BACKGROUND PAPER ON ACCESS TO REMEDY

1. Introduction

The Office of the Attorney General and the Department of Justice and the Kenyan National Commission on Human Rights are spearheading the drafting of a National Action Plan on Business and Human Rights in Kenya. After a Baseline Assessment was completed and consultations were held with the public, Experts in various subject matters pertaining to Business and Human Rights conflicts were sought to lead thematic working groups. Background Papers on each separate subject matter were commissioned as starting points for the continued discussion of how Kenya is meeting its obligations towards the UN’s Business and Human Rights Guiding Principles and what challenges still remain. This ongoing formulation of a Business and Human Rights framework will inform the development and drafting of Kenya’s National Action Policy on Business and Human Rights, which will be Africa’s first. This Background Paper addresses issues and proposed recommendations concerning the access to remedies available in Kenya when despite preventative measures, a business commits a human rights abuse.

When examining the interaction of Business and Human Rights in Kenya, it is important to consider a number of themes that have been historical flashpoints of conflict. Kenya with its present borders was demarcated by colonial powers who brought and developed a number of business interests that grew most often at the expense of the human rights of indigenous Kenyans. As a result, even prior to Kenya’s independence and continuing to the present day, Land, Labour, Environment as well as Revenue Transparency and Management have been recurring themes where rights have been contested. Because of these historical injustices, disputes concerning these issues have often been raised by community activists. Of course, at independence, there were few if any remedies available to individuals and communities when they found their human rights under attack by business interests. That reality has slowly evolved over time with the greatest leap being provided by the Constitution of Kenya, 2010, notably including an expanded and comprehensive Bill of Rights,\(^1\) the obligation on private parties to not infringe on constitutional rights,\(^2\) the enlargement of standing rules allowing various actors to bring public interest litigation\(^3\) and the requirement of active public participation in governance\(^4\). Critically, the Constitution gives the High Court, as well as subordinate courts where legislation dictates, clear jurisdiction and contains a standalone provision on

---

\(^1\) Chapter 4 of the Constitution, 2010.
\(^2\) See Articles 260 and 20 of the Constitution, 2010.
\(^3\) See Articles 22 and 258 of the Constitution, 2010.
\(^4\) See Article 10(2)(a) of the Constitution, 2010.
constitutional remedies available concerning human rights.⁵ These developments have greatly increased the access to remedies for those coming into human rights conflicts with business, but there is still much room for improvement.

This Background Paper will endeavor to consider access to remedies in Kenya in the context of each of the thematic areas highlighted above. It will consider emerging issues in not only access to justice, but how those affected by human rights abuses involving business can partake of both judicial and non-judicial remedies to satisfy their complaints. Specifically, this paper will look at the case management of judicial cases that are brought; the legal aid environment; the specialized courts within the judicial system; the use of alternative dispute resolution (ADR) and non-judicial grievance mechanisms provided for by the state, community and individual companies; and how corruption affects remedial action. Finally, it will pose recommendations on how to work towards ensuring appropriate, improved and more effective remedy avenues for those who find their human rights threatened by business.

### 2. Business and Human Rights Obligations

As per Article 260 of the Constitution, corporations are legal persons meaning they, like all persons, must abide by and respect the Bill of Rights.⁶ The Kenyan Constitution protects community rights⁷ as well as individual rights and also makes any international legal instrument ratified by Kenya a part of the domestic law⁸. This means that a number of UN and AU international human rights instruments form part of Kenya’s domestic law. Yet, Kenya also has a legal human rights regime for business that goes beyond the Constitution. Domestic legislation also addresses community land rights,⁹ landlord and tenant relations,¹⁰ labour relations,¹¹ employment standards,¹² environmental standards¹³ and reporting obligations for public companies.¹⁴ There is also domestic legislation that addresses corruption¹⁵ and provides for strict rules for public procurement¹⁶. Anti-discrimination legislation makes it illegal to discriminate against persons living with or perceived to be living with HIV and AIDS¹⁷ and persons living with disabilities¹⁸. In fact, the government offers businesses

---

⁵ See Article 23 of the Constitution, 2010.
⁶ See Article 20 of the Constitution, 2010.
⁷ See Articles 32(2), 44(2), 61(2) and 63 of the Constitution, 2010.
¹⁴ Companies Act, 2015.
incentives to encourage employing people with disabilities\textsuperscript{19} and implement progressive environmental policies\textsuperscript{20}. The \textit{Companies Act}, 2015 also encourages voluntary disclosure of business risks including environmental, employee as well as social and community issues that could affect the business.\textsuperscript{21} This voluntary business risk analysis applies to all companies that are not SME’s.

