

Combating Illicit brews in Kenya: An Analysis of the Legal and Institutional Framework.

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University Law School

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**DECLARATION**

I, EVELYN JOYCE WARINGA MUREGI, do hereby declare that this research is my original work and that to the best of my knowledge and belief; it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: .....

Date: .....

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

Signed:.....

Date:.....

Mr. Harrison Mbori

## **DEDICATION**

This research is dedicated to my family for their unwavering support and encouragement throughout my education. I will forever be grateful for your love and sacrifice.

I also dedicate this work to Jehovah God for granting me favor throughout the process and giving me direction as I wrote.

## **ACKNOWLEDGEMENT**

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## **Abbreviations and Acronyms**

ACA Anti-Counterfeit Agency (Kenya).

ACTA Anti-counterfeiting Trade Agreement.

ADR Alternative Dispute Resolution.

KEBS Kenya Bureau of Standards.

KES Kenya Shillings.

KLR Kenya Law Report.

KRA Kenya Revenue Authority.

NACADA National Authority for the Campaign against Drug Abuse

WHO World Health Organization.

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## **ABSTRACT**

Recognizing the seriousness of alcoholism in the country, the Kenyan Parliament enacted the Alcoholic Drinks Control Act of 2010, also known as Mututho law in an attempt to bring sanity in the Alcohol sector. Nevertheless, the regulation of alcohol consumption may highly affect the socio-economic welfare of the alcohol outlets. This study therefore sought to establish the effect of the Alcoholic Drinks Control Act, 2010 on the alcohol industry.

The study carried out both qualitative and quantitative research on the relevant stakeholders in the alcohol industry. From the findings, the study established that the various agencies which have been given the mandate to deal with alcoholism are working together to implement the law.

This study recommends that the officers charged with implementation of Mututho law to be strict and thorough. The agencies should create awareness, improve economic status, involve the media, information sharing forums, provide funding and assist the county governments.

## **CHAPTER ONE**

### **1.0 RESEARCH PROPOSAL**

#### **1.1 Introduction**

A study by National Agency for the Campaign against Drug Abuse Authority (NACADA) in 2007 revealed that nationally 13% of the population currently consumes alcohol, and that second generation alcohol is consumed by over 15% of 15–64 year olds.<sup>1</sup> In addition, nearly 90 percent of the alcohol consumed within East Africa comes from illicit brews due to their affordability.<sup>2</sup> Through the statistics it can be viewed that Kenya has a drug and abuse problem which has negative effects on public health and in the long run diminishing all sectors of the economy, security as well as reducing the ability to attain the national development goals.<sup>3</sup>

In addition, an illicit brew is described as an alcoholic beverage which the ingredients are various fruits that are fermented to release ethanol.<sup>4</sup> What makes the drink illegal is the use of methanol which increases the volume of alcohol in the drink.<sup>5</sup> Another type of illicit brew is the second generation alcohol. This is counterfeit alcohol of established brands.<sup>6</sup> Both brews use methylated

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<sup>1</sup> The Alcoholic Drinks Control Act and its impact on the hospitality industry <https://www.icpak.com/wp-content/uploads/2015/09/THE-ALCOHOLIC-DRINKS-CONTROL-ACT-AND-ITS-IMPACT-ON-THE-HOSPITALITY-INDUSTRY.pdf> on 11 December 2015

<sup>2</sup> Jackson Teaka, "Dying for a Drink: How the Consumption of Home brews Affects Health within the Kibera Slum of Nairobi, Kenya" (2015). *Independent Study Project (ISP) Collection*. Paper 2026. [http://digitalcollections.sit.edu/isp\\_collection/2026](http://digitalcollections.sit.edu/isp_collection/2026) on 11 December 2015

<sup>3</sup> National Authority for the Campaign Against Alcohol and Drug Abuse, *Rapid Situation Assessment of the Status of Drug and Substance Abuse in Kenya*, 2012, 2.

<sup>4</sup> Muthoni Thang'wa, "Kenya: After the Crackdown, Illicit Brews Have Bubbled Back" *Daily Nation* (Kenya, 28th January 2016) <http://allafrica.com/stories/201601281396.html> on 28 January 2016

<sup>5</sup> Patrick Gathara, "sober up Mr President there is no drink crisis" *The Star* (6 August 2015) [http://www.the-star.co.ke/news/2015/08/06/sober-up-mr-president-theres-no-drink-crisis\\_c1181987](http://www.the-star.co.ke/news/2015/08/06/sober-up-mr-president-theres-no-drink-crisis_c1181987) on 21 March 2016

<sup>6</sup> Patrick Gathara, "sober up Mr President there is no drink crisis" *The Star* (6 August 2015) [http://www.the-star.co.ke/news/2015/08/06/sober-up-mr-president-theres-no-drink-crisis\\_c1181987](http://www.the-star.co.ke/news/2015/08/06/sober-up-mr-president-theres-no-drink-crisis_c1181987) on 21 March 2016

spirits which have a negative impact on the health of its drinkers.<sup>7</sup> The chemical components that are used to make brews are methanol which is another form of alcohol that is not safe for human consumption.<sup>8</sup> Methanol is best known for preservation of dead bodies, and an ingredient commonly used in rat poison.<sup>9</sup>

In July of 2015 President Uhuru Kenyatta gave a directive that all illicit brews outlets in central Kenya should be shut down and the owners arrested.<sup>10</sup> This directive came as a consequence of the increasingly high numbers of deaths as a result of illicit brews.<sup>11</sup> Producers of legitimate brands such as Keroche Breweries then went to the High court to seek an injunction against the directive to destroy illicit alcohol.<sup>12</sup> The court held that the President's directive did not comply with Article 135 of the Constitution of Kenya 2010 which requires that the President's directives be in writing.<sup>13</sup> Moreover, the court held that the respondents' actions were illogical in that they had not taken into account the fact that the Petitioner's business and products are legitimate and duly licensed by the body which has purported to suspend the licenses.<sup>14</sup>

Kenya faces a challenge of a multiplicity of laws that have been enacted to deal with the production, sale and consumption of illegal alcohol.<sup>15</sup> The bodies given the mandate to curb the

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<sup>7</sup> The inside stories on emergencies, "poverty links in legal brew deaths (24 November 2000) <http://www.irinnews.org/news/2000/11/24/poverty-link-lethal-brew-deaths> on 19 February 2016

<sup>8</sup> Moshani D, Wangambo J, Mhinzi J, "African Traditional Brews: How safe are they?" 57:2 *Food chemistry* (1996), 206.

<sup>9</sup> The inside stories on emergencies, "poverty links in legal brew deaths (24 November 2000) <http://www.irinnews.org/news/2000/11/24/poverty-link-lethal-brew-deaths> on 19 February 2016

<sup>10</sup> Address causes, not symptoms to win war against alcoholism (6 July 2015) [http://standardmedia.co.ke/m1/story.php?articleID=2000168110&story\\_title=Address-causes-not-symptoms-to-win-war-against-alcoholism](http://standardmedia.co.ke/m1/story.php?articleID=2000168110&story_title=Address-causes-not-symptoms-to-win-war-against-alcoholism) accessed on 28 January 2016

<sup>11</sup> Hou Qiang, "Kenya cracks down on illicit brew that kills 7,000 in 4 years" *Africa news* (15 July 2015) [http://news.xinhuanet.com/english/2015-07/15/c\\_134415646.htm](http://news.xinhuanet.com/english/2015-07/15/c_134415646.htm) on 14 December 2015

<sup>12</sup> *Keroche Breweries Limited v Cabinet Secretary, Ministry of Interior And Co-ordination of National Government & others* (2015) eKLR

<sup>13</sup> The Constitution of Kenya 2010, s135 "A decision of the President in the performance of any function of the President under this Constitution shall be in writing and shall bear the seal and signature of the President."

<sup>14</sup> *Keroche Breweries Limited v Cabinet Secretary, Ministry of Interior And Co-ordination of National Government & others* (2015) eKLR

<sup>15</sup> Edwin Okoth, "How illicit alcohol is taking a toll on the economy" *Daily Nation* (16 March 2016)

production of illicit alcohol fight more against each other than coming together to fight against stopping this ongoing problem.<sup>16</sup>

## 1.2 Statement of the problem

Alcohol is consumed for leisure purposes with the aim of enjoyment.<sup>17</sup> However, the problem is that illicit brew production is a widespread practice in Kenya.<sup>18</sup> One of the factors that has led to an increase in production is that legitimate alcoholic beverages are taxed heavily which makes them unaffordable for people who live in poverty.<sup>19</sup> As a result, Kenyans especially in rural areas are left with no option but do drink the brew which kills them.<sup>20</sup> Even with a legal framework, the production of illicit alcohol is prevalent.<sup>21</sup> Alcohol production was previously governed by a myriad of statutes known as the Chang'aa Prohibition Act No 70 of 1980, The Liquor Licensing Act No 121 of 1986 and The Traditional Liquor Licensing Act No. 122 of 1991 whose mandate was to prohibit the production of illicit brews which did not provide a simple, secure and efficient system.

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<http://mobile.nation.co.ke/lifestyle/Illicit-brews-Staggering-cost--to-the-economy/-/1950774/3117506/-/format/xhtml/item/1/-/gfwo6az/-/index.html> on 21 March 2016

<sup>16</sup> Vnzomo, "Anti counterfeit agency under fire as war on illicit brews continues"

<https://ipkenya.wordpress.com/2015/07/13/anti-counterfeit-agency-under-fire-as-war-on-illicit-brews-continues/> on 21 March 2016

<sup>17</sup> International centers for alcohol policies <http://www.icap.org/PolicyTools/ICAPBlueBook/IntroAnIntegrativeApproachtoAlcoholPolicies/tabid/187/Default.aspx> on 19 February 2016

<sup>18</sup> Dr. Ruth Simiyu, "Influence of illicit brew consumption on the socio-economic status of households in Bungoma east district, Kenya.

<http://oris.nacosti.go.ke/modules/library/publications/archives/NCST-DL-PGM-3367.pdf> on 29 January 2016

<sup>19</sup> Marcus Grant, "alcohol and emerging markets: patterns, problems and responses"

[https://books.google.co.ke/books?id=eJVMq190TG4C&pg=PA339&lpg=PA339&dq=legal+aspect+of+illicit+production+of+alcohol&source=bl&ots=ECujwenIcN&sig=EqN6DJr0ZNu78H3LIXwYU9CUImY&hl=en&sa=X&redir\\_esc=y#v=onepage&q=legal%20aspect%20of%20illicit%20production%20of%20alcohol&f=false](https://books.google.co.ke/books?id=eJVMq190TG4C&pg=PA339&lpg=PA339&dq=legal+aspect+of+illicit+production+of+alcohol&source=bl&ots=ECujwenIcN&sig=EqN6DJr0ZNu78H3LIXwYU9CUImY&hl=en&sa=X&redir_esc=y#v=onepage&q=legal%20aspect%20of%20illicit%20production%20of%20alcohol&f=false) on 19 February 2016

<sup>20</sup> Jackson, Teaka, "Dying for a Drink: How the Consumption of Home brews Affects Health within the Kibera Slum of Nairobi, Kenya" (2015). *Independent Study Project (ISP) Collection*. Paper 2026.

[http://digitalcollections.sit.edu/isp\\_collection/2026](http://digitalcollections.sit.edu/isp_collection/2026) on 11 December 2015

<sup>21</sup> Jackson, Teaka, "Dying for a Drink: How the Consumption of Home brews Affects Health within the Kibera Slum of Nairobi, Kenya" (2015). *Independent Study Project (ISP) Collection*. Paper 2026.

[http://digitalcollections.sit.edu/isp\\_collection/2026](http://digitalcollections.sit.edu/isp_collection/2026) on 11 December 2015

### **1.3 Justification of the study**

The relevance of this study is founded on the fact that the production of illicit brews has been a growing problem in Kenya. Kenyan citizens are workers and laborers who boost the economy, these are mostly husbands, fathers and friends to their loved ones. The wives, mothers and the children gender are the victims who suffer because they become the bread winners of their families as a result of the husbands spending their days in the dens drinking the brews. They have a role to play in the society which means they should be protected. There is little research in illicit brew production from a legal perspective which poses a challenge to the researcher. Hence the results of this research will add literature in the field.

It is believed that this study will assist policy makers and the relevant government departments in coming up with policies that will inform the legal framework to resolve this specific problem.

### **1.4 Statement of objectives**

The general objective in this study is to evaluate the implementation of the Alcoholic Drinks Control Act, 2010.

The specific objectives in this study will be:

1. To examine the overlapping of roles of the institutions given the mandate to stop the production and consumption of illicit brews.
2. To examine the challenges NACADA, KRA, KEBS, ACA and illicit brewers face.
3. To propose appropriate recommendations to the policy, legal and institutional framework dealing with illicit brews.

### **1.5 Research questions**

This research will address the following interrelated research questions:

1. Which institutions are responsible in this fight against illicit brews?
2. Have the current institutions fulfilled their mandate?
3. How can these institutions be strengthened to meet their objectives?

## **1.6 Methodology**

This research paper intends to use both qualitative and quantitative research in order to get a holistic view of illicit brews within Kenya. The study intends to use semi structured interviews to develop illustrative scenarios on the social aspects of illicit brews. The goal of the interviews is to get qualitative information from individuals through their experiences.

### **1.6.1 Sampling**

This study intends to interview relevant stakeholders so as to successfully identify what in their opinion is the cause of the continuous production and consumption of illicit brews. With this in mind this study will intend to gather information from Kenya Revenue Authority, Kenya Bureau of Standards, Anti Counterfeit Agency, National Campaign against Drug Abuse and local brewers.

