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Editor's Note

Welcome to Volume 11 Issue 1 of the Journal of Conflict Management and Sustainable Development.

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

Sustainable Development has 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 in order to adhere to the highest quality of academic standards and credibility of information. To achieve this aim, the Journal draws from the experience and expertise of highly qualified and competent internal and external reviewers.

This volume contains papers covering relevant and emerging issues on the themes of Conflict Management, Sustainable Development and related fields of knowledge. These topics are: *Strengthening Environmental Rule of Law for Sustainability; The Role and Effectiveness of the Kenyan Institutional Framework in Protection Against Forced Evictions; Transitional Justice and Racial Injustice: Complicity, Challenges, and Ways Forward; Revisiting the legal debate on Genetically Modified Organisms (GMOs) in Africa: Which way for Kenya?; Greenwashing: A hindrance to Achieving Sustainability?; Promoting Urban Resilience and Sustainability in Kenya's Cities and Towns; Construction Adjudication in Kenya: The Need to Develop Legal Framework for Effective Construction Adjudication; Revisiting the Legal Debate on the Constitutionality of the Life Sentence in Kenya: The Case for Its Continued Relevance; Renewable*

Energy, The Promised Land: Obligations Under The UNFCCC (1992) & Steps Towards Fulfilling Kenya Vision 2030 On Renewable Energy; and *Separation of Powers and Judicial Overreach in Kenya: Legal Safeguards against Usurpation of Parliamentary Powers by Courts; Book Review: Achieving Climate Justice for Development; Review: Journal of Appropriate Dispute Resolution (ADR) and Sustainability, Vol. 1, Issue 1 (2023).*

We welcome feedback from our readers both in Kenya and across the globe to help us continue improving the Journal.

I wish to thank the contributing authors, editorial team, reviewers and all those who have made it possible to continue publishing such a high impact Journal.

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

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

The Journal adopts an open and non-biased approach in its publication. We thus encourage students, members outside the legal profession and other upcoming authors to submit papers to be considered for publication in subsequent issues of the Journal.

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

List of Contributors

Hon. Dr. Kariuki Muigua

Hon. 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 is a member of the Permanent Court of Arbitration, The Hague. 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

Stephen Chege Njoroge
Stephen Chege Njoroge is an advocate of the High Court of Kenya and currently working as a Senior Land Registration Officer at the State Department of Lands and Physical Planning. Stephen is a Doctor of Philosophy (Phd) candidate in law at the University of the Witwatersrand South Africa. He obtained his Master of Laws (LLM) degree from the University of Nairobi in 2013 and Bachelor of Laws (LLB) degree (Hons) from Moi University in 2007. His research interests include land and environmental law.
Stephen can be reached through 1807480@students.wits.ac.za

Dr. Kenneth Wyne Mutuma
Dr. Kenneth Wyne Mutuma is a Chartered Arbitrator of the Chartered Institute of Arbitrators as well as a Certified Professional Mediator. He is an advocate of the High Court of Kenya of over twenty-two years standing and a senior lecturer at the University of Nairobi, Faculty of Law. He is the Managing Partner at Kihara & Wyne Advocates, a dynamic medium sized firm based in Nairobi. Dr. Ken holds several academic qualifications including a Doctorate and Masters in Law from the University of Cape Town as well as a law undergraduate degree from the University of Liverpool. He is also a qualified Architect having graduated with a Bachelor's Degree in Architecture from the University of Nairobi. He has extensive senior management experience across local and international settings as well as practical knowledge of interdisciplinary issues.

Dr. Ken possesses a comprehensive understanding of the practice and procedures in ADR having acted as adjudicator, arbitrator and mediator in a wide range of disputes. He sits as a member of the

Dispute Resolution Panel of the Architectural Association of Kenya (AAK) and also has vast experience in ADR training having engaged in the various participant training events as a trainer for the Chartered Institute of Arbitrators (Kenya Branch).

Dr. Mutuma can be reached through kenmutuma@gmail.com or wyne@kenyanjurist.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

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

Caroline Jepchumba Kibii

Caroline Jepchumba Kibii is a Climate Protection Fellow under the International Climate Protection Fellowship of the Alexander von Humboldt, Germany and a visiting scientist at the United Nations University in Bonn, Germany.

Caroline is an environmental scientist, consultant and researcher about ten years of experience in natural resource management, climate adaptation and mitigation, agriculture, food security and community and urban transformation. She holds a master's degree in

environmental planning and management and a bachelors degree in environmental science.
Caroline can reached through kibcaroline@gmail.com

Lucky Philomena Mbaye
Lucky Philomena Mbaye is a dedicated legal professional awaiting from the prestigious University of Nairobi, School of Law. With a keen interest in the legal field, she combines her academic pursuits with a passion for research, particularly in the realm of Alternative Dispute Resolution (ADR).

Lucky holds certification as a professional mediator, demonstrating her commitment to facilitating peaceful resolutions to conflicts. As a student member of the Chartered Institute of Arbitrators and Women in ADR, she actively engages with and supports the ADR community. Her involvement in the ADR space extends to volunteering for the 31st Willem C. Vis Moot as a Moot Court Coach for the University of Dar es Salaam.

Beyond her academic and extracurricular commitments, Lucky contributes to the legal community through her work. She has previously interned at renowned law firms such as Coulson Harney (Bowmans) and ENS Africa, where she honed her legal research skills. Currently, she serves as a Legal Trainee at CFL Advocates and an Administrative Assistant at Women in ADR, combining practical experience with her passion for ADR.

Lucky's dedication to legal research is evident through her contributions to the East Africa Law Journal and her active participation as an oralist and researcher in the 30th Willem C. Vis International Arbitration Moot. Her research interests extend to Alternative Dispute Resolution, Gender Law, Dispute Resolution, and the rights of women and children.

For those interested in connecting with Lucky Philomena Mbaye or seeking her expertise, she can be reached via LinkedIn under the name ***Lucky Philomena Mbaye*** *or through email at mbayelucky@gmail.com*.

Andrew Derrick

Andrew Derrick is a Bachelor of Laws (LLB) finalist at the University of Nairobi. He has an outstanding passion for research in dynamic fields, not only in the legal sphere. He has been published in leading legal journals in Kenya. He is also a law reporter and correspondent for JURIST, the award winning US-based international legal news non-profit organization powered by law students from around the world. He is also a student member of the Chartered Institute of Arbitrators (CIArb). Andrew also serves in different capacities in the University of Nairobi Law Journal (UoNLJ) being in the Finance Editor as well as being in the lead team for publications review. He is also a legal assistant at National Council for Law Reporting (Kenya Law). He has also utilized his research prowess with the United Nations Conference on Trade and Development (UNCTAD) having been involved in mapping of non-tariff measures (NTMs) for Kenya. Andrew has also worked under various legal intern capacities as well as a legal research assistant with various law firms in Kenya.

His other interests in addition to research include Alternative Dispute Resolution, Intellectual Property Law, Commercial Law and Public International Law, Climate Change and Data Protection.

He can be contacted via LinkedIn, **https://www.linkedin.com/in/andrew-derrick-b97b74257/** and via Email, **andrewderrick.law@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 and Constitutional law and conflict management and Sustainable Development. His 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

Mwati Muriithi
Mwati Muriithi is an Advocate of the High Court of Kenya, an Associate member of the Chartered Institute of Arbitrators (ACIArb) and a Legal Researcher. He holds a Bachelor of Laws (LL. B) degree from Kenyatta University and a Post-Graduate Diploma in Law from Kenya School of Law. He is currently an associate at the firm of Kariuki Muigua & Co. Advocates. His interests include arbitration, conveyancing, civil litigation, probate and succession, constitutional law and commercial litigation.
Mwati can be reached through: emwati96@gmail.com

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Strengthening Environmental Rule of Law for Sustainability

*By:****Dr. Kariuki Muigua****[*]

Abstract

This paper critically discusses the concept of environmental rule of law. It defines environmental rule of law and examines its salient principles. The paper further examines progress made towards promoting environmental rule of law at the global, regional and national levels. It also explores some of the challenges facing the realization of environmental rule of law and suggests measures towards strengthening environmental rule of law for sustainability

1.0 Introduction

The rule of law has been defined as a phenomenon that comprises a number of principles of a formal and procedural character, addressing the way in which a society is governed[1]. The formal principles concern the generality, clarity, publicity, stability, and prospectivity of the norms that govern a society[2]. The procedural principles on the other hand concern the processes by which these norms are administered, and the institutions like courts and an independent judiciary that their

* *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; ESG Consultant; Advocate of the High Court of Kenya; Senior Lecturer at the University of Nairobi, Faculty of Law; Member of the Permanent Court of Arbitration (PCA) [September, 2023].*

[1] Waldron. J., 'The Rule of Law.' Available at *https://plato.stanford.edu/Entries/rule-of-law/* (Accessed on 12/09/2023)
[2] Ibid

administration requires[3]. On some accounts, the rule of law also comprises certain substantive ideals like a presumption of liberty and respect for private property rights[4]. The hallmarks of respect for the rule of law in a society include separation of powers of the executive, legislature, and judiciary; regular, free, and fair elections; an independent and impartial judiciary; free and independent media institutions; and equality of the people before the law[5].

The United Nations defines the rule of law as a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards[6]. According to the United Nations, the rule of law requires measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness,

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[3] Ibid

[4] Muigua. K., 'Rule of Law Approach for Inclusive Participation in Environmental, Social, and Governance (ESG) Accountability Mechanisms for Climate-Resilient Responses.' Available at *http://kmco.co.ke/wp-content/uploads/2023/09/Rule-of-Law-Approach-for-Inclusive-Participation-in-Environmental-Social-and-Governance-ESG-Accountability-Mechanisms-for-Climate-Resilient-Responses-1.pdf* (Accessed on 12/09/2023)

[5] International Commission of Jurists., 'Democratic Governance & Rule of Law.' Available at *https://icj-kenya.org/what-we-do/democratic-governance-rule-of-law/* (Accessed on 12/09/2023)

[6] United Nations., 'What is the Rule of Law.' Available at *https://www.un.org/ruleoflaw/what-is-therule-of-law/* (Accessed on 12/09/2023)

and procedural and legal transparency[7]. The rule of law therefore essentially means that the law and regulation matters and that legal rights will have the backing of the state[8]. In addition, the rule of law infers that the state itself is constrained by law and cannot act unfairly or arbitrarily in relation to its own citizens and businesses[9].

The rule of law is foundational to resilient democratic societies[10]. It has further been asserted that the rule of law is an enabler of justice and development[11]. According to the International Development Law Organization (IDLO), the rule of law is inseparable from equality, from access to justice and education, from access to health and the protection of the most vulnerable[12]. The IDLO further points out that the rule of law is crucial for the viability of communities and nations, and for the environment, that sustains them[13]. The importance of the rule of law is also recognized under the 2030 Agenda for Sustainable Development at its Sustainable Development Goals (SDGs)[14].

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[7] Ibid

[8] Lee. P., 'The Rule of Law and Investor Approaches to ESG: Discussion Paper.' Available at *https://binghamcentre.biicl.org/documents/155_rule_of_law_and_investor_approaches_to_esg.pd*f (Accessed on 12/09/2023)

[9] Ibid

[10] United States Agency for International Development., 'Democracy, Human Rights and Governance.' Available at *https://www.usaid.gov/democracy/rule-law* (Accessed on 12/09/2023)

[11] International Development Law Organization (IDLO)., 'Rule of Law.' Available at *https://www.idlo.int/what-we-do/rule-law* (Accessed on 12/09/2023)

[12] Ibid

[13] Ibid

[14] United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development.' A/RES/70/1., Available at

SDGs 16 and 16.3 seeks to promote the rule of law at the national and international levels and ensure equal access to justice for all[15].

According to the United Nations Environment Programme (UNEP), the rule of law is essential in all sectors of governance including the environment[16]. Consequently, the idea of environmental rule of law has emerged[17]. This paper critically discusses the concept of environmental rule of law. It defines environmental rule of law and examines its salient principles. The paper further examines progress made towards promoting environmental rule of law at the global, regional and national levels. It also explores some of the challenges facing the realization of environmental rule of law and suggests measures towards strengthening environmental rule of law for sustainability.

2.0 Defining Environmental Rule of Law

Environmental law is a collective term encompassing all aspects of the law that provide protection to the environment[18]. It

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https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainabl e%20Development%20web.pdf (Accessed on 12/09/2023)

[15] Ibid

[16] United Nations Environment Programme., 'Promoting Environmental Rule of Law.' Available at *https://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/promoting-environmental-rule-law* (Accessed on 12/09/2023)

[17] Ibid

[18] Conserve Energy Future., 'What is Environmental Law: Importance and Components.' Available at *https://www.conserve-energy-future.com/environmental-law-and-its-*

entails a set of regulatory regimes and environmental legal principles which focus on the management of specific natural resources, such as land, wildlife and biodiversity, forests, minerals, water, fisheries and coastal and marine resources[19]. It has been observed that if human society is to stay within the bounds of critical ecological thresholds, it is imperative that environmental laws are widely understood, respected, and enforced and the benefits of environmental protection are enjoyed by people and the planet[20]. Environmental rule of law offers a framework for addressing the gap between environmental laws as set out in text and in practice and is key to achieving the Sustainable Development Goals[21].

Environmental rule of law is understood as the legal framework of procedural and substantive rights and obligations that incorporates the principles of ecologically Sustainable Development in the rule of law[22]. This concept integrates environmental needs with the essential elements of the rule of law, and provides the basis for improving environmental

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components.php#:~:text=The%20two%20basic%20factors%20that,preserve%20and%20protect%20the%20environment (Accessed on 12/09/2023)

[19] Ibid

[20] United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Available at *https://www.unep.org/news-and-stories/press-release/dramatic-growth-laws-protect-environment-widespread-failure-enforce?_ga=2.16775999.845015847.1694504989-17506007.1686563450* (Accessed on 12/09/2023)

[21] Ibid

[22] International Union for Conservation of Nature., 'IUCN World Declaration on the Environmental Rule of Law.' Available at *http://www2.ecolex.org/server2neu.php/libcat/docs/LI/MON-091064.pdf* (Accessed on 12/09/2023)

governance[23]. It highlights environmental sustainability by connecting it with fundamental rights and obligations[24]. It reflects universal moral values and ethical norms of behaviour, and it provides a foundation for environmental rights and obligations[25]. Environmental rule of law therefore refers to an ideal where environmental laws are widely understood, respected, and enforced and the benefits of environmental protection are enjoyed by people and the planet[26].

According to the International Union for Conservation of Nature (IUCN), the concept of environmental rule of law is founded upon key elements of governance including development, enactment, and implementation of clear, strict, enforceable, and effective laws, regulations, and policies that are efficiently administered through fair and inclusive processes to achieve the highest standards of environmental quality; respect for human rights, including the right to a safe, clean, healthy, and sustainable environment; measures to ensure effective compliance with laws, regulations, and policies, including adequate criminal, civil, and administrative enforcement, liability for environmental damage, and mechanisms for timely, impartial, and independent dispute resolution; effective rules on equal access to information, public

[23] United Nations Environment Programme., 'Environmental Rule of Law.' Available at *https://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/promoting-environmental-rule-law0#:~:text=Environmental%20rule%20of%20law%20is,with%20fundamental%20rights%20and%20obligations* (Accessed on 12/09/2023)

[24] Ibid

[25] Ibid

[26] United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit

participation in decision-making, and access to justice; environmental auditing and reporting, together with other effective accountability, transparency, ethics, integrity and anti-corruption mechanisms; and use of best-available scientific knowledge[27]. It has been observed that despite most countries having established, to varying degrees, environmental laws and institutions to foster environmental governance, there is a growing recognition that a considerable implementation gap exists in both developed and developing nations between the requirements of environmental laws and their implementation and enforcement [28] . UNEP in its global assessment of environmental rule of law finds weak enforcement to be a global trend that is exacerbating environmental threats, despite prolific growth in environmental laws and agencies worldwide over the past few decades[29]. The goal of environmental rule of law is to bridge this gap and foster the implementation and enforcement of environmental laws[30].

IUCN posits that without the environmental rule of law and the enforcement of legal rights and obligations, environmental governance, conservation, and protection may be arbitrary,

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[27] International Union for Conservation of Nature., 'IUCN World Declaration on the Environmental Rule of Law.' Op Cit

[28] United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit

[29] United Nations Environment Programme., 'Dramatic Growth in Laws to Protect Environment, But Widespread Failure to Enforce, Finds Report.' Available at *https://www.unep.org/news-and-stories/press-release/dramatic-growth-laws-protect-environment-widespread-failure-enforce?_ga=2.16775999.845015847.1694504989-17506007.1686563450* (Accessed on 12/09/2023)

[30] Ibid

subjective, and unpredictable[31]. Therefore, environmental rule of law and robust institutions are essential to respond to increasing environmental pressures that threaten the ecological integrity of the Earth, in a way that respects fundamental rights and principles of justice and fairness[32]. Environmental rule of law is therefore an essential tool of environmental governance[33].

Environmental rule of law is central to Sustainable Development[34]. The concept of Sustainable Development seeks to foster development that meets the needs of the present without compromising the ability of future generations to meet their own needs[35]. It combines elements such as environmental protection, economic development and social concerns[36].

Environmental rule of law provides an essential platform underpinning the four pillars of Sustainable Development—economic, social, environmental, and peace[37]. It seeks to

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[31] International Union for Conservation of Nature., 'IUCN World Declaration on the Environmental Rule of Law.' Op Cit

[32] Ibid

[33] Muigua. K., 'Revisiting the Role of Law in Environmental Governance in Kenya.' Available at *http://kmco.co.ke/wp-content/uploads/2019/06/Revisiting-the-Role-of-Law-in-Environmental-Governance-in-Kenya-Kariuki-Muigua-June-2019.pdf* (Accessed on 12/09/2023)

[34] United Nations Environment Programme., 'Environmental Rule of Law.' Op Cit

[35] World Commission on Environment and Development., 'Our Common Future.' Oxford, (Oxford University Press, 1987)

[36] Fitzmaurice. M., 'The Principle of Sustainable Development in International Development Law.' *International Sustainable Development Law*., Vol 1

[37] United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit

integrate the fundamental principles of environmental law in environmental governance in order to realize Sustainable Development[38]. These principles include the principles of intergenerational and intragenerational equity, the polluter-pays principle, the precautionary principle, the principle of public participation and the principle of international cooperation in the management of shared environmental resources[39]. Environmental rule of law is thus vital in the attainment of the Sustainable Development agenda and the SDGs. UNEP asserts that the rule of law in environmental matters is essential for equity in terms of the advancement of the SDGs, the provision of fair access by assuring a rights-based approach, and the promotion and protection of environmental and other socio-economic rights[40].

It has been pointed out that without environmental rule of law, development cannot be sustainable[41]. However, the presence of environmental rule of law ensures that well-designed laws are implemented by capable government institutions that are held accountable by an informed and engaged public lead to a culture of compliance that embraces environmental and social values[42]. Strengthening environmental rule of law is thus vital in protecting the environmental, social, and cultural values and

[38] Muigua. K., 'Nurturing Our Environment for Sustainable Development.' Glenwood Publishers Limited, 2016
[39] Ibid
[40] United Nations Environment Programme., 'Environmental Rule of Law.' Op Cit
[41] United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit
[42] Ibid

to achieving ecologically Sustainable Development[43]. It is therefore imperative that environmental rule of law should serve as the legal foundation for promoting environmental ethics and achieving environmental justice, global ecological integrity, and a sustainable future for all, including for future generations, at local, national, regional, and global levels[44].

The United Nations observes that environmental law is a foundation for environmental sustainability and the full realisation of its objectives is ever more urgent in light of growing environmental pressures[45]. The world is facing increasing environmental problems including climate change, biodiversity loss, water scarcity, air and water pollution, soil degradation, among others, which contribute to poverty and to growing social inequalities[46]. Conflicts over natural resources and environmental crimes are further intensifying these problems thus hindering sustainability[47]. Environmental rule of law is vital in addressing these challenges by fostering sound environmental governance and realization of its principles including Environmental Justice and Environmental Democracy[48]. Environmental Justice means the right to have

[43] International Union for Conservation of Nature., 'IUCN World Declaration on the Environmental Rule of Law.' Op Cit

[44] Ibid

[45] United Nations., 'Environmental Law.' Available at *https://www.un.org/ruleoflaw/thematic-areas/land-property-environment/environmental-law/* (Accessed on 12/09/2023)

[46] Earth. Org., '15 Biggest Environmental Problems of 2023.' Available at *https://earth.org/the-biggest-environmental-problems-of-our-lifetime/#* (Accessed on 12/09/2023)

[47] Ibid

[48] Muigua. K, Wamukoya. D, & Kariuki. F., 'Natural Resources and Environmental Justice in Kenya.' Glenwood Publishers Limited, 2015

access to natural resources; not to suffer disproportionately from environmental policies, laws and regulations; and the right to environmental information, participation and involvement in decision-making[49]. It also refers to the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies[50]. Environmental Justice is attained when every person enjoys the same degree of protection from environmental and health hazards and has access to the decision-making process to have a healthy environment[51]. The concept of Environmental Democracy focuses on how decisions are made, with a particular emphasis on the need for citizens, interest groups, and communities generally, to participate and have their voices heard[52]. It enshrines principles such as inclusivity, representativity, accountability, efficiency, and effectiveness, as well as social equity, justice and good governance[53]. Environmental rule of law seeks to foster these principles by enhancing access to information, public participation, and access to justice and

[49] Ako. R., 'Resource Exploitation and Environmental Justice: the Nigerian Experience' Available at *https://www.elgaronline.com/display/edcoll/9781848446793/9781848446793.00011.xml* (Accessed on 12/09/2023)

[50] United States Environmental Protection Agency; 'Environmental Justice.' Available at https://www.epa.gov/environmentaljustice (Accessed on 12/09/2023)

[51] Ibid

[52] Muigua. K., 'Realising Environmental Democracy in Kenya.' Available at *http://kmco.co.ke/wp-content/uploads/2018/08/REALISING-ENVIRONMENTAL-DEMOCRACY-IN-KENYA-4th-May-2018-1-1.pdf* (Accessed on 12/09/2023)

[53] Ibid

effective remedies in environmental matters[54]. Environmental rule of law is therefore pertinent in fostering sound environmental governance by ensuring that the environment and natural resources are managed sustainably, transparently, and on the basis of the rule of law towards Sustainable Development, peace and justice[55]. It is therefore vital to strengthen environmental rule of law for sustainability.

3.0 Global Trends in Environmental Rule of Law: Prospects and Challenges

The importance of environmental rule of law received global recognition during the first world conference on the environment being the 1972 United Nations Conference on the Human Environment held in Stockholm, Sweden[56]. Participants at the conference adopted a series of principles for sound management of the environment including the *Stockholm Declaration and Action Plan for the Human Environment* and several resolutions[57]. The Stockholm Declaration provides that the protection and improvement of the human environment is a major issue which affects the well-being of people and economic development throughout the world and it is the urgent desire of the people of the whole world and the duly of

[54] Ibid
[55] United Nations Environment Programme., 'Environmental Rule of Law.' Op Cit
[56] United Nations., 'United Nations Conference on the Human Environment, 5-16 June 1972, Stockholm.' Available at *https://www.un.org/en/conferences/environment/stockholm1972* (Accessed on 13/09/2023)
[57] Ibid

all Governments[58]. The Declaration stipulates several principles that are vital in advancing environmental rule of law including the need to protect and improve the environment for present and future generations, careful planning and management of natural resources, halting and preventing environmental pollution, adoption of environmental laws and policies and adopt an integrated and the need to adopt a co-ordinated approach in development planning so as to ensure that development is compatible with the need to protect and improve environment[59]. The Stockholm Declaration was an important milestone for the development of environmental rule of law across the globe since it was the first global document outlining the general principles for the management of natural resources and the environment[60].

Environmental rule of law was further enhanced following the United Nations Conference on Environment and Development also known as the 'Earth Summit', held in Rio de Janeiro, Brazil, from 3-14 June 1992[61]. The Earth Summit concluded that the concept of Sustainable Development was an attainable goal for all the people of the world, regardless of whether they were at

[58] United Nations Environment Programme., 'Stockholm Declaration.' Available at *https://wedocs.unep.org/bitstream/handle/20.500.11822/29567/ELGP1StockD.pdf* (Accessed on 13/09/2023)

[59] Ibid

[60] Muigua. K., 'Nurturing Our Environment for Sustainable Development.' Op Cit

[61] United Nations., 'United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, 3-14 June 1992.' Available at *https://www.un.org/en/conferences/environment/rio1992* (Accessed on 13/09/2023)

the local, national, regional or international level[62]. It also recognized that integrating and balancing economic, social and environmental concerns in meeting our needs is vital for sustaining human life on the planet and that such an integrated approach is possible[63]. One of the major results of the Earth Summit was the adoption of *Agenda 21*[64] a daring program of action calling for new strategies to invest in the future to achieve overall sustainable development in the 21st century.

Agenda 21 affirms that integration of environment and development concerns and greater attention to them will lead to the fulfilment of basic needs, improved living standards for all, better protected and managed ecosystems and a safer, more prosperous future[65]. It calls for international cooperation to accelerate Sustainable Development in developing countries and related domestic policies[66]. Agenda 21 further acknowledges the importance of the rule of law in sustainability and provides that laws and regulations suited to country - specific conditions are among the most important instruments for transforming environment and development policies into action, not only through "command and control" methods, but also as a normative framework for economic planning and

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[62] Ibid

[63] Ibid

[64] United Nations Conference on Environment & Development Rio de Janerio, Brazil, 3 to 14 June 1992., 'Agenda 21.' Available at *https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf?_gl=1*9uipp7*_ga*MjA2NDk2MDMxMS4xNjcxMjU5NTEw*_ga_TK9BQL5X7Z*MTY5NDU5NjE3MS41NS4xLjE2OTQ1OTgzODUuMC4wLjA.* (Accessed on 13/09/2023)

[65] Ibid, Preamble

[66] Ibid, Chapter 2

market instruments[67]. It further stipulates that it is essential to develop and implement integrated, enforceable and effective laws and regulations that are based upon sound social, ecological, economic and scientific principles in order to enhance sustainability[68]. It also recognizes the importance of judicial and administrative procedures in advancing environmental rule of law and calls upon Governments and legislators, with the support, where appropriate, of competent international organizations, to establish judicial and administrative procedures for legal redress and remedy of actions affecting environment and development that may be unlawful or infringe on rights under the law, and should provide access to individuals, groups and organizations with a recognized legal interest[69]. Agenda 21 is therefore vital in fostering environmental rule of law by calling upon countries to develop integrated strategies to maximize compliance with their laws and regulations relating to Sustainable Development. These strategies include enactment of enforceable, effective laws, regulations and standards that are based on sound economic, social and environmental principles and appropriate risk assessment, incorporating sanctions designed to punish violations, obtain redress and deter future violations; establishing mechanisms for promoting compliance; strengthening institutional capacity for collecting compliance data, regularly reviewing compliance, detecting violations, establishing enforcement priorities, undertaking effective enforcement, and conducting periodic evaluations of the

[67] Ibid, Chapter 8.13
[68] Ibid, Chapter 8.14
[69] Ibid, Chapter 8.18

effectiveness of compliance and enforcement programmes; fostering mechanisms for appropriate involvement of individuals and groups in the development and enforcement of laws and regulations on environment and development and national monitoring of legal follow-up to international instruments[70].

Another important legal instrument that was adopted during the Earth Summit which is vital in advancing environmental rule of law is the *Rio Declaration on Environment and Development*[71]. The Declaration sought to balance the interests of states in exploiting their natural resources for development and environmental conservation with the aim of achieving Sustainable Development[72]. The Declaration stipulates that human beings are at the centre of concerns for Sustainable Development and are entitled to a healthy and productive life in harmony with nature[73]. It further states that in order to achieve Sustainable Development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it[74]. The Rio Declaration upholds key environmental principles that are vital in strengthening environmental rule of law including the principle of inter and intra generational equity, the principle of public participation, the precautionary principle and the

[70] Ibid, Chapter 8.21
[71] United Nations General Assembly., 'Report of the United Nations Conference on Environment and Development: Rio Declaration on Environment and Development.' A/CONF. 151/26 (Vol.1)
[72] Ibid, Principle 2
[73] Ibid, Principle 1
[74] Ibid, Principle 4

principle of international cooperation[75]. It also recognizes the role of women, youth and indigenous people and local communities in environmental management and development[76].

The Earth Summit was thus an important milestone in advancing environmental rule of law. It has been pointed out that following the 1992 Rio Earth Summit, countries made a concerted effort to enact environmental laws, build environment ministries and agencies, and enshrine environment-related rights and protections in their national constitutions[77]. At the global level, the right to a clean, healthy and sustainable environment has been recognized by the United Nations General Assembly as a fundamental human right[78]. The resolution by the United Nations General Assembly further affirms the importance of the right to a clean, healthy and sustainable environment for the enjoyment of all human rights[79]. The declaration by the United Nations General Assembly demonstrates global acceptance of the right to a clean, healthy and sustainable environment as a human right and could stimulate global efforts towards attaining this right and strengthening environmental rule of law[80].

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[75] Ibid

[76] Ibid, Principles 20, 21 and 22

[77] United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit

[78] United Nations General Assembly (UNGA)., 'The Human Right to a Clean, Healthy and Sustainable Environment.' UNGA Resolution 'A/76/L.75.'

[79] Ibid

[80] Muigua. K., 'Realizing the Right to a Clean, Healthy and Sustainable Environment.' Available at *http://kmco.co.ke/wp-*

In addition, there has been progress towards fostering environmental rule of law at the global level through the adoption of treaties, conventions and other legal and regulatory instruments geared towards promoting environmental sustainability and Sustainable Development, in general[81]. Some of the key instruments include the *Ramsar Convention*[82] whose purpose is to foster the conservation and wise use of all wetlands through local, regional and national actions and international cooperation, as a contribution towards achieving Sustainable Development throughout the world [83] ; the *Convention on Biological Diversity* [84] whose objective is to promote the conservation of biodiversity, the sustainable use of its components, and the fair and equitable sharing of benefits arising out of the utilization of genetic resources[85]; the *United Nations Convention on the Law of the Sea*[86] that seeks to promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment; the *United Nations Framework*

content/uploads/2023/06/Realizing-the-Right-to-a-Clean-Healthy-and-Sustainable-Environment.pdf (Accessed on 13/09/2023)

[81] Muigua. K., 'Nurturing Our Environment for Sustainable Development.' Op Cit

[82] Convention on Wetlands of International Importance especially as Waterfowl Habitat, 996 UNTS 245; TIAS 11084; 11 ILM 963 (1972)

[83] Ibid

[84] 1992 Convention on Biological Diversity, (1993) ATS 32/ 1760 UNTS 79/ 31 ILM 818 (1992)

[85] Ibid, Article 1

[86] United Nations Convention on the Law of the Sea., Available at *https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf* (Accessed on 13/09/2023)

Convention on Climate Change[87] and the *Paris Agreement*[88] which are geared towards combating climate change. Ensuring compliance with these among other international instruments is vital in promoting international environmental law as a tool for addressing specific environmental threats and for integrating long-term environmental protection into the global economy[89].

The *2030 Agenda for Sustainable Development*[90] and its 17 SDGs is also vital in fostering environmental rule of law. It is a plan of action for people, planet and prosperity[91]. It envisages the realization of Sustainable Development through tackling global environmental problems including water scarcity, lack of access to affordable, reliable, sustainable and modern energy and climate change through a combination of measures including enhancing national laws, policies and planning[92]. Achieving the 2030 Agenda for Sustainable Development is therefore vital in enhancing sustainability through environmental rule of law among other measures.

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[87] United Nations Framework Convention on Climate Change., United Nations, 1992., Available at *https://unfccc.int/resource/docs/convkp/conveng.pdf* (Accessed on 13/09/2023)

[88] United Nations Framework Convention on Climate Change., 'Paris Agreement.' Available at *https://unfccc.int/sites/default/files/english_paris_agreement.pdf* (Accessed on 13/09/2023)

[89] Hunter. D., 'International Treaties and Principles Protect the Environment and Guard against Climate Change.' *Insights on Law and Society*., Volume 19, Issue 1 (2021)

[90] United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development.' A/RES/70/1., Op Cit

[91] Ibid

[92] Ibid

Further, the International Court of Justice (ICJ) has also played a vital role in enhancing environmental rule of law at the global level by providing an avenue for realizing the right of access to justice and legal remedies in environmental matters[93]. In the case concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*[94], ICJ emphasized the need for the two countries to continue their cooperation and devise the necessary means to promote the equitable utilization of the river, while protecting its environment. The Court also recently rendered its first decision on environmental damage and compensation in the case *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*[95]. Such decisions are pertinent in strengthening environmental rule of law at the global level.

Environmental rule of law has also been fostered in Africa through regional environmental agreements. It has been argued that a regional approach to environmental governance through regional environmental agreements has an advantage over global agreements since there is greater similarity of interests, norms, perceptions and values at the regional level which enhances international cooperation[96]. In Africa, these

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[93] The ICJ and Environmental Case Law., Available at *https://www.uio.no/studier/emner/jus/jus/JUS5520/h15/undervisningsmateriale/icj-and-international-environmental-law.pdf* (Accessed on 13/06/2023)

[94] International Court of Justice., 'Pulp Mills on the River Uruguay (Argentina v. Uruguay).' Available at https://www.icj-cij.org/case/135 (Accessed on 13/09/2023)

[95] International Court of Justice., 'Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua).' Available at *https://www.icj-cij.org/case/150* (Accessed on 13/09/2023

[96] Muigua. K., 'Nurturing Our Environment for Sustainable Development.' Op Cit

instruments include the *African Convention on the Conservation of Nature and Natural Resources* [97] which seeks to enhance environmental protection; to foster the conservation and sustainable use of natural resources; and to harmonize and coordinate policies in these fields with a view to achieving ecologically rational, economically sound and socially acceptable policies and programmes [98]. Further instruments include the *Bamako Convention* [99] that is aimed at preventing environmental pollution by hazardous wastes by prohibiting the import into Africa of any hazardous (including radioactive) waste and the *Treaty for the Establishment of the East African Community*[100] which provides for co-operation in environment and natural resources and calls upon partner states to take joint efforts to cooperate in the efficient management of natural resources with key priorities to sectors such as climate change adaptation and mitigation, natural resource management and biodiversity conservation, disaster reduction and management, and pollution control and waste management[101].

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[97] Africa Union, *African Convention on the Conservation of Nature and Natural Resources*, OAU, 1001, UNTS 3.

[98] Ibid, Article 1

[99] Africa Union., 'Bamako Convention On The Ban Of The Import Into Africa And The Control Of TransBoundary Movement And Management Of Hazardous Wastes Within Africa, 1991.' Available at *https://www.informea.org/en/treaties/bamako-convention/text* (Accessed on 13/09/2023)

[100] East African Community, The Treaty for the Establishment of the East African Community, Available at *https://www.eala.org/uploads/The_Treaty_for_the_Establishment_of_the_East_Africa_Community_2006_1999.pdf* (Accessed on 13/09/2023)

[101] Ibid

The African Court of Justice and Human Rights and the African Commission on Human and Peoples' Rights which are judicial bodies established pursuant to the African Charter on Human and People's Rights have also played a pivotal role in fostering environmental rule of law in Africa through some of their decisions[102]. In the Endorois Case, the African Commission on Human and People's Rights upheld the right of indigenous communities to utilize natural resources including ancestral land[103]. This decision is integral in enhancing environmental rule of law by recognizing the rights of indigenous people to property, to culture, to the free disposition of natural resources, and to development[104].

At the national level, the Constitution of Kenya recognizes the right to a clean and heathy environment as a fundamental human right[105]. The Constitution further stipulates several obligations by the state in respect of the environment including the obligation to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits, the need to encourage public participation in the management, protection and conservation of the environment,

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[102] Muigua. K., 'African Court of Justice and Human Rights: Emerging Jurisprudence.' Available at *http://kmco.co.ke/wp-content/uploads/2020/06/African-Court-on-Human-and-Peoples-Rights-Emerging-Jurisprudence-Kariuki-Muigua-June-2020.pdf* (Accessed on 14/09/2023)

[103] Claridge. L., 'Landmark Ruling Provides Major Victory to Kenya's Indigenous Endorois.' Available at *https://www.refworld.org/pdfid/4ca571e42.pdf* (Accessed on 14/09/2023)

[104] Ibid

[105] Constitution of Kenya, 2010., Article 42., Government Printer, Nairobi

the obligation to protect genetic resources and biological diversity and the obligation to eliminate processes and activities that are likely to endanger the environment [106]. Constitutional recognition of environmental related rights is one the key ways of fostering environmental rule of law.[107] In addition, the *Environmental Management and Co-ordination Act*[108]establishes the legal and institutional framework for the management of the environment in Kenya. The Act upholds the right of every Kenyan to a clean and healthy environment and sets out various measures towards upholding this right including environmental planning, protection and conservation of the environment, Environmental Impact Assessment, Environmental Audit and Monitoring, environmental restoration and conservation orders and enforcement of environmental rights through courts and tribunals [109]. The Act further establishes the National Environment Management Authority which has the mandate to exercise general supervision and co-ordination over all matters relating to the environment and to be the principal instrument of Government in the implementation of all policies relating to the environment[110].

[106] Ibid, Article 69
[107] United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit
[108] Environmental Management and Co-ordination Act., No. 8 of 1999, Government Printer, Nairobi
[109] Ibid
[110] Ibid, S 7 & 9.

Courts and tribunals are also integral enhancing environmental rule of law and fostering environmental justice in Kenya[111]. The Constitution of Kenya also recognizes the role of litigation in enforcement of environmental rights[112]. It allows a person alleging the denial, infringement or violation or of the right to a clean and healthy environment to apply to a court for redress in addition to any other legal remedies that are available[113]. The Environmental Management and Co-ordination Act further sets out the role of the Environment and Land Court and the National Environment Tribunal in fostering the right to a clean and healthy environment in Kenya[114]. Litigation has fostered environmental rule of law in Kenya through decisions that have emanated from the Environment and Land Court, the National Environment Tribunal and other courts and judicial bodies[115]. Through such decisions, judicial bodies have pronounced themselves on several environmental matters including

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[111] Muigua. K., 'The Role of Courts in Safeguarding Environmental Rights in Kenya: A Critical Appraisal.' Available at *http://kmco.co.ke/wp-content/uploads/2019/01/The-Role-of-Courts-inSafeguardingEnvironmental-Rights-in-Kenya-A-Critical-Appraisal-Kariuki-Muigua-17th-January-2019-* (Accessed on 14/09/2023)

[112] Constitution of Kenya, 2010., Article 70

[113] Ibid

[114] Ibid, S 3 & S 125

[115] See for example the cases of Peter K. Waweru –vs- Republic, Miscellaneous Civil Application, 118 of 2004, (2006) eKLR; Friends of Lake Turkana Trust vs Attorney General & 2 others., ELC Suit No. 825 of 2012, (2014) eKLR; KM & 9 others v Attorney General & 7 others, Petition No. 1 of 2016 (2020) eKLR; National Environment Management Authority –vs- Kelvin Musyoka & Others59, Mombasa Civil Appeal No. E004 of 2020; Mohamed Ali Baadi and others –vs- Attorney General & 11 Others, Petition No. 22 of 2012 (2018) eKLR

Sustainable Development, public participation, access to information, climate change, pollution and compensation[116].

From the foregoing, it emerges that there have been attempts towards promoting environmental rule of law at the global, regional and national level. However, it has been observed that while environmental laws have become commonplace across the globe, too often they exist mostly on paper because government implementation and enforcement is irregular, incomplete, and ineffective[117]. In addition, the laws that have been enacted are lacking in ways that impede effective implementation (for example, by lacking clear standards or the necessary mandates)[118]. As a result, it has been argued that there is no culture of environmental compliance in most societies [119] . This often hinders sound environmental governance and sustainability[120]. There is need to address these challenges and foster a culture of compliance and enforcement of environmental laws in order to strengthen environmental rule of law for sustainability.

[116] Ibid
[117] United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit
[118] Ibid
[119] Ibid
[120] Muigua. K., 'Nurturing Our Environment for Sustainable Development.' Op Cit

4.0 Way Forward: Strengthening Environmental Rule of Law for Sustainability

It is imperative to strengthen the rule of law in general in order to enhance environment sustainability and social justice[121]. It has been argued that the rule of law is an element not only for economic growth, but also for environment sustainability and social justice [122] . One of the key ways of strengthening environmental rule of law is by enactment, and implementation of clear, strict, enforceable, and effective laws, regulations, and policies that are efficiently administered through fair and inclusive processes to achieve the highest standards of environmental quality; respect for human rights, including the right to a safe, clean, healthy, and sustainable environment[123].