Many of these human rights legal obligations placed on businesses are supported by Kenya’s commitments to its National Vision 2030, which will use many Public Private Partnerships (PPP’s) to achieve its infrastructure and development goals.\textsuperscript{22} Because PPP’s involve the government, the Constitution requires public participation, intergenerational equity in the sharing of natural resources and due regard to be given to marginalized communities.\textsuperscript{23} In addition, Kenya already operates within the policy frameworks provided by the UN’s Sustainable Development Goals (SDG’s) and its ratified ILO Conventions and the OECD Guidelines that Multi-National Corporations (MNC’s) are encouraged to abide by. Therefore, it is advisable to encapsulate all of these human rights obligations that businesses face in Kenya into a National Action Plan that outlines the available remedial options to help make the case to both domestic and international businesses operating in Kenya on why it makes good business sense to try to conform to human rights best practices. Kenya’s Business and Human Rights National Action Plan should also attempt to encompass Kenyan businesses that operate outside the country as Kenya does not have a human rights legal regime that includes these enterprises.

3. Issues, Analysis and Impacts

a. Issue: Case Management of Judicial Cases

\textbf{There are political and institutional barriers to easily bringing cases before the courts regarding conflicts between business interests and human rights.} First, jurisdiction can be an issue. As highlighted in Lodwar’s consultation meeting, access to justice is affected because magistrates do not have jurisdiction to hear land and environment cases and there are no specialized courts in Lodwar. These factors only increase the difficulty and cost of bringing a case before a court of competent jurisdiction. Jurisdiction can also be an issue where the conflict between business interests and human rights involves a contract that is governed by the law of a foreign jurisdiction. Labour contracts or contracts between business entities may raise this concern. This is more common for MNC’s, who may want to have their contracts governed by the jurisdiction where their head office is, but can also be an issue for Kenyan companies. While the wording of the contract is taken into account and companies cannot contract out of their human rights obligations,\textsuperscript{24} clarity

\textsuperscript{19} See Section 16 of the \textit{Persons with Disabilities Act}, 2017.
\textsuperscript{20} See Sections 48(3) and 57 of the \textit{Environmental Management and Coordination Act}, 2017 as well as Section 3(2)(f) of the \textit{Climate Change Act}, 2016.
\textsuperscript{21} See Section 655 of the \textit{Companies Act}, 2015.
\textsuperscript{23} See Article 10 of the Constitution, 2010.
\textsuperscript{24} See Case No. 1 of 2013 (HIV and AIDS Tribunal).
would still benefit all stakeholders. On the flip side, it is also important to note that there are no human rights obligations regulating Kenyan businesses operating outside Kenya.

Political and institutional barriers also exist within the criminal law realm. Even though the Director of Public Prosecutions (DPP) is an independent office, often there is still reluctance on behalf of the DPP to prosecute government officials as well as large private companies participating in PPPs. Even with the new Constitution being promulgated over seven years ago, Kenya’s history of power concentration in the Office of the President and the central government means that not all independent offices appreciate the powers and obligations that their offices hold. Perhaps due to the high profile role that human rights organizations have historically played in fighting human rights injustices perpetrated by the state, the two independent commissions dedicated to promoting human rights appear more independent. However, they could also be more creative in the use of the powers given to them under the Constitution with regards to business and human rights conflicts.

It should also be pointed out that there are notable political and institutional barriers facing parties alleging actual or possible human rights abuses when they are preparing their case. In Katiba Institute’s experience bringing public interest litigation on behalf of communities concerned with potential human rights abuses that may occur due to PPP projects, obtaining expert witnesses within Kenya can be problematic. There are relatively small communities of expert professionals in certain disciplines and many of these experts are often unwilling to speak out publicly against the few employers for high ranking professionals in their field in Kenya – those being very large corporations or government. These expert witnesses are especially important when bringing cases that involve environmental matters that require explaining scientific evidence or when cases involve issues that are novel in Kenya or where regulators do not have the needed expertise. The lack of or non-availability of domestic expert witnesses greatly increases the costs of litigation as foreign experts have to be brought in to testify.