There are two types of sampling which are called probability sampling and non-probability sampling design.<sup>22</sup> The Probability sampling design is also known as random sampling.<sup>23</sup> The design is where each division of the population must be represented in the sample and each sample has a non-zero chance of being selected into the sample.<sup>24</sup> In order to carry out random sampling the study must ensure that every unit in the population has an equal chance of being

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<sup>22</sup> Munga H, "Role of mobile technology in anti-counterfeit initiatives in Kenya: Case of electronic products" LLM Thesis, Strathmore University, June 2013.

<sup>23</sup><https://web.csulb.edu/~msaintg/ppa696/696sampl.htm> on 23 November 2016.

<sup>24</sup> Munga H, "Role of mobile technology in anti-counterfeit initiatives in Kenya: Case of electronic products" LLM Thesis, Strathmore University, June 2013.

chosen.<sup>25</sup> Types of such sampling include simple random sampling, stratified random sampling, systemic random sampling and cluster random sampling.<sup>26</sup>

The probability random sampling entails that information on the population needs to be accurate and current as it will be random.<sup>27</sup> In addition, to carry out such sampling would be time consuming and costly on the researcher if the sample area is large.<sup>28</sup> For the above reasons this sampling method would not be best for this study.

Non-probability sampling is a non-random selection of people in the population. People either volunteer or are chosen because of their availability when the research is being done.<sup>29</sup> The types of non-probability design sample include convenience sampling which is where the researcher picks people from the population with no specific characteristics.<sup>30</sup> Another type of sampling is called purposive sampling. Such sampling involves researching on a particular population with an end goal in mind.<sup>31</sup> The objective of this approach is to focus on a particular characteristics of the chosen sample so that they can meet the researcher's requirements.<sup>32</sup>

The exact sampling method under purposive sampling will be expert sampling because the research will rely on the knowledge of the people who will be interviewed.<sup>33</sup> Moreover the research will be less time consuming and costly on the researcher.<sup>34</sup> The potential drawback of

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<sup>25</sup><http://www.socialresearchmethods.net/kb/sampprob.php> on 23 November 2016.

<sup>26</sup><http://www.socialresearchmethods.net/kb/sampprob.php> on 23 November 2016.

<sup>27</sup><https://zenportfolios.ca/capu-bmkt-360-01-summer-2013/2013/06/10/team-8-chapter-sampling/> on 23 November 2016.

<sup>28</sup><https://zenportfolios.ca/capu-bmkt-360-01-summer-2013/2013/06/10/team-8-chapter-sampling/> on 23 November 2016.

<sup>29</sup><https://web.csulb.edu/~msaintg/ppa696/696sampl.htm> on 23 November 2016.

<sup>30</sup><http://dissertation.laerd.com/convenience-sampling.php> on 23 November 2016.

<sup>31</sup><http://www.socialresearchmethods.net/kb/samponon.php> on 23 November 2016.

<sup>32</sup><http://dissertation.laerd.com/purposive-sampling.php> on 23 November 2016.

<sup>33</sup> Battaglia P, "Non-probability sampling" *Encyclopedia of survey research methods* 2008, Sage publications, 2011, 524.

<sup>34</sup> Munga H, "Role of mobile technology in anti-counterfeit initiatives in Kenya: Case of electronic products" LLM Thesis, Strathmore University, June 2013.

such a method of sampling is that there is a high risk of potential bias which could affect the result of the study.

### **1.6.2 Data collection methods**

It would be done through face to face interviews for the available stakeholders. Also the use of observation and a check list to confirm if the brewers meet the requirements for having a licensed local brewery.

### **1.7 Hypothesis**

This study is of the assumptions that:

1. The current legal framework shows a multiplicity of laws dealing with the same problem.
2. The institutions are ineffective in dealing with illicit brews.

### **1.8 Limitations of the study**

The limitations of the research was the time to draft this research as well as collect data was strained and other legal subjects have to be considered. In addition, the information that is available in this topic from a legal perspective in relation to Kenya is limited. This is because the information is unrecorded and the production and consumption occurs deep in the villages.<sup>35</sup> The researcher's personal opinion may be biased because her family is involved in the sale of legitimate alcohol.

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<sup>35</sup> The National Campaign Against Drug Abuse Authority, "Summary report on morbidity and mortality caused by alcohol consumption in various parts of the county as at 11<sup>th</sup> May 2014"

## **CHAPTER TWO**

### **2.0 THEORETICAL FRAMEWORK AND LITERATURE REVIEW**

#### **2.1 Introduction**

This study intends to look at positivism and historical jurisprudence as legal theories in order to evaluate the impact illicit brews have on the Kenyan society. The positivist school of thought looks at what the law is and not what it ought to be.<sup>36</sup> While the historical school of thought seeks to look at the relationship between history and the law.

In addition to understanding the theories that this study will be based on, this chapter will include relevant literature written on the effects of illicit brews as well as various case studies in various communities.

#### **2.2 Positivist's school of thought**

Among various theories of law, this study is centered on the positivist school of thought. According to John Austin (classical positivist) law is a command of the sovereign backed by sanctions if the law is not upheld.<sup>37</sup> Austin's idea was that commands are an express wish of something to be done mixed with a punishment if it is not followed.<sup>38</sup>

Austin's definition of a law is "A law, in the most general and comprehensive acceptance in which the term, in its literal meaning, is employed, may be said to be a rule laid down for the guidance of an intelligent being by an intelligent being having power over him."<sup>39</sup>With that

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<sup>36</sup> Chinhengo A, *Essential Jurisprudence*, Cavendish Publishing limited, London, 2000, 30.

<sup>37</sup><http://www.jus.unitn.it/users/patterson/course/topics/materiale/analyticjurissupplemental.pdf> on 21 March 2016

<sup>38</sup> Green L, "Legal Positivism", *The Stanford Encyclopedia of Philosophy* (Fall 2009 Edition), Edward N. Zalta (ed.) <http://plato.stanford.edu/archives/fall2009/entries/legal-positivism/> on 19February 2016.

<sup>39</sup> Campbell R, Thomas P, *The province of Jurisprudence determined*, Ashgate Publishing Limited, 1885, 8.

general concept he further defined law into two categories: the laws of God which are sent from God to be obeyed by his creations and the laws set by man for man.<sup>40</sup>

Austin's theory distinguished between analytical jurisprudence and normative jurisprudence, where the first is looking at the law as it is and its foundation, current existence, basic concepts and the latter looks at the goodness or badness of the law.<sup>41</sup> His concept was looking at the law generally then breaking it down to be more specific which was important because one was able to distinguish what is significant in defining law.<sup>42</sup>

In addition, this theory states that morality does not play a role in law as is in the natural school of thought.<sup>43</sup> Austin's theory states that the law is a reflection of our moral order and this order is innate and is discovered through reason and experience.<sup>44</sup> Natural law theory focuses on what the law ought to be, and uses moral reasoning to arrive at its conclusions.<sup>45</sup> Ultimately laws should be created to take man to his ultimate end which is happiness.<sup>46</sup> This theory recognizes that law cannot operate in a vacuum but externalities such as public opinion affects the legislation.<sup>47</sup> However, this is viewed as non-legal material that is necessary for, and part of, every legal system.<sup>48</sup>

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<sup>40</sup> Chinhengo A, *Esssential Jurisprudence*, Cavendish Publishing limited, London, 2000, 33.

<sup>41</sup> Chinhengo A, *Esssential Jurisprudence*, Cavendish Publishing limited, London, 2000, 32.

<sup>42</sup> Chinhengo A, *Esssential Jurisprudence*, Cavendish Publishing limited, London, 2000, 32.

<sup>43</sup> <http://schoolworkhelper.net/positive-law-thomas-hobbes-jeremy-bentham-john-austin/> on 21 November 2016

<sup>44</sup> Campbell R, Thomas P, *The province of Jurisprudence determined*, Ashgate Publishing Limited, 1885, 8.

<sup>45</sup> <http://www.iep.utm.edu/natlaw/> on 10 February 2017.

<sup>46</sup> <http://www.iep.utm.edu/natlaw/> on 10 February 2017.

<sup>47</sup> <https://plato.stanford.edu/entries/natural-law-theories/> on 10 February 2017.

<sup>48</sup> <https://plato.stanford.edu/entries/natural-law-theories/> on 10 February 2017.

Where Austin's theory is flawed Herbert Lionel Hart<sup>49</sup> came in to fill in the gaps with his school of thought. Hart's theory was in line with positive jurisprudence.<sup>50</sup> He analysed the relationship between law, coercion and morality and attempts to answer the question if all laws may be viewed as coercive orders or moral commands.<sup>51</sup> He adds that there lacks a strict correlation between coercion and law or morality and law because in accepting one or the other, it simplifies the relationship between all three.<sup>52</sup> Hart defines law as a form of social rules and not orders of which if not adhered to will be followed by physical punishment such as going to jail as opposed to moral punishments such as emotional despair.<sup>53</sup>

He argues that law is a culmination of primary and secondary rules where primary rules deal with "actions that an individual must or must not do".<sup>54</sup> This is known as the rules of obligation where each individual must obey the rules.<sup>55</sup> However, these rules cannot stand alone hence why secondary rules which are "concerned with primary rules" are applied.<sup>56</sup> Secondary rules are divided into three subcategories known as the rules of recognition, rules of change and rules of adjudication.<sup>57</sup>

The rules of recognition provide certainty in validating laws, while the rules of change gives room for members of the society to change their position relative to primary rules and this is

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<sup>49</sup>HLA Hart was formerly Professor of Jurisprudence at Oxford University, Principal of Brasenose College, and Fellow of University College.

<sup>50</sup><http://www.angelfire.com/md2/timewarp/hart.html> on 7 February 2017

<sup>51</sup><http://www.angelfire.com/md2/timewarp/hart.html> on 7 February 2017

<sup>52</sup><http://www.angelfire.com/md2/timewarp/hart.html> on 7 February 2017

<sup>53</sup> Bogdanov E, "John Austin's and H.L.A Hart's legal positivist theories of law:an assessment of empirical consistency" 18 January 2012.

<sup>54</sup> Hart, H.L.A. "The Concept of Law." Classic Readings and Canadian Cases in the Philosophy of Law. Ed. Susan Dimock. Toronto: Pearson Prentice Hall, 2002. 91-113.

<sup>55</sup> Bogdanov E, "John Austin's and H.L.A Hart's legal positivist theories of law:an assessment of empirical consistency" 18 January 2012.

<sup>56</sup> Bogdanov E, "John Austin's and H.L.A Hart's legal positivist theories of law:an assessment of empirical consistency" 18 January 2012.

<sup>57</sup> Bogdanov E, "John Austin's and H.L.A Hart's legal positivist theories of law:an assessment of empirical consistency" 18 January 2012.

what gives the society the power to change their laws.<sup>58</sup> The rules of adjudication includes rules that ensure efficiency in creating a judiciary which is used as the medium to settle disputes among individuals with grievances in the society.<sup>59</sup>

Hart includes the internal and external point of views with respect to assessing the legal systems.<sup>60</sup> Law depends not only on the external social pressures of the society but also on the internal point of view of the individual who will consent and freely cooperate in following the rules which distinguishes rules from habits.<sup>61</sup> According to Hart, a law becomes valid if it passes the test of recognition.<sup>62</sup>

This study adopts a positivist approach because it is studying the effectiveness of the law in curbing the production and sale of illicit brews. This mean that the study is looking at what the current law on illicit brew is, which bodies are given the mandate to stop this production, why the entire system is failing. The core of this theory should be that not only the external pressures from the society would lead to making a law valid, but the individuals of the society to have an internal obligation to follow the law. The effect being that the more laws Kenyans create, the further deeper the industry is pushed into illegal activities making it very difficult for brewers to want to follow the arm of the law.

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<sup>58</sup> Hart, H.L.A. "The Concept of Law." Classic Readings and Canadian Cases in the Philosophy of Law. Ed. Susan Dimock. Toronto: Pearson Prentice Hall, 2002. 91-113.

<sup>59</sup> Hart, H.L.A. "The Concept of Law." Classic Readings and Canadian Cases in the Philosophy of Law. Ed. Susan Dimock. Toronto: Pearson Prentice Hall, 2002. 91-113.

<sup>60</sup><http://www.angelfire.com/md2/timewarp/hart.html> on 7 February 2017

<sup>61</sup> Bogdanov E, "John Austin's and H.L.A Hart's legal positivist theories of law:an assessment of empirical consistency" 18 January 2012.

<sup>62</sup> Bogdanov E, "John Austin's and H.L.A Hart's legal positivist theories of law:an assessment of empirical consistency" 18 January 2012.

### 2.3 Historical jurisprudence

Another school of thought this paper intends to look at is historical jurisprudence. This jurisprudence is concerned with looking at the relationship between law, history and the society.<sup>63</sup> The principal question is “what is the connection between changes in social conditions and changes in legal ideas?” This means that for one to understand the law one must look at its social context.<sup>64</sup>

The historical school of thought was founded by Friedrich Karl von Savigny. The central tenet was that customary law is crucial in understanding what is law<sup>65</sup> and he believed that the law ought to be enacted as a response to the impersonal powers found in the people’s ‘national spirit’.<sup>66</sup> This involved the culture of the people and the people’s customary law.<sup>67</sup>

He believed that the customary law is its true living law and that the task of jurisprudence is to uncover this law and describe in historical studies its social provenience.<sup>68</sup> Through the historical school of thought, Savigny showed the interrelationship between the people/nation and the law; the two being inseparable, and viewing the nation and the law as an organism which is born, matures and declines and dies.<sup>69</sup>

In other words, humans do not follow the law because it emanates the truth, it is because the law forms an integral part of the lives of human beings within communities.<sup>70</sup> Communities are

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<sup>63</sup> Rodes R, "On the Historical School of Jurisprudence" *Scholarly Works* (2004), 165.