In addition, it is vital to embrace civic engagement in order to strengthen environmental rule of law. It has been rightly pointed out that environmental rule of law requires an approach that involves everyone including the civil society[124]. The effective engagement of civil society results in more informed decision making by government, more responsible environmental actions by companies, more assistance in environmental management by the public, and more effective

[121] Leogrande. A., 'The Rule of Law in the ESG Framework in the World Economy.' Available at *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4355016* (Accessed on 14/09/2023)

[122] Ibid

[123] International Union for Conservation of Nature., 'IUCN World Declaration on the Environmental Rule of Law.' Op Cit

[124] United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit

environmental law [125]. Civic engagement can be fostered through public participation and access to information [126]. Public participation is believed to be important in bridging the gap between the government, civil society, private sector and the general public, building a common understanding about the local situation, priorities and programmes as it encourages openness, accountability and transparency, and is thus at the heart of inclusive decision-making[127].

Further, public participation can improve the quality of decision-making by providing decision-makers with additional, unique information on local conditions [128]. In addition, public participation can also improve policy implementation by increasing the legitimacy of the decision-making process and, in so doing, reducing instances of conflict [129]. Citizen involvement in environmental decision making has been associated with several benefits which include: information and ideas on public issues; public support for planning decisions; avoidance of protracted conflicts and costly delays; reservoir of good will which can carry over to future decisions; and spirit of cooperation and trust between

[125] Ibid

[126] Ibid

[127] Muigua. K., 'Towards Meaningful Public Participation in Natural Resource Management in Kenya.' Available at *http://kmco.co.ke/wp-content/uploads/2018/08/TOWARDSMEANINGFUL-PUBLIC-PARTICIPATION-IN-NATURAL-RESOURCEMANAGEMENT-IN-KENYA.pdf* (Accessed on 14/09/2023)

[128] Cerezo. L, & Garcia. G., 'Lay Knowledge and Public Participation in Technological and Environmental Policy.' Available at *https://scholar.lib.vt.edu/ejournals/SPT/v2n1/pdf/CEREZO.PDF* (Accessed on 14/09/2023)

[129] Ibid

decision makers and the public[130]. The Importance of public participation in environmental decision making is upheld under Principe 10 of the *Rio Declaration on Environment and Development* which stipulates that:

> *Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided (emphasis added)*[131].

It is thus pertinent to foster effective public participation and access to information in order to strengthen environmental rule of law. It is also vital to uphold the rights and foster the participation of indigenous people and communities who play an important role in managing the environment and natural resources through traditional ecological knowledge[132]. Local communities possess unique and valuable contextual

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[130] Muigua. K., 'Towards Meaningful Public Participation in Natural Resource Management in Kenya.' Op Cit

[131] Rio Declaration on Environment and Development, Principle 10

[132] United Nations., 'Indigenous People and the Environment.' Available at *https://www.un.org/development/desa/indigenouspeoples/mandated-areas1/environment.html#:~:text=The%20rights%20to%20lands%2C%20territories,of%20their%20traditional%20knowledge%20systems* (Accessed on 14/09/2023)

knowledge of natural resources and have a vested interest in ensuring the sustainable use of land and resources[133]. It is therefore desirable to uphold indigenous peoples' full participation in environmental governance in order to strengthen environmental rule of law.

In addition, environmental rule of law can be strengthened by embracing a rights-based approach to environmental governance[134]. A rights-based approach to environmental protection is one that is normatively based on rights and directed toward protecting those rights[135]. This approach differs from regulatory approaches where environmental statutes set forth certain requirements and prohibitions relating to the environment[136]. It has been argued that taking a rights-based approach to improving environmental rule of law provides a strong impetus and means for implementing and enforcing environmental protections[137]. There has been progress towards realizing this goal through the recognition of the right to a clean, heathy and sustainable environment as a human right[138]. This approach provides an impetus for realizing the right to a clean, healthy and sustainable

[133] International Development Law Organization., 'Climate Justice: A Rule of Law Approach for Transformative Climate Action.' Available at *https://www.idlo.int/sites/default/files/pdfs/publications/climate_justice_policy_paper_-_climate_action_-_final.pdf* (Accessed on 14/09/2023)
[134] United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit
[135] Ibid
[136] Ibid
[137] Ibid
[138] Muigua. K., 'Realizing the Right to a Clean, Healthy and Sustainable Environment.' Op Cit

environment and other human rights towards attainment of the Sustainable Development agenda[139].

There is also need to enhance access to justice in order to strengthen environmental rule of law. Courts and tribunals play a pivotal role in enhancing environmental rule of law and fostering environmental justice[140]. It has been observed that countries have reinforced and publicized the linkages between human rights and the environment, which has elevated the normative importance of environmental law and empowered courts and enforcement agencies to enforce environmental requirements[141]. It is thus vital to enhance access to justice by addressing barriers such as high court filing fees, bureaucracy, complex legal procedures, illiteracy, distance from formal courts, backlog of cases in courts and lack of legal knowhow which hinder effective access to justice[142]. It is also crucial to enhance practices such as public interest litigation in order to enhance access to justice in environmental matters[143].

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[139] Ibid

[140] Muigua. K., 'The Role of Courts in Safeguarding Environmental Rights in Kenya: A Critical Appraisal.' Op Cit

[141] United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit

[142] Ojwang. J.B , "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 Kenya Law Review Journal 19 (2007), pp. 19-29: 29

[143] United Nations Economic Commission for Europe., 'Access to Justice in Environmental Matters: Standing, Costs and Available Remedies.' Available at *https://unece.org/DAM/env/pp/a.to.j/AnalyticalStudies/SEE_Access2Justice_Study_Final_logos.pdf* (Accessed on 14/09/2023)

Capacity building is also vital in strengthening environmental rule of law. It is therefore critical to create strong environmental agencies and continuously strengthen their capacity in order to enhance their effectiveness in environmental governance[144]. It is also vital to adequately build capacity for judges, staff and ADR practitioners in environmental law in order to ensure that justice institutions, both formal and informal have the capacity to foster sound environmental governance[145]. Further, it is essential to foster public awareness and education on environmental laws and regulations in order to promote compliance and enforcement of such laws[146].

Finally, there is need to move beyond the law in order to enhance sound environmental governance. One of the ways through which these can be achieved is by embracing the concept of community-based natural resource management through organized community legal action or through Alternative Dispute Resolution and traditional justice systems[147]. Further, the concept of Environmental, Social and Governance (ESG) plays a fundamental role in environmental governance by incorporating Environmental, Social and Governance matters in corporate decision making in order to

[144] United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit
[145] International Development Law Organization., 'Climate Justice: A Rule of Law Approach for Transformative Climate Action.' Op Cit
[146] United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit
[147] Muigua. K, Wamukoya. D, & Kariuki. F., 'Natural Resources and Environmental Justice in Kenya.' Op Cit

foster sustainability[148]. It is thus vital for organizations to embrace ESG in order to achieve sustainable, responsible and ethical investments towards sustainability[149]. Environmental ethics and morals should also be embraced in environmental governance[150]. These ideas recognize the intrinsic value of nature and the responsibility of humans to act in accordance with ethical and moral principles towards environmental protection[151]. They envisage the moral and ethical obligations of human beings to protect and preserve the environment[152]. It is also ideal to embrace science and technology which play an important role in environmental governance in areas such sustainable waste management, climate change mitigation, sustainable agricultural practices and adoption of green and clean technologies[153].

Through the measures discussed above among others, environmental rule of law will be strengthened towards sustainability.

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[148] Stuart. L.G et al., 'Firms and social responsibility: A review of ESG and CSR Research in Corporate Finance.' *Journal of Corporate Finance* 66 (2021): 101889.

[149] Ibid

[150] Minteer. B., 'Environmental Ethics.' Available at *https://www.nature.com/scitable/knowledge/environmental-ethics-96467512/#:~:text=Environmental%20ethics%20is%20a%20branch,sustain%20biodiversity%20and%20ecological%20systems.* (Accessed on 14/09/2023)

[151] Ibid

[152] Ibid

[153] Muigua. K., 'Utilising Science and Technology for Environmental Management in Kenya.' Available at *http://kmco.co.ke/wp-content/uploads/2020/04/Utilising-Science-and-Technology-for-Environmental-Management-in-Kenya.pdf* (Accessed on 14/09/2023)

5.0 Conclusion

Environmental rule of law plays an important role in environmental governance. It offers a framework for addressing the gap between environmental laws as set out in text and in practice and is key to achieving the Sustainable Development Goals[154]. There has been global progress towards promoting environmental rule of law through the enactment of environmental laws, establishment of environment ministries and agencies, and enshrining environment-related rights and protections in national constitutions[155]. However, progress towards realizing environmental rule of law has often been thwarted by challenges of implementation and enforcement of environmental laws[156]. This often hinders sound environmental governance and sustainability[157].

It is thus imperative to strengthen environmental rule of law in order to foster sustainability. This can be achieved through the enactment, and implementation of clear, strict, enforceable, and effective laws, regulations, and policies, embracing civic engagement through public participation and access to information in environmental governance, upholding a rights-based approach to environmental governance, enhancing access to justice in environmental matters, capacity building and moving beyond the law for sound environmental

[154] United Nations Environment Programme., 'Environmental Rule of Law.'
[155] United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit
[156] Ibid
[157] Muigua. K., 'Nurturing Our Environment for Sustainable Development.' Op Cit

governance[158]. Strengthening environmental rule of law for sustainability is a noble endeavour which must be realized.

[158] United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit; See also Muigua. K., 'Rule of Law Approach for Inclusive Participation in Environmental, Social, and Governance (ESG) Accountability Mechanisms for Climate-Resilient Responses.' Op Cit

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Ako. R., 'Resource Exploitation and Environmental Justice: the Nigerian Experience' Available at *https://www.elgaronline.com/display/edcoll/9781848446793/9781848446793.00011.xml*

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The Role and Effectiveness of the Kenyan Institutional Framework in Protection Against Forced Evictions

By: ***Stephen Chege Njoroge****

Abstract

Institutions at national and municipal or county levels have the potential to protect individuals and communities against forced evictions in Kenya. A strong and accountable institutional framework is imperative in protection against forced evictions. Institutions have a critical role protection against forced evictions. The institutional framework includes the national and county governments. It also includes the executive, legislature and the judiciary. The institutional framework also includes quasi-government institutions and constitutional commissions. The main question to be addressed is the role of such institutions in addressing the problem of forced evictions.

This paper examines the role of different State institutions in order to ascertain their role and effectiveness in addressing the problem of forced evictions. At the national level, the study will evaluate and discuss the role of existing State agencies that are mandated to manage land and housing. The relevant institutions under the national government include the Ministry of Lands, Public Works (MLPWHUD), Housing and Urban Development, and the National Housing Corporation (NHC). The paper also

* *The author is an advocate of the High Court of Kenya. He is a Phd candidate at the University of the Witwatersrand Johannesburg, has an LLM from the University of Nairobi and LLB (Hons) from Moi University. He is a Chief Land Registration Officer at the State Department of Lands and Physical Planning. This work was extracted from my thesis submitted in partial fulfilment of the PhD at the Faculty of Commerce, Law and Management, University of the Witwatersrand Johannesburg. Any errors or omissions in this work remain the author's sole responsibility.*

discusses the role of county governments and constitutional commissions in protection against forced evictions.

The paper evaluates and investigates the role of institutions created by the Constitution and legislation in protection against forced evictions. At the national level of governance, the paper evaluates the role of the judiciary, the legislature and the executive in protection against forced evictions. In particular, it discusses reliefs that courts have granted in selected force eviction cases. The paper also discusses the role of county governments and constitutional commissions in dealing with forced evictions. It proposes institutional reforms that can make these institutions more effective in protecting people against arbitrary evictions.

1.0 Introduction

Institutions can play a critical role and have the potential in protection against forced evictions. Institutions help in reducing uncertainty, facilitating everyday business and solving problems effectively.[1] They structure human interactions and provide incentives that facilitate structuring of economic, social and political activity.[2] The UN Economic Commission for Europe (UNECE) has described the components of institutions as follows:

> …institutions are made up of formal rules, informal constraints and their enforcement characteristics. Formal rules, of course, are very straightforward. They are rules put into place; they are laws, constitutions, regulations, whatever, that have the character of being specific and being defined precisely.[3]

[1] United Nations Economic Commission for Europe 'The Role of Institutions in Economic Development: Occasional Paper No. 1' (2003) < *unpubli@unog.ch*> accessed 1 April 2022 [1].
[2] Ibid.
[3] Ibid.

The description by UNECE demonstrates that institutions are created with formal rules and regulations to achieve certain goals and objectives. Institutions are organised entities in society with mechanisms and processes that are aimed at meeting specific needs of people.[4]

The institutional framework in Kenya was indicted for not being responsive to the plight of indigenous peoples and failing to protect them from forced evictions by the African Commission on Human and Peoples Rights (the ACHPR).[5] In the *Centre for Minority Rights Development on behalf of the Endorois Community v Kenya* (*Endorois* case),[6] the ACHPR indicted the Kenyan government for lacking policies or governmental institutions that deal directly with indigenous peoples' issues. The ACHPR stated that:

> …the ACHPR notes that the rights of indigenous pastoralist and hunter-gatherer communities are not recognised as such in Kenya's constitutional and legal framework, and no policies or governmental institutions deal directly with indigenous issues. It also notes that while Kenya has ratified most international human rights treaties and conventions, it has not ratified ILO Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries, and it has withheld its approval of the United Nations Declaration on the Rights of Indigenous Peoples of the General Assembly.[7]

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[4] Ibid 2.

[5] The ACHPR is established under Article 30 of the African Charter of on Human and Peoples' Rights with the mandate of promotion and protection of human rights in Africa. It was officially inaugurated on 2 November 1987.

[6] Communication 276/2003.

[7] Ibid Para 155; K Sing'oei & J Shepherd 'In Land We Trust': The *Endorois*' Communication and the Quest for Indigenous Peoples' Rights in Africa' (2010) 16 *Buffalo Human Rights Law Review* 16.

The ACHPR ruled that the government had a duty to take positive steps to protect indigenous communities such as the *Endorois* by promoting cultural rights through creation of opportunities, policies and institutions.[8] The ACHPR observed that policies and institutions enhance the development and existence of different cultures and ways of life despite the challenges that face indigenous communities in Kenya.[9] Most importantly, the ACHPR observed that institutions are essential in protection of indigenous peoples who are prone to forced evictions from their land.[10]

The Constitution of Kenya (the Constitution) recognises policy and legislative measures as important components in the realisation of rights under Article 43.[11] The Constitution uses the term 'other measures' including the setting of standards that would facilitate realisation of socio-economic rights (SERs), to achieve progressive realisation of the rights under Article 43.[12] The 'other measures' contemplated by the Constitution can be construed to include institutional framework that facilitates realisation of the SERs under Article 43. The executive, judiciary and the legislature are critical institutions that can facilitate protection against forced evictions in Kenya.

The executive and the legislature bear the major responsibility in the realisation of SERs.[13] The courts also contribute to the realisation

[8] The *Endorois case* (note 6 above) Para 256.
[9] Ibid.
[10] Ibid.
[11] Republic of Kenya *The Constitution of Kenya* (2010) Article 21 (2).
[12] Ibid.
[13] C Ngang 'Judicial Enforcement of Socio-Economic Rights in South Africa and the Separation of Powers Objection: The Obligation to take 'other measures.' (2014) 14 *Africa Human Rights Law Journal* 658.

through translating SERs into enforceable legal claims.[14] Enforcement of SERs by court enhances their realisation. Judicial enforcement becomes a key strategy for protecting and empowering individuals and communities, where the channels of realisation of SERs within the executive and legislative arms become unavailable, inefficient, ineffective and insufficient.[15]

The following section addresses the roles of the arms of government namely, the judiciary, the legislature and the executive in protection of forced evictions in Kenya.

2.0 The Role of the Judiciary in Protecting against Forced Evictions

The Constitution establishes superior and subordinate courts.[16] The superior courts consist of the Supreme Court, the Court of Appeal, the High Court and specialised courts include the Employment and Labour Court and the Environment and Land Court (ELC) which have the status of the High Court.[17] The subordinate courts include Magistrates courts, Court Martial, Kadhis' courts and tribunals established by legislation.[18] Courts as established by the Constitution and legislation have the duty of administering justice and adjudicating disputes impartially and have the potential to provide remedy to the problem of forced evictions.[19]

The courts and tribunals are guided by the principles that justice must be done to all, irrespective of status, justice shall not be delayed, nor

[14] L Stewart 'Adjudicating Socio-Economic Rights Under a Transformative Constitution' 28 (3) *Penn State International Law Review* (2010) 506.
[15] Ngang (note 13 above) 658-659.
[16] Articles 163-170 of the Constitution
[17] Ibid Article 162(1) & (2).
[18] Ibid Article 169.
[19] N Sifuna 'The Role of Courts in Implementation of Environmental Law in Kenya' (2005) 1(2) *Law Society of Kenya Journal* 78.

alternative forms of dispute resolution and administration of justice without undue regard to procedural technicalities.[20] The principles that guide courts and tribunals make court action an avenue for protection of individuals and communities against forced evictions.
The Constitution grants the High Court jurisdiction to hear and determine applications for redress of denial, violation threats or infringement rights or fundamental freedoms contained in the Bill of Rights. The Constitution provides that:

> *…the High Court has jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.*[21]

The Bill of Rights in Article 43 (1) (b) the Constitution contains the right to adequate housing and to reasonable standards of sanitation. The Bill of Rights does not expressly make reference to protection from forced evictions. However, the general right to housing can be negatively enforced in protection from arbitrary evictions.[22] The right to housing forms an important component of protection against forced evictions. Purposive construction of the Bill of Rights is necessary because it enables courts to broadly interpret rights and takes into account other factors that affect realisation of rights other than addressing mere legal rules.[23]

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[20] Article 159 (2) of the Constitution.
[21] Ibid Article 23 (1).
[22] CJ Mashamba *Litigating Human Rights in African Institutions: Law, Procedure and Practice* (Nairobi: LawAfrica Publishing Limited, 2017) 137; I Currie & JD Waal *The Bill of Rights Handbook* (Cape Town: Juta and Company PTY Limited 2018) 586.
[23] SM Mbenenge Transformative Constitutionalism: A Judicial Perspective from the Eastern Cape Public Lecture delivered at the Nelson R. Mandela School of Law, University of Fort Hare on 17 April 2018 3-4.

The Bill of Rights under the Constitution would be of little effect if the courts are not properly equipped to enforce the rights and freedoms and to supervise compliance with the remedies granted.[24] The Constitution obligates the courts to develop the law through broad interpretation of the Bill of Rights and adopt the interpretation that most favours the enforcement of a right or fundamental freedom.[25] For the courts to effectively enforce the rights under the Bill of Rights, the interpretation should be articulated in expansive rather than restrictive language.[26]

Courts and in particular judges play critical roles as custodians of constitutional values such as freedom, human dignity and equality.[27] Courts lay down general principles for adjudication of the right to housing, protection of individuals and communities against arbitrary evictions and developing progressive jurisprudence in that respect.[28] Liebenberg, writing within the South African context but nevertheless applicable to the Kenya, has underscored the role of courts in adjudication of SERs by stating that:

> …SERs adjudication has a particular contribution to make in requiring government and powerful private actors to give serious and reasoned consideration to the claims of those who lack access to the economic and social resources. These groups usually resort

[24] L Juma 'Nothing but a Mass of Debris: Urban Evictions and the Right of Access to Adequate Housing in Kenya' (2012) 12 (2) *African Human Rights Law Journal* 501-502.
[25] Article 20 (3) of the Constitution.
[26] Mbenenge (note 23 above) 3.
[27] Ibid 2.
[28] CJT Mbianda 'The Public Protector as a Mechanism of Political Accountability: The Extent of its Contribution to the Realisation of the Right to Access Adequate Housing in South Africa' (2017) 20 *Potchefstroom Electronic Law Journal* 1.

> to litigation because their claims have not been recognised or pursued in the formal political processes. If judges are to play this role effectively they will, in appropriate cases, be required to make decisions with significant policy and budgetary implications.[29]

Liebenberg also stated that the courts are the avenues in which ordinary people challenge excesses of public power by State organs or private powers by non-state entities that undermine the rights provided in the Bill of Rights.[30]

Courts have a role in ensuring that procedural requirements in protection against forced evictions are adhered to. Firstly, the court as part of remedial measures should ensure reasonable alternative accommodation is provided or is available before granting an eviction order.[31] Secondly, courts should ensure that meaningful engagement and constructive discussion in the form of mediation has been explored before evictions are carried out.[32] Liebenberg observes that meaningful engagement and mediated solutions are instrumental in assessing the justice and equity of the eviction of people from their homes.[33] This is part of procedural protection from forced evictions as observed by the United Nations (UN) Committee on Economic Social and Cultural Rights (CESCR) in General Comment No. 7.[34]

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[29] S Liebenberg *Socio-Economic Rights Adjudication under a Transformative Constitution* (Cape Town: Juta & Co. Limited 2010) 70.
[30] Ibid.
[31] *Government of the Republic of South Africa and Others v Grootboom and Others* (2001) (1) SA 46 (CC) Paras 29 & 45.
[32] Ibid. South African courts have made progressive developments on the aspects of mediation, meaningful engagement and provision of alternative accommodation to address arbitrary evictions.
[33] Liebenberg (note 29 above) 154.
[34] UN CESCR General Comment No. 7: The Right to Adequate Housing (Art.11.1): Forced Evictions 20 May 1997 UN Doc E/1998/22.

Courts are instrumental in ensuring where eviction is considered to be inevitable, the actors adhere to the relevant provisions of international human rights law and the general principles of reasonableness and proportionality. Courts prompt the legislature and the executive to give effect to SERs through comprehensive, participatory social programmes and legislation.[35] The role of courts is to consistently prompt them to give effect to SERs in the event they fail to fulfil their constitutional responsibilities.

Regarding land rights and forced evictions in Kenya, the Constitution has established the ELC.[36] The ELC is a superior court for the purpose of hearing and determining disputes relating to land and the environment.[37] The enabling legislation is the Environment and Land Court Act, 2011.[38] The ELC has original and appellate jurisdiction in matters relating to the use, occupation and title to land. The power of the court to adjudicate on use and occupation of land is relevant to the protection against forced evictions. The ELC has the potential to interpret the provisions and implications of the treaties and conventions that have been ratified by Kenya.[39]

The ELC has been instrumental in interpreting international law norms on forced evictions and granting remedies to the occupiers.[40]

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[35] Liebenberg (note 29 above) 71.
[36] Article 162 (1) b of the Constitution. The Constitution provides that 'parliament shall establish courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land.'
[37] Ibid; TO Ojenda *Land Law and Conveyancing: Principles and Practice* (Nairobi: LawAfrica Publishing Limited, 2015) 87-88.
[38] Cap 12A Laws of Kenya.
[39] Kenya National Commission on Human Rights '*Making the Bill of Rights Operational: Policy Legal and Administrative Priorities and Considerations*' (2011) <*www.knchr.org*> last accessed on 1 November 2021.
[40] Ibid.

The Constitution does not have express provisions for protection from forced evictions. [41] However, the ELC has attempted to negatively enforce the right to housing under the Constitution to proffer protection against arbitrary evictions. [42] Kenya has an inadequate legislative framework that seeks to address the problem of forced evictions.[43] In absence of express provisions for protection against forced evictions in the Constitution and weak legislative framework, the ELC has in few instances considered the best international practices in deciding on cases of forced evictions in Kenya.

The following section addresses the remedial measures by the courts and their effectiveness in protecting against forced evictions.

2.1 Remedies available in Unlawful Eviction Cases

The Constitution grants power to courts to grant effective remedies in litigation under the Bill of Rights by according every person the right to institute proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.[44] The Constitution also grants power to the High Court to determine the questions on whether laws and actions are inconsistent with or in contravention of the Constitution.[45] The courts have granted reliefs in the form of declaratory orders and have in

[41] Chapter 4 of the Constitution provides for a detailed Bill of Rights with elaborate rights and freedoms which include justiciable SERs. However does not make reference to protection of individuals and communities from forced evictions.

[42] *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others* High Court of Kenya at Nairobi Petition No. 65 of 2010 and (2013) eKLR Paras 61-66.

[43] Ibid Para 79.

[44] Article 22 (1) of the Constitution.

[45] Ibid Article 165 (3) (d).

several instances used structural interdicts in forced eviction cases. The two remedies are discussed below.

2.1.1 Declaratory Orders

The courts have granted reliefs in the form of declarations that a right has been violated or that a law is inconsistent with the Constitution, ordering judicial review and in some instances, making orders for compensation.[46] The relief of declaration allows the courts to clarify and declare rights on the one hand while leaving the decision on how best to realise the rights on other branches of the State.[47] The legal basis for the relief is that the court has good grounds for believing that the State understands its obligations and will fulfil the obligations as described in the order.[48]

The *Fatuma Khamis Bilal & 3505 others v Kenya Railways Corporation & 6 others* [49] case concerned eviction notices made by the Kenya Railways Corporation (KRC) to the *Nubian* community living in Kisumu county. The community claimed to have been in possession and occupation of the land since 1937 without any interruptions or eviction threats.[50] The Ministry of Lands, Housing, Public Works and Urban Development had prepared the settlement scheme advisory plan in 2012 and the KRC neither complained nor indicated any interest in the land inhabited by the community.[51]

The KRC issued a seven day notice to the petitioners and thereafter destroyed their homes and other structures thereby evicting them

[46] Ibid Article 23 (3) b.
[47] Currie & De Waal (note 22 above) 196.
[48] Liebenberg (note 29 above) 382
[49] 2021 eKLR.
[50] Ibid 10.
[51] Ibid 12.

from the land, giving rise to the suit.[52] The KRC argued that the petitioners had not demonstrated that all the procedures in survey, alienation, transfer and registration were duly followed to enable a procedural transition of proprietorship of the suit land from them.[53] The Court found that the disputed land was Crown land that was alienated by the governor in 1937 to the Nubian Community by virtue of Legal Notice no 440 of 1963 issued under the Kenya (Vesting of Land) Regulations of 1963.[54] The Court further found the land occupied by the petitioners was not part of the land vested in the KRC since it had been alienated in 1937 and therefore the eviction, destruction and demolitions of property was an affront to the petitioner's right to property.[55]

The finding by the ELC vindicated the right to property of the community by not only protecting them from forced evictions but also protecting their right to housing by stating that:

> …any forcible, violent and brutal eviction through demolition of homes of the petitioners and other residents of the Kibos informal settlement, without according them alternative shelter and or accommodation and leaving them to live in the open exposed to the elements and vagaries of nature is a violation of their fundamental rights to accessible and adequate housing.[56]

The ELC declared that destruction of property without a court order and without, according to the affected parties, an opportunity to salvage any of their belongings is a violation of the fundamental right

[52] Ibid.
[53] Ibid 13.
[54] Ibid.
[55] Ibid.
[56] Ibid 14.

to protection of property guaranteed by the Constitution.[57] The ELC further vindicated the right to property under Article 40 of the Constitution. The ELC also declared that forced evictions without warning, court orders and reasonable notice in writing was a violation of the petitioner's fundamental right to fair administrative action guaranteed by the Constitution.[58]

The ELC ruled in favour of the petitioners by stating that they were entitled to full compensation for the loss suffered during and after the illegal demolition of their structures.[59] However, the ELC provided guidance to the petitioners by urging them to file a separate civil suit for compensation as the damages incurred could not be ascertained in the petition.[60] In this case the ELC played an important role in restraining the State and non-state actors from participating in arbitrary evictions and declaring the unconstitutionality of such actions. The case demonstrates that courts have remedial powers that attempt to offer solutions to forced evictions. However, there is inadequate guarantee of enforcement of court orders directed to the executive branch of government, especially because of budgetary resource constraints.[61]

The High Court in the *Ibrahim Sangor Osman v The Minister of State for Provincial Administration and Internal Security* case provided a remedy in the form of a declaration. The High Court declared that the forcible, violent and brutal eviction through demolition of homes of the

[57] Ibid 4, 9 & 14. The relevant provisions in the Constitution as referenced by the ELC are Articles 40 (1), (3) and (4) as read with 21 (3).
[58] The *Fatuma Khamis Bilal* case (note 49 above) 14. The right to fair administrative action is provided under Article 47 of the Constitution.
[59] Ibid 15.
[60] Ibid.
[61] L Franceschi & PLO Lumumba *The Constitution of Kenya: A Commentary* (Nairobi: Strathmore University Press, 2019) 202-203.

petitioners was in violation of their fundamental rights guaranteed in the Constitution.[62] The High Court further gave a mandatory injunction to the Minister of State for Provincial Administration and State Security to cease any further evictions and facilitate the return of the petitioners to the land from which they were evicted.[63] The High Court underscored that in essence, injunctions restrain future arbitrary evictions and demolitions without legal substantive and procedural protection of the occupiers.[64]

The remedy in the form of declaratory orders allows the executive to exercise its discretion on a range of complex policy choices for giving effect to protection from arbitrary evictions. The remedy further allows governments to adopt the necessary policies and legislation. However, the remedy is only appropriate if the State understands its obligations and is willing to take the necessary steps to fulfil the obligations described in the order. The remedy further leaves the implementation solely in the hands of the State. The following section discusses the remedy of structural interdict which allows the courts to supervise orders.

2.1.2 Structural Interdicts

Courts in Kenya have applied structural interdicts as remedies in forced eviction cases with minimal impact. Structural interdicts are remedies that involve the continuous involvement of the courts in implementation of their orders. They entail orders that require the parties in a case to negotiate a plan which will give effect to the relevant right and report back to the court on a regular basis.[65] The court issues a set of directions that regulate further engagement with

[62] Constitutional Petition No. 2 of 2011 (eKLR) 7.
[63] Ibid.
[64] Ibid.
[65] Liebenberg (note 29 above) 424.

the parties and implementation of the plans until the court is satisfied that the infringement of rights is satisfactorily remedied.[66] Structural interdicts enable courts to monitor compliance of court orders and facilitate engagement between the parties concerning the specific measures required to give effect to the normative standards set in the court orders.[67]

Structural interdicts help eliminate systemic violations of human rights that exist within organisational and institutional settings.[68] They do not seek to offer compensation to past wrongs but rather to adjust future behaviour through the court's active participation in the implementation of its orders.[69] They respond to the systemic violations of a complex organisational nature by addressing gaps left by the traditional remedies which are inadequate in eliminating systemic violations of human rights.[70] System violations establish themselves and endure in a sustained manner as part of an institutional behaviour and require a systemic approach to tackle.[71] The systemic approach embodies effective and participatory remedies. Van Der Berg has supported this fact by stating that:

> …the structural interdict potentially embodies an effective and participatory remedy that can overcome traditional concerns that courts lack the constitutional and institutional competence required to adjudicate complex resource allocation decisions. By

[66] Ibid.
[67] Ibid.
[68] C Mbazira 'From Ambivalence to Certainty: Norms and Principles for the Structural Interdict in Socio-Economic Rights Litigation in South Africa' (2008) 24 *South African Journal of Human Rights* 4.
[69] Ibid 5.
[70] Ibid.
[71] C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice* (2009) 110-111.

> accommodating these concerns at the remedial stage of adjudication, the need for deference in applying a capabilities-based standard of review to allocative decisions is obviated.[72]

Currie and De Waal observe that structural interdict is arguably the most effective remedy in forced eviction matters.[73] They have provided five elements that are contained in structural interdicts. The first element is the declaration by the court that conduct by the government falls short of its constitutional obligation and the second element is the order to the government to comply with the obligation.[74] The third element is the order by the court to the government to produce a report within a specified time setting out the steps it has taken and anticipates to take under the prevailing circumstances. The fourth element is the opportunity by the applicant to respond to the report and the fifth element is the hearing and upon satisfaction by the court, the report is made an order of the court.[75]

3.0 Application of Structural Interdicts by the Courts

3.1 *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others* case

The High Court in the *Satrose Ayuma case,*[76] determined the rights of the petitioners to adequate housing and sanitation as well as the right to human dignity and protection against forced evictions. The High Court stated that the right to adequate housing of the petitioners would have been violated by the manner in which the evictions were

[72] S Van Der Berg 'A Capabilities Approach to Remedies for Systemic Resource-Related Socio-Economic Rights Violations in South Africa' (2019) 19 *African Human Rights Law Journal* 300.
[73] Currie & De Waal (note 22 above) 199.
[74] Ibid.
[75] Ibid.
[76] The *Satrose Ayuma* case (note 42 above).

to be carried out.[77] The High Court observed that if the evictions were to be carried out without a proper plan and adequate notices, then the petitioners would be rendered homeless and vulnerable.

The High Court in granting a structural interdict, ordered the Attorney General to file an affidavit within 90 days after the judgement detailing out the existing or planned State policies and legal framework on forced evictions and demolitions and if the policies or legal framework adhere to acceptable international standards.[78] The High Court also ordered the Attorney General to provide information regarding measures that the government had put in place towards the realisation of the right to accessible and adequate housing and to reasonable sanitation in accordance with the Constitution.[79]

The High Court granted an injunction stopping the trustees from evicting the petitioners until the case was finally determined. Additionally, the Court offered guidance that neutral observers should be present during evictions including a mandatory presence of governmental officials or county officials, adherence to the rights to human dignity, life and security of the evictees.[80] The High Court also guided that evictions should not be carried out at night, during bad weather seasons and during times that could affect learning in schools.[81]

[77] Ibid Para 89.
[78] Ibid Para 111(b).
[79] Ibid Para 111(c).
[80] Ibid Para 111 (e).
[81] Ibid.

3.2 *Mitu-Bell Welfare Society v Attorney General & 2 Others* Case

The *Mitu-Bell Welfare Society* case[82] was first heard and determined by the ELC. The ELC declared that demolitions and forceful evictions were illegal, irregular and violated the rights of the occupiers.[83] The ELC held that the respondents who included the Commissioner of Lands, the Kenya Airports Authority (KAA) and the Attorney General had violated the right to housing and other SERs provided in Articles 43 and 21 of the Constitution.[84] The ELC ruled that demolition of the homes of poor people without providing an alternative accommodation violated the right to housing of the applicants provided in Article 43 on the positive obligation to ensure access to SERs.

The ELC did not grant the relief of compensation to Mitu-Bell Welfare Society (the Society) but requested for more information from the respondents before giving further orders on the relief of compensation to the occupiers. The ELC, in issuing a structural interdict ordered the respondents to provide information on the current State policies and programmes on provision of shelter and access to housing for the marginalised groups such as residents of informal and slum settlements.[85] The ELC further directed the respondents to engage with the petitioners, other relevant state agencies and civil society organisations with a view to identifying an appropriate resolution to the grievances of the occupiers following their eviction.[86] The declaration and orders by the court can be termed as progressive in protection against forced evictions.

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[82] *Mitu-Bell Welfare Society v Attorney General & 2 others* (2013) eKLR.
[83] Ibid Para 75.
[84] Ibid Para 77. Article 43 of the Constitution of Kenya provides for protection of economic and social rights and Article 21 provides for the implementation of rights and fundamental freedoms.
[85] Ibid Para 79 (i).
[86] Ibid Para 79 (iii).

The case was later determined by the Court of Appeal (the Court).[87] The Court stated that even though the Kenyan legal framework is inadequate in addressing the right to housing in Kenya, the courts do not have any role in granting prescriptive rights to land in the name of enforcement of SERs.[88] The Court found that the High Court erred in law in issuing orders and directions compelling KAA and other government agencies to formulate policy and programs for provision of shelter and access to housing for residents of informal and slum settlements.[89] In doing so, the Court opposed the application of structural interdicts in forced eviction cases. The Court observed that the High Court erred in using structural interdicts by stating that:

> … by allowing parties to file affidavits and reports after judgement, the trial Court erred in law as the procedure has the potential to introduce secondary litigation and raise new issues that were not in the original pleadings. That such a procedure was not provided for in the Civil Procedure Act and Rules and perpetuated and introduced secondary and side litigation; and that it was impermissible to allow parties to file pleadings after judgement.[90]

The Court found that the High Court erred in law in issuing orders and directions on un-pleaded issues and faulted the judge's directions that required third parties to comment on the policies and guidelines which the Court found was not a prayer in the petition.[91] The Court faulted directions to the effect that the parties engage civil society organisations as *amici curiae* for purposes of identifying

[87] *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others* (2016) eKLR.
[88] Ibid Para 136.
[89] Ibid Para 141 (h).
[90] Ibid Para 73.
[91] Ibid Paras 94-96.

appropriate remedies. [92] In faulting the directions, the Court contradicted itself by observing that the Constitution provides that courts may invite persons with expertise on a particular issue to participate as *amicus curiae* in matters involving general public interest.

The Court argued that the orders of the High Court were contrary to the statutory mandate of the KAA, the appellant in the case.[93] The Court also argued that the High Court had erred in finding that KAA should have provided Mitu-bell Welfare Society with alternative accommodation or a relocation plan.[94] The Court observed that KAA and other government agencies in the case were not vested with the constitutional mandate to identify and determine appropriate relief and resolution to the grievance raised by the Society.[95]

The Court set aside in entirety the judgement given by the High Court without providing a solution to the unlawfully evicted occupants who were left without a remedy. The Court ruled that concept of structural interdicts were not part of the Kenyan legal system and ruled that the High Court erred in delivering a judgement that was not a final judgement determining the rights and liability of parties. The Court fundamentally misconstrued the role of structural interdicts which aim at supervising the implementation of orders granted by the courts.[96]

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[92] Ibid Para 94.
[93] Ibid Paras 90-92.
[94] Ibid Para 119.
[95] Ibid Para 141 (b).
[96] V Miyandazi 'Setting the Record Straight in Socio-Economic Rights Adjudication: The Mitu-Bell Welfare Society Supreme Court of Kenya Judgment' (2022) 6 *Kabarak Journal of Law and Ethics* 38.

By setting aside the judgement by the High Court, the Court was retrogressive and its decision affront to protection against forced evictions in informal settlements in Kenya. Khakula argues that the Court should have focused on ensuring that the petitioners get justice for violation of their rights and not shoot down the structural interdicts as an appropriate remedy by the High Court.[97] Khakula observes that the finding by the Court denied the applicability of structural interdicts in Kenyan law but contradicted itself by suggesting that courts can use structural interdicts as long as they are precise and specific to avoid vagueness which can easily result in breach of the doctrine of separation of powers where the judiciary finds itself making policy instead of interpreting the law.[98]

The Society appealed to the Supreme Court (SC). The SC ruled that protection from forced evictions is not necessarily in the form of an order restraining the State agency from evicting the occupants but courts can be innovative in crafting adequate reliefs such as compensation, the requirement of adequate notice before eviction, the observance of humane conditions during eviction and the provision of alternative land for settlement.[99] The SC upheld the use of structural interdicts by virtue of Article 23(3) of the Constitution as an appropriate relief that a court may grant in forced eviction cases.[100] The SC disagreed with the decision by the Court of Appeal by stating that where a court of law issues an order whose objective is to enforce a right, or to redress the violation of such a right, it cannot be said to

[97] A Khakula 'Embracing Structural Interdicts in the Enforcement of Socio-Economic Rights in Kenya: Analysis of the Court of Appeal Decision in the *Mitubell* Case' (2018) 2 *Jomo Kenyatta University of Agriculture and Technology Law Journal* 181.
[98] Ibid 179.
[99] *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* (2021) eKLR.
[100] Ibid Para 121.

have abdicated its judicial function as long as the said orders are carefully and judicially crafted.[101]

The SC observed that courts can be innovative in granting structural interdicts. Though the SC upheld the use of structural interdicts as had been applied by the High Court, it observed that the most effective relief open to the occupiers under the prevailing circumstances was a claim for compensation since they had already been evicted from the land.[102] The SC observed that the orders by the High Court requiring the respondents to furnish the court with the current state policies and programmes on provision of shelter and access to housing did not have any remedial benefits to the occupiers. Courts can issue orders other than those listed as they deems fit on a case-by-case basis.[103]

The SC observed that orders aimed at enforcing rights or providing redress to the violation of such a right should be carefully and judicially crafted.[104] Interim reliefs, structural interdicts, supervisory orders or any other orders that may be issued by the courts, have to be specific, appropriate, clear, effective, and directed at the parties to the suit or any other State agency vested with a constitutional or statutory mandate to enforce the order.[105] The SC ruled that such structural interdicts must be realistic to avoid the temptation of judicial overreach, especially in matters of policy. Additionally, the orders should be addressed to parties who bear the constitutional or statutory mandate to enforce them and where necessary, a court of

[101] Ibid.
[102] Ibid Paras 154 & 155.
[103] Ibid Para 121.
[104] Ibid.
[105] Ibid.

law may indicate that the orders are of an interim nature and that the final judgement shall await the crystallisation of certain actions.[106]

The SC further recognised the remedies contained in international legal instruments such as the UN Guidelines, General Comments and foreign case law which can be applied by the courts as long as it is consistent with the Constitution to vindicate the right to housing for those living in informal settlements. The SC observed that the most effective relief open to the occupiers was a claim for compensation since they had already been evicted from the land.[107] The SC observed that the orders by the High Court requiring the respondents to furnish the court with the current State policies and programmes on provision of shelter and access to housing did not have any remedial benefits to the occupiers.

