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## Editor's Note

## Journal of Conflict Management and Sustainable Development

We are pleased to launch another issue of the *Journal of Conflict Management and Sustainable Development*, Volume 10, No. 2.

The Journal is focused on disseminating knowledge and creating a platform for scholarly debate on pertinent and emerging areas in the fields of Conflict Management and Sustainable Development.

Sustainable Development has emerged as arguably the most important goal in the 21st century. It is geared towards meeting the needs of both the present and future generations. The Sustainable Development goals represent a shared blueprint for achieving global peace and prosperity. The Journal analyses some of the current concerns and proposes interventions towards attaining Sustainable Development. It also discusses the role of Conflict Management in the quest towards Sustainable Development.

The Journal is peer reviewed and refereed in order to adhere to the highest quality of academic standards and credibility of information. Papers submitted to the Journal are taken through a rigorous review by our team of internal and external reviewers.

This issue contains papers on key thematic areas of Conflict management and Sustainable Development including *Realizing Environmental, Social and Governance Tenets of Sustainable Development; Assessing the Jurisprudential gains and Challenges in the Prosecution of Terrorism-related Offences in Kenya; Who Speaks for Nature? Entrenching the Ecocentric Approach in Environmental Management in Kenya; Waking up to the call of Climate change: Challenges for Africa and Europe; Effective Public Participation in Environmental Impact Assessment Process: Assessing The Law and Practice in Kenya; An Appraisal of Kenya's National Cybersecurity Strategy 2022: A Comparative Perspective; Safeguarding the Environment through Effective Pollution Control in Kenya* and *Resolving Intergovernmental Disputes in Kenya through Alternative Dispute Resolution (ADR) mechanisms.*

The Journal has witnessed significant growth since its launch and is now a widely cited and authoritative publication in the fields of Conflict Management and Sustainable Development. The Editorial Team welcomes feedback and suggestions from our readers across the globe to enable us to continue improving the Journal.

I wish to thank the contributing authors, Editorial team, reviewers and everyone who has made this publication possible.

The Journal is available online at *https://journalofcmsd.net*

We welcome the submission of papers, commentaries, case and book reviews on the themes of Conflict Management and Sustainable Development or other related fields of knowledge to be considered for publication in subsequent issues of the Journal. These submissions should be channeled to *editor@journalofcmsd.net* and copied to *admin@kmco.co.ke*

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**Editor, Nairobi,**
**April 2023.**

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# Journal of Conflict Management and Sustainable Development

## Volume 10 Issue 2

# Realising Environmental, Social and Governance Tenets for Sustainable Development

*By:* ***Kariuki Muigua****

***Abstract***

*This paper discusses the Environmental, Social and Governance (ESG) aspects of sustainable development agenda and how the same affect sustainability. The paper looks at the best practices as far as these tenets are concerned. The author argues that unless countries and stakeholders ensure that there is convergence of efforts in pursuit of environmental, social and governance aspects of sustainability, then the struggle for achievement of the 2030 Agenda for Sustainable Development will remain a mirage.*

## 1. Introduction

The Sustainable Development Goals (SDGs) adopted by the United Nations (UN) in 2015 are widely hailed as a huge success: they represent a global agreement on a comprehensive strategy to address the social and environmental issues that are affecting people all over the world.[1] Instead of relying on nature for survival, as we have done

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[1] Higgs, Kerryn. "How sustainable are the SDGs?" (2020): 109-130, 109 < *https://anzsee.org.au/wp-content/uploads/2020/07/EESolutionsFutureRoyalDraftJuly2ndFINALEbook.pdf#page=109*> accessed 13 July 2022.

for ages, sustainable development offers a framework for people to coexist with and thrive in harmony with the natural world.[2]

The main principles of sustainable development agenda as captured in the *2030 Agenda for Sustainable Development*[3] include the economic, social and environmental sustainability. These are encapsulated in the 17 Sustainable Development Goals and 169 targets, which are meant to lay out a plan of action for people, planet, and prosperity that will strengthen universal peace in larger freedom. They also identify eradicating poverty in all of its manifestations, including extreme poverty, as the greatest global challenge and a crucial prerequisite for sustainable development. [4] The Sustainable Development Goals (SDGs) also envisage a world in which democracy, good governance and the rule of law as well as an enabling environment at national and international levels, are essential for sustainable development, including sustained and inclusive economic growth, social development, environmental protection and the eradication of poverty and hunger.[5] The term "governance" is used to describe "steering" in this context, which includes both processes and institutions and involves an element of authority. Process relates to how decisions are made on priorities, how conflicts are addressed and maybe handled, and how coordination of people's actions with regard to resource usage is made easier. On the other hand, the structural aspect relates to how these procedures are set up and 'managed'.[6]

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[2] Dernbach, J.C. and Mintz, J.A., "Environmental laws and sustainability: An introduction." *Sustainability* 3, no. 3 (2011): 531-540, 531.

[3] UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

[4] 'Transforming Our World: The 2030 Agenda for Sustainable Development | Department of Economic and Social Affairs' <https://sdgs.un.org/2030agenda> accessed 13 July 2022.

[5] Ibid.

[6] Vatn, Arild, *Environmental governance: institutions, policies and actions*, Edward Elgar Publishing, 2015, p. 133.

It has been observed that COVID-19 has tremendously disrupted the world's economy where the pandemic left the world's informal employees, especially young workers and women, on their own with no support or protection against financial and health issues. This was as a result of massive job losses, enlarged market gender gap, informal workers' lack of social safety, and decreased work and education opportunities for youth.[7]

Despite having adopted the SDGs into its domestic laws and planning, Kenya still faces the risk of widespread poverty, natural resources and biodiversity degradation, lack of access to safe water for all, escalating climate change, desertification, land degradation, soil erosion, flooding and drought; and increased natural disaster risks.[8] This paper argues that these challenges cannot and should not be addressed in a disjointed manner, if any real progress is to be made.

This paper seeks to analyze the aspects of governance as well as how they interact with the environmental and social tenets of sustainable development with the aim of ensuring that the SDGs are achieved, especially post the COVID-19 pandemic. Arguably, sustainable development as a process of transformation of the economy must, in consequence, also result in a transformation of society and its governance structures for a sustainable future.[9] All this must also be

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[7] Fallah Shayan, N., Mohabbati-Kalejahi, N., Alavi, S. and Zahed, M.A., 'Sustainable Development Goals (SDGs) as a Framework for Corporate Social Responsibility (CSR)' (2022) 14 Sustainability 1222, 8 <https://www.mdpi.com/2071-1050/14/3/1222> accessed 13 July 2022.

[8] National Environment Management Authority, *Kenya State of Environment Report 2019-2021*< https://www.nema.go.ke/images/Docs/EIA_1840-1849/Kenya%20State%20of%20Environment%20Report%202019-2021%20final-min.pdf accessed 17 July 2022.

[9] Ketschau, T.J., "Social sustainable development or sustainable social development-two sides of the same coin? the structure of social justice as a

accomplished in a way that takes into account environmental sustainability.

The paper discusses the Environmental, Social, and Governance (ESG) approach to sustainability and how different players, including governments, communities and businesses can participate in promoting and achieving sustainability through ESG approach.

## 2. Environmental Aspect of Sustainable Development Agenda

The world leaders who signed the 2030 Agenda stated in the preamble that they are "Determined to protect the planet from degradation, including through sustainable consumption and production, sustainably managing its natural resources, and taking urgent action on climate change, so that it can support the needs of the present and future generations."[10] A number of SDGs are dependent on the health of the environment for their realisation. These include but are noted limited to: Goal 2 seeks to end hunger, achieve food security and improved nutrition and promote sustainable agriculture; Goal 6 seeks to ensure availability and sustainable management of water and sanitation for all; Goal 12 seeks to ensure sustainable consumption and production patterns; Goal 13 urges State parties to take urgent action to combat climate change and its impacts; Goal 14 calls for conservation and sustainable use of the oceans, seas and marine resources for sustainable development; and Goal 15 urges State parties to protect, restore and promote sustainable use of terrestrial

normative basis for the social dimension of sustainability." *International Journal of Design & Nature and Ecodynamics* 12, no. 3 (2017): 338-347, 338.

[10] Environment UN, 'Sustainable Development Goals' (*UNEP - UN Environment Programme*, 19 October 2017) <http://www.unep.org/evaluation-office/our-evaluation-approach/sustainable-development-goals> accessed 17 July 2022.

ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss.[11]

In order to achieve environmental sustainability, natural resources management and disaster risk management, there is also a need for improved management of natural resources and biodiversity; access to safe water for all; climate change; desertification, land degradation, soil erosion, flooding and drought; and natural disaster risk reduction and management.[12] It is thus arguable that unless the environmental problems facing the planet are addressed, the other SDGs will remain a mirage.

## 3. Economic Aspect of Sustainable Development Agenda

The SDGs envisage a world in which every country enjoys sustained, inclusive and sustainable economic growth and decent work for all.[13] The economic aspect is to be achieved through ensuring that every State has, and shall freely exercise, full permanent sovereignty over all its wealth, natural resources and economic activity.[14]

SDG 8 seeks to promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all.[15]

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[11] 'List of the 17 Sustainable Development Goals | Agora' <https://agora-parl.org/resources/aoe/list-17-sustainable-development-goals> accessed 17 July 2022.

[12] Urama, Kevin, Nicholas Ozor, and Ernest Acheampong, "Achieving Sustainable Development Goals (SDGs) Through Transformative Governance Practices and Vertical Alignment at the National and Subnational Levels in Africa," *SDplanNet Africa Regional Workshop, March 3–5, 2014*, 3.

[13] 'Transforming Our World: The 2030 Agenda for Sustainable Development | Department of Economic and Social Affairs' <https://sdgs.un.org/2030agenda> accessed 13 July 2022.

[14] Ibid.

[15] SDG 8, UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

Some of the related relevant targets include: Sustain per capita economic growth in accordance with national circumstances and, in particular, at least 7 per cent gross domestic product growth per annum in the least developed countries;[16] achieve higher levels of economic productivity through diversification, technological upgrading and innovation, including through a focus on high-value added and labour-intensive sectors; [17] promote development-oriented policies that support productive activities, decent job creation, entrepreneurship, creativity and innovation, and encourage the formalization and growth of micro, small- and medium-sized enterprises, including through access to financial services;[18] improve progressively, through 2030, global resource efficiency in consumption and production and endeavour to decouple economic growth from environmental degradation, in accordance with the 10-year framework of programmes on sustainable consumption and production, with developed countries taking the lead; [19] by 2030, achieve full and productive employment and decent work for all women and men, including for young people and persons with disabilities, and equal pay for work of equal value; [20] by 2020, substantially reduce the proportion of youth not in employment, education or training;[21] take immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour, including recruitment and use of child soldiers, and by 2025 end child labour in all its forms;[22] protect labour rights and promote safe and secure working environments for all workers, including migrant workers, in particular

[16] Target 8.1.
[17] Target 8.2.
[18] Target 8.3.
[19] Target 8.4.
[20] Target 8.5.
[21] Target 8.6.
[22] Target 8.7.

women migrants, and those in precarious employment;[23] by 2030, devise and implement policies to promote sustainable tourism that creates jobs and promotes local culture and products;[24] strengthen the capacity of domestic financial institutions to encourage and expand access to banking, insurance and financial services for all;[25] increase Aid for Trade support for developing countries, in particular least developed countries, including through the Enhanced Integrated Framework for Trade-Related Technical Assistance to Least Developed Countries;[26] and by 2020, develop and operationalize a global strategy for youth employment and implement the Global Jobs Pact of the International Labour Organization.[27]

The underlying affirmation of these targets are that "economic, social, and technological progress" must occur "in harmony with nature," envisaging "a world in which ... consumption and production patterns and use of all natural resources—from air to land, from rivers, lakes and aquifers to oceans and seas—are sustainable ... One in which humanity lives in harmony with nature and in which wildlife and other living species are protected," but the SDGs fail to offer any quantified target for resource efficiency, and do not specify what a sustainable level of material footprint might be.[28]

It has been noted that in the economic debate, sustainable development is most frequently defined as the requirement to maintain a continuous flow of income for humanity, produced from non-declining capital

[23] Target 8.8.
[24] Target 8.9.
[25] Target 8.10.
[26] Target 8.A.
[27] Target 8.B.
[28] Hickel, J., "The contradiction of the sustainable development goals: Growth versus ecology on a finite planet." *Sustainable Development* 27, no. 5 (2019): 873-884, at 874 & 875.

stocks. In this perception, at least, steady stocks of human, man-made, natural, and social capital are seen as necessary and frequently sufficient criteria for sustainable development. [29] Economic sustainability has been defined as the meeting the economic needs of the present without diminishing the economic needs of the future.[30] Although intergenerational equity is frequently viewed as a factor in economic sustainability, it is not always clear what exactly needs to be perpetuated.[31]

The question that has, therefore, been frequently asked is whether the world be able to sustain economic growth indefinitely without running into resource constraints or despoiling the environment beyond repair.[32] Thus, the relationship between economic growth and the environment is, and always remains, controversial.[33]

However, what may be universally accepted is that increased private earnings are only one aspect of economic growth; it may also make a substantial contribution to the production of resources that can be

[29] Joachim H Spangenberg, 'Economic Sustainability of the Economy: Concepts and Indicators' (2005) 8 International Journal of Sustainable Development 47, 48 <http://www.inderscience.com/link.php?id=7374> accessed 14 July 2022.

[30] Solin, J., "Principles for Economic Sustainability: Summary," (*a summary of John Ikerd's Principles of Economic Sustainability. It was developed based on attendance a 5-day workshop taught by John and John's Essentials of Economic Sustainability book)* < https://www3.uwsp.edu/cnr-ap/wcee/Documents/Principles%20for%20Economic%20Sustainability%205%20page%20summary.pdf> accessed 14 July 2022.

[31] Sudhir Anand and Amartya Sen, 'Human Development and Economic Sustainability' (2000) 28 World Development 2029, 2029 <https://linkinghub.elsevier.com/retrieve/pii/S0305750X00000711> accessed 14 July 2022.

[32] Panayotou, T., "Economic Growth and the Environment." *CID Working Paper Series* (2000), 1.

[33] Brock, W.A. and Taylor, M.S., "Economic growth and the environment: a review of theory and empirics." *Handbook of economic growth* 1 (2005): 1749-1821.

mobilised to enhance social services (such as public healthcare, epidemiological protection, basic education, safe drinking water, among others).[34] These are ultimately important in realisation of SDGs. Economic empowerment of individuals as well as investing in social services that will benefit the current wider citizenry as well as future generations is thus an important step towards achieving sustainability.

## 4. Social Aspect of Sustainable Development Agenda

Social sustainability entails robust, inclusive communities where people may voice their opinions and governments act on them. In order to achieve social sustainability, opportunities must be increased for everyone, both now and in the future. It is essential for eradicating poverty and promoting shared wealth, together with economic and environmental sustainability.[35]

Social problems, in particular, prohibit individuals from living healthy lifestyles, disturb communities, and interfere with businesses. While most of these problems are universal, some are particular to particular regions or populations. These problems may include, but are not limited to, discrimination (based on race, colour, and gender), poverty, homelessness, hunger, malnutrition, and obesity, a lack of basic freedoms, the unemployment crisis, pandemics and epidemics, disabilities and chronic diseases, violence, crime, and insecurity as well as wars and political conflicts, gender inequality, and a lack of education and opportunities.[36]

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[34] Ibid, 2032.

[35] 'Overview' (World Bank) <https://www.worldbank.org/en/topic/socialsustainability/overview> accessed 14 July 2022.

[36] Fallah Shayan, N., Mohabbati-Kalejahi, N., Alavi, S. and Zahed, M.A., 'Sustainable Development Goals (SDGs) as a Framework for Corporate Social

The distribution of economic opportunities and social services while resolving power disparities constitutes the process of social development, which involves institutions at all levels, from national governments to various civil society groups.[37] Social development has also been defined as "a process of planned social change designed to promote people's welfare within the context of a comprehensive process of economic development". [38] The emphasis of social sustainability and inclusion is on the requirement to "put people first" throughout the development process. By empowering individuals, creating cohesive and resilient societies, and making institutions accessible and answerable to citizens, it fosters social inclusion of the underprivileged and vulnerable.[39]

Efforts towards sustainability must thus take note of these aspects of social sustainability for creation of an inclusive society.

## 5. Role of Law in Promoting Environmental, Social, and Governance (ESG) Approach: Governance Aspect of Sustainable Development Agenda

The environmental rule of law is crucial to sustainable development because it combines environmental requirements with the fundamental components of the legal system and lays the groundwork

Responsibility (CSR)' (2022) 14 Sustainability 1222, 14 <https://www.mdpi.com/2071-1050/14/3/1222> accessed 13 July 2022.

[37] Julie L Drolet, 'Chapter 14 - Societal Adaptation to Climate Change' in Trevor M Letcher (ed), The Impacts of Climate Change (Elsevier 2021) <https://www.sciencedirect.com/science/article/pii/B9780128223734000112> accessed 14 July 2022.

[38] Kramer, J.M. and Johnson, C.D., "Sustainable Development and Social Development: Necessary Partners for the Future." *Sustainable Development* (1996), 79.

[39] 'Social Sustainability and Inclusion' (World Bank) <https://www.worldbank.org/en/topic/socialsustainability> accessed 14 July 2022.

for better environmental governance.[40] In addition, by linking environmental sustainability to fundamental rights and responsibilities, it draws attention to environmental sustainability, reflects universal moral principles and ethical standards of conduct, and establishes a basis for environmental rights and obligations. Without environmental rule of law and the enforcement of legal rights and responsibilities, it is possible to argue that environmental governance will be arbitrary, that is, discretionary, subjective, and unpredictable.[41]

The rule of law fosters equality of treatment, increases personal and property security, and offers a fair and amicable means of resolving conflicts.[42] The rule of law was defined by United Nations Secretary-General Kofi Anan in 2004 as follows:

> The rule of law . . . refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers,

[40] Environment UN, 'Promoting Environmental Rule of Law' (*UNEP - UN Environment Programme*, 5 October 2017) <http://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/promoting-environmental-rule-law> accessed 17 July 2022.
[41] Ibid.
[42] Michel J, *The Rule of Law and Sustainable Development*. Center for Strategic & International Studies, 2020, 5< https://www.researchgate.net/profile/James-Michel-3/publication/342881527_The_Rule_of_Law_and_Sustainable_Development/links/5f0b3464a6fdcc4ca46389c5/The-Rule-of-Law-and-Sustainable-Development.pdf> accessed 17 July 2022.

> participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[43]

The place of rule of law in promoting sustainability is well captured under SDG 16 which seeks to promote just, peaceful and inclusive societies.[44] The law is important as it provides essential tools and institutions for governing resources sustainably.[45] In addition to being critical (and frequently last) stages in itself for effectively adopting sustainability solutions, laws and governance are also vital elements to assist technological and economic progress.[46]

It has been emphasised that the presence of robust, well-resourced public institutions at the national and international levels is essential for the execution of the 2030 Agenda's necessary policy reforms.[47]

It has been observed that the SDGs have thus far mostly been implemented through a top-down, government-led strategy, with goals and initiatives determined at the global (and increasingly, national) level.[48] To achieve the SDGs, grassroots action for sustainable

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[43] Ibid, 8.

[44] Martin, 'Peace, Justice and Strong Institutions' (*United Nations Sustainable Development*) <https://www.un.org/sustainabledevelopment/peace-justice/> accessed 17 July 2022.

[45] Dernbach, J.C. and Mintz, J.A., "Environmental laws and sustainability: An introduction." *Sustainability* 3, no. 3 (2011): 531-540, 532.

[46] Clune WH and Zehnder AJB, 'The Three Pillars of Sustainability Framework: Approaches for Laws and Governance' (2018) 9 Journal of Environmental Protection 211.

[47] Martens, Jens. "Redefining policies for sustainable development." *Exploring* (2018): 11, 20 < https://www.2030spotlight.org/sites/default/files/spot2018/chaps/Spotlight_Innenteil_2018_redefining_policies_martens.pdf> accessed 13 July 2022.

[48] Szetey, K., Moallemi, E.A., Ashton, E., Butcher, M., Sprunt, B. and Bryan, B.A., 'Co-Creating Local Socioeconomic Pathways for Achieving the Sustainable Development Goals' (2021) 16 Sustainability Science 1251, 1251 <https://doi.org/10.1007/s11625-021-00921-2> accessed 13 July 2022.

development, also known as "solutions that react to the local context and the interests of the communities concerned," is necessary.[49] The SDGs' localization is based on Local Agenda 21, a bottom-up, participatory initiative allowing local governments to interact with their citizens on sustainable development.[50]

To co-create locally relevant sustainability routes, communities, stakeholders, and academics must collaborate, and participatory approaches are crucial for fostering this cooperation in governance issues.[51] Notably, the 2010 Constitution of Kenya provides that 'all State organs, State officials, public offices, and all individuals are bound by the national values and principles of governance whenever any of them: apply or interpret this Constitution; enact, apply, or interpret any legislation; or make or implement public policy choices'.[52] Good governance, integrity, transparency, accountability, sharing and devolution of power, the rule of law, democracy, and public participation are among the national values and guiding principles of governance. Other national values and guiding principles include good governance, integrity, transparency, and accountability, patriotism, national unity, as well as sustainable development.[53] "Social Development is based on positive, humane, people oriented development in society....The basic principles... are human dignity, equality, social justice, and equitable distribution of resources....

[49] Ibid.
[50] Ibid.
[51] See Szetey, K., Moallemi, E.A., Ashton, E., Butcher, M., Sprunt, B. and Bryan, B.A., 'Co-Creating Local Socioeconomic Pathways for Achieving the Sustainable Development Goals' (2021) 16 Sustainability Science 1251 <https://doi.org/10.1007/s11625-021-00921-2> accessed 13 July 2022.
[52] Article 10 (1), Constitution of Kenya 2010.
[53] Ibid, Article 10 (2).

People's participation and empowerment are necessary conditions…."[54]

These principles are especially relevant in light of the spirit of devolution, where the Constitution states that 'the objects of the devolution of government are, among other things—to promote democratic and accountable exercise of power; to give powers of self-governance to the people and enhance their involvement in the exercise of State authority and in making decisions that affect them; to acknowledge the right of communities to manage their own affairs and to further their development; to protect and promote the interests and rights of minorities and marginalised communities'.[55]

There is a need for efforts geared towards achievement of the principle of sustainable development to be molded around the foregoing national values and principles of governance to ensure that there is an inclusive approach to governance matters in the country, for the benefit of all.

## 6. Realising Environmental, Social and Governance Tenets for Sustainable Development: Moving Forward

Integrated decision-making, or the process of incorporating environmental, social, and economic goals and factors into choices, is the key action principle of sustainable development.[56] It has rightly been pointed out that despite the fact that all countries, regardless of their economic, social, or environmental contexts, can benefit from the

[54] Kramer, J.M. and Johnson, C.D., "Sustainable Development and Social Development: Necessary Partners for the Future." *Sustainable Development* (1996), 79.

[55] Article 174, Constitution of Kenya 2010.

[56] Dernbach, J.C. and Mintz, J.A., "Environmental laws and sustainability: an introduction. Sustainability, 3 (3), 531-540." (2011), 532.

Sustainable Development Goals (SDGs) framework, norms, and principles, translating global objectives into specific national contexts is difficult because of varying starting points, capacities, and priorities, among other factors.[57] Global goals will be transformed into targets and indicators that take into account the specific national settings of each country in order to be relevant to all nations (and to foster national ownership). Keeping broad global aims and very different national settings coherent will be a problem.[58]

Economic, social and governance aspects of sustainable development must take into account the environmental aspect of sustainable development. This is because environmental protection is essential to promoting sustainable economic growth because the natural environment supports economic activity both directly and indirectly through ecosystem services like carbon sequestration, water purification, managing flood risks, and nutrient cycling. Directly, the natural environment provides resources and raw materials such as water, timber, and minerals that are required as inputs for the production of goods and services.[59]

In the institutional arrangements of governments and parliaments, scholars have argued that it is crucial to reflect the encompassing nature of the 2030 Agenda and the SDGs. If competent national

[57] Urama, Kevin, Nicholas Ozor, and Ernest Acheampong, "Achieving Sustainable Development Goals (SDGs) Through Transformative Governance Practices and Vertical Alignment at the National and Subnational Levels in Africa," *SDplanNet Africa Regional Workshop, March 3–5, 2014*, 2 < https://www.iisd.org/system/files/publications/sdplannet_africa.pdf> Accessed on 25 June 2022.

[58] Ibid, 2.

[59] UN Environment, 'GOAL 8: Decent Work and Economic Growth' (UNEP - UN Environment Programme, 2 June 2021) <http://www.unep.org/explore-topics/sustainable-development-goals/why-do-sustainable-development-goals-matter/goal-8> accessed 13 July 2022.

equivalents do not reflect and "own" the new, more cogent global government, the effort will be in vain.[60] To make the UN system "fit for purpose" on a global scale, it is necessary to reform already-existing institutions and establish new bodies in regions where there are governance gaps. This can only be done by making a commitment to address the unequal distribution of resources as well as access to participation and decision-making.[61] This is especially important considering that the SDG index, which displays each country's compliance with the SDGs and breaks down each score by SDG, reflects the fact that governments have varying degrees of commitment to the SDGs.[62]

The 2030 Agenda presents a challenge to UN Environment to create and improve integrated approaches to sustainable development, methods that will show how enhancing environmental health would have positive social and economic effects. UN Environment's initiatives support the environmental component of sustainable development and promote socio-economic development by aiming to lower environmental hazards and boost society's and the environment's overall resilience.[63]

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[60] Martens, Jens. "Redefining policies for sustainable development." *Exploring* (2018): 11, 20 < https://www.2030spotlight.org/sites/default/files/spot2018/chaps/Spotlight_Innenteil_2018_redefining_policies_martens.pdf> accessed 13 July 2022.

[61] Ibid.

[62] Del-Aguila-Arcentales, S., Alvarez-Risco, A., Jaramillo-Arévalo, M., De-la-Cruz-Diaz, M. and Anderson-Seminario, M.D.L.M., 'Influence of Social, Environmental and Economic Sustainable Development Goals (SDGs) over Continuation of Entrepreneurship and Competitiveness' (2022) 8 Journal of Open Innovation: Technology, Market, and Complexity 73, 1 <https://www.mdpi.com/2199-8531/8/2/73> accessed 13 July 2022.

[63] Environment UN, 'Sustainable Development Goals' (*UNEP - UN Environment Programme*, 19 October 2017) <http://www.unep.org/evaluation-office/our-evaluation-approach/sustainable-development-goals> accessed 17 July 2022.

The Sustainable Development Goals (SDGs) are global, multifaceted, and ambitious, and it is arguable that in order to fulfil them, we need an integrated framework that encourages a growth path that protects the environment and whose benefits are shared by everyone, not just by the fortunate few.[64] Thus, the idea of sustainable development forces us to reconsider how we interact with the world and how we anticipate that governments would implement policies that promote that worldview.[65] Local communities need to concentrate on a locally relevant subset of goals and comprehend potential future pathways for key drivers which influence local sustainability because the Sustainable Development Goals (SDGs) recognise the importance of action across all scales to achieve a sustainable future.[66] There is need for continuous creation of public awareness, civic education and creating avenues for public participation among the communities because to guide long-term local planning and decision-making to achieve the SDGs, local communities also need to understand the range of potential future pathways for their region and how they align with local sustainability objectives.[67]

It has rightly been pointed out that 'since the world's poor understand scarcity and live "closer to nature," they have a better understanding of the finite nature of natural resources than the world's powerful and affluent elite, and they have a much greater immediate and vested interest in promoting change in the way that the world does business.

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[64] Ramos, G., "The Sustainable Development Goals: A duty and an opportunity." (2016): 17-21, in Love, P. (ed.), *Debate the Issues: New Approaches to Economic Challenges*, OECD Publishing, Paris, https://doi.org/10.1787/9789264264687-3-en.
[65] Ibid.
[66] Szetey, K., Moallemi, E.A., Ashton, E., Butcher, M., Sprunt, B. and Bryan, B.A., 'Co-Creating Local Socioeconomic Pathways for Achieving the Sustainable Development Goals' (2021) 16 Sustainability Science 1251, 1251 <https://doi.org/10.1007/s11625-021-00921-2> accessed 13 July 2022.
[67] Ibid, 1251.

As a result, they have a better understanding of the need to focus social development strategies on empowering the poor. They must thus be given the authority and influence to actively shape economic policy rather than just responding to circumstances outside their control'.[68]

This calls for adoption of participatory an inclusive governance approaches that give all members of society and/or their representatives to air their views and actively participate in governance matters, in a meaningful way that impacts their lives positively. It has also been pointed out that while environmental law is essential to attaining sustainability, we also need to acknowledge that there is a need for a wide range of other pertinent laws, such as those governing land use and property, taxes, our governmental system, and other issues.[69] This is important in ensuring that sustainability is achieved in environmental, economic, social and governance aspects of development.

Corporations, through following ESG frameworks or guidelines, such as the *Nairobi Securities Exchange ESG – Disclosures Guidance Manual, 2021,* can also play a huge role in promoting sustainability within the localities that they operate in and the country at large. ESG Reporting should be encouraged and used as a tool of promoting sustainability within the companies, communities and country. Under this, organisations make it part of their operational procedures to report publicly on their economic, environmental, and/or social impacts, and hence its contributions – positive or negative – towards

[68] Kramer, J.M. and Johnson, C.D., "Sustainable Development and Social Development: Necessary Partners for the Future." *Sustainable Development* (1996), 84.

[69] Dernbach, J.C. and Mintz, J.A., "Environmental laws and sustainability: An introduction," *Sustainability* 3, no. 3 (2011): 531-540, 532.

the goal of sustainable development.[70] As the business community seeks to invest in various sectors, there is a need for them to take into account ESG requirements under SDGs. The law (government) and other policy makers should work towards supporting businesses in their efforts to transition to more sustainable business models, through using various legal, policy and other effective incentives. The law should move towards ensuring that non-financial reporting on ESG becomes the standard mode of operation for ease of enforcing such principles as "the polluter pays principle", among others. This is especially important as it has been pointed out that 'previous literature, which attempted to investigate the link between sustainability and investment performance, found that a critical barrier to ESG integration is that investors lack reliable and non-manipulated information', at least in other jurisdictions, practices which may also take place in Kenya.[71] While it may not be disputed that institutional investors vary in their approaches to integrating ESG factors into their investment decisions, the end game should at least show some tangible an verifiable positive results.[72]

It has also been suggested that businesses and companies should embrace technology and innovation in engineering and product development as well as with regard to management structures and entrepreneurship, which will arguably continue to be crucial to overall sustainability strategy. Doing more with less may be a challenge that

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[70] *Nairobi Securities Exchange ESG – Disclosures Guidance Manual, November 2021*< https://sseinitiative.org/wp-content/uploads/2021/12/NSE-ESG-Disclosures-Guidance.pdf> accessed 17 July 2022.

[71] Roy, P.P., Rao, S., Marshall, A.P. and Thapa, C., 'Mandatory Corporate Social Responsibility and Foreign Institutional Investor Preferences' (2020).

[72] OECD, *OECD Business and Finance Outlook 2020: Sustainable and Resilient Finance* (OECD 2020) <https://www.oecd-ilibrary.org/finance-and-investment/oecd-business-and-finance-outlook-2020_eb61fd29-en> accessed 17 July 2022.

technology may help solve since it can reduce the strict ecological limitations while also relieving political and economic pressures (thereby allowing space and opportunity for more sustainability solutions from all quarters).[73]

## 7. Conclusion

According to stakeholders, the primary pillars of economic transformation and inclusive growth are: inclusive growth that reduces inequality; sustainable agriculture, food self-sufficiency and nutrition; diversification, industrialization and value addition; developing the service sector; and infrastructure development.[74] These focus on the economic growth as well as social aspects of development. The main goal of Social Sustainability and Inclusion's work is to support people in overcoming barriers that prevent them from fully participating in society, regardless of their gender, race, religion, ethnicity, age, sexual orientation, or disability, by collaborating with governments, communities, civil society, the private sector, and other stakeholders to create more inclusive societies, empower citizens, and foster more sustainable communities.[75]

It has rightly been pointed out that 'every objective and target in the SDG framework is implied to depend on and impact one another,

[73] Clune WH and Zehnder AJB, 'The Three Pillars of Sustainability Framework: Approaches for Laws and Governance' (2018) 9 Journal of Environmental Protection 211.

[74] Urama, Kevin, Nicholas Ozor, and Ernest Acheampong, "Achieving Sustainable Development Goals (SDGs) Through Transformative Governance Practices and Vertical Alignment at the National and Subnational Levels in Africa," *SDplanNet Africa Regional Workshop, March 3–5, 2014*, 3 < https://www.iisd.org/system/files/publications/sdplannet_africa.pdf> Accessed on 25 June 2022.

[75] 'Social Sustainability and Inclusion: Overview' (World Bank) <https://www.worldbank.org/en/topic/socialsustainability/overview> accessed 14 July 2022.

although the precise nature of these connections is yet unknown at this time. Due to the goals' and targets' integrated structure, advancements made toward one objective or another are connected to other goals and targets via causal chains and feedback loops. For these reasons, an integrated and systems-based approach to the SDGs is required to guarantee that these feedbacks are understood and handled. Countries will be better positioned to realise the transformational potential of the 2030 Agenda if mutually reinforcing activities are implemented and target trade-offs are minimised'.[76] As already pointed out, achieving sustainable development agenda requires an integrated approach that looks at the economic welfare of the people and the nation at large, while adopting a socially inclusive approach in all governance matters. Economically and socially empowered people are more likely to participate in governance matters objectively, without being distracted by poverty and other social ills, in order to also on the intergenerational aspect of sustainable development agenda for the sake of future generations. Thus, it is necessary at the local level, to support the economic and social self-determination of oppressed individuals and groups by enlisting the help of community leaders and the general public in creating locally tailored institutional responses to issues (such as fostering environmentally friendly industries as a means of combating unemployment) and encouraging communication between local interest groups regarding issues of sustainable development, and at the national level, for the government to offer all necessary support in promoting sustainability.[77] There is a need to adopt innovative governance approaches which integrate economic,

[76] Cameron, A., Metternicht, G. and Wiedmann, T., "Initial progress in implementing the Sustainable Development Goals (SDGs): a review of evidence from countries." *Sustainability Science* 13, no. 5 (2018): 1453-1467, 1453.

[77] Kramer, J.M. and Johnson, C.D., "Sustainable Development and Social Development: Necessary Partners for the Future." *Sustainable Development* (1996), 85.

social development and sustainable development principles at multiple levels of social organization in addressing the serious challenges facing our globe and achievement of the 2030 Agenda on Sustainable Development Goals.[78]

What can be deduced from the foregoing discussion is that it is not enough to achieve sustainable development, as conceptualized by the ruling class and those in positions of decision-making; communities must actively be involved in decision-making to come up with strategies and approaches that take into account the unique economic, social and governance needs of particular group or class of people. The fundamental principles and values have already been captured under Article 10 of the 2010 Constitution of Kenya and if fully adopted and implemented within the development agenda, they can go a long way in ensuring that Kenya achieves satisfactory results as far as implementation and localization of the 2030 Agenda for Sustainable Development, and the SDGs are concerned. This is the only way that sustainability can be truly achieved and appreciated by all the people affected, while leaving a positive mark on their lives and the country in general. Realising Environmental, Social and Governance (ESG) tenets of Sustainable Development is an imperative whose time is ripe.

[78] Ibid, 89.

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# Assessing the Jurisprudential Gains and Challenges in the Prosecution of Terrorism-related Offences in Kenya

*By:* ***Michael Sang****

***Abstract***

*It is without a shadow of doubt that terrorism has become a tough nut to crack in Kenya. It is a serious offence that has left in its wake deleterious effects in our society. The objective of this study is to critically examine the jurisprudential gains and challenges in the prosecution of terrorism-related offences in Kenya. Using a desktop review of selected case studies, it brings to the fore systemic issues faced in our criminal justice system. It begins by outlining the legal framework for terrorism-related offences in Kenya while highlighting the efficacies. It then unpacks, using selected case studies, challenges in prosecution of these offences. It finally critically assesses problematic aspects in prosecution of these offences and proffers proposals for reform in bail, evidence and sentencing. It is hoped that the study will contribute positively and massively to the jurisprudence in prosecution of terrorism related offences in Kenya.*

***Key Words****: Terrorism, Prosecution, Jurisprudence, Gains and challenges, Reforms, Kenya*

## 1.0 Introduction

The greatest security challenge currently facing Kenya is the threat of terrorism, which has significantly altered the lifestyles of its citizens.[1] Kenya's terror-related problems can be traced back to 1976 when the infamous Entebbe hostage crisis incident in neighboring Uganda. In that

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[1] Kenya National Commission on Human Rights, *Report on Securing National Security & Protection of Human Rights a Comparative Analysis of The Efficacy of Counter Terrorism*
*Legislation and Policy:* Final Report (Kenya: ECPL, 2018) at 12 (*hereinafter KNCHR Report).*

incident, members of an international terrorist group seized an Air France airliner and its 258 passengers.[2] About 30 people were killed in the subsequent hostage rescue mission, comprising both Israelis and Ugandans.[3] In 1980 terrorists linked to the Palestinian Liberation Organization attacked the Jewish-owned Norfolk hotel in Nairobi killing 15 people.

In 1998, the U.S. Embassy in Nairobi, Kenya and the one in neighboring Tanzania were bombed. According to official Kenyan government figures, 213 people were killed in the blast that gutted the U.S. Embassy building in Nairobi. This incident resulted in the killing of foreigners too.[4] In 2002, three suicide bombers attacked an Israeli-owned hotel, killing 11 Kenyans, 3 Israelis and wounding dozens. There have been sporadic terrorist attacks since 2002, but their frequency was intensified by the entry of Kenya Defense Forces in Somalia in hot pursuit of the militants after abducting an aged tourist. Since the late 2011, Kenya has seen an upsurge in violent terrorist attacks.[5]

The Kenyan government has previously asserted that many of the murders and blasts are carried out by the Al-Shabaab in retaliation for Operation Linda Nchi, a coordinated military mission between the Somali military and Kenyan military.[6] According to Kenyan security experts, the bulk of the attacks were increasingly carried out by radicalized Kenyan youth who were hired for the purpose. These include the attack on 10 March 2012, where six people were killed and over sixty were injured after four grenades were thrown into a Machakos bus station in Nairobi. The September 2013 Westgate mall attack claimed the lives of 67 people and left over 100 people

[2] Ibid
[3] Kenya National Commission on Human Rights, *Report on Securing National Security & Protection Of Human Rights A Comparative Analysis Of The Efficacy Of Counter Terrorism*
*Legislation and Policy:* Final Report (Kenya: ECPL, 2018) at 12 (*hereinafter KNCHR Report).*
[4] Ibid
[5] Ibid
[6] Ibid

injured and millions of properties destroyed.[7] In April 2015 Kenyans woke up to yet another terrorist attack at Garissa University in which over 150 people lost their lives, the majority being students.[8] These are just a few of the terrorist attacks Kenya has experienced. The obligation of the state to ensure these offenders are brought to book cannot be stressed enough. It is against this backdrop that the study undertakes to offer jurisprudential gains and challenges in the prosecution of these terrorism related offences.

## 2.0 Legal Framework for terrorism-related offences in Kenya

This section provides an outline of the existing laws on terrorism-related offences in Kenya. It focuses on local, regional and international laws and will attempt to give their efficacy with regards to countering terrorism.

### 2.1 Kenyan laws

#### 2.1.1 Constitution of Kenya, 2010

It is a general principle of law recognized by all civilized nations that a State has an obligation to protect its citizens.[9] Article 238 (1) defines national security as the protection against internal and external threats to Kenya's territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity and other national interest. This mandate is carried out by the national security organs.[10] Terrorism is a threat to national security and Kenya has a duty to counter it. The Constitution places this duty on the national security organs. This duty must be undertaken while taking into considerations the law on human rights.

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[7] Ibid

[8] Ibid.

[9] Kenya National Commission on Human Rights, *Report on Securing National Security & Protection Of Human Rights A Comparative Analysis Of The Efficacy Of Counter Terrorism*
*Legislation and Policy:* Final Report (Kenya: ECPL, 2018) at 12 (*hereinafter KNCHR Report).*

[10] Article 239 (1): national security organs include: the Kenya Defense Forces, the National Intelligence Service and the National Police Service

Chapter Fourteen of the Constitution on the other hand provides for National security. Article 238 on principles of national security provides that the national security of Kenya shall be promoted and guaranteed in accordance with two principles.[11] First is that national security is subject to the authority of the Constitution and Parliament and secondly, national security shall be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental principles.

### 2.1.2 Prevention of Terrorism Act, 2012

The Prevention of Terrorism Act, 2012 (hereafter referred to as "POTA") was enacted in 2012 to provide measures for the detection and prevention of terrorist activities.[12] POTA was necessitated by sporadic attacks by the Al-Shabaab terror group. POTA also has a subsidiary legislation; the Prevention of Terrorism (Implementation of the United Nations Security Council Resolution on Suppression of Terrorism) Regulations, 2013. These regulations were developed by the Cabinet Secretary responsible for internal security pursuant to section 50 of the Prevention of Terrorism Act, 2012.[13]
Section 32 of POTA provides for the right to be released. Any person suspected of terrorism must be brought before a court of law within 24 hours. Further, remand may only be ordered by the Court as provided for under section 33 of the Act. The Court must have the following reasons so as to remand a suspect:

i) There are compelling reasons for believing that the suspect shall not appear for trial, interfere with witnesses or the conduct of investigations, or commit an offence while on release; ii) It is necessary to keep the suspect in custody for the protection of the suspect or where the suspect is a minor,

[11] Article238 (2) of the Constitution of Kenya, 2010
[12] Act No. 30 of 2012.
[13] Section 50 (2): where the Security Council of the United Nations decides, in pursuance of Article 41 of the Charter of the United Nations, on the measures to be employed to give effect to any of its decisions and calls upon member States to apply those measures, the Cabinet Secretary may by regulations make such provisions as may be necessary or expedient to enable those measures to be applied.

> for the welfare of the suspect; iii) The suspect is serving a custodial sentence; or iv) The suspect, having been arrested in relation to the commission of an offence under the Act, has breached a condition for his release.