<sup>64</sup> Rodes R, "On the Historical School of Jurisprudence" *Scholarly Works* (2004), 165.

<sup>65</sup><http://www.encyclopedia.com/humanities/encyclopedias-almanacs-transcripts-and-maps/historical-school-jurisprudence> on 3 February 2017.

<sup>66</sup>Freeman M & Lloyd H, *Introduction to Jurisprudence*, 913.

<sup>67</sup> Freeman M & Lloyd H, *Introduction to Jurisprudence*, 913.

<sup>68</sup>Savigny F, *Of the Vocation of our Age for Legislation and Jurisprudence*, tr. Abraham Hayward (London, Littlewood, 1831; repr. Birmingham, Legal Classics Library, 986), 24. The translation is from the 1828 German edition. The first edition appeared in 1814.

<sup>69</sup> Freeman M & Lloyd H, *Lloyd's introduction to jurisprudence*, 913.

<sup>70</sup> Rodes R, "On the Historical School of Jurisprudence" *Scholarly Works* (2004), 165.

defined as “....communities of the dead, the living, the unborn, the temporal continuity of cultural traditions and of the reasons such traditions advance for giving life its meaning.”<sup>71</sup>

This school of thought is relevant to this study because the research intends to look at the history of illicit brews and the change in law with respect to the current society. This theory is meant to add the voice of the brewers to the discussion on our drinking nation in order to get a deeper understanding of the relationship between heavy drinking and sustainable development.

## 2.4 Literature review

According to the 2012 statistics by NACADA, alcohol is the highest abused drug by Kenyans at 13.3% followed by tobacco at 9.1%, marijuana at 1.0% and heroine at 0.1 %.<sup>72</sup> The results being that alcohol alone killed 60 Kenyans in 2015.<sup>73</sup> The total recorded alcohol consumption of pure alcohol per person aged over 15 years is 1.74 liters in Kenya per day.<sup>74</sup> This data shows Kenyans abuse alcohol at alarming rates.

Moreover, illicit alcohol in 2011, was estimated to account for at least 70 per cent of Kenya’s alcohol market, despite their non-compliance with the set requirements for manufacturing and sale of alcoholic beverages.<sup>75</sup> The alcohol industry is estimated to be worth 42 billion Kenya shillings of which the un-regulated sector accounts for 40 per cent (Sh16.8 billion).<sup>76</sup>

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<sup>71</sup> Rodes R, "On the Historical School of Jurisprudence" *Scholarly Works* (2004), 165.

<sup>72</sup> National Survey on Alcohol and Drug Abuse survey  
<http://www.nacada.go.ke/19-highlights> on 13 February 2016

<sup>73</sup> Magdalene Mukami, “ Kenya declares wars on illicit alcohol brews” (5July 2015)  
<http://aa.com.tr/en/world/kenya-declares-war-on-illicit-alcoholic-brews/29120> 13November 2016

<sup>74</sup> Dirk W. Lachenmeier, Benjamin J. Taylor and Jurgen Rehm, “Alcohol under the radar: Do we have policy options regarding unrecorded alcohol?”  
[https://www.academia.edu/5528687/Alcohol\\_under\\_the\\_radar\\_do\\_we\\_have\\_policy\\_options\\_regarding\\_unrecorded\\_alcohol](https://www.academia.edu/5528687/Alcohol_under_the_radar_do_we_have_policy_options_regarding_unrecorded_alcohol) on 19 February 2016

<sup>75</sup><http://www.businessdailyafrica.com/Fifty-changaa-distillers-seek-business-permits/-/539552/1277170/-/item/1/-/11hm89sz/-/index.html> on 21 March 2016

<sup>76</sup><http://www.businessdailyafrica.com/Fifty-changaa-distillers-seek-business-permits/-/539552/1277170/-/item/1/-/11hm89sz/-/index.html> on 21 March 2016

McCall's argues that "brewing (and distilling) constitutes a major economic subsystem throughout rural and peri-urban Sub Saharan Africa." Furthermore, he notes the importance of brewing to the allocation of resources in the producing (and indulgent) areas.<sup>77</sup> For example, besides the financial decisions made stemming from the commerce of brewing, the industry is also a major consumer of grain and fuel wood.<sup>78</sup> This prevalent trade is known and is used continuously as religious rights where it is partaken, yet treated as a social taboo in policy and well-to-do circles, is barely acknowledged by development agencies in projects or literature, along with its gender-biased attributes, being that brewing is largely a female function and skill, yet women suffer the effect of their work disproportionately; the brew is consumed to the detriment of family and often entails intoxicated abuse of women and reinforces a cycle of cultural suppression of women by men through labour.<sup>79</sup>

Bryceson posits in her research article that to understand the relationship between alcohol and society in Africa, one must embrace its multi-faceted nature, and that it is "probably unwise to assume that evolving patterns of usage simply mirror social transformations".<sup>80</sup>

She observes that alcohol is and has been a highly valued substance in sub-Saharan African culture, possessing symbolic and religious value.<sup>81</sup> The symbolic aspect arises from the fact that the drinks were and are produced by plants which provided staple meals and are thus vital to the

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<sup>77</sup> McCall M, "Rural brewing, exclusion, and development policy-making", 4:3 *Gender & Development* (1996), 29-38.

<sup>78</sup> McCall M, "Rural brewing, exclusion, and development policy-making", 4:3 *Gender & Development* (1996), 29-38.

<sup>79</sup> McCall M, "Rural brewing, exclusion, and development policy-making", 4:3 *Gender & Development* (1996), 29-38.

<sup>80</sup> Bryceson D, "Alcohol in Africa: Substance, stimulus and society" in D.F Bryceson (Ed), *Alcohol in Africa: Mixing business, pleasure and politics*, Portsmouth, NH: Hienemann, 2002, 4-21.

<sup>81</sup> Bryceson D, "Alcohol in Africa: Substance, stimulus and society" in D.F Bryceson (Ed), *Alcohol in Africa: Mixing business, pleasure and politics*, Portsmouth, NH: Hienemann, 2002, 4-21.

wellbeing of the population.<sup>82</sup> Furthermore, the preparation of the drinks entails “achieving specific changes in the observable chemical and physical properties of the foodstuff”.<sup>83</sup>

Finally, the beverage possesses a potency such that it can alter one’s state of consciousness upon consumption.<sup>84</sup> Alcoholic beverages also possess social and psychological value, as evidenced by the class divide in the consumption of homemade traditional (or illicit) brews versus manufactures bottled alcohol.<sup>85</sup> Also, creative, alcohol infused exchanges in the lower classes of society have come to be known as the “poor man’s opera”.<sup>86</sup> Alcohol also possesses Economic and political value, argues the author, demonstrated by the financial interest of the state in legitimate manufacturers’ presence and revenue and the political capital sought by politicians and legislators in exploiting the social particulars and difficulties of traditional brews.<sup>87</sup>

Ndetei *et al* studies traditional brews in sub-Saharan Africa, investigating the Central African Republic, DRC, Botswana, Ethiopia, Mozambique, Ghana, Kenya and Nigeria.<sup>88</sup> In their study of Kenya, they mention the following brews: chang’aa, which is investigated as being distilled, from a variety of grains and containing 20% to 50% ABV (Alcohol By Volume).<sup>89</sup> The study also mentions busaa, a traditional brew made from finger fillet malt; palm wine, popular in the Kenyan coastal region; muratina, made from sugarcane and muratina fruit; banana beer, made

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<sup>82</sup> Bryceson D, “Alcohol in Africa: Substance, stimulus and society” in D.F Bryceson (Ed), *Alcohol in Africa: Mixing business, pleasure and politics*, Portsmouth, NH: Hienemann, 2002, 4-21.

<sup>83</sup> Bryceson D, “Alcohol in Africa: Substance, stimulus and society” in D.F Bryceson (Ed), *Alcohol in Africa: Mixing business, pleasure and politics*, Portsmouth, NH: Hienemann, 2002, 4-21.

<sup>84</sup> Bryceson D, “Alcohol in Africa: Substance, stimulus and society” in D.F Bryceson (Ed), *Alcohol in Africa: Mixing business, pleasure and politics*, Portsmouth, NH: Hienemann, 2002, 4-21.

<sup>85</sup> Bryceson D, “Alcohol in Africa: Substance, stimulus and society” in D.F Bryceson (Ed), *Alcohol in Africa: Mixing business, pleasure and politics*, Portsmouth, NH: Hienemann, 2002, 4-21.

<sup>86</sup> Bryceson D, “Alcohol in Africa: Substance, stimulus and society” in D.F Bryceson (Ed), *Alcohol in Africa: Mixing business, pleasure and politics*, Portsmouth, NH: Hienemann, 2002, 4-21.

<sup>87</sup> Bryceson D, “Alcohol in Africa: Substance, stimulus and society” in D.F Bryceson (Ed), *Alcohol in Africa: Mixing business, pleasure and politics*, Portsmouth, NH: Hienemann, 2002, 4-21.

<sup>88</sup> Ndetei D, “Noncommercial Alcohol in Sub-Saharan Africa: Which way now? A Commentary, *International centre for alcohol policies*, 2008, 15-17.

<sup>89</sup> Ndetei D, “Noncommercial Alcohol in Sub-Saharan Africa: Which way now? A Commentary, *International centre for alcohol policies*, 2008, 15-17.

from a blend of banana and cereal flour (often sorghum); and urwaga banana beer, made from banana and sorghum and millet.<sup>90</sup>

In the aforementioned paper, Kakuma Refugee Camp (KRC) is provided as a case study. Located in Northwestern Kenya, it was populated at the time of assessment by 94, 707 inhabitants, roughly 80% of whom were from Sudan, the rest being from DRC, Eritrea, Ethiopia, Rwanda, Somalia and Uganda. 72% of the inhabitants were under 25 years of age.<sup>91</sup> Traditional and illicit brews were ubiquitous in the camp, with the most popular being chang'aa, kaada and busaa. The traditional brews were most notably produced by the Sudanese, Rwandese and Ugandans.<sup>92</sup> The ready supply of traditional brews in the camp was “facilitated by the fact that the refugees collected maize and sorghum...as food rations from the United Nations”, basically Using their food rations for production of the brews or selling them within and/or outside the camp to other brewers.<sup>93</sup> The case study found that the ubiquity of these brews led to a variety of detrimental outcomes, among them: “unsafe sex practices, diarrhea, organ system damage, trauma, gender-based and domestic violence, depression, child abuse and neglect and diversion of funds from food and other family expenses”.<sup>94</sup>

According to the article “Examining the influence of drug abuse in learning institutions in Kenya” drug abuse among youth is of rising concern. Initiation into drugs begins often during

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<sup>90</sup> Ndetei D, “Noncommercial Alcohol in Sub-Saharan Africa: Which way now? A Commentary, *International centre for alcohol policies*, 2008, 15-17.

<sup>91</sup> Ndetei D, “Noncommercial Alcohol in Sub-Saharan Africa: Which way now? A Commentary, *International centre for alcohol policies*, 2008, 15-17.

<sup>92</sup> Ndetei D, “Noncommercial Alcohol in Sub-Saharan Africa: Which way now? A Commentary, *International centre for alcohol policies*, 2008, 15-17.

<sup>93</sup> Ndetei D, “Noncommercial Alcohol in Sub-Saharan Africa: Which way now? A Commentary, *International centre for alcohol policies*, 2008, 15-17.

<sup>94</sup> Ndetei D, “Noncommercial Alcohol in Sub-Saharan Africa: Which way now? A Commentary, *International centre for alcohol policies*, 2008, 15-17.

teenage years and usually peaks between 18 to 25 years.<sup>95</sup> Peer pressure, curiosity and lack of awareness are viewed as the core reasons for youths indulging in drug use.<sup>96</sup> In Kenya drug abuse has taken a huge toll on the society's bearing, this is due to the fact that in most cases it is rare for people to see that drug use has a detrimental effect to one's health according to the National Campaign Against Drug Abuse (NACADA) in Kenya which was initiated in early 2001, the past twenty years has seen drugs and drug abuse soar to an extent that it now cuts across all sectors of life.<sup>97</sup>

Moreover, the level of drug abuse is startling and even more frightening because of the fact that many young people are getting hooked on drugs each passing day some commonly abused drugs being alcohol, bhang and tobacco but today opium, cocaine and heroin have added to the list.<sup>98</sup> In Nairobi alone 50% of students have used drugs and half of them end up being regular users it has also been monitored that these drugs are available almost anywhere, drugs is a lucrative business run by very powerful cartels raking in millions and have networks everywhere to their convenience.<sup>99</sup>

Although it's difficult to quantify the nature of drugs being abused in learning institutions research indicates that it is alcohol a countrywide survey conducted by NACADA (2012) among students and school leavers revealed that substances of abuse, both licit and illicit, were forming

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<sup>95</sup> Gabriel M, Muasya I, Mukhungulu M, Mwangi J, Ewoi L, Andati G, "Examining the Influence of Drug Abuse in Learning Institutions in Kenya", 28-33

<sup>96</sup> Gabriel M, Muasya I, Mukhungulu M, Mwangi J, Ewoi L, Andati G, "Examining the Influence of Drug Abuse in Learning Institutions in Kenya", 28-33

<sup>97</sup> Gabriel M, Muasya I, Mukhungulu M, Mwangi J, Ewoi L, Andati G, "Examining the Influence of Drug Abuse in Learning Institutions in Kenya", 3:3 *International Journal of Education and Social Science* (2016), 28-33.

