

**A CRITICAL ASSESSMENT OF KENYA'S POVERTY ALLEVIATION APPROACHES:
TOWARDS AN AFRICAN JURISPRUDENTIAL PERSPECTIVE**



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(G62/35657/2019)

*A Research project submitted in partial fulfilment of the requirements for the
award of the degree of Master of Laws (LLM) of the University of Nairobi.*


SEPTEMBER 2021.

DECLARATION


I, **GAVIN ROMEO CASTRO**, do hereby declare that this is my original work and that it has not been submitted for the award of a degree or any other academic credit in any other University.

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Signed.......... Date... 28th September, 2021.....

This Research Project has been submitted for examination with my approval as a University supervisor.

Signed.......... Date..... 9/28/2021.....

DR. NKATHA KABIRA

DEDICATION

To my wonderful wife, lovely daughter and two awesome boys. You rock!

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Most gracious thanks to my supervisor, Dr Nkatha Kabira, for the unwavering commitment and immeasurable support. *Umntu ngumuntu ngabantu!*

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Universal Declaration of Human Rights (Proclaimed by the United Nations General Assembly in Paris on 10 December 1948 vide UN General Assembly Resolution 217A)

Vienna Declaration and Programme of Action (Adopted and opened for signature, ratification and accession by the General Assembly Resolution 48/121 of 20 December 1993, entry into force May 2013)

ABBREVIATIONS AND ACRONYMS

ACHPR	African Charter on Human and Peoples' Rights
AU	The African Union
BEAA	British East African Association
CDF	Comprehensive Development Framework
DDCs	District Development Committees
DFRD	District Focus for Rural Development'
EAC	East African Community
EPC	Export Promotion Council
ERS	Economic Recovery Strategy Paper
FDIs	Foreign Direct Investments
GDP	Gross Domestic Product
GNI	Gross National Income
HLTF	High-Level Task Force on the Right to Development
HRBA	Human Rights-Based Approaches
HRC	Human Rights Council
IBEA	Imperial British East African Company
ICCPR	International Convention on Civil and Political Rights
ICDC	Industrial and Commercial Development Corporation
ICESCR	International Convention on Economic, Social and Cultural Rights
ICT	Information Communication Technology
ILO	International Labour Organization
IMF	International Monetary Fund
IPC	Investment Promotion Council
KNTC	Kenya National Trading Corporation

L&D	Law and Development
LFIs	Legal Frameworks and Institutions
MDGs	UN Millennium Development Goals
MTPs	Medium-Term Plans
NDP	National Development Plan
OAU	Organization of African Unity
ODA	Overseas Development Assistance
PFMA	Public Finance Management Act, 2012
PRSP	Poverty Reduction Strategy Paper
SAPs	Structural Adjustment Programs
SDGs	United Nations 2030 Agenda for Sustainable Development
UDHR	Universal Declaration of Human Rights
UNDP	United Nations Development Programme
UNDRTD	United Nations Declaration on the Right to Development
WG	Intergovernmental Working Groups

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ABSTRACT

Historically, Kenya's development agenda has directed immense resources towards mitigating poverty. This is equally true of contemporary development plans such as the Kenya Vision 2030 or its most recent enunciation under the Big Four Agenda. Yet, as of the 2019 Census and other reports, the poverty incidence continues to escalate with millions of Kenyans still in extreme poverty. This study uses the examples of select government policy documents and periodic reports on poverty and poverty alleviation to, firstly, critically interrogate the successes and failures of the Kenyan government's historical and contemporary approaches to poverty alleviation and, secondly, investigate the extent to which they resonate with the lived realities of Kenyans as exemplified in their African Ontology and Philosophy of law perspectives. The study argues that there is a disconnect between policy, related legal and institutional frameworks on poverty alleviation and the actual lived realities of Kenyans. These realities are encapsulated in the underlying socio-economic, political and cultural dispositions of the varied Kenyan communities which constitute their customary law and norms, and can generally be summed up as including the place of community; notions of wealth, poverty, justice and equality; individuality, personhood and the concept of human rights; collegiality; participation and representation etc. To establish the disconnect, we investigate the extent of the incorporation of these perspectives in policy and legal responses to poverty alleviation. The study first identifies the broad policy initiatives, then classifies them into three distinct categories, namely Classical Approaches; Social Approaches and Contemporary approaches, based on Duncan Kennedy's periodization in the *Three Globalizations of Law and Legal Thought*. To identify the root cause of the disconnect and place it within its proper context, the study equally investigates, firstly, the extent to which the approaches were influenced by the *Three Globalizations of Law and Legal Thought* and *Policy Transfer and Diffusion*, and secondly, assesses their policy frameworks critically using analytical tools borrowed from Wanjiku Kabira and Masheti Masinjila's *ABC of Gender Analysis*, and by way of a review of the Kenya government's periodic reports since 1963 on its policy initiatives and their failures or successes in addressing poverty and poverty alleviation. The study concludes that persistent poverty in Kenya is partly attributable to the historical disregard of the lived realities of Kenyans in the formulation, consideration, adoption and application of policy and related legal and institutional frameworks on poverty and poverty alleviation. Hence, it notes, that while policy prescriptions and the enabling legal and institutional frameworks look magnificent on paper, they have continually failed to connect to the actual lived realities in Kenya. From this assessment, we make a case for the utility of the African Ontology and Philosophy of law as a potential bridge for connecting law in the books and law in action in relation to poverty alleviation in Kenya. Using a mixed methodological approach, the study relies on Critical Legal Studies, Socio-legal theory and African Legal Theory to demonstrate, that for poverty alleviation, the contestation between the African and the received Western conception of law, development and social justice account for the gap between law in the books and law in action. Case law affirms that indeed this disconnect is the result of a persistent clash between African Philosophy and Western legal and policy influences. The study thus concludes by typologizing an African Philosophy of law perspective to law and development for poverty alleviation in Kenya. We propose the conception of a hybrid approach to poverty alleviation which incorporates African Ontology and Philosophy of law perspectives by conferring legal validity to some cross-cutting African customs and cultural practices to bridge the apparent disconnect.

CHAPTER ONE

INTRODUCTION

1.1 Background

Fifty-seven years since attaining independence, poverty, and its many dimensions, remains an inescapable reality for millions of Kenyans. The World Bank's most recent *State of Economic Inclusion Report 2021* estimates that currently, over 40% of Kenyans live in absolute poverty.¹ The Kenya National Bureau of Statistics' (KNBS) *2020 Comprehensive Poverty Report* estimated that as of 2020, roughly 15.9 million Kenyans were poor (about 33.4% of the population).² For rural areas, the report placed multidimensional poverty incidence at 67%, while urban areas stood at 27%.³ From the report, it's evident that there are twice as many multidimensionally poor Kenyans living in rural areas than in urban areas. Worse still, the World Bank reports in the *Kenya Economic Update: Navigating the Pandemic*, that in 2020, a further over two (2) million Kenyans fell into poverty due to the socio-economic disruptions of the COVID-19 pandemic.⁴

Whether it's poverty generally or extreme poverty, or gendered poverty and or child poverty, life for millions of Kenyans remains a perennial struggle for survival. Despite Kenya joining the ranks of lower Middle-Income Countries,⁵ millions still cannot afford healthcare, education, proper meals, decent shelter, jobs, clean water and sanitation, and other critical social services and amenities. Of its many dimensions, child poverty rates portend a bleak future for millions of Kenyan children.⁶ For instance, malnutrition remains a leading cause of death for

¹ As of 2020, the national absolute poverty rate was estimated at 36%. The report partly attributes this spike to the economic disruptions caused by COVID-19 which, as equally noted in the *2020 Kenya Economic Update: Navigating the Pandemic*, pushed a further over 2 million Kenyans into poverty. See The World Bank Group, 'The State Of Economic Inclusion Report 2021' (World Bank 2021).

² See Kenya National Bureau of Statistics, *Comprehensive Poverty Report* (2020). 14; See also '2019 Kenya Population And Housing Census Results - Kenya National Bureau Of Statistics' (*Kenya National Bureau of Statistics*, 2019) <<https://www.knbs.or.ke/?p=5621>> accessed 10 September 2020.

³ Ibid.

⁴See World Bank, 'Kenya Economic Update: Navigating The Pandemic' (World Bank 2020) <<http://documents1.worldbank.org/curated/en/957121606226133134/pdf/Kenya-Economic-Update-Navigating-the-Pandemic.pdf>> accessed 16 December 2020.

⁵ Kenya became a lower Middle-Income Country in 2014. The World Bank defines a lower middle-income country as one whose Gross National Income (GNI) per capita is between with a GNI per capita between \$1,036 and \$4,045.

⁶ Child poverty is the lack of access to or lack of availability of more than one basic need, service, or right necessary for child's survival and development, also referred to as multidimensional deprivation. See Kenya National Bureau of Statistics, 'Child Poverty In Kenya: A Multidimensional Approach' (Kenya National Bureau of Statistics 2017).

children under five, with an estimated 337,000 children under that age suffering from malnutrition, while some other 25% suffer from stunted growth due to poor nutrition.⁷

Hence, Poverty, nay, extreme poverty, remains a reality for millions of Kenyans. Yet, Kenya's quest for development since 1963 has been characterized by efforts to address poverty, inequality and socio-economic marginalization.⁸ This aspiration is historically enumerated under various policies, National Development Plans (NDPs), and equally anchored under various institutional and legal frameworks. The most contemporary of these plans is the Kenya Vision 2030.⁹ Billions of shillings have been channelled towards this objective since 1963. For instance, the World Bank estimates that between 1963 and 2019, Kenya had received net official development aid of US\$48.8 billion.¹⁰ In 2020, the World Bank alone approved a US\$1 billion budget support facility for Kenya, whose target, amongst others, was to promote inclusivity.¹¹ Still, despite investing immense resources and decades of preoccupation with poverty alleviation, the attainment of meaningful results remains a mirage. Dambisa Moyo in *Dead Aid: Why Aid Is Not Working and How There Is a Better Way for Africa* laments the failure of this vast sums of aid to promote sustainable poverty alleviation and development and calls for a change of tact.¹²

Alarmingly, the World Bank in 2018 reported that it may not be possible for Kenya to eliminate poverty under Vision 2030 by the year 2030 despite impressive gains in overall poverty reduction.¹³ The Bank's report was premised on Kenya's economic performance between 2008 and 2018, which it noted was insufficient to generate the levels of growth, inequality reduction

⁷Ibid; see also Word Food Programme, 'Kenya Annual Country Report 2019' (Word Food Programme 2020).

⁸ From the KANU Manifesto of 1963 to Sessional Paper No. 10 of 1965 on *African Socialism and its Application to Development*, various other Sessional Papers, through the nine (9) NDPs beginning in 1966 up to 2000, the Poverty Reduction Strategy Paper in 2004, the Economic Recovery Strategy Paper for Employment and Wealth Creation, the current Kenya Vision 2030 and its MTP framework.

⁹ The Kenya Vision 2030 is the current long-term development blueprint for the country, aiming to create "a globally competitive and prosperous country with a high quality of life by 2030. But like others before it, Vision 2030 has attracted lots of Scepticism. See 'About Vision 2030 | Kenya Vision 2030' (*Vision2030.go.ke*) <<https://vision2030.go.ke/about-vision-2030/>> accessed 22 February 2020. See also 'The Vision on Track' [2020] *Kenya Vision 2030 Newsletter* <<http://vision2030.go.ke/inc/uploads/2018/05/Kenya-Vision-2030-Newsletter..pdf>> accessed 10 February 2020.

¹⁰See 'Net Official Development Assistance And Official Aid Received (Current US\$) - Kenya | Data' (*Data.worldbank.org*, 2019) <<https://data.worldbank.org/indicator/DT.ODA.ALLD.CD?locations=KE>> accessed 10 May 2021.

¹¹See The World Bank Group, 'World Bank Approves \$1 Billion Financing For Kenya, To Address COVID-19 Financing Gap And Support Kenya's Economy' (2020) <<https://www.worldbank.org/en/news/press-release/2020/05/20/world-bank-approves-1-billion-financing-for-kenya-to-address-covid-19-financing-gap-and-support-kenyas-economy>> accessed 10 May 2021.

¹² See Dambisa Moyo, *Dead Aid: Why Aid Is Not Working And How There Is A Better Way For Africa* (Farrar, Straus and Giroux 2010).

¹³See 'GDP Growth (Annual %) - Kenya | Data' (*Data.worldbank.org*, 2018) <<https://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG?locations=KE>> accessed 16 March 2020.

and redistribution required to realize Vision 2030, and particularly its poverty and inequality targets.¹⁴ This grim forecast is reinforced by Afro Barometer, in its Lived Poverty Index (LPI) report.¹⁵ The report observes that between 2014 and 2018, Kenya's LPI rose from 0.93 to 1.06. These reports align with the United Nations Development Programme's (UNDP) annual reports, the Human Development Index (HDI).¹⁶ In 2018, Kenya's HDI value was at 0.579, corresponding to position 147 out of 189 countries and territories. Analysis of historical HDI data between 2008 and 2020 shows that Kenya has consistently been positioned in the medium human development category.¹⁷ Therefore, these circumstances are not new to Kenya. Little wonder then that Kenya is ranked the third poorest Lower-Middle-Income Country globally in the newly released study by the World Bank.¹⁸

While inequality and poverty have their roots in the colonial era and its approach to development, particularly its extractive nature and the exclusion of natives from the productive sectors of the economy, these disharmonies, gross inequalities, poverty, social and or class conflicts from this era permeated the post-independence period. Naturally, the mitigation of these challenges took priority, particularly poverty alleviation. Unfortunately, for a long time, the approaches employed to address poverty in the post-colonial period did not connect with the lived realities of Kenyans.¹⁹ This is partly because they were externally conceived and applied without much regard for the lived realities of the targeted populations. In other words, they didn't account for the underlying social, economic, political as well as cultural dispositions of the populations they were meant to benefit. A majority of the approaches in the first four decades of independence were primarily conceived within the scope of international development cooperation and were, therefore, donor-

¹⁴ Ibid.

¹⁵ See Afrobarometer, 'Lived Poverty On The Rise: Decade Of Living-Standard Gains Ends In Africa' (Afrobarometer 2020) <https://afrobarometer.org/sites/default/files/press-release//ab_r7_pr_lived_poverty_is_on_the_rise_in_africa_03032020.pdf> accessed 16 March 2020.

¹⁶ See United Nations Development Programme, 'Beyond Income, Beyond Averages, Beyond Today: Inequalities In Human Development In The 21st Century' (UNDP 2019) <<http://hdr.undp.org/en/content/human-development-report-2019>> accessed 16 March 2020.

¹⁷ See Max Roser, 'Human Development Index (HDI)' (*Our World in Data*, 2019) <<https://ourworldindata.org/human-development-index>> accessed 18 October 2020.

¹⁸ See World Bank Group (n. 1).

¹⁹ A discussable point if the reports are anything to go by. See Kenya National Bureau of Statistics (n. 2).; World Bank (n. 4).; World Bank (n. 13).; Afrobarometer (n. 15).

funded with conditions. Some of these approaches at best proved unsuccessful and at worst, counterproductive.²⁰

Notably, the imposition of these approaches followed the path of Duncan Kennedy's *Three Globalizations of Law and Legal Thought*, by which Western ideas and conceptions of "law and society," and "law and development" flourished and diffused to the global South by various mechanisms.²¹ Kennedy's periodization features three overlapping eras. These are the Classical Legal Thought (CLT); Socially oriented legal thought; and the Contemporary period. Each periodization featured the diffusion of atypical characteristic traits in the colonized world and among sovereign states. Additionally, an assessment based on Dolowitz and Marsh's *Learning from Abroad: The Role of Policy Transfer in Contemporary Policy-Making* and other policy transfer studies reveals influences, mechanisms and agents of learning, policy transfer and diffusion, which were either coercive or voluntary.²²

The consequence of the globalizations and transnational policy influences was that the approaches and their associated policy, legislative and institutional frameworks were often subject to unilateral changes by donors, both transnational organizations such as the World Bank and the IMF, and Western powers, over the decades.²³ These efforts permeated the three globalizations, which coincided with the *Three Moments* of law and development when economic aid became tied to good governance, legal and institutional reforms and rule of law programs.²⁴ Kenya, like most of the developing world, had to contend with imposed ideas on law and development and the

²⁰ For instance, Structural Adjustments Programs had far reaching long term socio-economic consequences and impoverished rather than uplift millions of Kenyans out of poverty and biting inequality. See Joseph Kipkemboi Rono, 'The Impact Of The Structural Adjustment' (2002) 17 *Journal of Social Development in Africa* 81.; See also David Dollar and Jakob Svensson, 'What Explains the Success or Failure of Structural Adjustment Programmes?' (2000) 110 *The Economic Journal* 894.

²¹ See Duncan Kennedy, 'Three Globalizations of Law and Legal Thought: 1850–2000', *The New Law and Economic Development: A Critical Appraisal* (1st edn, Cambridge University Press 2006) <<https://doi.org/10.1017/CBO9780511754425>> accessed 16 June 2020.

²² See David P. Dolowitz and David Marsh, 'Learning from Abroad: The Role of Policy Transfer in Contemporary Policy-Making' (2000) 13 *Governance*.

²³ See Clara Portela, 'Aid Suspensions As Coercive Tools? The European Union's Experience In The Africancaribbean-Pacific (ACP) Context' (2007) 3 *Canadian Journal of European and Russian Studies* <https://ink.library.smu.edu.sg/soass_research/1689> accessed 11 March 2021.; see also Shantayanan Devarajan, David R. Dollar and Torgny Holmgren, *Aid And Reform In Africa: Lessons From Ten Case Studies* (The World Bank 2002); and Dimitri Van Den Meerssche, 'The Evolving Mandate of The World Bank: How Constitutional Hermeneutics Shaped The Concept And Practice Of Rule Of Law Reform' (2017) 10 *Law and Development Review*; and Jac C. Heckelman And Stephen Knack, 'Foreign Aid And Market-Liberalizing Reform' (2008) 75 *Economica*.

²⁴ See David Kennedy, 'The "Rule of Law," Political Choices, and Development Common Sense', *The New Law And Economic Development: A Critical Appraisal*, (Cambridge University Press 2006).; and David Trubek and Alvaro Santos, 'The Third Moment In Law And Development Theory And The Emergence Of A New Critical Practice', *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press 2006).

attendant approaches to poverty alleviation. Mazrui observes that this globalization was not necessarily a bad thing, as Africa could not extricate itself from its forced incorporation into the global capitalist system.²⁵ Instead, he proposes, Africa needed to “modernize” without “westernizing.” The latter seems to have prevailed.

Accordingly, the globalized approaches manifested through ideas such as state-centric development, import substitution industrialisation, emphasis on foreign direct investments, redistribution, liberalization, privatisation, free-market economics, deregulation, human rights, rule of law reforms, institutionalism and constitutionalism etc. These ideas were often proposed and legislated through coercion and enticement at every turn of an era after independence for Kenya to benefit from donor funding and other economic incentives.²⁶ The approaches and their respective legal philosophies largely failed, and with them, efforts to meaningfully alleviate poverty and inequality. Further, being foreign driven, these efforts did not garner as much support and buy-in from not just the Kenyan people, for whom they were ostensibly implemented, but critically, the Kenyan political establishment beyond the opportunity for rent-seeking, and therefore no determination to see them through.²⁷

This study argues, therefore, that primary to this failure was the Western liberal legal reform agenda’s total disregard of the lived realities of Kenyans, manifest in the African Ontology and Philosophy of Law perspectives when imposing Western legal systems and ideals.²⁸ While a duality of law emerged, which pluralism prevails to date, bias has historically been given to formal Western law, while the African philosophy of law remains misunderstood and little appreciated,

²⁵ Ali Mazrui writing in the early 1980s proposed five strategies for de-Westernising globalisation, which he argued was really Western-oriented imperialism disguised as globalisation. See Carolyn Barnes and Ali A. Mazrui, 'The African Condition: A Political Diagnosis' (1981) 24 *African Studies Review*.

²⁶ See James Njeru, 'The Impact Of Foreign Aid On Public Expenditure: The case of Kenya' [2003] *African Economic Research Consortium 2*.; See also Nilima Gulrajani, 'Dilemmas in Donor Design: Organisational Reform and the Future of Foreign Aid Agencies' (2015) 35 *Public Administration and Development* 152.

²⁷ See Auty RM, 'Aid and Rent-Driven Growth: Mauritania, Kenya and Mozambique Compared' (The United Nations University World Institute for Development Economics Research (UNU-WIDER) 2007) WIDER Research Paper 2007/35 <http://hdl.handle.net/10419/63391>; See also George Economides, Sarantis Kalyvitis and Apostolis Philippopoulos, 'Does Foreign Aid Distort Incentives And Hurt Growth? Theory And Evidence From 75 Aid-Recipient Countries' (2007) 134 *Public Choice*.

²⁸ See David Trubek, and Mark Galanter 'Scholars In Self-Estrangement: Some Reflections On The Crisis In Law And Development Studies In The United States' [1974] *Wisconsin Law Review* <<https://heinonline.org/HOL/LandingPage?handle=hein.journals/wlr1974&div=49&id=&page=>> accessed 8 February 2020.; See also Ruth Buchanan, 'A Crisis And Its Afterlife: Some Reflections On 'Scholars In Self-Estrangement'', *Critical Legal Perspectives on Global Governance: Liber Amicorum David M Trubek* (1st edn, Hart Publishing 2014).; and David M Trubek, 'Law And Development: Forty Years After 'Scholars In Self-Estrangement'' (2016) 66 *University of Toronto Law Journal*.

particularly in development planning. Hence, the diffusion of Western law and legal thought and policy has over the decades prioritized and entrenched a particular kind of thinking about law and policy. For instance, economics over the social, individual over community e.g., individual rights over group rights, changing notions of identity, conceptions of justice, conceptions of wealth and poverty, inequality etc. These contestations may account for Kenya's historical and contemporary inability to connect law in the book and law in action for development policies and programs around poverty alleviation. Okot p'Bitek vividly illustrates this contestation in the *Song of Lawino and Song of Ocol*, summarizing the epic battle between Western culture (often presented as modernity) and African culture (often presented as the past).²⁹

We argue, therefore, that the gap between the promise of the law, for instance, the Constitution of Kenya, 2010 (*the "Constitution"*),³⁰ welcomed as amongst the most reformist Constitutions globally,³¹ and the absence of meaningful poverty alleviation will persist in the absence of a committed effort to rethink the application of law to development policy goals with greater incorporation of African Ontology and Philosophy of Law perspectives.³² Owing to the syncretic nature of African legal culture, evident in the Kenyan Constitution, we propose a similar approach to law and development for poverty alleviation, to craft policy, legal and institutional frameworks which speak to the lived realities of Kenyans.³³

Indeed, development, whatsoever its form, and the potential utility of the African Philosophy of Law to address contemporary challenges such as poverty remain unexplored in Kenya. In this study, like many others, as shall be evident, we conceive of the African Philosophy

²⁹ p'Bitek seems to contend that since the colonial legacy cannot be wished away, and the globalizing influence of the west, perhaps a middle ground which borrows the best of the conflicting cultures, both internally and externally, respecting the rights of women and minorities, participation and consensus, should serve as our new ideal. See 'Song Of Lawino & Song Of Ocol' (1985) 28 African Studies Review.

³⁰ See Constitution of Kenya 2010.

³¹ See Karl E Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 South African Journal on Human Rights. She notes thus, "*Transformative constitutionalism connotes an enterprise of inducing large-scale social change and through non-violent political processes grounded in law.*"

³² See Yah Pal Ghai, 'The Constitution and The Economy' (Institute of Economic Affairs, 2002).

³³ Legal Syncretism is the merging or assimilation of several originally discrete legal philosophies which asserts an underlying unity and allows for an inclusive approach to law, evident in Africa for instance in conceptions of human rights. See Dele Layiwola, *A Handbook Of Methodology In African Studies* (John Archers 1999).; see also Oleksandr Stovpets, 'Chinese Legal-Philosophic Syncretism And Its Influence To Value Orientations Of The Chinese Society' (2019) 0 Skhid.

of law from the basic premise that every legal philosophy finds footing in a culture.³⁴ While contested, the African philosophy of law is no exception. As Murungi observes, it is deeply rooted in African culture, regardless of the historical influences that have shaped it, for instance, colonialism.³⁵ From that perspective, we investigate firstly, what it means to be poor from an African perspective and how this understanding lends itself to the utility of the African legal philosophy as the lived reality of Kenyans and therefore essential in development planning for poverty alleviation. Secondly, we investigate what it is to be “*African*” and the concept of personhood, i.e., “*being and becoming.*” Thirdly, we examine the concept of community and justice, in other words, the ontological significance of “I” and “We” and conflict resolution. These concepts generally concretize in the South African concept of *Ubuntu*.³⁶ Hence, we conclude our assessment with a contrasting analysis of the concept of *Ubuntu*, African philosophy of law and received Western Legal Tradition and how these have impacted development and poverty alleviation efforts.

The fact that there is a role for law in creating the conditions necessary for sustained socio-economic growth (including poverty alleviation) is no longer in doubt.³⁷ Disagreement only persists on the types of legal institutions or reforms necessary to support such economic transformation.³⁸ But what, and whose law? Can we conceive of a place for the African ontology and philosophy of law in re-imagining law and development for poverty alleviation in Kenya?

³⁴ See Menachem Mautner, 'Three Approaches To Law And Culture' (2011) 96 Cornell Law Review <<https://core.ac.uk/download/pdf/73975164.pdf>> accessed 23 January 2021.; see also Amanda Perreau-Saussine and James B. Murphy, *The Nature Of Customary Law: Legal, Historical And Philosophical Perspectives* (1st edn, Cambridge University Press 2009).; and John Murungi, *An Introduction to African Legal Philosophy* (1st edn, Lexington Books 2013).

³⁵ Ibid.

³⁶ Ubuntu is typifying of African philosophy as a nebulous concept for common humanity, oneness: humanity i.e., Prof. John S. Mbiti sums it as ‘*I Am Because We Are, And Because We Are, Therefore I Am.*’ See 'Ubuntu (Philosophy) - New World Encyclopedia' (Newworldencyclopedia.org, 2019) <[https://www.newworldencyclopedia.org/entry/Ubuntu_\(philosophy\)](https://www.newworldencyclopedia.org/entry/Ubuntu_(philosophy))> accessed 16 November 2019.

³⁷ See Donald C. Clarke, Peter Murrell and Susan H. Whiting, *The Role Of Law In China's Economic Development: China's Great Economic Transformation* (Cambridge University Press 2008).; Yong-Shik Lee, 'General Theory Of Law And Development: An Overview' (2019) 12 Law and Development Review; Lan Cao, *Culture In Law And Development: Nurturing Positive Change* (1st edn, Oxford University Press 2016).; Jedidiah J. Kroncke, *The Futility Of Law And Development: China And The Dangers Of Exporting American Law* (2016).; Randall Peerenboom & Tom Ginsburg (Eds.), *Law And Development Of Middle-Income Countries: Avoiding The Middle-Income Trap* (2014).; Kenneth W. Dam, 'China As A Test Case: Is The Rule Of Law Essential For Economic Growth?' [2006] SSRN Electronic Journal; Yingyi Qian, 'How Reform Worked In China' [2002] SSRN Electronic Journal.; Phillip Garner, 'In Search Of Prosperity: Analytic Narratives On Economic Growth' (2004) 114 The Economic Journal.; Andrew James Harding and Bui Thu Hien, 'Law And Regional Development In ASEAN: A Singapore Perspective' [2017] SSRN Electronic Journal.

³⁸ See David M. Trubek, 'The “Rule of Law” In Development Assistance: Past, Present, And Future', *The Role of Law in Development —Past, Present and Future* (Cale Books 2005).

1.2 Statement of the Problem

Although the Kenyan government has historically employed diverse policy, legislative and institutional efforts to alleviate poverty, nonetheless these efforts have had little success in comprehensively mitigating poverty. Undeniably, poverty remains an enduring challenge for the Kenyan government. Despite a considerable drop in the poverty rate between 2005 and 2016, poverty and inequality remain persistent challenges.³⁹ Kenya's 2020 Human Development Report estimates that poverty incidences in remote areas of Kenya such as the ASALs remain above 70%.⁴⁰ Data from the KNBS' Welfare Monitoring Survey (WMS) reports in 1992, 1994 and 1997, as well as the Integrated Household Budget Survey (IHBS) reports of 2005 and 2015, reveal that the poverty headcount ratio oscillated at between 31% and 37% between 1992 and 2018.⁴¹ What is the Kenyan government not getting right? Can the enhanced incorporation of the African philosophy of law perspectives in policy framing and implementation bridge this gap? This study critically assesses Kenya's poverty alleviation approaches and makes the case for the greater incorporation of African philosophy of law perspectives to bridge this gap.

1.3 Research Questions

This study seeks to answer the following research questions: -

1.3.1. Main Research Question

1. What is the extent to which Kenya's historical and contemporary approaches to poverty alleviation incorporate African Philosophy of law perspectives as the lived reality of Kenyans?

³⁹See Kenya National Bureau of Statistics (n. 2.); World Bank (n. 4.); World Bank (n. 13.); Afrobarometer (n. 15.); UNDP (n. 16.); The UNDP notes that there remains a high level of poverty and exclusion despite a decline in the poverty rate from 46.6% in 2005-2006 to 36.1% in 2015-2016. See United Nations Development Programme, 'Human Development Report 2020' (UNDP 2020) <<http://hdr.undp.org/en/2020-report>> accessed 2 April 2020.

⁴⁰ Ibid.

⁴¹ The World Bank Poverty headcount ratio was calculated at \$1.90 a day (2011 PPP) (% of population). See 'Poverty And Equity | Databank' (*Databank.worldbank.org*) <<https://databank.worldbank.org/source/poverty-and-equity>> accessed 8 July 2020.; See Kenya National Bureau of Statistics (KNBS), 'Welfare Monitoring Survey (WMS)' [1997] <https://catalog.ihnsn.org/index.php/catalog/3709> accessed 26 February 2021.; See also See Kenya National Bureau of Statistics, 'The Kenya Integrated Household Budget Survey (KIHBS) Report'[2016] (Government Printer).;

1.3.2. Sub-Research Questions

1. What approaches has Kenya used in poverty alleviation and how did Kennedy's Three Globalizations of Law and Legal Thought and Policy Diffusion shape these approaches?
2. What are the policy, legislative and institutional frameworks for development and poverty alleviation?
3. What is the African understanding of poverty, and the nature of African Ontology and Philosophy of law and how are they relevant for poverty alleviation?
4. Why hasn't the African philosophy of law and ontological perspectives found enhanced expression and implementation in government policy?
5. What lessons, conclusions can be drawn from this study to inform future development planning on poverty alleviation?

1.4 Objectives of the Study

The objectives of this study are as follows.

1.4.1. Main Objective

The overall objective of this study is to assess the extent to which Kenya's historical and contemporary approaches to poverty alleviation incorporated African Philosophy of law perspectives as the lived reality of Kenyans.

1.4.2. Specific Objectives

1. Examine Kenya's approaches to poverty alleviation and how Kennedy's Three Globalizations of Law and Legal Thought and Policy Transfer and Diffusion shaped these approaches.
2. Assess the policy, legislative and institutional frameworks for development and poverty alleviation.

3. Examine the African understanding of poverty, and nature of African Ontology and Philosophy of law and how they are relevant for poverty alleviation.
4. Establish why the African philosophy of law and ontological perspectives have not found enhanced expression and implementation in government policy.
5. Draw lessons and conclusions from the study to inform future development planning on poverty alleviation.

1.5 Hypothesis

In this study, we argue that:

1. Kenya's approaches to poverty alleviation and the supportive legal and institutional frameworks are at odds with the lived realities of Kenyans.
2. The *Three Globalizations of Law and Legal Thought* and *Policy Transfer and Diffusion* heavily influenced Kenya's historical approaches to poverty alleviation.
3. To meaningfully alleviate poverty, a rethink of the law and its application to development, which prioritizes enhanced incorporation of the African ontology and philosophy of law perspectives is necessary to connect law in the books and the practical lives of Kenyans.

1.6 Theoretical Framework

All research is guided by certain assumptions. To evaluate these assumptions, a reader turns to a research's theoretical framework. Critically, a robust theoretical framework helps a researcher demonstrate an understanding of existing knowledge on a matter.⁴² This study applies the Socio-legal theory, the African Legal Theory and Critical Legal Studies. Firstly, the Socio-legal theory or law-and-society affords us a framework for appreciating the essence of law in society. Secondly, the African Legal Theory provides us a basis for not just understanding African realities but also conceptualizing a place for an African philosophy of law in "*law and development*" and particularly, for poverty alleviation. Thirdly, Critical Legal Studies provides us

⁴² See Sanne Taekema, 'Theoretical and Normative Frameworks for Legal Research: Putting Theory Into Practice' [2018] Law and Method <<https://repub.eur.nl/pub/111977/RePub-111977-OA.pdf>> accessed 6 February 2020.

a framework for rationalizing the aims of law within the context of the contestation between Western legal thought and practice and an African Ontology and philosophy of law, and hence a basis for rejecting Western universalism.

1.6.1 Socio-Legal Theory

Socio-legal studies deal with law and society.⁴³ For socio-legal theorists, how the law relates to a social situation forms part of the understanding of such a social situation. The socio-legal theory concerns itself with the social value of law and its specific functions in society.⁴⁴ Accordingly, emphasis is laid on the examination of legal rules, an approach often termed an instrumentalist view of the law.

While Eugen Ehrlich,⁴⁵ Emile Durkheim⁴⁶ and Max Weber⁴⁷ championed the Sociology of Law, Legal theorists such as Roscoe Pound⁴⁸ birthed sociological jurisprudence. Sociological approaches help us critically examine the function of law as a tool for social change. Baron de Montesquieu⁴⁹ and August Comte⁵⁰ theorized law as a living and thus constantly growing. In other words, the law cannot be separated from the physical and social environment. Bronislaw Malinowski,⁵¹ Richard Dworkin,⁵² Oliver Wendell Holmes⁵³ and Roscoe Pound⁵⁴ are supportive of this view of “living law” in their works. Roscoe Pound, who championed a Theory of Interests, describes the law as social engineering.⁵⁵ Separately, in *Scope and Purpose of Sociological*

⁴³ See Brian Z. Tamanaha, *Realistic Socio-Legal Theory: Pragmatism And A Social Theory Of Law* (Oxford University Press 1997).; Roberto Mangabeira Unger, *Law In Modern Society: Toward A Criticism Of Social Theory* (1st edn, Macmillan Publishers 1976); John R. Sutton, *Law/Society: Origins, Interactions, And Change* (1st edn, SAGE Publications, Inc 2000).

⁴⁴ Ibid.; see also Taekema (n. 42); Roger Cotterrell, 'Why Must Legal Ideas Be Interpreted Sociologically' (1998) Vol. 25, *Journal of Law and Society* 2 (, pp. 171-192.; Elise Nalbandian, 'Sociological Jurisprudence: Roscoe Pound's Discussion on Legal Interests and Jural Postulates' (2011) 5 *Mizan Law Review* <<https://www.ajol.info/index.php/mlr/article/viewFile/145483/135010>> accessed 21 March 2020.

⁴⁵ See David Nelken, and Eugen Ehrlich, 'Living Law, And Plural Legalities' (2008) 9 *Theoretical Inquiries in Law*.; see also Eugen Ehrlich and Walter Lewis Moll, *Fundamental Principles Of The Sociology Of Law* (China Social Sciences Publishing House 1999)

⁴⁶ See Roger Cotterrell, *Emile Durkheim: Law In A Moral Domain* (Stanford University Press 1999).

⁴⁷ See Simona Andriani, 'Max Weber's Sociology Of Law As A Turning Point Of His Methodological Approach' (2004) 14 *International Review of Sociology*.

⁴⁸ See Elise Nalbandian, 'Introductory Concepts on Sociological Jurisprudence' (2010) 4 *Mizan Law Rev.* <<https://www.ajol.info/index.php/mlr/article/viewFile/145480/135007>> accessed 31 March 2020.

⁴⁹ See 'Complete Works, Vol. 1 (The Spirit Of Laws) - Online Library Of Liberty' (*Oll.libertyfund.org*, 2020) <<https://oll.libertyfund.org/titles/montesquieu-complete-works-vol-1-the-spirit-of-laws>> accessed 22 March 2020.

⁵⁰ See Warren Schmaus, 'A Reappraisal Of Comte's Three-State Law' (1982) 21 *History and Theory*.

⁵¹ Mateusz Stpie, *Bronislaw Malinowski's Concept of Law* (Springer International Publishing 2016).

⁵² See Keith Doubt, 'Dworkin's Moral Hermeneutics and Sociological Theory' (1998) 35 *The Social Science Journal*.

⁵³ See also Oliver W. Holmes, 'The Path of The Law' (1897) 10 *Harvard Law Review* <<http://moglen.law.columbia.edu/LCS/palaw.pdf>> accessed 8 January 2020.

⁵⁴ See Debarati Pal, 'Sociological Jurisprudence - Theory of Roscoe Pound' [2011] *SSRN Electronic Journal*.

⁵⁵ See Nalbandian (n. 44).

Jurisprudence, Pound argues that sociological jurisprudence should ensure that the making, interpretation, and application of law incorporates social facts.⁵⁶ Holmes, in his essay, *Path of the Law*, is agreeable to this proposition and its relevance and application in judicial decision making.⁵⁷ Accordingly, the theory equally assesses the influence of local cultures, social control, and behavioural tendencies on people's observance of the law.

Accordingly, sociologists often define law as an instrument of government social control, with law exercising social control and promoting social change.⁵⁸ In that sense, the law must necessarily be regulatory and directive. It must set standards that regulate social practices and relations in society. However, this relationship is circular and not linear. Circular in the sense that firstly, is "*law changing the society*," where the law provides the impetus for social change. Secondly, is "*society changing the law*" to suit its evolving needs, what Pound christens continuous social engineering.⁵⁹ When law changes society, socio-legal theorists signal this as the beginning of the development of society. When society changes the law, it is a sign of the transformation of society.

1.6.2 African Legal Theory

African legal theory primarily deals with African conceptions of law. It concerns itself with the legal systems attendant to these conceptions and their cultural and historical basis. Debate rages on its existence, content and substance. Significant tenets of this philosophy have been enumerated by various scholars, both African and Western, such as John Murungi,⁶⁰ Ifeanyi A.

⁵⁶ See Roscoe Pound, 'The Scope And Purpose Of Sociological Jurisprudence' (1912) 25 Harvard Law Review.

⁵⁷ Holmes contends that judges while interpreting the law, ought to infuse lifeblood into the dry skeleton provided by the legislature and create a living organism appropriate and adequate to meet the needs of the ever-changing society. See Oliver W. Holmes, 'The Path of The Law' (1897) 10 Harvard Law Review <<http://moglen.law.columbia.edu/LCS/palaw.pdf>> accessed 8 January 2020.

⁵⁸ See John Griffiths, 'What Is Sociology of Law? (On Law, Rules, Social Control and Sociology)' (2017) 49 The Journal of Legal Pluralism and Unofficial Law.; see also Calavita, Kitty. 2010. *Invitation to law & society: An introduction to the study of real law*. Chicago Series in Law and Society. Chicago: Univ. of Chicago Press.; and Roger Cotterrell, *The Sociology of Law: An Introduction* (2nd edn, Oxford University Press 1992

⁵⁹ See Nalbandian (n. 44).; Pal (n. 54).; and Pound (n. 56).

⁶⁰ See Murungi (n. 34).

Menkiti,⁶¹ John S. Mbiti,⁶² William Idowu,⁶³ Cheikh Anta Diop,⁶⁴ Robert William⁶⁵ and Richard H. Bell⁶⁶ etc.

In *African Jurisprudence and the Reconciliation Theory of Law*, Idowu proposes a Reconciliatory Theory of Law as one which consists of African jurisprudence.⁶⁷ He argues that essentially, the African philosophy of law is chiefly about reconciliation and social cohesion. While he accepts that this may not be true of all cultures in Africa, he nonetheless contends that we can find it useful in our examination of African jurisprudence. Idowu's reconciliatory thesis consists of, firstly, the law as a social concept – which he argues is true for all societies, i.e., law as directive and regulatory of societal relationships. As such, the law from this basis becomes an instrument of not just social interaction, but equally, social transformation. This much, he argues, is evident in the Africanist definition or conception of law, and of other systems of law. However, he digresses, a divergence reveals itself regarding African thought, where law, other than being a social construct, is also an instrument for social cohesion. For African jurisprudence, therefore, it is not important that law has instrumental functions, it is important what those instrumental functions are – chiefly, a reconciliatory phenomenon.

Hence, by this approach, vis-à-vis justice, the law's purpose in African jurisprudence is restorative, not retributive as in Western legal philosophy. Secondly, Idowu observes that laws, for instance, customary laws, are seen as general rules of engagement whose sole intention is directing the affairs of mankind. In other words, the African normative framework outlines general norms by which society is to be shaped and order maintained. Thirdly, that for African philosophy, law and the notion of legal personality transcends the individual. Premium is placed on community and group responsibility, as opposed to the individual and his or her needs or wants. Fourthly, that

⁶¹ See Ifeanyi Menkiti, 'Person And Community—A Retrospective Statement' (2018) 7 *Filosofia Theoretica: Journal of African Philosophy, Culture and Religions.*; see also Ifeanyi Menkiti, 'Person And Community In African Traditional Thought', *African Philosophy: An Introduction* (3rd edn, University Press of America 1984).

⁶² See John S. Mbiti, *African Religions and Philosophies*, (Heinemann 1969).

⁶³ See William Idowu, 'African Jurisprudence and Reconciliation Theory of Law' (2006) 37 *Cambridge Law Rev.* 1

⁶⁴ See Isidore Okpewho, 'Cheikh Anta Diop: The Search For A Philosophy Of African Culture.' (1981) 21 *Cahiers d'études africaines*.

⁶⁵ See Robert William July, *The Origins Of Modern African Thought: Its Development In West Africa During The Nineteenth And Twentieth Centuries* (Africa World Press 2004).

⁶⁶ See Richard H Bell, *Understanding African Philosophy: A Cross-Cultural Approach To Classical And Contemporary Issues In Africa*. (Routledge 2002).

⁶⁷ See Idowu (n. 63).

law manifests communal spirit and bonds, expressed in lineage and kinship ties that define a society. Fifthly, that while unwritten, the African philosophy's normative framework is widely accepted and manifests via practised customs and covenants. In summation, Idowu concludes, that in African Philosophy, there is not so much difference between law, as a legitimate normative system and other equally legitimate normative systems like morality, religion and culture etc. This conception, he contends, can be gleaned from the general observable configurations of African cultures.