The decision by the SC in the *Mitu-Bell Welfare* case demonstrates that structural interdicts are appropriate remedies in forced eviction cases. However, the success of structural interdicts depends on the willingness of the executive to respect court orders. If the executive fails to comply with court orders, the aggrieved parties may not realise the reliefs through structural interdicts.

The following section evaluates the role of the legislature in protection against forced evictions.

4.0 The Role of the Legislature in Protecting against Forced Evictions

The Constitution establishes the legislature comprising the national assembly which represents the people of the constituencies and special interests, and the senate which presents the counties by

[106] Ibid Para 122.
[107] Ibid Paras 154 & 155.

serving to protect the interests of the counties and county governments.[108] The legislature through the national assembly and the senate perform a constitutional duty of protecting, promoting and fulfilling fundamental rights and freedoms.[109]

The legislature is supposed to ensure the widest possible enjoyment of rights and fundamental freedoms while allocating resources.[110] In doing so, the legislature should have regard for prevailing circumstances which include the vulnerability of individuals or groups. [111] The actions by the legislature enhance enjoyment of fundamental rights and freedoms. Conversely, omission by the legislature to exonerate the mandate is a violation of the fundamental rights and freedoms.

The role of the legislature in respect of forced evictions is to enact enabling legislation by responding to what the courts have pronounced in respect of protecting individuals and communities from forced evictions. In particular, the High Court in the *Satrose Ayuma* case[112] urged the legislature to enact legislation that offers protection from forced evictions in the following manner:

> …to that end, I strongly urge parliament to consider enacting a legislation that would permit the extent to which evictions may be carried out. The legislation would also entail a comprehensive approach that would address the issue of forced

[108] Articles 95 & 96 of the Constitution.
[109] Ibid.
[110] Ibid Article 20 (5) (b).
[111] Ibid.
[112] The *Satrose Ayuma* case (note 42 above).

> evictions, security of tenure, legalisation of informal settlements and slum upgrading.[113]

The High Court in this case underscored the need for a legislative framework to protect against evictions and to guide evictions in the event they are inevitable. The High Court observed that Kenya lacked appropriate legislation to provide guidelines on forced evictions.[114] The High Court in urging the legislature to enact appropriate legislation on forced eviction breathed life into Article 43 (1) b of the Constitution by formulating remedies that facilitate the executive and the legislature to take the necessary steps and measures that ensure adequate and effective legal framework.

The High Court in the case of *Susan Waithera Kariuki & 4 Others v Town Clerk Nairobi City Council & 2 Others*[115] made the same observation by stating that Kenya should develop appropriate legal guidelines on forced eviction and displacement of people from informal settlements.[116] The High Court further stated that legal guidelines would be imperative in mitigating extreme suffering and indignity to the people in the event that forced eviction is inevitable.[117] The High Court noted that the requirements set out by the CESCR in General Comment No. 7[118] had not been put in practice in Kenya.[119] The *Satrose Ayuma* and *Susan Waithera* cases provided appropriate guidance to the legislature to enact an appropriate and effective legal framework to regulate evictions.

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[113] Ibid Para 109.
[114] Ibid Para 108.
[115] (2011) eKLR.
[116] Ibid 9.
[117] Ibid 9-11.
[118] General Comment No. 7 (note 34 above).
[119] The *Susan Waithera* case (note 115 above) 9.

The legislature is supposed to ensure that all the Bills brought before it comply with human rights obligations before being enacted into law.[120] The legislature should ensure compliance with human rights obligations contained in treaties ratified by the State and scrutinise new treaties with human rights implications prior to their ratification. [121] By ensuring that legislation complies with international human rights standards, the legislature should refrain from passing legislation that unjustifiably interfere with human rights or legislation that may fail to deter actions by State or non-state actors who are likely to violate human rights.[122]

Kenya has ratified international law instruments that protect against forced evictions and is bound to implement the commitments under international law including general rules of international law, international agreements, conventions and treaties.[123] The legislature has a role in ensuring compliance with the obligations in the international law instruments that Kenya has ratified. That entails enactment of legislation that protects against forced evictions in compliance with international human rights standards.

The legislature should also reform the housing legislation that incorporates security of tenure, availability, affordability, accessibility, habitability and cultural adequacy[124] as a measure to curb forced evictions. Though the legislature has the role in ensuring

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[120] M Hunt, H Hooper & P Yowell *Parliaments and Human Rights: Redressing the Democratic Deficit* (2012) <*http://ahrc.ukri.org*> last accessed 30 November 2021 [13].
[121] Ibid 13-14.
[122] Ibid.
[123] M Mbondenyi & J Ambani *The New Constitutional Law of Kenya: Principles, Government and Human Rights* (Nairobi: Claripress Limited, 2012) 24-26.
[124] UN CESCR General Comment No. 4 'The Right to Adequate Housing' (1991) UN Doc No. E/1992/23 [Para 8].

compliance with international law obligations, it has not passed a legislation that provides substantive and procedural protection to individuals and communities against forced evictions.

The following section evaluates the role of institutions governed by the executive arm of government in protection against forced evictions.

5.0 The Role of Institutions under the Executive Arm in Protection against Forced Evictions

5.1 Ministry of Lands, Public Works, Housing and Urban Development (MLPWHUD)

MLPWHUD is currently constituted pursuant to an Executive Order No. 1 of 2023.[125] The functions of MLPWHUD relevant to this study include land policy management, physical planning, land transactions, survey and mapping, land adjudication, settlement matters, rural settlement planning, land reclamation, national spatial data infrastructure, land registration, land and property valuation services, and administration of public land as designated by the Constitution. [126] MLPWHUD is the key policy making body on matters relating to land.

MLPWHUD through the State department of lands and physical planning developed the Eviction and Settlement Guidelines in 2009[127] and was instrumental in formulating the Evictions and Resettlement Procedures Bill (ERPB) in 2012.[128] However, the substantive law on

[125] Republic of Kenya *Executive Order No. 1: Organisation of the Government of the Republic of Kenya* (2023) 23.
[126] Ibid.
[127] Republic of Kenya *Eviction and Settlement Guidelines: Towards Fair and Justifiable Management of Evictions and Resettlements* (2009).
[128] Republic of Kenya *The Evictions and Resettlement Procedures Bill* (2012).

eviction has not been enacted by the legislature to date. The ERPB had envisaged the procedures that were to guide the court proceedings during and after evictions. These elaborate procedures were not included in the 2016 amendments to the Land Act on protection against forced evictions.[129] The guidelines can provide a framework on evictions that align with internationally accepted standards, which would enhance protection from forced evictions.

5.2 The National Housing Corporation

The State Department of Housing under MLPWHUD oversees the National Housing Corporation (NHC).[130] The main role of the NHC is to give loans for the purposes of purchasing or constructing approved dwellings or to carry out approved housing schemes.[131] The NHC is established as a body corporate with perpetual succession and a common seal, and performs the duties and have the powers conferred on it by the Housing Act.[132]

The NHC consists of public officials including the principal secretary in charge of the State Department of Housing and not more than eight members appointed by the minister in charge of housing who should have knowledge of housing development or housing finance.[133] The NHC is also empowered to undertake research in housing related matters, dissemination of information concerning housing and related matters and to operate a housing finance institution with powers to borrow funds from the government, overseas agencies,

[129] Land Laws (Amendment) Act 28 of 2016.
[130] The NHC is established under Section 3 of the Housing Act Cap 117 Laws of Kenya.
[131] Ibid Section 7A.
[132] Ibid Section 3.
[133] Ibid Section 4.

pension and trust funds and any other institution or persons to finance residential housing development.[134]

The Housing Act establishes the housing fund under the control of the NHC. [135] The NHC considers the financial position of any company, building society or individual person and the ability of repayment before granting loans to build houses.[136] The loans attract interest that is determined by the NHC from time to time. The housing fund has not been designed to address the housing problem in Kenya. The fund is modelled to assist the people who have the capacity to take loans and repay them within prescribed timelines with the interests determined by the NHC.[137] The NHC addresses the housing needs of the working segment of the Kenyan population.[138]

The architecture and design of the NHC were not modelled to address the housing problem of the vulnerable and marginalised segments of Kenyan population.[139] The NHC and the housing fund do not align to the constitutional guarantee of the right to housing. This contributes to vulnerability to arbitrary evictions. Odongo observes that the mortgage market and housing finance in Kenya has targeted the high and upper middle income citizens and leaves out the rest of the populace.[140] He also observes that there is inequality and disparity in the housing sector in Kenya with the high and upper

[134] Ibid Section 7B.
[135] Ibid Section 6.
[136] Ibid Section 7 (3).
[137] Ibid Sections 7A, 7B
[138] Ibid see the Civil servants (Housing Scheme Fund) Regulations, 2004 in the schedule to the Act.
[139] Ibid.
[140] OM Benard 'The Right to Housing in Kenya: From Law to Practice' (2015) 2 (11) *Law Society of Kenya Journal* 38-39.

middle income Kenyans living in well serviced and planned houses and the low income Kenyans living in informal settlements.[141]

NHC has not been significant in protection against forced evictions. However, its role could be enhanced to play a greater part in provision of housing in conjunction with the devolved county governments. The role of the NHC, if enhanced, would play a critical role in addressing the problem of evictions and provision of emergency and alternative housing. The NHC should be strengthened through legislation to collaborate with county governments to address the problem of evictions and provision for emergency and alternative housing.

5.3 The National Land Commission

The National Land Commission (the NLC) is established under Article 67(2) of the Constitution with the mandate of managing public land on behalf of the national and county governments, recommending a national land policy to the national government and advising the national government on a comprehensive registration of land titles program in the country.[142] The NLC is further mandated to carry out research and recommendations to relevant authorities on land and the use of natural resources, and to investigate and recommend remedies to present or historical land injustices and encourage the use of traditional dispute resolution mechanisms in land conflict resolution.[143]

The NLC performs functions prescribed by its enabling legislation, the National Land Commission Act (NLCA).[144] NLCA provides for

[141] Ibid 39.
[142] Article 67 (2) (c) of the Constitution.
[143] Ibid.
[144] Act 5 of 2012.

the objects and principles of devolved governments in the management and administration of land. NLCA mandates the NLC to alienate public land on behalf and with the consent of both levels of government, monitor the registration of all rights and interests in land and ensure sustainable management of public land, including land held by State agencies.[145] NLCA further mandates the NLC to manage and administer all unregistered community land on behalf of the county governments and develop mechanisms for the use of alternative dispute resolution in resolving land disputes.[146]

The Land Laws (Amendment) Act (LLAA) [147] grants the NLC mandate to deal with forced evictions of illegal occupation of public land as follows:

> …the NLC shall cause a decision relating to an eviction from public land to be notified to all affected persons, in writing, by notice in the Gazette and in one newspaper with nationwide circulation and by radio announcement, in a local language, where appropriate at least three months before the eviction.[148]

The mandate provided to the NLC by LLAA does not have sufficient substantive and procedural protection to occupiers of public land. The LLAA does not consider the essence of the Court process before evictions. The LLAA does not create an avenue of mediation with occupiers in the event of being rendered homeless.

[145] Ibid Section 5 (2) (c).
[146] Ibid Section 5(2) (f).
[147] LLAA (note 129 above).
[148] Ibid Section 152C.

Angote observes that evictions from public land are common and are motivated by public good or political influences.[149] However, the SC has created protectable rights to housing occupation of public land as follows:

> …where the landless occupy public land and establish homes thereon, they acquire not title to the land, but a protectable right to housing over the same.[150]

The SC justified creation of the protectable right to housing to deter State and non-state agents from carrying out arbitrary evictions without seeking remedies for the occupiers of land. The SC stated that the Constitution has radically transformed land tenure in Kenya by declaring that all land in Kenya belongs to the people of Kenya collectively as a nation, communities and individuals.[151] The SC ruled that since the Constitution has created the category of public land, any Kenyan has an interest whether indescribable, unrecognisable or transient on public land.[152] This decision by the SC makes an important development in the attempt to offer protection to occupiers of informal settlements. The decision is critical in informing enactment of legislation that offers adequate and effective protection to occupiers from forced evictions.

The following section addresses the role of devolved county governments in protection against forced evictions.

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[149] OA Angote 'Evictions in Kenya: Which Way under the New Constitution and the Land Laws (Amendment) Act 2016?' (2018) 2(2) *Journalofcmsd* 77.
[150] The SC *Mitu-Bell Welfare* case (note 99 above) Para 151.
[151] Ibid.
[152] Ibid.

6.0 The Role of County Governments in Protection against Forced Evictions

Kenyan county governments are devolved governments created by the Constitution. The Kenyan territory is divided into 47 counties.[153] Devolution involves the transfer of power of governance to lower level units that assume responsibility for their own governance.[154] Muia posits that devolution is an approach that is increasingly seen as a model of making government accountable to the people.[155] Additionally, Muia defines devolution as the transfer of executive and legislative power and creation of two distinct and interdependent levels of government, the national and county governments.[156] The two levels of government are supposed to operate in an environment of mutual relations in a consultative and cooperative manner. The effect of devolution has been demonstrated as follows:

> …devolution under the new constitution will, in all probability, result in a major shift in the power configuration: as the various counties have urgent developmental priorities, and with their elected leadership committed to local issues, they are unlikely to render themselves amenable to undue control by the central government. The county set-ups are destined to generate contentious matters for judicial determination, in view of the

[153] Article 63(4) of the Constitution.
[154] D Muia 'Devolution of Governance to Districts in Kenya' in T Kibua & G Mwabu (eds) *Decentralization and Devolution in Kenya: New Approaches* (Nairobi: University of Nairobi Press, 2008) 77; Mbondenyi & Ambani (note 124 above) 100.
[155] Ibid.
[156] Ibid.

> competing interests therein, and also in relation to possible conflicts with national authorities.[157]

Devolution creates lower level units of government which elect their leaders, raise revenue and make decisions independently. The devolved units have legally defined geographical boundaries within which they exercise authority and perform public functions. The devolved units are not under obligation to seek authority from the central government before making and implementing decisions that fall within their jurisdiction.[158]

The Constitution outlines the objects of devolution and provides that devolution related disputes may be resolved through advisory opinions to county governments by the Supreme Court.[159] Several legislations have been enacted to govern the operations of county governments. They include the County Government Act,[160] the

[157] JB Ojwang *Ascendant Judiciary in East Africa: Reconfiguring the Balance of Power in a Democratizing Constitutional Order* (Nairobi: Strathmore University Press, 2013) 54.
[158] M Odero 'Devolved Government' in PLO Lumumba, MK Mbondenyi and SO Odero (eds), *The Constitution of Kenya: Contemporary Readings* (Nairobi: Strathmore University Press, 2011) 203-208. Devolution exercises political, administrative and fiscal powers within the devolved unit.
[159] Article 163 (6) of the Constitution. The objects of devolution are provided for in Article 174 of the Constitution. Relevant to this study, the objects of devolution include recognition of the right of communities to manage their own affairs and to further their development and to protect and promote the interests and rights of minorities and marginalised communities.
[160] Act 17 of 2012. The Preamble to the Act states that the legislation aims at giving effect to chapter eleven of the Constitution on devolution and to provide for the powers, functions and responsibilities of county governments.

Intergovernmental Relations Act,[161] the Transition to Devolved Government Act[162] and the Urban Areas and Cities Act.[163] The State Department of Devolution (the department) within the Office of the Deputy President is responsible for the co-ordination and implementation of devolution policies.[164] The department works with county governments to implement devolution.

Regarding land rights, the Constitution has elaborated on one of the objects of devolution to include recognition of the right by communities to manage their own affairs and protect and promote the interests and rights of minorities and marginalised communities.[165] The governments at county level are responsible for matters concerning land and more particularly community land.[166] The Constitution further provides that any dealings with community land and the extent of land rights of community members is to be determined through legislation.[167] The use of 'legislation' by the Constitution connotes that legislation could be either national or county legislation.[168] The Constitution, in making the provision

[161] Act 2 of 2012. The legislation establishes a framework for consultation, co-operation and a mechanism for dispute resolution between the national and county governments.
[162] Act 1 of 2012. The legislation provides the framework for the transition to devolved governments pursuant to the Constitution.
[163] Act 13 of 2011. The legislation gives effect to Article 184 of the Constitution and provides for the classification, governance and management of urban areas and cities and to provide for the principles of governance and public participation in establishment of urban areas.
[164] Republic of Kenya *Executive Order No. 1 on the Organisation of the Government of the Republic of Kenya* (2023) 5.
[165] Article 174 of the Constitution.
[166] M Kangu *Constitutional Law of Kenya on Devolution* (Nairobi: Strathmore University Press, 2015) 210.
[167] Article 63(4) of the Constitution.
[168] Ibid.

grants power to parliament to enact legislation to enable county governments to deal with community land.

The Land Laws (Amendment) Act (LLAA)[169] which amended the Land Act [170] assigned county governments a nominal role in protecting communities from forced evictions from unregistered community land. The role assigned to county governments does not in any way relate to evictions from public and private land. The LLAA assigns the County Executive Committee Member (CECM) responsibility for making decisions relating to eviction from unregistered community land. The LLAA provides as follows:

> …the CECM responsible for land matters shall cause a decision relating to an eviction from unregistered community land to be notified to all affected persons, in writing, by notice in the Kenya Gazette and a newspaper with nationwide circulation and by radio announcement, in a local language, where appropriate, at least three months before the eviction.[171]

The provisions in the LLAA relating evictions and the limited role of county governments demonstrate that legislation in Kenya has not created a framework within which county governments should react to and deal with forced evictions.[172] The LLAA also does not outline the roles and responsibilities of municipalities as important components for guarding against forced evictions.[173] Even though communities living on unregistered land are vulnerable, the LLAA does not accord communities adequate protection against forced

[169] LLAA (note 129 above).
[170] Act 6 of 2012.
[171] LLAA (note 129 above) Section 152C.
[172] Ibid.
[173] Ibid.

evictions. The LLAA does not state with clarity what constitutes illegal occupation of unregistered community land or who could be termed as an illegal occupier of such community land.[174]

The LLAA assigns a nominal role to county governments which deals with community land and fails to assign any role in respect of public and private land.[175] The LLAA does not render county governments as active participants in eviction proceedings. County governments, if sufficiently empowered by legislation, can play an important role in eviction proceedings in Courts ensuring that evictions do not result in homelessness.[176]

The ELC in the *Satrose Ayuma* case ordered that there must be a mandatory presence of governmental officials or representatives including Nairobi county government officials and security officers during evictions.[177] The court construed that the county governments had a critical role in eviction proceedings. However, parliament has not legislated the aspect of joinder of county governments in the process of lawful evictions.

The Constitution and the Community Land Act (CLA) mandates county governments to hold all unregistered community land on behalf of the communities. [178] The CLA mandates county

[174] Ibid Section 152A.
[175] Ibid Section 152D.
[176] Ibid.
[177] The *Satrose Ayuma* case (note 42 above) Para 111 (e).
[178] Article 64 (3) of the Constitution. The Article provides that 'any unregistered community land shall be held in trust by county governments on behalf of the communities for which it is held.' See also the Section 6 (1) Community Land Act 27 of 2016 which provides that 'county governments shall hold in trust all unregistered community land on behalf of the communities for which it is held.'

governments to hold any monies payable as compensation for compulsory acquisition of any unregistered community land, in trust for a community.[179] The monies obtained after compulsory acquisition are supposed to be released to the community upon registration of the community land. The respective county governments shall cease to manage community land upon registration in the name of the particular community.[180] County governments are precluded from selling, disposing, transferring or converting any unregistered community land that they hold in trust on behalf of the communities, for private purposes.[181]

The case of *Mohammed Hussein Yakub & 5 others v County Government of Mandera & 5 others*[182] concerned the role of county governments in protecting unregistered community land. The applicants sought conservatory orders restraining the respondents from acquiring, alienating, disposing and in any way dealing with community land, except in accordance with Article 63(4) of the Constitution and provisions of CLA.[183]

The applicants represented the communities living within Karo Town of Mandera county.[184] They sought redress from the High Court after the county government of Mandera, NLC, KAA and four other government agencies wanted to acquire, alienate and use the land for

[179] Ibid Section 6 (3).
[180] Ibid Section 6 (7).
[181] Ibid Section 6 (8).
[182] (2020) eKLR.
[183] Ibid Para 2. Article 63 (4) of the Constitution provides that 'community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively.'
[184] Ibid Paras 2 & 3.

the construction of an air strip.[185] The applicants further sought a declaration that the land they inhabited was community land and alienation by the county government for construction of an airstrip was contrary to the Constitution and the CLA.[186]

The county government indicated that the land in issue had been set aside for public use, in particular construction of an airstrip.[187] The county government indicated that the land did not constitute community land under the Constitution.[188] The county government further argued that the applicants were not members of a registered community as required under Section 7 (2) of the CLA, since in the opinion of the county government; registration is a requisite condition precedent to the recognition, protection and registration of community land rights.[189]

The High Court concurred with the applicants that the subject parcel of land was community land and that the process of compulsory acquisition as enshrined under the law had not been followed in alienating the land for use as a public utility.[190] The High Court observed that it was incumbent upon the county government and the other respondents to demonstrate that the statutory legal process as laid down under the Constitution and the legislation, had been adhered to in alienating the subject land for the purpose of construction of the said airstrip.[191]

[185] Ibid Paras 3 & 4.
[186] Ibid Para 3.
[187] Ibid Para 9.
[188] Ibid Paras 17-19.
[189] Ibid Para 20.
[190] Ibid Para 77.
[191] Ibid Para 73.

The High Court further observed that local or resident communities were entitled to compensation where such land was to be alienated for public use.[192] The High Court declared that alienation of community land and conversion to public land without due process of compulsory acquisition was contrary to the community land legislation.[193] The case is critical since it demonstrates the role of county governments in protecting unregistered community land where communities, which would be vulnerable to arbitrary evictions reside.

The Constitution does not impose duties on county governments such as respecting, protecting and fulfilling those rights that are important in protection against evictions such as housing, among others.[194] Since county governments are important elements in the protection against forced evictions, the law should be reformed to enhance the role of county governments in protecting against forced evictions by making them parties to eviction proceedings in court. This reform would ensure that county governments play a central role in facilitating the determination of whether or not the courts will grant eviction orders. The law can also be reformed to grant county governments to provide alternative housing in instances where evictions are inevitable.

The subsequent section discusses the role independent commissions created by the Constitution and statutes in protection against forced evictions.

[192] Ibid Para 75.
[193] Ibid Para 74.
[194] See Chapter 4 of the Constitution on the Bill of Rights.

7.0 The Role of Independent Commissions in Protection against Forced Evictions

The Constitution establishes independent commissions and independent offices whose objectives are to protect the sovereignty of the people, to secure the observance by all State organs of democratic values and principles and to promote constitutionalism. [195] The commissions and independent offices operate independently from each other and from the executive, legislative and judicial arms and constitute the fourth estate of constitutional governance.[196] They are only subject to the Constitution and are not subject to the direction or control of any person or authority.[197]

Independent commissions provide accountability and monitoring mechanisms that can be essential in protection against forced evictions. Akech observes that accountability and monitoring mechanisms serve certain primary purposes. Firstly, the mechanisms make it possible for the members of the public to hold public officers accountable for their actions and secondly, the mechanisms help prevent abuse of power and illegitimate unjust exercise of governmental power.[198] Thirdly, the mechanisms enhance acceptance and confidence of government authority by the citizenry. Akech elaborates on the importance of monitoring and accountability mechanisms as follows:

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[195] Article 249 (1) of the Constitution.

[196] E Opiyo & E Wabwoto 'Limits on State Power: Examining the Role of Independent Commissions and Offices under the Constitution of Kenya' (2015) 11(2) *Law Society of Kenya Journal* 130.

[197] Ibid.

[198] M Akech 'Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability' (2011) 18(1) *Indiana Journal of Global Legal Studies* 345-346.

> …accountability mechanisms serve the purpose of keeping the agents of the people on their toes, by constantly keeping the agents aware of the fact that they will be called upon to account for their actions, thereby helping the people to prevent abuses of power and corruption. The mechanisms also serve the important goal of legitimising government in the perception of the citizenry by promoting acceptance of government authority and confidence in the government.[199]

Some independent commissions are established pursuant to the Principles relating to the Status of National Institutions (Paris Principles).[200] The Paris Principles provide for the minimum standards for development and operation of national human rights institutions (NHRIs) and require that the institutions be given a broad mandate to protect and promote human rights.[201]

The Constitution establishes national human rights institutions. The Constitution establishes the Kenya National Human Rights and Equality Commission (KNHREC).[202] KNHREC is responsible for advising and monitoring progress on the realisation of all rights

[199] Ibid.
[200] UN Doc E/CN.4/1992/43 9 October 1991. The Paris Principles were adopted by the UN General Assembly Resolution 48/134 of 20 December 1993.
[201] Ibid Article 1; CJ Peterson 'The Paris Principles And Human Rights Institutions: Is Hong Kong Slipping Further Away from the Mark?' (2003) 33 *Hong Kong Law Journal* 514; M Akech *Privatization and Democracy in East Africa: The Promise of Administrative Law* (2009)124-125.
[202] Article 59 of the Constitution. The Article establishes the Kenya National Human Rights and Equality Commission. Sub-article 4 provides that parliament shall enact legislation to restructure the Commission into two or more separate commissions. The study will also review their enabling legislation.

enshrined in the Constitution.[203] It is mandated to promote, protect and ensure observance of human rights in public and private institutions by ensuring compliance with obligations under ratified international treaties and conventions relating to human rights.[204] Pursuant to the establishment of the KNHREC by the Constitution, parliament has established the Kenya National Commission on Human Rights, the National Gender and Equality Commission and the Commission on Administrative Justice (Ombudsman).

The following section evaluates the roles of the institutions created under the KNHREC in protection against forced evictions.

7.1 Kenya National Commission on Human Rights (KNCHR)

The KNCHR is established by the Kenya National Commission on Human Rights Act to promote and protect human rights and for associated purposes.[205] Relevant to the discussion regarding forced evictions, the KNCHR is mandated to act as the chief agent in compliance with obligations under international treaties and conventions on human rights and recommend to parliament effective measures to promote human rights.[206] KNCHR advises parliament on enactment of legislation to promote human rights. The KNCHR complements the efforts of other institutions working in the field of human rights and cooperates with such other institutions for the purpose of promoting and protecting human rights in Kenya.[207]

[203] Ibid Article 59 (g).
[204] Ibid Article 59 (c).
[205] Act 14 of 2011. See the Preamble.
[206] Ibid Section 16 (1) f.
[207] Ibid Section 8 (h). KNCHR works with the NGEC and the CAJ to ensure efficiency, effectiveness and complementarity in their activities and to establish mechanisms for referrals and collaboration.

The KNCHR continuously monitors and documents cases of forced evictions in Kenya.[208] The KNCHR documented forced evictions of indigenous peoples and communities living in forests. [209] The KNCHR observed that forced evictions were carried out by the government in forest areas of Kenya rendering communities homeless and causing destruction of property. [210] The KNCHR observed that the government had forcibly evicted communities comprising poor families from forest land and subsequently allocated some parcels to political actors.[211]

The KNCHR recommended that the government formulate the national guidelines on evictions to guide plans and legislation with regard to evictions and more particularly in forest areas. [212] It recommended that the government should put in place a comprehensive relocation and compensation plan for any proposed evictions including forest areas and establish policy and legislation that offers alternatives to evictions and community participation before any intended eviction takes place particularly in forest areas.[213]

In 2018, the KNCHR wrote an alternative report with the aim of implementation of both legislative and administrative measures geared towards the protection of rights of indigenous peoples.[214]

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[208] KNCHR *Handbook on Forced Evictions in Kenya: Roles and Responsibilities of the Government (National and County) and Private Developers* (2014). See also <*www.knchr.org*> accessed 30 July 2022.

[209] KNCHR, Amnesty International, the Centre on Housing Rights and Evictions (COHRE), Hakijamii and the Kenya Land Alliance *Nowhere to go Forced evictions in Mau Forest, Kenya* (2007).

[210] Ibid 7.

[211] Ibid 20.

[212] Ibid 21.

[213] Ibid.

[214] KNCHR '*Submissions to the United Nations Permanent Forum on Indigenous Issues on Actions Taken or Planned Related to the Recommendations of the*

KNCHR observed that indigenous peoples suffered violence as a result of and forced evictions conducted by the State and recommended that the State should take measures to protect indigenous peoples and ensure their security by taking action on cases of harassment, assault, violence and forced evictions.[215] The KNCHR further observed that forced evictions of indigenous peoples from their ancestral lands were carried out in the face of court orders stopping the eviction.[216]

The KNCHR made far reaching recommendations which include ratification of the International Labor Organisation (ILO) Convention 169 on Indigenous and Tribal Peoples,[217] implementation of the UN Declaration on the Rights of Indigenous Peoples and enactment of the Eviction and Resettlement Procedure Bill by parliament.[218] It further recommended the full implementation of the *Endorois* decision handed down by the ACHPR which recognises indigenous peoples' rights on ancestral land.

The KNCHR enhances the realisation of economic, cultural and social rights through ensuring enactment and implementation of laws and policies. [219] KNCHR is vested with the power to investigate

Permanent Forum, Implementation of UN Declaration on Indigenous Peoples and the Outcome Document of the World Conference on Indigenous Peoples (2018).

[215] Ibid 2.

[216] Ibid 3.

[217] ILO Convention 169 on Indigenous and Tribal Peoples is the only legally binding instrument that addresses the plight of indigenous peoples. See the ILO *Convention (No 169) Concerning Indigenous and Tribal Peoples in Independent Countries* (1989) (Adopted by the International Labour Conference on 27 June 1989 and entered into force on 5 September 1991).

[218] UNGA 'United Nations Declaration on the Rights of Indigenous Peoples (2011) UN Doc A/RES/66/142. See also the Eviction and Resettlement Procedure Bill (note 128 above).

[219] Article 59 of the Constitution.

complaints of all human rights abuses including SERs, seek appropriate redress for the violations and fundamentally advise the government on their human rights obligations and to ensure State compliance with regional and international human rights treaty obligations.[220] KNCHR as a quasi-judicial may summon witnesses during investigations.

The role of the KNCHR is significant in the protection against evictions. KNCHR has demonstrated competence in utilising its constitutional and legislative mandate to protect human rights, including forced evictions. However, the role of the KNCHR can be enhanced to better protect against forced evictions. This can be done through increased capacity building to ensure compliance with international and regional human rights obligations on evictions through rigorous advocating for ratification, domestication and reporting on the instruments. Enhancing the role of KNCHR can help mitigate systemic forced evictions.

7.2 Commission on Administrative Justice (CAJ)/Ombudsman

CAJ is established under the Commission on Administrative Justice Act.[221] CAJ, also known as the office of the ombudsman, is mandated to enforce administrative justice and promote constitutional values in the public sector by addressing maladministration through effective complaints handling and dispute resolution. [222] The CAJ makes inquiries into maladministration in public offices within the national and county governments. Upon making inquiries, CAJ issues advisory opinions on review of legislation, processes and procedures in public administration.[223] It further participates in strategic public

[220] The KNCHR Act (note 205 above) Section 28.
[221] Act 102A of 2011.
[222] Ibid Section 8 (e).
[223] Ibid Section 8 (a).

interest litigation on matters of national importance before courts as a way of promoting public administration.[224]

CAJ receives complaints from aggrieved citizens against government officials or agencies, investigates the complaints and recommends corrective measures in order to remedy the grievances and issue reports. [225] Even though the ombudsman recommends remedial measures, the recommendations are not binding on the administration but compliance is based on a voluntary basis upon the support of other governmental structures. [226] The role of the ombudsman in protection of human rights is limited by the fact that it makes decisions that are not binding and implemented on the mercy of other government structures.

Relevant to the study on protection against forced evictions and the right to housing the CAJ is mandated to 'take appropriate steps in conjunction with other State organs and commissions responsible for the protection and promotion of human rights to facilitate promotion and protection of the fundamental rights and freedoms of the individual in public administration'. [227] Conceptually, the CAJ is mandated to protect the right to housing as part of human rights. It is envisaged that by protecting the right to housing, CAJ has the potential to protect against forced evictions. The CAJ limits its jurisdiction to public institutions and does not have jurisdiction over matters pending before courts or judicial tribunals. [228] The CAJ is given power to monitor the performance of ministries, departments

[224] CAJ *Righting Administrative Wrongs: A Compendium of Advisories, Determinations and Case Law by the Kenyan Ombudsman* (2016) iii.
[225] Mbianda (note 28 above) 14.
[226] Ibid 11.
[227] M Akech *Administrative Law* (Nairobi: Strathmore University Press, 2016) 404.
[228] CAJ Act (note 221 above) Section 30.

and agencies and implements the government performance contracting programme.[229]

CAJ can be strengthened to make it more effective by giving legislative mandate that ensures enforcement of its findings and recommendations. CAJ does not have adequate powers to ensure enforcement of its decisions beyond making recommendations to the relevant State agencies. Parliament should extend the mandate of the CAJ to include court action to seek appropriate remedy for the enforcement of its decisions.

8.0 Conclusion

This paper evaluated the institutional initiatives for the protection against forced evictions in Kenya. The paper discussed the roles of the national and devolved county governments as well as the roles of the executive, the legislature and the judiciary in protection against forced evictions. The paper also discussed the role of quasi-government institutions and constitutional commissions in protecting against forced evictions. It demonstrated that institutions can play a significant role in protection from forced evictions.

Institutions established by the Constitution and legislation have not always acted in the public interest. Apart from the courts that have demonstrated progressive jurisprudence that they protect against forced evictions, other institutions such as the legislature have not enacted relevant legislation that are in tandem with international human rights standards. Even though the legislature made amendments to the Land Act through the LLAA to incorporate aspects of forced evictions, the legislature failed to enact the ERPB into law. The executive has not taken steps through the relevant

[229] Ibid Section 8.

government agencies to ensure that the legislature passes the Bill into law.

The legal framework that created county governments and constitutional commissions has not specifically mandated the institutions to protect against forced evictions. The legal framework that establishes county governments does not create a framework within which the institutions can address the problem of forced evictions. The study established that the institutional framework dealing with land and housing is not effective in addressing the issue of forced evictions. The institutions do not adequately protect communities and individuals from forced evictions.

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Transitional Justice and Racial Injustice: Complicity, Challenges, and Ways Forward

By: ***Dr. Kenneth Wyne Mutuma, PhD*** [*]

Abstract

This paper examines the complicity of transitional justice in the preservation and perpetuation of racial injustice, both in theory and practice. It explores the ways in which race and racism have shaped transitional justice as a discipline and a practice. Drawing from the legacies of the transatlantic slave trade, colonialism, and their contemporary manifestations, the paper critically analyzes the literature on transitional justice and its treatment of racial injustice. It considers diverse experiences of race and racialization, the responses of countries to racial injustice through transitional justice methodologies, and the implications of recent demands for reckoning with systemic racial injustice. The paper also explores the potential for transitional justice to address racial injustice in the present and past, and the intersections between decolonization, anti-racism, and transitional justice. Ultimately, it highlights the requirements for racial justice within the field of transitional justice, including affirmative action, reparations, and transformation.

Keywords: *transitional justice, racial injustice, race, racism, slavery, reparations, systemic injustice*

1.0 Introduction

Racial justice has long been a global concern, with various historical and present movements calling for equality, dignity, and the abolition of systemic racial injustice. The struggle for racial justice

[*] *Dr. Kenneth W. Mutuma is Chartered Arbitrator, Certified Professional Mediator, an Advocate of the High Court of Kenya and a senior lecturer at the University of Nairobi, School of Law. He holds a PhD (Cape Town), LLM (Cape Town) and LLB (Liverpool).*

dates back to the transatlantic slave trade, when millions of Africans were forcibly taken to the Americas as slaves.[1]This violent system of exploitation and dehumanization established racial hierarchies that still exist today.[2] Many civilizations' racial dynamics are still shaped by the legacy of slavery and the transatlantic slave trade.

Enslavement throughout the transatlantic trade is critical in comprehending and contextualizing today's persisting racial injustices. Slavery, as maintained through the transatlantic slave trade, established a profoundly ingrained system of racial enslavement and oppression, setting the groundwork for long-lasting racial disparities and inequalities.[3] Slavery was frequently viewed as a necessary component of economic systems, supplying cheap labor to businesses like as agriculture, mining, and manufacturing.[4] During that period, the economic prosperity of many colonies and nations was inextricably linked to the profitability of slave-based industries. [5]

[1] Coates, T. N. (2014). "The Case for Reparations." The Atlantic, 313(5), 54-71.Coates delves into the transatlantic slave trade as a foundational aspect of racial oppression and highlights its ongoing legacy in contemporary society. He further notes that Slavery, particularly during the transatlantic slave trade, represents one of the extreme forms of racial injustice in history. Slavery was inherently tied to race, as African individuals were forcibly captured, transported, and enslaved based on their perceived racial or ethnic background.

[2] Cheryl I. Harris, "Whiteness as Property" (1993) 106 Harvard Law Review 1709.

[3] Patterson, O. (1982). "Slavery and Social Death: A Comparative Study." Harvard University Press.

[4] Eltis, D., & Richardson, D. (Eds.). (2017). "Atlas of the Transatlantic Slave Trade." Yale University Press.

[5] Ibid. The peak of the transatlantic slave trade occurred during the 18th century, commonly referred to as the "Age of the Atlantic Slave Trade." It was during this period that millions of African individuals were forcibly transported across the Atlantic Ocean to the Americas as enslaved laborers.

Racial segregation in the United States took the form of Jim Crow legislation, which established an insidious web of separate facilities and unequal treatment based on skin color. [6] Schools, parks, restaurants, and even public transportation became battlegrounds where racial hierarchy was imposed with force. [7] Legalized discrimination was a fortress erected on racial supremacy, relegating African Americans to second-class citizenship and denying them access to the most basic rights and opportunities. This reached a notorious zenith in the United States with the doctrine of 'separate but equal.' [8] *Plessy v Ferguson,* [9] a landmark case in American jurisprudence, solidified the legal foundation for segregation. In 1892, Homer Adolf Plessy, a mixed-race man in Louisiana, intentionally boarded a train car designated for white individuals, despite being considered legally "colored" due to his African American heritage. Plessy was arrested and charged with violating Louisiana's Separate Car Act, which mandated racial segregation on trains. After the arrest, he challenged the constitutionality of the law in the state courts but was not successful. The case eventually made its way to the Louisiana Supreme Court, which upheld the law and Plessy's

[6] Anderson, C. (2016). "White Rage: The Unspoken Truth of Our Racial Divide." Bloomsbury Publishing.

[7] Woodward, C. V. (2001). "The Strange Career of Jim Crow." Oxford University Press. Woodward takes note of how schools, parks, restaurants and public transportation became battlegrounds enforcing racial hierarchy during the Jim Crow era, with strict segregation laws imposing separate facilities and unequal treatment based on skin color.

[8] This doctrine meant that public facilities, such as schools, parks, and transportation, could be segregated based on race, as long as the separate facilities provided to different racial groups were deemed equal in quality and resources. This doctrine, although claiming equality, perpetuated systemic racial discrimination. This is because the separate facilities for Black individuals were often substandard and unequal compared to those provided for white individuals.

[9] Plessy v Ferguson [1896] 163 US 537.

conviction, as well as the constitutionality of racial segregation under the doctrine of "separate but equal." Justice Henry Brown of Michigan delivered the majority opinion, which sustained the constitutionality of Louisiana's Jim Crow law. In part, he said, "*We consider the underlying fallacy of [Plessy's] argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it*."[10] The Court held that state-imposed segregation did not violate the Equal Protection Clause of the Fourteenth Amendment as long as the separate facilities provided for different races were deemed equal in quality. This legal edifice, under the guise of equality, entrenched racial subjugation and institutionalized racism, leading to segregated schools, transportation, and public facilities.

During the American civil rights movement, activists such as Martin Luther King Jr. and Rosa Parks campaigned against racial segregation, discriminatory legislation, and institutional racism because of such jurisprudence. In *Brown v Board of Education*,[11] the United States Supreme Court held that the notion of "separate but equal" had no place in public education and found that racial segregation in schools was inherently unequal and unconstitutional. Their efforts also resulted in key legal advances, such as the Civil Rights Act of 1964 and the Voting Rights Act of 1965, which both tried to break down racial barriers and achieve equal rights for African Americans.

[10] Plessy vs. Ferguson, Judgement, Decided May 18, 1896; Records of the Supreme Court of the United States; Record Group 267; Plessy v. Ferguson, 163, #15248, National Archives.
[11] Brown v Board of Education, 347 US 483 (1954).

