Journal of Conflict Management & Sustainable Development

Volume 10 Issue 3 2023 ISBN 978-9966-046-15-4

Journal of Conflict Management and Sustainable Development

Volume 10 Issue 3 **2023**

Journal of Conflict Management and Sustainable Development

Typesetting by:
Anne W. Kiramba
P.O. Box 60561 – 00200,
Tel: +254 737 662 029,
Nairobi, Kenya.

Printed by:
Mouldex Printers
P.O. Box 63395,
Tel – 0723 366839,
Nairobi, Kenya.

Published by:
Glenwood Publishers Limited
P.O. Box 76115 - 00508
Tel +254 2210281,
Nairobi, Kenya.

Editorial Board

This Journal should be cited as (2023) 10(3) Journal of cmsd
ISBN 978-9966-046-15-40

Editor's Note

Journal of Conflict Management and Sustainable Development

Welcome to Volume 10 issue 3 of the Journal of Conflict Management and Sustainable Development. The Journal is an interdisciplinary publication that focuses on key and emerging themes in Conflict Management, Sustainable Development and other related fields of knowledge.

Sustainable Development has been embraced at both the global and national levels as the blue print for socio-economic development and governance. The Journal interrogates and offers solutions to some of the current concerns in the Sustainable Development Agenda. It also explores the role of Conflict Management in the attainment of Sustainable Development.

The Journal is peer reviewed and refereed so as to ensure credibility of information and validity of data.

This volume contains papers on various themes including: *Tracing the Role of Biodiversity Conservation in Achieving Sustainable Development Goals; The Complex Interplay of State and Religion: Exploring The Dynamics and Implications for Modern Society; A Critical Analysis of Kenya's Anti-Money Laundering and Counter-Financing of Terrorism Regime; Recognizing the rights of nature for Environmental Justice in Kenya; High Seas Treaty: Enhancing Environmental Responsibility for Marine Protection; Establishing a Cold Case Investigation (CCI) Unit in Kenya's National Police Service: Delivering Justice for Victims of Unresolved Crimes; Against the Obnoxious Repugnancy Clause as a limitation to Application of Traditional Dispute Resolution Mechanisms in Kenya; Addressing Noise Pollution for a Clean and Healthy Environment in Kenya; A proposal for legislative reform of Kenya's Prevention of organized Crimes Act – A comparative analysis; and Decentralization of Clean Energy in Kenya: The Legal and Institutional Opportunities and*

Challenges. The Journal also contains a review of *Realizing True Sustainable Development,* Glenwood Publishers (2023).

We welcome feedback, comments and critique from our readers to enable us to continue improving the Journal.

I wish to thank all those who have made this publication possible including reviewers, editors and contributors.

The Editorial Team also welcomes the submission of articles to be considered for publication in subsequent issues of the Journal. Submissions can be channeled to editor@journalofcmsd.net and copied to admin@kmco.co.ke.

Our readers can access the Journal online at https://journalofcmsd.net.

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

List of Contributors

Dr. Kariuki Muigua

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

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

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

(CASELAP), Wangari Maathai Institute for Peace and Environmental Studies (WMI) and the Faculty of Law, University of Nairobi.
Dr. Kariuki can be reached through muigua@kmco.co.ke or admin@kmco.co.ke

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

He is passionate about this subject and continues to lend his knowledge and experience on the same as part of a consultancy team with the State Corporations Advisory Committee. He is also a senior lecturer with the University of Nairobi's School of Law. He teaches and supervises both postgraduate and undergraduate studies in the areas of corporate governance, international law, refugee law,

international human rights, and alternative dispute resolution mechanism. Further, he holds several academic qualifications including undergraduate studies in law and architecture, a master's in international law and a PhD in Law focusing on the challenges of outsourcing public functions to the private sector. He is widely published in in the areas he teaches and serves as part of the editorial team of a number of journals including the UoN Law Journal and the ICS Journal on Corporate Governance.
Dr. Mutuma also is engaged in legal practice both in Cape Town and Nairobi.
Dr. Kenneth may be reached via kenmutuma@gmail.com

Michael Sang
The Author holds a Bachelor of Laws degree, LLB from Moi University, Eldoret with a Master of Laws (LLM) in International Law from the University of Cape Town, South Africa. The author is also an Advocate of the High Court with a Post Graduate Diploma in Law and employed in public service as a Prosecutor and has risen to the position of Senior Assistant Director of Public Prosecutions (SADPP).

Current Position
Mr. Michael Sang,
Senior Assistant Director of Public Prosecutions, Head, Counter-Terrorism and Transnational Organized Crime(s) Division Office of the Director of Public Prosecutions ODPP HQs Ragati Road, Upper Hill,
Nairobi, Kenya.
Michael Sang can be reached through sang7michael@gmail.com

Waruiru Cecilia
Cecilia Waruiru is a final year law student at the University of Nairobi. She's an avid member of the Kenya Model United Nations where she has represented the Chapter in various debates and conferences where she has received awards. She is also keen on

giving back to society through legal aid where she has worked with organizations such as Amnesty International and the Kenya Christian Lawyers Fellowship in doing the same. She has worked as an intern at the National Legal Aid Services as well as at Kwamboka Orina Advocates.
Cecilia can be reached through ceciliawaruiru510@gmail.com

Kirui Diana
Diana Kirui is a final year law student at the University of Nairobi School of Law. She's a member of the Kenya Model United Nations Parklands Chapter and has represented the Chapter in various National mock debates. She is also a member of The Republic, a mentorship program for female law students, where she serves as the chair of the student's management team. Diana currently works as a Legal Fellow with the International Lawyers Project and as a Legal Intern at the firm of Johnson and Partners Advocates LLP. Diana has also volunteered as a Legal Aid Advisor at the Kenya Human Rights Commission and worked as a Legal Intern at A.E Kiprono and Associates and GM Gamma LLP.
Diana can be reached through kirui7diana@gmail.com

James Njuguna
James is an Advocate of the High Court of Kenya. He is a law lecturer at Embu University. He practices law at Kariuki Muigua & Co Advocates as the lead lawyer. He holds a Master of Laws (LLM) degree from University of Nairobi and a Bachelor of Laws (LLB) degree from Mount Kenya University. He holds a Post Graduate Diploma from the Kenya School of Law and a Higher Diploma in Management, Kenya Institute of Management (KIM). He has a vast knowledge of the legal practice of conveyancing, civil and criminal law in Kenya.

A Member of Chartered Institute of Arbitrators (MCIArb). He is a certified mediator by MTI East Africa. A church Council Member,

Worldwide Gospel Church of Kenya, Buruburu. James has special interests in Alternative Dispute Resolution, Intellectual Property, Constitutional law and Conflict Management and Sustainable Development. He has published the following articles; *Adopting Information Technology in the Legal Profession in Kenya as a Tool of Access to Justice, Towards Effective Management of Community Land Disputes in Kenya for Sustainable Development, Mediation as a Tool of Conflict Management in Kenya: Challenges and Opportunities, Applicability of Arbitration in Management of Community Land Disputes, Arbitration as a Tool for Management of Community Land Conflicts in Kenya*
James can be reached through njuguna@kmco.co.ke

Pamela Nyawira Muriuki
Pamela Nyawira Muriuki is a finalist law student at the University of Nairobi, a recipient of Dr. Kariuki Muigua Annual ADR Essay 2021, a certified mediator by MTI East Africa, and an avid participant in mediation and negotiation moot competitions. She is currently writing her dissertation on the use of ADR in the settlement of healthcare disputes. Her main interests include Public International Law, Financial & Securities Regulation, Children Law, Family Law and Alternative Dispute Resolution.
She is reachable via email pamelamuriuki053@gmail.com.

Gathii Irungu
Gathii Irungu is an experienced Kenyan professional with extensive expertise in the field of law. With over 32 years of practice, he has established himself as a reputable Advocate and legal advisor. He is a member of various professional bodies, including the Law Society of Kenya and the International Commission of Jurists. Gathii's academic background includes Bachelor and Masters of Law from the University of Nairobi. Currently, he is pursuing his PHD at the University of Nairobi. Throughout his career, he has participated in numerous professional training programs and workshops to enhance his skills and knowledge inclusive of several short courses acquiring certificates and Diplomas in the areas of leadership, Parliamentary

System and Governance e.g SMC & SLDP (Kenya School of Government), International Centre for Parliamentary Studies ICPS (U.K), ESAMI in Arusha, Strathmore Business School, & KCA Singapore. He is a member of Certified Mediator with the Mediation Training Institute International (MTI) East Africa & Chartered Institute of Arbitrators, Institute of Certified Public Secretaries (ICPSK) and an associate member of the Chartered Institute of Arbitrators (CIArb) and Member of EARB. He has been an LSK Disciplinary Committee Member (2020 to 2023) and Chair LSK Reforms Committee (2020 to 2022) and is patron of several Charitable Organizations.

In terms of work experience, he has been an advocate at Gathii Irungu & Co. Advocates since 1996. He has given legal services to many institutions, including county governments, financial institutions, educational institutions, Cooperative societies National Assembly & Parastatals. He has served as the Speaker of the Kiambu County Assembly (2013-2017), where he presided over debates and ensured compliance with constitutional and procedural requirements and was responsible for policy-making and administrative supervision. He has a special interest in devolution and its workings.

Gathii Irungu can be reached through irungu2023@students.uonbi.ac.ke

Journal of Conflict Management and Sustainable Development

Volume 10 Issue 3

(2023)Journalofcmsd Volume 10(3)

Tracing the Role of Biodiversity Conservation in Achieving Sustainable Development Goals

By: ***Kariuki Muigua****

Abstract

As the world focuses on achieving the Sustainable Development Goals (SDGs) by the year 2030, attention must also be paid to the important role that biodiversity will play if the dream of SDGs is to be realised. Biodiversity conservation will not only help in keeping the ecosystem services replenished for the sake of satisfying the human needs but also in protecting the health of the nature for the sake of future generations. This paper critically discusses the connection between biodiversity conservation and realisation of SDGs, which focus on challenges ranging from clean energy access, to poverty reduction and responsible consumption. The author argues that these SDGs cannot be met in and by an environment struggling with biodiversity loss and degradation.

1. Introduction

Arguably, biodiversity and ecosystems feature prominently across many of the Sustainable Development Goals (SDGs) and associated targets as they contribute directly to human well-being and development priorities.[1] It has been argued that there is a need for

PhD in Law (Nrb), FCIArb (Chartered Arbitrator), LL. B (Hons) Nrb, LL.M (Environmental Law) Nrb; Dip. In Law (KSL); FCPS (K); Dip. In Arbitration (UK); MKIM; Mediator; Consultant: Lead expert EIA/EA NEMA; BSI ISO/IEC 27001:2005 ISMS Lead Auditor/ Implementer; Advocate of the High Court of Kenya; Senior Lecturer at the University of Nairobi, School of Law [November 2021].

[1] United Nations Environment Programme, 'Biodiversity and the Sustainable Development Goals,' *CBD Press Brief*, Secretariat of the Convention on Biological Diversity
< *www.cbd.int/development/doc/biodiversity-*

(2023)Journalofcmsd Volume 10(3)

making biodiversity an integral part of economic and development strategy as it has the potential to bring a return on investment in economic, social and environmental terms. [2] This is important considering that the sustainable development agenda seeks to strike a working balance between development plans of a country an environmental conservation.[3] This is because humans rely on the environment for ecosystem services which include regulating services (e.g., filtering pollution, coastal protection, pest regulation, pollination), material provisioning services (e.g., food, energy, materials), and nonmaterial services (e.g., aesthetics, experience, learning, physical and mental health, recreation).[4]

The World Health Organization observes that since healthy communities rely on well-functioning ecosystems for clean air, fresh water, medicines and food security as well as limiting disease and stabilizing the climate, biodiversity loss can have adverse effects on human life and health by causing loss of livelihoods, income, local migration and, on occasion, may even cause or exacerbate political

---

2030-agenda-policy-brief-en.pdf> 31 July 2021.

[2] Limited BPPC, 'Biodiversity Dividend' *Bangkok Post* <*https://www.bangkokpost.com/business/2165927/biodiversity-dividend*> accessed 26 August 2021.

[3] See Basiago AD, 'Economic, Social, and Environmental Sustainability in Development Theory and Urban Planning Practice' (1998) 19 Environment Systems and Decisions 145; Stephen Polasky, Catherine L. Kling, Simon A. Levin, Stephen R. Carpenter, Gretchen C. Daily, Paul R. Ehrlich, Geoffrey M. Heal, Jane Lubchenco, 'Role of Economics in Analyzing the Environment and Sustainable Development' (2019) 116 Proceedings of the National Academy of Sciences 5233.

[4] Stephen Polasky, Catherine L. Kling, Simon A. Levin, Stephen R. Carpenter, Gretchen C. Daily, Paul R. Ehrlich, Geoffrey M. Heal, Jane Lubchenco, 'Role of Economics in Analyzing the Environment and Sustainable Development' (2019) 116 Proceedings of the National Academy of Sciences 5233.

conflict, and limited discovery of potential treatments for many diseases and health problems, all critical elements of SDGs.[5]

The political leaders participating in the United Nations Summit on Biodiversity in September 2020, in their Pledge for Nature, themed *United to Reverse Biodiversity Loss by 2030 for Sustainable Development*, acknowledged the interdependent crises of biodiversity loss and ecosystem degradation and climate change - driven in large part by unsustainable production and consumption - requiring urgent and immediate global action since biodiversity loss, land and ocean degradation, pollution, resource depletion and climate change are accelerating at an unprecedented rate causing irreversible harm to our life support systems and aggravating poverty and inequalities as well as hunger and malnutrition.[6]

This paper generally discusses the role of biodiversity in the quest for achieving sustainable development agenda. Considering that biodiversity is a term used to refer to the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part, it is arguably important to conserve the same since most, if not all, of the socio-economic needs required to fulfil the SDGs directly rely on healthy ecosystems.

---

[5]'Biodiversity and Health' <*https://www.who.int/news-room/fact-sheets/detail/biodiversity-and-health*> accessed 25 November 2021.
[6] Hub ISK, 'Leaders' Pledge for Nature Commits to Reverse Biodiversity Loss by 2030 | News | SDG Knowledge Hub | IISD' <*https://sdg.iisd.org:443/news/leaders-pledge-for-nature-commits-to-reverse-biodiversity-loss-by-2030/*> accessed 25 November 2021.

2. Linking Biodiversity Conservation and Sustainable Development Goals

Notably, the unusual rates of biodiversity loss, coupled with rising human population and consumption rates, threaten the sustainability of Earth's life support systems.[7] It has been observed that rapid environmental change has resulted in reshaping ecosystems and increased species loss globally.[8] Sustainable development goals (SDGs) set the 2030 agenda to transform the world by tackling multiple challenges humankind is facing to ensure well-being, economic prosperity, and environmental protection, thus providing a holistic and multidimensional view on development.[9]

Biodiversity and ecosystems feature prominently across many of the Sustainable Development Goals (SDGs) and associated targets.[10] They contribute directly to human well-being and development priorities, where biodiversity is at the centre of many economic activities, particularly those related to crop and livestock agriculture, forestry, and fisheries and globally, nearly half of the human

[7] Cavender-Bares, J., Heffernan, J., King, E., Polasky, S., Balvanera, P. and Clark, W.C., 'Sustainability and Biodiversity' in Simon A Levin (ed), *Encyclopedia of Biodiversity (Second Edition)* (Academic Press 2013) <*https://www.sciencedirect.com/science/article/pii/B9780123847195003907*> accessed 12 September 2021.

[8] Smith, M.M., Gilbert, J.H., Olson, E.R., Scribner, K.T., Van Deelen, T.R., Van Stappen, J.F., Williams, B.W., Woodford, J.E. and Pauli, J.N., 'A Recovery Network Leads to the Natural Recolonization of an Archipelago and a Potential Trailing Edge Refuge' n/a Ecological Applications e02416.

[9] Pradhan, P., Costa, L., Rybski, D., Lucht, W. and Kropp, J.P., 'A Systematic Study of Sustainable Development Goal (SDG) Interactions' (2017) 5 Earth's Future 1169.

[10] Schultz, M., Tyrrell, T.D. and Ebenhard, T., "The 2030 Agenda and Ecosystems-A discussion paper on the links between the Aichi Biodiversity Targets and the Sustainable Development Goals." *SwedBio at Stockholm Resilience Centre, Stockholm, Sweden* (2016).

population is directly dependent on natural resources for its livelihood, and many of the most vulnerable people depend directly on biodiversity to fulfil their daily subsistence needs.[11]

Regarding SDG 1 on ending poverty in all its forms everywhere, biodiversity provides resources and income, particularly for the rural poor. Ecosystem services and other non- marketed goods make up between 50% and 90% of the total source of livelihoods among poor rural and forest-dwelling households.[12]

The *2030 Agenda for Sustainable Development*, under Goal 2, aims to end hunger, achieve food security and improved nutrition and promote sustainable agriculture:- *By 2030, end hunger and ensure access by all people, in particular the poor and people in vulnerable situations, including infants, to safe, nutritious and sufficient food all year round; By 2030, double the agricultural productivity and incomes of small-scale food producers, in particular women, indigenous peoples, family farmers, pastoralists and fishers, including through secure and equal access to land, other productive resources and inputs, knowledge, financial services, markets and opportunities for value addition and non-farm employment; By 2030, ensure sustainable food production systems and implement resilient agricultural practices that increase productivity and production, that help maintain ecosystems, that strengthen capacity for adaptation to climate change, extreme weather, drought, flooding and other disasters and that progressively improve land and soil quality; By 2020, maintain the genetic diversity of seeds, cultivated plants and farmed and domesticated animals and their related wild species, including through soundly managed and*

[11] Secretariat of the Convention on Biological Diversity, Biodiversity and the 2030 Agenda for Sustainable Development, available at: *www.cbd.int/development/doc/biodiversity- 2030-agenda-policy-brief-en.pdf* accessed 12 September 2021.
[12] Ibid.

diversified seed and plant banks at the national, regional and international levels, and promote access to and fair and equitable sharing of benefits arising from the utilization of genetic resources and associated traditional knowledge, as internationally agreed; increase investment, including through enhanced international cooperation, in rural infrastructure, agricultural research and extension services, technology development and plant and livestock gene banks in order to enhance agricultural productive capacity in developing countries, in particular least developed countries.

The *CBD Aichi Target 13* states that countries should ensure: by 2020, the genetic diversity of cultivated plants and farmed and domesticated animals and of wild relatives, including other socio-economically as well as culturally valuable species, is maintained, and strategies have been developed and implemented for minimizing genetic erosion and safeguarding their genetic diversity.

One of the aims of the Programme of Work on Agricultural Biological Diversity is to promote the fair and equitable sharing of benefits arising out of the use of genetic resources.[13] Whilst the CBD refers to the concept of benefit sharing in the context of the use of genetic resources[14] a number of CBD decisions make reference to benefit sharing that is not confined to genetic resources[15] , including CBD Decision VII/11 which refers to "the equitable sharing of benefits derived from the use of *biodiversity*"[16] (emphasis added). The concept of benefit sharing is linked to traditional knowledge.[17]

[13] CBD Decision III/11, para. 1.
[14] CBD Arts. 1 and 15.
[15] Schroeder, Doris, "Benefit sharing: it's time for a definition," *Journal of medical ethics*, Vol. 33, no. 4 (2007), pp. 205-209, p. 205.
[16] CBD Decision VII/11, Annex I, annotations to rationale to Principle 10.
[17] The CBD calls for the parties to encourage the equitable sharing of the benefits arising from the utilisation of the knowledge, innovations and practices of indigenous and local communities (CBD, Article 8(j)).

CBD Decision XIII/15 called for Parties to develop and implement incentives for farmers and indigenous peoples and local communities to protect pollinators and pollinator habitats, for example through benefit-sharing schemes, including payments for pollinator services schemes.[18]

As regards relevant international instruments, the *International Treaty on Plant Genetic Resources for Food and Agriculture*, (ITPGRFA) states that the Contracting Parties should take measures to protect and promote farmers' rights, including the right to equitably participate in sharing benefits arising from the utilization of plant genetic resources for food and agriculture.[19]

The *Voluntary Principles* provide that responsible investment in agriculture and food systems respects traditional knowledge by, among other things, promoting fair and equitable sharing of benefits arising from the utilization of genetic resources for food and agriculture and that this should be done within applicable systems of access to genetic resources for food and agriculture, while respecting the rights of indigenous peoples and local communities under national law.[20]

In order to achieve SDG 3 on ensuring healthy lives and promoting well-being for all at all ages, healthy ecosystems help mitigate the spread and impact of pollution by both sequestering and eliminating certain types of air, water and soil pollution.[21]

---

[18] CBD Decisión XIII/15, para. 7(q).
[19] ITPGRFA, Article 9.2(b).
[20] Principles for Responsible Investment in Agriculture and Food Systems provides, Principle 7, para. 27.
[21] Lajaunie C and Morand S, 'Biodiversity Targets, SDGs and Health: A New Turn after the Coronavirus Pandemic?' (2021) 13 Sustainability 4353.

SDG 5 requires countries to achieve gender equality and empower all women and girls. The targets therein are, *inter alia*: ensuring women's full and effective participation and equal opportunities for leadership at all levels of decision-making in political, economic and public life; undertaking reforms to give women equal rights to economic resources, as well as access to ownership and control over land and other forms of property, financial services, inheritance and natural resources, in accordance with national laws; and adopting and strengthen sound policies and enforceable legislation for the promotion of gender equality and the empowerment of all women and girls at all levels.[22]

The CBD, in its preamble, recognizes "the vital role that women play in the conservation and sustainable use of biological diversity and affirms the need for the full participation of women at all levels of policy-making and implementation for biological diversity conservation."[23]

Healthy ecosystems can go a long way in achieving SDG 6 which seeks to ensure the availability and sustainable management of water and sanitation for all.[24]

---

[22] 'Sustainable Development Goal 5: Gender Equality' (*UN Women*) <*https://www.unwomen.org/en/news/in-focus/women-and-the-sdgs/sdg-5-gender-equality*> accessed 15 September 2021.

[23] UN Women, "Towards a gender-responsive post-2020 global biodiversity framework: Imperatives and Key Components", *A submission by the United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women) as an input to the development of the post-2020 global biodiversity framework, 1 May 2019.*

[24] Environment UN, 'GOAL 6: Clean Water and Sanitation' (*UNEP - UN Environment Programme*, 2 June 2021) <*http://www.unep.org/explore-topics/sustainable-development-goals/why-do-sustainable-development-goals-matter/goal-6*> accessed 13 September 2021.

Biodiversity and ecosystems underpin many national and global economic activities, including those related to agriculture, forestry, fisheries and aquaculture, energy, tourism, transport and trade, and as such, biodiversity conservation and sustainable use can lead to higher productivity, more efficient resource use, and long-term viability of resources thus helping in achievement of SDG 8 which seeks to promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all.[25] More importantly, SDG 15 is dedicated to "*protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss*".[26]

Being the supreme law of the land, the Constitution of Kenya sets a favourable environment for legislative protection of biodiversity. This is seen in Chapter Five on Land and the Environment, where there is the emphasis on sustainable use of land and other natural resources, including biodiversity as a key principle.[27] There is also the establishment of the National Land Commission, mandated to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities.

Article 69 of the Constitution remains relevant in the quest for biodiversity conservation especially in relation to the obligations of

---

[25] Secretariat of the Convention on Biological Diversity, Biodiversity and the 2030 Agenda for Sustainable Development, available at: *www.cbd.int/development/doc/biodiversity- 2030-agenda-policy-brief-en.pdf* accessed 12 September 2021.

[26] 'Biodiversity and Ecosystems.:. Sustainable Development Knowledge Platform'
<*https://sustainabledevelopment.un.org/topics/biodiversityandecosystems*>
accessed 13 September 2021.

[27] The Constitution of Kenya 2010, Article 60, 69.

the State in respect of the environment and natural resources management. It is comprehensive, addressing a number of cross-sectoral biodiversity concerns outlined by the CBD including issues of benefit sharing, traditional knowledge, elimination of activities harmful to biodiversity and the role of the community in conservation and sustainable use of biodiversity. Article 69(1) provides that: -

> *the State shall— (a) ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; (c) protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities; (h) utilise the environment and natural resources for the benefit of the people of Kenya.*

Mainstreaming of biodiversity into different economic activities is considered necessary to both halt biodiversity loss and achieve the SDGs.[28] The highly interconnected SDGs will only be achieved in their entirety through transformative changes in our societies.[29]

The Constitution also designates sustainable development as a national principle which is binding on all State organs, State officers, public officers and all persons.[30] In addition, it places an obligation upon the State to recognize the role of science and indigenous

[28] Hub ISK, 'Policy Brief: Why Biodiversity Matters: Mapping the Linkages between Biodiversity and the SDGs | SDG Knowledge Hub | IISD' <*https://sdg.iisd.org:443/commentary/policy-briefs/why-biodiversity-matters-mapping-the-linkages-between-biodiversity-and-the-sdgs/*> accessed 13 September 2021.
[29] Obrecht A and others, 'Achieving the SDGs with Biodiversity' (2021) 16 11.
[30] The Constitution of Kenya 2010, Article 10 (2) (d).

technologies in the development of the nation[31]. It goes further to mandate Parliament to enact legislation to ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage; and legislation to recognise and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya.

Notably, the political leaders participating in the United Nations Summit on Biodiversity in September 2020, representing 93 countries from all regions, and the European Union, committed to reversing biodiversity loss by 2030, same year SDGs are to be achieved.[32] As part of the UN Decade of Action to achieve sustainable development, the leaders at the Summit committed to achieve the vision of Living in Harmony with Nature by 2050 by undertaking, *inter alia*: mainstreaming biodiversity into relevant sectoral and cross-sectoral policies at all levels, including in food production, agriculture, fisheries and forestry, energy, tourism, infrastructure and extractive industries, and trade and supply chains, as well as into key international agreements and processes.[33]

In addition, in the 26th Conference of the Parties (or COP) to the UN Framework Convention on Climate Change (COP 26) Declaration on Forests and Land Use, the world leaders emphasised the critical and interdependent roles of forests of all types, biodiversity and sustainable land use in enabling the world to meet its sustainable development goals; to help achieve a balance between anthropogenic greenhouse gas emissions and removal by sinks; to adapt to climate

[31] Ibid, Article 11 (2) (b).
[32] 'Leaders' Pledge for Nature' (*Leaders Pledge for Nature*) <*https://www.leaderspledgefornature.org/*> accessed 25 November 2021.
[33] Ibid.

change; and to maintain other ecosystem services.[34] Notably, the COP26 presidency, held by the U.K., themed the summit around a "Nature Campaign" that advocates for ecosystem and biodiversity conservation serving as the foundation for transforming food and agriculture systems to become more sustainable.[35]

A World Wide Fund for Nature (WWF) 2021 Report titled *NDCs - A Force for Nature?*, and which was presented at COP 26 found that countries have started embracing nature based solutions in climate adaptation responses through their Nationally Determined Contributions (NDCs), country climate pledges under the Paris Agreement, where there was an increase from 82% to 92% of NDCs that included nature: 105 out of 114 (92%) of enhanced NDCs include nature-based solutions (NbS): 96 in the context of mitigation measures, 91 in the context of adaptation plans, with an overlap of 82 in both mitigation and adaptation.[36] For instance, *Kenya's Updated Nationally Determined Contribution (NDC) and JCM Activities*, submitted on 28th December, 2020, captures mitigation measures which include: making progress towards achieving a tree cover of at least 10% of the land area of Kenya; making efforts towards achieving land degradation neutrality; scaling up Nature Based Solutions (NBS) for mitigation; and enhancement of REDD+ activities, among

---

[34] 'Glasgow Leaders' Declaration on Forests and Land Use' (UN Climate Change Conference (COP26) at the SEC – Glasgow 2021, 2 November 2021) <*https://ukcop26.org/glasgow-leaders-declaration-on-forests-and-land-use/*> accessed 25 November 2021.

[35] 'Nature-Based Solutions at Center of COP26 Discussions' (*Landscape News*, 10 November 2021) <*https://news.globallandscapesforum.org/55761/nature-has-its-moment-at-the-center-of-cop26-discussions/*> accessed 25 November 2021.

[36] 'More Countries Including Nature in Their Climate Action Plans, but Step Change Still Needed To' <*https://wwf.panda.org/wwf_news/?4248391/NDCsreport*> accessed 25 November 2021.

others.[37] Nature-based Solutions are defined as 'actions to protect, sustainably manage, and restore natural and modified ecosystems that address societal challenges effectively and adaptively, simultaneously providing human well-being and biodiversity benefits'.[38]

3. Conclusion

At the United Nations Summit on Biodiversity 2020, the political leaders acknowledged that our societies are intimately linked with and depend on biodiversity and its loss and the degradation of its contributions to people jeopardize progress towards the Sustainable Development Goals (SDGs) and human wellbeing.[39]

Arguably, successful efforts to meet the needs of current and future generations will require a global perspective that considers the complex relationships between biodiversity, poverty, and equity as well as a progressive perspective that considers the nonlinear dynamics and potential tipping points in human and Earth systems.[40] It has been observed that the broader role of biodiversity and ecosystem function and the need to address drivers and pressures in order to maintain the flow of ecosystem services includes raising

---

[37] Republic of Kenya, *Kenya's Updated Nationally Determined Contribution (NDC) and JCM Activities*, 28th December, 2020.

[38] 'COP26: SDG or NDC? Our Guide to the Language You Need to Know' (*UN News*, 26 October 2021) <*https://news.un.org/en/story/2021/10/1104022*> accessed 25 November 2021.

[39] 'United Nations Summit on Biodiversity --30 September 2020' (*Convention on Biological Diversity*) <*https://www.cbd.int/article/2020-UN-Biodiversity-Summit*> accessed 25 November 2021.

[40] Cavender-Bares, J., Heffernan, J., King, E., Polasky, S., Balvanera, P. and Clark, W.C., 'Sustainability and Biodiversity' in Simon A Levin (ed), *Encyclopedia of Biodiversity (Second Edition)* (Academic Press 2013) <*https://www.sciencedirect.com/science/article/pii/B9780123847195003907*> accessed 12 September 2021.

awareness of the values of biodiversity, effectively addressing perverse incentives, pollution, the concept of safe ecological limits within sustainable use, and the breadth of roles of traditional knowledge, culture and practices.[41]

Biodiversity has been identified as essential for sustainable development and human well-being as it underpins the provision of food and water; it mitigates and provides resilience to climate change; it supports human health, and provides jobs in agriculture, fisheries, forestry and many other sectors. Without effective measures to conserve biodiversity and use its components in a sustainable manner, the 2030 Agenda for Sustainable Development will not be achievable.

[41] Schultz, M., Tyrrell, T.D. and Ebenhard, T., "The 2030 Agenda and Ecosystems-A discussion paper on the links between the Aichi Biodiversity Targets and the Sustainable Development Goals." *SwedBio at Stockholm Resilience Centre, Stockholm, Sweden* (2016), 4.

References

'Biodiversity and Ecosystems.:. Sustainable Development Knowledge Platform' <*https://sustainabledevelopment.un.org/topics/biodiversityandecosystems*> accessed 13 September 2021.

'Biodiversity and Health' <*https://www.who.int/news-room/fact-sheets/detail/biodiversity-and-health*> accessed 25 November 2021.

'COP26: SDG or NDC? Our Guide to the Language You Need to Know' (*UN News*, 26 October 2021) <*https://news.un.org/en/story/2021/10/1104022*> accessed 25 November 2021.

'Glasgow Leaders' Declaration on Forests and Land Use' (UN Climate Change Conference (COP26) at the SEC – Glasgow 2021, 2 November 2021) <*https://ukcop26.org/glasgow-leaders-declaration-on-forests-and-land-use/*> accessed 25 November 2021.

'Leaders' Pledge for Nature' (*Leaders Pledge for Nature*) <*https://www.leaderspledgefornature.org/*> accessed 25 November 2021.

'More Countries Including Nature in Their Climate Action Plans, but Step Change Still Needed to' <*https://wwf.panda.org/wwf_news/?4248391/NDCsreport*> accessed 25 November 2021.

'Nature-Based Solutions at Center of COP26 Discussions' (*Landscape News*, 10 November 2021) <*https://news.globallandscapesforum.org/55761/nature-has-its-moment-at-the-center-of-cop26-discussions/*> accessed 25 November 2021.

'Sustainable Development Goal 5: Gender Equality' (*UN Women*) <*https://www.unwomen.org/en/news/in-focus/women-and-the-sdgs/sdg-5-gender-equality*> accessed 15 September 2021.

'United Nations Summit on Biodiversity --30 September 2020' (*Convention on Biological Diversity*) <*https://www.cbd.int/article/2020-UN-Biodiversity-Summit*> accessed 25 November 2021.

Basiago AD, 'Economic, Social, and Environmental Sustainability in Development Theory and Urban Planning Practice' (1998) 19 Environment Systems and Decisions 145.

Cavender-Bares, J., Heffernan, J., King, E., Polasky, S., Balvanera, P. and Clark, W.C., 'Sustainability and Biodiversity' in Simon A Levin (ed), *Encyclopedia of Biodiversity (Second Edition)* (Academic Press 2013) <*https://www.sciencedirect.com/science/article/pii/B9780123847195003907*> accessed 12 September 2021.

Cavender-Bares, J., Heffernan, J., King, E., Polasky, S., Balvanera, P. and Clark, W.C., 'Sustainability and Biodiversity' in Simon A Levin (ed), *Encyclopedia of Biodiversity (Second Edition)* (Academic Press 2013) <*https://www.sciencedirect.com/science/article/pii/B9780123847195003907*> accessed 12 September 2021.

Environment UN, 'GOAL 6: Clean Water and Sanitation' (*UNEP - UN Environment Programme*, 2 June 2021) <*http://www.unep.org/explore-topics/sustainable-development-goals/why-do-sustainable-development-goals-matter/goal-6*> accessed 13 September 2021.

Hub ISK, 'Leaders' Pledge for Nature Commits to Reverse Biodiversity Loss by 2030 | News | SDG Knowledge Hub | IISD'

<*https://sdg.iisd.org:443/news/leaders-pledge-for-nature*-commits-to-*reverse-biodiversity-loss-by-2030/*> accessed 25 November 2021.

Lajaunie C and Morand S, 'Biodiversity Targets, SDGs and Health: A New Turn after the Coronavirus Pandemic?' (2021) 13 Sustainability 4353.

Limited BPPC, 'Biodiversity Dividend' *Bangkok Post* <*https://www.bangkokpost.com/business/2165927/biodiversity-dividend*> accessed 26 August 2021.

Obrecht, A., Pham, M., Spehn, E., Payne, D., Brémond, A.C., Altermatt, F., Fischer, M., Passarello, C., Moersberger, H., Schelske, O. and Guntern, J., 'Achieving the SDGs with Biodiversity' (2021) 16.

Pradhan, P., Costa, L., Rybski, D., Lucht, W. and Kropp, J.P., 'A Systematic Study of Sustainable Development Goal (SDG) Interactions' (2017) 5 Earth's Future 1169.

Republic of Kenya, Constitution of Kenya 2010.

Republic of Kenya, *Kenya's Updated Nationally Determined Contribution (NDC) and JCM Activities*, 28th December, 2020.

Schroeder, Doris, "Benefit sharing: it's time for a definition," *Journal of medical ethics*, Vol. 33, no. 4 (2007), pp. 205-209.

Schultz, M., Tyrrell, T.D. and Ebenhard, T., "The 2030 Agenda and Ecosystems-A discussion paper on the links between the Aichi Biodiversity Targets and the Sustainable Development Goals." *SwedBio at Stockholm Resilience Centre, Stockholm, Sweden* (2016).

Secretariat of the Convention on Biological Diversity, *Biodiversity and the 2030 Agenda for Sustainable Development*, available at: *www.cbd.int/development/doc/biodiversity- 2030-agenda-policy-brief-en.pdf* accessed 12 September 2021.

Smith, M.M., Gilbert, J.H., Olson, E.R., Scribner, K.T., Van Deelen, T.R., Van Stappen, J.F., Williams, B.W., Woodford, J.E. and Pauli, J.N., 'A Recovery Network Leads to the Natural Recolonization of an Archipelago and a Potential Trailing Edge Refuge' n/a Ecological Applications e02416.

Stephen Polasky, Catherine L. Kling, Simon A. Levin, Stephen R. Carpenter, Gretchen C. Daily, Paul R. Ehrlich, Geoffrey M. Heal, Jane Lubchenco, 'Role of Economics in Analyzing the Environment and Sustainable Development' (2019) 116 Proceedings of the National Academy of Sciences 5233.

UN Women, "Towards a gender-responsive post-2020 global biodiversity framework: Imperatives and Key Components", *A submission by the United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women) as an input to the development of the post-2020 global biodiversity framework, 1 May 2019.*

United Nations Environment Programme, 'Biodiversity and the Sustainable Development Goals,' *CBD Press Brief*, Secretariat of the Convention on Biological Diversity <*www.cbd.int/development/doc/biodiversity-2030-agenda-policy-brief-en.pdf*> 31 July 2021.

The Complex Interplay of State and Religion: Exploring The Dynamics and Implications for Modern Society

Kenneth Wyne Mutuma*

Abstract

The relationship between state and religion has been a complex and dynamic issue throughout history. This paper explores the interplay between these two entities and their implications for modern society. It examines how the relationship between state and religion has evolved over time and how it varies across different cultures and regions. It also analyzes the different ways in which religion and state can interact, including separation, cooperation, and conflict; and the challenges that arise when the two entities clash including religious extremism, discrimination, and human rights violations. Notably, the interplay between state and religion affects issues such as governance, education, social cohesion, and cultural identity. Therefore, it is crucial to understand the dynamics of this relationship and to develop policies that promote mutual respect, tolerance, and inclusion. In conclusion, the paper emphasizes the need for a nuanced and balanced approach to the relationship between state and religion. It highlights the importance of promoting pluralism, diversity, and freedom of religion while also ensuring that the state remains neutral and impartial in matters of belief.

Key words: *state, religion, human rights, discrimination, law, capture phenomenon*

* ***Dr. Kenneth W. Mutuma is an advocate of the High Court of Kenya and a senior lecturer at the University of Nairobi. He holds a PhD (Cape Town), LLM (Cape Town) and LLB (Liverpool). He also has extensive academic and practical knowledge in Alternative Dispute Resolution (ADR), Human Rights Law, International Law, Refugee Law, and Humanitarian Law.***

1.0 Introduction

Throughout history, the relationship between the state and religion has been complex and often contentious. From theocracies to secular democracies, the interplay between these two powerful institutions has shaped the course of human societies and their values. In recent years, the debate around the role of religion in public life has become increasingly salient, with issues such as religious freedom, tolerance, and extremism at the forefront of public discourse.[1] Understanding the dynamics and implications of this relationship is critical for policymakers, scholars, and individuals alike, as it has profound implications for the way we structure our societies, express our beliefs, and coexist with those who hold different opinions. This is because the relationship between these two institutions can affect the enjoyment of fundamental rights and freedoms such as the freedom of association, expression and the right to religion.[2] This paper aims to explore this interplay between state and religion, tracing its historical roots from medieval Europe to America, examining contemporary examples such as the Netherlands and the Kenyan context, and analyzing the theoretical framework surrounding this concept, as well as the capture phenomenon. This paper concludes by recommending a three-pronged test to assess whether state actions ensure that the relationship between the state and religion is balanced.

---

[1] Matteo Bonotti and Jonathan Seglow, 'Introduction: Religion and Public Life' (2017) 17 *Ethnicities* 141 *https://www.jstor.org/stable/pdf/26413943.pdf?refreqid=excelsior%3Acb05f7436b8139db7b88cff43b228694&ab_segments=0%2Fbasic_search_gsv2%2Fcontrol&origin=&initiator=* accessed 16 May 2023

[2] Paolo Carozza, "The Catholic Church, Human Rights and Democracy: Convergence and Conflict with the Modern State" (2012) 15 *Logos: A Journal of Catholic Thought and Culture* 3 pp.15-43 *https://doi.org/10.1353/log.2012.0023* accessed 05/16/2023

2.0 Historical Context

Medieval Europe was characterized by papal influence in state affairs.[3] This began when the Catholic church spread Christianity all through the Roman Empire as early as the third century and the religion crystallized following the legalization (Christians became free from persecution) of Christianity by Emperor Constantine 1 through the edict of Milan.[4] This was followed ten years later by Emperor Theodosius who made Christianity the religion of the Roman state.[5] Roman authorities required all persons to participate in the imperial religion, creating an allure of a universal empire, under one faith.[6] The union of the church and the state resulted in the centralization of political affairs and the church's insistence in exercising absolute control over wealth.[7] The church was often involved in political affairs and had significant influence over rulers and governments.[8] This influence was partly due to its role in crowning monarchs and anointing them as God's chosen leaders. The Catholic Church in Western Europe also controlled large tracts of land and was arguably the largest landowner in Europe.[9] A tenth of

---

[3] Walter A. Phillips, "Episcopacy" In Chisholm, Hugh (ed.). *Encyclopaedia Britannica.* Vol. 9 (11th ed., Cambridge University Press, 1911) 699-701.
[4] The edict was issued together with the eastern emperor, Licinius National Geographic, "Who was Constantine?" (2019)
[5] Michele Salzman, "The Evidence for the Conversion of the Roman Empire to Christianity in Book 16 of the "Theodosian Code" 1993
[6] Brent Nelsen and James Guth, "Roman Catholicism and the Founding of Europe: How Catholics Shaped the European Communities" (2003)
[7] Ibid note 3
[8] Ibid note 3
[9] Medieval Europe: Church History *https://www.timemaps.com/encyclopedia/medieval-europe-church-history/#:~:text=The%20Catholic%20Church%20of%20Western%20Europe&text=It%20controlled%20vast%20amounts%20of,advisors%20to%20kings%20and%20emperors.* accessed 10/17/2022

the income was paid by the people to the church every year.[10] In addition, churchmen had a virtual monopoly on learning and education.[11] Kings and emperors sought the advice of bishops and abbots.[12]

The church became a large propaganda machine with exclusive jurisdiction even over matters such as adultery, bigamy, matrimonial cases and failure to perform oaths.[13] All these were dealt with under Canon law as opposed to secular law in a court. The church's overwhelming power enabled it to command armies, form allies and foes in politics, and wage wars.[14] The church collected taxes from the populace and made money selling indulgences to everyone from royalty to peasants.[15] It also played a significant role in structuring medieval society. The clergy occupied the top rung of the social ladder, and church hierarchy determined people's social status. In addition, the church was the primary source of education during the medieval times.[16] Monasteries and religious institutions were centers of learning, and many scholars and intellectuals were members of the clergy.[17] The church's influence on education helped spread literacy and knowledge throughout Europe.

