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Editor's Note

Journal of Conflict Management and Sustainable Development

Welcome to Volume 10 Issue 1 of the Journal of Conflict Management and Sustainable Development. This is the first issue of the Journal in the year 2023 demonstrating our commitment towards spearheading scholarly discourse on the themes of Conflict Management and Sustainable Development.

The Journal has continued to grow as a key academic resource in the fields of Conflict Management, Sustainable Development and related fields of knowledge. It focuses on emerging and pertinent areas and challenges in these fields and proposes necessary legal, institutional and policy reforms towards addressing these issues.

The Journal is now one of the most cited and authoritative publications in the fields of Conflict Management and Sustainable Development. It adheres to the highest level of academic standards and is peer reviewed and refereed so as to ensure credibility of information and validity of data.

This volume covers relevant topics and themes on Conflict Management and Sustainable Development which include: *Entrenching Biodiversity Impact Assessment in Kenya as a Tool for Enhancing Sustainable Development Agenda; Role of Technology in Climate Change Disputes Resolution; Repatriating the Violation of Human Rights of Indigenous Communities in Africa: A Review of the African Commission on Human and Peoples' Rights v. Republic of Kenya Application No. 006/2012 (Reparations); Putting Children First: Prioritising Minors in The Application of ADR in Criminal Cases in Kenya; Exploring Heritage Impact Assessment in Kenya; Clarifying the Roles of the Director of Public Prosecutions and the Director of Criminal Investigations in Kenya: A Proposal for Legal Reform; The Duty to Treat Versus the Right to Refuse Unsafe Work of Healthcare Workers in Kenya: Implications for Public Health Emergencies; Effectuating the Doctrine of Eminent Domain: Sustainable Principles for Compulsory Land Acquisition in Kenya; Is Energy Law Sufficiently an Academic Discipline? A Review of Selected Documents* and Evaluation of a conflict in a learning environment: Does it always fetch a negative outcome? The Journal also

contains a review of *Attaining Environmental Justice for Posterity, Volume 1 and Volume 2 (2022).*

I wish to thank the contributing authors, Editorial Team, reviewers and all those who have made it possible to continue publishing this Journal whose impact has been acknowledged both in Kenya and across the globe.

The Editorial team welcomes feedback from our audience across the world to enable us continue improving the Journal and align it to current trends in academia and specifically in the fields of Conflict Management and Sustainable Development.

The Journal adopts an open publication policy and does not discriminate against authors on any grounds. We thus encourage submission of papers from all persons including professionals, students, policy makers and the public at large. These submissions should be channeled to editor@journalofcmsd.net and copied to admin@kmco.co.ke to be considered for publication in subsequent issues of the Journal.

The Journal can be accessed on https://journalofcmsd.net

Dr. Kariuki Muigua, Ph.D., FCIArb, (Ch. Arb), Accredited Mediator.
Editor, Nairobi,
January, 2023.

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Dr. Kariuki Muigua is a distinguished law scholar, an accomplished mediator and arbitrator with a Ph.D. in law from the University of Nairobi and with widespread training and experience in both international and national commercial arbitration and mediation. Dr. Muigua is a Fellow of Chartered Institute of Arbitrators (CIArb)-Kenya chapter and also a Chartered Arbitrator. He also serves as a member of the National Environment Tribunal. He has served as the Chartered Institute of Arbitrator's (CIArb- UK) Regional Trustee for Africa from 2019 -2022.

He became the first winner of the Inaugural CIArb (Kenya Branch) ADR Lifetime Achievement Award 2021. He was also the winner of the ADR Practitioner of the Year Award 2021 given by the Nairobi LSK and the ADR Publisher of the Year 2021 awarded by CIArb Kenya. He was the winner of the African Arbitrator of the Year 2022 award at the 3rd African Arbitration Awards held at Kigali Rwanda beating other competitors from Egypt, Mauritius, Ethiopia, Nigeria and Kenya. The African Arbitrator of the Year award is the highest and most prestigious ADR and Arbitration Award in Africa.

He is an Advocate of the High Court of Kenya of over 30 years standing and practicing at Kariuki Muigua & Co. Advocates, where he is also the senior advocate. His research interests include environmental and natural resources law, governance, access to justice, human rights and constitutionalism, conflict resolution, international commercial arbitration, the nexus between environmental law and human rights, land and natural resource rights, economic law and policy of governments with regard to environmental law and economics. Dr. Muigua teaches law at the Centre for Advanced Studies in Environmental Law and Policy (CASELAP), Wangari Maathai Institute for Peace and Environmental Studies (WMI) and the Faculty of Law, University of Nairobi.

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Dr. Kenneth Wyne Mutuma is a chartered arbitrator of the Chartered Institute of Arbitrators (London), a certified public secretary, an accredited mediator/advocate of the High Court of Kenya, and an active member of the several professional associations including the Law Society, Architectural Association, Institute of Certified Secretaries, Association of Professional Societies in East Africa etc. He also sits in a number of committees and boards of various professional and corporate organizations in and out of Kenya including the Governing Council of the Institute of Certified Secretaries and the Chartered Institute of Arbitrators, as well as committees of the Association of Professional Societies for East Africa, the National Committee on International Humanitarian Law, Africa Unite (Cape Town) etc. More specifically, his contribution on the subject of governance is based upon his experiences with the South Africa Institute of Management where he oversaw the legal compliance and governance unit during the consultations that preceded the adoption of the King III code. In addition, his work with the Nelson Mandela Foundation has been instrumental in understanding critical elements of community empowerment, conflict resolution, ethical leadership and stakeholder management in the corporate and non-profit sectors.

He is passionate about this subject and continues to lend his knowledge and experience on the same as part of a consultancy team with the State Corporations Advisory Committee. He is also a senior lecturer with the University of Nairobi's School of Law. He teaches and supervises both postgraduate and undergraduate studies in the areas of corporate governance, international law, refugee law, international human rights, and alternative dispute resolution mechanism. Further, he holds several academic qualifications including undergraduate studies in law and architecture, a master's in international law and a PhD in Law focusing on the challenges of outsourcing public functions to the private sector. He is widely published in in the areas he teaches and serves as part of the editorial team of a number of journals including the UoN Law Journal and the ICS Journal on Corporate Governance.

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He has written previously in various journal articles of the Institution of Surveyors of Kenya on large scale land acquisitions, resettlement action planning principles, effects of sustainable urbanism, challenges of suburbanization, emerging trends in property investment and decision making criteria for residential housing choice, and international economic law.

He recently launched his debut book: ***Living Fruitful life, God's Purpose for directing Passion***.
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Elim Limlim is hold of Bachelor of Law (LLB) and Bachelor of Veterinary Medicine (BVM) from the University of Nairobi as well as a final year master's student at Catholic University of Eastern Africa pursuing a Master of Art in Project Planning and Management (MPPM). He has been working with Humanitarian Organizations and government agencies for close to 10 years at various level on food security, program/project development and management both as an intern and an employee of various institutions. The

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Limlim is currently the Coordinator of Sector Forum for Agriculture, Livestock and Fisheries (SFAL) and the Programme Assistant for the Embassy of Switzerland -Kenya funded Livestock Sector Strengthening in Arid and Semi-Arid Lands of Northern Kenya Programme. This program support covers 10-counties of Northern Kenya in building resilience of the food security domain in Frontier Counties Development Council (FCDC) region. FCDC region has a membership of County Government of Isiolo, Marsabit, Turkana, Samburu, West Pokot, Mandera, Garissa, Wajir, Lamu and Tana River. His main role is to strengthen devolved system of government through coordinating the County Executive Committee Members (CECM) responsible for food security of the respective member counties. His prior experiences include 6-months interning with Lutheran World Federation (LWF) at Kakuma Refugee Camp while he was a student of Bachelor of Veterinary Medicine at the University of Nairobi in 2014. He also worked as a research assistant with GIZ before joining the County Government of Turkana for 3 years (2015-2018) as a veterinary officer where he played leading role in formulation of County Water Policy and Bill as well as the County Livestock Policy and Bill.
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Entrenching Biodiversity Impact Assessment in Kenya as a Tool for Enhancing Sustainable Development Agenda

By: ***Kariuki Muigua****

Abstract

Environmental Impact Assessment is globally considered as an important tool for environmental regulation and management. Impact assessments are performed to determine how particular projects, policies, and programmes will shape the environment. The Environmental Impact Assessment (EIA), according to UNEP, is a tool used to determine the environmental, social, and economic effects of a project before making a decision. It seeks to anticipate environmental effects early in the project planning and design process, identify strategies for minimising negative effects, adapt projects to the local environment, and give predictions and options to decision-makers. It is arguably the most widely used environmental tool globally when determining the potential impact of a project on the environment.

This paper argues that in the most sensitive ecological areas, such impact assessments should include biodiversity impact assessment as the most effective tool in safeguarding the biological diversity that may be found within these areas and also enhancing their conservation. The author argues that the ordinary EIA may not successfully reflect the real effect of the particular project, policy or programme on the biological diversity.

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1. Introduction

The *1992 Convention on Biological Diversity*[1] defines "biological diversity" to mean the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part: this includes diversity within species, between species and of ecosystems.[2] Every living creature, from people to things we know little about like bacteria, fungi, and invertebrates, is included in biodiversity, not only the species we regard to be uncommon, vulnerable, or endangered.[3] The majority of our daily activities depend on biodiversity. There are a variety of practical and fundamental reasons why we cherish biodiversity. Thus, we appreciate biodiversity both for what it offers to us and for its intrinsic worth.[4]

It is for this reason that human activities ought to take into consideration conservation and protection of biodiversity. One of the ways that this may be achieved is through environmental impact assessment exercises during approval of various projects. Environmental Impact Assessment is globally considered as an important tool for environmental regulation and management. Impact assessments are performed to determine how particular projects, policies, and programmes will shape the environment. [5] The Environmental Impact Assessment (EIA), according to UNEP, is a tool used to determine the environmental, social, and economic effects of a project before making a decision. It seeks to anticipate

[1] United Nations, *1992 Convention on Biological Diversity*, 1760 UNTS 79, 31 ILM 818 (1992). Adopted in Rio de Janeiro, Brazil on 5 June 1992.
[2] Ibid, Article 2.
[3] 'What Is Biodiversity? Why Is It Important? | AMNH' (*American Museum of Natural History*) <*https://www.amnh.org/research/center-for-biodiversity-conservation/what-is-biodiversity*> accessed 7 November 2022.
[4] Ibid.
[5] Unit B, 'What Is Impact Assessment?' (27 April 2010) <*https://www.cbd.int/impact/whatis.shtml*> accessed 7 November 2022.

environmental effects early in the project planning and design process, identify strategies for minimising negative effects, adapt projects to the local environment, and give predictions and options to decision-makers. It is arguably the most widely used environmental tool globally when determining the potential impact of a project on the environment.[6]

This paper is informed by the argument that EIA processes and conservation measures as currently carried out in Kenya do not adequately put into account the biodiversity impact assessment aspect of environmental assessments. Biodiversity assessment has been defined as identification and classification of the species, habitats, and communities found in a certain area or region. The main objective is to provide the information needed to determine if management is necessary to protect biological diversity. Assessments also contain information and data that may be applied to scientific research endeavours.[7]

The author argues that with the growing population and development activities, the increasing conversion of biodiversity rich areas into settlement areas to take care of the population and economic needs of the country requires the country to embrace biodiversity impact assessment exercises as part of the conservation efforts and race towards achieving sustainable development agenda.

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[6] Ibid.

[7] Henderson, A., Comiskey, J., Dallmeier, F. and Alonso, A., "Framework for Assessment and Monitoring of Biodiversity." *Encyclopedia of Biodiversity Online Update 1* (2007) *<https://repository.si.edu/bitstream/handle/10088/20985/nzp_Dallmeier_et_al_2013_Framework_for_Assess_and_Monit_of_Bd_022813.pdf>* accessed 7 November 2022.

2. Environmental Impact Assessment in Kenya: Legal and Institutional Framework

Environmental Impact Assessment (EIA) in Kenya is provided for under the 2010 Constitution of Kenya as well as Environmental Management and Coordination Act (EMCA) 1999 [8] and related regulations. International environmental regulatory framework also shapes the domestic framework.

2.1. The Constitution of Kenya 2010

Article 10(1) states that the national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—applies or interprets this Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions. [9] These national values and principles include, *inter alia*: good governance, integrity, transparency and accountability; and sustainable development.[10]

The Constitution outlines the principles of land policy in Kenya and states that land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the principles of, *inter alia*—sustainable and productive management of land resources; and sound conservation and protection of ecologically sensitive areas.[11]

Article 69 of the Constitution outlines the obligations of the State in respect of the environment as including, to: ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing

[8] Environmental Management and Co-ordination Act, No. 8 of 1999, Laws of Kenya, Revised Edition 2019 [1999].
[9] Article 10 (1), Constitution of Kenya 2010.
[10] Article 10 (2), Constitution of Kenya 2010.
[11] Article 60 (1), Constitution of Kenya 2010.

of the accruing benefits; work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya; protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities; encourage public participation in the management, protection and conservation of the environment; protect genetic resources and biological diversity; establish systems of environmental impact assessment, environmental audit and monitoring of the environment; eliminate processes and activities that are likely to endanger the environment; and utilise the environment and natural resources for the benefit of the people of Kenya.[12]

Notably, Article 260 of the Constitution defines "natural resources" to mean the physical non-human factors and components, whether renewable or non-renewable, including, *inter alia*-forests, biodiversity and genetic resources.[13]

2.2. Environmental Management Coordination Act, 1999 (EMCA)

The *Environmental Management Coordination Act (EMCA)* [14] envisages environmental impact assessments (EIA). Indeed, various requirements relating to the implementation of environmental impact assessments (EIA), strategic environmental assessments (SEA), environmental audits (EA), and management activities for air, water, wastes, and noise are included in the Environmental Management and Control Act (EMCA). Conservation of wildlife, management of forests and water resources, as well as worker health and safety, are additional requirements relating to environmental concerns.

[12] Article 69 (1), Constitution of Kenya 2010.
[13] Article 260, Constitution of Kenya 2010.
[14] Environmental Management Coordination Act, No. 8 of 1999, Laws of Kenya.

Section 42 (1) of EMCA states that no person shall, without the prior written approval of the Authority given after an environmental impact assessment, in relation to a river, lake, sea or wetland in Kenya, carry out any of the following activities: erect, reconstruct, place, alter, extend, remove or demolish any structure or part of any structure in, or under the river, lake, sea or wetland; excavate, drill, tunnel or disturb the river, lake, sea or wetland; introduce any animal, whether alien or indigenous, dead or alive, in any river, lake, sea or wetland; introduce or plant any part of a plant specimen, whether alien or indigenous, dead or alive, in any river, lake, sea or wetland; deposit any substance in a lake, river or wetland or in, on or under its bed, if that substance would or is likely to have adverse environmental effects on the river, lake, sea or wetland; direct or block any river, lake, sea or wetland from its natural and normal course; drain any lake, river, sea or wetland; or any other matter prescribed by the Cabinet Secretary on the advice of the Authority.[15]

Section 58 of EMCA provides for EIA and states that 'notwithstanding any approval, permit or license granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, should before for financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.[16] EMCA defines "environmental impact assessment" to mean a systematic examination conducted to determine whether or

[15] S. 42(1), EMCA.
[16] S. 58(1), EMCA.

not a programme, activity or project will have any adverse impacts on the environment.[17]

The contents of the reports from environmental impact assessment are provided for the *Environmental (Impact Assessment and Audit) Regulations, 2003*[18]. However, it is worth noting that CBD COP 6 Decision VI/7 recognises that although legislation and practice vary around the world, the fundamental components of an environmental impact assessment would necessarily involve the following stages: Screening to determine which projects or developments require a full or partial impact assessment study; Scoping to identify which potential impacts are relevant to assess, and to derive terms of reference for the impact assessment; Impact assessment to predict and identify the likely environmental impacts of a proposed project or development taking into account inter-related consequences of the project proposal, and the socio-economic impacts; Identifying mitigation measures (including not proceeding with the development, finding alternative designs or sites which avoid the impacts, incorporating safeguards in the design of the project, or providing compensation for adverse impacts); Deciding whether to approve the project or not; and monitoring and evaluating the development activities, predicted impacts and proposed mitigation measures to ensure that unpredicted impacts or failed mitigation measures are identified and addressed in a timely fashion.[19]

As far as protection of environmentally significant areas is concerned, EMCA provides that the Cabinet Secretary may, in consultation with the relevant lead agencies and in accordance with the Constitution, the

[17] S. 2, EMCA.
[18] Environmental (Impact Assessment and Audit) Regulations, 2003, Legal Notice No. 101 of 2003, Laws of Kenya.
[19] Unit B, 'COP Decision' <*https://www.cbd.int/decision/cop/?id=7181*> accessed 9 November 2022.

Convention on Biological Diversity and other treaties, by notice in the Gazette, declare any area of land, sea, lake, forests or river to be a protected natural environment for the purpose of promoting and preserving specific ecological processes, natural environment systems, natural beauty or species of indigenous wildlife or the preservation of biological diversity in general.[20]

EMCA defines "biological diversity" to mean the variability among living organisms from all sources including, terrestrial ecosystems, aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, among species and of ecosystems. [21] It also defines "biological resources" to include genetic resources organisms or parts thereof, populations, or any other biotic component or ecosystems with actual or potential use or value for humanity.[22]

Section 50 of EMCA deals with conservation of biological diversity where it provides that the Cabinet Secretary should, on the advice of the Authority, prescribe measures necessary to ensure the conservation of biological diversity in Kenya and in this respect the Authority should: identify, prepare and maintain an inventory of biological diversity of Kenya; determine which components of biological diversity are endangered, rare or threatened with extinction; identify potential threats to biological diversity and devise measures to remove or arrest their effects; undertake measures intended to integrate the conservation and sustainable utilisation ethic in relation to biological diversity in existing government activities and activities by private persons; specify national strategies, plans and government programmes for conservation and sustainable use of biological

[20] S. 54(1), EMCA, 1999.
[21] S. 2, EMCA, 1999.
[22] Ibid.

diversity; protect indigenous property rights of local communities in respect of biological diversity; and measure the value of unexploited natural resources in terms of watershed protection, influences on climate, cultural and aesthetic value, as well as actual and potential genetic value thereof.[23]

The Act envisages both *in situ and ex situ* conservation of biological resources.[24] In terms of *in situ* approach to conservation of biological resources, the Act provides that the Cabinet Secretary should, on the recommendation of the Authority, prescribe measures adequate to ensure the conservation of biological resources in situ and in this regard shall issue guidelines for, *inter* alia, land use methods that are compatible with conservation of biological diversity.

It is against the foregoing provisions that NEMA came up with regulations on conservation of biological diversity in 2006[25] as per section 147 of the Act.[26]

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[23] S. 50, EMCA.

[24] S. 51 & 52, EMCA.

[25] Environmental Management and Co-ordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations, 2006.

[26] 147. Power to make regulations

(1) The Cabinet Secretary may, on the recommendation of the Authority and upon consultation with the relevant lead agencies, make regulations prescribing for matters that are required or permitted by this Act to be prescribed or are necessary or convenient to be prescribed for giving full effect to the provisions of this Act.

(2) Regulations made under subsection (2) may—

(a) make provisions for the issue, amendment and revocation of any licence;

(b) provide for the charging of fees and levying of charges;

(c) adopt wholly or in part or with modifications any rules, standards, guidelines, regulations, by laws, codes, instructions, specifications, or administrative procedures prescribed by any lead agency either in force at the time of prescription or publication or as amended from time to time.

2.3. Environmental Management and Co-ordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations, 2006

The *Environmental Management and Co-ordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations, 2006*[27] are to apply to: (a) the exchange of genetic resources, their derivative products, or the intangible components associated with them, carried out by members of any local Kenyan community amongst themselves and for their own consumption; access to genetic resources derived from plant breeders in accordance with the Seeds and Plant Varieties Act (Cap. 326); human genetic resources; and approved research activities intended for educational purposes within recognized Kenyan academic and research institutions, which are governed by relevant intellectual property laws. [28]

The Regulations also state that a person shall not engage in any activity that may— have an adverse impact on any ecosystem; lead to the introduction of any exotic species; lead to unsustainable use of natural resources, without an Environmental Impact Assessment Licence issued by the Authority under the Act.[29]

2.4. Environmental (Impact Assessment and Audit) Regulations, 2003

The Environmental (Impact Assessment and Audit) Regulations, 2003[30] are to apply to all policies, plans, programmes, projects and

[27] the Environmental Management and Co-ordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations, Legal Notice No. 160 of 2006, Laws of Kenya.
[28] Regulation 3, LN No. 160 of 2006, laws of Kenya.
[29] Ibid, regulation 4.
[30] Environmental (Impact Assessment and Audit) Regulations, Legal Notice No. 101 of 2003, Laws of Kenya.

activities specified in Part IV, Part V and the Second Schedule of the Act.[31]

Regulation 7 (2) thereof provides that the project report submitted under sub regulation 7(1) shall specify — the nature of the project; the location of the project including —(i) proof of land ownership, where applicable; (ii) any environmentally sensitive area to be affected; (iii) availability of supportive environmental management infrastructure; and (iv) conformity to land use plan or zonation plan; and potential environmental impacts of the project and the mitigation measures to be taken during and after implementation of the project. On the other hand, comprehensive project report prepared pursuant to a recommendation under regulation 7 (3) (a), must specify — the nature of the project; the location of the project including — (i) proof of land ownership; (ii) the Global Positioning System coordinates; and (iii) the physical area that may be affected by the project's activities; the activities that shall be undertaken during the project construction, operation and decommissioning phases; a description of the international, national and county environmental legislative and regulatory frameworks on the environment and socio- economic matters; the preliminary design of the project; the materials to be used, products and by-products, including waste to be generated by the project and the methods of their disposal; the potential environmental impacts of the project and the mitigation measures to be taken during and after implementation of the project; an analysis of available alternatives including an alternative (i) project site; (ii) design; (iii) technologies; and (iv) processes, and the reasons for preferring the proposed site, design, technologies and processes; an action plan for the prevention and management of possible accidents during the project cycle; a plan to ensure the health and safety of the workers and

[31] Regulation 3, LN No. 101 of 2003.

neighbouring communities; the economic and socio-cultural impacts to the local community and the nation in general; a plan to ensure the relocation or resettlement of persons affected by the project; a strategic communication plan to ensure inclusive participation during the study and provide a summary of issues discussed at the public participation forum; an environmental management plan; integration of climate change vulnerability assessment, relevant adaptation and mitigation actions; the project cost; and any other information the Authority may require.[32]

As for environmental impact assessment study reports, they must incorporate, *inter* alia, information on — the proposed location of the project; a concise description of the national environmental legislative and regulatory framework, baseline information and any other relevant information related to the project; the objectives of the project; the technology, procedures and processes to be used, in the implementation of the project; the materials to be used in the construction and implementation of the project; the products, by-products and waste generated by the project; a description of the potentially affected environment; the environmental effects of the project including the social and cultural effects and the direct, indirect, cumulative, irreversible, short-term and long-term effects anticipated; alternative technologies and processes available and reasons for preferring the chosen technology and processes; analysis of alternatives including project site, design and technologies and reasons for preferring the proposed site, design and technologies; an environmental management plan proposing the measures for eliminating, minimizing or mitigating adverse impacts on the environment; including the cost, time frame and responsibility to implement the measures; provision of an action plan for the prevention

[32] Regulation 7 (4), LN No. 101 of 2003

and management of foreseeable accidents and hazardous activities in the cause of carrying out activities or major industrial and other development projects; the measures to prevent health hazards and to ensure security in the working environment for the employees and for the management of emergencies; an identification of gaps in knowledge and uncertainties which were encountered in compiling the information; an economic and social analysis of the project; an indication of whether the environment of any other state is likely to be affected and the available alternatives and mitigating measures; and such other matters as the Authority may require.[33]

In all the above reports, Second Schedule thereof outlines the issues that may, among others, be considered in the making of environmental impact assessments. These issues include, *inter alia*, ecological Considerations such as biological diversity including— effect of proposal on number, diversity, breeding habits, etc. of wild animals and vegetation; gene pool of domesticated plants and animals e.g. monoculture as opposed to wild types. Thus, while biodiversity is mentioned as one of the considerations that may be made during EIA, biological diversity assessment is not substantively provided for.

2.5. Convention on Biological Diversity 1992

The *1992 Convention on Biological Diversity*[34] is the international legal framework for the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits resulting from the use of genetic resources, including through appropriate access to genetic resources and through appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate

[33] Regulation 18 (1), LN No. 101 of 2003, Laws of Kenya.
[34] United Nations, *1992 Convention on Biological Diversity*, 1760 UNTS 79, 31 ILM 818 (1992). Adopted in Rio de Janeiro, Brazil on 5 June 1992.

funding.[35] The CBD offers a powerful worldwide platform for using impact assessment methods to conserve biodiversity. It expressly demands that projects, programmes, and policy choices address biodiversity through impact assessment procedures (Article 14).

Parties must conduct environmental impact assessments (EIAs) for projects that might have a detrimental impact on biodiversity under the Convention on Biological Diversity (CBD). The CBD calls for impact assessments to take biodiversity into account, but it also gives room for a more proactive approach, allowing for the identification of potential for both effect mitigation and biodiversity enhancement.[36]

3. Biodiversity Conservation: Challenges and Prospects

One of the main worldwide environmental challenges today is the preservation of biological diversity (biodiversity). Therefore, as suggested by the Convention on Biological Diversity, a detailed examination of the consequences of developments on biodiversity has to be included in the process of Environmental Impact Assessment (EIA): Each Contracting Party is required to "implement suitable processes requiring environmental impact assessment of any proposed projects that are expected to have considerable detrimental impact on biological diversity."[37]

Ecological impact assessments concentrate on both the advantages of biodiversity obtained through ecosystem services as well as the

[35] Ibid, Article 1.

[36] Brooke, C., 'Biodiversity and Impact Assessment,' *prepared for the conference on Impact Assessment in a Developing World Manchester, England, Oct 1998*, RSPB/BirdLife International < *https://www.cbd.int/impact/case-studies/cs-impact-bia-brooke-1998-en.pdf*> accessed 9 November 2022.

[37] Davide Geneletti, 'Biodiversity Impact Assessment of Roads: An Approach Based on Ecosystem Rarity' (2003) 23 Environmental Impact Assessment Review 343, 344 <https://linkinghub.elsevier.com/retrieve/pii/S0195925502000999> accessed 8 November 2022.

spatially constrained biophysical environment and biodiversity as composition, structure, and important activities. It deals with the distribution of space in complicated circumstances marked by ambiguity and opposing actor values. The entire proposal of a project, plan, or programme, its goals, alternate options and their acceptability from the perspective of biodiversity, and knowledge of the biodiversity and ecosystem services it provides are shaped in the process of ecological impact assessment, which is a part of environmental impact assessment (EIA) and strategic environmental assessment (SEA).[38]

It has been pointed out that despite the fact that 80% of Kenya's population depends on its biological resources for survival, insufficient management of these resources results in a broad range of biological resources. In addition, there is little knowledge of the non-consumptive values of resources, little access to biodiversity data and information, and poor adoption rates for new technologies, including biotechnology.[39]

According to *Kenya State of Environment Report 2019-2021*[40], a 2021 publication of the National Environment Management Authority (NEMA) Kenya, currently, it is thought that the nation is home to over 260 species of reptiles, over 250 small mammals, several big animals, over 7,004 kinds of plants, over 25,000 types of invertebrates, over

[38] Söderman, T., "Biodiversity and ecosystem services in impact assessment: from components to services," (2012), p. 3 < *https://core.ac.uk/download/pdf/14924073.pdf*> accessed 8 November 2022.

[39] Mwenda, A. and Kibutu, T.N., "Implications of the New Constitution on Environmental Management in Kenya' (2012)." *Law, Environment and Development Journal* 8: 76-78.

[40] National Environment Management Authority, *Kenya State of Environment Report 2019-2021*, 2021, ISBN: 978-9966-1987-0-9 < *https://www.nema.go.ke/images/Docs/EIA_1920-1929/NEMA%20SoE%202019-2021.pdf*> accessed 7 November 2022.

769 species of fish, and around 1,100 species of birds. The nation's national parks, national reserves, and conservancies are among the places where the biodiversity of the nation is most abundant. In lands used for communal settlement, biodiversity may also be found outside of protected areas.[41]

Kenya's conservation efforts are threatened by climate unpredictability, wildlife crime, urban sprawl, and rapid population increase.[42] It is crucial to analyse how each biophysical change can affect biodiversity by determining whether the change has an impact on one of the following aspects of biodiversity: composition, structure, or key processes. This will help us determine impacts on biodiversity for the ecosystems that are influenced.[43]

4. Entrenching Biodiversity Impact Assessment in Kenya as a Tool for Enhancing Sustainable Development Agenda

The objective of an environmental impact assessment (EIA) is to provide decision-makers a sense of the anticipated environmental effects of activities that might modify the environment and, if required, to enable for adjustments to be made to these actions to lessen any negative effects.[44] Arguably, ecological repercussions have frequently received less attention in impact assessments.[45] EIAs have

[41] Ibid, p. xviii.

[42] 'Environment | Kenya | U.S. Agency for International Development' (24 May 2022*) <https://www.usaid.gov/kenya/environment>* accessed 8 November 2022.

[43] Slootweg, R., "Biodiversity assessment framework: making biodiversity part of corporate social responsibility." *Impact Assessment and Project Appraisal* 23, no. 1 (2005): 37-46.

[44] Ritter, C.D., McCrate, G., Nilsson, R.H., Fearnside, P.M., Palme, U. and Antonelli, A., 'Environmental Impact Assessment in Brazilian Amazonia: Challenges and Prospects to Assess Biodiversity' (2017) 206 *Biological Conservation* 161.

[45] Brooke, C., 'Biodiversity and Impact Assessment,' *prepared for the conference on Impact Assessment in a Developing World Manchester, England, Oct 1998,*

traditionally concentrated on impacts on protected species and ecosystems. Other elements of biodiversity, such as diversity across species and ecosystems, changes through time, species abundance and distribution, and the functional components of biodiversity, have received less attention.[46]

The Conference of the Parties (COP) agreed to establish recommendations for including biodiversity-related problems in environmental impact assessment laws, procedures, and strategic environmental assessment in COP 6 Decision VI/7.[47] The COP guidelines for incorporating biodiversity-related issues into environmental-impact-assessment legislation or processes and in strategic impact assessment are meant to provide general advice on incorporation of biodiversity considerations into new or existing environmental impact assessment procedures, noting that existing procedures take biodiversity into consideration in different ways.[48] The framework will need to be improved in order to address how biodiversity may be included into the latter phases of the environmental impact assessment procedure, such as impact assessment, mitigation, evaluation, and monitoring, as well as strategic environmental assessment.[49] However, depending on their institutional and legal frameworks, individual nations may modify the phases in the approach to suit their needs and wants.[50]

RSPB/BirdLife International< *https://www.cbd.int/impact/case-studies/cs-impact-bia-brooke-1998-en.pdf*> accessed 9 November 2022.

[46] Ibid.

[47] Unit B, 'Case Studies - Impact Assessment' <*https://www.cbd.int/programmes/cross-cutting/impact/search.aspx*> accessed 9 November 2022.

[48] Unit B, 'COP Decision' <*https://www.cbd.int/decision/cop/?id=7181*> accessed 9 November 2022.

[49] Ibid.

[50] Ibid.

Therefore, conducting a biodiversity impact assessment necessitates a more thorough research and analysis of potential effects on an ecological unit and the species and populations that make up its ecosystem. According to the CBD, biodiversity refers to variety at the levels of species (both within and between species) and ecosystems. Therefore, ecological impacts might be viewed as a subset of biodiversity impacts, which focus on the broader interactions between animals and their habitats at the species, community, and ecosystem levels.[51] Because of the challenges that other disciplines, including social impact assessment, have had when attempting to "go it alone," biodiversity impact assessment should thus be viewed as a component of current impact assessment systems rather than being marketed as a distinct entity. The term "biodiversity impact assessment" might be used to bring these concerns to the attention of the impact assessment community because the biodiversity agenda has some momentum.[52]

In contrast to the conventional EIA strategy of mitigating consequences, this provides a focus on the more advantageous features of biodiversity, looking at the ecosystem perspective, dealing with fragmentation difficulties, and so forth. In addition to protecting endangered species and their ecosystems, biodiversity also entails improving damaged landscapes, halting species extinctions, and establishing new habitats.[53]

4.1. Biodiversity Monitoring

As a result of a wide range of internal and external stimuli, biodiversity is by its very nature a dynamic component of ecosystems, changing in composition, structure, and functional qualities. The term

[51] Brooke, C., 'Biodiversity and Impact Assessment,' *prepared for the conference on Impact Assessment in a Developing World Manchester, England, Oct 1998*, RSPB/BirdLife International, p.3.
[52] Ibid., p.3.
[53] Ibid, p.3.

"monitoring" refers to the systematic and targeted observation and assessment of current changes in biodiversity in its different forms (genes, species, structures, functions, and ecosystems), often within a specific context defined by, for example, a research topic or a management aim. [54] There are several purposes for biodiversity monitoring. Feedback on the effectiveness of conservation efforts is provided by observing protected species' population numbers in their protected zones. An early warning system for farmers or medical services can benefit from tracking the spread of hazardous invasive species or contagious organisms. Population management systems may be optimized thanks to monitoring systems at gaming farms. These are but a few instances of the numerous uses available.[55]

4.2. Adaptive Management of Biodiversity Resources

Adaptive management is a process for putting management into practice while learning which management activities are most successful at accomplishing certain objectives. [56] In other words, adaptive management is a methodical strategy for enhancing resource management by taking lessons from management results.[57]

The evolution of scientific knowledge, as well as numerous societal and political shifts, have all influenced how natural resource management has changed through time. Management's typical objective is to guarantee the continuity of one or more system-of-

[54] Juergens, N. "Monitoring of biodiversity." *Biodiversity: Structure and Function-Volume I* 1 (2009): 229.
[55] Ibid.
[56] Department of Planning and Environment, 'Adaptive Management' (*NSW Environment and Heritage*) <*http://www.environment.nsw.gov.au/research-and-publications/our-science-and-research/our-work/adaptive-management*> accessed 8 November 2022.
[57] 'Adaptive Management' (*Conservation in a Changing Climate*) <*https://climatechange.lta.org/get-started/adapt/adaptive-management/*> accessed 8 November 2022.

interest properties. This is sometimes seen as a necessity for managers to either work to maintain system stability or to preserve certain system linkages and components while permitting or promoting system change. A comprehension of resilience is especially important when taking into account the dynamics of management and system change.[58]

Arguably, EIA procedures should not be different. They should be adoptive to the changing environmental conditions due to climate change and other factors adversely affecting the environment and biological resources. These processes should be expanded to include biodiversity impact assessment especially where the EIA relates to a parcel of land that is rich in biological resources, such as those contemplated under section 42 of EMCA. It has been suggested that in order to take advantage of the role of science and innovation in enhancing biodiversity conservation measures, the challenge for researchers is to change their emphasis from discovery to the science of implementation, while managers and policy-makers must abandon their socio-political norms and institutional frameworks in order to adopt new thinking and effectively use the wealth of potent new scientific tools for learning by doing.[59] For instance, it has been documented that wetlands are losing their biodiversity more quickly than any other ecosystem and thus, data on species status and risks are necessary to properly manage and conserve the biodiversity of

[58] Allen, C.R. and Garmestani, A.S., "Adaptive Management." *Adaptive Management of Social-Ecological Systems* (2015): 1, p. 2 *<http://ndl.ethernet.edu.et/bitstream/123456789/67461/1/Craig%20R.%20Allen.pdf>* accessed 8 November 2022.

[59] Keith, D., Martin, T., McDonald-Madden, E. and Walters, C., "Uncertainty and adaptive management for biodiversity conservation." (2011) *https://www.sciencedirect.com/science/article/abs/pii/S0006320710004933?via%3* Dihub accessed 8 November 2022.

wetlands. [60] Thus, biological diversity monitoring offers recommendations for managing biological variety in terms of productivity and conservation. Monitoring analyses changes across time and place and evaluates the state of biological variety at one or more ecological levels.[61]

5. Conclusion

It has been suggested that programs for biodiversity monitoring and assessment (BMAP) offer a way to gather and present scientific data for use in managing natural resources. Establishing the objectives is the first step in creating the BMAP programme. The types of species and habitats that should be taken into account as part of the programme are then frequently determined by doing a baseline biological assessment. Following completion of the assessment, trends in biodiversity will be shown in the environment by tracking the chosen indicators and utilising science to offer answers. The results of monitoring operations reveal concerns that call for management methods, such as the need to safeguard vulnerable or endangered species or eradicate invasive non-native species.[62] Monitoring is a crucial part of an effective adaptive management programme since it is used to evaluate the progress achieved toward achieving management objectives.[63]

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[60] Stephenson PJ, Ntiamoa-Baidu Y and Simaika JP, 'The Use of Traditional and Modern Tools for Monitoring Wetlands Biodiversity in Africa: Challenges and Opportunities' (2020) 8 Frontiers in Environmental Science <*https://www.frontiersin.org/articles/10.3389/fenvs.2020.00061*> accessed 9 November 2022.

[61] Niemelä J, 'Biodiversity Monitoring for Decision-Making' (2000) 37 Niemelä, J. 2000. Biodiversity monitoring for decision-making. Annales Zoologici Fennici 37: 307-317.

[62] Henderson, A., Comiskey, J., Dallmeier, F. and Alonso, A., "Framework for Assessment and Monitoring of Biodiversity." *Encyclopedia of Biodiversity Online Update 1* (2007), p. 545.

[63] Ibid, p. 545.

If the Sustainable Development Goal 15 of the 2030 Agenda for Sustainable Development which is devoted to *"protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss"* is to be achieved, then biodiversity assessments must become part of environmental management approaches in the country. It is only through such assessments that the true status and impact on biodiversity can be established. It is important that given that a legislative requirement for an environmental impact assessment based on environmental considerations does not ensure that biological diversity will be taken into account, it should be taken into account to include biodiversity criteria in either current or future screening criteria. This is especially important where EIA processes are to be carried out in ecologically sensitive areas. It has thus been suggested that there is a need to solve the two key issues that biodiversity conservation poses for impact assessment, namely: First, current impact assessment techniques must be enhanced to address biodiversity impacts; second, they need to be broadened to give additional positive advantages for biodiversity.[64] If these goals for biodiversity and impact assessment are to be accomplished, changes must be made at all levels of impact assessment, including legal requirements, standards, training, and impact assessment practice.[65]

[64] Brooke, C., 'Biodiversity and Impact Assessment,' *prepared for the conference on Impact Assessment in a Developing World Manchester, England, Oct 1998*, RSPB/BirdLife International, p.4.
[65] Ibid, p. 6.

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Juergens, N. "Monitoring of biodiversity." *Biodiversity: Structure and Function-Volume I* 1 (2009): 229.

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Role of Technology in Climate Change Disputes Resolution-

By: ***Kenneth Wyne Mutuma*** [*]

1.0 Introduction

The inclusion of force majeure and Acts of God clauses in the law of contract, which date back from common law doctrines in England, illustrates man's early acknowledgement of his helplessness in some circumstances. It is also a testament to man's acceptance that disputes will likely occur due to any of these events. Natural calamities such as forest fires, tsunamis, tornadoes, earthquakes and extreme weather in general are a common occurrence in these clauses. While thought to be naturally occurring, evidence from the scientific community shows that these events have been exacerbated by climate change.[1] The widespread effects of these events, the mainstreaming of the polluter pays principle and climate justice questions in public discourse, coupled with increased scientific knowledge on the causes of climate change has seen a corresponding increase in climate change disputes.[2]

Use of technology, especially in the aftermath of disruptions such as the Covid-19 pandemic, is becoming a mainstay in both the litigation and ADR

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[1] Bernai, R. R. (2013). Managing the risks of extreme events and disasters to advance climate change adaptation. *Economics of Energy & Environmental Policy*, *2*(1), 101-113.

[2] National Research Council, 'Advancing the Science of Climate Change. Division on Earth and Life Studies, Board on Atmospheric Sciences and Climate' (2020)

fields.[3] The fact that technology can play a role in climate change dispute resolution is a restatement of the ironic and bittersweet relationship between technology and climate change. The industrial revolution and the technological advancement that came with it have been the universal culprits as the biggest causes of climate change.[4] A multisectoral study conducted in 2006 confirmed that there is a positive correlation between technological advancement, greenhouse gas emission increase and environmental degradation.[5] However, as will be discussed in this paper the benefits of technology in ameliorating climate change far outweigh the costs, for example digital technology is estimated by the World Economic Forum to help reduce global carbon emissions by up to 15%.[6] But it is still responsible for 1.4 to 5.9 percent of all greenhouse emission. [7]

The chapter seeks to analyze climate change and its implications, as well as the nature of climate change disputes. It will also examine the efficacy of climate change dispute resolution mechanisms within the Kenyan and international framework. The chapter concludes by making suggestions for requisite reforms required based on the gaps identified.

