

Post-Legislative Scrutiny in a Decentralized Setting

Opportunities from Alcoholic Drinks Regulation in Kenya

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Abstract

Irresponsible alcohol consumption is a complicated regulatory issue globally. Governments' regulatory regimes for the alcoholic drinks sector are primarily concerned with issues such as control of the production, sale, and use of alcoholic drinks for purposes of safeguarding the health of the individual in view of the dangers of excessive consumption of alcoholic drinks. This article is intended to offer insights on post-legislative scrutiny by drawing on lessons from alcoholic drinks regulation in Kenya. Post-legislative scrutiny as a methodology largely reviews government action or inaction and consequently proposes measures to be undertaken for purposes of managing the effective implementation of its policies and abiding by legal obligations in relation to regulatory frameworks and actions. The intention is to highlight the failures and insufficiencies of the different approaches on alcohol regulation and the manner in which they have been utilized to regulate and control abuse of alcoholic drinks. By comparing regulatory outcomes with the intended policy outcomes and design of regulatory regimes the authors make the case for the primacy of post-regulatory scrutiny and to provide suggestions on how it can be improved in settings such as Kenya's.

Keywords: affordability, alcohol, availability, enforcement, licensing, marketing, post-legislative scrutiny, regulation, regulatory impact, taxation.

A Introduction

There are generally 6 approaches¹ to alcoholic drinks regulation: (1) regulation of availability, (2) regulation of the drinking context, (3) regulation of affordability, (4) regulation of marketing, (5) regulation of the minimum drinking age, and (6) regulation of behaviour. A quick review of Kenya's alcoholic drinks control history shows that Kenya has applied all six, with mixed results.

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1 D.A. Brand, *et al.*, 'Comparative Analysis of Alcohol Control Policies in 30 Countries', *PLoS Medicine*, Vol. 4, No. 4, 2007 (April), p. 0753.

Francis A. Aywa & Gabriel K. Ndung'u

Kenya's experience with alcohol regulation stretches back to the colonial days.² The country's post-independence alcohol consumption has risen exponentially, with the exception of the period between 1980 and 2003 when there was a drop.³ Following independence in 1963, the country enacted the Chang'aa Prohibition Act (Cap. 70) and the Liquor Licensing Act (Cap. 121), which prohibited the production, sale and consumption of indigenous liquor while providing for licensing requirements for modern alcohol. Four key statutes currently regulate alcoholic drinks at the national level, while 27 county governments have also passed laws to regulate alcoholic drinks at a sub-national level.

The Alcoholic Drinks Control Act (No. 4 of 2010) repealed the Chang'aa Prohibition Act and Liquor Licensing Act and consolidated the laws for the "control of production, manufacture, sale, labelling, promotion, sponsorship and consumption of alcoholic drinks". The Act provides agency powers to National Authority for the Campaign Against Alcohol and Drug Abuse (NACADA), including the power to advise the relevant Cabinet Secretary and implement the Cabinet Secretary's directives. It also establishes an Alcoholic Drinks Control Fund to finance the implementation of the regulatory purposes of the law. The manufacture and trade in alcoholic drinks is legally restricted and can be conducted only under licence by the relevant agency upon meeting legal conditions. Promotions and advertisements are also strictly regulated. Powers of enforcement⁴ include the power to analyse products, enter premises, seize products, or to use force. Certain conduct (e.g. being drunk and disorderly or production or sale without a licence) is criminally punishable. NACADA also has broad research, education and information functions under the Act.

The National Authority for the Campaign Against Alcohol and Drug Abuse Act (No. 14 of 2012) established NACADA as the agency responsible for the control of alcohol and drug abuse and for the formulation and implementation of policies for the control of alcohol and drug abuse. Its mandate therefore covers both alcohol and other drugs (e.g. narcotics).

The Standards Act (Cap. 496) provides the benchmarks for the regulation of (among others) alcohol quantity and quality (e.g. permitted potency, components etc.). To this end, it establishes the Kenya Bureau of Standards to enforce standards.⁵ The Act also establishes the National Standards Council to oversee the Bureau's work and advise the relevant Cabinet Secretary on any matter under the Act.

The national government also has wide-ranging taxation powers that it also applies to regulate the alcoholic drinks sector.⁶ Over the years, the government has targeted the sector with a variety of sin taxes (more recently excise duty). The

2 C.H. Ambler, 'Drunks, Brewers and Chiefs: Alcohol Regulation in Colonial Kenya, 1900–1939', in S. Barrows & R. Room (Eds.), *Drinking Behavior and Belief in Modern History*, Oxford, University of California Press, 1991, pp. 165–183.