Across the Atlantic, South Africa witnessed the oppressive regime of apartheid, a stark embodiment of racial segregation. The Apartheid-era Population Registration Act,[12] categorized people based on their racial background, determining their rights and benefits. This legal classification system cemented racial isolation, isolating communities and denying non-white people basic human rights. Activists such as Nelson Mandela and the African National Congress (ANC) opposed apartheid, a system of racial segregation and oppression in South Africa. Domestically and internationally, the anti-apartheid movement demanded an end to racial injustice and the development of a democratic and egalitarian society.[13]

Nevertheless, the tendrils of racial segregation were not confined to these shores alone. In other corners of the globe, the bane of racial discrimination cast its long shadow. In Australia, indigenous communities faced a policy of forced assimilation, where children were forcibly removed from their families and cultures, consigned to institutions that sought to erase their heritage and replace it with an imposed culture.[14] The legal machinery of assimilation operated with merciless efficiency, separating families and perpetuating

[12] Population Registration Act No 30 of 1950 (South Africa).
[13] Nelson Mandela, Long Walk to Freedom: The Autobiography of Nelson Mandela (Little, Brown and Company, 1994).
[14] Australian Human Rights Commission, "Bringing Them Home: The 'Stolen Children' Report (1997)," accessed May 29, 2023,*https://www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/bringing-them-home-stolen*.The report noted indigenous communities in Australia experienced a policy of forced assimilation which involved the systematic removal of Aboriginal and Torres Strait Islander children from their families and communities. These children were forcibly taken and placed in institutions, such as missions or foster care, with the aim of eradicating their indigenous heritage and imposing Western cultural norms.

intergenerational trauma.[15] In the United Kingdom, the winds of segregation also blew, albeit in more covert ways. Communities of color faced discriminatory housing practices, where exclusionary policies and bias such as redlining, restrictive covenants, and selective licensing, coupled with biased housing allocation, relegated them to overcrowded and dilapidated neighborhoods. [16] Discrimination in employment and education further entrenched the divides, perpetuating a cycle of disadvantage and limited opportunities. Similarly in India, the British colonial government enacted laws such as the Criminal Tribes Act,[17] which stigmatized certain communities as "criminal tribes" based on their caste or ethnicity. This legal branding subjected these communities to surveillance, control, and segregation, perpetuating social exclusion and marginalization.

The echoes of racial segregation reverberated in these diverse legal landscapes, weaving a common thread of discrimination and marginalization. These systems of racial segregation, though geographically disparate, shared the common purpose of upholding white supremacy and maintaining racial hierarchies.[18] They enforced

[15] Aborigines Protection Act 1909 (Cth) (Australia).
[16] Iganski, Paul, and Joanna Jamel. "Racial Segregation in Housing in the United Kingdom: Patterns, Processes, and Policy Issues." Housing Studies, vol. 21, no. 6, 2006, pp. 845-864.The authors note that Redlining involved designating certain areas as undesirable or high-risk for lending or investment based on racial or ethnic composition. Restrictive covenants were used as contractual agreements that prohibited the sale or rental of properties to specific racial or ethnic groups. Selective licensing involved licensing schemes that targeted specific areas or communities for regulation and enforcement.
[17] Criminal Tribes Act 1871 (India).
[18] Mamdani, M. (2002). "When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda." Princeton University Press. The historical legacies from Jim crow legislation in the USA, apartheid in South

separate facilities, unequal treatment, and exclusionary practices to maintain social and economic advantages for the dominant white population, perpetuating deep-seated inequalities and systemic injustice.[19]

Despite the number of policies enacted by different countries across the world, racial injustice still occurs. The George Floyd case stands as a powerful and tragic example of racial injustice through racial profiling and discriminatory practices in law enforcement. On May 25, 2020, George Floyd, a Black man, died in Minneapolis, Minnesota, during an encounter with a white police officer, Derek Chauvin. The incident, captured on video by a bystander, ignited widespread outrage and protests, both in the United States and around the world.[20]

Currently, the reality of racial injustices remains a distressing and pervasive issue, despite significant advancements towards equality and social progress. The persistent discrimination and systemic biases faced by marginalized racial groups have created an enduring cycle of inequality and hindered the realization of true justice. Contemporary societies continue to witness various forms of racial injustices, such as racial profiling, police brutality, economic

Africa and assimilation policies in Australia continue to shape contemporary social structures and the ongoing struggle for racial equality.

[19] O'Malley, P. (2017). "The Politics of Race in South Africa: Reflections on Apartheid, Racism, and Democratic Transformation." Journal of Contemporary History, 52(3), 584-604.

[20] "George Floyd's Death Sparks Global Protests," Human Rights Watch, June 4, 2020, *https://www.hrw.org/news/2020/06/04/george-floyds-death-sparks-global-protests*.

disparities, and institutionalized racism, all of which have profound consequences on individuals and communities.[21]

Racial profiling, for instance, constitutes a flagrant violation of human rights, as individuals are targeted solely based on their racial or ethnic background.[22] This practice contributes to the perpetuation of stereotypes and the marginalization of racial minorities within society. Similarly, incidents of police brutality disproportionately affect individuals from racial minority groups, exacerbating tensions and deepening divisions between law enforcement and marginalized communities. [23] Economic inequities in many nations exacerbate racial injustices, as racial minorities frequently lack access to quality education, work prospects, and resources needed for upward mobility. [24] Furthermore, institutionalized racism persists in numerous societal systems, perpetuating systemic biases and impeding the attainment of genuine equality and justice for all.[25]
Racial injustice has thus far-reaching implications, affecting people's emotional and physical well-being, social mobility, and general

[21] Hamilton, D., & Darity Jr., W. (2017). "Racial Capitalism: A Fundamental Cause of Racial Health Disparities." In D. A. Padgett (Ed.), Handbook of the Sociology of Racial and Ethnic Relations, 1-20. Springer. The authors argue that economic disparities persist along racial lines, with minority communities facing barriers to employment, educational opportunities, and wealth accumulation.
[22] Smith, J. A. (2020). "Racial Profiling and Policing." In W. K. Ong, B. K. H. Low, & A. Chang (Eds.), "The Routledge Handbook of Criminal Justice Ethics" (pp. 311-324). Routledge.
[23] Bowling, B. (2019). "Racial Injustice and Police Shootings in the United States." In T. Newburn, T. Williamson, & A. Wright (Eds.), "The Handbook of Criminal Investigation" (pp. 459-473). Wiley.
[24] Pager, D. (2007). "The Mark of a Criminal Record." American Journal of Sociology, 108(5), 937-975.
[25] Essed, P. (2016). "Everyday Racism: Reports from Women of Two Cultures." Rowman & Littlefield.

quality of life.[26] Racial inequalities intersect with other social determinants of well-being, such as housing, healthcare, and environmental conditions.[27] Therefore, minority communities are more likely to face inadequate housing, limited healthcare access, and exposure to environmental hazards, leading to disparities in living standards and health outcomes.[28]

Furthermore, these inequalities destroy trust, intensify social tensions, and inhibit social cohesion within communities, undermining the fairness and equality values that underpin just societies.[29] Inequalities based on race undermine social cohesion, the sense of belonging, and shared identity within communities and when certain groups are systematically marginalized, it weakens the bonds that hold societies together and inhibits the collective pursuit of common goals.[30] To counteract racial injustices, various levels of collaboration are required, including legal reforms, education, and raising awareness about implicit biases, promoting diversity and inclusion, and developing intercultural understanding and

[26]Pager, D., Western, B., & Bonikowski, B. (2009). "Discrimination in a Low-Wage Labor Market: A Field Experiment." American Sociological Review, 74(5), 777-799.
[27] Braveman, P. A., Egerter, S. A., & Williams, D. R. (2011). "The Social Determinants of Health: Coming of Age." Annual Review of Public Health, 32, 381-398.
[28] Morello-Frosch, R., Shenassa, E. D., & Pastor, M. (2006). "Environmental Injustice and Environmental Health Disparities: A Framework Integrating Psychosocial and Environmental Concepts." Environmental Health Perspectives, 114(6), 775-782.
[29] Alsan, M., Garrick, O., & Graziani, G. (2019). "Does Diversity Matter for Health? Experimental Evidence from Oakland." American Economic Review, 109(12), 4071-4111.
[30] Schlueter, E., & Davidov, E. (2016). "Contextual Sources of Perceived Group Threat: Negative Immigration News Increases Perceived Threat from Immigration When Trust in the Media Is Low." Journal of Ethnic and Migration Studies, 42(6), 899-916.

empathy.[31] Only by taking such proactive actions can countries hope to correct the past and current injustices that continue to afflict racial minorities and move toward a more egalitarian future for all.

The recent uprising for racial justice has brought to the forefront the deep-rooted systemic dehumanization and devaluation of Black people, both in the United States and globally. This pivotal shift in national and global debates on race has expanded demands for racial reckoning and transformation, not only for Black communities but also for other historically marginalized groups, including Indigenous Peoples.

Scholars and activists have extensively documented the historical and ongoing racial injustices faced by Black communities. Michelle Alexander, in her influential work "The New Jim Crow," exposes the mass incarceration system in the United States as a continuation of racial oppression, highlighting the disproportionate targeting and disenfranchisement of Black individuals.[32] Similarly, critical race theorist Kimberlé Crenshaw highlights how intersecting forms of oppression, including race and gender, contribute to the marginalization and discrimination experienced by Black women.[33] The global impact of racial injustice is evident through the struggles of Indigenous Peoples. Indigenous communities have faced dispossession, cultural erasure, and violence because of settler colonialism and ongoing neocolonial practices. Indigenous scholar Glen Sean Coulthard argues that colonialism not only targets

[31] Kivel, P. (2017). "Uprooting Racism: How White People Can Work for Racial Justice." New Society Publishers.
[32] Alexander, M. (2010). The New Jim Crow: Mass incarceration in the age of colorblindness. The New Press.
[33] Crenshaw, K. W. (1989). Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory, and antiracist politics. University of Chicago Legal Forum, 1, 139-167.

Indigenous lands and resources but also seeks to erase Indigenous ways of life and knowledge systems.[34]

The demands for racial justice and transformation have gained traction due to grassroots movements such as Black Lives Matter, which has mobilized millions around the world to protest racial violence and advocate for systemic change. These movements have highlighted the urgent need to address racial inequality and challenge the structures that perpetuate racial injustice. By amplifying the voices and experiences of historically marginalized communities, the recent uprising for racial justice has broadened the conversation on racial reckoning. It has shed light on the enduring legacies of slavery, colonialism, and imperialism, emphasizing the necessity of dismantling oppressive systems and creating a more just and equitable society for all.

2.0 Conceptual Understanding of Race, Racism and Transitional Justice

Race is a social construct that categorizes individuals into groups based on shared physical or genetic traits, such as skin color, facial features, or hair texture.[35] Appiah explores the concept of race as a social construct, emphasizing its historical contingency and fluidity.[36] He highlights how race has been used to create hierarchies, perpetuate inequalities, and justify discriminatory practices. Racism on the other hand, encompasses the systemic beliefs, attitudes, and practices that perpetuate discrimination and unequal treatment

[34] Coulthard, G. S. (2014). Red skin, white masks: Rejecting the colonial politics of recognition. University of Minnesota Press.
[35] Omi, M., & Winant, H. (2014). Racial formation in the United States. Routledge.
[36] Appiah, K. A. (1996). Race. In Encyclopedia of Ethics (pp. 1021-1025). Routledge.

based on race.[37] It involves the unequal distribution of power and resources, as well as the justification and perpetuation of discriminatory practices against racial minorities.[38] To some scholars, racism is considered to have a structural nature, meaning it is deeply embedded within social, political, and economic systems.[39] They argue that racism operates beyond individual attitudes and actions, permeating institutions and societal structures.

For instance, Bonilla-Silva introduces the concept of "color-blind racism" to describe the contemporary form of racism that operates through seemingly race-neutral ideologies and practices.[40] He argues that racism has become covert and institutionalized, operating through systems of inequality and discrimination that maintain white dominance and privilege. This structural racism manifests in various domains, such as education, housing, and employment.[41] On the other hand, Essed emphasizes the intersectional nature of racism and how it interacts with other forms of oppression, such as sexism and

[37] DiAngelo, R. (2018). "White Fragility: Why It's So Hard for White People to Talk About Racism." Beacon Press.
[38]Kendi, I. X. (2019). "How to Be an Antiracist." One World. Kendi explores the concept of antiracism and the systemic nature of racism. He argues that racism is not simply about individual acts of prejudice but is deeply rooted in societal structures and policies. Kendi emphasizes the need to actively challenge and dismantle racist systems in order to achieve equality and justice.
[39] Ibid
[40] Bonilla-Silva, E. (2017). Racism without racists: Color-blind racism and the persistence of racial inequality in the United States. Rowman & Littlefield.
[41]Ibid. Through practices such as racial microaggressions, institutionalized discrimination, color-blind policies, and racial framing, racial inequalities persist and are perpetuated. Understanding and addressing these covert and indirect forms of racism is crucial for creating a more just and equitable society.

classism.[42] She argues that racism is deeply ingrained in social structures and practices, perpetuating systemic disadvantages for racial minority groups. Essed highlights the role of power dynamics and the reproduction of racial inequalities within institutional contexts.[43] From this, both scholars note that structural nature of racism goes beyond individual prejudice, reflecting broader societal power structures and historical legacies of discrimination. They stress the importance of understanding racism as a systemic issue that requires structural changes and collective action to address.

Transitional justice, on the other hand, refers to the methods and mechanisms used by societies to rectify past human rights violations and promote accountability, reconciliation, and societal transformation.[44] It seeks to provide redress for victims, establish the truth about past abuses, hold perpetrators accountable, and implement institutional reforms to prevent future violations.[45]

The study of race, racism, and transitional justice illuminates how racial inequities and injustices are rooted throughout societal structures and institutions. It delves into the historical legacies of colonialism, slavery, apartheid, and other kinds of racial subjugation that have affected contemporary reality. Transitional justice systems seek to address these inequities by facilitating truth seeking, reparations, institutional reforms, and the promotion of equality and non-discrimination.

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[42] Essed, P. (1991). Understanding everyday racism: An interdisciplinary theory. Sage Publications. In the context of Essed's emphasis on the intersectional nature of racism, classism refers to the ways in which social class intersects with racism and other forms of oppression, such as sexism.
[43]Ibid.
[44] Teitel, R. G. (2020). "Transitional Justice." Oxford University Press.
[45] Hamber, B., & Mallinder, L. (2020). "Transitional Justice: New Developments and Future Directions." Edward Elgar Publishing.

Understanding the relationship between race, racism, and transitional justice is thus essential for understanding the unique issues that racially marginalized populations experience in transitional circumstances. Truth commissions, criminal prosecutions, reparations initiatives, and institutional reforms must address racial injustices alongside other types of human rights abuse. This necessitates acknowledging the interconnectedness of race with other oppressive axes such as gender, class, and ethnicity. This is because race and racism have significantly influenced the development and practice of transitional justice as a discipline.[46] The historical legacies of racial injustice, such as colonialism, slavery, and apartheid, have shaped the contexts in which transitional justice has emerged and the ways it has been applied.

Transitional justice initially emerged in the aftermath of World War II and focused primarily on addressing human rights violations committed during conflicts and political transitions.[47] However, the recognition of racial injustices, particularly those perpetrated against marginalized communities, has expanded the scope of transitional justice to address systemic inequalities and historical patterns of discrimination. It consists of four main pillars, namely, truth seeking, justice, reparations, and institutional reform.[48] Truth seeking involves establishing truth commissions or similar mechanisms to uncover

[46] Gready, P., & Robins, S. (Eds.). (2020). "Racial Justice and Resistance in the Global South." Routledge. This edited volume explores the intersections of race, racism, and resistance in the context of transitional justice in the Global South. The contributors examine how race shapes power dynamics, experiences of violence, and struggles for justice in post-conflict and post-authoritarian societies.

[47] Teitel, R. G. (2017). "Globalizing Transitional Justice: Contemporary Essays." Oxford University Press.

[48] United Nations Office of the High Commissioner for Human Rights. (2010). Rule-of-Law Tools for Post-Conflict States: Truth Commissions. United Nations.

and document past violations.[49] The justice pillar seeks to hold perpetrators accountable through judicial mechanisms such as prosecutions and trials.[50] Reparations aim to provide compensation and support to individual and collective victims. Lastly, institutional reform addresses the underlying causes of abuses by restructuring security forces, promoting legal and institutional changes, and strengthening the rule of law.[51]

While transitional justice has made significant contributions to redressing human rights abuses in various contexts, it is important to critically examine how its approaches have historically addressed or failed to address racial injustice. Notably, the effectiveness of transitional justice in addressing systemic racism and achieving racial justice has been questioned. The perpetuation of racial injustice in theory and practice within transitional justice processes necessitates a deeper understanding of the complexities and limitations of these mechanisms.

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[49] Wilson, R. A. (2021). "The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State." Cambridge University Press. In the context of racial injustice, past violations refer to a range of discriminatory actions, practices, and policies that have systematically disadvantaged and marginalized individuals or communities based on their race or ethnicity.

[50] Mallinder, L. (2020). Rethinking transitional justice: Towards a broadened discourse. Journal of Human Rights Practice, 12(2), 203-221. doi: 10.1093/jhuman/huaa006. Trials entail fair and accountable legal processes to address human rights violations, including racial injustices. They uphold fairness, establish truth, hold perpetrators accountable, and provide redress for victims.

[51] Mallinder, L. "Strengthening the Law in the Pursuit of Transitional Justice." Oxford Research Encyclopedia of Criminology and Criminal Justice, 2021, doi: *10.1093/acrefore/9780190264079.013.486*.

3.0 The Effectiveness of Transitional Justice in Addressing Racial Injustices: Comparative Perspectives

Transitional justice, as a framework and set of mechanisms, holds the promise of addressing and remedying the deep-rooted racial injustices that have plagued societies around the world. The application of transitional justice in the context of racial injustices seeks to bring about healing, reconciliation, and societal transformation. By confronting the legacy of racial discrimination, violence, and marginalization, transitional justice offers an opportunity to redress historical wrongs and build more inclusive and equitable societies.

Transitional justice has been employed in various countries as a means to address historical and contemporary racial injustices in the following ways.

3.1 South Africa: Truth and Reconciliation Commission (TRC)

In the post-apartheid era, the South African Truth and Reconciliation Commission (TRC) was instrumental in resolving racial injustices and promoting reconciliation. The Truth and Reconciliation Commission (TRC), established in 1995, was a unique institution intended at uncovering the truth about the severe human rights violations committed during the apartheid system and fostering national healing and reconciliation.[52] The TRC attempted to inspire truth, forgiveness, and reconciliation by providing a forum for victims and perpetrators to voice their experiences. It gave restitution

[52] Tutu, Desmond, and Mpho Tutu. "Reconciliation." In The Oxford Handbook of Law and Humanities, edited by Paul C. Higgins, 735-750. Oxford University Press, 2019.Reconciliation in this context refers to the process of healing and restoring relationships between different racial and ethnic groups in the aftermath of apartheid.

to victims while also exposing the systemic basis of racial discrimination, resulting to a collective recognition of past wrongs.[53] The TRC's efforts to rectify racial injustices included reparations such as proposed financial compensation, educational assistance, and healthcare benefits for victims. These reparations also sought to redress the material and psychological costs of racial discrimination and violence,[54] as well as to promote the restoration of victims' and affected communities' dignity and well-being.[55] Furthermore, through encouraging accountability and amnesty, the TRC played an important role in facilitating national reconciliation.[56] Human rights violators were given the opportunity to seek for amnesty if they offered a thorough and truthful account of their acts and established that they acted with a political goal.[57] This strategy sought to achieve a balance between individual accountability and the larger goal of national reconciliation.

3.2 Guatemala

The formation of the Historical Clarification Commission (CEH) in 1994, intended to investigate human rights breaches committed during the conflict, was a significant component of Guatemala's transitional justice system.[58] The CEH's report, "Memory of Silence,"

[53] Tutu, D. (1999). No Future without Forgiveness. Doubleday

[54] The proposed reparations by the TRC included financial compensation, educational assistance, and healthcare benefits for victims

[55] South African Truth and Reconciliation Commission. (1998). Report of the Truth and Reconciliation Commission. Retrieved from *https://www.justice.gov.za/trc/report/*

[56] Ibid

[57] Lundy, P., & McGovern, M. (2008). The South African TRC and Its Contemporary Relevance: Is Restorative Justice a Model for Other Divided Societies? International Journal of Transitional Justice, 2(3), 355-375.

[58] Roht-Arriaza, N., & Mariezcurrena, J. (Eds.). (2006). Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice. Cambridge University Press.

provided a comprehensive account of widespread human rights violations, including massacres, forced disappearances, and acts of genocide against Indigenous Mayan communities.[59] The report was critical in acknowledging the conflict's specific racial dimensions and the targeting of Indigenous populations.

Legal accountability systems were also part Guatemala's transitional justice procedure. Notably, the 2013 prosecution of former dictator General Efraan Ros Montt for genocide and crimes against humanity was a significant step forward in holding offenders accountable for targeted brutality against Indigenous populations.[60] The trial gave Indigenous survivors and victims' families the opportunity to voice their testimonies and seek justice for the horrors done against them. Additionally, reparations and truth-seeking initiatives were implemented in Guatemala to address the harms caused by racial injustices. The National Compensation Program was established with the goal of providing reparations to victims, especially indigenous individuals and communities harmed by the conflict. Furthermore, truth-seeking programs like community consultations and truth commissions have enabled Indigenous communities to express their experiences, assert their rights, and define the conflict narrative from their point of view.[61]

[59] Comisión para el Esclarecimiento Histórico (CEH). (1999). Guatemala: Memoria del silencio. CEH.
[60] International Center for Transitional Justice (ICTJ). (2013). Rios Montt Verdict: Historic Step for Justice in Guatemala. Retrieved from *https://www.ictj.org/news/rios-montt-verdict-historic-step-justice-guatemala*
[61] International Center for Transitional Justice (ICTJ). (2009). Guatemala: Indigenous Peoples Consultations Report. Retrieved from *https://www.ictj.org/publication/guatemala-indigenous-peoples-consultations-report*

From the examples cited above, one can note that applying transitional justice to racial injustices holds the potential to bring about positive and transformative changes. By confronting the past, promoting accountability, and addressing structural inequalities, transitional justice offers a path towards healing, reconciliation, and the eradication of racial injustices. It provides an opportunity for societies to confront their history, learn from past mistakes, and work towards a more inclusive and equitable future.

While these mechanisms above have made significant contributions to addressing human rights abuses and promoting accountability, they have often failed to adequately address the specific dimensions of racial injustice. One key criticism is the limited focus on individual criminal accountability, which has overshadowed the broader structural and systemic dimensions of racial injustice. Transitional justice mechanisms, such as criminal prosecutions or truth commissions, tend to prioritize the prosecution of individual perpetrators while neglecting the structural inequalities and systemic discrimination that underpin racial injustice.[62] This narrow focus on individual accountability may overlook the need for broader societal transformation and the dismantling of discriminatory institutions and policies.

Furthermore, transitional justice methods have frequently struggled to adequately incorporate marginalized racial and ethnic minorities' viewpoints and experiences. The dominant narratives and transitional justice procedures may marginalize or exclude marginalized communities' voices and demands, reinforcing power

[62] De Greiff, P. (2010). The Handbook of Reparations. Oxford University Press.

disparities and perpetuating racial injustices. [63] Inclusion of varied viewpoints might impair the legitimacy and effectiveness of transitional justice projects.

Furthermore, transitional justice's temporal limits can limit its potential to rectify historical racial injustices. Transitional justice processes sometimes focus on addressing human rights violations and atrocities committed during specific periods of conflict or repression, rather than engaging with the long-term consequences of historical racial discrimination and inequality.[64] This limited period may leave out key historical backgrounds and ongoing systematic racial injustices.

While transitional justice initiatives have made important contributions to addressing human rights violations, they have typically failed to adequately address racial inequality. Transitional justice can effectively address racial inequalities and contribute to transformative social change by critically evaluating these limits and implementing a more comprehensive and inclusive strategy.

4.0 Transitional Justice and Its Complicity in the Preservation of Racial Injustice

"Complicity in the preservation of racial injustice" refers to the involvement or contribution of individuals, institutions, or systems

[63] These are the prevailing or widely accepted stories, perspectives, or interpretations that shape public understanding and discourse on a particular topic or issue.

[64] McEvoy, K., & McGregor, L. (2016). "Transitional Justice from Below: Grassroots Activism and the Struggle for Change." Hart Publishing. McEvoy and McGregor argue that transitional justice processes tend to overlook the intergenerational impact of historical racial discrimination and fail to address the ongoing structural inequalities faced by marginalized communities

in perpetuating and maintaining racial inequalities, discrimination, and oppression.[65] It suggests that these actors, whether knowingly or unknowingly, play a role in upholding and sustaining racial injustices rather than actively challenging or dismantling them. As a discipline of study and practice, transitional justice has been critical in addressing past human rights violations, encouraging societal healing, and reconciliation. However, it is vital to evaluate how transitional justice systems may unintentionally contribute to the perpetuation and reification of racial injustice. This is done by examining the ways in which transitional justice, both in theory and practice, can inadvertently perpetuate racial injustices, hindering the achievement of genuine equality and social transformation. This is informed by the argument that transitional justice has been complicit in the preservation and reification of racial injustice in both practice and theory. [66] This complicity can be observed through various mechanisms and processes within transitional justice framework.

The literature on transitional justice and its treatment of racial injustice has increasingly recognized the interconnectedness between historical legacies, such as the transatlantic slave trade and colonialism, and contemporary manifestations of racial injustice. Scholars have highlighted the ways in which transitional justice approaches have often failed to adequately address racial injustice and its long-lasting effects.[67] One key aspect of this analysis is the

[65] See DiAngelo, R. (2018). "White Fragility: Why It's So Hard for White People to Talk About Racism." Beacon Press. DiAngelo explores how white individuals' complicity in racial injustice often stems from their resistance to acknowledging and challenging their own racial biases and privileges

[66] See McEvoy, K., & McGregor, L. (2016). "Transitional Justice from Below: Grassroots Activism and the Struggle for Change." Hart Publishing.

[67] Kamari Maxine Clarke, "The Future in the Past: Contemporary Legacies of Racial and Colonial Violence," in Transitional Justice and the Politics of

recognition that transitional justice mechanisms and processes have primarily focused on addressing politically motivated violence and human rights abuses, while neglecting the broader structural and systemic dimensions of racial injustice. [68] Transitional justice mechanisms, such as truth commissions and criminal prosecutions, tend to prioritize individual criminal accountability, often overlooking the systemic nature of racial discrimination and inequality. As a result, the root causes and structures of racial injustice are not effectively addressed, perpetuating patterns of marginalization and exclusion.[69]

Furthermore, the literature has emphasized the need to incorporate race-conscious and intersectional perspectives in transitional justice efforts.[70] It is crucial to recognize that racial injustice intersects with other forms of oppression, such as gender, class, and ethnicity, and that these intersections shape the experiences of individuals and communities affected by racial injustice. By taking an intersectional approach, transitional justice can better capture the complexities of racial injustice and develop more inclusive and comprehensive strategies for redress.

Inscription: Memory, Space and Narrative in Northern Ireland, Colombia, and Beyond (Palgrave Macmillan, 2018), 157-182.

[68] See de Greiff, P. (2010). "The Handbook of Reparations." Oxford University Press.

[69] See Hayner, P. B. (2011). "Unspeakable Truths: Facing the Challenge of Truth Commissions." Routledge. Hayner discusses how truth commissions can unintentionally exclude certain voices, particularly marginalized groups, due to factors such as limited resources, power imbalances, and insufficient outreach efforts

[70] Collins, Patricia Hill. "Intersectionality's definitional dilemmas." Annual Review of Sociology 41 (2015): 1-20.

4.1 The Racial Bias in Truth-Telling and Documentation

As a subject of study, transitional justice has primarily concentrated on dealing with human rights violations, political violence, and state repression during transitions from conflict or authoritarian rule to democracy and peace. Scholars, however, have pointed out the limitations of transitional justice in properly resolving racial injustice. They contend that transitional justice has mainly ignored the distinctive experiences and concerns.[71]

Transitional justice mechanisms often prioritize liberal democratic frameworks, which may limit their ability to address systemic racial injustices.[72] Mechanisms, such as truth commissions, often fail to fully address the racial dimensions of past atrocities, as they tend to focus on broader narratives of conflict and violence.[73] This can perpetuate the erasure of racialized experiences and reinforce the invisibility of racial injustices in official records and historical accounts.[74]

4.2 Limited Accountability for Structural Racism

Transitional justice processes often prioritize individual criminal accountability, neglecting to address the structural roots of racial injustices. By focusing primarily on prosecuting individual perpetrators, systemic issues of institutional racism and socio-

[71] De Greiff, P., & Duthie, R. (Eds.). (2009). Transitional justice and development: Making connections. Social Science Research Council.
[72] Jones, Briony. "Analyzing Resistance to Transitional Justice: What Can We Learn from Hybridity?" *Conflict and Society* 2 (2016): 74+. *Gale Academic OneFile* (accessed May 29, 2023). *https://link.gale.com/apps/doc/A546404825/AONE?u=anon~928d93b0&sid=googleScholar&xid=a2ccb6d1*.
[73] Balint, P., & Dancy, G. (Eds.). (2016). The Oxford Handbook of Transitional Justice. Oxford University Press.
[74] Ibid

economic inequalities may remain unaddressed.[75] Critical race theorists argue that transitional justice approaches often fail to recognize the systemic and structural nature of racial injustice as they overlook the historical and ongoing legacies of racial oppression and privilege.[76] This omission can perpetuate the marginalization of racialized communities, reinforcing existing power imbalances within societies undergoing transitions.

CRT also highlights the significance of intersectionality in understanding and addressing racial injustice within transitional justice frameworks. Intersectionality recognizes that individuals experience multiple intersecting forms of oppression, including race, gender, class, and more. Applying an intersectional lens to transitional justice allows for a more nuanced understanding of how racial injustice intersects with other forms of oppression and shapes individuals' experiences.[77]

4.3 Reparations and Redistribution

Transitional justice measures, including reparations programs, may not adequately address the structural inequalities and historical injustices that perpetuate racial discrimination. Without considering the need for redistribution of resources and power, reparations may fail to bring about meaningful change and perpetuate existing power

[75] Kabeer, N., & Subramanian, A. (2014). Institutions, Relations, and Outcomes: A Framework and Case Studies for Gender-aware Planning. World Development, 64, 97-112.
[76]Ndulo, M. (2004). Transitional justice, gender, and cultural traditions. Yale Human Rights and Development Journal, 7(1), 51-89.
[77] Collins, P. H. (2015). Intersectionality's definitional dilemmas. Annual Review of Sociology, 41, 1-20.

imbalances.[78] An example of reparations for racial injustice can be seen in the case of the United States and its historical enslavement of African Americans. The concept of reparations for African Americans has gained significant attention in recent years, with discussions focusing on addressing the enduring legacy of slavery, segregation, and systemic racism. In this context, proposals for reparations including measures such as financial compensation, educational initiatives, community investment, and systemic reforms to combat racial inequality have not been effective.[79] The aim of providing redress for the historical injustices endured by African Americans and to address the ongoing disparities and disadvantages faced by the community as a result of systemic racism seems defeated because while there have been proposals for reparations have been put forth, it does not appear that compensation has been made by the US government.[80] Issues such as the psychological trauma and social-well beings of the victims are not properly catered for in the transitional justice system.

[78] Nino, C. (2019). Transitional Justice and Economic Justice: A Comparative Study of Reparations Programs in Colombia and Peru. International Journal of Transitional Justice, 13(1), 38-55.

[79] Maddison, S. and Shepherd, L. J. (2014). Peacebuilding and the postcolonial politics of transitional justice. Peacebuilding, 2(3), 253–269.Maddison and shepherd thus argue for an extension of the concept of transition, to enable proper accounting for colonial violence. In this way, they propose a post-colonial re-visioning of transitional justice that offers possibilities for deep social transformation at both the national and international levels.

[80] HRW. (2008). Reparations for Historical Injustices in the United States: The Domestic Reparations Movement and the Unfinished Work of the Civil Rights Era. Retrieved from *https://www.hrw.org/report/2008/07/28/reparations-historical-injustices-united-states/domestic-reparations-movement*

4.4 Marginalization of Minority Groups

Transitional justice processes can exclude or marginalize the voices and experiences of racial minority groups, particularly when they lack representation in decision-making bodies and institutions.[81] This can result in the perpetuation of racial inequalities and the failure to address the specific needs and concerns of marginalized communities.[82]

Similarly, when transitional justice processes such as truth commissions do not take into account the historical, social, and cultural contexts of racial minority communities, they may fail to address their unique experiences and needs. The truth commission in Guatemala for example, faced criticism for its limited engagement with indigenous communities.[83] The commission's focus on high-profile cases and the dominant narrative of the armed conflict overlooked the historical and systemic marginalization of indigenous populations, who suffered disproportionately from state-sponsored violence and discrimination.

5.0 Advancing Racial Justice in Transitional Justice: Pathways and Imperatives

Within the field of transitional justice, addressing racial injustice requires a comprehensive and transformative approach that goes beyond mere acknowledgement of past atrocities. This is because

[81] These institutions can include judicial bodies, truth commissions, reparations programs, memorialization initiatives, and other relevant mechanisms established to address the legacies of widespread human rights violations and systemic injustices

[82] Zehr, H., & Mika, H. (Eds.). (2013). The Little Book of Restorative Justice for People in Prison: Rebuilding the Web of Relationships. Skyhorse Publishing.

[83] Grandin, G. (2004). The Last Colonial Massacre: Latin America in the Cold War. University of Chicago Press.

renewed focus on the causes and consequences of global systemic racism has shown the contemporary human rights system's failure to address racist and colonial legacies, as well as institutions and policies that have perpetuated racial subordination.[84]

Transitional justice processes implemented in conflict, post-conflict, and authoritarian situations have similarly consigned racial prejudice to a secondary concern rather than confronting it full on, contributing to the recurrence of atrocities in numerous parts of the world.[85] These ambitious framings of transitional justice in the contexts of historical colonial and racial oppression opened it up to the critique that it served to legitimize continuities of inequality and structural violence.[86] Its focus on universal human rights norms has often centered on physical abuses, overlooking systemic violence and neglecting social, economic, and cultural rights that are equally important like the civil and political rights advocated.[87]

Horne[88] also notes the complexities and challenges in achieving transitional justice goals while maintaining social trust by examining whether lustration[89] helps repair or undermine social trust in these societies. Her article highlights that while lustration policies may

[84] Global initiative for Justice, Truth and reconciliation *https://gijtr.org/wp-content/uploads/2021/12/Racism-Ethnicity-and-TJ-final.pdf*
[85] van der Merwe, Hugo, and M. Brinton Lykes. "Racism and Transitional Justice." International Journal of Transitional Justice, vol. 14, no. 3, pp. 415–22, Silverchair, 2020, doi:10.1093/ijtj/ijab001.
[86] Ibid
[87] Ibid
[88] HORNE, CYNTHIA M. "Lustration, Transitional Justice, and Social Trust in Post-Communist Countries. Repairing or Wresting the Ties That Bind?" *Europe-Asia Studies* 66, no. 2 (2014): 225–54. *http://www.jstor.org/stable/24533967.*
[89] the process of purging individuals associated with the previous communist regime

initially serve as mechanisms for accountability and addressing past injustices, their long-term impact on social trust and reconciliation is uncertain.

To solve some of these challenges, Davidovic draws out key characteristics of transformations of non-guarantees (GNRs) including the norm's various contents and contexts, stressing its exceptional future-oriented nature in international law and upcoming pillar in transformational justice.[90] In terms of structural formations of transitional justice processes, Laidisch argues that any meaningful changes to laws and policies or institutional reforms must be grounded in a recognition and understanding of the society's past atrocities and its connection to present-day injustices, grievances, and violence.[91]

However so, there is still a gap in terms of collection of quality of race-based data to combat racial injustices in the world in the best sustainable way . As of July 2021, Twenty of the 38 Organization for Economic Co-operation and Development (OECD) countries failed to collect little/no racial or ethnic identity data.[92] This may hinder the effectiveness of transitional justice efforts. Without accurate and comprehensive data on racial disparities, discrimination, and systemic inequalities, it becomes challenging to identify patterns, assess the impact of policies, and develop targeted interventions to

[90] *https://academic.oup.com/ijtj/advance-article-pdf/doi/10.1093/ijtj/ijab011/38694709/ijab011.pdf*

[91] *https://www.ictj.org/publication/color-justice-transitional-justice-and-legacy-slavery-and-racism-united-states*

[92] Amanda Shendruk, "Missing Data: Are You Even Trying to Stop Racism If You Don't Collect Data on Race?", Quartz, July 8, 2021, Available at: *https://qz.com/*2029525/*the-20-countries-that-dontcollect-racial-and-ethniccensus-data/.*

address racial injustices.[93] In light of this gap, sustainable data collection can be embraced in the following ways:

5.1 Promotion of Technology Proficiency Among the Youth

Technology can make it easier to collect, analyze, and use race-based data to discover inequities, track progress, and inform policymaking.[94] It has the potential to enable the creation of sophisticated databases and analytical tools that provide insights into racial disparities in areas such as education, employment, healthcare, and criminal justice. For a long time, youth have often been characterized as "digital natives" to denote that they are proficient in using technology and have a high level of digital literacy. Similarly, youth have been recognized for bringing fresh perspectives and lived experiences that provided valuable insights into the realities of racial injustices.[95] However, according to a report by UNESCO, there are challenges related to the nature of technology that can hinder its potential to address racial injustices. These challenges include limited access to technology infrastructure, lack of digital literacy skills, and socioeconomic disparities, which in turn may hinder sustainable data collection.[96]

During the UN Security Council's open debate on transitional justice in 2020, member states identified youth inclusion as a critical aspect

[93] Crenshaw, K. (2018). Twenty Years of Critical Race Theory: Looking Back to Move Forward. Connecticut Law Review, 50(5), 1587-1607.
[94] UNESCO. (2018). I'd Blush if I Could: Closing Gender Divides in Digital Skills Through Education. Retrieved from *https://unesdoc.unesco.org/ark:/48223/pf0000262957*
[95] United Nations Department of Economic and Social Affairs. (2017). Youth and Transitional Justice: Processes and Practices.
[96] UNESCO. (2020). I'd Blush if I Could: Closing Gender Divides in Digital Skills Through Education. Retrieved from *https://unesdoc.unesco.org/ark:/48223/pf0000262957*

in transitional justice systems' success and hence pledged support to them.[97] This can be done by implementation of resource allocation in less developed countries to youth by investing in broadband connectivity, computer labs, internet access, and mobile devices in schools, community centers, and marginalized areas to improve technology infrastructure hence easier data collection by the youth.[98] In more developed countries, privacy and data protection measures can be developed to regulate the collection of sensitive information concerning race.[99] These countries should also establish robust legal frameworks and protocols to safeguard the privacy and confidentiality of individuals involved in the data collection process.[100] Involving the youth in data collection ensures the long-term viability of anti-racial injustice actions. By giving young people the opportunity to participate actively in transitional justice procedures; they become champions for data collecting and social change, contributing to a long-term commitment to resolving racial injustices.

6.0 Conclusion

This paper has shed light on the complicity of transitional justice in perpetuating racial injustice while also exploring its potential to address and redress such injustices. It has examined the ways in which race and racism have influenced the field of transitional justice,

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[97] *https://www.ictj.org/news/landmark-unsc-discussion-transitional-justice*

[98] UNESCO. (2017). Digital Skills for Youth: Policies, Practices, and Frameworks. Retrieved from *https://unesdoc.unesco.org/ark:/48223/pf0000260516*

[99] Hinton, A. L., & Sharlach, L. (2019). Data Collection for Transitional Justice: Practical Guidance. The International Center for Transitional Justice (ICTJ). Retrieved from *https://www.ictj.org/sites/default/files/ICTJ-DataCollectionPracticalGuidance-2019.pdf*

[100] strong privacy frameworks demonstrate a commitment to ethical and responsible data practices, promoting transparency and accountability in the handling of sensitive racial data.

emphasizing the need for a critical and inclusive approach. It has also highlighted the importance of recognizing the historical legacies of the transatlantic slave trade and colonialism, as well as their contemporary manifestations, in understanding racial injustice. By analyzing existing literature, this paper considers the effectiveness of transitional justice in addressing racial injustice. The discussion has encompassed diverse experiences of race and racialization, and the responses of different countries to racial injustice through transitional justice mechanisms.

Furthermore, the paper has underscored the requirements for racial justice within the field of transitional justice. However, there is a notable gap in the collection of data on race, which poses a risk of complicity in perpetuating systemic discrimination. Efforts such as promotion of technology proficiency among the youth must be made to enhance the collection and utilization of race-based data to inform transitional justice processes effectively. Privacy and data protection measures can also be formulated to aid collecting sensitive information concerning race.

Overall, this examination of transitional justice and racial injustice calls for a comprehensive and critical reevaluation of the field. By embracing a more inclusive and transformative approach, transitional justice can become a powerful tool in dismantling racial injustices and contributing to the creation of more equitable and just societies. In order to achieve meaningful progress, it is crucial for policymakers, practitioners, and scholars to continue engaging in interdisciplinary dialogue, centering the voices and experiences of marginalized communities, and striving for transformative change within the field of transitional justice.