<sup>98</sup> Gabriel M, Muasya I, Mukhungulu M, Mwangi J, Ewoi L, Andati G, "Examining the Influence of Drug Abuse in Learning Institutions in Kenya", 28-33

<sup>99</sup> Gabriel M, Muasya I, Mukhungulu M, Mwangi J, Ewoi L, Andati G, "Examining the Influence of Drug Abuse in Learning Institutions in Kenya", 28-33.

a way of living among Kenyan youth.<sup>100</sup> The article recommends resources should be put into place to design and implement drug abuse assessment programmes to determine the real extent and characteristics of the problem and to monitor its trends.<sup>101</sup> A lack of funds and a shortage of adequately trained personnel have made it difficult to implement drug abuse control programmes.<sup>102</sup> It has been recommended for African countries to not just concentrate on the formal drug control but also the informal means such as schools, churches etc. as this helps compensate on the resources the state lacks.<sup>103</sup>

According to the Birech, he viewed that alcohol abuse has a detrimental effect in a family. In the community they mainly take traditional brews which are commonly chang'aa and busaa The consumption is increasing and it is taken any time: in the day or at night.<sup>104</sup> This excessive taking of alcohol is affecting family life as it is mainly affecting the bread winners of the house, the sudden increase in alcohol abuse is caused by change in social and cultural factors whereby rules and regulations that guarded its abuse have broken down also the economy is not helping as inflation has continued to rise and has caused an economic fall hence number of people living below the poverty line is quite high.<sup>105</sup>

The community are severely affected as it mainly depends on agricultural produce, like milk and maize, whose prices keep on fluctuating and thus due to these many challenges these people

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<sup>100</sup> Gabriel M, Muasya I, Mukhungulu M, Mwangi J, Ewoi L, Andati G, “ Examining the Influence of Drug Abuse in Learning Institutions in Kenya”, 28-33

<sup>101</sup> Gabriel M, Muasya I, Mukhungulu M, Mwangi J, Ewoi L, Andati G, “ Examining the Influence of Drug Abuse in Learning Institutions in Kenya”, 28-33

<sup>102</sup> Gabriel M, Muasya I, Mukhungulu M, Mwangi J, Ewoi L, Andati G, “ Examining the Influence of Drug Abuse in Learning Institutions in Kenya”, 28-33.

<sup>103</sup> Gabriel M, Muasya I, Mukhungulu M, Mwangi J, Ewoi L, Andati G, “ Examining the Influence of Drug Abuse in Learning Institutions in Kenya”, 28-33.

<sup>104</sup> Birech J, Kabiru J, Misaro J, Kariuki D, “Alcohol Abuse and the Family: A case Study of the Nandi Community of Kenya” 3:15 *International Journal of Humanities and Social Science* (2013),137-144.

<sup>105</sup> Birech J, Kabiru J, Misaro J, Kariuki D, “Alcohol Abuse and the Family: A case Study of the Nandi Community of Kenya” 3:15 *International Journal of Humanities and Social Science* (2013),137-144.

resort to consuming of alcohol to help ease their stress.<sup>106</sup> The overindulgence in alcohol has led to domestic violence.<sup>107</sup> It has also affected emotional development of children, as the children whose parents are alcoholics will show signs of emotional disturbances such as anxiety and feelings of insecurity.<sup>108</sup> The government has tried to curb this menace by enacting laws that prohibit sale of illicit alcohol in addition there is the inception of NACADA.<sup>109</sup> The religious leaders, on their part, have played a role in trying to curb the problem. Rehabilitation centres have been put up to assist those affected which has not had impacted that was initially aimed at in the Nandi community.<sup>110</sup>

Analysis of the paper shows that those who take alcohol most are the in the category of 36-45 years of age and that of 46 and above this could be attributed that that grouped are married and therefore face family challenges thus alcoholism.<sup>111</sup> The study found that the families affected by alcohol abuse have resorted to various ways for survival. 50% of wives whose husbands drink have resorted to selling illicit brew like changaa and busaa, in order to meet their basic needs.<sup>112</sup>

Mmbali investigates the relationship between alcohol and law enforcement, or lack thereof, with respect to illicit brews in Kenya, specifically chang'aa and busaa – both traditional drinks of the

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<sup>106</sup> Birech J, Kabiru J, Misaro J, Kariuki D, “Alcohol Abuse and the Family: A case Study of the Nandi Community of Kenya” 3:15 *International Journal of Humanities and Social Science* (2013),137-144.

<sup>107</sup> Birech J, Kabiru J, Misaro J, Kariuki D, “Alcohol Abuse and the Family: A case Study of the Nandi Community of Kenya” 3:15 *International Journal of Humanities and Social Science* (2013),137-144.

<sup>108</sup> Birech J, Kabiru J, Misaro J, Kariuki D, “Alcohol Abuse and the Family: A case Study of the Nandi Community of Kenya”,3:15 *International Journal of Humanities and Social Science* (2013), 137-144.

<sup>109</sup> Birech J, Kabiru J, Misaro J, Kariuki D, “Alcohol Abuse and the Family: A case Study of the Nandi Community of Kenya” 3:15 *International Journal of Humanities and Social Science* (2013),137-144.

<sup>110</sup> Birech J, Kabiru J, Misaro J, Kariuki D, “Alcohol Abuse and the Family: A case Study of the Nandi Community of Kenya”,137-144.

<sup>111</sup> Birech J, Kabiru J, Misaro J, Kariuki D, “Alcohol Abuse and the Family: A case Study of the Nandi Community of Kenya” 3:15 *International Journal of Humanities and Social Science* (2013),137-144.

<sup>112</sup> Birech J, Kabiru J, Misaro J, Kariuki D, “Alcohol Abuse and the Family: A case Study of the Nandi Community of Kenya”,137-144.

Luhya people.<sup>113</sup> In the paper, he argues that not only is alcoholism among the youth a national crisis, but it is further aggravated by the legitimization by society of illicit brews banned by the government.<sup>114</sup> He seeks to answer two questions: Why does the brewing persist despite repeated indictment by the authorities, and what larger repercussions may manifest from this? The author argues that to the Luhya people, the discussed alcoholic beverages “represent a socio-cultural instrument, around which society mobilizes social capital, community socialization, accountability and unity.”<sup>115</sup>

For the police who were tasked with the task of eliminating illicit brews in the country, taking bribes from producers and consumers of these traditional alcoholic drinks was the easiest way to get money.<sup>116</sup> Terminating production of Chang’aa and Busaa would lead to loss of their illegal income while local politicians legitimated production and consumption of the products.<sup>117</sup> They made it a political agenda during election as the luhya community say busaa is more of their traditional heritage.<sup>118</sup>

Brewers started producing these products in secrecy as they had faced a lot of police brutality and extortion which created a new wave of rogue brewers making toxic alcohol in the disguise of Chang’aa which had adverse effects such as people going blind or even death.<sup>119</sup> To be able to curb this complex web of crime, abuse of power, and health concerns for sustainable

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<sup>113</sup> Mmbali O, “Alcoholism, Bribery and Abuse of Power; A Case Study of Chang’aa and Busaa Brewers in Western Kenya, 4:1 *American Journal of Social Sciences* (2016), 1-11.

<sup>114</sup> Mmbali O, “Alcoholism, Bribery and Abuse of Power; A Case Study of Chang’aa and Busaa Brewers in Western Kenya, 4:1 *American Journal of Social Sciences* (2016), 1-11.

<sup>115</sup> Mmbali O, “Alcoholism, Bribery and Abuse of Power; A Case Study of Chang’aa and Busaa Brewers in Western Kenya, 4:1 *American Journal of Social Sciences* (2016), 1-11.

<sup>116</sup> Mmbali O, “Alcoholism, Bribery and Abuse of Power; A Case Study of Chang’aa and Busaa Brewers in Western Kenya, 4:1 *American Journal of Social Sciences* (2016), 1-11.

<sup>117</sup> Mmbali O, “Alcoholism, Bribery and Abuse of Power; A Case Study of Chang’aa and Busaa Brewers in Western Kenya, 4:1 *American Journal of Social Sciences* (2016), 1-11.

<sup>118</sup> Mmbali O, “Alcoholism, Bribery and Abuse of Power; A Case Study of Chang’aa and Busaa Brewers in Western Kenya, 4:1 *American Journal of Social Sciences* (2016), 1-11.

<sup>119</sup> Mmbali O, “Alcoholism, Bribery and Abuse of Power; A Case Study of Chang’aa and Busaa Brewers in Western Kenya, 4:1 *American Journal of Social Sciences* (2016), 1-11.

development, a more holistic approach is required which also entails a better understanding of culture and science.<sup>120</sup>The author concludes that a strong solution will be grounded in “not only politics and law, but also in culture and science,” and holistically understanding the incentives and motives of all stakeholders, and “bringing them to the negotiating table.”<sup>121</sup>

The paper by Karey provides that there are many different avenues for contamination. Besides the unsanitary state of the jugs that contain the molasses, or the container in which the fermented mixture is placed, the latter of which could have been either an old oil drum that was poorly, if ever, cleaned, or a reused bug repellent canister, there are other ways in which the final product could become more egregiously contaminated.<sup>122</sup> These substances include oil, glue, bug repellent and “white rocks”, a substance which can “erode a metal nail”, leading to the conclusion that they are an alkali substance such as sodium hydroxide or potassium hydroxide.<sup>123</sup>

The methods discussed to combat the issue include a redefinition of government standards and inexpensive alcohol detection.<sup>124</sup> The authors conclude that “while in the long term, legal changes must occur to create effective regulation that will protect both the health of consumers and the livelihoods of brewers, technological innovation has the potential to improve the safety of chang’aa consumption in the short term.”<sup>125</sup>

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<sup>120</sup> Mmbali O, “Alcoholism, Bribery and Abuse of Power; A Case Study of Chang’aa and Busaa Brewers in Western Kenya, 1-11.

<sup>121</sup> Mmbali O, “Alcoholism, Bribery and Abuse of Power; A Case Study of Chang’aa and Busaa Brewers in Western Kenya, 1-11.

<sup>122</sup> Carey K, Kinney J, Eckman M, Nassar A, Mehta K, “ Chang’aa Culture and Process: Detecting Contamination in a Killer Brew” 107 *Procedia Engineering* (2015), 395-402.

<sup>123</sup>Carey K, Kinney J, Eckman M, Nassar A, Mehta K, “ Chang’aa Culture and Process: Detecting Contamination in a Killer Brew” 107 *Procedia Engineering* (2015), 395-402.

<sup>124</sup> Carey K, Kinney J, Eckman M, Nassar A, Mehta K, “ Chang’aa Culture and Process: Detecting Contamination in a Killer Brew” 107 *Procedia Engineering* (2015), 395-402.

<sup>125</sup> Carey K, Kinney J, Eckman M, Nassar A, Mehta K, “ Chang’aa Culture and Process: Detecting Contamination in a Killer Brew” 107 *Procedia Engineering* (2015), 395-402.

## **2.5 Conclusion**

The literature review and theoretical framework have been extensively researched to apply to this study. The chapter dealt with the factors that affect Kenyans which would lead them to drink illicit brews. These factors include cost, peer pressure, family problems among others. Moreover it is added that the youth are the most vulnerable party to drink the illicit brews. Also, researchers discuss the procedure of making the alcoholic beverage and state that it is highly contaminated which affects the health of its consumers. The literature review comes together with the theoretical framework in describing the philosophy this study will take. That being that law must be looked as it is, not if it is morally sound. Also in order to achieve validity of law certain criteria must be met and in order to understand what a law is one must consider its social context.

## CHAPTER THREE

### 3.0 LEGAL FRAMEWORK AND INSTITUTIONAL FRAMEWORK

#### **3.1 Introduction**

This chapter looks at the policy and institutional framework governing illicit brews in Kenya. At the institutional level the fight against illicit brews can be traced back to Moi's era where the production and sale of illicit brews was governed through three statutes: The Chang'aa Prohibition Act No. 70 of 1980 which prohibited the manufacture, sale and possession of chang'aa. The Liquor Licensing Act No. 121 of 1986 which described the procedure for licensing courts, issuance and penalties for licenses, control and supply of liquor with special consideration to prohibit sale of alcohol to children under the age of eighteen years. The Traditional Liquor Licensing Act No. 122 of 1991 worked together the Liquor Licensing Act which prescribed the manufacture and sale of alcohol other than traditional brews. The Act gave guidelines on where the alcohol could be manufactured and sold as well as an obligation to pay tax to the manufacturer.<sup>126</sup>

As a result, there was poor enforcement during Moi's era on the laws because the police preferred to take bribes from the manufactures in exchange for their silence.<sup>127</sup> This made it impossible to catch the culprits who were producing without a license.<sup>128</sup> As a result the Alcoholic Drink Control Act, 2010 was created and its objective was to repeal the previous laws and consolidate various laws into one. The functions of the Act could be dealt with any relevant agency. The reason behind this blanket opening is because not one authority deals with alcohol

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<sup>126</sup> Kimilu C, "Solving drug and substance problems among the youth in Kenya: Lessons from the drug Dutch Policy", Masters of Arts in Development Studies, Institute of Social Studies, December 2005, 28.