John Murungi picks up from Idowu, and like Idowu, concedes that African legal philosophy is firmly rooted in African culture.⁶⁸ Murungi contends that to make sense of African legal philosophy, one must first and foremost, examine what it means to be an African. Critically though, he avers, because an African is a human being, the examination necessarily extends to an investigation of what it is to be a human being. This investigation crystalizes in the concept of Ubuntu. Accordingly, he argues, such examination is by all accounts an examination of the African cultural context. That further, such examination must contextualize the influences of the European colonialist culture, if only to assist in the decolonization of African culture. This view of African legal philosophy is equally supported by Everisto Benyera et al who propose the conception of an African jurisprudence based on Ubuntu.⁶⁹ The authors contrast elements of Ubuntu with Western jurisprudence, outlining key differences between African philosophy and Western philosophy regarding community, personhood, identity, justice, human rights etc.

Majeke equally contends that African legal theory is firmly rooted in African culture.⁷⁰ He laments the impositions of colonialism and calls for the decolonization of legal training in Africa. For Majeke, the colonial imposition of foreign systems of thought and practice in Africa disregarded the cultural, economic and political contextual issues of the affected communities.

⁶⁸ See Murungi (n. 34).

⁶⁹ See Benyera E, Nhemachena A and Mtapuri O, 'The Man, Human Rights, Transitional Justice And African Jurisprudence In The Twenty-First Century', *Social and Legal Theory in the Age of Decoloniality: (Re-)Envisioning African Jurisprudence in the 21st Century* (Langaa 2018).

⁷⁰ See A.M.S. Majeke, 'Towards A Culture - Based Foundation For Indigenous Knowledge Systems In The Field Of Custom And Law', *Indigenous Knowledge and the Integration of Knowledge Systems: Towards a Philosophy of Articulation* (New Africa Books 2002).

However, he argues, that despite these impositions, Africans have largely retained their normative structures in their legal systems. In this contestation, these African legal systems have taken an antagonistic position towards the existing Roman law influenced legal superstructures. To mitigate this conflict, he proposes the rediscovery and re-integration of the indigenous skills that are found in the indigenous normative systems and a rethink of legal training if African legal theory is to find space in addressing contemporary African problems. Like Majeke, Odora also avers that African legal philosophy has its origin in the African experience, cultural beliefs and the thought patterns that reflect it. It, therefore, cannot be divorced from African philosophy and traditional knowledge systems.⁷¹

Silungwe disagrees with any purist conceptions of an African legal theory or jurisprudence.⁷² His objections are premised on the historical foreign influences which have impacted what would pass as African legal philosophy or jurisprudence. For Silungwe therefore, it is not possible to conceive of a pure conception of African jurisprudence, arguing that such intellectual enterprise is futile and impossible. He proposes that notions of ‘African’ legal theory, philosophy or jurisprudence be examined under the idea of ‘cultures in-between’ as propounded by Homi Bhabha.⁷³ Bhabha’s concept repudiates a purist conception of ‘culture’ and instead focuses on the diversity of ‘influence’. Silungwe contends that the violence of modernity on ‘knowledge’ or ‘thought’ has been deeply entrenched over time. This argument finds support in Legal syncretism, and scholars such as Nhemachena et al and Ndima, who also argue for the re-conception of African jurisprudence in the post coloniality.⁷⁴ Secondly, Silungwe contends, that merely decolonizing the authorship of any conceptions of ‘African’ legal theory, jurisprudence or philosophy does not negate the fact that the foundational basis of the resultant scholarship may have a root in modernity. He proposes that taking Bhabha’s approach serves two purposes. Firstly,

⁷¹ See Catherine A. Odora Hoppers, 'Indigenous knowledge and the integration of knowledge systems', *Indigenous Knowledge and the Integration of Knowledge Systems: Towards a Philosophy of Articulation* (New Africa Books 2002).

⁷² See Chikosa Silungwe, 'On 'African' Legal Theory: A Possibility, An Impossibility Or Mere Conundrum?', *African Legal Theory and Contemporary Problems: Critical Essays* (Springer Dordrecht Heidelberg 2014).

⁷³ Homi Bhabha’s concept of Hybridity proposes the creation of new transcultural forms within the contact zone produced by colonization. See Homi K Bhabha, *The Location Of Culture* (Taylor and Francis 2012).

⁷⁴ See Artwell Nhemachena, Tapiwa Victor and Samuel Amoo, *Social And Legal Theory In The Age Of Decoloniality: (Re-Envisioning Pan-African Jurisprudence In The 21st Century* (Langaa RPCIG 2018).; see also Dial Dayana Ndima, 'Reconceiving African Jurisprudence In A Post-Imperial Society' (2015) 48 *The Comparative and International Law Journal of Southern Africa*.

it helps with the examination of the complex socio-political environment of ‘law’ or the ‘legal’ in Africa which extends into its theory, jurisprudence or philosophy. Secondly, he avers, the multiple influences that characterize the ‘cultures in-between’ thesis presents an opportunity for the consideration of what could be referred to as ‘African’ in theory, jurisprudence or philosophy in dealing with global dynamics.⁷⁵

This study employs the concept of African philosophy of law proposed by William Idowu but contextualizes it broadly under Silungwe’s thesis. It argues that the failure of the institutional and legislative frameworks for poverty alleviation via the various approaches partly owes to disregard of the lived realities of Kenyans which can be gleaned from the potential utility of the African Legal philosophy. Specifically, the study contends that the historical disregard of African legal theory in the crafting and application of legal solutions to this contemporary problem has contributed to its persistence. For this study, therefore, the African legal theory provides us with the framework for understanding and delineating a place for African cultural realities in future poverty alleviation approaches.

1.6.3 Critical Legal Studies

This study identifies the historical imposition of globalised Western legal and institutional approaches to poverty alleviation in Kenya as the reason for the failure of these approaches to meaningfully mitigate poverty. To properly understand the foregoing pursuit, Critical Legal Studies (CLS) provides us with the theoretical basis for analysing the power dynamics of this imposition and its influences, as well as questioning the motives behind the impositions.

Advanced by Roberto Unger, the theory disabuses the universal norms and standards in legal thought and application.⁷⁶ He has written extensively on the CLS theory concerning various

⁷⁵ See Silungwe (n. 72).

⁷⁶ See Roberto Mangabeira Unger, *The Critical Legal Studies Movement: Another Times, A Greater Task*, (Harvard University Press, 1983)

socio-legal questions.⁷⁷ Other noted CLS theorists include Robert W. Gordon,⁷⁸ Karl Klare⁷⁹ and Duncan Kennedy.⁸⁰ Unger argues that law is neither neutral nor value-free. Instead, he asserts, it is intertwined with social issues, cannot be divorced from politics and hence has certain social biases. In that sense, the law is seen as a tool for the maintenance of power and domination by the establishment. In other words, the law furthers the interests of its creators.

From the above perspective, CLS for this study justifies the view that law perpetuates a power dynamic that works in favour of the historically privileged and against the historically underprivileged, typified in the North-South divide, or centre-periphery global politics. Is Western Cultural imperialism at play with these impositions?⁸¹ Accordingly, for society to prosper, the law's hierarchies and false dichotomies must be dismantled and re-imagined. This study questions the legal philosophies that underlie the imposition of globalised Western law, legal thought and practice for poverty alleviation in Kenya. To craft appropriate approaches to poverty alleviation from an African ontology and philosophy of law perspective, it is critical that we re-imagine the utility of law within the context of African cultural realities.

1.7 Justification of the Study

Poverty remains the most pressing contemporary development concern for Kenya. Approaches for poverty alleviation employed since independence have failed to connect to the lived reality of Kenyans. The failure of these approaches is a matter of concern that requires urgent assessment. We identify the causes of this failure and propose appropriate corrective measures.

⁷⁷ Unger observes that at its most basic level, the CLS movement challenges society to consider some ultimate questions about the validity of its own institutions and to reconsider some past 'ultimate answers' upon which those institutions are based." See Roberto Mangabeira Unger, *What Should Legal Analysis Become?* (Verso 1996).; see also Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (Verso 2015); and Roberto Mangabeira Unger, *Passion* (Free Press 1986).

⁷⁸ Robert W. Gordon, 'Unfreezing Legal Reality: Critical Approaches To Law' (1987) 15 Florida State University Law Review <<https://ir.law.fsu.edu/lr/vol15/iss2/1/>> accessed 18 October 2020.; see also Robert W. Gordon, 'Critical Legal Studies' (1986) X Legal Studies Forum <https://digitalcommons.law.yale.edu/fss_papers/1365/> accessed 27 August 2020.

⁷⁹ Duncan Kennedy and Karl E. Klare, 'A Bibliography Of Critical Legal Studies' (1984) 94 The Yale Law Journal <<https://www.jstor.org/stable/796234>> accessed 17 July 2020.; see also Karl E Klare and others, *Bibliographies Of Critical Legal Studies And Feminist Legal Studies* ([Faculty of Law, University of Toronto] 1988).

⁸⁰ Ibid.; see also Duncan Kennedy, 'Legal Education And The Reproduction of Hierarchy: A Polemic Against The System' (1984) 82 Michigan Law Review.

⁸¹ Western cultural hegemony has always loomed large in the colonial and postcolonial developmental states, evident in the continued globalization of thought and practice from the West through both coercive and non-coercive mechanisms. See Phillip R Trimble, *International Law, World Order, and Critical Legal Studies*, (Yale University Press, 1989).

This is the first study of its kind to assess Kenya's historical and contemporary approaches to poverty alleviation from an African ontology and Philosophy of Law perspective.

1.8 Research Methodology

While this study is documentary in nature, it leverages a mixed methodological approach, involving both Doctrinal and Historical approaches. Doctrinal research focuses on the analysis of rules, principles, norms, values and their interpretations.⁸² A scholar first takes up a proposition and then locates the law in the statutes, case law, commentaries or textbooks, journals, debates etc. Its focus on hard law is based on its jurisprudential origins from the positive or analytical school of law. One of the biggest shortcomings of this approach is its ignorance of contexts that shape the law, and how these are critical to our understanding of the law. It is often criticised for being disconnected from reality – for its analyses of the law only in terms of internal consistency and not the challenges or application of the law.

However, because our study assesses the relationship of law with other social ingredients that affect the impact of the law, it necessarily runs to historical approaches to enrich its analytical foundations. Historical approaches involve the collection and analysis of data to provide a description, explanation, and an understanding of past actions or events.⁸³ A historical study is employed to study the history and consequently reflect on the past failures and successes, reconcile them with modern problems, hypothesise, test hypotheses on the relationships or trends and understand present practices in a more comprehensive manner.⁸⁴ A researcher first delineates the gap of the study; locates useful sources such as documents, numerical records, oral statements etc; summarizes information derived from already recorded sources and then evaluates the historical sources.

These complementary approaches that enrich our contextual understanding of hard law and rules provide greater insight on what needs doing for the law to function better in any given

⁸² See Dawn Watkins and Mandy Burton, *Research Methods In Law* (1st edn, Routledge 2013).

⁸³ See Matthew Lange, *Comparative-Historical Methods* (1st edn, SAGE Publications Ltd 2013).

⁸⁴ *Ibid.*

circumstances.⁸⁵ Doctrinally, this study identifies law as detailed in the Constitution and statutes, case law as well as “informal” law, and reviews its application to poverty alleviation. We review the literature relevant to our understanding of the place of law in society. Historically, we interrogate Kenya’s policy historiography relevant to poverty alleviation from an African jurisprudential perspective and make appropriate observations, findings and recommendations. Then, we assess the influence of the *Three Globalizations of Law and Legal Thought* and Policy Transfer and Diffusion on Kenya’s historical and contemporary approaches to poverty alleviation and the dissonance between law in the books and law as the lived reality of Kenyans. The study concludes by leveraging various analytical tools to assess the disconnect between policy and the African ontology and philosophy of law, and delineating its place in addressing contemporary challenges. We then make recommendations to make the law more practical to the lived realities for the realization of meaningful poverty alleviation under the transformative Vision 2030 and beyond.

1.9 Literature Review

This literature review examines selected scholarly studies on law and development, poverty alleviation and African philosophy of law. Primarily, the review investigates the link between law, its application to development, and principally, poverty alleviation in Kenya. It also examines African ontology and philosophy of law perspectives as symbolizing African realities whose disregard may account for the failure to connect law in the books and law in action. The review briefly examines Duncan Kennedy’s *Three Globalizations of Law and Legal Thought* and the spread of Western legal thought and practice as defining of law and development approaches in Kenya.⁸⁶ Within this context, it also examines Policy Transfer and Diffusion theories and the influence of the transfers between the global North-South, and South-South.

We begin by contextualizing “law,” within “law and development;” “development,” within “law and development;” and “poverty” within “development discourse.” Then, we examine the

⁸⁵ See Terry Hutchinson ‘The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law’ [2015] *Erasmus Law Review*.

⁸⁶ See Kennedy (n. 21).

differences between “law in development” and “law as development.” The review then assesses the notion of an African ontology and philosophy of law, and how these intersperse with, and enhance, our understanding of development and poverty alleviation. We conclude the Chapter by demonstrating that the discord between law, its application to development and poverty alleviation, and the lived reality of Kenyans emanates from Kenya’s historical and contemporary pursuit of law and development within the paradigm of the *Three Globalizations of Law and Legal Thought*, and *Policy Transfer and Diffusion* by which African ontology and philosophy law perspectives have been largely ignored.⁸⁷

1.9.1 “Law” and “Development” In Law and Development

The Black’s Law Dictionary defines “Law” as a prescribed (by an authority) body of rules with binding legal force.⁸⁸ However, in “law and development,” the term “Law” assumes a different meaning. Y.S. Lee argues that within law and development, “law” takes a broader meaning beyond its formalistic definitions. The term may include binding judicial precedents or case law, as well as informal law such as customary law and rules.⁸⁹ This broad definition is critical for our assessment of an African ontology and philosophy of law and its place thereof in poverty alleviation discourse.

Our second definitional dilemma is “development.” Since the 1960s, conceptions of development have morphed over time from a bias for economic growth.⁹⁰ The contemporary term “development,” defies any precise definition. It has multiple meanings and remains increasingly contested and ambiguous. Chibundu in his three-tier assessment of law and development proposes that any study in law and development must, amongst other things, first identify what conception of development it addresses for which the law is invoked.⁹¹

⁸⁷ Ibid.

⁸⁸ See Garner Bryan and Black Campbell, *Black’s Law Dictionary*. 9th ed St. Paul MN: West.

⁸⁹ See Lee (n. 37).

⁹⁰ See Eric Thorbecke, ‘The Evolution of the Development Doctrine, 1950-2005’ (2006) World Institute for Development Economic Research. Research Paper No. 2006/155.

⁹¹ See Maxwell O. Chibundu, ‘Law in Development: On Tapping, Gourding, and Serving Palm-Wine’ (1997) 29 Case Western Reserve Journal of International Law.

For Lee, “development” within “law and development,” is the progressive transformation of both the economy and the society.⁹² Merryman has also defined “development” as “*progressive social change*,” noting that as such, “*law and development*” is a derivative of “*law and social change*.”⁹³ Development is presently a more holistic term that transcends both the economic and non-economic. Issues essential to enhancing human life are just as critical as the economy, for instance, gender equality, rule of law, human rights, etc.⁹⁴ This view was championed by Amartya Sen, in the seminal work, *Development as Freedom*.⁹⁵ Suffice to say, the exact nature of what constitutes “social progress” or “economic progress” remains contested.⁹⁶

1.9.2. “Poverty” in “Law and Development”

Poverty has long been the subject of development studies, primarily because poverty is inseparable from other problems of underdevelopment. Unfortunately, while there is consensus on poverty reduction as an overarching end of development policy, disagreements abound on the definition of poverty nor its measurement.⁹⁷ Like development, the term poverty has morphed in meaning over the decades, from a purely economic or monetary conception of a shortfall in income levels to a multidimensional definition that takes account of non-economic factors.⁹⁸ The result is a multiplicity of metrics by which poverty is measured and classified.⁹⁹ The focus has increasingly shifted to the concept of Sustainable Livelihood (SL), touted as more comprehensive in its bid to extend its scope beyond the common understanding and methodologies to poverty alleviation.¹⁰⁰

⁹² Lee (n. 37) 428.

⁹³ See John Henry Merryman, 'Comparative Law And Social Change: On The Origins, Style, Decline & Revival Of The Law And Development Movement' (1977) 25 *The American Journal of Comparative Law*.

⁹⁴ See Trubek (n. 38).; see also Ruth E. Gordon and John H. Sylvester, 'Deconstructing Development' (2004) 22 *Wisconsin International Law Journal* <<https://digitalcommons.law.ggu.edu/pubs/191/>> accessed 11 February 2020; see also Colin Crawford, 'Redefining And Analysing “Development” And The Role And Rule Of Law' (2015) 8 *Law and Development Review*.

⁹⁵ See Amartya Kumar Sen, *Development As Freedom*, (Oxford University Press 2001).

⁹⁶ See Joseph E Stiglitz, Jean-Paul Fitoussi and Martine Durand, *Measuring What Counts for Economic and Social Performance* (OECD Publishing 2018).

⁹⁷ See Caterina Ruggeri Laderchi, Ruhi Saith and Frances Stewart, 'Does It Matter That We Do Not Agree On The Definition Of Poverty? A comparison of Four Approaches' (2003) 31 *Oxford Development Studies* 3 < <https://www.ophi.org.uk/wp-content/uploads/ssRuggeri-Laderchi-Saith-Stewart-2003.pdf>> accessed 25 September 2020.

⁹⁸ See United Nations Department of Economic and Social Affairs, 'Final Report on World Summit for Social Development' (Resolution 1 world Summit, Copenhagen, March 1995) < <https://undocs.org/A/CONF.166/9>> accessed 25th September 2020 World Summit on Social Development in Copenhagen in 1995

⁹⁹ *Ibid*.

¹⁰⁰ The sustainable livelihoods approach focusses on first and foremost, understanding the livelihoods of the poor, seeking to make connections between factors that constrain or enhance livelihood opportunities.

For this study, while the conceptual definitions proposed by the UN World Summit on Social Development in Copenhagen in 1995 suffice,¹⁰¹ an assessment of notions of poverty from an African perspective enriches our understanding of what needs to be done to connect law and policy to the lived reality of Kenyans. While the declaration identified “absolute” and “overall” poverty,¹⁰² it took no consideration of the layered meanings of poverty across cultures, and how these may be contextually relevant in making the right prognosis.¹⁰³ It obsessed with material possessions and creature comforts. For this study, therefore, our use of these definitions and benchmarks is to merely demarcate parameters within which to approach the task. Otherwise, we enrich this analysis with perspectives from African ontology and philosophy in Chapter IV to provide a broad conceptual framework for understanding poverty and its contemporary manifestations and dimensions.

From a law and development perspective, Seers contends that a Country’s development can best be gleaned from assessing trends in poverty, joblessness and wealth distribution over some time.¹⁰⁴ He argues that if these have declined consistently, then a Country can be said to experience development. On the contrary, if any of these has been getting worse, or all three, he suggests that it would be absurd to find that development has occurred even if per capita income doubled. Seers’ proposition ties with the African and indeed contemporary understanding of poverty. Poverty as beyond econometrics. Poverty as the totality of well-being, family and societal cohesion, tranquillity, of being at ease with oneself materially and cosmologically etc or lack thereof. Unfortunately, law and development studies in Africa are yet to fully embrace this African conception of poverty and its relevance when addressing the contemporary problems of development and the role of law.¹⁰⁵ Accordingly, for this study, our contextual analysis suffices

¹⁰¹ See UNDESA (n. 98).; see also Dr. David Gordon, ‘Indicators of Poverty and Hunger’ (Indicators of Poverty and Hunger, New York, December 2005) < https://www.un.org/esa/socdev/unyin/documents/ydiDavidGordon_poverty.pdf> accessed on 25th September 2020

¹⁰² Absolute poverty was defined as "a condition characterised by severe deprivation of basic human needs, including food, safe drinking water, sanitation facilities, health, shelter, education and information.”

¹⁰³ See Maia Green, 'Representing Poverty And Attacking Representations: Perspectives On Poverty From Social Anthropology' (2006) 42 *Journal of Development Studies*.; see also David Booth, Melissa Leach and Alison Tierney, 'Experiencing Poverty In Africa: Perspectives From Anthropology' (1999).

¹⁰⁴ See D. Seers, “The Meaning of Development” in N.T. Uphoff et al (Eds.), *The Political Economy of Development: Theoretical and Empirical Contributions*, (Berkeley: University of California Press, 1972), pp. 123-129 at p.124.

¹⁰⁵ See Green (n. 103).; see also Elizabeth Amoah, 'African Traditional Religion and the Concept of Poverty', *Religion and Poverty: Pan-African Perspectives* (Duke University Press 2009).

to expand our understanding of the concept. However, for purposes of setting parameters, measurement and delineation, the HDI's Multidimensional Poverty Index (MPI) also suffices.¹⁰⁶

1.9.3. Law as Development

Law as development is the view that legal reforms are in and of themselves, development. This conception of the place of law in development takes the non-instrumental appreciation of the law.¹⁰⁷ It argues that we need not establish any linkages between law and any form of development. The fact of legal reforms, for instance, institutional or constitutional change or statutory amendments, is development by itself. The law is judged for its intrinsic value, not for its impact on development, whatever its form. In that regard, for instance, reforms that bring about greater civil and political liberties constitute development. *Development as Freedom*, as proposed by Sen, means freedoms become both an end and a means of development from this perspective.¹⁰⁸ A transformative Constitutional framework, such as Kenya's 2010 Constitution, can be seen in this light.

However, law as development does not deny that the law can have instrumental functions. Only that these instrumental functions cannot be the basis upon which law is analysed for its normative power for social change. It acknowledges that for instance, the interrelatedness and indivisibility of rights mean that the upholding and preservation of socio-economic rights (SERs) and their realization may coincidentally serve other instrumental functions such as poverty alleviation. Whether this law is effective or not should not be judged based on its instrumentality to poverty alleviation.¹⁰⁹

¹⁰⁶ The Multidimensional Poverty Index (MPI) identifies multiple deprivations at the household and individual level in health, education and standard of living.

¹⁰⁷ See M. J. Trebilcock and Ronald J Daniels, *Rule Of Law Reform And Development: Charting The Fragile Path Of Progress* (Edward Elgar 2009).

¹⁰⁸ See Sen (n. 95).

¹⁰⁹ Ibid 110.

1.9.4. Law in Development

Law in development takes the instrumental view of law and its normative power to promote social change. The nature of this instrumentality has however morphed over the years, as scholars grapple with the conceptual linkage(s) between “Law” and its relevance in “Development.” Since law and development is an interdisciplinary field, studies have taken different paths in an attempt to establish causation. This is mainly because what passes for law and its forms can be fluid depending on the context.¹¹⁰ Marc Galanter and David Trubek in their pioneering work, *Scholars in Self Estrangement*, lament the ambiguity of the field.¹¹¹ Primarily, they took issue with the field’s over-reliance on unproven assumptions about how the law relates to economic progress. Prado et al argue that within the purview of law and development, a researcher comes across a wide variety of studies, methodologies, analyses and subjects of study.¹¹² This makes establishing causation difficult and thus, the field suffers a lack of cohesiveness, with each study defining law and development within the specific lenses with which it intends to address causation and its subject. Indeed, this is the case for this study.

Tamanaha criticizes the conception of law and development as an area of study and practice, noting that it perpetuates confusion. He argues that because the multitude of countries targeted for law and development programs had vast differences, there was no unique basis upon which to build a field nor draw its conceptual delimitations.¹¹³ Tamanaha, like the rest, is wary of transplants and experimentation, typical of the early failures of the “field.”¹¹⁴ Yet, as established by Davis and Trebilcock, most doubts on the role of law in development are not on the impact of

¹¹⁰ Law and Development is part of a wider multidisciplinary development scholarship which borrows heavily from fields such as economics, the social sciences, political science, psychology, sociology etc.

¹¹¹ See Trubek and Galanter (n. 17).; *See also* Ruth Buchanan, 'A Crisis And Its Afterlife: Some Reflections On 'Scholars In Self-Estrangement'', *Critical Legal Perspectives on Global Governance: Liber Amicorum David M Trubek* (1st edn, Hart Publishing 2014).

¹¹² See Mariana Mota Prado, Diogo R. Coutinho and Mario G. Schapiro, 'Law And Development: An Evolving Research Agenda' (2016) 9 *Law and Development Review*; Mariana Mota Prado, 'What Is Law And Development?' (2010) 11 *Revista Argentina de Teoria Juridica* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1907298> accessed 2 February 2020.

¹¹³ See Brian Z. Tamanaha, 'The Lessons Of Law-And-Development Studies' (1995) 89 *American Journal of International Law*.

¹¹⁴ *Ibid.*

law in development, but about what forms or types of legal reforms are appropriate for spurring the same.¹¹⁵

For such an undertaking, Chibundu proposes a three-tier assessment of this relationship.¹¹⁶ Firstly, he argues, we must define what we understand the law to be and by what framework we wish to assess it. Is it formal law, rules or regulations or “informal” law, rules and norms? Secondly, this conception of law must account for the unique lived realities that define the developmental society under study. Noteworthy, disregard for the unique socio-economic and cultural issues that define developmental societies largely informed the failure of the early law and development movements. Thirdly, Chibundu avers, such study must then identify what conception of development it's concerned with. Lastly, he contends, the study must articulate causal linkages and their nature. He argues that because of the contingencies of law, and development, it is likely that there will be more than one set of linkages.

Elsewhere, Dam, while assessing the rule of law and economic development in China concludes that evidence suggests little role for rule of law in economic development.¹¹⁷ However, he nonetheless agrees with Rodrik that higher per capita sustainable growth demands the presence of robust legal institutions.¹¹⁸ This institutional approach has gained consensus amongst scholars in the third moment in law and development. While they do not reject instrumental arguments; third-moment scholars argue that despite the law being critical for constituting markets and implementing a host of policies, legal institutions fall within the purview of development. Hence, legal reform is now justified regardless of it being tied directly to development or not.¹¹⁹ Thus, the role of law on development has to be studied together with other institutions.

Douglas North provides empirical assessments of institutions and their place in economic development extensively.¹²⁰ Building on North's work, Dam looks at the implications of neo-

¹¹⁵ See Trubek and Santos (n. 24).; see also Kevin Davis and Michael Trebilcock, 'The Relationship Between Law And Development: Optimists Versus Skeptics' (2008) 56 *American Journal of Comparative Law*.

¹¹⁶ See Chibundu (n. 91).

¹¹⁷ See Dam (n. 37).

¹¹⁸ See Dani Rodrik, Arvind Subramanian and Francesco Trebbi, 'Institutions Rule: The Primacy of Institutions Over Geography and Integration In Economic Development' (2004) 9 *Journal of Economic Growth*.

¹¹⁹ See Trubek and Santos (n. 24).

¹²⁰ See Douglass Cecil North, *Institutions, Institutional Change and Economic Performance* (Cambridge University 1992).

institutional economics for legal reform and lays out emphasis on legal institutions as major influencers of economic development.¹²¹ Accordingly, Neo-institutional economics has gained traction as the current focus on institutions as a key element for development. Unlike the institutional assessments undertaken by Marx and Hayek purely on economics, neo-institutional economics looks beyond economic institutions, extending its assessment to legal and social norms and rules, that characterize economic activities.¹²²

For Lee, there is a circular relationship between economic development and social development.¹²³ Generally, social development primarily means an adjustment in the conditions and living standards of the population (a la poverty alleviation). Hence, he argues, poverty alleviation under any long-term national development plan, is first and foremost about economic empowerment. Sara Ghebremusse¹²⁴ and T. K. Pooe¹²⁵ separately apply Lee's General Theory to Botswana and South Africa respectively, leveraging this conceptual framework to assess the two Countries' economic successes. Similarly, Harding and Hien identify facets of a law and development policy for Singapore and assess to what extent such policies reflect Singapore's own developmental experience.¹²⁶ Unfortunately, this area of research has not extensively developed in specific country contexts in Africa, let alone Kenya.

1.9.5. Law, Development, the Three Globalizations and Policy Transfer and Diffusion

Duncan Kennedy's periodization of the *Three Globalizations of Law and Legal Thought* overlaps with David Trubek's characterization of the *Three Moments of Law and Development*. This periodization also takes care of Dolowitz and Marsh's assessment of policy transfer and diffusion in their seminal, *Learning from Abroad: The Role of Policy Transfer in Contemporary*

¹²¹ New Institutional Economics views the state and the institutions that comprise it as critical for the development process. See Kenneth W. Dam, *The Law-Growth Nexus: The Rule Of Law And Economic Development* (1st edn, Brookings Institution Press 2006).

¹²² See Yong-Shik Lee, 'Call for A New Analytical Model for Law and Development' (2015) 8 *Law and Development Review*.

¹²³ Lee argues in some ways, economic development begets social development by providing the public goods that promote better health, education etc for a better life for all. See Lee (n. 37) 430.

¹²⁴ See Sara Ghebremusse, 'Application of Y.S. Lee's General Theory of Law and Development to Botswana' (2019) 12 *Law and Development Review*.

¹²⁵ See T. K. Pooe, 'Law and Economic Development In South Africa: An Assessment Through The General Theory Of Law And Development' (2019) 12 *Law and Development Review*.

¹²⁶ See Andrew James Harding and Bui Thu Hien, 'Law and Regional Development In ASEAN: A Singapore Perspective' [2017] SSRN Electronic Journal. <https://pdfs.semanticscholar.org/f6ad/0da235d610ad1213926129a4a293f35222bd.pdf?_ga=2.184693546.209378760.1601104216-276297173.1601104216> accessed on 26th September 2020.

Policy-Making.¹²⁷ Firstly, in the *Three Globalizations*, Kennedy, like Trubek, through a structural historical exposition of law and legal thought, assesses the possible contribution of legal reforms to the take-off into long-term growth. In hindsight, Trubek in *Globalization, Lawyers, and Emerging Economies: The Rise, Transformation, and Significance of the New Corporate Legal Ecosystem in India, Brazil, and China*, notes marked developments and reforms in legal curricula and lawyering in the three countries under study in reaction to the historical shortcomings of the globalizing Western law and legal thought.¹²⁸ However, in *Legal Education Failures, Spontaneous Bypasses, And The Reproduction Of Hierarchy In Brazil: Some Preliminary Thoughts*, Trubek and Alves lament the dangers of sluggish reform in legal education in Brazil.¹²⁹ This criticism springs from the experience of the pioneering days of law and development, when globalizing law and legal thought heavily impacted the curricula of law schools and lawyering across the developing world, with great implications on development, whose failures necessitated reforms over the years to adapt that curricula and lawyering. For Trubek, it would seem the existing Brazilian legal curricula and lawyering has not responded adequately to the prevailing contemporary needs of legal training and lawyering, forcing the development of alternative pathways to counter what he calls dysfunctional systems.¹³⁰

Kennedy's goes further than Trubek's periodization which begins from the Cold War, postcolonial Third World of the 1960s. The origins of law and development coincided with Kennedy's Second Globalization, and began rightly, as Kennedy notes, with the conceptualization and problematization of its two terms, "law" with regards to "development."¹³¹ By the Second and Third Globalization, and conversely from the First to the Third moment in law and development,

¹²⁷ See Dolowitz and Marsh (n. 22).

¹²⁸ See David B. Wilkins, David M. Trubek and Bryon Fong, 'Globalization, Lawyers, And Emerging Economies: The Rise, Transformation, And Significance Of The New Corporate Legal Ecosystem In India, Brazil, And China' (2019) 2 *Harvard International Law Journal*.

¹²⁹ See David M. Trubek and Camila Alves, 'Legal Education Failures, Spontaneous Bypasses, And The Reproduction Of Hierarchy In Brazil: Some Preliminary Thoughts' (2020) 6 *Journal of Institutional Studies* <<https://repository.law.wisc.edu/s/uwlaw/item/304599>> accessed 18 December 2020.

¹³⁰ See also Mariana Mota Prado and Michael J Trebilcock, *Institutional Bypasses: A Strategy To Promote Reforms For Development* (Cambridge University Press 2018).

¹³¹ See Kennedy (n. 21).; Trubek and Galanter (n. 28).

the instrumentality of law had been subjected to practical use, which uses and its globalization had varying impacts on the development of the South, Kenya included.

This use in the 1960s began via Western-funded donor agencies and interest amongst North American scholars for using the law to promote economic development in the global South, especially Africa.¹³² But as Kennedy notes, law and its influence on the economy and society had been the subject of analysis by classical theorists such as Adam Smith,¹³³ Friedrich Hayek,¹³⁴ Emile Durkheim¹³⁵ and Marx Weber,¹³⁶ who considered the law a major factor in industrializing European societies. Kennedy posits that from this period emerged conceptions of law as freedoms, system and legal science, free market, individual rights, formal equality contract and commercial law etc.¹³⁷

The Second Globalisation and the Contemporary era or the Third Globalization had notable law and development scholars such as *David Trubek*,¹³⁸ *Marc Galanter*,¹³⁹ *John Henry Merryman*,¹⁴⁰ *Francis G. Snyder*,¹⁴¹ *Douglass North*,¹⁴² *Brian Z. Tamanaha*,¹⁴³ *Maxwell O Chibundu*,¹⁴⁴ *Richard A. Posner*,¹⁴⁵ *Amy Chua*,¹⁴⁶ *Frank B. Cross*,¹⁴⁷ *Kevin Davis* and *Michael Trebilcock*,¹⁴⁸ *Michael S. Barr* and *Reuven Avi-Yonah*,¹⁴⁹ *Thomas F. McInerney*,¹⁵⁰ *Kenneth*

¹³² See Gordon and Sylvester (n. 94).; Crawford (n. 94).; and Trubek (n. 38).

¹³³ See Walter J Kendall, 'Adam Smith's Lectures On Jurisprudence – Justice, Law, And The Moral Economy' (2014) 8 ICL Journal.

¹³⁴ See Friedrich A. von Hayek, William Warren Bartley and Ronald Hamowy, *The Constitution Of Liberty* (University of Chicago Press 2011).; see also F. A Hayek, *Law, Legislation And Liberty, Volume I* (University of Chicago Press 2012).

¹³⁵ See Roger Cotterrell, *Emile Durkheim: Law In A Moral Domain* (Stanford University Press 1999).

¹³⁶ See Max Weber and Max Rheinstein, *Max Weber On Law In Economy And Society* (Harvard University Press 1969).

¹³⁷ See Kennedy (n. 21) 22.

¹³⁸ See Trubek and Galanter (n. 28).; see also Trubek (n. 38).

¹³⁹ Ibid.; See also Marc Galanter and Rajeev Dhavan, *Law And Society In Modern India* (Oxford Univ Pr: Calcutta Chennai Mumbai 1997).

¹⁴⁰ See Merryman (n. 93).

¹⁴¹ See Francis Snyder, 'Customary Law And The Economy' (1984) 28 Journal of African Law.

¹⁴² See North (n. 120).

¹⁴³ See Tamanaha (n. 113).; see also Brian Z Tamanaha, *A General Jurisprudence Of Law And Society* (Oxford University Press 2006).; see also Brian Z. Tamanaha, 'The Rule Of Law And Legal Pluralism In Development' (2011) 3 Hague Journal on the Rule of Law.

¹⁴⁴ See Chibundu (n. 91).

¹⁴⁵ See R. A. Posner, 'Creating A Legal Framework For Economic Development' (1998) 13 The World Bank Research Observer.

¹⁴⁶ See Amy L. Chua, 'Markets, Democracy, and Ethnicity: Toward A New Paradigm For Law And Development' (1998) 108 The Yale Law Journal

¹⁴⁷ See Frank B. Cross, 'Law and Economic Growth' (2001) 80 Texas Law Review.

¹⁴⁸ See Davis and Trebilcock (n. 115).

¹⁴⁹ Michael S. Barr and Reuven S. Avi-Yonah, 'Globalization, Law And Development: Introduction And Overview' (2004) 1 Michigan Journal of International Law.

¹⁵⁰ See Thomas F. McInerney, 'Law And Development As Democratic Practice' (2005) 37 Vanderbilt Journal of Transnational Law <<https://ssrn.com/abstract=531382>> accessed 18 September 2020.

Dam,¹⁵¹ Okezie Chukwumerije,¹⁵² Y. S. Lee¹⁵³ and Mariana Mota Prado¹⁵⁴ assess various facets of the scholarship. Unfortunately, there is a dearth of literature from scholars in the global South on the study of law and development, particularly in Africa.¹⁵⁵

All these studies call for new approaches to law and development which take into account the local context and conditions *in theorizing about law and development*.¹⁵⁶ From the second globalization emerged conceptions of law and legal thought such as group rights, social rights and social law (*law as a means to social ends*), alternatives to the market, legal pluralism, the institution, bilateralism and the rise of the Bretton Woods institutions, international institutions and or public international law.¹⁵⁷ From the Third Globalization emerged human rights, constitutional law, the judge and litigants, pragmatic market regulation, civil society, democracy, rule of law, multiple normative reconstruction projects, structural adjustments etc. The diffusion of these ideas was through various mechanisms, including coercion for the colonies and direct imposition, reform movements, American influence upon victory in World War II and the Cold War etc. These diffusions had particularly far-reaching consequences for the development of colonies, both during and after colonialism, discussed more broadly in Chapter Five.

Dolowitz and Marsh's assessment of policy transfer and diffusion however notes the heavy influence of transnational policy influences by way of various mechanisms and agents. These learning, transfers and Diffusion were between the Global North-South, North-North and South-South. The two assess literature around the processes by which nations draw lessons from each other, whether by direct impositions, covert influences or voluntary emulation. These processes result in lesson-drawing, policy diffusion, policy convergence, and policy transfer. For these

¹⁵¹ See Dam (n. 117).; also see Dam (n. 37).

¹⁵² See Okezie Chukwumerije, 'Rhetoric Versus Reality: The Link Between The Rule Of Law And Economic Development' (2009) 23 Emory International Law Review <<https://heinonline.org/HOL/LandingPage?handle=hein.journals/emint23&div=22&id=&page=>> accessed 11 February 2020

¹⁵³ See Lee (n. 37).; also see Lee (n. 121).

¹⁵⁴ See Prado et al (n. 112).; see also Prado and Trebilcock (n. 130).

¹⁵⁵ Whereas there are few scholars from developing countries who've undertaken studies on the role of law in social and economic development, these voices have not often achieved as much attention in the Global North's academic discourses. See Scott Newton, 'The Dialectics of Law and Development, *The New Law and Economic Development: A Critical Appraisal* (1st edn, Cambridge University Press 2006).

¹⁵⁶ See Trubek (n. 38).; see also Lee (n. 121).

¹⁵⁷ See Kennedy (n. 21) 37.

studies, focus is on how knowledge and ideas about policy and attendant administrative arrangements in one setup diffuse to another, different set up (country to country, regions etc).¹⁵⁸

Thus, beginning in the 1960s, law and development projects championed the transplant of ostensibly what worked in the West to developing countries. Dolowitz and Marsh observe that for policy, this transplantation was either voluntary or coercive. The mechanisms of these policy transfers were transnational organizations, government bureaucracies, non-state actors etc. Trubek observes that contemporary law was seen as an instrument for state involvement in the economy.¹⁵⁹ This was the crux of Modernization theory as advanced by Walt Rostow in *Stages of Economic Growth* and others.¹⁶⁰ Therefore, underdevelopment could be explained by a society's stage in the continuum. As we entered the Third Globalization, and the third moment in law and development, beginning in the 1990s at the end of the Cold war, a more holistic view of law and development emerged, borne out of lessons from the first two moments, the first and second globalization, and their failures. The incorporation of the social emphasized non-economic values believed to enhance human life.¹⁶¹ Policy transfer also heightened by the third moment in law and development, with an increased emphasis on emulation and copying of what worked elsewhere to address contemporary problems of development in the global South. The concept of sustainable development, rule of law and human rights were mainstreamed. The notion of socio-economic rights as legal entitlements gained prominence. Kevin E. Davis and Michael J. Trebilcock note that this contemporary conception of law and development gave birth to New Constitutionalism, which assesses the constitutional law of developing countries and its ability to create the right environment for socio-economic development, namely freedom of press, democracy, and separation of powers.¹⁶² By the turn of the millennium, SERs had become critical to any

¹⁵⁸ See Kennedy (n. 21) 123

¹⁵⁹ See Trubek, David M., Law and Development 50 Years On (October 15, 2012). International Encyclopedia of Social and Behavioral Sciences (Forthcoming), Univ. of Wisconsin Legal Studies Research Paper No. 1212, Available at SSRN:<<https://ssrn.com/abstract=2161899>> accessed 26th September 2020

¹⁶⁰ See W. W Rostow, *The Stages of Economic Growth: A Non-Communist Manifesto* (Cambridge University Press 1960).

¹⁶¹ See Kerry Rittich, 'The State Of Law And Development: Challenges After The Second Generation Reforms' (2006) 100 Proceedings of the ASIL Annual Meeting.

¹⁶² See Davis and Trebilcock (n. 115).

development process. However, whether democracy is more amenable to development than other systems of government is hotly contested.¹⁶³

In conclusion, Trubek has categorized these intellectual developments beginning from the Second Globalization into three conceptual moments, firstly, *law as a tool for promoting transformation*, which dealt with the normative power of law to control behaviour and create the necessary institutions for promoting growth; secondly, *law as a barrier to change* i.e. the notion of “bad” law and its disruptive effects on markets, institutions etc, and thirdly, *law as a framework for facilitating private decision making*, eschewing overreliance on state-led development as championed by the first wave of scholarship and practice and its failures.¹⁶⁴

1.9.6. “African Philosophy of Law” in “Law and Development”

Scholarship on law and development, particularly in Africa, has tended to focus on an application of law as the received western tradition, to the contemporary problems facing Africa. As articulated in our analysis of the *Three Globalizations*, the diffusion of Western legal thought relegated the African philosophy of law to the periphery in favour of formal Western law. Hence historically, the utility of the African legal theory has not been fully explored for its possible applicability to legal, political, economic, social, and cultural problems.¹⁶⁵ While a few noteworthy African scholars beginning in the 1970s and 80s, such as Yash Pal Ghai,¹⁶⁶ Modibo Ocran,¹⁶⁷ Mashood Baderin,¹⁶⁸ Okezie Chukwumerije¹⁶⁹ and Maxwell Chibundu¹⁷⁰ sought to understand how the law and problems of social change fit into African realities, there is very little from contemporary African scholars on law and development from an African philosophy of law

¹⁶³ See Larry Diamond, 'Escaping The Development Impasse' (2009) 20 Journal of Democracy.