Finally, it has been documented that the current political environment in Kenya is not conducive to human rights defenders. In fact, it is more likely for community activists advocating for the human rights of their community to be charged with regulatory or criminal offenses as opposed to them initiating litigation against businesses. This means that those who are concerned about their human rights being infringed may be hesitant to bring legal actions against businesses or even just advocate for their human rights because they may fear reprisal.

These various forms of political and institutional barriers present within the Kenyan legal landscape either increase the cost of bringing litigation for parties affected by human rights abuses involving business interests, discourage litigation being brought or make criminal prosecution less likely. The overall outcome is that there is a chilling effect on litigation addressing actual or potential human rights abuses involving business interests. Few cases being filed also means there are fewer

---

27 See Ibid at p. 12.
opportunities for alternative dispute resolution to be attempted within the confines of the judicial system.

b. Issue: Legal Aid Environment

Access to justice is greatly hindered by the high cost of bringing a legal case before the courts and there are very limited opportunities to obtain legal aid or free legal services. The Constitution provides enlarged standing rights for bringing public interest litigation concerning constitutional infringements including violations of the Bill of Rights, which is the main domestic legal instrument which provides protection for human rights. Nevertheless, the high cost of hiring a lawyer, filing fees and other costs associated with bringing a legal case mean that very few ordinary Kenyans can actually afford to institute a claim in search of a legal remedy when they feel their human rights have been violated. Given that filing a legal case is beyond the reach of most Kenyans, the country’s legal aid environment becomes an important factor as to whether legal actions can be brought and unfortunately, the present legal aid environment in Kenya is very weak. Currently, the government only supplies citizens with a lawyer through a pauper brief scheme when they are charged with murder, however, the Supreme Court has said that legal aid should be made available whenever a person faces a substantial injustice without it28. While the government’s legal aid scheme contained in the Legal Aid Act, 2016, has been passed into law and will provide funding for public interest litigation as well as class actions, it has yet to be implemented. This delay in implementation means that there is currently no broad based public legal aid scheme operating in the country.

Stakeholders in both community consultations raised their concerns over the cost of bringing litigation as being very expensive and “quite high”29 as well as the immense barrier it poses to access to justice. Beyond this, members of the public in Kisumu were concerned that access to justice is also impacted by the lack of information on the redress mechanisms available. It should also be noted that the availability of legal aid would address this information deficit as legal advice is an important part of choosing which remedy you want and the forum in which to pursue it. However, information campaigns as well as staff of alternative dispute resolution providers that are able to give the public individualized information on the advantages and disadvantages of various remedy options may also help address this information deficit.

Members of the public in Kisumu also noted that many unions are in place in Kenya to advocate for the rights of workers and the Commission on the Administration of Justice (CAJ or Office of the Ombudsman) can participate in litigation as amicus curiae or an interested party in appropriate circumstances in cases regarding the violation of a person’s right to fair administrative action was violated30. Therefore, these options also form part of the legal aid environment, however, union representation as well as Ombudsman assistance are not yet commonplace in human rights claims. In addition, the Law Society of Kenya encourages its members to offer pro bono services. Still, while other lawyers operate on contingency fees which means they only get paid if they are able to obtain a monetary settlement for their clients (out of which they would be paid), there is no regulatory

28 See Republic v. Kariso Chengo & 2 Others [2017] eKLR Petition No. 5 of 2015 (Supreme Court) [hereinafter Republic v. Kariso Chengo].
framework for these arrangements. Non-Governmental Organization (NGO) sponsored litigation has been used to pursue infringements of human rights,\textsuperscript{31} especially for marginalized groups or communities, however, it is less likely for NGO sponsored litigation to be brought against corporations as civil society’s efforts have traditionally focused on state violations. Lastly, it is also important to note here that legal aid is also not available to human rights defenders that find themselves in conflict with the law other than a few instances where NGO’s offer assistance. Defending human rights defenders therefore can also make a dent in the litigation resources that NGO’s have to offer for human rights protection.