2.0 Climate Change and its Implications

The United States National Aeronautical Space Agency has described climate change as a protracted change in the average weather patterns defining earth's climates.[8] The Agency uses data records and observations

[3] Michael Peters, Fazal Rizvi and others, 'Reimagining the new pedagogical possibilities for universities post-Covid-19'' (2020) 54(6), 717-760.
[4] Christine Wamsler and Jamie Bristow, 'At the intersection of mind and climate change: integrating inner dimensions of climate change into policymaking and practice' (2022) 173(1), 1-22.
[5] Muhamad Ramzan, Tomiwa Adebayo and others, 'Do green innovation and financial globalization contribute to the ecological sustainability and energy transition in the United Kingdom? Policy insights from a bootstrap rolling window approach. Sustainable Development. (2022)
[6] Erica Zaja, Ariane Dubost and Matilde Oliveri, 'GHG Emissions Monitoring and Avoidance Strategy'
[7] Ipek Tunc, Serap Türüt-Aşık and Elif Akbostanci, 'CO2 emissions vs. CO2 responsibility: an input–output approach for the Turkish economy' (2007) 35(2) ERC Working Papers in Economics 06/04
[8]Accessed at

from the air, space, and ground, along with computer generated models, to observe climate change. It postulates that since the mid-20th century, climate change has been caused by anthropogenic activities. These are human-induced activities such as fossil fuel burning. These activities have resulted in an increase in global, land and ocean temperatures; increase in the recurrence and intensity of extreme weather such as wildfires, hurricanes, droughts, heat waves, floods, and precipitation; rise in the sea levels; cloud and vegetation cover change, and ice loss at the north and south poles and in mountain glaciers.[9] Changing precipitation patterns leading to droughts and shorter severe rainfall have led to food insecurity and has spurred conflict.[10] This is especially so among the pastoralists communities as resources become scarce and the dry season grazing land becomes less. Livestock herds became diminished as there is more competition over grazing lands.[11] The end result is a contest for resources and migration which can sometimes lead to increased conflict. The increased intensity of conflict in the Kenya Ethiopia border around the lower Omo River valley between the Turkana and Daasanach has been partially attributed to climate change.[12] Although the dispute has been long standing, locals fear that raids will be more frequent. While acknowledging that conflict is driven by a number of variables, a 2015 Human Rights Watch Report noted that climate change has altered traditional livestock raid patterns by increasing the frequency and intensity.[13] It has a multiplier effect on perennial factors such as state security, proliferation of arms, and developments in neighbouring countries.

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https://climate.nasa.gov/global-warming-vs-climate-change/#what_is_climate_change on 8th November 2022

[9] Szira, Z., & Alghamdi, H. The Achievements Of The Kyoto Protocol. *PaKSoM 2020*, 175.

[10] Castro de la Mata, Tim Benton and others, 'Food security and health in a changing environment'

[11] Philip Obaigwa Sagero, 'Assessment of past and future climate change as projected by regional climate models and likely impacts over Kenya' (Doctoral dissertation, PhD Thesis] (2019)

[12] Thomas Temesgen and Berisso Taddesse, 'Pastoral Conflict, Emerging Trends and Environmental Stress in Nyangatom, Southern Ethiopia' Ethiopian Journal of the Social Sciences and Humanities, (2020) 16(2), 111-132.

[13] Available at *https://www.hrw.org/report/2015/10/15/there-no-time-left/climate-change-environmental-threats-and-human-rights-turkana* accessed on 8th November 2022

It serves to amplify threats and risks to peace and development. In its Worldwide Threat Assessment brief, a 2018 U.S National Intelligence Council report warned that global warming, biodiversity loss, increased pollution and decreased water supply are likely to fuel social and economic unrest.[14] The Shalom Centre for Resolution and Conflict Resolution notes that it is becoming harder to mediate the conflicts between the two communities.[15]

To counter this, concerted effort to lower global warming needs to be undertaken. The IPCC in 2018 published a finding that reducing global warming to 1.5°C will positively benefit biodiversity and human beings.[16] According to the UN, the global average temperature from 1880 to 2012, rose by 0.85°C. As sea level rises, the amount of snow and ice have decreased as large water bodies warm up.[17] The average sea level increased by 19 cm between 1901 and 2010, as oceans expanded due to the warming and melting of ice. Glaciers are melting at an alarming rate, and the effects of decreased water supply in the drier months will affect future generations.[18] These occurrences need to be at least halted and ultimately reversed so as to ameliorate climate change's adverse effects.

3.0 The Nature of Climate Change Disputes

A dispute is basically a disagreement. The ICC taskforce has described a climate change related dispute as *"any dispute arising out of or in relation to the effect of climate change and climate change policy, the United Nations Framework Convention on Climate Change ("UNFCCC") and the Paris Agreement"*.[19] As discussed, climate change effects are far reaching and

[14] Available at https://www.dni.gov/files/documents/Newsroom/Testimonies/2018-ATA---Unclassified-SSCI.pdf accessed on 8th November 2022

[15] Available at https://shalomconflictcenter.org/briefing-paper-no-2-an-analysis-of-turkana-dassenach-conflict/ accessed on 8th November 2022

[16] Rex Chidera, 'Climate change, its palpable impacts in Sub-Saharan Africa and the measures to be taken'

[17] Available at https://www.un.org/en/global-issues/climate-change accessed on 8th November 2022

[18] Ibid note 157

[19] Accessed at *Resolving Climate Change Related Disputes through Arbitration and ADR* on 8th November 2022.

correspondingly some climate change disputes transcend the constraints of contracts such as the doctrine of privity of contract.[20] They in effect become transnational and matters to be addressed through such forums as the UN. There is also the fact that climate change has the potential to adversely affect human rights which makes limiting such disputes to a two-party affair virtually impossible.[21] Government mega projects either as interventions to limit the effects of climate change or to spur economic development have the potential of causing climate change thereby affecting millions of people even outside the borders of the given state. A good example is Ethiopia's Grand Ethiopian Renaissance Dam (GERD) dispute between South Sudan, Sudan, Ethiopia and Egypt which had to be mediated by the US.[22]

The simplest form of disputes in climate change would be based on frustration and non- performance of contractual obligations due the effects of climate change.[23] This occurs where a party is unable or does not perform its obligations due to the effects of climate change such as flooding, forest fires, drought, tsunamis or tornadoes.[24] The dispute is straightforward and simple and will be resolved according to the agreement between the parties and/or the statutory regime governing the law of contract and arbitration in the given jurisdiction. If the agreement contains an ADR clause, such as for mediation, arbitration or adjudication then the mediator, arbitrator or adjudicator will make a determination. Climate change has the potential to particularly affect the speed of construction projects in the construction industry, including power transmission, water dams, oil and gas, and road

[20] Jakko Salminen, Mikko Rajavuori, Viljanen and others, Greenhouse Gas Emissions in Global Value Chains: Governance, Regulation and Liability (2022) *Copenhagen Business School, CBS LAW Research Paper*, (22-03).
[21] Giada Giacomini, 'Indigenous Peoples in International Law and Governance. In Indigenous Peoples and Climate Justice' (2022) 151-225
[22] Tawfik Amer, 'Revisiting hydro-hegemony from a benefitsharing perspective: the case of the Grand Ethiopian Renaissance Dam' (No. 5/2015). Discussion Paper.
[23] Daniel Farber, 'Basic compensation for victims of climate change' (2007). *University of Pennsylvania law review* 1605-1656.
[24] Craig Brown and Sara Seck, 'Insurance law principles in an international context: Compensating losses caused by climate change' (2012) Alberta *Law Review 50*, 541.

construction.[25] Contracts for these projects usually contain a dispute resolution clause, with disputes arising from the sectors historically generating the largest number of ICC arbitration referrals.[26] The determiner can harness the use of technology to make the process more seamless. This can be done through the application of e-briefs, electronic submissions, video conferencing, Artificial Intelligence (AI), email communication, electronic signatures and e-filling.[27] The ICC has developed a manual on how to resolve disputes related to climate change using ADR including arbitration; which integrate the use of information technology.[28] The gains of adopting technology in climate change dispute resolution cannot be gainsaid.

4.0 Transnational Climate Change Disputes

As discussed earlier, climate change and human rights are very closely related.[29] The effects of climate change tend to diminish the enjoyment of fundamental freedoms and human rights including social economic rights. As a result, disputes are likely to arise between authorities and citizens with regard to provision and accessibility of such rights such as sanitation in case of flooding, food in times of drought and search and rescue services when forest fires break out.[30] This is exacerbated by the recognition that climate change has varying global impacts, the effects are felt more in the global

[25]Roberto Schaeffer, Alexandre Szklo and others, 'Energy sector vulnerability to climate change: A review. Energy' (2012) 1-12.

[26] Thi Hoa and Hoang Tu Linh, T, 'Alternative Dispute Resolution and the Application of the Multitiered Dispute Resolution Clause in the International Construction Sector' (2012) Journal of Legal Affairs and Dispute Resolution in Engineering and Construction, 15(1), 04522049.

[27] Kariuki Muigua and Jeffah Ombati, 'Achieving expeditious Justice: Harnessing Technology for Cost Effective International Commercial Arbitral Proceedings' (2018)

[28]Available at *https://iccwbo.org/publication/icc-arbitration-and-adr-commission-report-on-resolving-climate-change-related-disputes-through-arbitration-and-adr/* last accessed on 8th November 2022

[29] Marion Suiseeya, Laura Zanotti, L and Kate Haapala, 'Navigating the spaces between human rights and justice: cultivating Indigenous representation in global environmental governance' (2022) *The Journal of Peasant Studies* 604-628.

[30] Dennis Mutama Masika, George Oduol and Edna Kowenje, 'Indigenous Knowledge and Practices for Sustainable Water Resources Management: A Case of Luo and Banyala in Kenya. In From Traditional to Modern African Water Management' (2022) 179-193

south. These regions with fewer resources double as low-income countries with the least capacities to prevent and mitigate for the impacts of climate change[31]. In effect, the poorest and most vulnerable people bear the brunt of climate change despite contributing a minimal proportion to the crisis. Their populations have more challenges in accessing basic needs such as food, water, health and security. This has in some instances led to conflict. Of the 25 countries deemed most susceptible to climate change, 14 are mired in conflict[32]. This is because the adverse effects of climate change tend to make existing dismal social, economic and environmental factors worse.[33]

Therefore, disputes arise between nations on the apportionment of liability, who pays for the cost of mitigation and rehabilitation and also who should curb pollution more. These disputes are dealt with at the UN through such agreements as the Paris agreement.[34] In fact one of the purposes of the ICC working group on arbitration of climate change disputes was to find ways of arbitrating "*contracts relating to the……. mitigation or adaptation in line with the Paris Agreement commitments* and contracts related to "*change or related environmental disputes, potentially involving impacted groups or populations."*

5.0 Climate Change Dispute Resolution Mechanisms

The choice of the mechanism applied to the resolution of climate change disputes depends on the legal and institutional frameworks available in the jurisdiction and the nature of the dispute. Most climate change disputes are currently being resolved through litigation in national courts with cases going all the way to the supreme courts and apex courts of the countries[35]. Such cases include the *Urgenda* case,[36]where an NGO successfully sued the

[31] Climate change 2022: Impacts, adaptation and vulnerability. *IPCC Sixth Assessment Report https://www.ipcc.ch/report/ar6/wg2/* accessed 20/11/2022
[32] *https://www.icrc.org/en/document/climate-change-and-conflict*
[33] Ibid pg 44
[34] Grubb, Ml. "Seeking fair weather: ethics and the international debate on climate change." *International affairs* 71.3 (1995): 463-496.
[35] Mark C. & Stebbing H. Climate-related disputes: Adaptation and innovation (2018).
[36] Urgenda Foundation (on behalf of 886 individuals) v The State of the Netherlands (Ministry of Infrastructure and the Environment), First instance decision, HA ZA

Netherlands Government over laxity in implementing climate change mitigation policies and the *Lliuya v RWE AG* case,[37] where a Peruvian farmer is suing a German power utility company over its action in producing power in Germany which purportedly led to melting of ice glaciers in Peru.[38] The fact that the case survived the first preliminary hurdles in German courts is a testament to the global nature of climate change disputes.[39]

The other forum for climate change dispute resolution is the United Nations bodies such as the general assembly. Disputes are also resolved through the various summits organised and held by the United Nations State parties on climate change. In these summits aggrieved state parties are able to present their grievances and agreements reached.[40] An example is the United Nations climate summit held in Copenhagen in 2009, where rich nations made a pledge to contribute US$100 billion a year to less wealthy nations by 2020, to help them adapt to climate change and mitigate the adverse effects of climate change.[41]

ADR mechanisms such as arbitration are slowly also being adopted in resolving climate change disputes.[42] Article 14 of the UNFCCC on the settlement of disputes provides that in a case of a dispute between parties to

13-1396, C/09/456689, ECLI:NL:RBDHA:2015:7145, ILDC 2456 (NL 2015), 24th June 2015, Netherlands; The Hague; District Court. ECLI:NL:RBDHA:2015:7145

[37] Saul Ananias Luciano Lliuya v RWE AG, 2015

[38] The Norton fulbright international arbitration report 2018 available at *https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/international-arbitration-review---issue-11.pdf?revision=f23f1aee-4947-4743-86a2-b9b74ed6e191&revision=5248422353367387904* accessed 0n 8th November 2022.

[39] Thornton, F. (2021). Of harm, culprits and rectification: Obtaining corrective justice for climate change displacement. *Transnational Environmental Law*, *10*(1), 13-33.

[40] Bailey, S. D., Bailey, L., & Daws, S. (1995). *The United Nations: A concise political guide*. Rowman & Littlefield.

[41] Joycelyn, T. (The Guardian). The broken $100-billion promise of climate finance — and how to fix it. (2021).

[42] Ng, I. (2022). Beyond the Litigation Narrative: The Place and Roles of ADR in Climate Change Disputes. *Asian Dispute Review*, *24*(1).

the convention, a party may refer the dispute to arbitration.[43] However, the article requires the conference of parties to adopt procedures to be used in the annex mediation which has not yet been done.[44] The potential for use of ADR in climate change dispute resolution is best illustrated by the fact that sectors that are impacted or impact climate change accounted for around 70% of all new ICC arbitration cases in 2018. The construction, engineering and energy sectors were responsible for 40% of these.[45]

The UK global law firm of Norton Rose Fulbright has identified some areas of opportunity for application of ADR techniques, especially arbitration. These include: disputes pertaining to changing climate-related policy or mandating conduct; cases brought to seek financial redress for damages associated with the effects of climate change; contractual disputes arising out of the industry transitions; contractual disputes resulting from climate-related weather events; disputes between foreign investors and host state and; disputes between states and disputes between other transnational actors.[46]As more businesses go green, financial investment will be required to fund the transitions. This will inevitably lead to increased disputes between the actors in the field. This is in part due to a rise in the number of transactions. For instance, it is estimated that in order for businesses in the energy sector to achieve net zero emissions by 2030, approximately USD $4 trillion will be required in annual clean energy investment.[47] A percentage of these will invariably result in some form of dispute. A high proportion of disputes administered by arbitration institutions involve this sector. More green technology companies are also resorting to arbitration to resolve their

[43] Article 14. UNFCC available at *http://unfccc.int/resource/ccsites/zimbab/conven/text/art14.htm* accessed on 8th November 2022.
[44] Resolving climate change disputes through arbitration. Outlaw analysis (2021).
[45] Thomas, R. S. (2022). Resolving Climate Change Disputes through Arbitration: The ICC Perspective
[46] Available at *https://www.nortonrosefulbright.com/en/knowledge/publications/9dd6b170/what-are-climate-change-and-sustainability-disputes* accessed on 8th November 2022
[47] Glemarec, Y. (2022). How to ensure that investment in new climate solutions is sufficient to avert catastrophic climate change. In Handbook of International Climate Finance (pp. 445-474). Edward Elgar Publishing.

disputes.[48] The value of arbitration disputes in the energy sector can be best illustrated by the case of a Columbian utility company, Empresas Públicas de Medellín (EPM), which has filed a claim against the Spanish insurance company Mapfre with the Arbitration Court of the Medellín Chamber of Commerce (MCC) after the collapse of a hydroelectric dam that caused a severe flood seeking USD $1.6 billion in compensation and damages.[49] The potential for use of ADR in climate change dispute resolution is therefore exponential.

6.0 Climate Change Dispute Resolution Frameworks

6.1 Kenyan Context

Kenya has been at the forefront in Africa in trying to manage climate change and mitigate its effects.[50]It was one of the first countries in Africa to enact a comprehensive law and policy to guide national response to climate change. It has developed the National Climate Change Response Strategy (2018-2022)[51], and the National Climate Change Action Plan (NCCAP 2015-2030)[52] and it also enacted the Climate Change Act 2016[53] which established the Climate Change Council. The framework for resolution of climate change disputes can be found at Article 42, and 70 of the Constitution of Kenya 2010. Under Article 42 every person is guaranteed a clean and healthy environment, Article 70 provides that if the right guaranteed under Article

[48] Desierto, D. A. (2022). Environmental Protection in International Investment Arbitration: From Defences to Counterclaims. In The Environment Through the Lens of International Courts and Tribunals (pp. 325-349). TMC Asser Press, The Hague.

[49] Londoño Vargas, A. N. (2021). La gestión de la comunicación en la crisis del túnel de desviación del proyecto Hidroeléctrico Ituango (Master's thesis, Escuela de Ciencias Sociales).

[50] Yanda, P. Z., & Mubaya, C. P. (2011). *Managing a changing climate in Africa: Local level vulnerabilities and adaptation experiences*. African Books Collective.

[51]Available at *http://www.environment.go.ke/wp-content/uploads/2020/03/NCCAP_2018-2022_ExecutiveSummary-Compressed-1.pdf* accessed on 8th November 2022

[52] Ibid

[53] Available at *http://www.environment.go.ke/wpcontent/uploads/2018/08/The_Kenya_Climate_Change_Act_2016.pdf* accessed on 8th November 2022

42 is threatened a person may apply to a court for redress at the land and environment court established under article 162(2). Section 23 of the climate change act also provides that a person may, pursuant to Article 70 of the Constitution, apply to the Environment and Land Court alleging that a person has acted in a manner that has or is likely to adversely affect efforts towards mitigation and adaptation to the effects of climate change. These provisions seem to be pointing at litigation as the first port of call for resolution of climate change disputes. The cases of *Cortec Mining Kenya Limited v Cabinet Secretary, Ministry Of Mining & Attorney General* [54] and *KM & 9 Others v Attorney General & 7 Others*[55] are illustrative of parties using the Environment and Land court in the first instance. The Environmental Management and Coordination Act (EMCA) also established the National Environment Tribunal with the jurisdiction to hear and determine appeals from the National Environment Management Authority on issuance, denial, or revocation of environmental impact assessment licenses.[56] It also has jurisdiction to resolve disputes arising out of forest conservation, management, utilization Forest Conservation and Management Act.[57] Like the Environment and Land Court, the tribunal falls under the ambit of the judiciary. The judiciary gazetted the practice directions on electronic case management on 24th March 2020 vide Kenya Gazette Notice No. 2357. They provided for virtual hearings, use of email communication between the parties and the court and also for electronic service. The system also allows for e-filing and e-payments. Rulings and judgements are also delivered virtually with links sent to the litigants via email. This is convenient and saves costs for the parties involved. It enhances transparency and accountability.

The application of ADR in resolving climate change disputes in Kenya is anchored in law. The Environment and Land Court Act, states that if an ADR mechanism is a condition precedent to any proceedings before the Court, the

[54] Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others [2017] eKLR.
[55]KM & 9 others v Attorney General & 7 others[2020] eKLR
[56] Environmental Management and Co-ordination Act Act No. 8 of 1999, Section 129
[57]Forest Conservation and Management Act 2016, Section 34

Court shall stay proceedings until such condition is fulfilled.[58] This is in tandem with the Constitution which requires the judiciary to promote all forms of ADR including mediation, traditional dispute resolution, reconciliation, and arbitration while exercising their judicial function.[59] In addition, mediation has been successfully utilised in projects in Kenya. For example, in Olkaria IV, when the Kenya Electricity Generating Company (KenGen) needed the land to expand geothermal production, the government and the occupying community agreed to negotiate.[60]The community elected representatives which negotiated a relocation and compensation package to allow the project to take off. The constitution also provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya.[61] Therefore Bilateral Trade Investments (BTI's) entered into by Kenya with arbitration clauses can be determined by an arbitration tribunal.

For example clause 53 of the model production sharing contract between Kenya and oil contractors provides that a dispute can be resolved through arbitration in accordance with UNCITRAL arbitration rules adopted by the United Nations Commission on International Trade Law.[62] The decision of the arbitrator is final and binding. An example of a climate change dispute that was determined by an arbitration tribunal is the *Cortec Mining Kenya Limited v Republic of Kenya*[63] where an ICSID tribunal dismissed the claims of British investors in a mining project in Kenya whose licenses were suspended.[64] The agreement in this case included an arbitration clause. In a

[58] Ibid section 20(2)
[59] The Constitution of Kenya 2010, Article 159(2)(c)
[60] Muigua, K. Status of Participation of Women in Mediation: A case Study of Development Project Conflict in Olkaria IV, Kenya By: Lilian NS Kong'ani &. Typesetting by, 149.
[61] Ibid Article 2(6)
[62] Ngachu, C. N. (2022). Arbitration of oil and gas disputes in the upstream petroleum sector in Kenya: a critical appraisal (Doctoral dissertation, Strathmore University).
[63] ICSID Case No. ARB/15/29 available at http://icsidfiles.worldbank.org › DS11650_EnPDF 22 Oct 2018 — CORTEC MINING KENYA LIM
[64] Mohamadieh, K., & Uribe, D. (2016). The rise of investor-state dispute settlement in the extractive sectors: Challenges and considerations for African countries (No. 65). Research Paper

decision dated 19 March 2021, an ICSID ad hoc Annulment Committee refused to annul the determination of the arbitration tribunal.[65]

According to its website, the ICSID provides comprehensive services and technology for virtual hearings in its dispute resolutions such as in arbitrations, mediations and fact-finding proceedings. They also have a dedicated hearings team that works with parties and tribunals prior to the hearing to discuss hardware requirements and test-run the video-conferencing software. The institute also offers a variety of state-of-the-art video conferencing platforms with high-definition audio and video, real-time document display, and virtual chat functions that allow participants to communicate seamlessly.[66]

6.2 International Context

Climate change and its effects became a global concern in the 1960's.[67] In 1972, the first United Nations Conference on the environment was held in Stockholm. This Conference resulted in the Stockholm declaration, the Action Plan for the Human Environment and the creation of the United Nations Environment Programme (UNEP). [68] The outcome of this conference only led to broad and aspirational environmental policy goals and objectives rather than a detailed normative position.[69] However, it set the ground for future conferences and conventions such as the 1992 Conference that led to the establishment of the United Nations Framework Convention

[65]Available at *https://jusmundi.com/en/document/decision/en-cortec-mining-kenya-limited-cortec-pty-limited-and-stirling-capital-limited-v-republic-of-kenya-decision-on-annulment-friday-19th-march-2021* accessed on 8th November 2022

[66] Zekos, G. I. (2022). Courts and Arbitration Advancements. In Advanced Artificial Intelligence and Robo-Justice (pp. 285-320). Springer, Cham.

[67] Weart, S. R. (2010). The idea of anthropogenic global climate change in the 20th century. *Wiley Interdisciplinary Reviews: Climate Change*, *1*(1), 67-81.

[68] Kumar, R. (2020). The united nations and global environmental governance. *Strategic Analysis*, *44*(5), 479-489.

[69] Nyekwere, E. H., Okogbule, I., & Agwor, D. O. (2022). Understanding the Principles of International Environmental Law and Their Reflections in International Environmental Treaties and Non-Binding Soft Law Instruments. JL Pol'y & Globalization, 123, 73.

on Climate Change (UNFCCC) treaty which was ratified by 154 countries.[70] The UNFCCC aims at limiting dangerous human interference on the climate by in part stabilizing greenhouse emissions. It reaffirmed and built upon the Stockholm Declaration and has been hailed as a major environmental legal landmark.[71] The treaty has economic and development implications between state parties capable of fostering disputes.[72] It contains declarations on legal rights of nations and obligations bearing on environment and development.[73] The UNFCCC has near universal membership with 197 contracting states.[74] Next was the Kyoto Protocol in 1995 which legally binds developed state parties to emission reduction targets.[75] Next followed the Conference of Parties Agreements (COP) all the way from COP 1, to COP 27 held at Sharm el-Sheikh, Egypt in November 2022.[76] The conference's aim is to come up with inclusive, rules-based and substantive science-backed outcomes that commensurate with the challenges.[77] States make agreements and issue pledges as well as commitments on different aspects of climate change mitigation and adaptation such as financing.

[70] Orlove, B. (2022). The Concept of Adaptation. Annual Review of Environment and Resources, 47, 535-581.

[71] Petersmann, M. C. (2022). When Environmental Protection and Human Rights Collide (Vol. 173). Cambridge University Press.

[72] Addaney, M.Williams, E. L. (2022). Interrogating the 'science of climate accountability': Allocating responsibility for climate impacts within a frame of climate justice (Doctoral dissertation, UC Santa Barbara). (2023). Climate Change and the Realization of Human Rights in Africa. Promoting Efficiency in Jurisprudence and Constitutional Development in Africa, 207-237.

[73] Atapattu, S. (2022). Emergence of International Environmental Law: A Brief History from the Stockholm Conference to Agenda 2030. In The Environment Through the Lens of International Courts and Tribunals (pp. 1-33). TMC Asser Press, The Hague.

[74] Citaristi, I. (2022). United Nations Environment Programme—UNEP. In The Europa Directory of International Organizations 2022 (pp. 193-199). Routledge.

[75] Baldocchi, D., Ciais, P., Cramer, W., Ehleringer, J., Farquhar, G., Field, C. B., ... & Jarvis, P. G. (2022). The terrestrial carbon cycle: Implications for the Kyoto Protocol.

[76] EL-SHEIKH, S. H. A. R. M., & JUSTICE, C. ACT4EARTH.

[77] Belis, D., Joffe, P., Kerremans, B., & Qi, Y. (2015). China, the United States and the European Union: Multiple bilateralism and prospects for a new climate change diplomacy. *Carbon & Climate Law Review*, *9*(3), 203-218.

Notably, one of the most contentious issues within the climate change discourse is the finance of mitigation and adaptation measures.[78] The question of how to apportion liability for the damage occasioned by climate change, taking into account the disproportionate nature of its effects versus causation, has always plagued the international community.[79] The conversation has shifted to elements of equity, historical responsibility and per capita emissions.[80] This is informed by the fact that developed countries are the largest contributors to climate change due to centuries-long industrialization activities which have resulted in significant greenhouse gas emissions.[81]

However, developing countries with a much lower carbon footprint suffer the brunt of climate change adaptation and mitigation. As a result, these countries have been advocating for differentiated responsibilities based on common law and equity as well as the polluter pays principle.[82] A group of 54 African states supported by 24 other states including India proposed at the COP26 in Glasgow that developed countries should deliver a minimum of US $1.3 trillion per year in climate finance, to be split equally between climate mitigation and adaptation.[83] They claim that $100 billion committed per year previously at C0P 17 was not based on any meaningful scientific

[78] Labatt, S., & White, R. R. (2011). *Carbon finance: the financial implications of climate change*. John Wiley & Sons.
[79] Táíwò, O. O. (2022). Reconsidering reparations. Oxford University Press.
[80] Pellizoni, L., Leonardi, E., & Asara, V. (2022). Introduction: what is critical environmental politics?. In Handbook of Critical Environmental Politics (pp. 1-21). Edward Elgar Publishing.
[81] Raimi, D., Carley, S., & Konisky, D. (2022). Mapping county-level vulnerability to the energy transition in US fossil fuel communities. *Scientific Reports*, *12*(1), 1-10.
[82] Sobenes, E., & Devaney, J. (2022). The Principles of International Environmental Law Through the Lens of International Courts and Tribunals. In The Environment Through the Lens of International Courts and Tribunals (pp. 543-577). TMC Asser Press, The Hague.
[83] Ciplet, D., Falzon, D., Uri, I., Robinson, S. A., Weikmans, R., & Roberts, J. T. (2022). The unequal geographies of climate finance: Climate injustice and dependency in the world system. Political Geography, 99, 102769.

justification.[84] However, the developed countries have strongly opposed any mention of compensation and rehabilitation.[85]

7.0 Mechanism for International Climate Change Dispute Resolution

Article 14(1) of the UNFCCC, as transposed into subsequent COP Agreements provides that in the event of a dispute between the parties concerning the interpretation or application of the Paris Agreement, parties *"shall seek a settlement of the dispute through negotiation or any other peaceful means of their own choice."* The article incorporate ADR mechanisms in international climate change dispute resolution. Article 14(2) provides that a party may also declare that in case of a dispute concerning the interpretation or application of the Convention, it recognizes as compulsory submission of the dispute to the International Court of Justice, and/or arbitration. To date, 72 States have made such declarations recognising the compulsory jurisdiction of the Court.[86] The path therefore to be followed are: negotiation or any other peaceful means of dispute resolution followed by compulsory conciliation and finally recourse to the ICJ or arbitration. The caveat is that the conference of parties have to adopt the processes and procedures for the negotiation, arbitration which is yet to be done.

8.0 Role of Technology in Climate Change Dispute Resolution

As discussed, one of the main impediments to fruitful engagements on compensation for loss and damage due from developed countries to least developed ones is costing. Computer simulations can be used to obtain these figures. In 2022, researchers from the Potsdam Institute for Climate Impact Research used computer simulation models to develop new approaches which suggest carbon taxation can be used to reduce people living under

[84] Schwager, S. (2022). Allocating climate finance: a contributor's view. In the Handbook *of International Climate Finance* (pp. 318-332). Edward Elgar Publishing.

[85] Pill, M. (2022). Towards a funding mechanism for loss and damage from climate change impacts. *Climate Risk Management*, *35*, 100391.

[86] Lentz, C. State Withdrawals of Jurisdiction from an International Adjudicative Body. The Crisis of Multilateral Legal Order, 105-124.

poverty.[87] Computer modeling can also be used in damage valuation.[88]This will avoid misinformation and speculation, for example while withdrawing the United States from the Paris agreement, former President Donald Trump claimed that the agreement, would cost the United States $3 trillion in lost GDP and 6.5 million jobs saying the agreement would undermine the US economy, hamstring its workers while effectively decapitate the coal industry. These claims were subsequently termed by the scientific community as grossly inaccurate.[89] Developing countries have also claimed that $ 100 billion per year is inadequate and they require more than $ 1.3 trillion a year, computer models fed with initial conditions can give an accurate figure.

Further, Information Technology (IT) can greatly aid in dispute resolution. Harnessing the convenience and cost saving nature of features such as video conferencing, e-filing and email communication can go a long way in easing climate change dispute resolution.[90] Virtual sessions will decrease emissions that would have been caused by long distance travels. The Campaign for Greener Arbitrations is an initiative founded in 2019 by international arbitrator LuFcy Greenwood to reduce environmental impacts of international arbitration and carbon footprint. It encourages arbitral institutions to minimize the environmental footprint of arbitration. The tribunals should use environmentally friendly ink and toner while printing, use recycled or recyclable paper, eco-friendly printers, and minimize travel by utilizing information technology.[91]

[87] Nemet, G. F., Callaghan, M. W., Creutzig, F., Fuss, S., Hartmann, J., Hilaire, J., ... & Smith, P. (2018). Negative emissions—Part 3: Innovation and upscaling. Environmental Research Letters, 13(6), 063003.

[88] Farber, D. A. (2007). Modeling climate change and its impacts: law, policy, and science. Tex. L. Rev., 86, 1655.

[89] Factcheck Shows Trump's Climate Speech Was Full of Misleading Statements.(2017). Scientific American

[90] Meena, M. D., & Baplawat, A. (2022). Covid 19 And Judicial System–From A Pragmatic to Modern approach. Journal of Pharmaceutical Negative Results, 1079-1085.

[91] Laufer, H., & Stan, A. (2022). Environmental Sustainability Endeavours in International Arbitration: The Green Protocols. Rom. Arb. J., 16, 91.

AI also has applications in climate dispute resolution, once fed with the algorithms on dispute resolution together with past decisions on similar matters, it can predict outcomes of disputes saving the parties the costs incurred by a lengthy adversarial process.[92] However, the adoption of A.I should be with the caveat that the system can utilize defective algorithms and past biased decisions to make decisions with far reaching ramifications.[93]

9.0 Reforms

While the country and the world have made some strides in enhancing the use of technology in climate change dispute resolution, a lot more needs to be done. Firstly the laws on which climate change dispute resolution is anchored upon need to explicitly integrate the use of technology. Section 23 of the climate change act 2015, should be amended to include arbitration and ADR as the port of first call for dispute resolution and also resolution of disputes by harnessing technology. The amendment of the civil procedure rules to allow for electronic service was a step in the right direction. ADR training and regulatory institutions should also update their rules on electronic service. On a global scale, the state parties to the UNFCC should adopt the annexes to the Paris Agreement on dispute resolution.

10.0 Conclusion

International climate change disputes continue to be subjected to court processes which are plagued by lengthy and costly proceedings. However, notable national, regional and international ADR institutions have made strides by publishing handbooks, reports and guidelines on the use of ADR in climate change dispute resolution. As noted by the ICC report on resolving climate change related disputes, ADR mechanisms such as arbitration are uniquely positioned to accommodate and administer climate change related transition, adaptation and mitigation disputes. This is because these methods are already in use by different industries and businesses that are impacted by

[92] Sabo, I. C. (2022). A machine learning-based model for judgement results prediction and support in Brazilian Special Court? s conciliation hearings.

[93] Qadir, J., Islam, M. Q., & Al-Fuqaha, A. (2022). Toward accountable human-centered AI: rationale and promising directions. Journal of Information, Communication and Ethics in Society.

climate change. Thus, smart arbitration can play a substantial role in resolving climate change and sustainability-related disputes. Indeed, smart arbitration has the potential to become a key mechanism for the enforcement of environmental law and policy. They are also equally suited to address the cross-cutting nature of climate change disputes which involve aspects of human rights law, law of contract and insurance law. As long as ADR rises to the challenges ahead and incorporates technology, it will become the preferred method for resolving climate disputes.

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Atapattu, S. (2022). Emergence of International Environmental Law: A Brief History from the Stockholm Conference to Agenda 2030. In The Environment Through the Lens of International Courts and Tribunals (pp. 1-33). TMC Asser Press, The Hague.

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Repatriating the Violation of Human Rights of Indigenous Communities in Africa: A Review of the African Commission on Human and Peoples' Rights *v.* Republic of Kenya Application No. 006/2012 (Reparations)

By: ***Kirui Diana**** *&* ***Kibet Brian*****

1. Introduction

Sometime in October 2009, the Ogiek, an indigenous minority ethnic group in the Republic of Kenya, received a thirty (30) days eviction notice issued by the Kenya Forestry Service, to leave the Mau Forest. This was despite the fact that the Ogiek have lived in the Mau Forest for centuries.[1] On 14th November 2009, Ogiek Peoples' Development Program (OPDP) joined by Centre for Minority Rights Development (CEMIRIDE) and later by Minority Rights Group International (MRGI), sent a communication to the African Commission on Human and Peoples' Rights (ACHPR) highlighting the dilemma of the Ogiek People.

The Commission issued an Order for Provisional Measures requesting Kenya to suspend implementation of the eviction notice. Kenya did not comply with the same. This necessitated the ACHPR to on, 12 July 2012 file an application before the African Court on Human and Peoples Rights arguing that the evictions violated several provisions of the African Charter

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[1] Micheli I., The Ogiek of the Mau Forest: reasoning between identity and survival, 2014 Available at *https://www.researchgate.net/publication/283213921_The_Ogiek_of_the_Mau_Forest_reasoning_between_identity_and_survival* Accessed on 22/08/2022

on Human and Peoples' rights.[2] This application was heard and judgment entered on 26th May 2017.[3] The court held that Kenya had violated several Articles of the Charter and proceeded to order the state to take all appropriate measures within a reasonable time frame to remedy the violations. However, it reserved its judgment on reparations. The court issued the judgment on reparations on 23/06/2022.[4]

2. Prayers of the Parties

In their reparation's prayers, the applicant sought orders to compel the respondent to delimit and demarcate the ancestral lands of the Ogiek as well as open dialogue mechanisms on the commercial activities on Ogiek land. Further, that the Respondents would be obliged to pay the sum of US$297 104 578 in pecuniary and non-pecuniary damage into a Community Development Fund and adopt legislative, administrative and other measures to recognize and ensure the right of the Ogiek to be effectively consulted with regards to development, conservation or investment projects on Ogiek ancestral land. They also asked the court to issue orders compelling Kenya to fully recognize the Ogiek as an indigenous people of Kenya as well as provision of provision of amenities while enacting positive steps to ensure national and local political representation of the Ogiek.

[2] The Provisions claimed to have been violated were: Article 1 (which obliges all member states of the Organization of African to uphold the rights guaranteed by the Charter), Article 2 (freedom from discrimination), Article 4 (right to life), Article 8 (freedom of religion), right to property (Article 14), Article 17 (the right to culture (Article 17) , Article 21 (the right to freely dispose of wealth and natural resources) , Article 22 (the right to development).

[3] African Commission on Human and Peoples' Rights *v.* Republic of Kenya Application No. 006/2012 (Merits) Available at *https://africanlii.org/afu/judgment/african-court/2017/28 Accessed* on 24/08?2022

[4] African Commission on Human and Peoples' Rights (ACHPR) V. Republic of Kenya Application No. 006/2012 Judgment on Reparations Available at *https://www.africancourt.org/cpmt/storage/app/uploads/public/62b/44e/f59/62b44ef59e0bc692084052.pdf* Accessed on 22/08/2022

Kenya prayed for the court to find that its establishment of a multi-agency Task Force to oversee the implementation of the Court's judgment showed its commitment to the implementation of the court's judgment and that guarantees of non-repetition are the most far-reaching forms of reparations that could be awarded to redress the root and structural causes of identified human rights violations. They also prayed for orders to the effect that the court ought to use its offices to facilitate amicable with the Ogiek Community on the issue of reparations.

The Respondents also urged the court to hold that reparations could be achieved by reverse action of guaranteeing and granting access to the Mau Forest in accordance with the law and the public interest. They also invited the court to find that demarcation and titling was totally unnecessary for purposes of access, occupation and use of the Mau Forest by the Ogiek since it would hamper communal access to the i.e., nomadic groups that have seasonal access to the Mau Forest. The Respondent also urged the court to find that its 2010 Constitution created a legal super structure that was meant to address the structural and root causes of violations of Article 2 and that by virtue of the existing laws, the same had been substantially remedied and find that the court in the Merits Case, did not determine that the Ogiek were the owners of the Mau Forest.

Kenya also invited the court to reject the community survey report submitted by the Applicant and the claim for US$ 297,104,578 as not credible. The court was also urged to find that any compensation due as co as well as find that any compensation due to the Applicants could be computed in United States Dollars for a claim involving a country whose currency is not the United States Dollar. They also sought orders to Order that the Respondent State's general liability for violations of the Charter can only be computed from 1992, the year when the Respondent became a party to the Charter. Specifically, in relation to the eviction of the Ogiek from Mau Forest, they prayed that the court would hold that its liability could only be computed from 26 October 2009, when the notice of eviction from South Western Mau Forest was issued.

3. Court's Determination

Before considering the claims, the court commenced by looking into the three objections lodged by Kenya. On the first front, it objected to the court computing damages for the years prior to its ascension to the charter in 1992. The court reiterated its decision in the *Merits case* that it would only exercise temporal jurisdiction while determine the reparations just as it did in the merits case. Secondly, Kenya was of the view that amicable settlement was the most appropriate approach for the case in line with Article 9 of the Protocol. The court observed that it had initiated the process for the possible settlement of the matter during the merits stage of the proceedings but the same had collapsed. Given that failure and given that that the same was not mandatory under the Protocol, the court was convinced that foundations of the amicable settlement had not been laid.