---

[10] Charles Curran, "Just Taxation in the Roman Catholic Tradition" 1985
[11] Joseph Holden, "The Church and Education" 1929
[12] Bruce Bueno de Mesquita, "Popes, Kings, and Endogenous Institutions: The Concordat of Worms and the Origins of Sovereignty" 2000
[13] Ibid note 9
[14] History of the Medieval Church *https://study.com/academy/lesson/history-of-the-church-in-the-middle-ages.html* accessed 10/17/2022
[15] Charles Curran, "Just Taxation in the Roman Catholic Tradition" 1985
[16] Joseph Holden, "The Church and Education" 1929
[17] John Nelson Miner, "Schools and Literacy in Later Medieval England" British Journal of Educational Studies
Vol. 11, No. 1 (Nov., 1962), pp. 16-27

In the United States, the establishment clause in the First Amendment was intended to separate the church from the State. [18] This amendment states that Congress shall not make any law respecting the establishment of a religion or prohibiting its free exercise.[19] The First Amendment's Establishment Clause prohibits the government from creating an official religion or favoring one religion over another. This has led to a clear separation between religion and government in the United States, which has allowed individuals to practice their faith without interference. It has also created a state of religious pluralism since the protection of religious freedom has allowed for a diverse range of religious beliefs and practices to flourish in the country.[20]

An example of a country that allows for religious pluralism is the Netherlands. In the Netherlands, religious freedom is protected by law and is considered a fundamental human right.[21] This means that individuals have the right to freely practice their religion or belief without fear of discrimination or persecution. The Dutch Constitution guarantees freedom of religion and the right to worship or not to worship as one chooses.[22] This includes the right to form and join religious organizations,[23] to teach and practice religious beliefs, and

[18] Thomas Jefferson to Nehemiah Dodge, Ephraim Robbins, & Stephen S. Nelson, a committee of the Danbury Baptist association in the state of Connecticut., 'Jefferson's Letter to the Danbury Baptists' (1 January 1802) <*https://www.loc.gov/loc/lcib/9806/danpre.html*>accessed 16 May 2023
[19] Melissa Rogers, "Religious Freedom in the United States" (2004) International Journal Vol. 59 pp. 902-910
[20] Ted Jelen, "The Constitutional Basis of Religious Pluralism in the United States: Causes and Consequences" 2007
[21] Jeremy Banks, "Dutch Contributions to Religious Toleration" 2010
[22] Article 6.1 of the Constitution of the Kingdom of Netherlands, 2018
[23] Article 8 of the Constitution of the Kingdom of Netherlands, 2018

to express one's beliefs publicly or privately. The government of the Netherlands recognizes a number of religions and provides support for religious communities. For example, the government provides financial support for the construction and maintenance of religious buildings and religious organizations are eligible for tax exemptions.[24] At the same time, the Netherlands is a secular country that separates religion from the state.[25] This means that while the government respects and protects religious freedom, it does not endorse any particular religion or impose religious beliefs on its citizens.[26]

Historically, the meaning of establishment was presumed to be directed to state-sponsored churches such as the Church of England. Today, the establishment of religion is governed by a three-pronged test which was developed in *Lemon v. Kurtzman (1971)*[27] by the US Supreme Court. The 'lemon test' as its often referred to assumes that the government can only assist religion if the primary purpose of the assistance is secular. This means that the action must have a non-religious purpose and cannot be primarily motivated by a religious purpose. The second limb of the test is if the assistance neither promotes and advances nor discourages and inhibits religion. The third prong is where there is no excessive entanglement between the State and the Church. The government should not become too involved in religious matters nor religion in government affairs.

[24] 2021 Report on International Religious Freedom: Netherlands *https://www.state.gov/reports/2021-report-on-international-religious-freedom/netherlands/* accessed 03/17/2023
[25] Hans Knippenberg, "The changing relationship between state and church/religion in the Netherlands" 2006
[26] Ibid
[27] 403 U.S. 602

Excessive entanglement can take many forms, such as the government providing direct financial support to religious organizations, regulating the internal affairs of religious organizations, or giving preference to one religion over another.[28]

The first use of the term 'wall of separation' metaphor was by Roger Williams, an early American theologian and founder of Rhode Island. Williams used the phrase to describe the concept of the separation of church and state, which he believed was necessary to protect both religious liberty and civil government.[29] In 1802, Thomas Jefferson then wrote to Danbury Baptist Association on how the First Amendment created a 'wall of separation between church and State'.[30] The Supreme Court cited Jefferson's letter in key cases such as the 1947 polygamy case of *Everson v Board of Education*,[31] creating a direct nexus between the 'wall of separation' concept and the establishment clause.[32] Later on, James Madison and Thomas Jeffery, American presidents, developed the concept further by standing against the notion of compelling the citizens to support the Anglican

[28] Bryan K. Fair, "Excessive entanglement of Politics, Law and Religion" Journal of Law and Religion
Vol. 26, No. 1 (2010-2011) 371-380

[29] Joseph M. Dawson, "The meaning of separation of church and state in the first amendment" (1959) Journal of Church and State vol. 1 no. 1 37-42

[30] Ben Voth, "A case study in metaphor as argument: a longitudinal analysis of the wall separating Church and State" 1998

[31] 330 US 1

[32] See also the case of *Engel vs Vitale (1962)* where the Supreme Court struck down a New York state law that authorized a daily prayer in public schools. The Court held that the law violated the Establishment Clause of the First Amendment, which prohibits the government from establishing an official religion.

church through taxation.[33] They averred that that support infringed on their religious liberty and this position was supported by the Presbyterians, Baptists, Quakers and other dissenting denominations.[34]

3.0 The Kenyan Context

The preamble of the Constitution of Kenya begins by acknowledging the supremacy of the Almighty God of all creation.[35] This inclusion of the reference to God in the preamble acknowledges the importance of religion and spirituality to many Kenyans. The Constitution then goes ahead to assert in Article 8 that there shall be no state religion. By making this declaration, the Constitution is affirming that it will remain neutral with respect to religion and will not promote or favor any particular belief. This allows individuals to practice their own religion or none at all, without fear of discrimination or persecution by the government. However, upon a keen analysis of the provisions, there seems to be an inconsistency in whether the law endorses certain religious beliefs on one hand, or explicitly makes Kenya a secular state.

The Constitution seems not to impose a state religion by protecting the freedom of religion, belief and conscience in Article 32; and promoting incidental freedoms such as freedom of expression in Article 33; freedom of the media in Article 34 and freedom of association in Article 36. Any religious group, institution, or faith-

[33] William Lorigan, "The Supreme Court, the establishment clause, and the First Amendment" 2013
[34] Virginia Statute for Religious Freedom
https://billofrightsinstitute.org/essays/virginia-statute-for-religious-freedom
accessed 03/17/2023
[35] The Preamble, Constitution of Kenya 2010

based non-governmental organizations is allowed to register as a society. The Constitution also prohibits discrimination on the grounds of religion or belief. Article 27 states that every person is equal before the law and has the right to equal protection and benefit of the law without discrimination, and this includes discrimination on the basis of religion or belief.

The reality in Kenya, however, is that a majority of the people subscribe to certain religious beliefs with 85.52% of the people claiming Christianity, 11% Islam, and less than 2% being Hindus, Sikhs, Baha'is and those that follow the African Traditional Religion.[36] Religion has played a vital role in Kenyan society, including in politics.[37] Since Kenya's independence, the church has been the main opponent of Presidents Jomo Kenyatta and Daniel Arap Moi's closed political systems.[38] During this era, the church was very critical of the rampant extrajudicial killings, corruption cases, pitting ethnic groups against each other, oath-taking and election rigging.[39] Prior to the multi-party elections in 1992, it had tacitly positioned itself as an active participant in politics as and the sole institution that spoke on behalf of the people.[40] It was also involved in sustaining and holding public discourses on democratic processes and changes in Kenya at

[36] '2020 Report on International Religious Freedom: Kenya' US Department of State *https://www.state.gov/reports/2021-report-on-international-religious-freedom/kenya/* accessed 03/14/2023

[37] Catherine Kenga, "The role of religion in politics and governance in Kenya" 2014

[38] George Nyongesa, "On the relationship between Church and State in Kenya since Independence"

[39] Paul Gifford, "Christianity, Politics and Public Life in Kenya" 2009

[40] Galia Sabar-Friedman, "Church and State in Kenya, 1986-1992: The Churches' Involvement in the 'Game of Change" African Affairs Vol. 96, No. 382 (Jan., 1997) 25-52

the grass-root level.[41] However, this involvement dwindled upon President Mwai Kibaki's ascension into power.[42] During the 2002 national elections, the churches were less conspicuous but unquestionably on Kibaki's side.[43] For instance, the National Council of Churches in Kenya and the Anglican Church of Kenya who were at the forefront of criticizing previous regimes, suddenly abdicated their duties.[44] Observers also noticed the troubling tendency of the unwillingness to criticize Kibaki's administration even after the new NARC coalition crumbled due to Kibaki's refusal to uphold a pre-election memorandum of understanding after the 2002 general elections.[45] This was accompanied by rising accusations of tribalism, massive corruption claims such as those surrounding the Anglo-Leasing scandal and many other similar injustices.[46]

Manifestation of religion within the state can be noted in the National Anthem, which is a symbol of national unity, where it begins with "O God of all creation…" Another illustration of the acknowledgement of God in public institutions is when state officers, taking an oath, conclude by stating "…so help me God". The government of Kenya also advances religion by employing chaplains and the clergy to serve in the military.[47] From this, it may be inferred that the state is

[41] Ibid
[42] Vincent Makokha, "The role of church in State and public affairs during the Kibaki era, 2002-2013" 2018 European Journal of Philosophy, Culture and Religion Vol.2, Issue 1 No.3 27 - 40
[43] Paul Gifford, "Christianity, Politics and Public Life in Kenya" 2009
[44] Ibid
[45] Mwenda Ntaragwi, "Exploring the social impact of Christianity in Africa" 2011
[46] Ibid
[47] Nairobi Law Monthly, "Why marriage between the State and Church must not happen" 5/2/2016

advancing religion; and a particular belief system for that matter. However, it is worth noting that individuals who do not believe in God or who belong to religions that do not recognize the Christian God can affirm oaths in Kenya without using the phrase "so help me God." The law allows for alternative forms of affirmation that are appropriate to an individual's beliefs.[48]

Severing the ties between state and religion is a lot more difficult than it seems. This is because religion in Kenya has intertwined with numerous public institutions and has become impactful in provision of education and healthcare. Many churches in Kenya operate hospitals and health clinics that provide medical services to the public.[49] These facilities offer a wide range of healthcare services, including preventive care, diagnostic tests, treatment, and rehabilitation. Churches also operate schools at all levels, from primary to tertiary education.[50] These schools provide quality education to students, often in areas where there are few public schools or where public education is of poor quality. Some church-operated schools are also known for providing scholarships to students who would otherwise be unable to afford education.[51] Churches have sponsored schools such as Precious Blood, Loreto Convent and St. Mary's Nairobi as well hospitals such as AIC Kijabe Hospital, Coptic Hospital and Mater Hospital. On the other hand,

[48] See section 15 of the Oaths and Affirmations Act (2012)

[49] Francis Barasa, "The Church and the Healthcare Sector in Kenya: A Functional Analysis of Its Development through Evangelization" (2020) International Journal of Innovative Science and Research Technology Volume 5, Issue 9,

[50] Ej van Niekerk and others, "Education and the role of the church in Africa: three relevant aspects" 2009

[51] Stephen Muoki Joshua, "The 'Church' as a 'Sponsor' of Education in Kenya: A historical review (1844-2016)" 2017

Muslims have also built schools such as Sheikh Khalifa Schools in Mombasa.

From the description given, the Kenyan society seems like a deeply religious group, whose imposition of secularism would call for a contentious detachment of religion from political institutions. Besides, the tenets of secularism are not clearly defined and are reliant on an opposition of religious beliefs. Thus, the proposition that Kenya is a secular state only exists in the law and to the extent that the legislation does not establish or support a particular religious path for its people. This is the sovereign will of the people articulated in the Constitution. However, it should be noted that the relationship between the state and religion exists on a spectrum, oscillating between extremes of an absolutely opposed state such as China and Albania (1970s-1980s) and another where there exists no distinction whatsoever and the state and religion merge in a theocracy.[52] Kenya exists within the model where the separation is perceived only theoretically, but the limits of intrusion from both ends are blurred in a practical analysis. This breeds a situation of 'a constitution without constitutionalism'; where the dictates of the law do not reflect the practical aspect of the lives of Kenyans and a subsequent problematic implementation of the same.

4.0 The Theoretical Framework and the Capture Phenomenon

Religion has influenced the development of law as seen in the theories of natural law and consequently, deontological ethics.[53] Most

[52] Winfried Brugger, "From animosity to recognition to identification: models of the relationship of church and state and the freedom of religion" (2009)

[53] Svend Andersen, "Theological Ethics, Moral Philosophy, and Natural Law" (2001)

Abrahamic religions such as Christianity, Islam and Judaism premise their faith in the belief of a divinity who is the source of morality and order.[54] This divine moral code is then replicated in daily lives and acts as a means of societal organization. Natural law is also discernible by human reasoning.[55] This theory posits that what is consistent with the natural law is right and just, and what is out of alignment is wrong.[56] This reasoning stems from rational deductions and the law of nature. Natural law refers to a set of moral principles or ethical norms that are believed to be inherent in the nature of human beings and the universe itself. [57] These principles are discernible by human reason because they are based on the observation of the natural world and the study of human nature.[58] According to this theory, natural law is not dependent on human conventions or cultural norms but is based on objective and universal principles that can be discovered through human reasoning.[59] These principles are seen as binding on all human beings regardless of their cultural, social, or historical context.

Regardless, both divine and human natural law are geared towards preservation of life and adherence to morals.[60] For instance, laws against homicide and assault are meant to protect human life and prevent harm to others. Similarly, laws against theft and fraud are meant to promote honesty and fairness, which are important moral

[54] John Hare, "Religion and Morality" 2006 The Stanford Encyclopedia of Philosophy
[55] George Constable, "Who Can Determine What the Natural Law Is" 1962
[56] Thomas Aquinas, "Summa Theologiae" 1981
[57] Marcus Aurelius, "Meditations" Translated by Francis Hutcheson and James Moor 2008
[58] Ibid note 55
[59] Ibid note 55
[60] Thomas Hobbes, "Leviathan" 1651

principles as well as fundamental religious teachings. Proponents of the divine natural law such as St. Thomas Aquinas stated that natural law is good for the preservation of life, marriage, and family.[61] This line of thought that human rights are inherently God-given is seen in the rights and freedoms provided in the Bill of Rights including those related to life,[62] and the institution of family and marriage.[63] The precepts of morality that are advocated for in the various religions are also captured in Article 10 of the Constitution that calls for equality, social justice, human rights, non-discrimination and protection of the marginalized.

This theory of natural law influences the relationship between state and religion by advocating for laws and policies that have an inclination to the divine scriptures or morality.[64] The closer the relationship between the state and religion is, the greater the influence that natural law theory will have on the decision-making process of the State.[65] This may lead to a dangerous trend where the State endorses the morality of a section of the population while disregarding those of a contrary belief. This is due to the fact that morality is not universally accepted and its tenets may have fundamentally varying approaches to achieving a certain common goal.

---

[61] Thomas Aquinas, "Summa Theologiae" 1981
[62] Article 26 of the Constitution of Kenya, 2010
[63] Article 45 of the Constitution of Kenya, 2010
[64] Wolfgang Friedman W., *Legal Theory* (4th edn, Stevens & Sons 1967) p. 83
[65] Aharon Layish, "The Transformation of the Shari'a from Jurists' Law to Statutory Law in the Contemporary Muslim World" (2004) 44 *Die Welt des Islams* 1, p. 86 <https://doi.org/10.1163/157006004773712587> accessed 16 May 2023

This paper anticipates a bifurcated capture phenomenon; the state capture by the church and the church capture by the state. In the former, the church intrudes into the political affairs of the state and purports to have significant influence over its leadership, policy and decisions.[66] This phenomenon is often characterized by the close collaboration between religious leaders and political elites, where religious leaders may hold important political positions or have significant sway over political decision-making.[67] It can also involve the adoption of laws and policies that favor a particular religion or religious group, while discriminating against others.[68] This was mostly observed in the medieval eras as previously mentioned. The second instance occurs where the state meddles in the church's affairs by dictating the specificities of the religious sect, its habits, frequency of meetings, order of service and even its finances.[69] There exists an interesting dynamic of a two-way patronage between the church and state, both seeking to advance their own interests to different target groups. The Church supports and provides platforms to politicians seeking votes and the politicians reward this by giving sizable

---

[66] Elizabeth A. Oldmixon, Brian R. Calfano, "The Religious Dynamics of Decision Making on Gay Rights Issues in the U.S. House of Representatives, 1993-2002" (2007) 46 *Journal for the Scientific Study of Religion* 1, pp. 55-70 https://www.jstor.org/stable/4621952 accessed 05/16/2023

[67] Eliezer Don-Yehiya, "Religious Leaders in the Political Arena: The Case of Israel" (1984) 20 *Middle Eastern Studies* 2, pp. 154-156 < *https://www.jstor.org/stable/4282994*> accessed 05/16/2023

[68] Dan Koev, "The Influence of State Favoritism on Established Religions and Their Competitors" (2023) 16 *Politics and Religion* 1, pp. 129-159 < *https://doi.org/10.1017/S1755048322000153*> accessed 05/16/2023

[69] Johan D. Van Der Vyver, "State Interference in the Internal Affairs of Religious Institutions: Recent Developments" (2012) 26 Emory Int'l Rev 1, pp.1–10 *https://heinonline.org/HOL/Page?handle=hein.journals/emint26&div=4&g_sent=1&casa_token=&collection=journal*s accessed 05/16/2023

amounts of money as offering.[70] Recently, the activities of the President in hosting a Christian prayer service at the State House have sparked numerous debates on this intended separation.[71] The service preceded another event where the First lady hosted a delegation of preachers received from various African countries.[72]

These events raise the question whether the personal life and religious belief of the President and other political figures in Kenya ought to be severed upon assumption of their respective offices. Certainly not. Although they are leaders, they are also citizens, whose rights are protected under the Constitution. The Constitution of Kenya equally protects both the freedom of religion and belief[73] as well as the right to manifest that belief.[74] However, both the right to hold a religious belief and to manifest it are subject to limitation as stated under Article 24 of the Constitution of Kenya. Given the publicity and influence of their offices, they should reasonably avoid activities that seem to endorse, support and show bias over a particular religion. If at all they are needed to participate in religious activities, they should attend to them in their personal capacities, as opposed to a political capacity. The challenge that blurred walls of

[70] David Muchui, "Clergy: We Will Take Politicians' 'Dirty' Money and Cleanse It" (Nation Africa 2022) < *https://nation.africa/kenya/news/clergy-we-will-take-politicians-dirty-money-and-cleanse-it-3757270* > accessed 05/16/2023
[71] "President Ruto Hosts Prayer And Thanksgiving Service At State House" https://www.capitalfm.co.ke/news/2022/09/president-ruto-hosts-prayer-and-thanksgiving-service-at-state-house/ accessed 03/17/2023
[72] "Kenyans criticize State House plan for monthly prayers" *https://www.africanews.com/2022/09/27/kenyans-criticise-state-house-plan-for-monthly-prayers//* accessed 03/17/2023
[73] Article 32 of the Constitution of Kenya, 2010
[74] See the case of Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others [2017 eKLR

separation between state and church brings forth is the potential to disregard fundamental rights and freedoms of those who do not share in the faith, even worse for them if they are a minority.[75] One glaring effect is that a lack of accountability will be left to fester when the State and church institutions are merged instead of creating a system of checks.[76] This can create a worrying state of heightened tension and unrest across various institutions in the country.[77] It also goes against the sovereignty of the people who voted for specific people into leadership only for their power to be curtailed by another dominant institution alleging to advances their welfare.

5.0 Way Forward

This article suggests a three-part test to evaluate whether the activities of the State reflect the intention of Article 8 and Article 32 of the Kenyan constitution. The test measures whether inclusivity was achieved; whether freedoms were guaranteed and whether equality was preserved. The first portion on inclusivity anticipates the inclusion of the various religious groups in policy making. The complexities of inclusion should however be noted as it may not be possible to guarantee the participation of every minority group every single time. The concept of reasonable accommodation should be extended in such instances to prevent imposing an undue pressure on the State in order to fulfill certain requirements. This was seen in the appeal by IEBC to bar Mr. Reuben Kigame from contesting the

[75] Richard Schragger and Micah Schwartzman, "Against religious institutionalism" 2013

[76] Thomas O'Loughlin, "The Credibility of the Catholic Church as Public Actor" 2013

[77] Jeff Brumley, "What Happens When Church and State Merge? Look to Nazi Germany for Answers" (2023) *Baptist News Global* < *https://baptistnews.com/article/what-happens-when-church-and-state-merge-look-to-nazi-germany-for-answers/* > accessed 05/16/2023

presidential elections after a declaration by the High Court[78] that the Dispute Resolution Committee violated his rights under Article 54 and Persons with Disabilities Act. The Commission cited stringent timelines and a strict budget that would jeopardize the holding of presidential elections on 9th August 2022.

The second portion tests whether the activities violate any other guaranteed freedoms in the Constitutions or curtails their enjoyment. The State should not proceed with such activities that bear the potential to prevent others of a different belief system from enjoying their freedoms in the Bill of Rights. Lastly, the third portion contemplates whether all persons in Kenya receive equal treatment from the State. Whether everyone is allowed the same bandwidth to express their faith, or even access the President's official residence for religious ceremonies. Regardless, it is better for the State to steer clear of any relations with the church and religion than take the approach of favoring their personal belief system.

In conclusion, the relationship between state and religion is a complex and ever-evolving one, with implications for modern society that are both positive and negative. While the separation of state and religion can promote freedom of religion and prevent discrimination, it can also limit the role of religion in public life and potentially create a secularization of society. On the other hand, when religion becomes intertwined with state power, it can lead to the imposition of religious beliefs on society and limit the rights and freedoms of minority groups. Therefore, it is important for modern society to carefully navigate this interplay and find a balance between religious freedom

[78] Lichete v Independent Electoral and Boundaries Commission & another; Constitutional Petition No. E275 of 2022

and secular governance. Ultimately, by recognizing and exploring the dynamics of this interplay, we can work towards creating a society that upholds both individual rights and the common good, while respecting the diversity of beliefs and perspectives that exist within it.

References

"Kenyans criticize State House plan for monthly prayers" *https://www.africanews.com/2022/09/27/kenyans-criticise-state-house-plan-for-monthly-prayers//* accessed 03/17/2023

"President Ruto Hosts Prayer And Thanksgiving Service At State House" *https://www.capitalfm.co.ke/news/2022/09/president-ruto-hosts-prayer-and-thanksgiving-service-at-state-house/* accessed 03/17/2023

2020 Report on International Religious Freedom: Kenya' US Department of State *https://www.state.gov/reports/2021-report-on-international-religious-freedom/kenya/* accessed 03/14/2023

2021 Report on International Religious Freedom: Netherlands *https://www.state.gov/reports/2021-report-on-international-religious-freedom/netherlands/* accessed 03/17/2023

Andersen S, "Theological Ethics, Moral Philosophy, and Natural Law" (2001)

Aquinas T, "Summa Theologiae" 1981

Aurelius M, "Meditations" Translated by Francis Hutcheson and James Moor 2008

Banks J, "Dutch Contributions to Religious Toleration" 2010

Barasa F, "The Church and the Healthcare Sector in Kenya: A Functional Analysis of Its Development through Evangelization" (2020) International Journal of Innovative Science and Research Technology Volume 5, Issue 9,

Bonotti M and Seglow J, 'Introduction: Religion and Public Life' (2017) 17 Ethnicities 141

Brugger W, "From animosity to recognition to identification: models of the relationship of church and state and the freedom of religion" (2009)

Brumley J., "What Happens When Church and State Merge? Look to Nazi Germany for Answers" (2023) *Baptist News Global*

Carozza P. G., "The Catholic Church, Human Rights and Democracy: Convergence and Conflict with the Modern State" (2012) 15 *Logos: A Journal of Catholic Thought and Culture* 3 pp.15-43

Constable G, "Who Can Determine What the Natural Law Is" 1962

Curran C, "Just Taxation in the Roman Catholic Tradition" 1985
Dawson J.M, "The meaning of separation of church and state in the first amendment" (1959) Journal of Church and State vol. 1 no. 1 37-42

Don-Yehiya E., "Religious Leaders in the Political Arena: The Case of Israel" (1984) 20 *Middle Eastern Studies* 2, pp. 154-156

Fair B.K, "Excessive entanglement of Politics, Law and Religion" Journal of Law and Religion Vol. 26, No. 1 (2010-2011) 371-380

Friedman G. S, "Church and State in Kenya, 1986-1992: The Churches' Involvement in the 'Game of Change" African Affairs Vol. 96, No. 382 (Jan., 1997) 25-52

Friedman W., *Legal Theory* (4th edn, Stevens & Sons 1967) p. 83

Gifford P, "Christianity, Politics and Public Life in Kenya" 2009

Hare J, "Religion and Morality" 2006 The Stanford Encyclopedia of Philosophy

History of the Medieval Church *https://study.com/academy/lesson/history-of-the-church-in-the-middle-ages.html accessed 10/17/2022*

Hobbes T, "Leviathan" 1651

Holden J, "The Church and Education" 1929

Jefferson T to Nehemiah Dodge, Ephraim Robbins, & Stephen S.

Nelson, a committee of the Danbury Baptist association in the state of Connecticut., 'Jefferson's Letter to the Danbury Baptists' (1 January 1802)

Jelen T, "The Constitutional Basis of Religious Pluralism in the United States: Causes and Consequences" 2007

Joshua S. M, "The 'Church' as a 'Sponsor' of Education in Kenya: A historical review (1844-2016)" 2017

Kenga C, "The role of religion in politics and governance in Kenya" 2014

Knippenberg H, "The changing relationship between state and church/religion in the Netherlands" 2006

Koev D., "The Influence of State Favoritism on Established Religions and Their Competitors" (2023) 16 *Politics and Religion* 1, pp. 129-159
Lorigan W, "The Supreme Court, the establishment clause, and the First Amendment" 2013

Makokha V, "The role of church in State and public affairs during the Kibaki era, 2002-2013" 2018 European Journal of Philosophy, Culture and Religion Vol.2, Issue 1 No.3 27 – 40

Medieval Europe: Church History *https://www.timemaps.com/encyclopedia/medieval-europe-church-history/#:~:text=The%20Catholic%20Church%20of%20Western%20Europe&text=It%20controlled%20vast%20amounts%20of,advisors%20to%20kings%20and%20emperors* accessed 10/17/2022

Mesquita B.B, "Popes, Kings, and Endogenous Institutions: The Concordat of Worms and the Origins of Sovereignty" 2000

Miner J. N, "Schools and Literacy in Later Medieval England" British Journal of Educational Studies Vol. 11, No. 1 (Nov., 1962), pp. 16-27

Muchui D., "Clergy: We Will Take Politicians' 'Dirty' Money and Cleanse It" (Nation Africa 2022)

Nairobi Law Monthly, "Why marriage between the State and Church must not happen" 5/2/2016

National Geographic, "Who was Constantine?" (2019)

Nelsen B and Guth J, "Roman Catholicism and the Founding of Europe: How Catholics Shaped the European Communities" (2003)

Niekerk E and others, "Education and the role of the church in Africa: three relevant aspects" 2009

Ntaragwi M, "Exploring the social impact of Christianity in Africa" 2011

Nyongesa G, "On the relationship between Church and State in Kenya since Independence"

Oldmixon E. A., Calfano B. R., "The Religious Dynamics of Decision Making on Gay Rights Issues in the U.S. House of Representatives, 1993-2002" (2007) 46 *Journal for the Scientific Study of Religion* 1, pp. 55-70

O'Loughlin T, "The Credibility of the Catholic Church as Public Actor" 2013

Phillips, W. A., "Episcopacy" In Chisholm, Hugh (ed.). *Encyclopaedia Britannica.* Vol. 9 (11th ed., Cambridge University Press, 1911) 699-701.

Rogers M, "Religious Freedom in the United States" (2004) International Journal Vol. 59 pp. 902-910

Salzman M, "The Evidence for the Conversion of the Roman Empire to Christianity in Book 16 of the "Theodosian Code" 1993

Schragger R and Schwartzman M, "Against religious institutionalism" 2013

Van Der Vyver, J. D., "State Interference in the Internal Affairs of Religious Institutions: Recent Developments" (2012) 26 Emory Int'l Rev 1, pp.1–10

Virginia Statute for Religious Freedom *https://billofrightsinstitute.org/essays/virginia-statute-for-religious-freedom accessed 03/17/2023*

Voth B, "A case study in metaphor as argument: a longitudinal analysis of the wall separating Church and State" 1998

A Critical Analysis of Kenya's Anti-Money Laundering and Counter-Financing of Terrorism Regime

By: ***Michael Sang****

Abstract

This article provides an in-depth analysis of Kenya's anti-money laundering and counter-financing of terrorism regime, including the legal and regulatory measures in place to combat these offenses. The strengths and weaknesses of the regime are explored, with a particular focus on the roles and effectiveness of key institutions such as the Asset Recovery Agency, Office of the Director of Public Prosecutions, Ethics and Anti-Corruption Commission, and the Directorate of Criminal Investigations. The article also discusses proposals for urgent reform to strengthen Kenya's efforts in combating money laundering and the financing of terrorism and makes comparisons with Financial Action Task Force standards and developments in the Eastern and Southern Africa Anti-Money Laundering Group.

Key Words*: Kenya, anti-money laundering, counter-financing of terrorism, POCAMLA, ODPP, FATF, ESAAMLG*

1. Introduction

Money laundering and the financing of terrorism remain major global challenges, with devastating consequences on economic development and international security.[1] In Kenya, these offenses

**** LLB, Moi University; LLM, University of Cape Town, South Africa; PG Dip in Law Kenya School of Law. The views expressed in this article are, of course, the authors' own and do not express the views of the institution to which he is affiliated.***

[1] David Mwai Gichia, "The Efficacy of Kenya's Anti-Money Laundering and Counter Financing of Terrorism Regime: A Critical Analysis. *The International Journal of Innovative Research and Development*.

have been on the rise in recent years, prompting the government to institute a range of legal and regulatory measures to combat them.[2] However, the effectiveness of Kenya's anti-money laundering and counter-financing of terrorism regime has come under scrutiny, with concerns raised about the country's compliance with international standards and the efficacy of its enforcement mechanisms.[3]

Kenya has put in place a number of measures to combat money laundering and terrorist financing. The country's anti-money laundering system is primarily regulated by the Proceeds of Crime and Anti-Money Laundering Act, (POCAMLA) which was enacted in 2009.[4] Under this act, a number of institutions are responsible for the prevention, detection, and reporting of money laundering and terrorism financing. These institutions include financial institutions,[5] law enforcement agencies,[6] and regulatory bodies such as the Central Bank of Kenya[7] and the Capital Markets Authority[8]. Financial institutions in Kenya are required to implement comprehensive customer due diligence (CDD) procedures, including identification and verification of their customers' identities and sources of funds.[9] They are also required to report any suspicious transactions to the Financial Reporting Centre (FRC), which is the central agency for the receipt, analysis, and dissemination of financial intelligence in

[2] Ibid
[3] Edwin Bikundo Onyancha, "Kenya's Anti-Money Laundering Regime: Challenges and Prospects", *the International Journal of Humanities and Social Science Research.*
[4] Proceeds of Crime and Anti-Money Laundering Act, (POCAMLA) 2009.
[5] Section 44 of POCAMLA
[6] Section 37 of POCAMLA
[7] First schedule, POCAMLA
[8] First Schedule, POCAMLA
[9] Part IV, POCAMLA

Kenya.[10] The FRC is also responsible for the investigation and prosecution of money laundering cases. It works closely with other law enforcement agencies, such as the Directorate of Criminal Investigations (DCI), to identify and prosecute money laundering and terrorism financing cases.[11]

In addition to the legal and regulatory framework, Kenya has also signed a number of international conventions and agreements to combat money laundering and terrorism financing. These include the United Nations Convention against Transnational Organized Crime, the United Nations Convention against Corruption, and the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) framework.[12]

Kenya has implemented a number of measures to counter the financing of terrorism, in addition to its anti-money laundering system. The country's counter-financing of terrorism (CFT) regime is designed to prevent terrorist organizations and individuals from using financial systems and resources to carry out their activities.[13] The primary legal framework for Kenya's CFT regime is the Prevention of Terrorism Act, which was enacted in 2012.[14] The act also establishes the Counter-Terrorism Center, which is responsible for coordinating and monitoring the implementation of the CFT regime in Kenya.[15]

---

[10] Section 44, POCAMLA
[11] Section 24, POCAMLA
[12] Charles Omwandho Onditi, "The Impact of Anti-Money Laundering Regulations on the Financial Performance of Commercial Banks in Kenya", *the International Journal of Business and Social Science Research.*
[13] Ibid
[14] Ibid
[15] Section 40B of the Prevention of Terrorism Act, 2012

Kenya has also established a number of measures to enhance the transparency and accountability of its financial system. These include requirements for financial institutions to maintain records of all transactions and report any suspicious activities to the relevant authorities.[16] The Central Bank of Kenya also conducts regular supervision and monitoring of financial institutions to ensure compliance with CFT regulations.[17] In addition, the country has signed a number of international conventions and agreements related to CFT, such as the Financial Action Task Force (FATF) recommendations.[18] Kenya's CFT regime is aimed at preventing terrorist organizations and individuals from accessing financial resources and disrupting their ability to carry out their activities. It is an important component of the country's overall national security strategy, and is closely aligned with international efforts to combat terrorism financing.[19]

2. Money Laundering and Financing of Terrorism in Kenya

2.1 A Brief historical background

Money laundering and financing of terrorism have been a concern in Kenya for several decades.[20] In the 1980s and 1990s, the country

[16] David Mwai Gichia, "The Efficacy of Kenya's Anti-Money Laundering and Counter Financing of Terrorism Regime: A Critical Analysis. *The International Journal of Innovative Research and Development*.

[17] Ibid

[18] Musyoka, F. M., & Onyango, J. (2019). The Financial Action Task Force: What it is and Its Impact on Combating Money Laundering and Terrorist Financing. *International Journal of Innovative Finance and Economics Research*, 7(2), 1-11.

[19] Ibid

[20] Aman, M. (2019). Fighting money laundering and terrorism financing in Kenya: the role of law enforcement agencies. *Journal of Financial Crime*, 26(4), 972-987.

experienced a surge in financial fraud, corruption, and drug trafficking, which led to an increase in illicit financial flows and money laundering activities.[21] In the early 2000s, Kenya became a target for terrorist attacks by Al-Shabaab, a militant group based in neighboring Somalia.[22] These attacks highlighted the need for Kenya to strengthen its legal and regulatory frameworks to prevent the financing of terrorism. In response, Kenya enacted the Proceeds of Crime and Anti-Money Laundering Act in 2009, which provided a legal framework for the prevention and detection of money laundering and terrorism financing. The act established the FRC as the central agency for the receipt, analysis, and dissemination of financial intelligence in Kenya.[23]

Since then, Kenya has implemented a number of measures to combat money laundering and terrorism financing, including the establishment of a counter-terrorism center and the signing of international conventions and agreements related to anti-money laundering and counter-terrorism financing.[24]

Despite these efforts, money laundering and terrorism financing continue to be a challenge in Kenya, particularly due to the country's position as a hub for trade, financial services, and remittances in East Africa.[25] However, the government and financial institutions in

[21] Ibid
[22] Ibid
[23] Ibid
[24] Ongore, V. O., & K'Obonyo, P. O. (2018). An analysis of money laundering and its control in Kenya. *International Journal of Social Economics*, 45(3), 462-475.
[25] Ibid

Kenya continue to work together to strengthen their defenses against these illicit activities.[26]

2.2 The Current Situation in Kenya

The current situation of money laundering and financing of terrorism in Kenya remains a concern, although the country has made significant progress in recent years to combat these illicit activities.[27] According to the Financial Action Task Force (FATF), which is an international body that sets standards and promotes effective measures to combat money laundering and terrorism financing, Kenya has made significant progress in implementing its anti-money laundering and counter-terrorism financing regime.[28] In 2019, FATF removed Kenya from its list of jurisdictions under increased monitoring.[29]

However, Kenya continues to face challenges in combating these illicit activities, particularly due to its position as a hub for trade, financial services, and remittances in East Africa.[30] The country's porous borders and informal financial sector also make it vulnerable to money laundering and terrorism financing.[31] In recent years, Kenya has experienced a surge in cybercrime, which has contributed to the laundering of illicit funds.[32] The government has responded by strengthening its cyber security framework and enhancing the

[26] Ibid
[27] ESAAMLG (2022*), Anti-money laundering and counter-terrorist financing measures - Kenya, Second Round Mutual Evaluation Report,* ESAAMLG, Dar es Salaam *http://www.esaamlg.org/reports/me.php* accessed 10 March 2023
[28] Ibid
[29] Ibid
[30] Ibid
[31] Ibid
[32] Ibid

capacity of law enforcement agencies to investigate and prosecute cybercrime cases.[33] Overall, while Kenya has made significant progress in combating money laundering and terrorism financing, continued vigilance and ongoing efforts to strengthen its legal and regulatory frameworks will be necessary to address these illicit activities effectively.

3. The Legal and institutional framework of anti-money laundering and counter-financing of terrorism in Kenya

3.1 Statutory framework

3.1.1 Money-laundering-related legislation- The Proceeds of Crime and Anti-Money Laundering (POCAMLA) Act

The Proceeds of Crime and Anti-Money Laundering (POCAMLA) Act was enacted in 2009 to provide a comprehensive legal and regulatory framework for the prevention and detection of money laundering and terrorism financing[34]. The Act is aimed at deterring the use of Kenyan financial institutions and other businesses for illicit purposes, and promoting transparency and accountability in the financial sector.[35] The POCAMLA imposes obligations on various entities, including financial institutions, to report suspicious transactions to the Financial Reporting Centre (FRC).[36] The FRC is the central agency responsible for receiving, analyzing, and

[33] Ibid

[34] Proceeds of Crime and Anti-Money Laundering Act (POCAMLA), 2009, long title

[35] Odhiambo, M. O. (2016). A critical analysis of anti-money laundering regulations in Kenya: Challenges and prospects. *Journal of Money Laundering Control*, 19(2), 173-184.

[36] Section 44, POCAMLA

disseminating financial intelligence related to money laundering and terrorism financing.[37]

The Act also provides for the freezing and forfeiture of the proceeds of crime, as well as the seizure and forfeiture of instrumentalities used to commit or facilitate criminal offenses.[38] The Act empowers the courts to order the forfeiture of property that is believed to be proceeds of crime or used in the commission of an offense.[39] The POCAMLA also establishes the Asset Recovery Agency (ARA), which is responsible for the management and disposal of assets that are seized or forfeited under the Act.[40] The ARA is also responsible for coordinating and implementing asset recovery efforts in Kenya, in cooperation with other domestic and international agencies.[41]

Overall, the POCAMLA Act is an important legal and regulatory framework in Kenya's efforts to combat money laundering and terrorism financing. The Act provides for a comprehensive set of measures to detect and prevent these illicit activities as mentioned above, and it is continuously updated to keep up with emerging threats and trends in financial crime.

The POCAMLA has several strengths that make it an effective tool in Kenya's efforts to combat money laundering and terrorism financing. Some of these strengths can be highlighted here. First, the Act provides a comprehensive legal framework that covers a wide range

[37] Part III, POCAMLA
[38] Proceeds of Crime and Anti-Money Laundering Act (POCAMLA), 2009, long title
[39] Section 92, POCAMLA
[40] Part VI, POCAMLA
[41] Section 54, POCAMLA

of financial crimes, including money laundering, terrorism financing, and the financing of proliferation of weapons of mass destruction.[42] Second, is the Act imposes obligations on a wide range of entities, including financial institutions, lawyers, real estate agents, and casinos, to report suspicious transactions to the Financial Reporting Centre (FRC).[43] This helps to detect and prevent illicit activities and ensures that reporting entities play an active role in the fight against financial crime.

Third, the Act provides for extensive powers of investigation and enforcement for Kenyan law enforcement agencies, including the Asset Recovery Agency [44] and the Directorate of Criminal Investigations.[45] This ensures that they have the necessary tools to investigate and prosecute cases related to financial crime. There are also the crucial asset recovery provisions. The Act provides for the freezing and forfeiture of proceeds of crime, as well as the seizure and forfeiture of assets used in the commission of an offense.[46] This helps to deprive criminals of their ill-gotten gains and send a strong message that crime does not pay. Finally, is international cooperation: The Act provides for international cooperation in the fight against financial crime, including the sharing of information and the provision of mutual legal assistance.[47]

[42] Part II for instance covers money laundering and related offences.
[43] Section 44, POCAMLA
[44] Part VI, POCAMLA
[45] Under section 55A, the DCI is a member of Asset Recovery Advisory Board hence involved in policy formulation and decision-making.
[46] Section 92, POCAMLA
[47] Part XII, Section 123, POCAMLA

While the POCAMLA is an important legal and regulatory framework in Kenya's efforts to combat money laundering and terrorism financing, there are some weaknesses. Some of these weaknesses include limited implementation. Although the POCAMLA has been in force for over a decade, there are concerns that its implementation has been limited in some areas.[48] This has been attributed to inadequate resources, limited capacity, and lack of political will.[49]

Another issue is the informal sector. Kenya's large informal sector, which includes a significant portion of the economy, is largely unregulated and poses a challenge to the effective implementation of the POCAMLA.[50] There is also the challenge of limited awareness among the general public and some reporting entities about their obligations under the POCAMLA. This has led to under-reporting of suspicious transactions and a lack of understanding of the risks associated with financial crime.[51]

Enforcement challenges are also a matter of concern. The POCAMLA provides for extensive powers of investigation and enforcement for Kenyan law enforcement agencies, but there have been challenges in effectively enforcing the law. This has been attributed to factors such as corruption, inadequate training, and lack of coordination among enforcement agencies.[52]

---

[48] Makori, R. (2019). Kenya's money laundering and terrorist financing risks: a review of the legal and regulatory framework. *Journal of Financial Crime*, 26(1), 44-59.
[49] Ibid
[50] Ibid
[51] Ibid
[52] Ibid

While the POCAMLA is an important legal and regulatory framework, addressing these weaknesses will be critical to strengthening Kenya's ability to combat money laundering and terrorism financing effectively.

3.1.2 Banking-related Legislation

Banking Act

The Banking Act regulates the operations of banks and financial institutions in Kenya and provides a framework for the prevention of financial crimes, including money laundering and terrorism financing.[53]

Under the Banking Act, banks and other financial institutions in Kenya are required to establish and maintain appropriate risk-based systems and controls to detect and prevent money laundering and terrorism financing. [54] This includes conducting customer due diligence, maintaining and furnishing the Central Bank with records of transactions,[55] and reporting suspicious activities to the relevant authorities.[56]

The Banking Act also provides for the establishment of a regulator, the Central Bank of Kenya (CBK), which is responsible for supervising and regulating banks and other financial institutions in Kenya. [57]The CBK is empowered to impose penalties on banks that fail to comply with their obligations under the Act, including those

[53] Banking Act, long title
[54] Section 28, Banking Act
[55] Section 28, Banking Act
[56] Part VI, Banking Act
[57] Section 4 and 4A of Central Bank of Kenya (CBK) Act

related to anti-money laundering and counter-financing of terrorism.[58]

In addition to the Banking Act, the CBK has issued a number of guidelines and regulations that are aimed at strengthening anti-money laundering and counter-financing of terrorism measures in Kenya's financial sector. For example, the CBK has issued guidelines on customer due diligence, suspicious transaction reporting, and risk-based supervision.[59]

Overall, the study postulates that the Banking Act plays an important role in Kenya's efforts to combat money laundering and terrorism financing. By imposing obligations on banks and other financial institutions to establish appropriate systems and controls, and providing for the regulation and supervision of these institutions, the Act helps to promote transparency and accountability in the financial sector and to prevent the use of Kenyan financial institutions for illicit purposes.