Despite lack of international consensus on the definition of terrorism,[14] Section 2 of POTA provides an extensive definition of what encompasses a terrorist act. A terrorist act is defined as an act or threat of action which involves the use of violence against a person; endangers the life of a person, other than the person committing the action; creates a serious risk to the health or safety of the public or a section of the public and results in serious damage to property.[15]

Terrorism within the meaning of POTA also involves the use of firearms or explosives and the release of any dangerous, hazardous, toxic or radioactive substance or microbial or other biological agent or toxin into the environment. It is an act which also interferes with an electronic system resulting in the disruption of the provision of communication, financial, transport or other essential services; interferes or disrupts the provision of essential or emergency services and prejudices national security or public safety. POTA also highlights the aims for carrying out such acts which are said to be; to intimidate the public, compel the government to do or refrain from something and destabilize institutions in a country.[16]

However, the study views this definition as inadequate and overbroad. Firstly, POTA fails to provide a threshold for the differentiation of similar crimes enlisted in the Penal Code and in the Act. The definition has adopted

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[14] Kenya National Commission on Human Rights, *Report on Securing National Security & Protection Of Human Rights A Comparative Analysis Of The Efficacy Of Counter Terrorism*
*Legislation and Policy:* Final Report (Kenya: ECPL, 2018) at 12 (*hereinafter KNCHR Report).*

[15] Section 2 POTA.

[16] A disclaimer is provided in the subsequent paragraph that discredits demonstrations as terrorist acts if they do not give rise to the results in the definition

a 'catch-all' approach in that most penal crimes can be said to constitute terrorism; for example the prohibited use of explosives is provided for under Section 235 of the Penal Code and attracts a sentence of fourteen years,[17] whereas in POTA any person who possesses explosives is liable to face imprisonment for a period not less than twenty-five years.[18] Such conflicting and ambiguous provisions are open to abuse.[19] Harmonization of the punishments is required to avoid people colluding to prefer charges under the law that offers less punishment.

The United Nations Special Rapporteur on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism has noted that precision in the definition is a critical requirement that includes a requirement that "the law is adequately accessible so that the individual has a proper indication of how the law limits his or her conduct; and the law is formulated with sufficient precision so that the individual can regulate his or her conduct."[20]

For that reason a law on terrorism must be directed at terrorist activities in the narrow sense, and not just crime in general.[21] In addition, terrorism needs to be legally defined in line with the generally accepted definitions of what it is, rather than to leave it loose and allow other activities to fall within the confines of its definition. A law that permits many activities to be captured within it is seen to be in violation of international law.[22]

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[17] It reads as follows: 'Any person who unlawfully, and with intent to do any harm to another, puts any explosive substance in any place whatever, is guilty of a felony and is liable to imprisonment for fourteen years.'

[18] Section 12A of POTA

[20] E/CN.4/2006/98 (28 December 2005) para. 46.

[21] Kenya National Commission on Human Rights, *Report on Securing National Security & Protection of Human Rights a Comparative Analysis Of The Efficacy Of Counter Terrorism*
*Legislation and Policy:* Final Report (Kenya: ECPL, 2018) at 12 (*hereinafter KNCHR Report).*

[22] Ibid

The central tenet of a counter-terrorism law should be aimed at preventing and dealing with violence and threats of violence. The fact that some the aspects of the definition of a "terrorist act", in the Act are not limited to dealing with the threat of, or actual use of violence renders the law problematic. For example, would crimes such as serious damage to property provided for in the Act automatically amount to a terrorist act?

POTA provides for a number of offences including but not limited to; commission of a terrorist act,[23] provision[24] and possession of property for commission of a terrorist act,[25] dealing in property owned by terrorist groups,[26] supporting[27] and harboring suspected terrorist,[28] provisions of weapons to groups,[29] direction in the commission of a terrorist act,[30] recruitment[31] and training.[32] Financing of terrorist activities from within and outside Kenya is also prohibited under the Act.[33] The minimum sentence for any terror related offence is 30 years.[34] Life imprisonment is the maximum sentence that can be imposed for any person(s) convicted of an offence pertaining to terrorism that results in the loss of life of another person.[35]

In 2006 the UN Special Rapporteur on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism noted that the definition of terrorism at the domestic level should be defined:

[23] Section 4 of the Prevention of Terrorism Act 2012
[24] Section 5 of the Prevention of Terrorism Act 2012
[25] Section 6 of the Prevention of Terrorism Act 2012
[26] Section 8 of the Prevention of Terrorism Act 2012
[27] Section 9 of the Prevention of Terrorism Act 2012
[28] Section 10 of the Prevention of Terrorism Act 2012
[29] Section 11 of the Prevention of Terrorism Act 2012
[30] Section 12 of the Prevention of Terrorism Act 2012
[31] Section 13 of the Prevention of Terrorism Act 2012
[32] Section 14 of the Prevention of Terrorism Act 2012
[33] Section 22, 23 and 25 of the Prevention of Terrorism Act 2012
[34] Section 4(1) of the Prevention of Terrorism Act 2012
[35] Section 4 (2) of the Prevention of Terrorism Act 2012

> by the presence of three cumulative conditions: (i) the means used, which can be described as deadly, or otherwise serious violence against members of the general population or segments of it, or the taking of hostages; (ii) the intent, which is to cause fear among the population or the destruction of public order or to compel the Government or an international organization to do or refrain from doing something; and (iii) the aim, which is to further an underlying political or ideological goal. It is only when these three conditions are fulfilled that an act should be criminalized as terrorist; otherwise, it loses its distinctive force in relation to ordinary crime.[36]

The UN Special Rapporteur on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism has argued that conduct must be defined as that which is "genuinely of a terrorist nature".[37] He also argued that terrorism includes only acts or attempted acts "intended to cause death or serious bodily injury" or "lethal or serious physical violence" against one or more members of the population, or that constitute "the intentional taking of hostages" for the purpose of "provoking a state of terror in the general public or a segment of it" or "compelling a Government or international organization to do or abstain from doing something."[38]

Thus, legislation dealing with terrorism cannot be so wide so as to restrict ordinary activities that are necessary in democratic societies. Such activities include legitimate opposition protests and speech. A law that deals with terrorism must not be used to curb the democratic rights of political opponents, civil society organizations, trade unions, or human rights defenders.[39]

[36] A/61/267 (16 August 2006) para. 44.
[37] Id para. 17.
[38] Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism A/HRC/16/51 (December 22, 2010) para. 28.
[39] Ibid

Further, some scholars and members of the public have argued that the police have been given sweeping powers in the Act.[40] In the investigation of terror related offences, police are endowed with broad powers under the Act. Section 31 of POTA provides that a police officer may arrest a person if he has reasonable grounds to believe that the person has committed an offence pursuant to the Act. These arrests may be effected without a warrant. In essence, police are allowed to invade an individual's private property and arrest a suspect so long as there is reasonable suspicion that the individual has committed a crime under the Act.

Section 31 of POTA has been criticized as violating the right to privacy which not only entails privacy of personal information, but also prohibits unauthorized entry into private property.[41] This study, however, maintains that this provision is constitutional because the right to privacy under Article 31 of the Constitution of Kenya 2010 is not absolute.[42] Even so, the problem arises in the fact that many police officers abuse this power by unreasonably invading private property without justifiable grounds for suspicion of terrorism related activities.

### 2.1.3 Security Laws (Amendment) Act (SLAA) 2014

The Security Laws Amendment Act (hereafter referred to as "SLAA") is an Act of Parliament intended to amend the various laws relating to security. SLAA was highly criticized by political parties, civil society organizations among others for violation of the Constitution of Kenya, 2010, particularly, the Bill of Rights.[43] Several sections of the SLAA were challenged as

[40] Kenya National Commission on Human Rights, *Report on Securing National Security & Protection of Human Rights a Comparative Analysis of The Efficacy of Counter Terrorism*
*Legislation and Policy:* Final Report (Kenya: ECPL, 2018) at 12 (*hereinafter KNCHR Report).*
[41] Ibid
[42] Only four rights are absolute under the CoK 2010 Article 25. Right to privacy is not one of them.
[43] *Coalition for Reform and Democracy (CORD) & Another v Republic of Kenya and Others* [2015] eKLR

unconstitutional in the case of *Coalition for Reform and Democracy (CORD) & another v Republic of Kenya and Others*.[44]

For instance, Section 66(b) of the SLAA that amended section 33(10) of POTA provided that a person suspected to be a member of a terrorist group could be detained for up to 360 days before being produced in court. This is in direct contravention of the right to a fair trial, which includes the right to have the trial begin and conclude without unreasonable delay.[45] This is a fundamental right that cannot be limited as provided for under Article 25 of the Constitution of Kenya 2010. This study argues that to provide such a statutory period for remand would be a stretch and therefore subject to abuse by the police. Section 66(b) of SLAA is also unconstitutional for violating Article 49(1) (f) of the Constitution which provides that the statutory period of remand should be not later than 24 hours after being arrested.

### 2.1.4 National Intelligence Service Act, 2012

Some of the key functions of the National Intelligence Service (NIS) as provided for in the National Intelligence Service Act, 2012 (hereafter the "NIS Act") are as follows: to gather or share with the relevant State agencies, security and counter intelligence; [46] detect threats to national security; [47] safeguard and promote national security within and outside Kenya;[48] carry out protective and preventive security functions;[49] support law enforcement agencies in detecting and preventing threats to national security;[50] obtain intelligence about the activities of foreign interference[51] and liaise with intelligence of other countries.[52]

[44] [2015] eKLR.
[45] Article 50 of the CoK 2010
[46] Section 5 (1) (a) of the NIS Act.
[47] Section 5 (1) (b) of the NIS Act.
[48] Section 5 (1) (d) of the NIS Act.
[49] Section 5 (1) (h) of the NIS Act.
[50] Section 5 (1) (j) of the NIS Act.
[51] Section 5 (1) (n) of the NIS Act.
[52] Section 5 (1) (o) of the NIS Act.

Section 42 of the Act provides that where the Director General has reasonable grounds to believe that a covert operation is necessary to enable the Service to deal with a threat to national security, he/she may issue written authorization permitting an officer of the Service to undertake such an operation subject to the Council's guidelines. A special operation refers to measures, efforts and activities aimed at neutralizing threats against national security.[53]

The written authorization must be specific and accompanied by a warrant granted from the High Court. Moreover, it permits an officer to obtain any information, enter a premises and access anything, search for information, materials or documents, monitor communication and install or remove anything.[54] There are however no guidelines on how the information seized is to be handled so as to maintain a degree of privacy even as investigations are ongoing. This contradicts Article 238(2) (b) of the Constitution which calls for respect for liberties while effecting principles of national security.[55] In the NIS Act, some rights are subject to limitations under the criteria set out in Article 24 of the Constitution. These rights include the right to access information[56] and the right to privacy.[57] The right to privacy may be limited if a person is under investigation or is suspected of having committed a serious crime. In addition, the privacy of a suspect's communication may be interfered with or monitored for purposes of gathering information related to the crime under investigation. Section 61 of the Act provides for the

[53] Section 42(1) of the NIS Act.
[54] Section 42 (3) of the NIS Act.
[55] Article 238 (2) (b) of the Constitution reads as follows:
The national security of Kenya shall be promoted and guaranteed in accordance with the following principles:

> (b) national security shall be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms;

[56] Section 37 of the NIS Act
[57] Section 36 of the NIS Act

prosecution of any member of the Service who discloses information gathered without authorization from the Director General.

It can therefore be concluded that the NIS Act has been quite instrumental in promoting national security while balancing human rights as it has provided for various safeguards when carrying out various security operations. The question then becomes whether this is implemented in practice or whether these provisions are only on paper.

## 2.2 Regional Instruments

### 2.2.1 OAU Convention on the Prevention and Combating Terrorism, 1999

The Convention was adopted at Algiers on 14 July 1999 by Member States of the Organization of African Union having deep concerns over the scope and seriousness of the phenomenon of terrorism and the dangers it poses to the stability and security of States. The Convention was determined to eliminate terrorism in all forms and manifestations. The legal provisions of the Convention that address rights of terror suspects include:

> a. Article 4 (2) of the Convention which requires State parties to adopt any legitimate measures aimed at preventing and combating terrorist acts in accordance with the provisions of the Convention and their respective national legislation; and
> b. Article 22 of the Convention provides that nothing in the Convention shall be interpreted as derogating from the general principles of international law, in particular the principles of international humanitarian law, as well as the African Charter on Human and People's Rights.

This Convention has placed particular emphasis on legitimate measures being undertaken when carrying out security operations. In particular, special regard must be given to rights enshrined in the African Charter and general principles of International Humanitarian law when coming up with

counter-terrorism measures. This a progressive way of balancing national security with human rights.

### 2.3 International law

#### 2.3.1 International convention for the suppression of the financing of terrorism 1999

Its objective is to enhance international cooperation among States in devising and adopting effective measures for the prevention of the financing of terrorism, as well as for its suppression through the prosecution and punishment of its perpetrators. Article 17 of the Convention guarantees fair treatment for terrorist suspects. This demonstrates a clear balance between promotion of national security and protection of human rights.

## 3.0 Jurisprudential Gains and Challenges in the Prosecution of Terrorism-related Offences in Kenya: Analysis of Selected Case Studies

This section critically analyses some of the challenges encountered in prosecution of terrorism-related offences. This is achieved through a detailed analysis of selected case studies. The justification for choosing these cases is informed by the fact that they are recently decided cases that clearly bring out challenges in our criminal justice system when prosecuting terrorism-related offences. In addition, they bring forth significant gains in our justice system and are benchmark for proposing reforms.

### 3.1 Membership of a terrorist group *Abdirazak Muktar Edow v Republic* [2019] eKLR

This was an appeal against both conviction and sentence by the trial court where the learned Senior Principal Magistrate convicted the Appellant in count II and sentenced him to serve 10 years.[58] Count II was membership of a terrorist group contrary to Section 24 of the Prevention of Terrorism Act. The particulars were that he was found to be a member of a terrorist group

[58] Paragraph 1 of the judgment

namely Al-Shabaab which is an outlawed terrorist organization by the Kenya Gazette Notice No. 12585 of 2010.

The appellant argued, among other grounds, that there was no direct evidence of membership of the Al-Shabaab terrorist group and the available circumstantial evidence could not lead to the same inference.[59] He argued that the trial court had relied on hearsay evidence and conjecture. The Prosecution submitted that where the membership of Al-Shabaab is not confessed and/ or conceded, the court may infer such membership based on the conduct of the accused.[60]

The court concluded that having communicated the need to attend that meeting, which PW8 confirmed took place and Al-Shabaab flag was recovered, this led to an inference that the Appellant ascribed to the beliefs and activities of the proscribed group.[61] Additionally, flowing from the fact that some of the material recovered from the Appellant's phone contained information that advocated for terrorist activities such as, calling on the Kenyan youth to go to Somalia to fight the Kenyan government and exalting the *Al-Qaida* terrorist group, the court viewed these as sufficient grounds from which the court can infer membership of the Al-Shabaab group.[62]

The court added that the Appellant did not offer a rebuttal to the strong prosecution evidence and opined that the only inference that could be drawn from the message is that the Appellant was a member of Al-Shabaab. The court therefore upheld the conviction and sentence. One potential challenge with this finding is that the court ignored the accused's right to remain silent and consequently drew a negative inference. In *Sawe v Republic*[63] the Court of Appeal held:

[59] Paragraph 3e of the judgment
[60] Paragraph 93 of the judgment
[61] Paragraph 95 of the judgment
[62] Paragraph 96 of the judgment
[63] [2003] KLR 364.

> *"In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.....suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."*

Clearly, the burden of proof will always rest on the prosecution and the court should refrain from drawing a negative inference from the accused's silence. Another potential challenge is the reliance by the court on purely circumstantial evidence to convict a terrorist suspect. In *Abanga alias Onyango v Republic,*[64] the Court of Appeal set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case suffices to sustain a conviction. These are: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; and (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.[65] The present study recommends that in future, courts should strictly comply with these standards when direct evidence is insufficient to secure a conviction.

[64] CR. A NO.32 of 1990(UR)
[65] Paragraph 11 of the judgment

### 3.2 Collection of information for commission of a terrorist act

***Republic v Victor Odede Bwire alias Abdul-Aziz*** **(2023) (unreported)**

In count II, the accused was charged with the offence of collection of information contrary to section 29 of POTA. The particulars were that in preparation or facilitating the commission of a terrorist act, the accused collected and transmitted information on security arrangement of Kenyatta International Convention Centre (KICC) using his mobile phone on Facebook account "Mohamed Yore Abdalah" which information was to be used in commission of a terrorist act.[66] The accused in his defense stated that the information collected was not meant to facilitate a terrorist Act but was for general awareness of Mohamed Yare who was an exhibitor intending to do a Somali cultural show at the KICC in mid-2019.[67]

The court opined that the prosecution largely relied on circumstantial evidence and not direct evidence.[68] Again, the challenge of purely relying on circumstantial evidence was brought to the fore in this case. The court addressed that issue by holding that that there were four key strands of evidence that connected the accused with the offence. These are:

> *Nature of engagement*:[69] The accused was asked whether he was ready for the job at hand; he was warned that it was not easy and warned never to trust anyone not even 'his own friends, wife or even Sheikhs; he is also warned that there was a lot of espionage and therefore need for secrecy. This kind of engagement, in the court's view, was consistent with a plan to engage in a terrorist activity.
>
> *Concealment of identity*:[70] The court held that the fact that the accused was instructed and attempted to conceal his identity could be an indicator of his intentions. The accused was advised to drop use of his mobile phone number and asked to use Facebook accounts, he did not use his

[66] Paragraph 2 of the judgment
[67] Paragraph 33 of the judgment
[68] Paragraph 36 of the judgment
[69] Paragraph 39 of the judgment
[70] Paragraph 39 of the judgment

own phone number or name to open the Facebook accounts but used other peoples' numbers without their knowledge.

*Nature of surveillance and movements*:[71] The accused was asked to report on which he did, the number of police roadblocks on the way, the location of the roadblocks, whether the motor cycle was being stopped by the police, how many times if so and whether they asked for ID. He was also asked to carry luggage on the motorbike and a passenger and asked to confirm whether the luggage was being searched and whether the passenger ID was also being asked for. The court held that from this kind of information requested it can be deduced that the information requested was to assist in assessing the best mode of transport for the attackers who would naturally choose the least checked. It would also appear that they intended to carry some luggage and sought to know whether it was checked. The court opined that this kind of information definitely is critical for anyone wishing to perform a terrorist act.

*The place of attack and surveillance*:[72] From the conversations, the court viewed that several questions were asked about KICC; the nature of questions related to the entrance, number of entrance gates and location, the security at the gates, the distance from the gate to the building, doors to the building and the parking area locations. This information, the court held, was necessary if one was to perform a terrorist act at KICC as allegedly planned.

The court concluded that the information was for the purpose of carrying out a terrorist act. The court held that if Mohamed Yore wanted to do an event there was no need to disguise himself, or to secretly seek the security details stated above and in a secret manner.[73] The court held that count II had been proved beyond reasonable doubt, the accused was found guilty of the offence

[71] Paragraph 39 of the judgment
[72] Paragraph 39 of the judgment
[73] Paragraph 40 of the judgment

of collection of information contrary to section 29 of POTA and was convicted under section 215 CPC.[74]

This is a classic example of the court clearly interrogating the circumstantial evidence placed before it. Since relying only on circumstantial evidence can be problematic, the court went ahead to critically analyze the evidence and in doing so, established a rational link between the conduct of the accused and the offences. Drawing an inference of guilt can be challenging, it is upon the court to examine the evidence in totality.

### 3.3 Conspiracy to commit a terrorist act

***Benson Mwangi Maina v Republic*** **[2019] eKLR**

The Applicant was jointly charged with other two persons with terrorism related offences under the Prevention of Terrorism Act (POTA). The main charges were with respect to conspiracy to commit a terrorist act inside Kenya contrary to Section 23(2) of POTA. The particulars were that on or before 15th January, 2019 in the Republic of Kenya being persons inside Kenya conspired with others who were outside Kenya to carry out a terrorist act within the Republic of Kenya.[75]

The court questioned why the Applicant would procure an insurance cover in his name for a vehicle he does not own and that vehicle is later used in a terrorist attack. The court also noted that his father is deceased, yet he was able procure an insurance cover in his name for a vehicle that was never owned by him. The court questioned why an insurance company would allow procurement of insurance covers in the names of parties who do not own the vehicles.[76] The court therefore denied the applicant's application for bail due to the seriousness of the offence.[77]

[74] Paragraph 42 of the judgment
[75] Paragraph 1 of the judgment
[76] Paragraph 17 of the judgment
[77] Paragraph 18 of the judgment

The elements of proving this offence were well set out in the case of *Christopher Wafula Makokha v Republic,* [78]where the court had this to say regarding what constitutes the offence of conspiracy:

> *"In Archibold: Writing on Criminal Pleadings, Evidence and Practice, the learned writers observed at pages 2589 and 2590 that: 'The offence of conspiracy cannot exist without the agreement, consent or combination of two or more persons ...so long as a design rests in intention only, it is not indictable; there must be agreement ... Proof of the existence of a conspiracy is generally a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them.'"*[79]

The court went on to cite a Canadian Case of *R v Noseworthy*,[80] where the court stated:

> *"Conspiracy is an agreement between two or more individuals to act together to achieve an unlawful object. In Papalia v. The Queen,*[81] *the Supreme Court of Canada explained the offence at 276:*
> *... On a charge of conspiracy, the agreement itself is the gist of the offence: ... The actus reus is the fact of agreement: .... The agreement reached by the co-conspirators may contemplate a number of acts or offences. Any number of persons may be privy to it. Additionally, persons may join the ongoing scheme, while others may drop out. So long as there is a continuing, overall, dominant plan, there, may be changes in methods of operation, personnel or victims without bringing the conspiracy to an end. The important inquiry is not as to the acts done in pursuance of the agreement, but whether there was, in fact, a common agreement to which the acts are referable and to*

[78] [2014] eKLR.
[79] Paragraph 11 of the judgment

[80] 2018 NLCA 69(Can LII)
[81] 1979 Can LII 38 (SCC), [1979] 2 S.C.R. 256, 93 D.L.R. (3d) 161 at 276

> *which all of the alleged offenders were privy ... the Crown is simply required to prove a meeting of the minds with regard to a common decision to do something unlawful, specifically the commission of an indictable offence."*[82]

Following from the above decisions, the dominant aspect of the offence of conspiracy is the presence of an agreement or a meeting of the minds. The challenge here is how the courts can successfully infer that there was such meeting of the minds. *Mens rea* in such cases becomes a tough nut to crack. Nevertheless, the study proposes that this could easily be inferred by a careful examination of the conduct of the accused based on the evidence presented.

### 3.4 Possession of explosives

***Republic v Ahmad Abolfathi Mohammed and Another* (2019) eKLR**

The case of *Republic v Ahmad Abolfathi Mohammed and Another* [83] (hereinafter the *RDX* case) was an appeal before the Supreme Court of Kenya. The respondents had been charged before the Magistrate's Court with, inter alia, the offence of being in possession of explosives contrary to section 29 of the Explosives Act, Cap. 115 Laws of Kenya as per count three. The particulars were that at Mombasa Golf Course along Mama Ngina Drive in Mombasa City within Mombasa County, they had in their possession 15 kilograms of RDX explosive for unlawful object.[84] In addition to that, they put an explosive substance namely Cyclotrimethylenetrinitramine (RDX) at the Gold course with intent to cause grievous harm to the golf players.

The Chief Magistrates Court convicted the respondents of the offences and sentenced them to life imprisonment on the first count. The respondents appealed to the High Court and the conviction was upheld but the life sentence was set aside.[85] The case proceeded to the Court of Appeal which

[82] Paragraph 43 of *Republic v Victor Odede Bwire alias Abdul-Aziz (2023) (unreported)*
[83] [2019] eKLR (hereinafter *RDX Case*)
[84] Paragraph 3 of the judgment
[85] *Ahmad Abolfathi Mohammed & another v Republic* [2016] eKLR

quashed the conviction by the High Court and set aside the sentence.[86] This prompted the state to appeal in the Supreme Court.

The court, in allowing the appeal, upheld the conviction by the magistrate's court and stated that the respondents should serve the remainder of their imprisonment term. The court was of the view that Kenya has suffered many acts of terrorism 'which have been satanically planned and executed with ruthless bestiality against innocent people and that such heinous crimes must be harshly punished.' By a Ruling delivered on 28th September, 2018, the Supreme Court certified the Appeal as one that raises matters of great public importance under Article 164(3) (b) of the Constitution.[87]

One of the challenges which the court faced in the *RDX* case was (i) whether, despite the repeal of section 31 of the Evidence Act, information given to the Police by a suspect leading to discovery of material evidence and such discovered evidence is an admission or confession, and (ii) whether such information is admissible under the provisions of section 111(1) of the Evidence Act.[88] The Supreme Court opined that a distinction must be made between an 'admission' and a 'confession'.[89] The court held that an admission is an acknowledgement of "*... fact from which the guilt may be inferred by the jury*" while a confession is "*the express admission of guilt itself.*"[90] A confession must be obtained in conformity with Articles 49(1)(b), (d) and 50(2)(a) and (4) of the Constitution, sections 25 to 32 of the Evidence Act and The Evidence (Out of Court Confession) Rules, 2009 for it to be admissible in evidence. The Supreme Court further held that a confession is a direct acknowledgement of guilt on the part of the accused while an *admission* is a statement by the accused, direct or implied, of facts pertinent to the issue which, in connection with other facts, tends to prove his guilt, but which, of itself, is insufficient to found a conviction.[91]

[86] *Republic v Ahmad Abolfathi Mohammed & another* [2018] eKLR
[87] *Republic v Ahmad Abolfathi Mohammed and Another* (2019) eKLR
[88] Paragraph 27 of the judgment
[89] Paragraph 31 of the judgment
[90] Paragraph 33 of the judgment
[91] Paragraph 28 of the judgment

The Supreme Court concurred with the trial Court and the first appellate court that the 1st respondent indeed led the Police to the discovery of the RDX explosive in the Mombasa Golf Club golf course along Mama Ngina Drive.[92] That act was an admission of the respondents' possession of that explosive. The Supreme Court also found that the Court of Appeal erred in holding that the respondents' conviction was based solely on circumstantial evidence.[93] It was partly based on that admission and the circumstantial evidence on record corroborated that admission. These two factors sealed the guilt of the accused. The court therefore allowed the state's appeal and the earlier conviction was affirmed.

Another challenge faced by the Supreme Court in the *RDX* case was how the court could balance an accused's right to a fair trial and public interest. The court held that for judges and judicial officers, their vigilance has to be within the confines of the rule of law.[94] They cannot, for instance, act on public outrage of the offences of terrorism and ignore the law. While they must jealously guard an accused person's right to a fair trial, the courts should equally guard public interest by ensuring that those who commit or plan to commit terrorist offences do not escape punishment.

### 3.5 Travelling to a terrorist designated country

**Joseph Juma Odhiambo and another v Republic [2022] eKLR**

The appellants were charged with various offences. In count 1, they were charged with travelling to a terrorist designated country without passing through designated immigration exit points contrary to Sections 30B(1)(a) & 30B (2) (b) as read with Section 30C (1) of the POTA. They were found to have travelled to Somalia a terrorist designated country.[95]

The court also found that the route in question that the Appellants used is normally used by Al-Shabaab.[96] The court relied on section 30C on

[92] Paragraph 51 of the judgment
[93] Paragraph 51 of the judgment
[94] Paragraph 64 of the judgment
[95] Paragraph 1 of the judgment
[96] Paragraph 12 of the judgment

presumption of travelling to a country for purposes of being trained as a terrorist, which states that a person who travels to a country designated by the Cabinet Secretary to be a terrorist training country without passing through designated immigration entry or exit points shall be presumed to have travelled to that country to receive training in terrorism.

The court further held that the law states that it matters not that they did not yet receive the training and further that if one travels to such a country without passing through a designated area then such person is presumed to have travelled to that country to receive training in terrorism.[97] Based on the evidence on record, the court resonated with the findings of the trial court, affirmed the convictions and sentences, and found the Appeal lacking in merit and the same was therefore dismissed.[98]

This was a straightforward case that established the link between the conduct of the accused and the offences they were being charged with. The only challenge that would be potentially faced by the court would be vigilance in examining the evidence placed before the court, ensuring that the facts point undeniably towards the guilt of the accused. This was well addressed by the court.

## 4. Analysis of problematic aspects and proposals for reform

This section addresses some of the prominent problematic areas in prosecution of terrorism-related offences and proffers proposals for reform. The arguments are buttressed with relevant case law and statutory provisions.

### 4.1 Bail/Bond

The most prominent issue when it comes to bail is the reluctance by courts to grant it in serious offences like terrorism. The paramount consideration in granting bail is whether an accused person would honor attendance to the hearing whenever they are required to do so. This cardinal principal was

[97] Paragraph 21 of the judgment
[98] Paragraph 26 of the judgment

enunciated by the case of *Republic v Danson Mugunya and Another*[99] where the court stated: "The main function of bail is to ensure the presence of the accused at the trial…Accordingly, this criterion is regarded as not only the omnibus one but also the most important. As a matter of law and fact, it is the mother of all the criteria enumerated above."[100]

The Court went on to observe as follows:

> *"As a matter of fact, all other criteria are parasitic on the omnibus criterion on availability of the accused to stand trial. Arising directly from the omnibus criterion is the criterion of the nature and gravity of the offence. It is believed that the more serious the offence, the great incentive to jump bail although this is not invariably true. For instance, an accused person charged with a capital offence is likely to flee from the jurisdiction of the court than one charged with a misdemeanor, like affray. The distinction between capital and non-capital offence is one way crystallized from the realization that the atrocity of the offence is directly proportional to the probability of the accused absconding. But the above is subject to qualification that there may be less serious offences in which the court may refuse bail, because of its nature."*

The Bail and Bond Policy Guidelines[101] published by the National Council on Administration of Justice requires the court to lean towards granting bail to accused persons unless the prosecution proves that there are compelling reasons to deny the accused persons bail pending trial. In the case of *Watoro v Republic*[102] Porter J (as he then was) stated "… I think I have made it clear over a number of rulings in bail application that l take the view on authority that the paramount consideration in bail application is whether the Accused will turn up for trial…"[103]

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[99] [2010] eKLR
[100] Paragraph 10 in *Benson Mwangi Maina v Republic* [2019] eKLR
[101] The Judiciary Bail and Bond Policy Guidelines of March 2015
[102] [1991] KLR 220 at Page 283
[103] Page two in *Lydia Nyawira Mburu v Republic* [2019] eKLR

Bail pending trial is a constitutional right of an accused person under Article 49(1) (h) of the Constitution of Kenya, 2010. It provides that every arrested person has the right to be released on bond/bail on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released. The Constitution does not spell out what constitutes compelling reasons. One thing is clear though is that the onus of discharging the burden of demonstrating that there exists compelling reasons lies with the prosecution.[104]

The aspect of what constitutes 'compelling reasons' is problematic. The case of *Benson Mwangi Maina v Republic*[105] attempted to cure this lacuna. The court stipulated that what constitutes compelling reasons has been settled by case law and is also spelt out in the Judiciary Bail and Bond Policy Guidelines.[106] Among the major factors for consideration include: the nature of the charge, the seriousness of the attendant penalty to the charge itself, the strength of the prosecution case, the likelihood of interference with the witnesses, the need to protect either the victim of the crime or the accused person, the antecedent of the accused person, whether the accused person is in gainful employment, the previous record of conviction of the accused person, and for public order, peace and interest. Each case must however be considered on its own merit.[107]

Further, it is also apt to be mindful of the presumption of innocence, that an accused person remains innocent until otherwise proved. [108] This presumption, coupled with the factors cited above, should guide courts in deciding whether to grant bail even in serious offences like terrorism.

[104] Paragraph 12 in *Benson Mwangi Maina v Republic* [2019] eKLR
[105] [2019] eKLR.
[106] Paragraph 14 of the judgment
[107] Paragraph 14 of the judgment
[108] Article 50(2) (a) of the Constitution of Kenya, 2010.

### 4.2 Evidence

In most terrorism related cases, courts, including the prosecution, tend to place heavy reliance on circumstantial evidence and not direct evidence.[109] This has been hugely problematic and sometimes disadvantages the accused persons. Circumstantial evidence is "indirect [or] oblique evidence … that is not given by eyewitness testimony."[110] It is "an indirect form of proof, permitting inferences from the circumstances surrounding disputed questions of fact."[111] It is also said to be "evidence of some collateral fact, from which the existence or non-existence of some fact in question may be inferred as a probable consequence…."[112]

In the *RDX* case, the Supreme Court opined that on its application, circumstantial evidence is like any other evidence.[113] Though, it finds its probative value in reasonable, and not speculative, inferences to be drawn from the facts of a case, and, in contrast to direct testimonial evidence, it is conceptualized in circumstances surrounding disputed questions of fact, it should never be given a derogatory tag.[114]

Jowitt's Dictionary of English Law, 4th Edition, states thus of circumstantial evidence: "… with circumstantial evidence, everything depends on the context: circumstantial evidence can sometimes amount to overwhelming proof of guilt, as where the accused had the opportunity to commit a burglary, and items taken from the burgled house are found in his lock-up garage, … a fingerprint recovered from the window forced open by the burglar matches the accused's fingerprints, … [or where there is] a … DNA match between the accused's control sample and genetic material recovered from the scene of the crime …."[115]

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[109] This has been shown in the case studies above.
[110] Paragraph 55 of the RDX case
[111] Jowitt's Dictionary of English Law, 4th Edition, Vol. 1, P. 418.
[112] The Black's Law Dictionary, 9th edition, page 636 [2015].
[113] *RDX* case para 56.
[114] Paragraph 56 of the RDX case
[115] Jowitt's Dictionary of English Law, 4th Edition

However, conclusive as it may be, as it has long been established, caution is always advised in basing a conviction solely upon circumstantial evidence. The Court "should proceed with circumspection when drawing firm inferences from circumstantial evidence."[116] The court should also consider circumstantial evidence in its totality and not in piece-meal.[117] As the Privy Council in *Teper v. R* stated that: "Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another."[118]

To be the sole basis of a conviction in a criminal charge, circumstantial evidence should also not only be relevant, reasonable and not speculative[119], but also, in the words of the Indian Supreme Court, "the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established…."[120] As was stated in the case of *Kipkering Arap Koskei & Another v. R*[121], a locus classicus case on reliance of circumstantial evidence in our jurisdiction, for guilt to be inferred from circumstantial evidence the "... the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt, …"

As was further stated in the case of *Musili v Republic*[122] "to convict on the basis of circumstantial evidence, the chain of events must be so complete that it establishes the culpability of the appellant, and no one else without any reasonable doubt."[123] The chain must never be broken at any stage. In

[116] *Teper v R* [1952] A.C. 480 PC at [489].
[117] *S v Reddy & others* 1996 (2) SACR 1 (A).
[118] *Teper v R* [1952] A.C. 480 PC at [489].
[119] Barker, Ian. Circumstantial evidence in criminal cases. Bar News: The Journal of the NSW Bar Association, Winter 2011: 32-39. ISSN: 0817-0002. Available at https://search.informit.com.au/documentSummary;dn=597461518818069;res=IELHSS accessed 27 January 2023
[120] *Hanuman vs The State of Madhya Pradesh*, AIR 1952 SC 343, 1953 CriLJ 129, 1952 1 SCR 1091.
[121] (1949) 16 EACA 135.
[122] CRA No.30 of 2013 (UR)
[123] Paragraph 60 of the RDX case

other words, there "must be no other co-existing circumstances weakening the chain of circumstances relied on" and the circumstances from which the guilt inference is drawn must be of definite tendency and unerringly pointing towards the guilt of the accused. "Suspicion however strong, cannot provide a basis for inferring guilt."[124]

It is therefore imperative that courts uphold the above guidelines so as to critically examine circumstantial evidence in unearthing the guilt of the accused.

### 4.3 Sentencing

Furthermore, another issue encountered in prosecution of terrorism cases is whereby courts impose excessive and harsh sentences not within the law and without proper consideration of the evidence presented. Another issue is uniformity in sentencing. An appellate court would interfere with a sentence where the sentence, inter alia, is not within the law. This was well captured in *Mustafa Elimlim Emekwi v Republic*,[125] where the Court of Appeal sitting at Eldoret, while upholding the decision of the Superior Court stated as follows:

> *"The High Court (Ochieng, J) considered the Appellant's appeal but the learned judge dismissed the appeal by stating inter alia: 'In any event, the sentences meted out are both within the law. I find no reason to fault the manner in which the learned trial magistrate exercised his discretion in that regard. Accordingly, the sentences are both upheld. In the result this appeal is dismissed' ...we agree with the learned judge of the Superior Court that the sentences imposed were lawful."*[126]

There is also some legislative guidance on sentencing. Section 354(3) of the Criminal Procedure Code provides as follows;

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[124] *Mary Wanjiku Gichira v Republic* (Criminal Appeal No 17 of 1998) (unreported).
[125] Criminal Appeal No. 127 of 2007.
[126] Page two of the judgment

> *"The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may -in an appeal from a conviction -reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction; or (ii) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or (iii) with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence; (b) in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence; (c)... Nothing in Sub-section (1) shall empower the High Court to impose a greater sentence than might have been imposed by the court which tried the case."*

In addition, section 4 of the POTA provides punishment for the offence of commission of a terrorist act as a term of not exceeding 30 years. Where a person carries out a terrorist act which results in the death of another person, such person is liable, on conviction, to imprisonment for life. Attempted murder is punishable by imprisonment for life under section 220 of the Penal Code, as it is an offence that endangers human life. This presents a potential conflict in the said legal provisions. One would argue that a terrorist act, considering that it endangers human life, should attract as harsh penalty as that of murder or attempted murder and that the 30 years imprisonment is unnecessary.

To point out the absurdity in an example, consider an accused person getting life imprisonment for attempting to poison another person. Consider also an accused person getting less than 30 years for planting an explosive at an entertainment joint that was generally considered a terrorist act because nobody was killed. It really does not add up because both instances endanger human life and should attract the same penalty, even if nobody was killed.
Uniformity in terrorism legislations is therefore needed to avoid such conflicting provisions. It is recommended that a uniform sentence of life imprisonment be meted out in all terrorism offences. In addition, the sentences meted out must be within the law. Sentencing is a judicial discretion and can only be interfered with if the same is too harsh as to cause

an injustice or is illegal. Otherwise, an appellate court will see no justification to interfere with the judicial exercise.[127]

The sentence imposed must be commensurate with, not only the offence, but the circumstances of the case. More so, bearing in mind that terrorism is a menace not only in Kenya but all over the world and must be deterred at all costs. Kenya as a country has borne the brunt of effects of terrorism. It is important therefore, to discourage the vice by adhering to sentencing guidelines under the law.

## 5. Conclusion

The purpose of the study was to critically analyze challenges in the prosecution of terrorism related offences in Kenya. The study began by outlining the efficacy of the prevalent legal framework in Kenya addressing terrorism. These legislations have been shown to exhibit various conflicts and gaps. Using distinct case studies, the study has pinpointed various challenges encountered in the prosecution of terrorism-related offences. Some of the challenges identified include lack of uniformity in legislative provisions addressing terrorism, use of circumstantial evidence and not direct evidence, balancing an accused person's right to fair trial with public interest, burden and standard of proof among others.

The study has recommended various proposals for reform including uniformity in legislative provisions, vigilance when examining circumstantial evidence by the court, ascertaining that sentences are within the confines of the law, courts acknowledging the proportionality principle among others. Terrorism is a serious offence that requires vigilance by the state during prosecution. It is vital that courts comply with the set standards and precedents and prosecute cases in strict compliance with the law. Only through this vigilance can we ascertain a criminal justice system that treats terrorism cases with fairness but also upholds public interest.

[127] *Joseph Juma Odhiambo v Republic* [2022] eKLR

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*Lydia Nyawira Mburu v Republic* [2019] eKLR

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National Intelligence Service Act.

Prevention of Terrorism Act 2012

*Republic v Ahmad Abolfathi Mohammed & another* [2018] eKLR

*Republic v Ahmad Abolfathi Mohammed and Another* (2019) eKLR

*Republic v Victor Odede Bwire alias Abdul-Aziz* (2023) (unreported)
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# Who Speaks for Nature? Entrenching the Ecocentric Approach in Environmental Management in Kenya

*By:* ***Kariuki Muigua****

***Abstract***

*This paper makes a case for entrenchment of an ecocentric approach in environmental management in Kenya. The main argument is that while sustainable development agenda and its mainly anthropocentric approach is important for the improvement of livelihoods of communities around the world, there is a need for the human race to take care of the earth and its resources mainly because of its own ecological health and not merely because it is the source of the resources necessary for meeting human needs. All the other living species deserve to have the earth maintained in its natural status independent of human beings.*

## 1. Introduction

Much of the debates revolving around sustainable development agenda have evolved around how environmental and natural resources can be harnessed in a way that puts man in the middle of such activities, that is, an anthropocentric approach. An anthropocentric approach focuses mainly on meeting the need of human beings at the expense of a system that values the environment and ecological health, that is, an ecocentric approach. The 2030 Agenda on Sustainable Development focuses mainly on building on the Millennium Development Goals and complete what these did not achieve. They seek to realize the human rights of all and to achieve gender equality and the empowerment of all women and girls. They are integrated and indivisible and balance the three dimensions of sustainable development: the economic, social and environmental.[1]

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The human rights-based approaches provide a powerful framework of analysis and basis for action to understand and guide development, as they draw attention to the common root causes of social and ecological injustice.[2] Human rights standards and principles then guide development to more sustainable outcomes by recognizing the links between ecological and social marginalization, stressing that all rights are embedded in complex ecological systems, and emphasizing provision for need over wealth accumulation.[3]

While a human rights approach to environmental conservation and protection is useful in meeting the needs of human beings which mainly rely on natural resources, there is the risk of an overemphasis on anthropocentric approach at the expense of an ecocentric approach that puts a greater emphasis on environment and ecological health.

This paper discusses Kenya's approach to environmental conservation and protection and makes a case for a more ecocentric approach. The same is based on a hypothesis that the current approach focuses more on meeting the needs of human beings, a human rights approach, and offers little in terms of an ecocentric approach.