Lastly, the state objected to the participation of Centre for Minority Rights Development Minority Rights Group International and the Ogiek People's Development Programme since they were not the representatives of the Ogiek. The applicants contended that the Ogiek had been clear on who should represent during the case, namely OPDP. The court observed that it had handled the same in the merits case and that since the organizations being complained against were not appearing as "parties", it had the proper parties to render a judgment.[5]

Before considering the claims of the applicants and the respondents, the court outlined the principles it applied before arriving at its reparation's decision.[6] It commenced by reiterating its jurisdiction to issue a judgment on reparations in cases where human rights have been violated. It relied on the position of the Permanent Court of International Justice in the *Charzow Factory case* that was also applied in *Reverend Christopher Mtikila v United*

[5] African Commission on Human and Peoples' Rights *v.* Republic of Kenya Application No. 006/2012 (Merits) Para 88

[6] African Commission on Human and Peoples' Rights (ACHPR) V. Republic of Kenya Application No. 006/2012 Judgment on Reparations Para 36-45

Republic of Tanzania that the right to reparations for the breach of human rights,obligations is a fundamental principle of international law which has been recognized by amongst others the courts own Protocol in Article 27 (1).[7]

The court proceeded to lay down which of the parties would bear the burden of proof and was of the view that in this case, it was the applicant, and that such a proof alone would not qualify one for reparations, rather the same should be supported by a link that exists between the acts complained of and the prejudice suffered whilst citing the *Mtikila* case.[8] Such reparations, as stated in the *Zongo case*, ought to cover moral and material damages. The court was also guided that the damages complained of had to be casually linked with the wrongful acts of the respondent.[9]

On quantifying the reparations, the court reminded itself that the reparations it would award had to be of a sum that would be commensurate to the prejudice suffered. It placed its reliance on this principle in the *Charzow case*. On the intended beneficiaries of the reparations, the court observed that it would be the victims who it determined to include groups and communities as well as close relatives of persons who suffered harm as a result of the violations.

With these principles in mind, the court proceeded to examine the claims on their merits. The court considered the pecuniary claims of the applicant under two limbs, the material prejudice and the moral prejudice suffered by the Ogiek.

[7] The Factory at Chorzow (Jurisdiction) Judgment of 26 July 1927 p.21, Reverend Christopher Mtikila v United Republic of Tanzania (14 June 2013*)* 1 AfCLR 72 Para 27-29

[8]Reverend Christopher Mtikila v United Republic of Tanzania (14 June 2013*)* 1 AfCLR 72 Para 27-29

[9] Zongo and others v Burkina Faso (Reparations) Para 24

On material prejudice, the court held that since the Respondent State was found responsible for the violation of the rights of the Ogiek, it follows that it bears responsibility for rectifying the consequences of its wrongful acts.[10] On the currency question the court was guided by the decision in *Ingabire Victoire Umuhoza v Republic of Rwanda* where it held that where an applicant was a resident of the respondent state, the amount of reparation ought to be calculated in the currency of the respondent state.[11]The court was guided by the decisions in *Case of the Saramaka People v Suriname* where the indigenous community was awarded the sum of US$75, 000 (Seventy five thousand United States Dollars) as compensation for the illegal exploitation of their land and resources and in *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador* in the InterAmerican Court was awarded US$90 000 (Ninety thousand United States Dollars) for the pecuniary prejudice suffered by the Sarayaku in light of the expenses they incurred in domestic proceeding while enforcing their rights.[12] The court exercised its equitable discretion and awarded the sum of KES 57 850 000. (Fifty-seven million, eight hundred and fifty thousand Kenya Shillings) for the material prejudice suffered by the Ogiek.

Under the moral prejudice claim, the court relied on the *Zongo* case and reiterated that between the wrongful act and the moral prejudice suffered, may result from the violation of a human right, as an automatic consequence, without any need to prove otherwise and that the quantification ought to be done equitably.[13] The court awarded the sum of KES 100 000 000 (One hundred million Kenyan Shillings) for moral prejudice suffered while exercising its discretion in equity. Committed in the non-pecuniary compensation limb, the court observed that granting the Ogiek access to land alone would not be an adequate remedy and it was necessary to grant them communal titles in order to grant the tenure security. It therefore ordered the

[10] Para 66
[11] Ingabire Victoire Umuhoza v Republic of Rwanda (Reparations)Para 45
[12] IACtHR *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador* Judgment of June 27, 2012 (Merits and reparations)
[13] Zongo and others v Burkina Faso (Reparations)

demarcation of the land for use by the Ogiek through a collective title. The court further ordered the state to take the legislative, administrative or other measures to recognize, respect and protect the right of the Ogiek to be effectively consulted. The applicant's prayers for guarantees of non-repetition were not opposed by Kenya and the court ordered the laying don of measure that would ensure the avoidance of recurrence of the violations established by the Court.

4. Implications and Significance of the Judgment

Through its judgment, the Court demonstrated how the law could respond to the real challenges that indigenous communities face over their land and its exploitation. This is especially important to the many indigenous communities across the continent who, from time immemorial, have faced serious abuse to their rights. The positive outcome has brought hope to many on the continents who now believe in the Court's commitment to enforce the African Charter and in particular, rights of indigenous peoples'.[14]

For instance, Commentators have noted that now many other indigenous communities in Kenya such as the Sengwer, Endorois, Maasai, Yaaku and Samburu are empowered to utilize legal avenues to register communal land claims, to protect their culture and indigenous knowledge.[15] The courts innovative approach of grating the prayer of the creation of a community development fund where the reparations the court had ordered would be deposited and thereafter drawn for the benefit of the whole community is also a game changer in the management of reparations communities may be granted in the process of pursuing these legal avenues.

Additionally, the judgment affirmed the role of indigenous communities in the protection and conservation of land and natural resources as the Court

[14] Shatikha Suzanne Chivusia, *The Significance of Implementing the Ogiek Judgment Commissioner*, Kenya National Commission on Human Rights (KNCHR), Nairobi, Kenya

[15] ILC's Database of Good Practices, *Litigation for the Restoration of Ogiek Land Rights in Kenya.*

recognized that the Ogiek - and therefore many other indigenous peoples in Africa - have a leading role to play as guardians of local ecosystems, and in conserving and protecting land and natural resources.[16] The Continent is now faced with an unprecedented opportunity to secure the customary land and resource rights of millions of its most marginalized peoples, and research shows that securing these rights yields multiple globally relevant benefits as these communities possess vital environmental knowledge that will serve the world in its efforts to protect and conserve the environment.[17]

The judgment also has a considerable bearing on how Kenya and other African Governments treat indigenous communities. It has demonstrated that African Governments must comply with the rule of law and their international obligations towards indigenous communities in their territories. That African governments are not above the law but are open to scrutiny and any violation of international obligations will result in repercussions on their part.

Lastly, the judgment, being the first of its kind, has brought clarity and added onto the jurisprudence of indigenous rights litigation in Africa. The Court was able to provide clarity on Commission to Court transfers, representation of parties in a case, the identification and understanding of the concept of indigenous populations and the type of reparations to be awarded in cases involving the violation of indigenous rights. This will provide guidance for future cases.

Further, the application and reliance of other human rights instruments in the judgments has demonstrated that the Court does not limit itself to

[16] African Commission on Human and Peoples' Rights v. Republic of Kenya, ACtHPR, Application No. 006/2012 (2017) African Commission on Human and Peoples' Rights v. Republic of Kenya, ACtHPR, Application No. 006/2012 (2017) | ESCR-Net accessed 22nd August 2022.

[17] Rights and Resources Initiative, *Recognizing Indigenous and Community Rights, Priority Steps to Advance Development and Mitigate Climate Change*, September 2014

instruments that are ratified by member states that are parties to an application. This is important because it means that applicants do not need limit the law relied upon to that ratified by the member state in their petition but look to all international law and procedure in building their case.[18]

5. Conclusion

All human rights instruments across the globe recognize that all peoples, including indigenous peoples, are entitled to the enjoyment of the rights and freedoms, including the rights to land and natural resources, without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status. Apart from international recognition, many countries have recognized these rights through constitutional or legal protections or adjudication, constructive agreements and administrative programs. [19] Despite this recognition, a huge gap still remains in ensuring and realizing the same for indigenous peoples and consequently their rights to land and natural resources continue to face serious abuses. Take the example of the Ogiek in Kenya. Though Kenya recognized the aforementioned rights through its laws, the Ogiek's rights to their land and natural resources were violated. This continued, despite demands from the Ogiek for the formal recognition of their rights to their lands, and natural resources. By finding Kenya responsible for the violations of the Ogiek's rights and awarding the Ogiek both pecuniary and non-pecuniary compensation, the Court demonstrated how the law could respond to the real challenges that indigenous communities face over their lands. The judgement set new precedents and made many implications in the protection of indigenous rights not just in Kenya but across the Continent. Conclusively, with this

[18] Oliver Windridge, *Five Points on African Commission v Kenya*, June 15 2017 *http://www.acthprmonitor.org/five-points-on-african-commission-v-kenya/* accessed August 20th 2022

19 UN DESA, *Protecting the rights and well-being of indigenous peoples*, Vol 23 No. 4 - April 2018 Protecting the rights and well-being of indigenous peoples | UN DESA VOICE accessed 22nd August 2022

ruling, we hope to see countries across the continent effectively securing and ensuring the rights of indigenous peoples to their lands and natural resources.

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Case of the Kichwa Indigenous People of Sarayaku v. Ecuador Judgment of June 27, 2012 (Merits and reparations)
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Reverend Christopher Mtikila v United Republic of Tanzania (14 June 2013) 1 AfCLR 72 Para 27-29

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Putting Children First: Prioritising Minors in the Application of ADR in Criminal Cases in Kenya

By: ***Aaron Okoth Onyango****

Abstract

Among the hallmarks of Kenya's progressive 2010 constitution is the enshrined requirement that the best interests of the child be considered in any decision directly or indirectly affecting the child. This requirement has obligated courts to reshape its paradigm in approaching different legal matters inter-alia the child of tender ages presumption that favoured a mother's assumption of physical custody in the event that she was separated from the father and the child was of tender age. This paper shall highlight how the child's best interest requirement can be leveraged in advancing a pro alternative dispute resolution approach in criminal offences. Using landmark criminal cases as a case study, this paper shall underwrite the new opportunities available in the application of Alternative Dispute Resolution in the dispensing of criminal cases in Kenya's courts.

1. Introduction

Alternative Dispute Resolution refers to the body of methods and practices utilised by persons to solve disputes without resorting to the formal court system. It encompasses various methods including mediation, arbitration as well as traditional dispute resolution mechanisms(hereafter TDRMs) which were informal methods used in Kenya in the precolonial era and encompassed indigenous informal means of solving disputes.[1]

In pre-colonial Kenya, native tribes relied on TDRMs to settle any arising disputes, a method that was passed from one generation to the next,[2] with its

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[1] R. Mac Ginty, "Indigenous peace-making versus the liberal peace," Cooperation and conflict, Vol.43, No. 2, 2008, pp.139-163.

[2] T. Tafese, 'Conflict management through african indigenous institutions: A study of the Anyuaa community,' (World Journal of Social Science, 2016) 3(1), 22-32.

main aim being to secure the penance and remorse of the perpetrator and their eventual reintegration into the community. The onset of colonialism ushered in a period when traditional African systems were deemed as backward and irrational with the colonial government going as far as encoding their repugnance to justice and morality, something which remained in Kenya's Judicature Act CAP 8, post-independence.[3]

Courts have further exacerbated the issue by continuing to rely on the repugnance clause to refuse the use of TDRMs in cases where parties in criminal cases have resorted to alternative means of solving their conflicts out of court as in *Republic v Abdulahi Noor Mohamed Alias Arab* where the court asserted that the use of TDRMs was unconstitutional.[4]

In cases where Kenyan courts have allowed the use of TDRMs, there have been numerous inconsistencies from one case to the next making the harmonization of circumstances permitting the use of TDRMs in Kenyan cases a difficult feat to achieve.[5]

The aforesaid scenario resulted in a lack of justice, especially in murder cases, where the victim's dependents, who are also victims by extension, fail to have their rights considered. The perpetrator is whisked to jail after being denied an opportunity to settle the matter out of court by compensating the victim's spouses(s) and children in a way that would accord them a dignified livelihood, resulting in the family of the victim falling into indigence because they lack a breadwinner.[6]

The promulgation of the constitution of Kenya 2010 gave TDRMs a new lease on life through its provisions that seek to promote ADR in solving disputes. Under Article 159 courts are mandated to resort to the use of ADR

[3] Judicature Act 1957, s3(2)
[4] *Republic v Abdulahi Noor Mohamed Alias Arab* [2016] eKLR
[5] *Republic v Abdulahi Noor Mohamed Alias Arab* [2016] eKLR , *Republic v Mohamed Abdow* Mohamed [2013] eKLR; See also *Republic v Leraas Lenchura* [2011] eKL
[6] Ibid

in the interest of justice provided they are lawful.[7] The Criminal Procedure Code similarly engenders the use of ADR to prevent a backlog of cases in courts and to fast track dispute resolution.[8]

The constitution went on to introduce article 53(2) which demand that the best interests of a child should be considered in any decisions directly or indirectly affecting the life of a child. The court in *J.O v SAO* interpreted the provision to mean that no decision could be made with respect to all matters including family matters such as divorce, custody rights and child maintenance without first considering what was best for the child in every given case.[9]

This paper argues that the 'Child's best interest' principle offers a unique opportunity in harmonizing the utilisation of TDRMs in criminal cases, specifically, murder and manslaughter cases by forcing courts to refer all cases, where children could be affected by the death of a breadwinner, to TDR where the victim's dependents stand a chance of being compensated.

2. Legal Framework

The basis of the use of ADRMs in criminal cases and the integration of children's interests in these mechanisms are enshrined in both international and Municipal laws.

2.1. International Instruments

As a consequence of Articles 2(5) and 2(6) of the constitution of Kenya 2010, International Treaties and Conventions form a fundamental part of Kenya's body of laws[10] This effectively means that the following instruments govern the body of ADRMs in Kenya:

[7] Constitution of Kenya 2010, Article 159(2)
[8] Criminal Procedure Code 1966, Sec 2
[9] *J.O V S.A.O* [2016] eKLR
[10] Constitution of Kenya 2010, Art 2(5),(6)

2.1.1 United Nations Charter

The United Nations Charter not only ascribes rights but also outlines corresponding duties to the rights owners.

The UN Charter under Article 33 of the encourages any parties in a dispute to seek peaceful means of conflict resolution that encompass mediation, negotiation and other pacific means of their choosing.[11]

2.1.2 The United Nations Convention on the Rights of the Child

The preamble of the United Nations Conventions on The Rights of the Child restates that the rights outlined in the UN Charter are applicable to all persons regardless of their status, which encompasses children.[12]

Article 3(2) of the convention also asserts that any actions or decisions concerning children undertaken by both private or public bodies should take into account the best interests of the child. The envisioned institutions include courts of law, legislative assemblies and any administrative bodies.[13]

2.1.3 The Indigenous and Tribal People's Convention (ITPC)

The convention elevates TDRMs by placing an onus on its member states to ensure that Municipal laws are in congruence with the indigenous citizens' customary laws and traditions.[14]

It further enunciates that courts of law of respective member states should give due regard to traditional dispute resolution mechanisms that are consistent with national laws.[15]

[11] Charter of the United Nations 1945, Art 33
[12] United Nations Convention on the Rights of the Child 1989, Preamble
[13] Ibid, Art 3(2)
[14]Indigenous and Tribal Peoples Convention 1989, Art 8(1)
[15] Ibid, Art 9,10

2.1.4 African Charter of Human and People's Rights (ACHmPR)

One of the core tenets of the charter is the engenderment of African autonomy through the elimination of colonial vestiges and the promotion of African culture and individualism.[16]

The ACHmPR entitles citizens of member state the freedom to willfully engage in any cultural activities of their community,[17] and places a corresponding duty upon the member states to ensure that this right is promoted and protected.[18]

This provision hence provides a basis for the resolution of disputes via ADRMs and the inclusion of children where and when the culture permits.

2.2 Kenyan Legal Framework

The national legal framework buttressing the application of ADRMs in Criminal cases are:

2.2.1 The Constitution of Kenya 2010

Article 159(2) of the constitution indicates that the courts should promote ADRMs in the adjudication of disputes.[19] It also highlights the need for justice to be done without hindrances brought on by procedural technicalities and without delay.[20] This provision does not draw limits on the types of cases where ADRMs can be applied save that they are consistent with the law and are not repugnant to justice and morality.

Article 55(2) states that the best interests of children should be considered when making decisions affecting them.

[16] African Charter on Human and Peoples' Rights 1981, Preamble
[17] Ibid , Art 17(2)
[18] Ibid, Art 17(3)
[19] Constitution of Kenya 2010, Art 159 (2) (c)
[20] Ibid

The court in *Republic v Leraas Lenchura* rightly concluded that the death caused by the defendant was an unavoidable result of an old man attempting to defend himself and that by allowing the application of TDRMs between the deceased's family and the defendant's family, justice for all the parties involved, as well as their dependents, would be realized.[21] The court in *Republic v Mohammed Abdow* echoed similar sentiments by allowing the withdrawal of the criminal case because a more expeditious disposal of the matter would have been achieved. Furthermore, the families of the concerned parties had communicated their satisfaction at the just outcome of the TDRMs.[22]

2.2.2 The Judicature Act

Although the Judicature Act permits the utilisation of customs and traditions in the dispensation of cases, it places does so with a caveat that states that any such ADRMs may only be applied provided they are not repugnant to justice or morality.[23] This provision is problematic due to the expansive latitude it has left to adjudicators in deciding what can be termed as repugnant.

It also limits the limits the use of customary laws to civil case, the same being echoed by Justice Lesiit in *Republic v Abdulahi Noor Mohammed* when he stated that the application of TDRMs under the impugned law did not extend to capital offenses. The court however recognised a lack of clear guidelines on the application of TDRMs in murder cases and conceded that the request to resort TDRMs to adjudicate the matter would have succeeded if the applicant had followed the due process as in *Republic v Mohammed Abdow* where the request was made early and the court as well as Office of the DPP had been involved in the process. [24]

[21] *Republic v Leraas Lenchura [*2011] eKLR
[22] *Republic v Mohamed Abdow Mohamed [*2013] eKLR
[23] Judicature Act 1957, Sec 3(2)
[24] *Republic v Abdulahi Noor Mohamed* [2016] eKLR

2.2.3 Criminal Procedure Code

Part IV of the Criminal Procedure Code provides for plea bargains which are defined as agreements between the prosecutor and accused person under the code.[25] The code empowers the prosecutor to enter into an agreement that could reduce the defendant's sentence,[26] result in the withdrawal of the charges, and even provide for the compensation and restitution of victims.[27] The only crimes expressly excluded from the ambit of plea bargains are crimes under the Sexual Offences Act, and those under the International Crimes Act.[28] This therefore implies that reasonable opportunity should be accorded for the pursuit of ADRMs whose favourable outcome can then be reduced into writing and presented before the courts as plea agreement. In *R v Leraas Lenchura* the court accepted a plea agreement that required the accused to give the deceased's family a female camel that would be a source of livelihood for his dependents, and issued a suspended sentence that would require him to report to the area chief every fortnight. This was after the charges were changed from murder to manslaughter, following the plea bargain.[29] The Criminal Procedure Code thus provides a framework that could be utilized in good faith to help utilise TDRMs that espouse more reconciliatory and compensatory outcomes.

2.2.4 The Children's Act

Section 4(2) The Children's Act re-affirms the 'best interests' principle by echoing the requirement that all judicial and administrative institutions and officer that act in matters concerning children shall give paramountcy to the best interests of the affected child.[30]

[25] Criminal Procedure Code 1966, s 2
[26] Ibid, s 137A (1) (a)
[27] Ibid, s 137A (2)
[28] Ibid, s 137N
[29] *R v Leraas Lenchura* [2011] eKLR
[30] Children Act 2001, Sec 4(2)

The court in *Republic v Mohammed Abdow* echoed similar sentiments by allowing the withdrawal of the criminal case because TDRMs that catered for the needs of both affected families had been achieved out of court.[31]

3. How ADRMS Promote The Best Interests of the Child

Different authors have explored the positive traits of ADRMS and how these characteristics aid in the promoting a child's best interests. Some of these characteristics are outlined below.

3.1 Restorative

This refers to the quality of returning one to a position where they were prior to a point or event of reference. In stark contrast to Penal Code's retributive and deterrent punishments and sentences including inter-alia, life imprisonment and the death sentence,[32] ADRMs restore the relationship of the victim and the perpetrator to the position it was before the injury was suffered. *Francis Kariuki* states that TDRMs do this by bringing the victims and offenders together to hold the offender accountable and allowing the victim to express themselves for closure.[33] In doing so, the victim is not only reconciled with the community but also allowed to take an active step in making amends for their misdeeds which aids in the restoration of relations among the parties involved.[34] Children are still in a process of physical, emotional and psychological growth and thus require a stable and consistent environment for the best developmental outcomes. By restoring all the victims to their previous positions, ADRMs help in maintaining the status quo in a child's environment beyond the perpetration of a crime, maintaining the stability a child needs.

[31] *Republic v Mohamed Abdow Mohamed [*2013] eKLR
[32] Penal Code1948, s 204
[33] Francis Kariuki , 'Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya', 210.
[34] Francis Kariuki, 'Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya', 211.

3.2 Reconciliatory

Walter highlights the individualistic and self-interested capitalistic ideals imported into Africa by westerners during the European scramble for African real-estate.[35] *Muriithi* contrasts this with the prevailing African condition in the precolonial era whence a community's existence was marked by harmonious co-existence with any individuals or situations that could potentially lead to conflict being viewed as threats to the community's survival.[36] This is echoed by *Kariuki Muigua* who further propounds that in any typical traditional African society, communal living was highly valued and any societal division greatly abhorred.[37] *Mkangi* states that it is against the backdrop of this principle that mechanisms of TDRMs were established; the facilitation of dispute resolution mechanisms oriented towards reconciled parties and a harmonized communal living.[38] When children are victims of criminal acts, it is imperative that mechanisms are put in place to allow them to recover from the traumas of the crime. The first logical step, where possible is to ensure a reconciliatory tone is struck between the victims and perpetrators. Children are very impressionable, and likely to be willing to forgive. When they observe the community and older victims seeking reconciliation, the consequent harmony is likely to last inter generationally.

3.3 Affordable

Assefa & Pankhurst explore the application of Customary Dispute Resolution in Ethiopia. They highlight the instances where communal

[35] See generally, Walter, R., 'How Europe Underdeveloped Africa," Beyond borders: Thinking critically about global issues (1972), pp. 107-125; see also Samir, A., "Imperialism and globalization," Monthly Review, Vol.53, No. 2, 2001, p.6; See also Bamikole, L.O., "Nkrumah and the Triple Heritage Thesis and Development in Africana Societies," International Journal of Business, Humanities and Technology, Vol. 2, No. 2, March, 2012.

[36] See generally, Murithi, T., 'Practical Peacemaking Wisdom from Africa: Reflections on Ubuntu,' (Journal of Pan African Studies, 2006), Vol.1, No. 4, pp.25-34

[37] Kariuki Muigua, 'Traditional conflict resolution mechanisms and institutions', 4

[38] Mkangi K, Indigenous Social Mechanism of Conflict Resolution in Kenya: A Contextualized Paradigm for Examining Conflict in Africa, available at www.payson.tulane.edu, [Accessed on 02/06/2012].

interventions like traditional mediation would be undertaken with very minimal pecuniary burden to the disputants. For instance, the parties would not be required to hire lawyers or legal experts, nor part with fare to and from courts, but instead cater for consumables like food and drinks that would be taken by the elders during the adjudication of the dispute.[39] *Kariuki Muigua* buttresses this proposition by highlighting that in addition to their flexibility, TDRMs are cost effective.[40]

With a majority of Kenyans living below the poverty line, being part of expensive and protracted legal cases drains a family's resources that could otherwise be utilized by parties in providing for their children. Cheaper means such as communal mediation aid in mitigating litigation costs, resulting in the prioritization of children in the use of family resources.

3.4 Flexible

Assefa & Pankhurst propound that one of the salient features of ADRMs is their inherent flexibility in terms of rules, procedures and presentation of evidence. They support their assertion by highlighting how, unlike in formal justice systems, the applicable rules, ways evidence in presented, and even the types of punishment can be adapted suit particular cases and circumstances.[41] They also assert that TDRMs have evolved over time to better suit changing times. [42] This stands in contrast with the rigid predetermined sanctions under punitive statutes like the Penal Code wherein all persons convicted of a given crime face the same fate regardless of the

[39] Getachew Assefa and Alula Pankhurst,'Facing the Challenges of Customary Dispute Resolution: Conclusion and Recommendations' (Penal Reform International, 2015) 257-273 *https://books.openedition.org/cfee/516?lang=en*

[40]Kariuki Muigua,' Traditional Conflict Resolution Mechanisms and Institutions', (2017)14

[41] Getachew Assefa and Alula Pankhurst,'Facing the Challenges of Customary Dispute Resolution: Conclusion and Recommendations', (Penal Reform International 2001):5, p. 257-273 *https://books.openedition.org/cfee/516?lang=en*

[42] Getachew Assefa and Alula Pankhurst,'Facing the Challenges of Customary Dispute Resolution: Conclusion and Recommendations', (Penal Reform International 2001):5, pp 14 https://books.openedition.org/cfee/516?lang=en

circumstances involved.[43] *Njuguna* states that this flexibility is facilitated by the uncodified nature of TDRMs as opposed to tedious procedures and rigid rules of codified laws and set precedents which offer no room for flexibility and can only be changed after more tedious procedures and rigid rules are followed.[44]

Children who are victims of crimes possess very unique needs. Some, whose breadwinners as in *Mohammed Abdow* require first financial stability, having their breadwinner untimely killed. A child facing the risk of indigence would thus require finances that would aid in securing their basic needs and education for a reasonable period as opposed tom the death and/o imprisonment of the killer which would do nothing to aid their financial status.

4. The Benefits of Priorising Minors in ADRMS

This section will highlight the advantages of prioritising minors in the application of ADRMs.

4.1 Expeditious Dispensation of Criminal Cases

Formal dispute resolution mechanisms are encumbered by arduous procedural technicalities and requirements that result in a huge backlog of cases which not only prolongs the attainment of justice for the victims, but also continually forces them to relieve the trauma bought on by the crime. [45] This stands in contrast with TDRMs like conciliation and mediation which are more expeditious, quickly disposing off cases to allow the healing process to commence, and prevent the escalation of conflicts.[46] This was demonstrated by the *Gacaca* and *Abunzi* methods of traditional dispute

[43] Francis Karioko Muruatetu & another v Republic [2017] eKLR

[44] Sarah Wairimu Njuuguna, 'Suitability of traditional dispute resolution mechanisms in criminal matters in Kenya' (Strathmore University Press, 2018) 38

[45] Kariuki Muigua & Francis Kariuki, 'ADR, access to justice and development in Kenya' Strathmore Law Journal (2014), 1.

[46] Getachew Assefa and Alula Pankhurst, 'Facing the Challenges of Customary Dispute Resolution: Conclusion and Recommendations', Penal Reform International 2001:5, pp 17 *https://books.openedition.org/cfee/516?lang=en*

resolution respectively. The *Gacaca* courts of Rwanda worked around the rigid procedural formalities of the formal court systems by allowing largely informal procedures that were flexible to cater to the needs of the both the perpetrators and victims.[47] Similarly, the flexible nature of the *Abunzi* mediation committees where all witnesses and victims were accorded an opportunity to be heard allowed faster dispensation of justice.[48]This position has also been solidified in various criminal cases in Kenya including in the proceedings of *Republic v Juliana Mwikali Kiteme & Another.*

4.2 Win-Win for all Parties

It is a universal right that children grow in a healthy and stable environment[49]. Achieving this will be unlikely if a child is to be brought up in a post conflict environment where parties affected by a crime harbour simmering discontent. It would also be impossible to attain the healthiest possible environment where the child is a dependent who has lost their breadwinner, as in *Mohamed Abdow.*[50]

Unlike the formal justice systems that are adversarial in nature, TDRMs are focused on outcomes acceptable to both offenders and victims. The *Gacaca* traditional courts of Rwanda provided the offenders the opportunity to recognize and apologize for their wrongdoing. In this manner, TDRMs the victims' indulgence and forgiveness was sought.[51] In the *Juddiya* system of traditional dispute resolution practiced in Sudan, there was compensation provided by the perpetrator in an attempt to facilitate restitution. The gifting party would in turn be forgiven and the damage considered reversed.[52] This

[47] Sarah Wairimu Njuuguna, 'Suitability of traditional dispute resolution mechanisms in criminal matters in Kenya' (Strathmore University Press, 2018), 31
[48] Ibid, 32.
[49] United Nations Convention on the Rights of the Child 1989, Preamble
[50] *Republic v Mohamed Abdow Mohamed [*2013] eKLR
[51] Sarah Wairimu Njuuguna, 'Suitability of traditional dispute resolution mechanisms in criminal matters in Kenya' (2018) Strathmore University Press, 31
[52] A. S. Wahab, 'The Sudanese indigenous model for conflict resolution: A case study to examine the relevancy and the applicability of the judiyya model in restoring peace within the ethnic tribal communities of the sudan'(2018). *https://nsuworks. nova.edu/shss_dcar_etd/87/*

characteristic was reiterated among the Acholi of Uganda. Their TDRMs were oriented towards enhancing reconciliation and improving societal relations which is beneficial for peaceful coexistence of all within the community.[53] In contrast, a victim seeking retribution can be the only winner and the convicted perpetrator incapable of getting a favourable outcome as courts are mandated under the law to issue them with a death sentence.[54]

By utilising child-centric ADRMs in the disposal of disputes, the perpetrator's a just outcome acceptable to both parties will be achieved, providing a healthy and harmonious post conflict environment for the children affected. The victim's dependents may also be accorded appropriate compensation which would ensure dignified living even after their main breadwinner is rendered incapable of fulfilling their role.

5. Conclusion

This paper has established that there are positive attributes of the ADRMs that aid in upholding the best interests of the child doctrine well as the benefits of incorporating the best interests of the child in dispute resolution.

The restorative nature of TDRMs promotes social cohesion for all parties within the community by addressing the underlying issues in the conflict.[55] In all instances where courts allowed the application of ADRMs in criminal cases and given prominence to the best interests of the victim's dependents, they have been concluded expeditiously with the perpetrators exhibiting genuine remorse and a desire to change which guarantees a healthy post-conflict environment for all affected parties. In addition, the end result saw both the perpetrators and victims contented with the outcome and amicable relations between them restored.

[53] P. Tom. The acholi traditional approach to justice and the war in northern Uganda (2006) Retrieved from *https://www.beyondintractability.org/casestudy/tom-acholi*
[54] Penal Code, s 204
[55] Francis Kariuki, 'Conflict resolution by elders in Africa: successes, challenges and opportunities' (2015), 3.

Children are still in a process of physical, emotional and psychological growth and thus require a stable and consistent environment for the best developmental outcome. By restoring all the victims to their previous positions, ADRMs help in maintaining the status quo in a child's environmental beyond the perpetration of a crime and maintaining the stability a child needs. It also helps in securing a child's material future by ensuring that adequate provision has been made for the victim's dependents in the event that they lose their source of livelihood as a result of the crime.

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J.O V S.A.O [2016] Eklr

Exploring Heritage Impact Assessment in Kenya

By: ***Kariuki Muigua****

Abstract

The paper critically discusses the concept of Heritage Impact Assessment (HIA) in Kenya. It conceptualizes Heritage Impact Assessment and its role in the Sustainable Development Agenda. The paper further highlights the legal framework on HIA at both the global and national level. It discusses the extent to which HIA has been embraced in Kenya and challenges thereof. Finally, the paper suggests recommendations towards embracing heritage impact assessment for Sustainable Development in Kenya.

1.0 Introduction

World Heritage has been defined as the designation for places on Earth that are of outstanding universal value to humanity and as such, have been inscribed on the World Heritage List to be protected for future generations to appreciate and enjoy[1]. The Convention Concerning the Protection of the World Cultural and Natural Heritage defines World Heritage to entail cultural and natural heritage [2]. Cultural heritage includes monuments; architectural works; archeological sites; inscriptions, cave dwellings and buildings that are of outstanding value from the point of view of history, art and science[3]. Natural heritage on the other hand includes natural features consisting of physical and biological formations; geological and

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[1] United Nations Educational, Scientific and Cultural Organisation (UNESCO), 'World Heritage Conservation' available at *https://whc.unesco.org/en/faq/19* (accessed on 19/10/2022)

[2] UNESCO., 'The Convention Concerning the Protection of the World Cultural and Natural Heritage' available at *https://whc.unesco.org/archive/convention-en.pdf* (accessed on 19/10/2022)

[3] Ibid

physiographical formations and natural sites of outstanding value from the point of view of science, conservation or natural beauty[4]. UNESCO lists World Heritage sites in Kenya to include Lake Turkana National Park; Mount Kenya National Park and Natural Forest; Lamu Old Town; Fort Jesus; the Sacred Mijikenda Kaya Forests and the Lake System in the Great Rift Valley among others[5].

Conservation of World Heritage is a key component of sustainability. The Sustainable Development Goals seek to promote sustainable cities and communities among other goals[6]. Among the targets under this goal is strengthening efforts to protect and safeguard the world's cultural and natural heritage[7]. Conservation of World Heritage is thus a key component of the Sustainable Development agenda. Further, the Convention Concerning the Protection of the World Cultural and Natural Heritage recognizes the importance of world heritage and the need to preserve it as part of the world heritage of mankind as a whole[8]. It calls upon state parties to take measures towards protection and conservation of World Heritage and its transmission to future generations[9].

The Constitution of Kenya anchors the importance of protection and conservation of cultural and natural heritage. It acknowledges the important role the environment plays in sustaining our heritage and is determined to protect it for the benefit of future generations[10]. The Constitution further recognizes the role of culture as the foundation of the nation and mandates the state to promote and protect cultural heritage in the country[11].

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[4] Ibid
[5] UNESCO., 'World Heritage List' available at *https://whc.unesco.org/en/list/* (accessed on 19/10/2022)
[6] Sustainable Development Goal 11., available at *https://www.undp.org/sustainable-development-goals#sustainable-cities-and-communities* (accessed on 19/11/2022
[7] Ibid
[8] UNESCO., 'The Convention Concerning the Protection of the World Cultural and Natural Heritage' Op Cit
[9] Ibid, article 4
[10] Constitution of Kenya, 2010, Preamble
[11] Ibid, Article 12

The conservation of world heritage is threatened by certain factors including modernization and urban growth[12]. Further, cultural and natural heritage is threatened by traditional causes of decay and emerging social and economic conditions including developments and construction[13]. Consequently, the concept of Heritage Impact Assessment has emerged as a conservation tool to improve World Heritage in line with the Sustainable Development Goals[14]. It is aimed at promoting the protection and management of world heritage from adverse effects of developments and construction[15].

The paper seeks to critically discuss the concept of Heritage Impact Assessment. The paper further discusses the extent to which heritage impact assessment has been embraced in Kenya and proposes interventions towards promoting heritage impact assessment for Sustainable Development in Kenya.

2.0 Framework for Heritage Impact Assessment

Heritage Impact Assessment is conducted within the framework of Environmental Impact Assessment (EIA). EIA is a tool for integrating environmental and social concerns in decision making processes[16]. Environmental impact assessment (EIA) is the process of identifying potential environmental effects of proposed development and the required mitigation measures[17]. EIA has also been defined as a procedure for

[12] Ashrafi. B et al., 'Heritage Impact Assessment, Beyond an Assessment Tool: A comparative analysis of urban development impact on visual integrity in four UNESCO World Heritage Properties' *Journal of Cultural Heritage* 47 (2021) 199–207

[13] UNESCO., 'The Convention Concerning the Protection of the World Cultural and Natural Heritage' Op Cit

[14] Ashrafi. B et al., 'A Conceptual Framework for Heritage Impact Assessment: A Review and Perspective' available at *http://publications.rwth-aachen.de/record/839877/files/839877.pdf* (accessed on 19/10/2022)

[15] Ibid

[16] Muigua. K., 'Environmental Impact Assessment (EIA) in Kenya' available at *http://kmco.co.ke/wp-content/uploads/2018/08/A-Paper-on-Environmental-impact-assessment.pdf (*accessed on 19/10/2022)

[17] Mandelik. Y et al., 'Planning for Biodiversity: the Role of Ecological Impact Assessment' available at

evaluating the likely impact of a proposed activity on the environment[18]. Its object is to provide decision-makers with information about the possible effects of a project before authorizing it to proceed[19]. It is also aimed at identifying, predicting, evaluating and mitigating the biophysical, social and other relevant environmental effects of development proposals prior to major decisions being taken and commitments being made[20].

The concept of Heritage Impact Assessment has emerged in order to identify and evaluate the impacts of human activities on world heritage towards striking a balance between the protection of world heritage and promoting economic and social development[21]. It entails the requirement to undertake Environmental Impact Assessment at the project level or more strategic level in order to assist decision makers in identifying and preventing approval of developments that may destroy cultural and natural heritage[22]. Heritage Impact Assessment explores the damage or benefits that may accrue on cultural and natural heritage as a result of human activities such as economic development[23]. HIA is anchored in the *Convention Concerning the Protection of the World Cultural and Natural Heritage*. The Convention requires state parties to adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community and to *integrate the protection of that heritage into comprehensive planning programmes (*emphasis added)[24]. It further requires state parties to *develop scientific and technical studies and research* and to work out such operating methods as

https://www.researchgate.net/publication/227495149_Planning_for_Biodiversity_the_Role_of_Ecological_Impact_Assessment (accessed on 19/10/2022)

[18] Muigua. K., 'Environmental Impact Assessment (EIA) in Kenya' Op Cit

[19] Ibid

[20] Ashrafi. B et al., 'A Conceptual Framework for Heritage Impact Assessment: A Review and Perspective' Op Cit

[21] Ashrafi. B et al., 'Heritage Impact Assessment, Beyond an Assessment Tool: A comparative analysis of urban development impact on visual integrity in four UNESCO World Heritage Properties' Op Cit

[22] Pereira Roders. A & Van Oers. R., 'Guidance on Heritage Impact Assessments: Learning from its application on World Heritage site management' *Journal of Cultural Heritage Management and Sustainable Development* Vol. 2 No. 2, 2012

[23] Ibid

[24] The Convention Concerning the Protection of the World Cultural and Natural Heritage' Article 5 (a)

will make the State capable of counteracting the dangers that threaten its cultural or natural heritage (emphasis added)[25]. The Convention thus acknowledges the role of Heritage Impact Assessment as a planning tool towards conservation and protection of world heritage.

The process of Heritage Impact Assessment follows similar steps as the EIA process. The first phase of the HIA process entails understanding the potential impacts of development projects on world heritage as well as existing gaps that may negatively affect cultural and natural heritage[26]. This involves screening of prosed projects, scoping and examination of different alternative stages in implementing projects towards mitigating their impact on world heritage[27]. The second phase entails carrying out the assessment process in order to identify and predict threats emanating from proposed projects and their impact on world heritage[28]. Mitigation measures ought to be proposed in order to minimize adverse impacts as well as enhancing positive effects of developments of cultural and natural heritage[29].

The third phase involves preparation of a Heritage Impact Assessment Report for critical and technical review[30]. The report should capture all relevant information including the impact of the proposed development on cultural and natural heritage and the proposed mitigation measures towards mitigating the impacts[31]. The final phase involves decision making in relation to the project. The project may be disapproved if it may result in significant harm to world heritage or where the mitigation measures

[25] Ibid, article 5 (c)
[26] Ashrafi. B et al., 'A Conceptual Framework for Heritage Impact Assessment: A Review and Perspective' Op Cit
[27] International Association for Impact Assessment and UK (IEA) Institute for Environmental Assessment. Principles of Environmental Impact Assessment Best Practice. 1999. Available at *http://www.iaia.org/publicdocuments/specialpublications/Principles%20of%20IA_web.pdf* (accessed on 19/10/2022).
[28] Ibid
[29] Ibid
[30] Ashrafi. B et al., 'A Conceptual Framework for Heritage Impact Assessment: A Review and Perspective' Op Cit
[31] Ibid

proposed are not appropriate[32]. The project may also be approved and subsequently implemented. In this case, there is need for monitoring in order to ensure that the project adheres to the mitigation strategies set out in the HIA report[33].

3.0 Heritage Impact Assessment in Kenya

Kenya has in the recent past experienced rapid industrialization and growth in population which puts pressure on both cultural and natural heritage[34]. These developments affect both the natural environment and heritage resources creating the need for heritage impact assessment within the EIA framework for sustainability. Protection of cultural and natural heritage in Kenya is recognized under the *Environmental Management and Co-Ordination Act* which creates the legal framework for environmental management and conservation in Kenya[35]. EMCA provides for the formulation of national environment action plan which takes into account all monuments and protected areas under the National Museums and Heritage Act[36]. EMCA thus envisions protection of cultural and natural heritage as a key process in environmental management[37].