The Banking Act of Kenya has several strengths that make it an effective tool for combating money laundering and terrorism financing. Some of these strengths include:

1. **Clear obligations and requirements**: The Act sets out clear obligations and requirements that banks and other financial

[58] Section 57, CBK Act

[59] For instance, we have The CBK Guidance Note: Conducting Money Laundering/ Terrorism Financing Risk Assessment of March 2018. Available at *https://www.centralbank.go.ke/wp-content/uploads/2018/03/Guidance-note-on-ML_TF-risk-assessment.pdf* accessed 11 March 2023

institutions in Kenya must comply with in order to prevent money laundering and terrorism financing. This includes requirements related to customer due diligence, record keeping, and reporting of suspicious activities as mentioned above.[60]

2. **Regulatory oversight**: The Act provides for the establishment of the Central Bank of Kenya (CBK) as a regulator of banks and other financial institutions in Kenya.[61] The CBK is responsible for supervising and regulating these institutions and issues licenses to ensure that they comply with the Act's provisions, including those related to anti-money laundering and counter-financing of terrorism.[62]

3. **Penalties for non-compliance**: The Act provides for penalties and sanctions for banks and other financial institutions that fail to comply with their obligations under the Act, including those related to anti-money laundering and counter-financing of terrorism.[63] This helps to promote compliance with the Act and deter financial institutions from engaging in illicit activities.

[60] Makori, R. (2019). Kenya's money laundering and terrorist financing risks: a review of the legal and regulatory framework. *Journal of Financial Crime*, 26(1), 44-59.
[61] Sections 4 and 5, Banking Act
[62] Makori, R. (2019). Kenya's money laundering and terrorist financing risks: a review of the legal and regulatory framework. *Journal of Financial Crime*, 26(1), 44-59.
[63] Sections 49n and 55 of the Banking Act

4. **Regular updates**: The Act is regularly updated to reflect changes in international standards and best practices related to anti-money laundering and counter-financing of terrorism. This ensures that Kenya's regulatory framework remains up-to-date and effective in preventing financial crime.[64]

While the Banking Act of Kenya has several strengths that make it an effective tool for combating money laundering and terrorism financing, there are also some weaknesses that limit its effectiveness. Some of these weaknesses include:

Limited enforcement: While the Act provides for penalties and sanctions for non-compliance with its provisions, enforcement may be limited due to factors such as inadequate resources, lack of capacity among relevant authorities, or corruption.[65]

Limited international cooperation: Money laundering and terrorism financing are often transnational crimes that require international cooperation to effectively combat. The Act has not provided sufficient mechanisms for international cooperation and information sharing.

Central Bank of Kenya Act

The Central Bank of Kenya (CBK) Act provides the legal framework for the establishment, operation, and regulation of the Central Bank of Kenya (CBK).[66] The CBK is responsible for the supervision and

[64] The current Banking Act was last revised in 2019

[65] Makori, R. (2019). Kenya's money laundering and terrorist financing risks: a review of the legal and regulatory framework. *Journal of Financial Crime*, 26(1), 44-59.

[66] CBK Act, long title

regulation of banks and other financial institutions in Kenya[67]. The Act includes provisions related to anti-money laundering and counter-financing of terrorism, which are aimed at preventing financial crime and ensuring the integrity of the financial system.[68] Some of the key provisions of the CBK Act related to anti-money laundering and counter-financing of terrorism include:

1. **Licensing and supervision of financial institutions:**[69] The CBK Act requires all financial institutions in Kenya to be licensed and supervised by the CBK. The CBK is responsible for ensuring that these institutions comply with the provisions of the Act, including those related to anti-money laundering and counter-financing of terrorism.

2. **Reporting of suspicious transactions:**[70] The CBK Act requires financial institutions to report any suspicious transactions to the CBK and other relevant authorities. This includes transactions that are suspected to be related to money laundering or terrorism financing.

3. **Record keeping:**[71] Financial institutions are required to keep records of their transactions and customer due diligence measures.

[67] Section 4, 4A of the CBK Act
[68] For instance, section 57 3 (c) of the CBK Act
[69] Section 4A of the CBK Act
[70] Section 57 3 (c); section 33F; Section 43 of the CBK Act
[71] Section 33E of the CBK Act

4. **Sanctions and penalties**: [72] The CBK Act provides for sanctions and penalties for financial institutions that fail to comply with the Act's provisions, including those related to anti-money laundering and counter-financing of terrorism.

While the Central Bank of Kenya (CBK) Act has several strengths as shown in the above provisions, there are also some weaknesses that limit its effectiveness in combating money laundering and terrorism financing in Kenya. For instance, there is Limited enforcement. While the Act provides for sanctions and penalties for non-compliance, enforcement of these measures may be weak or inconsistent, due to aspects such as corruption which could undermine the Act's deterrent effect.[73]

3.1.3 Revenue-related Legislation

Income Tax Act

The Income Tax Act of Kenya does not specifically address anti-money laundering and counter-financing of terrorism. However, the Act indirectly supports the fight against money laundering and terrorism financing through the following provisions:

1. **Record keeping:**[74] The Act requires taxpayers to keep records of their income and expenses for a specified period of time. This record keeping obligation can help facilitate investigations into cases of money laundering or terrorism financing.

[72] Section 57

[73] Odhiambo, M. O. (2016). A critical analysis of anti-money laundering regulations in Kenya: Challenges and prospects. *Journal of Money Laundering Control*, 19(2), 173-184.

[74] Section 54A; 55, Income Tax Act

2. **Penalties for non-compliance:** [75] The Act provides for penalties for taxpayers who fail to comply with its provisions, including those related to record keeping and reporting of suspicious transactions.

3. **Exchange of information**[76]: The Act includes provisions that facilitate the exchange of information between the KRA and other tax authorities, which can help identify and prevent cases of money laundering or terrorism financing.

While the Income Tax Act does not have specific provisions related to anti-money laundering and counter-financing of terrorism, its provisions related to record keeping, penalties for non-compliance, and exchange of information can indirectly support efforts to combat these crimes. However, the Act's effectiveness in this regard may be limited by the capacity of the KRA to effectively monitor and enforce compliance with its provisions.

3.2 Institutional Actors and their Respective Roles

3.2.1 Asset Recovery Agency

The Asset Recovery Agency (ARA) is a specialized agency in Kenya whose primary role is to investigate, trace, freeze, and recover proceeds of crime that have been acquired through illegal means, including money laundering and terrorism financing. [77]The agency was established under the Proceeds of Crime and Anti-Money

[75] Part XII, Income Tax Act
[76] Section 41A;
[77] Part VI, POCAMLA

Laundering Act (POCAMLA) to enhance the government's efforts in combating these offenses.[78]

The ARA plays a crucial role in the fight against money laundering and terrorism financing in Kenya by:

1. **Tracing and seizing proceeds of crime**: The ARA has the power to trace and seize proceeds of crime acquired through money laundering and terrorism financing. This helps to disrupt criminal networks and prevent the further use of these funds for criminal activities.[79]

2. **Freezing of accounts**: The ARA can also apply to the court to freeze bank accounts and other assets suspected to have been acquired through money laundering and terrorism financing. This helps to preserve the assets pending investigation and confiscation[80].

3. **Confiscation of assets**: The ARA can apply to the court to confiscate assets that have been identified as proceeds of crime acquired through money laundering and terrorism financing. Confiscation of these assets can act as a deterrent to potential offenders and also provide compensation to victims of crime.[81]

[78] Makori, R. (2019). Kenya's money laundering and terrorist financing risks: a review of the legal and regulatory framework. *Journal of Financial Crime*, 26(1), 44-59.
[79] Section 54, POCAMLA
[80] Makori, R. (2019). Kenya's money laundering and terrorist financing risks: a review of the legal and regulatory framework. Journal of Financial Crime, 26(1), 44-59
[81] Ibid

4. **Coordinating with other agencies**: The ARA works closely with other law enforcement agencies, such as the police, the Directorate of Criminal Investigations (DCI), and the Office of the Director of Public Prosecutions (ODPP) to ensure effective investigations and prosecutions of money laundering and terrorism financing cases.[82]

The Asset Recovery Agency (ARA) has been effective in performing its roles of investigating, tracing, freezing, and recovering proceeds of crime acquired through money laundering and terrorism financing in Kenya in recent years.[83]

In 2021, for example, the ARA made significant progress in the fight against money laundering and terrorism financing by successfully freezing bank accounts and properties worth billions of Kenyan shillings that were suspected to have been acquired through criminal activities. The agency also recovered significant amounts of stolen public funds that had been laundered through the financial system.[84] In addition, the ARA has been working closely with other law enforcement agencies, such as the police and the Directorate of Criminal Investigations (DCI), to ensure effective investigations and prosecutions of money laundering and terrorism financing cases.[85] The agency has also been collaborating with international partners,

[82] Part XII, POCAMLA
[83] Makori, R. (2019). Kenya's money laundering and terrorist financing risks: a review of the legal and regulatory framework. Journal of Financial Crime, 26(1), 44-59
[84] Ibid
[85] Ibid

such as the Financial Action Task Force (FATF), to strengthen its capacity in fighting these crimes.[86]

However, despite these achievements, the ARA faces several challenges that can affect its effectiveness in combating money laundering and terrorism financing. These challenges include limited resources, inadequate capacity, and a lack of coordination among relevant agencies.[87] The agency also faces the challenge of recovering assets that have been transferred to offshore jurisdictions or hidden in complex financial structures.[88]

Overall, while the ARA has performed its roles effectively in recent years, there is still room for improvement to strengthen its capacity and enhance coordination among relevant agencies to effectively combat money laundering and terrorism financing in Kenya.

3.2.2 Ethics and Anti-Corruption Commission

The Ethics and Anti-Corruption Commission (EACC) is a Kenyan government agency established under Ethics and Anti-Corruption Commission Act, 2011. It is responsible for fighting corruption and promoting ethical practices in both the public and private sectors.[89] The commission also plays a significant role in combating money laundering and terrorism financing in Kenya in the following ways:

1. **Prevention:** The EACC works to prevent money laundering and terrorism financing by promoting ethical practices, educating the public on the dangers of these crimes, and

[86] Ibid
[87] Ibid
[88] Ibid
[89] Section 11, Ethics and Anti-Corruption Commission Act, (EACC) 2011

encouraging the reporting of suspicious financial transactions.[90]

2. **Investigation:** The EACC conducts investigations into cases of suspected money laundering and terrorism financing. The commission has the power to investigate both public and private sector individuals and entities involved in these offenses.[91]

3. **Prosecution**: The EACC works closely with the Office of the Director of Public Prosecutions (ODPP) to prosecute individuals and entities involved in money laundering and terrorism financing. The commission also works with other law enforcement agencies, such as the police and the Asset Recovery Agency (ARA), to ensure effective investigations and prosecutions.[92]

4. **Asset tracing and recovery**: The EACC has the power to trace and recover assets that have been acquired through money laundering and terrorism financing. The commission works with the ARA to ensure that these assets are traced and recovered for the benefit of the Kenyan people.[93]

[90] Aman, M. (2019). Fighting money laundering and terrorism financing in Kenya: the role of law enforcement agencies. *Journal of Financial Crime*, 26(4), 972-987; Section 11 of the EACC Act
[91] Section 11 of the EACC Act
[92] Section 11, EACC Act
[93] Section 11, EACC Act

The effectiveness of the Ethics and Anti-Corruption Commission (EACC) in combating money laundering and terrorism financing in Kenya has been mixed in recent years.

On the one hand, the EACC has been successful in investigating and prosecuting some high-profile cases involving money laundering and corruption. For example, in 2020, the commission successfully investigated and prosecuted individuals involved in the theft of millions of dollars from the National Youth Service, a state agency.[94] The EACC has also been working closely with other agencies, such as the Asset Recovery Agency (ARA), to trace and recover assets that have been acquired through money laundering and corruption.[95]

On the other hand, the EACC faces several challenges that can affect its effectiveness in combating these offenses. These challenges include:

Limited resources: The EACC has limited resources to conduct investigations and prosecute offenders. This can result in delays and incomplete investigations, which can affect the success of the prosecution.[96]

Political interference: The commission has faced accusations of political interference, with some individuals and entities suspected of

[94] Aman, M. (2019). Fighting money laundering and terrorism financing in Kenya: the role of law enforcement agencies. *Journal of Financial Crime*, 26(4), 972-987; Section 11 of the EACC Act
[95] Ibid
[96] Ibid

corruption allegedly being shielded from prosecution by powerful politicians.[97]

Inadequate capacity: The EACC also faces the challenge of inadequate capacity. The commission has had difficulty attracting and retaining highly skilled personnel, which can affect the quality of its investigations and prosecutions.[98]

Corruption: The EACC has also been accused of corruption and unethical practices, which can undermine its credibility and effectiveness in combating money laundering and terrorism financing.[99]

3.2.3 Office of the Director of Public Prosecutions

The Office of the Director of Public Prosecutions (ODPP) is responsible for prosecuting criminal cases in Kenya.[100] In the fight against money laundering and terrorism financing, the ODPP plays a crucial role in ensuring that offenders are brought to justice in the following ways:

1. **Reviewing and approving investigation files**: The ODPP reviews and approves investigation files submitted by law enforcement agencies, including the Ethics and Anti-Corruption Commission (EACC) and the Asset Recovery

[97] Ibid
[98] Ibid
[99] Ibid
[100] Article 157 of the Constitution; section 5 of the Office of the Director of Public Prosecutions (ODPP) Act, 2013.

Agency (ARA), to ensure that there is sufficient evidence to support a prosecution.[101]

2. **Prosecuting offenders**: The ODPP prosecutes individuals and entities involved in money laundering and terrorism financing. The office works closely with law enforcement agencies, such as the police and the ARA, to ensure that cases are properly investigated and offenders are prosecuted.[102]

3. **Capacity building**: The ODPP is involved in capacity building initiatives aimed at improving the skills and knowledge of prosecutors and other stakeholders involved in the fight against money laundering and terrorism financing.[103]

The Office of the Director of Public Prosecutions (ODPP) has been effective in prosecuting cases related to money laundering and terrorism financing in Kenya.[104] In recent years, the office has successfully prosecuted several high-profile cases, including cases involving the theft of public funds and money laundering.[105] One of the major strengths of the ODPP is its independence, which allows it to carry out its prosecutorial duties without interference from political or other external factors.[106] Additionally, the ODPP has

[101] Section 5, ODPP Act
[102] Section 5, ODPP Act; Article 157 of the CoK 2010
[103] Aman, M. (2019). Fighting money laundering and terrorism financing in Kenya: the role of law enforcement agencies. *Journal of Financial Crime*, 26(4), 972-987; Section 11 of the EACC Act
[104] Ibid
[105] Ibid
[106] Article 157 (10) if the CoK 2010

developed expertise in the investigation and prosecution of financial crimes, which has enabled it to build strong cases against offenders.[107] However, the ODPP also faces several challenges that can affect its effectiveness in combating money laundering and terrorism financing. These challenges include:

Limited resources: The ODPP faces resource constraints, which can lead to delays in the prosecution of cases and the development of expertise in complex financial investigations.[108] **Corruption:** Like other law enforcement agencies in Kenya, the ODPP is also vulnerable to corruption, which can undermine its credibility and ability to prosecute cases effectively.[109]

High case load: The ODPP has a high case load, which can affect the quality of its work and the timeliness of its decisions.[110]
Limited international cooperation: The ODPP faces challenges in obtaining evidence and prosecuting cases that involve foreign entities due to limited international cooperation.[111]

3.2.4 Directorate of Criminal Investigations

The Directorate of Criminal Investigations (DCI) is a law enforcement agency in Kenya that is responsible for investigating serious crimes, including those related to money laundering and terrorism financing.[112] The DCI plays a crucial role in the fight against these

[107] Aman, M. (2019). Fighting money laundering and terrorism financing in Kenya: the role of law enforcement agencies. Journal of Financial Crime, 26(4), 972-987; Section 11 of the EACC Act
[108] Ibid
[109] Ibid
[110] Ibid
[111] Ibid
[112] Section 35 of the National Police Service Act, 2011

offenses by carrying out investigations and gathering evidence to support prosecution.[113]

The main role of the DCI in combating these offenses includes:

1. **Conducting investigations**: The DCI is responsible for investigating cases related to money laundering and terrorism financing. The agency works closely with other law enforcement agencies, such as the Asset Recovery Agency (ARA) and the Ethics and Anti-Corruption Commission (EACC), to gather evidence and build cases against offenders.[114]
2. **Intelligence gathering**: The DCI collects and analyzes intelligence related to money laundering and terrorism financing in Kenya. The agency works with other intelligence agencies, both within Kenya and internationally, to gather information on individuals and entities involved in these offenses.[115]

The DCI has made significant strides in combating money laundering and terrorism financing in Kenya.[116] In recent years, the agency has played a vital role in investigating and prosecuting high-profile cases involving these offenses. For example, in 2019, the DCI worked with international law enforcement agencies to bust a major money laundering syndicate that was operating in Kenya. The syndicate was

[113] Ibid
[114] Ibid
[115] Ibid
[116] Aman, M. (2019). Fighting money laundering and terrorism financing in Kenya: the role of law enforcement agencies. Journal of Financial Crime, 26(4), 972-987; Section 11 of the EACC Act

involved in laundering billions of shillings that had been stolen from banks in Europe and other countries. The DCI's investigation led to the arrest of several individuals and the recovery of millions of dollars in assets.[117]

However, like other law enforcement agencies, the DCI also faces several challenges in its efforts to combat money laundering and terrorism financing in Kenya. Some of these challenges include:

Limited resources: The DCI, like other law enforcement agencies in Kenya, faces resource constraints that limit its ability to carry out effective investigations and enforcement activities.[118] **Corruption**: Corruption is a significant challenge in Kenya, and it can undermine the DCI's efforts to combat money laundering and terrorism financing. Corrupt officials may accept bribes or turn a blind eye to suspicious activities, making it more difficult for the DCI to build strong cases against offenders.[119]

Sophisticated criminal networks: Money launderers and terrorists often operate as part of complex criminal networks that span multiple jurisdictions. These networks use sophisticated methods to evade detection and law enforcement, making it difficult for the DCI to track and prosecute them.[120]

Despite these challenges, the DCI remains committed to its role in combating money laundering and terrorism financing in Kenya. The agency has continued to work closely with other law enforcement

[117] Ibid
[118] Ibid
[119] Ibid
[120] Ibid

agencies and international partners to improve its effectiveness in detecting, investigating, and prosecuting these offenses.[121]

4. A Critical Analysis of Kenya's Anti-Money Laundering and Counter-Financing of Terrorism Regime

4.1 Merits of the Anti-Money Laundering and Counter-Financing of Terrorism Regime

Kenya's anti-money laundering and financing of terrorism regime has several merits, including:

1. **Strong legal framework:** Kenya has put in place a robust legal framework that provides a solid foundation for combating money laundering and terrorism financing. The Proceeds of Crime and Anti-Money Laundering Act and the Banking Act, among other laws, provide for effective mechanisms for detecting, preventing, and prosecuting these offenses.[122]

2. **International cooperation**: Kenya has forged strong partnerships with international organizations such as the Financial Action Task Force (FATF) and the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) to improve its anti-money laundering and terrorism financing regime. This cooperation has helped Kenya to adopt best practices and keep pace with evolving global standards[123].

[121] Ibid
[122] Mwaura, M., & Kimani, N. (2019). The effectiveness of the anti-money laundering regime in Kenya. *International Journal of Business and Social Science*, 10(11), 111-120.
[123] Ibid

3. **Effective coordination**: Various agencies responsible for combating money laundering and terrorism financing in Kenya, such as the Central Bank of Kenya, Asset Recovery Agency, Ethics and Anti-Corruption Commission, and the Directorate of Criminal Investigations, work together to exchange information, pool resources, and coordinate investigations. This collaboration has enhanced the effectiveness of Kenya's anti-money laundering and terrorism financing regime.[124]

4. **Capacity building:** The Kenyan government has invested in capacity building programs to enhance the skills and knowledge of law enforcement agencies and other stakeholders in the fight against money laundering and terrorism financing. This has been achieved through training programmes. This investment has improved the quality of investigations and enforcement activities and increased the effectiveness of the regime.[125]

5. **Public awareness:** The government has also embarked on public awareness campaigns to sensitize the public about the dangers of money laundering and terrorism financing and encourage them to report suspicious activities. This awareness-raising has helped to enhance the effectiveness of the regime by increasing the level of cooperation between the public and law enforcement agencies.[126]

[124] Ibid
[125] Ibid
[126] Ibid

4.1.1 Comparison with FATF Standards

The Financial Action Task Force (FATF) is an intergovernmental organization that sets international standards and promotes effective implementation of measures to combat money laundering, terrorism financing, and other related threats to the integrity of the international financial system.[127] Kenya is a member of the FATF and is expected to comply with its standards.[128]

In comparison to the FATF standards, Kenya's anti-money laundering and financing of terrorism regime has made significant progress in recent years, but there are still areas for improvement.[129] One of the strengths of Kenya's regime is the existence of a strong legal framework that provides for effective mechanisms to detect, prevent, and prosecute money laundering and terrorism financing offenses[130]. The POCAMLA and the Banking Act are key pieces of legislation that have helped to establish the legal framework for combating these offenses in Kenya.[131]

Another strength of Kenya's regime is the effective coordination between various agencies responsible for combating money laundering and terrorism financing. This collaboration has helped to enhance the effectiveness of Kenya's anti-money laundering and terrorism financing regime.[132]

---

[127] Muthaura, M., & Gitahi, S. (2020). Evaluating the effectiveness of Kenya's anti-money laundering and countering the financing of terrorism regime against the FATF standards. *Journal of Money Laundering Control*, 23(4), 621-637

[128] Ibid

[129] Ibid

[130] Ibid

[131] Ibid

[132] Ibid

However, there are still areas where Kenya's regime falls short of FATF standards. For example, the FATF requires that countries establish a national strategy to combat money laundering and terrorism financing, and while Kenya has made progress in this area, there is still room for improvement.[133]

Another area of weakness is the lack of capacity building programs for some law enforcement agencies responsible for combating money laundering and terrorism financing. While there have been efforts to enhance the skills and knowledge of law enforcement agencies, further investment is needed to improve the quality of investigations and enforcement activities.[134]

While Kenya has made significant progress in recent years in combating money laundering and terrorism financing, there is still work to be done to fully comply with the FATF standards.

4.1.2 Regional developments

The Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) is an intergovernmental organization established in 1999 to combat money laundering and terrorism financing in the Eastern and Southern Africa region.[135] The group consists of 18 member countries, including Kenya.[136]

---

[133] Khauka, E., & Mwangi, S. (2020). Comparison of Kenya's anti-money laundering and counter-terrorism financing legal framework with FATF recommendations. *Journal of Money Laundering Control*, 23(3), 405-421.
[134] Ibid
[135] ESAAMLG (2022), Anti-money laundering and counter-terrorist financing measures - Kenya, Second Round Mutual Evaluation Report, ESAAMLG, Dar es Salaam *http://www.esaamlg.org/reports/me.php* accessed 10 March 2023
[136] Ibid

ESAAMLG was established to facilitate the implementation of international standards and best practices for combating money laundering and terrorism financing in the region.[137] It conducts mutual evaluations of its member countries to assess their compliance with the international standards set by the Financial Action Task Force (FATF) and provides technical assistance to help countries improve their anti-money laundering and terrorism financing regimes.[138]

ESAAMLG is relevant to Kenya because it provides a platform for cooperation and collaboration among member countries to combat money laundering and terrorism financing in the region.[139] Kenya, being a member of the group, benefits from the technical assistance provided by ESAAMLG in enhancing its anti-money laundering and terrorism financing regime.[140]

Through mutual evaluations, ESAAMLG assesses the level of compliance of member countries with international standards and provides recommendations for improvement. This process helps Kenya to identify areas where it needs to improve its anti-money laundering and terrorism financing regime.[141]

Furthermore, ESAAMLG provides a forum for sharing information and experiences among member countries, which can be useful in identifying emerging trends and typologies of money laundering and terrorism financing in the region. This information sharing can help

[137] Ibid
[138] Ibid
[139] Ibid
[140] Ibid
[141] Ibid

Kenya to stay ahead of evolving threats in the fight against money laundering and terrorism financing.[142]

4.2 Shortcomings the Anti-Money Laundering and Counter-Financing of Terrorism Regime

Despite the efforts made by Kenya to combat money laundering and financing of terrorism, the country's anti-money laundering and financing of terrorism regime has some shortcomings, including:

1. **Weak enforcement**: The enforcement of anti-money laundering laws in Kenya is still weak, with few prosecutions and convictions for money laundering and terrorism financing offenses. This undermines the effectiveness of the regime and creates a perception of impunity for offenders.[143]

2. **Inadequate supervision**: There is inadequate supervision of financial institutions, particularly those in the informal sector, making it easy for criminals to launder money and finance terrorism through these channels.[144]

3. **Insufficient resources**: The agencies responsible for enforcing anti-money laundering laws and combating terrorism financing in Kenya, including the ARA, EACC, and the DCI, have limited resources, including financial, human, and technological resources.[145]

---

[142] Ibid
[143] Moses Kinyanjui Njuru, "A Critical Analysis of the Anti-Money Laundering and Counter-Financing of Terrorism Legal Regime in Kenya", *the African Journal of Criminology and Justice Studies*, 2017.
[144] Ibid
[145] Ibid

4. **Limited international cooperation**: While Kenya is a member of the ESAAMLG and has made efforts to cooperate with international partners, there are still limitations in terms of information sharing and cross-border cooperation, which hinders the effective detection and prevention of money laundering and terrorism financing.[146]

5. **Corruption:** Corruption is still a significant challenge in Kenya, and it undermines the effectiveness of the anti-money laundering and terrorism financing regime. Corruption can allow criminals to circumvent the law and continue to launder money and finance terrorism with impunity.[147]

6. **Limited understanding of the risks**: There is a limited understanding of the risks of money laundering and terrorism financing among some financial institutions and other businesses, which can make them vulnerable to abuse by criminals.[148]

4.2.1 Concerns raised by FATF

The Financial Action Task Force (FATF) has raised several concerns with regards to Kenya's anti-money laundering and counter-terrorism financing regime. Some of these concerns include:

1. **Weak implementation of laws:** Despite the existence of strong anti-money laundering and counter-terrorism financing laws in Kenya, the implementation and enforcement of these laws are weak. FATF has expressed

[146] Ibid
[147] Ibid
[148] Ibid

concern about the low level of investigations, prosecutions, and convictions related to money laundering and terrorism financing.[149]

2. **Inadequate supervision of financial institutions:** There is inadequate supervision of financial institutions in Kenya, particularly those in the informal sector, making it easy for criminals to launder money and finance terrorism through these channels.[150]

3. **Insufficient international cooperation:** FATF has noted that Kenya needs to improve its international cooperation with other countries to enhance the effectiveness of its anti-money laundering and counter-terrorism financing regime.[151]

4. **Inadequate risk assessment**: Kenya needs to improve its risk assessment capabilities to better understand the nature and scope of money laundering and terrorism financing in the country. This will enable the authorities to develop more effective strategies to combat these crimes.[152]

5. **Limited use of financial intelligence**: FATF has also expressed concern about the limited use of financial intelligence in Kenya to combat money laundering and

[149] ESAAMLG (2022), Anti-money laundering and counter-terrorist financing measures - Kenya, Second Round Mutual Evaluation Report, ESAAMLG, Dar es Salaam *http://www.esaamlg.org/reports/me.php* accessed 10 March 2023

[150] Ibid

[151] Ibid

[152] Ibid

terrorism financing. There is a need to strengthen the capacity of the Financial Reporting Centre (FRC) to collect, analyze, and disseminate financial intelligence to relevant law enforcement agencies.[153]

4.2.2 Diminished role of the DPP

In recent years, the role of the Director of Public Prosecutions (DPP) in Kenya's anti-money laundering and counter-terrorism financing regime has been diminished due to several factors.

One of the main factors is the establishment of the Asset Recovery Agency (ARA), which has taken over some of the functions of the DPP[154]. The ARA is responsible for tracing, freezing, and confiscating proceeds of crime, including those related to money laundering and terrorism financing. As a result, the DPP's role in asset recovery has been reduced, and the ARA has become the primary agency responsible for asset recovery in Kenya.[155]

Furthermore, the DPP's role in prosecuting financial crimes is also limited by the fact that the Financial Reporting Centre (FRC) and the Central Bank of Kenya (CBK) have primary responsibility for monitoring financial transactions and receiving reports of suspicious activities related to money laundering and terrorism financing. The DPP relies on these agencies to provide financial intelligence that can be used to prosecute financial crimes. However, there have been

[153] Ibid
[154] Mwaura, J. N. (2020). The Role of the Office of the Director of Public Prosecutions in Fighting Money Laundering and Terrorist Financing in Kenya. *International Journal of Humanities and Social Science Research*, 8(1), 14-25.
[155] Ibid

concerns about the quality and timeliness of financial intelligence provided by these agencies.[156]

Under the POCAMLA[157], the Anti-Money Laundering Advisory Board established to oversee the implementation of the Act comprises various stakeholders. However, the ODPP is not a member of this board. The ODPP is an independent body responsible for prosecuting criminal cases, including those related to money laundering and terrorist financing. While the ODPP is not a member of the board, it is still a critical player in the anti-money laundering and counter-financing of terrorism regime in Kenya.

The ODPP works closely with the FRC, which is the agency responsible for receiving, analyzing, and disseminating financial intelligence related to money laundering and terrorist financing. The ODPP uses this financial intelligence to investigate and prosecute cases related to money laundering and terrorist financing.[158]

The exclusion of the ODPP as a member of the board has been a subject of debate.[159] Some argue that the ODPP, as the agency responsible for prosecuting cases related to money laundering and terrorist financing, should be a member of the board to provide its expertise in the fight against these crimes.[160]

---

[156] Ibid

[157] Section 49, POCAMLA

[158] Mwaura, J. N. (2020). The Role of the Office of the Director of Public Prosecutions in Fighting Money Laundering and Terrorist Financing in Kenya. *International Journal of Humanities and Social Science Research*, 8(1), 14-25.

[159] Ibid

[160] Ibid

On the other hand, others argue that the ODPP's role is limited to prosecution and not policy-making, which is the primary responsibility of the board. Therefore, having the ODPP as a member of the board may not be necessary.[161]

The study postulates that the ODPP is a critical body tasked with prosecution of these offenses. It should therefore be included as a board member to inform policy and decision-making in the board. The other board members can also share information with the ODPP and help in prosecution of these offenses. This mutual relationship is beneficial in tackling these offenses and therefore necessitates the inclusion of the ODPP as a board member.

To crown it all, the study posits that addressing the shortcomings above will require significant efforts by the Kenyan government, financial institutions, and other stakeholders, including increased resources for enforcement agencies, enhanced supervision of financial institutions, improved international cooperation, and strengthened efforts to combat corruption.

5. Proposals for Urgent Reform

Based on the above discussion, the study has formulated four key proposals for urgent reform of Kenya's anti-money laundering and counter-financing of terrorism regime:

5.1 Strengthening the role of the DPP

There have been concerns raised about the diminishing role of the DPP in combating money laundering and terrorist financing. To address this, the government could consider amending the

[161] Ibid

POCAMLA Act to include the ODPP as a member of the board established under the Act. Additionally, the government could allocate more resources to the ODPP to enable it to carry out its role effectively.

5.2 Enhancing the capacity of the Anti- money laundering (AML)/Counter-financing of terrorism (CFT) regulators

The CBK, CMA, and IRA play a critical role in the fight against money laundering and terrorist financing. To enhance their effectiveness, the government could consider providing more resources to these agencies to enable them to build their capacity and expertise in AML/CFT.

5.3 Strengthening the legislative framework

The existing AML/CFT laws, such as POCAMLA and the Banking Act, could be amended to align with international standards and best practices. This could include introducing provisions for beneficial ownership transparency, strengthening the risk-based approach, and improving the coordination between different agencies involved in the fight against money laundering and terrorist financing.

5.4 Enhancing international cooperation

Given the global nature of money laundering and terrorist financing, it is crucial for Kenya to enhance its cooperation with other countries and international bodies. The government could consider strengthening its partnerships with regional bodies such as ESAAMLG and international bodies such as the FATF. Additionally, the government could explore opportunities for mutual legal assistance and sharing of intelligence with other countries.

6. Conclusion

Money laundering and financing of terrorism remain significant global challenges, and Kenya is not immune to these offenses. The country has put in place a legal and institutional framework to combat money laundering and terrorist financing, including the POCAMLA, the Banking Act, the CBK Act, and the Asset Recovery Agency. Additionally, the EACC, the ODPP and the DCI play a critical role in investigating and prosecuting money laundering and terrorist financing offenses.

However, Kenya's regime faces several challenges, including inadequate resources and limited capacity of law enforcement agencies, inadequate coordination among stakeholders, and inadequate implementation of the legal framework. Kenya is also yet to fully comply with the FATF standards, and there are concerns about the role and participation of the DPP in the regime.

To address these challenges and enhance the effectiveness of the anti-money laundering and counter-financing of terrorism regime, urgent reforms are necessary. These reforms should include strengthening the legal framework, providing more resources to law enforcement agencies, improving coordination among stakeholders, enhancing international cooperation, and reviewing the role of the DPP.

Kenya has made significant strides in combating money laundering and terrorist financing. However, more needs to be done to enhance the effectiveness of the regime, and urgent reforms are necessary to address the existing gaps and challenges. By doing so, Kenya will be better placed to protect its financial system and prevent money laundering and terrorist financing offenses.

References

Aman, M. (2019). Fighting money laundering and terrorism financing in Kenya: the role of law enforcement agencies. *Journal of Financial Crime*, 26(4), 972-987.

Banking Act

Central Bank of Kenya Act

Charles Omwandho Onditi, "The Impact of Anti-Money Laundering Regulations on the Financial Performance of Commercial Banks in Kenya", *the International Journal of Business and Social Science Research.*

David Mwai Gichia, "The Efficacy of Kenya's Anti-Money Laundering and Counter Financing of Terrorism Regime: A Critical Analysis. *The International Journal of Innovative Research and Development.*

Edwin Bikundo Onyancha, "Kenya's Anti-Money Laundering Regime: Challenges and Prospects", *the International Journal of Humanities and Social Science Research*.

ESAAMLG (2022), Anti-money laundering and counter-terrorist financing measures - Kenya, Second Round Mutual Evaluation Report, ESAAMLG, Dar es Salaam *http://www.esaamlg.org/reports/me.php*

Ethics and Anti-Corruption Commission Act, (EACC) 2011
Financing Risk Assessment of March 2018. Available at *https://www.centralbank.go.ke/wp-content/uploads/2018/03/Guidance-note-on-ML_TF-risk-assessment.pdf*

Income Tax Act

Khauka, E., & Mwangi, S. (2020). Comparison of Kenya's anti-money laundering and counter-terrorism financing legal framework with FATF recommendations. *Journal of Money Laundering Control*, 23(3), 405-421.

Makori, R. (2019). Kenya's money laundering and terrorist financing risks: a review of the legal and regulatory framework. *Journal of Financial Crime,* 26(1), 44-59.

Moses Kinyanjui Njuru, "A Critical Analysis of the Anti-Money Laundering and Counter-Financing of Terrorism Legal Regime in Kenya", *the African Journal of Criminology and Justice Studies,* 2017.

Musyoka, F. M., & Onyango, J. (2019). The Financial Action Task Force: What it is and Its Impact on Combating Money Laundering and Terrorist Financing. *International Journal of Innovative Finance and Economics Research*, 7(2), 1-11.

Muthaura, M., & Gitahi, S. (2020). Evaluating the effectiveness of Kenya's anti-money laundering and countering the financing of terrorism regime against the FATF standards. *Journal of Money Laundering Control,* 23(4), 621-637

Mwaura, J. N. (2020). The Role of the Office of the Director of Public Prosecutions in Fighting Money Laundering and Terrorist Financing in Kenya. *International Journal of Humanities and Social Science Research*, 8(1), 14-25.

Mwaura, M., & Kimani, N. (2019). The effectiveness of the anti-money laundering regime in Kenya. *International Journal of Business and Social Science,* 10(11), 111-120.

National Police Service Act, 2011

Odhiambo, M. O. (2016). A critical analysis of anti-money laundering regulations in Kenya: Challenges and prospects. *Journal of Money Laundering Control*, 19(2), 173-184.

Office of the Director of Public Prosecutions (ODPP) Act, 2013.

Ongore, V. O., & K'Obonyo, P. O. (2018). An analysis of money laundering and its control in Kenya. *International Journal of Social Economics*, 45(3), 462-475.

Prevention of Terrorism Act, 2012

Proceeds of Crime and Anti-money laundering Act 2009

The Constitution of Kenya 2010

Recognising the Rights of Nature for Environmental Justice in Kenya

By: ***Waruiru Cecilia* & Kirui Diana*****

Abstract

Environmental justice in Kenya has since time immemorial been marred by various challenges. [1] *While the enactment of the Environmental Management and Coordination Act and the Constitution of Kenya 2010 provided a stronger legal basis for environmental litigation and conservation, there still are procedural challenges that continue to hinder the attainment of environmental justice.*[2] *This paper therefore, seeks to show how the recognition of the Rights of Nature as a legal doctrine can be adopted in Kenya. The same shall be achieved through an analysis of the various jurisdictions that have adopted this school of thought while also keenly looking at legal jurisprudence that speaks to the Rights of Nature. Thus, this paper shall demonstrate that the attainment of environmental justice for the present and future generations should take into consideration that nature has inherent rights, that is; the right to exist, regenerate and defend itself not only for the benefit of the people but for the benefit of nature itself.*

1. Introduction

Sometime in August 2018, officials of Ufanisi Center in Korogocho area in Nairobi County, an environmental community-based organisation, filed a suit against the National Environment Management Authority (NEMA) on account of air and water

[1] Kariuki Muigua & Francis Kariuki, *Towards Environmental Justice in Kenya*, KMCO, January, 2015, *Towards-Environmental-Justice-in-Kenya-January-2015.pdf (kmco.co.ke)* accessed 28th March 2023

[2] Brian Sang, *Tending Towards Greater Eco-Protection in Kenya: Public Interest Environmental Litigation and Its Prospects Within the New Constitutional Order*, Journal of African Law, 2013, Vol. 57, No. 1 (2013); 29-56

pollution in regions near the Nairobi and Athi River.[3] They later amended the petition to include the County Governments of Nairobi, Machakos, Kiambu, Kilifi, Makueni and Tana River as Interested Parties to the suit. The suit claimed that the Respondent and Interested parties failed to prevent or stop the pollution of the Athi and Nairobi rivers and the air and water pollution by the Dandora Dumpsite. They claimed that the resultant poor air and water quality had adverse effects on the right to life, health, water, food and adequate standards of living as enshrined in the Constitution.

Whilst rendering the judgement and finding the Respondent and Interested parties liable, Justice K Bor, proposed a way to deal with the said pollution by borrowing from other jurisdictions that have come up with creative ways to deal with pollution of their rivers. According to Justice K Bor one such innovation, adopted for the conservation of rivers and lakes is the granting of legal personalities to such bodies. This innovation constitutes an important element of the Rights of Nature Approach. To this end, this paper makes a case for the application of the rights nature approach towards the attainment of environmental justice in Kenya. It makes a start in looking at the rights of nature discourse by defining it and looking at key its proponents. Thereafter, the paper looks at the rights of nature in practise and environmental litigation under the rights of nature approach. The paper will demonstrate that Kenya ought to adopt the rights of nature approach in the attainment of environmental justice through conservation and litigation.

[3] Isaiah Luyara Odando & another v National Management Environmental Authority & 2 others; County Government of Nairobi & 5 others (Interested Parties) [2021] eKLR

2. The Rights of nature discourse

Laws prescribing rights of nature are constructed to grant nature a legal personality and conceptualize nature at the ecosystem level while recognizing that human beings are part of these ecosystems.[4] Therefore, the Rights of Nature are described as a means for people to uphold their use of natural resources while still preserving biodiversity.[5] This doctrine denotes a shift from an anthropocentric approach to an ecocentric one in attaining environmental justice where the rights of nature will speak to the conservation of the environment as matter of right rather than from the benefits accrued by human beings.[6]

The doctrine of Rights of Nature originates from an article by Christopher Stone titled ''Should Tress Have a Standing?''[7] which sought to contribute towards an ongoing case in a US federal court, *Sierra Club v Morton*. The plaintiff in *Sierra Club v Morton* sought to challenge the decision concerning the development of a ski resort within the Sierra Nevada Mountains of California.[8] While this suit was rejected by a majority of the court, a dissenting opinion by Justice

[4] Craig M. Kauffman, Pamela L Martin, *Constructing Rights of Nature Norms in the US, Ecuador & New Zealand*, Global Environmental Politics (2018) 18 (4):43-62

[5] Jan Darpo, *Can Nature Get It Right?; A Study on the Rights of Nature in the European Context*, *https://www.europarl.europa.eu/RegData/etudes/STUD/2021/689328/IPOL_STU (2021)689328_EN.pdf* accessed 28th March, 2023

[6] Kariuki Muigua, *Entrenching Ecocentric Approach to Environmental Management in Kenya*, published August 19, *2022 Entrenching Ecocentric Approach to Environmental Management in Kenya | University of Nairobi (uonbi.ac.ke)* accessed 28th March, 2023

[7] Stone Christopher D, '*Should Trees Have a Legal Standing? -Towards Legal Rights for Natural Objects.*' Southern California Law Review 45 (1972): 450-501

[8] Sierra Club v Morton 405 US. 727 (1972)

William O Douglas referred to the idea proposing that environmental objects be granted legal personhood to be able to defend themselves in court through representation by the public.

The proponents of this doctrine argue that modern environmental law continues to propagate the destruction of the planet through legislations that regard nature and natural resources as property and objects.[9] Further, such regulations and legislations are only aimed towards mitigating negative environmental impacts for the purposes of economic growth. The recognition of the Rights of Nature is important in making legal systems proactive in tackling emerging crises by granting Nature primacy over economic interests.[10]

Further, it has been argued that the rights of nature approach grants people the locus standi to bring cases to courts on behalf of nature where the merits of the case would be heard.[11] The advancement of this school of thought thus asserts that humanity's survival is dependent on healthy ecosystems and as such, the protection of nature's rights advances human rights and their well-being.