<sup>127</sup> Kimilu C, "Solving drug and substance problems among the youth in Kenya: Lessons from the drug Dutch Policy", Masters of Arts in Development Studies, Institute of Social Studies, December 2005, 28.

<sup>128</sup> Kimilu C, "Solving drug and substance problems among the youth in Kenya: Lessons from the drug Dutch Policy", Masters of Arts in Development Studies, Institute of Social Studies, December 2005, 28.

laws. The agencies are meant to complement each other to carry out what they are mandated to do. The functions include taking statistics, advising the minister on policies and laws, educating Kenyans and advising on test methods to be used in determining alcoholic drinks.<sup>129</sup> The current institutional framework comprises of various government agencies established under various laws discussed below.

### **3.2 The history of illicit brews**

#### Pre-colonial period

During pre-colonial Africa the conditions were that the population density was low but land was in abundance.<sup>130</sup> This meant that people rarely fought for land and pastoralists would graze different lands without getting into contact with other communities.<sup>131</sup> In each family unit the man was the patriarch of the family and the wife would follow his command.<sup>132</sup> The role of women was more family oriented and agricultural in that they did farming, marketing and trading.<sup>133</sup> Due to the division of roles women were more likely to be the producers of the traditional brews.

Traditional alcohol was commonly used during this era and it was essential in the social culture among the male elders.<sup>134</sup> Alcohol was a factor in forming the unity between the male elders and

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<sup>129</sup> Section 5, *The Alcoholic Drinks Control Act* (2010)

<sup>130</sup> Akyeampong E “Review of Potent Brews: A Social History of Alcohol in East Africa 1850-1999 by Justin Willis.” *Africa: Journal of the International African Institute* volume 73, (2003), 626–629.

<sup>131</sup> Green E, “production systems in the pre-colonial Africa” in Frankema E, *The History of African Development* Riksbanken Jubileumsford, 2.

<sup>132</sup> Parpart J, “women and the state in Africa” Dalhousie University, Working paper 117, May 1986 [http://pdf.usaid.gov/pdf\\_docs/PNAAX586.pdf](http://pdf.usaid.gov/pdf_docs/PNAAX586.pdf) on 6 December 2016.

<sup>133</sup> Parpart J, “women and the state in Africa” Dalhousie University.

<sup>134</sup> Dietler M, Herbich I “Liquid Material Culture: Following the Flow of Beer among the Luo of Kenya” Hans-Peter Wotzka (ed.), *Grundlegungen. Beiträge zur europäischen und afrikanischen Archäologie für Manfred K. H. Eggert* (Tübingen: Francke, 2006) 395–407

younger male generations which formed a belief system among the elders of the power to bless or curse anybody with alcohol being part of the factors that gave them power.<sup>135</sup>

What is most notable, are the features of the production and sale of the traditional brew during this period. The first feature being that sorghum and millet beers as well as palm wine held an alcohol content of 2-4%.<sup>136</sup> This was mainly because the alcohol was brewed not distilled.<sup>137</sup> Another common feature was that production and consumption of grain based beers was strictly seasonal due to the crops availability.<sup>138</sup> Lastly alcohol was mainly consumed by male elders who had the highest status in the village or community.<sup>139</sup>

### Colonial and early post-colonial period

During the colonial rule there was a shift in the production and consumption of the traditional brews in that young men and women in general were banned from drinking any alcohol.<sup>140</sup> This was mainly due to the Brussels Conference of 1890 which created a General Act of the Brussels Conference<sup>141</sup> that banned the importation of European alcohol into East Africa.<sup>142</sup> As the British

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<sup>135</sup> Akyeampong E “Review of Potent Brews: A Social History of Alcohol in East Africa 1850-1999 by Justin Willis.” *Africa: Journal of the International African Institute* volume 73, (2003), 626–629.

<sup>136</sup> Adelekan M, “Noncommercial alcohol in Sub-Saharan Africa”, *International Center for Alcohol Policies review* 3, 2008, 3-8.

<http://www.icap.org/Publications/ICAPReviews> on 1 December 2016

<sup>137</sup> Akyeampong E “Review of Potent Brews: A Social History of Alcohol in East Africa 1850-1999 by Justin Willis.” 626–629.

<sup>138</sup> Adelekan M, Razvodovsky Y, Liyanage U, Ndeti D, “Noncommercial alcohol in three regions” , *International Center for Alcohol Policies*, 2008

<http://www.icap.org/Publications/ICAPReviews> on 1 December 2016.

<sup>139</sup> Lagat L, “The impact of illicit brews consumption on social economic development: a case study of Kapseret division in Uasin-Gishu County Kenya” Bachelor of Science, Kissii University, September 2014.

<sup>140</sup> Akyeampong E “Review of Potent Brews: A Social History of Alcohol in East Africa 1850-1999 by Justin Willis.” 626–629.

<sup>141</sup> *Convention Relative to the Slave Trade and Importation into Africa of Firearms, Ammunition, and Spirituous Liquors*, 2 July 1890, Treaty Series. No. 7. 1892.

<sup>142</sup> Pliley J, Kramm R, Fischer-Tine H, “*Global Anti-Vice Activism, 1890-1950: Fighting Drinks, Drugs, and Immorality*” Oxford University press, 2014, 157.

Empire became more of their authority they granted permission for Africans to brew traditional alcohol on condition that one would have a license.<sup>143</sup>

Apart from the political change, the production of traditional brews had also developed a better techniques to yield higher volume of alcohol. The first being that brewers switched from sorghum or millet to maize which was available and yielded more crop.<sup>144</sup> Moreover, there was an improvement in the technology that was used to produce the alcohol which saw innovations such as distillation of the brew being used.<sup>145</sup> Distillation rapidly gained popularity due to its ability to raise the alcohol percentage from an average of 4% to 8%.<sup>146</sup>

The post-colonial period was met with new challenges that the local African government had to prove its legitimacy and meet a new goal of modern Africa.<sup>147</sup> In order to do so they introduced new liquor laws that allowed Africans to access modern wine and beer while drinking native alcohol was frowned upon and viewed to be backwards and old fashioned.<sup>148</sup> The new liquor laws introduced its own drawbacks where traditional alcohol could be served all year round as opposed to previously when one had to rely on specific seasons which consequently increased the number of regular drinkers.<sup>149</sup> The last major change during this era was the difference in alcohol consumption between the rural and urban dwellers.<sup>150</sup> Urban migration led to educated

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<sup>143</sup> Akyeampong E “Review of Potent Brews: A Social History of Alcohol in East Africa 1850-1999 by Justin Willis.” 626–629.

<sup>144</sup> Adelekan M, “Noncommercial alcohol in Sub-Saharan Africa”, *International Center for Alcohol Policies review* 3, 2008, 3-8.

<sup>145</sup> Adelekan M, “Noncommercial alcohol in Sub-Saharan Africa”, *International Center for Alcohol Policies review* 3, 2008, 3-8.

<http://www.icap.org/Publications/ICAPReviews> on 1 December 2016

<sup>146</sup> Adelekan M, “Noncommercial alcohol in Sub-Saharan Africa”, 3-8.

<sup>147</sup> Adelekan M, “Noncommercial alcohol in Sub-Saharan Africa”, 3-8.

<sup>148</sup> Akyeampong E “Review of Potent Brews: A Social History of Alcohol in East Africa 1850-1999 by Justin Willis.” *Africa: Journal of the International African Institute* volume 73, (2003), 626–629.

<sup>149</sup> Adelekan M, “Noncommercial alcohol in Sub-Saharan Africa”, 3-8.

<sup>150</sup> Adelekan M, “Noncommercial alcohol in Sub-Saharan Africa”, 3-8.

Africans being given an opportunity to take part in the economy and earn salaries.<sup>151</sup> This created a class divide where the rural dwellers continued to drink traditional brews, the working class stepped up to drink locally manufactured beers and the middle class preferred to drink bottled larger beer as a sign of prosperity.<sup>152</sup>

From the period of 1980-1990 Kenya saw an increase of regular drinkers which prompted President Daniel Arap Moi to start a campaign against traditional brews.<sup>153</sup> As a result alcohol production and consumption drastically reduced which was largely due to the economic and political uncertainty.<sup>154</sup> The agriculture sector was in a crisis and the influence from the government was disbanded as they were in serious debt. The decline in the economy led to a rise in unemployment which resulted in men moving back to the informal sector.<sup>155</sup> The women also took employment in the informal sector on a part or full time basis. Mostly the women turned to traditional brewing or distilling because they did not have the educational background to do anything else.<sup>156</sup> The bottled beer industry dried up and this led to the expansion of the traditional market. Due to its low cost and high alcohol content people preferred to drink their hardship away.<sup>157</sup>

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<sup>151</sup> Adelekan M, "Noncommercial alcohol in Sub-Saharan Africa", 3-8.

<sup>152</sup> Adelekan M, "Noncommercial alcohol in Sub-Saharan Africa", 3-8.

<sup>153</sup> Akyeampong E "Review of Potent Brews: A Social History of Alcohol in East Africa 1850-1999 by Justin Willis." *Africa: Journal of the International African Institute* volume 73, (2003), 626–629.

<sup>154</sup> Adelekan M, "Noncommercial alcohol in Sub-Saharan Africa", *International Center for Alcohol Policies review* 3, 2008, 3-8.

<http://www.icap.org/Publications/ICAPReviews> on 1 December 2016

<sup>155</sup> Adelekan M, "Noncommercial alcohol in Sub-Saharan Africa", 3-8.

<sup>156</sup> Adelekan M, "Noncommercial alcohol in Sub-Saharan Africa" 3-8.

<sup>157</sup> Adelekan M, "Noncommercial alcohol in Sub-Saharan Africa" 3-8.

### Late 1990's to the new millennium

The economy began to improve once again with foreign investment pouring in and the national market improving.<sup>158</sup> Employment was on the rise and with this the African middle class returned back to drinking bottled beer in the name of modernization.<sup>159</sup> The informal sector, however, faced a new challenge with the increase of second generation alcohol and tough competition from manufactures.<sup>160</sup> Though consumption of illicit brews faced its drawback, there was still a high number of consumers who were being killed by the brew. The former presidents Honorable Mwai Kibaki and Daniel Arap Moi together with the current president Uhuru Kenyatta have on many occasions ordered crackdowns of the brewers den but when the story is no longer newsworthy brewers and consumers fall back into old habits.<sup>161</sup>

### **3.3 Legal framework**

The legal framework that mainly governs the alcohol industry is The Constitution of Kenya, 2010 and the Alcoholic Drinks Control Act, 2010.

The promulgation of the new constitution gave rise to a new era with the reintroduction of devolution in Kenya. The fourth schedule of the constitution divides the roles between the county governments and national governments.<sup>162</sup> The functions of the county governments include health services, agriculture, pollution, transport, county planning and development as well as cultural activities.<sup>163</sup> Under cultural activities the county government has been given the

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<sup>158</sup> Adelekan M, "Noncommercial alcohol in Sub-Saharan Africa" 3-8.

<sup>159</sup> Adelekan M, "Noncommercial alcohol in Sub-Saharan Africa" 3-8.

<sup>160</sup> Lagat L, "The impact of illicit brews consumption on social economic development: a case study of Kapseret division in Uasin-Gishu County Kenya" Bachelor of Science, Kissii University, September 2014.

<sup>161</sup> <https://www.standardmedia.co.ke/article/2000104599/genesis-of-illicit-brews-and-the-untold-agonny> on 8 February 2017.

<sup>162</sup> Fourth schedule, *The constitution of Kenya* (2010)

<sup>163</sup> Fourth schedule, *The constitution of Kenya* (2010)

mandate to approve liquor licenses in their respective counties.<sup>164</sup> This imposes a duty on the county representatives to uphold and promote the law on illicit brews.

The devolution process led to the national government passing duties to county governments.<sup>165</sup> There was anticipated capacity gaps at the county level which led to NACADA assisting the counties in building their capacity so as to take the mandate of licensing.<sup>166</sup> However NACADA is proposing that chiefs should be involved in the licensing of alcoholic outlets.<sup>167</sup> This is to stop illegal dealings between the applicants and government officials who are granting them the required license without following proper procedure which will be that local committees will evaluate the applicants before the counties can grant a license.<sup>168</sup> Currently, the counties that have adopted the Alcoholic Drinks Control Act 2010 are: Baringo, Bungoma, Elgeyo Marakwet, Kakamega, Kiambu, Kitui, Machakos, Meru, Nairobi, Bomet and Uasin Ngishu.<sup>169</sup>

The Alcoholic Drinks Control Act, 2010 came in to repeal the Chang'aa Prohibition Act ,Chapter 70 and the Liquor Licensing Act Chapter, 121. The objective of the Act is to provide a law for the control of production, manufacture, sale, labeling, promotion, sponsorship and consumption of alcoholic drinks in order to protect the health of individuals, protect the consumers of alcoholic drinks from misleading and deceptive inducements, protect the health of persons under the age of 18 years, inform and educate the public on health effects of alcohol abuse, adopt and implement measures to eliminate illicit trade in alcohol like smuggling, promote and provide for

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<sup>164</sup> Fourth schedule 4.4 (c), *The Constitution of Kenya* (2010)

<sup>165</sup><http://iogt.org/blog/2015/08/25/alcohol-control-and-devolution-3-lessons-from-kenyas-experience/> on 10 February 2017.

<sup>166</sup><http://iogt.org/blog/2015/08/25/alcohol-control-and-devolution-3-lessons-from-kenyas-experience/> on 10 February 2017.

