive cluster of Stuttgart.

¹⁹⁴ Wahyuni, Sari; Anoviar, Alia N.; Santoso (n 187) 34.

¹⁹⁵ *ibid.*

Malaysia has been sufficient through Medium-Term Economic Planning that involves a series of 5-year plans.¹⁹⁶

The Malaysian Government, through its institutions such as the Malaysian Investment Development Authority (MIDA), the key Agency for the Promotion of the Manufacturing and Service Sectors in Malaysia, has strongly supported the industrialization process. MIDA also supports businesses interested in venturing for business opportunities abroad. The government has also been instrumental in reducing levels of corruption by rotating and transferring officials after a certain period. It also has a well-established anti-corruption agency that challenges those departments that are prevalent in corruption.¹⁹⁷ The government incentive for Malaysia, both tax and non - tax have also been instrumental in enabling sustainable economic growth. It is also through government support that the economic landscape has been made easy for doing business with Malaysia, gradually improving its status from 18th in 2009 to 10th in 2010.¹⁹⁸

Generally, post the 1960's era of trade restrictions under an interim government, the country's political stability has remained stable, creating an enabling environment both economically and socially. This has seen the entry into the market of big technology companies such as IBM and Motorola, amongst others. This culminated in Malaysia ranking 15 in 2018 for ease of operation by the World Bank.¹⁹⁹ All this is due to a stable political climate.

¹⁹⁶ *ibid.*

¹⁹⁷ *ibid.*

¹⁹⁸ See World Competitive Report 2010 IMD.

¹⁹⁹ 'Rankings & Ease of Doing Business Score' (n 175).

4.14 Conclusion

This chapter was tasked with drawing lessons from the study of SEZs in Malaysia and South Africa and how their economies have benefitted from the use of the SEZs to enable sustainable social-economic development. The case studies from these two countries have shown a common trend amongst the two countries. South Africa and Malaysian governments have been instrumental in spearheading the success of the Special Economic Zones in their regions. Despite the varied challenges and inequities unique to each region, these nations have lived up to remedy the situations and hence the effects of their reforms have trickled down to impact their societies generally through contributing to social justice in one way or another. In the next chapter, we will give our conclusion, findings and recommendations from the studies conducted in this research paper.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This study sought to find out whether Special Economic Zones can be used as a tool for the realization of social justice in Kenya. The study has shown that social-economic inequality can be solved through the implementation of the provisions of SEZs with the support of the state and political goodwill. Moreover, SEZ implementation comes with additional benefits such as the transfer of technology and regional integration. The study reviewed the domestic legal framework for Special Economic Zones in Kenya, from the historical establishment of the EPZ to the current SEZ legislation. It sought to establish how the right to development is being exercised in a manner that supports social - economic equality.

5.2 Findings

This study was guided throughout its length by three research questions as follows:

1. What are the policy, legal and institutional structures establishing both the Kenyan EPZ and the SEZ and how will the understanding of the SEZ structure contribute towards the realization of social justice?
2. What are the inadequacies of the EPZ and how have they resulted in the transitioning to the SEZ?
3. What are some of the best practices from Malaysia and South Africa on the management of SEZs that Kenya can learn in order to ensure success in its own SEZ and the realization of social justice?

In respect of the first question, this study has established in Chapter two that at the onset, the EPZ had a workable legal framework guided by the Export Processing Zones Act and EPZ

Authority. The findings established that the SEZ structure had an equally sound policy that was more robust and flexible for the establishment of various types of SEZs around the country. In that respect the SEZ structure was more ideal as compared to the EPZ in attaining social justice because the understanding of the same established that the SEZ was decentralized and devolved as supported by the Kenyan Constitution. Moreover, the SEZ aligns itself with vision 2030 as the national development plan, which seeks to provide employment, eradicate poverty, provide equitable resource distribution and make Kenya a middle-income economy by the year 2030.

Regarding the second question, this study has established in Chapter three that the inadequacies presented by the EPZ, both legislative and institutional were ineffective in enabling the progress of the EPZ. Firstly, it has been established that the EPZ policy framework is misplaced in its development approach resulting in many SMEs becoming risk - averse. It has also been established that the EPZ framework provided limited safeguards against unscrupulous investors who took advantage of the weak legislative instrument. The physical incentives also did not do much to benefit the EPZ program.