3. From theory to practise

Internationally, movements promoting the Rights of Nature began forming as early as in the 1980s which subsequently led to the formation of institutions and centers for earth jurisprudence in countries such as New Zealand and the United States of America. In 2009, the UN General Assembly created the UN Harmony with Nature Program which serves to facilitate the development of the Rights of Nature within the UN system. Rights of Nature are

[9] Ibid note 5 at pg. 14
[10] Ibid
[11] Ibid note 5 at pg.15

expressed in various reports and resolutions of the UN General Assembly [12] with the clearest expression being the Universal Declaration on the Rights of Mother Earth (UDRME) which addresses the obligations of Human Beings to Mother Earth. At the heart of global rights of nature norms is that all components of nature including humans have inherent rights.

Drawing examples from countries that recognize Rights of Nature such as Ecuador and New Zealand, these rights may vary in the specific ways in which they are granted. Ecuador's constitution for example, conceptualizes nature's value holistically. Chapter 7 of the Ecuadorian Constitution grants nature the rights to exist, to maintain its integrity as an ecosystem and to regenerate its life cycles, structure, functions and evolutionary processes. [13] On the other hand, laws prescribing the rights of nature in New Zealand are only granted to particular ecosystems (the Whanganui River and the Forest) and such laws explicitly define the boundaries of these ecosystems and restrict legal personality to them.[14] In both Countries however, these laws tend to recognize ecosystems as living spiritual beings.

In Colombia, the Supreme Court issued a decision in April 2018 in which it recognized the Amazon River ecosystem as having rights deserving protection in a case filed by a group of young people against the President, ministries, agencies and local governments.[15] The group claimed that the government had violated their rights to life, health and enjoyment of a healthy environment by failing to

[12] UN General Assembly, Harmony with Nature: resolution A/RES/70/208 2015
[13] Constitution of the Republic of Ecuador 2008, as amended to 2021
[14] Ibid note 4 at pg. 49
[15] Future Generations v Ministry of Environment & Others; Radicacion no. 11001-22-03-000-2018-00319-01; STC 4360-2018

control deforestation in the Amazon region which contributed to environmental degradation and climate change.[16] The Colombian court declared that it would recognize the Colombian Amazon as an entity with rights and entitled to protection, conservation, maintenance and restoration, for the sake of protecting the vital ecosystem for the future of the planet.[17] This 2018 decision followed an earlier one made in 2016 that granted legal rights to the Rio Atrato against the background of the devastating environmental and social impacts caused by illegal mining in the Atrato region and the failure of the State to address them, the Colombian Constitutional Court ruled in favour of the claimant communities in 2016.[18]

Conclusively, when the rights of nature approach is adopted in the conservation of the environment, the net effect is the development of concrete environmental policies and actions specific to that particular river or lake and so forth based on its inherent rights.

4. Environmental litigation and the rights of nature discourse

Environmental litigation provides a mechanism for both private and public interest claimants to enforce environmental law, determine environmental disputes, obtain compensation for environmental damage and in the end, conserve and protect the environment.[19]

---

[16] Ibid

[17] Ibid

[18] Philipp Weshe, *Rights of Nature in Practice: A Case Study on the Impacts of the Colombian Atrato River Decision,* Journal of Environmental Law, Volume 33, Issue 3, November 2021, Pages 531–555, *https://doi.org/10.1093/jel/eqab021* accessed 28th March 2023

[19] Oscar Amugo Angote, *Environmental Litigation in Kenya: A Call for Reforms*, Journal of cmsd Volume 3(1) 2019 *Justice-Oscar-Amugo-Angote-Environment-Litigation-and-A-Call-for-Reforms-10th-june-2019.pdf (journalofcmsd.net)* accessed 28th March 2023

Despite this, environmental litigation in Kenya has been frustrated since time immemorial.[20]

In the previous constitutional dispensation, environmental litigation was largely unsuccessful for various reasons. One such reason, was the question of *locus standi.* At the heart of many environmental actions was the question: who has the standing? Who can appear for the environment?

Like most African states with legal orders of British provenance, Kenya adheres to the tenets and traditions of common law.[21] As such, most Kenyan procedural rules including *locus standi* are based on common law. The common law position on *locus standi* requires that applicants who seek an actionable remedy must show or have an interest or must show that they have suffered or are likely to suffer as a result of the impugned conduct.[22] This is well set out in the case of *Gouriet v Union of Postal Office Workers* where the Court held that the jurisdiction of a civil court to grant remedies in private law is confined to the grant of remedies to litigants whose rights in private law have been infringed or are threatened with infringement.[23]

When this restrictive approach to locus standi was applied by Kenyan courts in environmental actions, litigants were required to indicate their interest in the case and prove the injury that they had suffered or were likely to suffer. This frustrated many environmental actions instituted by public-spirited individuals or non-state entities as such persons were often held not to meet the requisite threshold of

[20] Ibid
[21] Ibid note 2
[22] Ibid
[23] Gouriet v Union of Post Office Workers and others [1977] 3 All ER 70; [1978] AC 435.

proximate harm and/or loss from the impugned conduct.[24] This is because most environmental matters are by their very nature public and therefore it was difficult for a person to prove that he had suffered injury due to environmental degradation.[25] The upshot of all these was environmental litigation was hindered even in the presence of environmental degradation and apparent environmental violations.

This is well brought out in the case of *Wangari Maathai v Kenya Times Media Trust*.[26] In this case, the Plaintiff (Wangari Maathai) sought an injunction restraining Kenya Times Media Trust from embarking further on the construction of the proposed Kenya Times complex at Uhuru Park until determination of the suit or further orders of the court. Kenya Times Media trust raised a preliminary objection and sought to strike out the plaint on grounds that the plaint disclosed no cause of action against the Defendant and that the plaintiff had no locus standi to file the suit or the application. The Court struck out the plaint for the reasons raised by the Defence in its preliminary objection. The Court held that the Plaintiff had not shown that the Defendant Company was in breach of any rights, public or private in relation to the plaintiff nor that the Company caused damage to her nor that she anticipates any damage or injury. The Court further held only the Attorney General could sue on behalf of the public.

The implication and application of this strict rule in subsequent cases had a negative impact on the number of environmental cases filed in the courts, thus denying the courts the opportunity to settle environmental disputes and protect the environment.

[24] Ibid
[25] Ibid note 2
[26] Maathai v Kenya Times Media Trust Ltd [1989] eKLR

However, with the enactment of the Environmental Management and Coordination Act in 1999, litigants were provided with a clear basis for public interest litigation. Section 3 (1) of the Act guarantees every person in Kenya the right to a clean and healthy environment, and a corresponding duty to protect the environment.[27] The same section, under sub-section 3 provides a basis for any person to actively seek judicial redress in respect of (likely) violations of environmental rights or dereliction of environmental duties as set out in subsection 1 of the Act.[28] Section 3(4) of the EMCA surmounts the common law locus standi requirement by guaranteeing that any person proceeding under subsection (3) shall have the capacity to bring an action notwithstanding that such a person cannot show that the defendant's act or omission has caused or is likely to cause him any personal loss or injury provided that such action.[29]

The promulgation of the 2010 Constitution further developed and enhanced environmental litigation and ultimately environmental conservation and protection. Article 42 provides that every person has the right to a clean and healthy environment, which includes 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; and to have obligations relating to the environment fulfilled under Article 70. [30] The Constitution introduced provisions which also surmount the restrictive common law interpretation of locus standi. Article 22 (1) guarantees every person the right to institute court proceedings in respect of threatened breaches of fundamental guarantees in the Bill

[27] Environmental Management and Coordination Act, 1999, Section 3(1)
[28] Environmental Management and Coordination Act, 1999, Section 3(3)
[29] Environmental Management and Coordination Act, 1999, Section 3(4)
[30] Constitution of Kenya, 2010, Article 42

of Rights and facilitates the institution of judicial proceedings by persons other than those acting in their own interests.[31]

While the enactment of the Constitution and Environmental Management and Coordination have provided a clear legal basis for the public interest litigation in environmental matters, environmental litigation still faces procedural and substantive obstacles. The basis of instituting environmental claims under the Constitution and the Environmental Management and Coordination Act remains largely to be if the people's rights to the environment are threatened. This then usually translates to granting of reliefs to affected persons rather than the environment itself.

To improve environmental litigation, and ultimately environmental conservation, the rights of nature approach should be employed. This would mean that the environment becomes a right holder with legal standing in court. The environment will therefore be able to institute proceedings on its own behalf simply because nature has inherent rights that deserve to be protected. Additionally, the environment becomes the direct beneficiary of legal redress. As rightly stated by William O Douglas in *Sierra Club v. Morton*, "environmental objects" should be able "to sue for their own preservation", rivers, valleys, trees, beaches—all of these natural objects should be treated like other inanimate objects to which courts have given legal personhood, like ships or corporations.[32] These rights of nature can be enforced by a guardianship body who could initiate legal action

[31] Constitution of Kenya, 2010, Article 22
[32] Scott W. Stern, *Standing for Everyone: Sierra Club v. Morton, Supreme Court Deliberations, and a Solution to the Problem of Environmental Standing*, Fordham Environmental Law Review, Volume30, Number 2 2018 Article 2

and collect relief on behalf of the natural entity, which could then be directed into a fund to preserve and restore its condition.[33]

5. Conclusion

The spirit of the Constitution of Kenya 2010 reflected both in the preamble and subsequent provisions, speaks towards sustaining the environment for the benefit of future generations. In so doing, there needs to be a shift in our approach as a country on environmental conservation and litigation. As demonstrated above, by employing the rights of nature approach we can be able to attain environmental justice as a country because the basis of our environmental conservation and litigation would be that just like human beings, nature has inherent rights; that is, the rights to exist, regenerate and defend itself not only for the benefit of the people but for nature itself.

[33] Ibid note 19

References

Statutes and International laws

Constitution of Kenya, 2010 (Laws of Kenya)

Constitution of the Republic of Ecuador 2008, as amended to 2021

Environmental Management and Coordination Act, 1999 (Laws of Kenya)

UN General Assembly, Harmony with Nature: resolution A/RES/70/208 2015

Case law

Future Generations v Ministry of Environment & Others; Radicacion no. 11001-22-03-000-2018-00319-01; STC 4360-2018

Gouriet v Union of Post Office Workers and others [1977] 3 All ER 70; [1978] AC 435.

Isaiah Luyara Odando & another v National Management Environmental Authority & 2 others; County Government of Nairobi & 5 others (Interested Parties) [2021] eKLR

Maathai v Kenya Times Media Trust Ltd [1989] eKLR
Sierra Club v Morton 405 US. 727 (1972)

Journals, Articles, Reports

Angote O A, *Environmental Litigation in Kenya: A Call for Reforms*, Journal of cmsd Volume 3(1) (2019) *Justice-Oscar-Amugo-Angote-*

Environment-Litigation-and-A-Call-for-Reforms-10th-june-2019.pdf (journalofcmsd.net) accessed 28th March 2023

Kauffman C M & Martin P L, *Constructing Rights of Nature Norms in the US, Ecuador & New Zealand*, Global Environmental Politics (2018) 18 (4):43-62

Sang B, *Tending Towards Greater Eco-Protection in Kenya: Public Interest Environmental Litigation and Its Prospects Within the New Constitutional Order*, Journal of African Law, 2013, Vol. 57, No. 1 (2013), pp. 29-56

Stern S W, *Standing for Everyone: Sierra Club v. Morton, Supreme Court Deliberations, and a Solution to the Problem of Environmental Standing*, Fordham Environmental Law Review, Volume30, Number 2 2018 Article 2

Stone C, '*Should Trees Have a Legal Standing? -Towards Legal Rights for Natural Objects.*' Southern California Law Review 45 (1972): 450-501
Weshe P, *Rights of Nature in Practice: A Case Study on the Impacts of the Colombian Atrato River Decision,* Journal of Environmental Law, Volume 33, Issue 3, November 2021, Pages 531–555, *https://doi.org/10.1093/jel/eqab021,* accessed 28th March, 2023

Online Sources

Darpo J, *Can Nature Get It Right?; A Study on the Rights of Nature in the European Context*, *https://www.europarl.europa.eu/RegData/etudes/STUD/2021/689328/IPOL_STU(2021)689328_EN.pdf* accessed 28th March, 2023

Muigua K, *Entrenching Ecocentric Approach to Environmental Management in Kenya*, published August 19, 2022 *Entrenching*

Ecocentric Approach to Environmental Management in Kenya | University of Nairobi (uonbi.ac.ke) accessed 28th March, 2023

Muigua K & Kariuki F, *Towards Environmental Justice in Kenya*, KMCO, January, 2015, *Towards-Environmental-Justice-in-Kenya-January-2015.pdf (kmco.co.ke)* accessed 28th March 2023

High Seas Treaty: Enhancing Environmental Responsibility for Marine Protection

By: ***Kariuki Muigua****

Abstract

This paper is a commentary and highlights the contents of the proposed United Nations High Seas Treaty and discusses how the Treaty, when adopted can enhance environmental protection of the marine life in the open areas of international waters. The author also discusses the current international regulatory framework on management of marine resources and highlights the gaps especially in environmental conservation. The author argues that this Treaty is a step towards achieving Sustainable Development Goal 14 on conservation of marine resources that lie beyond national jurisdictions.

1. Introduction

For a long time, there has been no universal legal instrument specifically aimed at protecting the high seas beyond the national jurisdictions as defined by the United Nations Convention on the Law (UNCLOS). As a result, there has been a painful time of excessive exploitation, which has been carried out with utter impunity and with little regard for the health of the natural resources it harbours. It has been a case of humanity metaphorically shooting itself in the foot or seemingly not caring about future generations who will depend on a healthy ocean for their survival.[1] Worldwide oceans make up about

****Ph.D in Law (Nrb), FCIArb (Chartered Arbitrator), LL. B (Hons) Nrb, LL.M (Environmental Law) Nrb; Dip. In Law (KSL); FCPS (K); Dip. In Arbitration (UK); MKIM; Mediator; Consultant: Lead expert EIA/EA NEMA; BSI ISO/IEC 27001:2005 ISMS Lead Auditor/ Implementer; Advocate of the High Court of Kenya; Senior Lecturer at the University of Nairobi, Faculty of Law [March 2023].***

two-thirds of international waters. This implies that all nations have the freedom to fish, ship, and conduct research there. As a result, problems including climate change, overfishing, and shipping traffic pose a threat to the marine species that inhabits the vast bulk of the high seas.[2]

States have since moved to correct this situation by coming up with a High Seas Treaty, aimed at conserving recourses lying within these international waters. This paper highlights some of the positive aspects of this Treaty and how the same can enhance environmental responsibilities of those seeking to explore these resources.

2. Marine Protection and Conservation: The Current Regulatory Framework

The Convention on the Law of the Sea (UNCLOS), which was developed under the supervision of the United Nations and ratified in 1982 by 117 States, is the international instrument most frequently linked to the law of the sea. UNCLOS came into force in 1994.[3] UNCLOS is a framework Convention that addresses a wide range of ocean-related issues. The treaty, which is divided into seventeen parts and nine appendices, outlines states' rights and responsibilities with

---

[1] Owen-Burge C, 'Why the High Seas Treaty Is a Breakthrough for the Ocean and the Planet' (*Climate Champions*, 10 March 2023) <*https://climatechampions.unfccc.int/why-the-high-seas-treaty-is-a-breakthrough-for-the-ocean-and-the-planet/*> accessed 20 March 2023.

[2] 'What Is the UN High Seas Treaty and Why Is It Needed?' *BBC News* (5 March 2023) <*https://www.bbc.com/news/science-environment-64839763*> accessed 20 March 2023.

[3] Hoagland Porter and others, 'Law of the Sea☆' in J Kirk Cochran, Henry J Bokuniewicz and Patricia L Yager (eds), *Encyclopedia of Ocean Sciences (Third Edition)* (Academic Press 2019) <*https://www.sciencedirect.com/science/article/pii/B9780124095489113442*> accessed 20 March 2023.

regard to: (1) the territorial sea and contiguous zone; (2) straits used for international navigation; (3) archipelagic states; (4) the exclusive economic zone; (5) the continental shelf; (6) the high seas; (7) the regime of islands; (8) enclosed or semi- enclosed seas; (9) the right of access of landlocked states to and from the sea and freedom of transit.[4]

It establishes guidelines for all uses of the oceans' resources and establishes a comprehensive regime of law and order throughout the world's oceans and seas. It encapsulates long-standing guidelines for using the oceans in one document while also introducing new legal frameworks and addressing fresh issues. The Convention also lays forth the groundwork for future advancements in particular spheres of maritime law.[5]

The United Nations Convention on the Law of the Sea (UNCLOS) establishes guidelines for using the ocean and its resources, but it is silent on how governments should specifically, save for broad provisions, protect and sustainably utilise biodiversity found in the high seas. States are able to identify their jurisdictional waters and maritime zones by establishing a coastal baseline;200 nautical miles from the baseline are included in their Exclusive Economic Zone (EEZ). The resources present in the zone may only be utilised or conserved by States. The term "Areas Outside National Jurisdiction" refers to the portions of the ocean outside the Exclusive Economic

[4] 'The Legal and Institutional Framework Governing Ocean-Based Economic Sectors in Barbados' (2019) <*https://unctad.org/system/files/official-document/ditctedinf2019d14_en.pdf*> accessed 20 March 2023.

[5] 'United Nations Convention on the Law of the Sea' <*https://www.imo.org/en/ourwork/legal/pages/unitednationsconventiononthelawofthesea.aspx*> accessed 19 March 2023.

Zone. The water column, also known as the High Seas, and the seabed, sometimes known as the Area, are further divisions of these regions according to the Law of the Sea.[6] Thus, currently there is no comprehensive set of rules to ensure their conservation and sustainable use.[7]

Notably, UNCLOS provides that 'all States have the duty to take, or to cooperate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas'.[8] UNCLOS uses the term 'high seas' to mean 'all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State'.[9] It also states that 'the high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law.

It comprises, *inter alia*, both for coastal and land-locked States: (a) freedom of navigation; (b) freedom of overflight; (c) freedom to lay submarine cables and pipelines, subject to Part VI; (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI; (e) freedom of fishing, subject to the conditions laid down in section 2; and (f) freedom of scientific research, subject to Parts VI and XIII.[10] These freedoms are to be

---

[6] 'Biodiversity: UN Agreement for the Protection of the Ocean | Research Institute for Sustainability' <*https://www.rifs-potsdam.de/en/output/dossiers/ocean-treaty*> accessed 20 March 2023.
[7] Ibid.
[8] UNCLOS, Article 117.
[9] UNCLOS, Article 86.
[10] UNCLOS, Article 87(1).

exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.[11]

UNCLOS also states that 'States shall cooperate with each other in the conservation and management of living resources in the areas of the high seas. States whose nationals exploit identical living resources, or different living resources in the same area, are obligated to enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned. They are to, as appropriate, cooperate to establish sub-regional or regional fisheries organizations to this end.[12]

Regarding conservation of the living resources of the high seas, UNCLOS provides that 'in determining the allowable catch and establishing other conservation measures for the living resources in the high seas, States shall: (a) take measures which are designed, on the best scientific evidence available to the States concerned, to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether sub-regional, regional or global; and (b) take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or

[11] UNCLOS, Article 87(2).
[12] UNCLOS, Article 118.

dependent species above levels at which their reproduction may become seriously threatened.[13]

As far as the principles governing the area are concerned, UNCLOS provides that 'necessary measures shall be taken in accordance with this Convention with respect to activities in the Area to ensure effective protection for the marine environment from harmful effects which may arise from such activities. To this end the International Seabed Authority shall adopt appropriate rules, regulations and procedures for inter alia: (a) the prevention, reduction and control of pollution and other hazards to the marine environment, including the coastline, and of interference with the ecological balance of the marine environment, particular attention being paid to the need for protection from harmful effects of such activities as drilling, dredging, excavation, disposal of waste, construction and operation or maintenance of installations, pipelines and other devices related to such activities; and (b) the protection and conservation of the natural resources of the Area and the prevention of damage to the flora and fauna of the marine environment.[14]

UNCLOS outlines States' general obligation to protect and preserve the marine environment. [15] In order to move away from these generalized duties under UNCLOS and which mainly focuses on the jurisdictions of States, the High Seas Treaty is meant to come into force to define specific environmental duties relating to the high seas. The background to this new development is that UNCLOS is best understood as a framework providing a basic foundation for the international law of the oceans intended to be extended and

[13] UNCLOS, Article 119(1).
[14] UNCLOS, Article 145.
[15] UNCLOS, Article 192.

elaborated upon through more specific international agreements and the evolving customs of States.[16]

3. Draft Agreement Under the United Nations Convention On the Law of the Sea On the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (High Seas Treaty)

It has been noted that nearly two-thirds of the planet's surface is covered by water, and the oceans account for 95% of the planet's total habitat by volume. Only 39% of the ocean is subject to national jurisdiction, and only 1% of the high seas have ever been subject to any kind of protection protocol.[17] The High Seas Treaty, which ensures the protection and sustainable use of marine biodiversity in areas beyond of national authority, was approved by Member States of the United Nations after years of talks.[18]

The UN General Assembly unanimously approved Resolution 72/249 on December 24, 2017 to call a conference of governments and launch formal negotiations for a new international legally binding instrument (ILBI) under the UN Convention on the Law of the Sea (UNCLOS) for the conservation and sustainable exploitation of marine biological diversity in areas outside of national jurisdiction.[19]

---

[16] Hoagland P, Jacoby J and Schumacher ME, 'Law Of The Sea' in John H Steele (ed), *Encyclopedia of Ocean Sciences* (Academic Press 2001) <*https://www.sciencedirect.com/science/article/pii/B012227430X004153*> accessed 20 March 2023.

[17] Owen-Burge C, 'Why the High Seas Treaty Is a Breakthrough for the Ocean and the Planet' (*Climate Champions*, 10 March 2023) <*https://climatechampions.unfccc.int/why-the-high-seas-treaty-is-a-breakthrough-for-the-ocean-and-the-planet/*> accessed 20 March 2023.

[18] Ibid.

[19] 'Treaty Negotiations' (*High Seas Alliance*)

The *Draft Agreement Under the United Nations Convention On the Law of the Sea On the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction*[20] was informed by, *inter alia*: the relevant provisions of the United Nations Convention on the Law of the Sea, including the obligation to protect and preserve the marine environment; the need to respect the balance of rights, obligations and interests set out in the Convention; the need to address, in a coherent and cooperative manner, biodiversity loss and degradation of ecosystems of the ocean, due to, in particular, climate change impacts on marine ecosystems, such as warming and ocean deoxygenation, as well as ocean acidification, pollution, including plastic pollution, and unsustainable use; the need for the comprehensive global regime under the Convention to better address the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction; the importance of contributing to the realization of a just and equitable international economic order which takes into account the interests and needs of humankind as a whole and, in particular, the special interests and needs of developing States, whether coastal or landlocked; and recognizing also that support for developing States Parties through capacity-building and the

<*https://www.highseasalliance.org/treaty-negotiations/*> accessed 20 March 2023.

[20] United Nations, *Draft Agreement Under the United Nations Convention On the Law of the Sea On the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction*, Intergovernmental conference on an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction Resumed fifth session, New York, 20 February–3 March 2023 <*https://www.un.org/bbnj/sites/www.un.org.bbnj/files/draft_agreement_advanced_unedited_for_posting_v1.pdf*> accessed 20 March 2023.

development and transfer of marine technology which are essential elements for the attainment of the objectives of the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.[21]

The objective of the Draft Agreement is to ensure the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, for the present and in the long term, through effective implementation of the relevant provisions of the Convention and further international cooperation and coordination.[22]

The proposed Agreement, shall be interpreted and applied in the context of and in a manner consistent with the Convention. Nothing in this Agreement shall prejudice the rights, jurisdiction and duties of States under the Convention, including in respect of the exclusive economic zone and the continental shelf within and beyond 200 nautical miles. In addition, it shall be interpreted and applied in a manner that does not undermine relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies and that promotes coherence and coordination with those instruments, frameworks and bodies.[23]

In order to achieve the objectives of this Agreement, Parties shall be guided by the following principles and approaches: (a) The polluter-pays principle; (b) the principle of the common heritage of

[21] Preamble, *Draft Agreement Under the United Nations Convention On the Law of the Sea On the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction*.
[22] Article 2, *Draft Agreement Under the United Nations Convention On the Law of the Sea On the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction*.
[23] Article 4.

humankind which is set out in the Convention; (b) the freedom of marine scientific research, together with other freedoms of the high seas; (c)the principle of equity, and the fair and equitable sharing of benefits; (d)Precautionary principle or precautionary approach, as appropriate; (e) an ecosystem approach; (f)an integrated approach to ocean management; (g) an approach that builds ecosystems resilience, including to adverse effects of climate change and ocean acidification, and also maintains and restores ecosystem integrity, including the carbon cycling services that underpin the ocean's role in climate; (h) the use of the best available science and scientific information; (i)the use of relevant traditional knowledge of Indigenous Peoples and local communities, where available; (j) the respect, promotion and consideration of their respective obligations, as applicable, relating to the rights of Indigenous Peoples or of, as appropriate, local communities when taking action to address the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction; (k) the non-transfer, directly or indirectly, of damage or hazards from one area to another and the non-transformation of one type of pollution into another, in taking measures to prevent reduce, and control pollution of the marine environment; (l) full recognition of the special circumstances of small island developing States and of least developed countries; and (m) acknowledgement of the special interests and needs of landlocked developing countries.[24]

Parties shall be required to cooperate under this Agreement for the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, including through strengthening and enhancing cooperation with and promoting cooperation among

[24] Article 5.

relevant legal instruments and frameworks and relevant global, regional, sub-regional and sectoral bodies in the achievement of the objective of this Agreement.[25]

Notably, the proposed Agreement also seeks to ensure the fair and equitable sharing of benefits arising from activities with respect to marine genetic resources and digital sequence information on marine genetic resources of areas beyond national jurisdiction for the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.[26] It also calls for the building and development of the capacity of Parties, particularly developing States Parties, in particular the least developed countries, landlocked developing countries, geographically disadvantaged States, small island developing States, coastal African States, archipelagic States and developing middle-income countries, to carry out activities with respect to marine genetic resources and digital sequence information on marine genetic resources of areas beyond national jurisdiction.[27] It also seeks to promote the generation of knowledge, scientific understanding and technological innovation, including through the development and conduct of marine scientific research as fundamental contributions to the implementation of this Agreement.[28] In addition to the foregoing, the proposed Agreement seeks to promote the development and transfer of marine technology in accordance with this Agreement.[29]

[25] Article 6(1).
[26] Article 7(a).
[27] Article 7(b).
[28] Article 7 (c).
[29] Article 7(d).

The provisions of this Agreement shall apply to activities with respect to marine genetic resources and digital sequence information on marine genetic resources of areas beyond national jurisdiction collected and generated after the entry into force of this Agreement for the respective Party. The application of the provisions of this Agreement shall extend to the utilization of marine genetic resources and digital sequence information on marine genetic resources of areas beyond national jurisdiction collected or generated before entry into force, unless a Party makes an exception in writing under article 63 when signing, ratifying, approving, accepting or acceding to this Agreement.[30]

Regarding environmental management, the Agreement seeks to ensure that States:(a) conserve and sustainably use areas requiring protection, including through the establishment of a comprehensive system of area-based management tools, with ecologically representative and well-connected networks of marine protected areas; (b) strengthen cooperation and coordination in the use of area-based management tools, including marine protected areas, among States, relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies; (c) protect, preserve, restore and maintain biodiversity and ecosystems, including with a view to enhancing their productivity and health, and strengthen resilience to stressors, including those related to climate change, ocean acidification and marine pollution; (d) support food security and other socioeconomic objectives, including the protection of cultural values; and (e) support developing States Parties, in particular the least developed countries, landlocked developing countries, geographically disadvantaged States, small island

[30] Article 8.

developing States, coastal African States, archipelagic States and developing middle-income countries, taking into account the special circumstances of small island developing States, through capacity-building and the development and transfer of marine technology in developing, implementing, monitoring, managing and enforcing area-based management tools, including marine protected areas.[31]

The Agreement also seeks to: (a) operationalize the provisions of the Convention on environmental impact assessment for areas beyond national jurisdiction by establishing processes, thresholds and other requirements for conducting and reporting assessments by Parties; (b) ensure that activities covered by this Part are assessed and conducted to prevent, mitigate and manage significant adverse impacts for the purpose of protecting and preserving the marine environment; (c) support the consideration of cumulative impacts and impacts in areas within national jurisdiction; (d) provide for strategic environmental assessments; (e) achieve a coherent environmental impact assessment framework for activities in areas beyond national jurisdiction; and (f) build and strengthen the capacity of Parties, particularly developing States Parties, in particular the least developed countries, landlocked developing countries, geographically disadvantaged States, small island developing States, coastal African States, archipelagic States and developing middle income countries, to prepare, conduct and evaluate environmental impact assessments and strategic environmental assessments in support of the objectives of this Agreement.[32]

[31] Article 14.
[32] Article 21.

The Agreement also requires Parties to ensure that the potential impacts on the marine environment of planned activities under their jurisdiction or control, which take place in areas beyond national jurisdiction, are assessed as set out in this Part before they are authorized.[33] In addition, when a Party with jurisdiction or control over a planned activity that is to be conducted in marine areas within national jurisdiction determines that the activity may cause substantial pollution of or significant and harmful changes to the marine environment in areas beyond national jurisdiction, that Party shall ensure that an environmental impact assessment of such activity is conducted in accordance with this Part or an environmental impact assessment is conducted under the Party's national process. A Party conducting such an assessment under its national process shall: (a) make relevant information available through the clearing-house mechanism, in a timely manner during the national process; (b) ensure that the activity is monitored in a manner consistent with the requirements of its national process; and (c) ensure that environmental impact assessment reports and any relevant monitoring reports are made available through the clearing-house mechanism as set out in this Agreement.[34]

Beyond the provisions on environmental assessment under the Agreement, Parties are required to promote the use of environmental impact assessments and the adoption and implementation of the standards and/or guidelines developed under article 41 bis in relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies of which they are members.[35]

[33] Article 22 (1).
[34] Article 22(2).
[35] Article 23.

In addition to environmental assessments, Parties are also required to, by using the best available science and scientific information and, where available, the relevant traditional knowledge of Indigenous Peoples and local communities, keep under surveillance the impacts of any activities in areas beyond national jurisdiction which they permit or in which they engage in order to determine whether these activities are likely to pollute or have adverse impacts on the marine environment. In particular, each Party shall monitor the environmental and any associated impacts, such as economic, social, cultural and human health impacts, of an authorized activity under their jurisdiction or control in accordance with the conditions set out in the approval of the activity.[36]

Parties are also required to produce and make monitoring reports public, including through the clearing-house mechanism and the Scientific and Technical Body may consider and evaluate the monitoring reports.[37] Parties are also to ensure that the impacts of the authorized activity monitored pursuant to article 39 are reviewed.[38]

Parties shall also be required under this agreement, individually or in cooperation with other Parties, to consider conducting strategic environmental assessments for plans and programmes relating to activities under their jurisdiction or control, to be conducted in areas beyond national jurisdiction, to assess the potential effects of that plan or programme, as well as alternatives, on the marine environment.[39]

---

[36] Article 39.
[37] Article 40.
[38] Article 41.
[39] Article 41 ter.

The Agreement also seeks to:(a) assist Parties, in particular developing States Parties, in implementing the provisions of this Agreement, to achieve its objectives; (b) enable inclusive, equitable and effective cooperation and participation in the activities undertaken under this Agreement; (c) develop the marine scientific and technological capacity, including with respect to research, of Parties, in particular developing States Parties, with regard to the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, including through access to marine technology by, and the transfer of marine technology to, developing States Parties; (d) increase, disseminate and share knowledge on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction; (e) more specifically, support developing States Parties, in particular the least developed countries, landlocked developing countries, geographically disadvantaged States, small island developing States, coastal African States, archipelagic States and developing middle-income countries, through capacity-building and the development and transfer of marine technology under this Agreement in achieving the objectives in relation to: (i) marine genetic resources, including the sharing of benefits, as reflected in article 7; (ii) measures such as area-based management tools, including marine protected areas, as reflected in article 14; (iii) environmental impact assessments, as reflected in article 21 bis.[40]

This Agreement, as highlighted has key provisions and tools that are meant to ensure conservation and sustainable use of marine resources in areas beyond national jurisdictions. It is also worth noting that it

[40] Article 42.

seeks to empower developing countries in not only conserving these resources but also exploiting them through capacity building.

4. High Seas Treaty: Enhancing Environmental Responsibility for Marine Protection

After more than a decade of discussions at the UN, formal negotiations to create a new treaty under the UN Convention on the Law of the Sea (UNCLOS) for the preservation and sustainable use of marine biodiversity in areas beyond the national jurisdiction (ABNJ) began at the UN in September 2018. This is the first ocean-related global treaty process in more than 20 years, and the only one that is exclusively focused on safeguarding marine biodiversity in ABNJ.[41]

Recognized as the governing document for the world's oceans, UNCLOS does not, however, contain the precise standards necessary to guarantee the successful execution of its broad commitments to safeguard the marine environment and its living resources. [42] Hopefully, the High Seas Treaty will seal this gap as it spells out specific obligations for States and those interacting with the high seas. Although the oceans and seas are sometimes disregarded in climate negotiations, research demonstrates that they are a crucial component of any solution since they store the carbon that is responsible for climate change and offer significant advantages for climate adaptation. Action on land and at sea is required to preserve the ocean. This entails lessening the direct effects of humans on the

[41] 'Protecting Half the Planet: A New High Seas Biodiversity Treaty' (*High Seas Alliance*) <*https://www.highseasalliance.org/resources/protecting-half-the-planet-a-new-high-seas-biodiversity-treaty-in-2020/*> accessed 20 March 2023.
[42] 'Protecting Half the Planet: A New High Seas Biodiversity Treaty' (*High Seas Alliance*) <*https://www.highseasalliance.org/resources/protecting-half-the-planet-a-new-high-seas-biodiversity-treaty-in-2020/*> accessed 20 March 2023.

ocean, cleaning up polluted rivers, restoring wetlands, and creating a circular economy where potential pollutants are used for as long as feasible before being appropriately disposed of at the end of their useful lives.[43]

As seen in the previous section, the High Seas Treaty comes with key tools and provisions geared towards promoting conservation and sustainable utilisation of marine resources and environment in ABNJ. It also seeks to empower developing countries through capacity building to bolster their capacity in exploiting these resources, especially in this period when sustainable utilisation of the blue economy resources to promote national development has gained international momentum.[44]

5. Conclusion

This paper has critically discussed the current framework on marine resources governance and management and also compared it to the proposed High Seas Treaty which seeks to implement the UNCLOS provisions on protection and conservation of marine resources. Notably, the treaty goes beyond this by seeking to empower developing countries in their capacity to exploit the marine resources that lie within and beyond their territorial borders and high seas. It is hoped that the international community will fast track the formal adoption of this Treaty by fine tuning the few details remaining as it will go a long way in conservation of marine resources and

[43] 'Why Protecting the Ocean and Wetlands Can Help Fight the Climate Crisis' (*UNEP*, 11 November 2022) <*http://www.unep.org/news-and-stories/story/why-protecting-ocean-and-wetlands-can-help-fight-climate-crisis*> accessed 20 March 2023.

[44] *https://www.un.org/bbnj/sites/www.un.org.bbnj/files/draft_agreement_advanced_unedited_for_posting_v1.pdf*> accessed 20 March 2023.

environment as well as enhancing the capacity of developing countries in Africa to exploit their own marine resources for national development and socio-economic empowerment of their people.

References

'Biodiversity: UN Agreement for the Protection of the Ocean | Research Institute for Sustainability' <*https://www.rifs-potsdam.de/en/output/dossiers/ocean-treaty*> accessed 20 March 2023.

'Protecting Half the Planet: A New High Seas Biodiversity Treaty' (*High Seas Alliance*) <*https://www.highseasalliance.org/resources/protecting-half-the-planet-a-new-high-seas-biodiversity-treaty-in-2020/*> accessed 20 March 2023.

'The Legal and Institutional Framework Governing Ocean-Based Economic Sectors in Barbados' (2019) <*https://unctad.org/system/files/official-document/ditctedinf2019d14_en.pdf*> accessed 20 March 2023.

'Treaty Negotiations' (*High Seas Alliance*) <*https://www.highseasalliance.org/treaty-negotiations/*> accessed 20 March 2023.

'United Nations Convention on the Law of the Sea' <*https://www.imo.org/en/ourwork/legal/pages/unitednationsconventionontthelawofthesea.aspx*> accessed 19 March 2023.

'What Is the UN High Seas Treaty and Why Is It Needed?' *BBC News* (5 March 2023) <*https://www.bbc.com/news/science-environment-64839763*> accessed 20 March 2023.

'Why Protecting the Ocean and Wetlands Can Help Fight the Climate Crisis' (*UNEP*, 11 November 2022) <*http://www.unep.org/news-and-*

stories/story/why-protecting-ocean-and-wetlands-can-help-fight-climate-crisis> accessed 20 March 2023.

Hoagland P, Jacoby J and Schumacher ME, 'Law Of The Sea' in John H Steele (ed), *Encyclopedia of Ocean Sciences* (Academic Press 2001) <*https://www.sciencedirect.com/science/article/pii/B012227430X004153*> accessed 20 March 2023.

Hoagland Porter and others, 'Law of the Sea' in J Kirk Cochran, Henry J Bokuniewicz and Patricia L Yager (eds), *Encyclopedia of Ocean Sciences (Third Edition)* (Academic Press 2019) <*https://www.sciencedirect.com/science/article/pii/B978012409548911344 2*> accessed 20 March 2023.

Owen-Burge C, 'Why the High Seas Treaty Is a Breakthrough for the Ocean and the Planet' (*Climate Champions*, 10 March 2023) <*https://climatechampions.unfccc.int/why-the-high-seas-treaty-is-a-breakthrough-for-the-ocean-and-the-planet/*> accessed 20 March 2023.

UN General Assembly, *Convention on the Law of the Sea*, 10 December 1982.

United Nations, *Draft Agreement Under the United Nations Convention On the Law of the Sea On the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction*, Intergovernmental conference on an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction Resumed fifth session, New York, 20 February–3 March 2023.

Establishing a Cold Case Investigation (CCI) Unit in Kenya's National Police Service: Delivering Justice for Victims of Unresolved Crimes

*By: **Michael Sang** [*]*

Abstract

This paper focuses on the establishment of a Cold Case Investigation (CCI) Unit within the National Police Service of Kenya. The persistent problem of unresolved crimes in Kenya has created a need for urgent action towards delivering justice for victims and their families. Through an analysis of the legal and institutional framework for the resolution of unresolved crimes in Kenya, this paper identifies gaps and areas for improvement. The paper also outlines key steps and requirements for establishing a CCI Unit, including institutional location, funding, staff qualification and recruitment, training, investigation strategies, and support services for victims and survivors. The success of the CCI Unit will depend on the government's commitment to investing in this initiative and the willingness of law enforcement agencies to work together towards a common goal. By implementing the recommendations outlined in this paper, Kenya can take a significant step towards resolving the thousands of unsolved cases that continue to cause pain and suffering in the country.

Key Words: *Cold Case Investigation (CCI) Unit; National Police Service; Unresolved Crimes; Unsolved Cases; Legal framework; Institutional framework; the plight of Victims and their families.*

[*] ***LLB, Moi University; LLM, University of Cape Town, South Africa; PG Dip. in Law Kenya School of Law. The views expressed in this article are, of course, the authors' own and do not express the views of the institution to which he is affiliated.***

1. Introduction

Unresolved crimes in Kenya are a persistent problem that has plagued the country's justice system for decades.[1] Thousands of cases, ranging from homicides and kidnappings to economic crimes, remain unsolved, leaving victims and their families without closure and perpetrators free to continue their criminal activities.[2] To address this issue, there is an urgent necessity to establish a Cold Case Investigation (CCI) Unit within the National Police Service.[3] In Kenya, a cold case refers to a criminal case that remains unsolved, with no new leads or evidence, and has been inactive for an extended period of time, usually several years.[4] These cases include serious crimes such as murder, kidnapping, and robbery with violence, which have not been solved despite the efforts of law enforcement agencies. The lack of progress in solving these cases often leads to frustration for victims, their families, and the public, and can erode trust in the criminal justice system.[5] This unit would be responsible for investigating unresolved crimes and delivering justice to victims and their families.[6] The study will examine the legal and institutional framework for the resolution of unresolved crimes in Kenya, identify the gaps and areas for improvement, and outline the key steps and requirements for establishing a CCI Unit. Specifically, it will explore the institutional location and funding, qualification and recruitment of staff, training and continuous professional development, adoption of investigation strategies, and provision of support services to

[1] Akinyemi, O. (2019). Addressing Cold Cases in Kenya: A Proposal for a Cold Case Investigation Unit in the National Police Service. *Journal of African Criminology and Justice Studies*, 12(1), 1-16.
[2] Ibid
[3] Ibid
[4] Ibid
[5] Ibid
[6] Ibid

victims and survivors. By providing a comprehensive analysis of the establishment of a CCI Unit, this study aims to contribute to the ongoing efforts to address the issue of unresolved crimes in Kenya and deliver justice for victims.