**2. Ecocentric Approaches in Environmental Management**

Notably, the relationship between development and environment gave birth to the sustainable development concept, whose central idea is that global ecosystems and humanity itself can be threatened by neglecting the environment.[4] The argument is that since environmental economists are concerned that the long-term neglect of the environmental assets is likely to jeopardize the durability of economic growth, and sustainable development

[1] UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1, Preamble.
[2] Fisher, A.D., 'A Human Rights Based Approach to the Environment and Climate Change' *A GI-ESCR Practitioner's Guide*, March 2014.
[3] Ibid.
[4] 'Theories of Economic Development,' p. 14. Available at *www.springer.com/cda/content/document/cda_downloaddocument/9789812872470-c2.pdf?SGWID=0-0-45-1483317-p177033406* [Accessed on 12/06/2019].

therefore "involves maximizing the net benefits of economic development, subject to maintaining the services and quality of natural resources over time".[5] This is a clear indication that ecological health becomes an issue worth considering mainly because its neglect will affect the earth's ability to meet our needs not necessarily because of its intrinsic value as nature. This is a departure from the approach adopted in the *World Charter for Nature*[6] whose principles include the recognition that all beings are interdependent and every form of life has value regardless of its worth to human beings. The *Charter* focuses more on environmental conservation rather than meeting the needs of human beings. Human needs are treated as a by-product of well-functioning natural and environmental systems. The *Charter* points out that mankind is a part of nature and life depends on the uninterrupted functioning of natural systems which ensure the supply of energy and nutrients. Furthermore, civilization is rooted in nature, which has shaped human culture and influenced all artistic and scientific achievement, and living in harmony with nature gives man the best opportunities for the development of his creativity, and for rest and recreation.[7]

The *World Charter for Nature*[8], in its preamble, also recognises that one of the reasons for the adoption of this charter was the conviction that the benefits which could be obtained from nature depends on the maintenance of natural processes and on the diversity of life forms and that those benefits are jeopardized by the excessive exploitation and the destruction of natural habitats.[9] General Principle 1 thereof is to the effect that nature should be respected and its essential processes should not be impaired.

Principle 2 of the *Stockholm Declaration*[10] of 1972 is to the effect that the natural resources of the earth, including the air, water, land, flora and fauna

[5] Ibid.
[6] UN General Assembly, *World Charter for Nature,* 28 October 1982, A/RES/37/7.
[7] Ibid, Preamble.
[8] UN General Assembly, *World Charter for Nature,* 28 October 1982, A/RES/37/7.
[9] Ibid, Preamble.
[10] U.N. Doc. A/Conf.48/14/Rev. 1(1973); 11 ILM 1416 (1972), Declaration of the United Nations Conference on the Human Environment (*Stockholm Declaration* of

and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate. Also important to this discussion is Principle 5 which provides 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.

Ecocentric approaches to environmental management explores such themes as combating climate change, impact of resource extraction, environmental health, and environmental conservation for the sake of the Mother Nature.[11] The ecocentric approach to environmental management and governance advocates for the conservation of the environment as a matter of right and not merely because of the benefits that accrue to the human beings.[12]

Under the ecocentric approach, there is a moral concern for nature. Through it, there is the adoption of a new land ethic, where a thing is right when it intends to preserve the integrity, stability and beauty of the biotic community, and is wrong if it intends to otherwise.[13]

Some scholars have rightly argued that we should give legal rights to forests, oceans, rivers and other so-called "natural objects"· in the environment-indeed, to the natural environment as a whole.[14] The people to speak on

1972), the United Nations Conference on the Human Environment, Stockholm, 5 to 16 June 1972.

[11] See generally, Muigua, K., *Nurturing Our Environment for Sustainable Development,* (Glenwood Publishers Limited, 2016).

[12] See generally, 'Species Extinction Is a Great Moral Wrong' (Elsevier Connect). Available at *<https://www.elsevier.com/connect/species-extinction-is-a-great-moral-wrong>* [Accessed on 13/6/2019].

[13] See Carter, A., "Towards a multidimensional, environmentalist ethic," *Environmental Values* 20, no. 3 (2011): 347-374.

[14] See generally, Stone, C.D., "Should Trees Have Standing--Toward Legal Rights for Natural Objects." *S. CAl. l. rev.* 45 (1972): 450; cf. Varner, G.E., "Do Species Have Standing?" *Environmental Ethics*, Volume 9, Issue 1, Spring 1987, pp. 57-72.

behalf of these natural objects in the face degradation or pollution would arguably be the champions of an ecocentric approach.

Inspired by an ecocentric approach to conservation and management of environmental resources, in 2017 the New Zealand granted some human rights to a river. The local Māori tribe of Whanganui in the North Island had fought for the recognition of their river – the third-largest in New Zealand – as an ancestor for 140 years.[15] The new status of the river means if someone abused or harmed it, the law now sees no differentiation between harming the tribe or harming the river because they are one and the same.[16]

Soon after the New Zealand decision, India followed suit by granting the Ganges River and its main tributary, Yamuna, considered sacred by more than 1 billion Indians, the same legal rights as people. A court in the northern Indian state of Uttarakhand ordered on that the Ganges and its main tributary, the Yamuna, be accorded the status of living human entities.[17]

In both cases, some officials were appointed to act as legal custodians responsible for conserving and protecting the rivers and their tributaries. These two decisions are part of the evidence that it is possible to push for and fully incorporate ecocentric approaches to environmental conservation and management.

In Ecuador, the Constitution's enshrining nature's "right to integral respect"[18] also adopts an ecocentric approach that can go a long way in

[15] The Guardian, "New Zealand River Granted Same Legal Rights As Human Being," March 2017. Available at https://www.theguardian.com/world/2017/mar/16/new-zealand-river-granted-same-legal-rights-as-human-being [Accessed on 14/6/2019].
[16] Ibid.
[17] The Guardian, "Ganges and Yamuna rivers granted same legal rights as human beings," available at https://www.theguardian.com/world/2017/mar/21/ganges-and-yamuna-rivers-granted-same-legal-rights-as-human-beings [ Accessed on 14/6/2019].
[18] Tanasescu, M., "The Rights of Nature in Ecuador: The Making of an Idea," *International Journal of Environmental Studies* 70, no. 6 (2013): 846-861.

achieving an ecocentric approach in environmental conservation under domestic laws. This is a departure from Kenya's Constitution which, while it recognises the integral role of environment as part of the heritage of the people of Kenya, it does not extend the same rights to nature as in Ecuador.

## 3. Environmental Management Approaches in Kenya: Prospects and Challenges

The 2030 Agenda on Sustainable Development is supposed to guide countries around the world in coming up with their sustainable development agenda. The Sustainable Development Goals (SDGs) ought to inform the efforts of member states in achieving sustainable development, poverty eradication, and environmental conservation and protection.[19] They offer an integrated approach, which is environmentally conscious, to combating the various problems that affect the human society as well as the environmental resources. For instance, in September 2016, Kenya came up with its policy framework on achieving sustainable development. The launch of the SDGs in Kenya on 14th September 2016 was meant to create awareness among stakeholders and rally them behind implementation.[20] The implementation of these SDGs and their mainstreaming in the Kenyan development agenda focuses more on meeting the goals socio-economic development of its people, such as eradiation of poverty, education for all, universal health, peace, which is basically an anthropocentric approach. Arguably, environmental and ecological health is treated as a by-product of the socio-economic development targeted activities and plans.

The mainly anthropocentric approach in environmental matters in Kenya is also evidenced by the various legal instruments that puts man at the centre of environment. For instance, the *Environmental Management and*

[19] 2030 Agenda on Sustainable Development.
[20] Sustainable development Goals Knowledge Platform, *Voluntary National Review 2017*, available at https://sustainabledevelopment.un.org/memberstates/kenya [Accessed on 12/6/2019].

*Coordination Act* (EMCA)[21], defines "environment" to include; the physical factors of the surroundings of human beings including land, water, atmosphere, climate, sound, odour, taste, the biological factors of animals and plants and the social factor of aesthetics and includes both the natural and the built environment.[22]

The Constitution of Kenya 2010 outlines the obligations of the State in respect of the environment as including the duty to: ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources[23], and ensure the equitable sharing 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.[24] Environmental management and governance in the country mainly focuses on achieving sustainable development, where development is interpreted as having several dimensions which include: Economic development, that is, improvement of the way endowments and goods and services are used within (or by) the system to generate new goods and services in order to provide additional consumption and/or investment possibilities to the members of the

[21] *Environmental Management and Coordination Act* (EMCA), Act No. 8 of 1999, Laws of Kenya; See also *Environmental Management and Coordination (Amendment) Act*, 2015).

[22] *Environmental Management and Coordination Act* (EMCA), Act No. 8 of 1999, Laws of Kenya; See also *Environmental Management and Coordination (Amendment) Act*, 2015), s.2.

[23] The Constitution interprets "natural resources" to mean the physical non-human factors and components, whether renewable or non-renewable, including—sunlight; surface and groundwater; forests, biodiversity and genetic resources; and rocks, minerals, fossil fuels and other sources of energy (Article 260).

[24] Constitution of Kenya, Article 69(1).

system; Human development, that is, people-centred development, where the focus is put on the improvement of the various dimensions affecting the well-being of individuals and their relationships with the society (health, education, entitlements, capabilities, empowerment etc.); Sustainable development, that is, development which considers the long term perspectives of the socio-economic system, to ensure that improvements occurring in the short term will not be detrimental to the future status or development potential of the system.[25]

It is thus evident that while there are attempts aimed at conserving the environment, much of the efforts seems to be directed at anthropocentric approach that seeks to meet the needs of human beings and the general developmental needs of the country.

## 4. Entrenching the Ecocentric Approach in Environmental Management in Kenya

The anthropocentric approach mostly adopted by most of the existing legal instruments in Kenya and indeed much of the sustainable development agenda debates create the false impression that the environment should only be protected for the convenience of human beings.[26] However, a better approach should incorporate both anthropocentric and ecocentric ideals for better incentives.

There is a need for more emphasis while coming up with laws to ensure that there are measures that are geared towards protecting the aspects of nature whose benefits are not obvious to the human beings, if at all.
Some of the challenges that the country is experiencing such as degradation of natural forests and dwindling water catchment areas would become a thing

[25] Bellù, L.G., 'Development and Development Paradigms: A (Reasoned) Review of Prevailing Visions,' (Food and Agriculture Organization of the United Nations, May 2011), p.3. Available at *http://www.fao.org/docs/up/easypol/882/defining_development_paradigms_102EN.pdf* [Accessed on 12/06/2019].

[26] They focus on eliminating poverty and other social ills afflicting the human society in Kenya.

of the past if people understand that the earth has intrinsic value and right to be protected from climate change and degradation.

If human beings view themselves as part of the nature, and not merely as conquerors of the nature with a right to use or even plunder the earth resources, then respect for the environment is likely to increase as well as entrenchment of environmental ethics where people take care of the environment without necessarily doing it as a reaction to laws on environment in the country.[27]

It is important that the country integrates both anthropocentric and ecocentric approaches to environmental conservation and protection. However, a bigger emphasis should be placed on the ecocentric approach as the current trends in the country have been concentrating more on an anthropocentric approach with little or no regard for an ecocentric approach. This will ensure that the environment is not only secure for the sake of satisfying human needs, but also ensuring that it is healthy for the animals and plants.[28]

As already pointed out, this approach is envisaged in the *World Charter for Nature*[29] which calls for respect for the Earth and life in all its diversity in recognition of the fact that all beings are interdependent and every form of life has value regardless of its worth to human beings.[30] For instance, without the bees, pollination of plants would be almost impossible, and without plants animal lives would be jeopardized. A sustained and secure environment is also useful for the regeneration of resources. The Charter calls for rights with responsibilities and states that there should be care for the community of life with understanding, compassion, and love.[31]

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[27] Ojomo, P.A., "Environmental Ethics: An African Understanding," *African Journal of Environmental Science and Technology* 5, no. 8 (2011): 572-578.
[28] See generally, Oksanen M, 'Should Trees Have Standing? Law, Morality, and the Environment' 174.
[29] UN General Assembly, *World Charter for Nature,* 28 October 1982, A/RES/37/7.
[30] *World Charter for Nature,* Principle 1.
[31] Ibid, Principle 2.

These organisms may not talk for themselves and it is important that human beings take them into consideration when exploiting environmental and natural resources. They should be a voice for the voiceless. There is an increased need for the policy makers and legislators to ensure that any laws, plans, policies and other legal instruments are geared more towards ensuring that environmental conservation and management efforts reflect ecocentric approaches.

Communities should also be sensitized more on the need to ensure that all aspects of the environment and nature in general are taken care of regardless of any potential benefits that are likely to accrue to them. In addition, they ought to be made conscious of the fact that there are many living organisms that rely on nature for their survival away from the human needs. This is the only way that the challenges of wanton destruction of forests, rivers and other aspects of the environment currently being experienced in the country will be stopped.

**5. Conclusion**

It is imperative that human beings recognise that nature and all its aspects need protection away from their usual tying to satisfaction of human needs purely on the basis of their own health. Ecological health is important even when not tied to human needs. The current laws and policies in Kenya and the sustainable development debate revolves mostly around an anthropocentric approach. There is a need to ensure that these laws reflect an ecocentric approach as much as they do with anthropocentric approach, if not more.

The Mother Nature has rights on its own and these rights can best be safeguarded only when ecocentric approaches feature more in the environmental laws of Kenya and the globe at large.

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# Waking up to the call of Climate change: Challenges for Africa and Europe

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***Abstract***

*Climate change represents one of the most obstinate challenges to human and animal survival. The dramatic changes in the environment call for significant adaptation yet communities have distinct capacities for this. While Europe is much better predisposed, Africa in contrast, has a low adaptive capacity in the face of the far-reaching potential impact of climate change.*

*With current projections showing that climate change in Africa is worsening and will exacerbate further in the future the need for interventions is urgent but the roadmap fairly constrained by limited resources and well-thought-out policy interventions.*

*This paper underscores the need for initiating mechanisms that will mitigate the anticipate adverse impact and establishing coping mechanisms that better prepare Africa in addressing the challenge of climate change in the years ahead.*

*The paper further emphasizes the importance of building relevant knowledge on the impact of climate change and complimenting this with an enabling legal, policy and institutional framework that can enable countries strengthen adaptation, mitigate risks and ensure that climate change does not unduly disrupt livelihoods.*

## Introduction

Climate change is understood to refer to changes in weather conditions, occurring over a period of time.[1] Climate change is fundamental and has the

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potential to affect human and animal life and the environment as a whole and now represents one of the greatest challenges to human survival and development.[2]

A global phenomenon, climate change, is now recognised as a key challenge because of its potential to trigger serious social, political and economic problems and upset the ecosystem – a basis of human survival.[3] Whilst some of the impacts wrought by climate change are already being experienced, a failure to mitigate the scale and scope of future impact, poses a serious threat to the capacity of the environment to support plant and animal life in the future.[4]

Current projections show that climate change in Africa could become more pronounced in the future.[5] Since 1900, mean surface temperatures have increased by only 0.5 degrees but these temperatures will increase by 2-6 degrees by 2100.[6]

What is worrying is that Africa has a low adaptive capacity yet the potential impacts of climate change are far-reaching. Some of the key potential impacts will affect water resources and agriculture, water availability, carbon uptake and influence extreme weather conditions such as flooding, desertification, distribution and prevalence of human diseases and animal pests.[7] Reduction of crop yields in drylands across Africa is expected to increase vulnerability to food insecurity for many people than is currently the case.[8]

[1] IPCC, Climate Change widespread, rapid and intensifying, 2021
[2] Ibid
[3] McKinsey, Climate risk & response: Physical hazards and socioeconomic impact, January 16, 2020
[4] WMO, Climate Change triggers food insecurity, poverty and displacement in Africa, October 19, 2021
[5] UN Climate Change News, Climate Change is an increasing threat to Africa, October 27, 2020
[6] Hulme et al, 2001
[7] Source: IPPC 2001a
[8] Op. cit, No. 4

It is for this reason that climate change, once seen as a preoccupation of the developed world and far removed from the reality of developing countries, is now increasingly recognised as a global phenomenon demanding concerted action and attention. Because the environment forms the bedrock of livelihoods in Africa, climate change – by upsetting it – poses a grave challenge to the very existence of many communities on the continent. It will be futile to address climate change in isolation and indeed, mitigation efforts in Africa must compliment those in Europe and other developed countries.

It would appear, from the very outset, that part of Africa's challenge is that of adapting to climate change to safeguard those most vulnerable from its impact.[9] Yet, climate change is not yet high up on the agenda of many African countries even though the risks are real and the implications stark. The key indicators have been in terms of variations in the weather pattern. In particular, rainfall patterns are changing dramatically and extremes in climate conditions as a whole becoming more manifest.[10]

It is uncertain how well prepared the continent is in terms of adapting to these changes. But mechanisms geared towards mitigating adverse impact must be developed and coping mechanisms must be strengthened if Africa is to meet the challenge of climate change in the years ahead.

Poverty sticks out as one of Africa's most significant drawbacks as it seeks to mount an effective response to climate change.[11] In addition, weak institutions and insufficient tools for policy adaptation within the context of a fragile ecosystem exposed to the serious effects of climate change complete the cocktail of factors that define the continent's challenges in its quest to respond effectively to climate change. It is of the essence that these factors are carefully examined and addressed with a sense of purpose and urgency.

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[9] ADB, Climate Change in Africa, COP 25 Discussion Paper, December 2019
[10] WMO, Climate Change triggers food insecurity, poverty and displacement in Africa, October 19, 2021
[11] Ibid

The most immediate impact of climate change in Africa will be on livelihoods and in particular, agriculture – a basic means of sustenance in many African countries. Food security and water availability are likely to be affected by climate change with some of the key manifestations being the spread of vector-borne diseases and population migration especially into urban areas.[12]

It is imperative that Africa pays serious attention to climate change especially, in helping the poor and vulnerable cope with its impact. This demands a wholistic approach that draws in Africa's policy and development experts to consider strategies that address adaptation to climate change.

Relevant knowledge on the impact of climate change must be complimented by enabling legal, policy and institutional frameworks and appropriate mechanisms that strengthen adaptation, mitigate risks and ensure that climate change does not unduly disrupt livelihoods.

This will exert new pressures on those living in rural areas and increase migration to cities as people seek out alternatives. The irony is that those most at risk are not the most culpable which calls for a more responsive approach from Europe and other developed economies as well as Middle income and transitioning economies which must shoulder responsibility in assisting poorer countries address climate change. "The threats caused by global warming are by no means equally distributed among the world population; they disproportionately fall upon the socially weak and powerless. It is the poor who will have to bear the brunt of climate risks, not the rich producing them".[13] Rising global temperatures – largely the result of human influence and intervention – endangers the world's ecological balance.

[12] Joacim Rocklov & Robert Dubrow, Climate Change: An enduring challenge for vector-borne disease prevention and control, April 20, 2020
[13] Jorg Hass, Climate Change in Africa: Some lessons learned, Heinrich Boll Foundation, 2007

The challenges facing Africa are accentuated by its reliance on climate-dependent sectors such as agriculture and the strain exerted on the environment by population pressure and poverty, which further imperil environmental conditions.[14] In view of the fact that countries with lower levels of economic growth will be less suited to respond effectively to climate change, unlocking development potential is of the essence.

There is emerging consensus and confluence of opinion that climate change must be addressed not in isolation by individual countries but through a global compact that maximises on existing knowledge and resources. Within this context, closer collaboration between Africa and Europe is critical not only because of shared historical ties but also the understanding that, notwithstanding different contexts and circumstances, climate change presents a present and clear challenge to both continents and beyond.

Arguably, Europe is much better predisposed to deal with some of the most immediate challenges of climate change compared to Africa, which due to resource constraints, is not as well equipped to withstand many of the anticipated impacts of climate change. For the continent, the immediate challenges come in the form of potential dislocation livelihoods especially in agriculture and livestock production. It cannot be gainsaid that in the case of both Africa and Europe, strategies that enhance resilience and reduce peoples' vulnerability will be critical to development and future stability.

**Greenhouse emissions: Taking the burden of responsibility**

Reducing high levels of greenhouse gases is now widely acknowledged as one of the most critical factors in mitigating the impact of climate change.[15] Europe and other developed countries alongside middle-income countries like China and India are substantially to blame for these emissions*. By extension, they bear a disproportionate burden in cutting back on GHG emissions.

[14] AGRA, Irrigation doubles African Food Production, January 7, 2019
[15] UN News, 5 things you should know about the greenhouse gases warming the planet, January 8, 2022

While the costs of addressing climate change are enormous (estimated at 1.6% of GDP by 2030[16]), the cost of inaction is greater – estimated at five to twenty times this level.[17]

Europe can take several practical steps to minimise Africa's vulnerability to climate change. For instance, cutting down on GHG emissions could prevent temperatures from rising above 2 degrees centigrade of pre-industrial levels as is now widely predicted. There is unanimity that as temperatures rise, the potential for climate change to create a damaging and irreversible impact grows.[18] These underline the urgency to cut back on GHG emissions and forestall such an eventuality.

In the current set of circumstances, the EU faces a significant burden in reducing its emissions substantially within a limited timeframe. Current estimates call on the EU to cut back GHG by about 80 percent by 2020 to attain a threshold lower than the 1990s levels.[19] However, at current rates, it is not likely that this ambitious target can be met.

This entails enlisting Africa's support to help cover for the shortfalls, even if this will not meet the full target. In this area, Europe must explore means and ways of providing financing, technology transfer and capacity building to assist Africa in its quest. Such support should *inter alia* prioritize investment in adaptation and increased use of renewable energy to mitigate the impact of climate change and secure long- term sustainable development.

In the absence of such measures, climate change will exert new strains on Africa – especially the poorest countries – at a time when the development trajectory is rife with other challenges such as low industrialization, poor

[16] UNDP (2007), The Struggle Against Climate change, NY
[17] The Guardian newspaper, June 2008 quoting Lord Stern
[18] Africa – Up in Smoke 2: The Second Report on Africa and Global Warming, Working Group on climate Change and Development, 2008
[19] European Commission, Progress made in cutting emissions. 2020

terms of trade and a financial and trade architecture not amenable to Africa's integration in the global economy.[20]

It is noteworthy that some countries in Africa are already taking proactive steps to address the challenges posed by high levels of GHG emissions. For instance, South Africa has announced plans to cap GHG emissions. Current projections warn that South Africa, the continent's largest emitter, could quadruple its emissions by 2050 unless preventive measures are put in place. The country is working on a regulatory, fiscal and legislative framework that will make tracking and reporting of emissions mandatory.[21]

South Africa's Minister of Environmental Affairs and Tourism, Marthinus van Schalwyk recently warned that, "if South Africa continues to grow without a carbon constraint, we face the threat of border tax adjustments or trade sanctions from key trading partners and the destruction of thousands of jobs in the high emitting trade exposed sectors".[22]

The country plans to generate 15 percent of its electricity from renewable sources by 2020 and sees addressing climate change as key to issues of poverty and sustainable development.

**Agriculture: Africa's soft under belly**

A significant percentage of Africa's population depends on agriculture – mainly rain fed agriculture – for their livelihood. As a sector, agriculture is an important contributor to GDP in most countries and is, therefore, key to economic development. Climate change will lead to climate variability and will, in all probability, affect crop seasons and the adaptability of current crops to changing climatic conditions.[23]

[20] World Bank, Expanding African Trade to Boost Growth and Reduce Poverty, February 2022
[21] Climate Home News, South Africa sets out to tighten 2030 emissions target, 2021
[22] Business Daily Newspaper, March 5, 2009
[23] See note 14

Today, Africa is 0.5 degrees centigrade warmer compared to temperature levels 100 years ago.[24] 2005 was Africa's hottest year and since 1987, temperatures have been much warmer compared to previous years.

The arid and semi-arid areas have always been most vulnerable and climate change could exacerbate this vulnerability further to the detriment of pastoralists. Marginal areas and range lands face prospects of lower production as a consequence of climate change because of their fragile nature.

Africa's heavy dependence on rain-fed agriculture means that disruptions in weather patterns will impact adversely both subsistence agriculture and livestock production. The livelihoods of pastoralists and subsistence farmers will suffer from the consequences.

The overall impact of climate change on Africa's agriculture cannot be fully discerned but the projections are worrying. It is estimated that crop yields in Africa willreduce by 10 per cent overall.[25] Since agriculture is the main source of livelihood and sustenance in Africa – contributing on average, 40 percent of Gross Domestic Product – the socio-economic cost will be significant.

The full scale of the impact of climate change on national economies will in large part depend on the relative importance of agriculture to GDP in individual countries. Countries whose economies depend predominantly on agriculture face the prospect of being forced to divert more resources towards food imports to plug shortfalls caused by crop failure.[26]

The 1991 drought in Zimbabwe, for instance, increased the country's external debt from 6 percent to 12 percent of GDP between 1991 and 1992.

[24] IPCC, 2001
[25] Source: OECD, 2006
[26] World Bank, African Food Systems: The Importance of Climate Adaptation, May 2022

On the other hand, the external debt rose from 36 percent of GDP in 1991 to 60 percent in 1992 and 75 percent by 1995.[27] The La Nina drought resulted in a 16 percent loss in GDP during the 1998-1999 and 1999-2000 financial years.[28]

In other cases, countries that depend on a narrow range of cash crops for export earnings could lose much as a result of climate change affecting the ideal growing conditions for certain crops. For instance, it is projected that an increase of 2 degrees in Uganda's temperatures could drastically reduce the area ideal for growing robusta coffee – a major source of foreign exchange earnings.[29]

Beyond impacts on cash crops, the other main area of concern relates to how climate change will affect food security. Food production has been on the decline in Africa and the continent is at present unable to meet the food security needs of an ever- growing population. The FAO has estimated that to meet Africa's food security needs by 2050, the continent would need to quadruple food supply.[30] The Stern Review[31] has on its part concluded that a temperature increase of 3 degrees could expose between 125-275 million people in Africa to the risk of hunger.

Climate change, therefore, represents a new front of challenge that complicates and compounds this situation as more people are likely to be exposed to hunger and malnutrition as scope for increased production diminishes.[32]

Malnutrition is a significant challenge in sub-Saharan Africa where an estimated 40 percent of the population is under-nourished.[33] People affected

[27] Source: IMF, 2003
[28] Source: World Bank, 2006
[29] Source: DFID, 2004
[30] FAO, Food Production Index (2002)
[31] www.sternreview.org.uk
[32] Ibid
[33] Source: WHO, 2005

by malnutrition are at a higher risk of succumbing to illness, which means that, as climate change creates more conducive conditions for diseases like malaria, the food insecure could become more vulnerable to morbidity and mortality.[34]

Across many countries in Africa, food insecurity is a major development trajectory and one inextricably linked to poverty. Poverty leads to unsustainable use of resources and environmental degradation such as poor farming practices, over-grazing and reliance on wood as the main source of fuel.[35]

As the immediate survival needs of people take precedence over the long-term imperative of protecting the environment, climate change will increasingly become a defining challenge to human survival in Africa.[36] Climate change is bound to affect different sectors of Africa's economies to the detriment of overall socio-economic well-being. For instance, the tourism industry, a major source of foreign exchange earnings for several countries in Africa faces the stark threat of frequent droughts and increased loss of natural habitat due to human encroachment which threatens the survival of wildlife and hence, tourism.[37]

As climate change affects habitats, a migration of species to more conducive habitats will be experienced. It is possible that certain species may be lost altogether as a result with obvious implications on food security and balance in the ecosystem. Estimates point out that by 2085, between 25 to 42 percent of plant species in Africa could lose their natural habitats.[38]"Poor people, especially those living in marginal environments and in areas with low agricultural productivity in Africa, depend directly on genetic, species and

[34] IFRC, Climate Change Impacts on Health: Kenya Assessment, April 2021
[35] GoK, Response to Climate Change & Opportunities for Sustainable Development, Nairobi, 2008
[36] World Vision, Poverty & the environment, 2006
[37] Portia Sifolo & Unathi Henama, Implications of Climate Change for tourism in Africa, January 2017
[38] McClean et al, 2005

ecosystem diversity to support their way of life. As a result of this dependency, any impact that climate change has on natural systems will threaten the livelihoods, food intake and health of the population".[39]

But even in other regions outside the arid and semi-arid zones, erratic and cataclysmic weather conditions are bound to affect agricultural activity and the means of economic sustenance – especially, for subsistence farmers who have limited economic options.This means that the manifestation of climate change is not remote nor a possibility and arid and semi-arid areas inhabited mainly by pastoralists are at the knife-edge of these changes now and into the future. These regions are likely to become drier, forcing changes in lifestyle patterns where the already fragile ecosystem is further compromised deepening poverty as a result.[40]

It is obvious that adaptation strategies must be urgently prioritised and the necessary institutional structures put in place to mitigate future impact and ensure that communities transit without much difficulty. It must be noted, though, that climate change could, in some cases, impact positively on environmental conditions in arid areas while at the same time creating more adverse conditions in agriculturally productive regions which leads to net gains and losses. The extent of the impact will, therefore, depend on what tips the balance and will vary across different countries and regions.

**Coming to terms with the cost of climate change**

Africa is today the continent most vulnerable to drought. In particular, the Africa Sahel which borders the Southern part of the Sahara Desert, is highly prone to drought, a situation expected to become more precarious once the full impact of climate change sets in. Since the 1960s, droughts have hit the Sahel, Horn of Africa and Southern Africa at regular intervals.[41]

[39] op. cit p.6
[40] WMO, Climate Change triggers food insecurity, poverty and displacement in Africa, October 2021
[41] Michela Biasutti, Rainfall trends in the African Sahel: Characteristics, Processes and Causes, July 2019

With about a third of Africa's population living in drought prone areas, a potential worsening of this situation owing to climate change portends a serious challenge to the livelihoods of people living in drylands and range lands and A worsening of climatic conditions in these areas will exert undue strains on people's coping mechanisms because droughts often result in widespread disruptions for the affected communities while recovery takes long and is often disrupted by subsequent drought cycles.[42]

Droughts and floods are projected to become more common and intense. In more recent memory, the El Nino floods in 1997/98 over many parts of Eastern and Southern Africa highlighted the scale of destruction and suffering that could result from extreme weather conditions. While the El Nino floods wreaked havoc on the physical infrastructure and led to loss of human and animal lives, the La Nina drought had an equally devastating impact on agriculture and the livestock sub-sector.[43]

Most countries in Eastern and Southern Africa struggled to cope with these weather extremes and in most cases, donor support was sought to repair broken down infrastructure or enable communities cope with the effects of drought. Projected into the future, harsh and adverse climatic conditions will disrupt livelihoods in Africa and exert new pressures on donors even as they struggle to cope with the effects of climate change in their own backyards.

**Water: The challenge of keeping streams flowing**

Some of the dramatic manifestations of climate change in Africa have been evident in the gradual disappearance of the ice-caps on Mt. Kilimanjaro (Africa's highest mountain) and Mt. Kenya in the neighbouring country.[44] Rivers originating from these mountains have depended on the ice caps for their flow, a reduction of which has depleted their water flow affecting communities living downstream and cities and urban towns dependent on

[42] Ibid
[43] CARE, El Nino in 1997-98: Impacts & CARE's Response, June 1998
[44] BBC, Climate Change: Kilimanjaro & Africa's last glaciers to go by 2050, November 2022

these rivers for their domestic and industrial water supply.[45] Continued reduction of the ice-caps bodes ill for many rivers which face diminishing water flows or drying up in the worst of cases.[46]Climate change also poses a threat to fisheries and, by extension, the livelihoods of those dependent on these resources and ecosystems[47]. Rises in temperature in water masses could threaten fish, marine life and ecosystems. As a result, fisher folk communities dependent on these resources will experience threats to their livelihood and survival.[48]

Beyond marine resources, climate change is expected to have a varying impact on the availability of freshwater in various parts of the world. This is of particular concern to Africa where an estimated 300 million people presently lack access to portable water or adequate sanitation.[49]

There is a risk that in communities where climate change exerts environmental pressures leading to migration and competition over natural resources (such as pastures and water), tensions and conflicts could spiral into a breakdown of peace and social harmony.[50] It must be cautioned, though, that climate change on its own, cannot be the cause or reason for conflict. But it can be a potent trigger where other factors such as poor governance and political instability are present hence exacerbating conflict over diminishing resources.[51]

The reality that a significant number of people in Africa live in the drought-prone regions of the Sahel, Horn of Africa and Southern Africa means that the implications of climate change are stark. A reduction in water quality, will ultimately spurn negative impacts on health and biodiversity.[52]

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[45] Ibid
[46] Ibid., op. cit
[47] Essam Yassin Mohammed & Zenebe Bashaw Uraguchi, Impacts of Climate Change on fisheries: Implications for food security in sub-saharan Africa, 2013
[48] Ibid
[49] Source: UNEP, 1999
[50] Kala Hubbard, Global Warming Risks Increase in Conflicts, October 2021
[51] Ibid
[52] IFRC, Climate Change Impacts on Health: Kenya Assessment, April 2021

The combination of poor sanitation and water quality combine to present a sad prognosis for people living in deprived neighbourhoods who could face renewed and increased threats to their health and survival as additional resources are inevitably diverted away from other development priorities to address these emerging challenges.

For this reason, climate change – granted its potential to, among other things, enhance water stress – is a serious policy issue for Africa and one that demands clear strategies for mitigation.

**Population pressure triggers fresh alarms**

In many countries across Africa, population pressure has become a critical factor on the environment. As human settlements grow in the high to medium potential areas, agricultural activity is exerting tremendous pressure on the environment and has in many cases led to over-exploitation of resources.[53] In the rangelands, this pressure takes the form of new pressures on a fragile environment threatened by deforestation as demand for alternative energy sources grows. These pressures on the environment have led to land degradation and higher levels of GHG emissions. Climatic extremes like floods and droughts continue to increase largely due to the agency of human encroachment on the environment diminishing its capacity to withstand these consequences.[54]

The emission of GHG is of particular concern because it increases with deforestation and hence reduces the carbon sinks. This means that environmental conservation, especially preservation of forests, is critical in reducing GHG emissions, minimising land degradation and ensuring better resilience to climate change.

[53] Relefweb, Migration, agriculture and climate change: Reducing vulnerabilities and enhancing resilience, December 2017
[54] Ibid

**Health: The precarious link to climate change**

Africa faces significant public health challenges largely in the form of tropical diseases. These health challenges remain obstacles to the continent's development and manifest an intractable link to poverty. The continent's development trajectory is, therefore, closely linked to its capacity to respond effectively to the disease burden which often draws people away from productive economic activity and diminishes household savings.

Climate change could now open a new front to this challenge where it affects the profile and preponderance of tropical diseases on the one hand and increases the vulnerability of a growing number of people to some of these diseases on the other. This will in turn necessitate increased investment and prioritisation of public health at a time when the health infrastructure in many countries is poorly resourced as countries struggle to mobilise resources for other equally demanding needs such as education and infrastructure.[55]

There are already several climate-sensitive diseases that the continent is struggling to contain such as the Rift Valley fever, which affects both livestock and human beings, and one that bears a close correlation to increased rainfall. Climate change could further affect this disease's prevalence by creating more ideal environmental conditions for its incubation and spread.[56]

The 1997 El Nino rains showed how seriously adverse climatic conditions could affect livelihoods and hence, the potential risk that future climate change portends. It is estimated that 80 percent of livestock in Northern Kenya and Somalia was wiped out by the Rift Valley fever as a result of the El Nino rains.[57]

[55] IFRC, Climate Change Impacts on Health: Kenya Assessment, April 2021
[56] National Center for Biotechnology Information, The effect of climate change on cholera disease: The road ahead using artificial neutral network, 2019
[57] CARE assessment, El Nino in 1997-1998: Impacts & CARE's Response, June 1998

Another disease – cholera – could increase in many parts of Africa affected by poor sanitation where climate change leads to an increase in temperatures – considered ideal for the cholera bacteria in tropical zones with poor sanitation and hygiene standards.[58]

Africa's most intractable public health challenge – malaria – is already moving into previously malaria-free zones such as the highlands as a result of climatic changes. Climate change – especially that leading to an increase in temperatures – could create more ideal conditions for the malaria-carrier mosquitoes especially in the highlands which have been largely malaria-free zones.[59]

Unless malaria control initiatives are stepped up, it is estimated that a 2 degree rise in temperatures could expose an additional 40-60 million people in Africa to the disease. Much higher rises in temperature would increase these numbers significantly.

**Rising coastlines: A swing on the sea shore**

It is now widely agreed that climate change will lead to a rise in sea-level which will reduce the buffer role of coral reefs and mangrove systems along coastlines.[60] Communities living along coastlines will as a consequence face an increased threat of flooding and forced evictions as the coastline encroaches on their land.[61] The socio- economic cost of such relocations could be onerous on the part of many countries with significant coastal communities and tourist facilities along coastlines. Low lying countries like the Netherlands, which have reclaimed large swathes of land from the Sea, are particularly averse to the risk of flooding and dislocations.[62]

[58] See note 20 above
[59] Malaria costs Africa more than US$12 million annually and slows down economic growth in Africa by 1.3 percent annually.
[60] Alasdair James Edwards, Impact of Climate Change on Coral Reefs, Mangroves & Tropical Seagrass ecosystems, 1995
[61] Ibid
[62] UNDRR, Flooding, Climate Change and limited Insurance Coverage in the Netherlands, June 2022

To scale back the high costs associated with a rise in sea levels and potential flooding, substantial resources will need to go towards the construction of dykes and other preventive infrastructure. While this will entail diversion of significant resources away from other development priorities, the likelihood is that few countries will be able to underwrite the cost of such infrastructure. This means that communities living along coastlines will be significantly exposed to the vagaries of climate change.

A closely watched phenomenon is the rising sea temperatures and its impact on land adjoining large water masses. The Sahel region and Southern Africa have both received less rain in recent years largely attributed to the warming up of the Southern Atlantic and Indian Oceans respectively.[63] This warming up in the two oceans has resulted in the rain being drawn to the south rather than the Sahel in the first instance while in the case of Southern Africa, there has been less overland rainfall as more convectional rain falls above the warm ocean. [64] These changes are largely attributed to increased greenhouse emissions and according to Dr James Hurrell, "the Indian ocean shows very clear and dramatic warming into the future, which means more and more drought for Southern Africa".

**Europe and Africa: Common cause amidst shared challenges**

Europe has broad climatic variations within its geographical spread from the Baltics to the Mediterranean and the Atlantic to the Black Sea.[65] In each of these regions and zones, the actual impact of climate change will vary. From the outset, it must be pointed out that Europe is much better placed to mitigate the adverse impact of climate change. Unlike Africa, Europe can mobilise substantial resources to respond to climate change and is already more proactively engaged in anticipating and addressing the impacts of climate change.

[63] Michela Biasutti, Rainfall trends in the African Sahel: Characteristics, processes and causes, July 2019
[64] Ibid
[65] European Geosciences Union, Climate Change in the Baltic Sea Region: A summary, 2022

Still, climate change is expected to have varying impacts on Europe and other developed countries. Generally, colder countries, which are also located at higher altitudes, will benefit from warmer temperatures. This will, in turn, increase crop yields and could lower heating costs during winter occasioning savings to households.

On the flip side, countries at lower altitude levels and already facing water scarcity will experience aggravation and limited water availability will inevitably affect irrigation-based agricultural production and hence, livelihoods.[66]As is the case with Africa, climate change is no longer a distant possibility but a present reality. Already, a number of countries in Europe and other developed countries are already exposed to variations of extreme weather such as floods, drought and heat waves. These phenomena will become more frequent and widespread in the future increasing the costs of coping mechanisms and interventions.

In the UK for instance, an increase in temperature of between 3-4 degrees is expected to increase losses resulting from floods from the current level of 0.1 percent of GDP to double or quadruple depending levels depending on actual temperature increase. [67] At the same time, water availability in Southern Europe is expected to decline by between 20-30 percent where temperature go up by 2 degrees. Water availability is projected to fall by up to 50 percent should temperatures increase by 4 degrees.[68]

A more immediate area of concern regards weather-related deaths. Heat waves have become more regular and are a cause of death with growing frequency.[69] The 2003 heat wave in Paris led to the death of 15,000 people and additional losses run into $15 billion linked to losses incurred in farming,

[66] Unite States Environmental Protection Agency, Climate Impacts on Coastal Areas, 2017
[67] UK Government, Climate Change Now, October 2014
[68] Schroter et al. (2006) and Arnell (2004)
[69] WHO, Heatwaves, 2020

livestock and forestry sectors arising from the combined effects of drought, fire and heat stress.[70]

These conditions are expected to increase in frequency going into the future, which means that climate change will open new strains on European economies and increase risks to survival. As regards the latter, people living in the cities will be at a much higher risk due to other factors such as air pollution which will compound the effects of heat waves.[71] Beyond heat waves, cold-related deaths are expected to decline in the higher altitude European countries where warmer winters will lower mortality rates.[72]

The incidence of winter and summer brings to the fore, the implications of climate change on energy heating costs.[73] While actual costs will largely depend on the level of temperature variations, climate change is expected to have a minimal impact on Europe's energy bill. In the case of Italy for instance, heating costs could reduce by up to 20 percent in winter as a result of warmer temperatures and increase by 30 percent in summer – a variation of only 10 percent overall.[74]

Tourism is an important sector for several European economies[75]. It is likely that climate change will affect levels of tourism to certain destinations where climatic conditions are the main pull factors. An array of various factors such as increase in water stress, heat waves and forest fires in the Mediterranean could impact adversely on tourism. For Northern Europe, extreme rainfall and flooding resulting from melting of the ice glaciers on the Alps will also impact on tourism.[76]

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[70] Source: Munich Re (2004)
[71] WHO, Cities' Impacts on Climate, 2020
[72] Patrick l. Kinney, Winter Season Mortality: Will Climate Warming Bring Benefits?, 2016
[73] Matthew Ranson, Lauren Morris & Kats-Rubin, Climate Change & Space Heating Energy Demand: A review of the literature, August 2017
[74] European Union, Energy & Climate Change, August 2017
[75] Tourism is a major economic activity in the European Union with wide-ranging impact on economic growth, employment, and social development.
[76] Climate ADAPT, Climate Change as a threat to tourism in the Alps, 2002

Climate change presents opportunity for convergence and co-operation between Europe and Africa. One such prospect relates to carbon trade under the Kyoto Protocol under which European countries – alongside other developed countries – could lower their greenhouse gas emissions by financing projects in Africa geared towards reducing their GHG emissions. Under the Protocol, industrialised countries are required to reduce GHG between 2008-2012 to levels that are 5.2 percent lower than those of 1990.[77] The carbon market is a potential avenue that could enable African countries address climate change while fighting poverty by supporting the preservation of forests and other environmental resources.[78]

**Conclusion**

The greatest dilemma facing African countries relates to whether they will be able to reduce their own vulnerability before climate shocks become overbearing and unduly strain their development potential. The experience of past extreme climatic conditions such as the El Nino floods and subsequent La Nina drought showed the heavy economic costs that can be visited upon affected countries within a relatively short span of time.

Climate change presents a multiplicity of challenges because of its obvious link to broader development issues. By creating new pressures on poverty levels, food insecurity, disease burden and conflict over resources, climate change in Africa transcends environmental concerns.

At its heart, it is a governance and development issue which must be urgently addressed to secure and safeguard livelihoods and basic survival. Because the full extent of its potential impact is not yet fully understood, much less appreciated, more research and awareness creation is needed to better prepare African countries and build their resilience as a result.