Protection and conservation of natural and cultural heritage in Kenya is governed by the *National Museums and Heritage Act*[38]. The Act recognizes the role of environmental impact assessment in the conservation and protection of natural and cultural heritage in Kenya. It requires the National

[32] UNESCO. Convention Concerning the Protection of the World Cultural and Natural Heritage. In Proceedings of the General Conference at Its 17th Session, Paris, France, 17 October–21 November 1972. available at: *http://whc.unesco.org/archiveconvention-en.pdf* (accessed on 19/10/2022)
[33] Ibid
[34] Kiriama. H et al., 'Cultural Heritage Impact Assessment in Africa: An Overview' available at https://www.researchgate.net/publication/306118471_Impact_assessment_and_heritage_management_in_Africa_An_Overview/link/5bd5299992851c6b27931ba6/download (accessed on 20/10/2022)
[35] Environmental Management and Co-Ordination Act, No. 8 of 1999, Government Printer, Nairobi
[36] Ibid, S 38
[37] Ibid
[38] National Museums and Heritage Act, No. 6 of 2006, Government Printer, Nairobi

Museums of Kenya to conduct environmental impact assessments within the framework of EMCA towards fulfilling its mandate which includes the protection, conservation and transmission of cultural and natural heritage in Kenya[39]. Development projects whose implementation may affect heritage resources need to be subjected to Heritage Impact Assessment as envisioned under the National Museums and Heritage Act.

Heritage Impact Assessment has been undertaken in a number of projects in Kenya involving the National Museums of Kenya. Cultural Heritage Impact Assessment was conducted in relation to the optical fibre cable project at Fort Jesus Museum in Mombasa which is listed as a world heritage site by UNESCO[40]. Subsequently, during implementation of the project mitigation measures were adopted in order to minimize impacts on both marine and terrestrial cultural resources [41]. A number of cultural materials were excavated and stored for prosperity as result of the Heritage Impact Assessment[42]. Heritage Impact Assessment was also conducted during the proposed construction of children's park at Mama Ngina Heritage Site in Mombasa[43]. After the HIA, the project was halted after it emerged that it would result in adverse impacts on cultural heritage at the site[44]. The HIA established that the site was a cemetery of an ancient Tuaca settlement, an ancient civilization in the island of Mombasa thus amounting to significant cultural heritage[45]. Further, Heritage Impact Assessment was also conducted in relation to the Lamu Port South Sudan-Ethiopia Transport (LAPSSET) Corridor project in order to determine its impacts on the Lamu World Heritage Site[46]. The HIA report revealed that the project may have adverse

[39] Ibid, S 5 (1) (n)
[40] Busolo. N., 'Archaeological Impact Assessment for the Optical Fibre Cable at Swahili Cultural Centre, Mombasa' National Museums of Kenya
[41] Ibid
[42] Kiriama. H et al., 'Cultural Heritage Impact Assessment in Africa: An Overview' Op Cit
[43] Ibid
[44] Ibid
[45] Ibid
[46] UNESCO., 'World Heritage Committee on Lamu Old Town World Heritage Site: State of Conservation Report' available at

impacts on heritage resources linked to the Lamu World Heritage Site, ancient settlements along the Lamu coastline and islands and marine conservation in the area. Mitigation measures were recommended in order to reduce the direct and indirect impacts caused by the project.

Despite attempts to promote the protection and conservation of world heritage in Kenya, challenges still exist in striking a balance between development and conservation of heritage. In the course of development projects touching on world heritage, artefacts have been seized and sold and monuments destroyed due to the failure to fully appreciate the importance of world heritage[47]. There is need to effectively implement Heritage Impact Assessment towards Sustainable Development in Kenya.

4.0 Way Forward: Exploring Heritage Impact Assessment for Sustainable Development in Kenya

Protection and conservation of cultural and natural heritage is a key component of the Sustainable Development agenda. Both the *Sustainable Development Goals* and the *Convention Concerning the Protection of the World Cultural and Natural Heritage* envisage the importance of world heritage and the need for its protection for the benefits of the present and future generations[48]. Heritage Impact Assessment is an important tool in the protection and conservation of world cultural and natural heritage.

In order to effectively promote HIA, there is need for a more systematic and integrated approach in the EIA framework[49]. Concerns involving cultural and natural heritage should be fully addressed within the EIA process in order to effectively identify and evaluate impacts of projects on world

https://www.google.com/search?q=State+of+conservation+report+lamu+old+town&oq=State+of+conservation+report+lamu+old+town&aqs=chrome..69i57j33i160.12156j0j7&sourceid=chrome&ie=UTF-8 (accessed on 20/10/2022)

[47] Kiriama. H et al., 'Cultural Heritage Impact Assessment in Africa: An Overview' Op Cit

[48] See Sustainable Development Goal 11 and article 4 of the Convention Concerning the Protection of the World Cultural and Natural Heritage

[49] Ashrafi. B et al., 'A Conceptual Framework for Heritage Impact Assessment: A Review and Perspective' Op Cit

heritage and the need to come up with effective mitigation measures[50]. Further, there is need for involving an interdisciplinary team with sufficient knowledge in cultural and natural heritage in order to effectively conduct a comprehensive HIA. The HIA in relation to the LAPSSET project involved experts including those from UNESCO World Heritage Centre and local experts in cultural and natural heritage in order to effectively conduct the process[51].

Further, there is need to promote public participation in order to fully embrace HIA. Public participation plays an important role in the EIA process since it guarantees acceptability of development projects and prevents disputes between developers and local communities[52]. Public participation can play a central role conservation and protection of world heritage due to the sentimental value that communities may attach to cultural and natural heritage sites.[53] Communities may possess traditional indigenous knowledge concerning management of such sites[54]. Thus, there is need to promote public participation and public sensitization in order to fully promote HIA.

Finally, there is need to effectively capture the framework of HIA in national legislation in order to guarantee its adoption[55]. The Environmental Management and Co-ordination Act (EMCA) restricts the definition of

[50] Ibid
[51] UNESCO., 'World Heritage Committee on Lamu Old Town World Heritage Site: State of Conservation Report' Op Cit
[52] M. Hasan., 'Public participation in EIA: A comparative study of the projects run by government and non-governmental organizations.' *Environmental Impact Assessment Review* 72 (2018): 12-24.;Art.69(d) of
The Constitution of Kenya, Government Printer 2010
[53] Siamak. S et al 'Managing world heritage site stakeholders: A grounded theory paradigm model approach." *Journal of Heritage Tourism* 14.4 (2019): 308-324.; See the case of Mohamed Ali Baadi and others v Attorney General & 11 others, Petition No. 22 of 2012, [2018] eKLR; See also the case of Save Lamu & 5 others v National Environmental Management Authority (NEMA) & another, Tribunal Appeal NET 196 of 2016, [2019] eKLR
[54] Ibid; See Art.69(c) of the Constitution of Kenya on protection of indigenous knowledge.
[55] Ashrafi. B et al., 'A Conceptual Framework for Heritage Impact Assessment: A Review and Perspective' Op Cit

environment to the natural and biophysical environments only comprising of air, land, fauna, flora and water[56]. This definition does not capture cultural heritage. Further, the Environmental (Impact Assessment and Audit) Regulations, 2003 do not capture the concerns related to cultural and natural heritage. There may be need to capture cultural and natural heritage concerns in these legislations in order to fully promote HIA. Through these measures, HIA will be promoted in the quest towards Sustainable Development.

5.0 Conclusion

World heritage sites are of universal value to humanity for both present and future generations[57]. Protection and conservation of cultural and natural heritage is a key component of the Sustainable Development agenda[58]. However, the conservation of world heritage is threatened by certain factors including modernization and urban growth[59]. Further, cultural and natural heritage is threatened by traditional causes of decay and emerging social and economic conditions including developments and construction[60]. The concept of Heritage Impact Assessment has emerged as key tool in the conservation and protection of world cultural and natural heritage by ensuring that heritage concerns are captured in the EIA process as envisaged under the *Convention Concerning the Protection of the World Cultural and Natural Heritage*[61]. There is need to fully embrace and promote Heritage Impact Assessment for Sustainable Development in Kenya.

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[56] EMCA, No.8 of 1999, S 2

[57] UNESCO, 'World Heritage' available at *https://whc.unesco.org/en/about/* (accessed on 20/10/2022)

[58] Ibid; See Art.10 (2)(d) of the Constitution of Kenya-Sustainable Development is a National Value and Principle of Governance.

[59] Ashrafi. B et al., 'Heritage Impact Assessment, Beyond an Assessment Tool: A comparative analysis of urban development impact on visual integrity in four UNESCO World Heritage Properties' Op Cit

[60] UNESCO., 'The Convention Concerning the Protection of the World Cultural and Natural Heritage' Op Cit

[61] Convention Concerning the Protection of the World Cultural and Natural Heritage, article 5 (a)

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UNESCO., 'World Heritage Committee on Lamu Old Town World Heritage Site: State of Conservation Report' available at *https://www.google.com/search?q=State+of+conservation+report+lamu+old+town&oq=State+of+conservation+report+lamu+old+town&aqs=chrome..69i57j33i160.12156j0j7&sourceid=chrome&ie=UTF-8*

UNESCO., 'World Heritage List' available at https://whc.unesco.org/en/list/

United Nations Educational, Scientific and Cultural Organisation (UNESCO), 'World Heritage Conservation' available at *https://whc.unesco.org/en/faq/19*

Clarifying the Roles of the Director of Public Prosecutions and the Director of Criminal Investigations in Kenya: A Proposal for Legal Reform

By: ***Michael Sang****

Abstract

The Office of the Director of Public Prosecution and the Directorate of Criminal Investigations are two key offices in Kenya's criminal justice system. Their roles are outlined in the Constitution and various statutes. However, their effective operationalization has been a tough nut to crack, with both institutions at loggerheads as to who is tasked with performing what roles. This has led to supremacy battles between the two institutions, thereby hampering an efficacious criminal justice system. This study critically interrogates the distinguishing unique roles between the two offices, while referring to legislative mechanisms and judicial precedents. Using a desktop review methodology, it examines laws and programmes and postulates that a distinction between their roles is pertinent. The study will demonstrate that criminal investigations are a preserve of the DCI while the ODPP is mandated with bringing charges. The study brings to the fore legislative proposals to address the prevalent conflict. The study will draw from best practices in South Africa and the UK to show that a system of complementarity between these two institutions is the best way to avoid abuse of office. Collaboration between the two, while understanding their distinct roles is vital to enhance administration of justice.

Key Words*: Office of Director of Public Prosecution, Directorate of Criminal Investigations, legal reform, criminal justice system.*

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1. Introduction

The Kenyan criminal justice system is composed of institutional agencies and actors that are involved in ensuring the delivery of effective and equitable justice.[1] The criminal justice apparatus in Kenya is systematic, with distinct law enforcement agencies tasked with the responsibility of investigating, arresting and arraigning suspected criminals in court.[2] Once a conviction is entered, the criminal justice process will incorporate either the probation department or the prison department.[3] Two prominent institutional actors who are critical to discharging essential functions in the Kenyan criminal justice system are: the Office of the Director of Public Prosecutions (ODPP) and the Directorate of Criminal Investigations (DCI).[4]

Despite the relatively clear delineation of their respective functions, there have been periodic supremacy battles between the ODPP and the DCI.[5] It is imperative to underscore the fact that these two agencies are critical in the operationalization of our criminal justice system as a country. Ideally, the two institutions that are the focus of this study ought to complement each other in realizing a perfect criminal justice system that fits a just Kenyan legal system. However, the reality is far from that ideal vision. In fact, the theoretical projection of cooperation between the two agencies has not been in place for a couple of years.

The conflicts and overlap of jurisdiction between the DCI and the DPP indicate the unsatisfactory nature of the inter-agency interactions between them, which necessitates the inquiry in this paper. This paper seeks to clarify

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[1] Roselyine Aburili: Access to Criminal Justice in Kenya; an Assessment of Legal, Policy and Institutional Frameworks. Available at *http://erepository.uonbi.ac.ke/handle/11295/101848* accessed 4 December 2022

[2] Ibid

[3] Ibid

[4] Ibid

[5] The Standard: Endless war between DCI, Haji hurting Kenya. Available at *https://www.standardmedia.co.ke/editorial/article/2001446850/endless-war-between-dci-haji-hurting-kenya* accessed 4 December 2022

the roles of the Director of Public Prosecutions and the Director of Criminal Investigations with a view to resolve the jurisdictional conflict between these two agencies. The objective of the paper is to make proposals for legal reform in a bid to develop an improved criminal justice system that is conducive for the full realization of the interests of justice.

2. The Roles of the DPP and DCI in Kenya: Legal and Institutional Framework

Both the ODPP and the DCI are criminal justice institutions established under Kenyan law, the institutions have both constitutional and statutory basis that supports their operationalization. Within this segment the discourse is one that is shaped by the legal and institutional framework for the DCI and the DPP. This section clarifies the roles of the two institutions while drawing from their respective legislative frameworks. It interrogates the effectiveness of these mechanisms put in place.

2.1 The ODPP

The ODPP is mandated by article 157 of the Constitution of Kenya, 2010 and the ODPP Act to perform the following legal functions: First and foremost, the Director of Public Prosecutions is mandated to decide to charge which is the decision whether to prefer criminal charges against a suspected person.[6] The decision to charge is an exclusive remit of the DPP and not any other actor within the criminal justice system, the functionality is under protection by the constitution within article 157 and the DPP act.[7]

The institutional guidance on the decision to charge was launched on 30 July 2020 and is part of norm generation by ODPP in the criminal justice enterprise. There are a variety of factors that the ODPP considers in making their decision to charge against a person.[8] Generally, the decision to charge

[6] Article 157 of the COK

[7] Ibid

[8] "Guidelines on Decision to Charge and Case Management System Speech" (*The Office of the Director of Public Prosecutions (ODPP)* July 13, 2021) *https://www.odpp.go.ke/dtc-and-case-management-speech/* accessed 27 August 2022

is the prosecution counsel's determination of whether there is sufficient evidence by an investigator or investigative agencies to warrant criminal proceedings against an accused person before a court of law.[9]

This paper opines that the decision to charge is a positive attribute that shows DPP's firm resolve toward a culture of professionalized, intelligent prosecutorial system in Kenya. The decision to charge may also be interpreted as enhancing the normative frameworks of criminal accountability praxis in Kenya's CJS. The decision to charge is the most intrusive decision on a person's liberty, life and property that sound rules and principles must guide. Therefore, a compelling necessity for due and utmost care in deciding to charge is required.

In discharging their duties and obligations in the decision to charge, the DPP has to consider the authorization in some instances of corruption, terrorism, treason, sedition, and offences under the Anti-Counterfeit Act and offences involving aircraft. After that, there is not much to be considered other than ensuring that the applicable standards are enforced in line with the DPP's authorization under the law. In applying the applicable standard, the Prosecution Counsel must determine by considering two factors: the KEY evidence; and the minimum requirements of a file based either on a two-stage test or threshold test.[10] Evidence, either alone (being of one witness) or taken together with other evidence, establishes, first, elements for each offence, and second, reveals the person or persons to be charged for the offence(s).[11]

The two-stage test is composed of the evidential and the public interest tests. The evidential test essentially points to evidence as an alleged set of facts, the truth before an investigator is proved or disproved and includes statements, admissions, confessions or observations by the court.[12] The

[9] Ibid
[10] Ibid
[11] Ibid
[12] Section 80 of the Evidence Act

prosecutor must be satisfied that 'sufficient evidence' assures 'a realistic chance of conviction' of the accused. To decide whether there is sufficient evidence, the Prosecution counsel has first to identify the elements of the offence by thoroughly reviewing the law and judicial precedents. Once this is done, the prosecutor has to look at the evidentiary material in terms of Relevance i.e. does it add any probative value, or does it prove or disprove the elements of the crime.[13] In *R v Mark Lloyd Stevenson*,[14] it was held that the relevance of evidence in a criminal case is determined by the probative value of the evidence adduced.

The public interest aspect presents the elements of the second part of the two-stage test.[15] In the determination of the public interest, the following are considered: (i) seriousness of the offence; (ii) culpability of the suspect (tendency towards guilt or blameworthiness): suspects level of involvement, premeditation or planning, any benefits to the suspect, previous criminal conduct, suspect's position of trust about victim or offence; (iii) impact or harm to victim or community; (iv) status of the victim, suspect's age; and (v) whether prosecution is a proportionate response.[16] Apart from the decision to charge, other functions of the ODPP Include: taking over and continuing with criminal proceedings instituted by another authority or individual. The ODPP is also tasked with directing criminal investigations and guiding the conduct of the said investigations.

The ODPP has the power to discontinue criminal proceedings at any point before the court gives a decision. This is essentially the power of nolle

[13] "Guidelines on Decision to Charge and Case Management System Speech" (*The Office of the Director of Public Prosecutions (ODPP)* July 13, 2021) *https://www.odpp.go.ke/dtc-and-case-management-speech/* accessed 27 August 2022

[14] [2016] eKLR

[15] "Guidelines on Decision to Charge and Case Management System Speech" (*The Office of the Director of Public Prosecutions (ODPP)* July 13, 2021) *https://www.odpp.go.ke/dtc-and-case-management-speech/* accessed 27 August 2022

[16] Ibid

prosequi provided under Article 157 (6) (c) of the Constitution and section 82 and 87 of the Criminal Procedure Code. There are certain attributes related to the discontinuation of any proceedings from court by the office of the DPP. It is imperative to be cognizant of the fact that the discontinuation is procedural in order to protect the rule of law and therefore the prosecutor has to obtain the permission of the court before implementing the action, this condition is anchored under article 157 (8) of the Constitution of Kenya 2010.[17]

In the case *R v Enock Wekesa and Another* the court addressed the question as to the power to discontinue a trial.[18] The Court declared that the requirement to seek permission before the discontinuation of a case is to be applied in all cases that are under the purview of the DPP. It was adjudged that when exercising the procedures and powers spelt out by the law the DPP should consider issues in the administration of justice due to the need to prevent and avoid abuse of legal powers.[19] This case points to the fact that it is vital to ensure constitutional values and principles are upheld to prevent abuse of power by the DPP.

Similarly in the case of *Helmuth Rame v R*[20] the Court held that on matters discontinuation of cases, the court is required to interrogate the reasons given by the prosecutor to withdraw the cases to determine whether the threshold set under article 157 (11) of the constitution are met.[21] According to the set conditions the courts may thwart the withdrawal of the cases if: the process is oppressive to the victims, if the DPP is seen to be acting in bad faith or in any malicious manner whatsoever.

Finally, in the case *R v Muneh Wanjiku Ikigu* the court stated that if there is wind of the abuse of the court process then the power of the DPP to

[17] Article 157 (8) of the COK
[18] Misc App 267 of 2010.
[19] *R v Enock Wekesa and Another* Misc. 267 of 2010
[20] Misc. 530 of 2012.
[21] Article 157 (11) of the COK

discontinue criminal cases might become unenforceable. In the *Ikigu* case, the prosecution is reported to have conducted the case in question for about 4 years and 10 months and during the whole time the accused was in custody.[22] The key witness to the case could not be found which led to a request to withdraw the case by the prosecution. The court saw that there would be no reasonable way the witness could be traced and instead of just discontinuing the case through a withdrawal the court ended up acquitting the accused. These cases demonstrate the important role courts play in avoiding abuse of power and the court process. In this way, courts play an important role in administration of justice, and must only allow withdrawal of cases upon a hawk-eyed analysis of the evidence presented in its totality.

In Magistrate Courts, the prosecution can withdraw a case any time before the judgment is delivered with the permission of the court. This is further supported by section 87 of the Criminal Procedure Code (CPC).[23] Normally the law provides that if the case is discontinued after the close of the prosecution's case the accused person is to be acquitted. Alternatively, if a case is discontinued before the accused presents his defense then the accused person is supposed to be discharged.[24] It should be noted that according to the Kenyan law a discharge does not preclude the prosecution from bringing in a subsequent case on the same grounds against the accused person on the same facts as before if new evidence has been discovered.[25] It is very possible for a discharged person to be criminally prosecuted and found guilty later on. However, this presents an opportunity for the accused person to plead autrefois acquit as captured under Article 50 (2) (o).

In practice the ODPP in can invoke the power that is expressed by the principles of *nolle prosequi*. *Nolle prosequi* can be entered before the court by oral or written means for approval in regards to the discontinuation of a

[22] *R v Muneh Wanjiku Ikigu* [2016] eKLR
[23] Section 87 CPC
[24] Ibid
[25] Section 82 (1) of the CPC

case.[26] Section 82 of the CPC and article 157 of the constitution provide for the power of *nolle prosequi*. In *nolle prosequi* the accused is usually discharged from the case.[27] If the accused person is in custody he is supposed to be released, this is similar to the accused persons on bail and bond and in instances where the accused person is not present in court they ought to be served with a notice of the exercise of the power of *nolle prosequi*.[28]

Another imperative role of the ODPP is to facilitate witnesses and victims of crime during criminal proceedings. Monitoring, training and appointing new public prosecution counsels is the mandate of the ODPP. The ODPP handles international relations, such as mutual legal assistance and extradition requests. The ODPP has a role in influencing policy on law reform, advising the government and its agencies while also responding to complaints against public prosecutors.

Procedurally there are a lot of aspects that may come up in a criminal case; such a procedure is the pre-trial and the disclosure of evidence by the ODPP. This is a function that is required by the DPP. Under the provisions of article 50 (2) of the constitution the prosecutor is required to disclose evidence against an accused during the pre-trial period and across the entire period of the case.[29] This principle and requirement is not only theoretical in nature but one that has been effectively practised. In the case *Hussein Khalid and 16 others v AG and 2 others*,[30] as well as the case of Thomas *Patrick Gilbert Cholmondeley v R* whereby the disclosure of evidence by the prosecution was upheld.[31] Disclosure of evidence by the prosecution is a protected fundamental right under the Constitution as captured under Article 50 (2) (j) and Article 25. It therefore cannot be derogated.

[26] Judiciary, 'Criminal Procedure Bench Book – the Judiciary of Kenya" *https://www.judiciary.go.ke/?wpdmpro=criminal-procedure-bench-book* accessed 3 December 2022
[27] Section 82 of the CPC
[28] Ibid 5
[29] Article 50 of the COK
[30] *Hussein Khalid and 16 others v AG and 2 others* [2020] eKLR
[31] *Thomas Patrick Gilbert Cholmondeley v R* [2006] eKLR.

In time where the evidence in a case is only given during the hearing of the case the accused must be given proper and ample time to prepare for the defense against the evidence presented. The rationale behind the giving of ample time for the preparation of the defense is to practise the law under the right of the provision of article 48 of the Kenyan Constitution, which provides for the rights to access to justice.[32] The case of *Felix Mwova Vaasya v R*[33] examined the aspect of being given ample time after the disclosure of evidence by the prosecution during the hearing in a case. In the case the court held that providing accused persons with copies of statements by witnesses only a day before the trial of a case does not amount to sufficient time for the preparation of a defense.[34] These cases are proof that fair trial is a fundamental right under the Constitution and the ODPP should take necessary steps to ensure full realization and protection of this right. The aforementioned legal roles of the DPP point to the fact that the decision to charge in criminal prosecutions is entirely a function of the DPP.

2.2 The DCI

The importance of conducting thorough investigations cannot be overstated, and both witnesses and victims of crime rely significantly on the DCI in this regard.[35] Kenya mainly relies on traditional methods of gathering evidence, including confessions and witness testimonies.[36] Investigations occasionally rely on forensic science evidence because the usage of technology is so prevalent today. Since the Constitution of Kenya, 2010 does guarantee human rights in the criminal justice system [37] and certain means of information collection are permitted under the law, all these elements are

[32] Article 48 of the COK

[33] Misc. 48 of 2016.

[34] Ibid.

[35] Office of the Directorate of Criminal Investigations. Available at *https://www.cid.go.ke/index.php/aboutus/our-functions.html* accessed 4 December 2022

[36] Joseph Peterson, Ira Sommers, Deborah Baskin, and Donald Johnson, 'The Role and Impact of Forensic Evidence in the Criminal Justice Process' [September 2010]. Available at *https://www.ojp.gov/pdffiles1/nij/grants/231977.pdf* retrieved 4 December 2022

[37] Reference can be made to Article 49 and 50 of the Constitution of Kenya 2010

under the purview of the DCI. This section highlights the legal functions of the DCI.

The DCI, being Kenya's principal investigative agency in the criminal justice system, covers the following areas in terms of functions and jurisdiction. According to sections 28 and 35 of the National Police Service Act, 2011, the DCI's current duties include: gathering and providing criminal intelligence; conducting investigations into serious crimes like murder, drug-related offences, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cybercrime, among others uphold law and order.[38] The Constitution of Kenya, 2010 also pronounces itself on the functions of the DCI through the provisions under article 247 of the Kenyan Constitution.

Other functions of the DCI may include finding and stopping criminal activity, apprehending offenders, keeping track of criminal history, forensic investigation, and obeying the instructions that the Director of Public Prosecutions gave the Inspector General by dint of Article 157(4) of the Constitution.[39] Under Article 157(4), the Director of Public Prosecutions has the authority to order the Inspector General of the National Police Service to look into any information or allegation of criminal activity, and the latter is required to abide by any such written instructions.[40] The DCI may coordinate with national Interpol activities, perform any other task assigned to it by another written law, including any investigation into a subject that the Independent Police Oversight Authority may refer to it. Lastly, the powers of the DPP are performed in person or in a subsidiary manner through the prosecution attorneys working under the office.

3. Jurisdictional Conflict Between The DPP And DCI

As highlighted earlier on, the ODPP is given authority under article 157(6) to institute criminal proceedings through its prosecutorial powers.

[38] National Police Service Act of 2011
[39] Article 157(4) of the COK
[40] Ibid

Obviously from the provision it is concluded that the powers of prosecution in Kenya are vested in the ODPP. The provision places a mandatory obligation for the ODPP to deal with direct prosecutions.

It appears that Article 245(4)(a) of the Constitution,[41] which states that no person may direct the Inspector General with respect to the investigation of any specific offence or offences, directly conflicts with the Director of Public Prosecutions' authority to give the Inspector General mandatory instructions as discussed within article 157(4) of the Constitution. As long as the two opposing viewpoints in the Constitution remain unchanged, it is not improbable to envision a scenario in which there is a constitutional impasse. Giving instructions to the police during criminal investigations by the director of public prosecutions is not inappropriate. Such provisions show the jurisdictional conflict between the DPP and the DCI, who is under the authority of the Inspector General.

There is further confusion still on the issue of initiating criminal proceedings. The ODPP Act recognizes private prosecution and provides that any person who brings private prosecution under the provisions of section 28 of the ODPP Act should inform the DPP in writing within 30 days and the ODPP has the discretion of taking over or discontinuing the prosecutions. This raises the question as to whether the DCI may fall under the components of private prosecution as 'any person'. This is a ground for conflict between the DCI and the DPP, however, going with the literal interpretation of the constitution and the statutes the DCI cannot bring criminal proceedings against an accused person in court.[42]

Arguments on the qualification of the DCI to institute private prosecutions cannot succeed since there are conditions to be met for admissibility of such

[41] Article 245(4)(a) of the COK

[42] Charles Gatonye and Wilfred Nderitu: 'Does DCI have legal powers to start and sustain a criminal prosecution?' Available at *https://www.the-star.co.ke/news/big-read/2020-07-27-does-dci-have-legal-powers-to-start-and-sustain-a-criminal-prosecution/ accessed* 4 December 2022

prosecutions.[43] These include the approval by the court after it is proved beyond reasonable grounds that the DPP was presented with the case but failed to act on the case. If that is not shown then the DCI cannot institute any private prosecution.[44] It is evident that even in cases where a private prosecutor may have the option, the law finds it highly desirable for the DPP to initiate, undertake, conduct, and, if necessary, take over criminal prosecutions. Without the DPP's approval, there is little room for other individuals or organizations to initiate and sustain prosecutions.[45]

The highlighted provisions on the roles of the DCI and the DPP create a deadlock on the operations of the criminal justice system which is risky and may impede access to justice since there will be never ending court battles that try to seek a favorable interpretation for each of them. All the procedural and substantive battles on the issues only create an impasse on the decision to charge. Section 2 of the ODPP Act recognizes the National Police where the DCI is anchored as an investigative unit and this strips the DCI of any prosecutorial roles.[46]

Finally, providing a way forward on the impasse, the DCI does not have the authority to decide whether or not to prosecute, and he also does not have the authority to institute, conduct, or supervise a prosecution, according to the provisions under section 23(1) of the ODPP Act, which outline the functions of the DPP.[47]

4. The Kenyan Courts' Position on the DPP–DCI Conflict

Basing my evaluation on the Montesquieu's theory of separation of powers,[48] some Kenyan courts have failed to pronounce themselves clearly on the

[43] Ibid
[44] Ibid
[45] Ibid
[46] Section 2 of the ODPP Act
[47] Section 23(1) of the ODPP Act
[48] Montesquieu's Doctrine of Separation of Powers. Available at *https://www.scholarshipsads.com/montesquieus-doctrine-of-separation-of-powers/* accessed 4 December 2022

jurisdictional roles of the ODPP and the DCI that have given rise to conflicts between the two constitutional institutions. However, to a more significant extent, Kenyan courts have reiterated through their decisions that there is an established separation of powers between the DPP and the DCI and the functionalities as to prosecutions and the decision to charge have been awarded to the DPP.

The ruling delivered in the *Geoffrey Kaaria Kinoti v The Chief Magistrates' Court and Others*[49] ended up becoming a blow to the DPP, which had mostly enjoyed favorable decisions from the courts in relation to elements related with the decision to charge and the drafting of charge sheets. In fact in the case the court held that, prosecution of criminal offences in Kenya must only be undertaken by lawful prosecutors (being either the Director of Public Prosecutions or such other persons exercising the delegated powers of the Director of Public Prosecutions under Article 157(9) of the Constitution[50] or the entities conferred with powers of prosecution pursuant to Article 157(12) of the Constitution)[51] and as long as such prosecutions are in keeping with (a) above. The decision was stayed following an appeal on the matter to the court of appeal.[52] The status quo of the involvement of DCI in prosecution and the decision to charge still remains till the case is determined.

The Court of Appeal ruled that the Prosecution should not be stopped in its functions on initiating criminal charges unless the ODPP abuses its authority as was held in the case of *Director of Prosecutions v Crossly Holdings Limited & 2 Others*.[53] This case involved the constitutional right to bring criminal charges against anyone.[54] Additionally, in the case *Chibungu Sanga v Republic*[55] the court stated that once it receives recommendations from any

[49] Constitutional Petition E451 of 2021.
[50] Article 157(9) of the COK
[51] Article 157(12) of the COK
[52] Constitutional Petition No. E495 of 2021
[53] Civil Appeal No. 1 of 2013.
[54] *Director of Prosecutions v Crossly Holdings Limited & 2 Others*, Civil Appeal No.1 of 2013
[55] [2017] eKLR.

investigating body and has evaluated the evidence, the ODPP is free to select the best evidence that can support a conviction, so long as this discretion is applied legally and is not driven by ill will or ill motive.[56]

In the case of *Okiya Omtatah Okoiti v The DPP and others E266 Of 2020*,[57] the ODPP received an affirmation from the High Court when Korir J held that the ODPP's 2019 Decision to Charge Guidelines, which are an internal guide for prosecutors, are constitutional and valid.[58] The judge also held that: The power to file charges before courts belong to the DPP and not the Inspector General of Police; the police have no power to draft charges and take them to court without the authority of the DPP; the DPP has the power to direct all investigative agencies to conduct an investigation; to guide and assist such investigation agencies in such investigation; to expect and receive a report of such investigations; and to control the related applications and orders, including miscellaneous applications.

In *Geoffrey K. Sang v Director of Public Prosecutions & 4 Others*,[59] the issue of whether the DCI may choose to press charges against someone without the DPP's approval arose. The principal legislation in the case presented itself within Article 157 of the Constitution of Kenya, 2010.[60] The decision concluded that the DCI and the police are not entitled to initiate criminal cases as against the DPP's roles. Odunga J's decision in the *Geoffrey K. Sang* case directed the DCI to restrict itself to its mandate and indicated that everything relating to prosecution, including the decision to charge, rests with the ODPP.[61] Korir J's decision emphasized that the decision to charge belongs to the ODPP, and the investigating agencies must present their files to the ODPP.[62]

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[56] *Chibungu Sanga v Republic* [2017] eKLR.
[57] E266 of 2020
[58] Ibid at paragraph 186
[59] [2020] eKLR.
[60] Ibid.
[61] Ibid at paragraph 205 (a)
[62] Ibid at paragraph 220, 221

Clearly, the roles between the two entities have been spelt out by various judicial decisions. It therefore means that what happens in practice is the bone of contention. The two entities are not willing to stick to their outlined statutory and constitutional provisions. It would be satisfactory if the Judiciary were able to provide guidelines for the roles of the two entities for the interests of justice and a solid criminal justice system. Clarity is needed on the complementary roles of the DCI and ODPP, the questions as to who drafts a charge sheet and who makes the decision to charge in a court of law need to be ironed out properly.

5. A Proposal for Legislative Reform-Lessons Drawn from other Jurisdictions

This section examines the ways in which the legal frameworks of South Africa and the United Kingdom have overcome the problem of jurisdictional conflict between their prosecution and investigative authorities. Specific lessons from the comparative practices in South Africa and the United Kingdom that can be used to inform law reform in Kenya are identified.

5.1 South Africa

The criminal justice system in South Africa is similar to the Kenyan system, with the spearheading institutions being the South African Police Service and the National Prosecuting Authority. The Institutions both have a constitutional basis supported by statutory provisions.[63] The principles of separation of powers within the statutory bodies in the criminal justice system of South Africa are perfect and one with no overlap to report since the Police service is mandated with crime prevention, investigation and apprehending of suspects. Once this is accomplished, the findings of the said investigations are forwarded to the National Prosecuting Authority, which is

[63]South African Police Service Official Site. Available at https://www.gov.za/about-government/contactdirectory/departments/departments/south-african-police-service-saps ; National Prosecuting Authority Official Site. Available at *https://nationalgovernment.co.za/units/view/66/national-prosecuting-authority-of-south-africa npa#:~:text=The%20mission%20of%20the%20National,to%20solve%20and%20prevent%20crime.* Accessed 4 December 2022

tasked with deciding whether to charge or not, depending on the crime committed and evidence presented by the investigative agency.

The operations between the two agencies in South Africa are complementary, one with no incidences to report on wrangles as to the functionality. Reports are usually made on the partnerships and cooperation between the National Prosecuting Authority and the Police service. Before the current system, there was a hybrid system that also seemed to work well but was criticized by activists interested in the criminal justice system reform. The Directorate of Special Operations, also called "Scorpions," was established in September 1999.[64] The International Convention against Transnational Organized Crime was signed in 2000, and the Scorpions were established simultaneously.[65]

Raising public trust in the government's capacity to combat crime appears to be one of the driving forces behind the formation of the Scorpions. The Directorate investigated particularly serious organized crime to bring cases against those responsible. The goal was to establish a law enforcement organization like the FBI that would significantly increase the state's capacity to combat organized crime and high-profile corruption. The disturbingly high rates of severe and violent crime in South Africa led to the creation of this program. A legislative and operational mandate for the DSO existed.

5.2 The United Kingdom

In the UK, the primary duties of the police are described, along with the constitutional standing of the various police authorities. Police processes and powers within and outside the police station are outlined within the existing legal framework, including the legal foundation for detention, police

[64] Ibid

[65] Admin and others, "Prosecutors vs Investigators: Demarcating Legal Functional Autonomy" (*Nairobi Law Monthly* May 6, 2020) *https://nairobilawmonthly.com/index.php/2020/05/06/prosecutors-vs-investigators-demarcating-legal-functional-autonomy/* accessed 27 August 2022

interrogation and the right of silence, identification procedures, and stop, search, entry, and search of premises powers.[66] There are legal provisions on civil and criminal proceedings, police complaints and disciplinary actions, and the exclusion of illegally obtained evidence is, all factors considered, within provisions of the criminal justice system.

In the UK, the prosecution process includes both Prosecutions by the Director of Public Prosecutions and Prosecution by the police; this includes the official responsibility for Prosecution, police choices about Prosecution, limitations on police discretion in the decision to prosecute, and cautioning. Additional information is given on the functions of law officers concerning the prosecution system, private prosecutions, and prosecutions by non-police agencies. The procedures involved in commencing proceedings, committing cases, and the laws also highlight disclosing evidence by the defense and Prosecution.[67] Compared to the Kenyan system, this is a hybrid system that capitalizes on specialization and the division of roles between the Prosecution and the police, who are also investigators.

5.3 Lessons for Kenya

It is incorrect to equate role confusion with integration or close collaboration between the prosecutor and the investigator. Maintaining clear lines between the prosecutor and investigator's responsibilities is essential. The best individual to carry out the task of gathering the evidence is still the investigator. The prosecutor may evaluate, counsel, and guide the investigator, but at all times, keep in mind that he or she is still a court officer subject to specific ethical requirements. To ensure that these ethical

[66] Brown DK, Turner JI and Weisser B, *The Oxford Handbook of Criminal Process* (Oxford University Press 2019)

[67] Corporate Author Royal Commission on Criminal Procedure Address 8 Cleveland Row, "Investigation and Prosecution of Criminal Offences in England and Wales - the Law and Procedure" (*Investigation and Prosecution of Criminal Offences in England and Wales - The Law and Procedure | Office of Justice Programs*) *https://www.ojp.gov/ncjrs/virtual-library/abstracts/investigation-and-prosecution-criminal-offences-england-and-wales* accessed 27 August 2022

commitments are upheld, the prosecutor must keep a healthy distance from the actual gathering of evidence. The prosecutor's role is to direct the inquiry, not to carry out the investigator's duties.

A criminal investigation and prosecution's goal is to further justice, not to get a conviction. The prosecutor's duty is unique from the investigators, and the investigator dramatically benefits from the prosecutor's professional objectivity and detachment. The office of the director of public prosecutions is unquestionably not one of the investigatory agencies, although the Constitution does not stipulate that the prevention, Prosecution, or investigation of crime is the sole responsibility of any one institution. DCI is the organization tasked with the primary responsibility of leading the fight against crime and collaborating closely with the ODPP and other criminal justice organizations.

5.4 Proposed Amendments

Identical amendments should be made on the clarity of drafting charge sheets. This should be provided for since it has been identified as an area in which the two agencies find common ground in the conflict. The ODPP Act should exclusively delegate the drafting and signing of the charge sheets to the ODPP, and the NPS Act should not be concerned whatsoever with the issues around the drafting of charge sheets. The two acts also do not clearly state the extent to which the two entities should cooperate and the levels of interactions with cases.

The identified conflict between Article 245(4) (a) of the Constitution and article 157 on elements of the DPP giving the Inspector General directions on matters related to investigations should be reflected on both the NPS act and the ODPP act in a clear manner to avoid confusions. Section 29 and 30 of the ODPP Act should be amended to rightly strike off the DCI from qualifying as private prosecutors. Section 23(1) of the ODPP Act is perhaps the clearest indication that the DCI cannot prosecute criminal offences and this should be amended to the NPS act for uniformity.

6. Conclusion

Universally, the purpose of criminal justice in a particular jurisdiction is to help realize and attain the rule of law. The rule of law operating within the criminal justice system ensures that the criminals are put in their place while protecting the due process of the law to achieve sustainability within our society. Investigative agencies such as the DCI are mandated to conduct investigations to bring justice to suspected criminals. The role of the Prosecution is to normally counter-check the investigations done to mount prosecutions within the due process of the law.

A criminal case launched by the DCI would, in this article's opinion, not only constitute an abuse of the legal system but would also be intrinsically unjust and a barrier to an accused individual receiving a fair trial because it would not be within the DCI's constitutional or statutory authority to do so. The opinion is based on the claim that only a prosecutor who is legitimately in office would be able to adhere to the principles of a fair prosecution process because he would be directed by the legal and constitutional requirements that give him the authority to act. Second, the DCI lacks the legal and constitutional grounds necessary to file a criminal complaint.

Going forward, there needs to be a series of amendments of the ODPP Act and NPS Act by inserting identical clauses, which (i) clarify the respective roles of DPP and DCI, and (ii) emphasize the need for complementarity as opposed to competition. Once the amendments are effected, the criminal justice system is expected to shift positively since no energy and resources would be wasted on competition and supremacy battles between the DCI and the ODPP, rather the two entities will work together to ensure an efficacious criminal justice system.