¹⁶⁴ See David Trubek, 'Law And Development In The Twenty-First Century' [2009] SSRN Electronic Journal <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1949740&rec=1&srcabs=1907298&alg=1&pos=3> accessed 22 February 2020.; see also David M. Trubek, 'The Political Economy Of The Rule Of Law: The Challenge Of The New Developmental State' (2009) 1 Hague Journal on the Rule of Law.

¹⁶⁵ See Oche Onazi (ed), *African Legal Theory and Contemporary Problems Critical Essays* (Springer Science+media Dordrecht 2014).; see also Mashood Baderin, 'Law And Development In Africa: Towards A New Approach', *Diaspora's Scholars Lecture Series* (NIALS Journal of Law and Development 2010) <https://www.academia.edu/12547458/LAW_AND_DEVELOPMENT_IN_AFRICA_TOWARDS_A_NEW_APPROACH> accessed 19 February 2020.

¹⁶⁶ See Yash Ghai, 'Law, Development And African Scholarship' (1987) 50 The Modern Law Review.

¹⁶⁷ See Tawia Modibo Ocran, *Law In Aid Of Development: Issues In Legal Theory, Institution Building, And Economic Development In Africa* (Ghana Pub Corp 1978).

¹⁶⁸ Baderin (n. 165).

¹⁶⁹ Chukwumerije (n. 152).

¹⁷⁰ Chibundu (n. 91).

perspective.¹⁷¹ Africa like the rest of the global South has for decades been the subject of developmental and theoretical experimentation by the West, through Bretton Woods institutions' aid assistance programs tied to "good governance" and the "rule of law."¹⁷² These programs were implemented without much regard for African realities, and unsurprisingly, did not just fail, but were often counter-productive.

As elsewhere, these African cultural realities are the subject of studies that assess informal law, rules and or customary law and development. In *Customary Law and the Economy*, Frank Snyder analyses the relationship of African customary law to the economy.¹⁷³ Firstly, he details the economic contextual development of customary law and its manifestations today; the economic implications of diversity in customary laws; and the linkages between customary law and the economy. He then proposes the conception of new, alternative forms of development and social regulation. He avers that the North-South cultural contestations and the legal pluralism present in most of Africa mean that capitalist relations of production and exchange have only partially taken root in Africa.

Ginsburg also extensively examines how different historic, economic, social, and political factors may contribute towards, influence, or slowdown such development.¹⁷⁴ He assesses the relevance of informal contract law based on honour and mutual trust prevalent in Asian societies, noting that whereas not protected by formal systems, nonetheless define a considerable percentage of contractual engagements. He contemplates the dilemmas of development, noting the utility of non-economic values that ultimately shaped the failure of the moments in law and development. Similarly, Yul Kwon examines culture as one of the important development factors in South Korea, and the impact of the cultural influence of advanced economies. He argues that a variety of cultural changes in the recent past in Korea, such as a declining sense of community, trust and

¹⁷¹See Author's note (n. 155).

¹⁷² See Dimitri Van Den Meerssche, 'The Evolving Mandate of The World Bank: How Constitutional Hermeneutics Shaped The Concept and Practice of Rule Of Law Reform' (2017) 10 *Law and Development Review*.

¹⁷³ See Snyder (n. 141).

¹⁷⁴ See Tom Ginsburg and others, 'Does Law Matter for Economic Development? Evidence from East Asia' (2000) 34 *Law & Society Review*.

law observance carry the risk of raising transaction costs and socio-economic instability, which can adversely affect the economy.¹⁷⁵

This contestation between global doctrine and local knowledge remains a defining character of attempts at poverty alleviation in Kenya. While the urge to globalize, particularly the diffusion of western law and legal thought, has seemed appealing since independence, the stubborn facts of society as to its existence cannot be wished away. Harding's exploration of this historic contestation in South East Asia between universal understanding and local experiences viz law becomes relevant to our study.¹⁷⁶ These undeniable facts (realities) comprise the very world within which this received Western tradition and its institutional and legislative frameworks ought to operate, for instance in development and poverty alleviation. While the world has registered tremendous development since the 1960s and the naivety of the early law and development programs, the scholarship remains reluctant to give serious consideration to cultural influences on socio-economic development.¹⁷⁷ Whether this situation is driven by the vastness of culture and the difficulty with such an undertaking, or Western hegemony, is not clear.

Ohnesorge has criticized this Western-centric hegemonic approach and its repeated failures, arguing that scholarship in law and development has purported to produce theories on law and development none of which were as a result of careful analysis of places where the most realistic outcomes would have been derived, for instance, Asian success stories such as Malaysia, South Korea and Taiwan where he finds the law did function to promote socio-economic development.¹⁷⁸ As Amy Chua has demonstrated, even markets can have dangerous results for stability and socio-economic development in highly ethnically divided developing societies if they are captured by the ethnic majority and reinforce the economic dominance over ethnic

¹⁷⁵ See O. Yul Kwon, 'A Cultural Analysis of South Korea's Economic Prospects' [2006] *Global Economic Review Journal* 213-231

¹⁷⁶ See Harding A, "Global Doctrine and Local Knowledge: Law in South East Asia" (2002) 51 *International and Comparative Law Quarterly* 35.

¹⁷⁷ See Kwon (n. 175) 213-231.

¹⁷⁸ See John K.M. Ohnesorge, 'Developing Development Theory: Law & Development Orthodoxies And Northeast Asian Experience' (2006) 28 *Journal of International Law* <<https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1177&context=jil>> accessed 10 January 2020.

minorities.¹⁷⁹ Sufficient literature exists, mostly by development economists, on the failures of the market and its impact on socio-economic development, particularly on inequality, poverty and extreme poverty.¹⁸⁰ The centrality of these non-market factors may perhaps define the future of law and development, as Lindsey and Daniels observe in *The Persistent Dilemmas Of Development: The Next Fifty Years*.¹⁸¹ Given that these dilemmas are primarily discussed in the context of underdevelopment in the Global South, the utility of an African Legal Theory for addressing intractable contemporary problems such as poverty alleviation become critical if the reality of Africans is to change significantly and align law in the books with law in action. This undertaking has not been attempted for Kenya. This study makes that attempt.

1.10 Definition of Terms

Ontology: refers to the reflective study of human nature, in particular becoming, existence, reality, and also the basic categories of being and how they are related.¹⁸²

Law in “Law and Development:” according to professor Y.S. Lee, within law and development, “law” takes a broader meaning beyond formalistic definitions to include binding judicial precedents (*case law*) in common law countries, as well as informal laws such as customary law and rules.¹⁸³

“Development” within “Law and Development:” according to professor Y.S. Lee, within law and development, “development” refers to the process by which a society transforms or in other words, its social and economic progress.¹⁸⁴

Culture: refers to the way of life of a people, embodied in their knowledge systems, language, religion, food, social tendencies, music and arts.¹⁸⁵

¹⁷⁹ See Amy L. Chua, 'Markets, Democracy, and Ethnicity: Toward A New Paradigm For Law And Development' (1998) 108 The Yale Law Journal.

¹⁸⁰ See Leszek Balcerowicz and Stanley Fischer, *Living Standards And The Wealth Of Nations* (MIT Press 2006).

¹⁸¹ See Lindsey Carson and Ronald J. Daniels, 'The Persistent Dilemmas of Development' (2010) 60 University of Toronto Law Journal pg. 491-510 < <https://www.jstor.org/stable/40801415?seq=1>>accessed 26th September 2020.

¹⁸² See Thomas Hofweber, 'Logic and Ontology.' The Stanford Encyclopedia of Philosophy' 2020, accessed 30 March 2021 <https://plato.stanford.edu/archives/spr2021/entries/logic-ontology/>.

¹⁸³ See Lee (n. 37) 423.

¹⁸⁴ Ibid 428.

¹⁸⁵ See Orlando Patterson, 'Making Sense of Culture.' 4 The Annual Review of Sociology 83.

Cultural Imperialism: Brantlinger and Tomlinson define cultural imperialism as the exercise of control in cultural relationships in which the values, practices, and meanings of a powerful foreign culture as forced on one or more native cultures.¹⁸⁶

Law in Development: refers to the instrumental view of law and its normative power to promote social change, primarily examining the relationship between law and development.¹⁸⁷

Law as Development: refers to the view that legal reforms are an end in themselves, whether there can be established any linkages with other conceptions of development or not.¹⁸⁸

Restorative Justice: refers to a system of criminal justice that focuses on the rehabilitation of offenders through reconciliation with victims and the community at large.¹⁸⁹

Retributive Justice: refers to a system of criminal justice based on the punishment of offenders rather than on rehabilitation.¹⁹⁰

Globalization: broadly refers to the spread, movement and interactions of human beings, goods, and services, capital, technologies or cultural practices throughout the world.¹⁹¹

1.11 Chapter Outline

This Study features the following Chapter Breakdown.

Chapter 1: Introduction

Chapter 2: Historical & Contemporary Approaches to Poverty Alleviation in Kenya and the Influence of Kennedy's *Three Globalizations* and *Policy Transfer and Diffusion*.

Chapter 3: Legislative, Policy and Institutional Frameworks for Development and Poverty Alleviation.

Chapter 4: Problematizing Poverty in the Context of the Nature of The African Ontology and Philosophy of Law in Kenya.

Chapter 5: Critical Analysis of Select Government Policy Documents and Review of Reports

Chapter 6: Summary of Findings, Conclusion and Recommendations

¹⁸⁶ See Patrick Brantlinger and John Tomlinson, 'Cultural Imperialism: A Critical Introduction.' [1993] 79 *The Journal of American History*.

¹⁸⁷ See Robert B. Seidman, 'Law and Development: A General Model.' [1972] 6 *Law & Society Review* Pg. 311-342

¹⁸⁸ *Ibid*.

¹⁸⁹ See Idowu (n. 63).

¹⁹⁰ *Ibid*.

¹⁹¹ See 'Definition Of GLOBALIZATION' (*Merriam-webster.com*) <<https://www.merriam-webster.com/dictionary/globalization>> accessed 28 September 2020.

CHAPTER TWO

HISTORICAL & CONTEMPORARY APPROACHES TO POVERTY ALLEVIATION IN KENYA - THE INFLUENCE OF THE THREE GLOBALIZATIONS AND POLICY TRANSFER AND DIFFUSION

2.0. Introduction

This Chapter canvasses Kenya's historical and contemporary approaches to poverty alleviation and the influence of Duncan Kennedy's *Three Globalizations of Law and Legal Thought* on these approaches. It then juxtaposes the globalizations against Policy Transfer and Diffusion theories to enrich its analysis of transnational influences on historical and contemporary domestic policy on poverty and poverty alleviation. The Chapter identifies three main approaches, namely, the (1) *classical* (2) *social* and (3) *contemporary*. It assesses the strengths and weaknesses of these approaches and investigates the extent to which they resonated with the lived reality of Kenyans as manifest in the African Ontology and Philosophy of Law.

This assessment serves three purposes. Firstly, it helps us discern through a historical prism, the nature, form and function of law during and after colonialism, and secondly, the nature, form and function of development policy during and after colonialism, both with respect to poverty alleviation in Kenya. Thirdly, it reveals the depth by which the approaches were influenced by Kennedy's *Three Globalization of Law and Legal Thought*, as well as Dolowitz and Marsh's *Learning from Abroad: The Role of Policy Transfer in Contemporary Policy-Making*.

By this assessment, we hope to establish whether these influences account for Kenya's historical and contemporary failure to connect the approaches to the lived reality of Kenyans. We travel through history to 2010, when, like in 1963, Kenyans promulgate a new Constitutional and legal order, with renewed aspirations for a better life, and beyond 2010, to review law and development post the new Constitution and how these have shaped poverty alleviation strategies.

2.1. An Overview of Duncan Kennedy's Three Globalizations

For Kenya's law and development experience, particularly methodologies used in poverty alleviation and the influence of the three globalizations, the year 1897 becomes a critical entry point when the territory now known as Kenya became the British East Africa Protectorate. Kennedy's seminal work is chosen for its fundamental relevance for appreciating historical and contemporary thinking about law and development given its comprehensive assessment of developments in the realm of legal thought.¹⁹² In the *Three Globalizations*, Kennedy presents a historical outline of the evolution of law and legal thought in the West and the diffusion of this legal consciousness to other parts of the world over 150 years.¹⁹³ During these periods, Kennedy argues that there emerged certain dominant modes of legal thought and language, whose articulation, diffusion and practice had varying levels of impact on amongst other things, development and social change around the world. These distinct globalization periods are, namely:

1. The first globalization or era of Classical Legal Thought (1850-1914).
2. The second globalization or era of the social (1900-1968).
3. The third globalization (1945-2000) or the Contemporary era (*an amalgam of the first two*).

2.1.1. First Globalization - Classical Legal Thought (1850-1914)

The first of Kennedy's *Three Globalizations* is Classical Legal Thought (CLT), which globalised between 1850 and 1914.¹⁹⁴ Kennedy notes that this era was characterized by 19th Century liberal concepts about the law in a commercial society. Hence, what globalized was a mode of legal consciousness around this idea. The law was thought of as a system of spheres of autonomy to serve people both in the private and public spheres. The scopes of these spheres were defined by legal analysis and appreciated as a scientific practice. Legal formalism was predominant.¹⁹⁵ CLT could best be illustrated by the Will Theory and its prioritizing of Western

¹⁹² See Trubek and Santos (n. 24).

¹⁹³ See Kennedy (n. 21) 21.

¹⁹⁴ See Kennedy (n. 21) 25.

¹⁹⁵ *Ibid.*; Kennedy defines Legal formalism as a technique of deduction of legal results within a coherent and autonomous legal order.

private law rules, within the understanding that government is duty-bound to safeguard the rights of legal persons and facilitate the realization of their wills, restrained only as necessary to permit others equal exercise of such right. It could also be gleaned from John Stuart Mills' '*harm principle*,' the idea that society is not allowed to meddle with the exercise of individual liberties if they cause no harm to others.¹⁹⁶

Prominence was therefore given to individual autonomy and rights, principally the protection of property rights and a free market. A succinct distinction was made between private and public law. The mechanisms of globalization were direct Western imposition through conquest and colonialism or forced "opening" for independent nations in the rest of the world. Kennedy observes that from its origins in Germany, CLT spread to the rest of Europe, the United States and Latin America. In turn, colonies belonging to Western powers adopted some version of the globalizing German legal science from their imperial masters. Hence, began the forced opening of colonized nations to Western law, either through direct imposition or coercion as a mandatory precursor to Western trade and membership of the international system, for instance on states not colonized directly such as the Ottoman Empire, Japan, China etc. The Western legal and judicial system and its mechanisms spread to the developing world therewith.

Ultimately, Kennedy argues, CLT crystallized in the post-World War I era with the universalization of a single Classical system of public international law created by the Western Super Powers. As a consequence, there emerged the primary global system of international economic law, based on free trade, the gold standard and private international law for dispute settlement.¹⁹⁷ Kennedy observes that with global trade came the depoliticization of money, an international capital market and the emergence of gunboat diplomacy. The discontents of this globalization's mechanisms unleashed a process of social transformation that's proven irreversible, and the later emergence and salience of the "tradition/modernity" dichotomy that

¹⁹⁶ See Dong-Ryul Choo, 'Mill's Multilevel Utilitarianism - Beyond The Dichotomy Of Act Vs Rule Utilitarianism -' (2017) 131 Korean Journal of Philosophy.

¹⁹⁷ See Duncan Kennedy, 'Two Globalizations Of Law & Legal Thought: 1850-1968' (2003) XXXVI Suffolk University Law Review.

persists.¹⁹⁸ The great influence of this period in Kenya will be evident from our assessment of approaches to poverty alleviation in terms of policy and law during the colonial period.

2.1.2. The Second Globalization - Era of the Social (1900-1968)

In the second globalization, Kennedy argues that the law was repurposed as a tool for social engineering, or simply put, law as an instrument for social change by which it could be leveraged to achieve social ends. Law was therefore rethought as a deliberate activity, a control mechanism that can be used to guide the evolution of social life. Law was directed at not just the evolution of life at the family level, but at all levels including the global stage. In this era, he avers, the agents of globalization were reform movements in the West, nationalist movements on the sides, and the ruling class of the newly independent nation-states after 1945. Kennedy argues that this globalization had a huge impact on both the international and third-world economic development strategies through the 1960s.¹⁹⁹ It was a comprehensive reflection of the very individualist nature of CLT's legal method and its contributions to societal ills such as inequality etc, for instance by Marxists and other French scholars.

This movement gathered momentum in France from whence it globalized, but some of its early manifestations could be traced to German scholars such as Jhering,²⁰⁰ Gierke,²⁰¹ and Ehrlich.²⁰² The period was also characterized by rapid transformation in the then fast-industrializing Western world, with demand for law to respond to the problems of economic transformation beyond the individual and the market. Hence, Kennedy notes, emerged labour laws, control of urban areas through landlord/tenancy, sanitary and zoning regimes, the regulation of financial markets, and the development of new institutions of international law.²⁰³

Kennedy concludes that the second globalization had four key aims. Firstly, the law moved from "is" to "ought," i.e., the law as interdependent with other aspects of life, and adaptive to fit

¹⁹⁸ Ibid 641

¹⁹⁹ See Kennedy (n. 197) 648.

²⁰⁰ See Rudolph von Ihering, 'Law As A Means To An End' (1914) 23 The Yale Law Journal.

²⁰¹ See Wm. A. Dunning, Otto Gierke and Frederic William Maitland, 'Political Theories Of The Middle Age.' (1901) 16 Political Science Quarterly.

²⁰² See A. M. Kidd and Eugen Ehrlich, 'Fundamental Principles Of The Sociology Of Law' (1938) 38 Columbia Law Review.

²⁰³ See Kennedy (n. 197) 650.

new social needs hence legal pluralism. Secondly, a shift from deductive to an instrumental approach when creating norms. Thirdly, the mainstreaming of this instrumentality across the board, whether in the courts, academy or public administration. Fourthly, he argues, it was anchored in the normative practices emerging from the needs of the new interdependent social formation. For Africa and the rest of the Global South, the Social allied with tradition, by which, as Kennedy observes, nationalist movements facilitated its spread. Hence, he notes, there was Senghor's negritude, Kenyatta's African understanding of property, and Nyerere's ideology of African socialism or Ujaama.²⁰⁴ In other words, the Social became the public law ideology of a disempowered subgroup for instance in a British or French colonial structure etc.

Other than nationalism and tradition, the social also shaped laws around sex and family, land regimes, international economic law, Import Substitution Industrialization and the development of the welfare state. In the post-war period, Kennedy argues that the social saw the Globalization of the Bretton Woods System and its coercive mechanisms as well as the globalization of the regulated mixed economy. As Trubek and Galanter note elsewhere, the law's domain expanded into areas that had in the past been entrusted to the market or the discretion of the parties.²⁰⁵ This era coincided with the emergence of the First Moment in Law and Development in the 1960s, which equally embraced the foundational concepts of social law and consequentialism (*instrumentality*).

2.1.3. The Third Globalization (1945-2000) - The Contemporary Era

Kennedy conceptualizes the Third Globalization as blended arrangements of changed elements of CLT with changed elements of The Social. This conception is intentional since Kennedy sees this third globalization as still unfolding and therefore incapable of being "totalized." Nonetheless, he sees it as containing critiques of CLT and the Social. Its emergence was equally enabled primarily by law reform projects as opposed to legal consciousness. Kennedy observes, for instance, that there is an underlying concept of positively enacted classical contract

²⁰⁴ See Kennedy (n. 197) 661.

²⁰⁵ See Trubek (n. 38).; see also Trubek and Galanter (n. 28).

law everywhere, and on the same strand, above the surface of positively enacted social labour law. The same can be said of the contemporary state mechanisms to address socially problematic areas, contrasted with the law of the free market, which itself has been socialized. The result is the coexistence of interdependent regulatory regimes. Within this amalgam, it is possible to make a case for CLT or the social using any one or several of the ideas from the two eras and their relevant parole, with the corresponding banding on the political spectrum – right or left.²⁰⁶

Critical though, for the Social, the key transformed element is policy analysis, exercised by the careful striking of a balance of conflict considerations in running the system designed by the social jurists. Policy analysis deals with the management of the compromise between "individualist" (CLT) and social desiderata. This period also incorporated public neo-formalism. Public neo-formalism became manifest in the desire for universality, transcending both positivist and natural law theories, for example in the framing of Human rights, e.g., CEDAW and the rights of women across cultures etc. Within this globalization, the law's scope expanded to include guarantor of not just property rights, but human rights and the rule of law. Pragmatic market regulation was preferred to the free market, by which state regulatory intervention was heavy.

The Judge becomes central to this period, in determining conflicting public policy matters. As Kennedy notes, *in place of the question of the extent to which law should be moral, for CLT, and the question of the relation between law and society, for the Social, in contemporary legal consciousness the question is the relationship between law and politics.*²⁰⁷ Yet, the judge is constantly accused of usurping legislative and executive powers, or otherwise playing "politics by other means." But luckily for the contemporary legal consciousness, notes Kennedy, there exists an array of normative reconstruction projects, designed to transcend the opposition of CLT and The Social, and thereby restore Reason to rulership in law.²⁰⁸

Kennedy argues that the mechanisms by which this globalization took place were the American victory in World War II and the Cold War, the "opening" of nation-states to the new

²⁰⁶ See Kennedy (n. 197) 675.

²⁰⁷ See Kennedy (n. 197) 678.

²⁰⁸ See Kennedy (n. 197) 677.

legal understanding through involvement in the global market under the procedures laid by multinational corporations and institutions that conduct regulations on the global scale, and the pride and prominence of the American culture.

2.2. Overview of Policy Transfer and Diffusion Studies

The Assessment of policy change has traditionally focussed on internal factors that necessitate policy changes, for instance, political and socio-economic conditions. For this study, policy transfer and policy diffusion studies complement our analysis of the approaches and the influences of the *Three Globalizations* by enriching the hypothesis that these legal and policy diffusions from the West have played a primary role in the historical disconnect between law and or policy in the books and the lived reality of Kenyans. Dolowitz and Marsh define policy transfer *as the diffusion of policy and the relevant administrative and institutional arrangements from one jurisdiction to another through various mechanisms.*²⁰⁹ They identify several processes and mechanisms by which the transfer of policy can be done. The intentions of such transfers include policies, institutions, ideologies or justifications, attitudes and ideas, and negative lessons. This transfer can be *inter* or intra-country, or across policy fields, for instance, objectives of privatization when applied in the public sphere, or from private to public and vice versa.

Transfer processes can be summed up as involving straightforward copying of policy, emulation, mixtures and inspiration.²¹⁰ Dolowitz and Marsh frame this process in a continuum.²¹¹ Agents of transfer are noted as officials, bureaucrats, institutions, ideologies, think tanks, supranational institutions etc. Accordingly, they argue that transfer can be voluntary or coercive. Coercive means can be a direct imposition, pressure groups, political parties, policy experts etc. However, the authors equally argue that coercion is often masked, as demonstrated by Stiglitz in his study of the language of the World Bank, which language is often apolitical, coloured to appear neutral when in actual sense the obligations therewith are coercive. Thus, the authors argue

²⁰⁹ The authors see policy transfer as the use of knowledge regarding policies and other administrative and institutional arrangements and ideas from one political setting in the development of policies, administrative and institutional arrangements in another jurisdiction. See Dolowitz and Marsh (n. 22).

²¹⁰ See Dolowitz and Marsh (n. 22) 351.

²¹¹ See Dolowitz and Marsh (n. 22) 13-17.

that transfers can either be *Uniformed, Incomplete* and *Inappropriate*. However, they also note that transfer can fail due to resistance and other constraints. Constraints include policy complexity, structural, institutional, bureaucratic etc. The studies also assess the role of players beyond the state in policy transfer, for instance, Non-Governmental Organizations. The NGOs and the resulting transnational networks have often filled the space left by the state. The role of Third Sector organizations cannot be gainsaid, given how influential some transnational agencies are.

2.3. Assessment of Kenya's Approaches to Poverty Alleviation

In critically assessing Kenya's approaches to poverty alleviation, the approaches can largely be grouped as follows.

2.3.1 Classical Approaches

Classical approaches to poverty alleviation in Kenya followed the path of the diffusion of Classical Legal Thought (CLT), in what Kennedy classifies as the first globalization and the policy transfer mechanisms. The imposition of CLT ideals such as individual rights and private ownership of property and property protections followed with the imposition of English formal law in 1897, through the East African Order in Council. The Order domesticated some of the Indian and British Acts of Parliament to the East African Protectorate.²¹² This provision is retained to date under the Judicature Act (*as a source of Kenyan law*), only that a provision was added that the Courts consider the situation of Kenya and its inhabitants to the greatest extent permissible.²¹³ Equally critical was the introduction of the repugnancy clause and the relegation of customary law to the fringes of the justice system.²¹⁴

Law, in the form of English formal and common law, effectively replaced and relegated African customary law and dispute resolution mechanisms. This was in keeping with the notion of individual rights, formal equality and their protections, and the distinction of law and morality,

²¹² Effectively, the Order provided for, amongst other things, the application to Kenya of the statutes of general application in force in England on the 12th day of August 1897.

²¹³ See Judicature Act 1967.

²¹⁴ Ibid Section 3(2).

which ran counter to African philosophy.²¹⁵ In that sense, Africa or Africans had no legal philosophy in Western thought. The creation of a unitary state, free-market economy (*skewed in favour of white settlers*) and introduction and imposition of English law in areas as diverse as contracts, trade and commerce, taxation, criminal law, family law, labour law etc followed.

The globalization of classical ideas about the role, place and function of law mainly spread firstly, through colonial control and secondly, neo-colonial influences at the dawn of independence. These approaches manifested via policy, legislative and institutional frameworks tailored around ideas such as Modernization and Structural Adjustment Programs (SAPs).²¹⁶ Many of these ideas were transferred via transnational organizations like the World Bank and the IMF, through both coercion and voluntary copying or emulation from both North-South and South-South interactions.

2.3.1.1. Modernization

Two sub-epochs suffice for the Modernization approach to development in Kenya as follows.

a. Modernization During the Colonial Period, 1884 - 1963

The transfer or diffusion of Modernization, for our purposes, began with the Berlin Conference. The Conference marked the beginning of Kenya's legal and policy developments in terms of a contemporary economy and its organization. The conference itself did not begin the scramble for Africa. Indeed, the scramble had been ongoing for centuries, hence the territorial claims in dispute.²¹⁷ What the Berlin Conference did was to formalize this scramble, establishing rules for the conquest of Africa. Subsequently, each European power laying claim to African territory could formally carve out its sphere of influence and establish such forms of government as were fit for purpose. There was no representation from Africans at the Conference, but the Sultan of Zanzibar retained his 10-mile coastal strip territory.²¹⁸

²¹⁵ This contestation is discussed extensively in Chapters 2, 4 and 5. See Mbiti (n. 62).; Idowu (n. 63).; Onazi (n. 165).

²¹⁶ See Kennedy (n. 21).

²¹⁷ See Anthony Nutting, *Scramble for Africa* (Constable 1970); see also Thomas Pakenham, *The Scramble for Africa* (Abacus 2010); and M. E. Chamberlain, *The Scramble for Africa* (3rd edn, Routledge 2013).

²¹⁸ Ibid.

By 1920, when Kenya was declared a Colony of Britain, it had effectively been organized around an extractive economy linked to Britain (*the metropole*).²¹⁹ The appointment in the 1880s of outfits such as the Imperial British East African Company (IBEAC) must be seen as such - to oversee British exploitation of Kenya.²²⁰ Hence, the colonial government had no interest, firstly, in the socio-economic development of Kenya, and secondly, in its human development, nor poverty alleviation. Indeed, from very early on, the British had no interest in industrializing or transforming colonies, and the imposition of the globalized ideas of law and legal thought was merely to facilitate exploitation.²²¹ Policies emanated from London, which policies Kesner notes oscillated between the interests of the metropole and those of the settlers.²²² Other than marginalizing and socio-economically subjugating Africans, policy and law were equally used for political suppression.²²³ Malmsten observes that the British government was sceptical of investing in the socio-economic development of colonies.²²⁴ As such, long-range colonial development planning was absent, mostly undertaken in a piecemeal fashion.²²⁵ Unfortunately, the skewed economic arrangement meant that while Africans provided most of the labour and taxes, White settlers extracted a majority of the benefit, including from internal and external trade.²²⁶ Robinson and Acemoglu observe that today's vast economic inequality is the path-dependent result of a multitude of past developments, one of the most important of which has been the European colonial legacy.²²⁷

Throughout the Colonial period, Ochieng argues that the primary purpose of colonial law and policies was on mild dismantling and reorganizing of pre-colonial structures in support of a

²¹⁹ See Richard D. Wolff, 'Economic Aspects of British Colonialism in Kenya, 1895 To 1930' (1970) 30 *The Journal of Economic History*.

²²⁰ See Nazifa Rashid, 'British Colonialism in East-Africa During Nineteenth Century' (2014) 19 *IOSR Journal of Humanities and Social Science*.

²²¹ *Ibid.*; Ogonda R.T., 'The Colonial industrial Policies and the Process of Industrialization in Kenya', *An Economic History of Kenya* (East African Educational Publishers 1992).

²²² See Richard M Kesner, *Economic Control and Colonial Development* (Clio 1981).

²²³ See Brett Shadle, 'White Settlers and The Law in Early Colonial Kenya' (2010) 4 *Journal of Eastern African Studies*.

²²⁴ See Neal R. Malmsten, 'British Government Policy Toward Colonial Development, 1919-39' (1977) 49 *The Journal of Modern History*.

²²⁵ *Ibid.*

²²⁶ See Leys C, *Underdevelopment In Kenya* (East African Educational Publishers 1975).

²²⁷ See Daron Acemoglu, James Robinson, 'The Economic Impact Of Colonialism' (2017) 1 *Voxeconomy Journal* <<https://voxeu.org/article/economic-impact-colonialism>> accessed on 26th September 2020 by Daron Acemoglu, James Robinson

capitalist system.²²⁸ It was also in the interest of white settlers that the market is under the colonial state's control. This, he observes, was done with greater keenness in the post-Second World War era. So, whereas Africans earned wages for labour, overall, these wages did not translate to socio-economic developments nor improved livelihoods for natives.²²⁹ Accordingly, from the get-go, unlike some European Colonies for instance in the Americas (e.g., the U.S, Argentina, Chile etc), which were able to undertake path independent socio-economic growth with the introduction of full-blown capitalism and supportive institutions, the same cannot be said of Colonial Kenya.²³⁰

Firstly, private property and attendant rights, a cornerstone of capitalist development, was absent for Africans, who constituted a majority of the population. In any case, the British land tenure system was foreign to Africans. Secondly, law, and the institutions for property protections, were primarily for white settlers. Attempts at land reforms in the 1940s through the formation of the Kenya Land Commission achieved little. Consequently, competition from meaningful production and the accumulation necessary for self-sustaining economic growth could not take root for Africans.²³¹ Suffice to say, it is evident that colonial globalization of CLT's law and legal thought did not do much for Africans nor the overall socio-economic development of Kenya as a colony. Some studies have suggested the benefits of colonialism, extolling the virtues of the White Man's Burden in civilizing the African and through Capitalist organization, improving lives.²³² But these studies are highly controversial and inconclusive.²³³

Modernization as an approach to development and the transformation of society crystallized after the Second World War, championed by Walt Rostow in his seminal, *The Stages of Economic Growth*.²³⁴ It was a Western response to the challenge of development within the

²²⁸ See William Robert Ochieng', 'Kenya's Internal and International Trade in The Nineteenth Century', *An Economic History of Kenya* (East African Educational Publishers 1992);

²²⁹ See Acemoglu and Robinson (n. 368) 86.

²³⁰ See Shadle (n. 367).

²³¹ See Daron Acemoglu, Simon H. Johnson and James A. Robinson, 'The Colonial Origins of Comparative Development: An Empirical Investigation' (2001) 91: *The American Economic Review* <<https://economics.mit.edu/files/4123>> accessed 11 April 2020.; see also Gareth Austin, 'African Economic Development and Colonial Legacies' (2010) 1 *Open Edition Journal* 11-32 <<https://journals.openedition.org/poldev/78>> accessed 26th September 2020.

²³² See Leander Heldring and James Robinson, 'Colonialism and Development in Africa | VOX, CEPR Policy Portal' (*Voxeu.org*, 2013) <<https://voxeu.org/article/colonialism-and-development-africa>> accessed 15 April 2020.; and Stephen Ocheni and Basil C. Nwankwo, 'Analysis of Colonialism and Its Impact in Africa' (2012) 8 *Cross-Cultural Communication* <<http://cscanada.net/index.php/cc/article/view/j.ccc.1923670020120803.1189>> accessed 13 April 2020

²³³ *Ibid.*

²³⁴ See Rostow (n. 143).

framework of decolonization in Africa and Asia, during the formative years of the Cold War. The U.S., and Western European powers, basking in their victory in the Second World War, sought to analyse how the newly independent nations could be as economically and politically developed as the U.S and its Northern allies. Rostow opined that the economies of all states can be placed in one of five different stages of economic growth. These are; traditional society, preconditions to take-off, take-off, drive to maturity, and age of high mass consumption.²³⁵ A society's underdevelopment could be explained by the stages in the continuum.

However, the precepts of Modernization and its underpinnings had always been present in the Western scholarship of social change by the 19th Century. The influence of this received tradition, particularly evolutionary theory and functionalism, is evident in the conceptualization of modernization. First is the notion of development as “evolution” and secondly, the capacity to adapt to systemic, consistent change as the normal ingredient of stability, and thirdly, the analysis of social change as a directional process.²³⁶ This influence is also evident from Kennedy's analysis of the Three Globalizations, whose first globalization largely aligns with the precept of Modernization. Characteristic features of modernization theory include state-centric development (state control of the market), economic development as a precursor for social development (trickle-down), Import Substitution Industrialization (for industrialisation), urbanisation, secularisation and increasing literacy and education etc. Trubek observes that in terms of law and social change, Modernization saw contemporary law as an instrument for state involvement in the economy.²³⁷

As noted earlier though, the “modern” economies created in the colonized world post-Berlin Conference were primarily extractive in favour of the Metropole, with little regard for the socio-economic well-being of natives. No pretence was made at industrializing the colonies nor of poverty alleviation or of raising the living standards of Africans.²³⁸ In that sense, early colonial claims had no interest, firstly, in the economic development of the territory that would later be

²³⁵ Ibid.

²³⁶ See Dean C. Tipps, 'Modernization theory and the Comparative study of Societies: A Critical Perspective' (1973) 15 UC Berkeley Law Journal 199-226 <<https://www.jstor.org/stable/178351?seq=1>>accessed 26th September 2020.

²³⁷ See Trubek (n. 38).

²³⁸ See Ogonda (n. 221); and Richard D. Wolff, 'Economic Aspects of British Colonialism in Kenya, 1895 To 1930' (1970) 30 The Journal of Economic History.

referred to as Kenya, and secondly, in its human development. By the end of the Second World War, colonial policy towards the development of the colonies began shifting.²³⁹ This was mostly motivated by the demands of the Second World War, between 1939 and 1945, during which settlers experienced an increased need for self-reliance, having been cut off from Britain. The British began exploring purposive long-term planning for Kenya. The first ten-year development plan was published in 1946, whose primary objective for Africans was land resettlement.²⁴⁰ There would be published three more plans, namely, 1954 to 1957, 1957 to 1960 and 1960 to 1963.²⁴¹ Towards independence, three major Constitutional reforms were undertaken, whose effect was to open up space for African political participation and prepare the colony for independence.²⁴²

b. Modernization During the Post-Colonial Period, 1963 - 1970s

The post-colonial period in Kenya began in earnest with the aspiration for socio-economic development for Africans. As expected, Kenya's development policies primarily targeted extreme poverty, disease and ignorance. Critical for this period up to 1968 was the inheritance of Colonial economic policies and institutions into the post-colonial period. From this inheritance, Ake notes that both the colonial and the post-colonial economies were marked by two major forms of disarticulation: *geographical and structural*.²⁴³ The first refers to enclave development, by which development activities concentrate in a few urban areas. In Kenya, this was Nairobi, Mombasa, Nakuru, Kisumu, Eldoret and Naivasha for a very long time. By this approach, the colonial and successive post-colonial governments left huge swathes of Kenya underdeveloped, a legacy that persists in Northern Kenya.²⁴⁴ Ake notes the second structural disarticulation as the development of a limited range of activities. In Kenya, these activities are greatly focused on agriculture (*cash crop farming*) and a very small range of secondary industries. As a result, he observes, by 1963,

²³⁹ See Ogonda (n. 221) 164-166.

²⁴⁰ Ibid

²⁴¹ See also Zeleza T, 'Economic Policy and Performance in Kenya Since Independence' (1991) 20 *TransAfrican Journal of History*.; see also Kang'ethe G.T., 'Policy Analysis in Eastern Africa, Especially Kenya', *African Development and Public Policy* (Palgrave Macmillan 1994).; see also Mwege and Ndungu (n. 223).

²⁴² See 'Kenya Law: The Constitutional Amendment History' (*Kenyalaw.org*) <<http://kenyalaw.org/kl/index.php?id=9631>> accessed 24 April 2020.

²⁴³ See Claude Ake, *A Political Economy of Africa* (Heinemann 1981).

²⁴⁴ Ibid. See also John Overton, 'The Colonial State and Spatial Differentiation: Kenya, 1895-1920' (1987) 13 *Journal of Historical Geography*.

Kenya's economy retained a limited scope and was not properly spread out.²⁴⁵ Equally, colonial economic policies left a monopolistic and imperfect market. Indeed, colonial state use of the market as a tool for political control and exploitation continued well into the post-colonial period.²⁴⁶ The first reforms were mostly administrative, heavily retaining the legal structures then present from colonialism. Reforms were primarily aimed at unifying the legal system and breaking its racial bias against Africans.²⁴⁷

As Fahnbulleh notes, in many ways, this historical context is critical for assessing Africa's unsatisfactory record of industrial and economic development.²⁴⁸ He avers that it is important to look at the extent to which the structures that existed during the sunset days of colonialism set the pace for the pattern of development that would prevail in the post-independence period. That when evaluating the post-independence experience of industrial development, two particular colonial legacies are conspicuously decisive: '*colonial under-development* and the '*policy inheritance*'.²⁴⁹ Fahnbulleh agrees with the proposition that independent Kenya did not undertake major ideological and structural change to the colonial state. On the contrary, the state merely expanded the former colonial and administrative structures. Thus, was retained the colonial disregard and disdain for African Legal philosophy and its utility for addressing the lived economic realities of Africans. These legal, economic, political and social institutional continuities had a lasting impact on post-colonial socio-economic development and poverty alleviation efforts.²⁵⁰ Various NDPs and Sessional Papers were published and pursued beginning in 1965 with Sessional Paper No. 10 of 1965 on African Socialism, and the creation of public institutions to oversee planning and implementation of development.

Development was first pursued via modernization under the overbearing neo-colonial influence of the West. By this approach, law and development theorists in the 1960s transplanted

²⁴⁵ See Ndege P, 'Colonialism And Its Legacies In Kenya', *Fulbright – Hays Group Project Abroad Program* (2009)

²⁴⁶ Ibid 7; See also Blessing Chinsinga, 'The Market as An Instrument of Political Control and Exploitation: Some Insights from Kenya' (2001) 3 *Journal of Cultural Studies* <<https://www.jstor.org/stable/24487448?seq=1>> accessed 12 April 2020.

²⁴⁷ See Eugene Cotran, 'The Development and Reform of the Law in Kenya' (1983) 24 *Journal of African Law* 42-61.

²⁴⁸ See Miatta Fahnbulleh, 'In Search of Economic Development in Kenya: Colonial Legacies & Post-Independence Realities' (2006) 33 *Review of African Political Economy*.

²⁴⁹ Ibid.

²⁵⁰ See Nathan Nunn, 'Historical Legacies: A Model Linking Africa's Past to Its Current Underdevelopment' (2007) 83 *Journal of Development Economics*.

Western law, considered modern, to newly independent Countries such as Kenya hoping to spur modernization. “*Modern*” law was believed to be the “*functional prerequisite of an industrial economy*.”²⁵¹ This coercive transfer or transplantation was based on the assumption that Modernization would succeed just as the Marshall Plan had in the reconstruction of post-war Europe.²⁵² But unlike Europe, Kenya’s immediate problem was not that of reconstruction, but extreme poverty and vast inequality. Based on Modernization, emphasis was laid on state-led development, with rapid economic growth, investment and expansion of agriculture, industrial growth, mitigating unemployment, greater FDIs, a stable monetary and taxation policy, stable foreign exchange reserves, rapid social investments in education and health and conserving natural resources.²⁵³ Kenya adopted a highly centralized institutional framework for economic planning and development. State-led development was vertically controlled from the top, from whence were established several public sector institutions to support economic growth.²⁵⁴

Similar to the colonial period, Areas with high economic potential received favourable investment, in the belief that the economic returns from these investments would cascade to areas with low potential. This was in line with Modernization’s economic centric paradigm. To manage inflation and external debt, the government adopted conservative fiscal policy measures.²⁵⁵ Targeted development planning was articulated via NDPs, Sessional Papers, Legislation and or Regulations amongst other measures. Significantly, the NDPs outlined a multi-sectoral guideline for a wide range of programmes and projects, the primary of which was poverty alleviation. Nine NDPs were implemented between 1963 and 2003, each with its relevant legal and policy frameworks.²⁵⁶ Law was therefore purposed for these objectives. Firstly, *Sessional Paper No. 10 of 1965 on African Socialism and its Application to Planning in Kenya* promoted significant state-

²⁵¹ See David M. Trubek, 'Toward A Social Theory of Law: An Essay on The Study of Law and Development' (1972) 82 *The Yale Law Journal*.

²⁵² See 'Marshall Plan | Summary & Significance' (*Encyclopaedia Britannica*) <<https://www.britannica.com/event/Marshall-Plan>> accessed 25 February 2020.

²⁵³ See Zeleza (n. 190).; see also Kang’ethe (n. 241).; and Donald Rothchild, 'Kenya's Africanization Program: Priorities of Development and Equity' (1970) 64 *American Political Science Review*.

²⁵⁴ *Ibid.*

²⁵⁵ See Fahnbulleh (n. 248) 40.

²⁵⁶ See 'Development Plans – Kenya' (African Studies Centre Leiden) <<https://www.ascleiden.nl/content/development-plans-Kenya>> accessed 20 April 2020.

led economic development, premised on tight control of the market.²⁵⁷ This state intervention was hoped to provide a firm hand for steering the young nation to economic success.