<sup>167</sup><http://www.nation.co.ke/counties/nakuru/Nacada-wants-chiefs-involved-in-liquor-licensing/1183314-3242762-ko8kdqz/index.html> on 10 February 2017.

<sup>168</sup><http://www.nation.co.ke/counties/nakuru/Nacada-wants-chiefs-involved-in-liquor-licensing/1183314-3242762-ko8kdqz/index.html> on 10 February 2017

<sup>169</sup><http://kenyalaw.org/kl/index.php?id=4998> on 10 February 2017.

treatment and rehabilitation programs and promote research and dissemination of relevant information.<sup>170</sup>

In relation to licensing, anyone intending to manufacture, sell, import or export alcoholic drinks will be required to apply for a license under the Act. The District Alcoholic Drinks Regulation Committee issues licenses under the Act, inspect licensed premises and any other assigned function. The Committees replaced the Liquor Licensing Courts and shall be established in every district.<sup>171</sup>

The Act states that there shall be no licensing of alcoholic drinks selling outlets within close proximity of any schools or learning institution for persons below the age of 18 years and in supermarket and retail chain outlets unless alcoholic drink selling area is not accessible by persons below the age of 18 years.<sup>172</sup> This will protect children from easily accessible and available alcoholic drinks that are currently not controlled. In relation to brewers who produce in the informal sector, they must apply for a permit to manufacture alcoholic drinks and sell in the brewers den which ensures effective control of the production of the alcoholic drink.<sup>173</sup>

### **3.4 National Authority for the Campaign Against Alcohol and Drug Abuse (NACADA)**

In 1994 Kenya assented to The Kenya Narcotic Drugs and Psychotropic Substances (control) Act No. 4 of 1994 which criminalized drug abuse in Kenya.<sup>174</sup> The Act established very severe punishments for persons found guilty of production and sale of illicit drugs.<sup>175</sup> As a result the government created the Inter-ministerial Drugs Coordinating Committee to formulate drug

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<sup>170</sup> Article 3, *The Constitution of Kenya* (2010)

<sup>171</sup> Section 17, *Alcoholic Drinks Control Act* (2010)

<sup>172</sup> Section 28, *Alcoholic Drinks Control Act* (2010)

<sup>173</sup> Unpublished report on the guidelines for implementing and enforcing the Alcoholic Drinks Control Act, 2010.

<sup>174</sup> Section 3, *The Kenya Narcotic Drugs and Psychotropic Substances (control) Act* (Act No. 4 of 1994).

<sup>175</sup> Bureau for International Narcotics and Law Enforcement Affairs, *International Narcotics Control Strategy Report*, March 1995.

policy. This would be changed with the formation of The National Authority for the Campaign Against Alcohol and Drug Abuse Act of 2012.<sup>176</sup>

National Authority for the Campaign Against Alcohol and Drug Abuse hereinafter called NACADA was in 2001 institutionalised under the Ministry of Provincial Administration and Internal Security to begin the campaign against drug abuse and educate Kenyans on the harmful effects of drug misuse.<sup>177</sup> In 2006 the President of Kenya Mwai Kibaki established NACADA's Advisory Board that now oversees all operations to do with the authority.<sup>178</sup>

NACADA as an authority has the mandate to carry the following functions: the first being that the agency is meant to educate Kenyans on the effects of alcohol and drug abuse, encourage public participation on alcohol and drug abuse, collaborate with other relevant agencies to discover emerging trends in the alcohol and drug market, collaborate to ensure rehabilitation centers are easily accessible to people who suffer from alcohol and drug abuse, license and regulate operations of rehabilitation centers, formulate laws and policies on the control of alcohol and drug abuse which include enforcement, continuous review and evaluation, carry out research to get current statistics, publish status reports to both houses of parliament and assist the county governments to implement laws and policies on alcohol and drug abuse.<sup>179</sup>

The law also requires that authorized officers such as public health officers or someone else the Cabinet Secretary may see fit may enter a premises and carry out inspection of grounds of suspicion of carrying out an illegal activity.<sup>180</sup> This is highly dependent if the party in question

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<sup>176</sup> *National Authority for the Campaign Against Alcohol and Drug Abuse Act* ( Chapter 121B).

<sup>177</sup> <http://www.nacada.go.ke/about/nacada> on 2 February 2017.

<sup>178</sup> <http://www.nacada.go.ke/about/nacada> on 2 February 2017.

<sup>179</sup> Section 5, *The National Authority for the Campaign Against Alcohol and Drug Abuse Act* (Chapter 121B)

<sup>180</sup> Section 20, *The National Authority for the Campaign Against Alcohol and Drug Abuse Act* (Chapter 121B)

has given the officer the consent to enter the premises or that the court has granted a warrant to do the same.<sup>181</sup>

NACADA's mandate was expanded in order to deal with all matters with alcohol and drug abuse. However, its implementation has faced many obstacles in respect to educating, collaborating and creation of rehabilitation services. With respect to educating Kenyans, information is not readily available and the information that is available is not current. In addition, the website provides policy briefs but not in depth detail on what NACADA truly does and the impact it has had on Kenya.<sup>182</sup> In addition, NACADA has developed many drug abuse policies but no policy has reached the parliament due to either corruption or resistance from the alcohol industry.<sup>183</sup> Lastly, NACADA seems to be slow in progress yet in 2012/2013 budget allocation they were allocated one billion shillings to deal with drug abuse and the problem is rampant.<sup>184</sup>

### **3.5 Kenya Bureau of Standards (KEBS)**

Kenya bureau of Standards was established by the Standards Act<sup>185</sup> to ensure promotion of quality standards of all goods that are for human consumption. Their mandate is to provide standardisation and conformity assessment services through providing facilities for testing and educating people on standadisation.<sup>186</sup> One of the functions of KEBS is to develop standards for alcoholic beverages including traditional brews.<sup>187</sup> The standards are created through the technical committees and the entire process requires input from all relevant stakeholders before a

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<sup>181</sup> Section 21, *The National Authority for the Campaign Against Alcohol and Drug Abuse Act* (Chapter 121B)

<sup>182</sup> <https://www.standardmedia.co.ke/article/2000070070/nacada-not-doing-much-on-drug-abuse> on 2 February 2017.

<sup>183</sup> Interview with NACADA representative on 9 January 2017.

<sup>184</sup> Institute of economic affairs, *Budget guide*, June 2012 at 14.

<sup>185</sup> *Standards Act* ( Chapter 496)

<sup>186</sup> Section 4, *Standards Act* (Chapter 496)

<sup>187</sup> Section 4, *Standards Act* (Chapter 496)

consensus is reached.<sup>188</sup> This is inclusive of the standards set for hygiene and the maximum limit for methanol.<sup>189</sup>

The measures set in relation to illicit brews have not been successful because traditional brew standards have not yet been set which makes it difficult for a brewer to meet the requirements to get a clearance certificate if they have not been set. This creates policy gaps which forces the government to step in so as to protect Kenyans from sub-standard goods or counterfeit products.

### **3.6 Anti counterfeit agency (ACA)**

The agency is governed by the Anti- counterfeit Act<sup>190</sup> which aims to eliminate all counterfeit goods through promotion and enforcement of Intellectual Property rights in Kenya.<sup>191</sup> The agency has the mandate to enlighten and inform the public on matters relating to counterfeiting, to combat counterfeiting, trade and other dealings in counterfeiting goods in Kenya in accordance with the Act.<sup>192</sup> Also, to devise and promote training programs on combating counterfeiting. Lastly, to co-ordinate with national, regional or international organizations involved in combating counterfeiting.<sup>193</sup>

The Anti-counterfeit agency has been accused through the media for the lack of involvement in combating illicit brews with other state agencies such as, The National Authority for Campaign against Alcohol and Drug Abuse, Kenya Bureau of Standards and Kenya Revenue

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<sup>188</sup> Interview from Kenya Bureau of Standards Representative on 9 January 2017

<sup>189</sup> Kenya Bureau of Standards, “ Alcoholic Beverages- Methods of sampling and test”

<sup>190</sup> *Anti- counterfeit Act* ( Act No. 13 of 2008).

<sup>191</sup> [http://www.aca.go.ke/index.php?option=com\\_content&view=article&id=80&Itemid=489](http://www.aca.go.ke/index.php?option=com_content&view=article&id=80&Itemid=489) on 3 February 2017.

<sup>192</sup> Section 5, *Anti-Counterfeit Act* (Act No. 13 of 2008).

<sup>193</sup> Section 5, *Anti-Counterfeit Act*.

Authority.<sup>194</sup>In carrying out the mandate given by law, the Anti-counterfeit Agency faces challenges as the act sets out to protect Intellectual Property rights.

This is problematic because illicit brews are divided into two categories: the first being traditional brews which have not been manufactured according to the set guidelines and the second category is alcohol that is an imitation from an established brand such as famous grouse whiskey.<sup>195</sup> In relation to the latter the Anti-counterfeit agency has the mandate to protect the rights of the legitimate brands. However, in the case of traditional brews they do not have a mandate as nobody has Intellectual Property rights over traditional brews.

### **3.7 Kenya Revenue Authority (KRA)**

Kenya Revenue Authority focuses on government revenue collection while providing an effective tax management and sustainability through tax collection.<sup>196</sup> Also, KRA has a mandate is to perform functions that the Minister may see fit.<sup>197</sup>

In order to get clearance to manufacture alcoholic beverages, the manufacturer must attain a license from Kenya Revenue Authority as well as the other relevant agencies.<sup>198</sup> KRA maintains all records of persons who pay taxes which makes it easier to get information to the district committee who can either grant or revoke a license. KRA has a directive to first protect the people then collect revenue but in reality it is the other way around.<sup>199</sup>

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<sup>194</sup><https://ipkenya.wordpress.com/2015/07/13/anti-counterfeit-agency-under-fire-as-war-on-illicit-brews-continues/> on 3 January 2017.

<sup>195</sup> Section 5, *Anti-Counterfeit Act*.

<sup>196</sup> Section 5, *Kenya Revenue Authority Act* ( Act No. 2 of 1995)

<sup>197</sup> Section 5, *Kenya Revenue Authority Act* ( Act No. 2 of 1995)

<sup>198</sup> Office of the President, Guidelines for implementing and enforcing the Alcoholic Drinks Control Act 2010, May 2011.

<sup>199</sup> Interview from Kenya Revenue Authority on 9 January 2017.

### **3.8 Inter-Agency Taskforce for Control of Potable Spirit and Combat of Illicit brews**

After President Uhuru Kenyatta gave a directive in 2015 to destroy all illicit brews in Kiambu County, he formed an Inter-agency task force which included a representative of the Council of Governors, a representative of the Attorney-General and Department of Justice, a representative of the Deputy Inspector-General in charge of Administration Police Service, a representative of the Deputy Inspector-General in charge of Kenya Police Service, a representative of the Government Chemist, a representative of the Director of Public Health and Sanitation, a representative of the Kenya Bureau of Standards, a representative of the National Authority for the Campaign Against Alcohol and Drug Abuse, a representative of the National Intelligence Service, a representative of the Directorate of Criminal Investigations, a representative of the Anti-Counterfeit Agency, a representative of the Kenya Revenue Authority and a representative of the National Youth Service.<sup>200</sup> The interagency would seem effective because it has harmonized many agencies into one making it simpler for the manufacturers to comply with one agency as opposed with different agencies which have their own regulations and certificates.

The members of the task force aim to commence a full audit of all alcoholic drinks, potable spirits and illicit brews in the alcohol industry.<sup>201</sup> They are also assigned the task of giving recommendations and advising on the gaps in the law.<sup>202</sup>

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<sup>200</sup> Appointment of The Inter-Agency Taskforce for Control of Potable Spirit and Combat of Illicit brews, *Alcohol Drinks Control Act* (2010)

<sup>201</sup> Appointment of The Inter-Agency Taskforce for Control of Potable Spirit and Combat of Illicit brews, *Alcohol Drinks Control Act* (2010)

<sup>202</sup> Appointment of The Inter-Agency Taskforce for Control of Potable Spirit and Combat of Illicit brews, *Alcohol Drinks Control Act* (2010)

### **3.9 Conclusion**

Looking at the development of alcohol laws, Kenya has come from a long way and has a long way to go as well to combat illicit brews. The chapter illustrates how the historical perception on illicit brews was negative due to criminalizing its production and sale, now it has moved to the legalization of illicit brews so long as you have the license to do so. Indeed, the taskforce needs to be harmonized to continue simplifying the alcohol laws and the people of Kenya need to adhere to the law so that illicit brews become nothing but a distant memory.