The Duty to Treat Versus the Right to Refuse Unsafe Work of Healthcare Workers in Kenya: Implications for Public Health Emergencies

By: ***Naomi N. Njuguna*** [*]

Abstract

Whenever a jurisdiction is faced with a public health emergency or crisis, the focus of attention is usually the patients who need medical attention. The supply side of the healthcare provision equation (healthcare workers) is usually ignored, particularly in Low to Middle Income Countries (LMICs). The working conditions that healthcare workers are subjected to may be less than ideal and in many instances, unacceptable and unsafe, due to many factors such as long working hours, poor infrastructure, inadequate personnel, lack of personal protective gear, inadequate remuneration, etc. The duty of healthcare workers to treat their patients is pitted against their right to refuse unsafe working conditions.

This article seeks to trigger this debate in Kenya, in light of the recent pandemic and other public health emergencies that have gripped and that may grip the country in the future. It explores the nature of the duty to treat, its origins and justifications and whether indeed there is a duty to treat among healthcare workers in Kenya. It then goes on to consider the right to refuse unsafe work and explore whether this right is implicit in our regulatory system in Kenya. It concludes by proposing a system of reporting unsafe working conditions that will balance the rights of the healthcare workers and the rights of patients with a view to enhancing the realisation of the right to health in times of a health crisis.

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Introduction

"We are at war, with an invisible, relentless enemy!"

These words could easily form the lyrics of the chorus of a song that was sung by the President of the Republic of Kenya and his cabinet secretary for health for a time since the Corona Virus Disease (Covid – 19) pandemic reached the shores of Kenya in March 2020.[1] The sentiments were echoed by the High Court in a case, where Justice Weldon Korir declined to summon the cabinet secretary for health to appear in court to submit a plan for the prevention, surveillance, control and management of the virus. He stated:

> *"I decline to summon the CS…We must all appreciate that we are now at war with an enemy unknown to man. The man leading Kenyans in fighting that war is the President mostly supported by the Cabinet Secretary for Health."*[2]

In any war, there are soldiers and generals, and also civilians. The soldiers in this scenario would be the healthcare workers. Those at the frontlines are particularly vulnerable to death and injury. The generals, in this case, the CS and his team at the Ministry of Health, are the instructors and strategists. The likening of the pandemic in Kenya to fighting of a war creates an impression that no one should abandon their post, no matter how difficult it gets. Abandonment would deem one unpatriotic and would even lead to them being ostracised. In fact, if a soldier abandoned his or her post, they would be court martialled as that is considered a military offence. Herein then lies the dilemma for healthcare workers in a public health emergency. There is the duty that they must fulfil as a result of the oaths that they took and due to medical ethics on the one hand, and there is the right that they have to safe and healthy working conditions on the other. How are these soldiers to manage to balance this dilemma?

[1] See Presidential Speech of 6th April 2020 available at http://www.mfa.go.ke/wp-content/uploads/2020/04/presidential-address-enhanced-measures-in-response-to-the-COVID-19-pandemic-6th-April-2020.pdf accessed 4th August 2020

[2] See *https://citizentv.co.ke/news/court-declines-request-to-summon-health-cs-mutahi-kagwe-over-coronavirus-report-327126/* accessed 4th August 2020

The Covid – 19 pandemic is not the only pandemic to affect the globe. The 1918 Spanish Flu had an even more devastating effect in terms of the number of infections and deaths. There have also been other epidemics and public health emergencies that have had an impact on healthcare workers and have contributed to the debate about the dilemma as to whether there is a duty to treat and attend to patients when there is a real and significant risk of infection and death to the healthcare worker. Does the patient's life matter more than the healthcare worker's life?

It is no small mercy that Kenya has largely been spared the wrath of many epidemics that have broken out in neighbouring countries as well as in other countries which we have ties to – such as the Ebola crisis, Sleeping sickness epidemic, SARS, the Avian flu, etc. Though the country has suffered from the HIV/AIDS crisis of the early 1990's, the effects were not as devastating as countries such as Uganda and South Africa. The dilemmas that the treatment and management of these epidemics raised for healthcare workers were also not readily present. With the Covid – 19 pandemic, these dilemmas have strongly presented themselves, and rather than sweep them under the carpet of political correctness, it is prudent to address these questions and come up with answers that will form the basis of guidelines that can be used, should another pandemic or epidemic arise.

I. The Interrelationship between Ethics and Law

Before embarking on the nature of the duty to treat, and exploring whether the duty is anchored in law or ethics, it would perhaps be useful to set the foundation by examining the relationship between ethics and law. This relationship somewhat can be likened to two lovers who wish to dance together in sync, but because of their awkwardness with each other, keep stepping on each other's toes and hurting each other. This metaphorical illustration of the relationship between law and ethics seeks to bring out the fact that sometimes what is legal may be unethical and what may sometimes be considered illegal may be ethical. The ideal situation is when the two are synchronised i.e. what is legal is ethical and what is illegal is unethical. For health care workers, the distinction between ethics and law is particularly important due to the fact that the two have different sanctions and

consequences for them. If one breaches an ethical rule that is not couched in law, the consequence is meted out by their professional body. But if the action concerned is regulated by law, then the sanctions will be meted out by a court of law. During a pandemic, this relationship needs to be set right. Is there a duty to treat and is it ethical or legal? How does this duty correspond to the right of the healthcare worker to life and health as they treat patients? The healthcare profession has largely been a self – regulating one with various codes of ethics and professional conduct guiding their relationship with patients and with each other. However, in the wake of the Constitutionalisation of the right to health, the rights and responsibilities of health workers have been set out in statutes that seek to operationalize this right.

II. The Duty to Treat: Is it an Ethical or a Legal Duty?

Is there a duty to treat or attend to patients by healthcare workers during a pandemic or other public health emergency, when they are faced with unprecedented risks to their health and lives? This question is not really a unique one considering the past epidemics and pandemics that have occurred in history. The question arose during perhaps one of the worst global pandemics in the 20th century – the Spanish flu. It arose again in the later part of the 20th century with the HIV/AIDS epidemic and the early part of the 21st century with the outbreak of the Severe Acute Respiratory Syndrome (SARS)[3], and the avian flu as well as the recent outbreak of Ebola in West and Central Africa. The exposure of healthcare workers to such highly infectious diseases renders a consideration of their duties to patients and whether they have a duty to treat or attend to them. The question is particularly pertinent in a low to middle income country setting where there are resource restraints and the challenges of protecting healthcare workers from infections are greater. Anchoring the duty on ethics or law is important due to the different consequences that a breach of that duty will attract. If the duty is a legal one, the healthcare worker who breaches this duty can face termination of employment under labour law, or a law suit for breach of their

[3] When the SARS outbreak occurred in 2003, approximately 30 per cent of the global reported cases were of healthcare workers. Many died as a result of the infection.

statutory duty, or negligence for breach of the common law duty of care. If it is anchored in ethics, then a breach of the duty will attract professional sanctions such as suspension or revocation of one's practising licence for professional misconduct. Indeed as Brody and Avery observe, ethical duties may hold health practitioners to a greater standard than legal duties as they are seen as a symbolic communication of reassurance to the public of the responsibilities of healthcare professionals.

III. Duty to treat as an ethical duty

The duty to treat has several ethical foundations. These include: beneficence, non – maleficence, deontology, consent, and social contract arguments. The duty as an ethical one may also be internalised within professional codes of ethics. Clearly codifying the duty to treat and setting out its parameters makes it relatively unproblematic. The rights and responsibilities of health practitioners would be clearly set out, particularly their duties in times of a pandemics and public health emergencies.

Beneficence entails a duty to do good and to act in the best interests of the patient. Within the Hippocratic Oath for instance, the physician swears that they "will use those…regimens which will benefit my patients according to my greatest skill and judgement..." Some interpretations of the principle of beneficence would require the healthcare worker to put the interests of the patients above their own – a form of self – sacrifice, or what would be termed as "medical heroism." In a pandemic therefore, beneficence as an ethical basis for the duty to treat would not be controversial. They healthcare worker would be bound to treat any patient that presents themselves, even if there is risk to the healthcare worker's life. This perception is particularly relevant in Kenya, where in the early days of the pandemic and upon the first case being diagnosed in the country, many hospitals refused to treat patients who exhibited Covid – 19 like symptoms. Some health workers were reported to have abandoned their work stations and left patients in pain and untreated.

Non – maleficence means that the health provider should do no harm. It is couched in the Latin phrase *Primum non nocere* – first do no harm. Failing to treat a patient creates a risk of harm whether it is unintended and careless

harm risk of harm, or it is intentional and reckless risk of harm. Failing to treat a patient during a public health emergency is arguably a breach of duty of care and should harm occur to the patient, in terms of exacerbation of the illness or even death, the health worker could be liable for under negligence. Both non – maleficence and beneficence are ethical principles that strongly support the purposes of medical care i.e. to promote healing, to prevent further harm as a result of illnesses or the possibility of them, to rehabilitate, palliate and educate. Medical care is about the alleviation of patient suffering and the promotion of patient wellbeing.

Perhaps the most relevant ethical foundation for the duty to treat would be deontological ethics or duty based ethics. The main proponent of this ethical principle is Immanuel Kant. Using Kant's categorical imperative, one would ask the question, would healthcare workers elsewhere in the world, take the same action as this particular healthcare worker is about to take? To Kant, situational contexts do not matter. The decision or action must be one that is not situation or context – dependent.

Apart from these mainstream ethical theories, it has been argued that the duty to treat is derived from the consent of the healthcare professional. By choosing to engage in this profession, the healthcare worker voluntarily takes upon themselves the consequent risks that emanate from the treatment of patients – a form of *volenti non fit injuria.* The risk of death and of infection is part of the job, as it were. They are implicit in the nature of the practice of medicine. It can be put this way:

> *"Risk is a part of medicine as it is a part of the work of the police, fire-fighters or soldiers. No one has any of those social roles. If however, they chose to enter public safety roles, then society has the legitimate moral expectation that they will accept the risk attached to those roles…The same is certainly true in medicine."*[4]

[4] Heidi Malm, Thomas May, Leslie P. Francis, Saad B. Omer, Daniel A Salmon & Robert Hood, "Ethics Pandemics and the Duty to Treat" (2008) 8(8) The American Journal of Bioethics 4

However, the assumption that is made in grounding the duty to treat in consent, is that the healthcare worker, at the time of entering the profession and signing the contract of employment, had sufficient information concerning the risks that they would be facing, including a risk of a pandemic or a public health emergency, and sufficient mitigation measures have been put in place. In other words, the contract – based consent was given against the backdrop of proper bargaining power where, in light of the risks that they are bound to face, have the following: adequate remuneration, risk and hazard allowances, compensation for working overtime and sometimes being in quarantine, measures to mitigate for the time away from home and family and also psychosocial support.[5] The other assumption that is made is that at the time of entering into the contract, the healthcare worker envisaged the kind of risk that a pandemic poses. During a pandemic, health workers are called to take upon themselves risks that are perhaps not within their original training and job descriptions. It is arguable therefore, if the ethical foundation of the duty to treat is contract based consent, they can refuse to treat because it is not part of their contract. It is also doubtful whether Kenyan healthcare workers, have such a detailed work contact that envisaged the pandemic that we are now facing. Furthermore, the mere presence of a risk within a certain profession does not necessarily mean that a person has consented to its materialisation. A non – medical example would be that a young female law lecturer, may be aware of the risk of sexual harassment and discrimination from unprofessional and insecure male colleagues and students, but that does not necessarily mean that she consents to it. In the same way, the knowledge that there are risks of death and infection, particularly during a pandemic, does not mean that the healthcare worker consents to the materialisation of that risk. This is particularly the case for such healthcare workers such as laboratory technicians who are involved in the testing of patient samples, nurses and clinical officers.

Indeed, it has been argued that there is a moral duty placed on the healthcare professional to treat. Brody and Avery argue that "physicians arguably have a role – specific duty of rescue by virtue of their medical competence to

[5] Ibid

provide the help that victims of infectious diseases and outbreaks require."[6] Malm, et al posit that healthcare professionals have a special positive moral duty to help those in medical need as a result of the special relationship that is created either by law or by contract. This type of duty creates obligations to take on greater risks than those of general positive duties, which every human being has. The question that arises is whether they are limits to the kinds of risks that they are exposed to. Does this moral duty mean that health workers should take up every kind of risk? What about their duties to themselves or to their families and loved ones? Do those duties matter vis a vis their duties to their patients? Perhaps the limits can be grounded in the ethical principle of utilitarianism. In order for the common social good to be attained, there must be limits placed to exposure to extreme risks in order to preserve society. The exposure of health workers to the risk of death and sickness without any mitigation measures could lead to a healthcare crisis in terms of shortages of healthcare workers in hospitals as a result of death, sickness or even their withdrawal of labour through industrial action or turning away of patients. Healthcare facilities could in turn be seen as unsafe environments for patients who could in turn change their health seeking behaviours to unverifiable sources of treatment.

Healthcare workers are fiduciaries to their patients. They have been entrusted with the knowledge and skill, as well as resources that are not readily available to other members of the public. Clark 2005 states that "the expert knowledge and ability of the (healthcare professional) leads to a higher burden of responsibility to render aid." They cannot therefore in good faith, refuse to treat patients. There is some form of public trust that is placed on them to care for the ill in society. The trust is even higher when it comes to health workers in public facilities, as the resources that they are exposed to are funded by taxpayers. However, if knowledge and trust are the only basis upon which a duty to treat is hinged on, then it would mean that during a pandemic, particularly in resource challenged countries such as Kenya, it would be justifiable to recall retired health workers or restore those who have

[6] Howard Brody and Eric N. Avery, "Medicine's Duty to Treat Pandemic Illness: Solidarity and Vulnerability" (Jan – Feb 2009), Hastings Center Report 40, 41

had their licenses revoked or suspended due to misconduct, because they have the knowledge and the skill. Both these propositions are dangerous.

For healthcare workers who were trained in public universities and medical schools, and perhaps conducted their internship in public hospitals, it is argued that they have a duty to treat as part of their social contract with society. This is because of their fees may have been subsidised using tax payers money, and the resources that they used for their training were also funded using public money. For those employed in the public sector, their salaries come from the public coffers. There are also certain benefits that society confers on healthcare workers as a special privilege for the sacrificial work and the special skills that they have in saving lives, for instance, status and social prestige. In exchange for these benefits, there is considered a reciprocal duty to treat. This argument would hold a lot of water in Kenya, but for the fact that healthcare workers, particularly those in the public sector, do not enjoy these social and professional perks, in the same manner that holders of political positions do. Hence the perennial strikes and protests that have plagued the health sector in Kenya from the onset of the devolution of the health function in 2013. It also would depend on the cadre of the health professional, as not all cadres enjoy social prestige.

Perhaps it would be a stronger argument to ground the duty to treat in professional codes of conduct. Codes of ethics are "guides for ethical reasoning, and frameworks for treatment of individual patients."[7] Many professional codes of ethics, especially in Africa, are silent on the duties of healthcare workers in times of disasters or pandemics. Following the 9/11 terrorist attack in the USA, the American Medical Association came up with a policy document setting out the duties of healthcare workers in such situations. It provided thus:

[7] Carly Ruderman, C. Shawn Tracy, Cecile M. Bensiman, Mark Bernstein, Laura Hawryluck, Randi Zlotnick Shaul and Ross E.G. Upshur, " On Pandemics and the Duty to Care: Whose Duty? Who Cares?" (2006) 7 BMC Medical Ethics, 5 at 7; see also David Orentilecher, "The Physicians Duty to Treat During Pandemics" (2018) 108(11) AJPH 1459

> *"Because of their commitment to care for the sick and injured, individual physicians have an obligation to provide urgent medical care during disasters. This ethical obligation holds even in the face of greater than usual risks to their own safety, health or life. The physician however, is not an unlimited resource; therefore when participating in disaster responses, physicians should balance immediate benefits to individual patients with ability to care for patients in the future."*[8]

It would then be prudent to analyse the current codes of conduct in Kenya, in order to verify whether there is a duty to treat, particularly in times of a pandemic. For physicians – these include, medical doctors of general and specific specialisations as well as dentists - they are regulated by The Code of Professional Conduct and Discipline.[9] Whereas there is no exact duty to treat that is set out in the code, it does provide within its core values, the "respect for quality of human life and dignity" as well as "total commitment to service delivery." There is nothing within the acts that would raise disciplinary issues that suggests that failure to treat patients due to the risk of infection or death in a pandemic would be misconduct on the part of the health professional. However in Chapter V of the Code, reference is made to various international declarations and codes which are applicable to doctors in Kenya, some of which allude to the place of the patient vis a vis the interests of the doctor. For example, in the Geneva Declaration, doctors pledge that "the health of my patient will be my first consideration." This however, does not necessarily create an absolute duty to treat. Clinical officers are also governed by the same code of ethics, *mutatis mutandis.*[10]

With regard to nurses, their code of conduct and ethic[11]s also does not contain a general or specific duty to treat. However, the philosophy of the code states that "all people have a right to quality healthcare regardless of race, creed, ethnic background, political convictions, age, sex or colour."[12] It may have

[8] AMA, "Physician Obligation in Disaster Preparedness and Response" (June 2004)
[9] The Code of Professional Conduct and Discipline (6th edition, Revised 2012)
[10] Clinical Officers (Training, Registration and Licensing) Act (Cap 260, Laws of Kenya), section 15(1)
[11] National Nurses Association of Kenya (NNAK): Code of Conduct and Ethics (July 2009)
[12] Ibid p. 3

been useful to add, and illness. As part of their responsibilities under the code, it states that "The responsibility of nurses is to endeavour to help people attain, retain and regain health."[13]

What is clear from the discussion on the duty to treat as an ethical duty, unless the duty is clearly spelled out and cited as a specific duty on the part of the healthcare professional, it may be difficult to ethically compel a health worker to continue working in an environment that is unsafe and dangerous to their health. One may argue, that, the greater the mitigation and risk minimisation measures, the higher the duty on the health worker. In other words, if the healthcare worker is given personal protective equipment of good quality and is also protected from the other risks and hazards of the workplace or the harm that would occur as a result of working under such dangerous conditions, then there is a higher expectation that they would not engage in any medical discrimination, and be able to handle patients who have highly infectious conditions. Certainly, this was the situation during the HIV/AIDS epidemic, where health care workers had expressed reservations about treating patients with HIV/AIDS for fear of infection. However, when the risk of patient to health worker transmission was reduced as result of proper protective equipment and protocols, then it would be unethical to refuse to treat a patient with the condition. The same argument can then apply in the case of a pandemic. The duty to treat should be measured up against the protection that is offered to the health worker. If there are no mitigation measures, perhaps it should not be considered unethical for the health care worker to refuse to treat a patient where there is a significant risk to the life and health of the healthcare worker.

IV. Duty to Treat as a Legal Duty

As the debate rages on as to whether there is an ethical duty to treat, legal scholars have also been keen to find out whether the duty to treat can be construed as a legal one, and on what basis. This is not to suggest that there is no connection between ethical and legal duties. As pointed out earlier, the consequences could be different, but the ethical basis of the duty to treat can

[13] Ibid p. 5

inform whether it should also be a legal duty and the consequences of its breach. Shwartz emphasises the need to define the legal duty to treat, particularly in pandemics and epidemics. He states that: "..The failure to address the issue of whether and to what extent physicians have a duty to treat people with fatal, highly infectious diseases could have devastating consequences during an epidemic."[14] The increased risk to the healthcare worker, their patients, their family, the exposure to longer working hours, separation from family and quarantines, would make a legal duty difficult to justify if there is also no corresponding duty on the part of the employer of the healthcare worker. Where then, in Kenya, does the legal duty to treat emanate from?

The first point of reference is the Constitution of Kenya. Article 43 (1) (a) provides that:

> *"Every person has the right – to the highest attainable standard of health, which includes the right to health care services, including reproductive health care."*

It goes on to provide:

> *(2) "A person shall not be denied emergency medical treatment."*
> *The duty to treat patients is a significant aspect of the right to health, and particularly the aspects of access to and availability of health services.*[15] *The Corona virus disease has presented in different ways in different patients. For many, they have found themselves as patients requiring emergency and critical care. There is a constitutional duty not to deny any person emergency care. The requirement is couched in negative terms and not positive terms. But the legal import of this difference may not be practically different.*
> *There is also a statutory duty on healthcare providers in both the public and private sector "to provide health care, conscientiously and to the best of their knowledge within their scope of practice and ability, to every*

[14] Ariel R. Schwartz, "Doubtful Duty: Physicians' Legal Obligations to Treat during an Epidemic" (2007) 60(2) Stanford Law Review 657, 659
[15] General Comment No 14 on the Right to the Highest Attainable Standard of Care

person entrusted to their care or seeking their support."[16] *They are also under a duty to "provide emergency medical treatment."*[17]

The duty can also be construed within the common law tort of negligence. Medical negligence has been described as the conduct by a health care professional that falls below the accepted standards of medical practice due to an act or omission on the part of the health care professional. The conduct must cause some foreseeable harm. There are three established elements of medical negligence – duty of care, breach of the duty, and damage as a consequence of the breach of duty. Once a duty of care has been established, then the other two elements will be considered. Does a healthcare worker owe a duty of care to a patient who has a highly infectious disease? How far does the duty go in a pandemic? For health workers in the public sector, the answer would be in the affirmative. For healthcare workers in the private sector, the answer would be dependent on whether this is a patient that they had specifically established a relationship with i.e. through contract. However, as has been seen above, the healthcare worker, even in the private sector may find themselves statutorily and constitutionally bound to provide care to any patient who seeks their support or who is in an emergency situation. If the foreseeable harm as a result of being turned away upon seeking medical attention materialises, then the health worker may be liable for negligence.

Aside from these statutory and common law obligations, a healthcare worker's refusal to treat can be construed as discriminatory and contributing to the stigma that the infectious condition already carries. In Kenya, there is a significant level of social stigma that is attached to the coronavirus disease that would be fuelled if medical discrimination were to also occur.

V. The Right to Refuse Unsafe and Hazardous Work

The COVID – 19 pandemic has brought to the fore, many challenges and weaknesses in the healthcare system in Kenya. Not only does the health system not have a resilient built in surge capacity, but the working conditions

[16] Health Act, No 21 of 2017, section 12(2)(a)
[17] Ibid, section 12(2)(b)

that healthcare workers are subjected to, are in violation of their international, constitutional and statutory rights to decent, safe and healthy working conditions. Health workers, particularly the frontline workers, face a myriad of hazards and risks as they attend to patients during the pandemic. The hazards include "pathogen exposure, long working hours, psychological distress, fatigue, occupational burnout, stigma and physical and psychological violence."[18] The risks are higher for the frontline health workers – the first responders, EMT specialists, ICU specialists, nurses, and physicians as well as ambulatory health workers.

The dilemma that this paper seeks to bring out lies in the two-pronged question i.e. what are the acceptable levels of risk that healthcare workers should face in dealing with patients with highly infectious diseases like COVID – 19? How do you protect the rights of patients while not ignoring the rights and interests of healthcare workers to work in safe and healthy environments?

Placing the right to refuse unsafe work under individual employment law would mean that a hazard is defined and would have to meet a certain pre-determined legal standard for the worker's rights to be enforced. The framework that would be needed would entail the following:

a. A determination would be needed of the type of hazard that would justify a refusal to work
b. A mechanism needs to be put in place to assess the risk levels in the workplace
c. A standard for reviewing a worker's perception of danger
d. A way of allowing the employer to respond to the complaint of danger and of the refusal to work
e. Legal limitations or boundaries of the worker's refusal to work, that would give the employer the right to take certain actions such as

[18] See *https://www.who.int/news-room/detail/28-04-2020-who-calls-for-healthy-safe-and-decent-working-conditions-for-all-health-workers-amidst-covid-19-pandemic* accessed 28th August 2020

disciplinary measures, termination of employment or replacement with another worker.

It is also part of the Decent Work and Future of Work Agenda of the ILO, as well as part of the Sustainable Development Goals.

The neo-liberal tendencies within the labour sector, including the public sector, have led to commodified views of labour, and workers seen only as a means to an end – the employer's end. A commodified view of labour would cause an employer to dismiss an employee and tell them to find alternative work should they find their current working circumstances unbearable. However, the concept of safe work nullifies the concept of commodification of labour and seeks to promote a social justice agenda for the worker as well as their right to decent and safe working conditions.

VI. Is there a Right to Refuse Unsafe Work in Kenya?

To address this question, it is prudent to consider the various grounds/basis upon which the right could be founded.

International Regulatory Framework

By virtue of Article 2(5) and (6) of the Constitution of Kenya, there are several international instruments and general rules that form the basis of the right to refuse unsafe work.

Under international human rights law, the right to safe and healthy working conditions is a component of the right to just and favourable working conditions, as set out in the International Covenant of Economic Social and Cultural Rights.[19] The right to refuse work is then considered as a corollary of the right to just and favourable conditions of work as well as the right to work.[20] The right to work, is the right to decent work which recognises and

[19] Article 7, ICESCR
[20] Article 6

protects the fundamental rights of the worker.[21] According to Hilgert,[22] it is also considered an aspect of the freedom of association because it entails a worker exercising their right to dissent against inhumane and indecent working conditions. Workers are able to collectively form associations to bargain for better working conditions, and to have the bargaining power to withdraw labour should their concerns not be addressed. He argues that anchoring this entitlement within human rights enables workers to "act to improve their working conditions, not in order to enforce pre-determined health or safety regulations, but through their status as workers."

In line with the ILO Constitution which provides for the protection of workers from sickness, disease and injury at work, certain instruments and standards have been developed which are key to member states and signatories to those instruments, regarding safe and healthy conditions of work and the right to refuse unsafe work. The key instrument under the ILO regime is the Occupational Safety and Health Convention and its Recommendation. Member states are required to formulate an occupational safety and health policy that provides ways of minimising and eliminating hazards within the work place that cause accidents and injuries to workers in the workplace.[23] The Convention also provides that workers should not be subject to disciplinary measures as a result of undertaking actions in conformity to the measures that are contained in the nationally formulated policy.[24] Article 13 of the Convention provides for the right to refuse unsafe work in the Convention. It states that:

> *"A worker who has removed himself from a work situation which he has reasonable justification to believe presents an imminent and serious danger to his life or health shall be protected from undue consequences in accordance with national conditions and practice."*

[21] General Comment No 18 on the Right to Work
[22] Jeffrey Hilgert, "Hazard or Hardship: Crafting Global Norms on the Right to Refuse Unsafe Work" (2013) PP53 - 54
[23] C. 155 – Occupational Safety and Health Convention, 1981 (No. 155), article 4
[24] Ibid, Article 5(e)

What the worker must do is to report to his or her immediate supervisor "any situation which he has reasonable justification to believe presents an imminent and serious danger to his life and health." The employer has the obligation to take remedial action and "the employer cannot require workers to return to a work situation where there is continuing imminent and serious danger to life or health." a social dialogue approach is encouraged where the employer and employees engage in discussions as to the threats and what measures can be taken to eliminate them. Unfortunately, Kenya is not a signatory to this Convention. Lessons, however, can be learned from its provisions as to what type of framework can be useful in a domestic situation.

In the present situation in Kenya, the threats to the lives and safety of healthcare workers have been outlined previously. The on-going healthcare workers' strike in various counties is evidence of the threat that they feel towards their health and lives. There are inadequate PPE's and the available ones are of sub-standard quality, leaving them at risk of being infected as they attend to patients. The testing protocols and speeds are also a threat to them, as they could be attending to admitted patients who have the virus, and yet the results would be released after they have already been exposed to the patient without the proper protective gear. The long working hours and the work related stress associated with that and the stigma are also combined work related threats to their health and lives. One can argue that there was no time to conduct a health facility readiness assessment to address the concerns that the Covid – 19 pandemic brought with it. Yet, the hospitals needed to still open its doors to patients. The emergent nature of the pandemic meant that, at the time when the numbers of infections were still low, health facilities would have been equipping and preparing their workers for the risks involved. The World Health Organisation (WHO) in June 2020, released a rapid hospital readiness checklist that is useful to audit the conditions of the working environment for healthcare workers.[25]

[25] WHO, "Rapid Hospital Readiness Checklist: Harmonised Health Service Capacity Assessments in the Context of the COVID – 19 Pandemic" Interim Guidance (June, 2020)

Constitutional Basis

Any right to refuse unsafe work would first be anchored in the right to dignity of the worker. Article 28 of the Constitution provides that: "Every person has inherent dignity and the right to have that dignity respected and protected." Since labour is not a commodity and cannot be separated from the worker, the dignity of the worker must be protected at all times in the workplace. Any factors which would undermine the dignity of the worker in the work place, must be minimised or eliminated. Dignifying the worker, particularly in a capitalistic society, would mean that the worker has a choice to refuse work that devalues and demeans them not just as a worker, but as a human being.

Article 41 of the Constitution, creates a general protection for workers to have the right to "fair labour practices" and to "reasonable working conditions." The Employment and Labour Relations Court has defined what fair labour practices are in this way:

> *"... it is the opinion of the court that the right to "fair labour practices" encompasses the constitutional and statutory provisions and the established work place conventions or usages that give effect to the elaborations set out in Article 41 or promote and protect fairness at work. These include provisions for basic fair treatment of employees, procedures for collective representation at work, and of late, policies that enhance family life while making it easier for men, women and persons with disabilities to go to work."*

Protection of the right to refuse unsafe work can also be anchored within the right to the highest attainable standard of health[26], as well as the right to life.[27]

Statutory Protection of the Right to Refuse Unsafe Work in Kenya

There is little doubt as to the nature of the employer's duty to provide a safe and healthy working environment in Kenya. Indeed, there is a substantial body of jurisprudence to back this. The employer's obligations under the

[26] Article 43(1)(a), Constitution of Kenya 2010
[27] Article 26(1) Constitution of Kenya, 2010

Occupational Safety and Health Act are quite clear.[28] The employee is also under a duty to "ensure his own safety and health and that of other persons who may be affected by his acts or omissions at the workplace."[29]

There is however, interestingly a little utilised and implemented provision within the OSHA that seems to implicitly protect the right to refuse unsafe work for employees. Section 14 of the OSHA provides that:

> *"Every employee shall report to the immediate supervisor any situation which the employee has reasonable grounds to believe presents an imminent or serious danger to the safety or health of that employee or other employee in the same premises, and until the occupier has taken remedial action, if necessary, the occupier shall not require the employee to return to a work place where there is a continuing imminent or serious danger to safety or health."*

It further provides that:

> *"An employee who has left a workplace, which the employee has reasonable justification to believe presents imminent and serious danger to life and health shall not be dismissed, discriminated against or disadvantaged for such action by the employer."*

Several points need to be noted here. Firstly, the right to leave the workplace is couched as an individual employment right rather than a collective right. This means that this right is not the same as industrial action which is a collective right that can only be exercised through a trade union.[30] It therefore implies that even if other employees do not complain, a particular employee who has reasonable grounds to believe there is imminent and serious danger to their life and health, is permitted to refuse that unsafe work. This view however, does not seem to have been applied in this country going by the available jurisprudence. The Court was of the view that it must be all the employees who feared for their safety in order to warrant consideration

[28] Occupational Safety and Health Act, 2007 sections 6 - 9
[29] Occupational Safety and Health Act, 2007 section 13(1)(a)
[30] See the Provisions of the Labour Relations Act 2007

of the right to refuse unsafe work.[31] Secondly, the leaving of the workplace due to the threat of imminent and serious danger, should not be construed as an absconding of their duties or absenteeism as is understood under the Employment Act.[32] The employee should therefore not be subjected to disciplinary proceedings or summary dismissal from employment. There is protection against retaliatory dismissal. Finally, the provision seems protective of employee rights but does not elaborate what is meant by "imminent and serious danger" or "reasonable grounds".

Does a pandemic pose a threat of imminent and serious danger for the healthcare worker? The answer is in the affirmative if the risk of contracting the infection is significantly higher in the workplace than it is in the general community. The employer is therefore under an obligation to not only put in protocols for safety and reduction of chances of infection, but also to provide the protective equipment necessary to minimise infection from the patient to the healthcare worker. Lessons can be drawn from a country like Canada which has a well-developed regime for the right to refusal of unsafe work. The four main criteria that labour boards in Canada have set out for the right of refusal of unsafe work are as follows:[33]

a. There must be an honest belief by the worker that their health, life and wellbeing are in danger

b. The belief must be reasonable, making the test an objective one. It would entail considering whether another healthcare worker in the same position as the complainant would also refuse to work under those circumstances

[31] Kenya National Union of Nurses v Nairobi County Government & 5 Others (Cause No 593 of 2015, ELRC, NBI) at paras 89-91
[32] Employment Act, 2007 section 44
[33] Cara E. Davies and Randi Zlotnick Shaul, "Physicians Legal Duty of Care and Legal Right to Refuse Work during a Pandemic" (2010) 18 (2) CMAJ 167

c. There must be communication to the supervisor in a reasonable and adequate manner. The reasons for refusing the unsafe work must also be stated.

d. The danger must be sufficiently serious, immediate and "more than a matter of repugnancy, unpleasantness or fear of a minor injury."

There are however limits to the refusal of the right to unsafe work. If the hazard is acceptable for the kind of work involved, then it may not be in order for the worker to refuse the unsafe work. There are two types of acceptable hazards – those that are intrinsic to the particular profession or work and those that are part of the normal job description. For healthcare workers, it may be argued that there are some dangers that are inherent to the profession and to the job. They must accept those inherent risks and those that are part of the normal working conditions. Another limitation to the right to refuse unsafe work would be if the refusal puts the life, health or safety or another person in danger. It may be argued that in a health facility where there are a number of health workers who can cover for the withdrawal of a particular employee, then the right can be exercised. However, if there are not enough health workers or if that health worker is alone in some remote part of the country, then they may not refuse the work.

The Health Act does not specifically give the right to refuse unsafe work, but does give the healthcare provider the right to refuse to treat a patient if they are "physically or verbally abusive or who sexually harasses him or her, except in an emergency situation where no alternative health care personnel is available."[34]

Conclusion

Is there then a duty to treat on the part of health workers and is there a corresponding right to refuse unsafe work during a pandemic? The discussion in this article brings out the following conclusions:

[34] The Health Act No 21 of 2017, section 12(1)(c)

There can be construed both a legal and ethical duty to treat during pandemics and emergency situations. There is also a legal right to withdraw work when the environment is unsafe and a threat to the life and health of the healthcare worker. What is required in this country, is a clear framework on the circumstances under which these duties and rights can be exercised, the tests that will be used to determine the imminence and seriousness of the threat to health and life, the standards that will be used to judge the particular perception of the healthcare worker of the danger posed to them (for example, a pregnant health worker, or a health worker with underlying susceptibilities e.g. diabetes, heart conditions, etc.) and an audit of the mitigation measures that the employer has put in place. Examples of some mitigation measures would be: Safety protocols, adequate PPE's of acceptable quality, mitigation policies for long working hours, quarantine and isolation, increased hazard allowances, payment for extra personal expenses incurred as a result of prolonged separation from family, insurance or free medical treatment for healthcare workers and their families who contract the infection. The regulatory framework should clearly set out the rights and responsibilities of both the employee and the employer during a pandemic, as well as levels of compensation and remedial measures should the risk of infection or even death materialise.

The reality is that this may not be the only pandemic or emergency public health situation that the country will face in the future. Sorting out these ethical and legal dilemmas now, when the country is in the throes of the COVID – 19 pandemic, will better secure health services to patients by avoiding industrial action by health workers, and will better protect health workers and give them the motivation to work and save lives during a pandemic.

Effectuating the Doctrine of Eminent Domain: Sustainable Principles for Compulsory Land Acquisition in Kenya

By: ***Michael Otieno Okello*** [*]

Abstract

The doctrine defers to the Constitution, such that where there is a lacuna, the courts construe the constitutional provisions and a corpus of judge made law and adjudicate on case by case basis, with unanimous, variance in dissenting or concurring opinions. This paper critically analyzes the doctrine of eminent domain, the controversies that enshroud its prospects and the effect of sustainable principles on right to property. The empirical findings widely show a consensus on the rationale the doctrine, namely; public use, benefit or interest. The same is either broadly or narrowly construed. Secondly, right to property like any other right and fundamental freedom is inherent, though western jurisprudence have exalted economic right conception. It is apparent that in fact, the prospects and validity emanate more from the economic right conception rather than fundamental right in law. Nevertheless, it is submitted that expropriation should follow due process and with prudent balance between the public interest and right to private property.

The limitation on the right to property as a matter of law and in fact, is usually coupled with a case for public interest or use, prompt payment in full of just compensation, fair administrative action, and due to its multidisciplinary nature, requires a stakeholder engagement. On the other hand, where a probative case for public use or interest is not had, the pre-emptive rights should be effectuated, resulting to lawful revocation of such

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expropriation in favour of immediate owners of expropriated land. It is submitted and recommended that the expropriation process be widely participatory, transparent, well documented and fault proof through analytical, evaluative, with an innovative mechanism for monitoring and evaluation of its efficacy to achieve the public good. Ultimately, any public entity or its acquiring agency should not depart from the public trust principle if it needs to hold on to its legitimacy.

1.0 Introduction

Land acquisition is a result of the present global land rush for emerging trends in development; renewable energy, water and sanitation infrastructure, food and agricultural activities, real estate and transport projects; such as the biofuel industries, oil and gas, geothermal and wind power farms, standard gauge railways, development or expansion of inland and coastal ports, flag ship projects and effect of global trends in urbanization, suburbanization and agglomeration of establishments both in the suburbs and within urban inner cores. The demand for land is therefore almost inelastic while supply remains almost fixed, as competition, the rush and issues emerge. The governments and private entities alike cannot avoid the necessity, on the basis of among others, public interest and profit motif respectively.

The Constitution of Kenya, 2010[1] (and indeed in the Constitutions of other jurisdictions such as, Republic of South Africa[2], Ghana[3], Uganda[4], Federal Republic of Nigeria[5] and United States) inter alia, obligates the states to protect, promote and support the right to property. In order to address the mischief of deprivation of this right, the Constitutions have placed

[1] Constitution of Kenya 2010.
[2] *S. Keith, P. McAuslan, R. Knight, J. Lindsay, P. Munro-Faure and D. Palmer. Compulsory Acquisition of Land and Compensation. (FAO Land Tenure Series, 2008).*
[3] *Ashanti Goldfields vs the People of Akrofoum* [2004] Ghana Court of Appeals 191 of 2004.
[4] UGANDA. (1984). The Constitution of the Republic of Uganda. [Kampala],.
[5] *Alhaji Tsoho Dan Amale V Sokoto Local Government & Ors* (In the Supreme Court of Nigeria).

safeguards, and statutes give effect to them. The legal frameworks in Kenya guarantee everyone not only the right to own property of any description, but also in any part of Kenya[6]. The Constitution however qualifies the right to property: such that it can be deprived for public use or purposes with special measures including just prompt compensation and access to court for reprieve linked to any claims instituted by individuals or associations whose rights are affected[7].

The right to property (just like any other right under Kenyan Bill of rights) [8] is has to be justified[9], to the extent that it is inter alia, reasonable, and justified in an open and democratic Society, and based on human dignity, equality and freedom, among other relevant factors [10] In the context of eminent domain doctrine, the limitation of right to property (for public use or public interest is a relevant and justified. The law lays emphasis on proportionality and nexus between such a limitation and its purposes[11].

2.0 Foundational Concepts on Expropriation

According to John Locke[12], state of nature preceded the governments, and where people did not have right to oust or *take* the property of others. The property was acquired, possessed and owned as a natural right. Utilitarian

[6] Constitution of Kenya ch 2 (Any part of Kenya should be interpreted under article 5 as read with article 6 (1) and article 260.
[7] Ibid IV (art 40 (1) read together with article 65.
[8] Ibid see article 24 together with article 40 (3) on justifications for deprivation of right to property for public purpose or in the public interest with prompt payment in full, of just compensation and right of access to courts of law for redress in Kenyan .
[9] Ibid 4 (Bill of Rights).
[10] Ibid.
[11] Ibid 4 (under article 24 read entirely, in the context of right to property and its definition under articles 40 and 260 respectively).
[12] Yusuf Kiwanda, *The Exodus of Law and Legal Methods* (First Edition, Law Africa 2016).

theory departs from the idea of property as a natural right[13]. David Hume[14] believed that for a common good, individuals had to concur with the system, through a social convention or 'social contract' where they obeyed rules that further a mutual interest and general public utility[15]. According to Bentham, property rights is in a system of political and social decisions as opposed to that of morality (as was in natural law). According to Pufendorf[16], right to expropriate private land also known as 'eminent domain' was justifiable only when public necessity demands it; such that property of any subject so urgently needed at the time, could be seized and be used for public purposes. Pufendorf noted that where the goods of the subjects who are ousted are more valuable, the allotted share should be relinquished to the state[17].