[77] The Kyoto Protocol was adopted by the UN on December 11, 1997
[78] Climate Champions, African Carbon Markets Initiative launched to dramatically expand Africa's participation in voluntary carbon market, November 2022

Because climate change is a shared challenge for both Europe and Africa, it must help foster common cause and become a bond for meaningful co-operation in such areas as research, analysis and resourcing geared towards strengthening Africa's capacity at adapting and mitigating its potential adverse impacts. African governments, on their part, must seize the burden of responsibility to re-focus development strategies and interventions towards increased prioritization aimed at managing the risks of climate change.

# Effective Public Participation in the Environmental Impact Assessment Process: Assessing The Law and Practice in Kenya

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***Abstract***

*Public participation as a governance principle promotes cohesion by involving persons most likely to be affected by an act in the decision-making process leading to the success in the implementation of such act. It is based on the neighbor principle and seeks to protect the interests of neighbors by incorporating their views in decision-making. In Kenya, The Constitution and various statutes provide a basis for public participation in decision-making. This paper seeks to assess the usefulness and effectiveness of the Laws guiding public participation in environmental governance and provides recommendations on opportunities available for improvement.*

## 1. Introduction

Public participation is a process that allows individuals to express their views on different aspects of interest to them. [1] It is a consultative process, involvement of the public, inclusiveness, informAqwszzs

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ation sharing, transparency and a process influencing outcomes in decision-making.[2] It has also been defined as a process by which public concerns, needs and values are incorporated in decision making by both the public sector and corporates.[3] Public participation seeks to break information asymmetry challenges through shared knowledge on a specific area of concern.[4] Public participation is not an arbitrary process. It is a structured process having a target group or individuals; however, the target group participates in the process at will and thus making it a democratic process.[5]

Public participation in decision-making plays the important role of informing through added information or knowledge decisions to be made, reducing areas of conflict through the incorporation of divergent views in decision-making, providing a platform for transparency and accountability, building public trust and confidence in decisions made, providing for the incorporation of traditional knowledge and beliefs, providing a platform for communication of needs and concerns in respect to projects, educative purposes and creation of awareness and lastly to legitimize decisions made and decision making processes.[6]

The core values in public participation are: that public contributions will influence decisions made, that the process communicates the interests and needs of the public; that those potentially affected by a decision participate in the decision-making process; that the public is involved in designing how

[1] Marianela C, et al, Environmental Law in Developing Countries: Selected issue, Vol II, IUCN, 2004, P.7
[2] Philiph M. Omenge etal, Public participation in Environmental impact assessment and its substantive contribution to environmental risk management:Insight from EIA practitioners and other stakeholders in Kenya's renewable energy sub-sector.
[3] Creighton, J.L., The Public participation Hand book: Making better decisions through citizen involvement (John Wiley & sons, 2005) p.7
[4] Fact sheet 27: Public participation in the legislative process, P.1.
[5] Ibid, P.1
[6] Philiph M. Omenge etal, Public participation in Environmental impact assessment and its substantive contribution to environmental risk management:Insight from EIA practitioners and other stakeholders in Kenya's renewable energy sub-sector.

they participate; that information is shared between the public and the decision making organ to assist in making an informed choice and that the process provides a feedback mechanism on how the public's contribution influenced the decision made.[7]

In Kenya, public participation is anchored under the national values and principles of governance. Article 10(2) (a)[8] enlists public participation as a key governance principle. Under Article 69,[9] the role of public participation in the management, protection and conservation of the environment is affirmed. Article 70(3)[10] and Article 42 invites every person to affirm their rights to a clean and healthy environment without having to prove injury caused by any activity considered harmful to the environment. Based on Articles 70 and 42, participation of the public is not limited to the decision-making process but also the enforcement of rights considered to be infringed. Article 184(1)(c) of the Constitution further provides for the participation of residents in the governance of urban areas and cities. The constitutional provision places the neighbour principle at the heart of public participation. Public participation is also provided for under EMCA and the Environmental impact assessment regulations.

Noteworthy, any corporate or public body that invites the public to participate in decision-making retains the final decision-making authority. This has been argued as a necessity in apportioning liability for decisions made while raising criticism on the need for public participation.[11]

[7] Ibid, p. 8
[8] The Constitution of Kenya
[9] Ibid
[10] Ibid
[11] Creighton, J.L., The Public participation Hand book: Making better decisions through citizen involvement (John Wiley & sons, 2005) p.12

## 2. Analysis of Kenyan Legal Framework, Practice and International Law Provisions on Public Participation in Environmental Impact Assessment Processes

### 2.1. The Constitution of Kenya

The constitution of Kenya is the supreme law of the state.[12] Laws inconsistent with the constitution are void to the extent of their inconsistency.[13] The general rules of international law form part of the laws of Kenya[14] while treaties or conventions ratified by Kenya form part of the laws of Kenya under the constitution.[15] Therefore, all laws applicable in Kenya are anchored on the Constitution.

Article 10 of the Constitution gives life to public participation in governance within the legal framework of Kenya. Under section 2 of the Environmental Management and Co-ordination Act, Environmental Impact Assessment has been defined as "*a systematic examination conducted to determine whether or not a programme, activity or project will have any adverse impacts on the environment*". Governing is defined as controlling a point in issue.[16] Therefore, Article 10 of the Constitution of Kenya speaks to among others, public participation in Environmental Impact Assessment processes which is a governing tool geared towards reducing negative impacts on the environment occasioned by human activities.

Under Article 69(1) (d),[17] the state has an obligation to encourage public participation in management, protection and conservation of the environment. Through the Environmental Impact Assessment process, the state is able to manage, protect and conserve the environment and ecologically sensitive areas. It is therefore an obligation upon the state to

[12] Article 2(1) The Constitution of Kenya, 2010.
[13] Article 2(4) Ibid
[14] Article 2(5) Ibid
[15] Article 2(6) Ibid
[16] Bryan A. Garner, Black's law dictionary, eighth edition, page 715.
[17] The Constitution of Kenya, 2010.

encourage the participation of the public in the Environmental Impact Assessment processes. Through various activities such as regulations, statutes, educative and public awareness forums, the state may dispense this obligation and encourage the public to participate in environmental impact assessment processes. Article 69 of the Constitution is reflected under regulation 16 of the Environmental (Impact Assessment and Audit) Regulations, 2003 which requires Environmental Impact Assessment processes to take into account among others, legal considerations and Sections 59 and 60 of the Environmental Management and Co-ordination Act which impose the obligation to effect public participation on the National Environmental Management Authority.

Under Article 42,[18] the Constitution grants every person the right to a clean and healthy environment. The Environmental Impact Assessment process as a governance tool to manage, protect and conserve the environment provides a basis upon which Article 42 of the Constitution is implemented. Article 42 (b) lifts the requirement of locus on persons approaching the court to effect their rights to a clean and healthy environment and thus inviting the general public in securing and enforcing such rights.

The question that arises and which this paper will seek to answer is, should effective public participation be localized to a project area given the provisions of Article 42 and Article 70 of the Constitution?

### 2.2. Environmental Management and Co-Ordination Act, 1999

Under the Act, [19] Public participation has been provided for through participation of members of the public and lead agencies.

Lead agency has been defined as "*any Government ministry, department, parastatal, state corporation or local authority, in which any law vests functions of control or management of any element of the environment or*

[18] Ibid
[19] section 59 and 60, Environmental Management and Co-ordination Act, 1999.

*natural resource*".[20] Through lead agencies under Section 60 of the Act,[21] public participation is enhanced. Public participation through lead agencies is anchored under Article 1 of the Constitution of Kenya for the reason that state agencies draw their power from the people. In the Environmental Impact Assessment process, lead agencies are to be invited through a written request by the Director General of the National Environment Management Authority to submit their written comments on an Environmental Impact Assessment study, evaluation and review report.[22] The comments of the lead agencies are to be submitted within 30 days of the written request by the director general. The use of the word "shall" under Article 60 of the Act, [23] implies a mandatory obligation on lead agencies to submit comments on reports shared with them. [24]

Would the failure of a lead agency to submit comments in the Environmental Impact Assessment process thus lead to ineffective public participation and would a decision to grant a license without a lead agency's comments lead to a violation of the Environmental Impact Assessment process?

Under section 59 of the Act,[25] members of the public are to be invited for public participation through the gazette, in at least two newspapers in the area or proposed area of the project and over the radio. The notices to the public are to include "*a summary description of the project, the place where the project is to be carried out, the place where the environmental impact assessment study, evaluation or review report may be inspected, and a time limit of not exceeding ninety days for the submission of oral or written comments by any member of the public on the environmental impact assessment study, evaluation or review report*".

[20] section 2, Environmental Management and Co-ordination Act, 1999.
[21] Ibid
[22] Section 60, Environmental Management and Co-ordination Act, 1999.
[23] Ibid
[24] Bryan A. Garner, Black's law dictionary, eighth edition, page 1407; Shall defined as a duty to.
[25] Environmental Management and Co-ordination Act, 1999.

Based on Section 59 (1) (c) of the Environmental Management and Co-ordination Act 1999 the question that arises is whether this provision is effective in encouraging effective public participation in the Environmental impact Assessment process based on the provisions of Article 69 (1) (d).[26] Noteworthy, the Environmental Impact Assessment study reports and project reports are generated by experts[27] posing a challenge to the general members of the public with limited knowledge in environmental science to interrogate the findings and mitigation measures put in place to buffer against adverse impacts to the environment.

To facilitate effective participation of the general public, would pro bono services offered by experts in review of the Environmental Impact Assessment experts reports enhance effective participation of the public? Where pro bono services cannot be procured, could the National Environment Management Authority source experts to assist the general public in understanding the reports while maintaining the autonomy of the general public to select their preferred expert thus enabling a meaningful participation of the public in the environmental impact assessment process?

### 2.3. Environmental (Impact Assessment &Audit) Regulations, 2003

Licensing of projects under the regulations is two fold. Approval by the National Environment Management Authority through project reports and study reports.[28]

A project report is a summary statement of the likely environmental effects of a proposed development.[29] Under Regulation 9 of the Environmental (Impact Assessment and Audit) Regulations, 2003, a project report is to be submitted to relevant lead agencies, relevant district environment committee

[26] The Constitution of Kenya, 2010.
[27] Regulation 7 (3) and 13(2) of the Environmental (Impact Assessment and Audit) Regulations, 2003.
[28] Regulation 10 and 23, Environmental (Impact Assessment and Audit) Regulations, 2003.
[29] section 2, Environmental Management and Co-ordination Act, 1999.

or provincial environment committee where a project involves more than one district. Noteworthy, in the submission of project reports for comments, the general public is not factored under the regulations for participation.

Regulation 10[30] provides a basis upon which feedback for approval of a project through a project report or lack of is communicated to project proponents. The regulation fails to provide a basis upon which such feedback is communicated to the project affected persons and thus creating a gap in public participation in environmental impact assessment process. Feedback as noted by Omenge[31]is a key value in public participation and should seek to communicate how the participation of the public influenced decision making.

Under section 129(1) of the Environmental Management and Co-ordination Act, Aggrieved persons by the decision of the National Environment Management Authority touching on issuing or failure to issue a license have 60 days statutory limitation to Appeal such decisions. This, therefore, highlights the importance of communication of licensing decisions under project reports to both project proponents and the general public. Feedback provides a basis upon which aggrieved persons can participate in the environmental impact assessment process post-issuing of an Environmental Impact Assessment license.

A study report is a more detailed report preceded by a scoping exercise giving in detail the potential impacts, mitigation measures, and alternatives to the projects among other indicators. In developing a study report under regulation 17(1),[32] the project proponents in consultation with the National Environment Management Authority, are to seek the views of persons who

[30] Environmental (Impact Assessment and Audit) Regulations, 2003.
[31] Philiph M. Omenge etal, Public participation in Environmental impact assessment and its substantive contribution to environmental risk management: Insight from EIA practitioners and other stakeholders in Kenya's renewable energy sub-sector, page 8
[32] Environmental (Impact Assessment and Audit) Regulations, 2003.

may be affected by a project. Regulation 17(2) (a) (i)[33] seeks invitation of the public to participate in the Environmental impact assessment process through posting of posters in strategic public places in the vicinity of the site of the proposed project, this calls for questioning the technique to be implemented in identifying persons who may be affected by the impacts of the project against a backdrop of impacts that may spread beyond the locality of a project.

Under regulation 17(2)(c),[34] Venue and time for the meeting should be convenient for the affected communities and other concerned parties. The regulation is suggestive of a measure to engage the public or community leaders in determining convenient venue and timings for public hearings.

Regulation 17(2) (d) further provides for the appointment of a qualified coordinator to record both oral and written comments in public hearings, While the appointment is to be done in consultation with the National Environment Management Authority, the provision fails to accommodate the public involvement in selecting a coordinator yet the views and comments to be collected are in the interests of the public and thus the need to ensure objectivity and lack of bias.

Regulation 18 (1) (p)[35] seeks to mitigate and prevent cross border impacts of projects. This clause is important for the reason that identification of persons to be affected by a project for participation or localization of project impacts possess a great challenge for the reason that impacts may go beyond the areas identified.

Upon development and submission of the study report by the project proponent, the National Environment Management Authority is then called upon to submit the report to relevant lead agencies for comments.[36] The

[33] Ibid
[34] Ibid
[35] Ibid
[36] Regulation 20, Environmental (Impact Assessment and Audit) Regulations, 2003.

Authority is also obligated to invite the public to make oral and written comments on the study report.[37]

Regulation 23(4) provides a feedback mechanism for the decision made by the Authority; however, the communication obligation is limited to the project proponent without involving the public and interested parties who may be affected by the project.

In variation of a license, the regulations do not consider public participation as important. Under regulation 25(4)[38], public participation in variation of a license is limited to lead agencies and thus the process does not benefit from the inputs of interested persons and project affected persons.

Regulation 28(2) (c)[39] and Regulation 28(2) (d) provides remedies for licenses issued without adequate information on environmental threats and impacts, or based on misinformation, false or incorrect information. Through cancellation, revocation or suspension of a license, information acquired post issuance of an Environmental Impact Assessment license can be used to safeguard the interests of the environment.

### 2.4. Case Law Establishing Public Participation Guiding Principle in Kenya

In the case of ***British American Tobacco Kenya, PLC (Formerly British American Tobacco Kenya Limited) V Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance 7 Another (Interested parties); Mastermind Tobacco Kenya Limited (The Affected party) [2019] eKLR,***[40]the supreme court of Kenya established the guiding principles for public participation.

[37] Regulation 21(1), Environmental (Impact Assessment and Audit) Regulations, 2003.
[38] Environmental (Impact Assessment and Audit) Regulations, 2003.
[39] Ibid
[40] Paragraph 96

The court determined that public participation applied to all aspects of governance, that the public officer or entity bearing the duty to perform a certain function had the onus to facilitate public participation, that the lack of a prescribed legal framework for public participation is not an excuse for not conducting public participation and that the public entity bears the responsibility to give effect to the constitutional principle of public participation using reasonable means.

The court also determined that public participation must be real and not illusory. It is not a mere formality to be undertaken as a matter of course just to fulfill the constitutional requirement. There is a need for both qualitative and quantitative components in public participation, It must be purposive and meaningful.

The Court further decreed that a reasonable notice and reasonable opportunity (reasonableness to be determined on a case-to-case basis) must be provided, that public participation does not mean oral hearings only but can also involve written submissions, that allegations of lack of public participation does not vitiate the process but must be considered based on the mode, degree, scope and extent of public participation.

Effective public participation was considered to include clarity of the subject matter for the public to understand, structure and processes of participation that are clear and simple, opportunity for balanced influence from the public in general, commitment to the process, inclusive and effective representation, integrity and transparency of the process and capacity to engage on the part of the public including the public being sensitized on the subject matter.

### 2.5. Rio Declaration on Environment and Development

Principle 10 of the Rio declaration provides that," ***Environmental issues are best handled with the 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."***

Within the Kenyan legal framework, public participation in environmental impact assessment processes is two fold as noted. Public participation through the general public affected by the projects and through lead agencies. In review of project reports, the lead agencies who seemingly must not share their comments as noted under regulation 9(2) and 20(3)[41] is the only form of public participation geared towards approval of projects. It is thus given that public participation at this level, even where the decision to be reached may negatively impact the health and safety enjoyed by the general public fails to adhere to the principle 10 of the Rio declaration.

Access to information through a well-structured feedback mechanism is also important towards an effective access to judicial and administrative proceedings given the time limitations such as under section 129(1) of the Environmental Management and Co-ordination Act. Failure on the part of state agencies to put effort towards communicating feedback to the general public handicaps the public in seeking legal redress where decisions to issue Environmental Impact assessment licenses infringe on their rights. The Environmental (Impact Assessment and Audit) Regulations, 2003 makes provisions for communication of feedback with reasons for decisions made to the project proponents leaving the general public and lead agencies who participated through shared knowledge and comments in the dark as to the important role they played in coming up with the final decisions. This makes the final process of decision making a peculiar reserve of the Authority and thus violating the principle 10 of the Rio declaration.

[41] Environmental (Impact Assessment and Audit) Regulations, 2003.

Under Principle 20, "***women have a vital role in environmental management and development. Their full participation is therefore essential to achieve sustainable development."*** The Kenyan public participation legal framework as provided under case law seeks inclusivity and representation of all persons in public participation within the environmental impact assessment process and all governance process.[42] Noting the important role that women play as enumerated by the principle 20 of the Rio declaration, a well structured system of collecting public comments should not only focus at meeting ideal standards of public participation but ensure inclusivity and representation of women, youth and the marginalized groups in public participation within the environmental impact assessment process. The Environmental (Impact Assessment and Audit) Regulations, 2003 fails to provide a clear guideline on inclusivity while providing for public comments and thus a gap within the Kenyan legal framework on public participation within the Environmental Impact Assessment process. Failure to provide guidelines that ensure inclusivity also breach Principle 22 of the Rio declaration which provides for the support of indigenous people and their communities and enabling their effective participation in the achievement of sustainable development.

## 3. Developing Jurisprudence in Public participation

The Rio declaration provides a general guideline on the application of public participation in environmental governance. The international instruments provide for three basic guides; access to information, access to justice and access to public participation as key guiding principles to public participation.[43]

[42] British American Tobacco Kenya, PLC (Formerly British American Tobacco Kenya Limited) V Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance 7 Another (Interested parties); Mastermind Tobacco Kenya Limited (The Affected party) [2019] eKLR, paragraph 96

[43] A/CONF.151/26 (Vol. I) report of the United Nations conference on environment and development

In the guidelines for public consultations in the Covid-19 period[44] issued by NEMA, project proponents and the EIA experts are granted the autonomy to choose the most practical technique to be used in public participation during the development stage of an EIA study report.

A study that sought to determine the application of public participation in Kenya determined that the public is unaware of its role in environmental governance and that public participation framework was unsatisfactory.[45]
In the case of ***Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR***[46] the bare minimum for public participation was set as including; government agencies or public official has the mandate to fashion a programme for public participation with a great measure of discretion; in the measure of the adequacy of a public participation process, courts shall be guided by the measure of effectiveness; Environmental information sharing depends on the availability of such information and thus public participation is an ongoing obligation on the state through the process of EIA; Intentional inclusivity and diversity of participants in the EIA process should be shown with more weight placed on those affected by the project; Public bodies and government agencies are to take into consideration views submitted by the public on projects in good faith and the role of the public body as the final decision maker is not vacated by the public participation process.

Omenge P etal[47] notes that even with the weighty importance of public participation in environmental impact assessment processes, the design of

[44] Guidelines on conduct of public consultations for EIA, EA & SEA during the period of the corona virus (Covid-19 pandemic; guide 5(i)
[45] Nick, O et.al., The doing and un-doing of public participation during environmental impact assessment in Kenya, 2012.
[46] Constitutional petition No. 305 of 2012; Mui Coal Basin local community & 15 others V Permanent secretary Ministry of energy & 17 others 2015 eKLR
[47] Philiph M. Omenge etal, Public participation in Environmental impact assessment and its substantive contribution to environmental risk management:Insight from EIA practitioners and other stakeholders in Kenya's renewable energy sub-sector.

the process and implementation remain contentious with divergent views on how to effectively carry out public participation.

In the case of ***Ken Kasinga V Daniel Kiplagat & 5 others [2015] eKLR*** Munyao J states that "***public participation for the purpose of EIA ought to be real and actual***". That the processes must not be for the purpose of merely fulfilling legal requirements. In this case, assessing whether an EIA process is real and actual is subjective and based on personal judgement. An objective measure of what a real and actual public participation process would look like is not provided.

In the case of ***Getrude Mukoya Mwenda & 5 others v Cabinet Secretary Ministry of Infrastructure, Housing & Urban Development & 2 others [2020] eKLR,*** the court in determining whether an EIA license was validly issued found the EIA license to have been validly issued and its variation to have been legal even where further public participation had not been conducted in variation of the license. This raises the question of the importance of new environmental information post issue of an EIA license and the place of public participation in variation of an EIA License. Regulation 25 of the **Environmental (Impact Assessment and Audit) Regulations, 2003, does not obligate NEMA to undertake public participation before issuing of a variation certificate on a license and as such, variation can be done without public participation as supported by the *Getrude Mukoya Mwenda & 5 others v Cabinet Secretary Ministry of Infrastructure, Housing & Urban Development & 2 other*** case.

The public participation function in environmental governance has various gaps in ensuring the process is effective. Noteworthy, the process as noted in ***Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR***[48] has not effectively covered public participation during the process of developing EIA and SEA study reports, Public participation feedback mechanism to determine how

[48] Ibid

comments from the public influenced final decision of government agencies, the place of access to more information after issuance of an EIA license, the role of the public in choosing public participation techniques to be applied and guidelines to effectively determine relevant lead agencies to be involved in decision making.

Stewart and Sinclair noted that despite consensus on essential elements of a meaning public participation, often highlighted in laws, policy and regulations, actual public participation does not reflect the ideal practice standards.[49] Participation procedures are discretionary thus affecting value and effectiveness of public participation in EIA.[50] Earth care Africa and Wood aver that effective public participation ought to be backed by the force of law.[51] Laws should specify the role of the public in the Environmental Impact Assessment process.

Chigodora in his research found that there are limited opportunities for public participation in the Environmental Impact Assessment process, lack of social profiling and limited information availed beforehand.[52]

In the case ***Greenbelt Movement & 4 others v National Environmental Management Authority & another; Kenya National Highways Authority (Interested Party) [2020] eKLR,*** the National Environment Tribunal found public participation to have been effective even where final designs for the project had not been availed to the public. In the Appellants arguments, lack of final designs for the project had negatived their ability to participate adequately in the process leading to the issue of the Environmental Impact Assessment License. Under paragraph 66 of the Judgement, the project

[49]Elisha Toteng, et al, public participation in Environmental Impact Assessment: Review of 2005 to 2010 legislative and policy framework and its compatibility to international best practice.
[50] Ibid
[51] Fact sheet 27: Public participation in the legislative process.
[52] Elisha Toteng, et al, public participation in Environmental Impact Assessment: Review of 2005 to 2010 legislative and policy framework and its compatibility to international best practice.

proponents made it an obligation on the project affected parties and the public to seek the final designs to the project.

In the case of ***Republic Vs the Attorney General and Another ex parte Hon. Francis Chachu Ganya (JR Misc. App. No 374 of 2012),*** the court determined that environmental information sharing depends on availability of information. Hence, public participation is on-going obligation on the state through the processes of Environmental Impact Assessment. The practice as established by the tribunal in finding that public participation was effective even where final designs for the project had not been provided, leaves for questioning the ideal position in practice of public participation before and after issue of an Environmental Impacts Assessment license.

In the case ***Save Lamu & 5 others v National Environmental Management Authority (NEMA) & another [2019] eKLR,*** it was established that government agencies or the public official involved in the Environmental Impact Assessment process are to fashion a programme of public participation that accords with the nature of the subject matter. It was also noted that the test that the courts use in determining the adequacy of public participation is that of effectiveness. A reasonable opportunity must be afforded to members of the public and interested parties to know about the issues and to have an adequate say. A reasonable opportunity is to be based on existing circumstances and is to be on a case-by-case basis. Based on the court's determination, discretionary powers and latitude has been given to project proponents and government agencies to determine what a reasonable opportunity to participate in the process of Environmental Impact Assessment would be and to design programmes for public participation.

In this regard, the existing laws and regulations seem inadequate in giving a clear direction on the importance of public participation in designing of participation programmes and determining what a reasonable opportunity to participate in the processes of Environmental Impact Assessment licensing would be.

## 4. Significant gaps in the Legal Practice in Kenya

The office of the Attorney General has drafted a Draft Policy on Public Participation. It is worthy to note that this Policy offers a definition of 'Public Participation', provides for information rights and it calls for inclusion of marginalized groups like the youth, the elderly, women and ethnic minorities.[53]

However, the Draft Policy fails to include discussions on the reasonable test, does not cover persons who can neither read nor write, does not guide on how to examine whether a particular exercise met the Constitutional threshold for Public Participation.

It is also worthy to note the existence of the Public Participation Bill of 2018. The Bill partly addresses some of the issues missing in the current framework. For instance, it provides for access of information rights in preparation of the participation.[54] It is sensitive to the rights of persons with disabilities[55] and offers special protection to persons who cannot read and write and the relevant authority is mandated to provide an interpreter for such persons.[56]

However, the proposed Bill does not cure the legal challenges identified and these pertinent legal issues on the concept and threshold of Public Participation would not seem to be addressed were the Bill to pass in its current form. The Bill does not define Public Participation, it does not offer a breakdown of gauging the 'reasonable test' and it does not provide special rights for marginalized and minority groups like the women and the youth. As regards timeframes for participation, the Bill leaves it at the discretion of the responsible authority making the legislation open to misuse because of its vulnerability.

[53] Office of The Attorney General & The Department of Justice, *Kenya Draft Policy on Public Participation 24*
[54] The Public Participation Bill, 2018 s 10
[55] The Public Participation Bill, 2018 s 5(2)
[56] The Public Participation Bill, 2018 s 5

The Bill does not set a standard approach on the concept of Public Participation. It instead assigns this standard setting role to other persons like the Chief Justice, Cabinet Secretaries, County Assembly Committees and the relevant Parliamentary Committees.[57] This approach that the Bill adopts is likely to occasion jurisprudence that is unstructured in the definition, implementation and realization of the principle of Public Participation.

Such proposed legislations should be amended in a manner in which would adequately address the issues identified when it comes to Public Participation so as to come up with proper and well-founded jurisprudence in this area of law.

There also arises the negative attitude or apathy from the public that can be due to a lack of a common understanding of what constitutes Public Participation and the methods, processes and content needed to ensure effective engagement. It may also be lack of feedback from the previous consultations where the public feel that nothing ever comes out form their participation.

An increase in the amount and quality of civic education that citizens receive particularly through civil society mechanisms can greatly help in raising awareness and inspiring participation within the local communities.

Lack of an effective feedback mechanism on the decision made by the Authority (NEMA) to lead agencies and the general public may infringe on their rights to participate in the EIA process through legal redress. As highlighted, statutory provisions such as section 129(1) of EMCA has a limitation of time within which a person can seek legal redress. An effective feedback mechanism to all stakeholders would facilitate effective public participation in decision making.

[57] The Public Participation Bill, 2018 s 5

Additionally, knowledge gaps within the general public in review of study reports may lead to ineffective participation especially where the public is not able to engage experts to assist in reviewing such reports with limited provisions on how to facilitate. There needs to be formulated a manner in which laypersons can access such relevant information so as to expose them adequately to be able to participate in reviews of study reports. Moreover, there needs to be a body formulated for experts that are within reach of the public and who are able to engage and assist on the various processes as regards public participation as they create awareness on the same.

Aside from this, localization of efforts geared towards public participation as per the EIA regulations seem to limit participation of the public in decision making and thus seemingly infringing on Article 42 and 70 of the Constitution of Kenya, 2010 for the reasons that impacts may not be localized. To curb this limitation, public participation at this stage should, instead of being a localized practice, be opened to the larger public so as to involve wider participation.

## 5. Recommendations

To enhance access to environmental justice, the participation of persons in the Environmental Impact Assessment process is imperative. At the risk of over litigation, the development of public participation regulations would be timely in environmental governance. The regulations should seek to guide and bridge the gaps identified within the legal practice in Kenya.

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The doing and un-doing of public participation during environmental impact assessment in Kenya, 2012.

The Public Participation Bill, 2018.

# An Appraisal of Kenya's National Cybersecurity Strategy 2022: A Comparative Perspective

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***Abstract***

The objective of the study is to critically analyse Kenya's National Cyber Security Strategy of 2022, juxtaposing it with Estonia and UK's cyber-security strategies. It begins by outlining the legal framework for cyber security in Kenya and its efficacy. Using a desktop review, it discusses the 2022 strategy by bringing to the fore its necessity, design, development, principles, goals, pillars, merits and shortcomings, It also highlights the implementation of the strategy. The final section addresses implementation of the 2022 strategy while drawing valuable lessons from Estonia and the UK. Estonia and the UK have been selected due to their significant progress in this field and their different approaches to cyber security. The discussion on cyber security strategies is a sine qua non for development of jurisprudence and vital lessons in this emerging field.

**Key Words**: Kenya, National Cyber security strategy 2022, Estonia, UK, cyber-security, implementation.

## 1.0 Introduction

Cyber security has become an increasingly critical issue in today's digital age, and many countries are developing national cybersecurity strategies and laws to protect themselves from cyber threats.[1] It has become increasingly necessary for the Government of Kenya to secure her cyberspace. The Government thus, has continued to develop and implement initiatives to combat increasing cybercrimes and strengthen the safety and resilience of

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[1] Government of Kenya. (2022). Kenya National Cybersecurity Strategy 2022. Retrieved from https://www.president.go.ke/wp-content/uploads/2022/01/Kenya-National-Cyber-Security-Strategy.pdf {accessed 17 February 2023}.

our national critical systems. The initiatives include policy formulation and reviews, enactments of laws and regulations, strengthening of governance structures, capacity building, increased awareness programmes and fostering collaboration.[2] One of the initiatives Kenya has developed is the formulation of the National Cyber security Strategy of 2022. Kenya is one such country that has made significant efforts in recent years to develop its national cybersecurity strategies and laws. Cybersecurity is a key enabler for digital economy.[3]

The widespread adoption and rapid advancements in cyberspace, largely driven by emerging technologies, have introduced new risks that pose threats to individuals, businesses, national infrastructure, and governments.[4] These risks come from a broad range of sources, both state and non-state, and can result in disruptive activities. Their consequences can have severe impacts on public safety, national security, and the stability of the globally interconnected economy.[5]

However, Kenya's implementation of its 2022 cyber security strategy and laws is still in its early stages, and it can learn from the experiences of other countries that have made significant progress in this area.[6] Two countries that are often cited as global leaders in cybersecurity are Estonia and the

[2] Kenya National Cybersecurity Strategy 2022. Available at https://ict.go.ke/wp-content/uploads/2022/10/KENYA-CYBERSECURITY-STRATEGY-2022.pdf {accessed 14 February 2023}.
[3] Kenya National Cybersecurity Strategy 2022. Available at https://ict.go.ke/wp-content/uploads/2022/10/KENYA-CYBERSECURITY-STRATEGY-2022.pdf {accessed 14 February 2023}.
[4] World Bank. (2022). Kenya National Cybersecurity Strategy 2022. Retrieved from https://projects.worldbank.org/en/projects-operations/document-detail/P176435 {accessed 17 February 2023}.
[5] Ibid
[6] Government of Kenya. (2022). Kenya National Cybersecurity Strategy 2022. Retrieved from https://www.president.go.ke/wp-content/uploads/2022/01/Kenya-National-Cyber-Security-Strategy.pdf {accessed 17 February 2023}.

United Kingdom (UK).[7] By comparing Kenya's national cybersecurity strategy and laws with those of Estonia and the UK in terms of implementation, we can gain useful insights into how Kenya can enhance its cybersecurity capabilities and better protect itself from cyber threats.

## 2.0 The National Legal Framework for Cybersecurity in Kenya

Kenya has a legal framework for cybersecurity, which includes a number of laws, regulations, and policies that address various aspects of cybersecurity. This section addresses some of the key legal documents that make up Kenya's legal framework for cyber security while outlining their efficacies and proposals for legislative reform. It also highlights the concept of cyber-terrorism.

### 2.1 Constitutional Framework

The Constitution of Kenya does not have a specific provision on cybersecurity. However, it provides a framework for the protection of fundamental rights, which includes the right to privacy[8], the right to access information,[9] and the right to freedom of expression.[10] These rights have implications for cybersecurity, as the protection of personal data, the availability of information, and the freedom to use the internet and other communication technologies are important elements of cybersecurity.

Additionally, the Constitution provides for the establishment of various institutions that are involved in cyber security. The National Police Service is responsible for enforcing the law and investigating crimes, including cybercrimes.[11] The National Intelligence Service (NIS) is responsible for collecting and analyzing intelligence, including information related to cyber

[7] World Bank. (2022). Kenya National Cybersecurity Strategy 2022. Retrieved from https://projects.worldbank.org/en/projects-operations/document-detail/P176435 {accessed 17 February 2023}.
[8] Article 31 of the Constitution of Kenya (COK) 2010
[9] Article 35 of COK 2010
[10] Article 33 of COK 2010
[11] Article 244 of the COK 2010

threats and cybercrime.[12] The Independent Electoral and Boundaries Commission (IEBC) is responsible for conducting elections in Kenya, and as such, it plays a critical role in ensuring the security and integrity of the electoral process, including the protection of electoral data and systems from cyber threats.[13]

While the Constitution does not have a specific provision on cybersecurity, the above institutions, as well as other government bodies, operate within the framework of the Constitution to ensure the protection of fundamental rights and the security of the state.

**2.2 Statutory Framework**

The Computer Misuse and Cybercrimes Act 2018 is the primary legislation that governs cybersecurity in Kenya. The act criminalizes various cyber activities, such as unauthorized access, interception, and interference with computer systems and data.[14] It established the National Computer and Cybercrimes Coordination Committee to coordinate cybersecurity matters.[15]

The Data Protection Act 2019 establishes a legal framework for the protection of personal data in Kenya. It sets out the rights and obligations of data subjects[16] and data controllers, as well as the procedures for handling data breaches.[17]

Various statutes also establish various institutions involved in cyber security. The Communications Authority of Kenya (CA) is responsible for regulating the communications sector in Kenya, including the telecommunications and

[12] Article 242 of COK 2010; Section 5 of the National Intelligence Service Act, 2012
[13] Articles 88, 248 of COK 2010; Section 4 of the Independence Electoral and Boundaries Commission (IEBC) Act, 2011
[14] Part III of the Act captures the various offences
[15] Part II of the Act; Kenya National Cybersecurity Strategy 2022. Available at https://ict.go.ke/wp-content/uploads/2022/10/KENYA-CYBERSECURITY-STRATEGY-2022.pdf {accessed 14 February 2023}.
[16] Part IV of the Act
[17] Part VIII of the Act

information technology industries. The authority also plays a key role in the management of cyber security incidents.[18]

The Kenya Information and Communications (Cybersecurity) Regulations 2019 under the Kenya Information and Communications Act provide a legal framework for the implementation of the National Cybersecurity Strategy 2018. They set out the requirements for the protection of critical information infrastructure and the reporting of cybersecurity incidents.[19]

**2.3 Policy Framework**

The National Cyber security Strategy 2022 provides a policy framework for Kenya's cybersecurity efforts. The strategy outlines the government's approach to cybersecurity and identifies key initiatives and action plans to be implemented to achieve the strategic objectives.[20] It will be discussed in more detail in the next section.

The Communications Authority of Kenya (CA) has also issued a number of guidelines and regulations on cybersecurity, including the Guidelines for the Management of Cybersecurity and the Kenya Information and Communications (Cybersecurity Incident Management) Regulations 2020, National ICT Policy Guidelines 2020; and National Digital Master Plan 2022. These documents provide further guidance on the management of cybersecurity incidents and the reporting requirements for the incidents.[21]

Kenya has made significant progress in the development of legal frameworks and policies to promote cybersecurity. The Computer Misuse and Cybercrimes Act 2018, for example, provides a comprehensive legal framework for addressing cybercrime and other malicious cyber activities.

[18] Section 5 of the Kenya Information and Communications Act, 1998
[19] Kenya National Cyber security Strategy 2022. Available at https://ict.go.ke/wp-content/uploads/2022/10/KENYA-CYBERSECURITY-STRATEGY-2022.pdf {accessed 14 February 2023}.
[20] Ibid
[21] Ibid

The Data Protection Act 2019 and the Kenya Information and Communications (Cybersecurity) Regulations 2019 provide a legal framework for the protection of personal data and the management of cybersecurity incidents.[22]

The government has also taken steps to implement the National Cyber security Strategy 2022 and upgrade institutions such as the Kenya Computer Incident Response Team (KE-CIRT) and establish the National Cyber security Centre of Excellence (NCCoE) to enhance its cyber security capacity.[23]

However, despite these efforts, there are still some challenges that could limit the effectiveness of these legal frameworks in promoting cybersecurity. For example, the capacity of law enforcement agencies to investigate and prosecute cybercrime may be limited, and there may be gaps in the implementation of some of the regulations and policies.[24]

In addition, there are emerging threats such as social engineering, phishing attacks, and ransomware that may require a more proactive and adaptive approach to cybersecurity. It's important to continuously assess and update the legal frameworks and policies to keep up with the evolving cyber threat landscape.[25]

Overall, the legal frameworks in Kenya provide a good foundation for promoting cybersecurity, but their effectiveness will depend on how they are

[22]Kipkemoi R. arap Kirui and Hannes F. Zacher, "Cyber security and Cybercrime Legislation in Kenya: Gaps and Prospects for Reform", T*he Journal of African Law* (2021).
[23] Kenya National Cybersecurity Strategy 2022. Available at https://ict.go.ke/wp-content/uploads/2022/10/KENYA-CYBERSECURITY-STRATEGY-2022.pdf {accessed 14 February 2023}.
[24]James N. Kinyanjui and Stephen K. Mwaniki, "Critical Evaluation of Cybercrime and Cybersecurity Laws in Kenya", *the Journal of Computer Science and Information Security* (2019).
[25] Ibid

implemented and enforced. It is also important to note that promoting cybersecurity is a collaborative effort involving various stakeholders, including the government, the private sector, and individuals.

**2.4 Cyber-terrorism**

Cyber-terrorism refers to the use of computer networks to perpetrate terrorist activities such as spreading propaganda, committing financial crimes, disrupting critical infrastructure, or causing physical harm.[26] In Kenya, cyber-terrorism is a growing concern as the country becomes more digitally connected.[27]

One notable instance of cyber-terrorism in Kenya was the 2013 Westgate mall attack in Nairobi, in which Al-Shabaab militants used social media to claim responsibility and to spread propaganda. The group also hacked into the Kenyan Defense Forces' Twitter account and used it to disseminate false information.[28]

In recent years, there have been reports of other cyber-related terrorist activities in Kenya, including attempts to hack into government systems and financial institutions. In response, the Kenyan government has increased its focus on cybersecurity, including the development of the National Cybersecurity Strategy 2022, to enhance its capacity to prevent and respond to cyber-terrorism threats. The government has also collaborated with international partners to share information and build cybersecurity capabilities.[29]

[26]Charles Ombongi, "Cyber terrorism in Kenya: A Preliminary Analysis", *Journal of Global Security Studies*, Volume 5, Issue 2, Spring 2020, Pages 247–257.
[27] Ibid
[28] Daisy Cherotich and Richard Kipkoech Langat, "Emerging Trends of Cyber Terrorism in Kenya", *International Journal of Scientific and Research Publications*, Volume 9, Issue 8, August 2019, Pages 309–315.
[29] Ibid

Section 33 of the Kenyan Computer Misuse and Cybercrimes Act 2018 stipulates:

> *A person who accesses or causes to be accessed a computer or computer system or network for purposes of carrying out a terrorist act, commits an offence and shall on conviction, be liable to a fine not exceeding five million shillings or to imprisonment for a term not exceeding ten years, or to both. For the purpose of this section, "terrorist act" shall have the same meaning as assigned under the Prevention of Terrorism Act, 2012 (No. 30 of 2012).*[30]

This section makes it an offense to access a computer or computer system or network for the purpose of carrying out a terrorist act. The purpose of this section is to deter individuals from using technology to carry out terrorist activities in Kenya. However, some reports, such as the Kenya National Commission on Human Rights Report (KNCHR Report), have raised concerns that the definition of "terrorist act" is quite broad, and there is a possibility that innocent people may be falsely accused and charged under this section.[31]

Section 2 of the POTA has defined a terrorist act as

> *an act or threat of action—(a) which— (i) involves the use of violence against a person; (ii) endangers the life of a person, other than the person committing the action; (iii) creates a serious risk to the health or safety of the public or a section of the public; (iv) results in serious damage to property; (v) involves the use of firearms or explosives; (vi) involves the release of any dangerous,*

[30] Section 33 of the CMCA 2018
[31] Kenya National Commission on Human Rights, *Report On Securing National Security & Protection Of Human Rights A Comparative Analysis Of The Efficacy Of Counter Terrorism*
*Legislation and Policy:* Final Report (Kenya: ECPL, 2018) at 12 (*hereinafter KNCHR Report).*

> *hazardous, toxic or radioactive substance or microbial or other biological agent or toxin into the environment; (vii) interferes with an electronic system resulting in the disruption of the provision of communication, financial, transport or other essential services; (viii) interferes or disrupts the provision of essential or emergency services; (ix) prejudices national security or public safety; and (b) which is carried out with the aim of— (i) intimidating or causing fear amongst members of the public or a section of the public; or (ii) intimidating or compelling the Government or international organization to do, or refrain from any act; or (iii) destabilizing the religious, political, Constitutional, economic or social institutions of a country, or an international organization.*[32]

The study concurs with the KNCHR Report that this definition is beyond broad. In fact, there is no particular mention of cyber-terrorism in this section.

Section 33 of the Kenyan Computer Misuse and Cybercrimes Act 2018 and the Kenyan Prevention of Terrorism Act 2012 are similar in that they both criminalize the commission of terrorist acts. However, the Computer Misuse and Cybercrimes Act 2018 focuses specifically on the use of a computer, computer system or network to carry out a terrorist act, while the Prevention of Terrorism Act 2012 provides a broader definition of what constitutes a terrorist act, and criminalizes a wider range of activities related to terrorism, including financing of terrorism and recruitment of terrorists.