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Revisiting the legal debate on Genetically Modified Organisms (GMOs) in Africa: Which way for Kenya?

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

Abstract

This paper examines the status of genetically modified organisms (GMOs) in Africa, with a specific focus on Kenya, and explores the regulatory frameworks and approaches employed in various African countries. It discusses the experimental phase, resistance, and regulatory reforms that have shaped the GMO landscape in Africa. The paper analyzes international and regional treaty instruments, including the Convention on Biological Diversity and the Cartagena Biosafety Protocol, and their implications for GMO regulation. Furthermore, it provides a comparative analysis of GMO approaches in selected African countries, such as Uganda, South Africa, Cameroon, Ghana, and Zambia. The proposed way forward for Kenya's regulation of GMOs is discussed, highlighting the merits of a precautionary approach, the incorporation of socioeconomic considerations, institutional independence, public participation, and the essential role of access to information. This paper offers insights into the complex and evolving field of GMO regulation in Africa, providing a comprehensive overview of key issues and considerations.

Key Words: *Genetically Modified Organisms (GMOs), Africa, Regulatory Frameworks, Kenya*

1. Introduction

The regulation of genetically modified organisms (GMOs) in Africa, particularly in Kenya, has been the subject of intense debate and

[*] *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.*

scrutiny. [1] The journey of GMOs in Africa has evolved from experimental introductions to steady proliferation, accompanied by diverse regulatory approaches and legal frameworks. [2] This discussion delves into the status of GMOs in Africa, exploring the experimental phase, resistance and regulatory reform, and the current situation in Kenya. Additionally, it examines the regulatory landscape under international and regional treaty law, highlighting the Convention on Biological Diversity and the Cartagena Biosafety Protocol. Furthermore, a comparative analysis of GMO approaches in selected African countries, such as Uganda, South Africa, Cameroon, Ghana, and Zambia, sheds light on the various legal frameworks and approaches adopted by these nations. Finally, the proposed way forward for Kenya's regulation of GMOs is examined, emphasizing the merits of a precautionary approach, incorporating socioeconomic considerations, institutional independence, public participation, and the essential role of access to information.

The exploration of GMO regulation in Africa reveals a dynamic landscape shaped by scientific advancements, social concerns, and the need for sustainable agricultural practices.[3] The experimentation phase witnessed the introduction of GMOs into African countries, accompanied by both enthusiasm and resistance. While some African nations have embraced GMOs as a potential solution to agricultural challenges, others have expressed concerns about potential risks to human health, biodiversity, and traditional farming systems. In response, regulatory reforms have been implemented, aiming to

[1] Mwasiaji, E., Alaro, L., Muthinja, M., Njuguna, C. (2022). Critical evaluation of genetically modified organisms as an intervention strategy in agribusiness sector in Kenya within the context of climate change. *International Academic Journal of Innovation, Leadership and Entrepreneurship*, 2(3), 391-410.

[2] Ibid

[3] Ibid

address these concerns, establish transparent decision-making processes, and ensure the safety of GMOs.[4]

At the international level, the Convention on Biological Diversity and the Cartagena Biosafety Protocol have played crucial roles in shaping the regulatory framework for GMOs.[5] These treaty instruments emphasize the precautionary approach, advance informed agreement, exchange of information, competent national authorities, and socioeconomic considerations. They provide a basis for harmonizing GMO regulation across countries, facilitating knowledge sharing, and promoting responsible biotechnology practices.[6]

In Africa, selected countries have adopted diverse approaches to GMO regulation. As is discussed in the paper, South Africa's Genetically Modified Organisms Amendment Act (Act 23 of 2006) and permissive approach have facilitated the cultivation of GMOs and commercialization of genetically modified crops. Cameroon's Law No. 2003/006 of 21 April 2003 and restrictive approach reflect a cautious approach, imposing strict regulations on GMO activities. Ghana's Biosafety Act, 2011, and Biosafety (Management of Biotechnology) Regulations, 2019 demonstrate a commitment to biosafety emphasizing risk assessment, public participation, and labeling requirements. Zambia's Biosafety Act, 2007, and subsequent legalization demonstrate a cautious approach to GMOs, with a focus on risk assessment, public participation, and enforcement mechanisms. Uganda's unregulated approach also provides useful insights for the paper.

[4] Ibid
[5] Ibid
[6] Ibid

Considering Kenya's unique context, the way forward for GMO regulation necessitates a holistic approach that addresses the concerns and interests of various stakeholders. [7] Embracing a precautionary approach can ensure rigorous risk assessment, monitoring, and post-market surveillance to minimize potential risks associated with GMOs. Incorporating socioeconomic considerations in the regulatory decision-making process can evaluate the potential impacts of GMOs on farmers, consumers, food security, and local economies. Institutional independence and cooperation are critical to establishing a robust and transparent regulatory framework, fostering public trust, and ensuring effective oversight. Furthermore, public participation and access to information are essential elements for inclusive and informed decision-making, promoting transparency, accountability, and societal acceptance.[8]

The regulation of GMOs in Africa, particularly in Kenya, involves a complex interplay of scientific, social, and legal dimensions. [9] By examining the status of GMOs in Africa, the regulatory landscape at international and regional levels, and the approaches adopted by selected African countries, valuable insights are gained into the diverse perspectives and strategies surrounding GMO regulation. The proposed way forward for Kenya's regulation of GMOs emphasizes the merits of a precautionary approach, socioeconomic considerations, institutional independence, public participation, and access to information. By embracing these principles, Kenya can forge a path towards a responsible, inclusive, and sustainable GMO regulatory framework that addresses societal concerns, fosters

[7] Alliance for Science (2022). Kenya Approves GMOs after ten years Ban. Available at *https://allianceforscience.cornell.edu/blog/2022/10/* accessed 16 June 2023

[8] Ibid

[9] Ibid

agricultural innovation, and ensures the safe and beneficial use of GMOs.[10]

2. The status of GMOs in Africa: From experimental introduction to steady proliferation

2.1 Experimentation and Resistance.

Genetically Modified Organisms (GMOs) have been a subject of intense legal and public debate globally, and in Africa. The introduction of GMOs in Africa began with experimental research conducted by international biotechnology companies and agricultural research institutions. These experiments aimed to assess the potential benefits and risks associated with genetically modified crops in the African context.[11]

Factors contributing to Experimentation

One factor contributing to experimentation is Agricultural productivity. Proponents of GMOs argue that genetically modified crops have the potential to enhance agricultural productivity, reduce post-harvest losses, and address food security challenges in Africa.[12] Another factor is Pest and disease resistance. Genetic engineering techniques have been employed to develop crops with enhanced resistance to pests, diseases, and environmental stressors. This trait is particularly relevant for African farmers who often face significant yield losses due to various biotic and abiotic factors.[13]

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[10] Ibid

[11] Chaudhuri A and Datta A. (2018). Genetically Modified (GM) Crops: A Potential Source to Combat Global Hunger and Malnutrition. *Austin J Nutri Food Sci*. 2018; 6(3): 1106.

[12] Ibid

[13] Ibid

Resistance to GMOs in Africa

Critics of GMOs raise concerns about potential environmental risks associated with genetically modified crops, including gene flow to wild relatives, the development of pesticide-resistant pests, and negative impacts on biodiversity.[14]There are also concerns that the adoption of GMOs may lead to increased dependence on multinational seed companies, loss of traditional farming practices, and marginalization of small-scale farmers.[15]

2.2 Regulatory Reform and Normalization.

Many African countries have undertaken efforts to enhance their regulatory frameworks for GMOs, aiming to ensure the safe and responsible use of these organisms.[16] Robust biosafety regulations are being developed and implemented to assess potential risks associated with GMOs and establish procedures for their safe handling, transport, and release. Regional harmonization and cooperation efforts have been initiated in Africa to facilitate a coordinated approach towards GMO regulation. For instance, COMESA has developed the Harmonized Seed Trade Regulations, including provisions for the regulation of GMOs within member countries.[17]

GMOs have gradually transitioned to commercialization in Africa, with some countries approving the cultivation and commercial release of genetically modified crops.[18] Economic benefits, such as increased yields and reduced production costs, along with the

[14] Ibid

[15] Ibid

[16] Ibid

[17] COMESA Seed Trade Harmonization Regulations, 2014 available at *https://www.aatf-africa.org/wp-content/uploads/2021/02/COMESA-Seed-Trade-Harmonisation-Regulations-English.pd*f accessed 16 June 2023

[18] Chaudhuri A and Datta A. (2018). Genetically Modified (GM) Crops: A Potential Source to Combat Global Hunger and Malnutrition. *Austin J Nutri Food Sci*. 2018; 6(3): 1106.

potential to address agricultural challenges, are driving the adoption of GMOs in Africa. Challenges include varying public perceptions of GMOs, concerns about potential risks to human health and the environment, and limited access to genetically modified seeds and scientific capacity among farmers and regulatory agencies.[19]

2.3 Explicit Legalization and Contested Moratoriums

I. Explicit Legalization: Embracing GMOs

In recent years, several African countries have explicitly legalized the cultivation and commercialization of genetically modified crops, signaling a shift towards acceptance and adoption of GMO technology.[20]These countries have enacted laws and regulations that explicitly permit the cultivation, importation, and commercialization of genetically modified crops. This legal framework provides a clear pathway for GMO research, development, and deployment.[21] The explicit legalization of GMOs is often driven by economic factors. Governments recognize the potential benefits of genetically modified crops in increasing agricultural productivity, improving food security, and enhancing competitiveness in the global market.[22]

II. Contested Moratoriums: Restrictive Measures and Debate

While some African countries have embraced GMOs, others have implemented contested moratoriums, imposing restrictions on the cultivation and importation of genetically modified crops. This has led to ongoing debates and discussions surrounding the regulation and use of GMOs.[23]Supporters of moratoriums argue that the long-term risks and potential environmental and health impacts of GMOs

[19] Ibid
[20] Ibid
[21] Ibid
[22] Ibid
[23] Ibid

are not yet fully understood, necessitating precautionary measures before widespread adoption. The decision to impose moratoriums on GMOs can be influenced by public opinion, concerns about the dominance of multinational corporations, and the desire to protect traditional farming practices and biodiversity. The scientific community is engaged in ongoing debates regarding the safety, efficacy, and long-term implications of GMOs. This contributes to the complexity of the issue and influences the stance of different stakeholders.[24]

2.4 The Current Kenyan Situation

I. Regulatory Framework in Kenya

Kenya has implemented a regulatory framework to govern the assessment, approval, and commercialization of genetically modified organisms (GMOs). In 2009, Kenya enacted the Biosafety Act, which established the National Biosafety Authority (NBA) as the regulatory body responsible for overseeing the safe handling, transportation, and release of GMOs.[25]The NBA is mandated to assess applications for the importation, contained use, and environmental release of GMOs. It conducts risk assessments and ensures compliance with biosafety guidelines and protocols.[26]

II. Approved GMOs and Field Trials

Kenya has approved the cultivation and commercial release of certain genetically modified crops, while also conducting field trials for

[24] Ibid

[25] Biosafety Act 2009 available at *http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%202%20of%202020 09* accessed 16 June 2023; section 5 established the Authority

[26] Section 7, Biosafety Act.

research purposes. [27] Kenya has authorized the commercial cultivation of genetically modified cotton, which is resistant to the African bollworm, a devastating pest that affects cotton production.[28] In addition to commercial crops, Kenya has conducted field trials for other genetically modified crops, including maize (corn) with traits such as insect resistance and herbicide tolerance.[29]

III. Adoption and Controversies

The adoption and acceptance of GMOs in Kenya have been met with both support and controversies, reflecting diverse perspectives and concerns. Proponents argue that GMOs can contribute to increased agricultural productivity, reduced post-harvest losses, improved food security, and enhanced farmer income. They believe that biotechnology can address specific challenges, such as pest and disease pressures faced by farmers.[30]

Critics of GMOs raise various concerns, including potential risks to human health, environmental impacts, the dominance of multinational seed companies, potential loss of traditional farming practices, and potential adverse effects on biodiversity.[31]

IV. Public Perception and Engagement

The public perception of GMOs in Kenya remains diverse, with varying levels of awareness, understanding, and acceptance. [32]The Kenyan government and other stakeholders have initiated public

[27] Alliance for Science (2022). Kenya Approves GMOs after ten years Ban. Available at *https://allianceforscience.cornell.edu/blog/2022/10/* accessed 16 June 2023
[28] Ibid
[29] Ibid
[30] Ibid
[31] Ibid
[32] Ibid

awareness campaigns, educational programs, and engagement activities to inform and involve the public in the GMO debate. Ongoing dialogue, scientific research, and evidence-based decision-making are crucial in shaping the future trajectory of GMOs in Kenya. Striking a balance between promoting agricultural innovation and addressing public concerns is essential.[33]

3. Regulation of GMOs under International and Regional Treaty Law

3.1 International Treaty Instruments

3.1.1 Convention on Biological Diversity

The Convention on Biological Diversity (CBD) is a significant international treaty that addresses the conservation of biodiversity, the sustainable use of its components, and the fair and equitable sharing of benefits arising from genetic resources.[34]

The CBD has three main objectives. First, The CBD aims to promote the conservation and sustainable management of biological diversity, including ecosystems, species, and genetic resources. Secondly, it seeks to promote the sustainable use of biological resources, ensuring that they are utilized in a way that maintains their long-term viability and benefits both present and future generations. Finally, The CBD emphasizes the fair and equitable sharing of benefits arising from the utilization of genetic resources, particularly with regard to access to and transfer of technology.[35]

[33] Ibid
[34] Convention on Biological Diversity available at *https://www.cbd.int/doc/legal/cbd-en.pdf* accessed 16 June 2023
[35] Article 1, Ibid

Parties to the CBD are encouraged to develop national biosafety frameworks and mechanisms that align with the provisions of the convention. They are required to submit reports on their implementation of the convention and undergo periodic reviews to ensure compliance.[36]The CBD recognizes the need for synergy and cooperation with other relevant international agreements and organizations, such as the World Trade Organization (WTO) and the Food and Agriculture Organization (FAO), to address the diverse aspects of biodiversity conservation and sustainable use.[37]

3.1.2 Cartagena Biosafety Protocol

3.1.2.1 Precautionary approach

The Cartagena Protocol on Biosafety is an international treaty under the Convention on Biological Diversity (CBD) that specifically addresses the safe handling, transport, and use of living modified organisms (LMOs), including genetically modified organisms (GMOs).[38] One of the key features of the Cartagena Protocol is its precautionary approach. The precautionary approach is a guiding principle of the Cartagena Protocol. It recognizes the need for precaution in decision-making when dealing with potential risks posed by LMOs.[39]

The precautionary approach acknowledges that scientific understanding of the potential risks associated with LMOs may be incomplete or uncertain. It recognizes that there could be unforeseen

[36] Article 26, Ibid
[37] Preamble, Article 5. Article 18 Ibid
[38]Cartagena Protocol on Biosafety to The Convention on Biological Diversity available at *https://www.cbd.int/doc/legal/cartagena-protocol-en.pdf* accessed 16 June 2023
[39] Preamble. Article 1 Ibid

adverse effects on biodiversity and human health.[40] Under the precautionary approach, when there is a potential risk of significant harm, lack of scientific certainty should not be used as a reason to postpone or avoid taking measures to prevent or minimize those risks.[41]

The Protocol promotes the adoption of proactive measures to prevent or minimize potential risks of LMOs. It encourages countries to implement risk assessment and risk management procedures to evaluate and address potential adverse effects on biodiversity and human health.[42] It also recognizes the importance of considering socioeconomic impacts and the specific needs of developing countries, particularly with regards to their capacity to assess and manage risks associated with LMOs.[43]

In addition, The Protocol emphasizes the importance of information sharing and transparency to enable informed decision-making. It establishes the Biosafety Clearing-House as a mechanism for the exchange of scientific, technical, and regulatory information related to LMOs.[44]The Protocol promotes the concept of "prior informed consent" (PIC)[45] and "advance informed agreement" (AIA)[46]. It requires exporting countries to obtain consent from importing countries before exporting LMOs, ensuring that importing countries are fully informed about the potential risks and can make informed decisions.

[40] Article 15 & 16 Ibid
[41] Article 10 (6); 11 (8) Ibid
[42] Article 15 & 16 Ibid
[43] Article 26 Ibid
[44] Article 20, Ibid
[45] Article 10 Ibid
[46] Article 7 Ibid

3.1.2.2 Advance Informed Agreement

In the context of the Cartagena Protocol on Biosafety, the principle of "Advance Informed Agreement" (AIA) is an important aspect of the protocol. [47] The AIA principle emphasizes the need for communication and cooperation between exporting and importing countries of living modified organisms (LMOs), including genetically modified organisms (GMOs).[48]Under the AIA principle, an exporting country must obtain prior informed consent from an importing country before exporting LMOs. This means that the importing country should have the opportunity to make an informed decision about whether to accept or reject the import of a specific LMO.

To ensure informed decision-making, the exporting country is responsible for providing relevant information about the LMOs to the importing country. This information includes details about the specific LMO, its intended use, potential risks, and any risk management measures in place.[49]The exporting country notifies the designated national authority of the importing country through the Biosafety Clearing-House BCH. The notification includes comprehensive information regarding the LMOs, as well as any documentation required by the importing country.[50]

The importing country reviews the information provided and assesses the potential risks associated with the LMOs. Based on this assessment, the importing country decides whether to grant or deny its consent for the importation of the specific LMOs. The AIA principle also recognizes the right of the importing country to take appropriate measures to manage and regulate the import of LMOs,

[47] Ibid
[48] Ibid
[49] Ibid
[50] Ibid

including the possibility of requesting additional information or imposing specific conditions or restrictions.[51]

AIA promotes cooperation and dialogue between exporting and importing countries, allowing for exchanges of scientific, technical, and regulatory information related to LMOs. This facilitates the sharing of expertise and experiences, helping to enhance the capacity of countries to make informed decisions. By implementing the AIA principle, the Cartagena Protocol aims to ensure that importing countries have the necessary information and the opportunity to assess and manage potential risks associated with the import of LMOs. It promotes transparency, cooperation, and the sharing of information, which are crucial for informed decision-making and the safe handling of LMOs under the protocol.

3.1.2.3 Exchange of Information

In the context of the Cartagena Protocol on Biosafety, the exchange of information is a crucial element to ensure transparency, facilitate informed decision-making, and promote cooperation among countries regarding living modified organisms (LMOs), including genetically modified organisms (GMOs).

The Cartagena Protocol establishes the Biosafety Clearing-House (BCH) as a central mechanism for the exchange of scientific, technical, and regulatory information related to LMOs. The BCH serves as a platform to facilitate the sharing of information among countries and other stakeholders.[52] Under the Cartagena Protocol, Parties have obligations to share information through the BCH. This includes providing information on LMOs, national biosafety frameworks, risk

[51] Ibid

[52] Article 20, Ibid

assessments, and any relevant laws, regulations, and guidelines pertaining to biosafety.[53]

The protocol specifies the types of information that should be shared through the BCH, such as:

a) Identification of the LMOs: Details about the specific LMO, including its characteristics, traits, and intended use.
b) Risk Assessment: Information regarding the potential environmental and human health risks associated with the LMO, as well as any risk management measures in place.
c) Contact Points: Designation of national focal points and competent national authorities responsible for biosafety-related matters.[54]

The BCH ensures that the shared information is widely accessible to Parties and other interested stakeholders. It allows countries to access relevant information, studies, and experiences related to LMOs and biosafety measures, promoting knowledge sharing and capacity building. While promoting transparency, the Cartagena Protocol also recognizes the need to protect confidential information and intellectual property rights. Countries have the option to designate certain information as confidential, subject to specific guidelines and procedures.[55]

Finally, the exchange of information through the BCH is complemented by capacity-building initiatives and technical assistance provided to developing countries. This helps to enhance

[53] Ibid
[54] Ibid
[55] Ibid

their capabilities to generate, assess, and utilize the information related to LMOs.[56]

3.1.2.4 Competent National Authorities

In the context of the Cartagena Protocol on Biosafety, the establishment of competent national authorities is an important aspect of implementing the protocol's provisions. [57] Competent national authorities (CNAs) are designated bodies or institutions within each country that are responsible for carrying out the functions related to the regulation and oversight of living modified organisms (LMOs) under the Cartagena Protocol. CNAs serve as focal points for implementing the protocol's obligations at the national level.[58]

The specific responsibilities of CNAs may vary among countries, but generally, they include:

a) National Coordination: CNAs coordinate and oversee the implementation of the Cartagena Protocol within their respective countries. They serve as the primary contact points for communication and cooperation with other Parties to the protocol.
b) Information Sharing: CNAs are responsible for sharing information related to LMOs through the Biosafety Clearing-House (BCH) as mandated by the protocol. This includes providing information on LMOs, risk assessments, national biosafety frameworks, and any relevant laws and regulations.
c) Risk Assessment and Management: CNAs play a key role in conducting or facilitating the assessment of risks associated

[56] Ibid
[57] Article 19, Ibid
[58] Ibid

with LMOs. They may review and evaluate risk assessment dossiers submitted by applicants and ensure that risk management measures are implemented.[59]

d) Decision-Making Processes: CNAs are involved in the decision-making processes concerning LMOs. They may review applications for the import, export, or domestic release of LMOs and provide recommendations or decisions based on the assessment of risks and compliance with regulatory requirements.

e) Capacity Building and Awareness: CNAs are responsible for building national capacity in biosafety and raising awareness among relevant stakeholders, including regulators, scientists, and the public. They may provide training programs, workshops, and technical assistance to enhance understanding and expertise in biosafety issues.[60]

CNAs are encouraged to cooperate and exchange information with other CNAs at the regional and international levels. This promotes harmonization of approaches, sharing of experiences, and collaboration in areas such as risk assessment methodologies, regulatory practices, and capacity-building initiatives. CNAs often work in collaboration with other national bodies or agencies responsible for specific aspects related to LMOs, such as agriculture, environment, health, trade, or research. Cooperation between CNAs and these bodies helps to ensure effective coordination and integration of biosafety considerations into relevant sectors.[61]

[59] Ibid
[60] Ibid
[61] Ibid

3.1.2.5 Socio-Economic Considerations

The consideration of socio-economic factors is an important component of decision-making processes related to the handling and use of living modified organisms (LMOs), including genetically modified organisms (GMOs). The Cartagena Protocol recognizes the need to take into account socio-economic considerations when assessing the potential risks and benefits associated with LMOs. This includes considering the potential impacts on the economy, trade, livelihoods, and the well-being of individuals and communities.[62]

Countries are encouraged to evaluate the potential socio-economic impacts of LMOs within their specific national contexts. This involves considering factors such as agricultural systems, food security, cultural practices, indigenous and local knowledge, and the social and economic conditions of different sectors of society.[63] When making decisions related to LMOs, Parties are encouraged to take into account the results of the assessment of potential socio-economic impacts. This information helps in weighing the risks and benefits of LMOs, considering the potential consequences for different stakeholders and affected communities.[64]

The Protocol also promotes the involvement of relevant stakeholders, including farmers, indigenous communities, and non-governmental organizations, in decision-making processes related to LMOs. This participatory approach ensures that different perspectives, including socio-economic considerations, are taken into account.[65] The protocol emphasizes the need for capacity building initiatives to strengthen the ability of countries, particularly developing countries, to assess

[62] Article 26, Ibid
[63] Ibid
[64] Ibid
[65] Ibid

and manage the potential socio-economic impacts of LMOs. This includes providing technical assistance, sharing best practices, and enhancing expertise in the analysis of socio-economic factors.[66]

Furthermore, Socio-economic considerations also extend to trade and market access. Countries need to evaluate the potential impacts of LMOs on international trade, including any potential trade disruptions or market reactions that may arise due to the presence of LMOs in agricultural commodities.[67]

3.2 Regional Treaty instruments

3.2.1 Revised African Model Law on Safety in Biotechnology

The Revised African Model Law on Safety in Biotechnology is a regional treaty instrument that has been developed to provide a harmonized framework for the regulation of biotechnology and genetically modified organisms (GMOs) across Africa.[68] The Model Law aims to promote consistency and harmonization in the regulation of biotechnology and GMOs among African countries. It provides a common legal framework that countries can use as a basis for developing or revising their national biosafety laws.[69]

The Model Law applies to the intentional introduction, handling, use, and release of GMOs, including their import and export, within the territory of African countries. It covers various sectors, including agriculture, environment, health, and trade. [70] The Model Law

[66] Ibid
[67] Ibid
[68]The Revised African Model Law on Biosafety and the African Biosafety Strategy available at *https://acbio.org.za/wp-content/uploads/2022/03/AU_Biosafety-brief.pdf* accessed 16 June 2023
[69] Ibid
[70] Ibid

establishes provisions for risk assessment and risk management of GMOs. It requires countries to conduct scientific risk assessments to evaluate the potential risks to human health and the environment posed by GMOs. It also emphasizes the need for risk management measures to minimize or prevent adverse effects.[71]

The Model Law encourages countries to establish a National Biosafety Framework (NBF) to facilitate the implementation of biosafety measures. The NBF includes the establishment of competent authorities responsible for biosafety regulation and decision-making processes. [72] The Model Law recognizes the importance of public participation and access to information in decision-making processes related to GMOs. It encourages countries to promote public awareness, provide opportunities for public input, and ensure transparency in the regulation of GMOs.[73]The Model Law addresses issues of liability and redress related to GMOs. It establishes provisions for civil liability in case of damage resulting from GMOs and outlines mechanisms for seeking compensation and remediation.[74]

The Model Law emphasizes regional cooperation and capacity building among African countries. It encourages countries to share information, experiences, and expertise in the field of biotechnology and biosafety. It also calls for technical and financial support to enhance the capacity of African countries to implement the provisions of the Model Law.[75]

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[71] Ibid
[72] Ibid
[73] Ibid
[74] Ibid
[75] Ibid

3.2.2 African Biosafety Strategy

The African Biosafety Strategy is a regional treaty instrument that provides a comprehensive framework for biosafety management in Africa.[76] It was developed by the African Union in collaboration with other stakeholders to guide African countries in implementing effective biosafety systems. The strategy aims to promote the safe development, transfer, and application of biotechnology and genetically modified organisms (GMOs) in Africa while ensuring the protection of human health and the environment. It seeks to harmonize biosafety regulations, enhance capacity building, and facilitate the sustainable use of modern biotechnology across the continent.[77]

It promotes harmonization of biosafety regulations and guidelines among African countries. It encourages countries to adopt common approaches and standards to facilitate regional cooperation, information sharing, and the exchange of experiences and best practices in biosafety management.[78] The strategy emphasizes the importance of establishing and strengthening national biosafety institutions and regulatory frameworks. It encourages countries to designate competent authorities responsible for biosafety regulation, risk assessment, and decision-making processes. It also highlights the need for effective coordination among relevant national bodies and stakeholders.[79]

In addition, capacity building is a key component of the Strategy. It recognizes the importance of enhancing scientific, technical, and regulatory capacities in African countries to effectively assess and

[76] Ibid
[77] Ibid
[78] Ibid
[79] Ibid

manage biosafety risks associated with GMOs. The strategy promotes training programs, knowledge sharing, and collaboration with regional and international partners to strengthen expertise and skills in biosafety.[80]

The strategy also emphasizes the need for robust risk assessment and risk management frameworks for GMOs. It encourages countries to adopt science-based approaches to assess the potential risks to human health and the environment. It also calls for the implementation of risk management measures to minimize or prevent adverse effects.[81] It also recognizes the importance of public awareness and participation in decision-making processes related to GMOs. It encourages countries to promote public understanding of biotechnology and biosafety issues, engage stakeholders in dialogue, and provide opportunities for public input in policy formulation and decision-making.[82]

Finally, the strategy highlights the importance of monitoring and compliance mechanisms to ensure the effective implementation of biosafety regulations. It calls for the establishment of monitoring systems, data collection, and reporting mechanisms to track the environmental, health, and socioeconomic impacts of GMOs. It also emphasizes the need for enforcement mechanisms and measures to address non-compliance.[83]

[80] Ibid
[81] Ibid
[82] Ibid
[83] Ibid

4. A Comparison of Approaches to GMOs in Selected African Countries

4.1 Uganda

4.1.1 Unregulated Approach

In Uganda, the regulatory approach to genetically modified organisms (GMOs) has been characterized by a period of unregulated or partially regulated use and cultivation. The National Biosafety Act 2017 was passed by Parliament, but not assented to by the President, who asked the Parliamentarians to review the Act citing concerns about containment, impacts on indigenous species, labeling and patents. [84] In 2018, Parliament passed the Genetic Engineering Regulatory Bill after reconsidering the president's proposals. However, in 2019, the President announced his refusal to assent to the Bill for the second time, explicitly mentioning genetically modified mosquitoes and citing several concerns about safeguarding citizens and the ecology stating that 'commercial interests, however, need to be balanced against the need to protect the ordinary Ugandan Citizen from real and potential harm, health and wellbeing rather than profit, must be our primary concern'[85]

[84] Hivos: "Please review the Biosafety Act, Mr. Museveni" (2/2/2018) available at *https://hivos.org/please-review-the-biosafety-act-mr-museveni/* accessed 16 June 2023

[85] The Independent: GMO regulations in the offing – NEMA (2021) available at *https://www.independent.co.ug/gmo-regulations-in-the-offing-nema/* accessed 16 June 2023; Museveni Y. Letter: The Genetic Engineering Regulatory Act, 2018. Addressed to the Speaker, Rt. Hon. Rebecca A. Kadaga. 2019 available at *http://parliamentwatch.ug/wp-content/uploads/2020/08/Motion-for-Reconsideration-of-the-Genetic-Engineering-Regulatory-Bill-2018-as-Returned-By-H.E-the-President-in-Accordance-with-Article-913b-of-the-Constitution-and-Rule-142-of-the-Rules-of-Procedure.pdf.* Accessed 16 June 2023

As a result, GMO research, trials, and field cultivation are still conducted without stringent regulatory oversight.

During this unregulated period, a number of genetically modified crops, particularly insect-resistant and herbicide-tolerant varieties, are developed and field-tested in Uganda. The most notable example is the genetically modified insect-resistant variety of the banana, known as the GM Banana Xanthomonas wilt-resistant (BXW). This GM banana variety was developed to address the devastating impact of the Xanthomonas wilt disease on banana crops in Uganda.[86]

The unregulated approach to GMOs in Uganda has led to a situation where GMO research and trials are conducted without clear guidelines or oversight. This lack of regulation has raised concerns about potential environmental and health risks associated with GMOs and their potential impact on biodiversity, local farming systems, and traditional crops.[87]

4.2 South Africa

4.2.1 Genetically Modified Organisms Amendment Act (Act 23 of 2006)

The Genetically Modified Organisms Amendment Act (Act 23 of 2006) is a significant piece of legislation in South Africa that regulates the import, export, research, production, and release of genetically modified organisms (GMOs) within the country.[88] It establishes a comprehensive regulatory framework for GMOs in South Africa. It amends and supplements the existing Genetically Modified

[86] Ibid
[87] Ibid
[88] Genetically Modified Organisms Amendment Act (Act 23 of 2006)

Organisms Act of 1997 to strengthen the regulation and oversight of GMO activities.[89]

The Act requires anyone involved in the research, development, production, import, or export of GMOs to obtain a permit.[90] The permit application process involves providing comprehensive information on the GMO, its intended use, risk assessments, and risk management plans. Permits may be subject to conditions, including monitoring and reporting requirements. The Act emphasizes a science-based approach to risk assessment and management of GMOs. It requires applicants to conduct thorough risk assessments, considering potential impacts on human health, animal health, and the environment. Risk management plans must be developed and implemented to mitigate identified risks.[91]

4.2.2 Permissive approach

In South Africa, the regulatory approach to genetically modified organisms (GMOs) is often described as a permissive approach.[92] This approach is characterized by a relatively open and permissive regulatory framework that allows for the commercialization, cultivation, and importation of certain GMOs, subject to regulatory oversight and compliance with established procedures. Under the South African GMO regulatory system, the cultivation, importation, and commercialization of GMOs are allowed if certain criteria are met. These criteria typically include a rigorous risk assessment process to evaluate potential impacts on human health, the

[89] Long Title, Ibid
[90] Ibid
[91] Section 4 Ibid
[92] Muzhinji N, Ntuli V. Genetically modified organisms and food security in Southern Africa: conundrum and discourse. GM Crops Food. 2021 Jan 1;12(1):25-35. Available at *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7553747/* accessed 16 June 2023

environment, and biodiversity. The assessment considers factors such as the characteristics of the GMO, potential allergenicity, potential toxicity, and potential ecological impacts.[93]

In South Africa, engaging in activities related to GMOs requires obtaining a permit from the Registrar of Genetically Modified Organisms. To apply for a permit, you need to complete the relevant application form based on the type of activity you seek authorization for. There are certain prerequisites for specific applications, such as conducting field trial activities over three growing seasons before applying for general release. Applications to continue an activity will only be accepted if it was previously authorized.[94]

Once you have completed the application, you submit it along with the required number of copies to the Registrar of GMOs. Additionally, you provide an extra copy of the application that does not include any confidential business information. You pay the prescribed fee, which is adjusted annually. If applicable, you include a report on previous activities conducted and proof of public notifications.[95]

The Registrar of GMOs assesses the application for compliance with the provisions of the GMO Act, 1997. The Advisory Committee evaluates the scientific data submitted and provides a recommendation on the safety of the proposed activity to the Executive Council. Public input is also considered within the specified time period. The Executive Council makes a decision, taking

[93] Ibid
[94] South African Government: GMO Activities. Available at *https://www.gov.za/services/plant-production/gmo-activities* accessed 16 June 2023
[95] Ibid

into account the application, the Advisory Committee's recommendation, public input, and potential impacts on sectors such as agriculture, health, environment, labor, trade, and science and technological development.[96]

If the Executive Council's decision is positive, the Registrar is authorized to issue a permit. All permits are subject to containment conditions. Inspectors from the Department of Agriculture, Forestry, and Fisheries monitor the implementation of the permit conditions.[97] One of the key features of the permissive approach in South Africa is the emphasis on scientific assessment and risk management rather than a blanket prohibition or moratorium on GMOs. This approach allows for a case-by-case evaluation of GMOs, considering their specific characteristics and intended uses. It aims to strike a balance between harnessing the benefits of biotechnology and ensuring the protection of human health, the environment, and biodiversity.[98]

However, while South Africa has a permissive approach to GMO regulation, it still maintains a robust regulatory system with checks and balances in place to safeguard public and environmental safety. The regulatory authority continuously monitors and assesses new developments in GMO technology and adjusts regulations as necessary to address emerging challenges or concerns.[99]

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[96] Ibid

[97] Ibid

[98] Muzhinji N, Ntuli V. Genetically modified organisms and food security in Southern Africa: conundrum and discourse. GM Crops Food. 2021 Jan 1;12(1):25-35. Available at *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7553747/* accessed 16 June 2023

[99] Ibid

4.3 Cameroon

4.3.1 Law No. 2003/006 of 21 April 2003

Law No. 2003/006 of 21 April 2003, also known as the Law on the Environment in Cameroon, encompasses various aspects of environmental protection, including the regulation of GMOs.[100] The law establishes a regulatory framework for GMOs in Cameroon. It stipulates that the import, transit, and release of GMOs into the environment are subject to prior authorization from the competent national administration. This authority is responsible for assessing the potential risks and impacts of GMOs on human health, biodiversity, and the environment.[101]

The law mandates the conduct of risk assessments for GMOs before their release or use in Cameroon. The assessments evaluate potential risks to human health, biodiversity, and the environment. Additionally, the law requires the establishment of monitoring systems to track the potential effects of GMOs on the environment and human health.[102]It also emphasizes the importance of public participation in decision-making processes related to GMOs. It encourages the dissemination of information and public awareness regarding GMOs, their potential impacts, and the decision-making procedures. The law also promotes transparency in the regulatory process and encourages public involvement in environmental decision-making.[103]

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[100] Law No. 2003/006 of 21 April 2003 available at *https://minepded.gov.cm/wp-content/uploads/2020/01/LAW-NO.-2003006-OF-21-APRIL-2003-TO-LAY-DOWN-SAFETY-REGULATIONS-GOVERNING-MODERN-BIOTECHNOLOGY-IN-CAMEROON-1.pdf* accessed 16 June 2023

[101] Article 5 (1) Ibid; Part III, Chapter II Ibid

[102]Part II chapter III & IV Ibid

[103] Part V Ibid

4.3.2 Restrictive Approach

In Cameroon, the regulatory approach to genetically modified organisms (GMOs) is often described as a restrictive approach.[104] This means that the country has adopted a cautious and stringent regulatory framework with regards to the cultivation, importation, and release of GMOs. Under the regulatory framework, any person or entity intending to engage in activities involving GMOs, such as their importation, cultivation, or release, must obtain prior authorization from the competent administrative authority as mentioned above. This authorization process involves a thorough evaluation of the potential risks and impacts associated with GMOs.[105]

Cameroon places a strong emphasis on conducting comprehensive risk assessments of GMOs as also cited hereinabove. These assessments aim to evaluate the potential risks posed by GMOs to human health, biodiversity, and the environment. The assessments take into account factors such as the characteristics of the GMO, potential allergenicity, potential toxicity, and potential ecological impacts.[106]

In addition, the precautionary principle is a key component of Cameroon's approach to GMO regulation.[107] It means that in cases where there is scientific uncertainty regarding the potential risks of GMOs, precautionary measures are taken to protect human health,

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[104] Professor Vincent P.K. Titanji (2012) The Status of Genetically Modified Organisms (GMO) in Cameroon-A mini
Review. *Journal of The Cameroon Academy of Sciences* Vol. 10 No. 1 (2012) available at *file:///C:/Users/KIHALI%20R/Downloads/87058-Article%20Text-215117-1-10-20130403.pdf* accessed 16 June 2023

[105] Ibid

[106] Ibid

[107] Article 18, 19 and 20 of Law No. 2003/006 of 21 April 2003

biodiversity, and the environment. This principle allows for a cautious approach, even in the absence of conclusive scientific evidence of harm.[108]

Cameroon also emphasizes the importance of public participation in decision-making processes related to GMOs. The regulatory framework encourages the involvement of the public, including affected communities, civil society organizations, and stakeholders, in the decision-making process. Public consultations and awareness-raising activities are conducted to gather input and ensure transparency.[109]

Finally, Cameroon recognizes the importance of labeling and traceability of GMOs. The regulatory framework includes provisions for the labeling of GMO products, including food and feed, to provide consumers with information and enable them to make informed choices. Traceability measures are in place to track the movement of GMOs throughout the supply chain.[110]

By adopting a restrictive approach, Cameroon aims to ensure that the cultivation, importation, and release of GMOs are conducted in a manner that prioritizes human health, protects the environment, and safeguards biodiversity. This approach reflects the country's commitment to biosafety and aligns with international principles and agreements.

[108] Ibid
[109] Part V Ibid
[110] Chapter IV Part IX Ibid

4.4 Ghana

4.4.1 Biosafety Act, 2011

The Biosafety Act, 2011 (Act 831) is a significant piece of legislation in Ghana that regulates the safe development, handling, transfer, and use of genetically modified organisms (GMOs) within the country. The Biosafety Act establishes the National Biosafety Authority (NBA) as the regulatory body responsible for the implementation and enforcement of GMO regulations in Ghana. The NBA is responsible for granting permits, conducting risk assessments, monitoring compliance, and ensuring the safe use and handling of GMOs.[111]The Act requires anyone involved in the research, development, importation, exportation, transit, commercial release, and placing on the market of GMOs to obtain permits from the NBA. The permit application process involves providing detailed information on the GMO, including risk assessments, risk management plans, and potential socio-economic considerations.[112]

The Biosafety Act emphasizes the importance of conducting comprehensive risk assessments for GMOs. The risk assessments evaluate potential risks to human health, biodiversity, and the environment. Risk management plans must be developed and implemented to mitigate identified risks and ensure the safe handling and use of GMOs.[113]

The Act also recognizes the significance of public participation in decision-making processes related to GMOs. It requires the NBA to provide opportunities for public input during the permit application process and other relevant procedures. The Act also promotes

[111] Section 3 & 4 of the The Biosafety Act, 2011
[112] Ibid
[113] Fourth schedule, section 19 Ibid

transparency by providing access to information related to GMOs, risk assessments, and regulatory decisions.[114]

Finally, The Act establishes penalties for non-compliance with GMO regulations. It outlines offenses and corresponding penalties, which may include fines, imprisonment, or both, for violations such as conducting GMO activities without a permit, providing false information, or failing to comply with conditions imposed by the NBA.[115]

4.4.2 Biosafety (Management of Biotechnology) Regulations, 2019

The Biosafety (Management of Biotechnology) Regulations, 2019 is a set of regulations in Ghana that complement the Biosafety Act, 2011 (Act 831) in governing the safe handling, transfer, development, and use of genetically modified organisms (GMOs) within the country.