Scholars like Ellen[18] have questioned why Hugo Grotius theory; while defending the right to ownership, implied that private power over property was antecedent, yet was so easily given the government; a mere creature of human consent, created by human compact. [19] Ellen[20] asks whether the

[13] Samantha Hepburn, *Principles of Property Law* (Second Edition, Cavendish Publishing (Australia) Limited Pty 2001) 9 (In the late 18th Century, this theory was thought to support patronage amongst elitist Government and deemed vulnerable to favour individuals over public policy. In History of America, James Madison and Jefferson considered this conception as unfavorable to American Nationalism, Republicanism. The duo highly criticized Hamilton for projecting the David Hume's Conception that was thriving in the British Systems of Government).
[14] Jay Cost, *The Price of Greatness : Alexander Hamilton, James Madison and the Creation of American Oligarchy* (First Edition, Basic Books 2018) 21.
[15] Samantha Hepburn, *Principles of Property Law* (Second Edition, Cavendish Publishing (Australia) Limited Pty 2001) 9 (In the late 18th Century, this theory was thought to support patronage amongst elitist Government and deemed vulnerable to favour individuals over public policy. In History of America, James Madison and Jefferson considered this conception as unfavorable to American Nationalism, Republicanism. The duo highly criticized Hamilton for projecting the David Hume's Conception that was thriving in the British Systems of Government).
[16] Ellen Paul, *Property Rights and Eminent Domain* (First, Transaction Publishers 1986) v Quoted Samuel Pufendorf, De officio Homines et civis, Tit. II, CH. 15 1758.
[17] Ibid.
[18] Ellen Paul (n 16).
[19] Ibid.
[20] Ibid.

naturalists found eminent domain to be so much part of nature of government that it would be inconceivable without it. [21] This is answered by Bynkersheek, who declared that the state could not survive without eminent domain, which authority no man of sense questions. The theoretical conceptions, while recognizing right to private property and existence of rules, justify necessity for expropriation under certain grounds, public good, good end and utility. The power of eminent domain was therefore presumed indubitable[22]

3.0 Contemporary Principles in Eminent Domain

The term 'Compulsory acquisition" simply put refers to the power of the State to deprive or acquire any title or interests in land for a public purpose subject to prompt payment of compensation[23], the lack of which defeats theoretical and legal justification of eminent domain. The following principles guide in execution of the *taking* process:-

3.1 Public use and Public Interest

The states regulation of public use can be viewed in two approaches. Firstly, the *narrow approach*, restricts acquisitions to government initiatives, and limiting public use to use by the public. In this approach, even when private companies delegate power to *condemnation*, the projects when completed would be open to the public who had entitlement to use them by right[24]. Secondly, a *broad approach* considers public use in a more permissive way to mean, *public benefit, public welfare, public interest, public advantage* in more nebulous way[25]. This approach has hitherto exalted the economic right theory over right to property rights as a fundamental right. [26] According to

[21] Ibid.
[22] Ibid.
[23] *S. Keith, P. McAuslan, R. Knight, J. Lindsay, P. Munro-Faure and D. Palmer. Compulsory Acquisition of Land and Compensation. (FAO Land Tenure Series, 2008)* (n 2).
[24] Ellen Paul (n 16).
[25] Ibid.
[26] 'Hoopes, Neal (2013) "The Fundamental Flaw of Eminent Domain Jurisprudence," Brigham Young University Prelaw Review: Vol. 27 , Article 10.'

this broad approach, *Public use* needed not be construed literally for usage by public, but for *public benefit or general welfare*[27]

It is judicially held by most western jurisdictions to the effect that it has fostered economic rights and washed the distinction between public use and private purpose [28] In Kenya, the law regulates the use of any land or any interest in or right over any land, in the interest of defense, public safety, public order, public morality, public health or land use planning.[29]

3.2 Standard in Assessment of Just Compensation (AJC)

The Land Value (Amendment) Act[30] which is in tandem with Land (AJC) Rules[31]provides for process and context under which assessment of just compensation is done. The basis of assessment (valuation) is Market value as at the date of publication in the Gazette of the notice of intention to acquire the land from persons interested at the time of taking possession of the land. The assessment inter alia takes consideration of:-

1. *Injurious Affection* where damage is sustained or likely to be sustained in the acquisition) affecting moveable or immovable or actual earnings.
2. *Severance* where damage sustained or likely to be sustained by persons interested severing the land from his or her other land;
3. Encumbrances and overriding interests where any express or implied condition of title or law restricts the use to which the land concerned maybe put;
4. '*Disturbance'* Allowance equal to fifteen per centum of the total assessed market value is added thereupon to compensate for disturbance

[27] *Kelo v New London, 545 US 469 (2005)*.
[28] Ellen Paul (n 16).
[29] Constitution of Kenya Ch 5 (as read in article 66 and the entire chapter purposively).
[30] The Land Value (Amendment) Act 2019.
[31] Land (Assessment of Just Compensation) Rules 2017.

5. *Restitution*, where the loss to the must be completely made up to affected persons, to cover reasonable expenses incidental to the relocation/ change of residence or place of business damage genuinely resulting from diminution of the profits of the land between the date of publication in the Gazette (notice of intention) and date Commission takes possession of the land.

3.3 Prompt Payment of Compensation in Full

When property is compulsorily acquired by the Government, it vests in the Government. The previous owner merely loses his rights and title to his property; he does not in any sense transfer the property. Sheridan J stated in *Commissioner of Lands v Essaji Jiwaji & Public Trustee* that expropriation is not in any sense a transfer the property as it were in the normal conveyance and assignment process. [32] This implies that compensation is payable for the compulsory acquisition of land is not deductible as it does not involve voluntary transfers. This means that, exactions are deleterious to the principle of Prompt payment in full.

It is evident therefore, that "**compensation**" almost of itself carries the corollary that the loss to the land owners, must be completely made up to them, on the ground that unless they receives a price that is equivalent to their pecuniary detriment, the compensation would not be the compulsory sacrifice[33].

3.4 Enhancement in the Value

The compensation must also be understood within the context of change in value of the subject matter versus the Highest Best Use (HBU). The acquiring entity shall ensure that due regard is had to increase in Value subject to certain qualifications, and principles[34]:-

[32] *Commissioner of Lands v Essaji Jiwaji & Public Trustee* [1978] Court Of Appeal at Nairobi Civil Appeals Nos 15 and 16 of 1978, JELR.
[33] *Horn v Sunderland Corporation* [1941] Court of Appeal in England 480, 1 All ER.
[34] Land (Assessment of Just Compensation) Rules 2017.

- The mischief of speculative intents is circumscribed where increase results from improvement by the owner or his or her predecessor after the date of publication in the Gazette of the notice of intention to acquire the land;
- The increase shall be disregarded if the use of the land or premises in a manner which could be restrained by a court or is contrary to the law.
- Public Policy Principle dictates that the increase shall be disregarded if the use of the land or premises in a manner which could or is detrimental to the health of the occupiers of the premises or to public health
- Cut of dates ensure that any outlay on additions or improvement to the land, will be avoided if incurred after the date of publication in the Gazette of the notice of intention to acquire land, unless the additions or improvements were necessary for the maintenance of any building in proper state of repair.

3.5 Fair Administrative Action

The relevant statute laws are contemplated in the Constitution to give effect to *fair administrative action*[35] when enacting, interpreting and applying legislations[36]. This is applicable in compulsory acquisitions, a notable and process that limit fundamental, economic and sociocultural aspects attached to the right to property. In the nutshell, the national values and principles of governance requires [37] and administrative law and practice, accords every person the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair such as those connected with eminent domain[38]. When it is expeditious, we ensure execution with speed and efficiency. Effectiveness measures the degree of success in producing a desired result. Procedural fairness, is ensured through adherence to the set out processes, procedures and compliance requirements at each stage, time and aspects. Due procedures involve consultations, right to access to

[35] Fair Administrative Action Act 2015.
[36] Constitution of Kenya n see article 10 (1) b.
[37] Ibid see article 10 (1) a.
[38] Ibid see article 10 (2).

information, and due regard without error of facts or law nor human rights violations. The acquiring entities are expected to be reasonable, in determining facts, issues, timings, claims and remedies.

3.5 Equity as the Basis of Equivalence in Compensation

Land Act provides that expropriation is subject to, prompt payment of just compensation in full to all persons whose interests in the land have been affected. [39] This requires strict adherence to procedures and direct engagement of the affected persons[40], as held in *Patrick Musimba v National Land Commission & 4 others* [41] The National Land Commission further made rules to regulate the assessment of just compensation[42]. It was so cited in *Patrick Musimba's case*[43] *and Katra* [44] (supra) where *just* was imbued within the contexts of one which can be equated to restitution, as an equivalent to the direct loss suffered by the owner of acquired property.

It is now trite practice globally, that compensation is equal to the pecuniary detriment. The affected persons should not receive less or more. The question arise as to whether state should pay highest best use of the land or pay restitution of the actual loss on the current use. What if the land owner claims compensation for both?

3.6 Sustainability Principles

Compulsory acquisition is inherently disruptive. Even when compensation is generous and procedures are generally fair and efficient, the displacement of people from established homes, businesses and communities will still entail significant human costs. The rationale for eminent domain as against

[39] Land Act 2012 (6 of 2012) s 111.
[40] Ibid 117–133.
[41] *Patrick Musimba v National Land Commission & 4 others* [2016] High Court of Kenya, Nairobi (Constitutional and Human Rights Division) Petition No. 613 of 2014, eKLR.
[42] Land (Assessment of Just Compensation) Rules 2017.
[43] *Patrick Musimba v National Land Commission & 4 others* (n 41).
[44] *Katra Jama Issa v Hon Attorney General, Kajiado County Government, The National Land Commission, Kenya National Highways Authority* [2018] Environment and Land Court At Kajiado Petition 14 of 2017, eKLR.

right to property since both further legitimate aims is on proportionality and compensation to restore livelihoods for purposes of sustainability. Therefore, the courts of law and land based administrative bodies should continue to address the *public interest* or *public use* question and any claims deprivation of right to property to ensure due regard to law and fair administrative action.

4.0 Conclusion and Recommendations

It is submitted that expropriation should be viewed holistically by the state, with deference to the constitution, on the basis of public interest or purpose. There is universal consensus on the need for Assessment of just and fair compensation. The procedures and elements vary from state to state as well as whether compensation need to be paid. However, it is generally considered that compensation should be prompt, and paid in full with a forum for adjudication of disputes.

The process should also be viewed from International Human Rights Perspective, characterized by the right of access to information, informed consent, upholding the rights and dignity of all including special categories and minorities. In effect, the activities following the *takings* must be ecosystem management based to further environmental sustainability. The principles of good governance and national values will ensure that the process does not amount to land grabbing, as conceived in Tirana Declaration [45] . Since the rubrics of the process is multifaceted, a multidisciplinary approach and engagement should be considered to cater for diverse expertise and integrated livelihood restoration requirements.

The processes should be widely analytical to ensure proper baseline data on the affected persons and communities, household and property census, entitlement matrix, just and fair compensation and evaluation of the implementation cycle. The need for innovation is apt on the vogue, as it yields integrated digital data base capturing personal geodetic and legal descriptions within an interactive Leger system with back up cloud systems. Ledgers and block-chain should create ledges to overlay aspects of cadasters,

[45] International Land Coalition (ILC), 'Tirana Declaration' (2011).

persons affected, when they were paid, what amounts, valuation records, any grievances and how they were redressed and livelihood restoration strategies that were put in place.

Finally, any public institution should not depart from the public trust principle if it needs to hold on to its legitimacy. Where a solid case for public use or interest is not built, the pre-emptive rights should enable revocation of such expropriation in favour of immediate owners of condemned private land. On the basis of legitimate expectations of this principle on right of first refusal, the need for expropriation must be achieved or else the land reverts to the owners. There is a gap for reform and need for uniform standards and regulations that cover the processes and procedures of valuation and compensation with respect to acquisitions of wayleaves, which do not result to loss of exclusive rights but only loss of use.

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Is Energy Law sufficiently an Academic Discipline? A Review of selected Documents

By: ***Elim Limlim*** [*]

Abstract

The paper is informed by the in-depth analysis of three articles namely: (i) Critical Reflection on Regulation by Julia Black; (ii) Energy Law as an Academic Discipline by Adrian J Bradbrook and (iii) International Energy Law: An Emerging Academic Discipline by Alexandra S Wawryk. It was further buttressed by 3 reports from various global institutions namely: World Energy Assessment Report [2000]; United Nations World Commission on Environment and Development Report 1987 [Brundtland Report] as well as a Compendium of Sustainable Energy Laws. Based on the interaction with these resources, the presentation foundation is built on six thematic areas. First, the definition of the various operational words. Second, the energy resources. Third, the regulations. Fourth, the conceptualization of energy law as discipline as well the prevailing or the anticipated regulatory framework for Energy Law. Fifth, the conclusion. The paper establishes that Energy Law is indeed an academic discipline, and the decentered regulation format is the most appropriate.

1.0 The Preamble

Energy[1] Law is a set of rules, norms, principles, and practices that allocate the rights and duties surrounding the exploitation and utilization of energy resources between individuals and governments[2], between government and

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[1] Section 2 of Energy Act 2019: Energy" means any source of electrical, mechanical, hydraulic, pneumatic, chemical, nuclear, or thermal power for any use; and includes electricity, petroleum, coal, geothermal, biomass and all its derivatives, municipal waste, solar, wind and tidal wave power; while energy conservation is " means the efficient, economic and cost-effective production and use of energy.

[2] Petroleum Act, 2019 especially ss.57,58 and Part IV of the Act: relationship between the contractor and government, between national government and county government as well as local community in sharing the petroleum resource revenues.

between states.[3] Energy resources include both primary and secondary resources.[4] Electricity is the most important secondary source of energy as it is a derivative of the primary sources.[5] The different players in the energy sector make up the subgroups of the power industry.[6] It regulates 'the allocation of rights and duties concerning the exploitation of all energy resources between individuals, between individuals and the government, between governments and between states.[7] Talking of regulation, this analysis adopts the cybernetic[8] definition provided by Julia Black because of its essentialist aspects. Globally, there is an increasing recognition of the international law dimension of energy law among the scholars, legal practitioners and those working in any role within energy markets resulting in the emergence and development of international energy law.[9] At national level the pattern appears to be the same with the emergence of the role of the community in the wider society of regulation of energy as evidenced by the constitution for instance in land tenure systems and generally chapter five on environment and land.[10] This has resulted in the concept of the notion called 'regulatory society' in which we recognise that regulation is not 'centred' on the state, but instead is 'decentred', diffused throughout society. 'Decentred' regulation does not resonate with the globalisation debate, but also its existence and relevance go down to the subnational level.[11]

[3] Adrian J Bradbrook, (1996) Energy Law as an Academic Discipline, Journal of Energy & Natural Resources Law.
[4] Ibid
[5] Ibid.
[6] Ibid
[7] Ibid n.3.
[8] 'Regulation is the sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes, which may involve mechanisms of standard-setting, information-gathering and behaviour modification.'.
[9] Alexandra S Wawryk: International Energy Law: An Emerging Academic Discipline. Adelaide Law School Research Paper No. 2014-16.
[10] Constitution of Kenya 2010 article 63 which provides community land while Petroleum Act 2019 provides for local community share in revenue.
[11] Julia Black, (2002). Critical Reflection on Regulation.

2.0 The Resources in Energy Law

Resources means and refers to both renewable and non-renewable sources.[12] Renewable sources are also called the non-finite while non-renewable ones are also referred to as finite.[13] The finite energy sources include mineral based energy resources such as natural gas, petroleum oil, coal, geothermal, and uranium.[14] Solar, wind, tidal, and OTEC (Ocean Thermal Energy Conversion) are examples of non-finite.[15] The sources of energy which falls in either of those broad categories are:

i. Solar energy[16]: This simply means the transformation of radiation from the sun into electricity. Kenya had high insolation powers with an average of 5-7 peak sunshine hours. In 2013 the government had introduced tax over solar products but this was withdrawn after the motion to cut cost of renewable energy products. Kenya has one of the most active commercial PV systems in the world. Household solar system can be used for water pumping, power supply, telecommunication etc.[17]

ii. Hydro power[18]: This turns water in motion energy into electricity. The Kenya drainage system consists of 5 major basins for hydropower. That is Lake Victoria, Tana River, Athi and coastal area, Rift Valley and Ewaso Ngiro North River basin. It is the largest generation source of grid electricity in Kenya.[19]

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[12] Ibid n.10 article 260 provides for definition of natural resources and mentions energy while n.3 defines energy resources.
[13] Ibid.
[14] Ibid.
[15] Ibid.
[16] *https://kenyacradle.com/solar-energy-in-kenya/* accessed on 20.10.2022.
[17] *https://en.unesco.org/courier/2019-3/solar-energy-changing-rural-lives*-kenya accessed on 20.10.2022.
[18] SMALL HYDROPOWER DEVELOPMENT IN KENYA – Ministry of Energy. Accessed on 20.10.2022.
[19] *https://www.fao.org/3/X6611E/x6611e02a.htm#:~:text=The%20Rift%20Valley%20itself%20forms%20an%20internal%20drainage,surplus%20water%20resources%3A%20Lake%20Victoria%20and%20Tana%20River.* Accessed on 20.10.2022.

iii. Fossil fuels[20]: This is a general term for buried combustible geologic deposits of organic materials, formed from decayed organic matter that have been converted to crude oil, coal, natural gas, or heavy oils by exposure to heat and pressure in the earth's crust over millions of years. There are three major forms of Fossil Fuels; Coal, Oil and Natural Gas which are basically the same thing but in different forms with coal being solid, oil in liquid state and Natural Gas, as the name suggests, being gaseous. Fossil fuels are predominantly used in commercial and industrial sector either as petroleum to drive motor powered engines, gas for both domestic and commercial use and also to generate electricity e.g., diesel (Independent Power Producers use generators powered by diesel to generate electricity, for domestic or industrial use in case power blackouts). Fossil fuel usage in Kenya comprises of 1/5th of all total use, with petroleum accounting for 27% of the total energy consumption in Kenya.

iv. Biomass[21]: These are biological materials derived from living, or recently living organisms. In the context of biomass for energy, this is often used to mean plant-based material though biomass can equally apply to animal waste or both. Biomass is energy derived from organic matter. It includes mostly firewood and charcoal but can also include municipal waste or biofuels for example sugarcane to produce ethanol. Close to ⅔ of energy consumption in Kenya is by biomass, mostly firewood and charcoal which is entirely for domestic use.

[20] 15 Important Fossil Fuels Pros And Cons You Need To Know - Green Coast accessed on 20.10.2022.

[21] A Fege, "Energy From Biomass" in J Kreider and F Kreith, Solar Energy Handbook (1979), ch 25; N Smith, Wood: An Ancient Fuel with a New Future, Worldwatch Paper 42 (1981); California Energy Commission, Methanol as a Motor Fuel, Report PS00-89-002 (1989); D Hall, G Barnard and P Moss, Biomass for Energy in the Developing
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v. Energy Conservation[22]: This is more of secondary energy resource. This is because it is able to ensure that the society always has energy in store for abundant use. If the use of one resource like coal can be managed and solar is used instead then this leads to efficient planning. Energy conservation could be undertaken through least-cost planning or integrated resource planning. Exploitation of energy resources and turning them into something different that will benefit the society should be handled separately with different laws governing each because it varies in use and consumption. Certain resources when exploited in public places could be endangering and even cause health hazards. It is for such reasons that the state has to put up instruments that manage and supervise the use of individual resources.

vi. Geothermal resources[23]: This entails the 5 types namely volcanic or magmatic reserves, vapour-dominated systems, geopressured systems, hot groundwater and hot dry rocks (HDR). In Kenya, Olkaria Geothermal plant comes to mind as an example.

vii. OTEC[24]: It involves the exploitation of the temperature differential between the warm water at the ocean surface at tropical latitudes and the cold water of the deep ocean.

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[22] For a discussion of the possible types of application of energy conservation techniques and the associated legal issues, see G Thompson, Building to Save Energy: Legal and Regulatory Approaches (1980); A Brad brook, "Regulating for Fuel Efficiency in the Transport Sector" (1994) I Australasian J Na[ural Resources Law and Policy 1; A Bradbrook, Energy Conservation Legislation in Building Design and Construction (1991); California Energy Commission, California's Appliance Standards: An Historical Review, Analysis, and Recommendations (1983); S Ferrey, "Cold Power: Energy and Public Housing" (1986) 23 Harvard J Legislation 33; J-D Delley and L Mader, L'e'tatface au deft energetique (1986).

[23] S Sato and T Crocker, "Property Rights to Geothermal Resources" (1977) 6 Ecology L Q 250; D Hansen, "Water Conflicts from the Viewpoint of a Regulator" (1977) 13 Land and Water L Rev 151; K Bjorge, "The Development of Geothermal Resources and the 1970 Geothermal Steam Act- Law in Search of Definition" (1974) 46 U Colorado L Rev I.

[24] For a discussion of OTEC and the legal issues associated with it, see S Joseph, "Legal Issues Confronting the Exploitation of Renewable Sources of Energy from the Oceans" (1981) II California Western International L J 387; K Keith, "Laws Affecting the Development of Ocean Thermal Energy Conversion in the United States" (1981-2) 43 U Pittsburg L Rev I; R Krueger and G Yarema, "New Institutions

viii. Wind power[25]: Wind energy is the use of airflow to turn wind turbines thus generating electricity for supply to national grid. It currently accounts for about 2% of energy produced in Kenya.

Where there are portions of energy resources that are characterized by certainty concerning the ability to extract or utilize that resource in the future [26] it is called a reserve. The main difference between reserves, resources, and occurrences is usually the ratio of market price to cost of production. Feasibility studies are usually conducted to ascertain the existence of the resources before any decision can be made. The extraction costs are so high but with increasing technology, these costs are coming down thus making it easy to exploit existing resources while also bringing other forms into the resource circle. This is reflected in the resolution of UNECE in 1992 where it introduced a different dimension in the definition of resources to include the level of actual feasibility of extraction based on geological engineering assessment.[27] This document is an updated version of the "United Nations International Framework Classification for Reserves/Resources - Solid Fuels and Mineral Commodities", which was adopted by the United Nations Economic and Social Council in 1997 [4] and recommended for worldwide application (ECOSOC Decision 226/1997).[28] According to UNFC[29] Petroleum is defined as a naturally occurring mixture consisting of hydrocarbons in the gaseous, liquid or solid phase, it may be in both oil and natural gas forms. The resources in place of naturally occurring energy and mineral resources are described in terms of produced quantity',

for New Energy Technology: The Case of Ocean Thermal Energy Conversion" (1980-1) 54 Southern California L Rev 767; M Reisman, "Key International Legal Issues with regard to Ocean Thermal Energy Conversion Systems" (1981) II California Western International L J 425.

[25] *https://www.kengen.co.ke/index.php/business/power-generation/wind.html*> access 2:23 p.m 10th December 2021

[26] <*https://www.lawinsider.com/dictionary/proved-producing-reserves*> access 12:11 on 02 Dec 2021.

[27] <*https://unece.org/fileadmin/DAM/ie/se/pdfs/UNFC/UNFCemr.pdf*>accessed 1:50pm on 02 Dec 2021.

[28] Ibid.

[29]*https://unece.org/sustainable-energy/unfc-and-sustainable-resource-management*.

'remaining recoverable quantities, and additional quantities remaining in place. Produced quantities are the sum of sales quantities and non-sales quantities as determined at their respective reference points between a specified initial time up to a given date and time.[30] Non-sales quantities are considered to have intrinsic economic value.

Remaining recoverable quantities are the sum of sales quantities and non-sales quantities estimated to be produced at the respective reference points from a given date and time forward.[31] Additional quantities remaining in-place are quantities estimated to be in-place at the initial time, less the sum of the produced quantities and the estimated remaining recoverable quantities. Additional quantities remaining in-place are described in non-economic terms only. Their recoverability and, as a result, their economic viability, has not been assessed.[32] Therefore, from the examination of the definition of energy resources, it is evident that just as varied as the intricacies of the sources of energy are, the regulatory framework of energy law is similarly and adaptively manifested. Thus, has acquired specialization.

3.0 Energy Regulation

As observed by Bradbrook, each energy resource involves a different interface with the law in terms of its exploitation.[33] It is therefore, important that the regulatory framework of energy law is reflective of the context and the nature of the resource. The common thread must run through the framework from the superior norm to the least superior norm. The law has to reflect the national, regional and the international integration that is embedded in its practice, customs and usages. Thus, the centrality of decentred[34] regulation as averred by Julia Black is the corner stone of the energy regulation in recognizing command and control in the emerging human right anchored discharge of service in energy sector. It is on this basis that the paper proceeds to examine regulatory framework as follows:

[30] Ibid.
[31] Ibid at page 7.
[32] Ibid at page 8.
[33] Ibid n.3.
[34] Ibid.

3.1 International Framework

3.1.1 United Nations Conference on Environment and Development: Framework Convention on Climate Change.[35]

It provides its objective in Article 2 as is to achieve in accordance with the relevant provisions of the Convention, stabilization of the greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.

3.1.2 Kyoto Protocol to the United Nations Framework Convention on Climate Change[36]

The Parties included in Annex I shall, individually or jointly, ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in Annex A do not exceed their assigned amounts, calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex B and in accordance with the provisions of this Article, with a view to reducing their overall emissions of such gases by at least 5 per cent below1990 levels in the commitment period 2008 to 2012.

3.1.3 Convention on the Organisation for Economic Co-operation and Development[37]

The aims of the Organisation for Economic Cooperation and Development (hereinafter called the "Organisation") shall be to promote policies designed to achieve the **highest sustainable economic growth and employment** and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy; to contribute to sound economic expansion in Member as well as non-member countries in the process of economic development and to contribute to the

[35] *https://unfccc.int/process-and-meetings/what-is-the-united-nations-framework-convention-on-climate-change* accessed on 25.10.2022.
[36] https://unfccc.int/documents/2409 accessed on 25.10.2022.
[37] *https://english.dipublico.org/1217/convention-on-the-organisation-for-economic-co-operation-and-development/* accessed on 25.10.2022.

expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations.

3.1.4 The Decision of the Council Establishing an International Energy Agency of the Organisation

It was adopted by the Council at its 373rd Meeting on 15th November 1974. The key aim was to carry out an International Energy Program for cooperation in the field of energy, with the aims of development of a common level of emergency self-sufficiency in oil supplies; establishment of common demand restraint measures in an emergency; establishment and implementation of measures for the allocation of available oil in time of emergency; development of a system of information on the international oil market and a framework for consultation with international oil companies; development and implementation of a long-term co-operation programme to reduce dependence on imported oil, including: conservation of energy, development of alternative sources of energy, energy research and development, and supply of natural and enriched uranium; and promotion of co-operative relations with oil producing countries and with other oil consuming countries, particularly those of the developing world. There is explicit use of the word "energy".

3.1.5 Universal Declaration of Human Rights of 10th December 1963.[38]

It provides for eradication of poverty. Article 11 to 12 stipulates thus:
'…We will spare no effort to free our fellow men, women and children from the abject and dehumanizing conditions of extreme poverty, to which more than a billion of them are currently subjected. We are committed to making the right to development a reality for everyone and to freeing the entire human race from want. *We resolve therefore to create an environment –at the national and global levels alike – which is conducive to development and to the elimination of poverty.'*

[38] *https://www.un.org/en/about-us/universal-declaration-of-human-rights* accessed on 25.10.2022.

It is important to note that this is a persuasive authority that has given rise to several binding agreements. Eradication of poverty can not be achieved without energy hence implicitly supported.

3.1.6 Stockholm Declaration of the United Nations Conference on the Human Environment[39]

Under Principle 3 and Principle 5. Principle 3 commits to ensure the capacity of the earth to produce vital renewable resources must be maintained and, wherever practicable, restored or improved. Principle 5 requires that the *non-renewable resources of the earth must be employed in such a way as to guard against the danger of their future exhaustion and to ensure that benefits from such employment are shared by all mankind.* General observation is that the word "resource(s)" is the backbone of the treaty.

3.1.7 Declaration on the Right to Development[40]

Article 1 enunciates that the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural, and political development, in which all human rights and fundamental freedoms can be fully realized. Energy is part and parcel of enjoyment of this right to development.

3.1.8 World Charter for Nature of October 1982.[41]

The 24-articled document provides in article 10 that *natural resources* shall not be *wasted* but *used with a restraint appropriate* to the principles set forth in the present Charter, in accordance with the following rules: Non-renewable resources which are consumed as they are used shall be exploited with restraint, taking into account their abundance, their rational possibilities of converting them for consumption, and the compatibility of their exploitation with the functioning of natural systems. It is also important to note that the phrase "natural resource"; and the word "resources"; has been

[39] *https://www.clearias.com/stockholm-declaration/ accessed on 25.10.2022.*
[40] *https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-right-development accessed on* 25.10.2022.
[41] *https://www.refworld.org/docid/3b00f22a10.html* accessed on 25.10.2022.

repeated. Second, the word energy has been mentioned by the General Assembly in the first introductory paragraph.

3.1.9 Rio Declaration on Environment and Development of June 1992.[42]

This 27-principles document under Principle 8 provides to achieve *sustainable development* and a *higher quality of life* for all people, States should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies. Principle 2 provides for responsible exploitation of resources. Almost all the principles refer to sustainable development. It is common knowledge that energy is an essential ingredient for achievement of sustainable development and higher quality of life.

3.1.10 The Earth Charter[43]

It provides under part II for ecological integrity. It has repeatedly used the phrase "sustainable ways" and the word "development". Hence, implication of energy.

3.1.11 Plan of Implementation for the United Nations World Summit on Sustainable Development[44]

Article 8 provides for the commitment to take joint actions and improve efforts *to work together at all levels* to *improve access to reliable and affordable energy services for sustainable development* sufficient to facilitate the *achievement of the millennium development goals, including the goal of halving the proportion of people in poverty by 2015, and as a means to generate other important services that mitigate poverty, bearing in mind that access to energy facilitates the eradication of poverty. Energy is expressly provided.*

[42] *https://www.cbd.int/doc/ref/rio-declaration.shtml accessed on 25.10.2022.*
[43] *https://charterforcompassion.org/earth-charter accessed on 25.10.2022.*
[44] *https://www.un.org/en/conferences/environment/johannesburg2002* acced on 25.10.2022.

3.1.12 Decision of the Commission on Sustainable Development Ninth Session (CSD-9)[45]

The session provided for myriad aspects of energy for sustainable development namely:

[a] General Considerations: Some of the key principles here include an effective energy-mix that gives a greater share to renewable energies, energy efficiency and advances in technology including fossil fuels. The approach looks at economic and social development and responsible management of environmental resources. In view of the different contributions to global environmental degradations, States have common but differentiated responsibilities. The choice and implementation of policies to improve the ways to achieve energy for sustainable development basically rest with Governments.

[b] Issues and Options: Some of the issues and options raised is eradication of poverty as a priority for developing countries. Energy policies should align to this overriding priority. The recommendation is for governments to bear primary responsibility for developing and applying polices that ensure sustainable development considering options such as increasing use of renewable energy, encouraging energy efficiency, integrating energy considerations in socio economic programmes especially sectors like public transport, agriculture, industry, urban planning and construction. Another aspect is support of increased use of renewable both in grid connected and decentralized systems

[c] Key Issues: article 11 cites key issues of energy identified at the first session of the Ad Hoc Open-ended Intergovernmental Group of Experts on Energy and Sustainable Development, the Commission recommends the options and strategies set out. These includes accessibility of energy; energy efficiency; renewable energy; advanced fossil fuel technologies; nuclear energy technologies; rural energy; and energy and transport.

[45] *https://sustainabledevelopment.un.org/intergovernmental/csd9* accessed on 25.10.2022.

[d] Overarching Issues: research and development; capacity-building; technology transfer; information-sharing and dissemination; mobilization of financial resources; and making markets work effectively for Sustainable Development as well as multi-stakeholder approach and public participation.

[e] Regional Cooperation: The Commission notes with appreciation the efforts made at the regional level and by interest groups to discuss the key issues and formulate regional positions and programmes of action to promote energy for sustainable development.

[f] International Cooperation: In particular, international cooperation can be very effective in capacity-building, education, technology transfer, information-sharing, research and development, and the mobilization of resources, including financial resources, taking into account the above-mentioned key issues and energy sources.

3.2 Regional Framework

3.2.1 The Treaty for the Establishment of the East African Community[46]

This treaty creates a base for the regulation of energy within the East African Community. Article 101 states "The Partner States shall adopt policies and mechanisms to promote the efficient exploitation, development, joint research and utilisation of various energy resources available within the region." [47] Article 101 (2) states "The least cost development and transmission of electric power, efficient exploration and exploitation of fossil fuels and utilisation of new and renewable energy sources;" [48] this thus means that it provides for the most efficient methods of utilization of resources within the East African Community through regulation.

[46] *https://www.eala.org/documents/view/the-treaty-for-the-establishment-of-the-east-africa-community-1999-2006* accessed on 25.10.2022.
[47] The Treaty for the Establishment of the East African Community, Article 101 (1).
[48] The Treaty for the Establishment of the East African Community, Article 101 (2).

3.2.2 Southern African Power Pool (SAAP)[49]

The SAPP was created in August 1995 at the SADC summit held in Kempton Park, South Africa, when member governments of SADC (excluding Mauritius) signed an Inter-Governmental Memorandum of Understanding for the formation of an electricity power pool in the region under the name of the Southern African Power Pool. The ministers responsible for energy in the SADC region signed the Revised Inter-Governmental Memorandum of Understanding on 23 February 2006. [50] SAAP was formed so as to regulate the coordination and planning of the electricity power system in Southern African countries. It currently has twelve-member countries. SAAP also provides a solution to the challenges facing the regulation of the electric power pool in Southern Africa.

3.2.3 European Union Energy Policies[51]

These policies have been put in place in order to regulate the consumption of energy in the member states of the European Union. "The Energy Efficiency Directive (2012/27/EU), which entered into force in December 2012, required Member States to set indicative national energy efficiency targets in order to ensure that the EU reached its headline target of reducing energy consumption by 20% by 2020." [52] The policies seek to promote energy efficiency and they aim to achieve this directive through energy regulation.

3.3 National Regulation

3.3.1 The Constitution of Kenya 2010

The preamble of the constitution provides the commitment of the people to be respectful for the environment and appreciates principle of sustainability

[49] *https://www.sapp.co.zw/* accessed on 25.10.2022.

[50] 'About SAPP | Southern African Power Pool' (Sapp.co.zw, 2021) http://www.sapp.co.zw/about-sapp accessed 2 December 2021.

[51] *https://www.sciencedirect.com/topics/engineering/european-union-energy-policy* accessed on 25.10.2022.

[52] 'Energy Efficiency | Fact Sheets on The European Union | European Parliament' (Europarl.europa.eu, 2021) *https://www.europarl.europa.eu/factsheets/en/sheet/69/energy-efficiency* accessed 2 December 2021.

for posterity benefits. It also provided the sovereign power to the people and declare its supremacy and acknowledged the general rules of international law and ratified treaty or ratified convention.[53] Thus, the three introductory articles confirm the place of Energy Law in our Constitution. The paper agrees with the averments of Mussa, Lalji, Mungai, Omollo, & LLP, [2020][54] that that the Constitution accords responsibility to the government to regulate and administer natural resources on behalf of the people as per the Fourth Schedule to the Constitution.

Indeed, Article 42 provides for environmental rights, Article 66 mandates the state to regulate land use and property, Article 69 provides for state obligation in respect of environment and Article 70 stipulates enforcement of the rights while Article 71 enunciates agreement relating to natural resource. Under article 260, the constitution has expressly recognized energy resources. Given the proposition that our Constitution is heavily inspired by American and South African Constitution, it goes without mention that energy law constitutional framework is greatly common law based. This is also confirmed by the implicit reference that is accorded to the energy law by the constitution with exception of the Fourth Schedule that has directly mentioned energy policy[55]and regulation.[56]

3.3.2 Legislation.

Bradbrook opined that the allocation of rights and duties poses interesting considerations in other energy contexts. For instance, in the US, the congress enacted Public Utility Regulatory Policies Act (PURPA) in 1978[57] that provided inter alia for congenators[58] and individuals and companies which

[53] Article 2, Constitution of Kenya.

[54] Electricity regulation in Kenya: overview. Thomson Reuters Practical Law. Retrieved from *https://uk.practicallaw.thomsonreuters.com/w-028-058?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_pageContainer.*

[55] Paragraph 22 (d) of Part 1 of Fourth Schedule of the Constitution of Kenya 2010.

[56] Paragraph 8(e) of Part 2 of the Fourth Schedule of the Constitution of Kenya 2010.

[57] 16 USC ss79J-796; 824-825; 2601-2645. Germany also has similar legislation: Federal Law Gazette, vol I, 14 December 1990, at 2633.

[58] Cogeneration is the simultaneous production of electrical or mechanical energy and thermal energy. Cogeneration is sometimes referred to as "combined heat and

produces energy surplus to their own requirements the right of interconnection to the electricity grid and the right to sell excess electricity on guaranteed terms to the local power company. This act was aimed at energy conservation. The structure of electricity industry also varies from one jurisdiction to another for example in France where Electricite de France has a country-wide monopoly[59] just as it happens in Canada[60] and Australia[61] while states of the US, the electricity industry operates as a private enterprise. In Kenya, the Energy Act 2019[62] regulates the energy sector which is largely public enterprise. Some energy resources such as petroleum has been given prominence in Kenya through Petroleum Development Fund Act 1991[63] and

power" or "total energy plant". For a discussion of cogeneration technology, see California Energy Commission, Cogeneration Handbook (1982) Report PS00-82-054; F Cross, "Cogeneration: Its Potential and Incentives for Development" (1979) 3 Harvard Environmental L Rev 236; A Bradbrook, "Legal Aspects of Promoting Energy Cogeneration" (1989) 6 Environmental and Planning L J 332.

[59] See C Stoffaes, Entre monopole et concurrence (1994), ch4.

[60] In Alberta, the electricity industry is privatised and controlled by the Alberta Public Utilities Board: Public Utility Board Act, RSA 1980, c P-37. Nova Scotia Power was privatised in 1992. For other Provinces, see, eg, Public Utilities Act, RSO 1980, c 423; The Manitoba Hydro Act, RSM 1970, c Hl90 (as amended). See also L Leonoff, "Canada: Privatisation in the Electricity Sector", Paper presented at the IBA 25th Biennial Conference, Melbourne 1994.

[61] See Electricity Commission Act 1950 (NSW); Electricity Industry Act 1993 (Vic); Electricity Act 1994 (Qld); Electricity Corporation Act 1994 (WA); Electricity Corporations Act 1994 (SA) (not yet proclaimed); Hydro-Electricity Act 1944 (Tas); Electricity Act 1978 (NT). Note that the Government of the State of Victoria has recently begun to privatise the electricity industry.

[62] Preamble of the Act: Consolidate the laws relating to energy, to provide for National and County Government functions in relation to energy, to provide for the establishment, powers and functions of the energy sector entities; promotion of renewable energy; exploration, recovery and commercial utilization of geothermal energy; regulation of midstream and downstream petroleum and coal activities; regulation, production, supply and use of electricity and other energy forms; and for connected purposes.

[63] An Act of Parliament to provide for the establishment of a Petroleum Development Fund and the imposition of a petroleum development levy and for connected purposes.

Petroleum Act 2019[64] and other national laws.[65] Briefly, energy aspects are extremely diverse and require special and independent attention.

3.3.3 Policies

These includes *Feed-in-Tariffs (FiT)*[66] Policy 2012 amended in 2021[67], National Energy policy[68], Kenya Vision 2030[69] among others touching on land and environment. This is because energy law is intricately and intrinsically intertwined with land and environment.

3.3.4 Institutions

The enforcement of energy law is assigned to institution such as Ministry of Energy and Petroleum; Energy Petroleum Regulation Authority (EPRA)[70]; Energy and Petroleum Tribunal (EPT)[71]; Rural Electrification and Renewable Energy Corporation (REREC)[72]; Nuclear Power and Energy Agency (NPEA)[73]; Renewable Energy Resource Advisory Committee

[64] Preamble of the Act: AN ACT of Parliament to provide a framework for the contracting, exploration, development and production of petroleum; cessation of upstream petroleum operations; to give effect to relevant articles of the Constitution in so far as they apply to upstream petroleum operations, regulation of midstream and downstream petroleum operations, and for connected purposes

[65] Competition Act 2010; Land Act 2012; Public Finance Management Act 2012; National Construction Authority Act 2011; Environmental Management and Co-ordination Act 1999; Income Tax Act (Cap. 470 Laws of Kenya); National Transmission Grid Code; and National Distribution Grid Code among others.

[66] S.91 of Energy Act 2019.

[67] The Policy promotes the generation of electricity from renewable energy sources by enabling power producers to sell electricity generated at a pre-determined tariff for a given period. Tariffs are available for energy generated from wind power, biomass, small-hydro, geothermal, biogas, and solar resources.