2.The Persistent Problem of Unresolved Crimes in Kenya

Unfortunately, unresolved crimes are a persistent problem in Kenya.[7] Despite efforts by law enforcement agencies to investigate and solve crimes, there are still many cases that remain unsolved, often for years or even decades. This leaves victims and their families without closure and the perpetrators free to continue committing crimes.[8] There are several factors that contribute to the problem of unresolved crimes in Kenya. One of the main issues is a lack of resources and training for law enforcement agencies. Many police officers are overworked and underpaid, and do not have access to the necessary tools and technology to effectively investigate and solve crimes. Additionally, there is often a lack of specialized training in areas such as forensic science and criminal investigation.[9]

Another issue is corruption within the criminal justice system.[10] In some cases, police officers and other officials may be bribed or coerced into looking the other way, or even actively obstructing investigations. This can result in cases being closed prematurely or not being investigated at all.[11] Finally, there is often a lack of public

[7] Kariuki, K. (2019). Solving Kenya's Cold Cases: The Need for Improved Coordination among Law Enforcement Agencies. *Journal of Forensic Sciences & Criminal Investigation*, 6(1), 1-5.
[8] Ibid
[9] Ibid
[10] Ibid
[11] Ibid

trust in law enforcement agencies, which can discourage witnesses and victims from coming forward with information. This can make it difficult for police to build strong cases and gather the evidence needed to prosecute perpetrators.[12]

2.1 Historical Background.

Kenya has a long history of unresolved crimes, dating back to the colonial era.[13] During this time, crimes against Kenyan citizens were often ignored or dismissed by colonial authorities, and perpetrators were rarely held accountable. After Kenya gained independence in 1963, there was hope that the new government would be more effective at addressing crime and delivering justice for victims. However, in the years following independence, there were a number of high-profile crimes that remained unsolved, including political assassinations, massacres, and disappearances.[14]

One of the most infamous cases was the murder of JM Kariuki, a prominent opposition politician, in 1975.[15] Kariuki was a vocal critic of the government and had been advocating for greater accountability and transparency in government. His murder, which was widely believed to have been politically motivated, shocked the country and led to widespread protests. Despite a lengthy investigation, no one was ever convicted of the crime.[16] In the decades that followed, there were numerous other cases of unresolved crimes

[12] Ibid
[13] Ogot, M. A. (2017). Cold Case Investigations in Kenya: A Critical Analysis of Legal and Institutional Frameworks. *International Journal of Criminology and Sociology*, 6, 29-39.
[14] Ibid
[15] Ibid
[16] Ibid

in Kenya, including the 1990 massacre of students at the University of Nairobi, the 1998 bombing of the US embassy in Nairobi, and the 2013 Westgate mall attack.[17] In each of these cases, there were questions about the effectiveness of the police and the criminal justice system in delivering justice for victims.[18]

2.2 The Current Situation

The current situation of unresolved crimes in Kenya is still a cause for concern. Despite some efforts by law enforcement agencies to investigate and solve crimes, there are still many cases that remain unsolved, often for years or even decades.[19] This leaves victims and their families without closure and the perpetrators free to continue committing crimes.[20]

There are unfortunately many examples of unresolved crimes in Kenya. For instance, the murder of Caroline Wanjiku Maina remains unresolved. She was a businesswoman who was found dead in a forest in Kiambu County in April 2021. She had been abducted and murdered, and her body was found with multiple stab wounds.[21]

Another example is the brutal murder of Sharon Otieno and her seven-month unborn baby on September 3, 2018, at Kowade in Rachuonyo sub-county within Homa Bay County. Sharon was killed

[17] Ibid
[18] Ibid
[19] United Nations Office on Drugs and Crime. (2021). Global Study on Homicide 2019. *https://www.unodc.org/documents/data-and-analysis/gsh/Booklet1.pdf* accessed 23 April 2023
[20] Ibid
[21]Vincent Achuka, Nation Media Group (2021) 'Tender row linked to murder of Caroline Wanjiku' available at *https://nation.africa/kenya/news/tender-row-linked-to-murder-of-caroline-wanjiku-3306190* accessed 23 April 2023

while she was still a student at Rongo University. Five years since the murder, the case is still in court.[22]

One of the main challenges in addressing the problem of unresolved crimes is the lack of resources and capacity within the criminal justice system.[23] Police officers are often overworked and underpaid, and do not have access to the necessary tools and technology to effectively investigate and solve crimes.[24] Additionally, there is a lack of specialized training in areas such as forensic science and criminal investigation.[25] Corruption within the criminal justice system is also a major problem.[26] Police officers and other officials may be bribed or coerced into looking the other way or actively obstructing investigations, which can result in cases being closed prematurely or not being investigated at all.[27] Another issue is the lack of public trust in law enforcement agencies.[28] This can make it difficult for police to gather information and build strong cases, as witnesses and victims may be reluctant to come forward with information[29]. In addition to these challenges, there are also new forms of crimes emerging in

[22] Caleb Kingwara, The Standard: 'Okoth Obado murder case adjourned after two lawyers snub court' available at *https://www.standardmedia.co.ke/article/2001449777/obado-murder-case-adjourned-after-two-lawyers-snub-court* accessed 23 April 2023
[23] United Nations Office on Drugs and Crime. (2021). Global Study on Homicide 2019. *https://www.unodc.org/documents/data-and-analysis/gsh/Booklet1.pdf* accessed 23 April 2023
[24] Ibid
[25] Ibid
[26] Ibid
[27] Ibid
[28] Ibid
[29] Ibid

Kenya, such as cybercrime and terrorism, which pose new challenges for law enforcement agencies[30].

The study posits that while some progress has been made in addressing the problem of unresolved crimes in Kenya, such as the creation of the Directorate of Criminal Investigations, more needs to be done to ensure that victims receive the justice they deserve and that perpetrators are held accountable for their crimes.

2.3 The Urgent Necessity of a Cold Case Investigation Unit.

The establishment of a Cold Case Investigation (CCI) Unit is an urgent necessity for Kenya. This specialized unit would be responsible for investigating unresolved crimes, particularly those that have gone unsolved for years or even decades.[31] A CCI Unit is necessary for various reasons. First, it will aid in delivering justice for victims and their families.[32] Many of the crimes that remain unsolved in Kenya are serious offenses, such as murder, rape, and kidnapping. Victims and their families deserve closure and the knowledge that the perpetrators of these crimes have been held accountable.[33]

Secondly, it will enhance public trust in law enforcement.[34] When victims see that law enforcement agencies are actively working to solve unresolved crimes, they are more likely to have confidence in the criminal justice system. This can lead to increased cooperation

[30] Ibid
[31] Akinyemi, O. (2019). Addressing Cold Cases in Kenya: A Proposal for a Cold Case Investigation Unit in the National Police Service. *Journal of African Criminology and Justice Studies*, 12(1), 1-16.
[32] Ibid
[33] Ibid
[34] Ibid

with law enforcement and improved relationships between the police and the communities they serve.[35]

Establishing a CCI Unit can also serve as a deterrent for future crimes.[36] When criminals see that even long-unsolved crimes can be investigated and solved, they may be less likely to commit crimes in the first place. This can help to reduce the overall crime rate in Kenya. [37] Finally, a CCI Unit will provide closure for law enforcement.[38] Law enforcement officers who work on unresolved cases often feel frustrated and demoralized by their inability to solve these crimes. A CCI Unit can provide these officers with the opportunity to revisit old cases and use new technology and investigative techniques to try to solve them. This can be personally satisfying and rewarding for officers, and can also help to improve morale within law enforcement agencies.[39]

3 The Legal and Institutional Framework for Resolution of Unresolved Crimes in Kenya

3.1 The Constitution of Kenya 2010

The Constitution requires that an accused person has the right to have a trial begin and conclude without unreasonable delay.[40] An accused person in this sense becomes a victim of injustice if the matter remains unresolved. Such delay in turn negatively impacts the complainant too.

[35] Ibid
[36] Ibid
[37] Ibid
[38] Ibid
[39] Ibid
[40] Article 50 (2) (e) of the Constitution of Kenya 2010

3.2 Statutory Framework

3.2.1 National Police Service Act

The National Police Service Act provides the legal and institutional framework for the resolution of unresolved crimes in Kenya. The Act was passed in 2011 and sets out the legal framework for the organization, administration, and management of the National Police Service in Kenya. It calls for cooperation between the National Police Service (NPS) and the Independent Policing Oversight Authority (IPOA) including compensation to victims of police misconduct.[41] It stipulates that any complaint made against any police officer shall be recorded and reported to the IPOA.[42] The study presumes that such complaints can be complaints arising from non-resolution of cold cases.

It also establishes The National Police Service (NPS) [43]which is made up of the Kenya Police Service[44], the Administration Police Service[45], and the Directorate of Criminal Investigations.[46]The Kenya Police Service maintains law and order and conducts investigation of crimes among other functions.[47] The Administration Police Service also maintains law and order[48] while the DCI undertakes investigations on serious crimes.[49]

[41] Section 10 (1) (m) of the NPS Act
[42] Section 50 (3) of the NPS Act
[43] Part II of the NPS Act; Article 243 of the Constitution of Kenya 2010.
[44] Part III of the NPS Act
[45] Part IV of the NPS Act
[46] Part V of the NPS Act
[47] Section 24 of the NPS Act
[48] Section 27 of the NPS Act
[49] Section 35 of the NPS Act

It is interesting to note that the Act stipulates many functions of the various agencies within the NPS but there is no specific mention of the responsibility to ensure resolution of cold cases in a timely manner. It is hoped that amendments can be made to ensure the Act establishes efficient mechanisms for investigation and resolution of cold cases.

3.2.2 National Intelligence Service Act

The National Intelligence Service Act is another key piece of legislation that provides for the legal and institutional framework for the resolution of unresolved crimes in Kenya. The Act was passed in 2012 and sets out the legal framework for the organization, administration, and management of the National Intelligence Service (NIS) in Kenya.[50]

It establishes The National Intelligence Service (NIS), which is responsible for gathering and analyzing intelligence information in order to provide national security advice to the government.[51]The Act provides for cooperation between the NIS and other law enforcement and security agencies, including the Kenya Police Service and the Directorate of Criminal Investigations.[52]

Indeed, a perusal of the functions of the NIS in the Act leads to the conclusion that there is no mention of resolution of unresolved crimes in Kenya as a function of the service. The study recommends amendments to the Act to establish efficacious tools for resolution of cold cases in Kenya.

[50] Long Title, NIS Act
[51] Section 5, NIS Act
[52] Section 5 (1) (p) of the NIS Act

3.3 Institutional and administrative framework

The institutional and administrative framework for the resolution of unresolved crimes in Kenya includes several key organizations and entities. Some have already been addressed under the legal framework, including The Kenya Police Service, DCI and The NIS.

The Office of the Director of Public Prosecutions (ODPP) is an independent office created under the 2010 Constitution of Kenya, tasked with the responsibility of prosecuting criminal cases in Kenya[53]. The ODPP shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction. [54] The DPP shall exercise State powers of prosecution and may institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.[55] Again, these are merely general functions of the DPP and neither the Constitution nor the ODPP Act specifically addresses resolution of cold cases as a function of the ODPP.

The ODPP can play a critical role in the resolution of cold cases in Kenya. First, The ODPP can work closely with the CCI Unit to ensure that the cases being investigated are properly prepared for prosecution.[56] This involves providing legal advice to investigators and ensuring that the evidence collected meets the required legal

[53] Article 157 of the Constitution of Kenya (CoK) 2010
[54] Article 157 (4) of the CoK 2010; Section 5 ODPP Act
[55] Article 157 (6) (a) of the CoK 2010; section 5 ODPP Act
[56] Juma, E., & Onditi, V. (2019). Investigation and prosecution of cold cases in Kenya: A critical review of the role of the Office of the Director of Public Prosecutions. *Journal of Forensic Research and Analysis*, 1(1), 1-12.

standards[57]. The ODPP can also allocate resources towards the prosecution of cold cases. [58]This includes assigning prosecutors and other legal personnel to work on these cases, as well as providing resources such as training and equipment.[59]

In addition, The ODPP can review old cases that were closed due to lack of evidence or other reasons. With advancements in technology and investigative techniques, some of these cases may now be solvable, and the ODPP can work with the CCI Unit to reopen them.[60] Finally, The ODPP can raise public awareness about the importance of solving cold cases and encourage witnesses to come forward with any information they may have.[61]

The Judiciary in Kenya is responsible for the interpretation and application of the law in criminal cases.[62] The Judiciary is responsible for ensuring that justice is served in unresolved crimes by providing a fair trial to the accused and by ensuring that victims of crime receive justice.[63] In exercising judicial authority, the courts and tribunals are to be guided by the principle that justice shall not be delayed.[64]

3.4 The Oversight Role of IPOA

The Independent Policing Oversight Authority (IPOA) is an independent agency established under the 2011 Independent Policing

[57] Ibid
[58] Ibid
[59] Ibid
[60] Ibid
[61] Ibid
[62] Githinji, W. (2019). The Role of the Judiciary in Resolving Cold Cases: A Case Study of Kenya. *Journal of Law and Criminal Justice,* 7(1), 19-29.
[63] Ibid
[64] Article 159 (2) (b) of the CoK 2010.

Oversight Authority Act[65], with a mandate to hold the police accountable for their actions and to enhance professionalism in the police service.[66] In relation to the resolution of unresolved crimes in Kenya, IPOA plays an oversight role by ensuring that the police and other law enforcement agencies conduct investigations in a professional and ethical manner.[67]

Specifically, IPOA is responsible for investigating complaints and allegations of misconduct and human rights violations by the police.[68] This includes cases where the police may have mishandled or failed to properly investigate unresolved crimes.[69] IPOA also monitors police investigations to ensure that they are conducted in compliance with the law and with ethical and professional standards.[70]

IPOA has the power to make recommendations to the Director of Public Prosecutions, the National Police Service, and other relevant authorities where it finds evidence of misconduct or violations of human rights by the police.[71] In addition, IPOA can make recommendations for policy and procedural changes to enhance professionalism and accountability within the police service.[72]

---

[65] Section 3, IPOA Act
[66] Long Title, IPOA Act
[67] Section 5, IPOA Act
[68] Section 6 (a) of IPOA Act
[69] Vincent Otieno Oino and Jennifer Gitari (2019) "The Role of the Independent Policing Oversight Authority (IPOA) in Enhancing Police Accountability and Preventing Extrajudicial Executions in Kenya". *International Journal of Criminology and Sociology,* vol. 8, pp. 107-115.
[70] Ibid
[71] Section 7, IPOA Act
[72] Vincent Otieno Oino and Jennifer Gitari (2019) "The Role of the Independent Policing Oversight Authority (IPOA) in Enhancing Police

By playing this oversight role, IPOA helps to ensure that the resolution of unresolved crimes is conducted in a transparent and accountable manner, and that justice is served for victims of crime.[73]

3.5 Gaps and Areas for Improvement

Despite the legal and institutional framework in place for the resolution of unresolved crimes in Kenya, there are several gaps that are still prevalent. First, as earlier stated, no laws specifically attempt to define a cold case nor do they propose mechanisms for resolution of unresolved crimes. Most of the provisions in the legislations are too general. Secondly, the institutions responsible for the resolution of unresolved crimes, such as the police and the DCI, often lack adequate resources, including personnel, equipment, and funding.[74] This can make it difficult for them to conduct thorough investigations and properly handle unresolved cases.[75] Furthermore, many police officers and investigators lack specialized training in areas such as forensics, crime scene analysis, and investigation techniques. This can make it difficult for them to properly investigate complex and serious crimes.[76]

In addition, there is often limited collaboration and coordination between the different institutions responsible for the resolution of unresolved crimes, including the police, DCI, ODPP, Judiciary, and NIS. [77] This can lead to duplication of efforts, lack of information

Accountability and Preventing Extrajudicial Executions in Kenya". *International Journal of Criminology and Sociology,* vol. 8, pp. 107-115.

[73] Ibid

[74] Muraya, L. and Gachanja, D. (2021) 'The Struggle to Solve Cold Cases in Kenya: The Need for a Systematic Approach'

[75] Ibid

[76] Ibid

[77] Ibid

sharing, and delays in the resolution of cases.[78]Finally, there is limited public participation in the resolution of unresolved crimes. Victims and their families often lack access to information about the progress of investigations, and there is limited public participation in the justice system.[79]

To improve the legal and institutional framework for the resolution of unresolved crimes in Kenya, the study recommends formulation of laws and policies or amendments to existing legislations to bring on board tools and mechanisms for resolution of unresolved crimes in Kenya. This entails a working definition of what a cold case is and the period within which a case can be said to be unresolved. Our Constitution talks about 'unreasonable delay'[80] but does not specify how long a case can be said to have been delayed. Is it one year? Ten years? This specification is necessary in order to avoid unnecessary delays in resolution of cold cases in Kenya.

Furthermore, the government can increase resources allocated to institutions responsible for the resolution of unresolved crimes, including the police, DCI, and ODPP. This can include increased funding, personnel, and equipment. [81] Police officers and investigators can be provided with specialized training in areas such as forensics, crime scene analysis, and investigation techniques to enable them to properly investigate complex and serious crimes.[82]

---

[78] Ibid
[79] Ibid
[80] Article 50 (2) (e) of the Constitution of Kenya 2010
[81] Kariuki, J. (2019) 'The Legal and Institutional Framework for Resolution of Unresolved Crimes in Kenya: An Analysis of Gaps and Proposals for Improvement.'
[82] Ibid

There also needs to be enhanced collaboration and coordination between the different institutions responsible for the resolution of unresolved crimes, including the police, DCI, ODPP, Judiciary, and NIS. This can include improved information sharing, joint investigations, and shared resources.[83] Finally, victims and their families need to be given greater access to information about the progress of investigations, and there needs to be greater public participation in the justice system. This can include improved victim support services and public awareness campaigns.[84]

4 Establishing a Cold Case Investigation (CCI) Unit in Kenya: Key Steps and Requirements

4.1 Assessing the Country-Specific Needs.

Assessing country-specific needs is a crucial step in establishing a Cold Case Investigation (CCI) Unit in Kenya. The existing legal and institutional framework for the resolution of unresolved crimes in Kenya should be reviewed to identify any gaps or areas for improvement that have been identified above. This can help in designing an effective CCI Unit that complements existing institutions and legal frameworks.[85]

A needs assessment can also be conducted to identify the specific needs of the country in terms of the CCI Unit.[86] This can involve consultations with relevant stakeholders, including victims and their

[83] Ibid
[84] Ibid
[85] Kiplagat, G. K., & Cheruiyot, J. K. (2020). Critical Issues and Challenges in Establishing Cold Case Investigation Units in Kenya. *International Journal of Criminology and Sociology*, 9, 21-29.
[86] Ibid

families, law enforcement agencies, the judiciary, and civil society organizations. The needs assessment can help identify the types of cases that require CCI, the resources required, and the institutional capacity needed to implement the CCI Unit.[87]

Moreover, the resources required to establish and operate the CCI Unit should be identified.[88] This can include funding, personnel, equipment, and training. The resources needed should be based on the needs assessment and the existing legal and institutional framework.[89]

Furthermore, policies and procedures should be developed for the CCI Unit.[90] This can include guidelines for case selection, case review, evidence collection and preservation, and investigation techniques. The policies and procedures should be aligned with existing legal and institutional frameworks and should be designed to ensure transparency and accountability.[91]

Partnerships with relevant stakeholders, including law enforcement agencies, the judiciary, and civil society organizations, should be established.[92] This can help in the sharing of information, resources,

[87] Ibid
[88] Ibid
[89] Ibid
[90] Njoroge, M. K., & Nganga, M. K. (2019). An Analysis of Cold Cases Investigations in Kenya: A Case of Homicides Reported to Kenya Police Service. *International Journal of Social Sciences and Humanities Research*, 7(1), 121-130.
[91] Ibid
[92] Ibid

and expertise. Partnerships can also help in creating awareness about the CCI Unit and building public confidence in its work.[93]

The study posits that by assessing country-specific needs, the CCI Unit can be tailored to meet the specific needs of the country and complement existing legal and institutional frameworks. This can help in improving the resolution of unresolved crimes and delivering justice for victims and their families.

4.2 Institutional Location and Funding

The institutional location of the CCI Unit is crucial to its success. One possible option is to house the unit under the Directorate of Criminal Investigations (DCI) Homicide Division. This is because the DCI Homicide Division is responsible for investigating homicide cases, which are often the most complex and challenging cases to solve.[94] The expertise and experience of the DCI Homicide Division can be leveraged to strengthen the capacity of the CCI Unit.[95]

Furthermore, housing the CCI Unit under the DCI Homicide Division can ensure that the unit has access to necessary resources and infrastructure, such as forensic laboratories and equipment. This can help to enhance the effectiveness of the CCI Unit in investigating and solving cold cases.[96]

---

[93] Ibid

[94] Kimathi, R. K. (2019). Development of Homicide Investigation Capability in Kenya: A Review of its Current Status and Future Needs. *International Journal of Advanced Research in Public Policy, Social Development and Entrepreneurship*, 2(2), 52-60.

[95] Ibid

[96] Ibid

In terms of funding, the CCI Unit will require significant resources to establish and operate effectively. This can include funding for personnel, training, equipment, and operational costs.[97] One possible source of funding is the government, through the national budget or donor support. Other potential sources of funding include civil society organizations, international organizations, and private sector partners.[98]

It is important to ensure that the funding is sustainable and adequate for the needs of the CCI Unit. This can be achieved through regular budget allocations and transparent financial management processes.[99] Additionally, partnerships with relevant stakeholders can help to mobilize resources and ensure that the CCI Unit is adequately resourced.[100]

The institutional location and funding of the CCI Unit are critical factors that must be carefully considered in establishing an effective CCI Unit in Kenya. By housing the unit under the DCI Homicide Division and ensuring adequate and sustainable funding, the CCI Unit can be positioned for success in delivering justice for victims of unresolved crimes.

4.3 Qualification and Recruitment of Staff

The success of the CCI Unit in resolving cold cases largely depends on the qualifications and expertise of the staff. Therefore, it is

[97] Ibid
[98] Ibid
[99] Ibid
[100] Ibid

important to develop a rigorous recruitment process that attracts and selects highly qualified and experienced individuals.[101]

The recruitment process should be guided by clear qualification criteria, which can include education level, professional training, and relevant experience in law enforcement or investigations. The recruitment process should be transparent and free from any form of bias or discrimination.[102]

Additionally, the recruitment process should consider diversity and inclusion, ensuring that the CCI Unit reflects the diversity of Kenya's population in terms of gender, ethnicity, and regional representation. This can help to build trust and confidence in the CCI Unit among the public.[103]

Once recruited, staff should undergo specialized training to enhance their knowledge and skills in investigating cold cases.[104] This can include training in forensic science, crime scene investigation, and interview techniques, among others. The training should be ongoing to ensure that staff remains up to date with emerging trends and technologies in cold case investigations.[105]

It is also important to ensure that the staff are adequately remunerated to attract and retain highly qualified individuals.[106] The

[101] Okello, A. A. (2020). Strengthening Criminal Investigations in Kenya: A Review of Current Challenges and Prospects. *International Journal of Criminal Justice Sciences*, 15(1), 113-126.
[102] Ibid
[103] Ibid
[104] Ibid
[105] Ibid
[106] Ibid

remuneration package should be competitive with that of other law enforcement agencies in Kenya and include benefits such as medical insurance, pension schemes, and performance-based incentives.[107]

4.4 Training and Continuous Professional Development

Training and continuous professional development are crucial components in establishing and maintaining an effective CCI Unit. The staff of the CCI Unit should undergo regular and ongoing training to enhance their knowledge and skills in cold case investigations.[108] The training should cover a wide range of topics, including forensic science, evidence collection and preservation, crime scene investigation, and interview techniques, among others. The training should be conducted by qualified trainers and experts in the relevant fields.[109]

Additionally, the CCI Unit should establish partnerships with other agencies, both nationally and internationally, to access specialized training and resources. [110] These partnerships can provide opportunities for staff exchange programs, joint training exercises, and collaborative research.[111]

Continuous professional development should also be incorporated into the training program to ensure that staff remains up to date with emerging trends and technologies in cold case investigations. This

[107] Ibid
[108] Cheboiwo, J. K. (2019). Criminal Investigations in Kenya: Challenges and Prospects. *International Journal of Humanities and Social Science Research*, 8(1), 63-70.
[109] Ibid
[110] Ibid
[111] Ibid

can include attending conferences, seminars, and workshops and keeping up to date with relevant publications.[112]

Training and continuous professional development are critical in ensuring that the staff of the CCI Unit has the necessary knowledge and skills to effectively investigate cold cases and deliver justice for victims of unresolved crimes in Kenya.[113]

4.5 Adoption of Investigation Strategies

A report from the Bureau of Justice Assistance stipulates that,[114] "Cold cases are among the most difficult and frustrating cases that detectives face." Moreover, "conventional wisdom in homicide investigations holds that speed is of the essence. The notion is that any case that is not solved or that lacks significant leads and witness participation within the first 72 hours has little likelihood of being solved, regardless of the expertise and resources deployed."[115]

Adopting effective investigation strategies is therefore critical in ensuring the success of a CCI Unit. The investigation strategies used by the CCI Unit should be comprehensive, systematic, and evidence-based.[116]

---

[112] Ibid
[113] Ibid
[114] Turner, Ryan, and Kosa, Rachel (July 2003). Cold Case Squads: Leaving No Stone Unturned. Washington, DC:
U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance. NCJ 199781. Available at
www.ncjrs.gov/html/bja/coldcasesquads/199781.pdf. Accessed 24 April 2023
[115] Ibid
[116] Ibid

One effective strategy is to adopt a victim-centered approach.[117] This approach involves focusing on the needs and interests of the victim and their families throughout the investigation process. This includes providing regular updates on the progress of the investigation and ensuring that the victim's families are involved in the investigation process.[118]

Another effective strategy is to use forensic technology and techniques to analyze and collect evidence.[119] This can include DNA analysis, fingerprint analysis, and ballistic analysis, among others.[120] The CCI Unit should have access to state-of-the-art forensic technology and techniques and should have staff trained in their use.[121]

The use of data analytics and intelligence-led policing can also be effective in identifying patterns and connections between unresolved cases. The CCI Unit should have access to a comprehensive database of unresolved cases, which can be used to identify links between cases and potential suspects.[122] For instance, the unit can adopt a cold case register.[123]A cold case register is a central, non-public database for information about unsolved homicides.[124] The register provides a mechanism for the homicide victim's family and friends to enter and

[117] Ibid
[118] Ibid
[119] Ibid
[120] Ibid
[121] Ibid
[122] Ibid
[123] Kiplagat, G. K., & Cheruiyot, J. K. (2020). Critical Issues and Challenges in Establishing Cold Case Investigation Units in Kenya. *International Journal of Criminology and Sociology*, 9, 21-29.
[124] Ibid

update their contact information with the law enforcement agency that has jurisdiction over the case.[125]

Such a register should have an up-to-date list of the investigators who have worked the case.[126] The register should provide a chronological baseline of information, which is important if the investigator working the cold case rotates off the case and another investigator is assigned to it (in which case the new investigator's information is added to the register).[127] The law enforcement agency that maintains the register should encourage registrants to contact the appropriate investigator if they become aware of any new information about the case.[128] Any legislation drafted to establish the creation of a cold case register should include a compliance mechanism to ensure agencies establish the register.[129]

It is also vital to adopt a collaborative approach to investigations.[130] The CCI Unit should work closely with other agencies, such as the National Police Service, the National Intelligence Service, and the Independent Policing Oversight Authority, to gather information and intelligence that can aid in the investigation of unresolved crimes.[131]

4.6 Provision of Support Services to Victims and Survivors

Provision of support services to victims and survivors is an essential aspect of the work of a CCI Unit. The trauma and emotional impact

[125] Ibid
[126] Ibid
[127] Ibid
[128] Ibid
[129] Ibid
[130] Ibid
[131] Ibid

of unresolved crimes on victims and their families can be significant, and support services can help to mitigate these effects.[132]
One key support service that the CCI Unit can provide is victim advocacy.[133] This involves working with victims and their families to ensure that their voices are heard and their needs are met throughout the investigation process. The CCI Unit can also provide access to counseling services, which can help victims and their families to cope with the trauma and stress of unresolved crimes.[134] In addition to these support services, the CCI Unit should also work closely with other organizations that provide support to victims and survivors. These organizations can include non-governmental organizations (NGOs), community-based organizations (CBOs), and faith-based organizations.[135]

The CCI Unit can also provide support to survivors of unresolved crimes. This can include providing access to medical and psychological care, as well as legal assistance and support with navigating the criminal justice system[136].

Furthermore, law enforcement agencies should include a victim service provider in the cold case unit. As stated in the reports by the Arizona Cold Case Task Force[137] and the Canadian Resource Centre

[132] Reckdenwald, A., & Lu, S. (2018). Examining the victim-offender overlap in cold cases. *Journal of Interpersonal Violence*, 33(3), 508-531.
[133] Ibid
[134] Ibid
[135] Ibid
[136] Ibid
[137] Cold Case Task Force (December 28, 2007). *A Report to the Governor and the Arizona State Legislature*, Phoenix,
AZ: Office of the Attorney General. Available at

for Victims of Crime,[138] investigators and survivors of homicide victims both benefit when a victim service provider is a part of the cold case team.

Investigators should contact the homicide victim's family and friends at least once a year to update them on the case and inquire if they remember anything more or if there have been any changes in relationships.[139] If there has been a relationship change, this event can be an opportunity for the investigator to obtain new information, which may result in a new lead. Even if there have been no changes in relationships or other new information, the investigator-initiated communication will let survivors know that their loved one's murder has not been forgotten.[140] In the words of one homicide victim's family member: "Nothing to report is something to report."[141] It is imperative that law enforcement officials communicate with survivors of homicide victims in a sensitive manner.[142]

Moreover, crime victim compensation programs that provides financial assistance for out-of-pocket costs that arise from a crime are

www.azag.gov/law_enforcement/ColdCaseTaskForceReport2007.pdf. Accessed 24 April 2023

[138] Canadian Resource Centre for Victims of Crime (August 30, 2005). *Developing a Strategy to Provide Services and Support Victims of Unsolved, Serious Crimes, Final Report*. Ottawa, ON: Canadian Resource Centre for Victims of Crime. Available at *www.crcvc.ca/docs/Unsolved_crimes_finalreport.pdf.* Accessed 24 April 2023

[139] Ibid

[140] Ibid

[141] Ibid

[142] Ibid

essential. These costs include funeral and burial expenses, medical care, lost support for dependents, and counseling.[143]

Indeed, The Victim Protection Act of Kenya provides for the establishment of Victim Protection Trust Fund to facilitate the provision of support services to victims of crime, including those seeking justice for unresolved cases.[144] In addition, the Victim Protection Board is mandated to provide support services to assist victims deal with physical injury and emotional trauma.[145] The Cabinet Secretary for the time being responsible for matters relating to justice is mandated to establish victim services in all counties and ensure equal access to the services, and in particular shall ensure that all cases are investigated and prosecuted timely.[146] This ensures that cases are resolved in an expeditious manner.

Consequently, the provision of support services to victims and survivors is an essential aspect of the work of a CCI Unit. The CCI Unit can provide victim advocacy, access to counseling services, and support for navigating the criminal justice system, as well as working closely with other organizations that provide support to victims and survivors.

5. Conclusion

The persistent problem of unresolved crimes in Kenya calls for urgent action. The establishment of a Cold Case Investigation (CCI) Unit within the National Police Service is a crucial step towards addressing this issue and delivering justice for victims and their

[143] Ibid
[144] Section 28 (2) (a) of the Victim Protection Act 2014
[145] Section 14 (2) (a) of the Victim Protection Act 2014
[146] Section 22 (1) (a) of the Victim Protection Act 2014

families. The study's analysis of the legal and institutional framework for the resolution of unresolved crimes in Kenya highlights the need for significant improvements and reforms. The establishment of a CCI Unit would require the allocation of resources, recruitment of qualified staff, adoption of modern investigation strategies, and provision of support services to victims and survivors. By implementing these key steps and requirements, Kenya can take a significant step towards resolving the thousands of unsolved cases that continue to cause pain and suffering in the country. Ultimately, the success of the CCI Unit will depend on the government's commitment to investing in this initiative and the willingness of law enforcement agencies to work together towards a common goal.

References

Akinyemi, O. (2019). Addressing Cold Cases in Kenya: A Proposal for a Cold Case Investigation Unit in the National Police Service. Journal of African Criminology and Justice Studies, 12(1), 1-16.

Caleb Kingwara, The Standard: 'Okoth Obado murder case adjourned after two lawyers snub court' available at *https://www.standardmedia.co.ke/article/2001449777/obado-murder-case-adjourned-after-two-lawyers-snub-court*

Canadian Resource Centre for Victims of Crime (August 30, 2005). Developing a Strategy to Provide Services and Support Victims of Unsolved, Serious Crimes, Final Report. Ottawa, ON: Canadian Resource Centre for Victims of Crime. Available at *www.crcvc.ca/docs/Unsolved_crimes_finalreport.pdf.*

Cheboiwo, J. K. (2019). Criminal Investigations in Kenya: Challenges and Prospects. *International Journal of Humanities and Social Science Research*, 8(1), 63-70.

Cold Case Task Force (December 28, 2007). *A Report to the Governor and the Arizona State Legislature*, Phoenix, AZ: Office of the Attorney General. Available at *www.azag.gov/law_enforcement/ColdCaseTaskForceReport2007.pdf.*
Constitution of Kenya 2010

Githinji, W. (2019). The Role of the Judiciary in Resolving Cold Cases: A Case Study of Kenya. *Journal of Law and Criminal Justice,* 7(1), 19-29.
Independent Policing Oversight Authority Act 2011

Juma, E., & Onditi, V. (2019). Investigation and prosecution of cold cases in Kenya: A critical review of the role of the Office of the Director of Public Prosecutions. *Journal of Forensic Research and Analysis,* 1(1), 1-12.

Kariuki, J. (2019) 'The Legal and Institutional Framework for Resolution of Unresolved Crimes in Kenya: An Analysis of Gaps and Proposals for Improvement.'

Kariuki, K. (2019). Solving Kenya's Cold Cases: The Need for Improved Coordination among Law Enforcement Agencies. *Journal of Forensic Sciences & Criminal Investigation*, 6(1), 1-5.

Kimathi, R. K. (2019). Development of Homicide Investigation Capability in Kenya: A Review of its Current Status and Future Needs. *International Journal of Advanced Research in Public Policy, Social Development and Entrepreneurship,* 2(2), 52-60.

Kiplagat, G. K., & Cheruiyot, J. K. (2020). Critical Issues and Challenges in Establishing Cold Case Investigation Units in Kenya. *International Journal of Criminology and Sociology*, 9, 21-29.

Muraya, L. and Gachanja, D. (2021) 'The Struggle to Solve Cold Cases in Kenya: The Need for a Systematic Approach'

National Intelligence Service Act 2012

National Police Service Act 2011

Njoroge, M. K., & Nganga, M. K. (2019). An Analysis of Cold Cases Investigations in Kenya: A Case of Homicides Reported to Kenya

Police Service. *International Journal of Social Sciences and Humanities Research,* 7(1), 121-130.

Office of the Director of Public Prosecutions Act 2013

Ogot, M. A. (2017). Cold Case Investigations in Kenya: A Critical Analysis of Legal and Institutional Frameworks. *International Journal of Criminology and Sociology*, 6, 29-39.

Okello, A. A. (2020). Strengthening Criminal Investigations in Kenya: A Review of Current Challenges and Prospects. *International Journal of Criminal Justice Sciences*, 15(1), 113-126.

Reckdenwald, A., & Lu, S. (2018). Examining the victim-offender overlap in cold cases. *Journal of Interpersonal Violence,* 33(3), 508-531.

Turner, Ryan, and Kosa, Rachel (July 2003). Cold Case Squads: Leaving No Stone Unturned. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance. NCJ 199781. Available at *www.ncjrs.gov/html/bja/coldcasesquads/199781.pdf.*

United Nations Office on Drugs and Crime. (2021). Global Study on Homicide 2019. *https://www.unodc.org/documents/data-and-analysis/gsh/Booklet1.pdf*

Victim Protection Act 2014

Vincent Achuka, Nation Media Group (2021) 'Tender row linked to murder of Caroline Wanjiku' available at *https://nation.africa/kenya/news/tender-row-linked-to-murder-of-caroline-wanjiku-3306190*

Vincent Otieno Oino and Jennifer Gitari (2019) "The Role of the Independent Policing Oversight Authority (IPOA) in Enhancing Police Accountability and Preventing Extrajudicial Executions in Kenya". *International Journal of Criminology and Sociology*, vol. 8, pp. 107-115.

Book review: Realizing True Sustainable Development

By: ***James Njuguna****[*]

Title: Realizing True Sustainable Development
Author: Dr. Kariuki Muigua, PhD
Number of pages: 297
Publisher: Glenwood Publishers Limited, Nairobi: Kenya (2023)
ISBN: 978-9966-046-32-1

The goal of the book is to examine the distinct functions of various players from the public and commercial sectors, as well as communities and Non-Governmental Organizations (NGOs), and how they might work together to realize the sustainable development agenda. The book also examines how foreign actors fit into all of these.

The author, Dr. Kariuki Muigua, PhD, was declared the first ever winner of the CIArb (Kenya Branch) ADR Lifetime Achievement Award, the highest honour given by the Institute to one member for his immense contribution to the growth of practice, research and scholarship of ADR in Kenya and across Africa. The award came barely a week after he had won the coveted Law Society of Kenya ADR Practitioner of the Year Award at the 4th Edition of the Nairobi Legal Awards for his outstanding practice in ADR and especially arbitration and his role as a mentor to many lawyers venturing into the area. He was also awarded the ADR Publisher of the Year for his scholarship, authorship and editorship of leading research and publications on ADR in Africa including the Journal of Conflict

[*] ***LLB (Hons); LLM (UON); PGD (KSL); Dip. Management (KIM); Dip. Law (CILEX); ACIArb; Accredited Mediator; Lecturer, Embu University.***

Management and Sustainable Development and the Alternative Dispute Resolution (ADR) Journal.

He was the winner of the African Arbitrator of the Year 2022 award at the 3rd African Arbitration Awards held at Kigali Rwanda beating other competitors from Egypt, Mauritius, Ethiopia, Nigeria and Kenya. The African Arbitrator of the Year award is the highest and most prestigious ADR and Arbitration Award in Africa.

He was also awarded the ADR Practitioner of the Year Award 2022 at the AfAA Awards. The award which was presented by the African Arbitration Association is awarded to the Arbitrator/ADR practitioner who is adjudged to have made outstanding achievements in, or contribution to, the development of Arbitration/ADR in Africa.

He was recognized and awarded for his role as the Chartered Institute of Arbitrators (CIArb) Africa Trustee from 2019 to 2022 by CIArb Kenya Branch at the CIArb Kenya Branch ADR Excellence Awards 2022.

His book, *Settling Disputes through Arbitration in Kenya,4th Edition;* Glenwood Publishers 2022, was awarded the Publication of the Year Award 2022 by CIArb Kenya Branch at the CIArb Kenya Branch ADR Excellence Awards 2022.

He is a member of the National Environment Tribunal which was awarded as the best performing Tribunal in Kenya for handling the most cases.

Chambers and Partners Global Guide 2023 has ranked Dr. Kariuki Muigua Ph.D in Band 1 of Dispute Resolution (Arbitrators) noting that he is "highly recommended as a leading lawyer".

He was awarded for his distinguished service to the Law Society of Kenya at the Law Society of Kenya Annual Awards 2023. He was also awarded the Outstanding Mentor Award by his mentees in recognition and appreciation of his selfless mentorship and support.

Dr. Kariuki Muigua has demonstrated his prowess and sound understanding of Sustainable Development. The book discusses several strategies that may be used to achieve Sustainable Development Goals (SDGs), depending on the diverse situations, the intended outcomes, and the players involved.

The book also covers the two-pronged promotion of the idea of green arbitration, which aims to advance environmental sustainability while attaining sustainable justice. In Kenya and across the world, the author contends, this idea should be adopted.

In this book, the effectiveness of a framework legislation approach to environmental governance generally is also covered. Moreover, it addresses the difficulties that emerge when EMCA is implemented and provides practical reforms that may be taken into account in order to increase its efficacy in ensuring that Kenya meets its objectives for the Sustainable Development Agenda.

The book also argues that Kenya should implement the globally recognised polluter pays concept as a cornerstone for the achievement of the Sustainable Development Goals (SDGs), which effectively guarantees that more actors contribute to sustainability.

The book also argues for Biodiversity Impact Assessments in the most delicate ecological areas to protect any potential biological variety present there and to improve conservation efforts.

In line with the book, Realizing True Sustainable Development is an ideal whose time is now.

This book is a must read for students, teachers and the general public interested in acquiring knowledge on Sustainable Development.

Dr. Kariuki Muigua offered the book for free download in his law firm, Kariuki Muigua & Co. Advocates, website in a quest to realize the key objective of its publication and promoting knowledge on Sustainable Development:
http://kmco.co.ke/wp-content/uploads/2023/05/Realizing-True-Sustainable-Development.pdf

Against the Obnoxious Repugnancy Clause as a Limitation to Application of Traditional Dispute Resolution Mechanisms in Kenya

By: ***Pamela Nyawira Muriuki****

Abstract

This paper analyses the repugnancy clause and proceeds on the basis that it has outlived its time and usefulness as a limitation to the application of Traditional Dispute Resolution Mechanisms (hereinafter referred to as TDRMs) in Kenya. The author's assertions are premised on the basis that TDRMs as a mode of dispute resolution is deeply entrenched in communities in Kenya. Almost all ethnic communities have a TDRM as a means of dispute resolution. For example; Njuri Ncheke for Meru community, Kikuyu Council of Elders, Maslaha as practised through Elders amongst Cushite communities e.t.c

As such TDRMs play a vital role in the resolution of disputes in Kenya. The longevity in the application of TDRMs by various communities in Kenya is a manifestation of the vital role they play in the resolution of disputes. TDRMs highly supplement the formal systems of dispute resolution.

1.0 Introduction

From the onset, there is need to contextualize what constitutes *the repugnancy clause.* The repugnancy clause opines that TDRMs are only applicable or can be used as a means of solving disputes '*only if they were not* ***repugnant to justice and morality or results in outcomes that are repugnant to justice or morality.***

On the other hand, there is need to elucidate what constitutes TDRMs. TDRMs existed even before colonialization.[1] The TDRMs were geared towards fostering peaceful co-existence among the members of each community. The existence of TDRMs such as negotiation, reconciliation, mediation and others is evidence that these concepts are not new in Kenya.[2] The traditional methods of resolving disputes generally referred to as TDRMs are considered to be informal methods of resolving disputes. They operate outside the formal legal framework that exists. TDRMs vary from one community to another. Predominantly, TDRMs are based on cultural practices of various communities.

Each community has its own unique set of customary laws and as such, each community has a different method of dispute resolution.[3] The definition of offences and conflict differs from one community to another. Similarly, the punishment prescribed for each offence differs from one community to another. These various variances of traditional methods of resolving disputes inhibit the creation of a concrete definition of TDRMs.

**** Aspiring Lawyer-LL.B-University of Nairobi(Continuum) & Young Arbiter. Email;pamelamuriuki053@gmail.com***

[1] Kariuki Muigua, Traditional Conflict Resolution Mechanisms and Institutions, page 2-3.

[2] See generally, Brock-Utne, B., "Indigenous conflict resolution in Africa," A draft presented to week-end seminar on Indigenous Solutions to Conflicts held at the University of Oslo, Institute of Educational Research, 2001, pp. 23-24 ;See also Ajayi, A.T., & Buhari, L.O., "Methods of conflict resolution in African traditional society," African research review,Vol.8, No. 2, 2014, page 138-157

[3]Francis Kariuki, Community, Customary and Traditional Justice Systems in Kenya: Reflecting on and Exploring the Appropriate Terminology page 11

2.0 The Legal basis of application of the Repugnant Clause and TDRMs in Kenya

A. Enunciating the legal basis of application of the Repugnant Clause in Kenya

The repugnancy Clause is captured under ***Article 159(3)*** of the Constitution[4] and ***Section 3(2) of the Judicature Act***[5]. To this end, Article 159 (3) of the Constitution[6] verbatim provides: *Traditional dispute resolution mechanisms shall not be used in a way that;*

a) *contravenes the Bill of Rights;*
b) *is* ***repugnant to justice*** *and morality or results in outcomes that are repugnant to justice or morality; or*
c) *is inconsistent with this Constitution or any written law.*

In essence, the import of Article 159(3) of the Constitution is that TDRMs are applicable in Kenya as modes of dispute resolution provided that; they do not contravene the bill of rights, they are ***not repugnant to justice and morality*** and lastly that they are not inconsistent with the Constitution or any written law.