Additionally, the study postulates that the penalties for committing a terrorist act under these two acts differ. Section 33 of the Computer Misuse and Cybercrimes Act 2018 provides for a fine not exceeding five million shillings or imprisonment for a term not exceeding ten years, or both. In contrast, the Prevention of Terrorism Act 2012 provides for a maximum penalty of life imprisonment upon conviction for certain offenses related to

[32] Section 2, Prevention of Terrorism Act, 2012

terrorism, such as commission of a terrorist act, funding terrorism, and recruiting terrorists. Section 6 of the POTA stipulates that a person who possesses any property intending or knowing that it shall be used, whether directly or indirectly or in whole or in part, for the commission of, or facilitating the commission of a terrorist act, commits an offence and is liable, on conviction, to imprisonment for a term not exceeding twenty years. Clearly, these penalties are dissimilar for similar offences. There is therefore need for harmonization of these laws to ensure uniformity in legislation. The POTA also needs to come out clearly on what specifically constitutes terrorism, and it should address cyber-terrorism as it is an emerging area.

Overall, the effectiveness and fairness of Section 33 of the Kenyan Computer Misuse and Cybercrimes Act 2018 will depend on how it is enforced and whether the definition of "terrorist act" is interpreted appropriately.

## 3. Kenya's National Cybersecurity Strategy 2022: Its merits and shortcomings

This section critically examines Kenya's National Cyber security Strategy of 2022. It focuses on the necessity, design and development of the strategy. It also pinpoints its principles, goals, pillars, merits and shortcomings. Finally, it discusses the implementation of the strategy.

### 3.1 Necessity, Design and Development of the cybersecurity strategy

Kenya developed her first Cybersecurity Strategy in 2014, with the vision, key objectives, and commitment to support national priorities by encouraging ICT growth and proactive protection of critical information infrastructures.[33] Through the 2014 Strategy; Kenya established Kenya Computer Incident Response Team and coordination Centre (KE-CIRT/CC) and the National Digital Forensics Laboratory at the National Police Service under Directorate of Criminal Investigations (DCI). In regard to legislation, the Government enacted the Computer Misuse and Cybercrimes Act-2018

[33] Kenya National Cybersecurity Strategy 2022. Available at https://ict.go.ke/wp-content/uploads/2022/10/KENYA-CYBERSECURITY-STRATEGY-2022.pdf {accessed 14 February 2023}.

which is currently the overarching law for protection of Critical Information Infrastructures and management of cybercrime in Kenya. To achieve its objectives, the Act establishes and mandates the National Computer and Cybercrimes Co-ordination Committee (NC4) and the Secretariat, as the national authority to spearhead and coordinate cybersecurity matters.[34]

The Government of Kenya (GoK) has identified specific sectors and critical systems that are essential to providing vital services and are crucial to the nation's security.[35] These have been designated as Critical Information Infrastructures (CIIs) in accordance with the provisions of the Computer Misuse and Cybercrimes Act (CMCA). The Gazette Notice No.1043 of 31 January 2022 provides the details of these sectors and systems. The CIIs are systems whose disruption could result in the interruption of life-sustaining services, adverse effects on the Kenyan economy, massive casualties or fatalities, the failure or disruption of the money market, and significant harm to the Republic of Kenya's security, including its Intelligence and Military services. This demonstrates the Republic of Kenya's commitment to protecting its sovereignty and the welfare of its citizens.[36]

Kenya recognizes that cybersecurity is a major national economic and security challenge.[37] The country faces various cybersecurity issues, including adversaries exploiting the new operating environment to conduct

[34] Kenya National Cybersecurity Strategy 2022. Available at https://ict.go.ke/wp-content/uploads/2022/10/KENYA-CYBERSECURITY-STRATEGY-2022.pdf {accessed 14 February 2023}.
[35] Government of Kenya. (2022). Kenya National Cybersecurity Strategy 2022. Retrieved from https://www.president.go.ke/wp-content/uploads/2022/01/Kenya-National-Cyber-Security-Strategy.pdf {accessed 17 February 2023}.
[36] Kenya National Cybersecurity Strategy 2022. Available at https://ict.go.ke/wp-content/uploads/2022/10/KENYA-CYBERSECURITY-STRATEGY-2022.pdf {accessed 14 February 2023}.
[37] World Bank. (2022). Kenya National Cybersecurity Strategy 2022. Retrieved from https://projects.worldbank.org/en/projects-operations/document-detail/P176435 {accessed 17 February 2023}.

war-like activities that disrupt critical infrastructure operations.[38] In Kenya, efficiency, cost, and convenience have been prioritized during the development and implementation of most ICT infrastructure and users, leading to security being overlooked. Interconnected ICTs have inherent vulnerabilities that can be exploited by adversaries, exposing citizens, businesses, and the government to global threats. Despite various policies and laws being enacted, governance of cyberspace is still uncoordinated and lacks a clear structure. Moreover, the awareness of government employees and the general public about cybersecurity is considered low, increasing their susceptibility to cybersecurity threats.[39]

Kenya also faces cybersecurity threats that leverage the aforementioned challenges.[40] Nation-states and corporate entities engage in cyber espionage to gain access to sensitive data for financial gain, political reasons, or competitive advantage.[41] With the increasing interconnectedness of ICTs, systems can be sabotaged through deliberate and malicious acts that disrupt normal processes and functions or destroy/damage equipment and information. [42] Cyber subversion through propaganda, fake news, and misinformation undermines trust in the government, authority, and competence of leaders, posing a threat to Kenya's stability.[43] Furthermore, terror groups use ICTs, such as virtual private networks, the internet, global applications, social media platforms, and websites, for recruitment, radicalization, incitement, financing, training, planning, and execution of

[38] Ibid
[39] Kenya National Cybersecurity Strategy 2022. Available at https://ict.go.ke/wp-content/uploads/2022/10/KENYA-CYBERSECURITY-STRATEGY-2022.pdf {accessed 14 February 2023}.
[40] International Telecommunication Union. (2022). Kenya's National Cybersecurity Strategy 2022: Building resilience to cyber threats. Retrieved from https://www.itu.int/en/myitu/News/2022/01/27/14/20/Kenya's-National-Cybersecurity-Strategy-2022-Building-resilience-to-cyber-threats {accessed 17 February 2023}.
[41] Ibid
[42] Ibid
[43] Ibid

attacks. Additionally, there has been an increase in cyber fraud cases through banking/finance, sim swaps, and online scams, such as digital Ponzi schemes, job scams, fake websites and lotteries, Crypto and Forex Scams, "*Tuma kwa Hii Namba*" syndicates, among others.[44]

These cyber security risks have necessitated the formulation of the 2022 strategy. The National Cyber security Strategy 2022 sets out a roadmap for a coordinated and integrated approach to implementing cybersecurity activities in Kenya.[45] The Strategy lays down the necessary foundations and key principles for effective cybersecurity in both the public and private sectors, which incorporate good governance and various initiatives and interventions. The Strategy begins by providing an extensive overview of Kenya's cybersecurity landscape, which highlights the current policies, legal and regulatory frameworks in place and outlines the challenges and threats faced by Kenya's cyberspace.[46]

The goal of this strategy is to support the implementation of Kenya's cyber security initiatives and tackle the challenges and threats identified above.[47] This will be achieved by improving the institutional framework for cybersecurity governance and coordination, enhancing the policy, legal, and regulatory frameworks related to cybersecurity, increasing the protection and resilience of critical information infrastructures, strengthening the capability and capacity for cybersecurity, reducing cybersecurity risks and crimes, and

[44] Kenya National Cybersecurity Strategy 2022. Available at https://ict.go.ke/wp-content/uploads/2022/10/KENYA-CYBERSECURITY-STRATEGY-2022.pdf {accessed 14 February 2023}.
[45] Kenya National Cybersecurity Strategy 2022. Available at https://ict.go.ke/wp-content/uploads/2022/10/KENYA-CYBERSECURITY-STRATEGY-2022.pdf {accessed 14 February 2023}.
[46] Ibid
[47] Ibid

promoting cooperation and collaboration both nationally and internationally.[48]

### 3.2 Principles and goals of the cybersecurity strategy

The guiding Principles of the Kenya Cybersecurity Strategy 2022 are based on the objectives of the Computer Misuse and Cybercrimes Act,2018 and include: Protecting the confidentiality, integrity and availability of computer systems, programmes and data; Preventing the unlawful use of computer systems; Facilitating the prevention, detection, investigation, prosecution and punishment of cybercrimes; Protecting the rights to privacy, freedom of expression and access to information as guaranteed under the constitution of Kenya 2010; and Facilitating international cooperation on cybersecurity matters.[49]

In addition, the Strategy is guided by Kenya's public policy formulation process and international best practices.

The following are the goals of the Strategy: To; Enhance Kenya's institutional framework for cybersecurity governance and coordination; Strengthen cybersecurity policy, legal and regulatory frameworks; Enhance the protection and resilience of CIIs; Strengthen cybersecurity capability and capacity; Minimize cybersecurity risks and crimes and; Foster national and international cooperation and collaboration.[50]

### 3.3 Pillars of the cybersecurity strategy

The Strategy provides a framework to defend and protect the cyberspace of Kenya guided by the following strategic pillars:[51]

[48] Kenya National Cybersecurity Strategy 2022. Available at https://ict.go.ke/wp-content/uploads/2022/10/KENYA-CYBERSECURITY-STRATEGY-2022.pdf {accessed 14 February 2023}.
[49] Ibid
[50] Ibid
[51] Ibid

**1. Cybersecurity governance**

Cybersecurity governance is critical in developing a vibrant cybersecurity ecosystem for a digital economy.[52] Enhancing Kenya's cybersecurity governance will lay foundations for protecting Kenya from cyber threats in the long term. The Cybersecurity governance pillar provides strategic guidance on governance structures and resources required to support formulation and implementation of a secure national cyber ecosystem.[53]

**2. Cybersecurity policies, laws, regulations and standards**

Development of a safe, secure and resilient cyberspace ecosystem requires a robust policy, legal and regulatory framework.[54] To strengthen Kenya's ability to create and execute a comprehensive cybersecurity strategy, it is necessary to engage important stakeholders from both the public and private sectors in the process of developing and implementing cybersecurity policies, laws, regulations, and standards. Interventions under this pillar include: Reviewing cybersecurity policies, laws, regulations and standards; Amending/updating cybersecurity policies, laws, regulations and standards; Establishing new cybersecurity policies, laws and regulations for: implementation of CMCA-2018; adoption of new and emerging technologies; outsourcing of critical systems; adoption of country code top level domain ".ke" among others.[55]

**3. Critical Information Infrastructures Protection (CIIP)**

As digitalization grows, CIIs which were once disconnected from the internet in many industries are now becoming more integrated with other digital systems, putting them at risk of cyber threats and jeopardizing national security and public safety.[56] To enhance the cybersecurity position

[52] Ibid
[53] Kenya National Cybersecurity Strategy 2022. Available at https://ict.go.ke/wp-content/uploads/2022/10/KENYA-CYBERSECURITY-STRATEGY-2022.pdf {accessed 14 February 2023}.
[54] Ibid
[55] Ibid
[56] Ibid

and fortitude of CIIs and other digital systems and infrastructure, the Kenyan government is dedicated to implementing several initiatives. Interventions include; Developing Critical Information Infrastructure Protection framework; Identifying and classifying CIIs.; Implementation of Cryptography and access control to safeguard GoK sensitive information and data; Encouraging establishment of in-country Cloud Computing Data Centers and services, and promoting local hosting and; Establishing Information sharing/reporting and Incident response framework.[57]

**4. Cybersecurity capability and capacity building**

As technology evolves, the risks and threats in the cyberspace are becoming increasingly complex. To keep up with this rapid pace of technological change and ensure cutting-edge capabilities are available, the Kenyan Government plans to support advanced research, encourage local digital innovation, and cultivate local cybersecurity skills and knowledge.[58] The aim is to make Kenya a leader in cybersecurity on the African continent. In particular, the demand for qualified cybersecurity professionals is growing, representing an immediate and promising opportunity in the cybersecurity sector. To address this, the Government intends to collaborate with academia, research institutions, and the private sector to create new opportunities, stimulate investment, and encourage research and development in cybersecurity.[59]

**5. Cyber-Risks & Cyber-Crimes Management**

As the number of cyber threats and malicious attacks increases in complexity, it is necessary to establish measures for prompt detection and resolution of such threats.[60] To improve its ability to defend against and respond to malicious cyber activities, Kenya aims to strengthen its management of cyber risks and cybercrime. The government is dedicated to safeguarding Kenyan citizens from cybercrime, responding to evolving

[57] Ibid
[58] Ibid
[59] Ibid
[60] Ibid

threats, protecting critical systems, and managing cyber-physical risks effectively. The interventions under this pillar include: Developing and implementing a national cybersecurity risks management framework; Performing national cybersecurity risk assessment/audits; Developing and implementing a national framework for cybercrime management and; Establishing a National Cybercrimes Alert and Warning system.[61]

**6. Co-operation and collaboration**

Cybersecurity threats are not limited by national borders, and thus addressing them requires cooperation and coordination across nations.[62] Enhancing collaboration and engagement among all stakeholders, including academia, research institutions, private sector and international partners, is important to develop effective policies, mechanisms and initiatives to promote a secure and resilient cyberspace.[63] The Kenyan Government is dedicated to working with these stakeholders to improve Kenya's cybersecurity position at both national and international levels. Already, we have the Inter-Agency Guidelines on Cooperation and Collaboration in the investigation and Prosecution of Terrorism and Terrorism Financing.[64] These guidelines are issued under Section 50(3) of the Office of the Director of Public Prosecutions Act No. 2 of 2013 which empowers the ODPP to work with law enforcement agencies to come up with guidelines for investigating crimes. These guidelines are not only aimed at ensuring that there is effective coordination, collaboration and cooperation in the investigation and prosecution of Terrorism and Terrorism Financing, but are also meant to enhance Organizational Partnership between investigative agencies and the ODPP.[65]

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[61] Ibid
[62] Ibid
[63] Ibid
[64]Inter-Agency Guidelines on Cooperation and Collaboration in the investigation and Prosecution of Terrorism and Terrorism Financing. Available at https://www.odpp.go.ke/wp-content/uploads/2022/04/INTER-AGENCY-GUIDELINES-08.04.2022.pdf {accessed 17 February 2023}.
[65] Ibid

These guidelines include; Information Sharing; Confidentiality and Security of Information; Protection of Data; investigations; enforcement; Prosecution; disengagement; community engagement; detention of remandees and convicts; respect for human rights; witness and victim protection; capacity building and; international cooperation.[66] For instance, under investigations, lead agencies undertake to take cognizance of emerging/evolving threats from the cyberspace and more specifically dangers posed by unregulated cryptocurrencies in order to mitigate risks posed by terrorism, terrorism financing, and proliferation financing. They shall closely pursue any incidents involving the unlawful trade and dealing with Unmanned Aircraft Systems commonly referred to as 'Drones' to prevent any imminent aviation attack or any foreseeable National Security risk on land, at Sea and specifically to civil aviation safety and security.[67]

### 3.4 Implementation

The Strategy also has an implementation matrix which outlines the strategic interventions related to the Strategic Pillars.[68] The matrix assigns roles and responsibilities to various cybersecurity actors to be performed within specified timelines as well as estimated costing of the initiatives.[69] The implementation phase entails involving multi-stakeholders to support the execution of the identified initiatives in this strategy. Implementation of the Kenya Cybersecurity Strategy 2022 will adopt a multi-stakeholder approach. All the stakeholders in Kenya shall have responsibility of establishing respective governance structures with allocation of resources including;

[66] Inter-Agency Guidelines on Cooperation and Collaboration in the investigation and Prosecution of Terrorism and Terrorism Financing. Available at *https://www.odpp.go.ke/wp-content/uploads/2022/04/INTER-AGENCY-GUIDELINES-08.04.2022.pdf* {accessed 17 February 2023}.
[67] Ibid at 13
[68] Kenya National Cybersecurity Strategy 2022. Available at *https://ict.go.ke/wp-content/uploads/2022/10/KENYA-CYBERSECURITY-STRATEGY-2022.pdf {accessed 14 February 2023}*.
[69] Ibid

budget, human resource and infrastructure to support the overall mission of the Strategy.[70]

The monitoring and evaluation of the strategy are connected to the National Integrated Monitoring and Evaluation System (NIMES) to ensure that there is a clear connection between this strategy and the Vision 2030. A review of the strategy will be conducted after three years, and a final review after five years. Additionally, the National Computer Cybercrimes and Coordination Committee (NC4) Secretariat will perform an annual monitoring and evaluation exercise and report on the implementation of the strategy.[71]

### 3.5 Merits and shortcomings of the strategy

From the critical examination of the strategy, the study posits the following merits: One is the Comprehensive approach. The strategy covers a wide range of areas related to cybersecurity, including institutional framework, legal and regulatory frameworks, protection and resilience of critical infrastructure, capability and capacity building, risk and crime minimization, and national and international cooperation. Second is the aspect of Collaboration. The strategy emphasizes the need for collaboration among various stakeholders, including government agencies, private sector, academia, and international partners, to improve Kenya's cyber security posture and resilience. Finally, is the Monitoring and evaluation aspect. The strategy integrates with the National Integrated Monitoring and Evaluation System (NIMES), and includes mid-term and final reviews as well as annual monitoring and evaluation exercises to ensure the implementation of the strategy is on track.

The study identifies the following shortcomings: One is the lack of specifics. The strategy does not provide specific details on how each of its objectives will be achieved, which could make it difficult to measure progress and hold

[70] Kenya National Cybersecurity Strategy 2022. Available *at https://ict.go.ke/wp-content/uploads/2022/10/KENYA-CYBERSECURITY-STRATEGY-2022.pdf* {accessed 14 February 2023}.
[71] Ibid

stakeholders accountable. Resource constraints is another issue. The strategy acknowledges that resource constraints may limit its implementation, particularly in terms of funding, capacity building, and infrastructure. Implementation challenges will also be a problem. The strategy's success will depend on its implementation, which may face challenges such as bureaucracy, lack of expertise and capacity, and resistance to change.

## 4. Implementing Kenya's National Cybersecurity Strategy 2022: Comparative Lessons from Estonia and the UK

### 4.1 Rationale for selecting Estonia and the UK

Estonia and the UK are often discussed when it comes to the implementation of cybersecurity strategies due to their significant progress in this field and their different approaches to cybersecurity.

Estonia has been recognized as a global leader in cybersecurity, primarily because of its experience in dealing with cyber threats.[72] In 2007, Estonia suffered a large-scale cyber-attack that targeted its government, media, and financial institutions. This attack led Estonia to prioritize cybersecurity and develop innovative and comprehensive approaches to cybersecurity. Estonia's cybersecurity strategy emphasizes the importance of a secure digital infrastructure, promoting e-governance, and ensuring that every citizen has access to digital services.[73] Estonia's efforts have paid off, as it has one of the lowest rates of cybersecurity incidents in the world.[74]

The UK, on the other hand, has developed a comprehensive approach to cybersecurity that emphasizes collaboration between the government,

[72] The Estonian Ministry of Defence, "Estonian Cyber Security Strategy", available at *https://www.kaitseministeerium.ee/sites/default/files/Estonian%20Cyber%20Security%20Strategy%202019-2022.pdf* {accessed 17 February 2023}.
[73]Tim Stevens, "Estonia's Cyber Security Strategy: Lessons for the EU", available at *https://www.carnegieeurope.eu/2017/03/29/estonia-s-cyber-security-strategy-lessons-for-eu-pub-68433* {accessed 17 February 2023}.
[74] Ibid

industry, and academia.[75] The UK's cybersecurity strategy focuses on improving cybersecurity across all sectors and building a resilient digital economy. The UK has established various institutions, such as the National Cyber Security Centre (NCSC), to lead the implementation of its cybersecurity strategy. The UK has also taken a proactive approach to addressing cybersecurity challenges, such as the use of artificial intelligence to detect and respond to cyber threats.[76]

In summary, Estonia and the UK have different experiences and approaches to cybersecurity, which makes them interesting cases to study and compare when it comes to the implementation of cybersecurity strategies. Estonia's focus on a secure digital infrastructure and e-governance, and the UK's emphasis on collaboration and a resilient digital economy, can provide useful insights for Kenya developing its own cyber security strategies.

**4.2 Distinct features of Estonia's Cybersecurity strategy**

Estonia is known for being a pioneer in the field of cybersecurity, and its cybersecurity strategy has several distinct features. Here are some of the key features of Estonia's cybersecurity strategy[77]:

1. **Strong Emphasis on National Cybersecurity**: Estonia places a high priority on national cybersecurity and has invested heavily in developing its cybersecurity capabilities. The country recognizes that cyber threats can have significant implications for national

[75] HM Government. (2021). UK Cyber Security Strategy 2021-2026. *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1015105/UK_Cyber_Security_Strategy_2021-2026.pdf* {accessed 17 February 2023}.
[76] Ibid
[77] Maria Yen and Markus Vihma "Estonia's Cyber security Strategy: A Recipe for Success", available at *https://www.belfercenter.org/publication/estonias-cybersecurity-strategy-recipe-success* {accessed 17 February 2023}.

security and the economy and has made efforts to build a robust and resilient cybersecurity infrastructure.[78]

2. **Integration of Cybersecurity with e-Government**: Estonia is also known for its advanced e-government infrastructure, which provides a range of digital services to its citizens. The country has integrated cybersecurity into its e-government services to ensure the protection of sensitive information and systems. This integration has enabled Estonia to offer secure digital services that are accessible to its citizens and businesses.[79]

3. **Public-Private Partnership**: Estonia has established a strong public-private partnership to address cybersecurity. The country recognizes that cybersecurity is a shared responsibility and has collaborated with the private sector to develop cybersecurity policies and practices. This partnership has helped to build a strong cybersecurity ecosystem that leverages the expertise of both the public and private sectors.[80]

4. **Proactive Approach to Cybersecurity**: Estonia takes a proactive approach to cybersecurity and recognizes the importance of threat intelligence and situational awareness. The country has established the Cyber Security Council, which is responsible for coordinating national cybersecurity efforts and developing a cybersecurity strategy that is agile and adaptable to changing threats.[81]

5. **Focus on Education and Training**: Estonia places a strong emphasis on education and training to build a cybersecurity workforce that can respond to evolving threats. The country has

[78] Ibid
[79] Ibid
[80] Ibid
[81] Kaska, Kadri. "Estonian Cyber Security Strategy: Managing Risks from Cyberspace." *Journal of Strategic Security* 5, no. 1 (2012): 21-39. https://scholarcommons.usf.edu/cgi/viewcontent.cgi?article=1185&context=jss {accessed 17 February 2023}.

established the Estonian Academy of Security Sciences, which provides cybersecurity training to government officials, law enforcement agencies, and other stakeholders.[82]

Overall, Estonia's cybersecurity strategy is known for its comprehensive and proactive approach to cybersecurity, its integration with e-government services, and its strong public-private partnerships. These features have helped Estonia to become a leader in the field of cybersecurity and a model for other countries to follow.

**4.3 Distinct features of the United Kingdom's Cybersecurity strategy**

The United Kingdom's cybersecurity strategy has several distinct features, including[83]:

1. **A Comprehensive and Integrated Approach**: The UK's cybersecurity strategy takes a comprehensive and integrated approach to addressing cyber threats, focusing on prevention, detection, and response. The strategy is guided by the National Cyber Security Strategy, which outlines the government's objectives for protecting the UK from cyber threats.[84]

2. **Partnership with Industry and International Allies**: The UK recognizes that cybersecurity is a shared responsibility and has established strong partnerships with industry and international allies. The government works closely with the private sector to share threat intelligence and develop best practices, and it also collaborates with international partners to promote cybersecurity and combat cyber threats.[85]

[82] Ibid
[83] National Cyber Security Centre. (2021). Annual Review 2021. *https://www.ncsc.gov.uk/report/annual-review-2021* {accessed 16 February 2023}.
[84] Ibid
[85] Ibid

3. **A Focus on Innovation**: The UK is known for its innovative approach to cybersecurity, and the government has invested in research and development to create new technologies and approaches to cybersecurity. The strategy focuses on promoting innovation and supporting the development of new technologies that can improve cybersecurity.[86]

4. **Awareness and Education**: The UK places a strong emphasis on cybersecurity awareness and education. The government works to raise awareness of cyber threats and provides resources to help individuals and businesses protect themselves from cyber-attacks. The government also supports education and training programs to build a skilled and knowledgeable cybersecurity workforce.[87]

5. **Cybersecurity Standards and Certification**: The UK has established cybersecurity standards and certification programs to ensure that organizations are taking appropriate measures to protect their systems and data. The Cyber Essentials program, for example, provides a baseline standard for cybersecurity that all organizations can follow, while the Cyber Security Information Sharing Partnership (CiSP) enables organizations to share threat intelligence and best practices.[88]

Overall, the UK's cybersecurity strategy is characterized by a comprehensive and integrated approach, strong partnerships with industry and international allies, a focus on innovation, awareness and education, and cybersecurity standards and certification. These features have helped the UK to develop a strong cybersecurity infrastructure and respond effectively to cyber threats.

[86] National Cyber Security Centre. (2020). Cyber Security Skills in the UK Labour Market 2020. *https://www.ncsc.gov.uk/report/cyber-security-skills-in-the-uk-labour-market-2020* {accessed 16 February 2023}.
[87] Ibid
[88] Ibid

### 4.4 Lessons for Kenya from Estonia and the United Kingdom

Kenya can learn several lessons from Estonia and the United Kingdom in implementing its cybersecurity strategy. Firstly, Kenya should take a Comprehensive and Integrated Approach. Both Estonia and the UK have taken a comprehensive and integrated approach to cybersecurity. Kenya should also adopt a similar approach, focusing on prevention, detection, and response, and ensuring that all stakeholders are involved in the effort. Secondly, Kenya should emphasize Public-Private Partnerships. Estonia and the UK have both established strong public-private partnerships to address cybersecurity. Kenya should prioritize collaboration between government and the private sector, working together to develop policies, share threat intelligence, and build a strong cyber security ecosystem. Thirdly, Kenya should prioritize Awareness and Education. Both Estonia and the UK prioritize cybersecurity awareness and education. Kenya should follow their lead and invest in public education campaigns and cybersecurity training programs to raise awareness of cyber threats and help individuals and organizations protect themselves. In addition, Kenya should focus on Innovation. Estonia and the UK have a strong focus on innovation and investing in research and development to create new technologies and approaches to cybersecurity. Kenya should prioritize innovation and support the development of new technologies that can improve cyber-security. Finally, Kenya should establish Cyber-security Standards and Certification: Both Estonia and the UK have established cybersecurity standards and certification programs. Kenya should consider following their lead and develop similar programs to ensure that organizations are taking appropriate measures to protect their systems and data.

By following these lessons, Kenya can strengthen its cybersecurity infrastructure and respond effectively to cyber threats. However, each country's cybersecurity strategy is unique and must be tailored to its specific needs and circumstances.

## Conclusion

Kenya has made significant strides in recent years in developing its national cybersecurity strategies and laws. In 2014, Kenya established the National Cybersecurity Coordination Committee (NCCC) to coordinate and oversee the country's cybersecurity efforts. In 2018, Kenya enacted the Computer Misuse and Cybercrimes Act, which criminalizes various cybercrimes and provides a legal framework for investigating and prosecuting cybercrime offenses. Kenya has also been active in promoting cybersecurity awareness and capacity building through various initiatives, such as the National Cyber security Awareness Month. The study has focused on the 2022 Cyber-security strategy by addressing its necessity, initiatives, principles, goals, pillars, implementation, merits and shortcomings.

Compared to Estonia and the UK, Kenya is still in the early stages of implementing its 2022 cyber security strategy and laws. However, Kenya's efforts are commendable, and it is taking steps to address its cyber security challenges. To improve the implementation of its 2022 cyber security strategy and laws, Kenya can learn from the experiences of Estonia and the UK. For example, Kenya could prioritize the development of a secure digital infrastructure, as Estonia has done. Kenya could also focus on promoting collaboration between the government, industry, and academia, as the UK has done. Additionally, Kenya could explore the use of innovative technologies, such as artificial intelligence, to enhance its cybersecurity capabilities.

In conclusion, while Kenya has made progress in developing its 2022 national cyber security strategy and laws, there is still room for improvement in their implementation. By learning from the experiences of Estonia and the UK, Kenya can enhance its cybersecurity capabilities and better protect its citizens, businesses, and government institutions from cyber threats. Individuals must take measures to safeguard themselves and their important assets in the online or digital space, just as they would in the physical or terrestrial world. This requires taking appropriate steps to secure not only the physical devices such as phones, computers and other gadgets, but also the

information, software, hardware and infrastructure that allows them to enjoy the benefits of flexibility, convenience and independence in their personal and professional lives.

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Kenya National Cyber security Strategy 2022. Available at https://ict.go.ke/wp-content/uploads/2022/10/KENYA-CYBERSECURITY-STRATEGY-2022.pdf

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Maria Yen and Markus Vihma "Estonia's Cyber security Strategy: A Recipe for Success", available at https://www.belfercenter.org/publication/estonias-cybersecurity-strategy-recipe-success

National Cyber Security Centre. (2020). Cyber Security Skills in the UK Labour Market 2020. https://www.ncsc.gov.uk/report/cyber-security-skills-in-the-uk-labour-market-2020

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Tim Stevens, "Estonia's Cyber Security Strategy: Lessons for the EU", available at *https://www.carnegieeurope.eu/2017/03/29/estonia-s-cyber-security-strategy-lessons-for-eu-pub-68433*

World Bank. (2022). Kenya National Cyber security Strategy 2022. Retrieved from *https://projects.worldbank.org/en/projects-operations/document-detail/P176435*

# Safeguarding the Environment through Effective Pollution Control in Kenya

*By:* ***Kariuki Muigua*** [*]

***Abstract***

*Environmental pollution has become a major challenge, not only in Kenya but also across the globe, especially in the era of seeking faster economic development to take care of the ballooning human population in different countries. The Sustainable development agenda was formulated to help achieve the balance between development and environmental protection. Despite the development of the comprehensive sustainable development principles, there seems to have been slow progress in their implementation especially in curbing environmental pollution. Kenya has only seen increase in environmental pollution across the country and this threatens not only the environment but also human beings livelihoods that rely on a healthy environment. In the context of the constitutionally guaranteed right to a clean and healthy environment, this paper discusses how the problem of pollution can be dealt with in Kenya as a key step towards achieving sustainable development.*

## 1. Introduction

Recently, the Kenyan media has been awash with reports of increased and unregulated cases of pollution. This has ranged from water, air and soil pollution, among others.[1] However, this does not imply that pollution is a

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[1] Odinga, T., "Focus on miners, farmers as soil pollution rises," *Business daily*, Tuesday, December 4, 2018. Available at https://www.businessdailyafrica.com/datahub/3815418-4881226-11dxf1kz/index.html ; Omanga, E., Ulmer, L., Berhane, Z., & Gatari, M., "Industrial air pollution in rural Kenya: community awareness, risk perception and associations between risk variables," *BMC public health* 14, no. 1 (2014): 377.

Kenyan problem only. On the contrary, there have been increased cases of various forms of pollution the world over.[2] This is despite the presence of some legal and institutional frameworks meant to control the problem. At the international level and national environmental laws, environmental law has evolved to recognize substantive rights with relation to the environment, such as the rights implied in the common heritage of mankind and the right to be free from toxic pollution, among others.[3]

The Constitution of Kenya guarantees the right of every person to a clean and healthy environment including the right to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69.[4] One of the obligations of the State under Article 69 is to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and to ensure the equitable sharing of the accruing benefits.[5]

According to the Kenya's National Land Policy 2009[6], Kenya faces a number of environmental problems including the degradation of natural resources such as forests, wildlife, water, marine and coastal resources as well as soil erosion and the pollution of air, water and land. No doubt mining

[2] World Health organization, "9 out of 10 people worldwide breathe polluted air, but more countries are taking action," 2 May 2018. Available at https://www.who.int/news-room/detail/02-05-2018-9-out-of-10-people-worldwide-breathe-polluted-air-but-more-countries-are-taking-action

[3] United Nations, *UNEP Compendium on Human Rights and the Environment: Selected international legal materials and cases*, United Nations Environment Programme ; Center for International Environmental Law (2014). Available at http://wedocs.unep.org/handle/20.500.11822/9943

[4] Art. 42; Art. 70(1) of the Constitution states that if a person alleges that a right to a clean and healthy environment recognised and protected under Art. 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.

[5] Art. 69(1) (a), Constitution of Kenya, 2010.

[6] Republic of Kenya, National Land Policy (Government Printer, Nairobi, 2009).

will escalate the situation unless environmental management is integrated into mining activities.

There have been nationwide reports indicating that raw water in Kenya is too polluted with chemicals and heavy metals to be fit for irrigation or human and livestock consumption.[7] This paper seeks to add to the existing literature on how the problem of pollution in Kenya can be dealt with effectively. While this paper discusses environmental pollution in Kenya, it will specifically focus on air, water, land and noise pollution since these are the most common forms of pollution in Kenya.[8]

## 2. Environmental Pollution: Meaning and Forms

Environmental pollution has been defined as 'the contamination of the physical and biological components of the earth/atmosphere system to such an extent that normal environmental processes are adversely affected'.[9]
Environmental Pollution has also been defined as 'any discharge of material or energy into water, land, or air that causes or may cause acute (short-term) or chronic (long-term) detriment to the Earth's ecological balance or that lowers the quality of life'.[10]

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[7] Nasike, C., "Enforce measures to curb water pollution," *Business Daily*, Thursday, August 22, 2019. Available at *https://www.businessdailyafrica.com/analysis/letters/Enforce-measures-to-curb-water-pollution/4307714-5245596-tdpn9y/index.html* [Accessed on 9/9/2019].

[8] This list is not exhaustive as such Acts as the *Radiation Protection Act*, Cap 243, Laws of Kenya Revised Edition 2012 [1985], seeks to provide for the protection of the public and radiation workers from the dangers arising from the use of devices or material capable of producing ionizing radiation and for connected purposes. Sec. 8 (1) thereof prohibits any person, subject to such exemptions as may be prescribed under regulations made under this Act, to—(a) manufacture or otherwise produce; (b) possess or use; (c) sell, dispose of or lease, loan or deal with;
(d) import or cause to be imported; or (e) export or cause to be exported, any irradiating device or radioactive material except under and in accordance with a licence issued under this Act.

[9] Ullah, S., "A sociological study of environmental pollution and its effects on the public health Faisalabad city," *International Journal of Education and Research*, Vol. 1 No. 6 June 2013, p.2.

[10] Coker, A.O,. "Environmental Pollution: Types, Causes, Impacts and Management for the Health and Socio-Economic Well-Being of Nigeria," p.1. Available at

Pollutants strain ecosystems and may reduce or eliminate populations of sensitive species. Contamination may reverberate along the food chain causing mass destruction.[11] An example is the use of herbicides and pesticides in agricultural land. Some of these chemicals seep into rivers that flow through protected areas, causing poisoning of wildlife which drinks from the river. Another problem is the dumping of solid waste into rivers that flow through protected areas. Solid waste management which is constitutionally delegated to county governments has been a big problem across the country.[12]

Pollution has been attributed to many factors which include but not limited to waste by-products emanating from industrialization of our society, the introduction of motorized vehicles, and the explosion of the human population, leading to an exponential growth in the production of goods and services.[13] This is mainly because of the indiscriminate discharge of untreated industrial and domestic wastes into waterways, the spewing of thousands of tons of particulates and airborne gases into the atmosphere, the "throwaway" attitude toward solid wastes, and the use of newly developed chemicals without considering potential consequences has resulted in a lot of environmental disasters throughout the world.[14]

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https://pdfs.semanticscholar.org/8e7b/a9595bab30d7ea87715533353c53f7452811.pdf [Accessed on 9/9/2019].

[11] FIAN International, 'Study 3: Ecodestruction and the Right to Food: The Cases of Water and Biodiversity,' *Starving the Future*, June 2002, available at http://www.fian.at/assets/Ecodestruction02.pdf [Accessed 20/9/2019].

[12] Schedule 4, Constitution of Kenya 2010.

[13] Coker, A.O,. "Environmental Pollution: Types, Causes, Impacts and Management for the Health and Socio-Economic Well-Being of Nigeria," p.1. Available at https://pdfs.semanticscholar.org/8e7b/a9595bab30d7ea87715533353c53f7452811.pdf [Accessed on 9/9/2019].

[14] Coker, A.O,. "Environmental Pollution: Types, Causes, Impacts and Management for the Health and Socio-Economic Well-Being of Nigeria," p.1. Available at https://pdfs.semanticscholar.org/8e7b/a9595bab30d7ea87715533353c53f7452811.pdf [Accessed on 9/9/2019].

A major cause of pollution in coastal ecosystems is construction of hotels and other facilities in areas that are not on the sewerage lines.[15] Beach resorts and some households in Mombasa have constructed onsite sewage management systems such as septic tanks and soakage pits.[16] However, these often cause groundwater contamination which in turn causes considerable coral reef dieback and threatens the proliferation of marine life.[17] The Wildlife Conservation and Management Act, 2013[18] deals with pollution by making it an offence to pollute wildlife habitats.[19] The Act applies the polluter pays principle and environmental restoration alongside payment of hefty fines for persons convicted of polluting wildlife habitats.[20] EMCA has very substantive provisions on pollution of the environment and gives deterrent penalties for violation of those provisions. The courts have further upheld the provisions of EMCA relating to pollution of wildlife resources and one such incidence was in the case of *Kwanza Estates LTD v Kenya Wildlife Service*,[21] where the court issued an injunction stopping the construction of a public toilet on the beachfront without approval from NEMA holding that the actions had potentially negative effects on the environment.

Environmental pollution is a threat to not only the sustainable development agenda but also to the very existence of the humankind. Environmental law thus seeks to control the use of one's property and human behaviour so as to permit a habitable environment and to minimize adverse ecological effects.[22]

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[15] Businge, M.S., *et al*., 'Environment and Economic Development' in *Kenya State of the Environment and Outlook 2010* (NEMA, 2011) 2, p.14.
[16] *Ibid*.
[17] *Ibid*.
[18] No. 47 of 2013, laws of Kenya.
[19] S. 89.
[20] S. 89(2).
[21] Civil Case 133 of 2012 [eKLR].
[22] Kutner, Luis. "The Control and Prevention of Transnational Pollution: A Case for World Habeas Ecologicus," *University of Miami Inter-American Law Review* 9, no. 2 (1977): 257.

## 3. Types of Pollution in Kenya

The most common types of pollution perceived in our environment include: water pollution; land pollution; noise pollution; and air pollution.[23]

### 3.1 Land and Water pollution

It is estimated that about 30 to 50 per cent of nitrogen applied to soils leaches into rivers and the air, suffocating aquatic life, worsening climate change and shortening lives through contamination.[24] Nutrient pollution, or an excess of nutrients such as nitrogen and phosphorus in the water which enter the rivers as runoff from farmlands and residential areas, can lead to a host of health and environmental problems.[25] Nutrient pollution is attributed to fertilizer, animal manure, sewage treatment plant discharge, detergents, storm water runoff, cars and power plants, failing septic tanks and pet waste.[26]

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[23] Coker, A.O., "Environmental Pollution: Types, Causes, Impacts and Management for the Health and Socio-Economic Well-Being of Nigeria." Available at https://pdfs.semanticscholar.org/8e7b/a9595bab30d7ea87715533353c53f7452811.pdf; Ndungu, N.J., "Pollution in Thika Municipality: Assessment Of Community-Based Awareness and Perception." (2003), available at *http://erepository.uonbi.ac.ke/bitstream/handle/11295/19013/Ndungu%20John%20Ndiraku_Pollution%20in%20Thika%20Municipality-%20Assessment%20of%20Communty-based%20Awareness%20and%20Perception.pdf?sequence=3&isAllowed=y;* Ullah, S., "A sociological study of environmental pollution and its effects on the public health Faisalabad city," *International Journal of Education and Research*, Vol. 1 No. 6 June 2013.

[24] Onyango, L., "Nema shuts down four firms for polluting Nairobi River," *Daily Nation*, Monday August 26 2019. Available at https://www.nation.co.ke/news/Nema-shuts-down-four-firms-for-polluting-Nairobi-River/1056-5250274-dlwt1iz/index.html

[25]Thompson, E., "How Land Use Affects Nutrient Pollution in a Changing Climate," *Earth & Space Science News* (sourced from *Journal of Geophysical Research: Biogeosciences*), 4 September, 2019. Available at https://eos.org/research-spotlights/how-land-use-affects-nutrient-pollution-in-a-changing-climate

[26] United Nations Environmental Protection Agency, "The Facts about Nutrient Pollution," available at https://www.epa.gov/sites/production/files/2015-03/documents/facts_about_nutrient_pollution_what_is_hypoxia.pdf

Nutrient pollution of rivers is considered to be one of the most widespread human impacts on water resources.[27] This is especially more serious in agriculture based economies such as Kenya where most people in rural areas engage in farming using modern chemicals that end up in water bodies. This not only pollutes the water but have a residue effect on the soil thus polluting the soil. Apart from farming chemicals, Sewerage water, industrial wastes and disposals are also sources of water pollution.[28]

Target 6.3 of the Sustainable Development Goals (SDGs) requires that states should ensure that "by 2030, they improve water quality by reducing pollution, eliminating dumping and minimizing release of hazardous chemicals and materials, halving the proportion of untreated wastewater and substantially increasing recycling and safe reuse globally.

**3.2 Noise and Air pollution Control in Kenya**

Some scholars have defined the term noise to describe sounds that are disagreeable or unpleasant produced by acoustic waves of random intensities and frequencies.[29] Noise from industry, traffic, homes and recreation can cause annoyance, disturb sleep and effects health. Thus, sound is considered to be a potential serious pollutant and threat to the environmental health.[30]

Air pollution can be defined as "the introduction of chemicals, particulate matter, or biological materials that cause harm or discomfort to humans or

[27] Stevenson, R., "Nutrient Pollution: A Problem with Solutions," In book: River Conservation: Challenges and Opportunities, Chapter: 4, Publisher: Fundacion BBVA, Editors: Sergi Sabater, Arturo Elosegi, pp.77-104, at p.77.

[28] Ullah, S., "A sociological study of environmental pollution and its effects on the public health Faisalabad city," *International Journal of Education and Research*, Vol. 1, No. 6, June 2013.

[29] Ibid.