Sessional Paper No. 10 also emphasized the promotion of industry, mainly through foreign direct investments. To achieve this, regulatory incentives such as tariff protection, import quotas and bans were introduced.²⁵⁸ Domestically, price controls, control of interest charges and foreign exchange transactions were also instituted to regulate the balance of payments and inflationary pressures.²⁵⁹ The Foreign Investment Promotion Act, 1964 was enacted for this purpose. Total government control of the economy, and indeed the market, was achieved through other laws governing various facets of the economy.²⁶⁰ Industrial promotion was done under the firm guidance of the state.²⁶¹ To fast track the growth of industry, import substitution industrialization was preferred under Sessional Paper No. 10.²⁶²

The protective tariff regime instituted by the colonial government in 1958 was also continued.²⁶³ Effort was made to develop a robust private sector to supplement the public effort to build an industrial base. The outcome was the development of many new industries, heightened manufacture of consumables and reduction in net imports in the first decade of independence.²⁶⁴ However, Zeleza notes that government policy largely failed to sustain this momentum because it was poorly articulated and haphazardly implemented.²⁶⁵ A similar finding, and the challenges of the import substitution policy, are discussed at length by Ngui, Chege and Kimuyu in *Kenya's*

²⁵⁷ The Sessional Paper Number 10 of 1965 on African Socialism and its Application to Planning in Kenya was conceptually based on government planning as a tool for socio-economic development. This tool was meant to guide economic growth – that was built around equity informed by African Socialism. See 'Sessional paper no. 10 of 1965 on African Socialism and Its Application to Planning in Kenya' (Knls.ac.ke, 1965) <<https://www.knls.ac.ke/images/African-Socialism-And-Its-Application-To-Planning-In-Kenya.pdf>> accessed 18 March 2020.; See also Jesse Salah Ovadia and Christina Wolf, 'Studying the Developmental State: Theory and Method in Research on Industrial Policy and State-Led Development in Africa' (2017) 39 *Third World Quarterly*.

²⁵⁸ See Dianah Ngui, Jacob Chege and Peter Kimuyu, 'Kenya's Industrial Development: Policies, Performance, And Prospects', *Manufacturing Transformation: Comparative Studies of Industrial Development in Africa and Emerging Asia* (1st edn, Oxford University Press 2016) <<https://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198776987.001.0001/acprof-9780198776987-chapter-4>> accessed 11 June 2020.

²⁵⁹ See Mwangi S. Kimenyi, Francis M. Mwega and Njuguna S. Ndung'u, 'The African Lions: Kenya Country Case Study' [2015] UNU-WIDER.

²⁶⁰ There were created various regulatory and commercial public agencies for the purposes of regulating and overseeing the government's participation in, and control of the various sectors of the economy and the market.

²⁶¹ See Ogonda (n. 221).; see also Ngui, Chege and Kimuyu (n. 258).; and Paul Tiyambe Zeleza and Philip J McConaughay, *Human Rights, The Rule of Law, And Development in Africa* (1st edn, University of Pennsylvania Press 2004).

²⁶² See Ministry of Planning (n. 257).

²⁶³ See Austin (n. 231).

²⁶⁴ Ibid.

²⁶⁵ See Zeleza (n. 241).

Industrial Development: Policies, Performance, and Prospects.²⁶⁶ This policy incoherence hindered the implementation of industrialization measures. Industrial policy, like trade policy, would shift from import substitution, to export promotion and liberalization by the turn of the millennium.

While modernization has been credited with promoting rapid economic growth in Kenya in the 1960s and 1970s, its impacts were just as noticeable.²⁶⁷ With rapid economic growth came high mass consumption from the heightened manufacture of consumables and the protection of local industry.²⁶⁸ While overall employment remained a challenge, there was an upsurge in the proportion of employment in the service sector.²⁶⁹ Indeed, between 1964 and 1971, Kenya's annual economic growth maintained an impressive average of 6.5%.²⁷⁰ However, impressive GDP numbers did not translate to prosperity for a majority of the unemployed and poor as was hoped.²⁷¹ Thus, each subsequent NDP beginning in 1970 featured shifting government priorities, to adjust to changing socioeconomic conditions and address the ever-present challenge of extreme poverty.

The disintegration of this approach and its criticisms primarily rested on its naivety in not appreciating the lived realities of Kenyans. Tamanaha and others have observed that the transplant of Western legal, political and economic institutions in the 1960s, '70s and early '80s failed for its disregard of these realities, and how these affected the application of prevailing western conceptions of law and development.²⁷² The approach has also been criticized for its insistence on economic development at the expense of social development/human development. By the early 1970s, it had become apparent that economic development did not automatically translate to social development, and with it, poverty alleviation. Further, modernization had a heavy bias on Western, and especially U.S. society, as the most viable model for "modern" societies in general. It propounded a unilineal developmental logic from the traditional to the US-type of modernity - the

²⁶⁶ See Ngui et al (n. 258).

²⁶⁷ See Zeleza (n. 190) 35.; see also Kang'ethe (n. 241).

²⁶⁸ See Rothchild (n. 253).

²⁶⁹ See Austin (n. 231).

²⁷⁰ See Zeleza (n. 241) 46-47.

²⁷¹ See International Monetary Fund, 'Kenya: Poverty Reduction Strategy Paper' (International Monetary Fund 2005) <<https://www.imf.org/external/pubs/ft/scr/2005/cr0511.pdf>> accessed 18 June 2020; and Miriam W. Oiro, Germano Mwabu and Damiano K. Manda, 'Poverty and Employment in Kenya' (Nairobi, 2004).

²⁷² See Davis and Trebilcock (n. 122).; see also Trubek (n. 164).

superiority of the West over the non-West (*Unilinear evolutionism*). They did not consider how these so-called “successful” legal systems were constructed—including how they gained authority and legitimacy, and whether that underlying context was similar to that of the developing world where they were transplanting these systems.

What Modernization did therefore was to dichotomise world history into a traditional phase and a phase of modernity, effectively simplifying world history to a transition process from tradition to modernity. Within that understanding, African forms of being (ontology) or philosophy of law were considered traditional and therefore unsuitable for the law’s modern function in society. Worse still, these forms of African articulation were orally transmitted, and therefore considered non-existent and inferior to Western legal philosophy. Modernization has also been criticized for presupposing that social systems are in a state of perfect balance, which primarily focuses on structures and not processes. It implicitly identifies the social system with the nation-state and underestimates the role of politics and underlying conditions. For instance, by the late 1970s, LFIs had suffered gradual erosion, evidenced by the increasing cannibalization of state institutions by the political class.²⁷³ Along this institutional cannibalization emerged an ethnically aligned patronage system that was anathema to the maintenance of effective LFIs for economic development.

2.3.1.2. Structural Adjustment, 1980s – 1990s

Structural Adjustment refers to a set of economic policy reforms that were conditional for all Countries that experienced economic crises (*primarily from the balance of payment crises in the 1970s*) and sought loans from the Bretton Woods institutions beginning in the early 1980s. Monetary facilities were premised on implementation of these reforms, which included financial policy regulation; reprioritization of public spending from subsidies (*“especially indiscriminate subsidies”*) toward a more liberal provision of key pro-growth, pro-poor services such primary education, basic health care and investing in infrastructure ; tax reforms that are aimed at

²⁷³ See Mwaura K, 'The Failure of Corporate Governance in State Owned Enterprises and The Need for Restructured Governance In Fully And Partially Privatized Enterprises: The Case Of Kenya' (2007) 37 Fordham Int'l L.J. <<https://ir.lawnet.fordham.edu/ilj/vol31/iss1/1/>> accessed 21 June 2020.

broadening the tax base and reduce marginal tax rates, while reducing deadweight loss and market interferences; interest rates that are market influenced and positive (but moderate) in actual terms; fair exchange rates; devaluation of currency to encourage exports; Trade liberalization – liberalization of imports, with special focus on elimination of quantitative restrictions (licensing, etc.); any trade protection to be provided by average and fairly uniform tariffs; the conversion of import quotas to import tariffs; liberalization of inward foreign direct investment; privatization of state enterprises; deregulation – removal of regulations that impede market entry or discourage competition, except for those justified on safety, environmental and consumer protection grounds, and prudent supervision of financial institutions; and legal security for property rights.

Significant to this approach was *Sessional Paper No. 4 of 1980 on Economic Prospects and Policies*, which began Kenya's Structural Adjustment Programs (SAP).²⁷⁴ The Sessional Paper recommended comprehensive policy coordination and reform. Structural reform was instituted in fiscal and monetary affairs, reduction of import controls, cuts in recurrent and development expenditures, reduction of government deficits, elimination of social safety nets like free healthcare, free primary education etc and the ushering in of the concept of “cost-sharing.”²⁷⁵ Structural adjustment programs ran through subsequent Sessional Papers in agreements with the Bretton Woods Institutions.²⁷⁶ This was the case for the Fourth to Seventh NDPs (1979 - 1983; 1984- 1988; 1989- 1993; 1994- 1996 respectively). While all maintained a focus on poverty alleviation, and particularly the rural development program, new policy initiatives in keeping with SAPs were added over the years, including export-based industrialization, fiscal discipline, budget rationalization, investments in Agriculture and the informal sector, rationalization of resource mobilization, strengthening of the planning machinery and enhancing the effectiveness of project implementation etc.

²⁷⁴ See Ministry of Economic Planning and Development, 'Sessional Paper No. 4 Of 1980 On Economic Prospects And Policies' (Government Printer 1980).; see also Presidential Committee on Unemployment, *Report of the Presidential Committee on Unemployment 1982/83*, (Government Printer 1982) <<http://kenyalaw.org/kl/fileadmin/CommissionReports/Report-of-the-Presidential-Committee-Unemployment-1982-1983.pdf>> accessed on 26th September 2020.

²⁷⁵ See Francis M. Mwega and Njuguna S. Ndung'u, 'Explaining African Economic Growth Performance: The Case of Kenya' [2002] African Economic Research Consortium <<https://media.africaportal.org/documents/Kenya2.pdf>> accessed 18 July 2020.

²⁷⁶ See Zeleza (n. 241) 40.

The second SAP agreement between Kenya and the Bretton Woods institutions was implemented in the Fifth NDP. The SAPs enabled economic policy shifts would accelerate under *Sessional Paper No. 1 of 1986 on Economic Management for Renewed Growth*.²⁷⁷ Under these programs, drastic policy and institutional reforms were instituted for renewed economic growth. Over the next two decades, Kenya shifted from the import-substitution policies it had pursued since independence and instead replaced it with an open, liberalized trading regime.²⁷⁸ Tariffs were lowered, controls on imports relaxed, and trade facilitated through various export promotion platforms. Structural and macroeconomic reform heightened in the 1990s due to worsening economic performance and recession. Further reforms saw the easing of government control of, and participation in the market, elimination of price and import controls, currency devaluation, and liberalization to promote FDIs. A balance was sought for rural-urban distribution of economic growth, tax reform to increase revenue, export promotion and cutbacks in social services spending such as health and education which birthed the concept of cost-sharing and reduction of public sector employment.²⁷⁹ Key legislative reforms included a raft of amendments to the Trade licensing legislation, the regulatory environment governing manufacturing and international trade, the informal sector, technological development, elimination of price controls and privatization. Institutionally, reforms were proposed to strengthen internal trade through reforming the Kenya National Trading Corporation (KNTC), Joint Loans Board (JLB) and the ICDC.²⁸⁰ The first four decades of independence witnessed policy shifts from import substitution, structural adjustment and liberalization, to privatization and export promotion.

These shifts were the result of both domestic and external factors. These included the oil crisis in the 1970s and generally economic underperformance in the late 1970s and early 1980s. Equally, institutional and policy failures, particularly uncoordinated policy implementation necessitated change. The severe balance of payment challenges in the 1970s necessitated a shift to

²⁷⁷ See Ministry of Economic Planning and Development, 'Sessional Paper No. 1 Of 1986 On Economic Management for Renewed Growth' (Government Printer 1986).

²⁷⁸ See Mweya and Ndung'u (n. 275).

²⁷⁹ See Ministry of Finance and Economic Planning, *Sixth National Development Plan (1989 – 1993)*, (Government Printer 1989).

²⁸⁰ See Zeleza (n. 241) 45.

export promotion to generate more foreign exchange reserves.²⁸¹ Reforms continued throughout the 90s and 2000s, including the elimination of export and import licenses, moderating and lowering import tariffs, freeing up of foreign exchange and price controls and selective liberalization of the capital markets etc. Privatization gathered pace in the early 1990s, with a privatization Law enacted in 2005 and operationalized in 2008.

These reforms also called for reforms in trade policy and legal frameworks. Beginning in 1993, the state adopted tariffs under the auspices of the WTO as its main trade policy instrument.²⁸² Reforms included moderation of the tariff structure and the creation of incentives schemes. These reforms moved Kenya towards a liberalized market, which had effectively been achieved by 2000. However, since 2010, Kenya still retains price controls for essential commodities such as oil etc. Various laws were amended and or repealed and new ones enacted to conform to WTO Agreements. These included anti-dumping, countervailing and intellectual property laws.

While SAPs have been credited with enhancing fiscal discipline and management of fiscal resources, reducing government budget shortages, eliminating hyperinflation and sustaining debt payment schedules, their devastating impact on poverty and inequality stand out. Firstly, the disproportionate cut in social spending – e.g., unreasonable in the education and health sectors - had far-reaching consequences for poverty alleviation. In most instances, the government ended up spending less money on these essential services and used the bulk of it in servicing international debts.²⁸³ Secondly, the loss of policy autonomy for developing countries meant the IMF and World Bank's micromanagement of national policies in environments they did not properly understand. The two institutions wielded unprecedented control over economic policies and institutions in Kenya.²⁸⁴ For Kenya, the result was a defective institutional order, by whose failure economic growth had dropped to recession by the year 2000.²⁸⁵

²⁸¹ See Ngui, Jacob and Kimuyu (n. 258).

²⁸² See 'WTO | Trade Policy Review - Kenya 2000' (*Wto.org*) <https://www.wto.org/english/tratop_e/tp124_e.htm> accessed 27 June 2020.

²⁸³ See David Ajakaiye Olusanya and Olomola Ade, *Socio-Economic Transformation And Poverty Perspectives Of The Development Debates In Nigeria* (NISER 2003).

²⁸⁴ See Charles Soludo, Michael Osita Ogbu and Ha-Joon Chang, *The Politics of Trade and Industrial Policy in Africa* (International Development Research Centre 2014).

²⁸⁵ See World Bank (n. 13).; see also Kang'ethe (n. 241).; and, Mwega and Ndungu (n. 275).

Thirdly, SAPs, rather than address, actually amplified the structural causes of poverty by creating a path for reforms that discouraged regulation of labour, undermined environmental laws, reduced the state's involvement in social programs, and encouraged quick privatization of government enterprises, allowing well-connected elites to benefit from them financially. Fourthly, they were negotiated secretly with a small circle of government officials, most of whom only cared for the rents to be obtained from the loans. As a result, these programs were criticized as undemocratic and non-transparent, accounting for their high rates of program failure. In any case, SAPs loans to restore solvency were not development finance. In other words, they did not go to specific projects that could be evaluated for their economic impact. Instead, they were primarily for macroeconomic exigencies. Critically though, SAPs completely restructured entire economies according to radical market orthodoxy, by which the free market reigned supreme. In that environment, the fact that inequality harms economic growth was systematically overlooked, and poverty with it.

As a result, state commitment to LFIs under SAPs was only to the extent of compliance with the donor conditions necessary for aid for want of will. When compared to its peers in East Asia, whereas countries like South Korea enjoyed U.S.A. aid in the early years of independence, they actively resisted World Bank and IMF policy propositions.²⁸⁶ While South Korea had achieved Middle Income Country status by the 1980s based on roughly the same development path, Kenya was entering what would be a long period of recession with institutional collapse.²⁸⁷ In 1996, as South Korea concluded its final NDP, Kenya was experiencing a biting recession, with economic growth stagnating at an average of 1%. By illustration, economic growth fell from a high average of 7% in the 1960s to 2.4% in the 1990s before dipping to recession by 2000.²⁸⁸

²⁸⁶ Korea only accepted IMF conditionalities after a long period of unprecedented state led economic growth and prosperity during its 1997 financial crisis during which it needed a bailout. See Yong-Shik Lee, 'Law And Development: Lessons From South Korea' (2018) 11 Law and Development Review <<https://dx.doi.org/10.2139/ssrn.3037959>> accessed 16 November 2020.

²⁸⁷ See World Bank (n. 13).; see also Kang'ethe (n. 241).; and, Mwega and Ndungu (n. 275).

²⁸⁸ *Ibid.*

2.3.2. Social Approaches

Social Approaches to poverty alleviation followed the path of Kennedy's Second Globalization of Law and Legal Thought. It also coincided with the policy transfer and diffusion influences of the late 1980s and early 1990s, when welfare programs gained prominence and spread both coercively and voluntarily. Social approaches were grounded on the notion of law as a means for achieving social ends. Kennedy argues that law was rethought as a deliberate activity, a control mechanism that could and should facilitate the evolution of social life. Its periodization overlaps with the colonial period and post-colonial period, evidenced by the early colonial shift to the use of the law as a means to social ends.²⁸⁹ The law and its facilitating institutional and policy options were therefore consciously designed to achieve social ends. In this era, Kennedy notes that the agents of globalization were reform movements in the West, nationalist movements at the grassroots, and the ruling class of the newly independent nation-states after 1945. As Trubek and Galanter observe, the law's domain expanded into areas previously left to the market or the discretion of the parties.²⁹⁰ This era coincided with the emergence of the First Moment in Law and Development in the 1960s, which equally embraced the core ideas of social law and consequentialism (*instrumentality*). The social approaches manifested as follows in Kenya.

2.3.2.1. African Socialism, 1965 – 1970s

African socialism refers to a socialist doctrine that emerged in the context of decolonization in the 1950s and '60s.²⁹¹ It was championed by leading African nationalists and Pan-Africanists such as Leopold Sedor Senghor, Sékou Touré, Kwame Nkrumah, Julius Nyerere, Tom Mboya and others. It was adopted as a rallying call for mobilizing and uniting Africans around the challenge of economic growth in their postcolonial societies. Its proponents conceived of an indigenous African path to socialism, one that seemingly sought a middle ground between

²⁸⁹ See Kennedy (n. 21).

²⁹⁰ See Trubek (n. 38).; see also Trubek and Galanter (n. 28).

²⁹¹ See 'African Socialism | Definition, History, & Facts' (*Encyclopedia Britannica*, 2021) <<https://www.britannica.com/topic/African-socialism>> accessed 24 August 2020.

Western capitalism and Soviet communism.²⁹² Its basis was African identity (*negritude*) as defining of development planning and development. It aimed for balanced economic growth, class formation and social control. The approach sought to replace the materialism evident in Western Capitalism and Soviet Socialism with values embedded in the continent's pre-colonial collective identity. Economic growth was to be achieved around equity informed by African values. In that sense, economically, socially and politically empowering Africans or natives was prioritized, also called Africanization or Kenyanization in this case.²⁹³

Under Africanization or Kenyanization, poverty alleviation meant first addressing the colonial exclusion of Africans from the contemporary economy. A majority of Kenyans lived in extreme poverty, excluded from the formal economy and surviving on its fringes, primarily on subsistence agriculture and other forms of small-scale production. Equally, literacy levels were extremely low. Enterprise, capital and skill for manufacturing were almost completely provided by European and Asian settlers.²⁹⁴ The economy was primarily in the hands of white settlers and Asians. Thus, for the independence government, the first policy priority was to economically empower Kenyans, alleviate extreme poverty, ignorance and disease. Policy and law were thus redirected towards addressing the white and Asian stranglehold of the immediate post-colonial economy.²⁹⁵ Africanization was propounded under *Sessional Paper No. 10 of 1965 on African Socialism and its Application to Planning in Kenya*.²⁹⁶ Strategic institutions, specifically parastatals, were created or reformed, with the primary objective being to gradually transfer control of the economy to indigenous Kenyans.²⁹⁷ The parastatals were in sectors such as agriculture, industry, transport and communications, finance, commerce and services. Sessional Paper No. 10 hoped to radically restructure government and local authorities to make governance fit for purpose - social-economic progress.

²⁹² Ibid.

²⁹³ See Rothchild (n. 253).

²⁹⁴ See Zeleza (n. 241); see also Ogonda (n. 193).

²⁹⁵ See Kang'ethe (n. 241).

²⁹⁶ See Ministry of Planning (n. 257). Its six-point agenda was enumerated as political equality; social justice; human dignity including freedom of conscience; freedom from want, disease and exploitation; equal opportunities and high and growing per capita incomes, equitably distributed.

²⁹⁷ Rothchild (n. 253).

Further, Kenya enacted the Immigration Act of 1967 and the Trade Licensing Act. the Immigration Act, 1967 was enacted, primarily to control residency, employment and or issuance of work permits and citizenship. Over time, the foreign stranglehold of the economy, particularly ownership of trade, commerce and the means of production was greatly reduced.²⁹⁸ The Immigration Act eliminated Colonial Ordinance permissions for non-residents for temporary residence and renewable work permits. Only areas where African skilled manpower was unavailable would be left for expatriates and non-residents. On the other hand, the Trade legislation would over time withdraw licenses issued to Asians to conduct commercial enterprises and reissue them to Africans. The law also forbade foreigners from conducting wholesale, retail, and export-import trade. Non-citizens were given up to January 1, 1969, to liquidate their holdings.²⁹⁹ The first five-year NDP, 1966 – 1970, was based on Sessional Paper No. 10 and prioritized Africanization of the economy, foreign investments promotion, training and skills enhancement, development of the private sector, poverty alleviation, investments in agriculture and development of a mixed economy. To stall capital flight from settlers fearful of Africanization, the Foreign Investment Protection Act, 1964 was enacted.

Africanization had various successes which were critical to addressing inequality and poverty. Firstly, the policy resulted in rapid employment creation for Africans through preferential treatment in commerce and civil service hiring. Secondly, it addressed the resettlement of Africans and redistribution of agricultural land to hitherto disposed natives, as well as investment in human capital to enable Africans to engage in Agriculture and other gainful employment. Thirdly, African Socialism greatly reduced foreign control of the economy through restrictions on the employment of emigrants, control of immigration and citizenship and restriction of certain commercial undertakings to citizens only.

²⁹⁸The majority small scale traders, known as dukawallas, were Indians. The Act gave them three months to decide their citizenship, either Kenya or the UK and exit Kenya accordingly. See Salim Lone, 'The Lost Indians Of Kenya' (The New York Review of Books, 1971) <<https://www.nybooks.com/articles/1971/10/07/the-lost-indians-of-kenya/>> accessed 18 June 2020; and Zarina Patel, 'The Great Asian Exodus Of 1969' *The East African* (2010).

²⁹⁹ Ibid.

However, despite the apparent successes of the first NDP period and Africanization, impressive GDP did not translate to socio-economic development for the majority poor. The second NDP, therefore, sought to address the challenge of rural development and increasing poverty despite impressive economic growth. This NDP also emphasized rural development, realigned government priorities towards poverty alleviation, employment creation, rapid economic growth and redistribution. A radical shift was called for. Accordingly, under this plan, the Planning function was devolved to then Districts, and Development Committees created at both the provincial and district levels.

Yet, by the early 1970s, Africanization had largely failed to deliver the kinds of widespread equitable distribution of economic growth contemplated under Sessional Paper 10 of 1965.³⁰⁰ Primary to this failure was criticism of its ambiguity on the substratum of its constitutive elements. In *Problems Facing Our Socialism*, Barack Obama Snr. notes that no African Country nor its proponents had defined what African Socialism is, nor common ground obtained amongst its exponents.³⁰¹ Was it African Socialism or Kenyan Socialism, and if it was African Socialism, how did Kenya's uniqueness in terms of its circumstances fit within it? Wonders Obama!

Ahmed Mohiddin³⁰² and Henry Chipembere³⁰³ go further in their criticism of African Socialism. Both, in a comparative study of "Kenya's Socialism" and Tanzania's "Ujamaa," term African Socialism in Kenya as not more than "*politics couched in a lie.*" Mohiddin, in his assessment, concludes that 'African Socialism' was neither African nor socialism at all. He avers that Kenya's African Socialism was capitalism, for its support of both economic growth and gross inequities. Equally, Friedland and Rosberg dismissed African Socialism as not more than a rallying call by African leaders, and a doctrine to replace anti-colonialism and nationalism, to

³⁰⁰ See Zeleza (n. 241); see also David Himbara, 'The Failed Africanization Of Commerce and Industry in Kenya' (1994) 22 World Development.

³⁰¹ See Barack Obama Snr, 'Problems facing our socialism' [1965] East African Journal 26-32 <https://www.politico.com/pdf/PPM41_080411_bhobama_article_1965.pdf>accessed 26th September 2020.

³⁰² See Ahmed Mohiddin, *African Socialism In Two Countries* (Croom Helm 1981).

³⁰³ See Henry Chipembere, 'Kenyan and Tanzanian Socialism (A comparative Study)' (1970) *Journal of African Studies* <https://escholarship.org/content/qt57x3n6k1/qt57x3n6k1_noSplash_179dc7fbf530aedcd3e7cd06dacde7c0.pdf?t=mnimar>access ed on 26th September 2020.

unify Africans.³⁰⁴ Okoth-Ogendo agrees with these conclusions, remarking in *The Politics of Constitutional Change in Kenya since Independence, 1963-69*, that Sessional Paper No. 10 of 1965 was nothing more than an unpretentious answer to public demand for an ideology of government.³⁰⁵

The Paper's six-point agenda would suffer erosion at implementation and ultimately failure. Firstly, the Kenya government did not abandon the colonial government's spatial differentiation programs. So-called "white highlands" and other "productive areas" were favoured to the exclusion of other areas of Kenya. Secondly, while it made great claims about dignity and equality for Africans, its implementation merely replaced the colonial settler elite with an African petty bourgeoisie.³⁰⁶ By the 1980s, the top African elites' voracious appetites for public goods would be manifest brazen self-aggrandizement and corruption. Political patronage and expediency replaced merit, such that by the 1970s, Kenya's economic policy shifts were significantly affected by the politics of the day.³⁰⁷ In this environment, Barkan notes, the kinds of policy and institutional continuities necessary for long term national development could not take root. Hence, over the decades, policy and law became only relevant where they supported the existing patronage machinery created by elites, a legacy that continues to date. At the same time, an increasingly autocratic state emerged, with constitutional amendments undertaken beginning in the 1960s revealing the erosion of fundamental rights and the creation of an imperial presidency.³⁰⁸ Soon, a radical shift was once again sought to address the challenge of widespread rural underdevelopment and increasing extreme poverty despite impressive economic growth – and hence, in came basic needs and redistribution.

³⁰⁴ See Friedland W. H. and Rosberg C. G., "The Anatomy of African Socialism," in Friedland and Rosberg 1 eds, *African Socialism*, p.4.

³⁰⁵ See H.W.O. Okoth Ogendo, 'The Politics of Constitutional Change in Kenya since Independence' (1972) 71 *Oxford Journal* 9-34 < https://learning.uonbi.ac.ke/courses/GPR203_001/document/Property_Law_GPR216-September_2014/Articles/Okoth-Ogendo_Constitutional_Change_in_Kenya_since_Independence_nnnnn.pdf>accessed on 26th September 2020.

³⁰⁶ See Richard D. Wolff and Nicola Swainson, 'The Development of Corporate Capitalism in Kenya, 1918-1977' [1981] *African Economic History*.

³⁰⁷ See Whitaker J, and Barkan J, 'Politics and Public Policy in Kenya And Tanzania' (1985) 64 *Foreign Affairs*.

³⁰⁸ See Wolff and Swainson (n. 306).; see also Ogendo (n. 305).

2.3.2.2. Basic Needs Approach, 1970s – 1980s

The Basic Needs approach arose from the failure of economic centric growth (*particularly the expansion of incomes*) to spur redistribution and address increasing poverty and unfair distribution of resources in the first ten years of independence.³⁰⁹ Its key basis and targets were development in the rural areas, alleviating poverty in the urban centres, creating employment through small-scale industries, “redistribution with growth” and other approaches that gravitated towards equity. It was a shift of focus towards social services designed to help and create goodwill among the poor. Its emphasis was on the human, and his or her deficiencies. It thus spelt out human needs from the perspective of health, food, education, water, shelter, transport, simple household goods, and also non-material needs such as participation, choice, cultural identity etc.

For Kenya, the adoption of the Basic Needs Approach was by way of the International Labour Organization’s (ILO) 1972 Country Report, titled, *Employment, Incomes and Equality: A Strategy for Increasing Productive Employment in Kenya*, in which ILO recommended a “*Redistribution through Growth Strategy*.”³¹⁰ The report faulted Africanization as insufficient for addressing widespread poverty and joblessness. It also faulted the economic centric approach advocated by modernization, noting that economic growth by itself cannot generate redistribution. To promote redistribution and poverty alleviation, the ILO proposed tax on idle land, investment in the informal sector, agriculture and restrained growth of urban incomes. Kenya incorporated the ILO’s recommendations in *Sessional No. 10 of 1973 on Employment*,³¹¹ the Third NDP, 1970 – 1974, Fourth NDP, 1974-1978 and the Fifth NDP, 1984 - 1988. Focus shifted to mitigating widespread extreme rural poverty. Significant financial investment was therefore channelled towards the promotion of agriculture, with corresponding cuts in infrastructure spending. This new approach was also detailed in *Sessional Paper No. 5 of 1975 on Economic Prospects and*

³⁰⁹ See Paul Mosley, 'Kenya In The 1970s: A Review Article' (1982) 81 *African Affairs*.; see also Colin Leys, 'Development Strategy In Kenya Since 1971' (1979) 13 *Canadian Journal of African Studies / Revue Canadienne des Études Africaines* <<http://www.jstor.org.uonlibrary.remotexs.co/stable/484648>> accessed 2 April 2020.

³¹⁰ See International Labour Office, 'Employment, Incomes and Equality: A Strategy for Increasing Productive Employment in Kenya' (ILO 1972) <https://www.ilo.org/public/libdoc/ilo/1972/72B09_608_engl.pdf> accessed 18 April 2020.

³¹¹ See Ministry of Economic Planning and Development, 'Sessional No. 10 of 1973 on Employment' (Government Printer 1973).

Policies.³¹² Policy responses to the oil shocks and the crisis of balance of payments were outlined in the Third, Fourth and Fifth NDPs.³¹³ District Focus for Rural Development (DFRD) was also adopted to decentralize planning and better mitigate poverty and promote redistribution. This approach was enumerated under *Sessional Paper No. 1 of 1986 on Economic Management for Renewed Growth*.³¹⁴ The Sessional paper listed priorities to be pursued for development towards the new millennium. Central to its programs were measures for renewing economic growth, employment creation, poverty alleviation, fair sharing of benefits of growth and provision of basic needs for every citizen.³¹⁵

Notable measures for poverty alleviation within this approach included the introduction of subsidies in social service delivery. For instance, in 1973, primary education was made free to increase access and literacy levels. A financial facility was also made available to support students qualified for university education. Further, health services were also heavily subsidized and investments made to expand healthcare and healthcare facilities. While the Basic Needs Approach was credited for broadening the revenue bases for the poor; facilitating their access to public utilities; improved trade; better participation of the poor in how their needs are met, it failed to bring about meaningful poverty alleviation. By the end of the 1970s, it was apparent exogenous factors coupled with persistent poor economic management and performance had wiped out the impressive growth of the 1960s. Poverty and inequality maintained a consistent uptick.³¹⁶

The approach was criticized for its little focus on non-material basic needs (*i.e., participation in decision making, self-determination, political freedom, etc.*) which were equally critical for creating conditions for the effective satisfaction of the material basic needs. It has also been criticized for obsessing with employment opportunities both as an end and as a means of meeting basic needs. Although it addressed the deprived and deficient of basic needs, it was not a welfare concept. Instead, it was very much a mechanism of economic development. Indeed, the

³¹² See Ministry of Economic Planning and Development, 'Sessional Paper No. 5 of 1975 on Economic Prospects and Policies' (Government Printer 1975).

³¹³ See Zeleza (n. 241) 39.; see also Kang'ethe (n. 241).; Mweha and Ndung'u (n. 223).

³¹⁴ See Government Printer (n. 277).

³¹⁵ *Ibid.*

³¹⁶ See World Bank (n. 13).; see also Kang'ethe (n. 241).; Ngui et al (n. 206).; and, Mweha and Ndung'u (n. 223).

foregoing aligns with its assumption of redistribution with growth. Critically though, the Basic Needs approach relied on state capacity and goodwill for implementation of its programs – an approach which largely failed in Kenya.

Wolf and Swainson, Zeleza, Leys, and Mosley have argued that the absence of political will and private interests is responsible for the failure to implement the ILO's basic needs approach recommendations fully. They argue that these recommendations would have risked the fortunes of the nascent African petty bourgeoisie and its corporate interests.³¹⁷ Further, signature basic needs approach measures such as social subsidies were mere political gerrymandering seeing as they were Presidential decrees with no legal or policy documents backing them.³¹⁸ Implementation of these measures was near impossible, the result of which was minimal impact on poverty alleviation. Cost-sharing was introduced in 1989 and had an immediate serious effect on the affordability of healthcare, education and social services for the majority poor.³¹⁹ For instance, increased investment in education and government subsidies saw enrolment in primary school jump from 50% in 1963 to 95% in 1989.³²⁰ With the introduction of cost-sharing and the increase in the cost of education, enrolment had dipped to 77.5% by 1996.³²¹ By the early 1980s, the failure of the basic needs approach was becoming manifest. The 1982 report of the Working Party on Government Expenditures highlighted various public sector inefficiencies.³²² Owing to stagnating economic growth, and to recover from the economic shocks of the 70s, the government embarked on Structural Adjustment Programs.

³¹⁷ See Leys (n. 309).; see also Mosley (n. 309).

³¹⁸ Presidential decrees carrying significant policy implications beginning with President Kenyatta and later Moi, issued at random at rallies and when the President was going about his business, without prior government planning or public consultation, and often suffering non-implementation, became known as "roadside declarations."

³¹⁹ See Kang'ethe (n. 241).

³²⁰ See United Nations Development Program, *Kenya Human Development Report (UNDP 1999)* <http://hdr.undp.org/sites/default/files/kenya_1999_en.pdf>accessed 26th September 2020.

³²¹ Ibid.

³²² See Ministry of Economic Planning and Development, 'Sessional Paper No. 4 Of 1980 On Economic Prospects And Policies' (Government Printer 1980).; see also Presidential Committee on Unemployment, Report of the Presidential Committee on Unemployment 1982/83, (Government Printer 1982) <<http://kenyalaw.org/kl/fileadmin/CommissionReports/Report-of-the-Presidential-Committee-Unemployment-1982-1983.pdf>>accessed on 26th September 2020.

2.3.2.3. Poverty Reduction Strategy Papers, 1990s – 2000s

The Poverty Reduction Strategy Paper (PRSP) approach to economic development and poverty alleviation was adopted by the World Bank and IMF following heavy criticism and inefficiencies of SAPs and their devastation of developing economies. PRSPs refers to documents conditional for grant of debt relief under the Bretton Woods Institutions' Heavily Indebted Poor Countries (HIPC) initiative. It was lauded by the World Bank and IMF when launched in 1999 as a new strategy for dealing with the challenges of poverty alleviation and economic development. Countries had to demonstrate how money saved from debt servicing would be used to alleviate poverty. Consequently, both the IMF and the World Bank were expected to adjust their respective lending programmes to a country's PRSP. For the IMF, this would be under the Poverty Reduction Growth Facility (PRGF)--the old Enhanced Structural Adjustment Facility (ESAF)--and the Financial Programming Framework was within the framework of PRSP. For the World Bank, the Country Assistance Strategy (CAS) and all loans and grants were to be based on the PRSP. Its basic tenets were that it was country-driven, poverty-focused government, result-oriented, comprehensive, and partnership-oriented and based on a long-term perspective for poverty reduction.

Accordingly, Kenya adopted its first PRSP in 1999, vide the National Poverty Eradication Plan, 1999-2015. The plan primarily focussed on rural poverty, with an ambitious target to reduce urban and rural poverty incidence by 50% by the year 2015. It was followed by the Poverty Reduction Strategy Paper, 2000-2003. These two were perhaps the most comprehensive policy documents in Kenya's quest for poverty alleviation. Essential to this undertaking were amongst others, *Sessional Paper No. 2 of 1997 on Industrialization and the National Poverty Eradication Plan* of 1999.³²³ These Policy aspirations were detailed under the Eighth NDP, 1997 – 2001 and Ninth NDP, 2002 – 2008.

³²³ See Ministry of Planning, 'Sessional Paper No. 2 of 1997 on Industrialization and the National Poverty Eradication Plan of 1999' (Government Printer 1997).

Yet, by 2000, economic growth had completely stagnated, with GDP stuck at 0.6%.³²⁴ The ninth NDP, themed *Effective Management for Sustainable Economic Growth and Poverty Reduction*, emphasized education, training and capacity building. Education was highlighted as a functional strategy for human resource development and subsequent socio-economic development. Funding was channelled towards vocational and technical training for artisans, craftsmen, technicians, technologists as a means for promoting industrial development.

The Moi era ended following the General Elections of December 2002, when the Kibaki administration came to power. President Kibaki shifted from the Moi era five-year plans. Poverty and inequality remained priority areas for the new administration. The NDP 2002–2008 was therefore replaced with the Economic Recovery Strategy Paper for Wealth and Employment Creation, 2003 – 2007 (ERS). The ERS was based on the Poverty Reduction Strategy Paper and was the new regime's first attempt at hastening economic recovery following years of underperformance and stagnation.³²⁵ The fundamental focus of the Plan was job creation through well thought out macroeconomic policies, better governance, proper public service delivery, an enabling business environment, and public investments and policies aimed at making business affordable. The Plan also sought to address high socio-economic inequalities and promote pro-poor policies on sustainable management of natural resources such as land, water, forests etc. The ERS was equally aimed at achieving good governance, observance of the rule of law, transparency and accountability and providing a lasting solution to hunger, poverty and unemployment.

While the PRSPs have been credited with giving poverty central prominence in National Economic Planning, this prominence has not resulted in a substantial drop in poverty prevalence in Kenya.³²⁶ Indeed, the approach gave room for enhanced participation and autonomy of developing nations in poverty alleviation policy formulation and support from IMF and WB unlike the SAPs of old. As such, PRSPs were locally-driven: involving greater participation by civil

³²⁴See World Bank (n. 13).

³²⁵ The Preamble to the Strategy notes that the Kenyan economy had performed poorly over the last two decades leading to deterioration in the quality of life of Kenyans. See Ministry of Economic Planning and National Development, 'Economic Recovery Strategy (ERS) For Wealth and Employment Creation, 2003 - 2007' (Government Printer 2003).

³²⁶ Ibid.

society and the private sector in all operational steps. Unlike SAPs, they were goal-oriented: emphasizing objectives that would be of assistance to the poor and cover all the relevant aspects: appreciating the multidimensional character of poverty. They are partnership-oriented: involving planned input of development partners (bilateral, multilateral, and non-governmental) and spearheaded by a long-term perspective for poverty mitigation.

PRSPs have been faulted for increasing aid terms even in as much as it was initially designed to remove the introduction of external policy terms by improving country control. Guttalwe et al contend that not so much has changed in the substance, form and process of World Bank and IMF programmes.³²⁷ They note that for PRSP, “Poverty” is used as an avenue to peddle more or less the same Structural Adjustment Programmes (SAPs) that occasioned existing stark inequalities and extreme poverty. They note that despite claims of state-led, states had less say over the structure, content and policy prescriptions in their various PRSPs, thus mocking the World Bank-Fund claims of national control, public accountability and greater participation.

Further, despite the rhetoric of “nationally driven” development, the PRSP frameworks continue to be against the local and national priorities of mitigating poverty, working towards domestically meaningful economic development, encouraging equality and equity, and encouraging popular participation in the design of national development policies. For this reason, PRSPs have been criticized also for being naive about domestic political processes. They lay too much emphasis on social sectors and infrastructure sectors and under-emphasize the productive sectors (*including agriculture*).³²⁸

2.3.3. Contemporary Approaches

Contemporary approaches to poverty alleviation followed the path of Kennedy’s Third Globalization, which features an amalgam of elements from the first and the second globalization. The Contemporary approaches arose out of critiques of CLT and the Social, proposed as the

³²⁷ See Jenina Joy Chavez and Shalmali Guttalwe, ‘Poverty Reduction Strategy Papers: A Poor Package for Poverty Reduction’ (2003) < <http://www.cadtm.org/IMG/pdf/prsp.pdf>> accessed 26th September 2020

³²⁸ Ibid.

careful balancing of conflicting dynamics in administering the system created by the social jurists. Law's scope expanded to include guarantor of not just property rights, but human rights and the rule of law. The Human rights-based approaches to development emerged thus. Pragmatic market regulation was preferred to the free market, by which state regulatory intervention was heavy.

Kennedy notes that this period incorporated two further separate elements: *policy analysis* and *public law neo-formalism*. The mechanisms by which this globalization took place were the American victory in World War II and the Cold War, the “opening” of nation-states to the new legal awareness through involvement in the world market on the terms made by multinational corporations and international regulatory institutions, and the pride of the American culture. For law and development, Contemporary Approaches to development primarily encompass trade-offs from the preceding approaches, taking what works from each approach and applying them to the challenges of development. It rejects false universalism, i.e., that there is one approach to development and thus one model for law in development.³²⁹ For instance, while the free market is critical, it leaves room for limited state regulatory involvement to reduce transaction costs and make up for market failures. This approach also rejects neo-liberal market fundamentalism. Its emergence coincided with the Third Moment in law and development. Such approaches manifested as follows.

2.3.3.1. Human Development or “Development As Freedom,” 1990s – mid-2000s

The Human Development Approach emerged in 1990 as a reaction to the shortcomings of GDP as a measure of human well-being. Like Basic Needs, it sought to shift focus to improving lives as opposed to assuming GDP growth will automatically result in broader well-being for all. In this approach, income growth is viewed as a path to development, rather than an end in itself.

The approach was formulated for the United Nations Development Program by Mahbub Ul Haq, based on Amartya Sen's work in Development as Freedom.³³⁰ From Sen's human

³²⁹ Justice Mensah | Sandra Ricart Casadevall (Reviewing editor) (2019) Sustainable Development: Meaning, History, Principles, Pillars, And Implications For Human Action: Literature review, Cogent Social Sciences, 5:1, DOI: [10.1080/23311886.2019.1653531](https://doi.org/10.1080/23311886.2019.1653531)<accessed on 26th September 2020.