## **CHAPTER FOUR**

### **4.0 DATA ANALYSIS, PRESENTATION AND INTERPRETATION**

#### **4.1 Introduction**

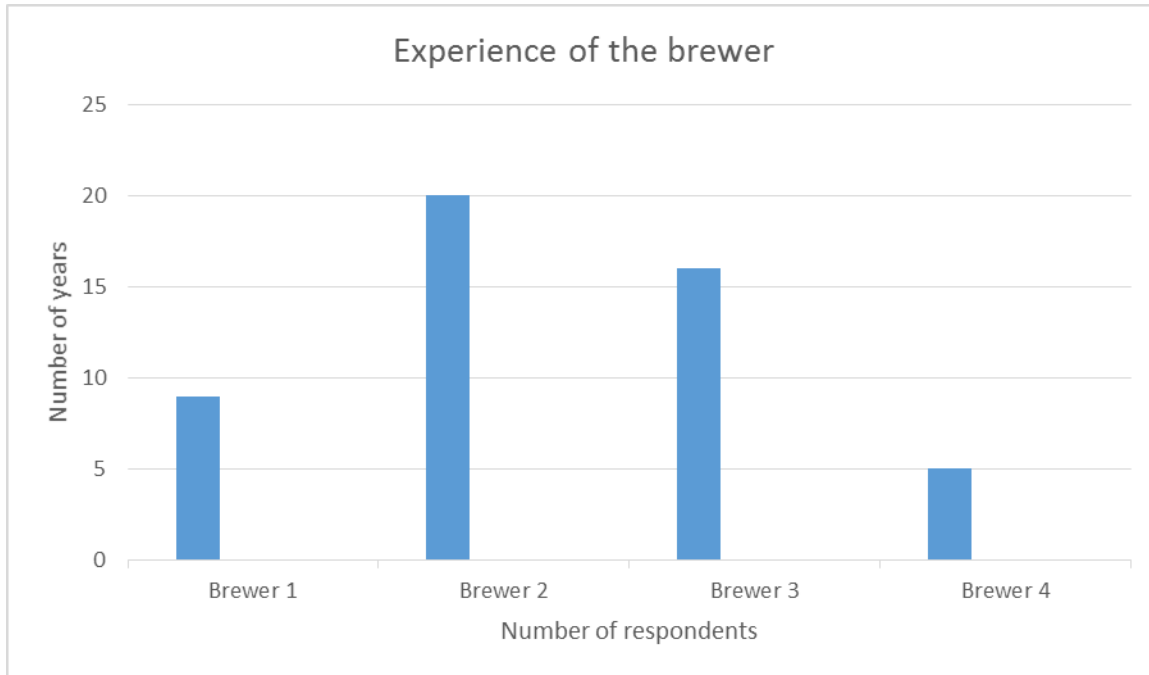
This chapter presents the analysis, interpretation and discussion of data obtained from conducted interviews made with a view to drawing conclusions and recommendations to the study. The specific areas of interest covered in the study are fulfillment of objectives stated in chapter one which were: to evaluate the implementation of the Alcoholic Drinks Control Act 2010, to determine the adverse consequences of illicit brews to Kenyans, to examine the overlap of roles of the Institutions given the mandate to stop the production and consumption of the brew and to propose appropriate recommendations to the policy, legal and institutional framework dealing with traditional brews.

#### **4.2 General Understanding illicit brews**

##### **4.2.1 Experience of the brewer**

Question one of the interview contained closed question geared towards understanding the knowledge of the brewer on the legality of traditional brews.

**Figure 4.2.1 Experience of the brewers**



**Source, Interviews, January 2017**

The brewers were randomly selected from Limuru County. They were picked due to the availability considering that illicit brews are produced in secret. From the above figure, it can be seen that the brewers have vast familiarity with manufacturing of traditional brews. All respondents joined this business because of the quick profits it would bring. Moreover, two stated that they first began as sellers of the brew and eventually grew into brewing it themselves. This raises the question that they have been brewers for many years yet they are not aware of the legal qualifications to be a licensed brewer in Kenya.

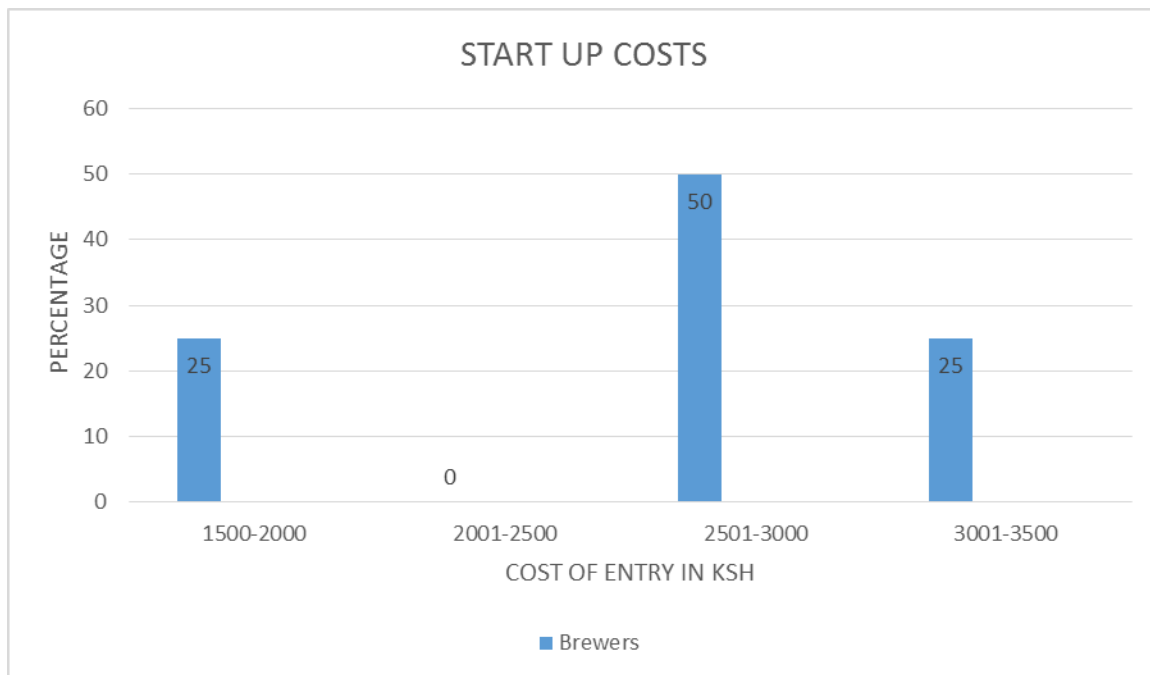
### 4.3 Definition of illicit brews

This study sought to understand the definition of illicit brew according to each body's representative. The general understanding is that an illicit brew can be defined as any brew manufactured that is not licensed according to the Act. In defining what an illicit brew is, the study can understand the criteria that is used by the various authorities to define what is legal or illegal. This provides clarity when authorities are carrying out crackdowns of the legal or illegal alcohol.

### 4.4 Barriers to entry

The responses as relates to the cost of starting a business selling illicit brews were categorized into four groups. The statements posed that brewers needed startup capital that ranges from one thousand five hundred to three thousand five hundred Kenya shillings.

**Figure 4.4 Startup costs**



Source, Interviews, January 2017

From the above, it can be seen that the category with two thousand five hundred to three thousand Kenya shillings was ranked highly while the cost ranging from one thousand five hundred to two thousand and three thousand to three thousand five hundred was equal in selection. This is due to the availability and low cost of the raw materials. This enables the brewers to sell the brew at a cost ranging from ten shillings to thirty shillings.

The low startup costs are a low barrier of entry to the illicit brew trade. This greatly contributes to the high number of brewers which compounds the issue of regulation. The institutions mandated with this task often have a difficult time owing to the very high number of players involved. Moreover, the low retail prices create a distortion in the alcoholic drinks market which disfavors larger players that are legally compliant.

#### **4.5 Types of customers**

Respondents chose from a list of statements the type of customers that they receive on a daily basis. They generally included farmers, tea pickers, construction workers, conductors and public transport drivers. The brewers concurred that majority of the customers were male, married and aged from thirty five and above. This indicates that most consumers are casual laborers who are low income earners. The type of customers are low income earners who do not earn enough to drink a tusker beer which retails at 140 Kenya shillings.<sup>203</sup> Therefore the government could provide training to the low income earners so that they can be able to become entrepreneurs who can provide for themselves and eventually improve on the quality of life.

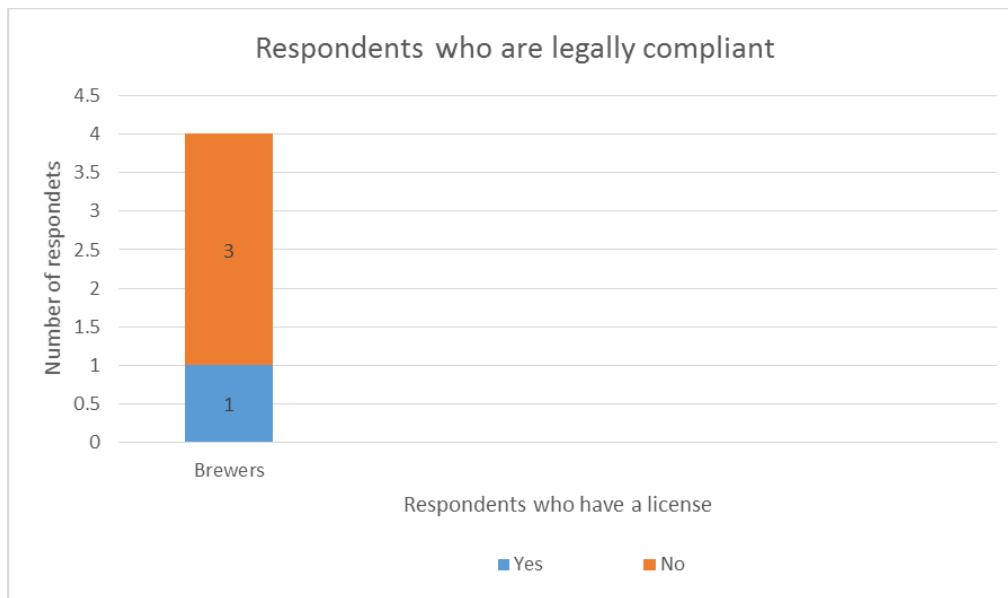
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<sup>203</sup><http://biasharapoint.com/blog/eabl-recommended-retail-prices-2016/> on 8 February 2017

#### 4.6 Legal compliance

One of the objectives in this research is to determine if the Alcoholic Drinks Control Act 2010 has been implemented successfully. In order to do so the brewers were asked if they are aware that it is legal to produce traditional brews and they require a license to do so.

**Figure 4.6 Respondents who are compliant**



**Source, Interviews, January 2017**

The questions sought to prove the level of awareness of the legal requirements to have a brewing business. The allocation is summarized in the table above.

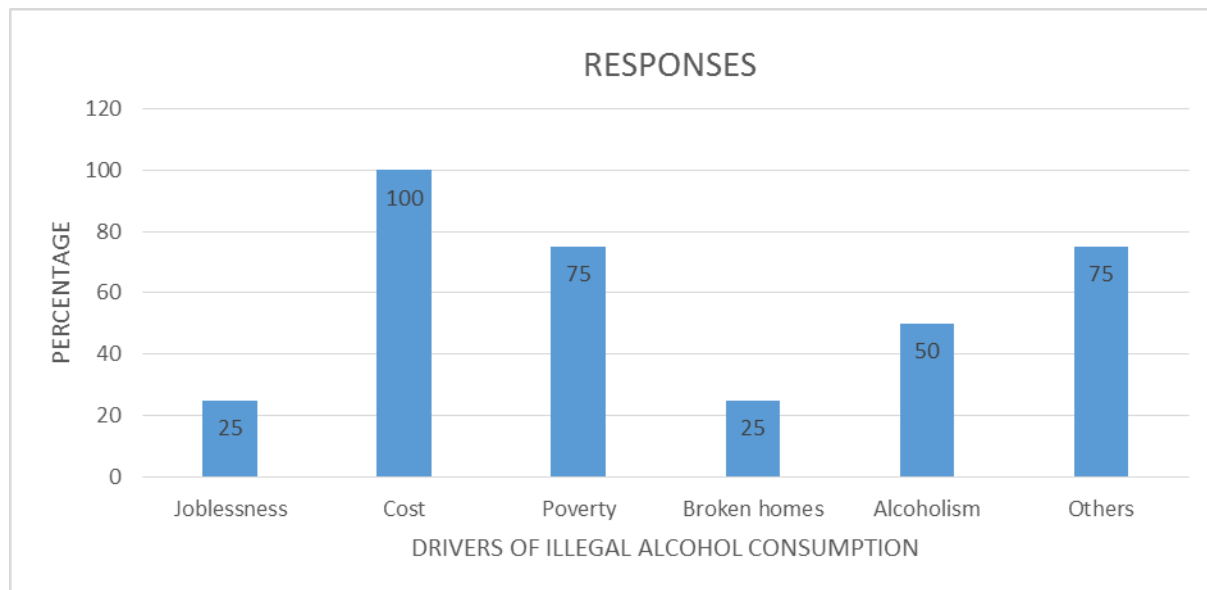
The study revealed that the brewers were generally not aware that they are meant to get a license to brew. The perception is that the brews are still illegal to manufacture and sell. One brewer was aware that they are to get a license but has not taken an initiative to apply for one for fear of it being a tedious process.

The requirements to be a brewer are set out in the Alcoholic Drinks Control act 2010 which include getting a brewers license the brewer should also have the Kenya Bureau of Standards mark as well as the Kenya Revenue Authority Certificate. The cost of meeting all the standards of the various bodies is high and the brewers would prefer to stay without a license. The lack of awareness shows that the brewers are not compliant with the alcohol laws in Kenya. Hence, efforts by institutions should engage a social perspective to be effective.

#### **4.7 Drivers of illegal consumption**

The study sought to find out what the factors causing the rampant consumption of illicit brew. It was revealed that the major factors are cost of the brew which ranges from 10-25 Kenya shillings and other reasons such as ignorance where the consumer is aware that the drink is an illicit brew but does not care.

**Figure 4.7 Factors of illicit brew consumption**



**Source, Interviews, January 2017**

Overall analysis of the factors that lead to illegal alcohol consumption illustrates that one of the major causes of the drinking the brew is cost. It was revealed that the four respondents believed that the low cost of the brew was the major cause of the continuous alcohol abuse. Another factor that was considered to be a major factor was poverty. At seventy five percent the respondents believed that the poor economic status of the drinkers makes them feel as if they have no other option. Other than poverty and cost other factors to include were ignorance, lack of information, availability and lack of strict enforcement.