[30] Ibid; Mead, M.N.,"Noise Pollution: The Sound behind Heart Effects," *Environmental Health Perspectives* 115, no. 11 (2007): A536; Owen, D., "Is Noise Pollution the Next Big Public-Health Crisis?" *The New Yorker, May 13, 2019 Issue.* Available at https://www.newyorker.com/magazine/2019/05/13/is-noise-pollution-the-next-big-public-health-crisis

other living organisms, or cause damage to the natural environment or built environment, into the atmosphere".[31]

Air pollution is now considered to be a significant public health problem, responsible for a growing range of health effects in many regions of the world.[32] Indeed, it has been documented that air pollution has overtaken poor sanitation and a lack of drinking water to become the main environmental cause of premature death.[33] Nitrogen oxides, Sulphur dioxide, Carbon Monoxide, Ammonia and Ozone are considered to be the major air pollutants.[34]

The United Nations observes that most recorded air pollution-linked deaths occur in developing countries, where laws are weak or not applied, vehicle emission standards are less stringent and coal power stations more prevalent.[35]

Kenya's air condition in most major cities and towns has been rated as some of the most polluted in the world.[36] This is mainly attributed to the

[31] Sharma, S. B., Jain, S., Khirwadkar, P., & Kulkarni, S., "The effects of air pollution on the environment and human health," *Indian Journal of Research in Pharmacy and Biotechnology* 1, no. 3 (2013): 391-396; Ghorani-Azam, A., Riahi-Zanjani, B., & Balali-Mood, M., "Effects of air pollution on human health and practical measures for prevention in Iran," *Journal of research in medical sciences: the official journal of Isfahan University of Medical Sciences* 21 (2016); Rani, B., Singh, U., & Maheshwari, R., "Menace of air pollution worldwide," *Advances in Biological Research* 2, no. 1 (2011): 1-22.

[32] Kelly, F. J., & Fussell, J. C., "Air pollution and public health: emerging hazards and improved understanding of risk," *Environmental geochemistry and health* 37, no. 4 (2015): 631-649.

[33] Ibid.

[34] Ullah, S., "A sociological study of environmental pollution and its effects on the public health Faisalabad city," *International Journal of Education and Research*, Vol. 1, No. 6, June 2013.

[35] United Nations Environment Programme, "Air pollution hurts the poorest most," 9 May, 2019. Available at https://www.unenvironment.org/news-and-stories/story/air-pollution-hurts-poorest-most

[36] Chasant, M., "Air Pollution In Kenya: Causes, Effects And Solutions," 4 July, 2019. Available at https://www.atcmask.com/blogs/blog/air-pollution-in-kenya

unsustainable policies in sectors such as transport, energy, waste management and industry.[37]

It has been argued that while other parts of the world, particularly the developed nations, also have the problem of air pollution mainly caused by burning of hydrocarbons for transport that can be addressed by tackling fuel usage through electric vehicles, and car-free zones, African cities have entirely different problems; pollution is mainly due to the burning of rubbish, cooking with inefficient solid fuel stoves, millions of small diesel electricity generators, cars which have had their catalytic converters removed and petrochemical plants, all pushing pollutants into the air over the cities.[38]

According to the World Health Organization, approximately 19,000 people die prematurely in Kenya annually because of air pollution.[39] This is mainly attributed to PM 2.5 annual exposure, which, according to the United Nations, are 70 per cent over the safe level in Nairobi.[40] Kenya has had its own share of air and noise pollution despite the existence of laws meant to curb the same.[41]

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[37] Ibid.

[38] Vidal, J., "'There is no escape': Nairobi's air pollution sparks Africa health warning," *The Guardian,* 10 July, 2016. Available at https://www.theguardian.com/cities/2016/jul/10/no-escape-nairobi-air-pollution-sparks-africa-health-warning

[39] United Nations Environment Programme, "Nairobi matatus' odd engine idling culture pollutes, harms health," 19 December, 2019. Available at https://www.unenvironment.org/news-and-stories/story/nairobi-matatus-odd-engine-idling-culture-pollutes-harms-health

[40] Ibid.

[41] Sfrican City Planner, "Nairobi, Kenya, faces a Growing Challenge of Noise Pollution," October 17, 2016. Available at http://africancityplanner.com/nairobi-kenya-faces-growing-challenge-noise-pollution/; Barczewski, B., "How well do environmental regulations work in Kenya?: a case study of the Thika highway improvement project." *Center for Sustainable Urban Development* (2013); Jammah, A., "Kenya needs to address the crisis of air pollution," Standard Digital, 18th March, 2016. Available at https://www.standardmedia.co.ke/article/2000195290/kenya-needs-to-address-the-crisis-of-air-pollution.

## 4. International and Regional Law and Pollution Control

The *International Covenant on Economic, Social and Cultural Rights*[42], recognises the right to be free from pollution and states that 'the States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: the improvement of all aspects of environmental and industrial hygiene.[43]

The United Nations *Montreal Protocol on Substances that Deplete the Ozone Layer*[44] aims to reduce and eventually eliminate the emissions of man-made ozone depleting substances. The *1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*[45] requires the parties to reduce to a minimum the transboundary movements of hazardous wastes; to ensure that such wastes are managed and disposed of in an environmentally sound manner, as close as possible to their source of generation; and to reduce to a minimum the generation of hazardous wastes at the source.

The *1992 Framework Convention on Climate Change*[46] requires parties to achieve "stabilization of greenhouse gas concentrations in the atmosphere at

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[42] United Nations, *International Covenant on Economic, Social and Cultural Rights*, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with article 27.

[43] *International Covenant on Economic, Social and Cultural Rights*, Article 12 (1)(2)(b).

[44] UN General Assembly, *Protection of global climate for present and future generations of mankind: resolution / adopted by the General Assembly*, 6 December 1988, A/RES/43/53.

[45] UN General Assembly, Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Basel, 22 March 1989, United Nations, *Treaty Series* , vol. 1673, p. 57.

[46] UN General Assembly, *United Nations Framework Convention on Climate Change: resolution / adopted by the General Assembly*, 20 January 1994, A/RES/48/189.

a level that would prevent dangerous anthropogenic interference with the climate system.

The other *Protocol to the Nairobi Convention is the Protocol Concerning Co-operation in Combating Marine Pollution in Cases of Emergency in the Eastern African Region*[47] which was adopted in 1985. Article 2 of the Protocol provides that it applies to "marine pollution incidents which have resulted in or which pose a significant threat of, pollution to the marine and coastal environment of the Eastern African region or which adversely affect the interests of one or more of the Contracting Parties." The other Protocol relating to the East Africa region, is the Protocol for the Protection of the West Indian Ocean Marine Environment from Land-Based Sources and Activities (LBSA Protocol)[48], enacted in 2010.

The *Nairobi Convention*[49] together with its three protocols constitutes the current regional legal framework for the protection and conservation of the marine and coastal environment of the Western Indian Ocean region. The Convention is meant to ensure there is a joint regional legal framework that coordinates the efforts of the member states to build their capacity to protect, manage and develop their coastal and marine environment.[50] This would include capacity to keep these areas pollution free. This is because transnational pollution would require cooperation among states sharing major water bodies like Indian Ocean.[51]

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[47] United Nations, *Protocol Concerning Co-operation in Combating Marine Pollution in Cases of Emergency in the Eastern African Region*, Jun 21, 1985, Nairobi. Entry into force: May 30, 1996

[48] Protocol for the Protection of the Marine and Coastal Environment of the Western Indian Ocean from Land-Based Sources and Activities. Adopted in Nairobi, Kenya on 31 March 2010

[49] https://www.unenvironment.org/nairobiconvention/

[50] Ibid.

[51] See generally, Mendis, C., "Sovereignty vs. trans-boundary environmental harm: The evolving International law obligations and the Sethusamuduram Ship Channel Project," *Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, New York, NY(USA). 67* (2006): 2006, see also Caron, D.D., "Liability for Transnational Pollution Arising from Offshore Oil Development: A Methodological Approach," *Ecology Law Quarterly* (1983): 641-683; Kutner, L.,

These legal instruments are to offer guidelines to states on how to conserve the various aspects of the environment and also curb pollution.

## 5. Legal and Institutional Framework on Pollution Control in Kenya: Challenges and Prospects

### 5.1 Constitution of Kenya 2010

Under the Constitution of Kenya 2010[52] Although the national government, has the role of protecting the environment and natural resources,[53] county governments have a role in pollution control[54] and implementation of specific national government policies on natural resources and environmental conservation including soil and water conservation and forestry.[55] The Counties should however work closely with the national government and other stakeholders in discharging some of these duties considering that they may traverse various counties and may require some major steps from both national and county levels of government.

### 5.2 Environmental Management and Coordination Act (EMCA), 1999

The Environmental Management and Coordination Act (EMCA), 1999[56], is the framework law on environmental management and conservation. EMCA establishes among others institutions; National Environment Management Authority, National Environment Complaints Committee[57], National Environment Tribunal and County Environment Committees.

EMCA provides the general guidelines and standards to be observed in management and conservation of various aspects of the environment. It is therefore supposed to be implemented through enactment of sectoral laws

"The Control and Prevention of Transnational Pollution: A Case for World Habeas Ecologicus," *University of Miami Inter-American Law Review* 9, no. 2 (1977): 257.
[52] Constitution of Kenya 2010 (Government Printer, Nairobi, 2010).
[53] Ibid, Fourth Schedule, S. 22.
[54] *Ibid*, S. 3 of Part II.
[55] *Ibid*, S. 10.
[56] No. 8 of 1999, Laws of Kenya.
[57] See Environmental Management and Co-ordination (Amendment) *Act* (*No 5 of 2015*), Laws of Kenya.

that should focus on the various aspects of the environment. In order to align the Act with the Constitution, EMCA was amended in 2015 by the *Environmental Management and Co-ordination (Amendment) Act* (No 5 of 2015). While EMCA contains provisions on almost all the aspects of the environment, it is worth pointing out that the procedural aspects of the regulation of these aspects heavily depends on regulations and other laws that expound on the EMCA provisions.

### 5.3 National Environment Management Authority (NEMA)

The National Environment Management Authority (NEMA) was established as the principal instrument of government charged with the implementation of all policies relating to the environment, and to exercise general supervision and coordination over all matters relating to the environment. In consultation with the lead agencies, NEMA is empowered to develop regulations, prescribe measures and standards and, issue guidelines for the management and conservation of natural resources and the environment. The Act provides for environmental protection through; Environmental impact assessment; Environmental audit and monitoring; and Environmental restoration orders, conservation orders, and easements.

Notably, NEMA can delegate its functions under EMCA to any lead agency, being the oversight authority, and where it carries out a delegated duty, it can recover costs from the relevant body for any of such functions.[58]

### 5.4 Health Act, 2017

The Health Act, 2017[59] was enacted to establish a unified health system, to coordinate the inter-relationship between the national government and county government health systems, to provide for regulation of health care service and health care service providers, health products and health technologies and for connected purposes.[60] In seeking to promote and advance public and environmental health, the Act obligates the national

[58] Sec. 12, EMCA.
[59] Act No. 21 of 2017, Laws of Kenya.
[60] Ibid, Preamble.

health system to ensure that measures for managing environmental risk factors to curtail occurrence and distribution of diseases are put in place and implemented. In particular such measures should target, inter alia—the reduction of disease burden arising from poor environmental hygiene, sanitation, occupational exposure and environmental pollution.[61]

### 5.5 Public Health Act

The *Public Health Act*[62] was enacted to make provision for securing and maintaining health.[63] The Act empowers the Cabinet Minister in charge to make rules concerning port health matters. Specifically, the Cabinet Secretary may make rules, inter alia: or the destruction of rats, mice or insects in, vessels, the disposal of bilge or other water on board, the cleansing of vessels, the provision of a supply of pure water on board, and for preventing the pollution of the water of the port with excreta and manure or any infective or offensive matter.[64]

It also places a duty on local authority to protection of water supplies. Specifically, It provides that it shall be the duty of every local authority to take all lawful, necessary and reasonably practicable measures—for preventing any pollution dangerous to health of any supply of water which the public within its district has a right to use and does use for drinking or domestic purposes (whether such supply is derived from sources within or beyond its district); and for purifying any such supply which has become so polluted, and to take measures (including, if necessary, proceedings at law) against any person so polluting any such supply or polluting any stream so as to be a nuisance or danger to health.[65] The Act also empowers the Cabinet Secretary on the advice of the Central Board of Health, to make, and impose on local authorities and others the duty of enforcing, rules in respect of defined areas—prohibiting bathing in, and prohibiting or regulating the washing of clothes or other articles or of animals in, or in any place draining

[61] Health Act, 2017, Sec. 68 (2)(a).
[62] Public Health Act, Cap. 242, Laws of Kenya Revised Edition 2012 [1986].
[63] Ibid, preamble.
[64] Ibid, sec. 73 (d).
[65] Ibid, sec. 129.

into, any such water supply as is mentioned in section 129; and prohibiting or regulating the erection of dwellings, sanitary conveniences, stables, cattle-kraals, pig-styes, ostrich-pens, dipping tanks, factories or other works likely to entail risk of harmful pollution of any such water supply, or prohibiting or regulating the deposit in the vicinity of, or in any place draining into, any such supply of any manure, filth or noxious or offensive matter or thing, and generally, for preventing the pollution dangerous to health of any supply of water which the public within its district has a right to use and does use for drinking or domestic purposes and for purifying any such supply which has become so polluted, and for preventing the pollution of streams so as to be a nuisance or a danger to health.[66]

Regarding disposal of sewage, the Act provides that no person should dispose of solid or liquid sewage or sewage effluent in such a manner or in such a position as to cause or be likely to cause dampness in any building or part thereof, or to endanger the purity of any water supply, or to create any nuisance, with exception of disposal of waste water from baths, lavatory basins or kitchen sinks by a satisfactory method of surface irrigation or sub-irrigation in such a manner that neither dampness of buildings, the breeding of mosquitoes, the pollution of water supplies nor other form of nuisance is caused thereby.[67]

While this Act seems comprehensive in its provisions, its implementation and enforcement seems minimal or non-existent considering that all that it seeks to prohibit is what has been happening across the country and especially in major towns and cities such as Nairobi and Mombasa. Nairobi River is enough evidence of lack of implementation of the Public Health Act owing to its current pathetic state and absolute pollution as has been highlighted severally in the media. The ripple effect has been the pollution of other watercourse downstream such as the River Athi.[68] This affects not

[66] Sec. 130.
[67] Sec. 63; See also EMCA's Water quality Regulations, 2006 (Legal notice No. 121); Water Act, 2016.
[68] Kienja, K., "Pollution of urban waterways in Nairobi: a case study of Mathare 4B village, Nairobi, Kenya." Master Thesis, University of Canterbury (2017). Available

only human beings and animals but also adversely affects agricultural production and also causes the double tragedy of people consuming polluted and contaminated foodstuffs produced with the polluted water. There is thus a heightened need for protection of the public health from industrial pollution in Kenya which may range from water, air and land pollution.

### 5.6 Suppression of Noxious Weeds Act

Considering that land degradation and pollution can be caused by various factors including noxious weeds, the *Suppression of Noxious weeds Act*[69] was enacted to provide for the suppression of noxious weeds.[70] The Cabinet Secretary may by notice in the Gazette declare a plant to be a noxious weed in any area, which shall be specified in the notice, and which may consist either of the whole of Kenya or of one or more districts or portions thereof.[71] Where a weed is declared as noxious, any person in charge of such land should clear the noxious weed, or cause it to be cleared, from that land.[72] Such weeds may be injurious to agricultural or horticultural crops, natural habitats or ecosystems, or humans or livestock, hence the need to control them.[73]

#### a) Water pollution Control

National Environment Management Authority (NEMA) has made considerable attempts at controlling water pollution in the country. [74]

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at https://pdfs.semanticscholar.org/06b6/abcabbe413610fe725ee8bb27ac61971868a.pdf

[69] *Suppression of Noxious weeds Act, Cap 325*, Laws of Kenya, Revised Edition 2012 [1983].

[70] Ibid, Preamble.

[71] Ibid, sec. 3.

[72] Ibid, sec. 4.

[73] Gbèhounou, G., *Guidance on Weed Issues and Assessment of Noxious Weeds in a Context of Harmonized Legislation for Production of Certified Seeds*, Plant Production and Protection Division, Food and Agriculture Organization of the United Nations, 2013. Available at http://www.fao.org/3/a-i3493e.pdf

[74] Onyango, L., "NEMA shuts down four firms for polluting Nairobi River," Daily *Nation*, Monday August 26 2019. Available at

However, this may be considered to be a reactive measure which was only taken after media houses' expose on the extent of pollution that is taking place in the country, especially perpetrated by the corporate bodies. This begs the question where NEMA was and whether the perquisite measures during the licensing of these companies were taken. Environmental Impact Assessment (EIA)[75] and Strategic Environment and Social Assessment (SESA)[76] assessments as required by the law were supposed to address this problem; follow up measures by NEMA to ensure that there is compliance were evidently missing. This has resulted in various companies dropping their guard and engaging in wanton destruction of water bodies through uncontrolled and untreated discharge of pollutants into the water bodies. NEMA Director General has been on record stating that some of the closed down companies do not have efficient waste water treatment plants.[77] This is worrying as it may mean that there are many more out there doing the same and its only that they have not been discovered.

The *Water Quality Regulations 2006*[78] apply to drinking water, water used for industrial purposes, water used for agricultural purposes, water used for recreational purposes, water used for fisheries and wildlife, and water used for any other purposes.[79] The Regulations not only obligate every person to refrain from any act which directly or indirectly causes, or may cause immediate or subsequent water pollution, but also seek to regulate through licensing the various uses and interaction with water. They also set standards by which every user of water and water bodies must observe.

https://www.nation.co.ke/news/Nema-shuts-down-four-firms-for-polluting-Nairobi-River/1056-5250274-dlwt1iz/index.html

[75] Sec. 68, EMCA.

[76] Sec. 57A, EMCA.

[77] Onyango, L., "Nema shuts down four firms for polluting Nairobi River," *Daily Nation*,Monday August 26 2019. Available at https://www.nation.co.ke/news/Nema-shuts-down-four-firms-for-polluting-Nairobi-River/1056-5250274-dlwt1iz/index.html

[78] Water quality Regulations, 2006 (Legal notice No. 121).

[79] Regulation 2.

The Water Act 2016[80] also carries provisions that seek to curb contamination and pollution of water sources and establishes institutions that should enforce the Act. Despite the enactment of this Act, there are still many cases of pollution of water bodies due to lack of enforcement of the prescribed standards and little has changed if at all, in the quality of water across the country as far as water hygiene is concerned.

**b) Land pollution Control**

Land pollution and degradation is closely related to water pollution as this can also result in water pollution, hence the need to tackle the problem. Land degradation in Kenya is often attributed to both natural and human factors which include biophysical (natural) factors related to climatic conditions and extreme weather events such as droughts and floods, and catchment factors such as steep slopes and highly erodible soils.[81] However, human activities carry the greatest share of blame, and these include unsustainable land management practices (anthropogenic) factors such as destruction of natural vegetation, over-cultivation, overgrazing, poor land husbandry and excessive forest conversion.[82]

Land degradation may include: biological/Vegetation degradation (loss of biodiversity/vegetation); Soil erosion by water; Wind erosion; Water resources degradation; Chemical degradation; and physical degradation.[83] Considering that the above factors fall under different sectors, land pollution is governed by various policies and laws that range from agricultural laws, forestry laws, climate change laws and water laws among others.[84]

[80] No. 43 of 2016, Laws of Kenya.
[81] Republic of Kenya, Report Of the Land Degradation Assessment (LADA) In Kenya: Based On A Study Of Land Degradation Assessment (Lada) With Remote Sensing And GIS, For Sustainable Land Management (SLM) In Kenya, March 2016. Available at http://www.environment.go.ke/wp-content/uploads/2018/08/LADA-Land-Degradation-Assessment-in-Kenya-March-2016.pdf
[82] Ibid.
[83] Ibid.
[84] See Agricultural Sector Development Strategy 2010–2020, the Kenya Vision 2030, the National Environment Policy, 2013, the Environment Management and Coordination Act 1999, the National Livestock Policy, 2013, the National Ocean

Article 60 of the Constitution requires that in Kenya should be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the principles of sustainable and productive management of land resources; and sound conservation and protection of ecologically sensitive areas, among others.

The Constitution also obligates the State to: ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya; 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; and eliminate processes and activities that are likely to endanger the environment.[85] It also requires every person to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.[86]

and Fisheries Policy, 2008, the National Food and Nutrition Security Policy, 2011, the National Horticulture Policy, 2012, the Forest Policy, 2014, the Sessional Paper No. 3 of 2009 On National Land Policy, the Draft National Land Use Policy, 2016, the National Spatial Plan (NSP) 2015-2045, the Natural Resources Benefit Sharing Bill, the Forest Conservation and Management Act, No. 34 of 2016, the Community Land Act No. 27 of 2016, the Agriculture, Fisheries and Food Authority Act (No 13 of 2013) Crops Act 2013 No 16 of 2013, The Kenya Agricultural and Livestock Research Act, 2013 (No. 17 of 2013), the Fisheries Management and Development Act, 2016, Biosafety Act, No. 2 of 2009, the Kenya Plant Health Inspectorate Service Act, No. 54 of 2012, the Seeds and Plant Varieties Act, Cap 326, the Wildlife Conservation and Management Act, 2013 (No. 47 of 2013), the County Governments Act, 2012 (No.17 of 2012), the Urban Areas and Cities Act, 2011 (No. 13 of 2011), the Land Adjudication Act (Cap. 284), Agriculture and Food Authority (AFA) 2016-2021 Strategic Plan, the Livestock and Livestock Products Development and Marketing Bill, 2016, the Food Security Bill, 2017, and the National Drought Management Authority Act, No. 4 of 2016.

[85] Article 69 (1).

[86] Article 69 (2).

The *Kenya Vision 2030* also commits the country to mitigate unintended adverse land degradation.

The various policies and laws thus seek to curb or mitigate the above forms of land pollution/degradation. However, the situation on the ground paints a grim picture and serves as an indication that little has been achieved despite the existence of these legal instruments.

**c) Noise pollution Control**

The *Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulation, 2009*[87] defines "noise" to mean any undesirable sound that is intrinsically objectionable or that may cause adverse effects on human health or the environment. These Regulations prohibit any person from making or causing to be made any loud, unreasonable, unnecessary or unusual noise which annoys, disturbs, injures or endangers the comfort, repose, health or safety of others and the environment.[88] However, there are some exemptions to these prohibitions.[89]

In the case of **Pastor James Jessie Gitahi and 202 others vs Attorney General**[90], the court recognized one of the components of a clean and healthy environment to be the prevention of noise and vibration pollution. The National Environmental Management Authority (Nema) inspectors have made attempts at noise pollution control in the country.[91]

Despite the Regulations, noise pollution is however still a major problem in the country because of lack of enforcement of the Regulations and possibly

[87] Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations, 2009, Legal Notice No. 61 of 2009.
[88] Ibid, Regulation 3 (1).
[89] Regulation 7.
[90] [2013] eKLR,petition No. 683 of 2009.
[91] Omullo, C., "Nema shuts four Nairobi clubs over noise pollution," *Business Daily*, Thursday, January 11, 2018. Available at *https://www.businessdailyafrica.com/news/Nema-shuts-four-Nairobi-clubs-over-noise-pollution/539546-4260126-1u5arqz/index.html*

the public's ignorance on the levels of noise that may be considered as air pollution.

**d) Air pollution Control**

The *Air Quality Regulations 2014* seek to provide for prevention, control and abatement of air pollution to ensure clean and healthy ambient air. They also seek to ensure that there is establishment of emission standards for various sources such as mobile sources (e.g. motor vehicles) and stationary sources (e.g. industries) as outlined in the Environmental Management and Coordination Act, 1999.[92] As already pointed, despite the existence of these Regulations, there has been massive pollution of air especially around major towns due to industrial development and unsustainable mode of transport, mainly public service vehicles (matatus) and other unroadworthy vehicles. Some authors have rightly pointed out that developing countries such as Kenya have limited air quality management systems due to inadequate legislation and lack of political will, among other challenges. In addition, maintaining a balance between economic development and sustainable environment is usually a challenge; there are no investments in pollution prevention technologies.[93] More attention goes to the short-term benefits from increased production and job creation where the lack of air quality management capability translates into lack of air pollution data, hence the false belief that there is no problem.[94]

Under EMCA, projects and activities that are likely to cause air pollution are also to be subjected to Environmental Impact Assessment[95].

[92] The Environment Management And Co-Ordination (Air Quality) Regulations, available at http://www.nema.go.ke/index.php?option=com_content&view=article&id=31&Itemid=171

[93] Omanga, E., Ulmer, L., Berhane, Z., & Gatari, M., "Industrial air pollution in rural Kenya: community awareness, risk perception and associations between risk variables," *BMC public health* 14, no. 1 (2014): 377.

[94] Ibid.

[95] Sec. 68, EMCA.

## 6. Towards an Effective framework on Pollution Control in Kenya

### 6.1 Effective Waste Management

Effective disposal and management of waste is considered as one of the ways of pollution control.[96] Achievement of sustainable waste management mechanisms in Kenya has been attributed to such factors as lack of adequate consumer awareness, poor policy frameworks and lack of structured Extended Producer Responsibility Schemes, among others.[97]

### 6.2 Real Time Air Pollution Monitoring

Under the Kenya Bureau of Standards legal provisions of 2014, the Kenya Bureau of standards offers pre-export inspection of used vehicles to determine whether they conform to the code regulations in a bid to control pollution.[98] Investing in technology that will enable the government agencies to achieve real time air pollution monitoring can go a long way in ensuing that pollutants are kept within acceptable levels as defined by the World Health Organisation standards. As already pointed out, air pollution is worst in the major cities and towns and these efforts should be concentrated more on these areas due to their high susceptibility and the high population living in these areas. Kenya can develop and invest in the relevant sensors through tapping into the local experts skills.[99]

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[96] Spiegel, J., & Maystre, L. Y., "Environmental pollution control and prevention." *Encyclopedia of Occupational Health and Safety. 4th ed. Geneva: International Labour Office* 2 (1998).

[97] Wakiaga, P., "Incentivising waste management is way to go," *Business Daily*, Sunday, August 25, 2019. Available at *https://www.businessdailyafrica.com/analysis/letters/Incentivising-waste-management-is-way-to-go/4307714-5248640-ym86ov/index.html* [Accessed on 17/9/2019].

[98] Uttamang, P., Aneja, V. P., & Hanna, A. F., Assessment of gaseous criteria pollutants in the Bangkok Metropolitan Region, Thailand, *Atmospheric Chemistry and Physics*, *18*(16), 12581-12593.

[99] Mugendi, E., "Measuring Nairobi's air quality using locally assembled low-cost sensors: How low cost sensors are tracking air quality in East Africa's largest city," May 9, 2018. Available at *https://medium.com/code-for-africa/measuring-nairobis-air-quality-using-locally-assembled-low-cost-sensors-94a356885120*

There is a need to invest in pollution prevention technologies like emission controls especially for factories and heavy industries with strict enforcement to ensure that people living in such areas do not pay the heavy cost of air pollution. The risk of such pollution is not just restricted to the urban areas. Research has concluded that 'pollution from industries negatively impacts the health of employees and neighbouring communities and the potential for adverse health outcomes is heightened when the industries are located in rural areas where the bulk of the population is vulnerable because of limited information about their rights and limited capacity to defend themselves or influence policy decisions'.[100]

There is need to fully operationalize the *Air Quality Regulations 2014* which ensure clean and healthy ambient air. There is need for strict enforcement of compliance with the emission standards for various sources such as mobile sources (e.g. motor vehicles) and stationary sources (e.g. industries) as outlined in the *Air Quality Regulations 2014 and* Environmental Management and Coordination Act, 1999.[101]

### 6.3 Incentive-Based Regulatory Approaches for Pollution Control

There are other regulatory approaches that can be used to promote and attain environmental protection and public health that are not rights-based. These include economic incentives and disincentives, criminal law, and private liability regimes which are all now considered as part of the framework of international and national environmental law and health law.[102] Scholars have argued that market-based instruments "harness market forces" so that

[100] Omanga, E., Ulmer, L., Berhane, Z., & Gatari, M., "Industrial air pollution in rural Kenya: community awareness, risk perception and associations between risk variables," *BMC public health* 14, no. 1 (2014): 377.

[101] The Environment Management And Co-Ordination (Air Quality) Regulations, available at *http://www.nema.go.ke/index.php?option=com_content&view=article&id=31&Itemid=171*

[102] Shelton, D., 'Human Rights, Health and Environmental Protection: Linkages in Law and Practice: A Background Paper for the WHO,' p. 3. Available at *http://www.who.int/hhr/information/Human_Rights_Health_and_Environmental_Protection.pdf* [Accessed on 28/09/2019].

they use market signals to affect behaviour (of both consumers and firms) towards pollution control. They are also called Economic Incentives for pollution control (EI) and include pollution charges or levies, taxes and tradable permits.[103]

Some authors have argued that incentive-based policy instruments are more efficient means of achieving environmental goals such as reductions in polluting emissions and fostering the delivery of ecosystem services.[104] Both a charge system and a tax system use financial instruments to persuade polluters to reduce pollution, by making pollution more costly to the polluter, thus forcing firms to reduce emissions.[105]

Kenya has been making progress in adopting these approaches, with the latest being the Green Bond Programme - Kenya, which aims to promote financial sector innovation by developing a domestic green bond market.[106] Such measures are commendable for promoting sustainability and reducing climate change[107], which is one of the results of pollution, through funding renewable energy and afforestation projects.[108]

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[103] Di Falco, S., "Economic incentives for pollution control in developing countries: what can we learn from the empirical literature?." *Politique Agricola Internazionale (PAGRI)* 2, no. 2 (2012): 7-24, at p.7.
[104] de Vries, F. P., & Hanley, N., "Incentive-based policy design for pollution control and biodiversity conservation: a review." *Environmental and Resource Economics* 63, no. 4 (2016): 687-702.
[105] Di Falco, S., "Economic incentives for pollution control in developing countries: what can we learn from the empirical literature?" *Politique Agricola Internazionale (PAGRI)* 2, no. 2 (2012): 7-24, at p.9.
[106] "The Green Bonds Programme – Kenya," available at https://www.greenbondskenya.co.ke/
[107] Kenya Bankers Association, *Kenya Green Bond Guidelines Background Document (Draft 02)*. Available at https://www.nse.co.ke › products-services › debt-securities › the-green-bond

[108] Ngugi, B., "Kenya sets stage for first ever green bond after approving rules," *Business Daily*, Wednesday, February 20, 2019. Available at https://www.businessdailyafrica.com/markets/capital/Kenya-sets-stage-for-first-ever-green-bond/4259442-4990946-y3k2y4z/index.html

Banning of non-reusable plastic bags in August 2017 was also a major step in curbing pollution in the country and this has received accolades across the globe.[109] This has not only been embraced by companies but also the general public.

Using such incentives and investing in technology, the Government of Kenya can succeed in achieving sustainable solid waste management in the country which is still a big menace. Notably, the poorly disposed solid waste causes water, air and soil/land pollution.

The Government should also invest more in modern modes of transport that emit fewer polluting gases through offering relevant tax breaks/exemptions to encourage investment in the sector.

It is hoped that in the long run, this will see Kenya achieve a cleaner environment for all, thus moving closer to achieving the right to a clean and healthy environment.

### 6.4 Pollution Control in the Context of Sustainable Development

*Sustainable Development Goals (SDGs)* 3.9 requires that by 2030, countries should substantially reduce the number of deaths and illnesses from hazardous chemicals and air, water and soil pollution and contamination.[110]

In addition to the 2030 SDGs, *Agenda 21*[111] was adopted in 1992 with the aim of combating the problems of poverty, hunger, ill health and illiteracy, and the continuing deterioration of the ecosystems on which the human race depend for their well-being. Further, it sought to deal with the integration of

[109] National Environment Management Authority, "Government BANS Plastic Carrier Bags," *NEMA News: NEMA Quarterly magazine*, January-March, 2017. Available at *http://www.nema.go.ke/images/Docs/Awarness%20Materials/NEAPS/NEMA%20Quarterly%20Magazine-Jan-March%202017.pdf*

[110] SDG 3 requires countries to ensure healthy lives and promote wellbeing for all at all ages.

[111] (A/CONF.151/26, vol.II), United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992, Agenda 21.

environment and development concerns and greater attention to them which would lead to the fulfillment of basic needs, improved living standards for all, better protected and managed ecosystems and a safer, more prosperous future. [112] The aim was to achieve a global consensus and political commitment at the highest level on development and environment cooperation.

Chapter 3 of the *Agenda 21* deals with combating poverty. Clause 3.2 thereof provides that while managing resources sustainably, an environmental policy that focuses mainly on the conservation and protection of resources must take due account of those who depend on the resources for their livelihoods. Clause 4.5 thereof notes that special attention should be paid to the demand for natural resources generated by unsustainable consumption and to the efficient use of those resources, consistent with the goal of minimizing depletion and reducing pollution.[113] *Agenda 21* basically seeks to enable all people to achieve sustainable livelihoods through integrating factors that allow policies to address issues of development, sustainable resource management and poverty eradication simultaneously.[114]

The *Forest Principles*[115] state in the preamble that the subject of forests is related to the entire range of environmental and development issues and opportunities, including the right to socio-economic development on a sustainable basis. The guiding objective of these principles is to contribute to the management, conservation and sustainable development of forests and to provide for their multiple and complementary functions and uses.[116]

The Principles require countries to ensure that forest resources and forest lands are sustainably managed to meet the social, economic, ecological,

[112] Ibid, Preamble.
[113] Ibid, Clause 4.5.
[114] Ibid, Clause 3.4.
[115] United Nations, The Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests (Forest Principles) A/CONF.151/26 (Vol. III).
[116] Ibid, Preamble.

cultural and spiritual needs of present and future generations. These needs are for forest products and services, such as wood and wood products, water, food, fodder, medicine, fuel, shelter, employment, recreation, habitats for wildlife, landscape diversity, carbon sinks and reservoirs, and for other forest products. As a result, appropriate measures should be taken to protect forests against harmful effects of pollution, including air-borne pollution, fires, pests and diseases, in order to maintain their full multiple value.[117]

Notably, the *Principles* state that the vital role of all types of forests in maintaining the ecological processes and balance at the local, national, regional and global levels through, inter alia, their role in protecting fragile ecosystems, watersheds and freshwater resources and as rich storehouses of biodiversity and biological resources and sources of genetic material for biotechnology products, as well as photosynthesis, should be recognised.[118]

### 6.5 Public Empowerment and Participation

The Constitution provides that every person has a duty to cooperate with the State in discharging of its obligations towards the environment. Noting that the general public is as much a partaker in generation of pollution as it is a victim of its effects, there is need to involve them in combating pollution in the country. Creating awareness on the harmful effects of the various forms of pollution as well as creating incentives for the public to desist from activities that cause pollution is necessary. This must however be accompanied by providing alternative means of production that are sustainable. Environmental education and ethics should be promoted in the country. They should also be involved through other participatory tools such as the Environmental Impact Assessment (EIA) [119] and Strategic Environmental Assessment (SEA) [120] in order to make environmentally sound decisions which also consider their views.

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[117] Principle 2 (b).
[118] Principle 4.
[119] See Article 69 (1), Constitution; Sec. 68, EMCA.
[120] See 57A, Environmental Management and Co-ordination (Amendment) Act, *2015* (*No. 5 of 2015*).

There is also a need to put in place a working public/citizen complaint mechanism that provides the opportunity for citizens to lodge complaints and grievances about the violation/infringement of their right to a clean and healthy environment by companies polluting the environment. The acceptance speech by Nobel Laureate, the late Prof. Wangari Maathai, summarises the importance of public participation and empowerment in environmental protection and conservation as follows: "…….*So, together, we have planted over 30 million trees that provide fuel, food, shelter, and income to support their children's education and household needs. The activity also creates employment and improves soils and watersheds. Through their involvement, women gain some degree of power over their lives, especially their social and economic position and relevance in the family….Initially, the work was difficult because historically our people have been persuaded to believe that because they are poor, they lack not only capital, but also knowledge and skills to address their challenges. Instead they are conditioned to believe that solutions to their problems must come from 'outside'. Further, women did not realize that meeting their needs depended on their environment being healthy and well managed. They were also unaware that a degraded environment leads to a scramble for scarce resources and may culminate in poverty and even conflict….In order to assist communities to understand these linkages, we developed a citizen education program, during which people identify their problems, the causes and possible solutions. They then make connections between their own personal actions and the problems they witness in the environment and in society*…. (Emphasis added)."[121]

## 6.6 Proper and Effective Spatial Planning

There have been various reports of demolition of buildings deemed to have been built in riparian land and other ecologically sensitive areas. There is a need to put in place effective spatial planning management systems as well as a working system for monitoring development activities. This will avoid

[121] The Norwegian Nobel Institute, 'Wangari Maathai: The Nobel Lecture (Oslo, December 10, 2004),' available at *http://nobelpeaceprize.org/en_GB/laureates/laureates-2004/maathai-lecture/* [Accessed on 20/9/2019].

situations where people not only suffer losses but also eliminate all chances of corruption by government officers who may be in the habit of illegally issuing clearances. The means of achieving some of these are well set out in the *National Spatial Plan 2015-2045*[122] whose specific objectives are:-To create a spatial planning context that enhances economic efficiency and strengthens Kenya's global competitiveness; To promote balanced regional development for national integration and cohesion; To optimize utilization of land and natural resources for sustainable development; To create livable and functional Human Settlements in both urban and rural areas; To secure the natural environment for high quality of life; and to establish an integrated national transportation network and infrastructure system. Full implementation of this Plan can go a long way in not only controlling pollution but also eliminating any factors that may lead to pollution in future.

**6.7 Role of Courts in Environmental Conservation**

The Constitution of Kenya places an obligation on national Courts and tribunals to protect and enforce environmental rights and especially the right to a clean and healthy environment.[123] The Court, especially the Environment and Land Court has made impressive efforts to discharge this duty. These efforts date to the pre-2010 Constitution era as evidenced by such cases as *Peter K. Waweru v Republic*,[124] where the Court stated that '…environmental crimes under the Water Act, Public Health Act and EMCA cover the entire range of liability including strict liability and absolute liability and ought to be severely punished because the challenge of the restoration of the environment has to be tackled from all sides and by every man and woman….' It went further to state, ―…In the name of environmental justice water was given to us by the Creator and in whatever form it should never ever be the privilege of a few – the same applies to the right to a clean environment.[125] The Court, while borrowing from such

[122] National Spatial Plan, 2015-2045 (Government Printer, Nairobi, 2015).
[123] Articles 21, 22, 42, 70, Constitution of Kenya.
[124] [2006] eKLR, Misc. Civ. Applic. No. 118 of 2004.
[125] p.14.

jurisdictions as India[126], also affirmed the broad scope of the right to a clean and healthy environment by stating, *inter alia*, that 'the right of life is not just a matter of keeping body and soul together because in this modern age that right could be threatened by many things, including the environment. The right to a clean environment is primary to all creatures including man; it is inherent from the act of creation, the recent restatement in the Statutes and the Constitutions of the world notwithstanding.'[127]

The recognition of the right to a clean and healthy environment as now guaranteed under Article 42 of the Constitution of Kenya has been reaffirmed by the Environment and Land Court in several more recent decisions[128].

[126] The Supreme Court of India held in *Subhash Kumar v. State of Bihar*, that the "right to life guaranteed by Art. 21 of the Constitution includes the right of enjoyment of pollution-free water and air for full enjoyment of life." Further, in the case of *Dr. Mohiuddin Farooque v. Bangladesh, represented by the Secretary, Ministry of Irrigation, Water Resources and Flood Control and Others,* the Supreme Court interpreted the right to life to include the protection and preservation of the environment and ecological balance free from pollution of air and water. In another Indian case of *K. Ramakrishnan and Others v State of Kerala and Others* (smoking case), the Court stated that "*The word 'life' in the Constitution has not been used in a limited manner. A wide meaning should be given to the expression 'life' to enable a man not only to sustain life but also to enjoy it in a full measure. The sweep of right to life conferred by Art. 21 of the Constitution is wide and far-reaching so as to bring within its scope the right to pollution free air and the "right to decent environment."*

[127] [2006] eKLR, Misc. Civ. Applic. No. 118 of 2004, p.8.

[128] Friends of Lake Turkana Trust v Attorney General & 2 others, [2014] eKLR, ELC Suit No. 825 of 2012; In The Matter of the National Land Commission [2015] eKLR; Joseph Leboo & 2 others v Director Kenya Forest Services & another [2013] eKLR, Environment and Land No. 273 of 2013; Joseph Letuya & 21 others v Attorney General & 5 others [2014] eKLR, ELC Civil Suit No. 821 of 2012 (OS); Joseph Owino Muchesia & another v Joseph Owino Muchesia & another [2014] eKLR; John Mining Temoi & Another v Governor Of County Of Bungoma & 17 Others [2014] EKLR; Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others [2017] eKLR; *Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR.*

It is a commendable step towards realising the right to a clean and healthy environment free from pollution for the courts to protect the rights of all especially those that seem to have been ignored in decision making processes during the setting up of industries that affect their environment adversely.

## 7. Conclusion

The 2030 SGDs acknowledge that social and economic development depends on the sustainable management of our planet's natural resources. The goal is therefore to conserve and sustainably use oceans and seas, freshwater resources, as well as forests, mountains and drylands and to protect biodiversity, ecosystems and wildlife. They also seek to ensure that countries promote sustainable tourism, tackle water scarcity and water pollution, to strengthen cooperation on desertification, dust storms, land degradation and drought and to promote resilience and disaster risk reduction.[129] Combating pollution in all its forms is thus critical if the sustainable development agenda is to be achieved. This calls for concerted efforts from all stakeholders including state organs, private sector and individuals. Kenya still has a lot to do in its fight against pollution and all its ills. If the Vision 2030, which seeks to ensure that Kenya achieves a newly industrialised state by 2030 through sustainable means of production and manufacturing is to be achieved, environmental pollution must receive more attention than it is receiving currently. So far the various phases of the Vision 2030 have not performed satisfactorily in curbing pollution. Pollution threatens national development as well as achievement of sustainable livelihoods for the Kenyan people.

Safeguarding the environment through effective pollution control in Kenya is essential. It is worth the effort for the sake of the current and future generations.

[129] Target 33.