Practically speaking, there are currently few avenues open for legal aid in Kenya. Without a comprehensive public legal aid scheme in place, given the sheer percentage of the population for whom seeking a lawyer’s expertise is too expensive, it makes it very hard to expect individuals to bring legal actions against corporations that infringe their human rights. Furthermore, without somewhere to access legal advice or more information concerning possible remedies, these remedies remain firmly out of reach.

c. Issue: Specialized Courts

While specialized courts exist in Kenya with expertise in dealing with the human rights provided for under the Constitution and other domestic laws, they are not easily accessible to citizens all over the country and especially less so in marginalized or under-developed areas. Even though it is recognized that the Judiciary is working to further devolve its operations, easy access to specialized courts has not yet been made a priority as the Judiciary is still ensuring there are courthouses available in all 47 counties.\textsuperscript{32} For example, as raised in the Lodwar consultation process, while specialized courts such as the Industrial Court and the Land and Environment Court are available in large centers, they are not available in all counties.

Courts that are specialized in areas pertinent to human rights and business conflicts also include tribunals\textsuperscript{33} that deal with the infringement of a person’s human rights such as the Rent Tribunal, National Environment Tribunal and the HIV and AIDS Tribunal. Tribunals are an especially important type of specialized court to be considered to deal with conflicts between human rights and business because they ideally are meant to increase access to justice by using simplified, informal and more efficient processes to be more accessible to ordinary people. Tribunals also do not suffer from the same level of backlog that the courts do.\textsuperscript{34} It should be noted, however, that while the three tribunals named above are within the Judiciary’s mandate, not all tribunals are currently under its purview.\textsuperscript{35} Nevertheless, the reality is that most tribunals have not been able to devolve their operations in a

\textsuperscript{31} For example, see Satrose Ayuma & 11 Others v. Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 Others [2013] eKLR Petition No. 65 of 2010 (Nairobi) on the right to housing and Aids Law Project v. Attorney General & 3 others [2015] eKLR Petition No. 97 of 2010 (Nairobi) regarding the right to privacy and the treatment of people living with HIV.


\textsuperscript{33} See Article 169(1)(d) of the Constitution, 2010.

\textsuperscript{34} Sustaining the Judiciary Transformation, supra note 32 at p. 28.

\textsuperscript{35} Ibid.
manner that is accessible to most Kenyans outside Nairobi. The public also lacks awareness of tribunals and the specific services they offer. Lastly, while there has been discussion of creating a dedicated human rights tribunal, there is currently no formal plan or bill that would implement this initiative.

Although it is helpful to individuals seeking remedies for human rights violations by business to have specialized courts constituted with expertise in the subject matter, if they are unable to access them, they cannot benefit from their expertise. Specialized courts are especially well placed to look out for systemic abuse by businesses and may offer an opportunity to apply rehabilitative or policy remedies as appropriate. Yet, the centralization of specialized courts and tribunals in Nairobi means that there are few options available to rural citizens other than to travel long distances to file an action. Furthermore, the stark lack of awareness among citizens about many tribunals poses an additional barrier to access to justice. These barriers also have a consequential chilling effect on human rights litigation brought against businesses.

d. Issue: Alternative Dispute Resolution and Non-Judicial Grievance Mechanisms

Non-legal remedies are important options offered via various alternate dispute resolution and non-judicial grievance mechanisms, however, these systems are not being utilized to the extent they should be to put remedies to human rights and business conflict truly within reach. The Judiciary is making efforts to implement Article 159(2)(c) of the Constitution and encouraging the wider use of alternative dispute resolution through pilot programs and by training their staff to facilitate such processes.36 The use of alternative dispute resolution within the judicial system will broaden the scope of remedies available as mediated and negotiated settlements are not limited to the same legal remedies that are available in a legal action. Nevertheless, beyond the Judiciary’s use of alternative dispute resolution, the availability of non-judicial grievance mechanisms are also key. In this vein, even though there are many non-judicial grievance mechanisms that have the confidence of the community in Kenya, they have not been utilized to their full potential in the area of business and human rights conflict.