The Regulations classify the Authority as the national focal point responsible for the following: (a) liaising with the Secretariat of the United Nations Convention on Biological Diversity for the performance of the administrative functions required under the Cartagena Protocol on Biosafety; (b) informing other Parties to the Cartagena Protocol on Biosafety of any bilateral, regional or multilateral agreements and arrangements that Ghana has entered into before and after the date of entry into force of the Protocol; (c) the exchange of information and provision of information to other Parties to the Cartagena Protocol and other countries in relation to biosafety and biotechnology; among other functions.[116]

[114] Section 42 Ibid
[115] Section 41 Ibid
[116] Regulation 1 of the Biosafety (Management of Biotechnology) Regulations, 2019

The Institutional biosafety committee is also established. It plays a crucial role in enforcing guidelines and ensuring biosafety compliance. The committee monitors ongoing regulated work within the institution, providing guidance and counseling to proponents on biosafety issues and compliance with the relevant regulations. If any infractions are identified, the committee reports them to the institutional head or the regulatory authority, recommending the cessation of a biosafety activity if it poses a threat to the public, environment, or laboratory personnel.[117]

Additionally, the committee determines additional biosafety measures and develops supplementary terms and conditions tailored to the specific risks and concerns identified. It assists researchers in conducting risk analysis, organizes training programs for institution staff and stakeholders, and provides a platform for researchers and personnel to address questions, disputes, or concerns.[118]

The committee maintains an updated directory of personnel involved in biosafety activities at different levels and ensures proper training on laboratory or field practices, emergency procedures, and equipment operation. It also serves as a conduit for information exchange between the regulatory authority, research teams, and other stakeholders, facilitating the flow of information, ideas, and opinions.[119]

The regulations also emphasize on authorization prior to placing, export and transit of GMOs [120] and the importance of public

[117] Regulation 8 Ibid
[118] Ibid
[119] Ibid
[120] Regulation 15, 16 and 17 Ibid

participation and awareness.[121]The Authority is also responsible for the overall monitoring, risk management and environmental release of genetically modified organisms.[122]The regulations also address other concepts such as food safety.[123]

4.5 Zambia

4.5.1 Biosafety Act, 2007

The Biosafety Act of 2007 is a significant piece of legislation in Zambia that governs the safe handling, use, and transfer of genetically modified organisms (GMOs) within the country.[124] The act provides a regulatory framework for the assessment, regulation, and management of GMOs in order to protect human health, biodiversity, and the environment. It applies to all activities involving GMOs, including research, development, importation, exportation, transit, commercial release, and placing on the market of GMOs in Zambia. It covers both agricultural and non-agricultural GMOs.[125]

The act establishes the National Biosafety Authority (NBA)[126] as the regulatory body responsible for implementing and enforcing biosafety regulations in Zambia. The NBA is responsible for granting permits, conducting risk assessments, monitoring compliance, and ensuring the safe use and handling of GMOs.[127]

The Biosafety Act emphasizes the importance of conducting comprehensive risk assessments for GMOs. It requires applicants to

[121] Regulation 19 Ibid
[122] Regulation 18 Ibid
[123] Regulation 23 Ibid
[124] Long Title, Biosafety Act, 2007
[125] Section 3, Ibid
[126] Section 4, Ibid
[127] Section 5, Ibid

submit data and information on the characteristics of the GMO, potential risks to human health, biodiversity, and the environment, as well as risk management plans to mitigate identified risks.[128] In addition, anyone involved in activities related to GMOs must obtain permits from the NBA. The act sets out the permit application process and specifies the information and documentation required for each category of GMO activity. The NBA evaluates applications based on the potential risks and compliance with biosafety requirements.[129]

The act establishes measures for the containment and control of GMOs to prevent their unintended release into the environment. It specifies requirements for physical and biological containment, monitoring systems, and reporting obligations to the NBA.[130]The Biosafety Act also promotes public participation in decision-making processes concerning GMOs. It requires public consultations during the assessment of permit applications and provides mechanisms for public access to information related to GMOs, risk assessments, and regulatory decisions.[131]

Finally, the act defines offenses and penalties for non-compliance with biosafety regulations. It specifies fines, imprisonment, or both for violations such as conducting GMO activities without authorization, providing false information, or failing to comply with containment measures or reporting requirements.[132]

[128] Part IV & V Ibid
[129] Section 10, 17, 18 Ibid
[130] Section 7 Ibid
[131] Section 14 Ibid
[132] Section 45 Ibid

4.5.2 Subsequent Legalization

In Zambia, subsequent legalization refers to the process of granting legal status or approval for the cultivation, importation, or commercialization of specific genetically modified organisms (GMOs) that were previously under a moratorium or not explicitly authorized.[133] It signifies a shift in the regulatory approach towards GMOs and allows for their regulated use within the country.

Zambia has had a complex history with GMOs. In the early 2000s, Zambia imposed a moratorium on the importation and commercialization of GMOs, particularly genetically modified food aid during a period of food insecurity. The moratorium was implemented due to concerns about the safety and long-term impacts of GMOs on human health and the environment. Over time, as scientific knowledge and understanding of GMOs have evolved, there has been a reevaluation of the regulatory framework surrounding GMOs in Zambia. This has led to a shift from a restrictive approach to a more permissive or regulated approach.[134]

Subsequent legalization involves the issuance of specific authorizations or approvals for the cultivation, importation, or commercialization of certain GMOs. This process typically requires rigorous risk assessments, evaluation of potential environmental and health impacts, and adherence to regulatory protocols. Even with subsequent legalization, there are usually regulatory safeguards in place to ensure the safe handling, monitoring, and containment of GMOs. These may include measures such as labeling requirements,

[133]Emma Broadbent (June 2012) Research-based evidence in African policy debates. Case study 3, The contemporary debate on genetically modified organisms in Zambia. Available at *https://onthinktanks.org/wp-content/uploads/2014/08/9122.pdf* accessed 16 June 2023

[134] Ibid

traceability systems, and post-release monitoring to assess the environmental and socio-economic impacts of GMOs.[135]

Subsequent legalization of GMOs often involves public engagement and consultation to ensure transparency and allow for input from various stakeholders. Public concerns, ethical considerations, and socio-economic implications may be taken into account during the decision-making process.[136]

5 The Proposed Way Forward for Kenya's Regulation of GMOs

5.1 Merits of a Precautionary Approach

The precautionary approach is an important concept in the regulation of genetically modified organisms (GMOs) that advocates for caution in the face of scientific uncertainty and potential risks to human health and the environment.[137] In the context of Kenya's regulation of GMOs, adopting a precautionary approach can have several merits. First, A precautionary approach prioritizes the protection of human health and the environment by taking proactive measures to minimize potential risks associated with GMOs. It acknowledges that scientific knowledge regarding the long-term impacts of GMOs may be incomplete or uncertain, and therefore calls for careful evaluation and risk management before widespread deployment.[138]

Secondly, by adopting a precautionary approach, Kenya can proactively assess the potential risks of GMOs before they are introduced into the environment or reach the market. This allows for

[135] Ibid
[136] Ibid
[137] Muchiri, Josphat & Mutui, Theophilus M. & Ogoyi, Dorington. (2020). Kenya—A Review of Regulation of Genetically Modified Organisms (GMOs)—Case Study of Kenya. 10.1007/978-3-030-53183-6_23.
[138] Ibid

the early detection and prevention of any potential adverse effects, minimizing the chances of irreversible harm to ecosystems, biodiversity, and human health.[139]

Thirdly, the precautionary approach recognizes the ethical considerations surrounding GMOs, such as the right of individuals and communities to be informed and make choices regarding the food they consume and the environment they inhabit. It supports transparency, public participation, and informed decision-making, allowing for a more inclusive and democratic regulatory process.[140] In addition, A precautionary approach aligns with principles of sustainability by promoting the responsible and sustainable use of GMOs. It encourages comprehensive risk assessments, monitoring systems, and the consideration of socio-economic impacts, ensuring that GMOs are introduced in a manner that does not compromise the long-term sustainability of agricultural systems, ecosystems, and livelihoods.[141]

Finally, many international agreements and frameworks emphasize the importance of a precautionary approach in GMO regulation. By adopting this approach, Kenya can align its regulatory system with international standards, enhancing its credibility and facilitating trade relationships with countries that have similar precautionary principles.[142]

Important to note, the precautionary approach should be balanced with the need for scientific progress, innovation, and the potential benefits that GMOs can offer, such as increased crop yields and

[139] Ibid
[140] Ibid
[141] Ibid
[142] Ibid

enhanced nutritional content. Striking a balance between precaution and the potential benefits of GMOs requires careful evaluation, continuous monitoring, and adaptive management approaches.[143]

As Kenya considers the way forward for the regulation of GMOs, carefully weighing the merits of a precautionary approach can contribute to the development of a robust and science-based regulatory framework that protects human health, the environment, and the interests of all stakeholders involved.

5.2 Benefits of Incorporating Socioeconomic Considerations

Incorporating socioeconomic considerations into the regulation of GMOs in Kenya can bring several benefits. By taking into account the broader social and economic impacts of GMOs, the regulatory framework can better address the needs and interests of various stakeholders.

Socioeconomic considerations allow for an evaluation of the potential contributions of GMOs to food security and agricultural productivity.[144] By assessing the economic benefits and potential risks associated with GMOs, regulatory decisions can be made in a manner that supports sustainable agricultural practices, enhances crop yields, improves food availability, and contributes to overall food security. Incorporating socioeconomic considerations also helps to safeguard the interests of small-scale farmers and rural communities. It allows for an examination of the potential effects of GMOs on rural livelihoods, local economies, and traditional farming

[143] Ibid

[144] Mmbando GS. The legal aspect of the current use of genetically modified organisms in Kenya, Tanzania, and Uganda. GM Crops Food. 2023 Dec 31;14(1):1-12. doi: 10.1080/21645698.2023.2208999. PMID: 37158150; PMCID: PMC10171133.

practices. This consideration can help ensure that GMO regulations do not disproportionately favor large-scale commercial agriculture but also support the needs and sustainability of small-scale farmers.[145]

Furthermore, a comprehensive assessment of socioeconomic considerations can help identify the potential economic benefits and opportunities associated with GMOs. It allows for an analysis of the impacts on various sectors, such as agribusiness, biotechnology research and development, and technology transfer. By considering economic development and innovation, regulatory frameworks can encourage investment, job creation, and the growth of a knowledge-based economy.[146]

Taking socioeconomic considerations into account also facilitates trade and market access for Kenyan agricultural products. Many countries and regions have specific requirements regarding GMOs, and understanding the socioeconomic implications can help ensure that Kenyan products meet international standards and regulations. This consideration enables the country to participate in global markets and maximize trade opportunities.[147]

Finally, addressing socioeconomic considerations also recognizes the importance of public perception and acceptance of GMOs. By considering social and economic impacts, regulatory frameworks can promote transparency, public engagement, and informed decision-making. This can help build public trust, enhance dialogue between

[145] Ibid
[146] Ibid
[147] Ibid

stakeholders, and foster a more inclusive and participatory regulatory process.[148]

Incorporating socioeconomic considerations in GMO regulation is crucial for making well-informed decisions that go beyond the scientific aspects of GMOs. It acknowledges that GMOs can have far-reaching effects on society, economy, and the livelihoods of individuals and communities. By taking a holistic approach, Kenya can develop a regulatory framework that balances the potential benefits and risks of GMOs while ensuring socioeconomic welfare, sustainability, and equitable access to the benefits of modern biotechnology.

5.3 Institutional Independence and Cooperation

Institutional independence and cooperation play a vital role in the effective regulation of genetically modified organisms (GMOs) in Kenya. These factors are essential for establishing a robust and transparent regulatory framework. Institutional independence refers to regulatory bodies having the autonomy to make decisions based on scientific evidence and objective analysis without undue influence from political or commercial interests.[149] It ensures that regulatory decisions are made in the best interest of public health, safety, and environmental protection. This has several benefits. First, Institutional independence fosters public trust in the regulatory process, as it demonstrates that decisions are made impartially and without bias. Secondly, Independent regulatory bodies are better equipped to evaluate scientific evidence objectively, ensuring that GMO assessments are based on rigorous scientific principles. Thirdly,

[148] Ibid

[149] Gebre Kedisso E, Barro N, Chimphepo L, Elagib T, Gidado R, Mbabazi R, Oloo B, Maredia K. Crop biotechnology and smallholder Farmers in Africa. *Genet Modif Plants Beyond*. 2022; 107:27.

Independent regulatory bodies enhance the credibility of the regulatory process, both nationally and internationally, leading to increased confidence in the safety and reliability of GMOs.[150]

Cooperation among relevant institutions and stakeholders is essential for effective GMO regulation. This includes collaboration between regulatory agencies, research institutions, industry, civil society organizations, and the public.[151]Cooperation enables the sharing of scientific research, data, and expertise, fostering a better understanding of GMOs and their potential impacts. Collaborative efforts can facilitate the harmonization of regulatory standards and practices, promoting consistency and coherence in GMO regulation across different sectors and jurisdictions. Cooperation also allows for a multidisciplinary approach to risk assessment, integrating scientific, environmental, health, and socioeconomic expertise to make well-informed decisions. Furthermore, Cooperation encourages active involvement and engagement of stakeholders, ensuring that diverse perspectives and concerns are taken into account in the decision-making process.[152]

Moreover, Institutional independence and cooperation also necessitate the development of adequate capacity within regulatory bodies. This involves providing training, resources, and technical support to regulatory agencies to strengthen their ability to assess and manage GMOs effectively. [153] Capacity building empowers regulatory institutions with the necessary knowledge and skills to conduct comprehensive risk assessments, monitor compliance, and enforce regulations. Strengthened capacities also enable regulatory

[150] Ibid
[151] Ibid
[152] Ibid
[153] Ibid

bodies to carry out their functions more efficiently, leading to timely decision-making and effective oversight of GMO activities. Finally, Continuous capacity building ensures that regulatory bodies keep pace with advancements in biotechnology and are equipped to address emerging challenges and opportunities.[154]

5.4 Necessity of Public Participation in GMO Governance

Public participation is crucial in the governance of GMOs in Kenya. Involving the public in decision-making processes related to GMO regulation ensures transparency, inclusivity, and accountability.

Public participation promotes democratic principles by allowing individuals and communities to have a say in matters that directly impact their lives, health, and environment. It recognizes that decisions on GMOs should not be made solely by regulatory authorities or industry stakeholders but should involve the broader public. [155] Engaging the public provides an opportunity to share information, knowledge, and scientific evidence related to GMOs. It enables citizens to understand the potential benefits, risks, and socio-economic implications of GMOs, facilitating more informed decision-making by regulatory authorities.[156]

In addition, public participation allows for the identification and consideration of diverse perspectives, values, and concerns related to GMOs. It provides a platform for individuals and communities to express their views, raise questions, and seek clarifications. This open dialogue helps build trust between regulators, industry, and the

[154] Ibid

[155] Zhang C, Wohlhueter R, Zhang H. Genetically modified foods: a critical review of their promise and problems. *Food Sci Hum Wellness*. 2016; 5:116–23. doi: 10.1016/j.fshw.2016.04.002

[156] Ibid

public, creating a more inclusive and responsive regulatory system. [157] Public participation also ensures that socio-economic considerations, such as impacts on farmers, local communities, and food security, are taken into account during decision-making processes. It allows for the evaluation of potential benefits and risks from a broader societal perspective, promoting a balanced approach to GMO governance.[158]

Furthermore, Public participation lends legitimacy to GMO governance processes and outcomes. When people are given the opportunity to participate and influence decisions, they are more likely to accept and support the resulting regulations. This can lead to increased public acceptance of GMOs, facilitating their responsible and sustainable use. [159] Engaging the public in GMO governance fosters capacity building and awareness-raising efforts. It provides opportunities for education, dialogue, and the sharing of knowledge related to biotechnology, GMO safety, and regulatory processes. This empowers individuals and communities to make informed choices and actively participate in discussions around GMOs.[160]

To ensure effective public participation, it is essential to create accessible and inclusive platforms, use clear and understandable language, and provide sufficient time for engagement. Additionally, efforts should be made to reach marginalized and vulnerable groups who may be disproportionately affected by GMO decisions. [161] By incorporating public participation in GMO governance, Kenya can benefit from diverse perspectives, build public trust, and develop

[157] Ibid
[158] Ibid
[159] Ibid
[160] Ibid
[161] Ibid

regulations that reflect societal values, while effectively managing the risks and potential benefits of GMOs.

5.5 Essential Role of Access to Information

Access to information plays an essential role in the regulation of GMOs in Kenya. It ensures transparency, empowers stakeholders, and facilitates informed decision-making. Access to information promotes transparency in GMO regulation by making relevant data, scientific studies, risk assessments, and regulatory processes available to the public. This transparency holds regulatory authorities accountable for their decisions, ensuring that they are based on sound scientific evidence and rigorous evaluation.[162]

Access to information empowers stakeholders, including the public, farmers, consumers, and civil society organizations, to make informed decisions about GMOs. By providing comprehensive and accurate information about the potential benefits, risks, and socio-economic implications of GMOs, stakeholders can actively engage in discussions and contribute to the decision-making process.[163]

Transparent access to information builds public confidence and trust in GMO regulation. When stakeholders have access to relevant information, they are more likely to trust the regulatory system and perceive it as fair, reliable, and responsive to their concerns. This trust is crucial for the acceptance and responsible use of GMOs.[164]

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[162] Mabaya E, Fulton J, Simiyu-Wafukho S, Nang'ayo F. Factors influencing adoption of genetically modified crops in Africa. *Dev South Afr*. 2015; 32:577–91. doi: 10.1080/0376835X.2015.1044078.

[163] Ibid

[164] Ibid

Access to information also enables effective risk communication between regulatory authorities, scientists, industry, and the public. It allows for the dissemination of information about the potential risks, mitigation measures, and monitoring plans associated with GMOs. This communication helps address concerns, clarify misconceptions, and foster a constructive dialogue between different stakeholders.[165] In addition, Access to information fosters scientific understanding of GMOs and their impacts. Researchers, scientists, and academic institutions can access data and research findings, which can contribute to a better understanding of the potential benefits and risks of GMOs. This knowledge supports evidence-based decision-making and the advancement of scientific research.[166]

Finally, Access to information empowers farmers and consumers to make informed choices about GMOs. Farmers can access information about GMO seeds, their cultivation practices, and potential impacts on their livelihoods. Consumers can access information about GMO labeling, product ingredients, and safety assessments, allowing them to make choices aligned with their preferences and values.[167]

To ensure effective access to information, regulatory authorities should establish clear mechanisms for information disclosure, including public databases, websites, public consultations, and stakeholder engagement processes. Efforts should also be made to promote information dissemination in local languages and target marginalized communities to ensure inclusivity.[168] By prioritizing access to information, Kenya can build a transparent and inclusive GMO regulatory framework that empowers stakeholders, fosters

[165] Ibid
[166] Ibid
[167] Ibid
[168] Ibid

trust, and facilitates informed decision-making for the responsible use of GMOs in agriculture and food production.

Conclusion

The discussion on the status of GMOs in Africa, with a particular focus on Kenya, has shed light on the evolving regulatory landscape, the role of international and regional treaty instruments, and a comparative analysis of GMO approaches in selected African countries. Through this examination, several key themes and considerations have emerged.

Firstly, the introduction of GMOs in Africa has transitioned from an experimental phase to steady proliferation, accompanied by both enthusiasm and resistance. This has prompted regulatory reforms aimed at addressing concerns, ensuring transparency, and safeguarding the environment, biodiversity, and human health.

International and regional treaty instruments, such as the Convention on Biological Diversity and the Cartagena Biosafety Protocol, have played pivotal roles in shaping the regulatory framework for GMOs. These instruments emphasize the precautionary approach, advance informed agreement, exchange of information, competent national authorities, and socioeconomic considerations. They provide a foundation for harmonizing GMO regulation, fostering knowledge sharing, and promoting responsible biotechnology practices across nations.

The comparative analysis of GMO approaches in selected African countries has highlighted the diversity of regulatory frameworks. Countries like South Africa have embraced GMOs, implementing comprehensive legislation to regulate their cultivation, commercialization, and safety assessments. Cameroon and Ghana

have taken more cautious approaches, imposing strict regulations and emphasizing risk assessment, public participation, and labeling requirements. Zambia's cautious approach, reflected in its Biosafety Act, 2007, demonstrates the importance of rigorous risk assessment, public participation, and enforcement mechanisms.

Looking ahead, the proposed way forward for Kenya's GMO regulation involves key considerations. The merits of a precautionary approach have been emphasized to ensure thorough risk assessment, monitoring, and post-market surveillance. Incorporating socioeconomic considerations is crucial to evaluate the impacts of GMOs on farmers, consumers, food security, and local economies. Institutional independence and cooperation are essential for establishing a transparent and robust regulatory framework. Additionally, public participation and access to information are vital elements that foster transparency, inclusivity, and informed decision-making.

The regulation of GMOs in Africa, including Kenya, necessitates a balanced and adaptive approach that addresses societal concerns, promotes scientific rigor, and facilitates sustainable agricultural practices. By adopting principles such as the precautionary approach, socioeconomic considerations, institutional independence, public participation, and access to information, African nations can develop effective GMO regulatory frameworks. These frameworks can ensure responsible GMO use, safeguard human health and the environment, and foster public trust and acceptance. Ultimately, an informed and inclusive approach will allow Africa to navigate the complexities of GMO regulation and harness the potential benefits of biotechnology in a manner that aligns with local contexts and priorities.

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Greenwashing: A hindrance to Achieving Sustainability?

*By****: Dr. Kariuki Muigua****

Abstract

This paper critically discusses the concept of greenwashing as a strategy used by the corporate world and other players to create the impression that they are compliant with Environmental, Social and Governance (ESG) while hiding the true level of compliance, through marketing. The author argues that it is necessary to ensure that all corporations and businesses, whose operations have the potential to impact the environment, are included and held accountable for any detrimental consequences on both human beings and the environment, through stricter enforcement of corporate governance and environmental legislation aimed at curbing violation of ESG rules and greenwashing in particular. These efforts are aimed at attaining sustainability in Kenya and Africa as a whole.

1. Introduction

A company's level of social responsibility may be measured by how well it strikes a balance between its economic success and its commitment to protecting the environment.[1] The concept of Corporate Social Responsibility (CSR) pertains to the

**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; ESG Consultant; Advocate of the High Court of Kenya; Senior Lecturer at the University of Nairobi, Faculty of Law; Member of the Permanent Court of arbitration(PCA) [August 2023].*

[1] Zhang D, 'Are Firms Motivated to Greenwash by Financial Constraints? Evidence from Global Firms' Data' (2022) 33 Journal of International Financial Management & Accounting 459.

equilibrium between a company's financial performance and its commitment to environmental preservation. This subject has garnered growing interest among academic researchers, particularly in the context of the Paris Climate Agreement of 2015. [2] Corporate social responsibility (CSR) refers to a discretionary conduct that goes beyond legal obligations. It is often used by firms as a strategic approach to address the diverse demands of many stakeholder groups, including institutional, public, and other stakeholders, in response to external pressures.[3]

In light of the need for sustainable development, Corporate Environmental Responsibility has emerged as a vital ethical asset for organisations seeking to enhance company values and secure resources.[4]

The incorporation of environmental performance into corporate social responsibility (CSR) is a crucial aspect that is gaining significance in tandem with the global push for sustainable economic development. [5] Organizations that demonstrate strong environmental performance have the potential to cultivate a favourable reputation among investors and therefore lower their costs of financing. Conversely, organizations that exhibit poor environmental performance are likely to face detrimental consequences, such as damage to their

[2] Ibid.
[3] Xia F and others, 'Financial Constraints and Corporate Greenwashing Strategies in China' (2023) 30 Corporate Social Responsibility and Environmental Management 1770.
[4] Ibid.
[5] Ibid.

reputation.[6] The fundamental process at play is that investors anticipate that polluting entities would incur substantial costs and liabilities associated with pollution, thereby diminishing their future competitiveness.[7]

Nevertheless, a legitimate worry arises over the phenomenon known as "greenwashing," wherein corporations may strategically disclose environmental performance data in a manner that deceives both the general public and potential investors.[8]

This paper critically discusses the concept of greenwashing as a strategy used by the corporate world to create the impression that they are compliant with Environmental, Social and Governance (ESG) while hiding the true level of compliance, through marketing, and makes recommendations on how to address the same.[9]

2. Greenwashing: Meaning and Drivers

One of the conceptualizations of greenwashing pertains to the phenomenon whereby firms exhibit an appearance of transparency and disseminate substantial volumes of environmental, social, and governance (ESG) data, but

[6] Ibid.
[7] Ibid.
[8] Xia, F., Chen, J., Yang, X., Li, X. and Zhang, B., 'Financial Constraints and Corporate Greenwashing Strategies in China' (2023) 30 Corporate Social Responsibility and Environmental Management 1770.
[9] Yu EP, Van Luu B and Chen CH, 'Greenwashing in Environmental, Social and Governance Disclosures' (2020) 52 Research in International Business and Finance 101192.

demonstrate inadequate results in many dimensions of their ESG endeavours.[10]

The assessment of a firm's engagement in greenwashing involves evaluating its standing in relation to other firms by comparing the disparity between its ESG disclosure and performance ratings. [11] The primary motivation for organizations' decision to participate in greenwashing of their environmental performance is the anticipation of future investment and financing need. It has been observed that companies with elevated levels of debt are more inclined to partake in greenwashing practices.[12]

The phenomenon of greenwashing often arises from the strategic use of legal resources, such as green subsidies, by enterprises. The presence of legitimacy status ensures that corporations are open to external resources, which may lead enterprises with substandard environmental performance to use selective disclosure tactics.[13] However, it is important to note that firms engage in greenwashing practices with the intention of conveying favourable messages. Companies may engage in the deceptive transmission of information by concealing unfavourable environmental data in order to

[10] Zhang D, 'Are Firms Motivated to Greenwash by Financial Constraints? Evidence from Global Firms' Data' (2022) 33 Journal of International Financial Management & Accounting 459.
[11] Ibid.
[12] Xia F and others, 'Financial Constraints and Corporate Greenwashing Strategies in China' (2023) 30 Corporate Social Responsibility and Environmental Management 1770.
[13] Ibid.

preserve their reputation and project an environmentally responsible image, sometimes in response to pressure from investors.[14] Furthermore, the environmental decisions made by firms may be influenced by the interests and risk preferences of corporate leaders, who hold managerial and decision-making positions inside these organisations.[15]

There is ongoing discourse on the potential influence of cultural variables on the propensity for greenwashing. The development of the current notion of corporate social responsibility (CSR) and the majority of studies on greenwashing have been focused on western cultures. However, there is an increasing interest in the social and environmental practices of corporations in transitional economies, leading to a fast expansion of relevant literature.[16]

3. Combating Greenwashing for Sustainability

In recent years, there has been a growing focus on climate change and pollution emissions due to their significant impact on both human well-being and the economic and financial sectors.[17]

The involvement of firms in greenwashing practices has the potential to negatively impact several stakeholders, such as

[14] Ibid.
[15] Ibid.
[16] Xia F and others, 'Financial Constraints and Corporate Greenwashing Strategies in China' (2023) 30 Corporate Social Responsibility and Environmental Management 1770.
[17] Zhang D, 'Are Firms Motivated to Greenwash by Financial Constraints? Evidence from Global Firms' Data' (2022) 33 Journal of International Financial Management & Accounting 459.

investors, the general public, and competing enterprises. Greenwashing practices may result in a situation of information asymmetry, thereby causing detrimental effects on the financial interests of investors. The disclosure of previously concealed adverse environmental data by corporate executives has the potential to result in a significant decline in the value of a company's shares.[18] Furthermore, engaging in greenwashing practices does not contribute to the enhancement of business environmental performance. It is plausible for corporations to conceal instances of pollution and even breaches of environmental legislation by engaging in symbolic compliance.[19]

The absence of consequences for greenwashing corporations also ultimately hampers equitable competition within markets, particularly for companies who prioritize environmental management and proactively publish essential environmental information.[20] Consequently, the presence of greenwashing practices may have an impact on stakeholders' perceptions of the firm, the decision-making processes of managers, the work performance of staff, and the purchase choices of customers.[21]

It is the cultural aspect that has informed the current paper, with a focus on developing nations like Kenya. For instance, the Kenya Flower Council, a voluntary membership organisation

[18] Xia F and others, 'Financial Constraints and Corporate Greenwashing Strategies in China' (2023) 30 Corporate Social Responsibility and Environmental Management 1770.
[19] Ibid.
[20] Ibid.
[21] Ibid.

run by a board, with its main office located in Nairobi, oversees the adherence of its members to a set of guidelines encompassing various aspects of horticultural practices, sustainability, social responsibility, hygiene, health and safety, capacity development, environmental preservation, and conservation. The adherence to the code of practice serves as the fundamental support for all actions undertaken.[22] The code of practice has been evaluated by the Floricultural Sustainability Initiative to assess its compliance with recognised social and environmental sustainability criteria, making it one of the three global standards that have undergone independent benchmarking.[23]

This does not mean that human rights violations and greenwashing have not been reported in Kenya and perhaps other African countries. [24] Western countries have been increasingly calling on African companies and other international corporations with presence in developing countries and others to adhere to ESG requirements. For instance, on the 1st of June 2023, after a prolonged period of

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[22] 'Council Strives to Ensure Flower Farmers Meet Defined Standards - Kenyan Woman' (4 February 2018) <*https://kw.awcfs.org/article/council-strives-to-ensure-flower-farmers-meet-defined-standards/*> accessed 23 August 2023; see also 'EU Trade Deal: Kenya Opens Its Market to European Goods – DW – 06/20/2023' (*dw.com*) <*https://www.dw.com/en/eu-trade-deal-kenya-opens-its-market-to-european-goods/a-65978273*> accessed 23 August 2023.

[23] Ibid; see also Buxton A and Vorley B, 'The Ethical Agent: Fresh Flowers in Kenya' [2012] International Institute for Environment and Development/Sustainable Food Lab.

[24] Arif-Fear L, 'The Dark Side of the Flower Sector: The Growing Exploitation of Women in Kenya' (*Anti-Slavery International*, 3 November 2022) <*https://www.antislavery.org/flower-sector-exploitation-of-women-in-kenya/*> accessed 23 August 2023.

rigorous discussions, the European Parliament endorsed its formal stance on the Corporate Sustainability Due Diligence Directive (CSDDD).[25] The implementation of the Corporate Sustainability Due Diligence Directive (CSDDD) proposed by the European Commission would require corporations to create due diligence protocols in order to mitigate the negative consequences of their activities on human rights and the environment. This would include addressing such effects across their global value chains. The objective is to promote the development of enduring and accountable corporate conduct, as well as to include sustainability factors into the operational and governance practices of firms.[26]

The CSDDD is a component of the European Green Deal which encompasses a series of policy measures implemented by the European Commission. Its primary objective is to align the climate, energy, transport, and taxation policies of the European Union in order to achieve a minimum reduction of 55% in net greenhouse gas emissions by 2030, relative to the levels recorded in 1990. Furthermore, the European Green Deal aims to attain climate-neutral by 2050.[27]

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[25] Russell G, 'One Step Closer to Mandatory Human Rights and Environmental Due Diligence in the EU' (*Anti-Slavery International*, 20 June 2023) <*https://www.antislavery.org/one-step-closer-to-mandatory-human-rights-and-environmental-due-diligence-in-the-eu/*> accessed 23 August 2023.

[26] Union (EBU) EB, *Sustainability Rulebook: The Corporate Sustainability Due Diligence Directive (CSDDD)* (2023) <*https://www.ebu.ch/case-studies/open/legal-policy/the-future-of-eu-sustainability-regulation-ii-the-corporate-sustainability-due-diligence-directive-csddd*> accessed 23 August 2023.

[27] Ibid.

Similarly, the proposal for a rule on deforestation-free supply chains was presented by the EU Commission in November 2021.[28] Cocoa was chosen, with beef, palm oil, soy, and coffee, as one of the five global commodities that needed more control. According to the survey, cocoa is alone accountable for 7.5% of deforestation worldwide that is attributed to the European Union.[29]

It has been noted that Although governments require corporate environmental information disclosure, weak enforcement and low penalties can make it easy for companies to greenwash.[30] It is suggested that African countries could borrow a leaf from the proposed European CSDDD Rules' mode of enforcement which is:[31]

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[28] Ghana <*Anand Chandrasekhar*> with reporting by Delali Adogla-Bessa in, 'West Africa Braces for Tough Sustainable Cocoa Rules in Europe' (*SWI swissinfo.ch*, 2 August 2022) <*https://www.swissinfo.ch/eng/business/west-africa-braces-for-tough-sustainable-cocoa-rules-in-europe/47713236*> accessed 23 August 2023.

[29] Ibid; see also Ilgar O, 'SAP BrandVoice: The Sustainability Problems Percolating In The Coffee Supply Chain' (*Forbes*) <*https://www.forbes.com/sites/sap/2022/09/29/the-sustainability-problems-percolating-in-the-coffee-supply-chain/*> accessed 23 August 2023.

[30] Xia F and others, 'Financial Constraints and Corporate Greenwashing Strategies in China' (2023) 30 Corporate Social Responsibility and Environmental Management 1770.

[31] Union (EBU) EB, *Sustainability Rulebook: The Corporate Sustainability Due Diligence Directive (CSDDD)* (2023) <https://www.ebu.ch/case-studies/open/legal-policy/the-future-of-eu-sustainability-regulation-ii-the-corporate-sustainability-due-diligence-directive-csddd> accessed 23 August 2023.

a. **Administrative supervision and sanctions**: Member States would designate an authority to supervise and impose administrative sanctions, including fines and compliance orders. At the European level, the Commission will set up a European Network of Supervisory Authorities that will bring together representatives of the national authorities to ensure a coordinated approach. Natural and legal persons would be entitled to submit "substantiated concerns" to any supervisory authority alleging that a company is failing to comply.[32]
b. **Civil liability**: Member States will ensure that victims have access to compensation for damages resulting from the companies' failure to comply with their due diligence obligations.[33]
c. **Financial incentives**: Implementation of the emission reduction plans will be embedded in the financial incentives of directors of EU companies by linking their variable remuneration to their contribution to fulfilling these plans.[34]

While these proposals may require additional legislation/regulations, they are not entirely unachievable with the current framework, especially in Kenya. Companies are subject to oversight from the public and social organisations in order to ensure their adherence to Corporate Social

[32] Ibid; see also 'Corporate Sustainability Due Diligence' (23 February 2022) <*https://commission.europa.eu/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en*> accessed 23 August 2023.
[33] Ibid; 'Corporate Sustainability Due Diligence' (23 February 2022) <*https://commission.europa.eu/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en*> accessed 23 August 2023.
[34] Ibid; see also 'Corporate Sustainability Due Diligence' (23 February 2022) <*https://commission.europa.eu/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en*> accessed 23 August 2023.

Responsibility (CSR) practices. Public and social organisations closely monitor the environmental practices of enterprises and often express dissatisfaction or impose penalties on companies that demonstrate environmental irresponsibility. [35] The presence of social oversight heightens the likelihood of greenwashing being exposed, resulting in a subsequent erosion of public confidence.[36] Hence, the oversight from the general public has the potential to impede the practice of greenwashing by corporations. [37] Moreover, in a geographical area characterized by elevated environmental requirements and a greater emphasis on corporate environmental disclosure, the influence of societal scrutiny will assume a more important role.[38]

Directors, in fulfilment of their duty to enhance the flourishing of a company, are mandated by the Companies Act of 2015 in Kenya to duly consider the potential impacts of the company's operations on both the surrounding community and the ecological environment. [39] Furthermore, the legislation mandates that directors include environmental considerations

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[35] Xia F and others, 'Financial Constraints and Corporate Greenwashing Strategies in China' (2023) 30 Corporate Social Responsibility and Environmental Management 1770.

[36] 'Corporate Sustainability Greenwash and the Risk to Social and Governance Standards' <*https://www.ibanet.org/corporate-sustainability-greenwash-risk-to-social-and-governance-standards*> accessed 23 August 2023; Laufer WS, 'Social Accountability and Corporate Greenwashing' (2003) 43 Journal of business ethics 253;

[37] Xia F and others, 'Financial Constraints and Corporate Greenwashing Strategies in China' (2023) 30 Corporate Social Responsibility and Environmental Management 1770.

[38] Ibid.

[39] Companies Act, No. 17 of 2015, s. 143 (1) (d), Government Printer, Nairobi.

into their reports and assess the impact of the firm's activities on the surrounding ecosystem.[40]

Efforts must be collectively undertaken to ensure the implementation of effective reporting mechanisms, particularly in the realm of corporate and environmental legislation, in order to successfully attain sustainability objectives within the nation and effectively curb the practice of greenwashing. This can get support from the provisions of section 655 of the Companies Act[41] which requires that unless the company is subject to the small companies regime, the directors shall include in their report a business review that complies with subsection (3), so far as relevant to the company.[42] The purpose of the business review is to inform members of the company and assist them to assess how the directors have performed their duty under section 144.[43] In the case of a quoted company, the directors are required to specify in the business review (to the extent necessary for an understanding of the development, performance or position of the company)—(a) the main trends and factors likely to affect the future development, performance and position of the business of the company; (b) information about— (i) environmental matters (including the impact of the business of the company on the environment); (ii) the employees of the company; and (iii) social and community issues, including information on any policies of the company in relation to those matters and the effectiveness of those policies;

[40] Ibid, s. 655 (4) (b).
[41] Companies Act. No. 17 Of 2015, Laws of Kenya. Revised Edition 2021 [2015]
[42] Ibid, s.655(1).
[43] Ibid, s.655(2).

and (c) information about persons with whom the company has contractual or other arrangements that are essential to the business of the company.[44]

In addition to the foregoing, the Environmental Management and Co-Ordination Act, 1999 [45] (EMCA) envisages environmental reporting and even spells out enforcement tools and offences to enhance compliance.[46] EMCA stipulates various environmental offences which including offences related to *inspection*, offences *related to Environmental Impact Assessment*, offences related to records and *standards and offences related to hazardous wastes* (emphasis added).[47] The Act also prescribes penalties for these offences.[48] Offences under EMCA relate to among other things, failing to submit to inspection[49], offences relating to Environmental Impact Assessment [50]; offences relating to records[51]; offences relating to standards[52]; offences relating to hazardous waste[53]; offences relating to pollution[54]; and offences relating to restoration orders[55].

[44] Ibid, s.655(4).
[45] Environmental Management and Co-ordination Act, No. 8 of 1999, Laws of Kenya, Revised Edition 2019 [1999].
[46] See SEC. 38 (C); Sec. 57; Part XIII, EMCA
[47] EMCA, s. 137-146.
[48] Ibid.
[49] Sec. 137, EMCA.
[50] Sec. 138, EMCA.
[51] Sec. 139, EMCA.
[52] Sec. 140, EMCA.
[53] Sec. 141, EMCA.
[54] Sec. 142, EMCA.
[55] Sec. 143, EMCA.

To meet the obligations towards the environment, it is mandated by both Kenya's Constitution and the Environmental Management and Coordination Act (EMCA) that periodic environmental audits and monitoring activities be conducted.[56] According to EMCA, an environmental audit is a systematic, documented, regular, and unbiased evaluation of the effectiveness of an organization's environmental practices, management strategies, and equipment in the preservation and safeguarding of the environment.[57] Environmental audits and monitoring are used as subsequent measures to examine the extent to which ongoing operations align with the environmental impact assessment study report, addressing the pertinent problems associated with the particular project at hand.[58]

This is a testimony that Kenya is not entirely devoid of the requisite legislation to curb greenwashing by the corporations operating in the country. All that is required is streamlining the operational efficiency of co-operation between enforcement agencies and the goodwill of the political class. The political goodwill is important as the monitoring and enforcement task will not come without financial implications. While some of the enforcement costs may be recovered from the polluters, some

[56] Constitution of Kenya, 2010, Article 69 (1) (f), Government Printer, Nairobi.
[57] EMCA, s. 2.
[58] *National Environment Management Authority (NEMA) - Environmental Audit (EA).https://www.nema.go.ke/index.php?option=com_content&view=article&id=155&Itemid=274* (accessed 2023-06-16).

of the costs may not. [59] Even as the companies market themselves as 'green' they must not be taken at their word; regulators must verify the information being fed to the public either through media or own audit reports.

4. Conclusion

There is an urgent need for enhanced implementation of these provisions, accompanied by the implementation of sustainability audits. This is necessary to ensure that all corporations and businesses, whose operations have the potential to impact the environment, are included and held accountable for any detrimental consequences on both human beings and the environment. These efforts are aimed at attaining sustainability in Kenya and Africa as a whole.

Greenwashing is clearly a hindrance to achieving true sustainability. We should curb or avoid it altogether.