On the other hand, the repugnant clause finds its refuge statutorily under ***Section 3(2) of the Judicature Act***[7] which verbatim provides that: '*The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is* ***not repugnant to justice and morality or inconsistent with any written***

[4] Constitution of Kenya 2010
[5] Cap No.8 of the laws of Kenya
[6] Under Chapter Ten of the Constitution of Kenya 2010 (Judicial Authority)
[7] Cap No.8 of the laws of Kenya

***law**, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and undue delay.'*

These two salient provisions of the law form the legal basis of the application of the repugnancy clause in Kenya. The repugnancy clause as captured by ***Article 159(3)*** of the Constitution[8] and ***Section 3(2) of the Judicature Act***[9] can be considered to be a limitation to the application of traditional dispute resolution mechanisms in Kenya.

B. Enunciating the legal basis of application of traditional dispute resolution mechanisms in Kenya

TDRMs have a wide legal basis of their application as modes of dispute resolution. This legal basis includes; constitutional, statutory and policy bases. These legal provisions either directly or indirectly promote the application of TDRMs in Kenya especially appreciating that culture and TDRMs are conjoined twins.[10]

This assertion is based on the fact that TDRMs operate within the confines of cultural practices. As such, TDRMs vary from one community to the other based on each community's cultural

[8] Constitution of Kenya 2010
[9] Cap No.8 of the laws of Kenya
[10] See generally Kassa, G.N., "The Role of Culture and Traditional Institutions in Peace and Conflict: Gada System of Conflict Prevention and Resolution among the Oromo-Borana," Master's thesis, 2006. Available at <http://urn.nb.no/URN:NBN:no-17988> [Accessed on 09/04/21]; See also Mengesha, A. D., et al, „Indigenous Conflict Resolution Mechanisms among the Kembata Society," *American Journal of Educational Research*, Vol.3, No.2, 2015, page 225-242.

practices.[11] It is on this basis then that one can assert that promoting cultural practices in Kenya, to a great extent promotes TDRMs. In essence, TDRMs are based on African Customary Laws. TDRMs operate within the realms of customary law. *Okoth-Ogendo* asserts that the reason why customary law has stood the test of time, among many other reasons, is because the customary laws have over time been seen to function as a set of social and cultural facts.[12] This is the case with TDRMs as they are governed by customary laws.

The most explicit legal provision for the application of TDRMs in Kenya is Article 159 of the Constitution which addresses judicial authority and the legal system.

Article 159 of the Constitution offers the best enumeration of the basis of the application of TDRMs in Kenya. Under Article 159(2) I of the Constitution, TDRMs are considered to be one of the principles that ought to guide courts and tribunals in the exercise of their judicial authority. Verbatim Article 159(2)(c) of the Constitution provides that; In exercising judicial authority, the courts and tribunals shall be guided by the following principles; alternative forms of dispute resolution including reconciliation, mediation, arbitration and *traditional dispute resolution mechanisms* shall be promoted, subject to clause (3).

[11] Francis Kariuki, Community, Customary and Traditional Justice Systems in Kenya: Reflecting on and Exploring the Appropriate Terminology page 11

[12] Okoth-Ogendo, "The Tragic African Commons: A Century of Expropriation, Suppression and Subversion" (2010)

In essence, Article 159(2)(c) of the Constitution persuades courts and tribunals to at all material times promote the application of TDRMs provided they operate within the scope stipulated under Article 159(3) of the Constitution.

Over time, courts in Kenya in promoting the application of TDRMs in Kenya have heavily relied on these provisions of the Constitution. Buttressing this *Justice Edward M. Muriithi* in the case of; *Mary Kinya Rukwaru v Office of the Director of Public Prosecutions & another [2016] eKLR*[13]stated as follows;

> *"I would agree with Counsel for the Interested Party that "the Constitution of Kenya 2010 recognises that justice is not only about prosecution, conviction and acquittals [and that] it reaches out to issues of restoration of the parties [with] court assisted reconciliation and mediations are the order of the day with Article 159 being the basic test for that purpose. Accordingly, Alternative Dispute Resolution (ADR) "including reconciliation, mediation, arbitration and* ***traditional dispute resolution mechanisms****" are available means of settlement of criminal cases under the Constitution, and the Court is enjoined Article 159 to promote ADR."*

Apart from Article 159 of the Constitution, other few articles of the Constitution encourage the use of TDRMs. It is important to appreciate that TDRMs as earlier stated is part and parcel of culture and/or cultural practices. As such, where the Constitution or statutes promote application, preservation and promotion of culture and/or cultural practices, TDRMs is part and parcel of the same. The preamble of the Constitution states that we are proud of our ethnic,

[13]eKLR, Petition No. 285 of 2016 at paragraph 17 & 18

cultural and religious diversity. Article 2(4) of the Constitution recognizes the existence of customary law which governs TDRMs, though it limits its application where it is inconsistent with the Constitution.

Article 11 of the Constitution recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation. To this end, it advocates for the promotion of cultural expressions.

Article 44 of the Constitution posits that every person has the right to enjoy their language, and culture though no one should be compelled to perform, observe or undergo any culture or rite. The Constitution under Article 45(4) requires the parliament to enact legislation that recognizes traditional marriages. Such marriages are based on cultural practices. Article 60 (1)(g) of the Constitution encourages communities in Kenya to settle land disputes through recognized local community initiatives consistent with this Constitution.

Lastly, Article 67(2)(f) of the Constitution enlists one of the functions of the National Land Commission is to encourage the application of traditional dispute resolution mechanisms in land conflicts.

A statutory basis for application of TDRMs can be derived from Marriage Act[14], under Section 68 encourages the use of TDRMs. Buttressing, Article 67(2)(f) of the Constitution, Section 5(1) (f) of the National Land Commission Act[15] provides that one of the functions

[14]Cap No. 4 of 2014
[15]Cap No. 5 of 2012

of the National Land Commission is to encourage the application of traditional dispute resolution mechanisms in land conflicts.

Under Section 3(5) (b) of the Environmental Management and Co-ordination Act[16], the Environment and Land Court in the exercise of its jurisdiction is required to be guided by the cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and are not repugnant to justice and morality or inconsistent with any written law.

Section 7(3) of the Magistrates Court Act[17] offers an enumeration of Civil matters that are subject to African Customary Law and a great extent TDRMs.

On 4th March 2016, his Lordship the Chief Justice, Hon. (Dr.) Willy Mutunga (as he then was), *vide The Kenya Gazette* (Special Issue) *Gazette Notice. Vol. CXVIII-No.21*, appointed the Taskforce on Alternative Justice Systems to look at the various *Traditional, Informal and Other Mechanisms Used to Access Justice in Kenya (Alternative Justice Systems).* The tenure of the Taskforce was subsequently extended by Chief Justice emeritus Hon. David Maraga.[18]

The Taskforce was required to examine the legal, policy and institutional framework for the furtherance of the endeavour by the Judiciary to exercise its constitutional mandate under Article 159 (2) and its plans to develop a policy to mainstream the Alternative Justice

[16]Cap No.8 of 1999
[17] Cap No.26 of Laws of Kenya
[18] Alternative Justice System Policy, Executive Summary page xiv

System (*hereinafter AJS*) to enhance access to and expeditious delivery of justice as espoused at Pillar one of the *Judiciary Transformation Framework*, which was the blueprint which undergirded transformation in the Judiciary in the period 2012-2016. This objective was later included in the *Sustaining Judiciary Transformation* Blueprint.[19]

On 27th August 2020, which was the 10th Anniversary of the adoption of the Kenya Constitution, Chief Justice emeritus David Maraga presided over the launch of the Alternative Justice System Baseline Policy(AJS) after the completion of its preparation by the Taskforce. The Alternative Justice System Baseline Policy [20] (hereinafter the policy) outlines steps to embrace and implement alternative justice systems per Article 159(2) (c) of the Constitution 2010. This policy best encapsulates the effectiveness and application of TDRMs in Kenya comprehensively.

The policy analyses:[21]

a) *Alternative Justice Systems and the need for an AJS policy in context.*
b) *Conceptual framework and imperatives for Alternative Justice Systems.*
c) *Challenges and responses on Alternative Justice Systems.*
d) *How is AJS practised? Existing models of AJS.*

[19] Alternative Justice System Policy, Executive Summary page xiv
[20]Alternative Justice Systems Baseline Policy <*https://www.judiciary.go.ke/resources/publications/*> accessed on 09/04/21
[21]The table of Contents Alternative Justice Systems Baseline Policy page x to xi <*https://www.judiciary.go.ke/resources/publications/*> accessed on 09/04/21

e) Operational doctrines of interaction between Courts and matters determined by or before AJS institutions.
f) Key areas of intervention and implementation.
g) Operationalizing the AJS policy—the roles of different actors.
h) Operationalizing the AJS policy: The implementation matrix.

The policy in a nutshell emphasizes the importance of AJS and the need for them to be adopted in our justice system to promote access to justice in Kenya. TDRMs form part of Alternative Justice Systems in Kenya as such the policy promotes TDRMs.

The significance of the policy lies in the fact that, unlike the other legislations which seeks to promote TDRMs in Kenya, the policy identifies; the k*ey areas of intervention and proposes ways for operationalizing the AJS policy.*

3.0 Against the Obnoxious Repugnancy Clause as a limitation to Application of Traditional Dispute Resolution Mechanisms in Kenya

To appreciate why there is a need to scrape off the repugnancy clause in our laws there is a need to appreciate the historical basis of TDRMs in Kenya, which led to the introduction of the repugnant clause in our laws. As earlier pointed out, TDRMs existed even before colonialization.[22] These mechanisms were geared toward fostering peaceful co-existence among the members of each community. The existence of traditional conflict resolution mechanisms such as

[22] Kariuki Muigua, Traditional Conflict Resolution Mechanisms and Institutions, page 2-3.

negotiation, reconciliation, mediation and others is evidence that these concepts are not new in Kenya.[23]

Communities in Kenya had their ways of dealing with day to day challenges. They relied on their customs and practices to resolve their disputes. However, during colonialization, the colonial masters deliberately suppressed customs and practices allowing them to be applied '*only if they were not repugnant to justice and morality*.[24] This is formed the origin of the repugnancy clause[25] as currently constituted in the Kenyan legal framework. Subsequently, the repugnant clause has since been retained in Kenya legal framework for example the Judicature Act, Cap 8 and the Constitution of Kenya 2010 as a limitation to the application of TDRMs in Kenya.[26]

It is fair to state that, the repugnancy clause as stipulated under Article 159 (3)(b) of the Constitution reflects the continuing conflict between African legal systems and legal systems which began in the colonial era.

[23] See generally, Brock-Utne, B., "Indigenous conflict resolution in Africa," A draft presented to week-end seminar on Indigenous Solutions to Conflicts held at the University of Oslo, Institute of Educational Research, 2001, pp. 23-24 ;See also Ajayi, A.T., & Buhari, L.O., "Methods of conflict resolution in African traditional society," African research review,Vol.8, No. 2, 2014, page 138-157

[24]Kariuki Muigua, Alternative Dispute Resolution and Access to Justice in Kenya page 59

[25] Repugnant Clause-'only if they were not repugnant to justice and morality or results in outcomes that are repugnant to justice or morality'

[26]The clause is retained under Section 3(2)Judicature Act, Cap 8 and Article 159(3) of the Constitution of Kenya 2010

The view that African legal systems are inferior to legal systems which began in the colonial era hence the need to have the repugnancy clause has been captured in writing by various foreign writers.

Arthur Phillips, [27] in a report he prepared, propounds that it is inevitable and indeed desirable that Africans should eventually attain a system of law and justice that is similar to though not necessarily identical to the British system of law. *Frederick Lugard* argued that only from native courts employing customary law was it possible to create rudiments of law and order, to inculcate a sense of responsibility and evolve among a primitive community some sense of discipline and respect for authority.[28] The view of African cultural practices like TDRMs as 'primitive' has always downgraded African legal systems which are primarily based on different cultural practices of communities.

It is observable that, where African ideas of custom and law were retained by the legal systems imposed on the Africans during the colonial era the same was based on necessity. This was observed by *Karen Fields*[29] who verbatim stated "*...Britain had not the manpower, the money nor the mettle to rule by force of arms alone. Essentially, to make the colonial rule work with only a `thin white line ' of European administrators, African ideas of custom and law had to be incorporated into the new state*

[27] Arthur Phillips, Report on Native Tribunals (Nairobi: Government Printer, Colony and Protectorate of Kenya, 1945), 5±6 on the powers of Native Tribunals,
[28] Lord Lugard, The Dual Mandate in British Tropical Africa (London, 1965 [1922]),547-8, 549-50.
[29] See Karen Fields, *Revival and Rebellion in Colonial Central Africa* (Portsmouth, NH,1997), chs. 1±2.

systems. In a very real way, customary law and African courts provided the ideological and financial underpinnings for European colonial rule."

It is on this background, then that one can appreciate why even where cultural practices like TDRMs are promoted by the existing legal framework the same is subject to various caveats and limitations like the repugnant clause.[30]

However, there is a need to question the relevance of the *repugnant clause* in the 20th century, especially where Kenya as a country seeks to promote the application of alternative dispute resolution mechanisms.[31] TDRMs and in general customary law, has gone through a period of expropriation, suppression and subversion.[32] The consistency with which the repugnancy clause has been retained in various laws is living proof.

---

[30]Article 159 3(b) of the Constitution of Kenya 2010 - "TDRMs are not used in a way that is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality

[31] The Emeritus Chief Justice Dr Willy Mutunga stated as follows in his keynote speech during the judicial marches week "*Let me reiterate our main aims in undertaking the judicial marches: …We want to encourage the public to use alternative dispute resolution mechanisms, including traditional ones, as long as they do not offend the Constitution."* (Keynote Speech by The Chief Justice, Hon. Dr. Willy Mutunga, At The Commencement of 'the Judicial Marches Week' Countrywide On August 21, 2012 <*http://kenyalaw.org/kenyalawblog/commencement-of-the-judicial-marches-week-countrywide/*> accessed on 09/04/21)

[32] Okoth- Ogendo, "The Tragic African Commons: A Century of Expropriation, Suppression and Subversion" (2010) Available at<*http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/8098/The%20Tragic%20African%20Commons.pdf?sequence=1*> accessed on 09/04/21

The features of TDRMs which include inter alia; informality, affordability/less expensive, exhaustion of issues in dispute, are not time-consuming, reconciliatory in nature, familiarity and simplicity have ensured TDRMs have stood the test of time.[33] This is despite being battered by clauses like the repugnancy clause.

It is not lost on the author that TDRMs are considered to be accessible by the rural poor and the illiterate people, flexible, voluntary, foster relationships, proffer restorative justice and give some level of autonomy to the parties in the process.[34]

Most TDRMs are concerned with the restoration of relationships (as opposed to punishment), peace-building and parties' interests and not the allocation of rights between disputants.[35] This nature of TDRMs informs their resilience and endurance despite deliberate attempt to curtail their application.

This paper opines that the repugnant clause is against the spirit of the law to promote the application of TDRMs as captured under Article 159(2)(c) of the Constitution. In essence, the impact of the repugnant clause is to inhibit without justification the application of TDRMs in

[33]ICJ-Kenya Report, 'Interface between Formal and Informal Justice Systems in Kenya,' (ICJ,2011), page 32; See also A.N. Allott, 'African Law,' in Derrett, J.D An Introduction to Legal Systems, (Sweet & Maxwell, 1968), page 131-156.

[34] Francis Kariuki 'Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of Republic v Mohamed Abdow Mohamed [2013] eKLR, Alternative Dispute Resolution, Vol. 2, No. 1 (2014), page 202-228.

[35] ICJ-Kenya Report, 'Interface between Formal and Informal Justice Systems in Kenya,' (ICJ, 2011), page 32

Kenya and especially as one of the principles that ought to guide courts and tribunals in the exercise of their judicial authority. Further, all the provisions of the law that seek to promote cultural practices which include TDRMs are in essence diluted and/or rendered ineffective by the repugnant clause. For example; Article 11 of the Constitution recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.

It is also apparent that the repugnant clause as a limitation only surprisingly and discriminatorily exists against TDRMs in exclusion of all the other formal systems of dispute resolution. Such a discriminatory application approach makes it only necessary to scrape off the repugnant clause in the current legislation.

Premised on the foregoing, it is this paper view that the repugnancy clause has no use at all. It is sufficient to limit the application of TDRMs by providing that they will not be applicable where the law provides so, without invoking the negative connotation of the *"repugnant clause"*.

4.0 Conclusion

The repugnancy clause has outlived its usefulness and it's a clause of no significance especially where there is a need to promote the application of alternative dispute resolution mechanisms like TDRMs in Kenya.

References

Alternative Justice System Baseline Policy (AJS)

Arthur Phillips, Report on Native Tribunals (Nairobi: Government Printer, Colony and Protectorate of Kenya, 1945), 5 to 6 on the powers of Native Tribunals

Brock-Utne, B., "Indigenous conflict resolution in Africa," A draft presented to week-end seminar on Indigenous Solutions to Conflicts held at the University of Oslo, Institute of Ed

Francis Kariuki 'Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of Republic v Mohamed Abdow Mohamed [2013] eKLR, Alternative Dispute Resolution.

Francis Kariuki. Community, Customary and Traditional Justice Systems in Kenya: Reflecting on and Exploring the Appropriate Terminology. (2015)

ICJ-Kenya Report, 'Interface between Formal and Informal Justice Systems in Kenya,' (ICJ,2011), p. 32; See also A.N. Allott, 'African Law,' in Derrett, J.D An Introduction to Legal Systems, (Sweet & Maxwell, 1968)

Karen Fields, *Revival and Rebellion in Colonial Central Africa* (Portsmouth, NH,1997),

Kariuki Muigua, Alternative Dispute Resolution and Access to Justice in Kenya.

Kariuki Muigua, Traditional Conflict Resolution Mechanisms and Institutions.

Kassa, G.N., "The Role of Culture and Traditional Institutions in Peace and Conflict: Gada System of Conflict Prevention and Resolution among the Oromo-Borana," Master's thesis, 2006.

Keynote Speech By The Chief Justice, Hon. Dr. Willy Mutunga, At The Commencement Of 'the Judicial Marches Week' Countrywide On August 21, 2012.

Lord Lugard, The Dual Mandate in British Tropical Africa (London, 1965 [1922]),

Mengesha, A. D., et al, „Indigenous Conflict Resolution Mechanisms among the Kembata Society," *American Journal of Educational Research*, Vol.*3*, No.2, 2015.

Okoth- Ogendo, "The Tragic African Commons: A Century of Expropriation, Suppression and Subversion" (2010)

Addressing Noise Pollution for a Clean and Healthy Environment in Kenya

*By: **Kariuki Muigua****

Abstract

This paper discusses the general and specific effects of noise pollution on human health as the basis for addressing noise pollution in Kenya, in line with the constitutional and statutory guarantees on creating a clean and healthy environment for all persons. The author argues that noise pollution is a direct violation of this right and consequently offers recommendations on how the problem can be addressed. The paper generally discusses the legal and institutional framework on noise regulation, with a view to identifying the key players and stakeholders in tackling the vice. The author argues that unless this problem is effectively addressed, realisation of a clean and healthy environment for the Kenyan people will remain a mirage.

1. Introduction

Any sound that bothers, irritates, or potentially harm a person's ear is considered noise. Other definitions of noise include undesired, undesirable, and unpleasant sound.[1] Environmental noise, as defined by the World Health Organization (WHO), is all noise, except noise from places of employment. Any unwelcome sound or group of

PhD in Law (Nrb), FCIArb (Chartered Arbitrator), LL. B (Hons) Nrb, LL.M (Environmental Law) Nrb; Dip. In Law (KSL); FCPS (K); Dip. In Arbitration (UK); MKIM; Mediator; Consultant: Lead expert EIA/EA NEMA; BSI ISO/IEC 27001:2005 ISMS Lead Auditor/ Implementer; Advocate of the High Court of Kenya; Senior Lecturer at the University of Nairobi, Faculty of Law.

[1] Hadzi-Nikolova, M., Mirakovski, D., Ristova, E. and Stefanovska Ceravolo, L., 'Modeling and Mapping of Urban Noise Pollution with SoundPLAN Software' (2012) 6 International Journal for Science, Technics and Innovations for the Industry MTM (Machines, Tecnologies, Materials) 38, p.38.

noises that annoys people or could be harmful to their health is considered noise.[2] EMCA defines "noise" as any undesirable sound that is intrinsically objectionable or that may cause adverse effects on human health or the environment.[3] Notably, EMCA also defines "pollutant" as including any substance whether liquid, solid or gaseous which—(a) may directly or indirectly alter the quality of any element of the receiving environment; (b) is hazardous or potentially hazardous to human health or the environment; and includes objectionable odours, radio-activity, noise, temperature change or physical, chemical or biological change to any segment or element of the environment.[4]

Environmental noise pollution still poses a serious risk to people's health and quality of life on a global scale. Urbanization, along with the accompanying rise in mobility and industrialization, has led to an amplification of noise in densely populated areas, increasing noise exposure. In a city, as the population grows, so does industrial activity to suit the demands of the populace. Hence, noise levels rise.[5] This paper discusses the general and specific effects of noise pollution on human health as the basis for addressing noise pollution in Kenya, in line with the constitutional and statutory guarantees on creating a clean and healthy environment for all persons. The author argues that noise pollution is a direct violation of this right and consequently offers recommendations on how the problem can be addressed. The

---

[2] 'Definition of Environmental Noise' (*Gouvernement du Québec*) <*https://www.quebec.ca/en/health/advice-and-prevention/health-and-environment/the-effects-of-environmental-noise-on-health/definition-environmental-noise*> accessed 25 March 2023.

[3] EMCA, Sec. 2.

[4] EMCA, Sec. 2.

[5] Wawa EA and Mulaku GC, 'Noise Pollution Mapping Using GIS in Nairobi, Kenya' (2015) 7 Journal of Geographic Information System 486, p. 487.

paper generally discusses the legal and institutional framework on noise regulation, with a view to identifying the key players and stakeholders in tackling the vice. The author argues that unless this problem is effectively addressed, realisation of a clean and healthy environment for the Kenyan people will remain a mirage. Kenyans have for a while suffered the menace of noise pollution especially after the promulgation of the 2010 Constitution, where there has been conflicting jurisprudence on which level of the Government between national and county governments is mandated to address noise pollution and other nuisances that affect the right to clean and healthy environment as far as far noise pollution is concerned.[6]

---

[6] https://www.the-star.co.ke/authors/maureen-kinyanjui, 'Sakaja Thanks Ruto for Support in Curbing "noise Pollution Menace" in City' (*The Star*) <*https://www.the-star.co.ke/news/2022-12-12-sakaja-thanks-ruto-for-support-in-curbing-noise-menace-in-city/*> accessed 24 March 2023; Okoth B, 'Loud Music in Kenya Neighbourhoods Illegal Regardless Nature of Your Business' (*The Standard*) <*https://www.standardmedia.co.ke/article/2001458024/loud-music-in-neighbourhood-illegal-regardless-nature-of-your-business*> accessed 24 March 2023; February 16 2020 S, 'You Have a Right to a Quiet Environment' (*Business Daily*, 19 September 2020) <*https://www.businessdailyafrica.com/bd/lifestyle/personal-finance/you-have-a-right-to-a-quiet-environment-2280534*> accessed 24 March 2023; Okafor C, 'Night Clubs in Kenya Face Closure and WhatsApp Groups Could Help Save Them' (*Business Insider Africa*, 55:25 100AD) <*https://africa.businessinsider.com/local/markets/night-clubs-in-kenya-face-closure-and-whatsapp-groups-could-help-save-them/rsv3phk*> accessed 24 March 2023; 'Kisumu Bans Church Crusades over Noise Pollution – Kenya News Agency' (4 November 2022) <*https://www.kenyanews.go.ke/kisumu-bans-church-crusades-over-noise-pollution/*> accessed 24 March 2023; Chepkwony J, 'Churches on the Spot over Noise Pollution, Court Order Them to Cease or Be Prosecuted' (*The Standard*) <*https://www.standardmedia.co.ke/coast/article/2001459278/churches-on-the-spot-over-noise-pollution-court-order-them-to-cease-or-be-prosecuted*> accessed 24 March 2023; WAKWELO V, 'Kileleshwa Bar Operators, Patrons Arrested after Alai's Noise Pollution Complaint » Capital News' (*Capital News*, 2 October 2022) <*https://www.capitalfm.co.ke/news/2022/10/kileleshwa-bar-*

2. Links Between Noise and Human Health

Building sites or traffic on the roads, trains, and in the air are significant sources of environmental noise exposure. Other sources of noise exposure include wind turbines and leisure activities like playing loud music or other audio content or participating in e-sports (video and computer game competitions). In addition to increasing the risk of ischemic heart disease (IHD), hypertension, sleep disturbance, hearing impairment, tinnitus [7], and cognitive impairment, research shows that excessive noise can be annoying. There is also mounting evidence that excessive noise can have negative effects on mental health and birth outcomes.[8]

---

operators-patrons-arrested-after-alais-noise-pollution-complaint/> accessed 24 March 2023;

[7] When a person has tinnitus, their ears or head may hiss, ring, or buzz. These sounds do not originate from an outside source; instead, a person hears them. High noise levels, such as those produced by loud music, can cause tinnitus. Tinnitus may also be brought on by loud or abrupt noises, such as an explosion or gunshot. Hearing loss frequently coexists with the hearing issue of tinnitus. It might be merely passing or permanent. A person's emotional, cognitive, psychological, or physical state is constantly disturbed by debilitating tinnitus.
Around 3% of debilitating tinnitus is caused by environmental noise exposure, primarily noise from leisure activities. <'*Effects on Physical Health - The Effects of Environmental Noise on Health*' (*Gouvernement du Québec*) <*https://www.quebec.ca/en/health/advice-and-prevention/health-and-environment/the-effects-of-environmental-noise-on-health/effects-of-environmental-noise-on-physical-health*> accessed 25 March 2023.

[8] 'Guidance on Environmental Noise' <*https://www.who.int/tools/compendium-on-health-and-environment/environmental-noise*> accessed 24 March 2023; 'Compendium of WHO and Other UN Guidance on Health and Environment' <*https://www.who.int/publications-detail-redirect/WHO-HEP-ECH-EHD-22.01*> accessed 25 March 2023.

Decibels are used to measure noise level (dB). Decibel levels increase as noise levels do. To accommodate human hearing, decibels can be changed. Decibels (dBA) is the unit of measurement for noise level. As a person is exposed to different levels of noise, different impacts result. Hearing loss can occur after years of being exposed to loud noises (75 dBA for eight hours each day). The body can react to lower noise levels as well; for example, a 40 dBA outdoor noise can be enough to keep someone awake.[9]

Noise's psychosocial effects on people include annoyance, which is the discomfort and disturbance that the person exposed to the noise experiences, as well as consequences on learning.[10]

3. Noise Regulation in Kenya: Legal and Institutional Framework

According to the International Covenant on Economic, Social, and Cultural Rights, every person has the right to the best possible level of physical and mental health, and State Parties are required to recognise this right. The actions that must be done by the States Parties to the current Covenant in order to fully realise this right must include those required for: the advancement of all facets of industrial and environmental hygiene.[11]

---

[9] 'Noise Measurement - The Effects of Environmental Noise on Health' (*Gouvernement du Québec*) <*https://www.quebec.ca/en/health/advice-and-prevention/health-and-environment/the-effects-of-environmental-noise-on-health/noise-measurement*> accessed 25 March 2023.

[10] 'Psychosocial Effects - The Effects of Environmental Noise on Health' (*Gouvernement du Québec*) <*https://www.quebec.ca/en/health/advice-and-prevention/health-and-environment/the-effects-of-environmental-noise-on-health/psychosocial-effects-of-environmental-noise*> accessed 25 March 2023.

[11] 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, Article 12 (1)(2)(b).

3.1 Constitution of Kenya 2010

Article 42 (a) of the 2010 Constitution[12] guarantees that: "every person has the right to a clean and healthy environment, which includes the right to have the environment protected for the benefit of present and future generations through legislative and other measures."

Article 70 (1) of the Constitution provides: "If a person alleges that a right to a clean and healthy environment recognised and protected under Article 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."

It is also worth pointing out that the Fourth Schedule [Articles 185(2), 186(1) And 187(2) to the Constitution provides for the distribution of functions between the national government and the county governments. The functions and powers of the county governments include, *inter alia*: control of air pollution, noise pollution, other public nuisances and outdoor advertising. The implication of this is that the duty of noise pollution control moved from National Environment Management Authority (NEMA) which is a national government arm, to the county governments. NEMA is just required to play an oversight role in this area, as per the Act. This is on the understanding that county governments are the lead agency in noise pollution control.[13] EMCA defines "lead agency" to mean any Government ministry, department, parastatal, state corporation or local authority,

[12] Constitution of Kenya 2010 (Government Printer, Nairobi, 2010).
[13] EMCA, sec. 12.

in which any law vests functions of control or management or any element of the environment or natural resources.[14]

3.2. Environmental Management and Co-ordination Act, 1999

The Environmental Management and Co-ordination Act, 1999 [15] (EMCA) was enacted to provide for the establishment of an appropriate legal and institutional framework for the management of the environment and for matters connected therewith and incidental thereto.[16]

Section 101 of EMCA gives the Cabinet Secretary the power to set standards for noise and, on the recommendation of the Authority: recommend minimum standards for emissions of noise and vibration pollution into the environment as are necessary to preserve and maintain public health and the environment; determine criteria and procedures for the measurement of noise and vibration pollution into the environment; determine criteria and procedures for the measurement of sub-sonic vibrations; determine standards for the emission of sub-sonic vibrations which are likely to have a significant impact on the environment; issue guidelines for the minimization of sub-sonic vibrations, referred to in paragraph (d) from existing and future sources; determine noise level and noise emission standards applicable to construction sites, plants, machinery, motor vehicles, aircraft including sonic bonus, industrial and commercial activities; determine measures necessary to ensure the abatement and control of noise from sources referred to in paragraph (f); and issue

[14] EMCA, sec. 2.
[15] Environmental Management and Co-ordination Act, No.8 of 1999, Laws of Kenya.
[16] Ibid, Preamble.

guidelines for the abatement of unreasonable noise and vibration pollution emitted into the environment from any source.[17]

Section 102 thereof prohibits noise in excess of established standards by providing that subject to the provisions of the Civil Aviation Act (Cap. 394), any person who emits noise in excess of the noise emission standards established under this Part commits an offence. However, exceptions exist in relation to noise levels.[18]

EMCA offers the broad rules and criteria to be followed in the management and conservation of several environmental issues. Hence, it is intended to be put into practice by the adoption of sector-specific laws that should concentrate on the various facets 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.

[17] EMCA, sec. 101.
[18] EMCA, sec. 103.

3.3. *Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulation, 2009,* Legal Notice No. 61 of 2009

The *Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulation, 2009*[19] 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.[20] However, there are some exemptions to these prohibitions.[21]

In the case of *Pastor James Jessie Gitahi and 202 others vs Attorney General*[22], the court recognized one of the components of a clean and healthy environment to be the prevention of noise and vibration pollution. Despite the Regulations, noise pollution is however still a major problem in the country because of lack of enforcement of the Regulations and possibly the public's ignorance on the levels of noise that may be considered as air pollution.

3.4. National Environment Management Authority (NEMA)

In order to implement all environmental policies and to exert general oversight and coordination over all environmental issues, the National Environment Management Authority (NEMA) was

[19] Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations, 2009, Legal Notice No. 61 of 2009.
[20] Ibid, Regulation 3 (1).
[21] Regulation 7.
[22] *Pastor James Jessie Gitahi and 202 others vs Attorney General*, [2013] eKLR, petition No. 683 of 2009.

established as the main government vehicle under EMCA. NEMA has the authority to create rules, specify requirements and guidelines, and issue directives for the management and preservation of the environment and natural resources in conjunction with the lead agencies. Environmental restoration orders, conservation orders, and easements are just a few of the mechanisms the Act uses to protect the environment. It also calls for environmental impact assessments, audits, and monitoring.[23]

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.[24]

3.5. County Laws

Some counties have already embraced their role under the Constitution to control noise pollution, such as the Nairobi City County Government which has since enacted the Nairobi City County Public Nuisance Act 2021.[25]

3.5.1. Nairobi City County Public Nuisance Act 2021

Notably, Section 20 thereof provides that: "a person shall not in any street or in any shop, business premises or any other place adjoining any street to which the public are admitted, play, operate, cause or allow to be played or operated, any musical instrument, wireless, gramophone, amplifier or similar instrument thereby making,

[23] See EMCA, Part Vi – Integrated Environmental Impact Assessment; Part Vii – Environmental Audit and Monitoring.
[24] Sec. 12, EMCA.
[25] 'The Nairobi City County Public Nuisance Act 2021 Signed into Law. | Nairobi City County' (20 August 2021) <*https://nairobi.go.ke/nairobi-city-county-public-nuisance-act-2021-signed-law/*> accessed 25 March 2023.

causing or authorising noise to be made which is loud and continuous, or repeated as to constitute a nuisance to the occupants or dwellers of any premises in the neighbourhood or to passersby on the street."

There is a need for other county governments to follow suit and put in place laws and regulations aimed at addressing noise pollution within their counties.

4. Getting it Right: Streamlining Noise Regulation Framework in Kenya

This section offers some viable recommendations on how to address the noise pollution in the country.

4.1 Institutional Streamlining and Effective Enforcement of Laws and Regulations on Noise Pollution

As a way of curbing noise pollution, the World Health Organisation (WHO) urges countries to enact and enforce legislation/regulations/policies for limiting sound levels and exposure in entertainment venues and events such as clubs, bars, fitness centres, concerts.[26] WHO also advises that such legislation should focus on: limiting sounds to 100 dB(A) averaged over 15 minutes; conducting regular sound monitoring to ensure and document compliance; optimizing venue acoustics and sound system design to ascertain optimal listening conditions for all audience members in the venue/event; create quiet zones allowing audience members to rest; ensuring provision of hearing protection (earplugs);

[26] 'Compendium of WHO and Other UN Guidance on Health and Environment' <*https://www.who.int/publications-detail-redirect/WHO-HEP-ECH-EHD-22.01*> accessed 25 March 2023, p. 152.

and ensuring provision of training on noise reduction strategies and information about noise.[27]

It is worth pointing that there is still a lot of confusion on who between NEMA and the county governments should substantively deal with the noise pollution menace. This may, therefore, call for some updates and/or amendments to EMCA to capture and clarify the constitutional position on this issue.

Meanwhile, while under the Constitution of Kenya 2010, the national government, has the role of protecting the environment and natural resources, [28] and county governments have a role in pollution control [29] and implementation of specific national government policies on natural resources and environmental conservation including soil and water conservation and forestry,[30] the counties should 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.

4.2. Use of Appropriate Technology for Noise Mapping

One of the most effective methods for identifying the crucial locations in urban, suburban, and rural areas is noise monitoring under various traffic and environmental conditions.[31]

---

[27] Ibid, p. 152.
[28] Fourth Schedule, S. 22.
[29] S. 3 of Part II.
[30] Fourth Schedule, S. 10.
[31] Alam, P., Ahmad, K., Afsar, S.S. and Akhtar, N., 'Noise Monitoring, Mapping, and Modelling Studies–a Review' (2020) 21 Journal of Ecological Engineering, p.82.

The level of noise in a given area at a given moment is depicted cartographically as a noise map. Aside from general evaluation, noise maps are also used to assess the impact of new roads and highways within metropolitan areas as well as the noise levels during various phases of any development project. As a result, noise maps are a valuable strategic tool for planning metropolitan areas and making environmental management decisions.[32]

The idea that it is crucial to gauge the amount of noise coming from particular sources and communicate that information to those who are nearby the source of the noise is well-founded. This will enable the public to understand the noise levels to which they are exposed and to create mechanisms for reducing the noise to acceptable levels.[33] One of the suggested ways of doing this is geographic information system (GIS). A geographic information system (GIS) is a computer-based system that makes it possible to input, manage, analyse, produce, and disseminate geographically referenced, land-related data and information at all scales. Auditory circumstances are well-presented spatially on noise maps. GIS helps in creating a spatial decision support system that can be applied in the decision-making process and offers effective tools for visualising noise propagation. As a result, such analysis and management procedures might leverage noise maps created in GIS.[34] GIS offers a potent set of tools

[32] Manojkumar N, Basha K and Srimuruganandam B, 'Assessment, Prediction and Mapping of Noise Levels in Vellore City, India' (2019) 6 Noise Mapping 38, p.40.
[33] Wawa EA and Mulaku GC, 'Noise Pollution Mapping Using GIS in Nairobi, Kenya' (2015) 7 Journal of Geographic Information System 486, pp. 486-87.
[34] Ibid, p. 487.

for storing and retrieving, processing, and displaying spatial data from the real world for a specific set of uses.[35]

In order to create a graphic depiction of the distribution of sound levels over a certain location for a specific time period, noise mapping entails measuring sound levels at predetermined sites and using the generated data. Assessing compliance with permissible noise levels, putting in place noise reduction measures, and tracking the effects of such actions can all be done using noise maps.[36]

Some authors have praised SoundPLAN Software, a software package offering a wide variety of noise and air pollution evaluation modules, developed by SoundPLAN International LLC and Braunstein + Berndt GmbH. It is perhaps the world's top environmental forecast programme and is used by more than 5,000 users, including governments, consultants, and researchers in more than 40 nations.[37]

---

[35] Hadzi-Nikolova, M., Mirakovski, D., Ristova, E. and Stefanovska Ceravolo, L., 'Modeling and Mapping of Urban Noise Pollution with SoundPLAN Software' (2012) 6 International Journal for Science, Technics and Innovations for the Industry MTM (Machines, Tecnologies, Materials) 38, p.38.

[36] Wawa EA and Mulaku GC, 'Noise Pollution Mapping Using GIS in Nairobi, Kenya' (2015) 7 Journal of Geographic Information System 486, p. 488.

[37] Hadzi-Nikolova, M., Mirakovski, D., Ristova, E. and Stefanovska Ceravolo, L., 'Modeling and Mapping of Urban Noise Pollution with SoundPLAN Software' (2012) 6 International Journal for Science, Technics and Innovations for the Industry MTM (Machines, Tecnologies, Materials) 38, p.38.

It is suggested that the government of Kenya and/or County Governments should invest in such tools in order to enhance noise mapping in the country.

4.3. Need for Integration of Health in Urban and Territorial Planning

As already pointed, there are various sources of noise especially in urban areas. As a result, there is a need for urban and city planners to take these sources of noise into consideration. Target 3.9 of Sustainable Development Goal (SDG) 3 urges countries to ensure that by 2030, they substantially reduce the number of deaths and illnesses from hazardous chemicals and air, water and soil pollution and contamination.[38] This is closely related to SDG 11 which provides that countries should ensure that they make cities and human settlements inclusive, safe, resilient and sustainable.[39] Target 11.a seeks to support positive economic, social and environmental links between urban, peri-urban and rural areas by strengthening national and regional development planning. In addition, Target 11.b seeks to ensure that by 2020, countries substantially increase the number of cities and human settlements adopting and implementing integrated policies and plans towards inclusion, resource efficiency, mitigation and adaptation to climate change, resilience to disasters, and develop and implement, in line with the Sendai Framework for Disaster Risk Reduction 2015-2030, holistic disaster risk management at all levels.[40] The Physical and Land Use Planning Act, 2019[41] provides that one of the things that should be considered in the contents of local physical and land use development plans is aspects of housing,

[38] 'Goal 3 | Department of Economic and Social Affairs' <*https://sdgs.un.org/goals/goal3*> accessed 25 March 2023.
[39] 'Goal 11 | Department of Economic and Social Affairs' <*https://sdgs.un.org/goals/goal11*> accessed 25 March 2023.
[40] Ibid.
[41] Physical and Land Use Planning Act, No. 13 of 2019, Laws of Kenya.

unemployment, traffic congestion, pollution, land tenure, lack of services, terrain, soils.[42]

5. Conclusion

As discussed in this paper, noise pollution has various adverse effects on human health and thus poses a risk to the realisation of Article 42 of the Constitution of Kenya on the right to clean and healthy environment for all. As a result, it is important that all stakeholders join hands in addressing the menace for the sake of all, and promoting public health. It is not the time to point fingers and watch as the general populace suffers; both levels of government should respond to the cry for help from their citizens and address the problem of noise pollution.

[42] Ibid, sec.48; Second Schedule.

References

'Compendium of WHO and Other UN Guidance on Health and Environment' <*https://www.who.int/publications-detail-redirect/WHO-HEP-ECH-EHD-22.01*> accessed 25 March 2023.

'Definition of Environmental Noise' (*Gouvernement du Québec*) <*https://www.quebec.ca/en/health/advice-and-prevention/health-and-environment/the-effects-of-environmental-noise-on-health/definition-environmental-noise*> accessed 25 March 2023.

'Effects on Physical Health - The Effects of Environmental Noise on Health' (*Gouvernement du Québec*) <*https://www.quebec.ca/en/health/advice-and-prevention/health-and-environment/the-effects-of-environmental-noise-on-health/effects-of-environmental-noise-on-physical-health*> accessed 25 March 2023.

'Goal 11 | Department of Economic and Social Affairs' <*https://sdgs.un.org/goals/goal11*> accessed 25 March 2023.

'Goal 3 | Department of Economic and Social Affairs' <*https://sdgs.un.org/goals/goal3*> accessed 25 March 2023.

'Guidance on Environmental Noise' <*https://www.who.int/tools/compendium-on-health-and-environment/environmental-noise*> accessed 24 March 2023.

'Kisumu Bans Church Crusades over Noise Pollution – Kenya News Agency' (4 November 2022) <*https://www.kenyanews.go.ke/kisumu-bans-church-crusades-over-noise-pollution/*> accessed 24 March 2023.

'Noise Measurement - The Effects of Environmental Noise on Health' (*Gouvernement du Québec*) <*https://www.quebec.ca/en/health/advice-and-prevention/health-and-environment/the-effects-of-environmental-noise-on-health/noise-measurement*> accessed 25 March 2023.

'Psychosocial Effects - The Effects of Environmental Noise on Health' (*Gouvernement du Québec*) <*https://www.quebec.ca/en/health/advice-and-prevention/health-and-environment/the-effects-of-environmental-noise-on-health/psychosocial-effects-of-environmental-noise*> accessed 25 March 2023.

'The Nairobi City County Public Nuisance Act 2021 Signed into Law. | Nairobi City County' (20 August 2021) <*https://nairobi.go.ke/nairobi-city-county-public-nuisance-act-2021-signed-law/*> accessed 25 March 2023.

Alam, P., Ahmad, K., Afsar, S.S. and Akhtar, N., 'Noise Monitoring, Mapping, and Modelling Studies–a Review' (2020) 21 Journal of Ecological Engineering.

Chepkwony J, 'Churches on the Spot over Noise Pollution, Court Order Them to Cease or Be Prosecuted' (*The Standard*) <*https://www.standardmedia.co.ke/coast/article/2001459278/churches-on-the-spot-over-noise-pollution-court-order-them-to-cease-or-be-prosecuted*> accessed 24 March 2023.