³³⁰ See UNDP (n. 16).; see also Sen (n. 95).

capabilities, the approach concerns itself with the people's ability to "be" and "do" good things in life. For instance, as beings are people having proper meals, shelter, and health? In terms of their capacity and doings, the approach assesses access to employment, education, voting, and involvement in social life. Critically though, freedom of choice is the basis of everything. As the enabler of all else, freedom is as critical for enabling people access to opportunities to live lives they value. The aim is to build people's capabilities and provide opportunities for them to use them.

For instance, ensuring access to education for the underprivileged for skills enhancement must be accompanied by access to job opportunities. When one is better educated, they are better informed about their choices and can live the lives they choose. The process of development – human growth - should at the very least create an avenue for people, personally and jointly, to grow to their full capacities and to have a fair opportunity of living well and engaging lives that they desire. The UNDP's Human Development Reports (HDRs) and the Human Development Index were born of this approach. The clamour for greater freedoms beginning in the 1990s in Kenya can be seen in this light. With worsening poverty and inequality, the autocratic Moi regime came under increasing pressure to undertake major institutional, social, political and economic reforms, beginning with the repeal of Section 2A. Freedoms were seen as critical to addressing persistent contemporary problems. The Constitutional reform process culminating in the 2010 Constitution was a crystallization of this approach.

2.3.3.2. Socio-Economic Rights or Development as Rights (Human Rights-Based Approaches), 1990s - Present

The Socio-Economic Rights or Development as Rights Approach, commonly known as the Human Rights-Based Approaches (HRBA), closely followed the paradigm of Human Development or Development as Freedom. Its key tenets are involvement, transparency, non-discrimination and equality, empowerment and legality. Unlike Human Development, its

emphasis is on international human rights standards as the basis for economic, social and political development.³³¹

Its primary aim is to uphold and safeguard human rights. Its key driver is the elimination of inequity, biased practices and unfair distribution of power that undermines development continuity. The outstanding characteristic of a rights-based approach is its legal philosophy, internationally, regionally, and nationally. Under the HRBA, the framework, policies and stages of growth are embedded in a system of rights and the relevant obligations enshrined by international law, including all civil, cultural, economic, political and social rights, and the right to development.³³²

HRBA dictates that human rights principles (*universality, indivisibility, equality and non-discrimination, participation, accountability*) provide a framework for development and emphasize developing the capacities of both ‘duty-bearers’ to meet their obligations, and ‘rights-holders’ to demand their rights. HRBA approaches demand that human rights standards and principles guide not just development, but the development process itself. These approaches have changed at par with the evolution of the term “development,” and hinge on the understanding that an effective development strategy ought to respect human rights and involve measures to promote the realization of such rights.³³³ This understanding currently permeates available legislative and policy measures at the international, regional and domestic levels.

Generally, the framework for human rights in Kenya centres on the Constitution, the National Policy and Action Plan on Human Rights and statutes where applicable. This framework domesticates and incorporates international treaties and best practices for the safeguarding of human rights in Kenya, in so far as Kenya’s ratification of these instruments is concerned. The Constitution outlines perhaps the most progressive guideline for the protection, promotion and

³³¹ See H.O. Sano, ‘Development and Human Rights: The Necessary But Partial Integration Of Human Rights And Development’ [2000] Danish Institute of Human Rights Review 734-752.

³³² Ibid.

³³³ See Office of the United Nations High Commissioner for Human Rights, “Realizing the Right to Development: Essays in Commemoration Of 25 Years of The United Nations Declaration on The Right to Development’ (Office of the United Nations High Commissioner for Human Rights 2013) <https://www.ohchr.org/Documents/Issues/Development/PamphletsRealizing_for_TransformativeDevelopment_en.pdf> accessed 18 May 2020.

realization of human rights, including the right to development. Firstly, ratification of international treaties, in this case, Human rights treaties, is contemplated under Articles 2(5) and 2(6). Specifically, Article 2(5) provides that the general rules of international law form part of the law of Kenya. Whereas in practice Kenya retains a Dualist system, where treaties are subjected to the provisions of the Treaty Making and Ratification Act, the Courts have ruled that under the new Constitution, Article 2(5) contemplates a monist system.³³⁴ Kenya has ratified six of the nine core human rights Conventions and signed a seventh, as well as several Optional Protocols.³³⁵

The inclusion of enforceable SERs in the Constitution can be seen under the ambit of the HRBA. It is noteworthy that the Constitution was the culmination of clamour for reforms to address inequality, inequity and underdevelopment. The Constitution provides for SERs; protections for group rights, for instance, the right to self-determination; the centrality of public participation; rights of minorities to socio-economic development; right to a clean environment and sustainable development, and duties and responsibilities of the state in the realization of these rights. Indeed, Article 19(3) provides room for other rights not contained in the bill of rights but recognized or conferred by law.³³⁶ Within this broad interpretation, the domestication process under Article 2(6), read together with Article 19(3), means the even the right to development as expressly detailed in the African Charter under Article 22, can be considered recognized or legitimized by law. Article 10 on National values and principles of governance provides for amongst others, the participation of the people, inclusivity, equality, human rights, non-discrimination and protection of the marginalised and sustainable development.³³⁷

Significantly, Chapter Four on the Bill of Rights expressly provides safeguards for all rights. For the realization of Article 20 on the applicability of the Bill of Rights, specifically, Article 20(5) places a duty on the state, where the State posits that it does not have the resources

³³⁴ In these cases, the Courts principally found that international treaties and conventions ratified by Kenya, as well as general rules of international law, form part of the laws of Kenya. See *Re The Matter of Zipporah Wambui Mathara* [2010] eKLR; see also *Joseph Kimani Gathungu v. Attorney General & 5 Others* [2010] eKLR; and *Satrose Ayuma & 11 others v. Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others* [2016] eKLR.

³³⁵ See Davis Malombe and others, 'Kenya's Regional and International Human Rights Obligations' (*Khrc.or.ke*) <<https://www.khrc.or.ke/mobile-publications/economic-rights-and-social-protection-er-sp/126-kenya-s-regional-and-international-human-rights-obligations/file.html>> accessed 12 May 2020.

³³⁶ See Art 19(3) The Constitution of Kenya 2010.

³³⁷ See Art 10 The Constitution of Kenya 2010.

to facilitate the realization of any right under Article 43, to show that the resources are not available.³³⁸ This is essential for the justiciability of socio-economic rights. The State's obligation to *observe, respect, protect, promote* and *fulfil* the rights and fundamental freedoms in the Bill of Rights is enshrined under Article 21.³³⁹ Article 21 (2) obligates the State to take legislative, policy and other initiatives, including the setting of standards, to achieve the gradual realisation of the rights guaranteed under Article 43. Separately, 21(4) requires that the State enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms. The right to institute claims, in this case for socio-economic rights, against the state for violations or infringement of rights or fundamental freedom is domiciled under Article 22.³⁴⁰ Article 24 outlines the limitation of rights and fundamental freedoms and the conditions precedent.

HRBA is also captured in *Sessional Paper No 3 of 2014 on National Policy and Action Plan on Human Rights*, adopted in 2016.³⁴¹ The policy outlines the Kenyan state's guideline for furthering the safeguarding and upholding of human rights. In the context of law and development, focus shifts to the mainstreaming of this concept in the regulatory design, implementation and enforcement of the law for a particular development objective, e.g., poverty alleviation. Equally, for implementation and enforcement, the rule of law becomes critical for human rights and sustainable development.³⁴²

HRBA has been credited with enhancing access to basic services for the most vulnerable in society. Its legal protections of SERs gives voice to the voiceless and strengthens their participation in governance. The use of legal instruments to enforce rights and make available legal means for the vulnerable to claim violations reinforces the path to realization. Unlike the other approaches, if properly implemented, carries the potential to tackle the root causes of poverty as SERs are primarily indicators of poverty. By focusing on discrimination and its elimination, it

³³⁸ Art. 43 The Constitution of Kenya 2010.

³³⁹ Art. 21 The Constitution of Kenya 2010.

³⁴⁰ See Art. 22 The Constitution of Kenya, 2010.

³⁴¹ See 'Sessional Paper No 3 Of 2014 On National Policy and Action Plan on Human Rights' (*Statelaw.go.ke*) <<http://www.statelaw.go.ke/wp-content/uploads/2016/10/Sessional-paper-on-policy-and-action-plan-on-human-rights.pdf>> accessed 21 May 2020.

³⁴² See Zeleza and McConnaughay (n. 261).

has can provide a solid basis for addressing inequality. However, the approach has been criticised for its foreign construction and thus challenges with acceptance. Due to its origin outside of the development context, the application of the HRBA to development is adversely seen as “globalization of policymaking” with the use of Western power - cultural imperialism. The approach is also state-centred in its discourse - partly explained due to the origin in the West where the states have the obligation for their “citizens.” This dependence on the state and its capacity means challenges with operationalization, in reality, seeing as most developing countries do not have the resources to realize these rights in any given timeline, even progressively.

2.3.3.3. Law as Development, 1990s – Present

Law as development is supported by the notion that legal reforms are an end in themselves, whether we can establish any linkages with other conceptions of development or not. Trebilcock and Daniels observe thus, that for instance, based on Sen’s conception of development as freedom, freedom in its different forms is both the outcome and avenue for development.³⁴³ Freedoms, for instance, as outlined under Chapter Four of the Constitution, are thus defining normative characteristics of development. The inclusion of SERs in the 2010 Constitution can equally be seen in that sense. That we need not justify the law based on instrumentalist terms. The law’s intrinsic value is to be divorced from its effect on other measures of development, even though, for instance, a commitment to protecting freedoms, or SERs in this case, may also coincidentally serve important instrumental functions such as poverty alleviation.³⁴⁴

Law as development, therefore, pays little attention to the instrumentalist view of the law or economic growth and its metrics such as GDP per capita or GNI. For instance, these indices make little sense in Sen’s analysis of development as freedom. That we have statutory protections for these rights and the state and Courts uphold them is development in and of itself, regardless of how these legal protections relate with other conceptions of development. Sen argues that people

³⁴³ See Trebilcock and Daniels (n. 107).

³⁴⁴ See Sen (n. 95).; see also Trubek and Santos (n. 24).

typically look for freedom to live their lives as they see fit. Income or wealth are facilitators of freedoms and not ends in themselves, for from income or wealth, people gain greater capabilities.

Accordingly, Sen concludes that development when seen as freedom requires political liberties, economic access, transparency guarantees and protective security.³⁴⁵ This is precisely because fundamental freedoms are interconnected, such that from higher incomes, people can obtain better healthcare, education, shelter etc. Sen proposes the complimentary promotion of fundamental freedoms instead of prioritizing one over the other. Thus, law in development and law as development are two sides of the same coin in that the protection of freedoms guaranteed by the rule of law as the end goal can concurrently serve an instrumental purpose in promoting other development objectives. The UNDP's HDI was conceived as part of this evolving understanding of law as development.

This approach can be gleaned from the clamour for constitutional reforms since the 1990s. The promulgation of the new Constitution on 27th August 2010 marked the culmination of years of demands and agitation for Constitutional reforms by the Kenyan public, beginning with the second wave of democratic emancipation across Africa, following the end of the Cold War.³⁴⁶ Since Independence, Kenya had not undertaken meaningful comprehensive Constitutional reforms. Instead, successive governments had merely undertaken self-serving piecemeal amendments.³⁴⁷ Indeed, between 1963 and 2009, the independence Constitution had been amended thirty-eight (38) times. The new Constitution sought to end decades of these self-serving amendments whose implications to governance and public administration had effectively run the Country aground, socially, economically and politically. The new Constitution primarily aimed at engendering institutional reforms that would spur economic and human development by addressing long-standing challenges such as rule of law, poor governance, mismanagement of resources, impunity and corruption, marginalization and discrimination, regional development and

³⁴⁵ See Sen (n. 95) 40-41.

³⁴⁶ See Jeffrey Ira Herbst and Greg Mills, *Africa's Third Liberation* (Portfolio Penguin 2014).

³⁴⁷ See Ogendo (n. 305).; see also J.B. Ojwang, 'Constitutional Trends in Africa-The Kenya Case' (2000) 10 *Transnat'l L. & Contemp. Probs.*

self-governance, public participation and accountability, land reforms and sustainable development amongst others.

Governance was particularly altered drastically, with the creation of a decentralised political system, and limiting presidential powers. Forty-seven county governments were established, with oversight over branches and levels of government heightened through the creation of better checks and balances. Within this broad Constitutional framework are contemplated various other statutes such as legislation on land and the environment, essential for the protection of property and sustainable planning and development, to which the Physical Planning Act, the Urban Areas and Cities Act, 2011, and other environmental management laws fall.

Equally, legislation is contemplated for public finance management under Chapter 12, to which the Public Finance Management Act, 2012, the Public Procurement and Asset Disposal Act, 2015 and other relevant laws fall. These are just but demonstrative examples of the robust 2010 Constitutional framework and do not in any way account for the range of legislation required by the Constitution to achieve its ends.³⁴⁸ For law as development, that the Constitution was promulgated, and that it has a transformative framework that's greatly reformed governance, is to be judged for its intrinsic value, free of these collateral benefits.

2.4. Conclusion

It is evident from our assessment of the historical and contemporary approaches to poverty alleviation in Kenya that these approaches followed the path of the *Three Globalizations of Law and Legal Thought* and mechanisms of *the policy transfer or diffusion* theories. It is also evident that particular thinking about law, policy and development from each era shaped Kenya's responses to poverty alleviation in terms of its policy interventions throughout the decades. For Kenya, and indeed most of the developing world, globalization, whatever its form, historically meant the voluntary reception and or direct imposition of foreign ideas in various spheres of life.

³⁴⁸ Fifth Schedule, The Constitution of Kenya 2010.

We have seen that each of the globalizations and moments in law and development carried with them far-reaching consequences. Unfortunately, these impositions were without regard for the prevailing socio-economic conditions of the newly emerging states such as Kenya.³⁴⁹ We conclude that this disregard caused a persistent disconnect between law in the books and law in practice.

³⁴⁹ See Trubek and Galanter (n. 28).; Lee (n. 37).; Lee (n. 121).; Tamanaha (n. 113).; Davis and Trebilcock (n. 115).

CHAPTER THREE

LEGISLATIVE, POLICY AND INSTITUTIONAL FRAMEWORKS FOR DEVELOPMENT AND POVERTY ALLEVIATION

3.0. Introduction

In the preceding chapter, we examined Kenya's historical and contemporary approaches to poverty alleviation from 1884 to 2018. Significantly, we noted that since 1963, poverty alleviation has been a recurring feature in Kenya's historical and contemporary development, and a key driver of the struggle for governance and institutional reforms. In this chapter, we examine the manifestation of poverty and development in policy and law. While there is currently no stand-alone treaty or legal framework for development or poverty alleviation at the international, regional or domestic levels respectively, these aspirations are nonetheless manifested via other existing instruments, particularly in the realm of human rights. This chapter, therefore, reviews how development and poverty alleviation manifest in select legislative and institutional frameworks at the international, regional and domestic levels and how case law has reinforced conceptions of African philosophy in their interpretation.

3.1. Dimensions of Poverty, Human Rights and the Law

While the legal frameworks at all levels do not provide directly for standalone statutes or instruments on poverty alleviation, the contemporary definitions of poverty form a broader conceptual framework within which safeguards against "want" in the various dimensions or indicators of poverty suffice within the Human rights realm. This paper adopts this definition for purposes of assessing the approaches to poverty alleviation and their effectiveness and or disconnect. In that regard, the UNDPs MPIs suffices. The MPI features three dimensions and ten indicators, namely: health (child mortality, nutrition), education (years of schooling, enrolment), and living standards (water, sanitation, electricity, cooking fuel, floor, assets). These indicators

speak directly to other challenges of poverty, such as inequality. Inequality is also measured under different dimensions, whether it's income inequality, gender inequality, racial inequality etc.³⁵⁰

To address these triple challenges of poverty, deprivation and inequality, each of the dimensions of poverty and inequality is addressed variously via the international human rights framework. This is especially so for socio-economic rights, whose conceptualization and enunciation addresses themselves greatly to dimensions of poverty.³⁵¹ Socio-economic rights, as shall be evident under the relevant international, regional and domestic frameworks includes the right to an adequate standard of living, including food, clothing, and housing; right to work; the right to physical and mental health; the right to a healthy environment; the right to social security and the right to education. These instruments superintend international human rights guarantees and underlie the human rights-based (HRB) approaches to development which looks at development beyond economic growth.³⁵²

Indeed, case law equally demonstrates the prominence of group rights as opposed to individual rights, and the struggle between western and African conceptions of rights and development. In this contemporary conception of human rights, beginning with the UN Charter after the Second World War, human rights became the subject of international, and not just domestic, concern.³⁵³ This understanding, therefore, provides us with the tools for analysing the relevant legislative and institutional frameworks on human rights to assess how they address the indicators and by so doing, broadly seek to mitigate poverty and inequality.

3.2. International Legislative and Institutional Framework

Under the auspices of the UN, a robust international human rights framework has emerged over the years. This framework redefines development, codifies socio-economic rights, creates

³⁵⁰ See Kimberlé Williams Crenshaw, 'Intersectionality, Identity Politics And Violence Against Women Of Color' [2006] Kvinder, Køn & Forskning.

³⁵¹ Author's own note (n. 106). See also (*Oecd.org*, 2015) <<https://www.oecd.org/dac/POST-2015%20multidimensional%20poverty.pdf>> accessed 16 January 2020.

³⁵² See Tatyana P Soubbotina, *Beyond Economic Growth* (World Bank 2004).; Peter Uvin, 'From the Right to Development to The Rights-Based Approach: How 'Human Rights' Entered Development' (2007) 17 *Development in Practice*.

³⁵³ See Dinah L. Shelton, 'An Introduction to The History of International Human Rights Law' [2007] GWU Legal Studies Research Paper <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1010489> accessed 15 May 2020.

mechanisms to clarify the nature of the state's obligations, and monitors their realisation. It can be summed up as follows.

3.2.1. UN Declaration on The Right to Development

The Declaration on the Right to Development (UNRtD) was adopted by the UN General Assembly on December 4th 1986.³⁵⁴ The RtD derives from the broad foundations of the UN Charter, particularly Article 56, as read together with Article 55, and Article 22 of the UDHR. The Declaration equally supports Contemporary approaches to poverty alleviation, recognizing development as an inalienable right under Article 1 of the Declaration.

By this approach, the RtD uniquely and comprehensively links human rights aspects to the issue of development. Through this provision, and under Article 2(2), the RtD shifts focus to the individual, placing persons at the heart of the development process as both the subject and beneficiary of it. Accordingly, a distinction is made between "*the right to development*" and the "*process of development*," both recognized as integrated parts of the whole.³⁵⁵ Such that, since development is "*gradual improvement of a people's circumstances*," the RtD, other than protecting the right to development, requires that people actively participate in the processes that bring about development. This fits well with Sen's appreciation of Development as Freedom and generally, HRB approaches to development which places a premium on participation. Indeed, Social approaches to poverty alleviation equally find footing in the exposition of Article 2(2) of the RtD, for instance, Basic Needs and Poverty Reduction Strategy Papers.

Consequently, recognition is given to individual responsibility for development, by which all peoples, personally and jointly, should uphold and safeguard an appropriate political, social and economic order for development. Under Article 2(3), the duties and obligations of the State are defined, including creating the conditions necessary for development. These measures - policy,

³⁵⁴Development is defined in the Preamble of the RtD as 'a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.' See 'OHCHR | Declaration on The Right to Development' (*Ohchr.org*, 2020) <<https://www.ohchr.org/en/professionalinterest/pages/righttodevelopment.aspx>> accessed 17 May 2020.

³⁵⁵ See Beate Rudolf, 'The Relation of the Right to Development to Existing Substantive Treaty Regimes', *Implementing the Right to Development: The Role of International Law* (1st edn, Friedrich-Ebert-Stiftung 2008).

legislative and otherwise - must be suited to the full exercise and gradual realization of the right to development. Under Article 6(2), all rights are viewed as an integrated whole and the right to development as an elaborate component of their achievement.

This conception of development also shifts focus away from the traditional obsession with economic growth metrics such as GDP and GNP, as espoused in the Classical approaches.³⁵⁶ Indeed, the RtD promotes international cooperation as essential to establishing the enabling conditions for development.³⁵⁷ In that sense, the Declaration, in recognition of global power dynamics and the challenges faced by the developing world, requires that developed nations contribute to the realization of basic socio-economic development globally.³⁵⁸ However, the declaration has not been without challenges and criticism, mostly arising from its lack of an operationalization mechanism given its non-binding nature. Specifically, its moral and legal justification, justiciability and fundamental provisions remain subject to the ongoing debate.³⁵⁹

3.2.2. Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR), notably the archetypal for human rights, was adopted by the UN General Assembly on 10th December 1948.³⁶⁰ It outlines the universal basic rights and freedoms, i.e., the inalienable entitlements of all human beings. They span economic, social, political, cultural and civic rights. Whereas the UDHR has no explicit reference to the right to development, the right's foundations can be interpreted as amongst those contemplated under the socio-economic and cultural rights category.³⁶¹ In that regard, Articles 22 to 27 of the UDHR suffice. Specifically, Article 22, amongst other things, provides for the realization of the economic, social and cultural rights as indispensable to dignity and the free development of personality.

³⁵⁶ See Soubbotina (n. 352) 23-33.

³⁵⁷ See Ian Brownlie, *The Human Right to Development: Study Prepared for The Commonwealth Secretariat* (Human Rights Unit, Commonwealth Secretariat 1989).

³⁵⁸ See Margot E. Salomon, 'Legal Cosmopolitanism and The Normative Contribution of The Right to Development', *Implementing the Right to Development: The Role of International Law* (1st edn, Friedrich-Ebert-Stiftung 2008).

³⁵⁹ See Arjun Sengupta, 'Right to Development as a Human Right' (2001) 36 *Economic and Political Weekly* <<https://www.jstor.org/stable/4410829>> accessed 21 May 2020.

³⁶⁰ See 'Universal Declaration of Human Rights' (*Un.org*) <https://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf> accessed 24 May 2020.

³⁶¹ See Salomon (n. 358) 23.

Seven decades since its adoption, the framework of the UDHR continues to form the basis for all international human rights law.³⁶² From it have emerged over eighty (80) transnational and regional human rights treaties and declarations, and domestic constitutional guarantees and statutes. Taken together, this framework constitutes an elaborate legally binding system for the upholding and safeguarding of human rights. Indeed, the emergence of the Contemporary Approaches to poverty alleviation such as the Human Rights-Based Approach to development directly draw from its legacy. Arguably, Article 22 of the UDHR addresses itself to Sen's Development as Freedom in its promotion of human rights as inseparable from dignity and the free development of personality. While this instrument is not as robust on socio-economic rights as the ICECSR, it nonetheless provides a basis for the Social Approaches as well in its all-encompassing approach to rights and development.

3.2.3. Vienna Declaration and Programme of Action

The Vienna Declaration and Programme of Action was adopted on 25th June 1993 by the World Conference on Human Rights.³⁶³ Concerning development, Article 2 of the Declaration affirms the peoples' right to self-determination.³⁶⁴ The Declaration deals with the Social as well as the Contemporary Approaches. This is further reinforced under Article 11, which promotes sustainable development.³⁶⁵ Poverty and its alleviation are noted as challenges that require joint action of the international community to eradicate for sustainable human development, outlined under Article 25.

³⁶² See Hurst Hannum, 'The UDHR In National and International Law' (1998) 3 Health and Human Rights <<https://www.jstor.org/stable/4065305>> accessed 15 May 2020.; See also 'The Foundation of International Human Rights Law' (*Un.org*) <<https://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html>> accessed 17 May 2020.

³⁶³ See 'Vienna Declaration and Programme of Action' (*Unesdoc.unesco.org*) <<https://unesdoc.unesco.org/ark:/48223/pf0000096121>> accessed 25 May 2020.

³⁶⁴ It notes that under that right they freely determine their political status, and freely pursue their economic, social and cultural development.

³⁶⁵ Provides for the right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations.

3.2.4. International Covenant on Economic, Social and Cultural Rights

Perhaps the most robust framework on the Social and Contemporary approaches to poverty alleviation is the International Covenant on Economic, Social and Cultural Rights (ICESCR). The ICESCR is the foremost framework on second-generation rights. It was adopted by the UN General Assembly on 16th December 1966.³⁶⁶ The UDHR and the ICESCR make up the ‘International Bill of Human Rights.’ Key to the ICESCR is the protection of basic economic, social and cultural rights. Article 1 of the ICESCR provides for the right of self-determination, noting that by that right, people can freely determine their political status and freely pursue their *economic, social and cultural development*. Under Article 2, the ICESCR provides for state obligations, requiring that state parties take steps for achieving progressively the full realization of the rights including particularly the adoption of legislative measures. Emphasis on states obligations borrows from the Classical approaches’ bias for the state as guarantor of socio-economic and political well-being.

Thus, while the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect. This is emphasised under *General Comment No. 3, on The Nature of States Parties Obligations* and its minimum core obligations framework.³⁶⁷ The Optional Protocol to the ICESCR (OP-ICESCR) establishes a mechanism for bringing violations of economic, social and cultural rights before the UN Committee on Economic, Social and Cultural Rights. The Contemporary approaches such as the Human Rights-based ones and the Social Approaches such as basic needs and poverty reduction strategy papers derive heavily from the framework of the ICESCR concerning the attainment of SERs and their potential for poverty alleviation.

³⁶⁶See ‘International Covenant on Economic, Social and Cultural Rights’ (*Ohchr.org*) <<https://www.ohchr.org/Documents/ProfessionalInterest/cesr.pdf>> accessed 21 May 2020.

³⁶⁷ See CESCR General Comment No. 3: The Nature of States Parties (adopted on 14 December 1990) UNGA Res E/1991/23.

3.2.5. The Convention on the Elimination of All Forms of Discrimination against Women

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted by the United Nations General Assembly on 18th December 1979. It is the most robust framework for the prevention of discrimination and other detrimental practices towards women. Its basis is an appreciation of the continued existence of widespread discrimination against women across the world that violates the principles of equality of rights and respect for human dignity. It details the meaning of equality and outlines how it is to be achieved through non-discrimination. In so doing, it explicitly lays down an international bill of rights for women. It also gives state parties an agenda for action for the guarantee and enjoyment of rights by women. Article 1 defines discrimination to include any distinction, exclusion or restriction made based on sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. State parties are obligated to take such actions as are appropriate to eliminate all forms of discrimination against women. CEDAW forms part of the social approaches to poverty alleviation, addressing primarily how discrimination results in inequality and the need to mitigate the same. Discrimination feeds inequality and poverty across metrics such as race, class, caste, gender, age, health etc.

3.2.6. UN Millennium Declaration

The UN Millennium Development Goals (MDGs) were a set of eight (8), fifteen (15) year development objectives adopted in the year 2000.³⁶⁸ The Declaration symbolized the UN's effort to eradicate extreme poverty and other pressing development concerns by 2015. Concerning the right to development, Section III, Article 11 reiterates the UN's commitment to making the right to development a reality for everyone and to freeing the entire human race from want. The MDGs

³⁶⁸See 'United Nations Millennium Declaration' (*Un.org*) <https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_55_2.pdf> accessed 21 May 2020.

were succeeded in 2015 by the Sustainable Development Goals (SDGs). The MDGs significantly encouraged governments to build their development strategies around the RtD. The RtD is noted as facilitative of the objectives of the MDGs and, in the realization of the UN Charter's aspirations for a more equal and just world.³⁶⁹ The Declaration took on both the Contemporary and Social approaches to poverty alleviation. Emphasis was laid on human rights as essential for sustainable development, and basic needs of all as critical for attaining social equity and meaningful poverty alleviation.

3.2.7. The 2030 Agenda for Sustainable Development

The UN 2030 Agenda for Sustainable Development, commonly known as Sustainable Development Goals (SDGs), was adopted in 2015 and succeeded the MDGs.³⁷⁰ The SDGs equally seek to end poverty, protect the environment and promote sustainable development through to 2030. There are seventeen (17) SDGs, integrated in their conception such that action in one area affects outcomes in others. In that sense, the SDGs target development that balances social, economic and environmental sustainability.³⁷¹ Specifically, Article 10 states, amongst other things, that the agenda is grounded in the UDHR, international human rights treaties, the MDGs, as well as the Declaration on the Right to Development. Like the MDGs, the SDGs equally espouse Contemporary and Social approaches to poverty alleviation. This grounding highlights the salience of human rights to the attainment of the SDGs, which aim to reduce poverty, ill-health and inequality as well as increase access to education and improve environmental sustainability. SDGs place prominence on sustainability, built around respect and attainment of human rights as essential for sustainable development, and basic needs of all as critical for attaining social equity and meaningful poverty alleviation.

³⁶⁹ See 'Information Note: The Right to Development – Framework for Achieving the MDGs' (*Un.org*) <https://www.un.org/en/events/righttodevelopment/pdf/info_note_rtd_mdgs.pdf> accessed 20 May 2020.

³⁷⁰ See 'The 2030 Agenda for Sustainable Development' (*Sustainabledevelopment.un.org*, 2020) <<https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf>> accessed 24 May 2020.

³⁷¹ See Joyeeta Gupta and Courtney Vegelin, 'Sustainable Development Goals and Inclusive Development' (2016) 16 *International Environmental Agreements: Politics, Law and Economics* <<https://link.springer.com/article/10.1007/s10784-016-9323-z>> accessed 16 May 2020.

3.3. International Institutional Framework

At the international level, the institutional framework features different treaty bodies which oversee the implementation of their respective treaties.³⁷² For this study, the following are key for the protection and promotion of human rights in the context of the right to development and the attainment of other socio-economic rights.

3.3.1. UN Human Rights Council

The Human Rights Council (HRC) was created by a Resolution of the UN General Assembly on 15th March 2006.³⁷³ It replaced the Commission on Human Rights. The HRC principally undertakes periodic review of the fulfilment by each State of its human rights obligations and commitments. It is also responsible for strengthening the promotion and protection of human rights around the globe and for addressing situations of human rights violations and making recommendations on them.

A Complaint Procedure allows individuals and organizations to bring human rights violations to the attention of the Council. Under the Council are established Intergovernmental Working Groups (WG), amongst which is the WG on the Right to Development and the High-Level Task Force on the Right to Development (HLTF). The primary purpose of the two is to explore further ways to implement the RtD. The HLTF serves as an academic expert advisory group to the HRC. The HLTF reports to the WG on the progress made regarding work assigned to it in the preceding year. Both the WG and HLTF hold annual meetings during which consensus is sought on commonly accepted grounds in the interpretation and implementation of the RtD.

³⁷² See 'UN Human Rights Treaty Bodies | International Justice Resource Center' (*Ijrcenter.org*) <<https://ijrcenter.org/un-treaty-bodies/>> accessed 9 May 2020.

³⁷³ See ODS Team, 'Human Rights Council' (*Documents-dds-ny.un.org*) <<https://www.ohchr.org/EN/HRBodies/HRC/Pages/AboutCouncil.aspx>> accessed 14 May 2020.

3.3.2. Treaty Bodies

While there are various treaty bodies for monitoring and overseeing the implementation of various human rights instruments, this study focuses on a select few concerning the instruments highlighted in the legislative framework.

i. Committee on Economic, Social and Cultural Rights

The Committee on Economic, Social and Cultural Rights (CESCR) is mainly tasked with overseeing state parties to the ICESCR's implementation of their obligations under the treaty.³⁷⁴ Its work is operationalized by the Optional Protocol to the ICESCR (OP-ICESCR).³⁷⁵ The protocol came into force in 2013 and establishes mechanisms for conveying violations of economic, social and cultural rights to the Committee. It outlines an individual complaints' mechanism, an inter-state complaint mechanism and an inquiry procedure. It also requires state parties to submit regular reports to the Committee on how these rights are being implemented. An initial reporting period of two years is allowed for new member states, and thereafter every five years. Complaints can only be received from Member states who have ratified the Optional protocol. Kenya has not ratified the Optional Protocol. To promote the meaningful progressive realization of these rights, the Committee pioneered the concept of minimum core obligations under General Comment No. 3, on the *Nature of States Parties' Obligations*.³⁷⁶ The minimum core obligations ought to be immediately realized as a matter of priority. They outline a floor below which states ought not to fall in meeting their obligations.

ii. Committee on the Elimination of Discrimination against Women

The Committee on the Elimination of Discrimination against Women (CEDAW) is charged with overseeing the implementation of the Convention on the Elimination of All Forms of Discrimination against Women. The Committee consists of 23 experts on women's rights. State

³⁷⁴See 'OHCHR | Committee on Economic, Social and Cultural Rights' (*Ohchr.org*) <<https://www.ohchr.org/en/hrbodies/cescr/pages/cescrindex.aspx>> accessed 24 May 2020.

³⁷⁵ See 'OHCHR | Optional Protocol of The Covenant on Economic, Social and Cultural Rights' (*Ohchr.org*) <<https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCESCR.aspx>> accessed 12 May 2020.

³⁷⁶ UNGA (n. 304).

parties are required to submit regular reports to the Committees on the implementation of the rights in the treaty. The Optional Protocol to the treaty details the mandates of the Committee to receive communications from individuals or groups regarding violations and initiate inquiries into situations of grave or systematic violations of women's rights. These procedures are optional and are only available where the State concerned has accepted them.

3.4. Regional Legislative and Institutional Framework

Regional human rights frameworks draw their basis from Articles 52, 53 and 54 of the UN Charter.³⁷⁷ The African regional framework falls under the auspices of the African Union (AU), formerly the Organization of African Unity (OAU). The OAU Charter recognizes the full range of human rights, including the promotion of social, cultural and economic rights. Closer home, the Treaty for the establishment of the East African Community equally provides for the protection and promotion of Human Rights.

3.4.1. African Charter on Human and People's Rights

The African Charter on Human and People's Rights (Banjul Charter) was adopted on 27th June 1981.³⁷⁸ It's Africa's preeminent instrument for the protection of Human rights. The Preamble of the Charter reaffirms Member states commitment to pay particular attention to the *right to development*. It notes that civil and political rights cannot be detached from economic, social and cultural rights in their conception as well as universality. Significantly, it recognizes that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights. The Charter encompasses elements of the Social and Contemporary approaches in its promotion of the indivisibility of rights and their realization as key to improving the well-being of people.

The Charter remains the only binding transnational human rights framework for the enforcement of the right to development. The right to self-determination is anchored under Article

³⁷⁷ These provisions of the UN Charter create space for the development of Regional Charters or treaties that complement the international Human rights framework.

³⁷⁸ See AM&BF PLC, 'African Commission on Human and Peoples' Rights Legal instruments' (*Achpr.org*) <<https://www.achpr.org/legalinstruments/detail?id=49>> accessed 25 May 2020.

20, empowering people to determine their political status and pursue their economic and social development. Further, Article 22(2) places on states the duty to take such measures as are necessary to promote the exercise of the right to development. Unlike the Declaration on the RtD itself, the African Charter goes further and recognises the right to development as a distinct justiciable right.³⁷⁹ Equally, Article 24 requires that all peoples enjoy the right to a general satisfactory environment favourable to their development.

3.4.3. Treaty on the Establishment of the East African Community

The East African Community (EAC) was founded in 1967, collapsed in 1977, and was revived on 7th July 2000. The EAC treaty reaffirms respect for international human rights instruments and all generations of rights. Firstly, Article 3(3) of the Treaty stipulates that the observance of human rights is a condition precedent for joining the East African Community. Article 6, on Fundamental Principles of the Community, states amongst other things, the recognition, promotion and protection of human and peoples' rights under the provisions of the African Charter on Human and Peoples' Rights. This is equally reinforced under Article 7(2), which requires that partner States commit to the maintenance of universally accepted standards of human rights. However, it has no regional mechanisms for the enforcement of Human rights.

3.5 Regional Institutional Framework

The African regional institutional framework for the right to development and second-generation rights primarily features the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights.

3.5.1. African Commission on Human and Peoples' Rights

The African Commission on Human and Peoples Rights (ACHPR) or the Commission, is established under Part II of the African Charter, specifically Article 30.³⁸⁰ Its main role is to

³⁷⁹ See Rebecca Browning, 'The Right to Development in Africa: An Emerging Jurisprudence? Examining the Endorois Recommendation by The African Commission for Human and People's Rights' [2011] Kenya Law Reports <<http://kenyalaw.org/kl/index.php?id=1900>> accessed 24 May 2020.

³⁸⁰ See African Charter on Human and Peoples' Rights (adopted 28 June 1981 OAU Res AHG/Dec.115 (XVI) (ACHPR) art 30.

promote human and peoples' rights and ensure their protection in Africa. Unlike the state reports based international framework, the African institutional framework allows individuals or groups to bring claims on their behalf or on behalf of others to the Commission or the Court for consideration. Accordingly, the African Commission enjoys a rich history of litigation and decisions regarding violation or infringement of individual or group rights. For instance, for the right to development, the Commission in *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* was called upon to make a finding on the right to development as a justiciable human right.³⁸¹

The Endorois community, a small indigenous community suffered eviction from their ancestral lands around Lake Bogoria in the 1970s for the creation of a public nature reserve. The state did not seek views nor participation from the community in taking that decision, nor were its members compensated for the loss of their communal lands. A suit was decades later brought to the Commission on their behalf, that Kenya had infringed their right to social, cultural and economic development under Article 22 of the African Charter.³⁸² The Commission agreed with the Endorois, recommending that Kenya return their lands. Further, the state was required to afford the community the right to participate in their development in any such future undertakings. The decision was noteworthy, being the first in which the Commission had outrightly ruled in favour of the rights of minorities and indigenous peoples, noting that the state bore the burden of creating conditions favourable to a people's development.

Equally significant for the African Commission was the Ogoniland Case, also known as *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria*.³⁸³ In this case, the Ogoni people, a minority community who occupy the Niger Delta, brought a claim against the Nigerian state for violation of their environmental and socio-economic rights following decades of environmental degradation through oil exploration in the delta at the expense of the Community. The Court ruled in favour of the petitioners, acknowledging the Community's rights had been

³⁸¹ See *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* [2009] 1 AFCLR 112 (ACJHR).

³⁸² See Art 22, The African Charter on Human and Peoples Rights.

³⁸³ See *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria*. [2001] AHRLR 60 (ACJHR).

violated by successive Nigerian governments and recommending restitution. Looked at broadly, the Commission's finding was supportive of the RtD for the right to self-determination, property rights, rights over natural resources and socio-economic development.

Principally though, the Commission laid out the negative and positive obligations imposed on states under Articles 16, 21 and 24 of the African Charter. The case also reaffirmed the integrated rights principle of the RtD, in which the protection of one class of rights has a corresponding positive bearing on the enjoyment of other related rights. In other words, the enjoyment of one right should not jeopardize the enjoyment of another. In all these cases, the Commission dealt with admissibility, the justiciability question, the content of rights claimed and the appropriate findings on violations or otherwise.³⁸⁴

3.5.2. African Court on Human and Peoples' Rights

The African Court on Human and Peoples' Rights (AfCHPR) was created under the Protocol to ACHPR, which came into force in 2004. The Court plays an advisory role and has jurisdiction over the interpretation and application of the Banjul Charter. It can only determine communications emanating from states who have ratified the Optional Protocol to the Banjul Charter. However, matters may also be referred to the Court by the African Commission.

Its notable determination is the Ogiek case, in *African Commission on Human and Peoples' Rights v. Republic of Kenya*.³⁸⁵ The Ogiek community, a minority group who traditionally inhabited the Mau Forest, were evicted from the forest by the Kenyan state without consultation, on the basis of protecting the forest. The Community alleged violation of their rights under the African Charter, specifically Article 2 on non-discrimination; Article 17 (2) and (3) on culture; Article 8 on religion; Article 14 on property; Article 21 on natural resources and Article 22 on the right to development.

³⁸⁴ See 'Admissibility of Complaints Before the African Court: A Practical Guide' (*Refworld.org*) <<https://www.refworld.org/pdfid/577cd89d4.pdf>> accessed 23 May 2020.

³⁸⁵ See *African Commission on Human and Peoples' Rights v. Republic of Kenya (The Ogiek Case)* [2012] 1 AFCLR 193 (ACJHR).

Firstly, to prevent further violations and breaches, the Court, in 2013 issued a provisional measures order, requiring the Kenyan state to cease further land transactions in the Mau Forest and refrain from taking any action until the matter is determined. In its final finding, the Court agreed with the Petitioners, finding that their rights had been violated. The Court noted, that a persistent denial of Ogiek land rights, their religious and associated cultural and hunter-gatherer practices constituted a violation of those rights by the Kenyan state. Kenya has however not implemented the decision of the Court.

3.6. Domestic Legislative, Policy and Institutional Framework

At the domestic level, the promotion of socio-economic rights, the right to development, development itself or poverty alleviation is manifest via various instruments, key of which is the Constitution of Kenya 2010. The Constitution aspires for a Kenya that's just and equitable. Key to this aspiration is the promotion of fundamental rights and freedoms, including SERs, and particularly the rights of minorities and vulnerable groups, through which the people can realize their full potential. The domestic framework for human rights in Kenya centres around the Constitution, the National Policy and Action Plan on Human Rights and statutes where applicable.

3.6.1. The Constitution of Kenya, 2010

Arguably, the Constitution of Kenya 2010 is in and of itself an experiment in social engineering in its attempt to address long-standing inequality and its effects such as poverty and underdevelopment, and as such, lies squarely within the Social Approaches. Rights are given robust prominence, encompassing protection, promotion and realization. International treaties which Kenya is party become Kenyan law by dint of Article 2(5) and 2(6). *Jus cogens* are domesticated vide Article 2(5), which recognizes the general rules of international law as part of the law of Kenya. While there is duality in practice, the Constitution contemplates automatic

domestication (monism).³⁸⁶ Kenya is currently party to six of the nine core human rights Conventions. It has also ratified various Optional Protocols.³⁸⁷

While the Constitution makes no express mention of RtD, the right is nonetheless manifest in the Constitutions SERs framework. Under Article 19(3), the Constitution recognizes that they may be other rights not recognized but which are nonetheless recognized or conferred by law. The RtD is indeed recognized by international law, which Kenya is a party to, and which by dint of Article 2(6), as read together with Article 19(3), means the RtD can be considered recognized or conferred by law. Other essential elements of the RtD are manifest under Article 10 on National values and principles. Key to these values and principles is the participation of the people, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised and sustainable development.

Accordingly, the Constitution, by its broad enumeration of rights, supports the promotion of HRB approaches to development, and its negotiated passage can be contextualized within the Contemporary Approaches. Kenyans yearned for a new beginning, which beginning was best thought to be achieved via a robust HRB framework. It defines the duties, obligations and responsibilities of duty bearers and rights holders.³⁸⁸ These rights are thus justiciable, and every Kenyan has the right to sue, both vertically and horizontally, for infringements.³⁸⁹ Progress realization of SERs is to be achieved under Article 21 (2) through the institution by the state of appropriate legislative, policy and other measures.³⁹⁰ Regarding the state's international obligations, Article 21(4) requires that the State enact and implement legislation to fulfil these obligations. However, these rights can be limited under specific conditions under Article 24.³⁹¹

³⁸⁶ See eKLR (n. 334).