3 World Health Organization, *Global Status Report on Alcohol and Health*, Geneva, WHO Press, 2014, pp. 1–9.

4 Alcoholic Drinks Control Act (No. 4 of 2010), s. 52.

5 Kenya Bureau of Standards Act (Cap. 496), ss. 3–5.

6 These include the Excise Duty Act (No. 23 of 2015) and Tax Procedures Act (No. 29 of 2015).

Table 1 *Number of Counties with ADC Legislation*

	Years						Total
	2013	2014	2015	2016	2017	2018	
Number of Counties	0	20	3	4	0	0	27

aim of sin taxes is to make alcoholic beverages more expensive and thereby limit their consumption through the creation of elasticity in demand. They are also a source of revenue for the government. Since the advent of county governments in 2013, 27 out of 47 (57.5%) have passed legislation to regulate the alcoholic drinks sector. Modelled largely on the Alcoholic Drinks Control Act (No. 4 of 2010), they also mirror its objectives.

There are generally four regulatory tools in county government alcoholic drinks legislation. The first is the administration of a licensing regime for products and premises by agencies established under the various laws. A single agency is responsible for the overall regulation of the sector in each county. It facilitates sub-county committees to regulate the manufacture, advertising and sale of alcoholic drinks within the county. A review mechanism, including recourse to courts of law, ensures that the system is run in an administratively fair manner. Second, the levying of charges for the manufacture and trade in alcoholic products not only raises revenues for the counties but also introduces barriers to entry that control the number of people engaged in the alcohol business. Public information and rehabilitation investments are intended to promote responsible consumption and mitigate the injurious effects of those who may fall into harmful consumption patterns. Last, the regulation of the hours of business is intended to limit the amount of the time the products are available for sale to consumers.

However, the current regulatory framework has largely been unsuccessful. For instance, illicit drinks are still sold in the country and anecdotal evidence suggests that they may be on the rise. Drunk driving is still a significant cause of accidents on the country's roads. Underage drinking is also rife, especially among high school and college students. Consequently, both the national and county governments have resorted to crackdowns of the kind witnessed in early 2015. The Cabinet Secretary for Interior and Coordination of National Government has recently ordered the resumption of these crackdowns, conducted by the country's security agencies.⁷ Some governors are also taking a similar approach: the Kiambu governor, for example, recently ordered all bars closed and demanded that operators apply for fresh licences. The operators thereupon sued the county government and the matter is pending in court.⁸

7 See <https://www.capitalfm.co.ke/news/2018/01/matiangi-takes-charge-interior-docket-orders-crackdown-illegal-drugs-brewns> (last accessed 5 June 2018).

8 See <https://www.standardmedia.co.ke/business/article/2001281352/bar-owners-contest-new-alcohol-law> (last accessed 5 June 2018).

B Post-Legislative Scrutiny in Kenya: Practice and Prospects

Kenya's Parliament traditionally had a very low legislative throughput.⁹ There has been an improvement since 2001, with an average of 28 laws passed per year.¹⁰ Debates are robust, the quality of laws is also improving, and many analysts argue that it is one of the more assertive legislatures in Africa. Regulatory impact assessments are nonetheless rare,¹¹ in spite of the clear provisions of the Statutory Instruments Act (No. 23 of 2013), and despite its opportunities for the evolution of Kenya's post-legislative scrutiny (PLS) practice. There is no evidence of PLS practice at the county level either.

Debates on new laws are not preceded by an analysis of the weaknesses of the preceding laws.¹² Examples include the country's dead-letter law against bigamy,¹³ ineffective anti-corruption laws,¹⁴ and continuing challenges with negative ethnicity.¹⁵ The stock legislative response to institutional failure has been to pass more laws or establish more institutions. There is growing evidence that passing laws without analysing the impact of preceding laws is not consistent with good legislative practice. Based on these challenges, we proffer some suggestions of the weaknesses of Kenya's alcoholic drinks regime that future PLS practice can address.

First, the legal framework for the regulation of alcoholic drinks is unclear, incoherent, and ineffectively in force. Alcoholic drinks are not clearly defined in many laws. Inept taxation "has driven the approved booze out of reach of the poor", while the trade in native liquor has "gone underground and become more dangerous".¹⁶ In 2003, East African Breweries Limited (EABL) produced a low-cost un-malted drink, Senator Keg, targeting drinkers of low economic status (at the time estimated at 60% of alcohol consumers).¹⁷ Without excise duty, it initially retailed for KSh. 20 a glass (about US\$ 0.2). Excise tax later imposed by gov-

9 J.D. Barkan & F. Matiangi, 'Kenya's Tortuous Path to Successful Legislative Development', in J.D. Barkan (Ed.), *Legislative Power in Emerging African Democracies*, London, Lynne Rienner, 2009, pp. 33-72.