To affirm that there are many non-judicial grievance mechanisms available, the Kisumu consultation report cites a number of such systems that were named by the public, including: customer care mechanisms such as suggestion boxes and customer care desks; open door policies for government offices; outreach programs to enable grassroots level interaction; hotline numbers to file complaints; information dissemination through Chiefs; unions advocating for workers’ rights; court user committees; Office of the Ombudsman (CAJ), Deputy’s Registrar’s office in Kisumu receiving public complaints or grievances; court annexed mediators; Nyumba Kumi initiatives; and religious institutions mediating disputes. In the Lodwar public consultation, members of the business community were concerned that there was no facilitation of fees to the Council of Elders which left them feeling neglected. This was a concern because the Council of Elders could provide alternative dispute resolution. Indeed, in some communities, councils of elders and other informal community leaders have provided non-judicial grievance mechanisms that carry weight with members of the community and could also serve as representatives to bring forward human rights complaints to businesses. As per Article 159(3) of the Constitution though, any traditional methods of dispute

---

36 *Sustaining the Judiciary Transformation*, supra note 32 at p. 16.
resolution must conform with the Constitution, including not perpetuating discrimination as defined by the Bill of Rights or generally accepted standards of morality and justice.

In addition to these informal dispute resolution processes, other constitutional independent commissions, in addition to the Ombudsman Office (CAJ) which offers alternative dispute resolution, are also good sources for remedies for human rights grievances in the face of business interests. The Kenya National Commission on Human Rights regularly constitutes boards of inquiry and has a large investigative, advocacy, public information provision and government advisory mandate. The National Gender and Equality Commission also has a similar mandate with regards to discrimination. Similarly, the National Land Commission also shares such a mandate with respect to land issues and notably is charged with encouraging the use of traditional dispute resolution mechanisms in land conflicts. Moreover, non-judicial, local state sponsored grievance mechanisms such as going informally before the Chief are more accessible and appropriate for SME’s while wider community consultation may be more suited to larger businesses.

There are also many non-state sponsored informal dispute resolution systems that have been used in Kenyan public disputes such as facilitation being provided by religious leaders, human rights organizations, labour groups and civil society generally. Likewise, the Kenya Private Sector Alliance, Kenya Association of Manufacturers and the Kenya Chamber of Mining are all industry associations that educate their members about their legal obligations and engage with government on industry issues. Though these organizations do not appear to currently offer informal grievance facilitation processes, they might be able to create such a process that would suit their membership. They could also ensure member businesses are aware of their human rights obligations are encouraged to develop internal grievance processes.

Some informal grievance mechanisms within companies themselves have already been mentioned such as suggestion boxes and customer care desks, Corporate Social Responsibility (CSR) or outreach programs and hotline numbers to file complaints. All of these systems can open the dialogue between a business and the community which could be helpful in working towards solutions to human rights and business interests conflict. Unfortunately Kenyan law does not require any business to have an informal complaint process, much less hold it to a certain standard. Again, local industry associations could facilitate the implementation of internal business grievance systems by providing model mechanisms that the public can easily access.

While there is no scarcity of options for informal grievance dispute resolution that could play a part in settling and providing remedies for human rights and business conflicts, these alternative methods have not been widely used in this context. Once more, industry associations may serve as a way to promote these various informal grievance dispute resolutions as confidence from the business community may be part of the obstacle in adopting them in human rights and business conflict scenarios. Without widespread adopting of such alternative methods, stakeholders may feel

37 See Article 29(2) of the Commission of Administrative Justice Act, 2011.
38 See Article 59 of the Constitution, 2010.
39 Ibid.
40 See Article 67 of the Constitution, 2010 generally.
41 Article 67(2)(f) of the Constitution, 2010.
confined to judicial processes which will usually favour businesses because they most often have greater financial resources at their disposal.

e. Issue: Corruption

Finally, it is important to note that the presence of corruption within any type of dispute resolution system negatively affects the community’s confidence in the mechanism and also undermines its ability to offer appropriate remedies. Furthermore corruption also contributes to human rights abuses because it reinforces the current power structure and keeps those who are marginalized or disadvantaged within a pattern of discrimination. It also compromises sources of help to marginalized or disadvantaged persons and promotes a hostile environment for human rights defenders because authorities receiving human rights complaints are undermined. Quite simply, corruption allows human right abuses to happen without resistance. And corruption can occur in state bodies as well as private companies.