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# Resolving Intergovernmental Disputes in Kenya through Alternative Dispute Resolution (ADR) mechanisms

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***Abstract***

*Devolution is one of the transformative changes introduced by the Constitution of Kenya (hereinafter referred to as "Constitution"). Unlike pre-2010 where power was centralised, authority and power have been decentralised through two levels of government: namely, national government and county government. The universal support for devolution was anchored in its promise of bringing services closer to the 'wananchi'. Under Articles 6 and 189 of the Constitution, the two levels of government are required to work together through consultation and co-operation in performing their functions. Cognizant of potential intergovernmental disputes, the Constitution directs that such disputes be resolved through Alternative Dispute Resolution (ADR) mechanisms. Following this constitutional directive, the Intergovernmental Relations Act 2012 (IGRA hereinafter) was enacted to provide for procedures in resolving intergovernmental disputes. Pursuant to the IGRA, the Intergovernmental Relations (ADR) Regulations 2021 were gazetted to provide a detailed framework. This paper analyses the nature and causes of intergovernmental disputes by highlighting examples witnessed in the last thirteen years of devolution. It observes that contrary to the constitutional directive that intergovernmental disputes should be resolved through ADR mechanisms, majority of the disputes have been resolved through litigation. This has not only worsened relations between and within the two levels of government, but has also delayed projects as well as wastage of resources though high litigation fees. Consequently, this has negatively affected the provision of services to the people. Further, the paper critically examines the strengths*

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*and gaps in the ADR Regulations. Lastly, the paper offers recommendations on better resolution of intergovernmental disputes through ADR.*

## 1.0 Introduction

On 27th August 2010, Kenyans promulgated a new Constitution which significantly transformed the system of governance in the country.[1] For a long time, political and economic power was centralised around 'an imperial' presidency causing many governance and economic problems such as bad governance, marginalisation, unequal distribution of power and resources.[2] The centralised system crippled democratic participation of the people and communities in their governance, development, and management of their own affairs.[3] In response to these problems, the people of Kenya overwhelmingly voted for devolution as a new system of governance. This was aimed at decentralising power, resources, and national prosperity from the centre to the people.[4] Under the devolved system of government, citizens participate in their governance by exercising their sovereignty either directly or indirectly through elected and appointed representatives.[5] Little wonder, the Constitution of Kenya Review Commission noted that there was no single person that opposed the principle of devolving and sharing power.[6]

Devolution is arguably the most transformative aspect of the Constitution as it promises a new Kenya.[7] It came with the hope that it would deliver massive

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[1] Mutakha Kangu, *Constitutional Law of Kenya on Devolution* (Strathmore University Press 2015)1.

[2] Council of Governors, *Annual Report*, 2014 /2015, vii.

[3] Kangu (n 1)2.

[4] Council of Governors, 3rd Annual Devolution Conference Report held at Meru National Polytechnic, Meru County from 19th to 23rd April 2016. Under Article 10 of the Constitution, sharing and devolution of power is one of the core principles in Article 10 of the Constitution.

[5] Ministry of Devolution and Planning, *Policy on Devolved System of Government*, 2016,2.

[6] Council of Governors, *Annual Report, 2014/2015*, 4.

[7] Patrick Onyango, *Devolution Made Simple: A Popular Version of County Governance System* (Friedrich-Ebert-Stiftung 2013) 4.

gains and improve the lives of people if implemented properly.[8] While the Constitution brought other major changes like the recognition of the supremacy of the Constitution, separation of powers, robust bill of rights, and independence of the judiciary, these were also present in the repealed constitution, at least in theory.[9] However, devolution did not exist and this major change has changed the purpose and structure of the state from centralisation of power to effective participation of people as well as service delivery.[10] This is evident from the objectives of devolution outlined in the Constitution.[11]

The Constitution creates two distinct and interdependent levels of government, namely the national and county governments.[12] At the national level, there exists three arms of government which are the Parliament, Executive, and Judiciary. Parliament is empowered to make, amend, and repeal laws.[13] It is bicameral in nature comprising the National Assembly and the Senate. [14] The executive is tasked with enforcing laws and

[8] Mutakha Kangu 'Kenya's Model of Devolution' in Intergovernmental Relations Technical Committee (IGRTC) (ed) *Deepening Devolution and Constitutionalism in Kenya: A Policy Dialogue,*2021)3.
[9] Ibid 40.
[10] Intergovernmental Relations Technical Committee, *Strategic Plan 2021/2015*,1.
[11] Constitution of Kenya, Article 174. The objectives are: a) To promote democratic and accountable exercise of power; b) To foster national unity by recognising diversity; c) 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; d) To recognise the right of communities to manage their own affairs and to further their development; e) To protect and promote interests and rights of minorities and marginalised communities; f) To promote social and economic development and the provision of proximate, easily accessible services throughout Kenya; g) To ensure equitable sharing of national and local resources throughout Kenya; h) To facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya; and, i) To enhance checks and balances and the separation of powers.
[12] See Article 1 of the Constitution which provides that the sovereign power of people is exercised at the national and county level.
[13] Constitution of Kenya, Article 94 (5).
[14] Ibid Article 93(1) and 93(2).

implementing policies while the judiciary interprets the law.[15] At the county level, county governments are divided into county assemblies and county executives.[16] Besides creating the two levels of government, the Constitution also creates geographic constituent units and fixes them in it.[17] For this reason, there are forty-seven counties entrenched and constitutionally protected under the Constitution. Their names can only be changed through a constitutional amendment.[18] Further, the Constitution stipulates that the relations among the two levels of government are distinct and interdependent. In addition, the two levels must conduct their mutual relations based on consultation and co-operation.[19] The co-operation envisaged by the Constitution is one which respects the functional and institutional integrity of each level of government.[20] To foster co-operation and consultation, the two levels of government may set up joint committees and authorities.[21]

The principle of cooperation and consultation stems from a phenomenon of intergovernmental dialogue where both levels of government share and exchange information with each other.[22] This is aimed at avoiding conflict of interests in performing their assigned duties which to some extent requires a compromise between them for the better good.[23] It discourages an adversarial approach to resolving disputes or conflicts between them and instead fosters a harmonious intergovernmental relationship.[24] The principle of consultation requires the making of conscious and deliberate efforts to

[15] Ibid Articles 129 and 159.
[16] Ibid 176.
[17] Ibid Article 6(1) and the First Schedule.
[18] Kangu (n 1)126.
[19] Constitution of Kenya, Article 6(2) and 189.
[20] Ibid Article 189(1).
[21] Ibid Article 189(2).
[22] Gabriel Gathumbi, 'Alternative Dispute Resolution Mechanisms as a tool for Dispute Settlement in the Devolved Governance System in Kenya' (Unpublished LLM Thesis, University of Nairobi 2018) 40.
[23] Report of the Intergovernmental Relations Workshop held at Royal Swiss Hotel Kisumu from 3rd to 5thDecember 2018,64. (Kisumu Workshop).
[24] Gathumbi (n 22).

seek out views of the other party and to consider them before arriving at a decision. This enhances the decision making of all the parties concerned.[25] Consultation requires that one level of government invites the other to present its views on the matter. The consulted government is then afforded an adequate opportunity and a reasonable opportunity to share its considered views.[26] Following this, the consulting government must consider the views of the consulted government in good faith before making a decision.[27] Notably, the other government should not be consulted as a mere formality, but with the commitment to consider the views shared where they add value to the decision being made.[28] Be that as it may, where the views are not accepted or considered, the consulting government should give reasons justifying non-acceptance.[29]

The principle of interdependence recognises that whereas the various levels of government are autonomous, they cannot operate in isolation.[30] Interdependence is necessary because both levels of government have a responsibility to serve the people of Kenya.[31] In addition, the national government is allocated certain functions by virtue of its role in national policy formulation and standard setting while the county government is assigned theimplementation of functions.[32] Therefore, interdependence demands that the two levels of government not only cooperate and consult

[25] *Commission for the Implementation of the Constitution* ***v*** *Attorney General and another* (2013) eKLR.
[26] Peter Wanyande & Gichira Kibara, 'Kenya's Devolution Journey: an Overview' in Intergovernmental Relations Technical Committee (IGRTC) (ed) *Deepening Devolution and Constitutionalism in Kenya: A Policy Dialogue* (IGRTC 2021) 68.
[27] Ibid
[28] Gathumbi (n 22) 41.
[29] Ibid.
[30] Faith Simiyu, 'Recasting Kenya's devolved Framework for Intergovernmental Relations: Lessons from South Africa' (2015) < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2692607> accessed on 15 February 2023 10.
[31] Kisumu Workshop (n 23)18.
[32] Gathumbi (n 22) 41.

each other but also share information and build capacity.[33] This is because the performance of any function cannot be complete if one level of government fails to do its part.[34] While referring to the relationship between the two levels of government, the Supreme Court of Kenya in *the Matter of the Interim Independent Election Commission* recognised that there is a close connectivity between the functioning of national and county governments*".*[35]

The principle of distinctiveness requires that each level of government be autonomous from the other.[36] As a result, the two levels of government created are equal and neither is subordinate to the other.[37] Autonomy encompasses certain distinct features such as political economy, functional economy, financial autonomy, and administrative autonomy.[38] In addition, the principle of distinctiveness connotes a measure of flexibility on each level of government to make their own decisions pursuant to their constitutionally defined roles.[39] *In the case of Institute of Social Accountability v National Assembly and Others,* the High Court noted that the principle of distinctness means that each level of government must be free from interference in the performance of its function.[40]

From the foregoing, the seamless interdependence of the two levels of government is dependent on intergovernmental relations.[41] This paper critically examines the alternative dispute resolution of intergovernmental disputes. The overall structure takes the form of six parts. Part One is this brief introduction that sets the context of the study. Part Two discusses

[33] Kisumu Workshop (n 23) 42.
[34] Ibid 63.
[35] (2011) eKLR
[36] Kisumu Workshop (n 23),42.
[37] Simiyu (n 30).
[38] Kangu, (n 8) 64.
[39] Simiyu (n 30)10.
[40] (2015) eKLR.
[41] Kisumu Workshop (n 23) 7.

the legal framework governing intergovernmental relations. In Part Three, the paper discusses the nature, parties, and causes of intergovernmental disputes. It analyses the rationale and benefits of using ADR mechanisms in resolving intergovernmental disputes. This is achieved by highlighting the challenges associated with using litigation to resolve intergovernmental disputes. Part Four critically analyses the Intergovernmental Relations (ADR) Regulations 2021 passed to provide a framework to guide the resolution of intergovernmental disputes. Part Five makes recommendations while Part Six concludes the paper.

**2.0 Legal Framework Governing Intergovernmental Relations in Kenya**

The concept of intergovernmental relations refers to the processes of interactions between different governments, and between organs of state from different governments in the course of the discharge of their functions.[42] Such relations facilitate the attainment of common goals through cooperation.[43] Intergovernmental relations and interactions occur through law making, policy alignment, fiscal grants and transfers, planning and budgeting. [44] Co-operation and co-ordination are the pillars of intergovernmental relations. This is because no single level of government can deliver its mandate and vision of a nation on its own.[45] In this section, the paper extensively explores the various laws establishing the intergovernmental relations. The primary law is the Constitution and the Intergovernmental Relations Act. Nonetheless, other legislations with provisions on intergovernmental relations are briefly highlighted.

[42] IGRTC, *Strategic Plan 2021 – 2025*, 2. See also South African Intergovernmental Relations Framework Act 2005 which defines intergovernmental relations as the relationship that arise between different governments or between organs of state from different governments in the conduct of their affairs.

[43] Karega Mutahi, 'Intergovernmental Relations' A presentation during the induction of Governors, 14th December 2017,2.

[44] Winnie Mitullah, 'Intergovernmental Relations Act 2012: Reflection and Proposals on Principles, Opportunities and Gaps' FES Kenya Occasional Paper, No. 6, 2012,1.

[45] Ibid 2.

## 2.1 The Constitution of Kenya

As stated in the previous section, the Constitution provides that governments at national and county levels are distinct and interdependent. They are obliged to conduct their mutual relations based on cooperation and consultation.[46] This may be achieved through forming joint committees and joint authorities for co-operation in the performance of functions.[47] In addition, the Constitution outlines the national values such as sharing and devolution of power, good governance, and sustainable development. These national values are binding on all persons and offices in interpreting the Constitution, interpreting the law, and implementing public policy decisions.[48] Further, the Constitution provides for the transfer of functions and powers between levels of government where; a) the functions would be more effectively performed by the receiving government, and b) the transfer of functions or powers is not prohibited by the legislation under which it is to be performed.[49] This is aimed at fostering service delivery.

In addition, the Constitution addresses the anticipated disputes between the two levels of government.[50] It stipulates that in any dispute between governments, the governments shall make every reasonable effort to settle the dispute, including by means of procedures provided under national legislation. Besides, it provides that in exercising judicial authority, the courts and tribunals shall be guided by the principle of promoting alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms provided they do not contravene the Bill of Rights.[51] Furthermore, the Constitution requires that the national legislation shall provide for procedures for settling intergovernmental disputes by alternative dispute resolution mechanisms,

[46] Constitution of Kenya, Article 6(2).
[47] Ibid Article 189(2).
[48] Ibid Article 10.
[49] Ibid Article 187(a)(b).
[50] Ibid Article 189(3).
[51] Ibid Article 159(2)(c).

including negotiation, mediation and arbitration.[52] Pursuant to the constitutional imperative, the Intergovernmental Relations Act was enacted in 2012. It is the main statute that extensively deals with intergovernmental relations.

### 2.2 Intergovernmental Relations Act (IGRA) Act Number 2 of 2012

The IGRA provides structures for interaction between the national and county governments and also among county governments.[53] It establishes three institutions to facilitate intergovernmental consultations; namely, the National and County Government Co-ordinating Summit (Summit), which is designated as the apex body for intergovernmental relations, the Intergovernmental Relations Technical Committee (IGRTC) responsible for coordinating the activities of the Summit, and the Council of Governors. These institutions are discussed in detail below.

#### 2.2.1 The Summit

The summit is the apex body of intergovernmental relations.[54] It comprises: the president or in the absence of the president, the deputy president, who shall be the Chairperson; and the governors of the forty-seven counties.[55] The chairperson of the Council of County Governors (CoG) is the Vice-Chairperson.[56] Given the composition of the summit, it facilitate vertical relations between national and county governments.[57] The Summit is empowered to evaluate the performance of both levels of government, coordinate and harmonise the development of national and county policies, facilitate and coordinate the transfer of functions, powers and competencies to either level of government, and to resolve disputes.[58]

[52] Ibid, Article 189(4).
[53] IGRTC, *Status of Sectoral and Intergovernmental Forums in Kenya*, 2018,2.
[54] IGRA, Section 7(1).
[55] IGRA, Section 7(2).
[56] IGRA, Section 7(3).
[57] IGRTC (n 53) 2.
[58] IGRA, Section 8 and 34.

### 2.2.2 The IGRTC

The IGRTC is the primary facilitator of intergovernmental relations.[59] It envisions harmonious and effective intergovernmental relations. IGRTC's mission is to support successful devolution through cooperative, consultative, and coordinated intergovernmental relations.[60] It comprises of a chairperson, a maximum of eight members competitively recruited, and the Principal Secretary of the State department responsible for devolution. The IGRTC is responsible for the day-to-day administration of the Summit and the Council of Governors.[61] This is through facilitating the activities and implementing the decisions of the summit and CoG.[62] As a result, the IGRTC serves as the secretariat between the summit and the CoG.[63] The Secretariat of the IGRTC is responsible for implementation and monitoring of the decisions of the Summit, CoG, and IGRTC.[64]

Second, the IGRTC is also responsible for the finalisation of the residual functions of the defunct Transition Authority (TA).[65] Prior to the formation of IGRTC, the TA was the institution mandated to oversee the functional changeover to the devolved governance system from the previous centralized authority.[66] Upon expiry of the TA's term on March 4, 2016, there were still a number of issues that had not been concluded.[67] Therefore, those residual functions are undertaken by the IGRTC.[68]

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[59] IGRTC (n 53)2.
[60]IGRTC, *Strategic Plan 2021-2025*,28.
[61] IGRA, Section 12(a).
[62] Ibid.
[63] Ibid Section 15 which establishes the Intergovernmental Relations Secretariat headed by the Secretariat of the IGRTC and consists of a secretary appointed by the IGRTC. The secretary is mainly responsible for the implementation of the decisions of the Summit, the Council and IGRTC and any other duties assigned by the said structures.
[64] Ibid.
[65] Ibid Section12(b).
[66] Transition to Devolved Government Act 2012, Section 4.
[67] Kisumu Workshop (n 23) 81.
[68] IGRA, Section 12(b).

Third, the IGRTC is mandated to convene a meeting of the forty-seven County Secretaries within thirty days preceding every Summit meeting.[69] In addition, the IGRTC can perform any other function conferred on it by the Summit, CoG, or any other legislation.[70] The IGRA empowers the IGRTC to establish sectorial working groups or committees for better execution of its functions.[71] Further, the IGRTC handles intergovernmental disputes reported to it by any of the parties through ADR mechanisms.[72] Furthermore, the IGRTC handles emerging issues on intergovernmental relations that are referred to it by the Summit and the CoG.[73] The IGRTC may establish sectoral working groups for the better carrying out of its functions.[74] However, the Cabinet Secretary is not precluded from convening a consultative for on sectoral issues of common interest to the national and county government.[75] Lastly, the IGTRC is accountable to and must submit quarterly reports to the Summit and CoG.[76]

### 2.2.3 The CoG

The CoG exists as the main avenue through which consultation and cooperation can be pursued among the forty-seven County Governments.[77] It provides a forum for consultation with the national government and other institutions that interact with the county governments.[78] The IGRA requires the governors to elect their own chairperson and vice-chairperson for a term of one year which may be renewed for another year.[79] The CoG facilitates

[69] Ibid Section 12(c).
[70] Ibid Section12(d).
[71] Ibid Section 13(1).
[72] Ibid Section 33(2).
[73]IGRTC, *Strategic Plan 2021-2025*,2.
[74] IGRA Section 13(1).
[75] Ibid Section 13(2).
[76] Ibid Section 14.
[77] Council of Governors, *Annual Report 2014/2015*,1.
[78] IGRA, Section 20(1).
[79] IGRA, Section 19(1) and 19(2).

horizontal relations by bringing together all county governors for consultations among county governments.[80]

The CoG is vested with the following responsibilities: sharing information on the performance of the counties in the execution of their functions with the objective of learning and promotion of best practice and where necessary, initiating preventive action; considering matters of common interest to County Governments; dispute resolution between counties within the framework provided under the IGRA; facilitating capacity building for Governors; receiving reports and monitoring implementation of inter-county agreements on inter-county projects; consideration of matters referred to the council by a member of the public; consideration of reports from other intergovernmental forums on matters affecting national and County interests or relating to the performance of counties; and performing any other function as may be conferred on it by the IGRA or any other legislation or that it may consider necessary or appropriate.[81]

In fulfilling its responsibilities, the CoG has powers to establish other intergovernmental forums, sectoral working groups, and committees including inter-city and municipality forums.[82] To this end, the CoG has established about 18 committees that focus on several issues and sectors.[83]

[80]IGRTC, Status of Sectoral and Intergovernmental Forums in Kenya, 2018,2.
[81] IGRA, Section 20(1).
[82] IGRA, Section 20(2) and 20(3).
[83] The Council of Governors Statutory, *Annual Report, 2015 – 2016*, page 17. The committees are: Health Committee; Agriculture Committee; Infrastructure and Energy Committee; Urban Development, Planning and Lands Committee; Tourism and Wildlife Committee ; Water, Forestry and Mining Committee ;Cooperatives and Enterprise Development Committee; Trade, Industry and Investment Committee; Education, Youth, Sports, Culture and Social Services Committee; Finance, Planning and Economic Affairs Committee; Human Resources, Labour and Social Welfare Committee; Legal and Human Rights Committee; Intergovernmental Relations Committee (which resolves disputes between counties); Security and Foreign Affairs Committee; Resource Mobilization Committee; Information, Technology and Communications (ICT) Committee; Rules and Business Committee

The CoG is the highest decision-making organ and provides overall direction, leadership, and guidance to the committees.[84] In addition, it established a secretariat to implement and coordinate its activities. The secretariat is responsible for administrative and technical support to the activities of the CoG.[85] It also implements secretariat activities under the guidance and direction of the CoG and the respective committees. The Secretariat staff is composed of the Chief Executive Officer who reports to the CoG, and directorates as well as departments in charge of programmes, administration and finance, corporate communications, sectoral issues, resource mobilisation, and legal affairs.[86]

### 2.2.4 Dispute Resolution Provisions Under the IGRA

Besides establishing intergovernmental institutions, the IGRA makes provision for dispute resolution. It provides that parties shall take all reasonable measures to resolve disputes amicably and apply and exhaust ADR mechanisms provided thereunder or other legislation before resorting to judicial proceedings under Article 189(3) and (4) of the Constitution.[87] It provides for the transfer and delegation of powers, functions, and competencies from either level of government to the other by agreement as provided by Article 186 and 187 of the Constitution.[88] The IGRA also provides that all agreements between the national and county governments and among county government shall have a dispute resolution mechanism, appropriate for the nature of the agreement, for disputes that may arise in implementation.[89]

(oversees the operations of the Secretariat), and Arid and Semi-Arid Land (ASAL) Committee.

[84] The Council of Governors, *Annual Report 2015/2016*,17.

[85] Ibid.

[86] Ibid.

[87] IGRA, Section 31.

[88] Ibid Section 24-28.

[89] Ibid Section 32.

Dispute resolution mechanisms are provided in Sections 30-36 of the IGRA. These provisions apply to disputes between the national and county governments and disputes among county governments.[90] Disputes should as far as possible be resolved through ADR.[91] After efforts to negotiate either directly or through an intermediary have failed, then a party may declare a dispute by referring the matter to the Summit, Council of Governor (CoG) or any other intergovernmental structure established under the IGRA.[92] Once the dispute is declared, the organ responsible is required to convene a meeting of the parties or their representatives within 21 days.[93] The aim of the meeting is to determine the nature of the dispute and the material issues which are not in dispute and identify the mechanisms and procedures for settling the dispute.[94] Such a mechanism may be provided in the IGRA, another legislation or an agreement.[95] Where efforts to resolve the disputes under the Act fail the matter may be taken to court.[96] The minister of devolution and planning is empowered to make regulations to provide a framework for dispute resolution under the IGRA.[97] Pursuant to this authority, the Intergovernmental Relations (ADR) Regulations were gazetted in 2021. These regulations are analysed in part three of this paper.

**2.3 National Government and Co-ordination Act, Act No. 1 of 2013**

This Act seeks establish an administrative and institutional framework for co-ordination of national government functions at the national and county levels of governance.[98] It also provides for an extensive mediation procedure of resolving disputes that arise between powers of officers of the county government and the national government.[99] The mediation team shall

[90] Ibid Section 30.
[91] Ibid Section 31.
[92] Ibid Section 33(1)
[93] Ibid Section 34(1).
[94] Ibid Section 34(1)(a).
[95] Ibid Section 34(2).
[96] Ibid Section 35.
[97] Ibid Section 38(2)(c).
[98] *National Government and Co-ordination Act*, Preamble.
[99] Ibid Section 19.

consist of two eminent persons appointed by the governor and two eminent persons appointed by the Cabinet Secretary for the time being responsible for national government co-ordination.[100] In addition, the mediation team shall be guided by the constitutional principles and the respective constitutional mandates of each respective government.[101] The mediation must be finalized within a period of fourteen days.[102] Where the mediation team fails to resolve the dispute within the stipulated time, the matter may be referred to the Summit under the IGRA for resolution.[103]

### 2.4 County Governments Act, Act No. 17 of 2012

The County Government Act creates citizen forums to facilitate citizen participation in their governance at the county level.[104] The avenues for the participation of people's representatives including but not limited to members of the National Assembly and Senate.[105] In addition, the County Government Act establishes a county intergovernmental forum in each county. It is chaired by the governor or in his absence, the deputy governor, or county executive committee (where both the governor and deputy governor are absent).[106] The forum comprises: the heads of all departments of the national government rendering services in the county; and county executive committee members.[107] The intergovernmental forum is responsible for among other things coordination of intergovernmental functions and harmonisation of services rendered in the county.[108]

### 2.5 Public Finance Management Act, Act Number 18 of 2012

The Public Finance Management Act creates the Intergovernmental Budget and Economic Council (IBEC) which brings together the national and county

[100] Ibid 19(2).
[101] Ibid 19(3).
[102] Ibid 19(4).
[103] Ibid 19(5).
[104] *County Governments Act*, Section 91.
[105] Ibid Section 91(f).
[106] Ibid Section 54(2).
[107] Ibid Section 54(3).
[108] Ibid Section 54(4).

government leaders to discuss matters of budgeting, borrowing, disbursements from consolidated fund and equitable distribution of revenue between the two levels of government.[109] The IBEC is composed of the deputy president, cabinet secretary in charge of intergovernmental relations, every county executive committee member of finance, chairperson of the CoG, a representative of the Public Service Commission, a representative of the Judicial Service Commission, and the Cabinet Secretary in charge of finance.[110] The National Treasury provides secretariat services to the IBEC. The IBEC meets at least twice a year, and the agenda as well as time are set by the deputy president in consultation with other council members.[111] In addition, the National Treasury is obligated to enter into an agreement with the respective county government for the transfer of the respective conditional allocations made to the county government.[112] The agreement sets out the conditions that may attached to conditional allocation.[113]

### 2.6 Urban Areas and Cities, Act Number 13 of 2011

Under the Urban Areas and Cities Act, the two levels of government are required to enter into an agreement regarding the performance of functions and delivery of services by Nairobi, the capital city.[114] The agreement may provide for administrative structure of the capital city, funding operations, and activities, joint projects to be undertaken by both governments in the capital city, and dispute resolution mechanisms.[115]

### 2.7 Health Act, Act Number 21 of 2017

Under the Health Act, both levels of government are obligated to cooperate to ensure the provision of free and compulsory vaccination of children under

[109] *Public Finance Management Act*, Section 187
[110] Ibid.
[111] Ibid Section 187(3) and (5).
[112] Ibid Section 191.
[113] Ibid.
[114] Section 6(5).
[115] *Urban Areas and Cities Act*, Section 6(6).

5 years and maternity care.[116] To actualise this, the national government is required to consult with respective county governments and provide funds.[117]

**2.8 Agriculture, Fisheries, and Food Authority Act Number 13 of 2013**

Under the Agriculture and Food Authority Act, the national government is responsible for agricultural matters. On the other hand, county governments are responsible for agricultural matters.[118] These matters are outlined in Part 2 of the Fourth Schedule of the Constitution.[119]

**2.9 National Cohesion and Integration Act, Act Number 12 of 2008**

This statue establishes the National Cohesion and Integration Commission which is tasked among other functions to promote arbitration, conciliation, and mediation to secure and enhance racial harmony and peace.[120]

**2.10 National Police Service Act (NPSA), Act Number 11A of 2021**

The NPSA establishes the County Policing Authority in each county. It comprises the governor (the chairperson), county representatives appointed by the Inspector General, two elected members nominated by the County Assembly, the chairperson of the County Security Committee, and at least six members appointed by the governors.[121] The County Policing Authority provides a platform through which the public participates on all aspects to do with county policy and the National Police Service at the county level.[122]

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[116] *Health Act,* Section 5(4).
[117] Ibid.
[118] *Agriculture and Food Authority Act*, Section 29(2).
[119] Crop and animal husbandry, livestock sale yards, county abattoirs, plant and animal disease control, and fisheries.
[120] *National Cohesion and Integration Act*, Sections 15 and 25.
[121] *National Police Service Act*, Section 41. These people may come from the business sector, religious organisations, youth, community-based organisations, and persons with special needs.
[122] Ibid Section 41(9)(g).

## 3.0 Intergovernmental Disputes and ADR mechanisms

### 3.1 Definition and Parties to Intergovernmental disputes

Conflicts arise when people pursue irreconcilable goals and end up compromising or opposing the interests of another.[123] Disputes are a product of unresolved conflicts, they arise when conflicts are not adequately managed.[124] The conduct of mutual relations between the two levels of government has been characterised by recurrent conflicts which often escalate into disputes.[125] For a dispute to qualify as an intergovernmental dispute under the IGRA, it must meet the certain criteria. First, the dispute must involve a specific disagreement concerning a matter of fact, law, or denial of another.[126] Second, it must be of a legal nature which means that the dispute is capable of being the subject of judicial proceedings.[127] Third and most importantly, the dispute must be an intergovernmental one.[128] This essentially means that such a dispute must involve various organs of state and arises from the exercise of powers of function assigned by the Constitution, a statute or an agreement or instrument entered into pursuant to the Constitution or a statute.[129] The inclusion of an agreement implies that even a commercial agreement between the national and county government qualifies as an intergovernmental dispute.[130] Therefore, intergovernmental disputes are not limited to the exercise of powers of the two governments as

[123] Kariuki Muigua, 'Dealing with Conflicts in Project Management' [2018] *Alternative Dispute Resolution*,4.
[124] Kariuki Muigua, Accessing Justice through ADR (Glenwood Publishers Limited, Nairobi 2022) 76.
[125] Kibaya Imaana Laibuta, 'Facilitation of a Consultative Forum on the Development of the Proposed Intergovernmental Dispute Resolution Mechanisms' available at < https://ciarbkenya.org/wp-content/uploads/2021/03/the-place-of-adr-in-intergovernmental-disputes.pdf> 3 accessed on 25 February 2023.
[126] *County Government of Nyeri v Cabinet Secretary, Ministry of Education Science & Technology & another (2014) eKLR, para 10.*
[127] Ibid.
[128] Ibid.
[129] Ibid. See Section 32 of the IGRA.
[130] Ibid,

specified in the Constitution.[131] Fourth, the dispute may not be subject to any of the previously enumerated exceptions.[132] In *Kenya Ports Authority v William Odhiambo Ramogi & Others*, the COA considered that the test of determining the matter as an intergovernmental dispute was simply not to look at the parties to the dispute but the nature of the claim in question.[133]

In view of the above, intergovernmental disputes can only arise between the national government and a county government, or amongst county governments.[134] Therefore, a dispute between a person or state officer in his individual capacity seeking to achieve his own interest or rights would not equate an intergovernmental dispute.[135] However, where a state officer seeks through any means to advance the interest of a government, whether county or national, against another government whether county or national.[136] Then such a dispute would rank as an intergovernmental dispute.[137] Interestingly, in another court decision, the Environment and Land Court held that there can be no intergovernmental dispute between an individual and the county government or vice versa.[138] Intergovernmental disputes can also arise

[131] *Isiolo County Assembly Service Board & another vs Principal Secretary (Devolution) Ministry of Devolution and Planning & another (2016) eKLR.*
[132] *County Government of Nyeri v Cabinet Secretary, Ministry of Education Science & Technology & another* (2014) eKLR, *para 10.*
[133] [2019] eKLR.
[134] Section 30(2)(b) of the IGRA.
[135] *Isiolo County Assembly Service Board & another vs Principal Secretary (Devolution) Ministry of Devolution and Planning & another (2016) eKLR.*
[136] Ibid.
[137] Ibid.
[138] *Okoiti v Parliament of Kenya & 2 Others; County Government of Taita Taveta & 3 Others* (Interested Parties) (Petition 33 of 2021)[2022] KEELC 33 (KLR)(23 March 2022)(Ruling). In this case, the petitioner and 178 other residents petitioned Parliament to set up an independent commission to resolve the boundary dispute between the counties of Taita Taveta and Kwale and between the counties of Taita-Taveta and Makeuni to survey and erect beacons to clearly demarcate the boundaries. See also *Daniel Muthama v Ministry of Health: Shenzhen Mindray Bio-Medical Electronics Co. Ltd* [2015] eKLR.

between county governments and state agencies established by the national government, and between state agencies.[139]

### 3.2. Nature and Examples of Intergovernmental Disputes

According to the IGTRC, intergovernmental disputes can be categorised as administrative, financial, functional, legislative, and jurisdictional relations.[140] The administrative category relates to intergovernmental relations.[141] Financial is concerned with intergovernmental fiscal relations and fiscal resource allocation.[142] Functional relates to the encroachment by the national government and state agencies on the functions of county governments, joint undertakings between the national and county governments, and intergovernmental service delivery in the contest of shared functions.[143] The implementation of the devolved governance system commenced in March 2013. Since then, disputes have emerged between the two levels of government and various organs of state which threaten the implementation of the devolved governance system if not checked and addressed.[144] There are many areas and issues around which tensions between the two levels of government and between county governments are likely to arise. Tensions are also likely to arise within institutions and structures of the same level of government. While most of these conflicts are likely to revolve around functional areas, others are of a purely political or ideological nature. It must also be noted that some disputes may have their origins in history and therefore not necessarily caused by the adoption of a devolved system of governance. Some of these conflicts that have their origins in history may have been exacerbated by the adoption of devolution.[145] Below are some of the intergovernmental disputes witnessed in the last ten years of devolution.

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[139] IGRTC, Cost of Litigation in Inter/Intragovernmental Litigation in Kenya, May 2017, 47.
[140] Ibid 12.
[141] Ibid.
[142] Ibid.
[143] Laibuta (n 125) 3.
[144] Gathumbi (n 22) 47.
[145] Kisumu Workshop (n 23).

**a) Supremacy wars between the Senate and National Assembly**

Prior to the establishment of a devolved governance system, Kenya had a unicameral Parliament. However, the Constitution provides for a bicameral Parliament comprising two Houses, the Senate, and National Assembly.[146] The two Houses have had bitter disagreements which at times spill over in the public arena. This has played out in conflicts arising in the operations of the two Houses of Parliament. Soon after the establishment of the two Houses, supremacy battles emerged as to which of the Houses was superior to the other. The Constitution of Kenya is silent on this matter.[147] The most contentious one arose on the exclusion of the Senate in the consideration of the Division of Revenue Bill deemed to be affecting the county governments.[148] The Senate objected to the exclusion by way of preference to the Supreme Court seeking for an Advisory Opinion on the matter. In its Advisory, the Supreme Court held that the consideration of Bills to be passed was not a unilateral exercise exclusive to either of the two Houses; rather, the Speaker of both houses had to engage and consult.[149] The Supreme Court observed that the two Houses had an obligation to work together in the spirit of consultation and cooperation in the discharge of their constitutional mandate. [150]The Court further observed that this was a case where the two Speakers of the Senate and National Assembly had an obligation, in case of disagreement between themselves to engage the ADR mechanism of mediation.[151]

[146] Constitution of Kenya, Article 93(1).
[147] Oseko Louis, Denzel Obure and Kihiko Rosemary Wambui, 'Intergovernmental Dispute Resolution: Analysing the Application and Future of ADR' [2021] *Journal of Conflict Management and Sustainable Development*,148.
[148] *In the Matter of the Speaker of the Senate & Another v Attorney General & 4 Others* (2013) eKLR.
[149] Ibid para 197.
[150] Ibid para 125.
[151] Ibid, Para 143. See Also the Court of Appeal decision in *Speaker of the National Assembly & another v Senate & 12 others* (Civil Appeal E084 of 2021) [2021] KECA 282 (KLR) (19 November 2021) (Judgment**)** and Council *of Governors & 4 Others v Attorney General & 3 Others* (2020) eKLR.

A similar dispute on the division of revenue arose in the financial year 2019/2020. The Commissioner on Revenue Allocation (CRA) had recommended the equitable shareable revenue for the counties for KES. 335.7 billion.[152] However, the Cabinet Secretary in charge of National Treasury on his part published the Budgetary Policy Statement in which he set the equitable sharing revenue for counties at KES. 310 billion.[153] The statement was tabled in the National Assembly. The CoG rejected the proposal and urged the two houses to go with the CRA's recommendation.[154] The senate fully agreed with the CoG's position, but the National Assembly and Treasury disagreed.[155] There were failed negotiation attempts prompting a request to the Supreme Court to render an advisory opinion on the matter.[156]

**b) Disputes over Allocation of Resources**

Despite their effort to live within the letter and spirit of the Constitution, the two levels of government have not always agreed with each other. There have been disputes caused by perceived or real interference in the county government mandates by the national government including competition for power, resources and relevance. The issues have involved a number of devolved functions such as health, agriculture, roads, water, gaming, gambling and betting, among others. National government is accused of holding the bigger portion of resources allocated to these functions thus going against the principle of resources follow functions.[157] There have been disputes conflicts as to the erroneous allocation of funds. In *Council of Governors v Attorney General & 4 Others*, the High Court declared , inter alia, that the National government cannot allocate itself funds for and

[152] *Council of Governors & 47 Others v Attorney General & 3 Others* (interested parties); *Katiba Institute & 2 Others* (2020) eKLR.
[153] Ibid.
[154] Ibid.
[155] Ibid.
[156] Ibid.
[157] IGRTC, *Strategic Plan 2021 – 2025*,10.

undertake devolved functions without first executing inter-government agreements as required under Article 187 of the Constitution.[158]

**c) Disputes Resulting from Transfer of Functions and powers**

The Constitution recognizes that the functions and powers assigned to the national and county governments fall into the two categories of exclusive and concurrent functions and powers.[159] It, however, creates a lot of uncertainty since it does not specify which of the assigned functions and powers are exclusive and which are concurrent.[160] This results into duplication of efforts, roles and expenditure by the levels of government; wasteful use of financial resources as both levels of government may invest money in the same activity.[161] In view of the uncertainties, disputes have arisen as to which level of government is responsible for what task. For instance**,** the dispute between the county government and national government over sugar milling and privatisation of South Nyanza Sugar Company.[162] The contention was that sugar milling was a devolved function, therefore, the national government could not privatise sugar milling as it was not within its powers.[163] In response, the national government maintained that sugar milling companies were public investments thus were to be dealt with by the national government.[164]

Another source of contention is that many functions that belong to county governments have been retained by the national government through state

[158] (2020) eKLR. The national government had been allocated KES. 4121 billion for maternity health care, KES. 45 billion for leasing medical equipment, and KES 4.5 billion for level 5 hospitals in the Division of Revenue Act 2016. Yet, the above are devolved functions.
[159] *Constitution of Kenya,* Article 186(2).
[160] Kisumu Workshop (n 23) 42.
[161] Ibid.
[162] *County Government of Migori & 4 Others v Privatisation Commission of Kenya* (2017) eKLR.
[163] Ibid.
[164] Ibid.

corporations.[165] An example is in the agricultural sector where the national government retains the functions on the basis that it oversees international trade.[166] Therefore, since most of the agricultural products are intended for export, such matters are within hence within its mandate. This position has resulted from the failure to delineate the roles and boundaries by the national government in respect to the international trade function.[167] Furthermore, the Supreme Court has held that a county government cannot levy a charge for a road service that is vested in the National Government.[168]

In the health sector, disputes have also arisen because of the failure by the national government to consult the county governments. In *International Legal Consultancy Group & another v Ministry of Health & 9 others*, the national government leased modern medical equipment and instructed county governments to accept them and install them in hospitals managed by county governments.[169] This agitated the county governments because the health function has been devolved to county governments and therefore the national government did not have jurisdiction over the function and consequently could lease the medical equipment for counties. Although counties eventually accepted the equipment, tensions remain over the procurement.[170] The CoG has formally raised concerns on the use of the

[165] *Council of County Governors v Attorney General & 4 Others* (2015) eKLR and *Council of Governors v Attorney General & 12 Others* (2018) eKLR. Some of these parastatals include Kenya Leather Development Council, Directorate of Fisheries, Nyayo Tea Zones Development Authority, Agricultural Finance, National Irrigation Board, National Cereals and Produce Board, Kenya Dairy Board, and Agricultural Development Corporation.
[166] Part One, Fourth Schedule to the Constitution.
[167] Page 92. See *Lake Naivasha Grower Group & another v County Government of Nakuru* (2019) eKLR where the high court held that the county government cannot levy, import, and export tax on horticultural products as the said mandate is a preserve of the national government.
[168] *Base Titanium Limited v County Government of Mombasa & another* (Petition 22 of 2018) [2021] KESC 33 (KLR) (16 July 2021) (Judgment).
[169] (2016) eKLR.
[170] Wanyande and Kibara (n 26) 11.

newly introduced e-procurement system.[171] The system has not only made the procurement system overly bureaucratic but has also excluded sections of the society that are unable to access Internet services.[172] Counties in regions with low Internet activity have also been affected, as they are unable to access the system to enable the respective Counties to carry out procurement processes.[173]

**d) Disputes between County Assemblies and Controller of Budget**

These disputes stem from the delayed release of the Exchequer to the counties and conflicts over revenue sharing.[174] For example, in the financial year 2019/2020, there was disagreement on the division of revenue where the counties had stuck with the estimates by the Commission on Revenue Allocation of KES. 335 billion, as opposed to KES. 314 billion allocated by the National Assembly. The stalemate grounded service delivery in some counties thus affecting service delivery to the public.[175] In another dispute, the Controller of Budget set mandatory ceilings for financial allocations to County Assemblies forcing the latter to object through a petition before the High Court.[176] Apart from County Assemblies, the CoG has raised concerns on the manner the lack of consultation and involvement by the National Treasury in the negotiation and management of loans and donor grants for functions that belong to Counties.[177] This is also coupled with the perennial delay of disbursements of the equitable share to County Governments.[178] Recently, the Controller of Budget declined to grant KES. 3.2 billion sought by counties. The counties had sought KES. 187 billion but the office

[171] Ibid.
[172] Ibid.
[173] The Council of Governors, *Annual Report 2014 /2015*, 22.
[174] IGRTC, *Strategic Plan 2021 – 2025*, 11.
[175] Ibid.
[176] *Speaker, Nakuru County Assembly & 46 others v Commission on Revenue Allocation & 3 others* [2015] eKLR. Article 216(2), Constitution of Kenya.
[177] The Council of Governors, *Annual Report, 2014 /2015*, 22.
[178] Ibid.

approved KES.179.5 billion.[179] In justifying its declination, the Controller of Budget stated that the counties had breached fiscal laws including imprudent use of funds and exceeding the threshold of administrative costs.[180] Narok had the largest sum of declined approvals. The rest of the counties included Kiisi County, Nakuru County, and Nairobi County.[181]

**e) Disputes between County Assemblies and Governors**

Tensions were also bound to arise between the county-level institutions, namely the governors and the county assembly. This, however, does not appear to have been contemplated by the framers of the Constitution as it was thought that threats to county governments would emerge from the national government.[182] These conflicts undermined the functioning of the county governments and therefore the smooth and effective implementation of the Constitution.[183]Some of these as was the case of Makueni County threaten the viability of these counties and therefore service delivery.[184]

The last thirteen years of the devolved system of government have seen some of the governors impeached.[185] For example, the governors of Embu, Kericho, Nairobi, Kirinyaga, Makueni, Murang‟a, and most recently Meru were affected.[186] In the case of Makueni County, the conflict was so serious that a Commission, in accordance with the constitution, was set up to advice the president on whether or not the county government should be

[179] Serfine Achieng, 'Controller of Budget Declines Kshs. 3.2 billion sought by counties' Citizen digital on 21 February 2023 < *https://www.citizen.digital/news/controller-of-budget-declines-ksh32-billion-sought-by-counties-n314847*> accessed on 25 February 2023.
[180] Ibid.
[181] Ibid.
[182] IGRTC, *Strategic Plan 2021 – 2025*,10,
[183] Wanyande and Gichira Kibara (n 26)11.
[184] Kisumu Workshop (n 23) 66. The tensions between former Makueni Governor Kivutha Kibwana and the MCAs,
[185] *Martin Nyaga Wambora and County Government of Embu v The Speaker of the County Assembly ofEmbu and 4 Others* (2015) eKLR.
[186] Paul Chepkwony-Kericho County, Ferdinard Waititu – Kiambu County,

dissolved.[187] The commission led by Honourable Mohamed Nyaoga recommended for the resolution of the county government.[188] Notably, all the impeachment proceedings were thrown out by the Senate except: Nairobi City County, Mike Sonko; Kiambu County, Ferdinard Waitutu; Wajir County, Mohamed Abdi Mohamoud; and the one concerning the Embu County Governor, Martin Nyaga Wambora, which the Senate confirmed.[189] However, the High Court overturned the impeachment of Martin Wambora by the Senate and reinstated the Governor who went ahead to complete his five-year term in August 2017. He was re-elected Governor of Embu in the general elections held on 8th August 2017.[190] In 2022, the Supreme Court confirmed the impeachment of Mike Sonko by the Nairobi County Assembly on grounds of gross violation of the Constitution, abuse of office, violation of national laws, and a lack of mental capacity to run the county government. The Supreme Court found that the impeachment had been properly conducted in accordance with the Constitution.[191]

**f) Disputes between Governors and Senators over accountability of public funds**

The tension in this regard has been over whether the Senate has authority to summon governors to appear before a Senate committee. On 8 Febuary 2014, the Senate Committee on County Public Accounts and Investment summoned 15 county governors to appear before it and answer questions on county finance management. Several governors appeared save for four,

[187] Francis Gachuri, 'Commission Report shows Makueni County headed for dissolution' published on 3 September 2015, Citizenship http://www.citizen.digital/news/commision-report-shows-makueni-county-headed-for-a-dissolution-99778 accessed on 5 January 2023.
[188] Ibid.
[189] Governor Martin Nyaga Wambora was impeached by the County Assembly of Embu and confirmed by the Senate. The impeachment was reversed by the Court after a successful appeal. See *Martin Nyaga Wambora and County Government of Embu v The Speaker of the County Assembly ofEmbu and 4 Others, Petition No. 7 and 8 of 2014 (consolidated*) (2015) eKLR.
[190] Ibid.
[191] *Sonko v Clerk, County Assembly of Nairobi City & 11 others* (Petition 11 (E008) of 2022) [2022] KESC 26 (KLR) (15 July 2022) (Judgment).

namely, Bomet, Kiambu, Kisumu, and Murang'a even after they were personally summoned. In protest, the four governors filed a petition in the High Court challenging the summons. The governors took the position that it is the county assemblies that can oversight the county executive. In addition, they asserted that being subjected to oversight by the amounts to double oversight.[192] They were unsuccessful at the High Court as it found that that the Senate were within their constitutional mandate. Their appeal at the Court of Appeal was unsuccessful for lack of merit prompting a further appeal to the Supreme Court.[193] In affirming the decisions of the High Court and Court of Appeal, the Supreme Court held that without the powers to summon governors, the Senate would not be able to exercise oversight over the national revenue allocated to counties.[194] As a result, the Senate was within its constitutional mandate of ensuring that county governments operated at optimal and within accountability standards.[195]

**h) Boundary Disputes**

The introduction of a devolved system of government in Kenya's political arena has brought to the fore simmering boundary disputes. The affected counties have disagreed over the location of boundaries, and this has sparked conflicts. Some of the counties with boundary disputes are Nandi and Kisumu, Meru and Isiolo, Makueni and Taita Taveta, Baringo and Turkana. To illustrate, in *County Government of Tana River v County Government of Kitui & 2 others*, the High Court was faced with a boundary dispute between Tana River County and Kitui County over Kalalani and Ddiddale areas. In dismissing the petition, the court found that the dispute was an intergovernmental dispute and referred the parties to the ADR frameworks under the IGRA.[196] Second, there have been boundary disputes between the counties of Taita Taveta and Kwale and between the counties of Taita-Taveta

[192] IGRTC, *Strategic Plan 2021 – 2025*, 15.
[193] *International Legal Consultancy Group v Senate & another* (2014) eKLR
[194] *Senate v Council of Governors & 6 Others* [2022] KESC 57(KLR), para 64.
[195] Ibid. See also Constitution, Articles 96,110, and 112.
[196] *County Government of Tana River v County Government of Kitui* (2022) eKLR.

and Makeuni over Mackinnon town and Mtito Andei town.[197] The Environment and Land Court directed the National Land Commission to investigate the historical boundaries and the county boundary dispute involving the three counties, and prepare a detailed report with practical recommendations on the appropriate redress to resolve the county boundary dispute.[198] There have also been boundary disputes between Meru and Isiolo , Nairobi city and Machakos, Kisumu and Vihiga, and Kisii and Nyamira counties.[199] Closely related to boundary disputes, intergovernmental disputes are also likely to arise from natural resource management. Such disputes concern the access and use of natural resources such as pasture, agriculture, forests, sharing agreements with national government, and cattle rustling.[200]

### 3.3 Impact of Litigation on Intergovernmental relations

During the first ten years of devolution, intergovernmental disputes have been largely resolved through litigation in courts.[201] A 2017 study by the IGRTC found that the litigation was mainly between national government and county government, among county governments, county governments and state agencies, county organ and another organ within the same county, National Assembly and Senate, and between state agencies.[202] The disputes were mainly resulting from the interpretation and implementation of powers transferred and implementation of functions as provided in the Fourth Schedule to the Constitution; transfer of functions and policies, impeachments, county boundaries, and employment relations.[203]

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[197] *Okoiti v Parliament of Kenya & 2 Others; County Government of Taita Taveta & 3 Others* (Interested Parties) (Petition 33 of 2021) [2022] KEELC 33 (KLR) (23 March 2022) (Ruling).
[198] Ibid, para 102.
[199] Senate standing committee on Justice, Legal Affairs, Human Affairs, and Human Rights, *Report on the County Boundaries Bill* (Senate No 11 of 2021).
[200] Kisumu Workshop (n 23)66.
[201] Ibid 10.
[202] IGRTC, *Cost of Litigation in Inter/Intragovernmental Litigation in Kenya*, May 2017, 47.
[203] IGRTC Members, *End Term Report 2015* – 2020, 111.