Constitution of Kenya 2010 (Government Printer, Nairobi, 2010).

Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations, 2009, Legal Notice No. 61 of 2009.

Environmental Management and Co-ordination Act, No.8 of 1999, Laws of Kenya.

February 16 2020 S, 'You Have a Right to a Quiet Environment' (*Business Daily*, 19 September 2020) <*https://www.businessdailyafrica.com/bd/lifestyle/personal-finance/you-have-a-right-to-a-quiet-environment-2280534*> accessed 24 March 2023.

Hadzi-Nikolova, M., Mirakovski, D., Ristova, E. and Stefanovska Ceravolo, L., 'Modeling and Mapping of Urban Noise Pollution with SoundPLAN Software' (2012) 6 International Journal for Science, Technics and Innovations for the Industry MTM (Machines, Technologies, Materials) 38.

https://www.the-star.co.ke/authors/maureen-kinyanjui, 'Sakaja Thanks Ruto for Support in Curbing "noise Pollution Menace" in City' (*The Star*) <*https://www.the-star.co.ke/news/2022-12-12-sakaja-thanks-ruto-for-support-in-curbing-noise-menace-in-city/*> accessed 24 March 2023.

Manojkumar N, Basha K and Srimuruganandam B, 'Assessment, Prediction and Mapping of Noise Levels in Vellore City, India' (2019) 6 Noise Mapping 38.

Okafor C, 'Night Clubs in Kenya Face Closure and WhatsApp Groups Could Help Save Them' (*Business Insider Africa*, 55:25 100AD) <*https://africa.businessinsider.com/local/markets/night-clubs-in-kenya-face-closure-and-whatsapp-groups-could-help-save-them/rsv3phk*> accessed 24 March 2023.

Okoth B, 'Loud Music in Kenya Neighbourhoods Illegal Regardless Nature of Your Business' (*The Standard*)

<*https://www.standardmedia.co.ke/article/2001458024/loud-music-in-neighbourhood-illegal-regardless-nature-of-your-business*> accessed 24 March 2023.

Pastor James Jessie Gitahi and 202 others vs Attorney General, [2013] eKLR, petition No. 683 of 2009.

Physical and Land Use Planning Act, No. 13 of 2019, Laws of Kenya.

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, Article 12 (1)(2)(b).

Wakwelo V, 'Kileleshwa Bar Operators, Patrons Arrested after Alai's Noise Pollution Complaint » Capital News' (*Capital News*, 2 October 2022) <*https://www.capitalfm.co.ke/news/2022/10/kileleshwa-bar-operators-patrons-arrested-after-alais-noise-pollution-complaint/*> accessed 24 March 2023.

Wawa EA and Mulaku GC, 'Noise Pollution Mapping Using GIS in Nairobi, Kenya' (2015) 7 Journal of Geographic Information System 486.

A Proposal for Legislative Reform of Kenya's Prevention of Organised Crimes Act – A Comparative Analysis

By: ***Michael Sang*** [*]

Abstract

This paper critically discusses the problem of organized crime in Kenya, with a particular focus on the current situation, challenges and proposed solutions. The paper examines the history of organized crime in Kenya and highlights some of the major forms of organized crime in the country, such as: money laundering; arms trafficking; drug trafficking; human trafficking and organ trafficking. It explores the provisions of the Prevention of Organised Crimes Act, 2010, which seeks to combat organized crime in Kenya, as well as the legal and institutional weaknesses that hinder its effective enforcement. Additionally, the paper draws lessons from comparative experiences in the US, UK and South Africa and recommends various solutions, such as: legislative reforms; strengthening of investigative and prosecutorial capacities; and international cooperation, to effectively address organized crime in Kenya.

Key Words*: Legislative reform, Prevention of Organised Crimes Act.*

1. Introduction

Organized crime refers to any criminal activity that is conducted by a structured group of individuals, typically operating in secrecy with the intention of obtaining financial or other material benefits.[1] These

[*] ***LLB, Moi University; LLM, University of Cape Town, South Africa; PG Dip. in Law Kenya School of Law. The views expressed in this article are, of course, the authors' own and do not express the views of the institution to which he is affiliated.***

[1] Finckenauer, J. O., & Schrock, J. A. (Eds.). (2010). Encyclopedia of organized crime in the United States. Greenwood Publishing Group.

groups may engage in a wide range of illegal activities such as: drug trafficking; arms trafficking; human trafficking; money laundering; and other illicit enterprises.[2] Organized crime groups are often highly sophisticated and have access to significant resources, including money, weapons and technology.[3] They may operate across national borders, making them difficult for law enforcement agencies to track and prosecute.[4] Organized crime is a global challenge affecting the economic, social and political development of nations. Kenya, like many countries in the world, is grappling with the menace of organized crime, which has been fueled by various factors such as: corruption; poverty; unemployment; and weak law enforcement systems.[5] The country has experienced different forms of organized crime, including money laundering, arms trafficking, drug trafficking, human trafficking, and organ trafficking, with the most recent being the 'wash wash' business.[6] Kenya has made efforts to combat organized crime through various laws, including the Prevention of Organized Crimes Act, 2010, but several challenges hinder effective enforcement of these laws.[7] This paper has explored the current situation of organized crime in Kenya, including the challenges and proposed solutions to address them. Additionally, it has drawn lessons from comparative experiences in the US, UK, and South Africa that can inform reforms aimed at combating organized crime in Kenya.

---

[2] Ibid
[3] Ibid
[4] Ibid
[5]Naituli, S. M. (2014). The organized crime and its impact on democracy and human rights in Kenya. *International Journal of Innovative Research & Development*, 3(7), 199-203.
[6] Ibid
[7] Ibid

2.A Background on the Problem of Organized Crimes in Kenya

2.1 History of organized crimes in Kenya

Organized crime groups in Kenya have been linked to a range of social, economic and political issues, including corruption, violence and instability.[8] These groups have also been known to target vulnerable communities, exacerbating poverty and insecurity.[9]

Organized crime in Kenya has a long history dating back to the colonial era.[10] During this time, criminal networks were involved in activities such as smuggling and illegal trading of goods.[11] After Kenya gained independence in 1963, organized crime continued to thrive, with criminal networks expanding their operations to include drug trafficking, extortion, and other illegal activities.[12] In the 1990s, Kenya's economy began to liberalize, creating new opportunities for organized crime groups to exploit. This led to an increase in the number and sophistication of criminal networks in the country.[13] Criminal networks in Kenya are often transnational, with links to other criminal organizations in the region and beyond.[14]

The Kenyan government has made efforts to combat organized crime, including establishing specialized law enforcement agencies and enacting legislation such as the Prevention of Organized Crime Act.

[8] Kibet, S. (2017). Organized crime in Kenya: A threat to human security. *Journal of Security and Terrorism Issues*, 2(1), 15-23.
[9] Ibid
[10] Ibid
[11] Ibid
[12] Ibid
[13] Ibid
[14] Ibid

However, there are concerns about the effectiveness of these measures, and calls for further reform to better address the problem.[15]

2.2 Current situation of organized crimes in Kenya

Organized crime continues to be a significant problem in Kenya. Criminal networks are involved in a range of illegal activities, including drug trafficking, human trafficking, cybercrime, and money laundering.[16] These criminal networks are often highly sophisticated and well-organized, with the capacity to operate across borders and evade law enforcement agencies.[17] Organized crime groups in Kenya have been linked to a range of social, economic, and political issues, including corruption, violence, and instability.[18] These groups have also been known to target vulnerable communities, exacerbating poverty and insecurity.[19]

The Kenyan government has made efforts to combat organized crime, including establishing specialized law enforcement agencies such as the Anti-Narcotics Unit and the Directorate of Criminal Investigations.[20] However, there are concerns about the effectiveness of these measures and calls for further reform to better address the problem. This section highlights the 'wash wash' business, arms, drugs, human and organ trafficking as reflective of the current situation of organized crime in Kenya.

---

[15] Ibid
[16] Ondabu, I. W., & Karume, D. (2020). The Role of Corruption in Sustaining Transnational Organized Crime in Kenya. In Corruption and the Criminal Justice System in Africa (pp. 165-182). Palgrave Macmillan, Cham.
[17] Ibid
[18] Ibid
[19] Ibid
[20] Ibid

"Wash wash" businesses are a type of fraud that has been reported in Kenya and other parts of East Africa. These businesses are also sometimes referred to as "black dollar scams" or "wash-wash scams." [21] The basic premise of a wash-wash scam is that the fraudsters claim to have access to a large amount of cash, often in the form of US dollars, that has been stained or marked in some way and cannot be spent until it is "cleaned."[22] They offer to sell the marked bills to their victims at a discount, claiming that they can be cleaned with a special chemical solution.[23] However, the solution is usually fake, and the scammers disappear with the victims' money.[24]

Wash-wash scams are illegal in Kenya and are typically carried out by organized crime groups. They can result in significant financial losses for victims and contribute to the overall problem of organized crime in the country.[25] Law enforcement agencies in Kenya have made efforts to crack down on these scams, but they continue to be a problem.[26]

Arms trafficking is a significant problem in Kenya, with illegal arms and ammunition entering the country from neighboring countries such as Somalia and South Sudan.[27] Criminal networks involved in

---

[21] Mwaura, P. (2018). 'Wash Wash' Scams in Kenya: Understanding the Evolution and Dynamics of a Financial Crime. *African Journal on Conflict Resolution and Peacekeeping*, 8(2), 44-62.
[22] Ibid
[23] Ibid
[24] Ibid
[25] Ibid
[26] Ibid
[27] Mwakubo, S. N., & Gatiba, J. W. (2017). Arms trafficking and terrorism in Kenya: A review of the 2014 Westgate Mall terror attack. *Journal of Terrorism Research,* 8(2), 53-64.

arms trafficking often have links to other forms of organized crime, including drug trafficking, human trafficking, and terrorism.[28]

The proliferation of small arms and light weapons in Kenya has been linked to a range of social, economic and political issues, including inter-communal violence, political instability, and organized crime.[29] There have been several high-profile incidents of violence in Kenya involving the use of illegal firearms, including terrorist attacks by groups such as Al-Shabaab. For instance, the 2014 Westgate Mall attack.[30]

The Kenyan government has made efforts to combat arms trafficking, including enacting legislation such as the Firearms Act and establishing specialized law enforcement agencies such as the National Focal Point on Small Arms and Light Weapons.[31]

Drug trafficking is a significant problem in Kenya, with criminal networks involved in the production, transportation, and distribution of illegal drugs such as heroin, cocaine and methamphetamine.[32] Kenya serves as a transit point for drug trafficking between Asia, Europe, and other parts of Africa, with drugs smuggled into the country by air, sea and land.[33] Drug trafficking is often linked to other forms of organized crime, including money laundering, human trafficking, and terrorism. The proliferation of illegal drugs in Kenya

[28] Ibid
[29] Ibid
[30] Ibid
[31] Ibid
[32] Humphrey Sipalla, (2019) "The Role of Corruption in Drug Trafficking in Kenya," *the Journal of Politics and Society*
[33] Ibid

has been linked to a range of social, economic and health issues, including addiction, crime, and the spread of infectious diseases such as HIV/AIDS.[34]

The Kenyan government has made efforts to combat drug trafficking, including enacting legislation such as the Narcotic Drugs and Psychotropic Substances Control Act and establishing specialized law enforcement agencies such as the Anti-Narcotics Unit.[35]

Human trafficking is a significant problem in Kenya, with criminal networks involved in the recruitment, transportation, and exploitation of men, women and children for forced labor, sex work and other forms of exploitation.[36] Kenya is both a source and destination country for human trafficking, with victims trafficked within the country and across international borders.[37] Human trafficking in Kenya is often linked to other forms of organized crime, including drug trafficking, money laundering and terrorism. The proliferation of human trafficking has been linked to a range of social, economic, and political issues, including poverty, inequality, and the marginalization of vulnerable groups.[38]

The Kenyan government has made efforts to combat human trafficking, including enacting legislation such as the Counter-

[34] Ibid
[35] Ibid
[36] UNODC (2019). Global Report on Trafficking in Persons 2018. Available at: *https://www.unodc.org/documents/data-and-analysis/glotip/2018/GLOTiP_2018_BOOK_web_small.pdf* accessed 27 March 2023
[37] Ibid
[38] Ibid

Trafficking in Persons Act and establishing specialized law enforcement agencies such as the Counter-Trafficking in Persons Secretariat.[39] However, there are concerns about the effectiveness of these measures and calls for further reform to better address the problem of human trafficking in the country.[40]

Organ trafficking, the illegal trade of human organs for transplantation, is not a significant problem in Kenya. However, there have been reports of organ trafficking in other parts of East Africa, including Tanzania and Uganda, and there are concerns that the trade could spread to Kenya.[41] Organ trafficking is a highly illegal and unethical activity that involves the exploitation of vulnerable individuals, often in developing countries, who are coerced or deceived into selling their organs.[42] The trade is typically driven by a shortage of organs for transplantation and the high demand for such organs in developed countries.[43]

The Kenyan government has made efforts to combat organ trafficking by enacting legislation such as the Human Tissue Act, which regulates the removal and transplantation of human tissue, and by establishing the Kenya National Blood Transfusion Service, which oversees blood transfusions and organ donation in the country.[44]

[39] Ibid
[40] Ibid
[41] J.M. Atinga, A.O. Odhiambo, and P. Wangila (2019) "Organ trafficking and transplant tourism in Kenya: a call for action", *Journal of Health and Human Services Administration*
[42] Ibid
[43] Ibid
[44] Ibid

However, there is a need for continued vigilance and awareness-raising to prevent the spread of organ trafficking in Kenya.[45]

3. The International and Domestic Legal Framework Governing the Control of Organised Crimes in Kenya

3.1. International and Regional treaties.

Kenya is a signatory to several international and regional treaties that aim to combat organized crime. The United Nations Convention against Transnational Organized Crime is one of them.[46] Kenya signed the convention in 2000 and ratified it in 2004. The convention aims to prevent and combat organized crime at the national and international level.[47] Secondly, we have The United Nations Convention against Corruption. Kenya signed the convention in 2003 and ratified it in 2004. The convention aims to prevent, detect and deter corruption, including organized corruption.[48] The African Union Convention on Preventing and Combating Corruption is another example. Kenya signed the convention in 2003 and ratified it in 2004. The convention aims to promote and strengthen the development of mechanisms for preventing, detecting, punishing and eradicating corruption and related offenses in the African

[45] Ibid
[46] United Nations Convention against Transnational Organized Crime available at *https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THERETO.pdf* accessed 27 March 2023
[47] Ibid
[48] United Nations Convention against Corruption. Available at *https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf* accessed 27 March 2023

continent.[49] Further, we have The Mutual Legal Assistance Treaty with the United States of America: Kenya signed the treaty in 1991. The treaty provides for cooperation between Kenya and the United States of America in the investigation, prosecution, and suppression of criminal offenses, including organized crime.[50]

These treaties and agreements provide a framework for international cooperation in the fight against organized crime, and Kenya's participation in them reflects its commitment to combating this issue.

3.2 Statutory Framework.

Various statutes in Kenya address and combat organized crime in Kenya. The Prevention of Organized Crimes Act, 2010 is the primary legislation that deals with organized crime in Kenya. The Act provides for the prevention, investigation, and prosecution of organized crime offenses such as money laundering, terrorism financing, drug trafficking, human trafficking, and cybercrime.[51] In addition, The Proceeds of Crime and Anti-Money Laundering Act, 2009 provides for the prevention, detection, and punishment of money laundering activities in Kenya. The Act requires financial institutions, casinos, and other businesses to report suspicious

[49] The African Union Convention on Preventing and Combating Corruption. Available at *https://au.int/sites/default/files/treaties/36382-treaty-0028_-_african_union_convention_on_preventing_and_combating_corruption_e.pdf* accessed 27 March 2023

[50] Mutual Legal Assistance Treaty Between the Government of the United States of America and the Government of the Republic of Kenya, Signed at Nairobi on 22nd February, 1991. (1991). United States of America: U.S. Department of State

[51] Kenya Law Reports. Available at *http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%206%20of%202010* accessed 27 March 2023

transactions and to comply with know-your-customer (KYC) requirements.[52]

Furthermore, The Prevention of Terrorism Act, 2012 provides for the prevention and suppression of acts of terrorism in Kenya. The Act defines acts of terrorism and provides for penalties for individuals or groups found guilty of committing such acts.[53]The Firearms Act, Cap. 114 provides for the control and regulation of firearms in Kenya. The Act requires individuals and organizations to obtain licenses for the possession, manufacture, and sale of firearms.[54] Finally, the Penal Code, Cap. 63 is the main criminal law legislation in Kenya. The Code provides for offenses such as robbery with violence, drug trafficking, and human trafficking, which are often associated with organized crime.[55]

These statutory frameworks provide a legal basis for the control of organized crime in Kenya. They establish offenses, procedures for investigation and prosecution, and penalties for individuals or groups found guilty of engaging in organized crime activities.

---

[52] Kenya Law Reports. Available at *http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%209%20of%202020 09* accessed 27 March 2023
[53] Kenya Law Reports. Available at *http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2030%20of%202 012* accessed 27 March 2023
[54] Kenya Law Reports. Available at *http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2030%20of%202 012* accessed 27 March 2023
[55] Kenya Law Reports. Available at *http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2030%20of%202 012* accessed 27 March 2023

4. A Critique Of Kenya's Prevention Of Organised Crimes Act, 2010 (POCA)

This section critically examines the progressive aspects and weaknesses of Kenya's Prevention of Organized Crimes Act, 2010. Consequently, it highlights various areas in need of reform.

4.1. Progressive Aspects

The Prevention of Organized Crimes Act, 2010 is a comprehensive piece of legislation that provides for the prevention, investigation, and prosecution of organized crimes in Kenya. It also provides for the recovery of proceeds of organised criminal group activities.[56] The Act contains several progressive aspects that reflect Kenya's commitment to combating organized crime.

First, the Act defines "organised criminal group" as a structured group of three or more persons, existing for a period of time and acting in concert with the aim of (a) committing one or more serious crimes; or (b) committing one or more serious crimes in order to obtain, directly or indirectly, a financial or other material benefit, other advantage for the organized criminal group or any of the members of organized criminal group.[57]

The Act the goes ahead to describe in extensive detail what entails organized criminal activities. [58] A person engages in organized criminal activity where the person (a) is a member or professes to be a member of an organized criminal group; (b) knowingly advises, causes, encourages or recruits another person to become a member of an organized criminal group; (c) acts in concert with other persons in

[56] Long Title, the Prevention of Organized Crimes Act, 2010. (POCA)
[57] Section 2, POCA
[58] Section 3, POCA

the commission of a serious offence for the purpose of obtaining material or financial benefit or for any other purpose; (d) being a member of an organized criminal group, knowingly directs or instructs any person to commit a serious crime; (e) threatens to commit or facilitate the commission of any act of violence with the assistance of an organized criminal group; (f) threatens any person with retaliation in any manner in response to any act or alleged act of violence in connection with organized criminal activity; (g) being a member of an organized criminal group with intent to extort or gain anything from any person, kidnaps or attempts to kidnap any person, threatens any person with injury or detriment of any kind; (h) provides, receives or invites another to provide or receive instructions or training, for the purposes of or in connection with organized criminal activity; (i) possesses an article for a purpose connected with the commission, preparation or instigation of serious crime involving an organized criminal group; (j) possesses, collects, makes or transmits a document or records likely to be useful to a person committing or preparing to commit a serious crime involving an organized criminal group; (k) provides, receives, or invites another to provide property and intends that the property should be used for the purposes of an organized criminal group; (l) uses, causes or permits any other person to use property belonging to an organized criminal group for the purposes of the activities of an organized criminal group; (m) knowingly enters into an arrangement whereby the retention or control by or on behalf of another person of criminal group funds is facilitated; (n) being a member of an organized criminal group endangers the life of any person or causes serious damage to the property of any person; (o) organizes, attends or

addresses a meeting for the purpose of encouraging support of an organized criminal group or furthering its activities.[59]

Indeed, The Act provides a broad definition of what constitutes organized crimes. Consequently, it allows for a more comprehensive approach to addressing organized crimes. Moreover, the Act provides for Tracing, Confiscation, Seizure and Forfeiture of Proceeds of Crime.[60]

Section 15 specifically provides for Property tracing. It stipulates that where the Attorney-General has reasonable grounds to suspect that a person, a member of an organized criminal group or an organized criminal group has committed, is committing or is about to commit a crime or is in possession of property that belongs to an organized criminal group, he may, for the purposes of the investigation of an offence, apply to the High Court for an order (a) compelling the person to deliver up any document or record relevant to identifying, locating or quantifying any property belonging to him or to the organized criminal group, or in his possession or control; (b) requiring a bank or any other financial institution, trustee, cash dealer or custodian to produce all information and deliver up all documents and records regarding any business transaction conducted by or on behalf of the person concerned.[61]

The Act provides for Seizure and detention of organized criminal group cash. [62] It declares that an authorized officer who has reasonable grounds to suspect that any cash which is being imported

[59] Ibid
[60] Part IV, POCA
[61] Section 15, POCA
[62] Section 17, POCA

into or exported from Kenya, or is being brought to any place in Kenya for the purpose of being exported from Kenya, is the property of an organized criminal group, may seize the cash.[63] The authorized officer shall, as soon as is reasonably practicable and in any event not later than seven days after the seizure of cash, make an application to the High Court for a detention order with respect to that cash.[64] Furthermore, The Act provides for Forfeiture of property of organized criminal group by the court.[65]

Indeed, the Act empowers the courts and the police service among other authorized officers under the Act, to ensure enforcement of and compliance with the provisions of the Act. These provisions help to disrupt the financial incentives for engaging in organized crimes and provide mechanisms for recovering assets that have been acquired through criminal activities, a testament to progressive provisions.

The Act also provides for the protection of witnesses.[66] A person who, in relation to a witness (a) uses physical force or threats; (b) intimidates or attempts to intimidate; or (c) dissuades or attempts to dissuade a person from giving evidence: (d) induces false evidence; (e) interferes with the giving of evidence; (f) interferes with the production of evidence for the purpose of interfering with the judicial process; or (g) promises or offers a benefit, commits an offence.[67] Furthermore, Retaliation against witnesses is prohibited. A person who, by act or omission, does anything against a person or a member

[63] Section 17 (1) POCA.
[64] Section 17 (4) POCA
[65] Section 18 of POCA
[66] Part III of POCA
[67] Section 8 (2) of POCA

of the family of the person in retaliation for the person having given evidence commits an offence.[68]

These provisions are important in ensuring the safety and security of those who are willing to come forward and provide information that can lead to the prosecution of individuals or groups involved in organized crimes.

4.2 Legal and Institutional Weaknesses.

While the POCA is a comprehensive piece of legislation that provides for the prevention, investigation, and prosecution of organized crimes in Kenya, there are still some legal and institutional weaknesses that need to be addressed.

First, the Act fails to explicitly and specifically define what an organized crime is. It only defines an organized criminal group as a group intending to commit serious crimes, and serious crimes have been defined. Section 3 only highlights instances when a person can be said to be engaged in organized criminal activity, but no specific definition whatsoever exists defining what exactly an organized crime is.

Furthermore, there are inadequate Witness Protection Measures. While the Act provides for the protection of witnesses and whistleblowers as hereinabove cited, the measures are inadequate to ensure their safety and security.[69] There have been instances where witnesses have been threatened or harmed, which has resulted in low

[68] Section 9 of the POCA

[69] Mutua, M. (2016). Witness Protection in Kenya: Challenges and Prospects. In F. Gikonyo & S. Kiama (Eds.), Criminology and Criminal Justice in Kenya: A Social Perspective (pp. 171-187). Springer.

prosecution rates for organized crimes.[70] Witness threatening and intimidation has also meant that people fear to come out to give evidence of these offences, a drawback to effective prosecution of these offences.

Another weakness is the weak Asset Recovery Mechanisms**.** Although the Act provides for the confiscation of proceeds of crime and the forfeiture of assets as cited above, there are weak asset recovery mechanisms in place. There is a lack of transparency and accountability in the asset recovery process, which has resulted in low recovery rates for assets acquired through organized crimes.[71]

There are also inadequate International Cooperation measures**.** There is limited cooperation between Kenya and other countries in addressing cross-border organized crimes. This limits the effectiveness of the Act in addressing organized crimes that have international dimensions[72].

In addition, there is also inadequate Implementation and Enforcement by law enforcement agencies. Despite the comprehensive legal framework provided by the Act, there have been few successful prosecutions under the Act, which suggests that law

[70] Ibid

[71] Kimathi, K. (2019). The Legal Framework for Asset Recovery in Kenya: An Appraisal. *African Journal of Criminology and Justice Studies*, 12(1), 34-52. *https://www.ajol.info/index.php/ajcjjs/article/view/191029* accessed 27 March 2023

[72] Kameri-Mbote, P. (2013). Kenya's Anti-Money Laundering and Countering Financing of Terrorism Regime: Compliance Challenges and Prospects. *Journal of Money Laundering Control*, 16(4), 359-376.

enforcement agencies have not fully implemented and enforced the provisions of the Act.[73]

Insufficient Judicial Capacity is also a potential weakness**.** The Act requires courts to handle cases related to organized crimes. However, the capacity of these courts is limited, and there are few judges with the expertise to handle such cases. This creates a backlog of cases and delays in the prosecution of organized crimes.[74]

These legal and institutional weaknesses limit the effectiveness of the Prevention of Organized Crimes Act, 2010 in addressing organized crimes in Kenya. Addressing these weaknesses will require significant reforms in legal and institutional frameworks which shall be addressed later.

4.3. Areas in Need of Reform

4.3.1. Lack of Racketeering Offences

One area in need of reform in the Prevention of Organized Crimes Act, 2010 is the lack of provisions for racketeering offenses. Racketeering involves the operation of illegal businesses or schemes for profit, such as extortion, money laundering, and bribery, and is a common form of organized crime.[75]

---

[73] Wambua, F. M. (2021). An evaluation of the effectiveness of the prevention of organized crime Act in combating organized crime in Kenya. University of Nairobi.

[74] Ibid

[75] Kiama, S. G., & Mutuku, M. M. (2018). An Analysis of the Challenges Faced in the Implementation of the Prevention of Organized Crimes Act in Kenya. *International Journal of Social Science and Humanities Research*, 6(4), 11-21.

To address the issue of the lack of racketeering offenses in the Act, there are several reforms that could be considered:

One is amendment of the Act. One option would be to amend the Prevention of Organized Crimes Act, 2010, to include provisions for racketeering offenses.[76] This would involve adding provisions that specifically address the various forms of racketeering, such as money laundering, extortion, and bribery.[77] Secondly is the introduction of a separate racketeering law that specifically addresses racketeering offenses. This law would complement the Prevention of Organized Crimes Act, 2010 and provide a more comprehensive legal framework for addressing racketeering offenses.[78] Strengthening of Law Enforcement Agencies is also another option. To effectively combat racketeering offenses, law enforcement agencies need to be strengthened in terms of resources, training, and capacity.[79] This would involve increasing funding for law enforcement agencies, providing training on investigation and prosecution of racketeering offenses and increasing the number of personnel involved in the fight against organized crimes.[80] Finally, Cooperation with International Partners is also key.[81] Racketeering offenses are often transnational in nature, and therefore, require international cooperation to effectively combat them.[82] Kenya could strengthen its cooperation with

[76] Ibid
[77] Ibid
[78] Ibid
[79] Okatch, J. O. (2020). The Efficacy of Legal Frameworks in Countering Organized Crime in Kenya. *Journal of Security and Sustainability Issues*, 10(4), 1876-1890.
[80] Ibid
[81] Ibid
[82] Ibid

international partners, such as Interpol and other law enforcement agencies, to effectively combat racketeering offenses.[83]

4.3.2 High evidentiary threshold

Another area in need of reform in the Prevention of Organized Crimes Act, 2010 is the high evidentiary threshold required to prove organized crimes. This is because the Act requires a higher burden of proof than other criminal offenses, which can make it difficult to successfully prosecute cases related to organized crimes.[84]

The high evidentiary threshold refers to the high level of proof required by the prosecution in order to secure a conviction for organized crime offenses in Kenya.[85] This is often a challenge in cases where the evidence is circumstantial or difficult to obtain, making it hard to meet the high threshold required for a conviction.[86] One example of this is the case of the Akasha brothers, who were accused of drug trafficking and other organized crime offenses in Kenya. Despite the evidence presented against them, including recorded conversations and testimony from witnesses, the high evidentiary threshold made it difficult for the prosecution to secure a conviction.[87] The case was eventually transferred to the United States, where the brothers were convicted and sentenced to lengthy prison terms.[88]

---

[83] Ibid
[84] Wambua, F. M. (2021). An evaluation of the effectiveness of the prevention of organized crime Act in combating organized crime in Kenya. University of Nairobi.
[85] Ibid
[86] Ibid
[87] Ibid
[88] Ibid

To address the issue of the high evidentiary threshold, there are several reforms that could be considered. One is lowering the Burden of Proof required to prove organized crimes. This could be achieved by amending the Act to align the evidentiary threshold with that of other criminal offenses to ease the prosecution of these offences.[89]

Secondly, is Strengthening Investigation and Prosecution. To successfully prosecute cases related to organized crimes, there needs to be a stronger focus on investigation and prosecution.[90] This would involve increasing the capacity of law enforcement agencies to effectively investigate and gather evidence related to organized crimes.[91] It would also require the judiciary to be trained on the unique nature of organized crimes and the evidentiary requirements for such cases.[92]

Another option would be to introduce plea bargaining as a way of reducing the evidentiary threshold required to prove organized crimes.[93] This would allow defendants to plead guilty to lesser charges in exchange for cooperation with law enforcement agencies and providing evidence that can be used to successfully prosecute other individuals involved in organized crimes.[94] Finally, is the Use of Technology. The use of technology, such as surveillance, forensics, and data analytics, can significantly aid in the investigation and prosecution of organized crimes and gathering of evidence.[95] The

[89] Ibid
[90] Ibid
[91] Ibid
[92] Ibid
[93] Ibid
[94] Ibid
[95] Ibid

government could invest in technology and training for law enforcement agencies to leverage technology in the fight against organized crimes.[96]

4.3.3 Limited investigative powers.

Another area in need of reform in the Prevention of Organized Crimes Act, 2010 is the limited investigative powers of law enforcement agencies. This limits their ability to effectively investigate and prosecute cases related to organized crimes.[97]

Limited investigative powers refer to the restrictions placed on law enforcement agencies when conducting investigations related to organized crime.[98] The Prevention of Organized Crime Act of Kenya has been criticized for not providing adequate investigative powers to law enforcement agencies to effectively combat organized crime.[99] This includes limitations on the use of electronic surveillance, wiretapping, and other investigative techniques necessary for detecting and prosecuting organized criminal activities.[100]

Inadequate investigative powers make it difficult for law enforcement agencies to gather sufficient evidence to prosecute organized criminal activities.[101] This also limits the ability to identify and dismantle criminal networks involved in organized crime. As a

[96] Ibid
[97] Ngeno, D. K., & Mwenda, P. M. (2020). Legal frameworks for the prevention and combating of organized crime in Kenya. *International Journal of Innovative Research and Advanced Studies* (IJIRAS), 7(4), 21-30.
[98] Ibid
[99] Ibid
[100] Ibid
[101] Ibid

result, criminal organizations are able to operate with impunity, leading to increased levels of violence and corruption.[102]

To address the issue of limited investigative powers, there are several reforms that could be considered. One is Expansion of Investigative Powers of law enforcement agencies. This could be achieved by amending the Act to allow for more comprehensive investigative techniques, such as wiretapping, surveillance, and the use of informants.[103] Two, is Strengthening Cooperation and Coordination: To effectively investigate and prosecute cases related to organized crimes, there needs to be stronger cooperation and coordination between different law enforcement agencies.[104] This would involve establishing task forces and inter-agency cooperation frameworks to facilitate the sharing of intelligence and resources.[105]

In addition, another option would be to invest in training and capacity building for law enforcement agencies. This would include providing training on investigative techniques, prosecution, and evidence gathering, as well as investing in resources such as technology and personnel to support these efforts.[106]

4.3.4 Lack of extraterritorial jurisdiction

Another area in need of reform in the Prevention of Organized Crimes Act, 2010 is the lack of extraterritorial jurisdiction. This means that the Act only applies to crimes committed within Kenya's borders,

[102] Ibid
[103] Ibid
[104] Ibid
[105] Ibid
[106] Ibid

which can make it difficult to prosecute cases involving organized crimes that have cross-border elements.[107]

To address the issue of the lack of extraterritorial jurisdiction, there are several reforms that could be considered. One option would be to expand the jurisdiction of the Act to cover crimes committed outside Kenya's borders that have a nexus to organized crimes within the country.[108] This could be achieved by amending the Act to allow for extraterritorial jurisdiction in certain circumstances.[109] Secondly, is International Cooperation. To effectively investigate and prosecute cases involving cross-border organized crimes, there needs to be stronger cooperation between different countries. This would involve establishing bilateral and multilateral cooperation frameworks, as well as investing in international training and capacity building to support these efforts.[110]

Another option would be to use Mutual Legal Assistance Treaties (MLATs) to facilitate cooperation between countries in the investigation and prosecution of organized crimes.[111] MLATs allow for the exchange of information and evidence between countries, as well as the provision of legal assistance in the prosecution of cases.[112] Finally, is Investment in Technology and Personnel. The use of technology and personnel can significantly aid in the investigation and prosecution of organized crimes that have cross-border elements.

---

[107] Mbuthia, J. W. (2020). An evaluation of the effectiveness of the prevention of organized crime act (POCA) in combating organized crime in Kenya. Strathmore University.
[108] Ibid
[109] Ibid
[110] Ibid
[111] Ibid
[112] Ibid

The government could invest in technology such as data analytics, surveillance, and forensics, as well as personnel with expertise in investigating and prosecuting cross-border crimes.[113]

5. Comparative Lessons on the Reform of Organized Crime

5.1.United States of America

The RICO statute

The Racketeer Influenced and Corrupt Organizations (RICO) Act is a federal law in the United States of America that provides for criminal and civil penalties for individuals and organizations engaged in racketeering activities.[114] Racketeering activities refer to a wide range of crimes, including bribery, extortion, money laundering, fraud and drug trafficking, among others.[115] The RICO Act was passed in 1970 as part of efforts to combat organized crime in the United States.[116] It allows for the prosecution of individuals who are involved in a pattern of racketeering activities or who are part of a criminal organization. The Act also allows for the seizure of assets obtained through criminal activities.[117]

The RICO statute has been instrumental in the prosecution of organized crime in the United States. It has been used to prosecute high-profile cases, such as those involving the mafia and drug

[113] Ibid
[114] G. Robert Blakey, The RICO Civil Fraud Action: A Powerful Weapon in the Fight Against Organized Crime, 11 Am. Crim. L. Rev. 367 (1973)
[115] Ibid
[116] Ibid
[117] Ibid

cartels.[118] The Act has also been used to prosecute white-collar criminals, such as executives involved in corporate fraud.[119]

One of the key features of the RICO Act is its broad definition of a "criminal organization."[120] Under the Act, a criminal organization can be any group of individuals or entities that engage in a pattern of racketeering activities.[121] This definition has allowed for the prosecution of a wide range of criminal organizations, including traditional organized crime groups, drug cartels, and street gangs.[122] Another key feature of the RICO Act is the provision for civil RICO lawsuits.[123] This allows individuals and organizations who have been injured by racketeering activities to sue for damages. This provision has been used to hold criminal organizations accountable for the harm they have caused to individuals and businesses.[124]

The RICO statute in the United States provides an example of a comprehensive legal framework for the prosecution of organized crime. Its broad definition of a criminal organization, provision for civil lawsuits, and asset seizure provisions have been instrumental in the prosecution of organized crime in the United States.[125]

---

[118] Ibid
[119] Ibid
[120] Douglas W. Kiker, the RICO Act: A Model for State Organized Crime Control Statutes, 51 U. Cin. L. Rev. 801 (1983).
[121] Ibid
[122] Ibid
[123] Ibid
[124] Ibid
[125] Ibid

The Magnitsky Act

The Magnitsky Act is a US law that was enacted in 2012 and named after Sergei Magnitsky, a Russian lawyer who was imprisoned and died in custody after exposing corruption and fraud by Russian government officials.[126] The law is officially known as the "Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012."[127] The Magnitsky Act targets individuals and entities that are involved in human rights abuses or significant corruption by imposing targeted sanctions, such as asset freezes and visa bans.[128] The sanctions can be imposed on individuals and entities from any country, not just Russia, and are aimed at holding them accountable for their actions.[129]

The law has been expanded since its enactment and now includes several other acts, such as the Global Magnitsky Act and the Hong Kong Autonomy Act. [130] These acts allow for the imposition of sanctions on individuals and entities involved in human rights abuses and corruption worldwide.[131]

The Magnitsky Act provides a useful example of how targeted sanctions can be used to hold individuals and entities accountable for their involvement in organized crime and corruption.[132] By imposing targeted sanctions, the law aims to disrupt the activities of criminal

[126] Carden, J. (2019). The Magnitsky Act: behind the scenes of America's new global weapon. Oxford University Press.
[127] Ibid
[128] Ibid
[129] Ibid
[130] Ibid
[131] Ibid
[132] Magnitsky, S. (2017). The Magnitsky Act: Behind the Scenes. CreateSpace Independent Publishing Platform.

organizations and corrupt individuals and send a message that their actions will not be tolerated.[133]

The Magnitsky Act in the United States provides an example of a targeted sanctions regime that can be used to combat organized crime and corruption.[134] Its focus on holding individuals and entities accountable for their actions, regardless of their location, provides a useful model for other countries such as Kenya looking to address these issues.[135]

The role of the FBI.

The Federal Bureau of Investigation (FBI) is the domestic intelligence and security service of the United States and is responsible for investigating a wide range of criminal activities, including organized crime.[136]

In the United States, the FBI is the lead federal agency responsible for investigating organized crime.[137] The FBI's Organized Crime Section (OCS) is responsible for investigating criminal enterprises and individuals who engage in organized crime activities, such as racketeering, money laundering, drug trafficking, and extortion.[138] The FBI also works closely with other federal, state, and local law enforcement agencies to investigate and prosecute organized crime cases.[139] It has the authority to use a range of investigative techniques,

[133] Ibid
[134] Ibid
[135] Ibid
[136] Abadinsky, H. (2018). Organized Crime. Routledge.
[137] Ibid
[138] Ibid
[139] Ibid

such as wiretaps and informants, to gather evidence and build cases against organized crime groups.[140]

One of the key strengths of the FBI in the fight against organized crime is its ability to use intelligence-led policing techniques.[141] By gathering and analyzing intelligence on organized crime groups, the FBI is able to identify key individuals and activities and disrupt their operations.[142] The FBI also plays a key role in providing training and support to law enforcement agencies in other countries.[143] Through its International Training and Assistance Program, the FBI provides training and technical assistance to law enforcement agencies in other countries to help them combat organized crime and other forms of criminal activity.[144]

The study postulates that The FBI in the United States provides an example of how a dedicated and well-resourced law enforcement agency can play a key role in the fight against organized crime. Its use of intelligence-led policing techniques and cooperation with other law enforcement agencies provides a useful model for other countries looking to address organized crime.

5.2 United Kingdom

The Serious Organised Crime and Police Act 2005

The Serious Organized Crime and Police Act (SOCPA) 2005 is a UK law that was introduced to provide law enforcement agencies with

[140] Ibid
[141] Federal Bureau of Investigation. (n.d.). Organized Crime. Available at *https://www.fbi.gov/investigate/organized-crime* accessed 28 March 2023
[142] Ibid
[143] Ibid
[144] Ibid

enhanced powers to tackle serious organized crime.[145] The Act includes provisions to strengthen police powers to seize assets and cash suspected of being linked to criminal activity, as well as powers to investigate and prosecute organized crime groups.[146] It also provides for new offenses related to organized crime, such as conspiracy to commit an offense, and criminalizes participation in an organized crime group.[147]

One of the key features of SOCPA is the establishment of the Serious Organized Crime Agency (SOCA), which was created to coordinate the efforts of law enforcement agencies in combating serious organized crime.[148] SOCA has since been replaced by the National Crime Agency (NCA), which has a broader remit that includes cybercrime, economic crime, and border policing.[149] SOCPA also introduced provisions to allow for the creation of civil orders to restrict the activities of individuals involved in organized crime. These orders, known as Serious Crime Prevention Orders (SCPOs), can be used to restrict an individual's movements, communication, and financial activities in order to disrupt their involvement in organized crime.[150]

---

[145] "Serious Organised Crime and Police Act 2005." Legislation.gov.uk, available at *www.legislation.gov.uk/ukpga/2005/15/contents*. Accessed 28 March 2023
[146] Ibid
[147] Ibid
[148] Williams, Daniel J. "The Serious Organised Crime and Police Act 2005." *Journal of the Society for Advanced Legal Studies,* vol. 1, no. 1, 2005, pp. 21-26.
[149] Charlotte Woodhead (2020) "The Modern Slavery Act 2015 and the Serious Organised Crime and Police Act 2005: Strengthening the UK's Response to Human Trafficking," *Journal of Human Trafficking*, vol. 6, no. 1
[150] Ibid

The Act has been amended several times since its introduction, most recently in 2015 with the Serious Crime Act, which introduced new offenses related to cybercrime and child sexual exploitation.[151]

The study postulates that the Serious Organized Crime and Police Act in the United Kingdom provides an example of how legislation can be used to provide law enforcement agencies with enhanced powers to tackle serious organized crime. Its focus on creating a dedicated agency to coordinate efforts, introducing new offenses related to organized crime, and allowing for civil orders to restrict the activities of individuals involved in organized crime provides a useful model for other countries looking to address organized crime.

The Global Human Rights Sanctions Regulations 2020

The Global Human Rights Sanctions Regulations 2020 is a UK law that was introduced to provide the UK government with powers to impose targeted sanctions against individuals and entities that are involved in serious human rights abuses.[152] Under the regulations, the UK government can impose asset freezes and travel bans on individuals and entities involved in serious human rights abuses, including those involved in organized crime.[153] The sanctions can also be extended to family members and associates of those targeted.[154] The regulations are part of the UK government's wider efforts to promote human rights and combat serious crimes such as

[151] Ibid
[152] United Kingdom. (2020). the Global Human Rights Sanctions Regulations 2020. UK Legislation. *https://www.legislation.gov.uk/uksi/2020/680/contents/made* accessed 28 March 2023
[153] Dixon, P. (2020). The UK Global Human Rights Sanctions Regulations 2020. *European Human Rights Law Review*, 5, 526-536.
[154] Ibid

human trafficking, modern slavery, and forced labour.[155] They provide a powerful tool for the UK government to hold individuals and entities accountable for their involvement in serious human rights abuses, including organized crime.[156]

The Global Human Rights Sanctions Regulations 2020 is an example of how legislation can be used to target serious organized crime in a way that promotes respect for human rights.[157] By providing targeted sanctions against individuals and entities involved in serious human rights abuses, the UK government is sending a clear message that organized crime will not be tolerated, and that those involved will be held accountable.[158]

The study postulates that the Global Human Rights Sanctions Regulations 2020 provides an important lesson for other countries looking to combat organized crime. By introducing targeted sanctions against individuals and entities involved in serious human rights abuses, governments can send a powerful message that organized crime will not be tolerated, while also promoting respect for human rights.