Since 2011, the Judiciary has embarked on a transformation undertaking that has included vetting of judges, performance appraisal systems and strengthening of internal complaint mechanisms. Nevertheless, some charges of corruption still exist. Yet, corruption in Kenyan society must be tackled head on so that it is not an accepted part of doing business and more individuals are held accountable for corrupt actions. Kenya ranks as one of the worst countries for corruption on Transparency International’s corruption index. If the country’s propensity for corruption can be tamed, access to remedies will improve and recognition of human rights abuses will more readily occur.

4. Recommendations

a. Issue: Case Management of Judicial Cases

With regards to the concerns raised over jurisdiction, government may consider providing jurisdiction to magistrates or another specialized tribunal where litigation costs may be lower in order to facilitate ordinary citizens bringing human rights cases against businesses. The government should also consider legislation to clarify the human rights obligations of Kenyan businesses operating outside of Kenya. Independent government offices may need further training on their duties to the Kenyan people and human rights sensitization. Parties should also be encouraged to name government offices who have failed to protect Kenyans’ human rights in their actions to ensure attitudes change. Moreover, government and all public officers generally need to understand their obligations under the Constitution regarding human rights and how their offices can affect the enforcement of these rights. A radical culture shift is required in society to combat both the climate for human rights defenders, expert or otherwise, and government must lead the way.

44 Sustaining the Judiciary Transformation, supra note 32 at pp. 32 - 35.
b. Issue: Legal Aid Environment

The most important step that government can take to assist making remedies more available to Kenyans for human rights violations committed by businesses is to operationalize the *Legal Aid Act, 2016* as soon as possible. Care should also be taken to ensure that it is operationalized in a manner that conforms with the constitutional requirements as set out the Supreme Court in its recent ruling. While the legal aid scheme can provide both legal representation as well as information by way of legal advice, the lack of public information regarding human rights remedies may also be addressed through information resources made available through the independent commissions relating to human rights. These commissions could also create practical human rights remedy training programs to target other organizations that could also provide legal aid such as the Ombudsman’s Office (CAJ), labour unions, NGO’s that have litigation programs and lawyers that offer pro bono services.

c. Issue: Specialized Courts

The main problem with the specialized courts and tribunals that already exist with a mandate to address some of the issues that may arise in business and human rights conflicts is accessibility. Challenges regarding accessibility also extend to the information available about these options. The Judiciary must work on effectively devolving these specialized courts and tribunals even if only by making circuits to ensure that rural areas also benefit from their services. The Judiciary must also ensure that citizens are aware of the various tribunals that can address human rights issues and be able to access information regarding how and when they can bring a complaint. Finally, given that tribunals can more effectively offer access to justice and expertise in human rights issues, further consideration should be given to forming a tribunal dedicated to handling human rights abuses.

d. Issue: Alternative Dispute Resolution

Alternative dispute resolution options should be available within the judicial system for conflicts between human rights and business interests and staff must be specifically trained on how to handle these cases as there is almost always an extreme discrepancy between bargaining power, legal resources and sophistication between the parties. Going further, community based non-judicial grievance mechanisms should be supported by the government. Remedies that are created and implemented by members of the community are the most effective first line of defense against business violations of human rights. Community grievance mechanisms that already have the confidence of the community such as mediation by Chiefs, consultation with Councils of Elders and even regionally based offices of the independent commissions relating to human rights are well versed in the local issues and customs that may affect human rights in these areas. Government training and funding could make these systems much more viable options for citizens that feel that their human rights have been impacted by business. Finally, given the emphasis the Guiding Principles on Business and Human Rights place on intra-company grievance mechanisms in order to start dialogue on conflicts early to aid in early settlement of disputes, it may be worth considering whether businesses should be required to put company-community grievance resolution systems in

---

place. This could be done via legislation or by encouraging industry associations to require members to put these procedures in place.

e. Issue: Corruption

The Judiciary’s continued transformation should be encouraged, especially the internal complaint mechanisms that have the power to address individuals cases such as the Judiciary’s Ombudsman Office. Fighting corruption within Kenyan society is a larger problem, however, actors in the justice system such as the police and the DPP must be targeted for further training and sensitization to human rights issues. Similarly, country and national government officials that are involved in facilitating business investment and incentive programs must be trained and sensitized in human rights so that they may ensure businesses are accurately informed of their human rights obligations in Kenya.