[59] See Chapter Seven, Farmer A, *Handbook of Environmental Protection and Enforcement: Principles and Practice* (Earthscan 2012).

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Yu EP, Van Luu B and Chen CH, 'Greenwashing in Environmental, Social and Governance Disclosures' (2020) 52 Research in International Business and Finance 101192.

Zhang D, 'Are Firms Motivated to Greenwash by Financial Constraints? Evidence from Global Firms' Data' (2022) 33 Journal of International Financial Management & Accounting 459.

Promoting Urban Resilience and Sustainability in Kenya's Cities and Towns

By: ***Caroline Jepchumba Kibii****

Abstract

Increased urbanisation in low and lower-middle-income nations, swelling urban populations and frequent climate risks signal a need to redesign, modify and promote cities and towns that can accommodate and withstand the changes. Urban resilience and sustainability building are necessary. Urban areas are vital as more than 80% of the global gross domestic product comes from cities, and more than 70% of global greenhouse emissions come from urban areas; it is fundamental to understand the various indicators that will help cities and towns become more inclusive, liveable and self-sufficient while reducing environmental degradation. This article discusses some key indicators that, if improved and advanced, will promote urban sustainability in Kenyan urban areas to answer the following question: 'What can be done to establish and enhance resilience and sustainability in Kenya's urban areas?' The aspects discussed include urban mobility, urban water systems, urban energy systems, informal settlements, urban planning and policy and waste management by consulting various sources. The article notes, for instance, that improving the overall status of informal settlements as they are an integral part of all urban areas, where neglecting them leads to far-reaching problems for the urban inhabitants within and away from these settlements. While this article does not exhaust the key indicators, it recognises that building urban resilience and promoting sustainability requires a combination of several solutions.

* *MA (Environmental Planning and Management), B.Sc. (Environmental Science). Caroline is an International Climate Protection Fellow of the Alexander von Humboldt and a Visiting Scientist at the United Nations University, Bonn, Germany.*

1.0 Introduction

Urban areas (cities and towns) offer an incredible dynamism for human habitation worldwide. Many people are gravitating towards urban areas, with the current statistics indicating that approximately 56% of the global population live in cities.[1] The trend is expected to continue over the years, with a projection of 68% of the world's population living in urban areas by 2050.[2] While urbanisation continues across all regions, highly noticeable urbanisation was recorded in developing economies during the 2011-2021 period.[3] Besides population growth, urbanisation significantly contributes to a country's gross domestic product (GDP). World Bank estimates that more than 80% of the world's GDP comes from cities.[4] Similarly, urbanisation is responsible for one-third of Africa's per capita GDP.[5] With the approximations mentioned above, urbanisation positively influences a country's development as it enables improved access to socio-economic opportunities, services and infrastructure to many people. On the contrary, urban development contributes immeasurably to greenhouse gas emissions. Urban areas contribute to about 70% of the global energy-associated carbon dioxide emissions.[6] With the projected rapid urbanisation, the urban

[1] World Bank. (2023). Urban Development. *The World Bank Group*.
[2] UNDESA. (2018). The World Urbanization Prospects. *Department of Economic and Social Affairs of the United Nations*.
[3] UNCTAD. (2022). Total and urban population. *Handbook of Statistics 2022*
[4] World Bank. (2023). Urban Development. *The World Bank Group*
[5] OECD/UN ECA/AfDB. (2022). *Africa's Urbanisation Dynamics 2022: The Economic Power of Africa's Cities*, West African Studies, OECD Publishing, Paris, *https://doi.org/10.1787/3834ed5b-en*
[6] Wu, D., Lin, J. C., Oda, T., & Kort, E. A. (2020). Space-based quantification of per capita CO_2 emissions from cities. *Environmental Research Letters*, *15*(3), 035004. https://doi.org/10.1088/1748-9326/ab68eb

emission index is likely to increase should aspects of sustainability be ignored or downplayed.[7]

It is acknowledged that future urban growth will largely take place in Africa; however, its effective growth might be limited by inadequate planning systems and ill-equipped agencies to address emerging environmental challenges.[8] Urbanisation does not occur in isolation but is entangled with existential global problems such as climate change and inequalities, mandating the need to build resilience across all sectors, including improving governance, policies and regulation and infrastructural advancement.[9] This means urban areas, including those in Kenya, need to prepare for unpredictable and complex futures.[10] Resilience building and socio-economic and environmental sustainability must be at the heart of urban development.[11] A 2022 World Cities Report predicts that most city land area expansion will occur in low-income and low-middle-

[7] Nero, B. F., Callo-Concha, D., & Denich, M. (2019). *Increasing urbanisation and the role of green spaces in urban climate resilience in Africa*. In J. Tischler & I. Haltermann (Eds.), Environmental Change and African Societies (pp. 265–295). BRILL. ISBN: 9789004410848. *https://doi.org/10.1163/9789004410848_013*
[8] Cobbinah, P. B. (2023). City in Africa II: Urban environmental health. *Journal of Urban Affairs*, *45*(3), 483–487. *https://doi.org/10.1080/07352166.2023.2171617*
[9] Nero, B. F., Callo-Concha, D., & Denich, M. (2019). *Increasing urbanisation and the role of green spaces in urban climate resilience in Africa*. In J. Tischler & I. Haltermann (Eds.), Environmental Change and African Societies (pp. 265–295). BRILL. ISBN: 9789004410848. *https://doi.org/10.1163/9789004410848_013*
[10] Revi, A., et al. (2014). *Urban areas. In: Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects*. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change. Cambridge University Press, pp. 535-612.
[11] Ibid

income countries.[12] The same report projects, based on new data, city expansion over the next five decades, taking 2020 as the base year, that a 141% growth in low-income countries and 41% in low-middle income countries is a possibility.[13]

Urbanisation in Kenyan cities and towns is rapid and gradual. A 4.3% urbanisation annual rate has been estimated, with a projection of more than half of the country's population residing in urban areas by 2025.[14] More resources will be needed. Already, the existing natural and infrastructural resources and services have been over-stretched forcing the continued establishment of informal settlements and, in some cases, slum communities.[15] Overcrowding, limited primary resources such as water, drainage systems, energy sources and housing structures and environmental degradation are some features characterising informal settlements that form a significant part of most urban areas in Kenya.[16] Realising that climate-related risks threaten many cities and towns in Kenya, such as Nairobi, Mombasa and Kisumu, that have recorded increasing flood incidences recently, it is crucial to enhance the resilience of existing and new establishments.[17] Urban resilience building is conceivable where sustainability and, more so, environmental sustainability are an integral part of development.[18]

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[12] UN-Habitat (2022). World Cities Report 2022. *Envisaging the future of cities. Nairobi: UN-Habitat*.
[13] Ibid
[14] UN-Habitat (2023). Urbanization in Kenya: Building inclusive & sustainable cities. *UN-Habitat*.
[15] Ibid
[16] Ibid
[17] Whitaker, E. Et al. (2023). Climate Security Study: Kenya. *Weathering Risk*
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In light of the information above, this article discusses some critical indicators in building and promoting urban resilience and sustainability in urban areas, with Kenyan cities and towns being the primary focus. Essentially, the article seeks to answer the question: What can be done to establish and enhance resilience and sustainability in Kenya's urban areas?

1.1 Defining and contextualising urban sustainability

Sustainability encompasses a wide range of concepts and terminologies. Before the official definition of sustainable development in 1987 under the 'Our Common Future' report, sustainability had existed and is evidenced in the indigenous or local ecological knowledge systems. The Brundtland Report defined sustainable development as "*meeting the needs of the present without compromising the ability of future generations to meet their own needs*."[19] It is clear from this umbrella definition that sustainability is an ongoing process that considers equity, justice and accountability. This means someone must be held accountable to achieve sustainable development. Sustainable development is sometimes assumed to refer only to the 'green' aspects or, in other words, to the environmental component. In practical and realistic terms, sustainable development entails environmental, social and economic sustainability.

Environmental sustainability is realised when humans consume resources at a rate that does not exceed the natural ability of those resources to regenerate.[20] This implies human consumption that does

[19] United Nations Brundtland Commission. (1987). Report of the World Commission on Environment and Development: Our Common Future. *United Nations*

[20] Andrea, V. (2015). *Handbook of research on social, economic, and environmental sustainability in the development of smart cities*. IGI Global.

not generate waste or pollutants such as greenhouse gas emissions beyond the resource's restoration rate. Social sustainability points to society being able to protect and uphold human rights while enabling availability, affordability and access to basic amenities such as food, shelter, transportation, education and healthcare. [21] Healthy communities foster productive development. Economic sustainability points to the independence of communities worldwide to access and utilise resources to meet their personal and extended needs. Social, economic and environmental sustainability are interdependent. [22] In fostering sustainable development, all three dynamics must be disparagingly considered and incorporated from the conceptualisation stages of a product, service or ideology.

Sustainable urban development, although it is centred on the three dimensions of sustainability highlighted above, is believed to have expanded to incorporate specific concepts that advance liveability, mobility, technology, and cultural and ecological wellbeing. [23] For instance, the foundation of urban infrastructure influences its sustainability, such as improving the workability of the transportation system within a given town or city eases mobility.[24] Arguably, urban areas are the locus of an effective and practical green future. Therefore, cities and towns mandate the construction of durable infrastructures and the establishment of places and spaces that stimulate development and promote interrelationships of land

[21] Rodrigues, M.J. et al (2017). *Architectural Research Addressing Societal Challenges Volume 1*. CRC Press, Technology & Engineering
[22] Andrea, V. (2015). *Handbook of research on social, economic, and environmental sustainability in the development of smart cities*. IGI Global.
[23] Song, X., Guo, R., & Zhang, H. (2022). MaaS for sustainable urban development. In *Big Data and Mobility as a Service* (pp. 265–279). Elsevier
[24] Ibid

uses but minimise human footprint.[25] Despite the urban potential to promote meaningful green futures, it is claimed that the notion that sustainable development is urban development is not automatically apparent.[26] Nonetheless, urban areas provide an avenue for effective and efficient application of green technologies.

While urban sustainability might offer an opportunity for the universal application of ideas and technologies, it is not always the case. Urban scientists determine that urban sustainability is fundamentally a geographical notion that takes into consideration the social, economic and ecological systems, including the socio-natural relations and regulations. [27] Achieving urban sustainability will almost always be influenced by the local contexts of a given city or town, although it is enshrined in most of the Sustainable Development Goals.

1.2 What is urban resilience?

Various definitions and contexts exist on what resilience and urban resilience mean, but they have a common point of convergence. The concept of resilience was introduced and appropriated in relation to ecological systems in the 1970s. Holling (1973), in their resilience and stability of ecological systems, conceptualised that "*resilience determines the persistence of relationships within a system and is a measure of the ability of these systems to absorb changes of state variables, driving variables, and parameters, and still persist. In this definition, resilience is the property of the system and persistence or probability of extinction is the*

[25] Callender, J. (2012). Sustainable urban development. In *International Encyclopedia of Housing and Home* (pp. 129–133). Elsevier
[26] Ibid
[27] Whitehead, M. (2009). Sustainability, urban. In *International Encyclopedia of Human Geography* (pp. 109–116). Elsevier

result." [28] Others define resilience as a function of resistivity and adaptation ability of a community or system.[29] One of the definitions of urban resilience is the ability of communities, businesses, individuals and systems within a town or city to withstand, adapt, produce and expand despite the disturbances and shocks they encounter.[30] The essence of resilience building in urban areas is to lower the impacts of risks associated with intended and unintended developments. It is crucial, therefore, to improve urban resilience, especially for communities in risky and vulnerable territories.

Urban resilience and sustainability are crucial paradigms shaping city and town planning and policy formulation in the recent past. Although the two concepts are conceived variedly in terms of the indicators, principles, targets and scopes, they are bound on similar components. In a proposed model for urban resilience, three elements are identified: physical infrastructure-based urban planning, social actors and the ability to recover after a disturbance. [31] These components are also considered when advancing urban sustainability.

[28] Holling, C. S. (1973). Resilience and stability of ecological systems. *Annual Review of Ecology and Systematics*, *4*(1), 1–23. *https://doi.org/10.1146/annurev.es.04.110173.000245*

[29] Ribeiro, P. J. G., & Pena Jardim Gonçalves, L. A. (2019). Urban resilience: A conceptual framework. *Sustainable Cities and Society*, *50*, 101625. https://doi.org/10.1016/j.scs.2019.101625

[30] Cerasoli, M., Amato, C., & Ravagnan, C. (2023). The theoretical grid. An antifragile strategy for Rome post-COVID mobility. In *Resilient and Sustainable Cities* (pp. 15–37). Elsevier. *https://doi.org/10.1016/B978-0-323-91718-6.00036-0*

[31] Swapan, A. Y., & Sharifi, A. (2023). The fundamentals of smart city assessment. In *Urban Climate Adaptation and Mitigation* (pp. 117–146). Elsevier. *https://doi.org/10.1016/B978-0-323-85552-5.00005-1*

2.0 Urbans Sustainability and Resilience Indicators in Kenya

This section discusses some of the key indicators or sectors that Kenyan cities and towns can invest in, modify or advance in order to be more resilient and sustainable.

2.1 Urban mobility and smart mobility

Mobility is vital in urban areas; it enables people to move from one point to another.[32] Cities or towns' mobility is expected to address features such as affordability, diversity, inclusivity, accessibility and reliability in order to enhance urban sustainability. [33] The infrastructural and technological integration influence the features mentioned above. Currently, most cities and towns in Kenya are still at their infancy stage when it comes to smart mobility; however, mobility in general has been advanced with modern infrastructural facilities such as road networks, like the construction of super highways and expressways as enshrined in Kenya's Vision 2030.[34]

Gaining a lot of prominence and popularity across the globe towards smart and sustainable cities is the establishment of dedicated lanes for cycling, buses, trams, pedestrians and motorists. Objectively, dedicated lanes aim to improve efficiency and mobility in urban areas with mixed traffic and varied drivers, but it can be costly to implement. [35] Kenyan cities and towns could benefit from well-

[32] Semanjski, I. C. (2023). *Introduction to smart mobility. In Smart Urban Mobility* (pp. 9–23). Elsevier. *https://doi.org/10.1016/B978-0-12-820717-8.00009-9*

[33] Georgouli, C. Et al. (2021). Urban Mobility Innovation Index – 2021. Leading transformations with innovation for inclusive, sustainable and resilient urban mobility. *UMIii*

[34] Kenya Vision 2030. (2008). *https://vision2030.go.ke/*

[35] Fakhrmoosavi, F., Kamjoo, E., Zockaie, A., Mittal, A., & Fishelson, J. (2023). Assessing the network-wide impacts of dedicated lanes for connected autonomous vehicles. *Transportation Research Record: Journal of the*

designed and intentioned commissioning of dedicated lanes. Dedicated lanes in high population density cities like Nairobi and Mombasa could reduce traffic congestion during rush hours. However, arguments exist that dedicated lanes could cause traffic in some parts of the same cities.[36]

Across the globe, urban areas encourage bicycling as a population and transportation strategy. Investing in cycling infrastructure is vital to enable the populace to adopt bicycling as an everyday mode of transport; that is, separating from but connecting bicycling lanes with the motorways.[37] The strategy meets the health, safety, and reduction of traffic congestion and greenhouse gas emissions. Bicycling in Kenya's cities can be enhanced and complemented by designing safe and separate pedestrian lanes or footpaths. Accordingly, safety, continuity and comfort are regarded as the governing principles when designing and constructing pedestrian amenities. [38] For instance, the distance between the motorway and walk path should offer safety, and the possibility for two-way traffic and pedestrian paths should be independent of cycling paths. Relaxation benches and trees along the footpaths promote comfort and encourage people to walk or spend time outdoors regardless of age or physical ability.[39]

Transportation Research Board, *2677*(3), 371–388. *https://doi.org/10.1177/03611981221115431*

[36] Ibid

[37] Winters, M., Branion-Calles, M., Therrien, S., Fuller, D., Gauvin, L., Whitehurst, D. G. T., & Nelson, T. (2018). Impacts of Bicycle Infrastructure in Mid-Sized Cities (Ibims): Protocol for a natural experiment study in three Canadian cities. *BMJ Open*, *8*(1), e019130. *https://doi.org/10.1136/bmjopen-2017-019130*

[38] Kost, C., Mwaura, N., Jani, A., & Eyken, C. V. (2017). Streets for walking & cycling Designing for safety, accessibility, and comfort in African cities. *UN-Habitat*

[39] Labdaoui, K., Et al. (2021). Utilizing thermal comfort and walking facilities to propose a comfort walkability index (CWI) at the neighbourhood level.

These proposals are viable and possible with better governance and adherence to urban planning policies.

Another element of promoting urban sustainability in Kenya is upgrading and adopting smart vehicles. [40] There are several approaches, measures and benefits to smart vehicles depending on the city's size and the existing transportation infrastructure. If the primary objective is to reduce emissions associated with obsolete vehicles and those running entirely on gasoline, then motivating individuals and companies to invest in electric cars, especially those running on renewable energies, is fundamental.[41] This could be done through subsidies or tax reductions on electric vehicles and bikes and enabling accessibility and availability as well as installation of charging stations in strategic locations throughout the cities and towns. [42] While electric vehicles look attractive, scientists and researchers contend that the zero-emission tags associated with fully electric vehicles are not entirely true.[43] The argument is that fully electric vehicles produce fewer greenhouse gases.[44] Still, emissions are produced while manufacturing the vehicular parts and

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Sage Journals; Environment and Behavior. *https://doi.org/10.1016/j.buildenv.2021.107627*

[40] Bamwesigye, D., & Hlavackova, P. (2019). Analysis of sustainable transport for smart cities. *Sustainability*, *11*(7), 2140. *https://doi.org/10.3390/su11072140*

[41] Al-Ghaili, A. M., Et al. (2022). Can electric vehicles be an alternative for traditional fossil-fuel cars with the help of renewable energy sources towards energy sustainability achievement? *Energy Informatics*, *5*(S4), 60. *https://doi.org/10.1186/s42162-022-00234-*3

[42] IEA. (2023). Global EV Policy Explorer: Key policies and measures that support the deployment of electric and zero-emission vehicles. *International Energy Agency*.

[43] Mosemand, A. & Paltsev, S. (2022). Are electric vehicles definitely better for the climate than gas-powered cars? *MIT Climate Portal*.

[44] Ibid

batteries. [45] The type of raw materials and resources used in production and manufacturing determine the cleanliness and emission factor. For instance, one emission source in electric vehicles is the development of large lithium-ion batteries.[46] Therefore, caution has to be exercised and regulations instituted to aid in availing ecologically friendly electric vehicles carrying lower emissions badges.

Another ingredient to urban sustainability is exploiting the renewable energy potential to support and transform the transport sector. For instance, Kenya has a huge solar energy potential as it receives a daily insolation of 4-6 kWh/m^2, but it has yet to be extensively exploited.[47] The charging stations for electric vehicles and bikes can be solar-powered. The walk paths, bicycles and motorways can be lit with solar energy.[48]

Although most Kenyan towns have car-sharing options in the form of a Taxi, it is yet to be adopted in smaller towns.[49] Still, car and bike sharing with self-service operation mode could be encouraged. This is attractive, particularly to young people and reduces the over-dependency on personal vehicles, which is one of the leading causes of traffic congestion in major towns. [50] This approach has been adopted and implemented in many European cities, resulting in

[45] Ibid
[46] Ibid
[47] EPRA. (2023). Solar Energy. *Energy & Petroleum Regulatory Authority*.
[48] Coutu, R., Et al. (2020). Engineering tests to evaluate the feasibility of an emerging solar pavement technology for public roads and highways. *Technologies*, *8*(1), 9. *https://doi.org/10.3390/technologies8010009*
[49] Sovacool, B. K., Daniels, C., & AbdulRafiu, A. (2022). Transitioning to electrified, automated and shared mobility in an African context: A comparative review of Johannesburg, Kigali, Lagos and Nairobi. *Journal of Transport Geography*, *98*, 103256. *https://doi.org/10.1016/j.jtrangeo.2021.103256*
[50] Ibid

economic, health and ecological benefits.[51] To achieve this step, the overall transport system needs to be overhauled, stringent policies instituted, and some road networks redesigned to include dedicated lanes.

2.2 Waste Management

Urban areas are a hub of activities whose operations lead to an increased flow of goods and services that consequently increase the amount of waste generated with respect to the core activities in a given area.[52] Diverse origins and sources of waste in towns can complicate waste management initiatives, notably where effective systems are lacking.[53] In addition, waste generation is associated with decreasing ecological resources, increased consumption of natural resources, degradation of the said resources and corrective costs.[54] Although cities occupy only 2% of the global space, it is responsible for over 75% and 70% of resource consumption and waste generated, respectively.[55]

Zero waste urban concept is an ambitious goal that many cities and towns across the globe strive towards achieving as a channel for sustainability. Attaining a zero-waste concept requires amalgamating several aspects such as behavioural change, awareness creation,

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[51] Martínez, S. et al. (2019). The Economic Impact of Bike Sharing in European Cities. *IESE Business School*. DOI: *https://dx.doi.org/10.15581/018.ST-505*

[52] Mesjasz-Lech, A. (2014). Municipal waste management in context of sustainable urban development. *Procedia - Social and Behavioral Sciences*, *151*, 244–256. *https://doi.org/10.1016/j.sbspro.2014.10.023*

[53] Ibid

[54] Ibid

[55] Zaman, A. U., & Lehmann, S. (2013). The zero-waste index: A performance measurement tool for waste management systems in a 'zero waste city.' *Journal of Cleaner Production*, *50*, 123–132. *https://doi.org/10.1016/j.jclepro.2012.11.041*

waste-to-business scenarios, circular economy, rules and regulations, and waste management strategies. [56] Proper design and implementation of policies and regulations governing waste management (municipal or industrial waste) could be ground-breaking for zero-waste towns.[57]

Kenya's small and big urban areas are confronted by a huge waste management crisis resulting from increased waste generated or inadequate waste management structures. [58] The ballooning urban population is one of the primary reasons for the massive amounts of waste generated per day in a given town. [59] The Kenya National Environment Management Authority (NEMA) cited that most towns and cities lack sufficient waste collection and disposal structures, highlighting that approximately 30-40% of waste in Nairobi, the capital of Kenya, remain uncollected. [60] Nairobi and Mombasa, according to NEMA, generate more than 2200 tons of waste each per day. [61] With a significant proportion of the waste remaining uncollected or unmanaged, it can lead to compounding challenges that weaken the ability of the urban areas to become sustainable and resilient to potential environmental hazards.[62]

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[56] Ibid
[57] Mesjasz-Lech, A. (2014). Municipal waste management in context of sustainable urban development. *Procedia - Social and Behavioral Sciences*, *151*, 244–256. https://doi.org/10.1016/j.sbspro.2014.10.023
[58] African Population and Health Research Center. (2019). Solid Waste Management and Risks to Health in Urban Africa: A Study of Nairobi and Mombasa Cities in Kenya. *Urban Africa Risk Knowledge.*
[59] Ibid
[60] NEMA. (2015). The National Solid Waste Management Strategy. *Kenya National Environment Management Authority*
[61] Ibid
[62] Mustafa E. (2018). *Urban agglomeration*. IntechOpen.

Many solutions exist to solve the waste crisis in Kenyan cities and towns. However, alternative options and solutions to the traditional waste management pathways that combine the socio-technical-ecological model should be adopted to realise sustainability and promote social concerns such as health-associated challenges.[63] It is, therefore, critical to adopt integrated solutions to urban waste management that will generate direct and indirect benefits to the primary and secondary subjects within those areas.[64] For instance, a waste-to-energy strategy would be one of the sustainable solutions to fix the waste menace, generating energy, a highly sought-after commodity. This strategy has been applied globally, especially among the European nations. In Sweden, for instance, only 1% of the trash goes to landfills, about 47% gets recycled, and 52% is transformed into energy.[65] Sweden uses the energy from waste for various reasons, including heating homes. It is estimated that about one million households in Sweden benefit from waste to energy strategy.[66] As a result of this strategy and the overall recycling revolution, Sweden reduced its carbon dioxide emissions by about 2.2 million tons annually with a 34% reduction between 1990 and 2006.[67] Although waste recycling has gained a lot of support as an urban sustainability approach, it should not be the ultimate goal; instead, waste minimisation at the point of generation should be advocated for, reinforced, and facilitated. Municipalities (county governments

[63] Randhawa, P., Marshall, F., Kushwaha, P. K., & Desai, P. (2020). Pathways for sustainable urban waste management and reduced environmental health risks in India: Winners, losers, and alternatives to waste to energy in delhi. *Frontiers in Sustainable Cities*, *2*, 14. https://doi.org/10.3389/frsc.2020.00014
[64] NEMA. (2015). The National Solid Waste Management Strategy. *Kenya National Environment Management Authority*
[65] Kim, C. & Mauborgne, R. (2023). Turning Waste to Energy: Sweden's Recycling Revolution. *Blue Economy Strategy*
[66] Ibid
[67] Ibid

in Kenya) play a critical role in waste prevention by developing applicable and functioning waste infrastructure and instituting realistic policies.[68] What needs to be improved in Kenyan urban areas is reducing waste at the source and throughout the waste management cycle. Waste segregation takes place in some homes and estates, but not at the point of collection, transportation and disposal is where the problem arises.[69] This issue lies squarely in the hands of the county departments mandated with waste management. [70] Privatisation and joint venture (public and private) of waste collection and management would be another way of improving efficiency issues, although this must be approached with caution.[71] Overall, active involvement of all urban stakeholders is recommended not only for efficiency but for behavioural change, effectiveness and sustainable waste management.[72]

2.3 Urban Water Systems

Water is a primary resource and the sustenance of human civilisation.[73] The urban population needs a consistent water supply to serve their various needs: drinking, industrial use, sanitation and

[68] Koop, C., Schinkel, J & Wilts, H. (2019). Waste Prevention Strategies for Sustainable Urban Development. *Urbanet*.

[69] NEMA. (2020). Kenya Waste Management Guidelines. *National Environment Management Authority*

[70] Ibid

[71] Randhawa, P., Marshall, F., Kushwaha, P. K., & Desai, P. (2020). Pathways for sustainable urban waste management and reduced environmental health risks in india: Winners, losers, and alternatives to waste to energy in Delhi. *Frontiers in Sustainable Cities*, *2*, 14. *https://doi.org/10.3389/frsc.2020.00014*

[72] Kotei, P., Annang, T., & Yirenya-Tawiah, D. (2020). Stakeholder Participation for Sustainable Solid Waste Management in Ga West Municipality, Accra – Ghana. *American Journal of Environment Studies*, *3*(1), 44–60. *https://doi.org/10.47672/ajes.611*

[73] Vuorinen, H. S., Juuti, P. S., & Katko, T. S. (2007). History of water and health from ancient civilizations to modern times. *Water Supply*, *7*(1), 49–57. *https://doi.org/10.2166/ws.2007.006*

the general well-being of the environment. Accordingly, a sustainable urban economy depends on the quality, sustainability, cost-efficiency and reliability of water supply.[74] Thus, providing sufficient potable water and adequate water for sanitation is essential. Often, demand for water in urban areas increases with population growth and the expansion of cities and towns.[75] In return, for example, the amount of wastewater generated, which is often released into the environment (land and water bodies) untreated in most developing nations, increases.[76] In fact, it is estimated that demand for municipal waters in large cities across the world will increase by about 80 million cubic meters annually by 2025 to satisfy the needs of urban inhabitants.[77]

It is noted that sustainable urban development, particularly in developing countries, faces cumulative challenges, one being the limited water resources.[78] For a long time, particularly in the early to mid-1900s, the urban water system, that is, the whole cycle from water supply to the final discharge of wastewater into the environment, adopted a linear system that did not give much consideration to the ecological impacts.[79] To break the traditional urban water system and establish an integrated approach that restores the damaged urban liveability, new strategies and measures for water sustainability are necessary.

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[74] Bergkamp, G., Diphoorn, B. & Trommsdorf, C. (2015). *Water and development in the urban setting*. SIWI publications. ISBN: 978-91-981860-4-8.
[75] Ibid
[76] Ibid
[77] Ibid
[78] UN Water. (2018). Synthesis Report on Water and Sanitation. *United Nations Water.*
[79] Wang, X. C., & Fu, G. (Eds.). (2021). *Water-wise cities and sustainable water systems: Concepts, technologies, and applications*. IWA Publishing. *https://doi.org/10.2166/9781789060768*

In most Kenyan urban areas where water supply is inconsistent, and availability, accessibility or quality are not assured in equal measures to all communities, modification of water supply strategies and measures is crucial.[80] A spatiotemporal research carried out on water consumption and distribution in Nairobi demonstrated varied usage and unequal distribution, where those in the middle- and high-income areas, as well as in less dense and newer neighbourhoods, received larger volumes of water, almost in the recommended amounts per capita per month compared to low-income and densely populated areas.[81] Other research confirms that water supply and sanitation in Nairobi are a major problem synonymous to other fast-growing urban areas where water distribution and provision is limited to the extent that even those populations with direct connections to tap water do not receive regular supply.[82]

The essence of efficient urban water systems in promoting sustainability goes beyond the primary uses.[83] It includes unevenly distributed water resources and exacerbating climate-related risks like drought. Assessments on drought risk as an indicator of water risks (quality, reputation and quantity) rank Kenya as a medium to

[80] Mulwa, F., Li, Z., & Fangninou, F. F. (2021). Water scarcity in kenya: Current status, challenges and future solutions. *OALib*, *08*(01), 1–15. *https://doi.org/10.4236/oalib.1107096*
[81] Mutono, N., Wright, J., Mutembei, H., & Thumbi, S. M. (2022). Spatio-temporal patterns of domestic water distribution, consumption and sufficiency: Neighbourhood inequalities in Nairobi, Kenya. *Habitat International*, *119*, 102476. *https://doi.org/10.1016/j.habitatint.2021.102476*
[82] Ledant, M. (2013). Water in Nairobi: Unveiling inequalities and its causes. *Cahiers d'Outre-Mer*, *66*(263), 335–348. **https://doi.org/10.4000/com.6951**
[83] Mulwa, F., Li, Z., & Fangninou, F. F. (2021). Water scarcity in kenya: Current status, challenges and future solutions. *OALib*, *08*(01), 1–15. *https://doi.org/10.4236/oalib.1107096*

high drought-risk country.[84] This emphasises the need to develop new plans to ensure water efficiency within all cities and towns while keeping in mind the rapid urban population growth.

One of the major challenges surrounding water availability in many urban areas in developing countries, including Kenya, is that water supply is disproportionate to the demand.[85] This fact has been linked to rapid urbanisation, population growth and shifting consumption patterns. [86] Further, it is reported that poor infrastructural development and poor management of voluminous wastewater and faecal sludge generated in urban cities hamper the quality, availability and affordability of water.[87] This is mainly instigated by poor governance, weak legal framework, inefficient urban planning, lack of updated urban data and limited finances. Another major challenge is undervaluing the vitality of urban planning and the use of outdated plans.[88]

2.4 Urban Energy Sources

Of the overall global energy consumption, urban energy systems are responsible for three-quarters and account for 70% of worldwide greenhouse gas emissions.[89] With the projected increase in the global

[84] Wang, X. C., & Fu, G. (Eds.). (2021). *Water-wise cities and sustainable water systems: Concepts, technologies, and applications*. IWA Publishing.
[85] Koros, J. K., et al. (2023). Leaving no one behind: Prospects for user-owned urban water utilities in Kenya. *Public Works Management & Policy*, 1087724X231181076. https://doi.org/10.1177/1087724X231181076
[86] Bergkamp, G., Diphoorn, B. & Trommsdorf, C. (2015). *Water and development in the urban setting*. SIWI publications. ISBN: 978-91-981860-4-8.
[87] Ibid
[88] Ibid
[89] Klemm, C., & Wiese, F. (2022). Indicators for the optimization of sustainable urban energy systems based on energy system modeling. *Energy, Sustainability and Society, 12*(1), 3. https://doi.org/10.1186/s13705-021-00323-3

urban population and more so in the global south, as discussed earlier, urban energy demands are expected to rise, which might imply an increase in the greenhouse gas emissions associated with energy production and consumption if sustainable measures are not adopted.[90] Energy is a fundamental development factor irrespective of the source; it is needed for the functioning of urban areas, from domestic activities and industrial production to service operations.[91] An uninterrupted energy supply is necessary to run these operations smoothly and effectively. However, in developing countries, there is a mismatch between energy supply and consumption in urban areas.[92] It is estimated that annual energy demand in developing countries grows by about 7% while the supply remains the same despite the economic expansion, population increase and rapid urbanisation.[93] The imbalance has prompted power rationing in some cities and towns, as in Kenya.

The energy mismatch is also heightened by extreme weather events such as heavy rainfall or drought. In the past, power rationing has been applied in Kenya due to severe drought leading to low water levels in major dams.[94] Although Kenya has diversified its energy mix, green energy consisting mainly of hydro, geothermal power is still one of the leading sources of electricity production, meaning weather events such as drought could affect power generation and

[90] Lu, W.-C. (2017). Greenhouse gas emissions, energy consumption and economic growth: A panel cointegration analysis for 16 Asian countries. *International Journal of Environmental Research and Public Health*, *14*(11), 1436. https://doi.org/10.3390/ijerph14111436
[91] OECD (2011). Green Growth Studies: Energy. *Organisation for Economic Co-operation and Development*
[92] UN-Habitat. (2023). Urban Energy. *United Nations Human Settlements Programme*
[93] Ibid
[94] AGOA. (2011). Kenya Power resorts to rationing. *African Growth and Opportunity Act.*

supply.[95] Similarly, extreme rainfall could damage infrastructure, limiting the continuous power supply to all neighbourhoods, especially the densely populated areas.[96] Data shows that Kenya's energy mix consists of more than 80% green energy, that is, hydropower, geothermal, solar and wind power, with geothermal energy continuously growing over the years.[97] The growth of geothermal energy is vital in reducing the reliance on hydroelectricity.

The challenges affecting urban energy systems in Kenya range from policy ineffectiveness, unrealistic demand growth estimations, climate change, energy monopoly, and financial and unreliable supply.[98] Fixing these challenges demands well-calculated, practical and diversified solutions integrated into the urban energy plan. For instance, in response to climate change impacts, expanding renewable energy sources such as wind and solar that currently contribute less than 15% of the overall energy supply would be significant.[99] This can be done by tapping energy potentials in places neighbouring the urban areas. The use of geothermal, wind and solar energies in cities is rising; however, not extensively untapped.[100]

Similarly, improving competitiveness in urban energy supply to eliminate the existing monopoly, increasing financial investment and

[95] Trade.gov. (2022). Kenya: Energy-Electrical Power Systems. *The International Trade Administration, U.S. Department of Commerce*
[96] Ibid
[97] Ibid
[98] World Bank. (2021). Climate Risk Profile: Kenya. *The World Bank Group*
[99] Ibid
[100] IRENA (2020), Rise of renewables in cities: *Energy solutions for the urban future*. International Renewable Energy Agency. ISBN 978-92-9260-271-0

ensuring quality and reliable power supply is vital.[101] Self-sufficiency in energy production is an important feature.[102] City-specific energy production and supply models that have been applied in many cities in developed nations such as in Europe, most of which are renewable energy can be used in Kenya's urban areas.[103] Doing so can easily decarbonise the energy mix.

2.5 Upgrading Informal Settlements

Informal settlements form a very significant part of many urban areas in low and middle-income countries and are integral in urban development and advancing sustainability.[104] On the global scale, about 1 billion people live in urban informal settlements, with the majority being in low-income nations.[105] These are areas characterised by poor drainage systems, water shortage, overcrowding, poor-quality housing and located in hazardous areas such as along river banks or sewer lines.[106] The emergence and continued growth of informal settlements is associated with rapid urbanisation and population increase in many urban areas whose standing resources and facilities cannot cater for the new population.[107] Although informal settlements have existed for

[101] OECD. (2013). Policy Guidance for Investment in Clean Energy Infrastructure: Expanding access to clean energy for green growth and development. *OECD, World Bank and UNDP.*
[102] Ibid
[103] Villamor, E., et al. (2020). European cities in the energy transition: A preliminary analysis of 27 cities. *Energies*, *13*(6), 1315. https://doi.org/10.3390/en13061315
[104] Frediani, A.A.; Cociña, C.; and Roche, J.M. 2023. Improving Housing in Informal Settlements: Assessing the Impacts in Human Development. *Habitat for Humanity International, Washington, D.C.*
[105] Satterthwaite, D., et al. (2020). Building resilience to climate change in informal settlements. *One Earth*, *2*(2), 143–156. *https://doi.org/10.1016/j.oneear.2020.02.002*
[106] Ibid
[107] Ibid

decades in many urban areas, city governments responsible for overall urban development through planning, zoning and allotment of resources often ignore these areas because they are illegal from the legal framework.[108]

Figure 1: A picture of Mathare informal settlement portraying Mathare river flowing through the settlement[109]

Major cities and towns in Kenya host several informal settlements varying in size, scale, demographically and location. Nairobi, for instance, hosts some of the largest informal settlements in Africa, such as Kibera and Mathare, harbouring huge populations and

[108] Ibid
[109] Google Earth Pro. (2023). A computer screenshot

deplorable living conditions.[110] As a result of the poor conditions in these settlements, the inhabitants are subjected to health problems and are highly vulnerable to climate risks.[111] Often neglected is the fact that some of the practices in informal settlements, such as dumping waste into flowing rivers, have far-reaching impacts on other urban populations living far away from the settlements; especially those on downstream.[112]

Improving the status of informal settlements has immense direct benefits to the people within and far from the settlements and on the face of the city.[113] The smartness and sustainability of an urban area are judged not only by the few high-tech installations but also by the overall facelift.[114] The future and sustainability of Kenya's urban areas include recognising the challenges evident in informal settlements, evaluating them and developing solutions consistent with existing urban planning and zoning policies.[115] The intention has to be to improve a city or town's overall status, including the

[110] Wamukoya, M., et al. (2020). The Nairobi Urban Health and Demographic Surveillance of slum dwellers, 2002–2019: Value, processes, and challenges. *Global Epidemiology*, *2*, 100024. https://doi.org/10.1016/j.gloepi.2020.100024
[111] Satterthwaite, D., et al. (2020). Building resilience to climate change in informal settlements. *One Earth*, *2*(2), 143–156. *https://doi.org/10.1016/j.oneear.2020.02.002*
[112] Ngatia, M., Kithiia, S. M., & Voda, M. (2023). Effects of anthropogenic activities on water quality within Ngong river sub-catchment, Nairobi, Kenya. *Water*, *15*(4), 660. *https://doi.org/10.3390/w15040660*
[113] Frediani, A.A.; Cociña, C.; and Roche, J.M. 2023. Improving Housing in Informal Settlements: Assessing the Impacts in Human Development. *Habitat for Humanity International, Washington, D.C.*
[114] D'Auria, A., Tregua, M., & Vallejo-Martos, M. (2018). Modern conceptions of cities as smart and sustainable and their commonalities. *Sustainability*, *10*(8), 2642. *https://doi.org/10.3390/su10082642*
[115] UN-Habitat. (2016). Sustainable Urban Development in Kenya: Addressing Urban Informality. Volume 4: Report on Capacity Building for Community Leaders. *United Nations Human Settlements Programme*

informal settlements.[116] It is recognised that the Kenyan government has taken significant steps to upgrade slum areas and informal settlements, primarily the infrastructural facilities such as housing.[117] While the upgrading initiatives have had a positive impact, more still needs to be done to make cities, towns and human settlements safe, resilient, sustainable and inclusive as outlined and encouraged under sustainable development goal 11.[118]

The provision of functioning drainage systems and sewers, directing all wastewater into a common collection point, and enforcing a treatment-before-discharge policy are crucial in urban areas.[119] For instance, an environmental risk assessment carried out in the Nairobi river catchment area demonstrated the extensive downstream impact of untreated wastewater directedly discharged by informal settlements.[120] This indicates that the status and conditions in urban informal settlements will directly affect the socio-economic and ecological status of a city or town. In most cases, neglecting these settlements jeopardises a mission to build resilience and foster sustainability in urban areas.[121]

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[116] Ibid

[117] State Department of Housing and Urban Development. (2018). Kenya Slum Upgrading Programme (KENSUP). *Ministry of Lands, Public Works, Housing and Urban Development*.