It has also been established that the EPZ program and its goals did not mirror the industrialization policy. In addition, the majority of the board members of the EPZ Authority worked under the Ministry of Trade and Industrialization, and this led the program to be vulnerable to political intervention. All these inadequacies were ineffective towards the SEZs successes in achieving social justice.

The last question was addressed in Chapter four by looking at both the Malaysian and South African (Coega) SEZs. The study established the two countries SEZ structures were ideal in helping the countries attain social justice. Nevertheless, these nations lived up to the realization

of success in their SEZ structure despite the inequalities unique to each country. It is from these successes that the lessons drawn from these case studies are ideal benchmarks that Kenya can learn from.

The study preceded with two hypotheses, the first being that the current implementation of Special Economic Zones in Kenya is subjected to political interference, and secondly that the inadequacies of the previous EPZ regime contributed less towards achieving social justice, thus resulting in the transitioning to SEZ.

The findings from this research have informed that there is a need for more regulation on the operationalization of SEZs in Kenya. This research paper has proved that; indeed, political interference has resulted in the in-operationalization of SEZ's and this has slowed down development by three years since the coming into force of the SEZ Act. This research thus proposes the amendment of the Act in a purposive and deliberate measure to avoid profit shifting and political interference for purposes of aligning with international best standards.

5.3 Recommendations

It is the author's argument that political interests cloud Kenya's approach to the realization of a successful SEZ regime all this to the detriment of the society. If Kenya is to realize social and economic equality, the author suggests the following as the recommendations.

5.3.1 Integration of zone programs into Kenya's long-term trade, industrial development and wider economic growth be prioritized

This research was able to show how other nations have integrated their SEZs with the long-term development goals of their national economy. However, zone development in Kenya, like

many African countries, suffers from a disconnect between its general economic policies and the implementation. Successful SEZs use zones as a strategy to support the dynamic processes of agglomeration and spillover.²⁰⁰ Despite the same, Kenya has tried to integrate its SEZ development plan in its vision 2030 as one of the flagship programs. Currently, Kenya is lagging behind time in the establishment of a fully functional SEZ. It is through this delay that the government is moving with haste to establish SEZs in the country.²⁰¹

However, unlike many flagship programs in the country which fail to see the light of day, Kenya's SEZ program may risk being a stagnant enclave if the integration isn't prioritized in the general context of economic development. Thus, it is suggested that the integration of SEZ programs in the general economic development initiative in Kenya be prioritized.

5.3.2 Political goodwill and commitment by leaders to realize the SEZ dream

The findings from this research have shown that in all successful SEZs, it was the government's initiative and goodwill that led to the success of the Zones. Studies and observations from most successful zones have shown that it usually takes 5-10 years after the launch of Special Economic Zones for an economy to realize its success.²⁰² Unlike successful zones, Kenya's top leadership is shrouded in a half-hearted commitment to the economic zones, which is as a result of the heinous culture of corruption and political interest in all government projects. For Kenya to succeed in its SEZ program, it is recommended that the government steps up its initiative and commitment to the program. Doing so will help in the realization of social justice for the greater good of society.

²⁰⁰ Farole (n 4) 35.

²⁰¹ 'Kenya To Speed Up Creation of Special Economic Zones' (*Expogr.com*, 2018) <https://www.expogr.com/expokenya/detail_news.php?newsid=3237&pageid=2> accessed 16 September 2018.

²⁰² Farole (n 4) 35.

5.3.3 Harmonization of the Special Economic Zones Act and the Export Processing Zones Act

The study established that the inception of the SEZ was as a result of the lessons learned from the operation of the EPZ. As previously stated, the SEZ came to replace the EPZ in a more robust way that opened the scope of operation of business within the zones. However, it remains to be known about the fate of the EPZs since they are still operational. As seen from the case studies on South Africa, the country integrated its IDZ programs into its SEZ. This enabled continuity of the IDZ programs but in a more liberal and structured way within the SEZ framework. This research suggests that there is a need to harmonize the roles and functions of the two entities in order to avoid redundancies and resource misuse.²⁰³

5.3.4 Control and Limitation of incentives in Special Economic Zone Programs

This presents itself as a policy issue. The SEZ Act has established various incentives for attracting investors, both domestic and foreign, into the zone.²⁰⁴ However, as previously presented, there is a risk of losing out revenues owing to over incentivizing.²⁰⁵ On the same, studies have shown that there is no guarantee for positive outcomes in the SEZ programs over the long term by over incentivizing. The irony is that successful SEZs use fewer incentives than unsuccessful ones.²⁰⁶ Moreover, through this study, we have shown the possibility of a carte blanche effect emanating out of over liberalization.²⁰⁷ This research suggests that Kenya

²⁰³ Kinuthia Peter Ndungu Richard, 'Analysis of the Special Economic Zones Act, 2015' (2015) <<https://assets.kpmg.com/content/dam/kpmg/ke/pdf/tax/analysis-of-the-special-economic-zone-act.pdf>> accessed 16 September 2018.