10 Authors' analysis based on review of Parliament's Bill Trackers between 2001 and 2017.

11 Some recent work provides promise in this area. See, for example, Competition Authority of Kenya, *Assessment of Regulatory Impact Assessment on Competition: Guidance for Policy Makers*, Nairobi, CAK/IFC/Kingdom of the Netherlands/DFID, November 2015; and Energy Regulatory Commission, *Regulatory Impact Assessment of the Kenya National Transmission Grid Code and the Kenya National Distribution Code*, Nairobi, ERC, 2016.

12 For example, debate in the National Assembly on the Bribery Bill. National Assembly, Parliamentary Debates, Wednesday, 10 August 2016.

13 Penal Code (Cap. 63), s. 171.

14 Anti-Corruption and Economic Crimes Act, 2003 (No. 3 of 2003).

15 Established under the National Cohesion and Integration Act (No. 12 of 2008), s. 15.

16 See <https://www.theelephant.info/features/2017/04/07/kenyas-alcohol-problem-the-govt-needs-to-sober-up/> (last accessed 5 June 2018).

17 See <https://www.businesstoday.in/magazine/lbs-case-study/diageo-success-in-kenya-case-study/story/189547.html> (last accessed 5 June 2018).

ernment¹⁸ has since raised its retail price to KSh. 60 (approx. US\$ 0.6), seriously eroding the original benefits to low-income drinkers.

Second, enforcement of restriction of promotions and advertisements has proved unsuccessful in light of a sizeable middle class with significant disposable income to spend on alcohol. Testing blood alcohol content of drivers has suffered successful court challenges to the legality of the breathalyser devices due to communicable disease fears and the lack of a precise threshold for the minimum level of impairment for criminality.¹⁹ Alcohol consumers have relocated to non-policed areas, where alcohol-related traffic crashes continue unabated. As a result, the targets of regulation are seemingly unaffected by it, and hitherto ineffective command and control approaches are making a comeback.

C Conclusions and Recommendations

The effectiveness of alcohol control measures ultimately depend on the extent that they alter the decisions made around manufacture, marketing, sale, and consumption of alcohol and the behaviour of drinkers. Put differently, if either the national or sub-national legislatures begin to practice PLS, lessons or good practices for future replication could emerge.

This article makes a case for the better utilization of the law as a tool for regulating alcoholic drinks. Before the existing laws are amended, or replaced, or additional ones passed, a regulatory impact assessment(s) of the existing legal frameworks will be necessary. The national government, with its research funding and institutional expertise, should lead the way. If analysis suggests that implementation is the problem, adapting existing regulatory tools to the market responses seems a better solution than the promulgation of new legal frameworks.

Going forward, the taskforce appointed by the Cabinet Secretary will need to look into the coordination of enforcement, guided by PLS principles. To begin with, clarifying the division of labour between the national government and the county governments will be necessary. A likely organizing principle, based on the principle of subsidiarity, should be for national government institutions to play a role that is consistent with its overall policy and law-making function while local enforcement action should mainly be left to county governments.

There should be a limit to the use of taxation as a regulatory tool. It is time for the Treasury to draw a line on additional 'sin taxes' targeting the sector. The Parliamentary Budget Office (PBO) should subject these taxes to an analysis of the macroeconomic effects on the sector before legislators pass even more taxes and levies.

18 According to EABL, the initial KSh. 5 rise in price "hit sales tremendously, a clear indication that the brew's future is dependent on EABL maintaining costs at a minimum and the government retaining and the government retaining the current 100% duty remission".

19 See https://www.the-star.co.ke/news/2017/04/07/court-stops-use-of-alcoblow-to-charge-offenders-says-law-contradicts_c1539958 (last accessed 5 June 2018).

Francis A. Aywa & Gabriel K. Ndung'u

Finally, the country's legislatures should take up their obligation to conduct PLS as good practice in policy and law making. A likely starting point would be to at least comply with the requirements of the Statutory Instruments Act (No. 23 of 2013) in at least two ways. Either parliament or county assemblies should require the Executive to submit a legislative impact assessment to precede any considerations of a new law or amendments to existing law or commission such assessments as a means to independently engaging the Executive on new legislative proposals.