³⁸⁷ See Davis Malombe and others, 'Kenya's Regional and International Human Rights Obligations' (*Khrc.or.ke*) <<https://www.khrc.or.ke/mobile-publications/economic-rights-and-social-protection-er-sp/126-kenya-s-regional-and-international-human-rights-obligations/file.html>> accessed 12 May 2020.

³⁸⁸ Article 20 on the application of the Bill of Rights, specifically Article 20(5) places a duty on the state, where the State claims that it does not have the resources to implement any right under Article 43, to show that the resources are not available. See Art. 20, The Constitution of Kenya 2010.

³⁸⁹ The State's obligation to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights is enshrined under Article 21.

³⁹⁰ Under Article 43, social-economic rights are outlined to include the highest attainable standard of health; to accessible and adequate housing, and to reasonable standards of sanitation; freedom from hunger; clean and safe water in adequate quantities; social security, and education. See Art. 43, The Constitution of Kenya 2010.

³⁹¹ Art 24, The Constitution of Kenya 2010.

Further, Article 42 details group rights to a clean and healthy environment.³⁹² The state's obligations regarding the environment are then enumerated under Article 69, while Article 70 provides for enforcement of environmental rights.³⁹³ Minorities and the rights attendant to them are provided for under Article 56.³⁹⁴ The need to give powers of self-governance to the people and promote cohesion is listed as a key objective of the Devolved system established under Chapter 11.³⁹⁵ All these rights are constitutive elements of the RtD.

3.7. Domestic Policy Framework

Other than the legal and institutional frameworks, at the domestic level equally, suffice policy frameworks adopted to further the aims of the Constitution and relevant international frameworks for human rights and its role in poverty alleviation. These policy frameworks address the multi-dimensional nature of poverty and poverty alleviation, and include: -

3.7.1. Sessional Paper No 3 of 2014 on National Policy and Action Plan on Human Rights

Adopted in 2016, the Sessional Paper No 3 of 2014 on National Policy and Action Plan on Human Rights³⁹⁶ is touted as the basis for coordination in the protection and promotion of human rights in Kenya. It gives effect to Chapter four of the Constitution and highlights ways to foster human rights principles in public service delivery. Priority human rights areas are listed as amongst others, economic and social rights as well as Group Rights. The Policy also clarifies the responsibilities for the implementation of human rights, as anchored in the Bill of Rights in the Constitution.

A monitoring and evaluation mechanism is similarly entrenched for assessing the fulfilment of human rights obligations by various duty holders. The Policy is to be implemented

³⁹² Art 42, The Constitution of Kenya 2010.

³⁹³ Art 69, the Constitution of Kenya 2010.

³⁹⁴ Provides for, and include, amongst others, the right to participate in governance and special opportunities in educational and economic fields and reasonable access to water, health services and infrastructure. See Art. 56, The Constitution of Kenya 2010.

³⁹⁵ Objectives of Devolution includes, amongst others, to *give powers of self-governance to the people and enhance the participation of the people, recognise the right of communities to manage their own affairs and to further their development and to protect and promote the interests and rights of minorities and marginalised communities.* See Chapter Eleven, The Constitution of Kenya 2010.

³⁹⁶ See 'Sessional Paper No 3 Of 2014 On National Policy and Action Plan on Human Rights' ([Statelaw.go.ke](http://www.statelaw.go.ke/wp-content/uploads/2016/10/Sessional-paper-on-policy-and-action-plan-on-human-rights.pdf)) <<http://www.statelaw.go.ke/wp-content/uploads/2016/10/Sessional-paper-on-policy-and-action-plan-on-human-rights.pdf>> accessed 21 May 2020.

through a five-year action plan. The Plan outlines specific priority action areas and outcome indicators to measure progress in the realization of human rights. State actors are required to observe, respect, protect, promote and fulfil human rights. Significantly, the Policy will help the national and county governments consciously mainstream human rights within the government's planning processes.

3.7.2. Sessional Paper No. 2 of 2019 On National Policy on Gender and Development

Adopted in 2019, the National Policy on Gender and Development was a build-up on the first National Policy on Gender and Development adopted in 2000. The state attempted to provide a frame of reference for furthering the aims of gender mainstreaming. The 2019 Policy furthers this objective by giving salience to the needs of women and the mainstreaming of the same across all sectors. The Policy equally furthers the aims of international human rights instruments regarding equality, diversity and participation. Other than the legal frameworks, the policy also recognizes other international initiatives on gender equality to which Kenya has been a party, for instance, UN Declarations such as the SDGs, MDGs etc. Key to this policy is the mainstreaming of gender perspectives in planning, programming, budgeting and implementation of development programmes. Prominence is given to improved livelihoods, promotion and protection of human rights, participation in decision-making and governance, recognition of gender and promotion of women empowerment in macro-economic management among others.

Critically for us, poverty is highlighted as one of the Policy's key thematic foci. This conception draws from the gendered dimension of poverty and its nexus with inequality. Its approach focuses on the non-material manifestation of poverty, for instance, the structural and systemic factors that impact people's capabilities, opportunities and agency in political, social and economic spheres. The Policy takes notice of the historical systemic challenges women have faced in terms of access to resources, power, decision making etc. When manifested as poverty, these make it difficult for women to make any meaningful contribution to nation-building or development. Thus, a solid basis for the furtherance of Affirmative Action is laid out in the Policy.

3.7.3. Sessional Paper No. 3 of 2009 National Land Policy

The National Land Policy is critical for our policy frameworks analysis for its role in promoting the rights of all over land. As a factor of production, land for a majority of Kenya's rural and peri-urban population has implications on poverty and its alleviation. Therefore, the National Land Policy's key objective is to secure the rights of all, whether the public, individuals, groups or communities over land. Key to these rights is the promotion of sustainable growth and development, investment and the reduction of poverty. Principally, the policy outlines measures to prevent harmful laws, customs and practices that discriminate against women, minorities, children and persons with disabilities regarding land ownership and its appropriation for survival. It recognizes that the development of the Country requires the full participation of every person, group, gender etc. A framework of policies and laws designed to ensure the maintenance of a system of land administration and management is detailed.

3.8. Domestic Institutional Framework

The domestic institutional framework in Kenya primarily rests with the institutions created under the new Constitution for the protection and promotion of human rights. The institutions are designed to strengthen constitutional democracy, an indispensable avenue for the promotion of rights, including the right to development. These can be summed as follows.

3.8.1. The Courts

The High Court of Kenya is established under Article 165 of the Constitution. Article 23 bestows on the Court the jurisdiction, per Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. The same is echoed under Article 165 (3)(b), where the High Court enjoys original jurisdiction to determine the question of alleged violations of a right or fundamental freedom. In that respect, the High Court has made various findings regarding claims of violations of socio-economic rights.

In *Mitu-Bell Welfare Society v Attorney General & 2 others*,³⁹⁷ Justice Mumbi Ngugi relied on ICESCR General Comment No. 7 on forced evictions, finding favourably for the plaintiffs who had been victims of eviction by the state.³⁹⁸ The matter regarded an alleged violation of Article 43 of the Constitution, particularly the right to housing. In summary, the Court held that in the absence of due process, adequate consultation and the provision of alternative housing or compensation, forced evictions are illegal.³⁹⁹ However, the Court of Appeal, in reversing the decision, determined that the trial court's reliance on the United Nations Guidelines on eviction was irregular as it was not based on specific Articles of a Convention ratified by Kenya but was based on general comments on the Convention.

In *Okwanda v. The Minister of Health and Medical Services & 3 Others*,⁴⁰⁰ the petitioner, a diabetic with a terminal disease, needed urgent medical attention but could not afford the prohibitive costs. He turned to the Courts, brought a claim against the state, for the enforcement of his right to the highest attainable standard of health under Article 43, as read together with Article 11 of the ICESCR. He equally invoked Article 57, specifically Article 57(d), which mandates the state to take measures to ensure the rights of older persons to receive reasonable care and assistance from their family and the State. While the Court agreed with the petitioner on the extent of the state's responsibility for the less privileged, it noted that the question at hand was whether the state had fulfilled its obligations under Article 43 as read in conjunction with Article 21. The Court found in the affirmative. The cost at which the services are provided, noted the Court, was a matter of government policy and not before the court. Accordingly, the Court dismissed the petition, on the basis that the petitioner had not presented evidence to show a violation of the right to the highest attainable standard of health.

³⁹⁷ See *Mitu-Bell Welfare Society v Attorney General & 2 others* [2013] eKLR (HC).

³⁹⁹ Justice Mumbi noted, that “*granted, these rights are progressive in nature, but there is a constitutional obligation on the state, to go beyond the standard objectionand assist the court by showing if, and how, it is addressing or intends to address the rights of citizens to the attainment of the social-economic rights, and what policies, if any, it has put in place to ensure that the rights are realized progressively.....*” See *Ibid*.

⁴⁰⁰ See *Mathew Okwanda v Minister of Health and Medical Services & 3 others* [2013] eKLR (HC).

Separately, in *Consumer Federation of Kenya (COFEK) v Attorney General & 4 others*⁴⁰¹, the Court was asked to make a finding based on violations of Articles 43 and 46 of the Constitution. The petitioners alleged that the state by failing to adequately control fuel prices, which act occasioned an escalation in the cost of living with an increase in food prices, transport and other essentials had violated Article 43. The Court noted that in alleging a failure by the state to fulfil its obligations under Article 43, the Petitioners should have placed before it such material as would inform the Court what the existing policies, if any, were, concerning the right in question, what the state had done or failed to do to ensure the enjoyment of the rights in question and how it had failed to meet its obligations under the Constitution. The Petition was dismissed on the basis that it was not possible to discern any failure on the part of the Respondents to fulfil their constitutional obligations under Article 43.

3.8.2. Article 59 Commissions

Article 59 Commissions include the Kenya National Commission on Human Rights (KNCHR), and the other Commissions created by an Act of Parliament under Article 59(4), namely the National Gender and Equality Commission (NGEC) and the Commission on Administrative Justice (CAJ) or Office of the Ombudsman.⁴⁰² Article 59 (3) affords every person the right to complain to the KNCHR, alleging that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. KNCHR's primary mandate is the promotion of human rights in Kenya, by acting as a watchdog over the Government for human rights.

For the NGEC, its functions are provided for in Section 8 of the NGEC Act 2011. This mandate primarily revolves around the broad provisions of Articles 10, 27, 43 and 59 on gender and equality related to compliance with the Constitution by state entities. Separately, the Office of the Ombudsman primarily deals with maladministration in the public sector. In this regard, the Commission is empowered to, among other things, investigate complaints of delay, abuse of

⁴⁰¹ See *Consumer Federation of Kenya (COFEK) v Attorney General & 4 others* [2012] eKLR (HC).

⁴⁰² See Art. 59, The Constitution of Kenya 2010.

power, unfair treatment, manifest injustice or discourtesy. Secondly, the Commission has the mandate to oversee and enforce the implementation of the Access to Information Act, 2016.

3.8.3 The National and County Executive Arms and Parliament/Assemblies as Actors

Until 2020, not much prominence was given to the promotion and protection of human rights, not just by the Executive arm of government, but by the State generally. Constitutional amendments since 1963 were primarily aimed at widening the scope of the state's powers, at the expense of human rights. The multi-dimensional nature of poverty and its interconnectedness with human rights received little to no attention in crafting appropriate responses. Beginning in the early 1990s, clamour for governance reforms by non-state actors and the citizenry forced Human rights back to the centre, which process gradually culminated in the adoption of the robust framework under the Constitution of Kenya, 2010.

Under the current framework, the National Executive and the County Executives are bound to not just promote and protect human rights, but also safeguarding equity, equality and non-discrimination, both in law and various policy frameworks. While National policy recommends the formation of Human Rights Units (HRUs) in all Government ministries, departments and agencies at both levels, this requirement is yet to be attained. Indeed, it is the duty of all Government ministries, departments and agencies to implement the Constitution and therefore mainstream human rights priorities in all projects and programmes, yet this doesn't always happen.

Noticeably, Gender as a critical contemporary focus of human rights enjoys the benefit of a State Department and related resourcing. Unfortunately, Parliament and County Assemblies have not taken up the mantle to specifically scrutinize all Government activities for their impact on human rights and the steps taken to minimize any negative impacts. Further, the Executive has been slow to provide resources in its budgetary plans to support the mainstreaming of human rights in the planning and budgetary process in the various government ministries, departments and agencies.

Through these mechanisms, and since the 2006/2007 financial year, the government has initiated various social protection programmes for instance Cash transfer programs, both for orphans and Vulnerable children; Hunger Safety Net Programmes; Older Persons Cash Transfers and People with Severe Disability Cash Transfer programs. While progress is slow, stakeholders continue to push for robust implementation of both the Constitutional and Policy frameworks at both levels of government and across state agencies.

3.8.4. Non-State Actors

a.Civil Society Organizations and Community Based Organizations

Non-governmental organizations have historically played a significant role in the promotion and protection of human rights in Kenya. The second liberation was largely achieved on the back of the work of NGOs, both Civil Society Organizations (CSOs) and Community Based Organizations (CBOs). By the late 1980s, Kenya had effectively converted from democracy to autocracy, to the great detriment of rights and freedoms. State abuse of personal freedoms heightened with the death of the democratization process hoped for at independence. The emergence of CSOs, CBOs and other non-state actors collectively bolstered the push for reforms and democratization.

With these reform movements was born the human rights movement, with the end goal being the opening up of the political space and the eventual adoption of the new Constitution. Even to date, these non-state actors continue to play a significant role in the promotion of human rights, and particularly Social Economic Rights and the protection of the rights of the marginalized. This much is evident in case law (*both domestic and regional courts*), and the actions of these actors, for instance in filing Alternative periodic Reports to the African Commission on Human & Peoples' Rights and ECOSOC on the implementation of the International Covenant on Economic, Social and Cultural Rights, essentially disputing the Kenyan state's formal characterization of the prevailing status of human rights protections and or

abuses.⁴⁰³ These non-state agencies continue to leverage human rights provide as a tool for empowerment initiatives which encompass human rights education, mobilization, advocacy and monitoring of Government policies by and on behalf of people who are poor and marginalized.

3.9. Conclusion

In this chapter, we have assessed how development and poverty alleviation manifest in select legislative and institutional frameworks at the international, regional and domestic levels and how case law has reinforced conceptions of African philosophy in their interpretation. We also assessed the notion of development as a legal right and examined the supportive legislative and institutional frameworks at the international, regional and domestic levels. We noted that despite the RtD being non-binding, it finds expression via other binding instruments such as the ICESCR and the African Charter. We established that the same applies to poverty, which manifests via frameworks such as the Human rights realm. We argued that in that sense, Kenya's Constitution furthers the right through its domestication of the "international bill of rights" via Article 2(5) and (6), a robust Bill of Rights, Article 59 Commissions as well as the Courts. Nonetheless, we observed that despite the apparent sufficiency of law and requisite institutions, the incorporation of specifically HRB responsive measures and implementation of the RtD in its composite manifestations within the socio-economic realm remains a challenge in Kenya.

⁴⁰³ See Taking these Rights Seriously: Civil Society Organisations' Parallel Report to the Initial State Report of the Republic of Kenya on the implementation of the International Covenant on Economic, Social and Cultural Rights; and Joint Civil Society Organizations Alternative Report To The African Commission On Human & Peoples' Rights

CHAPTER FOUR

PROBLEMATIZING POVERTY IN THE CONTEXT OF THE NATURE OF THE AFRICAN ONTOLOGY AND PHILOSOPHY OF LAW IN KENYA

4.0. Introduction

This chapter furthers our understanding of the study in two ways. Firstly, it problematizes and contextualizes poverty from the African perspective, and secondly, examines the nature of an African ontology and philosophy of law as a basis for understanding the failure of Kenya's historical and contemporary approaches to poverty alleviation to connect to the lived reality of Kenyans. The Chapter then examines epistemic and ontological assumptions about knowledge, consciousness and thought evident in the African World view and how these play out in the resulting contestations.

By this analysis, the Chapter demonstrates mismatches between the historical and contemporary approaches to poverty alleviation, the institutional and legislative frameworks adopted therewith, and the lived reality of Kenyans. We argue that this contestation is at the root of the failure of the approaches to meaningfully mitigate poverty and propose a re-imagination of law and development in Kenya, from the perspective of an African ontology and philosophy of law, particularly for its poverty alleviation approaches, through rejection of Western universalism. The terms "African" and "Kenyan" are used interchangeably. They primarily refer to cultural formations and how this interacted with imposed legal thought and practice within the *Three Globalizations, policy transfer and diffusion* and the approaches to poverty alleviation.

4.1. The Concept of Poverty – An African Perspective

The contemporary conceptualization and understanding of the term "poverty" remains mired in controversy. Principally, there seems to be no consensus nor exactitude as to what the term means.⁴⁰⁴ As seen elsewhere in Chapter One, the term's contemporary meaning has morphed

⁴⁰⁴ See Caterina Ruggeri Laderchi, Ruhi Saith and Frances Stewart, 'Does It Matter That We Do Not Agree On The Definition Of Poverty? A comparison of Four Approaches'(2003) 31 Oxford Development Studies 3 < <https://www.ophi.org.uk/wp-content/uploads/ssRuggeri-Laderchi-Saith-Stewart-2003.pdf>> accessed 25 September 2020.

over the decades, from a purely economic or monetary conception of a shortfall in income levels to a multidimensional characterisation that takes account of non-economic factors.⁴⁰⁵ The result is a multiplicity of metrics by which poverty is measured and classified.⁴⁰⁶ The global system is such that these metrics, whichever they may be, are primarily developed by Western or transnational institutions or academics, and applied to Africa and Africans from a development policy perspective. Indeed, evidence suggests insufficient participation of Africans at the grassroots level in the preparation of these metrics.⁴⁰⁷ In other words, it seems little attempt is made to find out from Africans for whom these metrics are applied in the form of policy solutions what it means to be “poor” and how do these perspectives inform legal and policy responses. Could this equally be part of the large disconnect? Might policy and legal prescriptions be set upon achieving the wrong targets in terms of the baselines for what it means to be poor?

The African view of wealth, poverty and well-being on one hand and the Western view of wealth, poverty and well-being on the other are at great variance. However, the historical violence of modernity and globalization in the capitalist system has tended to blur this reality. The contemporary African is just as concerned with material things and creature comforts. Nevertheless, that Africans have had historical experiences which have shaped the present poverty situations cannot be gainsaid. Whether it's colonialism, Judaeo-Christian value impositions, the slave trade and neo-colonialism, all have contributed to produce the vicious and seemingly inescapable forms of poverty whichever way or perspective one wants to describe it.

Writing for the World Bank, David Booth, Melissa Leach and Alison Tierney propose that perhaps the problem with crafting the right metrics lies in asking the right questions. That the answers to the questions *who are poor?; why are they poor?; and what can be done about it?* from an analysis of anthropological ethnographic works would provide better answers.⁴⁰⁸ They propose that anthropological work help enrich statistical poverty profiles, that a more important

⁴⁰⁵ See United Nations Department of Economic and Social Affairs, ‘Final Report on World Summit for Social Development’ (Resolution 1 world Summit, Copenhagen, March 1995) < <https://undocs.org/A/CONF.166/9>> accessed 25th September 2020 World Summit on Social Development in Copenhagen in 1995

⁴⁰⁶ Ibid.

⁴⁰⁷ See Green (n. 103).

⁴⁰⁸ See Booth, Leach and Tierney (n. 103).

contribution may be in documenting the variable, fluid, complex and contested categorisations and relationships that constitute the reality that poverty reduction efforts must contend with on the ground. The World has attempted the use of such an inclusive framework when identifying metrics.⁴⁰⁹

Yet, the concept of well-being from an African perspective has to do with all that which makes societal life worthwhile.⁴¹⁰ Primarily, these include cohesion and stability, societal harmony both at the individual and cosmological level, good health and sufficiency of resources necessary for everyone's enjoyment of life. To be well means to be possessed of both external (*resources*) and internal (*spiritual*) solidarity.⁴¹¹ Wealth on the other hand, within traditional African societies, connoted ownership of farmland, domestic animals and even family. As Kalu observes, poverty conversely is as much a cultural fact as it is an economic one.⁴¹² To find its meaning, one must revisit the language and the culture of a people. For instance, in his analysis of the multiplicity of words for “*lack*” or “*want*” in the Igbo language of Nigeria, Kalu concludes that a term for “*want*” may have more than one meaning for the levels of “*want*” or “*lack*” thereof. Such that such term may mean a state of “*absolute want*” or lack of material comforts, but equally mean the absolute lack or want of familial support or relations. For Kalu, assessment of vocabulary around poverty in Africa allows for reconstruction of the social systems that communities employ in negotiating the continuities amidst the invasion of change agents.⁴¹³

The foregoing framing is dialectically opposed to the language of poverty from the West, which is often informed by the experience of those who work in the “*industry*,” both in academia, states and international financial institutions.⁴¹⁴ This language is often then framed into

⁴⁰⁹ At the beginning of the millennium, with lessons from the failures of its programs, the World Bank embarked on poverty eradication strategy papers and mandated the use of anthropological studies to enrich its poverty indices through participants in identification exercise.

⁴¹⁰ See Rev. J. Kwabena Asamoah-Gyadu, 'Poverty, Wealth And Social Justice In Africa' (2012) 2012 Religions: A Scholarly Journal.; see also Ogbu Kalu, *Power, Poverty And Prayer: The Challenges Of Poverty And Pluralism In African Christianity* (Africa World Press 2006).

⁴¹¹ See Elizabeth Amoah, 'African Traditional Religion and The Concept of Poverty', *Religion and Poverty: Pan-African Perspectives* (Duke University Press 2009).

⁴¹² See Kalu (n. 410).

⁴¹³ See Kalu (n. 410) 60.; see also Blessing Gweshengwe, Noor Hasharina Hassan and Hairuni Mohamed Ali Maricar, 'Perceptions of The Language And Meaning Of Poverty In Brunei Darussalam' (2020) 55 Journal of Asian and African Studies.

⁴¹⁴ See Philippa Bevan and Sandra Fullerton Joireman, 'The Perils Of Measuring Poverty: Identifying The 'Poor' In Rural Ethiopia' (1997) 25 Oxford Development Studies.

measurables, what is often called the identification exercise, by which a “poverty line” is stipulated in income (or more generally, a ‘money metric’). This practice extends to multi-dimensional poverty evidence in the UNDP’s Multidimensional Poverty Index (MPI). For Africans, the language used to describe poverty and the metrics therewith have historically had immense implications on the implementation of policy, and conversely, how policies are perceived and accepted by the wider population.

As Kalu observes, poverty for Africans is more than material lack and includes the absence of knowledge, skill, dignity, sense of well-being, political voice, and the social support system of family. Thus, one cannot say that a person is poor as long as the kinship system with its coterie of the extended family remains functional.⁴¹⁵ Hughes also notes that for Africans, regardless of the circumstances, poverty is fundamentally a matter of distribution of the adequate provision that has always been there.⁴¹⁶ However, within this system are equally to be found the causes of deprivation, primary of which is certain socio-cultural practices that have survived colonialism, the forces of modernity and the process of globalization which often inadvertently hamper communal progress and require addressing, for instance, the treatment of women.

Nonetheless, the multi-layered meaning of “poverty” becomes evident in the African perspective. Yet, these non-western perspectives often seem lost or disregarded in the Western world’s eyes and globalization process. Attempts to address poverty have thus continually focused on metrics and perspectives drawn from Western socio-economic experience, and handed down historically by the conquest of weak nations through colonialism and continuing economic subjugation and exploitation. Joseph Stiglitz in *Globalization and Its Discontents* decries this state of affairs, analysing the role of the World Bank and IMF and their use of certain language around contemporary economic and development challenges such as poverty to push their agenda and continually impoverishing developing nations.⁴¹⁷

⁴¹⁵ See Kalu (n. 410) 62, 63.

⁴¹⁶ See Dewi Arwel Hughes, *Power And Poverty: Divine And Human Rule In A World Of Need* (Inter-Varsity Press 2008).

⁴¹⁷ See Joseph Stiglitz, *Globalization And Its Discontents* (1st edn, W W Norton & Company 2003).

As evidenced by anthropological studies, scholars such as Vigdis Broch-Due argue that contemporary measurements' obsession with material and measurable elements, such as income and nutrition will continue to present challenges to policymakers.⁴¹⁸ These approaches merely scratch the surface, with anthropologists arguing that deeper ethnographic analysis demonstrates far more complex, multi-layered pictures as demonstrated in the preceding paragraphs. While material deprivation is a reality everywhere, the understanding and interpretation of these deprivations vary widely across Africa, Kenya included. In other words, we may find that a culture groups the distinct components of material deprivation metrics differently from another. This distinctive understanding ought to form the core focus of the work of those involved in poverty and poverty alleviation, primarily based on the wider participation of those policy is to affect.

4.2. The Concept of Ontology and African Philosophy of Law

Ontology, as the philosophical study of beings, provides an understanding of the question, "Who am I?" While answers to this question have sufficed from fields as diverse as biology, anthropology and sociology, to frame its argument, this study seeks answers from the concept of an African philosophy of law. Because Ontology concerns itself with the study of beings, particularly the nature of beings, becoming or existence, reality and the basic categories of beings and their interactions within a hierarchy, we cannot conceive of an African philosophy of law without first understanding African ontology.⁴¹⁹

There is no doubt that a lasting legacy of colonialism was the imposition of English law and Western legal thought and practice. Yet, at independence, little effort was made to re-orient law and its application to the challenges bedeviling Kenya to African culture and experience. It was evident from colonialism that the globalization of Western law and legal thought had served little usefulness in enhancing the lives of Africans. It was foreign in its orientation, appropriative and exploitative in its design, and oppressive in its application. In that sense, this conception of

⁴¹⁸ See Vigdis Broch-Due, *Poverty Paradoxes: The Economy Of Engendered Needs* (Nordic Africa Institute (Nordiska Afrikainstitutet) 1995).

⁴¹⁹ See Chijioke Uzoma, 'An Overview of the Ontological Basis of African Jurisprudence' (2018) 9 Nanmdi Azikiwe Journal of International Law and Jurisprudence.

law was not amenable to addressing the lived reality of Africans in relation to poverty alleviation. As is true of any cultural configuration, this law and legal thought had evolved in Western society and was conditioned by the culture of said society, and manifested as an expression of their overall philosophy of life. Its imposition in Kenya and disregard of the African experience thus had far-reaching consequences for law and development, especially poverty alleviation.

a. Ontological Significance Of "I" and "We"

The ontological significance of “I” and “We” summarizes the primary difference between African and western conceptions of the individual and his place in society. For Africans, as noted by Mbiti, being is conceptualized in the phrase “*I am because we are, and since we are, therefore I am.*”⁴²⁰ On that basis, the ontological significance of "I" and "We" become essential to our understanding of African philosophy. Leopold Sedor Senghor observes that the African puts more emphasis on the group than the individual.⁴²¹ This conception is summarized in the Ubuntu philosophy. The individual is subservient to the community. Similarly, Sekou Toure pointedly avers that “*Africa is fundamentally communocratic.*”⁴²² This conception is different from Western philosophical systems where the individual and the reality of the individual enjoy a distinct status of autonomy vis-a-vis the non-self, manifested in Existentialism⁴²³ and characterized by Rene Descartes as “*Cogito ergo sum*” or “*I think therefore I am.*” For Africans, Ubuntu, whose origin is Zulu responds with “*Umuntu ngumuntu ngabantu,*” which means “*a person is a person because of or through others.*” This ontological characterization of “I” and “We” provides a basis for understanding African Philosophy or law or jurisprudence.

Thus, while the approaches to poverty alleviation have all been designed around western jurisprudential thought, practice and influences, the settings within which they operate in Kenya lend themselves to African conceptions of law, thought and practice. The obsession with the

⁴²⁰ See Mbiti (n. 62).

⁴²¹ Senghor writes, “Negro African society puts more stress on the group than on the individual, more on solidarity than on the activity and needs of the individual, more on the communion of persons than on their autonomy.” See Walter Skurnik, ‘Leopold S. Senghor, and African Socialism.’ Transl. Mercer Cook, New York 1964, pp. 93-4.

⁴²² Sekou observes that the collective life and social solidarity gives Africa a basis of humanism which many peoples might envy. See Sekou Toure, ‘Presence Africaine.’ Nos. 24 and 25, February-May 1959.

⁴²³ See Skurnik (n. 421).

individual within these approaches finds resistance in the African obsession with community. This clash, between individualism and collectivism, is definitive of the failure of these approaches to connect to the lived reality of poor Kenyans.

b. The African Concept of Personhood

Personhood in Africa connotes the process by which one becomes a “person.” Unlike Western philosophy, personhood is not something one is born with. Rather, one has to work towards becoming a “person.” Culture constructs personhood, and life, as it were, is a struggle for personhood. The attainment of personhood is therefore through acculturation, as one grows and conforms to certain norms and ethos of the community. Negritude or identity is derived from this process. Active participation in, and contribution to, community, are critical to personhood. Thus, personhood can be lost, or one can fail to achieve personhood. When one loses their identity, they also lose their personhood because society creates other identities that refer to such individuals by what it is that they have done to lose their personhood. From personhood derives African personality, which epitomizes the tenets of Ubuntu. Personality is defined by cordiality, sharing, sacrifice, belonging, respect etc. In Western philosophy, one is born a “person,” a free agent, of his own will and destiny, divorced from society and its cultural configurations.

c. The African Concept of Community

The notions of community in Africa and the West are diametrically opposed. Menkiti observes that the African view of Community moves from society to individuals, while the Western view moves instead from individuals to society.⁴²⁴ Collectivism is synonymous with African Community, signified by *Ubuntu*. The community defines the person as a person, not some isolated static quality of rationality, will, or memory. The African community is an organic collective of people. Community gives definition and value. To the West, a community is merely a group of persons, each with their determinate individuality, who come together to accomplish a task that could not be accomplished singly. In this understanding, the community is simply the

⁴²⁴ See Ifeanyi Menkiti, ‘Person and Community in African Traditional Thought’ (1984) 3 *The Journal of Modern African Studies* 349-369.

aggregated sum of individuals comprising it. It is an inorganic group of individuals constituted into something more like an association.

b). Ubuntu, African Jurisprudence and Received Western Legal Tradition

The conceptual distinctions highlighted in the preceding paragraphs regarding poverty, individuality, personhood and community between African and Western cultural configurations summarize the different contexts within which contemporary law operates. It also demonstrates the difficulty posed by the disregard of African ontology and philosophy of law. Ubuntu cherishes collectiveness, oneness, dignity and collegiality in its normative framework.⁴²⁵ Its basic tenets include communality, respect for human dignity, emphasis on family ties, sense of belonging, communal growth, regulation of human behaviour and promotion of restorative justice. This underpinning ties with the African concept of law and restorative justice. On the other hand, Western philosophy places the individual and the satisfaction of his wants or desires above all else.

Colonialism and the study of African societies by Western anthropologists conceptualized and defined philosophy in the image of the dominant Euro-American thought systems, considered benchmarks for measuring the propriety of all philosophical thought.⁴²⁶ It is only when Africans began studying and writing about African philosophical thought that consideration began being paid to the “possibility” of African philosophical thought. Trevor-Roper, a Professor of History at Oxford University, once remarked that there may be a future when there will be some African history to speak of.⁴²⁷ On the other hand, writing for *The Observer* on an African concept of Jurisprudence in 1951, R.T. Paget dismissed African philosophy of law as not more than a “tribal” fetish and far from being “law.”⁴²⁸ In other words, from a Euro-American perspective, Africans did not have a reflective system of laws before the arrival of colonialism. The notion of the non-

⁴²⁵ See New World Encyclopaedia (n. 36).

⁴²⁶ See Ndimma (n. 74).

⁴²⁷ Roper disparagingly wrote, “Perhaps in the future, there will be some African history to teach but at present there is none. There is only the history of the Europeans in Africa. See Hugh Trevor-Roper, *The Rise Of Christian Europe* (Thames and Hudson 1964).

⁴²⁸ He notes, that “in tribal society, law is governed not by logic but by fetish. To the tribe by fetish is just and trial by reason is unjust... it is futile to seek a reason in tribal justice, as it is not rational. See R.T. Paget, ‘Letter To The Observer’ *The Observer* (1951).

existence of an African philosophy of law is premised on the non-existence of written records about such law, nor of an African History.

Mohanty Chandra notes that Euro-Centrism manifests itself when non-western economic, religious and familial structures are treated as phenomena to be judged by Western standards.⁴²⁹ Thus, these structures are defined as ‘*underdeveloped*’ or ‘*developing*’ purposely to denigrate and desecrate the essence and existence of African realities. Because a people’s system and conception of law is connected with and rooted in their history, which is true for the beginnings and growth of English Law or Islamic Law, a denial of that history is a denial of said conceptions of law.

These assumptions or wilful contempt informed the imposition of Western law and legal thought throughout the *Three Globalizations*, firstly during Colonialism, and through neo-colonialism. The question of what is law, by formalist Western standards, whether Austin’s law as a *command of the sovereign backed by a sanction*, or conceptions of natural law, would not fit the African experience.⁴³⁰ For Africans, laws, in terms of the received Western legal tradition, were unknown and a society’s code of behaviour, albeit unwritten, was deeply ingrained in every member of society. Therefore, Morality, as understood in the African worldview was law in a sense. This is the situation colonialists found with the dawn of independence. There was no clear-cut distinction between law and morality since the rules of conduct did in a way amount to law.⁴³¹ This body of norms, customs, and practices constituted African Customary law. Therefore, drawing from the various African customs, it’s possible to extract an African philosophy of law.

The globalization of Western legal thought relegated African jurisprudence and reduced it to subordinate law.⁴³² Customary law and African judicial institutions were permitted, except where they felt that law and the institutions ran counter to the Western ideals or thought to be repugnant to the “civilized” ideas of justice and humanity (*repugnancy clause*). For example, in the 1917 case of *Lokilite ole Ndinoni v. Netwala ole Nebele*, the Maasai custom of blood money

⁴²⁹ See Chandra Talpade Mohanty, 'Under Western Eyes: Feminist Scholarship And Colonial Discourses' [1988] *Feminist Review*.

⁴³⁰ See Ike Oraegbunam, 'The Principles And Practice Of Justice In Traditional Igbo Jurisprudence' (2010) 6 *OGIRISI: a New Journal of African Studies*.

⁴³¹ See Taslim Olawale Elias, *The Nature Of African Customary Law* (The University Press 1956).

⁴³² See Cotran (n. 247).

was canvassed.⁴³³ The victim's family sought compensation from the killer's family under the custom thirty-five years after the killing of their kin. The Appeals Court rejected the claim on the grounds that it was repugnant to entertain a claim of this kind after such a long time. The repugnancy clause was commonly invoked by English colonial courts to invalidate African normative practices based on the rationale that the legal philosophies behind some of those norms were repugnant to justice and morality.

Further, in the 1952 case of *R v. Amkeyo*, the court invalidated a marriage validly contracted under African Customary Law on the basis that such a marriage was a wife purchase and repugnant to law.⁴³⁴ The reality is, Court's logic would today render most marriages in Kenya invalid, for dowry is a major part of any African marriage whether conducted formally, under Christianity or customarily. Hence, the Marriage Act and the Law of Succession Act expressly identify and recognize African Customary law on Marriages as one of the systems of Marriage and succession in Kenya. However, the lingering dominance of English law is still evident in its retention in Sections 3 (1) (b) and (c) of the Judicature Act.⁴³⁵ This hierarchy was maintained under the 2010 Constitution, under Article 2(4).⁴³⁶ However, unlike the Independence Constitution, the Constitution of Kenya, 2010, does provide for traditional dispute resolution mechanisms as one of the avenues for settlement of disputes.⁴³⁷

In 2013, the High Court, in *Republic v. Mohamed Abdow Mohamed*, allowed for the settlement of a murder charge via African traditional dispute resolution mechanisms.⁴³⁸ The parties had submitted themselves to traditional and Islamic laws which provide an avenue for reconciliation. He cited Article 159 (1) of the Constitution which allowed the courts and tribunals to be guided by alternative dispute resolution including reconciliation, mediation, arbitration and

⁴³³ See *Lokilite ole Ndinoni v Netwala ole Nebele* [1917] 7 EALR 14.

⁴³⁴ The court held that "the elements of a so-called marriage by native customs differ so materially from the ordinarily accepted idea of what constitutes a civilized form of marriage, that it is difficult to compare the two." See *R v Amkeyo* [1917] 7 EALR 14 (1917).

⁴³⁵ See Sec. 3 The Judicature Act 1967.

⁴³⁶ Article 2(4) provides thus, "any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid." See Art. 3 Constitution of Kenya 2010.

⁴³⁷ Article 67 (f), which requires the National Land Commission to encourage the application of traditional dispute resolution mechanisms in land conflicts.

⁴³⁸ See *Republic v Mohamed Abdow Mohamed* [2013] eKLR (High Court).

traditional dispute resolution mechanisms. The Court granted the request. It is fair to surmise that African jurisprudence will continue to subsist side by side with formal law, and will shape how future responses to the lived reality of Africans are addressed.

4.3. Viability of African Philosophy of Law for Poverty Alleviation in Kenya

As Basil Davidson avers, the soul of every race is manifest in its traditional institutions. These institutions define the nature and character of that race. As such, he notes, a people cannot derive help nor profit from institutions that are not the outcome of their traditional institutions.⁴³⁹ To conceive of a viable African Philosophy of law perspective to poverty alleviation is to answer the question, “*to what extent should African philosophy of law influence approaches to law and development for poverty alleviation?*” Such an undertaking must necessarily take cognizance of the influences of Western legal thought and practice and re-imagine these influences by finding a place for the application African philosophy of law, for instance, individualism and the notion of rights.

The task for us thus is to delineate a place for an African philosophy of law in the contemporary context. We have seen from the preceding paragraphs that the challenge with conceptualizing an African philosophy of law was made harder by attempts to do so through Western benchmarks. This approach was born of European ideological hegemony and perceived cultural superiority and sophistication, by which African lived realities including history, political and social structures, and normative structures and institutions are largely disputed and considered insignificant in value in contemporary discourse on logic, jurisprudence and legal philosophy.

Scholarship from the Continent has however suggested otherwise, contending that we can indeed glean a legal philosophy from the oral traditions of African societies as passed down over generations, a belief system, norms and practices which formed the concept of law for Africans. The closest approach to poverty alleviation from an African ontology and philosophy of law perspective was African Socialism, and more particularly, Tanzania’s Ujamaa, based on criticism

⁴³⁹ See Basil Davidson, *The African Past: Chronicles from Antiquity to Modern Times*, (Penguin 1996). 42

of Kenya's failed attempt at African Socialism. The writings of Mwalimu Julius Nyerere vis a vis Ubuntu philosophy shows there is a fine line or no difference at all. e.g., the African concept of communal ownership of property. But even Ujamaa failed to connect to the realities of Africans in Tanzania based on its objectives.⁴⁴⁰

The challenge we face in attempting to create a singular, African philosophy of law is that indigenous customary laws are not uniform, there are points of similarity and convergence, which transcend ethnic groupings, but there are also vast differences in the structure of the laws and contents. For that reason, the concept of Ubuntu comes close to providing a unifying standard for conceptualizing the key tenets of an African jurisprudence, principally, law as serving a restorative justice agenda to promote cohesion, peace and tranquillity in the society for the betterment of all. Indeed, this was demonstrated in Rwanda, South Africa and Kenya, through the Gacaca Courts, Truth Justice and Reconciliation Commission and the National Dialogue and Reconciliation Committee respectively. This was also the case in *R. v. Mohamed*.⁴⁴¹ In Rwanda for instance, the Gacaca courts are credited for having done much more in restoring social relationships among Banyarwanda than the formal courts would have done. African justice systems have been critical in pacifying states emerging from inter-ethnic conflicts. However, this approach has not been mainstreamed in the sphere of law and development.

Accordingly, for development and poverty alleviation, we can equally conceive of the function of law from an African Ontology and philosophy of law perspective as that of promoting restorative justice and equality for the underprivileged in the society. In *On 'African' Legal Theory: A Possibility, an Impossibility or Mere Conundrum?* Silungwe proposes that for contemporary Africa, it is easier to conceive of a conception of African Legal Thought along with the framework of Homi Bhabha's idea of 'culture's in-between'; which rejects a purist conception of 'culture' and emphasizes the diversity of 'influence'.⁴⁴² This argument accepts that received Western tradition has permeated the African landscape and certain influences are here to stay,

⁴⁴⁰ See Cranford Pratt, *The Critical Phase in Tanzania: Nyerere and the Emergence of a Socialist Strategy*, (Cambridge University Press, 1st edn 2009).

⁴⁴¹ See eKLR (438).

⁴⁴² See Silungwe (n. 72).

which contention we agree with. Perhaps future approaches will have to navigate this contestation to craft solutions that develop the best of both philosophies. Unlike Western conceptions of justice, African traditional justice is restorative rather than retributive, the main objective being the restoration of equilibrium between the interests of the individual and the broader community.

Since customary laws and institutions continue to play a significant role in the lives of large segments of the population in African countries, legal pluralism means the state must pay more attention to these traditional mechanisms in its approach to poverty alleviation. While State institutions recognize substantive customary and or religious laws as law and actions of customary institutions are considered enforceable (*e.g., in family law, property ownership through inheritance cases, marriage and its dissolution and final rites (burial) – for instance in the Wambui Otieno case*), this recognition has not materialized for development planning and poverty alleviation. The closest the state has come to leveraging the African philosophy of law for development is through the notion of Human rights.