[68] S.4 of Energy Act 2019.

[69] Kenya Vision 2030 | Kenya Vision 2030 accessed on 25.10.2022. The Kenya Vision 2030 aims to transform Kenya into a newly industrializing, middle-income country providing a high quality of life to all its citizens by 2030 in a clean and secure environment.

[70] S.9 of the Energy Act 2019.

[71] Wako, J., & Ngumo, J. (2020). CMS Law. Renewable Energy Law and Regulation in Kenya. Retrieved from *https://cms.law/en/int/expert-guides/cms-expert-guide-to-renewable-energy/kenya*. Also s.25 of the Energy Act 2019.

[72] s.43 of Energy Act 2019.

[73] s.54 of Energy Act 2019.

(RERAC)[74]; National Environmental Management Authority (NEMA)[75]; Kenya Electricity Generating Company Limited (KenGen)[76]; and Kenya Power and Lighting Company Ltd (KPLC).[77] These are national government institutions. The county government[78] and the Ministry of Energy & Petroleum Mining[79] also fall under institutions that play part in regulation of energy.[80]

3.3.5 Caselaw

3.3.5.1 *Friends of Lake Turkana Trust v Attorney General & 2 others* [2014] eKLR

The issue in this case was whether the Court had jurisdiction to intervene and address issues arising from any agreement entered into between the Kenyan Government and Ethiopian Government for the purchase of electricity from Ethiopia? The power was to be generated from Gibe Dam which was being built in Omo River in Ethiopia. The Omo River feeds Lake Turkana with nearly 90% of its water and hence the petitioners alleged that it was potentially devastating to the existence of Lake Turkana and sue the Government. The Attorney General used the defence of sovereignty of Ethiopia. The court found that in order to enforce a constitutional right such as the environment one, it has jurisdiction as long as the parties fall within the territorial jurisdiction of the court.

[74] s.76 of Energy Act 2019
[75] S.7 of Environmental Management & Coordination Act 1999 (EMCA).
[76] *https://kenyanwallstreet.com/kenya-electricity-generating-company-kengen-analysis/* accessed on 27.10.2022.
[77] *https://kenyacradle.com/kenya-power-and-lighting-company-ltd/* accessed on 27.10.2022.
[78] Chapter 11 of the Constitution of Kenya 2010 and part 2 of the fourth Schedule to the Constitution 2010.
[79] *https://www.petroleumandmining.go.ke/* accessed on 27.10.2022.
[80] Fourth Schedule to the Constitution 2010 provides for the functions to be undertaken.

P. Nyamweya, J posited thus:

> *'…The facts that the subject matter of the petition is an agreement entered by the Kenyan Government with the Ethiopian State, and that the alleged violations of the rights of the Petitioner arises in a transboundary context, and may have originated from transactions that were undertaken in Ethiopia do not on their own operate to limit access to this Court, or this Court's jurisdiction. This is for the reason that this Court is obliged to consider any issue raised as to whether the actions of the Respondents in this regard has resulted in a violation of the Petitioner's rights, and whether the Respondents are subject to any constitutional and statutory duties and responsibilities under Kenyan law when entering into such an agreement. Going forward, and for the avoidance of doubt, this court's jurisdiction to hear the present petition is therefore with respect to the alleged violation of the Petitioner's constitutional rights by the Respondents and the Respondents' obligations if any in this regard, and the remedies if any, that the Petitioner is entitled to.'*

Earlier on the honourable Justice had observed as follows:

> *'…in the present Petition, there is no foreign state or foreign and/or intergovernmental entity that is a party that would make this court incompetent to hear and determine this petition. The Petitioner and the Respondents are all Kenyan entities and are resident within the Kenyan territory. In addition, the subject matter of the petition before the court concerns the Petitioner's fundamental rights and freedoms, and alleged violations of the same by the Respondents. The Petitioner also bases its claim on the Kenyan Constitution including its Bill of Rights which is applicable within the Kenyan territory. This court can therefore apply the Constitution to the parties herein and has jurisdiction to this extent pursuant to Articles 22, 23, 70 and 165(3)(b) of the Constitution.'*

This case also considered the question of whether the fundamental rights and freedoms of the Petitioner have been violated and the Respondents' Obligations?

The learned Judge concluded, and we replicate it here:

'…Specifically in relation to the right to and access to environmental information, Article 69 (1) (d) of the Constitution places *an obligation on the State to encourage public participation* in *the management, protection and conservation of the environment.* This court in exercising its jurisdiction under the Environment and Land Court Act section 18 is also obliged to take into account the principle of sustainable development including the principle of public participation in the development of policies, plans and processes for the management of the environment and land…It was stressed in Chapter 8 of Agenda 21 that all stakeholders in the environment should have access to the relevant environmental information relating to products or activities that have an environmental impact. Principle 10 of the Rio Declaration on Environment and Development, 1992, also provides as follows:

> *"Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision – making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."*

The Stated thus:

> *'…In the present petition the Respondents and Interested Party admit that there are intentions of importation of electric power from Ethiopia. The Petitioner has shown that the harnessing of such electricity in Ethiopia is likely to affect its right to life and a livelihood and its cultural and environmental heritage as detailed out in the foregoing. I find that this risk imposes a positive duty upon the Respondents and Interested Party to provide the Petitioner with the all-relevant information in relation to importation and/or purchase and transmission of electric power from Ethiopia…It is thus the finding of this court that the Respondents and Interested Party as trustees of the environment and natural resources owe*

a duty and obligation to the Petitioner to ensure that the resources of Lake Turkana are sustainably managed utilized and conserved, and to exercise the necessary precautions in preventing environmental harm that may arise from the agreements and projects entered into with the Government of Ethiopia in this regard.'

3.3.5.1 Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR

Among other issues for determination, the court was invited to pronounce itself on the question of:

a. Whether lack of the involvement of the County Government rendered the Coal Mining Project legally infirmed?

On the first issue, the court observed thus at paragraph 101-102:

'…One question we are yet to answer but whose answer is suggested by our approach above is whether it is fatal that the Kitui County Government was not involved at all in the Coal Mining Project. What is the proper role of the county government in this process" …? With the dispensation of the new Constitution, we now have a devolved government in Kenya. At the national level Public participation is enshrined under Article 10 of the Constitution as part of our national values. At the county level, Article 174 (c) provides that the objects of the devolution of government are to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them. It is, therefore, the Constitutional expectation that counties will be the forums where public participation is perfected on some of the most pressing issues. Yet, in this case, there was no conscious or even feigned attempt to involve the Kitui County Government in the Coal Mining Project.'

At paragraph 104-106, the learned bench concluded:

'…We are disappointed that the Kitui County Government chose not to participate in the legal proceedings even after we issued several express invitations to it to be represented as a party or amicus in the suit. All our efforts to engage, *in view of the polycentricity of the issues,* to get the most wholesome analysis were rebuffed by the County so we did not have the benefits of their arguments. We are, however, persuaded by the

> two-track position taken by Mr. Imende on the issue. *An issue involving prospecting and concessioning of minerals that potentially could affect hundreds of thousands of people in a county must be done in consultation with the County Government – even if the primary activity is assigned to the National Government in our scheme of devolution. We believe that this is the logical consequence of the cooperative and collaborative two-tier overnance system imposed by our Constitution. This is the future prescribed by the Constitution. Hence, we hope that the National Government will involve the County Governments, as repositories of local priorities and preferences, in public decisions that would affect many of the county citizens. We believe that is the Constitutional imprimatur…we fully expect, as expressed above, that the National Government must, as a consequence of the requirement of public participation, involve County Governments when it comes to negotiations for all contracts or partnerships to exploit natural resources.'*

The jurisprudence emerging from the above two Kenyan Cases is a testimony to the demonstration by Bradbrock[81] in using the Australian Case of *New South Wales v CommonWealth [1976] 135 CLR 337.* In this case, the issue was on whether the federal law of Seas and Seabed Land Act 1973 which was vesting control of energy reserves to the federal government was constitutional since the constitution was reserves residual on energy issue to the state and enumerated powers on federal government. The High Court in this case upheld the legislation insisting that the federal government has the control over territorial sea and internal waters of Australia hence control over territorial sea and continental shelf. By a majority decision, the court also held that the jurisdiction of the states ends at the ordinary low watermark. Thus, all offshore petroleum and gas fell within the federal control. It is also important to note that the federal government attracts jurisdiction to itself over the industry trade and commerce pursuant to ss.50[1] and 50[20] of the Constitution in regard to cooperation power. In our Kenyan context, residual powers have been expressly reserved for the National level. These aspects are cardinal in energy law.

[81] Ibid n.3.

4.0 Conceptual Analysis

4.1 Is Energy Law sufficiently an Academic Discipline or Not?

It is therefore a foregone conclusion that energy law is an academic discipline due to the following traits:

a. First, energy law is wide in scope and extent. This is what Bradbrook has categorized as social and jurisprudential considerations. It is only through its independent teaching and research that would provide substantive comprehension. Under social consideration, energy law is a multi-disciplinary subject encompassing engineers, scientists, architects, and behavioural scientists thus a classic panacea for the drift towards academic and professional isolationism. It also offers a potential new avenue of the study in law and technology field just as it has manifested in the medical and computer technology. Security factors such as the willingness of the US to intervene militarily in 1991 to oust the Iraqi forces from their occupation of Kuwait under the pretext of democracy is suspected to be attributable to the concerns of the United States to ensure orderly flow of Petroleum product from the Gulf region. Other security concerns in regard to resources include South China Sea issue[82]; the Falkland (Malvinas Island issue)[83] and recently Kenya-Somalia issue[84]. Currently, the Ukraine-Russian War also appears to have resulted on energy resource-based impact undertones.[85] The 1973 Arab Oil Embargo through the Organization of Petroleum Exporting Countries (OPEC) also is considered a security concern. Further, nuclear proliferation through the production

[82] https://thediplomat.com/2021/07/the-global-south-china-sea-issue/ accessed on 27.10.2022.

[83] *https://en.mercopress.com/2022/10/21/falkland-islands-lawmakers-committed-to-enable-oil-production* accessed on 27.10.2022. Confirming the allegation, the conflicts between UK and Argentina has been energy related.

[84] *https://www.theafricareport.com/16164/kenya-and-somalias-maritime-border-spat-risks-degenerating/* accessed on 27.10.2022.

[85] *https://quointelligence.eu/2022/10/global-energy-crisis-impact-of-the-war-in-ukraine/#:~:text=The%20war%20in%20Ukraine%2C%20together%20with%20the%20Western,of%20the%20war%20for%20the%20European%20energy%20sector.* Accessed on 27.10.2022 after 9 months of conflict existence.

and usage of nuclear energy has serious security concerns resulting in the 1968 Nuclear Non-Proliferation Treaty. It is in light of this, that US and North Korea are engaged in a diplomatic spat. Plutonium is a dangerous by-product of nuclear energy processing. Under the above treaty, the International Atomic Energy Agency (IAEA) is mandated to check for the nuclear plants for plutonium stockpiling. This is done as a deterrence mechanism. Other social considerations include moral and ethical dimension where energy production and use generate intriguing dilemmas for instance inter-generational equity and precautionary principles; the role of government in the question of hard energy pathways versus soft energy pathways in relation to nuclear energy as advanced by Lovins[86]; and behavioural dimensions which creates the question of gender role in energy sector. Energy law is, of overwhelming social importance.

Within the boundaries of jurisprudential considerations, first energy transcends the traditional legal boundaries and hence demonstrates how practical problems in the society are resolved by a combination of legal subjects. Second, energy transcends national and international law, thus rapid internationalization of energy law representing a unique and fascinating study of changing interface of national and international law. Third, it is a mixed of applied and pure law hence the paper agrees with Bradbrook that energy law is a discipline that has the propensity of breaking down the prejudices against the teaching of applied law while simultaneously applying aspects of pure law as opposed to the traditional doctrinal approach. It is on the basis of this attribute that energy issues and disputes have been responsible for the creation of significant body of pure law for instance joint ventures legal recognition at common law in regard to resource development.[87] It is also responsible for legal recognition of solar

[86] A Lovins, Soft Energy Paths (1977), passim.

[87] On the use of joint ventures in oil and gas development, see J Merralls, "Mining and Petroleum Joint Ventures in Australia: Some Basic Legal Concepts" (1988) 62 Australian L 1 907; M Sharwood, "Joint Venture Agreements: Transition from Informality to Formality" (1988) Australian Mining and Petroleum Law Association

easement negotiated between two neighbouring landowners to give legal protection to the right of solar access to certain parts or parts of the dominant tenement.[88]

Fourth, energy law is inherently laced with legal dynamism as it constitutes a useful illustration of the dynamic nature of the law. It represents an aspect of society which has historically been under-represented in the sense of legal development. It takes on board both common law and statutory law.

Fifth, it provides a classic example of studying the law reform process. This is because the development of new energy resource has led to the necessity of developing new laws into areas which previously had no law existed. Thus, energy law always provides law reformers with a new challenge in the energy context between domestic and international law.

Sixth, the interface of law and economics. Energy law is embedded in both regulatory and stimulatory measures which have been traditionally augmented by education. Thus, the traditional method of introducing changes into the society being regulation, simulation and education or a combination of two or more of these measures.

Seventh, environmental law and energy law are intricately linked. Energy law can be considered an aspect of environmental law. The relationship between the duo is so interesting to explore academically because of the fact that energy issues sometimes divide the environmental movement for instance the hydro-electricity debate; wind -energy debate; climate change debate due to contribution of fossil fuels resulting in favour of nuclear energy proponents. This is

Yearbook I; P O'Regan and T Taylor, "Joint Ventures and Operating Agreements" (1984) 14 Victoria U of Wellington L Rev 85.

[88] See J Gergacz, "Legal Aspects of Solar Energy: Easements for Sunlight and Individual Solar Energy Use" (1980) 18 American Business L 1 414; A Bradbrook, "The Development of an Easement of Solar Access" (1982) 5 University of New South Wales L 1 229; A Bradbrook, Solar Energy and the Law (1984), chs 3-4.

because nuclear energy produces no carbon dioxide. Therefore, the law must weigh contradictory environmental points and issues when devising the new laws in respect of different energy industries. Energy law focuses on the causes of environmental problems as opposed to effects. Thus, challenging the traditional way that environmental law has developed. Consideration of environmental factors forces the government and legal profession to come to term with the developmental and economic issues associated with the energy industries and therefore energy law raises an acute fashion, the tension between environment and development from the global perspective as observed by Bradbrook.

b. By 1996, several universities had started offering energy law as an academic discipline and that number has risen over the years. Bradbrook for instance points out that in 1996, out of the 26 university in Australia, two were offering Energy law namely University of Adelaide and the University of Wollongong. In Canada, it was offered by the University of Calgary while in New Zealand there was none. A cursory online search of the universities offering energy law in the same countries in 2022 indicates that all the countries have energy law being offered in their jurisdiction. Australia has at least 6 universities out of 43 (Australian National University, The University of Melbourne, The University of Western Australia and the University of Sydney in addition to the previous two); Canada has a minimum of 7 (University of Toronto, University of Alberta, University of British Columbia, Carleton University, University of York and University of Canberra in addition) while New Zealand has a minimum of two (University of Wakaito and University of Canterbury). Of course, we must remind ourselves that the University of Nairobi offers Energy law as an elective unit. Hence a clear testimony that energy law is here to stay as an academic discipline.

c. Energy law has contributed to other legal disciplines such as environment law, law and technology, international law as well as climate change law among others for instance the International Convention for the Prevention of Pollution by Ships (MARPOL) in 1973 and United Nation Convention on the Law of the Sea (UNCLOs) in 1982 came as a result of transportation of Energy resource

(Petroleum oil) which got spilled into sea when the ship was in the High Seas as a result of a spectacular and environmentally catastrophic wreckage of the oil tankers. UNCLOs 1982 redefined the legal relationship between the coastal and the port state on one hand and the flag state on the other hand. Essentially, this increased significantly the enforcement powers of the coastal and port state as well increasing the obligations of the flag state towards protection of the sea.[89] Second, the Bradbrook notes that the recent recognition of ozone depletion and climate change have led to further international conventions and declarations[90] and, in the latter case, to an ongoing search for suitable and appropriate new approaches to international law to try to resolve the world problem. While there are many contributing causes to the problems of ozone depletion and climate

[89] See, eg, A Boyle, "Marine Pollution Under the Law of the Sea Convention" (1985) 79 American Journal of International Law 347; PAll ott, "Power Sharing in Law of the Sea" (1983) 77 American Journal of International Law 1; P Bernhardt, "A Schematic Analysis of Vessel- Source Pollution: Prescriptive and Enforcement Regimes in the Law of the Sea Conference" (1979) 20 Virginia Journal of International Law 265.

[90] In the case of ozone depletion, see Vienna Convention for the Protection of the Ozone Layer (in force 22 September 1988), 26 ILM 1529; Montreal Protocol on Substances that Deplete the Ozone Layer (in force I January 1989), 26/LM 1541; Adjustment and Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer (London), 30 ILM 537 (1991); Adjustments and Amendment of the Montreal Protocol on 1992 Substances that Deplete the Ozone Layer (Copenhagen), 32/LM 874 (1993). This area of international law is discussed in P Birnie and A Boyle, International Law and the Environment (1992), at 404-411; Brunee, Acid Rain and Ozone Layer Depletion (1988), at 225-254; A Enders and A Porges, "Successful Conventions and Conventional Success: Saving the Ozone-Layer" in K Anderson and R Blackhurse (eds), The Greening of World Trade Issues (1992), at 131; D Ogden, "The Montreal Protocol: Confronting the Threat to the Earth's Ozone Layer" (1988) 63 Washington L Rev 997; D Doolittle, "Understanding Ozone depletion: The Meandering Road to the Montreal Protocol and Beyond" (1989) 16 Ecology L Q 408. In the case of climate change, see Framework Convention on Climate Change, 31 ILM 849 (1992); Rio Declaration on Environment and Development, 31 /LM 874 (1992). The climate change issue is discussed in D Bodansky, "Managing Climate Change" (1992) 3 Yearbook of International Environmental Law 60; A Kiss and D Shelton, International Environmental Law (1994 Supplement), at 128ff; S Geiser, "The 1992 Earth Summit: A Harbinger of the Urgent Need for the Clinton/Gore Administration to Act on Electric Energy Policy" (1994) 17 Suffolk Transnational L Rev 408.

change, energy production and use plays a significant role. Indeed, the figures in 1996 showed that the energy sector was responsible for 57 per cent of all greenhouse gas emissions.[91] This has now risen to 73.2% in 2020.[92] Including contributions of agriculture, forestry and land use makes the level of emission even grimmer because it becomes 91.6% according to the same source. This has forced international community to come up with imaginative way of solving the environmental issues for example the Framework Convention on Climate Change, signed at the United Nations Conference on Environment and Development (UNCED) at Rio de Janeiro in June 1992. This Convention divided the countries into two separate groups and imposed separate and more onerous legal responsibilities on developed, as opposed to developing countries.[93] Thirdly, establishment of energy reserves has also become an environmental issue in as per as ownership is concerned. The case of Australian-Indonesian Zone of Cooperation involving joint control of an area of the Timor Sea between the former Portuguese colony of East Timor and Australia."[94]is an example. It is also noteworthy that nuclear accidents incidents of The Three Mile Island in United States and Chernobyl in Soviet Union of Russia led to the recognition that there

[91] See R Fowler, "International Policy Responses to the Greenhouse Effect and their Implication for Energy Policy in Australia", in D Swaine (ed), Greenhouse and Energy (1990), at 462. The figure of 57 per cent was calculated by the US Environment Protection Agency and applies to the United States. The actual figure may vary from country to country depending on its energy mix.

[92] Climate Watch, The World Resource Institute [2020]

[93] For example, Treaty between the German Democratic Republic and Poland concerning the Delimitation of the Sea Areas in the Oder Bight, 22 May 1989 (TDMZ Treaty No 4.39); Agreement between France and the United Kingdom Relating to the Delimitation of the Territorial Sea in the Straits of Dover, 2 November 1988 (TDMZ Treaty No 3.8); Agreement between the United Kingdom and Ireland Concerning the Delimitation of Areas of the Continental Shelf between the Two Countries, 7 November 1988 (TDMZ Treaty No 3.5).

[94] Treaty between Australia and Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia, II December 1989 (TDMZ Treaty No 10.4): see G Moloney, "Australian- Indonesian Timor Gap Zone of Cooperation Treaty: A New Offshore Petroleum Regime" (1990) 8 JERL 128; H Burmeister, "The Timor Gap Treaty" (1990) Australian Minerals and Petroleum Law Association Yearbook 233.

is necessity for new international legal controls relating to the use of nuclear Energy.[95] Energy production and use has led to global environmental awareness concerns. This has been witnessed in atmospheric pollution having no respects for state boundaries for example the expression of concerns in 1970s in regards to acid rain arising from heavy use of coal with increase sulphur content.[96]Thus, the law on the safety of international oil transportation as well as nuclear production was enhanced.

d. Energy law is central to the necessity of energy by the society for its existence and therefore it has overwhelming social vitality. The other law that as such significance is the family law. As we are all aware, family law is an academic unit and therefore, it will be a monumental misnomer to not bequeath the energy law equivalent status at the least.

e. Energy law has the attributes of juxtaposition between the counterposing goals of stimulating national development while simultaneously safeguarding the environment makes the sector peculiar and hence worthy of a separate study. The great divide between environmentalist movement is a classic demonstrator for instance the hydro-debate; wind-energy debate; and fossil use versus nuclear energy use debate. Recently in Kenya, sharing of revenue arising from energy debate[97] between the two levels of government as well as the local community. This is unique to energy and hence must weigh contradictory environmental points and issues when devising the new laws in respect of different energy industries.

Having provided the supportive view in this discourse, the paper is also providing the opposing position. It is the contrary view that energy law has

[95] International law relating to nuclear energy is discussed in P Birnie and A Boyle, International Law and the Environment (1992), ch9; P Cameron et al (ed), Nuclear Energy Law After Chernobyl (1988); P Sands, Chernobyl: Law and Communication (1988).

[96] See generally US Congress, Office of Technology Assessment, Acid Rain and Transported Air Pollutants: Implications for Public Policy (1984); UK House of Commons, 4th Report of the Environment: Acid Rain (1984); UNECE, Air Pollution Studies, Nos 1-6 (1984-89).

[97] *https://ugandaoiljournal.com/2019/08/28/kenyas-first-oil-ignites-revenue-sharing-debate/* accessed on 27.10.2022.

not achieved the status of being an academic discipline for the following reservations. First, the schools teaching energy law are geographically located in areas endowed with vibrant energy sector within the local business community. [98] Compare this with the teaching of family law which is in almost every school and even in the religious books of major religions in the world. Second, energy law is a subset of other legal academic disciplines such as environment; international law; mining and petroleum law. Based on this, it will be uneconomical and waste of resource and time to repeat the same principles as an independent discipline. Third, energy law is characterised by insufficient legal framework in comparison to other established disciplines for example international law which has numerous. Finally, energy law burrows from other disciplines. It burrows from Natural resources as well as from mining and petroleum. Conclusively, there are more demonstratable grounds in support of established energy law as academic discipline than being not.

4.2 Which Regulatory Framework is or has Energy Law Adopted or ought to Adopt?

On Critical Reflections on Regulation, Julia Black[99] invites us to reconsider the notion of regulation by exploring a concept known as decentred regulation. She argues for a thinking that interrogates the way regulation is diffused within society in what she terms as the notion of 'regulatory society'. She further delves into what conception of regulation is required by, and for, a decentred analysis of regulation to be developed, and explores the implications of such an analysis for our understanding of the relationship between law and regulation.

Regulation is commonly understood from the Command and Control (CAC) concept. Rules are made and sanctions are clearly prescribed. This is a perfect interpretation of the positivists school as advanced by legal philosophers such as John Austin who see law as the command of the sovereign backed by sanction. This model has been criticized for being poster child of all that is wrong with regulation. This includes rigidity,

[98] Ibid n.33.
[99] Ibid n.11.

ossification, under or over regulation and unintended consequences. It also assumes that it is state 'centred' in that it assumes that the state has to the capacity to command and control, to be the only commander and controller, and to be potentially effective in commanding and controlling.

This approach she argues has the following failures:

1. Instrument failure: Laws backed by sanction are inappropriate
2. Information and knowledge failure: The government does not have enough information to craft suitable solutions to the problems
3. Implementation failure: that implementation of the regulation is inadequate
4. Motivation failure and capture theory: Lack of sufficient compliance from those regulated and those regulating do not do so in the interest of the public

With this backdrop, we can critique regulation in the energy using a decentred approach which revolves around five central notions: complexity, fragmentation, interdependencies, ungovernability, and the rejection of a clear distinction between public and private. Complexity in this context refers to the fact that societal problems are caused by various factors which cannot be precisely understood. These factors change over time and there is constant interaction between actors and systems. Actors are diverse in their goals, intentions, purposes, norms and powers. Fragmentation is seen as fragmentation of knowledge, power and control. No single actor can understand the totality of an industry. It deviated from the all-knowing government and an industry in need of solutions. Societal problems are too complex for one single actor to prescribe solutions. Fragmentation of control and power considers that power and control is not centred in government but exists in various areas and institutions and actors. This is equally consistent with the realist theory of law.

Independencies and interactions between actors and actors and governments are core to decentred regulation. Regulation is more than a two-way process in the sense that it does not follow that societies have problems which governments have solutions to. Problems and solutions exist within both

society and governments and the two are mutually dependent on each other. This perspective should be sent not just at national level but at international level as well. The other aspect of decentred approach is the collapse of public/private distinct in regulation. This view moves away from formal government authority and looks at interactions between government and non-government actors who share authority in making and enforcing binding decisions.

Based on the analysis in terms of the diversity of players in the sector, the vastness and difference in energy resources and the history of the available energy law, the supportive view which this paper adopts is that a de-centered regulatory framework is the most convenient. First, we agree that energy law is wide in scope and broad in extent thus requires hybrid, multi-faceted and indirect approaches as averred by Julia Black[100]. This normally calls for the employment of a utilitarian approach and realist way of interpretation. As such, the knowledge of social foundation of law dictates that utilitarianism theory and realist legal theory prevails and hence de-centered regulatory framework.

Second, de-centered regulatory framework augers well with the principle of sustainable development which is a dominant theme in the energy sector as evidenced by the legal instruments. In all the legal instruments provided in the articles, the principle is either explicit, implicit or both. Out of the 3 regional instruments, all implied the principle while out of the 11international legal instruments, 6 had expressively provided the principle while the other 5 were implicit. The paper analyzed the introductory articles. This is further buttressed by the Brundtland report which explicitly enunciates the concept and the national constitution of Kenya 2010 caps the principle under article 10. A demonstrable example is the citation from the United Kingdom on matters electricity. The UK government had to repeal its Electricity Act of 1957 using the Electricity Act of 1987.[101] The former had a centred regulatory framework in the sense that it was under state monopoly while the later has de-centered regulatory framework strong in

[100] Ibid n.11.
[101] Ibid n.33.

electricity privatization. For sustainable development to be achieved all the players at all levels of the society need to be appreciated.

Third, de-centered regulatory framework upholds the human-right based approach for instance the question of role of gender and indigenous communities are suitably taken care of. The soft law as exercised by institutions such as World Bank and IMF advocate for human rights-based approach in their funded projects. This approach avoids the dictatorial tendencies of centered regulatory framework which more often than not provides carte blanche to whatever and whomever it thinks as evidenced in the example of Tasmanian Hydro-Electric Commission Act 1944 which gives the state electric utility extensive statutory powers under ss.15, 36, 40-45, 47 and 54-58.

Fourth, the decentered regulatory framework appreciates the different systems of governance which is a constitutional imperative. Take the example of all federal jurisdiction such as US [102] and Australia, [103] the legislative powers over energy issues tend to be divided between different levels of government. In Australia and US, the constitution reserves the residual powers to the states and gives only enumerated powers to federal government. Therefore, in both nations, energy issues fall within the residual powers of states hence the primary responsibility for energy laws. However, the federal government can attract jurisdiction based on the constitutional dictates as demonstrated by the *New South Wales v CommonWealth [supra]* where High Court of Australia applied the constitution principles provided under s. 51(1) and 51(20) of the Constitution[104]. In our Kenyan situation, the residual powers lie with the National Government while the enumerated powers are with both levels of Government as per Fourth Schedule.[105]

[102] *https://constitution.congress.gov/constitution/amendment-10/* accessed on 3.11.2022.
[103] *file:///C:/Users/eliml/Downloads/2020_Australian_Constitution.pdf* accessed on 3.11.2022.
[104] Ibid.
[105] Constitution of Kenya 2010.

Fifth, de-centered regulatory framework appreciates the broad context of the role of individual member countries in the energy sector in various large groupings. The European Union (EU) and the North America Free Trade Agreement (NAFTA) are the classical examples. EU created an internal energy market and a corresponding harmonization of the energy laws of the member nations while NAFTA imposes restrictions on the sovereign rights of the individuals to enact energy laws that are inconsistent with the freedom to trade cross borders in energy field.

However, the proponents of centered regulation who formed the contrary opinion outline the following aspects that make decentered regulation in their view inappropriate for energy law. First, they argue that energy production and use is prone to catastrophic accidents and environmental pollution. The incidents of nuclear accidents in the Three Mile Island [106] and the Chernobyl[107] are the reference points. Such sources of energy require in their perspective centred regulation. They also cite the oil spills.

Second, the security concerns for instance issue of terrorism in relation to plutonium stockpiles. The Government in their counterargument is the only competent authority to handle such complex matters and hence involving many players compromises the situation for instance when it comes to intelligence gathering. The unfolding scenario between US and North Korea comes to their minds for justification thus they argue that de-centered regulatory framework is prone to breeding diplomatic spat.

Thirdly, the economic relevance in terms of application of decentered regulations is cumbersome. How convenient will taxation and revenue collection in general would be? How about the question of claims to establishment of energy reserves in the international waters? World interpretational innovativeness that is inherent in energy law suffice? In their postulation, the decentered regulations cannot answer those questions convincingly. The answer in their view lies in centred regulatory framework.

[106] Ibid n.33.
[107] Ibid.

All in all, the supportive view which this paper holds is that those concerns are adequately taken care of by the government being one of the players in the decentered regulatory framework. In facts, the other players also have a role to play in all of those counter arguments. The decentered regulation is the future in energy law in light of the sovereignty of the people doctrine-an inherent human right.

5. Conclusion

Energy law is and should be considered an academic discipline with decentralisation of regulatory framework forming the backbone of its peculiarity. However, the paper agrees with Bradbrook that the energy law has indeed given rise to some cardinal issues. First, the question of the role in legal education of applied law as opposed to pure law? Second, to what extent should law curricula be influenced by the importance of social as opposed to doctrinal issues. Third, what is the continued relevance of the common law in modern society bearing in mind that energy law is bulk in statutes and regulation? Considering these, the paper takes judicial notice of the fact as follows: (1) that on the first issue, there is existence of realism as an influence on the application of law. This coupled with the theory of utilitarianism addresses the first issue to a greater extent; (2) On the second issue, the provisions of s.3[c] of the Judicature Act[108] provides for the hierarchy of laws in which statutes are rank higher than common law; and (3) on the third issue, energy law being inherently characterised by constant evolution is inherent and legally dynamic and hence addressing the question of applied versus pure law. These three are contributing to addressing the emerging issue though not concretively.

[108] CAP 8, Laws of Kenya.

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Evaluation of a Conflict in a learning Environment: Does it always Fetch a Negative Outcome?

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Abstract

Conflict is a disagreement between two individuals or groups in an environment where one party's goals and aspirations are incompatible with the other party's interests and aspirations to achieve their desired outcome. Conflicts permeate every sector of an institution or take place even in a learning environment regardless of class, position, age, race, caste, or gender. It is started by a person who is antagonistic to another person in an effort to achieve a goal that is in opposition to their core values and interests. Even though the premise of it suggests a negative outcome, it ultimately has either a positive or negative result. This paper evaluates each stage of an institutional conflict that began as an interpersonal conflict, turned into an external conflict, and was finally settled by exterior intervention followed by a constructive outcome. It also depicts the entire conflict cycle on a sketch map, using the observational approach to draw conclusions based on both primary and secondary data. This article provides some background information and stimulates some thought about the life sketch of a conflict occurred in an academic setting and its resolution mechanisms.

Keywords*: Conflict, escalation, stalemate, de-escalation, and resolution.*

1. Introduction

Conflict is something we must deal with every day whether we are interacting, working, learning, volunteering, or participating in any other capacity in an institutional setting, even though we would like to avoid it. It can occur even in an educational environment, whether they are located locally or internationally, because it is undoubtedly a crucial aspect of human

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interactions. It may occur due to the difference of viewpoint, opinion, or perspective between two people or groups or among institutions represented by some or groups of people who remain opposing goals and aspirations, which an antagonist sparks to another to achieve a targeted goal. According to Pruitt and Kim (2003), a perceived divergence of interest, a belief that the parties' current aspirations are incompatible, is considered as conflict, and when it happens in an educational environment, it is termed as academic conflict. This academic conflict may be various in nature and manifested in multifaceted ways depending upon the context or environment of the academic institution. Generally, an individual or group experiences both internal and external conflict while socializing, interacting, working, volunteering, and performing in academic institutional contexts. Internal conflict indicates the mental, emotional, or spiritual struggles a person that he/she faces internally like, Character versus Self. On the other hand, external conflict is the struggle of an individual or among/within groups that face(s) against an exterior force(s). Conflict can be intrapersonal, interpersonal, intragroup, or intergroup depending on its internal and external meaning. However, it is very typical for one story to contain both sorts of conflict. In reality, internal conflict occasionally causes external conflict, and vice versa. Conflict naturally results from differences in interest, belief, and perception; therefore, if it is not managed, it may be destructive. Only effective and efficient conflict management can transform a destructive conflict into a constructive one. Therefore, conflict management techniques, and occasionally third-party interventions, are crucial for managing the conflict constructively in a learning environment, particularly for determining which characters are intervening in what manner, and at what stage of escalation.

The primary objective of this study is to investigate how a conflict occurred in an educational setting, like the one outlined below, which began as interpersonal conflicts, progress to group conflicts that are exacerbated by additional competing factors, and eventually lead the parties seeking for an intervention by third party to resolve the conflict in a manner that advantages all parties. In addition to the idea of conflict and its stages, styles, and methods, this article also discusses conflict behavior, escalation, and

resolution procedures, with a particular emphasis on institutional conflict. Using different conflict resolution approaches, a conflict can be addressed constructively or destructively depending on whether the parties involved work to improve society, settle disputes, or eventually deepen a group's sense of unity.

To evaluate the ensuing conflict and determine its underlying causes and means of resolution, this study poses the following important questions:

Who were the main characters or parties in the mentioned conflict? What was the parties underlying interest and aspiration? What was their goal and why did they want to achieve this goal? What steps did the parties take to work toward achieving their goals? What triggered the parties to involve in dispute that was originated from a conflict? What were the other elements that prevent the parties to achieve their goal? Why did the antagonist or antagonistic force oppose the other party in conflict? How was the conflict resolved? Was there a clear winner from this conflict?

In addition to determining the answers to the questions stated above, this study also examines the following queries using synchronizations of the questions indicated above:

What is conflict and conflict management? What is the nature of the conflict? What is underlying interest and aspiration in a conflict? What are the common categories of conflict? What are the common sources of conflict? What are the strategies in conflict? Why people involve in conflict? How do parties respond to conflict? What modes do parties use to address conflict? What are the key issues that affecting the decision making in conflict? What the moderating factors of escalation of conflict? What are the dual models in conflict? How contentious model of conflicts works in escalation of conflict? What is constructive and destructive conflict? Why power is exercised and how it works in the process of conflict? What are the strategic distinctions between players with high and low power in a conflict? How trust works in conflict? When conflict stabilizes? What is stalemate? What are the reasons for stalemate and its effect? What

motivates the parties involved to resolve the conflict? What are the common mechanisms of settlement of a conflict occurred in a learning environment in a constructive way?

2. Methodology

The conflict in issue is addressed and evaluated in this article in a qualitative approach using primary and secondary data to achieve the article's goal and to investigate the relevant questions. Primary data was gathered using the observational technique, with individuals, parties, political elite, and court as a mediator or intervener as the unit of observation. As a direct and participatory observation and longitudinal process, the observer kept track of the situation for two years, as well as the conflict's resolution for six months. Additionally, the observer also took notes and recorded all that was witnessed. Since this is a fact, the identities of the parties to the conflict, the group of individuals who support them, and the names of relevant organizations were used under pseudonyms to protect individual privacy and to adhere to the ethical standards of this writing.

The secondary data sources include prior studies, discussion papers, books on conflict analysis and management, journals, the internet, e-journals, numerous tools and websites for conflict management, and conflict resolution-focused magazine articles. The data were gathered longitudinally in an unstructured setting.

3. The Factual Overview of the Conflict

It was around 20 years back when Rahim (pen name) was a student of class x, and his Secondary School Certificate (SSC) Examination was knocking at the door. At the time, Zahid (pen name), the Head Master (Head Teacher) of his school, retired, leaving the position vacant. As required by school policy, the School Managing Committee published an advertisement in national dailies seeking a Head Master to fill the position. The advertisement included every criteria needed for the position. All qualified Bangladeshi nationals were eligible to apply. His teacher, Mr. Karim (pen name), who also applied for the position of Head Master while serving as

an Assistant Head Master, was one of the other applicants. The neighborhood where the school was located was Mr. Karim's hometown. Additionally, he was the brother of a political elite in Bangladesh. He consequently always displayed greater influence than his competitors. Although an oral and written appointment examination was held on the scheduled day, Mr. Zabbar was chosen by the school managing committee after placing first in the examination. Mr. Karim was incensed when he saw the outcome and, as a result, he could no longer stand Mr. Zabbar, the recently appointed Head Master. Even then, conflicts occasionally sprang out between them over trivial matters, which upset the other faculty members and disrupted the school's atmosphere. Almost all of the pupils had some awareness of this problem. In general, the newly appointed Head Master, Mr. Zabbar, was more well-liked and approachable among the faculty, staff, and students.

One day, Rahim was startled to hear a commotion in the headmaster's office, and he quickly realized that Mr. Karim was berating Mr. Zabbar. In just a few minutes after the news traveled around the campus, all of the school's personnel and kids gathered on the school field and started to feel nervous. After hearing such information, the second group of people—who were Mr. Zabbar's supporters—entered the school and made an effort to denigrate Mr. Karim. Rahim and other faculty members at the school were aware of the situation's deteriorating state and reported it to the police station. Soon after, police arrived at the school and quickly took charge of the situation. Police recorded the first information and filed a case. Rahim represented the students at the school at that time. The cops recorded his identity as a witness. Mr. Karim and his politically influential brother exerted pressure on Rahim to testify during the witness gathering phase of the continuing legal dispute between Mr. Zabbar and Mr. Karim. Though Rahim was in a fear if he would not give his testimony in favor of Mr. Karim, he might have to face some political harassment, but his mind/conscience did not give the consent to produce testimony against Mr. Zabbar. So, after consulting with his family members and considering that entire thing Rahim was determined not to give testimony in favor of Mr. Karim. When the date of producing of the witness came, Rahim left his city

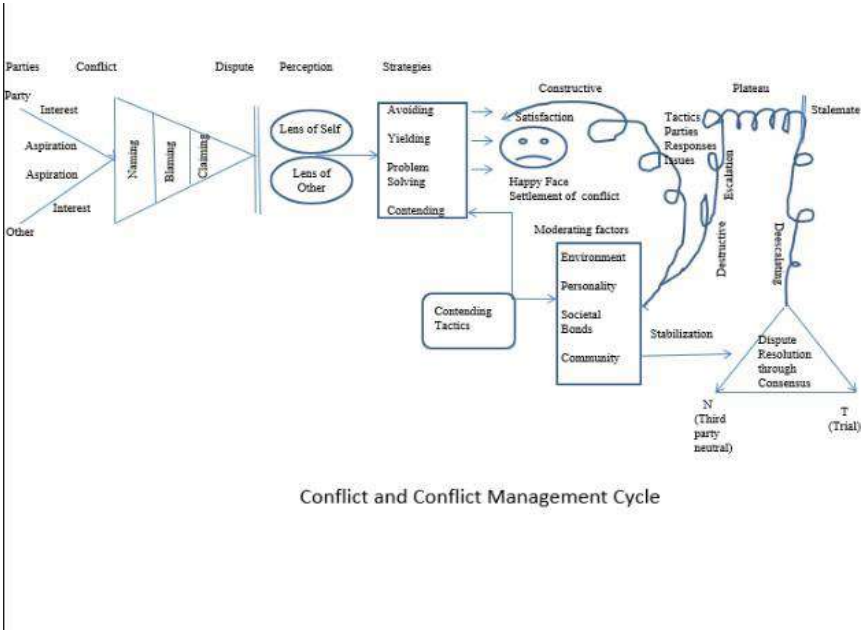
and moved to the capital city, and returned after a few days. When Mr. Karim and his brother found him they showed their heated behave on him. During his SSC final exam, that political elite had created some uncomfortable situation for him, but nobody dares to say anything against that political elite, even the local executive officer; because the concerned political elite was the Chief executive of his local jurisdiction. Rahim obtained his Secondary School Certificate and was accepted into a college in the nation's capital. When Rahim moved to the city to finish his higher secondary education, Mr. Karim forewarned him that he would be keeping an eye on Rahim's performance there. Until the dispute was handled in a positive way with the help of the court's intervention, Mr. Karim even started to express his irritation and annoyance toward Rahim whenever Rahim encountered him or made eye contact with him in person.