This shows that the consumers of illicit brews are drinking because of the daily struggles in life. They are low income earners meaning that if they want to drink they cannot afford the regular known alcoholic beverage, while the illicit brews will range from ten to thirty shillings.

#### **4.8 Roles of institutions**

This question sought to find out the roles of the relevant institutions when dealing with illicit brews. The areas of interest were the approach used and if they have fulfilled their mandate as stipulated in the law. This was an open ended question where the respondents gave their views on the same. All relevant agencies stated to have the mandate to create awareness on what illicit brews are and its harmful effects on the human body. For instance, NACADA's role is to create awareness on the dangers of alcohol and drug abuse. In addition, the body has the mandate to provide statistics on the merging trends in the alcohol industry. KEBS also has the mandate to educate alcohol consumers on the legal and illegal alcoholic beverages as well as set standards that would ensure that any product is fit for human consumption.

Another role of the relevant agencies is the mandate to give or renew licenses. The respondents were of the view that each institution has the mandate to grant a license to a manufacturer so long as they meet the requirements in the law. Moreover, some agencies have the power not only to give licenses but enforce the law on those who break it.

Lastly, all respondents discussed about inter agency liaison. After the presidential directive in 2015 to destroy illicit brews in Central Kenya an inter agency committee was formed where the office of the President together with NACADA, KEBS, KRA, ACA, Police and Ministry of Health came together to form one body that deals with alcohol control. The reason for this committee was to simplify the implementation of alcohol laws.

#### **4.9 Overlap of roles**

One of the objectives this study sought was to determine if there was an overlap of roles between the relevant agencies. All four respondents from the various departments stated that there was no

overlap of roles between the institutions. Each institution was created for its own purpose with its own mandate. By way of illustration, Kenya Bureau of Standards has a broad mandate to create international standards for all products including alcoholic beverages while Anti-Counterfeit Agency deals with enforcement of the law by checking counterfeit products. NACADA is also an enforcement agency that also creates awareness on the dangers of alcohol and drug abuse while Kenya Revenue Authority collects taxes for the government and ensures public protection. Hence the role of each body may look similar but they are more complimentary.

## **4.9 Challenges**

### **4.9.1 Challenges faced by the brewer**

This study sought to find out the challenges encountered in dealing with illicit brews. The respondents gave their views on this. The following reasons were congregated:

1. Police- all respondents cited that the police were the biggest problem. They always demand bribes from the brewers so that they are not arrested. This is known as protection fees which shows high levels of corruption. One respondent added that the police would arrest him on a daily basis but would never catch him with his own brew and would instead frame him with other peoples brew and claim it to be his.
2. Robbery- this challenge was cited by fifty percent of the respondents where they stated that their brew would sometimes be stolen when it was left to be fermented for several days. If it was not stolen by the competition it would be stolen by the customers who were the intended consumers.
3. Customers- all respondents cited that customers would be a nuisance at times. They would drink and exhibit aggressive behavior towards other consumers which would lead to

altercations among themselves. In addition the customers would have high unpaid debts and still ask for more credit.

#### **4.9.2 Challenges faced by institutions**

1. Ignorance- all respondents cited that consumers of illicit brews lack awareness on the effects of illicit brews. Of importance to note is that one respondent stated that consumers are accepting of the illicit brews even though they know of its harmful effects.

2. Corruption- all respondents claimed that corruption is a big hindrance in achieving their goal to reduce illicit brew production and consumption. The brewers are protected by the police at a cost which allows them to continue brewing without following the procedures written under the law.

3. Policy making- this challenge was unique to NACADA as they are one of the bodies that make policies. They have drafted thirteen policies which have been taken to the government for approval. If the policies were to be approved it would mean strict enforcement on the alcohol industry. The reason of this failure is mainly because the alcohol industry resists this change by going to court and seeking injunctions.

4. One of the four respondents added that funding was a major drawback for them. The government's financial constraints limits their capability to enforce the mandate they have been granted by virtue of law.

#### **4.10 Hypothesis testing**

This study hypothesized that “the current legal framework is ineffective in dealing with illicit brews”. The interviews reveals that there is a deep understanding on what illicit brews are and its harmful effects. Also the creation of an inter-agency committee shows development in the

continuous enforcement against illicit brews. To promote better efficiency of the institutions, they identified the need to train and educate consumers of alcohol using the media. The study has established that the institutions are effective when dealing illicit brews because the bodies have separate mandates that complement each other as opposed to overlap the roles. As earlier stated, the policies required to make regulation effective are yet to be approved causing a bottleneck in efforts of institutions.

The study has established that for effective regulation to prevail, the solution is not limited to a strong legal framework and there are serious bottlenecks to the existing one. Resultantly, the hypothesis can be adopted since the results of the study were as hypothesized.

#### **4.11 Challenges encountered in data collection**

The researcher experienced some challenges during the execution of the study, though an effort was made to ensure the results were reliable. These included:

1. Some respondents were not very cooperative requiring different approvals to book an appointment.
2. The research was conducted under limited time constraints.

## **CHAPTER FIVE**

### **5.0 SUMMARY OF RESEARCH FINDINGS, CONCLUSIONS AND RECOMMENDATIONS**

#### **5.1 Introduction**

This chapter contains a summary of the research findings, recommendations in view of those findings and conclusions for the study. The purpose for the study was to examine the role of the relevant agencies when dealing with illicit brews. The main objective was to establish if the Alcoholic Drinks Control Act has been implemented.

#### **5.2 Summary of research findings**

The study established that there is a deep understanding of what illicit brews are. Moreover, the relevant agencies are working together to try and control the alcohol industry.

##### **5.2.1 General understanding of illicit brews**

One of the objectives of the study was to define what illicit brews are. This was done through asking the respondents their understanding of what illicit brews are. In addition, the study had a category that required the brewers to state how many years they have been brewing so as to appreciate why they are not compliant with the law even though they have been in this business for many years.

##### **5.2.2 Roles of institutions**

A second objective was to determine the role of each institution and if there was an overlap of roles in that each body was given the same mandate. All respondents stated that each institution has a separate mandate. They may seem similar in that they are creating awareness and ensuring quality products for human consumption but they have different roles in educating consumers and the legal framework of each institutions.

### **5.2.3 Challenges faced by the brewer and institutions.**

A third objective of the study was to determine the challenges the brewer and the institutions face when dealing with illicit brews. They ranged from resistance from the alcohol industry members, ignorance of consumers, robbery from competitors and lack of funding from the government. A major challenge was corruption from the law and enforcement agencies.

### **5.3 Conclusion**

The discussions in the literature review and analysis in the foregoing sections reveal that implementation of the Alcoholic Drinks Control Act 2010 is well underway. My hypothesis was that there was lack of an effective and efficient system that was incorporating the illicit brewers. The alcohol market is in need of strict control, but the objective is not to criminalize drinking of alcohol but to stop the culprits who brew alcohol that does not meet the required standards for human consumption. The government has a strategic role in that they can enhance legislation and strict enforcement policies.

The study focused on three concerns, namely; (i) the institutions responsible for dealing with illicit brews; (ii) how the current institutions have fulfilled their mandate; (iii) how can these institutions be strengthened to meet its objectives. The results indicate fluctuating levels of awareness on the laws that legalise the production of illicit brews. Moreover, KRA, KEBS, NACADA and ACA are working together in an inter-agency platform to be able to create awareness on the consequences of alcohol abuse as well prohibit the continuous production of illicit brews. The agencies have been able to challenge popular perceptions held as customs so as to slowly change the negative ideas into a positive light so achieve their respective goals.

While the need for adapting to changing times, the researcher also appreciates that implementation of measures is a gradual long term process requiring cooperation between all

relevant stakeholders involved in implementation and execution. Such cooperative measures have been observed through the creation of the inter agency committee. The committee is meant to simplify the legal process of attaining the relevant licenses.

#### **5.4 Recommendations**

In light of the objectives and findings, the following recommendations suffice:

1) Create awareness

Political, religious and other civic leaders to embark nationwide awareness campaign on the dangers of drinking illicit brews. This awareness should include all learning institutions as part of the syllabus.

2) Involve the media in the campaign against illicit brews

The media should be included in the strategy against alcohol and drug abuse in the country. This would mean training reporters to accurately state facts and make articles news worthy. Editors should also be trained so as to make them understand the importance of distinguishing between licit and illicit brews.

3) Improve economic status

The government should create training institutions where the society develop their skills which can enable them to become entrepreneurs and eventually improve on their quality of life. A better quality of life means that the spending power has increased enabling consumers to afford better alcohol quality.

4) Information sharing forums

NACADA together with all relevant stakeholders, especially brewers should be able to have an open forum to discuss the challenges each party faces when implementing and adhering to the law.

5) Assist county governments

After the implementation of the new constitution, the county government was given the mandate to undertake liquor licensing and drug control. However, some county governments lack the proper legal framework and technical capacity to pass sufficient alcohol laws.

6) Provide funding

Lastly, the government should provide adequate funds to increase the number of rehabilitation centers to the people who have been diagnosed with alcoholism. Also, the government should provide funding to the relevant agencies to enable them to enforce the mandate given to them.

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APPENDICES

APPENDIX 1: INTRODUCTION LETTER



**Strathmore University**  
**Law School**

To whom it may concern,

Nairobi, 12<sup>th</sup> January, 2017

Dear Sir/Madam,

**RE: EVELYN MUREGI- ADM. NO. 077569**

This is to certify that Evelyn Muregi, admission number 077569 is a fourth year student enrolled in the Bachelor of Laws (LL.B.) program on a full-time basis at Strathmore Law School of Strathmore University. Evelyn is expected to graduate with her LL.B. degree in June 2017.

As part of the course, she is writing her final year dissertation which is on the “Effects of illicit brews and the poor implementation of the Alcoholic Drinks Control Act 2010”. She is currently in the process of collecting data towards the completion of her dissertation.

I kindly request that you accord her any assistance she may require in the collection of her data. If you have any questions regarding this student, please contact Strathmore Law School on

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Luis G. Franceschi'.

Dr. Luis G. Franceschi F., LL.B, LL.M. LL.D.

Dean – Strathmore Law School

[law@strathmore.edu](mailto:law@strathmore.edu) or 0703 034 601.

**Ole Sangale Rd, Madaraka Estate. P.O Box 59857-00200, Nairobi, Kenya. Tel +254 (0)703 034601**

**Fax +254 (0)20 607498 Email [lfranceschi@strathmore.edu](mailto:lfranceschi@strathmore.edu) Website [law.strathmore.edu](http://law.strathmore.edu)**

APPENDIX 2: INTERVIEW QUESTIONS FOR NACADA, ACA AND KEBS

This interview is meant for government representatives in pursuit of a research project by Evelyn Muregi, a final year student at Strathmore University. The research topic is on “The effects of illicit brews and the poor implementation of The Alcoholics Drinks Control Act 2010”

This interview is meant for academic research purposes only and any information provided will be treated with utmost confidentiality.

1. What would you define as an illicit brew?

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2. What are the drivers of illegal alcohol consumption?

- a. Lack of employment opportunities
- b. Cost of brew
- c. Poor background
- d. Comes from broken homes
- e. Alcoholism
- f. Other \_\_\_\_\_

3. What is the role of your body when dealing with illicit brews?

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4. How can the traditional brewers be involved/spoken to on following the procedures written under the law?

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5. What initiative has your body done to educate /train Kenyans and brewers on the difference between legal and illegal brews?

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6. What challenges do your body face in implementing your role when it comes to illicit brews?

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7. Traditional brews have been categorized as the modern illicit brews because of the presumption that they have harmful content. This presumption stems from the fact that prior to 2010 it was illegal to manufacture traditional brews and stories from the media criminalizing the brew. What has been done to counter that presumption?

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8. In your opinion, isn't there an overlap of roles between your body and (KRA/NACADA/ACA/KEBS)? This could involve the mandate given by the law to educate Kenyans on the harmful effects of alcohol abuse or develop standards that are to be used as benchmark for quality assurance.

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### APPENDIX 3: INTERVIEW QUESTIONS FOR KENYA REVENUE AUTHORITY

This interview is meant for government representatives in pursuit of a research project by Evelyn Muregi, a final year student at Strathmore University. The research topic is on "The effects of illicit brews and the poor implementation of The Alcoholics Drinks Control Act 2010"

This interview is meant for academic research purposes only and any information provided will be treated with utmost confidentiality.

1. What would you define as an illicit brew?

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2. What are the drivers of illegal alcohol consumption?

- a. Lack of employment opportunities
- b. Cost of brew
- c. Poor background
- d. Comes from broken homes
- e. Alcoholism
- f. Other \_\_\_\_\_

3. What is the role of your body when dealing with illicit brews?

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4. Is there an existing tax system for traditional brews?

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5. What challenges does your body face in implementing your role when it comes to illicit brews?

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6. Case practice: according to the Alcoholic drinks amendment act 2015 the excise duty for sorghum, millet and cassava has been reduced with respect to beer. Has this had any impact on the alcoholic market where Kenyans have preference to drink senator as opposed to the traditional brews?

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7. In your opinion, isn't there an overlap of roles between your body and (KRA/NACADA/ACA/KEBS)? This could involve the mandate given by the law to educate Kenyans on the harmful effects of alcohol abuse or develop standards that are to be used as benchmark for quality assurance.

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