The role of the National Crime Agency

The National Crime Agency (NCA) is the UK's primary law enforcement agency responsible for investigating and preventing serious and organized crime.[159] It was established in 2013 to replace

[155] Ibid
[156] Ibid
[157] Ibid
[158] Ibid
[159] Victoria Carrington (2017) "The National Crime Agency: A brief overview", *the Journal of Financial Crime*

the Serious Organised Crime Agency (SOCA).[160] The NCA has a broad range of powers and responsibilities, including intelligence gathering, investigation, and prosecution of serious and organized crime.[161] Its primary areas of focus include drug trafficking, human trafficking, cybercrime, economic crime, and firearms trafficking.[162] The NCA works closely with other law enforcement agencies, such as the police, HM Revenue and Customs, and the Border Force, as well as international partners, to identify and disrupt serious and organized criminal networks.[163] It also works with other government agencies and the private sector to prevent crime and protect the UK's critical infrastructure.[164]

One of the key strengths of the NCA is its ability to operate across jurisdictions, both domestically and internationally.[165] It has the power to investigate and disrupt criminal networks wherever they operate, including in countries where there may be limited capacity or willingness to tackle organized crime.[166] The NCA also has a range of specialist capabilities, including financial investigation, cybercrime, and covert operations. It uses these capabilities to gather intelligence, build cases against criminal networks, and disrupt their activities.[167]

---

[160] Ibid
[161] Ibid
[162] Ibid
[163] Ibid
[164] Ibid
[165]Andrew Staniforth (2017) "The National Crime Agency: Strategic policing in a global context", *Policing: An International Journal of Police Strategies & Management*.
[166] Ibid
[167] Ibid

The study posits that the NCA is a powerful law enforcement agency that plays a key role in the UK's efforts to combat serious and organized crime. Its broad range of powers, specialist capabilities, and ability to operate across jurisdictions make it an effective tool for disrupting criminal networks and protecting the UK's national security.

5.3. South Africa

The Prevention of Organized Crime Act 1998

The Prevention of Organized Crime Act (POCA) of 1998 is a South African law aimed at combating organized crime.[168] The Act defines organized crime as any group of people who commit crimes for financial gain or power, and who operate in a structured or systematic manner.[169]

One of the key features of POCA is the creation of a specialized unit, the Directorate for Priority Crime Investigation, also known as the Hawks. [170] The Hawks are responsible for investigating and prosecuting organized crime, including corruption, money laundering, and serious commercial crime.[171] POCA also provides for the establishment of a National Register of Organized Crime Offenders, which is a database of individuals and organizations involved in organized crime. The register is used by law enforcement agencies to monitor and investigate organized crime activities.[172]

[168] Langa, M. (2015). The Prevention of Organised Crime Act 121 of 1998: An Evaluation. *South African Journal of Criminal Justice,* 28(3), 352-370.
[169] Ibid
[170] Ibid
[171] Ibid
[172] Ibid

Another important feature of POCA is the provision for the use of special investigative techniques, such as electronic surveillance, undercover operations, and the use of informants. [173] These techniques are intended to enable law enforcement agencies to gather intelligence and evidence on organized crime activities.[174] POCA also provides for the forfeiture of assets acquired through organized crime activities.[175] Law enforcement agencies can apply to the court to seize and confiscate assets believed to be the proceeds of crime. The proceeds of these forfeitures are used to fund law enforcement activities[176].

The study avers that POCA is a comprehensive law that provides law enforcement agencies with a range of tools to combat organized crime in South Africa. Its provisions for the establishment of specialized units, the use of special investigative techniques and the forfeiture of assets acquired through organized crime activities, are all aimed at disrupting organized criminal networks and reducing their power and influence.

Role of the South African Police Service and the Hawks

The South African Police Service (SAPS) is the primary law enforcement agency in South Africa and has the responsibility of maintaining law and order, preventing crime, and protecting

[173] Smith, G. (2007). The Prevention of Organised Crime Act and the South African Prosecution Process: A Critical Evaluation. *Journal of Southern African Studies*, 33(4), 841-857.
[174] Ibid
[175] Ibid
[176] Ibid

citizens.[177] The SAPS is responsible for investigating and prosecuting all crimes, including organized crime.[178]

However, to specifically address the challenges posed by organized crime, South Africa established the Directorate for Priority Crime Investigation (DPCI), also known as the Hawks.[179] The Hawks are a specialized unit within the SAPS and are responsible for investigating and prosecuting organized crime, corruption, and economic crimes.[180]

The Hawks have the power to conduct investigations, make arrests, and seize assets related to organized crime activities.[181] They work in close cooperation with other law enforcement agencies, including the National Prosecuting Authority (NPA), the Financial Intelligence Centre (FIC), and the South African Revenue Service (SARS).[182] The Hawks have been successful in disrupting organized crime activities in South Africa, and have been involved in high-profile cases, including those involving drug trafficking, money laundering, and corruption. [183] They have also been involved in the seizure of significant assets related to organized crime, including properties and luxury vehicles.[184]

---

[177] Williams, M. J., & Venter, F. (2018). Policing organised crime in South Africa: Challenges and responses. *Journal of Organized Crime*, 1-15.
[178] Ibid
[179] Ibid
[180] Ibid
[181] Shilungwi, A. M. (2021). The contribution of the Hawks to combating organized crime in South Africa. *Journal of Financial Crime.*
[182] Ibid
[183] Ibid
[184] Ibid

The South African Police Service and the Hawks consequently play a critical role in the fight against organized crime in South Africa. The SAPS is responsible for maintaining law and order, while the Hawks are responsible for investigating and prosecuting organized crime activities. The collaboration between these two institutions, as well as other law enforcement agencies, has been essential in disrupting organized criminal networks and reducing their influence.[185]

5.4 Lessons for Kenya from comparative experience

From the comparative experiences of the US, UK, and South Africa, and from the entire discussion in the study, the study pinpoints several lessons that Kenya can learn in reforming its approach to tackling organized crime. One is strengthening legal frameworks. All three countries have strong legal frameworks that enable law enforcement agencies to effectively investigate and prosecute organized crime. Kenya can learn from these countries by amending its laws to provide for clearer definitions of organized crime, stronger evidentiary standards, and expanded investigative powers. Secondly, is Investing in specialized law enforcement units. The US has the FBI, the UK has the National Crime Agency, and South Africa has the Hawks. These specialized units have been instrumental in disrupting organized crime activities in these countries. Kenya can learn from these examples and invest in specialized units with the resources, training, and expertise to combat organized crime.

Furthermore, Kenya can strive to build strong partnerships. Effective strategies to combat organized crime require collaboration between law enforcement agencies, prosecutors, and other stakeholders. The US, UK and South Africa have established strong partnerships

[185] Ibid

between law enforcement agencies, prosecutors, and other stakeholders, such as financial institutions and civil society groups. Kenya can learn from these examples and build strong partnerships between relevant agencies to improve coordination and information-sharing. This also entails Emphasizing international cooperation. Organized crime is a global phenomenon that requires international cooperation to effectively combat it. The US, UK, and South Africa have established partnerships with other countries to tackle transnational organized crime. Kenya can learn from these examples and prioritize international cooperation in its efforts to combat organized crime. Finally, Kenya should prioritize asset recovery. Organized crime often generates significant profits that are used to fund other criminal activities. The US, UK, and South Africa have implemented effective asset recovery programs to seize and forfeit assets related to organized crime. Kenya can learn from these examples and prioritize asset recovery as a key element of its efforts to combat organized crime.

6. Conclusion.

Organized crime continues to be a serious threat to the social, economic and political stability of Kenya. While the Prevention of Organised Crimes Act, 2010 provides a legal framework to combat organized crime, its enforcement has been hindered by legal and institutional weaknesses. The challenges of high evidentiary thresholds, limited investigative powers, lack of extraterritorial jurisdiction, and inadequate resources have all contributed to the ineffective implementation of the Act. However, the experiences of the US, UK, and South Africa provide valuable lessons and solutions that Kenya can learn from, including legislative reforms, strengthening of investigative and prosecutorial capacities and international cooperation. In order to effectively combat organized

crime in Kenya, there is a need for a concerted effort from all stakeholders, including the government, civil society, and international partners, to address the root causes and implement sustainable solutions. This requires a long-term commitment to tackling the problem of organized crimes and the political will to make the necessary reforms to strengthen the legal and institutional frameworks for combating the same.

References

Abadinsky, H. (2018). Organized Crime. Routledge.

Andrew Staniforth (2017) "The National Crime Agency: Strategic policing in a global context", Policing: *An International Journal of Police Strategies & Management.*

Carden, J. (2019). The Magnitsky Act: behind the scenes of America's new global weapon. Oxford University Press.

Charlotte Woodhead (2020) "The Modern Slavery Act 2015 and the Serious Organised Crime and Police Act 2005: Strengthening the UK's Response to Human Trafficking," *Journal of Human Trafficking*, vol. 6, no. 1

Dixon, P. (2020). The UK Global Human Rights Sanctions Regulations 2020. *European Human Rights Law Review*, 5, 526-536.

Douglas W. Kiker, The RICO Act: A Model for State Organized Crime Control Statutes, 51 U. Cin. L. Rev. 801 (1983).

Federal Bureau of Investigation. (n.d.). Organized Crime. Available at *https://www.fbi.gov/investigate/organized-crime*

Finckenauer, J. O., & Schrock, J. A. (Eds.). (2010). Encyclopedia of organized crime in the United States. Greenwood Publishing Group.

G. Robert Blakey, The RICO Civil Fraud Action: A Powerful Weapon in the Fight against Organized Crime, 11 Am. Crim. L. Rev. 367 (1973)

Humphrey Sipalla, (2019) "The Role of Corruption in Drug Trafficking in Kenya," *the Journal of Politics and Society*

J.M. Atinga, A.O. Odhiambo, and P. Wangila (2019) "Organ trafficking and transplant tourism in Kenya: a call for action", *Journal of Health and Human Services Administration*

Kameri-Mbote, P. (2013). Kenya's Anti-Money Laundering and Countering Financing of Terrorism Regime: Compliance Challenges and Prospects. *Journal of Money Laundering Control*, 16(4), 359-376.
Kenya Law Reports

Kiama, S. G., & Mutuku, M. M. (2018). An Analysis of the Challenges Faced in the Implementation of the Prevention of Organized Crimes Act in Kenya. *International Journal of Social Science and Humanities Research*, 6(4), 11-21.

Kibet, S. (2017). Organized crime in Kenya: A threat to human security. *Journal of Security and Terrorism Issues,* 2(1), 15-23.

Kimathi, K. (2019). The Legal Framework for Asset Recovery in Kenya: An Appraisal. *African Journal of Criminology and Justice Studies,* 12(1), 34-52.
https://www.ajol.info/index.php/ajcjjs/article/view/191029

Langa, M. (2015). The Prevention of Organised Crime Act 121 of 1998: An Evaluation. South African Journal of Criminal Justice, 28(3), 352-370.

Magnitsky, S. (2017). The Magnitsky Act: Behind the Scenes. CreateSpace Independent Publishing Platform.

Mbuthia, J. W. (2020). An evaluation of the effectiveness of the prevention of organized crime act (POCA) in combating organized crime in Kenya. Strathmore University.

Mutua, M. (2016). Witness Protection in Kenya: Challenges and Prospects. In F. Gikonyo & S. Kiama (Eds.), Criminology and Criminal Justice in Kenya: A Social Perspective (pp. 171-187). Springer.

Mutual Legal Assistance Treaty Between the Government of the United States of America and the Government of the Republic of Kenya, Signed at Nairobi on 22nd February, 1991. (1991). United States of America: U.S. Department of State

Mwakubo, S. N., & Gatiba, J. W. (2017). Arms trafficking and terrorism in Kenya: A review of the 2014 Westgate Mall terror attack.

Journal of Terrorism Research, 8(2), 53-64.

Mwaura, P. (2018). 'Wash Wash' Scams in Kenya: Understanding the Evolution and Dynamics of a Financial Crime. *African Journal on Conflict Resolution and Peacekeeping*, 8(2), 44-62.

Naituli, S. M. (2014). The organized crime and its impact on democracy and human rights in Kenya. *International Journal of Innovative Research & Development*, 3(7), 199-203.

Ngeno, D. K., & Mwenda, P. M. (2020). Legal frameworks for the prevention and combating of organized crime in Kenya. *International Journal of Innovative Research and Advanced Studies* (IJIRAS), 7(4), 21-30.

Okatch, J. O. (2020). The Efficacy of Legal Frameworks in Countering Organized Crime in Kenya. *Journal of Security and Sustainability Issues*, 10(4), 1876-1890.

Ondabu, I. W., & Karume, D. (2020). The Role of Corruption in Sustaining Transnational Organized Crime in Kenya. In Corruption and the Criminal Justice System in Africa (pp. 165-182). Palgrave Macmillan, Cham.

Serious Organised Crime and Police Act 2005. Legislation.gov.uk, available at *www.legislation.gov.uk/ukpga/2005/15/contents.*

Shilungwi, A. M. (2021). The contribution of the Hawks to combating organized crime in South Africa. *Journal of Financial Crime.*

Smith, G. (2007). The Prevention of Organised Crime Act and the South African Prosecution Process: A Critical Evaluation. *Journal of Southern African Studies*, 33(4), 841-857.

The African Union Convention on Preventing and Combating Corruption. Available at *https://au.int/sites/default/files/treaties/36382-treaty-0028_-_african_union_convention_on_preventing_and_combating_corruption_e.pdf*

The Prevention of Organized Crimes Act, 2010.

United Kingdom. (2020). The Global Human Rights Sanctions Regulations 2020. UK Legislation. *https://www.legislation.gov.uk/uksi/2020/680/contents/made*

United Nations Convention against Corruption. Available at *https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf*

United Nations Convention against Transnational Organized Crime available at *https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THERETO.pdf*

UNODC (2019). Global Report on Trafficking in Persons 2018. Available at: *https://www.unodc.org/documents/data-and-analysis/glotip/2018/GLOTiP_2018_BOOK_web_small.pdf*

Victoria Carrington (2017) "The National Crime Agency: A brief overview", *the Journal of Financial Crime*

Wambua, F. M. (2021). An evaluation of the effectiveness of the prevention of organized crime Act in combating organized crime in Kenya. University of Nairobi.

Williams, Daniel J. "The Serious Organised Crime and Police Act 2005." *Journal of the Society for Advanced Legal Studies,* vol. 1, no. 1, 2005, pp. 21-26.

Williams, M. J., & Venter, F. (2018). Policing organised crime in South Africa: Challenges and responses. *Journal of Organized Crime*, 1-15.

Decentralization of Clean Energy in Kenya: The Legal and Institutional Opportunities and Challenges

By: ***Gathii Irungu****

Abstract

This paper analyzes the legal and institutional frameworks governing the energy sector in Kenya, including the Constitution of Kenya 2010, Climate Change Act 2016 and the Energy Act 2019, among others with an aim of pointing out the gaps in the law that contribute to the challenges of implementing the clean energy policies at the sub-national level. Through a comprehensive analysis of the legal and institutional frameworks, the paper highlights gaps such as conflict in legal and policy framework between the national and county governments, inadequate access to financial resources and insufficient coordination between national and county governments. It also examines the capacity and effectiveness of regulatory bodies responsible for implementing clean energy policies at the sub-national level. By identifying these gaps and challenges, the study aims to provide insights for policymakers and stakeholders to address the limitations in the legal and institutional frameworks. This can help facilitate the effective implementation of clean energy policies, enhance collaboration between national and county governments and enable the transition towards sustainable and low-carbon energy systems in Kenya.

1.0 Introduction

In a move to avert the worst impacts of climate change that are caused by emission of greenhouse gases, the UN adopted The United Nations Framework Convention on Climate Change signed at the United Nations Conference on Environment and Development held in Rio de Janeiro, Brazil, in 1992.[1] The treaty was established to address the issue of global

****(PHD candidate (U.O.N);LLM(U.O.N); LLB (U.O.N) Dip. In Law (KSL); Certified Professional Mediator(CIArb & MTI); Associate Arbitrator***

warming by reducing greenhouse gas emissions and promoting sustainable development.[2] The UNFCCC established a framework for the annual Conference of the Parties, which brings together all countries that have ratified the treaty to review progress in addressing climate change and to negotiate and adopt new measures to address the issue.[3] The most notable outcome of the UNFCCC was the adoption of the Paris Agreement in 2015.

The Paris Agreement on Climate Change that was signed by 196 UN member states with its main objective being to hold the global average temperature below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels.[4] In order to achieve this goal, it ushers in a call toward a world with net-zero emissions by 2050. Net zero simply put as, "net zero target" is a strategy that involves the cutting of greenhouse gas emissions to as close to zero as possible with any leftover emissions being reabsorbed from the atmosphere, for example, by oceans and forests.[5]

While the Paris Agreement sets a global objective, action to achieve that objective is driven at the national levels. Since its establishment, over 90 countries including Kenya have committed themselves to the "net-zero

(CIArb); ICPS(K) ; SMC &SLDP (KSG); Member (ICJ) ;CPA(ICPS));CA & SL(ESAMI);CDLC(STRATHMORE);CG & L(KCA-SINGAPORE) & Advocate of the High Court of Kenya.

[1] United Nations Framework Convention on Climate Change <*https://unfccc.int/resource/docs/convkp/conveng.pdf*>Accessed 11/5/2023

[2] Ibid

[3] Ibid

[4] Paris Agreement on Climate Change 2015 *https://unfccc.int/process-and-meetings/the-paris-agreement* Accessed on 10/5/2022

[5] Ibid

targets." [6] Important to note is that even world's largest emitters including China, the United States and India have committed themselves to this goal.[7]On top of that, hundreds more regions, cities and companies have also set targets of their own with an aim of reaching the net zero target.[8] In order to ensure this targets are made, the convention adopted what is referred to us "Nationally Determined Contribution" which requires each country that is a signatory to the convention to submit an NDC report, which outlines its individual efforts towards reducing greenhouse gas emissions and adapting to the impacts of climate change.[9]

In 2015 Kenya submitted its NDC report.[10] The key components of the report included reducing its greenhouse gas emissions by 30% below the business-as-usual scenario by 2030. It also aims to achieve 100% clean cooking solutions by 2030, increase forest cover to 10% of the land area by 2030, and achieve 100% access to electricity by 2022.[11] The Kenyan government has also has taken steps in achieving the net zero target through development of legislation and policy framework. At the center of the legal and policy framework seats The Constitution of Kenya 2010 Energy Act 2019 and the Climate Change Act 2016.

---

[6] Bodle, Ralph, et al. "The Paris Agreement: Analysis, Assessment and Outlook." Carbon & Climate Law Review, vol. 10, no. 1, 2016, pp. 5–22. JSTOR, *http://www.jstor.org/stable/43860128.* Accessed 23 May 2023.
[7] Ibid
[8] Ibid
[9] Ibid
[10]Kenya's Updated Nationally Determined Contribution <*https://unfccc.int/sites/default/files/NDC/2022-06/Kenya*>*Accessed* on 11/5/2022
[11] Ibid

1.1 Legal Framework for decentralization of clean energy in Kenya

1.1.1 Constitution of Kenya 2010

Although the Constitution of Kenya 2010 does not explicitly mention climate change action and renewable energy development, it serves as the fundamental basis for the institutional and legal framework related to these topics. It accomplishes this by allocating responsibilities and powers between the central government and the counties in a relatively balanced manner.[12] The Constitution under its articles recognizes and establishes two levels of governments that is the national government and the county governments.[13] Article 1(4) of the Constitution for example provides that the people of Kenya can exercise their sovereign power at the national and the county level.[14] Article 6(1) divides the territory of Kenya into the counties specified in the First Schedule. Further Article 10 of the constitution sets out national values and principles of governance, such as sustainable development, devolution of government, and public participation, that are mandatory when making or implementing any law or public policy decisions, including climate change.

The functions of devolved governments in Kenya are further expounded under section 5 of The County Governments Act 2012.[15] These responsibilities include safeguarding the environment and natural resources to promote sustainable development, ensuring water protection and the safety of dams, formulating energy policies including electricity and gas distribution, regulating the energy sector

[12] Constitution of Kenya 2010, Chapter 4
[13] Constitution of Kenya 2010, Article 1(4)
[14] Constitution of Kenya 2010, Article 6(1)
[15] Count Governments Act, Section 5

and overseeing public investments in the energy sector.[16] Part 2 of the Fourth Schedule states that County Governments in Kenya have the responsibility for county planning and development, which includes tasks related to electricity and gas distribution, as well as energy regulation.[17]

The Constitution under Article 42 provides for the right to a clean and healthy environment for every Kenyan, which includes the right to have the environment protected for the benefit of present and future generations. The article further obligates the government to come up with legislative and other measures in protecting this right. While the Constitution does not explicitly mention climate change or set specific net-zero targets, it does establish a system where both levels of government can work together to address environmental issues, including climate change. The national government can formulate and implement policies and legislation to tackle climate change, set national targets and engage in international climate change agreements and conventions.

However, the Constitution has limited clarity and specificity regarding the allocation of responsibilities and powers between the National and County Governments in the energy sector. While the Constitution assigns certain responsibilities to the National Government, such as formulating energy policies and regulating the energy sector, it does not provide explicit guidelines on how these functions are to be coordinated with the County Governments. This paper seeks to look into these gaps with an aim of coming up with a recommendation on how the same can be addressed.

[16] Ibid
[17] Ibid

1.1.2 Energy Act 2019

In March 2019, Kenya enacted The Energy Act (2019), which establishes regulations concerning the generation, transmission, distribution, and commercialization of energy.[18] This legislation delineates the duties of different government entities and regulatory bodies while governing the utilization of renewable energy sources, petroleum and coal. The Energy Act was enacted to consolidate the existing laws concerning energy in Kenya.[19] It addresses the roles and responsibilities of both the National and County Governments in relation to energy matters.[20] The Act also establishes and defines the powers and functions of various entities within the energy sector.[21] It promotes the development and use of renewable energy sources, as well as the exploration, extraction, and commercial utilization of geothermal energy. Additionally, it regulates activities related to the midstream and downstream sectors of petroleum and coal, and governs the production, supply, and use of electricity and other forms of energy.[22]

Rural Electrification Authority (REA) was dissolved and replaced by the Rural Electrification and Renewable Energy Corporation (REREC) under the Energy Act 2019.[23] The REREC is entrusted with the responsibility of leading Kenya's efforts in promoting green energy and executing rural electrification initiatives. Additionally, the Renewable Energy Resources Advisory Committee (RERAC) was established to oversee the development and regulation of renewable

[18] Energy Act 2019
[19] Ibid
[20] Ibid
[21] Ibid
[22] Ibid Part 6
[23] Ibid

energy policies. Under the Act REREC has a wider responsibility compared to those of the REA which only addressed rural electrification problems in the past.[24] The REREC is also a key entity in the development of policies, conducting research and development efforts, promoting international cooperation, and encouraging renewable energy in all of Kenya.[25]

Section 74 of the Energy Act requires the Ministry of Energy & Petroleum in Kenya to create a comprehensive "inventory and resource map" of renewable energy resources.[26] This inventory and map aim to facilitate foreign investment in the renewable energy sector by providing interested investors with readily available information, eliminating the need for individual resource exploration and assessment. By providing this resource map, the Ministry aims to streamline the process, saving time and costs associated with independent resource exploration efforts.[27]

1.1.3 Climate Change Act 2016

The Climate Change Act establishes a regulatory framework aimed at improving the response to climate change. [28] It outlines mechanisms and measures to achieve low carbon climate development, along with other related objectives.[29] According to the Act the county governments are required to incorporate and prioritize climate change actions into its functions, interventions and responsibilities as outlined in this Act. Additionally, it must integrate

[24] Ibid
[25] REREC Strategic Plan 2018- 2023
[26] Ibid Section 74
[27] Ibid
[28] Climate Change Act, Preamble
[29] Ibid

the County National Climate Change Action Plan across different sectors.[30]

In accordance with the Act and the Constitution, a county government has the authority to pass laws that provide more specific guidelines for fulfilling its obligations under the Act, as well as other climate change functions that are relevant to the county or serve similar purposes.[31] Among its obligation is the adoption of policies such as the use of clean energy as a way of combating climate change. At the conclusion of each fiscal year, the county government is required to submit a progress report on the implementation of climate change actions to the County Assembly for evaluation and discussion.[32]The report will be presented by the designated County Executive Committee Member, and a copy of the report will be shared with the Directorate for informational purposes.[33]

1.2 Role of County Assemblies in adopting clean energy

County assemblies in Kenya play a significant role in adopting clean energy and promoting sustainable development within their respective jurisdictions.[34]Most of these roles are scattered in the above discussed legislations. Firstly, it is in the Legislation and Policy Making. County assemblies have the power to enact by-laws, regulations, and policies related to clean energy and sustainability.[35]They can develop and implement local legislation

[30] Climate Change Act 2016, Section 19
[31] Ibid
[32] Ibid
[33] Ibid Section 19 (5)
[34] Victoria Chengo, "*Energy Development plans in the Kenyan Counties: Highlights from the Transforming Energy Access workshop" CIS Journal*
[35] Constitution of Kenya, Article 185

that promotes the use of renewable energy sources, energy efficiency measures, and sustainable practices within their counties.[36]

Secondly, the Counties play a role in County Energy Planning: County assemblies are responsible for the development of County Integrated Development Plans (CIDPs), which outline the long-term development goals and strategies for each county.[37] Section 4(3) of the Energy Act provides that Each County Government shall develop and submit a county energy plan to the Cabinet Secretary in respect of its energy requirements.[38] In executing these mandates the Counties can incorporate clean energy targets, plans for renewable energy projects, and energy efficiency measures into the CIDPs to guide sustainable energy development within the county. The County Assemblies equally play a significant role in the Promotion of Renewable Energy Projects.[39] County assemblies can actively promote and support the development of renewable energy projects within their jurisdictions.[40] They can facilitate the establishment of wind farms, solar power plants, small hydropower projects, and other clean energy initiatives by collaborating with investors, private sector entities, and relevant government agencies.[41]

County assemblies can also engage in partnerships and collaborations with various stakeholders, including the national government, development agencies, private sector entities, and local

[36] Energy Act 2019
[37] Ibid n 30
[38] Energy Act Section 2019 4(3)
[39] Ibid
[40] Ibid
[41] Ibid

communities. [42] Through these collaborations, they can access technical expertise, funding, and resources to implement clean energy projects and initiatives effectively.[43] Public Awareness and Education is another role that the counties can play in adoption of clean energy. County assemblies have the responsibility to raise public awareness about the benefits of clean energy and sustainable practices. [44] They can organize campaigns, workshops, and educational programs to inform and educate the public on the importance of transitioning to clean energy sources and adopting energy-efficient technologies.[45]

Further the counties play a role in monitoring and compliance. County assemblies have oversight functions to monitor the implementation and compliance of clean energy policies and regulations within their counties.[46] They can ensure that renewable energy projects adhere to environmental standards, monitor energy efficiency initiatives, and take appropriate action against non-compliance. Lastly, is Budget Allocation. The Energy Act mandates the County Assemblies to establish a fund for promotion of the efficient use of energy.[47] in so doing the Counties are expected to prioritize funding for renewable energy initiatives, energy-efficient infrastructure and capacity building activities to support the transition to clean energy within their counties. By actively engaging in these roles, county assemblies in Kenya can contribute to the

[42] Muthoni, J., 'Renewable Energy Policies in Kenya' (2022) 8(2) Journal of Sustainable Energy [145-158] <*https://www.examplejournal.com/article123.*>Accessed 0n 23/5/2023
[43] Ibid
[44] Ibid n 34 Section 193(d)
[45] Ibid
[46] Ibid section 195
[47] Ibid Section 194

adoption of clean energy, promote sustainable development, and help the country achieve its renewable energy targets at the local level.[48]

1.3 Challenges facing County Assemblies in adopting clean energy at the subnational levels

Despite having the mandate to deliver on the promotion of clean energy at the County level, County Assemblies in Kenya face a myriad of challenges in promoting the use of clean energy at the sub-national level.[49] Particularly in coordination and collaboration with the National Assembly. Some of these challenges include;

1.3.1 Conflict in Policy and regulatory framework

The national government holds the authority to formulate and enforce policies and regulations related to the energy sector, including clean energy.[50]On the other hand County governments have also the mandate to develop their own comprehensive energy policies, as they are required to align their initiatives with the national energy policy framework. [51] This has restricted their ability to implement specific clean energy measures tailored to their local contexts. According to a research done by the World Bank Group in Kiambu County, inadequate strategies and structures to domesticate

[48] Ibid
[49] Rogers Kipkoech, Paul Kwame Essandoh, "A comprehensive review of energy scenario and sustainable energy in Kenya" (2021) *Fuel Communication Journal Volume 7*
[50] Ibid
[51] Sydney Oluoch and others, "Assessment of public awareness, acceptance and attitudes towards renewable energy in Kenya" (2020) Vol. 9 *Scientific African Journal*, p. 3.

the national policies to fit the county context is among the many challenges facing the policy framework on clean energy in Kiambu.[52] Boniface O. and Martin M. in their article titled "Barriers to Uptake of Clean and Renewable Energy: Case of Bomet and Homa-Bay County" observe that access to sustainable energy is still a challenge, especially in rural areas where availability of renewable energy (RE) services is limited.[53] They further observe that access to renewable energy is constrained by several interlinked social, economic, cultural, institutional, and policy related barriers. These included low awareness on RE services; lack of a clear policy framework and resources to develop the RE sub-sector; limited availability or supply of some RE sources such as briquettes; and poverty which negatively affected ability and willingness to pay for available RE services. Establishment of appropriate RE policy and legal framework in the two counties was constrained by limited technical capacity.[54]

1.3.2 Limited Funds

The national government controls the allocation of financial resources, including funds for clean energy projects.[55] County governments heavily rely on financial support from the national government for the implementation of clean energy initiatives.[56]

---

[52] World Bank Group," Kenya County Climate Risk Profile: Kiambu County" (2020) <*https://cgspace.cgiar.org/bitstream/handle/10568/115065/KIAMBU%20COUNTY%20FINAL.pdf?*>Avccessed 17/5/2023

[53] Boniface O. and Martin M. in their article titled "*Barriers to Uptake of Clean and Renewable Energy: Case of Bomet and Homa-Bay County" (2018) CUTS International Journal*

[54] Ibid

[55] Peter O. and Hillary K., "*The Landscape of Climate Finance in Kenya On the road to implementing Kenya's NDC"*(2022) Climate Policy Initiative

[56] Ibid

According Nairobi County Integrated Development plan 2018-2022, Financing of County operations on clean are a huge challenge. Local revenue collection persistently fell short of target, and National Government transfers occasionally delayed. These cash flow challenges greatly affect the timeliness of implementation of programmes.[57]

In a different study conducted by the World Bank Group in Kiambu County, limited funds to carry out climate change adaptation initiatives is among the top challenges facing Kiambu County.[58] According to a research conducted by Catherine W. & David M. titled "Determinants of Project Sustainability in Kiambu County, Kenya" the authors observe that the devolved system of governance in Kenya has enabled County Governments to initiate various developmental-oriented projects in the counties.[59] However most of these projects do fairly well at the end of the funding period while others fail because most of the funds provided for projects by the County Government are short-term. Limited financial resources can therefore hinder the efforts of county governments to invest in clean energy infrastructure, research and capacity-building.[60]

[57] Nairobi County Integrated Development plan 2018-2022
[58] Ibid
[59] Catherine W. & David M "Determinants of Project Sustainability in Kiambu County, Kenya" International Journal of Current Aspects, Volume 5, Issue 1, 2021, PP 66-84, <*https://doi.org/10.35942/ijcab.v5i1.160*> Accessed 30/4/ 2023
[60] Amadou Sy, A. C. "*Closing the financing gap for African energy infrastructure: trends, challenges, and opportunities" (2017)*. Washington DC, USA: African Growth Initiative: Brookings Institution.

1.3.3 Limited authority over licensing and permitting

The national government retains the authority to grant licenses and permits for energy projects, including those related to clean energy.[61] County governments have limited control over the licensing process, which can result in delays and complications in the implementation of clean energy projects.[62] An example of a county in Kenya facing limited authority over licensing and permitting for energy projects, including clean energy, is Nairobi County.[63] As the capital city and one of the 47 counties in Kenya, Nairobi County experiences challenges in exercising control over the licensing process for energy projects within its jurisdiction.[64]

While Nairobi County may have its own priorities and specific clean energy goals, the authority to grant licenses and permits for energy projects ultimately lies with the national government, specifically the relevant regulatory bodies such as the Energy and Petroleum Regulatory Authority (EPRA) or the National Environment Management Authority (NEMA).[65] This centralized control can lead to delays and complications in the implementation of clean energy projects in Nairobi County, as the county government has limited influence over the licensing and permitting processes.[66] As a result, Nairobi County is facing difficulties in swiftly approving and executing clean energy initiatives tailored to its local context. This limitation can impact the county's ability to attract clean energy investments, hinder the timely deployment of renewable energy

[61] Nairobi County Integrated Development plan 2018-2022
[62] Ibid
[63] Ibid
[64] Ibid
[65] Ibid
[66] Ibid

projects, and impede the county's efforts to transition to a sustainable and low-carbon energy system.[67]

1.4 Strategies of combating the limitations faced by Counties in adopting clean energy at the subnational levels

1.4.1 Flexible policy framework

In his book titled "Renewable Energy Policy and Politics: A handbook for decision-making" Karl Mallon studied numerous failed renewable energy policies across different countries and devised a list consisting of "Ten Features of Successful Renewable Markets" among the recommendation Karl makes is to have a flexible policy framework.[68] He argues that A well-defined and consistent policy framework that provides long-term stability and incentives for renewable energy development is key for the achievement of this goal. In line with this recommendation, The Kenyan government should consider providing more flexibility within the policy and regulatory framework. This can allow county governments to develop and implement their own tailored clean energy policies that address local needs and opportunities. Allowing for experimentation and innovation can lead to more effective clean energy strategies at the county level.

1.4.2 Enhanced collaboration and coordination:

Improved collaboration between national and county governments is crucial. This can be achieved through regular dialogue, consultations, and joint planning processes to align clean energy goals and

[67] Ibid
[68] Karl Mallon, "Renewable Energy Policy and Politics: A handbook for decision-making" 1st Edition, Kindle Edition

strategies. [69] Clear communication channels and mechanisms for sharing information and resources should be established to foster effective collaboration. [70] Joint planning processes are essential to align the objectives and actions of national and county governments in the renewable energy sector. This can involve the development of shared frameworks, guidelines, and targets that reflect the specific characteristics and opportunities of each county. [71] Through joint planning, national and county governments can coordinate their efforts, avoid duplication of initiatives, and optimize the use of resources.[72]

1.4. 3 Increased funding and financial support

The national government should allocate sufficient financial resources to county governments for clean energy initiatives. This can be done through dedicated funding mechanisms or increased budgetary allocations. Access to financing, grants, and incentives for clean energy projects should also be facilitated to attract private investment and stimulate local economic development.

1.4. 4 Strengthened infrastructure development

The national government should prioritize the expansion and improvement of energy infrastructure, particularly in rural and underserved areas. This includes investing in renewable energy mini-grids and off-grid solutions to provide reliable clean energy access to communities. County governments can advocate for their energy infrastructure needs and work collaboratively with relevant stakeholders to improve grid connectivity and access. it is crucial for

[69] Ibid
[70] Ibid
[71] Ibid
[72] Ibid

the national government to prioritize the expansion and improvement of energy infrastructure, especially in rural and underserved areas. This involves investing in renewable energy mini-grids and off-grid solutions to ensure reliable access to clean energy for communities that are currently lacking electricity or heavily reliant on fossil fuels.

Renewable energy mini-grids play a vital role in providing decentralized power generation and distribution systems to communities that are geographically dispersed or located far from the national grid.[73] These mini-grids can be powered by solar panels, small wind turbines, or micro-hydro systems, and can supply electricity to homes, businesses, schools, and healthcare facilities. They offer a sustainable and cost-effective solution to electrify rural areas and reduce reliance on fossil fuels.[74]

1.4.5 Public awareness and engagement

Promoting public awareness and engagement is crucial for the successful adoption of clean energy.[75] County governments can implement public outreach campaigns, educational programs, and community engagement initiatives to raise awareness about the benefits of clean energy and encourage public participation in clean energy projects.

1.5 Conclusion

Decentralization of clean energy in Kenya presents both opportunities and challenges for county governments. While there are limitations imposed by the national government, such as policy

[73] Ibid
[74] Ibid
[75] Ibid

constraints, resource allocation, infrastructure barriers, technical capacity gaps, and limited authority over licensing, these challenges can be addressed through collaborative approaches. By fostering closer collaboration between national and county governments, empowering local officials with capacity-building initiatives, ensuring a flexible policy framework, allocating adequate funding, improving energy infrastructure, streamlining licensing processes and promoting public awareness and engagement, these limitations can be overcome. Through concerted efforts, county governments can effectively adopt and implement clean energy initiatives, contributing to a sustainable and low-carbon future for Kenya.

Bibliography

Constitution of Kenya 2010

Statutes

Climate Change Act 2016

Energy Act 2019

Count Governments Act

Conventions

United Nations Framework Convention on Climate Change

Paris Agreement

Kyoto Protocal

Books

Karl Mallon, "Renewable Energy Policy and Politics: A handbook for decision-making" 1st Edition, Kindle Edition

Journals

Amadou Sy, A. C. "Closing the financing gap for African energy infrastructure: trends, challenges, and opportunities"

(2017). *Washington DC, USA: African Growth Initiative: Brookings Institution.*
Jones, Sarah, 'The Impact of Climate Change Policies' (2021) 10 Environmental Law Review 123

Heidtman, Joanna, et al. "Positivism and types of theories in sociology." Sociological focus, vol. 33, no. 1, 2000, pp. 1–26.

Sydney Oluoch and others, "Assessment of public awareness, acceptance and attitudes towards renewable energy in Kenya" (2020) Vol. 9 *Scientific African Journal*, p. 3.

Catherine W. & David M "Determinants of Project Sustainability in Kiambu County, Kenya" International Journal of Current Aspects, Volume 5, Issue 1, 2021, PP 66-84

Boniface O. and Martin M. in their article titled "*Barriers to Uptake of Clean and Renewable Energy: Case of Bomet and Homa-Bay County" (2018) CUTS International Journal*

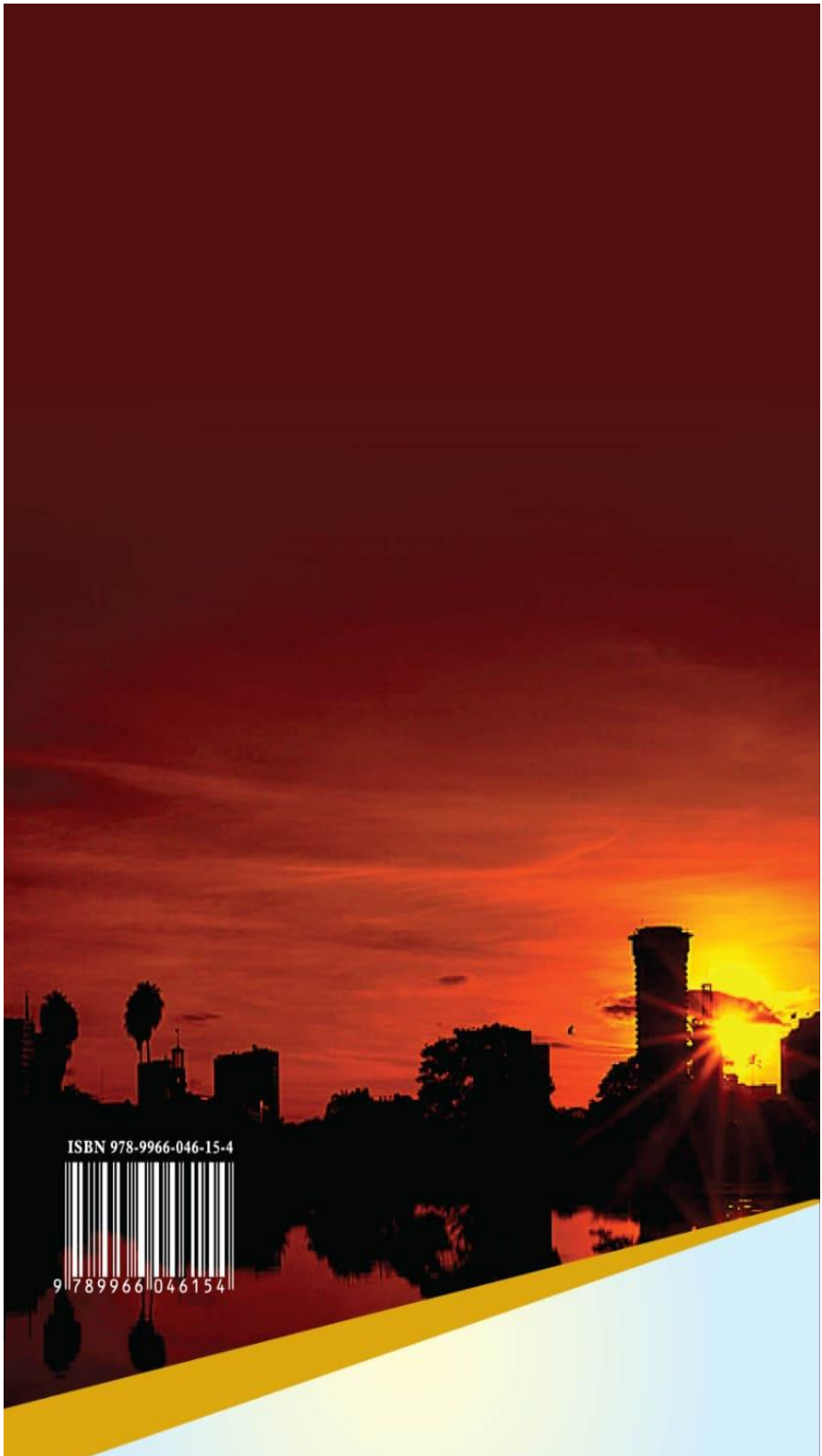
Rogers Kipkoech, Paul Kwame Essandoh, "A comprehensive review of energy scenario and sustainable energy in Kenya" (2021) Fuel Communication Journal Volume 7

Victoria Chengo, "Energy Development plans in the Kenyan Counties: Highlights from the Transforming Energy Access workshop" CIS Journal

Websites

<*https://unfccc.int/process-and-meetings/the-paris-agreement*>Accessed 10/5/2022

<*https://unfccc.int/sites/default/files/NDC/2022-06/Kenya*>*Accessed11/5/2022*
<*https://unfccc.int/resource/docs/convkp/conveng.pdf*>*Accessed 11/5/2023*


ISBN 978-9966-046-15-4