To figure out the best possible responses to the aforementioned questions and to assess the fact that is mentioned earlier, this paper also congruently explores the following significant words and brief notes that are emphasized in the accompanying flowchart (Figure 1):[1]

[1] Note: This flow-chart is prepared as per the draft-chart presented in class on April 18, 2019 in the course of Conflict and Conflict Management by Professor Richard C. Ruben, University of Missouri-Columbia School of Law, USA.

Figure 1

Conflict and Conflict Management Model



Conflict and Conflict Management Cycle

The flowchart, designed-above from left to right, outlined each stage of a conflict happened in an educational environment and its management by pointing out just its essential components. It portrayed how the underlying interests and aspirations between parties at some point clash and create interpersonal conflict, eventually leading to a group conflict due to external factors and finally coming to a settlement.

Like the mentioned conflict and conflict management model, the mentioned fact also embraces two parties: they are Mr. Karim and Mr. Zabbar. Their interpersonal conflict eventually turned as group conflict, which was finally resolved by the intervention of the court in a constructive way.

4. Analysis of the Conflict

Conflict analysis is a technique to plan, carry out, and assess the dynamics, participants, causes, effects, and resolution mechanisms of conflict between the parties, groups, society, and the state. In a similar fashion to how doctors examine patients, conflict analysts also do so. The conflict analysts assist the conflicting parties, groups, or states in resolving their conflicts by increasing their ability to comprehend of how to promote changes in the conflicting parties by minimizing the negative effects of conflict or modifying the conflict to make some positive changes to ensure social justice. The following subheadings provide further explanation and evaluation of the stated conflicting fact:

i. Conflict

Regardless of the fact that social psychology considers conflict as one of the most significant areas of study (Katz & Kahn, 1966; Lewin, 1948), the question of what constitutes conflict has not yet been resolved (Tjosvold, 2008). In common parlance, conflict can be characterized as physiological or physical encounter between two opponents who are actively striving to impose their will on one another. Conflict is a disagreement between two or more parties (individuals or groups) if at least one of them is offended, or feels disturbed by the other (Van de Vliert, Euwema, & Huismans, 1995). According to Pruitt and Kim, conflict arises when parties believe their current goals are irreconcilable and there is a perceived difference in their areas of interest (Pruitt and Kim, 2003, p.8). Conflict can be termed as an incompatible activity where one person's actions block, interfere with, or otherwise conflict with another person's action (Patricia, Martin & Lourdes, 2017; Deutsch, 1973).

Conflict can be manifested through the following equation:

Parties'/Characters + Perceived interest and aspiration + Achieving a certain goal + Opposed by the other parties'/characters = Conflict

Therefore, conflict can be defined broadly as a difference in the interests and objectives of two people or a group of people in the pursuit of an aspirational

end. The two people involved—Mr. Karim and Mr. Zabbar—along with their followers on the outside were engaged in conflict over how best to pursue their individual aspirated goal in an academic setting. In order to better understand how the discussed conflict functions as a conflict cycle, the following basic aspects of a conflict will be addressed in detail:

ii. Parties/characters of a conflict

The entities like, individuals, groups, organizations, governments etc. that are capable of making decisions, or play role, or directly or indirectly related to the conflict are considered as parties' in a conflict. Generally, there are two parties' or characters are involved in a conflicting situation: one is antagonist and another is defender. However, there are three major types of parties may appear in any conflict situation:

a) **Primary parties'**: The key players in the conflict whose perceived goals or aspirations are incompatible with other in pursuit of their objectives (Pruitt and Kim, 2003, p.15; Conflict Analysis Framework: Field Guidelines & Procedures, (2012, May), p. 27; Brahm, 2003)

b) **Secondary parties**: The parties who have vested interest in or may be affected directly by the conflict and its outcome, but for some reason are not directly involved. Secondary parties are potential coalition members, and may become primary parties at some point (Pruitt and Kim, 2003, p.15; Conflict Analysis Framework: Field Guidelines & Procedures, (2015, December), p.41; Brahm, 2003).

c) **Peripheral parties**: The parties who have an interest in the conflict and outcome but are not affected directly like public and media (Pruitt and Kim, 2003, p.15; Conflict Analysis Framework: Field Guidelines & Procedures, (2015, December), p.41).

In the above-mentioned fact, Mr. Karim and Mr. Zabbar were the primary parties and rest of the faculties, students and other actors were the secondary and peripheral parties. In general, conflict involves two parties but others often get involved in creating persecution, victim and rescuers. When two people have an interaction and each influences the other and is affected by the other then they considered as actors or active party. Sometimes, a third party gets involved through exacerbating the situation creates a negative triangle and making matters worse also be termed as active party.

iii. Conflict of Interest and Aspiration

A conflict, whether it may be the social or institutional, it requires a difference in the interests and goals of two parties in a particular circumstance, case, fact, or topic. When the objectives and priorities of two parties diverge, the situation is said to be conflicting, and the issue is said to be a conflict. In a conflict situation, both parties prefer to look for solutions to their problems rather than caving in or cutting off communication since their interests are at odds or they don't necessarily desire the same things. This incompatibility of aspiration and conflict of interest are the underlying reasons to involve in conflict by two individuals working together in an institution. Conflicts can start when goals are obstructed or when there is ambiguity over how to achieve that goal. Conflict also arises when a person or group pursues a goal that is seen as impeding the pursuit of a different party's goal/objective.

From the mentioned fact it shows that initially Mr. Karim had a latent intention to be the Head Master of the concern School and through participating in the job appointing examination his underlying intention was manifested as an aspiration to acquire the post. So, this was the combination of interest and aspiration of an individual to reach a goal or achieve of an objective with certain endeavor. On the other hand, Mr. Zabbar as an aspiring candidate for the same post he was possessed the similar interest and aspiration to achieve that objective through fulfilling certain requirements of appointment. Therefore, in a sense, it was a latent or interpersonal clash of

interest and aspiration between Mr. Karim and Mr. Zabbar to attain their own objectives. Until it's manifestation through certain action it cannot be considered as external conflict. So, from this notion conflict may be divided as internal and external conflict.

iv. Perceived Interest, Aspiration and Certain Goal

In a conflict, the interest and aspiration of the parties are to be perceived, felt, manifest and have an aftermath affect. So, non-perceived interest and aspiration that is, the issues which occur are unaware by the parties' cannot be termed as conflict. In terms of defining of a conflict, the emphasis is always given on the non-manageable disagreement of interests and aspirations of the parties (Onyesom & Emeke, 2015, p. 250). Therefore, interests indicate something that tends the parties to think and action, forming the core of many of their attitudes, goals and intentions. One the other hand, it can be considered as the parties perceptions or internal representation about what are they desire (Pruitt and Kim, 2003, p.15; Austin & Vancouver, 1996, p. 338). Interests have several dimensions like, tangible, intangible, specific and universal (Pruitt and Kim, 2003, p.16). Power, honor and recognition come within the purview of intangible category due its abstract nature (Pruitt and Kim, 2003, p.16). The indicated conflict is very much intangible in nature because it was initially started to acquire for a post or designation or rank and that ultimately triggered as a groups conflict amalgamation of other power related issue. But, the aspiration of the parties' must be understood as the manifestation of the underlying interests. On the other hand, it can be said as the mental representations of the parties, or goal or objective which the parties strived for or perceived to be achieved (Pruitt and Kim, 2003, p.16). In the mentioned case the goal of both Mr. Karim and Mr. Zabbar were to achieve the post of a Head Master in anyway, so they had a strong and perceived aspiration. So, conflict appears when a party experiences his interest and goal or aspiration is incompatible with other (Pruitt and Kim, 2003, p.16).

v. Internal and External Conflict

One of life's most difficult facets is dealing with internal or interpersonal conflicts. Even while everyone would prefer avoid it, it exists everywhere,

has a cause and effect (Coser, 1956), and may either be destructive or constructive. Knowing its underlying causes increases the likelihood of finding integrative solutions to problems, which might allow all parties to achieve their goals (Fisher, Ury, & Patton, 1991; Rahim, 2001). It is the struggle a person goes through inside that affects their thoughts, emotions, interest, and aspirations to achieve his/her targeted goal. Likewise, the interpersonal issues which affect the actions, motivations and interactions of an individual with other may be termed as interpersonal conflict. Generally, the conflict management expert does not consider the latent/internal conflict as a conflict, because sometimes it may not be manifested through further actions.

A conflict on an interpersonal scale, may be provoked by some of the external actors. It may be a political, economic, or social nature (Sandole, 1998). In general, a conflict between an individual or group of individuals and any other external force, such as a villain, or the government, is referred to as external conflict. External conflict can be intergroup, intragroup, and inter-organizational conflict (Thakore, 2013). Intergroup conflict may be very difficult since it often involves people from different groups or institutions who are either emotionally or substantively driven to struggle. According to the fact given, Mr. Karim initially went through internal conflict because of his ambition for fame and power, which ultimately led him to get involved in an external conflict or intergroup conflict.

vi. Reasons for Arising Conflict

Conflicts typically have the same tone and underlying causes whether they occur at a place of worship or a school. Experts have been disputing for a long period of time whether conflict is a result of sociopolitical and economic causes or an innate human characteristic (Collier, 1975). Some scholars claim that human biology is one of the main reasons on what causes conflict. Such a strategy is known as individual characteristic theory, according to Schellernberg (1996), and it concentrates on the person performing the act rather than its surroundings. McCauley (1990) supports this assertion and mentioned that people engage in violent conflict because it is hereditary. On the other hand, anthropologists have successfully used

these ethnographic studies to disprove and expose the insufficiency of the biologically based explanation of the causes of conflict.

However, Conflict may arise in so many reasons like, scarcity of resources (Pruitt and Kim, 2003, p.21), rapidly changing of aspiration due to its expansion (Pruitt and Kim, 2003, p.21), zero-sum thinking or fixed pie assumption (Pruitt and Kim, 2003, p.22), ambiguity about nature of power (Pruitt and Kim, 2003, p.22), invidious comparison (Pruitt and Kim, 2003, p.23), and status inconsistency (Pruitt and Kim, 2003, p.24), distrust (Pruitt and Kim, 2003, p.25), lack of normative consensus (Pruitt and Kim, 2003, p.26), dilemma of security (Pruitt and Kim, 2003, p.25), issues of social identity (Pruitt and Kim, 2003, p.28-30), social structure (Ruben, 2019, January 29), social aggression (Ruben, 2019, January 29), needs (Ruben, 2019, January 29), struggle over resource (Ruben, 2019, January 29), craving for long term happiness (Ruben, 2019, January 29),biological reason (Schellenberg, 1996, p. 43), and group mobilization (Pruitt and Kim, 2003, p.32). People's different styles of thinking, perceptions, perspectives, understanding, principles, values, beliefs, and slogans are also the reasons of disagreement (De Bono, 1985). Sometimes, high concern about self-esteem and concerned with fear, force, fairness or funds are also the reasons arising conflict between the parties (De Bono, 1985). In the institutional level sometimes high stress workplaces, ambiguous roles and responsibilities, situations with several bosses, and a predominance of cutting-edge technology (Kirchoff and Adams (1982), also creates conflicting environment if is not managed properly. According to Filley (1975), a number of variables, such as communication barriers, conflicts of interest, incompatibilities in goals and jurisdiction, reliance on one party by a group or an individual, organizational differences, affiliations and specialties of the parties, behavior regulation, and unresolved prior disputes, may lead to conflict situations in an institution. It is typical for members of a team or institution to experience stressful conditions as a result of confusion and pressure, which can sometimes result in conflicting scenarios (Thakore, 2013).

In the instant case, both Mr. Karim and Mr. Zabbar have only one goal to achieve the post of a Head Master. So, there was limited resource available and the aspiration to achieve that resource/ post rapidly changed their perceptions and they felt it just like a zero-sum game. Moreover, as an invidious comparison Mr. Karim thought himself more knowledgeable/qualified and more powerful than Mr. Zabbar, which ultimately triggers the internal conflict to the external conflict. So, among the mentioned reasons, some are internal and some are external reasons which in fact trigger someone to involve in the conflict. Internal reasons may be arising from emotion, ego and other psychological reasons. On the other hand, power, identity, security and group mobilization are the external reasons of a conflict. Basically, external conflict can be motivated by survival, by pride, love, morality or duty, or number of other factors. This sort of external conflict pits one individual against another, albeit the origin of the conflict can vary. There are times when both parties want the same thing, sometimes both want different things, but one or both hinder the other's success, sometimes one side wants to destroy or hinder the other, sometimes one side wants to harm, hate the other out of malice or greed, and sometimes one party wants what another party has. So, from this perspective external conflict may be Individual versus Individual, Individual versus Society, Individual/group of people versus Nature, Individual/group versus Machine, and Individual/group versus Fate/Supernatural conflict. In the depicted fact it shows that initially it was just like an interpersonal conflict and that finally triggers into as groups conflict.

vii. Conflict and its Transformation as Dispute

Conflicts in today's environment can take many different shapes and cover a wide spectrum of viewpoints. These "systemic" features of conflict are the overt or obvious manifestations of the aggrieved group's dissatisfaction with the other group(s) and are intended to hurt or degrade the other group(s). The ability of the parties to settle their disagreements on their own, without the external involvement or outside support, is tough and complex when this form of conflict occurs on a bigger scale. Most often, a larger-scale conflict manifests as a dispute that needs the intervention of a third party or outside help to be resolved. Though conflict and dispute runs together, but all

conflict is not the dispute. Generally, a dispute is the mature formation of a conflict. According to Costantino and Merchant (1996), "conflict is a fundamental disagreement between two parties, whereas, a dispute is one the possible outcome of a conflict." A dispute is a short term disagreement that might lead to an agreement between the disputants; it involves issues that are negotiable (Keator, 2011; Burton, 1990). Contrarily, conflict may last a long time and involves core issues that are viewed as "non-negotiable." (Burton, 1990). The primary idea is that a dispute can quickly escalate into a conflict if left unresolved and unaddressed. However, without assistance, conflicts rarely turn into dispute (Keator, 2011; Burton. 1990). In general conflict does not escalate until parties' take any further action regarding escalation. This escalation process is also called as transformation of conflict to a dispute, which occurs through process of naming, blaming and claiming (Felstiner, Abel & Sarat, 1980). These three processes in accordingly help to transform the conflict to a dispute. In the illustrated dispute, Mr. Karim pointed his finger to Mr. Zabbar and indicated that if Mr. Zabbar would not apply for the post he would get the job. So, Mr. Karim's naming, blaming and claiming approach in fact, triggers the conflict as a dispute.

viii. Lens of Conflict

One of the most fundamental inborn conflicts that people encounter is between their own concerns and those of others. People frequently focus on themselves and seek out their own interests first. However, conflict arises when there is another person out there who shares the same aspirations and is ready to employ any method necessary to achieve those goals. Short-term self-interest may push us to act selfishly and take advantage of others' goodwill without giving something in return (Jhangiani & Stangor, 2022). Nevertheless, it can be detrimental in the long run due to its inherent conflict nature. The self-concern model includes the naming, blaming, and claiming issues, which are also the contentious behavior characterized as one of the Lens of Conflict. On the other hand, having knowledge of and awareness of how others perceive you (other-concern) is another lens of conflict that aids in bridging the understanding gap and encouraging a constructive resolution. In fact, the lens of conflict is a conflict management tool that is based on self-perceived personality and how a person makes out himself/herself to

have behaved (lens of self) which may differ from how others perceived the behavior (lens of other). Through this lens of conflict a party may identify two tangible conflicts they were tangled in, and then open the door to perceive about what they worked, belief and thought during the conflict and about the aftermaths of each conflict.

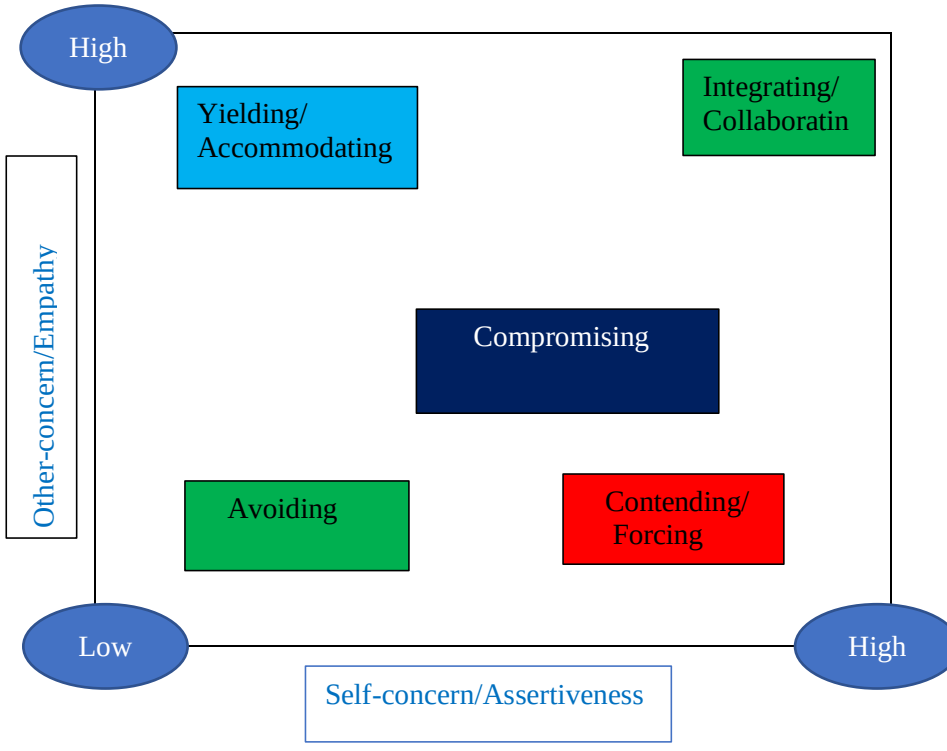
In the aforementioned conflict, which started as an interpersonal conflict but later turned into a group conflict as a result of putting a higher focus on self-interested factors in order to achieve a goal.

ix. Styles of Conflict

For resolving the aforementioned conflict as perceived by the parties through applying their lens of conflict, parties' may use various styles that are terms as styles of conflict. According to Pruitt Dean & Kim (2003, p.42), "conflict style is the way a person most commonly deals with conflict." These strategies are categorized by the behavior of the parties like, contending, yielding, problem solving, enacting and withdrawing (Pruitt and Kim, 2003, p.5; Thomas and Kilmann, 1974). Although there are many ways to resolve conflicts, Mary Follett was the first to make an effort to do so when she proposed dominance, compromise, and integration as the three main strategies in the 1940s (Chinyere, 2018). This effort took full shape when she later added avoidance and suppression as conflict management styles, which caused a paradigm shift in the field of human resource management (Chinyere, 2018). Other researchers have developed styles ranging from two to eight (Chinyere, 2018), suggesting that no single style is sufficient to resolve a conflict because it depends on the viewpoint of the parties involved as well as the circumstances.

Given this fact, Thomas and Kilmann's (1974) model of conflict management styles and Pruitt and Robin's (1986) conflict management model are both used to further the explanation of how conflict styles can be used and when they should be used. So, the following diagram can be used to better comprehend the conflict management styles as well as the dual-concern model:

Figure 2
Conflict Management Styles and Dual-Concern Model



The mentioned model has two components, assertiveness (self-concern) and empathy (concern of others). Empathy is designated on the y-axis, whereas assertiveness is on the x-axis. The model is used to produce five distinct conflict management styles that people might employ to handle issues that they may encounter on a regular basis. The model portrays five styles for resolving conflicts: competing, avoiding, compromising, accommodating, and cooperating. The x axis depicts competing and avoiding styles, which indicate assertiveness, while the y axis depicts accommodating and collaborating styles, which indicate empathy. Compromises can be formed where there is a balance between being cooperative and assertive.

As per the model, low concern for oneself and others characterizes the avoidance style, whereas high self- and low other-concern characterizes the accommodating style, high levels of self- and low levels of other-concern characterize the forcing style, and a compromising style indicates concern for both, respectively. These conflict resolution styles indicate a person's degree of concern for self and for the others and the level of their satisfaction.

According to the mentioned model, if parties' use a competing style, then they might force the others to accept 'their' solution, but this acceptance may be accompanied by fear and resentment (Pruitt and Kim, 2003, p.7). If they accommodate, the relationship may proceed smoothly, but they may build up frustrations that their needs are going unmet. If they compromise, they may feel comfort about the outcome, but still harbor resentments in the future. If they collaborate, they may not gain a better solution than a compromise might have yielded, but they are more likely to feel better about their chances for future understanding and goodwill. And if they avoid discussing the conflict at all, both parties may remain clueless about the real underlying issues and concerns, only to be dealing with them in the future.

In the illustrated conflicting parties' initially used the contentious techniques and finally they applied the problem solving approach through a third party neutral like, court proceedings. The mentioned conflict was very much related with the strategies of contending, where both parties' adopted the contentious techniques (Pruitt and Kim, 2003, pp. 63-84) through applying their active strategies like, threat, tit for tat, and engaging in a violent activities (both instrumental and in group violence) (Pruitt and Kim, 2003, pp.79-80) in a relatively consistent and coherent manner that ultimately lead them to reach a solution.

x. Constructive and Destructive Conflict

It is clear that a conflict has had negative outcomes when both parties believe they have lost as a result of the conflict. Similar to this, an educational institutional conflict or conflict occurs in a learning environment has positive outcomes if everyone involved is happy with their outcomes and feels like

they have benefited from the conflict. This is what Morton (1969) refers to as "the greatest good for the greatest number" in a single sentence. It does not necessarily mean that conflict is a negative thing. It is far from being necessarily dysfunctional. Moreover, a certain degree of conflict is essential for group formation and persistence of group life (Coser, 1956, p.31). Sometimes, it facilitates the reconciliation of peoples' legitimate interests (Pruitt and Kim, 2003, p.10), discourages premature group decision making (Pruitt and Kim, 2003, p.11), and a sine qua non of reflection and ingenuity (Dewey, 1930, p.300). Generally, differences in opinion over organizational tasks, rules, and other issues commonly lead to conflicts that have a constructive outcome as opposed to conflicts that are typically instigated by members and result in verbal abuse, racial tension, and sexual harassment (Chinyere, 2018, p. 25). Usually, avoiding, yielding and problem solving strategies promote the parties to a constructive outcome and where both the parties' become happy for settlement of dispute through consensual mechanism. On the other hand, contending style of conflict, parties usually achieve the negative outcome.

The aforesaid conflict though initially started as a contending style, nonetheless, it facilitated the substantive dialogue between Mr. Karim and Mr. Zabbar through adopting the court-mediation process, it fostered mutual understanding, and finally it reached to an integrative solution through resolution of dispute by the mechanism of court-mediation. So, it can be said that it was a constructive conflict, rather than the very opposite nature of destructive conflict.

xi. Escalation of Conflict

Escalation of conflict indicates the intensification of conflicting nature between individuals or groups in interpersonal relationships, or it may refer to the acceleration of hostilities in a large societal context. In another sense it can be said that it is a situation when conflict heightens in a grade to which one party dehumanizes the other. Eckert (2003) pointed out that every conflict has the potential to escalate, from the process of escalating interpersonal disagreements to the inhumane treatment of relationship between groups or states to the point when violence, terrorism, and war are

engaged. As an idiosyncratic features conflict may be escalated due to the competition, exasperation, impulsion and for retaliatory mindset of the parties (Pruitt and Kim, 2003, p. 129). Moreover, tendency toward strong need for social approval, feel guilty about aggression, high empathy with more reflectiveness may be the causes of escalation of conflict. In addition, strong group bondage or association, limiting norms of the communities, cultural differences, age, gender and divergence of power play a significant role in terms of escalation of conflict. Among the mentioned features of escalation power imbalance is the key factor that helps the strong party or group to exercise dominance, control, and autonomy over the weaker party or group through using his/their advanced information, connectivity, role and strength (Pruitt and Kim, 2003, pp.144-146). This power may be the personal power and relationship power, which accrues from the deep-rooted structure of the society like, role, history and hierarchy and interdependence of group goal. The party with high power beliefs in superior competence than the individual with low power and tries to marginalize him through using heavy techniques of under-estimation. On the other hand, the low power holders through using the techniques of cohesion, organization and motivation try to mitigate the power imbalance. In addition, environmental conditions (Pruitt and Kim, 2003, pp. 126-128), idiosyncratic features (Pruitt and Kim, 2003, pp. 128-129) of the parties, social bond (Pruitt and Kim, 2003, p. 134) and relation with the larger communities (Pruitt and Kim, 2003, p. 136) play a significant role in terms of escalation of conflict. In terms of escalation of conflict, the contender-defender model (where one side behaves as a defender and the other as a contender), the contentious model (where both parties are interested in struggling to attain the goal), and the stereotyping and mirror imaging model (parties project images onto others, and this creates a stereotype of the other) are commonly seen in the area of conflict management. So, from the mentioned viewpoints, conflict escalation can be demarcated as an increase in a conflict's severity in relation to the degree that is seen and the methods that are employed (Richard, 2017).

In the mentioned fact, Mr. Karim’s insulting attitude to Mr. Zabbar created a contentious atmosphere, and then the defensive attitude of Mr. Zabbar created it a spiral one, that is as a destructive conflict spiral model. As a cycle

of escalation the associated group of Mr. Karim attacked on Mr. Zabbar, which created a huge emotional change regarding Mr. Zabbar image. Thereafter the associated group of Mr. Zabbar rushing to the spot escalated the conflict more rapidly. So, this **spiral of conflict** was both the combination of defensive and retaliatory, where each party punished the other for actions it found aversive. According to Dean G. Pruitt and Sung Hee Kim (2003, pp.119-120), "*a cycle of escalation might, for example, start with Party's receipt of what it considers to be an insult from other. If this makes Party angry and fearful about its image of adequacy, these emotional changes could produce a return result from Party. This might then produce similar emotional changes in other, encouraging still another insult. This cycle would then be complete, but it could be followed by further cycles, causing the conflict to become increasingly escalated.*"

From the above-mentioned observation of Dean G. Pruitt and Sung Hee Kim, it shows that the current factual overview also portrays the similar issues of **conflict spiral** (combination of contender-defender model, conflict spiral model and structural change model) with the involvement of other emotional issues, goals and responses of each party's associated group of people. Moreover, as per the factual overview, when the two groups (Mr. Karim's group and Mr. Zabbar's group) took their preparation to attack one another, then the police rushed to the spot and arrest some of them and lodged a criminal case. As a representative of the school and informer of the incident Rahim was one of the witnesses of the mentioned case. In fact, this was the **peak point** of the illustrated conflict, and after that the mentioned conflict persisted for a long time as a **plateau**, and then in one point it reached as a **stalemate**.

xii. Stalemate of Conflict

Stalemate is a condition when parties understand they are not willing to continue the conflict, or further endeavor to success through escalation are unfeasible (Pruitt and Kim, 2003, p.172) or imprudent (Pruitt and Kim, 2003, p.172).This situation may be termed as the ripeness of conflict (Marieke, 1994). It may be categorized as perceived and non-perceived. As a mechanism of settlement negotiation and mediation usually developed from

perceived stalemate (Pruitt and Kim, 2003, pp.129-146). This type of stalemate occurs when the tactics of the parties are failed, or exhausted due to lack of necessary resources that required for using the tactics or loss of support from the associated members or group, or high cost and risk to continue (Pruitt and Kim, 2003, p. 188).

As seen by the provided fact, both parties to the conflict eventually became weary and believed that continuing with the litigation was not in their best interests as academics and should be put to an end. This impasse in the conflict is referred to as a stalemate since both sides are waiting for a favorable or prestigious resolution. However, this stalemate situation can occasionally lead to escalating violence due to outside interference and instigation.

xiii. De-escalation Conflict

De-escalation periods saw the deployment of less violent force than even "normal" times when the sides were allies (Mitchell, 1990). The good behaviors are amplified at this stage to make the issue easier to resolve. This viewpoint holds that two parties in a conflict scenario can collaborate or compete to resolve the disagreement by altering either their own behaviors or how they view the actions of the other party (Dunaetz, 2010). After passing few years of litigious condition, both Mr. Karim and Mr. Zabbar perceived that the case tarnished their image in the school, and that would not ultimately carry any fruitful outcome due to cost and other social effect. This tendency may be termed as de-escalation of conflict (Pruitt & Kim, 2003, pp. 126-128). Generally speaking, de-escalation signifies the behavior of the parties involved in conflict which is intended to escape from the further escalations of conflicts. It is one of the meaningful turning points of conflict resolution.

In the given fact, both Mr. Karim and Mr. Zabbar were mutually hurt from the incidence, so at this point, as a theory of ripeness (Pruitt & Kim, 2003, p.188) they were pushed by the judge to solve the case through court mediation process.

xiv. Outcome and the resolution of conflict

The styles a conflict is handled determines its outcome. (Deutsch, 1949). Each conflict produces a specific set of outcomes and depending on the method used to solve the problem, these outcomes change. Whitfield (1994) pointed out that depending on the management style used by an institution, the outcome of a conflict can either be detrimental or beneficial. From this point of view, conflict does not fetch a bad thing always that has to be avoided. Instead, it should be viewed and handled positively to encourage creativity, innovation, better performance, and improved interpersonal relationships by reducing its negative effects within an institution. (Rahim, 2002).

Every institution, regardless of size, complexity, or simplicity, has a variety of systems or processes for handling conflicts and resolving disputes. Along with tactics and ways for resolving the dispute, it also identifies approaches and strategies for managing the conflict. Dealing with conflict and managing conflict are both parts of conflict resolution. Therefore, conflict management and negotiation are two separate components of conflict resolution that must be combined to produce favorable results. When hostile attitudes have diminished and conflicting or destructive behavior has been curbed, the conflict management or settlement, takes place. The conflict's root issues must to be addressed, though. However, there is still room to address the conflict's underlying issues. Following a reduction in the level of conflict, the next stage is to employ negotiation or problem-solving techniques to reach a solution that is acceptable to both sides. At this stage, the interests of the parties involved in the conflict are changed or modified in order to resolve the issue. Finally, the conflict management processes, as well as third-party involvement such as a judge, arbitrator, or mediator may be employed to resolve a conflict or dispute finally. Negotiation is another alternative process where either integrative (win-win) or distributive (win-loss) mechanism is used to resolve the conflict or dispute.

In the aforementioned conflict, as a theory of contractual intervention (Pruitt & Kim, 2003, p.227) used by a professional mediator or judge, Mr. Karim and Mr. Zabbar eventually came to a constructive resolution of their

disagreement after going through the mediation process and withdrew their lawsuit.

5. Conclusion

Conflict can occur at any point in an institutional or a learning environment, making conflict management crucial to the growth of an institution, preserving peace and security, and ensuring equal access to institutional justice. Even though conflict by definition implies something negative outcome, the particular conflict in question was settled in a constructive way. Generally, constructive behaviors like, mutual understanding, integrative, and cooperative relationships will be very beneficial; yet, this is the most difficult problem because the parties' interests and aspirations are so different. Therefore, in terms of decision-making and conflict resolution, emphasis should be placed on approaches that enable constructive conflict management, such as civil discourse, trust building, and constructive controversy among/within the groups, and disregard approaches like autistic hostility, like autistic hostility (Pruitt & Kim, 2003, p.160), group or community polarization (Pruitt & Kim, 2003, pp. 163-164), group think syndrome (Pruitt & Kim, 2003, p.113), overlapping bonds (Pruitt & Kim, 2003, p.139), stereotype behavior (Schaller & Neuberg, 2008; Bar-Tal & Teichman, 2005, p.3), dehumanization (Pruitt and Kim, 2003, p.111) and de-individuation (Pruitt and Kim, 2003, p. 111). Moreover, to facilitate social interaction between and among the parties to a conflict, conflict analysis and management are vital (Pruitt & Kim, 2003, p.227). In reality, both contractual and emergent intervention (Conlon & Meyer, 2004; Pruitt & Kim, 2003, p.227) are crucial for addressing the conflict constructively, especially for identifying the parties' roles and levels of intervention throughout the phase of escalation. In light of the fact that the constructive or problem-solving approach is the best way to resolve conflict in academic settings, this study also recommends further research to identify all underlying causes of conflict of a similar nature in academic settings in order to improve the edifying qualities of an educational institution.

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Note: 1
This flow-chart is prepared as per the draft-chart presented in class on April 18, 2019 in the course of Conflict and Conflict Management by Professor Richard C. Ruben, University of Missouri-Columbia School of Law, USA.

Figures and figures Legends

Figure 1: Conflict and Conflict Management Model

Figure 2: Conflict Management Styles and Dual-Concern Model

Book Review: Attaining Environmental Justice for Posterity, Volume 1 and Volume 2

By: ***Mwati Muriithi****

Author : Dr. Kariuki Muigua, PhD

Number of pages: Volume 1 – 936 & Volume 2 – 954

Publisher : Glenwood Publishers Limited, Nairobi: Kenya (2022)

ISBN : 978-9966-046-29-1

The book entails a collection of papers on Environmental Justice in Kenya and Africa. Some of the papers have been published in peer-reviewed Journals and book chapters.

The author, Dr. Kariuki Muigua, PhD, was declared the first ever winner of the CIArb (Kenya Branch) ADR Lifetime Achievement Award, the highest honour given by the Institute to one member for his immense contribution to the growth of practice, research and scholarship of ADR in Kenya and across Africa. The award came barely a week after he had won the coveted Law Society of Kenya ADR Practitioner of the Year Award at the 4th Edition of the Nairobi Legal Awards for his outstanding practice in ADR and especially arbitration and his role as a mentor to many lawyers venturing into the area.

He was also awarded the ADR Publisher of the Year for his scholarship, authorship and editorship of leading research and publications on ADR in Africa including the Journal of Conflict Management and Sustainable Development and the Alternative Dispute Resolution (ADR) Journal.

He was the winner of the African Arbitrator of the Year 2022 award at the 3rd African Arbitration Awards held at Kigali Rwanda beating other competitors from Egypt, Mauritius, Ethiopia, Nigeria and Kenya. The African Arbitrator of the Year award is the highest and most prestigious ADR and Arbitration Award in Africa.

* ***LLB (Hons) KU; Dip. In Law (KSL); ACIArb; Advocate of the High Court of Kenya; Legal Researcher.***

He was also awarded the ADR Practioner of the Year Award 2022 at the AfAA Awards. The award which was presented by the African Arbitration Association is awarded to the Arbitrator/ADR practitioner who is adjudged to have made outstanding achievements in, or contribution to, the development of Arbitration/ADR in Africa.

He was recognized and awarded for his role as the Chartered Institute of Arbitrators (CIArb) Africa Trustee from 2019 to 2022 by CIArb Kenya Branch at the CIArb Kenya Branch ADR Excellence Awards 2022.

His book, *Settling Disputes through Arbitration in Kenya,4th Edition;* Glenwood publishers 2022, was awarded the Publication of the Year Award 2022 by CIArb Kenya Branch at the CIArb Kenya Branch ADR Excellence Awards 2022.

He is a member of the National Environment Tribunal which was awarded as the best performing Tribunal in Kenya for handling the most cases.

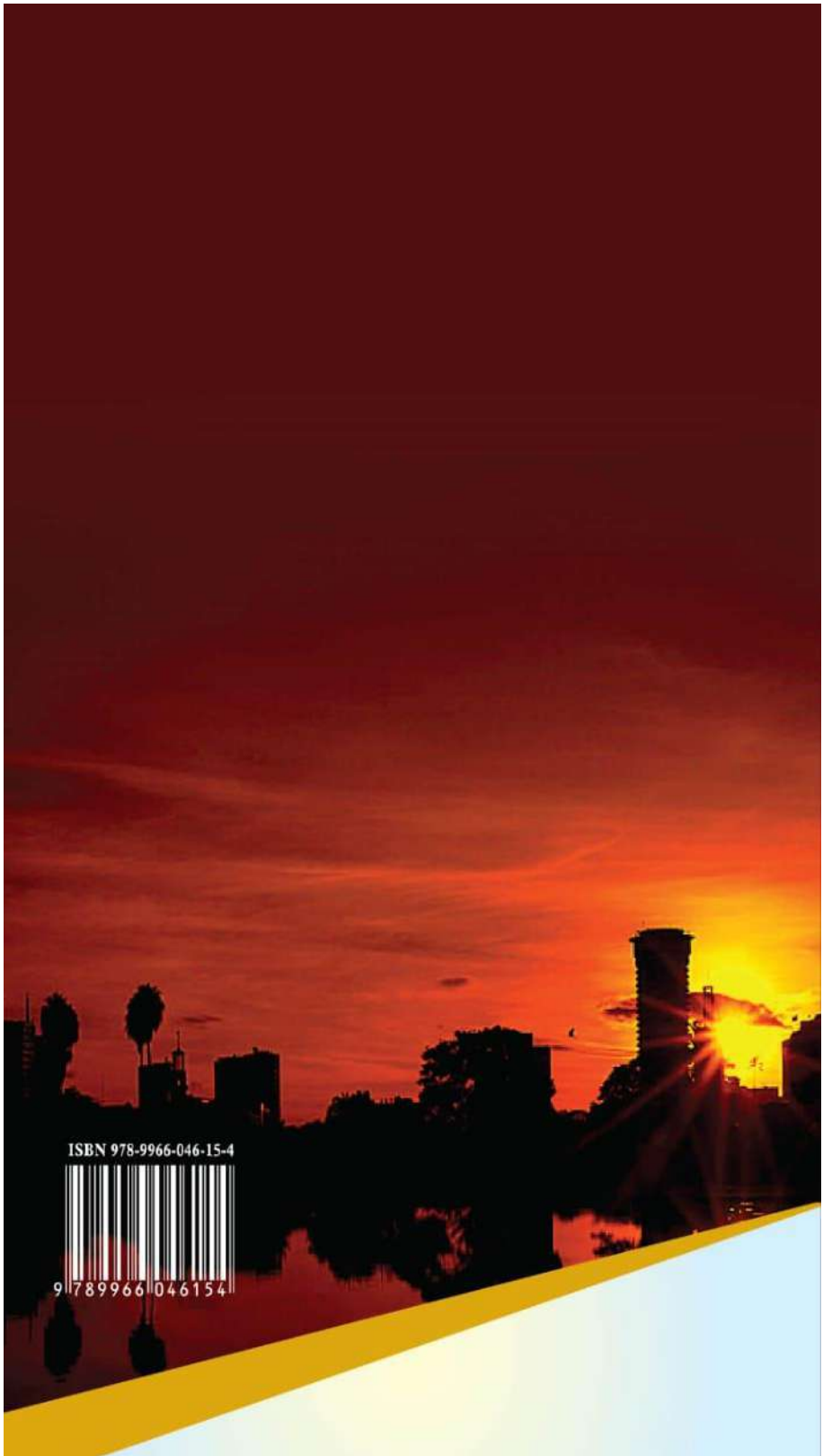
This book was necessitated by the desire to merge the author's work in Environmental Justice. The papers address some of the salient and pertinent concerns facing the attainment of Environmental Justice in Kenya and Africa. They further cover the author's reflections and recommendations towards Attaining Environmental Justice for Posterity.

Dr. Kariuki Muigua has demonstrated his prowess and sound understanding of Environmental Justice. He notes that Environmental Justice is a fundamental right in Kenya and Africa at large. The environment is critical to the well-being and survival of human beings.

Key themes covered in the book include: the nexus between Sustainable Development and Environmental Justice; the right to a clean and healthy environment; the role of Conflict Management in attainment of Environmental Justice; Human Right Concerns in Environmental Justice; Environmental Impact Assessment; Heritage Impact Assessment; Biodiversity Impact Assessment; Public Participation; Environmental Security and the role of good governance in fostering Environmental Justice.

The book also addresses emerging concerns such as the COVID-19 pandemic and the concept of Environmental, Social and Justice (ESG) and their place in the Environmental Justice discourse.

Dr. Kariuki Muigua offered the book for free download in his law firm Kariuki Muigua & Co. Advocates website.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