Yet, while African philosophy of law can be gleaned from the 2nd and 3rd Generation Human Rights, i.e., economic, social & cultural rights and group/collective rights, self-determination, natural resources, satisfactory environment, even this conception is a Western construction, and therefore not wholly home-made for the realities of the African experience. But there is hope under Article 159 of the Constitution.⁴⁴³ Kenya's transformative constitution provides a basis upon which to further the aims of the African philosophy of law. As it is, the challenge is exacerbated by the lack of a statutory legal framework or policy to guide the application of the African philosophy of law under Article 159, not just by the courts or legal practitioners, but by policymakers in the implementation of development programs and initiatives. Yet, the state can still embark on this project. The continuation of the repugnancy test as enshrined in the Constitution and the low hierarchy value in the Judicature Act means serious consideration is yet to be made of the place of African philosophy of law in crafting responsive approaches to

⁴⁴³ Article 159 is a progressive Constitutional basis for Reforms – perhaps a national project to research and delineate the structure/composition/form/articulation of African (Kenyan) philosophy of law perspective and its application (statute/statutory reform or policy)

poverty alleviation in Kenya. The argument that African Jurisprudence has no literary or philosophical significance for general jurisprudence is coloured with racial prejudices and intolerance against Africa and its people. Indeed, culture, its recognition, respect and practice, is now a critical component of our Constitutional architecture.⁴⁴⁴

The argument that African Jurisprudence has no respect for human rights is weak and is grounded on the belief that communal rights negate individual rights. The assertion that African law is positive and not negative is based on the view that African law is the pursuit of social equilibrium, the maintenance of pre-existing harmony and not the punishment of offenders. By rejecting Western universalism, we can conceive of an approach to poverty alleviation that places Community first, respect for Human Dignity, emphasises belonging and ownership of processes through meaningful participation, promotes communal Growth and restorative justice. It is possible to incorporate these mechanisms within the received Western tradition.

4.4. Conclusion

In this chapter, we examined poverty and the alleviation approaches therewith within the context of the African ontology and philosophy of law perspective. We identified and problematized epistemic and ontological assumptions about poverty, knowledge, consciousness and thought evident in the African World view. We demonstrated mismatches between the historical and contemporary approaches to poverty alleviation, the institutional and legislative frameworks adopted therewith, and the lived socio-economic reality of Kenyans. We argued that this contestation is the root cause of the failure of the approaches to meaningfully mitigate poverty. In concluding, we proposed a re-imagination of law to account for the African experience in its application to development in Kenya, specifically for poverty alleviation. In the next Chapter, we undertake an analysis of select government policy documents to evaluate the effectiveness of the approaches against the lived reality of Kenyans.

⁴⁴⁴ The old Constitution had no mention of culture nor recognition of it. The conversations began by with CKRC and the place of value systems in a constitutional architecture.

CHAPTER FIVE

A CRITICAL ANALYSIS OF SELECT GOVERNMENT POLICY DOCUMENTS AND REVIEW OF REPORTS

5.0. Introduction

In this Chapter, we undertake a critical analysis of select government policy documents and reports relating to development and poverty alleviation. We hope to demonstrate their disconnect with the actual lived realities of Kenyans and why historically and contemporarily there hasn't been greater incorporation of African philosophy of law perspectives in policy framing and implementation in relation to poverty alleviation. To do so, we identify four key tools of analysis and contrast the policy provisions against the lived realities as described in key government assessment reports and other sources over the last five decades since independence. By so doing, we hope to distinguish between the nature of an African ontology and what's truly captured in the legislative and institutional frameworks from select provisions of government policies on development and poverty alleviation and thus concretize the philosophy using relevant examples.

Accordingly, we will analyse the following select policy documents and reports, i.e.: -

1. Sessional Paper No. 10 of 1965 on African Socialism and its Application to Kenya;
2. Sessional Paper No. 5 of 1975 on Economic Prospects and Policies;
3. Sessional Paper No. 4 of 1980 on Economic Prospects and Policies;
4. Sessional Paper No. 1 of 1986 on Economic Management for Renewed Growth;
5. The Social Dimensions of Development (SDD) Programme;
6. The National Poverty Eradication Plan (NPEP) 1999-2015;
7. Poverty Reduction Strategy Paper (PRSP) 2000-2003;
8. Economic Recovery Strategy for Wealth and Employment Creation (ERS), 2003-2007;
9. Sessional Paper No. 10 of 2012 On Kenya Vision 2030;
10. Welfare Monitoring Survey Reports, namely:
 - a. Welfare Monitoring Survey, 1990;
 - b. Welfare Monitoring Survey, 1994;

- c. Welfare Monitoring Survey, 1997;
- 11. Kenya Integrated Household Budget Survey Reports, namely;
 - a. Kenya Integrated Household Budget Survey 2005/2006;
 - b. Kenya Integrated Household Budget Survey 2015/2016; and
- 12. Annual Progress Reports on the Vision 2030 (MTP reviews).

5.1. Tools of the Critical Analysis

To carry out an African jurisprudential analysis of the select government policy documents and reports, we propose four analytical tools. The framing of these tools borrows from Wanjiku Kabira and Masheti Masinjila's *ABC of Gender Analysis*.⁴⁴⁵ By these tools, we hope our systematic analysis reveals the dynamics of each policy instrument and hence provides the basis for drawing conclusions on whether they respond to the African ontology and philosophy of law perspectives. The analysis develops by way of asking and seeking answers to a series of questions that ultimately show the level of responsiveness of policy to the African philosophy of law. Firstly, we analyse the text of the policy and secondly, deal with the identification of gaps through the use of both historical qualitative and secondary quantitative data, leading to the identification of appropriate strategies for bridging the gaps. The tools are, namely: -

a) Power and Its Dynamics

Power relations remain definitive of the North-South relationship and how this ultimately affects and informs policy options in the global South.⁴⁴⁶ Questions of power are crucial because North-South relations are kept in place by prevailing global power structures that are evident in policy options. Has African jurisprudence found a place in development policy options? To answer the foregoing, we turn to global power dynamics. Critical questions include; -

- i. Who has power?
- ii. Why do they have this power?

⁴⁴⁵ See Wanjiku Mukabi Kabira and Masheti Masinjila, *ABC Of Gender Analysis* (Forum for African Women Educationalists 1997).

⁴⁴⁶ See David Slater, 'Geopolitical Imaginations Across The North-South Divide: Issues Of Difference, Development And Power' (1997) 16 *Political Geography*.

- iii. What is the source of power?
- iv. Who receives power?
- v. What is the nature of this power?
- vi. How is power exercised?
- vii. How is power maintained and perpetuated?
- viii. What is the power distribution like and how is it reflected?

In this context, power has to do with decision making and the ability to force others to do what the power holder prescribes.⁴⁴⁷ Accordingly, this power often reveals itself when it is being exercised. Often, certain forms of power follow clearly defined or conventionally understood and accepted patterns. For our analysis, focus shifts to the substance of policy and the power that shapes such policy, for it greatly impacts the outcome at implementation. For instance, establishing the source of power tells us who has authority and legitimacy. Critical to this analysis are also subtle forms of power that may not have immediate coercive visibility, but which might, in the long run, play a crucial part in the unfolding of events.

b) Aid Assistance and Or Help and Its Dynamics

The notion of aid assistance and or help from a policy perspective carries great significance for this study. Hence, we assess the relationship between the “helper” (*Western donors*) and the “helped” (*developing nations*) as an indicator of the North-South relationships.⁴⁴⁸ From a social perspective, whoever is helped can be compromised and may have to be psychologically and ideologically dependent upon the helper. Indeed, sometimes the helper may end up doing the major part of the activity but still remain a “helper.”⁴⁴⁹ This analysis is critical in assessing the role of the Bretton Woods institutions in aid assistance and or “help” and how this help impacts African jurisprudential application in policy options.

⁴⁴⁷ See K Raffer and HW Singer, 'The Economic North-South Divide: Six Decades Of Unequal Development' (2002) 33 *Études internationales*.

⁴⁴⁸ See Emma Mawdsley, Laura Savage and Sung-Mi Kim, 'A 'Post-Aid World'? Paradigm Shift In Foreign Aid And Development Cooperation At The 2011 Busan High Level Forum' (2013) 180 *The Geographical Journal*.

⁴⁴⁹ See Maria Eriksson Baaz, *The Paternalism Of Partnership* (Zed Books 2005).

Critical questions include: -

- i. How is help defined?
- ii. Who helps?
- iii. What forms of help are there?
- iv. Who asks for (what) help?
- v. Who offers (what) help?
- vi. When is one helped?

Here, we seek to answer the question, to what extent did foreign help and or aid assistance impact the application of African philosophy of law and how does this create the gap evident in the lived realities of Kenyans.

c) Langue or Language

Our understanding of language is premised on the analysis of *langue* in Duncan Kennedy's Three Globalizations of Law and Legal Thought.⁴⁵⁰ For this study, language becomes critical as the means by which particularly western legal thought and consciousness are globalized. Critical questions here include: -

- i. How is language defined?
- ii. Whose language?
- iii. How is language diffused or spread?
- iv. Who receives the language?
- v. How does it shape events?

Language is one of the most important and subtle ways of portraying foreign influences and biases through conventions of speaking and writing. Here, we attempt to demystify the neutrality of language through analysis of its smaller components, quantifying their appearance in texts and taking these components through rigorous qualitative analysis. Kennedy notes *langue* or *language* in the context of globalization as a vocabulary of concepts and typical arguments. He

⁴⁵⁰ See Kennedy (n. 21) 23.

interrogates the positively enacted rules of the various countries to which the *langue* globalized as *parole*, or speech. These were simple legal phrases that became accepted as modes of communicating the globalizing ideas and thoughts, in the same way a phrase in English or any other language popularizes and gains currency as mainstream *parole* in relation to a specific subject.⁴⁵¹ Thus, for each period, various *parole* gained currency and prominence, from the Classical Legal Thought to the Social and the Contemporary. Hence, Kennedy notes, an infinity of regulatory statutes could be formulated in the conceptual vocabulary of any of the periodizations and justified using various sound bites from within the globalizing *parole* of any of the periods. How did this foraging *langue* impact and or displace the utility and influence of the *langue* of African philosophy of law in policy formulation?

d) Locus of Activities

Locus here refers to places where policy originates and operates from and how this influences the African philosophy of law's utility and usefulness. This is critical for determining the responsiveness of policy options to the African philosophy of law. It is noteworthy that in the first four decades of independence, policy options originated from Washington (*Washington Consensus*) and were imposed on Capitals in the South by coercion and other means. Critical questions include: -

- i. What is the locus of activities?
- ii. Which places signify importance and why?
- iii. What is the impact of the locus on visibility?

In this analysis, the locus may thus be broadly identified as Home (*homegrown*) or away from home (*foreign and imposed*). The analysis aims to demonstrate, inter alia, the advantages of operating from certain environments as opposed to others if we are to bridge the gap between policy and the lived reality of Kenyans.

⁴⁵¹ Ibid

5.2. Overview of Select Government Policy Documents

5.2.1. Sessional Paper No. 10 of 1965 on African Socialism and its Application to Kenya

Sessional Paper No. 10 was Kenya's first government policy planning document that sought to comprehensively address inequality at the dawn of independence. Its primary purpose was to guide economic growth, under the assumption that economic growth would, in turn, promote redistribution and address inequality and poverty. This economy-centric approach was in keeping with the *langue* of Kennedy's globalizations, characterized by an obsession with terms such as modernization, GDP, FDIs, Export Promotion, Import Substitution Industrialization etc. For the African ontology and philosophy, Sessional Paper No. 10 marked perhaps the first, and only, concrete attempt to rely on the African ontology and philosophy as the basis of government policy aimed at addressing persistent inequality and its sister challenge – poverty. This can be gleaned from its exposition of what constitutes African Socialism and its application to Kenya. The Sessional Paper explored at length the viability of an African ontology and philosophy as a possible avenue for bridging the gap between public policy pronouncements and the lived reality of Kenyans at the dawn of independence. Largely, the policy underscored its objective as dominated by a desire to ensure Africanization of the economy and the public service.⁴⁵² The Sessional Paper outlined the principal conditions the blueprint must satisfy as -

- i. it must draw on the best of African traditions;
- ii. it must be adaptable to new and rapidly changing circumstances; and
- iii. it must not rest for its success on a satellite relationship with any other country or group of countries.

The main features of African Socialism were highlighted as including -

- i. political democracy;
- ii. mutual social responsibility;

⁴⁵² African socialism was characterized as a term describing an African political and economic system that is positively African not being imported from any country or being a blueprint of any foreign ideology but capable of incorporating useful and compatible techniques from whatever source. See Government Printer (n. 194) para 7.

- iii. various forms of ownership;
- iv. a range of controls to ensure that property is used in
- v. the mutual interests of society and its members;
- vi. diffusion of ownership to avoid concentration of
- vii. economic power;
- viii. progressive taxes to ensure an equitable distribution of wealth and income.

African traditions for purposes of African socialism were broadly enumerated as twofold in nature, firstly, *political democracy*⁴⁵³ and secondly, *mutual social responsibility*.⁴⁵⁴ This, indeed, is classical ubuntu philosophy. The State was therefore obligated to ensure equal opportunities to all its citizens, eliminate exploitation and discrimination, and provide needed social services such as education, medical care and social security. Economic growth was given prominence as the definitive objective of African Socialism.⁴⁵⁵ That the most important of these policies was to provide a firm basis for rapid economic growth. Other immediate problems such as Africanization of the economy, education, unemployment, welfare services, and provincial policies were to be handled in ways that will not jeopardize growth. It concluded thus, that the only permanent solution to all of these problems rests on rapid growth.

Indeed, while the first decade of independence experienced impressive economic growth based on Sessional Paper No. 10, little was achieved in poverty alleviation, especially the alleviation of extreme poverty.⁴⁵⁶ By the early 1970s, Africanization had largely failed to deliver the kinds of widespread equitable distribution of economic growth contemplated under Sessional Paper.⁴⁵⁷ Despite its good intentions, the failure of Sessional Paper No. 10 to achieve the kinds of equitable society contemplated under African Socialism was attributed to several factors. Primary

⁴⁵³ The Sessional paper defined political democracy as each member of society being equal in his political rights and that no individual or group will be permitted to exert undue influence on the policies of the State. The idea was to prevent the state becoming the tool of special interests, catering to the desires of a minority at the expense of the needs of the majority.

⁴⁵⁴ See Government Printer (n. 257) para 11.

⁴⁵⁵ The Policy noted that the high priorities placed on political equality, social justice and human dignity mean that these principles will not be compromised in selecting policies designed to alleviate pressing and immediate problems. See Government Printer (n. 205) para 53

⁴⁵⁶ The World Bank notes that between 1964 and 1971, annual economic growth maintained an impressive average 6.5%. See World Bank (n. 13).

⁴⁵⁷ See Himbara (n. 300).

to this failure was criticism of its ambiguity on the substratum of its constitutive elements. While it made grand claims about African Socialism and the use of an African ontology and philosophy as the guiding principles of National Planning, its implementation was a completely different affair.⁴⁵⁸

Ahmed Mohiddin went further in his criticism of African Socialism, in a comparative study of “Kenya’s Socialism” and Tanzania’s “Ujamaa,” terming African Socialism in Kenya as not more than “*politics couched in a lie.*”⁴⁵⁹ In his assessment, ‘African Socialism’ was neither African nor socialism at all. He avers that Kenya’s African Socialism was in fact capitalism, for its support of both economic growth and gross inequities. Friedland and Rosberg dismissed African Socialism as not more than a rallying call by African leaders, and a doctrine to replace anti-colonialism and nationalism, to unify Africans.⁴⁶⁰ Okoth-Ogendo agrees with these conclusions.⁴⁶¹

Indeed, its six-point agenda tenets were gradually eroded and discarded. Firstly, it continued the colonial policy of placing a premium on “white highlands” and other “productive areas” to the disadvantage of other parts of Kenya. Secondly, its rallying call for dignity and equality has been criticized for merely replacing the colonial settler elite with an African petty bourgeoisie.⁴⁶² Social justice slowly faded as African elitism by the few at the top manifested in voracious self-aggrandizement and corruption at the expense of the majority poor. Indeed, economic policy shifts in Kenya became significantly affected by the politics of the day, critically impacting the kinds of policy and institutional continuities necessary for long term national development planning and implementation.⁴⁶³ In that environment, policy and law were implemented only to the extent that they were supportive of the vast patronage machinery created by African Socialism.

These legacies persist to date. Human dignity, including freedom of conscience, atrophied with constitutional amendments whose tenor was the erosion of civil liberties and the creation of

⁴⁵⁸See Obama Snr (n. 301).

⁴⁵⁹ See Chipembere (n. 303).

⁴⁶⁰ See Friedland and Rosberg (n. 304).

⁴⁶¹ See Ogendo (n. 305).

⁴⁶² See Wolff and Swainson (n. 306).

⁴⁶³ See Whitaker and Barkan (n. 307).

a highly autocratic centralized government.⁴⁶⁴ While the policy sought to prevent the emergence of powerful elites running the state for private interests, its promotion of significant state-led economic development, premised on tight control of the market resulted in exactly the opposite. Thus, Africanization, as opposed to redistributing wealth, concentrated that wealth in the hands of a powerful few, from former colonial land holdings to major private enterprises. There was nothing “African” or “Socialist” about the implementation of Sessional Paper No. 10. As will be evident from various government reports, these reasons partly account for its failure to connect with the lived realities of Kenyans despite its grand claims to African ontology and philosophy as its rallying call.

5.2.2. Sessional Paper No. 5 of 1975 on Economic Prospects and Policies

Sessional Paper No. 5 of 1975 on Economic Prospects and Policies was aimed at the containment of external impediments to development, principally the oil price shocks of 1973-74 which created a balance of payment challenge. In response, Kenya tightened the trade regime and sought external finances.⁴⁶⁵ It was also a reaction to the failure of African Socialism, particularly the insufficiency of redistribution of land and retail outlets from Europeans and Asians to Africans in addressing widespread poverty and unemployment. It shifted development planning to the districts via the rural development program. Redistribution through growth became the buzzword i.e., the idea that income inequalities and their consequences such as poverty can be reduced by the sustained cumulative growth of GNP combined with measures to ensure that the overall improvements to income benefit primarily the poor. The decentralization of planning marked a departure from the centralized aspiration of growth for its own essence under Sessional Paper No. 10.

From an African philosophy and ontology perspective, Sessional Paper No. 5 of 1975 was a complete departure from the “homegrown solutions” approach advocated by Sessional Paper

⁴⁶⁴ See Wolff and Swainson (n. 306).

⁴⁶⁵ See F. M. Mwega Njuguna Mwangi And F. Ole We-Ochilo, 'Macroeconomic Constraints And Mediumterm Growth In Kenya: A Three-Gap Analysis' accessed 30 March 2021 <<https://econpapers.repec.org/paper/aerwpaper/23.htm>>.

No. 10 of 1965. Firstly, it was foreign in its conception and marked the entry of the Bretton Woods institutions in Kenya's efforts at socio-economic development. Secondly, its application and implementation was marked by external coercion, something Sessional Paper No. 10 had frowned upon. Little regard was paid to the underlying socio-economic conditions of Africans. It's no surprise that the redistribution through growth approach soon ran into headwinds, which Zeleza notes as amongst others, weak planning machinery, manpower shortages, lack of political will and the young economy's vulnerability to external shocks. The 1982 report of the Working Party on Government Expenditures highlighted public sector inefficiencies, specifically in parastatals. Owing to stagnating economic growth, and to recover from the economic shocks of the 70s, the government embarked on Structural Adjustment Programs (SAPs). As shall be evident from the analysis of reports, SAPs had devastating consequences on the status of the poor.

5.2.3. Sessional Paper No. 4 of 1980 on Economic Prospects and Policies

Sessional Paper No. 4 of 1980 on Economic Prospects and Policies formally commenced Kenya's SAPs sponsored by the World Bank in conjunction with the International Monetary Fund.⁴⁶⁶ It recommended comprehensive policy coordination and reforms. Structural reform was instituted in international economic relations, fiscal and monetary affairs, reduction of import controls, cuts in recurrent and development expenditures, reduction of government deficits etc. Zeleza notes that structural adjustment programs would run through subsequent Sessional Papers following the terms of the Bretton Woods Institutions.⁴⁶⁷ As part of this program, in 1983 the Government embarked on a fast-tracked decentralization programme known as 'District Focus for Rural Development' (DFRD). DFRD primarily aimed at strengthening planning capacity at the district level. The initiative was deemed critical to the economic progress of Kenya for its potential to accelerate rural development.

From an African philosophy and ontology perspective, Sessional Paper No. 4 marked perhaps a seismic turn in the fortunes of Kenya's poor. Firstly, SAPs were conceived without

⁴⁶⁶ See Ministry of Economic Planning and Development, 'Sessional Paper No. 4 Of 1980 On Economic Prospects And Policies' (Government Printer 1980).

⁴⁶⁷ See Zeleza and McConaughay (n. 261).

much regard for the prevailing socio-economic circumstances of Kenyans. The reforms were proposed and championed by the World Bank and the IMF, with little consideration for Kenyans. There was no public participation nor alternative voices from Kenya, seeing as the reforms were conditional for IMF and World Bank financial aid. On the contrary, SAPs heralded an era of open domestic policy interference from external players in Kenya's development and poverty alleviation efforts. Thus, Kenya had to contend with imposed ideas on law and development. These included modernization, globalization, liberalization and market reforms, foreign direct investment (FDIs) inflows, privatization, import substitution industrialization and structural adjustment programs (SAPs), and rule of law reforms.

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

While Sessional Paper No. 4 of 1980 began the SAPs program, their implementation accelerated under Sessional Paper No. 1 of 1986 on Economic Management for Renewed Growth. This Sessional Paper gave an outline for broad development planning through to the year 2000.⁴⁶⁸ It identified a series of development priorities for economic management towards the new millennium. Principally, it was a reaction to a series of economic crises which had slowed economic growth, with mean incomes hardly rising in the late 1970s. It thus proposed a long-term strategy and particular safeguards for achieving the national vision of renewing economic growth, including the provision of jobs for the ballooning job market, success for a large number of people in the rural areas, a fair sharing of proceeds of growth and availability of basic needs for every citizen. Other measures included a rural-urban balance in the distribution of economic growth, tax reform to increase revenue, export promotion, cutbacks in social services spending like health and education which birthed the concept of cost-sharing and reduction of public sector employment.

From an African Ontology and philosophy perspective, Sessional Paper No. 1 of 1980 continued with the departure from homegrown solutions. It paid no regard to the prevailing socio-economic conditions of Kenyans. In the decades that followed, it would become increasingly clear

⁴⁶⁸ See Government Printer (n. 277).

that the implementation of SAPs worsened poverty. Particularly noticeable were skyrocketing prices of goods and services such as education and health because of cost-sharing. The basic needs approach was completely abandoned as the government shifted its focus from efforts at poverty alleviation, evident in the reduced investment in social services and or welfare. As the government proceeded to execute SAPs, poverty levels continued to rise compelling the state to reconsider the policy of cost-sharing. The worsening poverty situation called for a shift in policy to cushion the vulnerable. This formed the core of the next series of government policy documents such as the Social Dimensions of Development (SDD).

Cost-sharing meant the poor and vulnerable who could not afford medical fees suddenly found themselves dying of preventable illnesses. For instance, the World Bank notes that health spending as a percentage of GDP fell with the onset of SAPs.⁴⁶⁹ While in 1980, 7.6% of the government's total expenditure was allocated to health, it dropped to 6.5 in 1986 and 5.4 in 1992. By 1995, it stood at 5.2%. In fact, between 2000 and 2018, Kenya spent an average of 5.4% of the government's total expenditure on health. In education, the number of children dropping out of school for lack of fees also increased significantly.⁴⁷⁰ During the adjustment period, the rate of enrolment in both primary and secondary schools dropped quite significantly. While in the pre-adjustment decade 1972-1982 school enrolment grew at a rate of 8.2%, it slowed down to only 2.7% in the adjustment period 1982-1992. Secondary school enrolment witnessed a similar trend with enrolment growing at the rate of 9.1% in the decade 1972-1982 only to drop to 3.2% between 1982 and 1992.⁴⁷¹ These developments did not auger well with efforts at poverty alleviation nor the independence government's pledge to fight poverty, ignorance and disease, and were therefore totally disconnected from the lived reality of Kenyans.

⁴⁶⁹See 'Current Health Expenditure (% Of GDP) - Kenya | Data' (*Data.worldbank.org*, 2020) <<https://data.worldbank.org/indicator/SH.XPD.CHEX.GD.ZS?locations=KE>> accessed 15 August 2020.

⁴⁷⁰ Ibid. See also David Kigozi, Edward A. Oyugi and Oduor On'gwen, 'Structural Adjustment And Public Social Spending' (*Old.socialwatch.org*, 1997) <<http://old.socialwatch.org/en/informesNacionales/335.html>> accessed 27 May 2020.

⁴⁷¹ Ibid.

5.2.5. The Social Dimensions of Development (SDD) Programme

The SDD was launched in 1994 as the government's response to runaway poverty arising from the devastating impact of economic and institutional reforms under SAPs.⁴⁷² It was an attempt to define and properly channel the government's collective social development initiatives. Poverty alleviation was prioritized, taking cognizance of the impact of the shift from basic needs and its debilitating effects on the poor under SAPs. Budgetary attempts were made to subsidize fees and the provision of healthcare under the program. The IMF notes that the Program achieved little in the way of poverty alleviation.⁴⁷³ Firstly, its initial budgetary allocation was a paltry Kshs. 5.58 million, the bulk of which went to non-poverty alleviation programs.⁴⁷⁴ Unsurprisingly, the monies allocated for bursaries to cushion the poor from fees went to undeserving beneficiaries.

Like many plans and programs before it, not much was appreciated of the content and strategies for the implementation of the SDD programme.⁴⁷⁵ While it attempted to address the plight of the poor, little effort was made to include the voices of the poor in its crafting. Indeed, it was part of IMF and World Bank efforts to walk back the effects of SAPs. As shall be evident from an analysis of Welfare Monitoring Surveys and other government reports from the period, it achieved little impact.

5.2.6. The National Poverty Eradication Plan (NPEP) 1999-2015

The NPEP proposed a comprehensive policy and institutional framework for poverty alleviation. It detailed a series of programs and public sector investments that would be undertaken in its target period to address increasing poverty. Decades of Sessional Papers, NDPs and speciality programs to address poverty had failed to connect with the lived realities of Kenyans and make a meaningful impact. It was hoped that the NPEP would bridge the gap between the

⁴⁷² See 'Social Dimensions of Development In Kenya: An Approach To Human-Centred Development And Alleviation Of Poverty: Conceptual Framework And Project Profiles' (Government Printer 1994).

⁴⁷³ See International Labour Organization, 'The Social Dimensions Of Development Finance In Africa: Results Of A Survey Among AADFI Members' (International Labour Organization 2016) <https://www.ilo.org/wcmsp5/groups/public/---ed_emp/documents/publication/wcms_545319.pdf> accessed 13 October 2020.

⁴⁷⁴ Ibid.

⁴⁷⁵ See ILO (n. 496).; see also African Development & Economic Consultants, 'Social Dimensions Of Development (SDD) Investment Study: Towards A Blue Print For Implementing SDD Programmes Targeted At The Poor And Vulnerable Groups' (African Development & Economic Consultants 1995).

development plans and the lived realities of Kenya's poor. It proposed a range of solutions, including a charter for social integration with pro-poor policies, increased access to basic services, broad-based economic growth, access to education, healthcare etc for the most vulnerable.

It was hoped that with investments that increase the incomes of poor households, the state could achieve balanced economic growth with poverty reduction. The NPEP set ambitious poverty reduction targets. For instance, the number of poor as a percentage of the population was to be reduced by 20% by 2004, and by a further 30 per cent by 2010. Other targets included enrolment at 15% and 19% respectively in the first six years of the plan and Universal Primary Education (UPE) by 2015. Even more ambitious, Universal access to Primary Health Care was to be made available within 5 km of all rural households or one hour of local transport by 2010.

The NPEP created a Commission of Poverty Eradication (CPE) for purposes of overseeing the implementation of the Plan. Within it was created the Poverty Eradication Unit (PEU), to monitor the development and coordination of projects, ensure geographical targeting and provide links between policy, public sector leadership and community action planning. Its programs were to be financed by the Poverty Eradication Budget (PEB) drawn from the exchequer. An Anti-Poverty Trust Fund (APTF) was equally contemplated as a distinct fund outside of the exchequer to supplement public efforts at poverty alleviation.

5.2.7. Interim Poverty Reduction Strategy Paper 2000–2003

The Interim Poverty Reduction Strategy Paper 2000–2003 (IPRSP) was a precursor to the Poverty Reduction Strategy Paper 2000–2003.⁴⁷⁶ It was a key demand of the IMF and the World Bank for financing and summarized contemporary knowledge and analysis of a country's poverty situation, dissecting the existing poverty reduction approach, pointing out gaps in poverty data, diagnostics, and assessing capacity and coming up with a framework for addressing these gaps as well as a fully developed Poverty Reduction Strategy Paper in a participatory fashion.

⁴⁷⁶ See Ministry of Economic Planning and National Development, 'Interim Poverty Reduction Strategy Paper 2000–2003' (Government Printer 2000).

The IPRSP had a five-fold objective, namely, to ensure sustained and rapid economic growth; better governance and security; to improve the capacity of the poor to raise their incomes; to improve the quality of life of the poor, and to improve equity and participation. Of interest to us is the Kenya government admission in the IPRSP that *it is evident that efforts to date have been inadequate and the growth of poverty has not been reversed.*⁴⁷⁷ To address these long-standing challenges, the paper proposed various measures, amongst which was restoring economic growth while maintaining macroeconomic stability; the Medium-Term Macroeconomic Framework; improving governance; raising income opportunities of the poor; improving the quality of life; improving equity and participation amongst others. These measures were then comprehensively articulated in the final Poverty Reduction Strategy Paper, 2000 – 2003.

5.2.8. Poverty Reduction Strategy Paper (PRSP) 2000-2003

The PRSP continued along the path laid out by the National Poverty Eradication Plan – primarily, action against poverty.⁴⁷⁸ It sets a guideline for institutionalising poverty alleviation in Kenya to reduce the incidence of poverty to below 30% of the total population by 2015. Its policy objectives were outlined as to ensure sustained, rapid economic growth; better governance and security; increase the ability of the poor to raise their incomes; and improve the quality of life of all citizenry, especially the poor. It recognized that economic growth is not a sufficient condition to ensure poverty reduction. Its twin objectives were therefore economic growth and poverty reduction.⁴⁷⁹

The PRSP outlined measures for poverty reduction and the need for broad-based sustainable development targeted at improving the fortunes of the less fortunate. Key to these were priorities and measures necessary for poverty reduction and economic growth. The principles guiding the PRSP process in Kenya included giving a voice to the poor, participation and ownership, transparency, openness and accountability, equitable distribution of national resources

⁴⁷⁷ Ibid.

⁴⁷⁸ See International Monetary Fund, 'Kenya: Poverty Reduction Strategy Paper' (International Monetary Fund 2005) <<https://www.imf.org/external/pubs/ft/sr/2005/cr0511.pdf>> accessed 18 June 2020; and Miriam W. Oiro, Germano Mwabu and Damiano K. Manda, 'Poverty and Employment in Kenya' (Nairobi, 2004).

⁴⁷⁹ Ibid.

and development initiatives. It was touted as central to the development of a pro-poor and pro-growth Medium Term Expenditure Framework (MTEF) budget. The three-year rolling MTEF budget was to implement the priorities by shifting additional resources towards pro-poor activities and programmes and thus improve the quality of expenditure.

Like most of the preceding plans or programs, the PRSP was formulated in line with the goals and commitments of the international development goals (IDGs), notably to reduce the proportion of people living in extreme poverty by half by 2015. Again, the IMF and the World Bank were foremost proponents of this international development goal, by which financial aid was pegged to the development and implementation of PRSPs. While its formulation process included wide-ranging public participation and drew from the failures of the past policies, its implementation was befuddled by a series of challenges.

5.2.9. Economic Recovery Strategy for Wealth and Employment Creation (ERS), 2003-2007

The ERS was the new President Kibaki administration's attempt at hastening economic recovery following years of underperformance and stagnation.⁴⁸⁰ The fundamental emphasis of the Plan was poverty reduction and employment creation through proper macroeconomic policies, better governance, improved public service delivery, a conducive business environment, and public investments and policies aimed at reducing the cost of doing business. The Plan also sought to address high socio-economic inequalities and promote pro-poor policies on sustainable management of natural resources such as land, water, forests etc. The ERS was equally aimed at achieving good governance, rule of law, transparency and accountability and providing a lasting solution to hunger, poverty and unemployment. The ERS had five thematic areas, namely, create an enabling environment for macroeconomic stability; strengthen institutions of governance; rehabilitate and expand the physical infrastructure; raise productivity and invest in human capital. Regarding poverty, the ERS targeted reducing poverty levels by at least 5% from its then 56.8%

⁴⁸⁰See Government Printer (n. 325).

rate in 2002. The state targeted the creation of 2.5. million jobs, around 500,000 annually, with emphasis on small business (88%) and 12% in the formal sector.

Unfortunately, the End Term Review of the ERS notes that the strategy did not indicate how and what activities were to create the 2.3. million jobs in the informal and small businesses sub-sector.⁴⁸¹ It observes that while on paper the ERS seemed to be an ideal and comprehensive policy that should have enabled the country to make remarkable achievements in terms of its economic recovery, its implementation did not live up to expectations. It relied heavily on donor financing and had inadequate budgetary allocations, suffering a setback when donors pulled out due to corruption and scandal.⁴⁸² The End Term Review also points out delays with the implementation of the necessary laws, for instance in procurement, public finance management, new Constitution as reasons for this failure to achieve some of its most ambitious targets. Noticeably for poverty reduction, an impressive reduction was registered, with the incidence of poverty-reducing to 45.9% by 2005/2006 on the back of strong economic resurgence. Unfortunately, this reduction did not address increasing inequality both at the regional as well as individual levels.

5.2.10. Sessional paper No. 10 of 2012 On Kenya Vision 2030

Launched in 2007, Vision 2030 is the first national long-term development vision. Its objective is to transform Kenya into a newly industrialising, middle-income country by the year 2030. Vision 2030 is primarily aimed at improving the economic recovery momentum achieved from the implementation of the ERS. Its three key pillars are sustained average economic growth rate of 10% p.a.; a social pillar designed to achieve just, equitable and cohesive social development; and a political pillar meant to engender an issue-based, people-centred, results-oriented and accountable democracy.⁴⁸³ Vision 2030 is currently being implemented through five-year Medium-Term Plans, the first covering the period 2008–2012; the second covering 2013 –

⁴⁸¹ See Ministry of State for Planning, National Development and Vision 2030, 'End Term Review Of The Economic Recovery Strategy For Wealth And Employment Creation, 2003 - 2007' (Office of the Prime Minister 2009).

⁴⁸² Ibid.; See also Jerome Y. Bacheland, 'The Anglo-Leasing Corruption Scandal in Kenya: The Politics of International and Domestic Pressures and counter-pressures' [2010] 37 African Political Economy Rev. 187-200.

⁴⁸³ See Kenya Vision 2030 (n. 9).

2017 and the third covering 2018 – 2022 respectively. The MTPs form the basis of our analysis of socio-economic planning post the Constitution of Kenya 2010 period.

Unlike previous development plans and policies, Vision 2030 was the result of robust multi-stakeholder engagement and participation. As noted elsewhere, the inheritance of colonial policy and institutional continuities meant for a long time the Kenya government's centralised planning greatly left local communities playing a non-substantial role in the decision-making and execution of planned development projects. Beneficiaries of development projects were merely recipients of “made-in-the-air” plans, implemented without regard to the needs of said recipients. To bridge this gap, Vision 2030 took a bottom-up approach in its formulation and implementation. Yet, a review of the Annual Reports reveals that while the Vision has had successes each consecutive MTP, there have been numerous challenges that may threaten the realization of the Vision nine (9) years to 2030.⁴⁸⁴

While effort was made to have as much participation as possible in its preparation, by itself, the document merely pours over culture as a critical component to development planning. Unlike Sessional Paper No. 10 of 1965 which attempted the incorporation of African philosophy and traditions in the body of its prescriptions, the Vision 2030 merely details the development of international art and cultural centre for the promotion of youth talents and dialogue of cultures.⁴⁸⁵ Its prescriptions, including how it addresses the social pillar, are capitalist, informed by prevailing economic thinking. Like the rest of the policies since Sessional Paper No. 10 of 1965, it seems to have equally caught the contagion of the failures of the previous plans in not exploring the potential utility of African philosophy of law in its prescriptions for addressing poverty, inequality etc. While there are numerous political, social and economic challenges bedevilling the attainment

⁴⁸⁴ The Ministry of Economic Planning's Directorate of Monitoring and Evaluation has carried out various annual assessments of the implementation of the Vision. The reports reveal of mixture of successes and challenges with respect to the attainment of various targets for the three pillars. See Ministry of Economic Planning and National Development, 'First Annual Implementation Report 2018/2019 On The Implementation Of The Third Medium Term Plan (2018-2022) Of The Kenya Vision 2030' (Government Printer 2020).; Ministry of Economic Planning and National Development, 'First Annual Progress Report on Implementation of the First Medium Term Plan-2008-2012 Of The Kenya Vision 2030' (Government Printer 2010).; Ministry of Economic Planning and National Development, 'End Term Review of The First Medium Term Plan 2008-2012 Of The Kenya Vision 2030' (Government Printer 2012).; Ministry of Economic Planning and National Development, 'First Annual Progress Report on Implementation of the First Medium Term Plan-2008-2012 Of The Kenya Vision 2030' (Government Printer 2012).

⁴⁸⁵ Kenya Vision 2030 (n. 9) 16.

of Vision 2030, for this study, our analytical tools reveal the two most critical – over-reliance on FDIs and Overseas Development Assistance (ODA), which have proven unsustainable in the past, and rapid economic growth as a driver of progress.⁴⁸⁶ Nine years to 2030, KNBS data shows that the country's economy has been growing by an average of 5.1% since 2008. For a thorough analysis of the successes and failures of Vision 2030 and the MTPs, item 6.3 of this chapter reviews the Annual Progress Reports on Vision 2030's MTPs, as well as other reports in its situational analysis of lived realities from select government reports. Briefly, the MTPs have been as follows: -

a) First Medium-Term Plan

The first MTP covered the period 2008-2012.⁴⁸⁷ It followed the economic decline occasioned by the post-election violence of 2007-2008 and the formation of the Grand Coalition Government. Primarily, this MTP highlighted the Grand Coalition Government's key policy actions and reforms, programmes and projects for the period 2008-2012. The MTP targeted equitable economic growth and increased employment opportunities. Critical to its implementation was the incorporation of the activities isolated in the Report of the National Accord Implementation Committee on National Reconciliation, the Emergency Social and Economic Recovery and the country's One-Year Economic and Social Recovery Plan, all aimed at rapid economic and social transformation.⁴⁸⁸

b) Second Medium-Term Plan

The second MTP, 2013 – 2017, coincided with the coming to power of President Uhuru Kenyatta administration, following the General Elections of March 2013.⁴⁸⁹ This MTP aligned with the Kenyatta administrations' manifesto policy proposals, reforms, programmes and project priorities, as well as the ongoing rolling out of the objectives of the new Constitution and

⁴⁸⁶ See Ezekiel Mbitha Mwenzwa and Joseph Akuma Misati, 'Kenya's Social Development Proposals And Challenges: Review Of Kenya Vision 2030 First Medium-Term Plan, 2008-2012' (2014) 4 American International Journal of Contemporary Research <<http://ir-library.mmarau.ac.ke:8080/handle/123456789/7164>> accessed 10 July 2020.

⁴⁸⁷ See 'First Medium-Term Plan (2008-2012) | Kenya Vision 2030' (*Vision2030.go.ke*) <<https://vision2030.go.ke/2008-2012/>> accessed 17 April 2020.

⁴⁸⁸ See Mbitha and Misati (n. 486).

⁴⁸⁹ See 'Second Medium-Term Plan (2013-2017) | Kenya Vision 2030' (*Vision2030.go.ke*) <<https://vision2030.go.ke/2013-2017/>> accessed 29 April 2020.

objectives of Vision 2030. The MTP was themed "*Transforming Kenya: Pathway to Devolution, Socio-Economic Development, Equity and National Unity.*" Priority was given to the implementation of devolution under Chapter Eleven of the constitution and more robust socio-economic development with equity as a tool for ensuring national unity. Equally prioritized was infrastructural development, seen as essential to scaling up the pace of economic transformation.

c) Third Medium-Term Plan

The third MTP, themed "*Agenda for Kenya 2013-2017 and Beyond,*" covers the period 2018-2022 and coincides with the second term of the Uhuru Kenyatta administration.⁴⁹⁰ It, therefore, aligns policies, programs and project priorities in the Kenyatta administration's Jubilee Manifesto, themed the *Big Four Agenda* to the framework of Vision 2030. The Big Four Agenda prioritizes food security, affordable housing, affordable healthcare for all and manufacturing. Agenda Four hopes to build on the foundation laid by the First and Second Medium Terms Plans.

5.3. Situational Analysis of Lived Realities from Select Government Reports

5.3.1. Welfare Monitoring Surveys

The Welfare Monitoring Survey (WMS) was a series of surveys introduced in the early 1990s to primarily monitor the possible socio-economic effects of SAPs in Kenya. For purposes of this study, we undertake an analysis of the Welfare Monitoring Surveys conducted in 1992, 1994 and 1997. The first WMS following the introduction of SAPs was revealing in its results on poverty incidence.⁴⁹¹ As of 1990, the survey indicated that nearly half of the Kenyan population was living in Absolute Poverty and that poverty, in general, was on the increase. As of the 1994 survey, rural poverty had peaked at 46% and urban poverty at 26%. By the third WMS in 1997, the incidence of rural food poverty stood at 51%, while overall poverty had reached 53% of the rural population. In urban areas, food poverty afflicted 38% and overall poverty 49% of the population. The overall national incidence of poverty stood at 52%. Estimates suggested that for

⁴⁹⁰See VDS Publication, 'Third Medium Term Plan 2018 – 2022 | Kenya Vision 2030' (*Vision2030.go.ke*, 2020) <<https://vision2030.go.ke/publication/third-medium-term-plan-2018-2022/>> accessed 17 April 2020.

⁴⁹¹See Kenya National Bureau of Statistics (KNBS), 'Welfare Monitoring Survey (WMS)' [1997] <https://catalog.ihnsn.org/index.php/catalog/3709> accessed 26 February 2021.

over 25 years, between 1972 and 1997, food poverty had increased more than absolute poverty. The number of poor increased from 3.7 million in 1972-3 to 11.5 million in 1994. Thereafter, numbers increased to 12.5 million in 1997 and by 2000 were estimated to have reached some 15 million Kenyans. In other words, by the fourth decade of independence, a majority of Kenyans could not afford basic food and non-food items. Poverty had gradually increased over the years despite the Kenya government's best efforts to mitigate it.⁴⁹²

Also detailed were poverty incidence for each of the then provinces. According to the WMS 1994 and the Participatory Poverty Assessment (PPA) 1996, the prevalence of overall poverty in 1994 was highest in North Eastern Province (58% of the population), Eastern (57%), and Coast (55%) while the lowest were Nyanza (42%) and Central (32%). Nevertheless, by 1997 indications are that not only had poverty went up dramatically but that its distribution had changed with Nyanza (63%) recording the highest level followed by Coast (62%) although Central still recorded the lowest incidence (31%).⁴⁹³ It was evident that over five years, poverty had been going down in some provinces such as Central while increasing in others, notably, Nyanza and Coast. This was evidence of the legacy of the colonial and post-colonial government bias for highlands and other productive areas under the Classical approaches.