²⁰⁴ Special Economic Zones Act (n 7)

²⁰⁵ Chimbombi (n 144).

²⁰⁶ Farole (n 4) 35.

²⁰⁷ Chimbombi (n 144).

should reduce its reliance on fiscal incentives and shift its focus on activities that give it a comparative advantage.

5.3.5 Improve strategic planning and implementation

This research has extensively shown that successful zones have benefitted from the general integration among the institutions, stakeholders and shareholders. As stated, the current legislation in Kenya is sound but has its limitations, which derail the implementation owing to political interference and interests. The challenges of execution and planning pose questions as to whether the state ability is adequate to effectively deliver on the zone program. More often than not, Kenya and other African countries misplace their priorities by prioritizing quantity over quality through focusing on ‘selling licenses’ instead of attracting quality investors and getting value for money through promoting exchange between the zones and the domestic economy. Improving strategic planning will help in the alignment of SEZ development with the national social and economic goals that are sufficient enough to achieve social justice.

5.3.6 Development of a more robust soft and hard infrastructure and integrating it more with the domestic market

There’s a necessity to have infrastructure relevant to the particular SEZ to attract investors. These infrastructures should be of high quality and meet the basic needs sufficient enough to support the fiscal incentives in place. Further, the infrastructure environment in the zones should be enhanced and the effects seen throughout the country. On soft infrastructure, successful trade in many SEZs has shown that efficient customs processes are vital as a tool for ensuring successful economic growth.²⁰⁸ Kenya requires specific service agreements between the zone authorities and the customs authorities to be modernized and developed. This

²⁰⁸ Farole (n 4) 35.

will ensure that there is improvement in the zones operations. The success of these reforms will attract foreign direct investment through trade, which Kenya will utilize to solve its age-old economic inequality hence achieving social justice.

5.3.7 Departure from the Hegemonic thought of development

As previously established, global social order is influenced by several hegemonic states such as the USA and UK. It has been argued in this research that dependence of hegemonic policies such as the SAPs program as a tool for development is detrimental to the success of social justice globally as developing nations are forced into unsustainable programmes. This form of compromise has been a recipe for injustices and inequalities between nations. This research recommends that in the quest for development, Kenya does not embrace itself intimately into the power relations exchanged by leading countries. It is suggested that Kenya realigns itself with leadership that supports social justice.²⁰⁹

5.3.8 Focus on Intra - African trade as a tool for investment

African countries' zone development is primarily geared towards attracting foreign entities outside Africa. This is seen through the limited trade among African countries and the preference given to European markets. Our studies in South Africa have shown that intra-African trade has the ability to create sustainable economic growth and integration. This also enables the transfer of technology amongst African states.²¹⁰ This research suggests that as part of the development agenda, Kenya should tap into the Intra - African trade in order to attract investment and enhance regional integration. It is believed that tapping into the same will

²⁰⁹ Anne Leewis, 'Social Justice and Development' (2009) 19 *Development in Practice* 938 <<http://www.tandfonline.com/doi/abs/10.1080/09614520903122592>>.

²¹⁰ 'Intra-African Trade Is Key to Sustainable Development – African Economic Outlook' (*African Development Bank*, 2018) <<https://www.afdb.org/en/news-and-events/intra-african-trade-is-key-to-sustainable-development-african-economic-outlook-17022/>> accessed 16 September 2018.

enable the realization of social justice through the many experiences and revenues generated, which would be useful in development.

5.4 Conclusion

This research was tasked with making a case for SEZs to achieve social justice. From the chapters, we have analyzed the history of Kenya's EPZ that led to the SEZ transition. A study of Malaysia's and South Africa's SEZ programs have revealed some of the challenges faced by Kenya. The lessons drawn from the research leads us to conclude that proper implementation of the SEZ programme through political goodwill and proper governing structures can lead to economic growth and the realization of social justice.

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