The study further revealed that the recurrent inter- and intra-governmental disputes being filed in courts for judicial resolution had had a great impact on the budgetary allocation, in terms of legal fees, to both levels of government. Furthermore, the study found out that the costs of litigation were high and a major constraint to development particularly in the county governments. These costs included both direct financial expenditure and opportunity costs due to delayed, frustrated or abandoned projects as a result of court cases.[204] Consequently, this has a negative impact on the resources allocated for development and service delivery.[205] Moreover, it was found that the major challenge for the counties was the reliance on external counsel as they did not have established legal departments unlike in the national government where cases are handled through the Office of the Attorney General/State Law Office.[206] This exposed the counties to the risk of collusion between county officers and advocates in fixing exorbitant fees.[207] To illustrate the high legal fees incurred in some of the intergovernmental disputes, the first case is one involving the National government and County government over land rates. The advocates who represented the Nairobi County government demanded for Kshs 2 billion as legal fees. Subsequently, they were paid Kshs. 724 million.[208] In another case involving the National Assembly and the CoG on the constitutional validity of the provisions of the National Government Constituencies Development Fund Act (NGCDF) in the High Court.[209] The average legal fees amounted to Kshs

[204] Ibid.
[205] Kisumu Workshop (n 23)16.
[206] IGRTC, *Cost of Litigation in Inter/Intragovernmental Litigation in Kenya*, May 2017, IGRTC, 48. This is no longer the case as there is now the County Attorney Act 2020 (Act Number 14 of 2020). The County Attorney is the principal legal adviser to the county government. The Act establishes the office of the county attorney in all the 47 county governments. The office consist of the county attorney, county solicitor and such other number of county legal counsel as the county attorney may, in consultation with the county public service bard, consider necessary. The County Attorney is the principal legal adviser to the county government.
[207]Ibid 21.
[208] Judicial Review Application No. 109 of 2014.
[209] *Wanjiru Gikonyo v National Assembly & 8 Others* (2016) eKLR.

20 to 30 million.[210] Third, in a case contesting the summoning of four governors to answer questions on county financial management.[211] The litigation of cost was about 3.32 million in the High Court and Kshs. 2.16 million in the Court of Appeal.[212] Most recently, in *KTK Advocates v Nairobi City County Government*, the Applicant's bill of costs was taxed by the Deputy Registrar of the Environment and Land Court as against the Respondent in the sum of about Kshs.1.3 billion, and a certificate of costs issued in June 2022.[213] The case involved the dispute between the Kenya Defence Forces and the Nairobi County government over the 3000-acre land where Embakasi Barracks sits.[214] Furthermore, according to the Council of Governor's Audited reports, the Council spent a total of Kshs. 49,134,138 and Kshs. 87,153,900 on legal fees for the financial years 2013/14 and 2014/15 respectively.[215]

Besides high legal fees, litigation has led to other costs that have negatively impacted service delivery and intergovernmental relations. To begin, it has delayed implementation of projects, opportunity costs when projects are delayed, and stalled projects. For example, in Nyeri County, a dispute between the Public Service Board and the county assembly delayed approval of the county budget for 6 months thus affecting service delivery and the recruitment of chief officers in the county.[216] It has also strained intergovernmental relations. This was seen in the dispute between the

[210] IGRTC, *Cost of Litigation in Inter/Intragovernmental Litigation in Kenya*, May 2017,47.
[211] *Council of Governors & 6 Others v Senate* (2015) eKLR.
[212] IGRTC, *Cost of Litigation in Inter/Intragovernmental Litigation in Kenya*, May 2017,47.
[213] Miscellaneous Application No. 56 of 2020. See also *KTK Advocates v Baringo County Government* (2017) eKLR wherein Donald Kipkorir sued Baringo county over KSh. 17.570,907 million owed for services offered. The judgement was entered by the High Court in favour of KTK Advocates.
[214] IGRTC Members, *End Term Report 2015* – 2020,114.
[215] Report of the Auditor General on the Financial Statements of COG Secretariat for the year ended 30 June 2014 and year ended 30 June 2015.
[216] IGRTC, *Cost of Litigation in Inter/Intragovernmental Litigation in Kenya*, May 2017,24.

County Government of Nairobi and Kenya Power over debt incurred for power consumption by the previous local authority. This resulted to Kenya power shutting down power for the county government offices and in return Nairobi County clamped down entrances of Kenya Power premises.[217]

### 3.4 A Case for ADR in Resolving Intergovernmental Disputes

Given the high legal costs associated with litigation as discussed above, ADR mechanisms such as negotiation, conciliation, mediation, and arbitration should be used in resolving intergovernmental disputes.[218] With the exception of arbitration that culminates in an arbitral award, the other ADR mechanisms result in mutually generated outcomes.[219] ADR seeks to find non-confrontational ways of resolving disputes and promoting harmony, tolerance and peaceful coexistence between concerned parties thus fostering parties' satisfaction.[220] By promoting dialogue, ADR mechanisms avoid the winner-loser scenario that characterize conventional court processes by promoting a win-win, give-and-take approach to resolving dispute. The adversarial nature of litigation pits parties against each other which injures the relationship between parties.[221] As a result, it would worsen the relationship between the levels of government which are expected to work together through consultation and corporation as provided for by the Constitution.[222] Closely related to this, ADR mechanisms would enhance confidentiality in intergovernmental disputes and reduce embarrassment occasioned by exposure of such disputes in public through litigation.[223]

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[217] Ibid.
[218] 2nd Annual Devolution Conference Held at Tom Mboya Labour College Kisumu County, 2015 21st April To 23rd April, 14.
[219] Laibuta (n 125) 4.
[220] Council of Governors, *2nd Annual Devolution Conference held at Tom Mboya Labour College Kisumu County*, from 21st April to 23rd April 2015, 14. See also NCIA, *Research Report on Awareness, Perception and Uptake of Alternative Dispute Resolution in Kenya*, 2021, 9.
[221] David Ngwira, '(Re) Configuring 'ADR' as Appropriate Dispute Resolution? Some Wayside Reflections'
[2018] *Alternative Dispute Resolution*, 194.
[222] Oseko, Obure, and Wambui (n 147),155.
[223] Muigua (n 124) 601. Kisumu Workshop (n 23) 80.

Also, ADR mechanisms except for arbitration are less formal than litigation. In most cases, the rules of procedure are flexible, without formal pleadings, extensive written documentation, or strict rules of evidence.[224] This leads to expeditious and cost-effective resolution of intergovernmental disputes. As a result, this ensures that there are no delays in implementation of policies and service delivery.[225] A critical examination of Articles 159 and 189(4) of the Constitution read together with Section 81(b) of the IGRA reveals that ADR mechanisms are complementary, and not alternative to judicial processes.[226] In fact, those provisions dictate that ADR mechanisms are appropriate as the first option for resolving intergovernmental disputes.

**3.5 Intergovernmental Disputes Resolved through ADR Mechanisms**

Between 2015-2020, the IGRTC received a total of twenty-one (21) cases for resolution through ADR mechanisms. Eight (8) of the cases were successfully resolved; one (1) case was referred to the courts for determination; and twelve (12) were still undergoing dispute resolution processes as at the time of preparing this report.[227] The IGTRC also successfully mediated and oversaw the execution of MOUs by the disputants in the disputes involving the County Government of West Pokot and theMinistry of Interior and National Coordination; County Government of Siaya (Agricultural Training Centre) and the Ministry of Interior and National Coordination; Ministry of Agriculture,Livestock and Fisheries (Food and Fisheries Authority) and County Governments ; County Government of Baringo and the Ministry of Agriculture, Livestock and Fisheries; County Government of West Pokot and the Ministry of Agriculture, Livestock and Fisheries; County Government of Garissa and the Ministry of Devolution and Arid & Semi-Arid Lands on construction of masonry perimeter fence, double steel gate and a pedestrian gate at the

[224] Scott Brown, Christine Cervenak, and David Fairman, Alternative Dispute Resolution Practitioners Guide (Conflict Management Group 1998) 6.
[225] Muigua (n 124) 602.
[226] Henry Murigi, 'Institutionalization of Alternative Dispute Resolution' [2020] Journal of Conflict Management and Sustainable Development,246.
[227] IGRTC Members, *End Term Report 2015* – 2020,109.

Garissa Referral Hospital.[228] Furthermore, the IGRTC also facilitated consultative negotiations between West Pokot County Government and County Commissioner over office blocks. The offices occupied by the county government belonged to the national government but were allocated to them by the Transition Authority in January 2013 to facilitate effective settling of the county government following the general elections in 2013. The offices were under construction and were nearing completion in readiness to accommodate the county commissioner whose offices were old and condemned as unfit for human habitation. The county commissioner and the governor were unable to agree on an amicable solution, so the commissioner declared a dispute. The negotiations led to the signing of an MoU and the chairperson of the IGRTC witnessed the agreement.

The dispute over land ownership between the County Government of Tharaka Nithi and the Prisons Department was another dispute resolved by the IGRTC. Initially, the matter was in court but was later withdrawn and referred to IGRTC which successfully facilitated negotiations to have the matter resolved amicably.[229] Lastly, the IGRTC resolved the dispute between Nairobi City County and the Ministry of Agriculture, Livestock and Fisheries regarding the entity mandated to conduct meat inspection in slaughterhouses that export meat products.[230] The dispute was reported to the IGRTC by Nairobi City County. It contended that county abattoirs/slaughterhouses services are a devolved function and hence a mandate of the county while the Veterinary Department's position was that export house should fall under the national government. After intensive consultation, IGRTC advised that both the national and county governments deploy officers to fulfil their constitutional mandates until a policy and regulations are developed and approved. The Parties agreed and they are complying.

[228] IGRTC, Unreported Status Report as at February 2020,28.
[229] IGRTC, *Cost of Litigation in Inter/Intragovernmental Litigation in Kenya*, May 2017,16.
[230] Ibid 17.

The above cases indicated that it was possible to resolve intergovernmental disputes quickly and in a less costly way through ADR. They also demonstrated that IGRTC can effectively facilitate the resolution of disputes.[231] The CoG also provides a forum for dispute resolution mechanisms between counties within the framework of the IGRA.[232] Such disputes are referred to the COG Committee in charge of Intergovernmental Relations.[233] The Committee is mandated to hear the parties and make a preliminary assessment of the matter before a referral to the full Council.[234]

## 4.0 The Intergovernmental Relations (ADR) Regulations 2021

For a long time, there was no detailed framework on the resolution of intergovernmental disputes. Intergovernmental relations bodies such as the CoG and the IGRTC had to use their internal procedures in resolving such disputes. This led to uncertainty and inconsistencies in how intergovernmental disputes were resolved. With the gazettement of the Intergovernmental Relations (ADR) Regulations 2021, there is predictability, certainty, and clarity in the resolution of intergovernmental disputes through ADR in conformity with the IGRA and the Constitution. This next section assesses the strengths and gaps in the regulations.

### 4.1 Strengths of the ADR Regulations

Firstly, the regulations provide for a range of ADR mechanisms that can be chosen by the parties. These include dispute avoidance strategies such as providing for negotiation and consultations between the parties and other constitutional commissions and offices, line ministries, and intergovernmental forums.[235] The inclusion of such strategies will ensure that conflicts are resolved before they escalate to disputes. Away from dispute avoidance strategies, the regulations provide for detailed provisions of resolving intergovernmental disputes through conciliation, mediation,

[231] Ibid.
[232] IGRA, Section 20(d).
[233] Council of Governors, *Annual Report 2019/2020*,5.
[234] Ibid 11.
[235] *The Intergovernmental Relations (ADR) Regulations 2021*, Regulation 6(2)(a).

traditional dispute resolution mechanisms (TDRMs), and arbitration.[236] Notably, the inclusion of TDRMs is commendable and reflect an inclusive and broad appreciation of the role played by elders in impacting country politics and resolution of disputes. TDRM principles such as social cohesion, harmony, peaceful co-existence, respect, and tolerance are in tandem with the constitutional principles of consultation and co-operation.[237] TDRMs will be very instrumental in the resolution of natural resource intergovernmental disputes where communities are involved, for instance, oil and pasture disputes as well as those on the access and use of natural resources.[238]

Secondly, the objects and purpose of the regulations align with the dictates of Articles 6(2), 189, 159(2)(c) of the Constitution. To begin, the regulations reinforce the constitutional principles of consultation and co-operation. This is evident in various consultation procedures. For instance, parties are obligated to take all necessary measures to amicably resolve disputes through negotiations, conciliation, and consultations before declaring a dispute.[239] Should the parties fail, either party must issue a notice to the other party showing intention to declare an intergovernmental dispute.[240] After seven days of the expiry of the notice, a party may then formally declare a dispute by filling form in the Schedule and serving the other party, line ministry, and Cabinet Secretary.[241] Even when a dispute is formally declared, parties are required to consult with each other in an initial meeting and agree on the nature of the dispute, and the most appropriate ADR forum for resolution.[242] Furthermore, where the dispute remains unresolved within the ADR mechanisms in the regulations, the parties are required to notify the Summit which then convenes another consultative meeting in an effort to resolve the

[236] Ibid Regulations 10-12.
[237] Francis Kariuki, 'African Traditional Justice Systems' [2017] *Journal for Conflict Management and Sustainable Development*, 165.
[238] Kisumu Workshop (n 23), page 66.
[239] ADR Regulations (n 235) Regulations 3(b), (c), (d), and Regulation 6(2).
[240] Ibid Regulation 6(7)
[241] Ibid Regulation 7(1).
[242] Ibid Regulation 8.

dispute.[243] The Regulations are alive to the constitutional dictate that courts be the last resort in the resolution of intergovernmental disputes.[244]

Still on the objects and purpose, the regulations seek to promote and ensure the effective, efficient, expeditious, and amicable resolution of intergovernmental disputes. This is achieved by stipulating timelines within which disputes must be resolved through the various ADR mechanisms. For instance, where the parties choose mediation, the dispute must be resolved within 14 days from the date of the commencement of the mediation proceedings.[245] Regarding TDRMS, the dispute must be determined within 21 days from the date of commencement of the proceedings.[246] For arbitration, the dispute must be determined within 30 days from the date of commencement of the arbitration proceedings.[247] These timelines are welcome and workable. They must have been motivated by the long durations previously experienced in attempts to resolve intergovernmental disputes through litigation.

Closely related to the objects and purpose, the regulations are guided by critical principles. The first significant principle is the prudent use of public funds in the resolution of intergovernmental disputes.[248] This is a welcome acknowledgement of the high litigation costs incurred in the resolution of such disputes through the courts. In part three of this paper, it was demonstrated that legal fees were high and caused strains on budgets of the two levels of government thus affecting service delivery. Another significant principle is the compliance with the procedures, decisions, and outcomes made through ADR mechanisms in the regulations.[249] This is important because without compliance with the outcomes of the ADR fora, this would

[243] Ibid Regulation 14(2).
[244] Ibid Regulation 15.
[245] Ibid Regulation 10(4). However, the parties may extend the mediation for a period not exceeding 7 days.
[246] Ibid Regulation 11(4). The parties can extend the proceedings for a period not exceeding 7 days.
[247] Ibid Regulation 12(4). Parties may extend for a period not exceeding 15 days.
[248] Ibid Regulation 4(b).
[249] Ibid Regulation 4(d).

frustrate the successful resolution of intergovernmental disputes.

Fourthly, the regulations provide clear provisions on the parties to intergovernmental disputes. The regulations enshrine that they apply to disputes between the national government and county government, and amongst county governments. They also apply to state organs and public offices in the two levels of government; namely, ministries, departments, agencies within the national government, and county departments as well as agencies. In doing so, the regulations provide clarity on parties to intergovernmental disputes. This aligns with case law where there have been prevalent disputes among organs within the same government. They also cater for disputes between county governments and agencies of the national government. Further, the regulations reflect the position enunciated by recent case law on determining the party to an intergovernmental dispute.[250] Courts have determined that one has to look beyond the parties and examine the subject matter.[251] Therefore, an intergovernmental dispute can actually arise between a public officer seeking to enforce an interest of either level of government, and an organ of the other government.[252]

Furthermore, the Regulations outlines an extensive list of intergovernmental disputes. These reflect the tensions and controversies witnessed in the last couple of devolution years. Intergovernmental disputes may relate to the assignment or implementation of functions, a financial matter, written agreement between the parties, boundary disputes, natural resource management, and any other intergovernmental dispute. [253] Regarding boundary disputes, the regulations require parties to consult with the relevant statutory and constitutional bodies in accordance with the existing laws. This obligation implicitly appreciates that there is the County Boundaries Bill

[250] *See County Government of Nyeri v Cabinet Secretary of Education, Science, and Technology* [2014] eKLR, *Board of Management, Frere Town Primary School v County Government of Mombasa* [2022] eKLR.
[251] See Part two.
[252] Ibid.
[253] Regulations 6(5)(b), 8(c).

2021 which seeks to provide for the resolution of county boundary disputes through establishing *ad hoc* county boundary mediation committees.[254] The Bill also creates the independent county boundaries commission tasked with making recommendations to the alteration of county boundaries as dictated by the Article 188 of the Constitution.[255] Relevant to this, the Environment and Land Court has held that the National Land commission has powers to investigate disputes arising from intercounty boundaries.[256] The court noted that county boundary disputes are examples of historical injustices.[257]

Regarding TDRMs, the regulations recognise that decisions from TDRMs may not be in writing. They instead require that where the dispute is resolved, the traditional body submits an outcome of the dispute, and any document that may be necessary.[258] For other ADR mechanisms, reports, and an arbitral award must be submitted.[259]

Lastly, the regulations enhance party autonomy and flexibility which are central to ADR mechanisms. Parties have the right to choose and agree on the ADR forum and practitioner to resolve their dispute.[260] However, where they fail to agree on the ADR practitioner, the Summit, CoG, or an intergovernmental structure can appoint or request a recognised ADR institution to make the appointment.[261] In addition, the parties and the ADR practitioner determine the procedure of the proceedings. Moreover, the parties can extend the period of the proceedings.

[254] Preamble, the *County Boundaries Bill* (Senate Bills Number 20 of 2021).
[255] Ibid Clauses 23, 24, and 26 (Senate Bills Number 20 of 2021).
[256] *Okoiti v Parliament of Kenya & 2 Others; County Government of Taita Taveta & 3 Others* (Interested Parties) (Petition 33 of 2021) [2022] KEELC 33 (KLR)(23 March 2022)(Ruling).
[257] Ibid.
[258] ADR Regulations (n 235) Regulation 11(8).
[259] Ibid Regulations 10(8) and 12(7)
[260] Ibid Regulations 10, 11,12.
[261] Ibid Regulations 10(2),11(2), and 12(2).

### 4.2 Gaps in the ADR Regulations

**a) Incomplete definition of an ADR practitioner.** The Regulations defines an ADR practitioner as an individual appointed to assist, guide, or determine an intergovernmental dispute. This definition seems incomplete as it omits individuals or groups of people such as elders who play a role in resolving intergovernmental disputes in the regulations. The omission can be resolved by revising the definition to include individuals or groups. Similarly, the definition of a traditional body is wanting. A traditional body is defined as an institution recognized by the parties or registered within Kenya as an authority with respect to traditional knowledge and cultural practices. 'Recognition by the parties' assumes that traditional institutions lose their authority and validity when they are not recognised by the parties. Also, what traditional institution is being referred to by the regulations? Is it council of elders? If that is the case, it should be expressly clear 'Registered within Kenya' presupposes that all traditional institutions or elders are registered by the Registrar of Societies. This is not the case on the ground because elders get their legitimacy from being custodians of customary law in their communities, it does not depend on registration.

**b) Absence of the definition of an intergovernmental dispute**. The Regulations do not provide a clear definition of an intergovernmental dispute. It only stipulates that an intergovernmental dispute is one defined under Section 30 of the IGRA. However, looking at the IGRA, there is no definition of an intergovernmental dispute. The regulations could be amended to reflect the definition that has been developed by courts.[262]

**c) Limited scope of ADR mechanisms.** The regulations define and provide procedures for negotiation, mediation, TRDRMs, and arbitration. Conciliation is mentioned as one of the ADR mechanisms but there are inadequate procedures on how the process will be conducted. The regulations only stipulate that before a dispute is formally declared, the

[262] See discussion in part 3.1 on the definition of an intergovernmental dispute.

parties may resolve the issues in controversy through an intermediary agreed upon by the parties. The question that arises is that who is an intermediary in this context? This is because an intermediary generally means a mediator. The regulations should have just indicated 'conciliator'. In addition, the regulations do not cover other ADR mechanisms such as adjudication, dispute review boards, dispute adjudication boards, and Early Neutral Evaluation. Perhaps, it was assumed that the CoG, Summit, and IGRTC can work as the boards. In the recent past and current regime, religious leaders play a significant role in resolution of intergovernmental disputes. The Cabinet Secretary may consider their inclusion in the regulations during the revision of the current ones.

**d) Lack of clarity as to whether parties can appear with their advocates**. The regulations are silent on the question as to whether parties must appear in person or can be represented by their lawyers. There is no doubt that parties appearing in person would safeguard the ADR processes from legalities and litigation technicalities. However, one wonders about the place of county attorneys in these ADR mechanisms. County Attorneys are the principal legal advisor of the County Executive in legal proceedings.[263] They have a right of audience in all proceedings in matters to be of public interest and those that involve public property within the county.[264] There is a need to harmonise the provisions of the County Attorney's Act and the regulations. The County Attorney and Attorney General may come in after the ADR mechanisms have failed and parties have resorted to judicial proceedings. However, lawyers are likely to be needed in arbitration under the regulations.

**e) Lack of provisions on the revocation of appointment of ADR practitioners.** The regulations are silent on the removal of ADR practitioners. There is a danger of the processes where either of the parties feels that there are elements of bias and partiality of the ADR practitioner to

[263] County Attorney Act (Act Number 14 of 2020), Section 7.
[264] Ibid Section 9.

any of the parties. In intergovernmental disputes, there is a lot of tension and political interests at play. Where an ADR practitioner is not ethical, they can end being influenced through corruption and bribery. Save for arbitration where the provisions of the Arbitration Act 1995 on removal of an arbitrator may apply, the regulations do not provide for procedures of challenging the appointment of mediator, conciliator, or Traditional body. This could be remedied by providing such procedures for removal and substitution of an ADR practitioner in cases of gross misconduct, bribery, and bias.

**f) Lack of provisions on immunity of ADR practitioners**. Save for arbitration where an arbitrator is not liable for anything done or omitted to be done in good faith in discharging their function, the regulations do not provide for immunity of other ADR practitioners.[265] Given the high tensions involved in intergovernmental disputes, some of the ADR practitioners may be intimidated with civil suits and threats. It is important to have them insulated from any act or omission in the performance of their roles unless it can be proved that they acted in bad faith, negligently, or fraudulently.

**f) Vague and restrictive provisions on the use of TDRMs.** While the inclusion of TDRMs in the regulation is welcome, there are provisions that restrict the application of TDRMs. To begin, the definition of TDRMs as the resolution of an intergovernmental dispute by a traditional body, is vague. As earlier discussed, the definition of a traditional body is inadequate. The regulations could be revised to consider the following amendments on TDRMs. First, 'traditional dispute resolver' should be used instead of the 'traditional body'. This is because the implication of 'body' presupposes that there are no individuals who possess extensive knowledge in customary law and skills. Borrowing from the ADR Bill 2021, a traditional dispute resolver can be defined as a person or group of persons who are by the traditional custom of their community recognised and accepted as possessing skills and traditional knowledge required to resolve the dispute. Second, the definition of TDRM can be revised to read as follows: 'traditional dispute resolution

[265] See Section 16B of the Arbitration Act 1995 and Regulation 12(6).

mechanism means a process in which parties attempt to reach a mutually acceptable settlement outcome or agreement to resolve their dispute through the application of customary law of the community concerned with the assistance of a third party called a traditional dispute resolver'.

The Regulations reinforce the repugnancy clause on TDRMs from the Constitution.[266] This trend continues to subjugate and undermine TDRMs against other form of ADR mechanisms. In TDRMs, there is high regard for truth and belief in ancestral powers, superstitions, and sorcery which are a great part of the dispute resolution.[267] However, in *Dancan Ouma Ojenge v P.N*, the Employment and Labour Relations court found that the use of superstitions and witchcraft was repugnant to justice and morality, therefore, inconsistent with the Constitution. [268] While the limitations in the Constitution are clear, the Constitution does not define the standards of morality and justice in the context used, leaving it open for courts to decide.[269] This presents inconsistencies and cripples the role of TDRMs in dispute resolution as religious leaders and elders in Kenya often use oaths and ritual ceremonies in resolving political disputes.

## 5.0 Recommendations

In addition to the above recommendations concerning the ADR Regulations, this paper makes more recommendations to entrench the resolution of intergovernmental disputes through ADR, and generally on intergovernmental relations.

First, there is a need for comprehensive training to the two levels of government and their respective organs on ADR mechanisms. This will create awareness about the benefits of such mechanisms in resolving

[266] Regulation 11(5). See also Art 159(3) of the Constitution.
[267] Francis Kariuki, 'Conflict Resolution by elders in Africa: Successes, Challenges and Opportunities' [2015] *Alternative Dispute Resolution*, 162-165.
[268] [2017] eKLR.
[269] Joseph Segona and Omandi Scholastica, 'An Analysis of the Weaknesses of TDRMs as an avenue of dispute resolution in Kenya' [2019] *Journal of Humanities and Social Science*, 5.

intergovernmental disputes over litigation. The awareness will equip state officers with knowledge about ADR mechanisms and ensure that they do not file cases in courts in the first instance. While it is clear from the jurisprudence that courts will refer them back to ADR, resolving intergovernmental disputes in the first instance will save them costs and long delays. In addition, there is need for capacity building by the intergovernmental organs and ADR institutions to strengthen their effective conflict management and ADR.[270]

Second, given that there are still legal certainties about the functions and powers of the two levels of government. This may be resolved through a legislation clarifying the functions and powers. The legislation could be entitled "The Functions and Powers of the National Government and County Government Act".[271] The Act can provide for the (i) clarification of powers and functions, specify the exclusive functions and powers of both levels of government, and outline the concurrent functions and powers. In addition, the Act can provide for guidelines that can guide the national government in the assignment of additional functions and powers to the county governments in accordance with Articles 18693) and 183(1)(b) of the Constitution.[272] The legislation should also address legal inconsistencies and gaps on functions of the two governments. In doing so, the legislation will reduce duplication of efforts, role, and expenditure as well as wastage of resources. It will minimise the likelihood of a total failure in the delivery of services to the public where each level of government may take no action in the functional area hoping that the other will provide the services.[273]

Third, the judiciary is encouraged to continue promoting ADR mechanisms in accordance with the dictates of Article 159(2)(c). Courts have been supportive of ADR mechanisms by staying intergovernmental dispute

[270] IGRTC, *End Term Report 2015-2020*,117.
[271] Kisumu Workshop (n 23)10.
[272] Ibid 63.
[273] Ibid 43.

proceedings and referring parties to ADR.[274] The doctrines of exhaustion and constitutional avoidance have been endorsed by the Supreme Court and the superior courts.[275] This pro-ADR stance should continue, and members of the bench should not view ADR as a threat to the court system. The outcomes of the ADR mechanisms resulting from the resolution of intergovernmental disputes in the ADR regulations should be enforced. Nonetheless, courts can play a limited role in interpreting the Constitution and providing clarity on novel areas affecting the functions of the two levels of government through advisory opinions to the Supreme Court.[276] The ADR regulations also allow parties to seek interim measures from courts.[277]

There may also be a need to review the renumeration of advocates for cases involving the public sector.[278] As discussed in the paper, many counties have incurred huge budgetary costs in terms of legal fees. While advocates are entitled to legal fees for legal services offered, the huge legal fees have an impact on service delivery to people. This is because a lot of public funds have been diverted to legal representation by agencies within the national government and county government.[279] The Law Society of Kenya and the Attorney General may work together to come up with a special renumeration order applicable for public sector litigation. In same spirit, there may be a

[274] See *County Government of Migori & 4 Others v Privatisation Commission of Kenya* [2017] eKLR, *International Legal Consultancy Group & another v Ministry of Health* [2016] eKLR, *Daniel Muthama v Ministry of Health; Shenzhen Mindray Bio-Medical Electronics Co. Ltd* [2015] eKLR; *Council of Governors v Lake Basin Development Authority & 6 Others* [2017] ekKLR*; Silas v County Government of Baringo* [2014] eKLR; *Turkana County Government v Attorney General* [2015] eKLR.

[275] *Speaker of the Senate and another v Attorney General* [2015] eKLR. See also *Communication Commission of Kenya v Royal Media Services* [2014] eKLR.

[276] In para 18 of the In *re Matter of the Principle of Gender Representation in the National Assembly* [2011] eKLR, the Supreme Court observed that advisory opinions are an important avenue for resolving matters of great public importance which may not be suitable for conventional mechanisms of justiciability. This arises in novel situation especially those affecting county government.

[277] Regulation 9.

[278] IGRTC, *End Term Report 2015-2020*,118.

[279] IGRTC, *Cost of Litigation in Inter/Intragovernmental Litigation in Kenya*, 2017,33.

need to come up with standard rates of renumeration or guidelines for resolution of intergovernmental disputes through ADR mechanisms especially arbitration. There have been valid concerns about the rising costs of arbitration fees in the country. Nonetheless, the average cost of resolving an intergovernmental dispute through ADR will depend on the complexity of the case and hours taken to resolve the dispute.[280]

There is a need to protect the neutrality and autonomy of the IGRTC. Under the IGRA, the principal secretary of the ministry of devolution affairs is a member of the IGRTC. However, other intergovernmental organs like the CoG does not have a representative. There have been tensions and perceptions about neutrality of the IGRTC. For example, in a meeting with the Senate, the principal secretary declared that the IGRTC was part of the ministry.[281] In another meeting, the principal secretary told the committee that it was disrespectful when it attended a meeting convened by the National Assembly Committee on the implementation of the Constitution without his approval.[282] In addition, the IGRTC's budget is part of the ministry's budget.[283] This undermines the neutrality of the IGRTC and the interference in its affairs could undermine the compliance and enforcement of ADR processes, outcomes, and agreements in the ADR Regulations. The funding model of the defunct Commission for the Implementation of the Constitution may be adopted, its funding was not directly anchored on a ministry or state agency thus enhancing its full neutrality.[284] The IGRA may be amended to remove the ministry of devolution from its membership or include representatives from the CoG and other intergovernmental organs so that it remains truly neutral.[285]

Lastly, the regulations stipulate that the Cabinet Secretary in charge of devolution may in consultation with the IGRTC and CoG issue guidelines for better carrying out of the provisions of the regulations.[286] The CS is called upon to address some of the issues raised in this paper to address the gaps in

[280] Ibid 26.
[281] IGRTC, *End Term Report 2015-2020*,132.
[282] Ibid
[283] Kisumu Workshop (n 23) 80.
[284] IGRTC, *End Term Report 2015-2020*,132
[285] Kisumu Workshop (n 23) 92.
[286] Regulation 21.

the regulations. The guidelines should also consider the possibility of waiving confidentiality in some of the matters that may need to be open to the public because of public interest and right to access to information.[287]

## 6.0 Conclusion

We are all interdependent and must co-exist with each other. This does not mean that it will always be peaceful. On the contrary, conflicts and differences will always be there. However, peace and harmonious co-existence requires that we work together to resolve such differences through dialogue, mutual respect, and tolerance – all principles inherent in ADR mechanisms. Similarly, this is required for the two levels of government. Being co-operative and consultative does not ignore differences of approach and viewpoints but encourages healthy debate to address the needs of people and resolve disputes that arise amicably.[288] Strictly speaking, there are no intergovernmental relations, there are only relations among officials in different levels of government. Individual interactions among state and public officers are at the core of intergovernmental relations.[289] In order for those officers to satisfactorily serve the people of Kenya, they need to co-operate and work together because if one level does not function well, the whole government will not function optimally. This extends to the resolution of their disputes through ADR mechanisms. To paraphrase the words of *Dalai Lama*, a Nobel Prize winner, the two levels of government should not let litigation injure the great relationship they ought to have for the betterment of the lives of Kenyans. There is willingness in the current regime to resolve intergovernmental disputes through ADR. In the Official communique from the 9th ordinary session of the Summit organised by the IGRTC 2023, the government has committed to achieve the following. First, all existing intergovernmental legal cases by one level of government against the other level of government shall be subjected to ADR as provided under the IGRA. Second, through the IGRTC, Kenya Revenue Authority shall withdrawal all matters against county governments from courts and seek

[287] Regulation 18(1).
[288] Kisumu Workshop (n 23) 39.
[289] Ibid 33.

ADR. Third, Summit has committed to empowering the IGRTC to enable it adjudicate intergovernmental disputes. All in all, this paper has extensively discussed the resolution of intergovernmental disputes through ADR mechanisms. In view of the recommendations given in part three and four and commitments by the summit, the paper hopes that intergovernmental relations will be improved and promote the gains of devolution.

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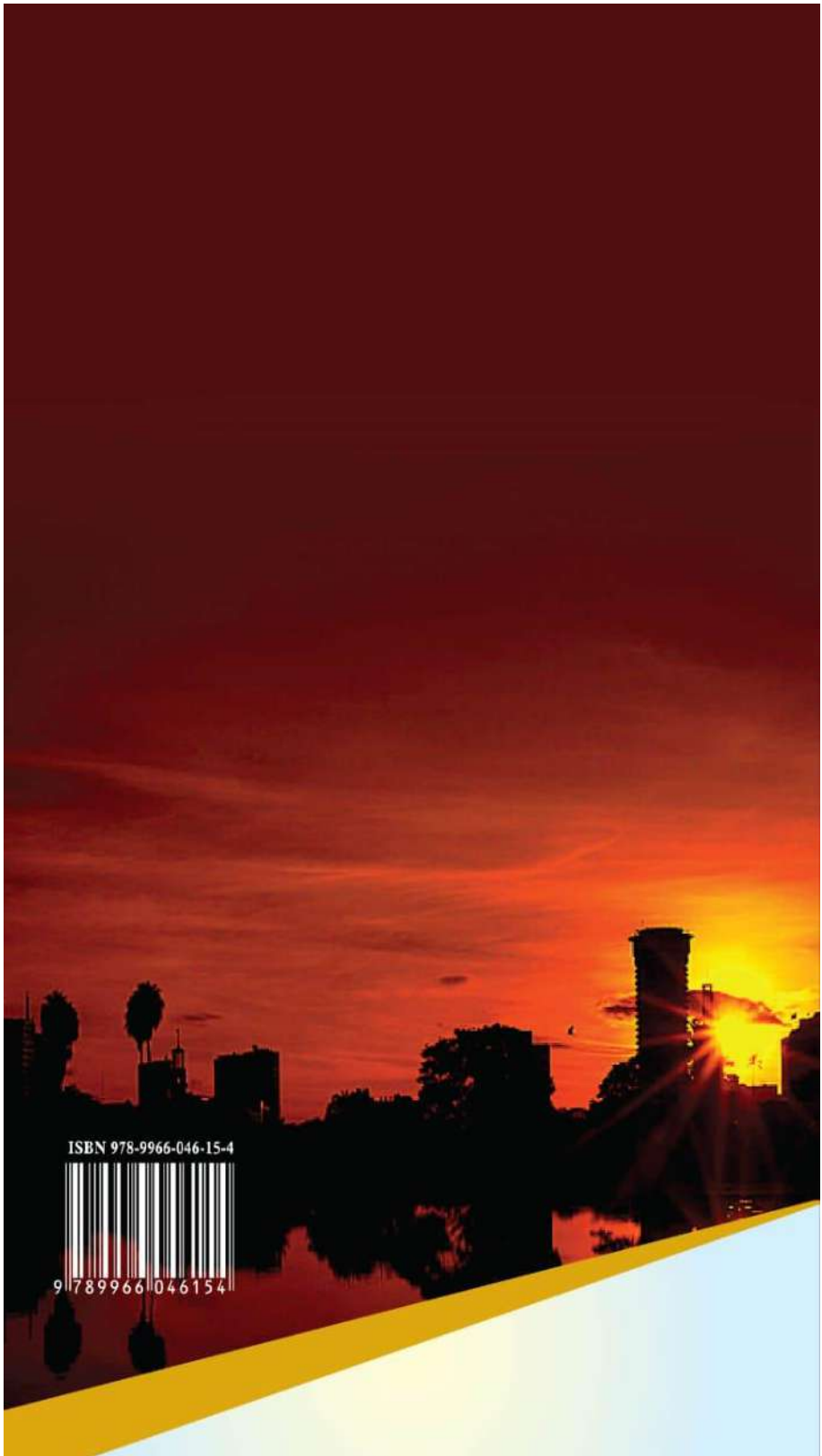
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