An interesting finding on the policy measures put in place for poverty alleviation between 1994 and 1999 can be gleaned from the government's 1999 Participatory Poverty Assessment Reports (PPAR).⁴⁹⁴ The PPAR highlighted insights into poverty issues through the voices of the poor. The reports revealed systemic exclusion of the poor in policy formulation aimed at alleviating poverty. In other words, Kenya's poor had since independence been reduced to passive participants in their development. There was therefore little to no ownership of poverty alleviation programs. They are not properly represented in different policy-making organs and institutions

⁴⁹² Ibid.

⁴⁹³ KNBS (n. 41).

⁴⁹⁴ See World Bank, 'Kenya : Participatory Poverty Assessment' (World Bank 1996) <<http://hdl.handle.net/10986/11615>> accessed 25 February 2021.; see also John Omtiti, 'Poverty Reduction Efforts in Kenya: Institutions, Capacity and Policy' [2002] available at <https://waterfund.go.ke/watersource/Downloads/007.%20Poverty%20Reduction%20Efforts%20in%20Kenya.pdf> accessed 25 February 2021.

dealing with poverty at the grassroots. Bureaucrats formulated policies and specific projects without much regard for the voices of the poor nor their input.

5.3.2. Kenya Integrated Household Budget Surveys

The Kenya Integrated Household Budget Survey (KIHBS) is a Report published by the Kenya National Bureau of Standards⁴⁹⁵. It is aimed at collecting key information for calculation of recent poverty and inequality indicators, to bring labour force indicators up to date, derive the consumer price index, and review the national accounts information. The survey aims at coming up with data on key socio-economic aspects of the Kenyan population which include: education, health, energy, housing, water and sanitation. This data is critical to the national and county governments and private sector to guide investment and national development policy decisions. The basic report reflects the socio-economic status of the Kenyan population. For purposes of this study, we undertake an analysis of the Kenya Integrated Household Budget Survey 2005/2006 and the Kenya Integrated Household Budget Survey 2015/2016. The Kenya Integrated Household Budget Survey 2015/2016 collected data on household characteristics, housing conditions, education, general health characteristics, nutrition, household income and credit, household transfers, information communication technology, domestic tourism, shocks to household welfare and access to justice⁴⁹⁶. The findings are presented at national, county, rural and urban domains.

Firstly, poverty reduction efforts between 2006 and 2016 paid off with the proportion of the population living below the national poverty falling from 46.8% in 2005/06 to 36.1% in 2015/16, showing a decent rise in the living standards of the Kenyan population.⁴⁹⁷ This success rested on the back of the impressive economic rebound began by the Kibaki administration which saw the economy grow at an average of 5.3% per annum. Similarly, poverty under the international poverty line of US\$ 1.90 a day declined from 43.6 per cent in 2005/06 to 35.6 per cent in 2015/16.

⁴⁹⁵ See Kenya National Bureau of Statistics, 'The Kenya Integrated Household Budget Survey (KIHBS) Report'[2016] (Government Printer)

⁴⁹⁶ Ibid.

⁴⁹⁷ See Government Printer (n. 518).; see also World Bank, 'Fiscal Incidence Analysis for Kenya: Using the Kenya Integrated Household Budget Survey 2015/16' [2018] <<https://elibrary.worldbank.org/doi/abs/10.1596/30263>> accessed 30 March 2021.

However, the World Bank in its assessment of the 2015/16 KIHBS noted that despite this tremendous reduction in the levels of poverty, the real number of poor declined only marginally, from 16.6 million in 2005/06 to 16.4 million after ten years.⁴⁹⁸ The Bank further notes that the proportion of the population living in poverty remains comparatively high in Kenya and the rate at which growth translated into poverty reduction was lower than elsewhere. It observed that at twice the average, Kenya's poverty rate is still high for a lower-middle-income country, a group that Kenya joined only in 2015. In addition, Kenya's growth elasticity of poverty reduction, the percentage reduction in the poverty rate associated with a one per cent increase in mean per capita income is only 0.57, lower than in Tanzania, Ghana, or Uganda. This leads to the obvious question of what can be done to make economic growth more responsive to the needs of the people in the country.

An assessment of the direct transfer programs (*such as Hunger Safety Net Program (HSNP), the Cash Transfer for Orphans & Vulnerable Children (CT-OVC), the Older Persons Cash Transfer (OPCT), and the Cash Transfer for Persons with Severe Disabilities (CT-PwSD)*)⁴⁹⁹ revealed the funds only reach a small segment of the population, resulting in only a modest effect on poverty and inequality. For instance, accordingly to the World Bank's analysis, the most popular of the programs, the Older Persons Cash Transfer, covered only around 3% of all households in Kenya in 2015/16. Consequently, transfers from all four of the program's accounts for, on average, only 3.8 per cent of total household expenditure among the bottom 20 per cent of the population. It concludes that the direct cash transfers reduced the poverty rate by only 0.7 percentage points.⁵⁰⁰

⁴⁹⁸ Ibid.

⁴⁹⁹ See World Bank (n. 520).; See also Sophie Song, 'Does the Hunger Safety Net Programme Reduce Multidimensional Poverty? Evidence from Kenya' [2018] <https://doi.org/10.1080/21665095.2019.1582347> accessed 30 March 2021.

⁵⁰⁰ Ibid.

5.3.3. Kenya Comprehensive Poverty Analysis: Children, Youth, Women, Men & the Elderly

Launched in August 2020, the Comprehensive Poverty Analysis Report was the first attempt in Kenya to assess poverty conclusively, encompassing multidimensional and monetary methodologies, for the various population groups: children, youth, women, men and the elderly, using the 2015/16 Kenya Integrated Household Budget Survey.⁵⁰¹ The study broke down the situation of poverty for these groups through the lenses of 1) Monetary poverty measurement, 2) Multidimensional poverty measurement, 3) Poverty overlap analysis, specifically the level to which multidimensional and monetary poverty overlap, and 4) An exploration of the factors associated with monetary and multidimensional poverty. Monetary and multidimensional poverty, as well as the overlap between both types of poverty, were measured for all age groups in Kenya: children under 18, youths age 18-34 years [national definition], adult women and men age 35-59 years, and elderly age 60 years and over.⁵⁰²

Several key findings emerged from the study. Firstly, it noted that 52% of children under 18 in Kenya are multidimensionally poor, deprived of their fulfilment of between 3 and 7 basic needs and rights while 42% of children under 18 live in monetarily poor households. That for children, denial in nutrition, housing and sanitation are the major drivers of multidimensional poverty among children of all ages in Kenya.⁵⁰³

5.3.4. Reports on Vision 2030 & Medium-Term Plans

The Ministry of Planning's Monitoring and Evaluation Directorate has published several reports on the implementation successes and failures of Vision 2030. These include: -

- a) End Term Review of The First Medium Term Plan 2008-2012
- b) First, Second and Third Annual Progress Reports on Implementation of the First Medium Term Plan-2008-2012

⁵⁰¹ See Kenya National Bureau of Statistics, 'Kenya Comprehensive Poverty Report: Children, Youth, Women And Men, Elder From National To County Level' <https://knbs.or.ke/?wpdmpromo=comprehensive-poverty-report> accessed 30 March 2021.

⁵⁰² Ibid.

⁵⁰³ See KNBS (n. 41).

- c) Third Medium Term Plan Dissemination Report July 2019
- d) First, Second and Third Annual Progress Report on MTP II
- e) First Annual Progress Report on Implementation of the Third Medium Term Plan-2018-2022
- f) Medium-Term Review of MTPII 2013-2017

Primarily, the annual progress reports track the implementation of the national policies identified in each MTP annually. They also outline the challenges experienced and the lessons learnt to inform future planning, programming and budgeting. Primarily, the reports present mixed results. While some progress has been made on each of the pillars, some have missed their targets.⁵⁰⁴ From the reports, progress has been as follows. In the first MTP, there were marked improvements in enrolment and transition, infrastructure projects with the construction of more tarmacked roads, (about 2,200 kilometres), investments in ICT and optic networking, enhanced power generation and the implementation of Devolution as enshrined in the Constitution of Kenya, 2010. The Second MTP saw additional major infrastructure projects, particularly the construction of tarmacked roads and the SGR Phase 1.

The government also ramped up power production, ICT, access to clean water, agricultural investments e.g., irrigation projects, healthcare etc. The Third MTP period, running currently, features mixed results, with ramped-up infrastructure projects, sector reforms etc. Anticipated economic growth continues to oscillate between 5 and 6%. For the Vision's desires to be realized at this point, the economy must grow by over 15% to recover the lost growth, an impossible task under the current economic environment.⁵⁰⁵ Extreme inequality remains a persistent challenge and has indeed worsened since the adoption of Vision 2030. Oxfam estimates that as of 2020, less than 0.1% of the Kenyan population owned more wealth than the bottom 99.9% (more than 44 million people).⁵⁰⁶ In other words, the richest 10% of people in Kenya earned roughly twenty-three (23)

⁵⁰⁴ See Ministry of Economic Planning (n. 484).

⁵⁰⁵ See World Bank (n. 13); see also 'The Vision On Track' [2020] *Kenya Vision 2030 Newsletter* <<http://vision2030.go.ke/inc/uploads/2018/05/Kenya-Vision-2030-Newsletter..pdf>> accessed 10 February 2020.

⁵⁰⁶ See 'Kenya: Extreme Inequality In Numbers | Oxfam International' (*Oxfam International*, 2021) <<https://www.oxfam.org/en/kenya-extreme-inequality-numbers>> accessed 8 October 2020.

times more than the poorest 10%. Many of its promises remain just that, promises. At this rate, it looks highly unlikely that Kenya will achieve Vision 2030.

5.4. Application of the Analytical Tools on The Select Government Policy Documents and Reports

a. Power and its Dynamics

In analysing power and its dynamics, the intention is to demonstrate why the utility of the African philosophy of law did not gain as much prominence post-independence. For, while the select policy documents were all touted as homegrown, the fact is all had foreign support, and were derivatives of these foreign influences in one way or the other.⁵⁰⁷ For instance, the most robust of them all in its application of African philosophy was Sessional paper No. 10 of 1965, which while touted as “*African Socialism*” was eventually criticized for being anything but Socialism.⁵⁰⁸ While foreign influence was covert in Sessional Paper No. 10, it would become explicit by Sessional Paper No. 5 of 1975 on Economic Prospects and Policies and Sessional Paper No. 4 of 1980 on Economic Prospects and Policies when Structural Adjustment Programs make their entry.

The adoption of Sessional Paper No. 1 of 1986 on Economic Management for Renewed Growth marked the “complete takeover” of economic planning by the Washington Consensus and the Bretton Woods institutions. Structural adjustment programs and other Washington favoured development policies would dominate the 80s, 90s and the early 2000s. By the early 2000s, to address the severe impacts of SAPs on the poor and vulnerable, the World Bank and IMF shifted gears, mandating the National Poverty Eradication Plan (NPEP) 1999-2015; Poverty Reduction Strategy Paper (PRSP) 2000-2003 which birthed the Economic Recovery Strategy for Wealth and Employment Creation (ERS), 2003-2007 as the new requirement for aid support.

⁵⁰⁷ See Zeleza (n. 190).

⁵⁰⁸ Ibid.; See also Obama Snr. (n. 301); Ogendo (n. 305).

It is evident that in all these policy prescriptions, the models for attaining socio-economic progress were premised on prevailing Western models and thinking on economic growth and poverty alleviation. It is also noteworthy that Kenya seemed powerless to overcome this overbearing influence from Washington and other Western Capitals. For instance, coming immediately after independence, Kenya did not have sufficient professional and technical skills to prepare a Sessional Paper of the magnitude of Sessional Paper No. 10 of 1965, nor the resources to see it through. Accordingly, foreigners provided the expertise and the financing.⁵⁰⁹ Former colonial powers such as the UK still had a great influence on Kenya's internal affairs, and this influence was directed at African elites who formed the weak independence government.

Power originated from these Western capitals, and its influence was exercised both directly and indirectly, subtly and overtly. This power was maintained through the inheritance of colonial policy and institutional continuities, which formed the basis for neo-colonial control of Kenya for instance, under Sessional Paper 10 of 1965, the bias on economic development of high potential areas.⁵¹⁰ Its maintenance would also be perpetuated through loans and other forms of coercion such as unfair bilateral or multilateral agreements, as well as threats of or sanctions to ensure Kenya follows the path decided by Washington and other donor powers in its governance and development programs.

In this environment, it was hard to countenance a place for the African philosophy of law in crafting development policy or appropriate responses to poverty. The Western academy, from whence Kennedy's legal thought and consciousness originated, had its misgivings about the existence of an African philosophy let alone a philosophy of law. Across the colonized world, Civil or Common law systems took root to the great detriment of African systems of knowledge, and particularly law in this case. African problems were conceptualized and distilled via a Western lens and solutions were crafted from that perspective. This powerful influence of the Western

⁵⁰⁹ See Zeleza T, 'The Colonial Labour System In Kenya', *An Economic History of Kenya* (East African Educational Publishers 1992).; see also John M. Cohen, 'Foreign Advisors And Capacity Building: The Case Of Kenya' (1992) 12 *Public Administration and Development*.

⁵¹⁰ See Ministry of Planning (n. 257) 166.; See also John Overton, 'The Colonial State and Spatial Differentiation: Kenya, 1895–1920' (1987) 13 *Journal of Historical Geography*.

Academy indeed continues to date in its production of knowledge and its dissemination to the South.⁵¹¹

The combination of indirect forms of power or soft power that may not be coercive in the short run, but which might, when the rubber meets the road, play a crucial part in the unravelling of events, as well as raw power, whether economic, political or social meant Kenya remained largely helpless against Bretton Woods institutions' onslaught for a long time. At the same time, post-independence Kenya found itself in a fast-globalizing world with an emergent international system, which system was heavily controlled by the UN's big five and other major Western economies. First was the cold war, which meant weaker states such as Kenya had to lean either east or west, with attendant consequences. Power therefore firmly originated from the West and was received by the likes of Kenya overtly and covertly. The consequences for state and policy autonomy live with us to date, as evidenced by the various government reports.

b) Aid Assistance and Or Help and Its Dynamics

In the context of "help," this study's analysis concerns itself with the economic and or financial aid assistance packages and programs historically championed by Western Countries for developing nations such as Kenya. This "help" was primarily from economically powerful European and North American states, often channelled through direct bilateral financial aid, grants and syndicated loans, or donor agencies such as the USAID, UKAID, DANIDA, AFD etc, as well as international financial institutions like the IMF and World Bank. The actualization of Kenyan policy recommendations and programs beginning in the late 1970s became heavily dependent on financing from Western donors. The oil shocks of the early 1970s created challenges with the balance of payments, which forced Kenya to turn to foreign financing and structural adjustments by the early 1980s.

Unfortunately, this help was not without conditions. Firstly, it lent Western countries heavy influence on the internal affairs of Kenya, particularly economic planning and development

⁵¹¹ See Francis Adyanga Akena, 'Critical Analysis Of The Production Of Western Knowledge And Its Implications For Indigenous Knowledge And Decolonization' (2012) 43 Journal of Black Studies.

programs. Indeed, sometimes the helper would end up doing the major part of the activity but still remain a “helper.”⁵¹² Secondly, it heavily compromised policy autonomy, with Kenya largely complying with whatever conditions were levelled for purposes of benefiting from financial assistance. Donors made aid largely dependent on financial discipline and proper policy frameworks, resulting in freezes of funds if the Kenya government did not comply. Critically though, over time, it created an economic dependence that continues to date.⁵¹³ For instance, between 1970 and 1999, donor funds received by Kenya averaged about 9% of GDP, which was responsible for 20% of the annual budget and 80% of development expenditure.⁵¹⁴ Kenya’s share of overall debt assistance among developing countries was 1.22 per cent over 1980-2006 and the country’s share of development aid to Africa was 3.34 per cent over the same period.⁵¹⁵ The World Bank estimates that as of 2011, around 15% of Kenya’s public expenditures was donor-funded, compared to more than 40 per cent in other EAC countries.⁵¹⁶ As of December 2020, the Central Bank of Kenya estimated Kenya’s foreign debt to stand at Kshs3.7 trillion.⁵¹⁷

This aid dependence had a lasting impact on institutions and governance. For Kenya, the cost of aid dependence remains high, with the entry of the Chinese ramping up Kenya’s foreign debt portfolio. That aid dependence can burden institutions and undermine capacity and ownership, result in revenue instability and dramatically breakdown budgets, lower tax effort, and affect accountability and democratic decision-making is well established.⁵¹⁸ Dependence meant the helper had greater sway in what strategies were employed in not just development, but critically, poverty alleviation. In the absence of recognition of African philosophy of law, its utility was completely ignored and the effects of this ignorance addressed via other approaches, which met a similar fate – failure.

⁵¹² See Maria Eriksson Baaz, *The Paternalism Of Partnership* (Zed Books 2005).

⁵¹³ See N Mhango, *Africa's Dependency Syndrome* (Langaa RPCIG 2017).; see also Carol Lancaster and S. M Wangwe, *Managing A Smooth Transition From Aid Dependence In Africa* (Overseas Development Council 2000).

⁵¹⁴ See Njeru (n. 26).

⁵¹⁵ Ibid.

⁵¹⁶ See World Bank Group, 'Kenya Public Expenditure Analysis 2019: Creating Fiscal Space To Deliver The Big Four While Undertaking A Needed Fiscal Consolidation' (World Bank Group 2019) <<https://openknowledge.worldbank.org/handle/10986/32252>> accessed 14 April 2021.

⁵¹⁷ See 'Public Debt | CBK' (*Centralbank.go.ke*, 2021) <<https://www.centralbank.go.ke/public-debt/>> accessed 16 April 2021.

⁵¹⁸ See Deborah Brautigam and Kwesi Botchwey, 'The Institutional Impact Of Aid Dependence On Recipients In Africa' (1999) Michelsen Institute Working Paper 1/1999, 1 <<https://core.ac.uk/download/pdf/59168268.pdf>> accessed 12 April 2021.

It's not lost on us that the primary motivations for providing aid, while clothed under development support, are almost always commercial and political, primarily to secure commercial and political interests.⁵¹⁹ Firstly, commercial to encourage commercial and financial relations with the recipients of aid, liberalize markets, and secure opportunities for investors, contractors, and suppliers from the donor countries and secondly, political to continuously ensure the allegiance of governments that are in good books with the donor, an especially prominent feature of aid during the Cold War, and as China has emerged as a global power. Aid was therefore part and parcel of the coercive power of the former colonial powers and a critical tool in their continued neo-colonial control of Kenya. From government reports on the repeated failures of policy to address poverty alleviation and other development challenges, it is evident that foreign interests were at variance with the interests of Kenyans and their lived realities, and accordingly, little attention was paid to this reality in pursuing western interests.

c) **Langu** or **Language**

This study's analysis of langu or language refers to Kennedy's *parole* or the elements of speech by which the legal thought and consciousness globalized from the west, and which *parole* became common parlance and accepted speech amongst policymakers in the South. But whose language? It was the language of the Western academy, a vocabulary of concepts and typical arguments propounded by Western scholarship and thought, and propagated via the mechanisms of globalization.⁵²⁰ The Classical period had langu such as individual rights, formal equality, free markets, free trade, freedom, system etc. The Social period had langu around group rights, social justice, social welfare, corporatism, the institution, bilateralism etc. For the Contemporary period, the langu featured catchphrases around human rights, non-discrimination, democracy, constitutional law, civil society, structural adjustments, legal plurality, justice and pragmatism etc.

For instance, in the first decade of independence, socio-economic development was pursued via modernization. Its primary purpose was to guide economic progress, under the

⁵¹⁹ See Njeru (n. 26).

⁵²⁰ See Kennedy (n. 21) 21.

inference that economic growth would, in turn, promote distribution and address inequality and poverty. This economy-centric approach was in keeping with the *langue* of Kennedy's classical period. It was characterized by an obsession with terms such as GDP, FDIs, Export Promotion, Import Substitution Industrialization, structural adjustment, basic needs, poverty reduction etc. Kenya, like most of the developing world, had to contend with imposed ideas on law and development. Indeed, Sessional Paper No. 10 of 1965 in its first paragraphs sets out its six-point vision in the following terms, namely *political equality; equal opportunities human dignity, including freedom of conscience; social justice, freedom from want, disease and exploitation; and high and growing per capita incomes, equitably distributed.*⁵²¹ While Sessional paper no. 10 of 1965 made attempts at incorporating perhaps the *langue* of African philosophy of law, for instance observing thus, that two African ways of life which form an essential basis for African Socialism are *mutual social responsibility and political democracy.*⁵²²

Political democracy is distinguished in the following terms, that *in the African way of doing things, political democracy would not countenance a party of the elite, strict tests or biased criteria for party membership, degrees of party membership, or first- and second-class citizens.*⁵²³ For mutual social responsibility, the Sessional paper outlined its understanding within African traditions as individuals endeavouring *to all they can for each other with the full knowledge and appreciation that if society develops its members will share in that success and that society cannot succeed in the absence of the full co-operation of its members.*⁵²⁴ However, while acknowledging the challenge of adaptability of African traditions to a monetary economy, Sessional paper no. 10 quickly observes thus, with respect to the emotive land issue, that *these African traditions cannot be superimposed on a modern, monetary economy. The need to grow and invest needs credit and a credit economy rests largely on a system of land titles and their registration.*⁵²⁵

⁵²¹ See Ministry of Planning (n. 257) 5

⁵²² See Ministry of Planning (n. 257) 3

⁵²³ See Ministry of Planning (n. 257) 4

⁵²⁴ Ibid.

⁵²⁵ See Ministry of Planning (n. 257) 10

While the Sessional Paper made mention of religion, communalism, community, justice and equity, African democracy, the African appreciation of human rights and responsibilities etc, the incorporation of these aspirations within the Western monetary economy adopted from early on proved impossible. This is evident in the criticisms of Sessional Paper no. 10.⁵²⁶ These references to African traditions, knowledge systems and philosophy were therefore not more than fancy embellishments of an otherwise capitalist planning document. The fancy foreign parole would evolve as the decades went by and the policy prescriptions failed to deliver the kinds of anticipated growth or poverty alleviation.

The globalizing *langue* morphed from around modernization, globalization, liberalization and market reforms, foreign direct investment (FDIs), privatization, import substitution industrialization and structural adjustment programs, institutional and rule of law reforms, human rights etc. Primarily, the foundational ideas behind this *langue* were proposed and legislated for Kenya to benefit from donor funding. These policy shifts were articulated in successive Sessional Papers and NDPs, beginning from Sessional Paper No. 10 of 1965, Sessional Paper No. 4 of 1975, Sessional Paper No. 4 of 1980 etc. By the early 1980s, the SAPs enabled economic policy shifts would accelerate under Sessional Paper No. 1 of 1986, outlining policies and legislative measures for sustained growth through to the year 2000.

As economic growth faltered in the 1980s, the *langue* shifted with the shifting policy prescriptions, for instance, a shift to “bringing to an end export and import licensing, moderating and minimizing import tariffs, freeing up of foreign exchange and price controls and selective opening up of the capital markets, governance reforms, institutional reforms, privatization etc. The *langue* of privatization gathered pace in the early 1990s. By the mid-1990s, privatization had gained prominence as the only way to save some state institutions and improve their efficiency. Yet, by 2010, many state corporations were either struggling or near collapse and in need of state bailouts, for instance, Kenya Power, Kenya Cooperative Creameries, Uchumi Supermarkets,

⁵²⁶ See Obama Snr. (n. 301).; Ogendo (n. 305).

Kenya Railways Corporation, Sugar Companies, Telkom Kenya, National Housing Cooperation, Agricultural sector parastatals etc.

It is evident that the recipient of the *langue* was the global South or developing nations, Kenya included. The foundational ideas behind this langue were proposed and legislated for Kenya to benefit from donor funding. For Kenya, policy autonomy greatly dwindled and had nearly vanished by the fourth decade of independence. This langue greatly shaped events as we know them today. Whether it's in policy prescriptions for economic growth, education, welfare etc – all facets of the economy. As argued elsewhere in this analysis, the Western academy paid no recognition to African ontology or Philosophy of law as a cogent knowledge system whose utility was relevant to development planning and or poverty alleviation. The *langue* of the African ontology or philosophy of law and its foundational ideas such as communalism, collectiveness, personhood, duty, identity, responsibility etc were ignored. Indeed, save for attempts in Sessional Paper No. 10 of 1965, this shelving is evident from an analysis of subsequent Sessional Papers and NDPs between the 1970s and 2010.⁵²⁷

d) Locus of Activities

Our analysis of the Locus of activities refers to places where ideas which informed policy options originated and the places where it was received and implemented. This locus is critical, firstly, in assessing how the origins of these ideas reflected against their implementation and the lived reality of Kenyans. Secondly, the analysis also helps us to ascertain how this influenced the African philosophy of law's utility and relevance as characteristic of the lived realities of Kenyans. Here too, our analysis is shaped by Kennedy's Three Globalizations on what he calls "*locales of production*" in reference to the origins of the foundational ideas that shaped the three globalizations.⁵²⁸ Kennedy contrasts locales where knowledge was produced and diffused (*Western capitals*), and those where this knowledge was received with very little dialectical counter influence on the international arena (*global south e.g., Kenya*).

⁵²⁷ Our analysis reveals that no effort was made in subsequent planning documents to address African philosophy generally as was done in Sessional Paper No. 10 of 1965 despite its criticisms and failures.

⁵²⁸ See Kennedy (n. 21) 23.

He identifies the locales of production as Germany, France and the United States for the first, second and third globalizations respectively. For this study, these locales served a purpose beyond just the production and dissemination of legal thought and consciousness. Their coercive influence extended beyond the academy and into national policy formulation for nascent post-colonial states such as Kenya. It was manifest in the work of Western economists such as John Williamson and his centrality to the 1989 Washington Consensus.⁵²⁹ The ten-point recommendations of the Consensus would be critical to economic underperformance and stagnation in Kenya and the dwindling fortunes of the poor for over two decades (*the points were the bedrock for SAPs*). Underlying the Consensus' policy recommendations was neoclassical economics premised on the market's "invisible hand," the due consideration of economic players' choice, and a minimalistic vision of the states' control of economies – in other words, liberalization.

Hence from the outset, the academy in Kenya was rendered the mere recipient of ideas and the popular parole by which these ideas diffused from the Western Academy, with its contribution to the national well-being minimal.⁵³⁰ Policy prescriptions were based on knowledge produced from Western capitals devoid of the contextual realities which shaped the lived realities of Kenyans. Galanter and Trubek explore the foregoing at length viz the failure of the policy prescriptions in their seminal work, *Scholars in Self Estrangement*.⁵³¹ The Kenyan academy, legal and otherwise, followed the path of these globalizing ideas. It was not until these ideas and thought systems began to repeatedly fail to address African contemporary problems that Africans began to question their foundational basis and assumptions and propose relevant alternatives.⁵³² Unfortunately, the African philosophy of law, while amongst the ideas which gained much prominence from this "awakening" in the legal fraternity, its utility has nonetheless not been fully

⁵²⁹ See Belinda Archibong, Brahim Coulibaly and Ngozi Okonjo-Iweala, 'Washington Consensus Reforms And Economic Performance In Sub-Saharan Africa: Lessons From The Past Four Decades' [2020] SSRN Electronic Journal.

⁵³⁰ See Majeke (n. 70).

⁵³¹ See Trubek and Galanter (n. 28).

⁵³² See Chibundu (n. 90); Onazi (n. 165); Ghai (n. 32); Chukwumerije (n. 152).

leveraged by the academy and successive governments in policymaking in Kenya. Suffice to say, it is studied as a curiosity.

5.5. Conclusion

In this Chapter, we have assessed select government policy documents and concluded that there isn't an insufficiency of tangible efforts at mitigating poverty in Kenya. We noted the Kenya government itself has admitted in report after report and policy after policy, its failures in mitigating poverty in the past and plans to overcome these failures in its future programs. However, it would seem these efforts continue to fall short of the overwhelming demand for a better life by millions of Kenya living in destitution. It was also evident that the failure of these policy measures to comprehensively mitigate poverty can be explained by the failure of the Kenya government to take greater cognizance of the lived realities of Kenyans when preparing policy options for poverty mitigation. Our analytical tools revealed the dynamics at play which made it historically impossible to incorporate the utility of African philosophy of law in development planning and poverty alleviation efforts, save for attempts in Sessional Paper no. 10 f 1965. The failure of Sessional Paper No. 10 seems to have, from very early on in the 1960s, had a contagion effect on all other planning documents in ways that were systemic. In the next chapter, we make appropriate recommendations to overcome these challenges.

CHAPTER SIX

SUMMARY OF FINDINGS, CONCLUSION AND RECOMMENDATIONS

6.1. Summary of Findings

This study commenced with the proposition that although Kenya has throughout history adopted comprehensive institutional and legislative frameworks on poverty alleviation based on various identified approaches, these measures have largely failed. To guide our study, we asked the following questions: -

1. What were Kenya's approaches to poverty alleviation and how did Kennedy's *Three Globalizations of Law and Legal Thought* and *Policy Transfer and Diffusion Theories* shape these approaches?
2. What were the policy, legislative and institutional frameworks for development and poverty alleviation?
3. What is the African understanding of poverty, and nature of African Ontology and Philosophy of law and how are they relevant for poverty alleviation?
4. Why hasn't the African philosophy of law and ontological perspectives found enhanced expression and implementation in government policy?
5. What lessons, conclusions can be drawn from this study to inform future development planning on poverty alleviation?

Our consideration of each research question reveals the following findings, in summary.

a) Historical and Contemporary Approaches to Poverty Alleviation and the influences therewith

Our assessment of Kenya's historical and contemporary approaches to poverty alleviation and the influences therewith revealed several things. Firstly, the approaches largely followed the periodization of Duncan Kennedy's *Three Globalizations of law and legal thought*, and the *Policy Transfer and Diffusion theories*, and morphed with the globalization over time. The influence of

the Three Globalizations and Policy Transfer and Diffusion is manifest in the continued struggle by Kenya, and indeed African states, with the colonial legacy and neo-colonialism and its erosion of African culture and way of life, from the political, social, economic, law and governance. This erosion partly accounts for the failure of these approaches to connect to the lived reality of Kenyans. Secondly, that the imposition of colonialism had a lasting impact on the post-colonial socio-economic and political arrangements critical to development and poverty alleviation. Thirdly, colonialism's dismantling and rearranging of pre-colonial African societal structures in support of an economically exclusionary and ruthless capitalist system created a dependence relationship that was amenable to the overbearing neo-colonial influence on Kenya. Fourthly, the inheritance of colonial and neo-colonial legal, economic, political and social institutional continuities continues to define contemporary biased conceptions of law and its application to development. We noted that in the Contemporary Approaches, specifically under Vision 2030 and the new Constitution of Kenya 2010, there is a renewed thirst for public leadership and legislative reforms, the result of which has been the entrenchment of robust structural reforms, a solid policy and legal basis for a just, equitable society and sustainable development. Critical to these reforms is the mainstreaming of, recognition and respect for culture and national values as the basis for the governance framework and acknowledgement of African jurisprudence via recognition of Traditional Dispute Resolution mechanisms. How far this mainstreaming post-2010 affects development policy remains to be seen and is an area for further study.

b) Policy, Legislative and Institutional Frameworks for Development and Poverty Alleviation

In Chapter Three, we examined the legislative and institutional frameworks for development at the international, regional and domestic levels and how poverty presents in these instruments via a SERs conception. We made the following findings. Firstly, there is no standalone instrument nor statute on development and or poverty alleviation at the international, regional or domestic frameworks. Accordingly, in terms of a legal framework, development and poverty alleviation can be gleaned from assessing their manifestations within the realm of human rights,

particularly SERs and the frameworks therewith. Secondly, our assessment revealed a sufficiency of the legislative and institutional frameworks, its implementation which remains problematic in Kenya. Fourthly, we noted that perhaps to address the implementation of SERs in Kenya, conceptualizing these rights within an African ontology and philosophy of law would potentially enhance their relevance and utility in the pursuit of poverty alleviation. This became manifest in our analysis of the points of convergence and divergence between received Western law in the books and the place of African ontology and philosophy of law as the lived reality of Kenyans.

c) Nature and Relevance of An African Ontology and Philosophy of Law

Our examination of poverty from the African perspective, the nature and relevance of an African ontology and philosophy of law in Kenya revealed the following. Firstly, there is a persistent struggle between the African philosophy of law as the lived reality of Kenyans and the imposition of foreign legal thought and consciousness in addressing contemporary problems such as poverty. The two are at variance, from their conceptions of poverty and wealth, being and well-being, community, becoming and belonging, human rights, duty and responsibility, justice etc. That secondly, as a result of this struggle, this ideological discontent is evident in mismatches between the historical and contemporary approaches to poverty alleviation, the institutional and legislative frameworks adopted therewith, and the lived socio-economic reality of Kenyans. We argued that this contestation is the root cause of the failure of the approaches to meaningfully mitigate poverty. Accordingly, we proposed a re-imagination of law and its application to development in Kenya, specifically for poverty alleviation. We argued for new thinking and approaches, with greater inclusion of perspectives from the African ontology and philosophy of law and the rejection of long-standing Western universalism.

d) Critical Analysis of Select Government Policy Documents and Review of Reports

In carrying out this analysis, we first examined select government policy documents, then reviewed periodic reports for the periods when these policy prescriptions were implemented, and subjected both to a critical examination using four identified tools. This analysis revealed several

findings. Firstly, the select policy documents, save for Sessional Paper No. 10 of 1965, made no attempts at incorporating African philosophy of law perspectives in their policy prescriptions. Secondly, that the failure of Sessional Paper No. 10 of 1965 had a ripple effect on the rest of the planning documents in ways that were systemic. Thirdly, that from successive government reports, it is evident that various policy prescriptions failed to connect to the lived reality of Kenyans. Fourthly, our analytical tools revealed that this failure was partly accounted for by the heavy neo-colonial influence of Western powers. Fifthly, it emerged that by the third decade of independence, Kenya had lost policy autonomy owing to persistent dependence on foreign aid, and the coercive influence of the Western academy backed by Western powers and the international system. Critically though, it also emerged from the analytical tools that this coercive influence and its manifestations, whether in power relations; aid, help and dependence; langue or language; and locus and activities, made it historically impossible to meaningfully incorporate the utility of African philosophy of law in development planning and poverty alleviation efforts.

6.2. Conclusion

In this study, we set out to diagnose the cause(s) of the Kenya government's failure to connect its historical and contemporary approaches to poverty alleviation to the lived reality of Kenyans. We hypothesized that this failure may partly be accounted for by the absence of greater incorporation of African ontology and philosophy of law perspectives in policy framing and implementation. We have demonstrated that the dissonance between law and the lived reality of Kenyans a la poverty and poverty alleviation approaches was aggravated by the imposition of Law and Legal Thought within the *Three Globalizations*, and by policy transfer and diffusion by which African ontology and philosophy of law was disregarded despite its possible utility.

We have assessed and challenged conceptions of law, legal thought and development within the *Three Globalizations* and the *Three Moments* in Law and Development as foreign, and asserted that Kenya needs to rethink and shape its conception of law and development, cognizant of her underlying unique African socio-economic realities as key to its efforts at poverty alleviation. Indeed, we averred that scholarship in law and development has not benefited from

the context-specific appreciation of the prevailing in-country cultural realities and their impact on imposed Western legal ideals on law and development. This is particularly true for Africa, and Kenya indeed.

That from a socio-legal theory perspective, to effectively apply the law to social ordering and the transformation of society, it must not only be understood, but also owned from a contextual understanding of ourselves, our history and our challenges, and applied as such. We have argued that by the absence of this contextual approach, African Ontology and philosophy of law is relegated in development thinking in Kenya. Yet hopefully, the transformative Constitution of Kenya, 2010 provides a fresh impetus for the vigorous pursuit of the utility of the African philosophy of law for poverty alleviation.

The study was guided in its endeavour by the Socio-Legal Theory, Critical Legal Studies and African Legal Theory. These theories draw from the sociological and African schools of jurisprudence. Sociolegal theory provided us with the tools for critical examination of the function of law as an instrument of social change, often called an instrumental view of the law. African Legal Theory helped us, firstly, shape our understanding of the constitutive elements of African realities and how these intersperse with received Western legal tradition's approaches to law and development, and secondly, contextualize the failure of the approaches to poverty alleviation.

Two things emerged from our assessment based on the Critical Legal Studies theory. Firstly, was a framework for analysing the power dynamics of the imposition of Western Legal thought and practice and its influences. Secondly, a basis for questioning the motives behind the impositions and the need for a rethink of the place of African Legal Theory in addressing contemporary problems such as poverty alleviation. These theories helped us understand that the context of the design of law (*its nature, form and function*), its application to social ends and the cultural realities within which the law operates can have lasting consequences for law and development in relation to poverty alleviation in Kenya.

In Chapter Two, we assessed the strengths and weaknesses of the approaches to poverty alleviation and the influences that have shaped these approaches, and by so doing traced the

historiography of law and development policy in Kenya. We affirmed that colonial policy and legal continuities heavily impacted socio-economic arrangements in the post-colonial era. We argued that this legacy was critical to understanding Kenya's development experience viz a viz poverty alleviation within the *Three Globalizations* and policy transfer and diffusion. Under the Constitution of Kenya 2010, we noted a renewed thirst for governance and rule of law reforms, the result of which was the entrenchment of robust structural reforms, a solid policy and legal basis for a just, equitable society and sustainable development. Critical to these reforms was the mainstreaming of culture and national values as the basis for the governance framework and acknowledgement of African jurisprudence via recognition of Traditional Dispute Resolution mechanisms.

In Chapter Three, we examined the legislative and institutional frameworks for development at the international, regional and domestic levels. Specifically, we examined how poverty presents in these instruments via a SERs conception and noted the sufficiency of the legislative and institutional frameworks. We concluded that while the implementation of SERs remains a challenge in Kenya, conceptualizing these rights within an African ontology and philosophy of law would potentially enhance their relevance and utility in the pursuit of poverty alleviation.

Chapter Four examined the African ontology and philosophy of law as a basis for understanding the failure of Kenya's historical and contemporary approaches to poverty alleviation to connect to the lived reality of Kenyans. We conceptualized an African ontology and philosophy of law, and problematized epistemic and ontological assumptions about poverty, knowledge, consciousness and thought evident in the African World view. By this enunciation, we demonstrated mismatches between the historical and contemporary approaches to poverty alleviation, the institutional and legislative frameworks adopted therewith, and the lived socio-economic reality of Kenyans. We argued that this contestation is the root cause of the failure of the approaches to meaningfully mitigate poverty. Accordingly, we proposed a re-imagination of law and its application to development in Kenya, specifically for poverty alleviation. We argued

for new thinking and approaches, from the perspective of an African ontology and philosophy of law and the rejection of Western universalism.

In Chapter Five, we examined select government policy documents on development and poverty alleviation. To assess the success or otherwise of the select policy documents, we also examined various Kenya government reports on the poverty and development situation in the country over the decades. These periodical reports were critical in gleaning the lived realities of Kenyans and contrasting this lived reality with the aspirations of the select policy documents. We subject the select policy documents to four identified analytical tools. Three things emerged, firstly, that the preparation of policy documents for development and poverty alleviation did not take into account the voices of Kenyans nor their lived reality. Secondly, and as a result of the foregoing, policy measures were prepared by bureaucrats in Washington and Nairobi, for the donor-funded projects and financial aid, and for implementation respectively, in total ignorance of the circumstances in which these projects and programs were to operate. Thirdly, as a result of this, these programs and projects failed to connect with the lived reality of Kenyans and hence the persistent poverty.

6.3. Recommendations

Having set out to, and comprehensively assessing and establishing the causes of the failure of law and policy to connect to the lived reality of Kenyans, we make the following recommendations, for both the short term, mid-term and long term.

Firstly, in the long term, state and non-state actors while overseeing the implementation of the Constitution, including Constitutional amendment processes, must prioritize the furthering of the general aims of the Constitution relating to culture, but specifically those of Article 159(2)(c) for the development of a robust policy framework and or statute to delineate the composition, structure and form of TDRs for firstly, recognition, and secondly, conferring legal validity for ease of application by the state, legal practitioners, and for Courts to develop that jurisprudence. Such action will incorporate and mainstream the African Ontology and Philosophy of law perspectives

by conferring legal validity to the better cross-cutting African mores to bridge the apparent disconnect.

Secondly, in the short term, state and non-state actors must rethink and readjust existing programs and projects aimed at poverty and poverty alleviation to ensure they as much as possible address the lived realities (*socio-economic and cultural conditions*) of the Communities they intend to benefit. Thirdly, in the medium and long term, future programs, projects and their enabling policy and institutional frameworks must be designed with greater incorporation of African ontology and philosophy of law perspectives, even where donor-funded, taking into context the unique historical and contemporary realities of Kenyans, best practices and lessons from the past. Fourthly, state and non-state actors must do more to ensure the people not only widely participate in the formulation and implementation of these programs and projects, including when deriving poverty indices, but that those to be affected, whether communities and or individuals, also understand what is at stake and their role in addressing their immediate problems.

Fifthly, in the long term, the state must urgently ponder a syncretic approach for poverty alleviation which prioritizes the utility of the African philosophy of law perspectives as a bridge for connecting its policy measures with the lived reality of Kenyans. While such an attempt was made in Sessional Paper No. 10 of 1965, there have been no comprehensive similar attempts since. The state must realize that while Kenya is fast modernizing, Kenyans by nature remain culturally tied to their mores, norms and ethics – never having uprooted Okot p’Bitek’s pumpkin in the old homestead. These mores, norms and ethics often time impact the reception and responses to government policy programs and their implications.

Sixthly, and as a consequence of the foregoing, the state may have to, in the long term, rethink legal education and lawyering in Kenya. For instance, as long as the legal curriculum and syllabus continue to reflect a bias in terms of status and capacity of a person, identity, community, contractual and constitutional status institutions as is purely found in Roman law and English law,

those emerging from this system will little appreciate the utility of indigenous knowledge systems and its relevance to contemporary problems.

Finally, in the long term, Kenya may have to find ways to gradually wean itself off of dependence and over-reliance on ODA and foreign debt, including from emergent powers such as China. Dependence has implications on power relations and has historically impacted policy autonomy, hence affected the implementation of development policy and related legal frameworks responsive to the lived realities of Kenyans.

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