[118] UN-SDGs. (2023). Goal 11: Make cities and human settlements inclusive, safe, resilient and sustainable. *United Nations*

[119] Onu, M. A., et al. (2023). Challenges of wastewater generation and management in sub-Saharan Africa: A Review. *Environmental Challenges*, *11*, 100686. *https://doi.org/10.1016/j.envc.2023.100686*

[120] Bagnis, S., et al. (2020). Characterization of the Nairobi River catchment impact zone and occurrence of pharmaceuticals: Implications for an impact zone inclusive environmental risk assessment. *Science of The Total Environment*, *703*, 134925. *https://doi.org/10.1016/j.scitotenv.2019.134925*

[121] UN-Habitat. (2016). Sustainable Urban Development in Kenya: Addressing Urban Informality. Volume 4: Report on Capacity Building for Community Leaders. *United Nations Human Settlements Programme*

Energy is an important factor in improving informal settlements that need to be addressed concretely. With over 50% of the urban population in Kenya living in informal settlements, mainly in Kisumu, Nairobi and Mombasa towns, the energy demands are high.[122] However, the sources of energy for daily use, especially for cooking purposes where a significant population heavily relies on charcoal, firewood and kerosene, deserve urgent viable solutions. On a brighter note, there have been efforts by the Government of Kenya to promote liquified petroleum gas, which is considered cleaner compared to charcoal and firewood.[123] These efforts are aimed at meeting the sustainable development goals geared towards universal access, affordable and reliable energy for all, as well as reducing health and environmental challenges associated with the use of charcoal and firewood.[124] The reliance on solid biomass as a cooking energy source in Kenya harms biodiversity, air quality, and human health; it destroys natural carbon sinks.[125] By revolutionising the energy sources used in informal settlements coupled with modifying road networks, waste management and greening the surroundings gives cities and towns a boost while making them more appealing.[126]

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[122] Christley, E. et al. (2021). Sustainable energy for slums? Using the Sustainable Development Goals to guide energy access efforts in a Kenyan informal settlement. *Energy Research & Social Science*, *79*, 102176. *https://doi.org/10.1016/j.erss.2021.102176*

[123] Ibid

[124] Besner, R., Mehta, K., & Zörner, W. (2023). How to enhance energy services in informal settlements? Qualitative comparison of renewable energy solutions. *Energies*, *16*(12), 4687. *https://doi.org/10.3390/en16124687*

[125] Kibii, C.J. (2022). Decarbonising Africa's Agriculture and Forestry. Synergies and Trade-offs for Sub-Saharan Africa. *Journalofcmsd Volume 8*(2)

[126] Douglas, I. (2018). The challenge of urban poverty for the use of green infrastructure on floodplains and wetlands to reduce flood impacts in intertropical Africa. *Landscape and Urban Planning*, *180*, 262–272. *https://doi.org/10.1016/j.landurbplan.2016.09.025*

This, however, demands policy changes, huge finances, political willingness, technology use and practicability.

2.6 Urban Planning and Policy

Urban planning is integral to establishing and maintaining a better quality of life and sustainability in cities and towns in light of rapid urbanisation and population increase.[127] Urban planning embodies a vision, is a communication tool, an evaluation tool, creates a framework for economic growth and citizen participation, guides leaders and promotes natural resource management, better land use and aids in designing practical climate adaptation and mitigation measures.[128] Urban planning is also helpful for city administrators and managers in achieving sustainable development. In cases where effective planning and implementation are lacking, several challenges emerge, such as urban poverty, encroachment into riparian zones, social and economic inequality and the emergence of informal settlements.[129] These challenges can be solved by enforcing the relevant policies and legal frameworks. [130] In Kenya, the establishment, management and government of cities and towns are enshrined in Article 184 of the 2010 Constitution with related provisions on land use planning and regulations guided under Article 166.[131] Similarly, the National Urban Development Policy of 2016, guided by the above articles in the Constitution, recommends smart and compact urban growth, integrated urban heritage conservation strategy, urban regeneration programmes and

[127] Mwau, B & Thung, I., et al. (2018). *Urban Planning for City Leaders: A Handbook for Kenya*. United Nations Human Settlements Programme. ISBN (Volume): 978-92-1-132812-7
[128] Ibid
[129] Ibid
[130] Ibid
[131] Kenya Law. (2010). The Constitution of Kenya, 2010.

classification of urban areas.[132] The same policy recognises the challenges faced by the urban poor and the need for a balanced urban development, among other issues. Ideally, policy integration into an urban development plan is critical in establishing a functioning loop where a strong nexus between the built environment, spatial planning, people's needs and ecological aspects are viewed wholesomely.[133]

3.0 Conclusion

In light of the above, Kenyan cities and towns, both small and big, will continue to record an influx of people migrating from rural areas and other towns within and across the Kenyan border. There is a high likelihood that existing urban resources will be overstretched to meet the demands of the ballooning populations.[134] More pressure will be exerted on natural resources.[135] Increased waste generation is a potential consequence of the changing urban demographics and needs.[136] Each factor of urban sustainability discussed presents unique challenges to fostering sustainable urban development. Hence, a holistic approach is necessary where all elements are

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[132] State Department of housing and urban development. (2016). National Urban Development Policy. *Ministry of Transport, Infrastructure, Housing and Urban Development*.

[133] Mwau, B & Thung, I., et al. (2018). *Urban Planning for City Leaders: A Handbook for Kenya*. United Nations Human Settlements Programme. ISBN (Volume): 978-92-1-132812-7

[134] Whitaker, E. Et al. (2023). Climate Security Study: Kenya. *Weathering Risk*

[135] Revi, A., et al. (2014). *Urban areas. In: Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects*. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change. Cambridge University Press, pp. 535-612.

[136] Zaman, A. U., & Lehmann, S. (2013). The zero-waste index: A performance measurement tool for waste management systems in a 'zero waste city.' *Journal of Cleaner Production*, *50*, 123–132. *https://doi.org/10.1016/j.jclepro.2012.11.041*

recognised and considered singularly and in unison to promote liveability and resilience.

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Construction Adjudication in Kenya: The Need to Develop Legal Framework for Effective Construction Adjudication Lucky

By: ***Lucky Philomena Mbaye****

Abstract

Construction adjudication has long been favored as the primary method for resolving disputes in the construction industry due to its stringent time schedules. However, studies have revealed that the lack of a comprehensive legal framework for construction adjudication in Kenya has led to its inefficacy. This article critically examines the existing legal framework on construction adjudication in Kenya, identifying its inherent shortcomings. Drawing comparisons with jurisdictions possessing well-established legal frameworks for construction adjudication, such as England, the paper further explores the differences and similarities between the two systems, and provides recommendations for the development of a robust legal framework in Kenya to ensure the effectiveness of construction adjudication. By addressing these issues, the paper contributes to the enhancement of construction dispute resolution mechanisms in Kenya's legal landscape.

Introduction

Adjudication, as a legal process of dispute resolution, has gained prominence as a preferred alternative in the construction industry.[1] Construction adjudication, with its emphasis on an independent

**Trainee Lawyer; Certified Professional Mediator (CPM); She is an Alternative Dispute Resolution (ADR) enthusiast with a major interest in Dispute Resolution and International Commercial Arbitration.*

[1] Nazeem Ansary, Olanrewaju Abdul Balogun & Wellington Didibhuku Thwala, 'Adjudication and Arbitration as a technique in resolving construction industry disputes: A literature review' (2017) *https://www.researchgate.net/publication/323929575_Adjudication_and_arbitration_as_a_technique_in_resolving_construction_industry_disputes_A_literature_review/link/5ab6d87e45851515f59daac4/download* accessed 23 October 2023.

third party, the adjudicator, addresses the unique complexities of the construction sector, making it the best choice for resolving disputes efficiently.[2] In Kenya, construction adjudication has emerged as a relatively recent development, inspired by the practices of the South African construction industry and supported by funding from entities such as the World Bank and other stakeholders.[3] Unlike other conflict resolution methods, in the construction domain, adjudication stands out for its hallmark of prompt an immediate compliance.[4] This characteristic proves advantageous in averting the escalation of existing disputes and acts as an insurance against project stalling, which can have significant cost implications.[5]

As construction projects continue to grow in scale and complexity, the need for an effective an expeditious resolution mechanism for disputes becomes paramount.[6] Despite the benefits and increasing popularity of construction adjudication, its efficacy in Kenya faces challenges due to the absence of comprehensive legal framework to

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[2] Nicholas Gould, 'Adjudication and ADR: an overview' (2007) *https://www.fenwickelliott.com/sites/default/files/nick_gould_-_adjudication_and_adr_-_an_overview_matrics_paper.indd_.pdf* accessed 23 October 2023.

[3] Ibrahim Godofa & Barkley Odhiambo, 'Construction Adjudication in Kenya: A New Dawn?' Africa Construction Law Journal *(https://africaconstructionlaw.org/5997-2/)* accessed 13th November 2023.

[4] Ibid 1.

[5] Eric Hong Ying Ngai, 'Do those Textbook Examples of the Pros and Cons of Adjudication Necessarily Apply to the Hong Kong Construction Industry?' (2022), 24, *Asian Dispute Review*, Issue 2, pp. 82 – 87, *https://kluwerlawonline.com/journalarticle/Asian+Dispute+Review/24.2/ADR2022015*

[6] Ibrahim Godofa & Barkley Odhiambo, 'Construction Adjudication in Kenya: A New Dawn?' Africa Construction Law Journal (*https://africaconstructionlaw.org/5997-2/)* accessed 13th November 2023.

support and regulate the process.[7] This paper critically analyzes the existing legal framework for construction adjudication in Kenya, identifying its limitations and evaluating its impact on the effectiveness of dispute resolution within the construction industry. Drawing inspiration from jurisdictions like the UK, renowned for their well-established legal frameworks for construction adjudication, the paper undertakes a comparative examination, identifying best practices and potential areas for improvement in the Kenyan context. By exploring successful practices in other regions, the study offers valuable insights that can inform the development of a robust legal framework for construction adjudication in Kenya, paving the way for more efficient and equitable resolution of construction disputes. In the subsequent sections, this article will delve into the principles and processes governing construction adjudication in Kenya, examining the challenges faced by stakeholders in the absence of a comprehensive legal framework. It then turns to a detailed comparison with the UK's well-structured construction adjudication system, highlighting key differences and drawing relevant lessons. The paper concludes with a set of recommendations tailored to the Kenyan context, offering potential pathways for the development of an effective legal framework that ensures the success of construction adjudication in the country.

Through this exploration, the article seeks to contribute to the ongoing discourse surrounding construction dispute resolution in Kenya, fostering a greater understanding of the legal and procedural aspects that underpin successful construction adjudication processes worldwide. By establishing a comprehensive legal foundation for

[7] Kariuki Muigua, 'Adjudication Procedure: The Housing Grants, Construction and Regeneration Act, 1996 of U.K; Its Development and Lessons for Kenya' (2011).

construction adjudication, Kenya can harness the full potential of this dispute resolution mechanism, fostering a more conducive environment for sustainable growth and development within its burgeoning construction industry.[8]

The Current Legal Landscape and Regulatory Framework Governing Construction Adjudication in Kenya

Constitution of Kenya 2010

In the pursuit of a more efficient and accessible justice system, the Constitution of Kenya, specifically Article 159(2), directs the courts and tribunals to promote the adoption of Alternative Dispute Resolution (ADR) Mechanisms.[9] Such ADR methods encompass a range of approaches, including reconciliation, mediation, arbitration, and traditional dispute resolution mechanisms.[10] Among these options, it can be inferred that adjudication falls within the ambit of permissible alternatives.[11] This constitutional provision underscores the country's commitment to exploring alternative avenues for dispute resolution, signifying a recognition of the value and potential of adjudication as an effective means of resolving legal conflicts.[12]

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[8] Ibid 6.

[9] Constitution of Kenya 2010, Article 159 (2).

[10] Ibid 8.

[11] Chacha Odera & Meshack Kwaka, 'Speedy Resolve: Adjudication as a Means of Effective Alternative Dispute Resolution' (2023) < *https://www.oraro.co.ke/speedy-resolve-adjudication-as-a-means-of-effective-alternative-disputeresolution/#:~:text=Though%20not%20expressly%20mentioned%2C%20adjudication,are%20called%20upon%20to%20promote*.>

[12] Kariuki Muigua, 'Alternative Dispute Resolution and Article 159 of the Constitution' < *http://kmco.co.ke/wp-content/uploads/2018/08/A-PAPER-ON-ADR-AND-ARTICLE-159-OF-CONSTITUTION.pdf*>

Adjudication Rules of the Chartered Institute of Arbitrators, Kenya branch (The CIArb (K) Adjudication Rules)

The Chartered Institute of Arbitrators (Kenya Branch) has laid down comprehensive adjudication rules that govern the process and scope of applying adjudication in Kenya's construction industry. [13] This legal framework comprises a combination of standard form contracts, laws, norms, and regulations that collectively establish the foundation for resolving construction disputes in the country.[14] To invoke the CIArb Kenya adjudication rules, the dispute resolution clause within construction contract must expressly stipulate the submission of any arising disputes to adjudication. [15] However, parties have the flexibility to include procedural details in the contract to address scenarios where the Rules may not apply. [16] According to the Rules, the adjudicator assumes several critical responsibilities, including upholding the principles of natural justice, adhering to mutually agreed-upon timeframes, and issuing a written determination within 28 days of the reference or any other timeline established by the parties.[17] The adjudicator's decision holds finality and binds the parties unless mutually consented otherwise, or subject to arbitration or litigation in accordance with applicable laws.[18]

Agreement and Conditions of Contract for Building Works of 1999 (The Green Book)

The Joint Building Council of Kenya, established by the Kenya Association of Building and Civil Engineering Contractors (KABCEC), introduced a widely utilized standard form contract known as "The Green Book" or the Agreement and Conditions of

[13] CIArb (K) Adjudication Rules
[14] Ibid 12.
[15] Ibid, Rule 6.
[16] Ibid, Rule 6.
[17] Ibid, Rule 6.
[18] Ibid, Rule 8.

Contract for Building Works of 1999.[19] Clause 45 of this contract addresses dispute resolution measures, requiring the party allegedly deprived of their contractual rights to notify the other parties about any contractual disputes. In the event of unsuccessful resolution attempts, the parties must then undergo binding arbitration proceedings.[20] Notably the Green Book lacks an adjudication clause despite its extensive usage in the Kenyan construction and building works sector.[21]

However, in a recent development, the Joint Building Construction Council (JBCC) recommended amending the Green Book to incorporate additional alternative dispute resolution mechanisms before resorting to arbitration proceedings.[22] One of the proposed mechanisms is the inclusion of adjudication.[23] The revised standard form contract suggests introducing pre-arbitral steps, including the lodging of complaints with a pre-selected adjudicator appointing body.[24] This body would appoint an adjudicator on ad-hoc basis.[25] The adjudicator would be obliged to issue a determination within thirty days of receiving the complaint, with a possible extension of

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[19] Agreement and Conditions of Contract for Building Works (*http://bonarch.co.ke/wp-content/uploads/2016/08/JBC-Std-Form-of-Contract.pdf)* accessed 13th November 2023.

[20] Nicholas Gould, 'Adjudication and ADR: an overview' (2007) *https://www.fenwickelliott.com/sites/default/files/nick_gould_-_adjudication_and_adr_ _an_overview_matrics_paper.indd_.pdf* accessed 23 October 2023.

[21] KN Law LLP, 'A move from Dispute Resolution to Dispute Management in Construction' (2022) < *https://kn.co.ke/wp-content/uploads/2022/05/ADR-Construction-Disputes_Newsletter.pdf*> accessed 10th October 2023.

[22] Ibrahim Godofa & Barkley Odhiambo, 'Construction Adjudication in Kenya: A New Dawn?' Africa Construction Law Journal *(https://africaconstructionlaw.org/5997-2/)* accessed 13th November 2023.

[23] Ibid 21.

[24] Ibid 22.

[25] Ibid 22.

fifteen days under exceptional circumstances.[26] Parties unsatisfied with the adjudicator's determination have the option to issue a notice of dissatisfaction (NOD) within seven days and refer the dispute to mediation, a preliminary step before arbitration.[27] This proposed amendment aims to enhance the dispute resolution process, providing parties with an interim resolution mechanism in the form of adjudication before resorting to the more formal and time-consuming arbitration proceedings.[28] By incorporating adjudication, the Green Book seeks to offer parties a more efficient and effective means of resolving construction disputes, ultimately contributing to a smoother and a more collaborative contractual environment within the Kenyan construction industry.[29]

The International Federation of Consulting Engineers Contract for Construction (2017)

The International Federation of Consulting Engineers Contract for Construction (2017), commonly referred to as the 'Red Book', holds prominence in international civil engineering and building projects, and is notably favored within the local context for projects exceeding a minimum value of Ten Million United States Dollars (USD 10,000,000).[30] Clause 21 of this standard form contract delineates a structured dispute resolution mechanism. Initial recourse involves attempting conciliation, with the project manager serving as the conciliator. Should this endeavor prove unsuccessful, the parties

[26] Ibid 22.
[27] Ibid 22.
[28] Ibid 22.
[29] Ibid 22.
[30] FIDIC Conditions of Contract for Building and Engineering Works Designed by the Employer Second Edition (2017) *(https://fidic.org/sites/default/files/Conditions%20of%20Contract%20for%20Construction%20%28Second%20Ed.%202017%29%20amendments_0.pdf)* accessed 13th November 2023.

possess the option to escalate the matter to a pre-established Dispute Avoidance/Adjudication Board (DAAB) tasked with facilitating non-binding discussions aimed at dispute resolution. Within eighty-four days from the referral of the dispute, the DAAB is mandated to provide its decision.[31] In the event that these approaches also falter, the parties retain the liberty to initiate arbitration, litigation proceedings, thereby ensuring an exhaustive progression of resolution avenues within the contractual framework.[32]

Best Practices: Construction Adjudication in UK

The primary recourse for resolving construction disputes in the UK had traditionally been arbitration,[33] yet this approach began to lose its appeal within the dynamic landscape of the construction industry due to its escalating intricacies of projects and inequitable payment practices. Consequently, the spotlight shifted towards adjudication as a more responsive solution.[34] Around 1998, a significant turning point emerged, marked by a noteworthy shift towards adjudication. Esteemed voices such as Justice Coulson, as early as the ***Severfield v Duro (2015)***[35] case, hailed it as the long-awaited panacea for the construction sector. This transformative trajectory culminated in the legislative enactment of the Housing Grants, Construction and

[31] Eugenio Zoppis, ' DAAB and Dispute Resolution Under the 2017 FIDIC Forms of Contract' (2015), *Centre for Construction Law and Dispute Resolution King's College London https://bscl.bg/en/daab-and-dispute-resolution-under-the-2017-fidic-forms-of-contract-by-eugenio-zoppis/*

[32] Ibid 24.

[33] Sina Safinia, 'A review on Dispute Resolution Methods in the UK Construction Industry' (2014*) International Journal of Construction Engineering and Management*, pp. 105 – 108. *https://www.researchgate.net/publication/316663867_A_Review_on_Dispute_Resolution_Methods_in_UK_Construction_Industry/citation/download*

[34] Ibid 26.

[35] Severfield (UK) Ltd v Duro Felguera UK Ltd (2015) EWHC 3352 (TCC) (*https://vlex.co.uk/vid/severfield-uk-ltd-v-792940001).*

Regeneration Act of 1996 (referred to as '**the Act'**), which became effective in May 1998. This legislation not only introduced provisions governing payment aspects in construction contracts but also provided a comprehensive legal framework for addressing disputes through construction adjudication within the UK.[36] Complementing the Act are additional legislations and schemes such as The Scheme for Construction Contracts (England and Wales) Regulations of 2011, designed to plug any gaps left by the Act. [37] In essence, these supplementary mechanisms operate within the confines defined by the overarching Act.

Definition of Adjudication in the Act

In the realm of UK's construction landscape, the term "construction adjudication" may sound similar to general adjudication, but it stands as a distinct and separate procedure. [38] Essentially, construction adjudication within the UK pertains to the process of resolving conflicts stemming from construction contracts. [39] In this scenario, a neutral third party, akin to an arbitrator, takes on the role of a judge. [40] Their responsibility extends beyond assessing substantive issues; they also oversee procedural aspects, making it a comprehensive adjudicative process.[41]

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[36] Housing Grants, Construction and Regeneration Act of 1996.(*https://www.legislation.gov.uk/ukpga/1996/53/contents)*

[37] The Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (England) Regulations 2011. (*https://www.legislation.gov.uk/ukdsi/2011/9780111512975#:~:text=1.,into%20force%20of%20these%20Regulations.)*

[38] Ibid 21.

[39] Housing Grants, Construction and Regeneration Act of 1996, Section 108 (1).

[40]Ibid 32.

[41] Ibid 32.

Adjudication Procedure under the Act

In essence, the Act establishes the legal framework for addressing payment-related disputes within the construction industry, alongside other existing conflicts. [42] Notably, the parties involved hold the flexibility to select their preferred adjudication procedure, provided it aligns with the fundamental requisites outlined within the Act.[43] If a disparity arises regarding the chosen procedure or if the selected procedure does not adhere to the Act's pre-requisites, the England and Wales Scheme for Construction Contracts Regulations comes into play. This scheme essentially acts as a supplementary measure, bridging gaps in cases where the contract's provisions are incongruent with the stipulations of the Construction Act of 1996.[44]

Parties engaged in a construction contract hold the right to opt for adjudication as a means of settling disputes. Section 108 of the Act outlines a specific procedure for adjudicating conflicting matters. The initiation commences when a construction dispute surfaces, prompting the party desiring to resort to adjudication to draft and forward a written notice to the opposing party involved in the construction contract. [45] This notice encapsulates the nature of the conflict, the sought-after remedy to resolve it, and pertinent personal information of the parties embroiled in the dispute, encompassing their names and physical addresses. [46] This preliminary notice

[42] Housing Grants, Construction and Regeneration Act 1996, Section 108 (2), (3), and (4).
[43] Housing Grants, Construction and Regeneration Act 1996, Section 108 (5).
[44] Derreck Simmonds, 'The Scheme for Construction Contracts (England and Wales) Regulations 1998' (2008) (*https://www.researchgate.net/publication/315751111_The_Scheme_for_Construction_Contracts_England_and_Wales_Regulations_1998)* accessed 13th October 2023.
[45] Housing Grants, Construction and Regeneration Act 1998, Section 108.
[46] Ibid 38.

essentially delineates the jurisdiction's scope for the adjudicator's role. Upon receipt of the notice, and its originator are tasked with collaboratively selecting an adjudicator within a seven-day span.[47] In situations where this concurrence is unattainable, the party who issued the adjudication notice reserves the right to approach an independent adjudicator nomination body, formally requesting their intervention in nominating an adjudicator.[48] Upon receiving such a request within a five-day window, the independent entity assumes the responsibility of designating an adjudicator to oversee the dispute resolution process.[49] Once the adjudicator is appointed, they proceed to furnish the disputing parties with a referral notice, outlining the intricacies of the dispute, supporting witness statements, and any additional evidence upon which the parties intend to anchor their respective claims.[50]

Finality of the Arbitrators' Decision

In the context of challenging an adjudicator's determination, parties involved have the option to choose between two avenues: litigation or arbitration, and this choice is typically dictated by the terms laid out in the construction contract.[51] It's worth noting that if the parties opt for litigation, the resulting dispute is treated as a brand-new proceeding, distinct from an appellate review of the adjudicator's decision.[52] There are only two specific circumstances in which one

[47] Ibid 38.
[48] Ibid 38.
[49] Ibid 38.
[50] Ibid 38.
[51] Housing Grants, Construction and Regeneration Act of 1996, Section 108 (3).
[52] HG Construction Ltd v Ashwell Homes (East Anglia) Ltd [2007] EWHC 144 7CCC.

can challenge an adjudicator's decision.[53] First, if the adjudication process violated the principles of natural justice and if the adjudicator exceeded the boundaries of their jurisdiction, going beyond what was initially established in the reference notice.[54]

In the recent case of ***Exyte Hargreaves Ltd v NG Bailey Ltd (2023)***,[55] Judge Kelly made a significant ruling where she emphasized that adjudicators' decisions are temporarily binding, and they remain so until a court overturns them. The only grounds for non-enforceability are if these decisions breach the principles of natural justice or if the adjudicator had exceeded their jurisdiction.[56] Judge Kelly further clarified that an adjudicator's jurisdiction is not confined solely to the content of the adjudication notice; the Technology and Construction Court (TCC) will take into account various factors when considering the adjudicator's decision. This includes the positions taken by the parties during the adjudication process, the evidence presented to the adjudicator, as well as any claims and assertions made both before and during adjudication. This decision was also affirmed in the case of ***Essential Living (Greenwich) Limited v Elements (Europe) Limited [2022]*** [57] where the court held that adjudicators' decisions are temporarily binding. Consequentially, until the matter is ultimately addressed and resolved through litigation or arbitration, the parties

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[53] Emlyn Hudson, Holly Howarth & Wendy Greenwood, 'Adjudication enforcement: To challenge, or not to challenge?' *https://gateleyplc.com/insight/article/adjudication-enforcement-to-challenge-or-not-to-challenge/*

[54] Construction v Devonport Royal Dockyard [2020] EWHC 3314 (TCC) ; Amec v Whitefriars [2005] EWCA Civ. 1358.

[55] EWHC 94 (TCC)

[56] Exyte Hargreaves Ltd v NG Bailey Ltd (2023) EWHC 94 (TCC)

[57] EWHC 140 (TCC) (*https://www.keatingchambers.com/case-report/essential-living-greenwich-ltd-v-elements-europe-ltd/#:~:text=The%20dispute%20arose%20out%20of,modular%20units%20for%20the%20project)*

remain subject to the influence of the adjudicator's determination.[58] Notwithstanding, it is pertinent to observe that in practicality, upon the delivery of an adjudication award to the parties, a tacit consensus often arises that the matter has been conclusively settled.

Costs of Adjudication

The cost of adjudication in the United Kingdom is notably economical for a couple of reasons.[59] Firstly, parties have the alternative of subsequently resorting to court for the resolution of substantive aspects of their dispute, which tends to discourage exhaustive exploration of every facet of the issue during adjudication.[60] Second, the process is intentional, leading to a situation where parties often don't have the luxury of delving into exhaustive detail as is common in arbitration.[61] As a result, minimal resources are typically expended during this method of dispute resolution. However, the fees attributed to the adjudicator can be established through two distinct approaches. First, the construction contract itself might contain a provision empowering the adjudicator to determine their own fees and charges.[62] Secondly, upon the adjudicator's appointment to oversee the dispute, they can propose their fees and charges, which

[58] Ibid 50.

[59] Christopher Dancaster, 'Construction Adjudication in the United Kingdom: Past, Present, and Future' (2018) *Journal of Professional Issues in Engineering Education and Practice*. *https://www.researchgate.net/publication/245291549_Construction_Adjudication_in_the_United_Kingdom_Past_Present_and_Future/citation/download*

[60] Proff. Renato Nazzini & Alexander Kalisz, '2022 Construction Adjudication in the United Kingdom: Tracing Trends and Guiding Reforms' (2022) *Centre of Construction Law & Dispute Resolution, King's College London* (*https://www.kcl.ac.uk/construction-law/assets/2022-construction-adjudication-in-the-united-kingdom-tracing-trends-and-guiding-reform.pdf)* accessed 13 October 2023.

[61] Ibid 52.

[62] Housing Grants, Construction & Regeneration Act 1996, Section 108A(2b).

the parties can then mutually agreed upon.[63] It is important that any arrangement concerning the cost of adjudication be clearly documented in writing and subsequently integrated into the construction contract.[64]

Natural Justice and Adjudication

During the adjudication process, the adjudicator is obligated to the principles of principles of procedural fairness and natural justice, as articulated in the case of ***Glencot Development and Design Company Limited v. Ben Barrett and Son (Contractors) Limited [2001].*** This requirement arises from the fact that adjudication was introduced within the construction industry as a swift and pragmatic solution, often characterized as a 'rough but expedient' approach, as expressed by Lord Ackner. Consequently, this renders the entire process a mechanism designed for prompt resolution, unburdened by extensive legal formalities, to address construction disputes efficiently. The language of the Act itself indicates the intention for construction adjudication to be a relatively expeditious and unencumbered means for resolving such disputes.

Appointment of Adjudicator

The Act stipulates that within their construction agreement, the involved parties must reach a consensus on the process of selecting an adjudicator.[65] Consequently, any adjudicator who fails to meet the prerequisites outlined in the parties' construction agreement will be

[63] Ibid 20.

[64] Kariuki Muigua, 'Adjudication Procedure: The Housing Grants, Construction and Regeneration Act, 1996 of UK; Its Development and Lessons for Kenya' (2011) *(http://kmco.co.ke/wp-content/uploads/2018/08/Adjudication-Procedure-The-Housing-Grants-Construction-and-Regeneration-Act-1996-of-U.K.pdf)* accessed 13 October 2023.

[65] Housing Grants, Construction & Regeneration Act 1996, Section 108.

ineligible to preside over the adjudicative process.[66] Furthermore, it is crucial to emphasize that prior to the commencement of adjudication, a formal notice of an adjudicator's appointment must be duly provided to the opposing party.[67]

Recommendations to Scale up the Legal Framework for Construction Adjudication in Kenya

As expounded upon above, the current legal framework overseeing construction adjudication in Kenya is lacking in comprehensiveness.[68] The country primarily leans on the JBCC Green Book and the regulations set forth by the CIArb (K) for guidance.[69] However, the construction adjudication process is rapidly gaining popularity as the preferred method for resolving disputes within the industry.[70] This is largely attributed to its straightforwardness, confidential nature, and efficiency.[71] Consequently, there is a clear need to enhance the existing legal framework concerning construction adjudication in Kenya. In order to facilitate the effective utilization of adjudication, several recommendations are put forth for consideration:

a) Amendment of the JBCC Green Book

Clause 45 of the JBCC Green Book addresses the resolution of disputes that may arise among potential parties involved in a construction contract. However, this clause primarily emphasizes arbitration as the preferred method of dispute resolution, with minimal consideration given to construction adjudication. In light of this, efforts have been undertaken by the Architectural Association of

[66] Ibid 58.
[67] Ibid 58.
[68] Kariuki Muigua, 'Dealing with Conflicts in Project Management' [2005].
[69] Ibid 61.
[70] Ibid 21.
[71] Ibid 4.

Kenya (AAK) to enhance the legal framework surrounding construction adjudication.[72] One proposal involves amending the provisions of the Green Book, particularly within its dispute settlement clause, to explicitly include provisions for construction adjudication.[73] Despite these proposed changes, the implementation of such amendments is still pending and has yet to be realized.[74]

b) Legislation/Statutory Ratification of Construction Adjudication

In order to establish a cohesive and effective framework for adjudication practices within the construction sector, it is imperative to introduce an Adjudication Bill in parliamentary proceedings. Subsequently, the enactment of an Adjudication Act becomes crucial to realize this goal. This envisioned legislation should encompass both substantive and procedural dimensions, incorporating the following key components:

- **Definition & Clarity:** The legislation should provide a clear and concise definition of adjudication, articulating its fundamental essence and scope within the context of the construction industry.
- **Procedural Guidelines:** It is essential to articulate the required procedural steps and protocols to be followed during construction adjudication proceedings.
- **Scope of Applicability:** A comprehensive and exhaustive catalog of issues suitable for adjudication should be outlined, ensuring that all relevant matters have a suitable recourse through this process.

[72] Ibid 21.
[73] Ibid 15.
[74] Ibid 21.

- **Finality of Decisions:** The legislation must affirm the binding nature of the adjudicator's verdict, instilling certainty and conclusiveness in the adjudication process.
- **Qualification Criteria for Adjudicators:** Prerequisites that an individual must meet to be recognized as a qualified and competent adjudicator should be specified.
- **Available Remedies:** Enumeration of the potential remedies that parties can pursue following the conclusion of construction adjudication proceedings.

Furthermore, it is vital to align these legislative endeavors with the constitutional principles enshrined in Article 50(1) of the 2010 Constitution in Kenya. This provision safeguards the right of every individual to a just and open hearing, either within a court of law or an independent and impartial tribunal. With this in mind, several critical assurances must accompany the introduction of such legislation, encompassing:

- **Impartiality:** Adjudicators must remain impartial and devoid of personal interests in the disputes they preside over, mirroring the precedent set forth in Section 108 of England's Housing Grants, Construction and Regeneration Act.
- **Equity:** An unequivocal commitment to ensuring fairness throughout the adjudication process is foundational to the effectiveness of alternative dispute resolution mechanisms within the construction industry.

The realization of optimal construction adjudication practices in Kenya hinges upon these proposed amendments and the enactment of comprehensive legislative measures. This paradigm shift stands to foster equitable, transparent, and robust dispute resolution mechanisms within the construction industry. It is a significant step

towards ensuring fairness, clarity, and efficiency in construction adjudication procedures.

c. Borrowing a Leaf from the UK Legal Framework on Construction Adjudication (The Housing Grants, Construction and Regenerations Act 1996)

Recognizing that not all facets of the UK's legal practices can be seamlessly transplanted into our own system, it is evident that there are indeed valuable elements we can adopt from their construction adjudication methods. One notable example is the time framework established in the UK's Housing Grants, Construction and Regeneration Act. Incorporating a comparable time limitation, like the 28-day window for resolving construction disputes, into our envisioned adjudication legal framework could substantially enhance the expeditious resolution of disputes, ultimately resulting in improved efficiency.[75]

Moreover, we can embrace the notion of temporary binding decisions, a concept drawn from the UK's construction adjudication system.[76] Given the common occurrence of disputes throughout construction projects, the incorporation of a mechanism for temporary binding resolutions can prove highly advantageous.[77] This approach facilitates the seamless progress of projects by offering interim solutions, all the while preserving the option for a final resolution of substantive issues through a formal legal process, be it in court or arbitration.[78] As such, it is imperative that our envisioned

[75] Housing Grants, Construction & Regeneration Act 1996, Section 108.
[76] Housing Grants, Construction and Regeneration Act of 1996, Section 108 (3).
[77] Ibid 46.
[78] Ibid 46.

construction adjudication framework includes provisions that clearly delineate the interim and temporary character of the adjudicator's decisions.[79]

Integrating the compulsory adherence to the principles of natural justice by adjudicators is yet another advantageous feature that can be adopted from the UK's construction adjudication model. By mandating that adjudicators strictly follow these principles, our system would demonstrate a commitment to impartiality and fairness. [80] The unwavering adherence of adjudicators to the principles of natural justice is pivotal for preserving the integrity of their decisions and ensuring the satisfaction of all parties engaged in the process. In cases where these principles are violated or disregarded, our proposed legal framework should provide a clear avenue for contesting the adjudicator's decision on these grounds.

Regarding the role of adjudicators, it is advisable to follow the UK's model by explicitly outlining the entities responsible for appointing adjudicators and defining their qualifications. This approach guarantees that the individuals entrusted with dispute resolution possess the essential expertise and relevant knowledge in the relevant areas.[81] By including such specifications in our legal framework, we can elevate the credibility and competence of the selected adjudicators.[82] In conclusion, while adapting practices from the UK's construction adjudication model to our jurisdiction requires careful consideration and medication, there are valuable elements that can

[79] Kariuki Muigua, 'Dealing with Conflicts in Project Management' (2011).
[80] CIArb K Adjudication Rules, Rule 11.
[81] Kariuki Muigua, 'Adjudication Procedure: The Housing Grants, Construction and Regeneration Act, 1996 of U.K; Its Development and Lessons for Kenya' (2011).
[82] Ibid 74.

integrated to improve the efficiency, fairness, and effectiveness of our own constitution dispute resolution processes.

Conclusion

In summary, adjudication has emerged as the favored alternative dispute resolution mechanism within the construction industry, owing to its inherent strengths and alignment with the unique demands of this sector.[83] As a result, construction adjudication has made significant strides in advancement. Notably, there is a confluence between adjudication and the involvement of third-party experts in determining matters.[84] Kenya, as a developing nation with a pronounced focus on infrastructural development through construction projects, can draw inspiration from the experiences of countries like Malaysia, the United Kingdom and Singapore. These countries have successfully integrated construction adjudication, yielding substantial benefits for their populations.[85] It is evident that a gap exists within the Kenyan legal framework, and the incorporation of relevant laws should be undertaken with meticulous care. Given that this field of jurisprudence is still evolving, it is crucial to navigate this process thoughtfully, avoiding potential pitfalls such as excessive legislative measures. In conclusion, as the construction sector continues to expand in Kenya, embracing the lessons and successes of other nations in implementing construction adjudication can contribute significantly to efficient dispute resolution and overall progress of the industry.

[83] Ibid 72.
[84] Ibid 74.
[85] Ibid 74.

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Revisiting the Legal Debate on the Constitutionality of the Life Sentence in Kenya: The Case for Its Continued Relevance

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

Abstract

This paper delves into the legal debate on the constitutionality of life sentences in Kenya's criminal justice system. It provides an overview of the national and international legal context surrounding life imprisonment, exploring domestic provisions and the evolution of views on criminal justice sanctions from the abolition of the death penalty to the rejection of life sentences as human rights violations. The paper discusses inconsistent judicial decisions and their adverse impact on criminal justice in Kenya, leading to confusion and uncertainty. Proposing reform measures, including statutory amendments, seeking advisory opinions, and comprehensive reviews by the Kenya Law Reform Commission, the paper aims to present a balanced approach to address the challenges surrounding life sentences. It highlights the importance of striking a balance between justice for serious crimes and the protection of human rights, emphasizing the need for a transparent, fair, and equitable criminal justice system in Kenya's pursuit of a just and humane society.

Key Words*: Life-Sentence, Constitutionality, Kenya, Criminal-Justice, Death-Sentence, Human-Rights, Legal-Reform*

1. Introduction

Kenya's criminal justice system has long grappled with the question of life sentences and their constitutionality.[1] The debate surrounding

[*] *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] *Godfrey Ngotho Mutiso v Republic [2010] eKLR; Joseph Njuguna Mwaura and 2 Others v Republic [2013] eKLR*

the appropriateness and effectiveness of this severe form of punishment has evolved over the years, drawing on domestic legal provisions, international human rights standards, and the ever-changing landscape of societal values.[2] This discourse has led to conflicting judicial decisions, resulting in confusion and a lack of clarity on the constitutionality of life sentences.[3]This comprehensive exploration delves into the legal context and the evolving views on criminal justice sanctions in Kenya, with a particular focus on the life sentence. Beginning with an examination of domestic law, the paper sheds light on the various domestic provisions that pertain to life imprisonment, exploring the offenses that attract such severe sentences. Moreover, the paper analyzes the impact of these provisions on sentencing practices and the potential for judicial discretion in imposing life sentences.

Subsequently, the paper delves into international treaty law, tracing the evolution of perspectives on criminal justice sanctions from the abolition of the death penalty to the rejection of the life sentence as a serious violation of human rights. By drawing upon landmark cases, both domestic and international, the paper elucidates the growing recognition of fair trial rights, individualized sentencing, and the protection of human dignity within the context of life imprisonment. As the discussion unfolds, we encounter inconsistent judicial decisions that have fueled the legal debate on the constitutionality of life sentences in Kenya. Analyzing various case law, the paper highlights the contrasting approaches adopted by the courts, resulting in confusion within the legal landscape. Furthermore, the

[2] *Republic v Regina Wambui Njoroge [2020] eKLR*

[3] Muthoga, R., & Bowman, R. (2010). A Brief Survey of Sentencing Law and Its Practice in Kenya. *Federal Sentencing Reporter*, *22*(4), 249–253. Available at https://doi.org/10.1525/fsr.2010.22.4.249 accessed 1 August 2023

paper explores the adverse impact of this uncertainty on the criminal justice system, from delayed justice and inequality in sentencing to potential infringements on human rights.

To navigate this challenging terrain, the paper presents a series of proposed reform measures that could offer a way forward. These include statutory amendments by Parliament to clarify and standardize sentencing practices, seeking a comprehensive advisory opinion from the Supreme Court to definitively address the issue, and commissioning a thorough review of sanctions for serious crimes by the Kenya Law Reform Commission.

Amidst these reform proposals, the paper acknowledges the multifaceted nature of the debate. The case for the continued relevance of life sentences finds its basis in the pursuit of justice for serious crimes, public safety, and deterrence, while acknowledging the severity of certain offenses. Conversely, the paper recognizes the counterarguments advocating for individualized sentencing, the preservation of human rights, and the pursuit of more effective alternatives to lengthy incarceration.

As the discourse on life sentences in Kenya's criminal justice system continues to evolve, this exploration aims to shed light on the complexities and implications of the prevailing legal framework. By evaluating potential reforms and embracing a human rights-based approach, we aspire to foster a more equitable, transparent, and balanced system of criminal justice—one that upholds the rule of law while safeguarding the dignity and rights of all individuals involved.

2. The National and International Legal Context of the Life Sentence

2.1 Domestic Law on the Life Sentence in Kenya

The penal code stipulates that 'save as may be expressly provided by the law under which the offence concerned is punishable, a person liable to imprisonment for life or any other period may be sentenced to any shorter term.[4] This means that the court has the discretion to impose a sentence shorter than life imprisonment, even if the offense carries the possibility of life imprisonment as the maximum penalty. The penal code also provides for offences that attract life imprisonment including concealment of treason,[5] manslaughter,[6] attempted murder[7]and arson[8].

In addition, the Sexual Offences Act prescribes a sentence of life imprisonment for an offender who defiles a minor aged 11 years and below.[9] The Prevention of Terrorism Act also prescribes life imprisonment for 'where a person carries out a terrorist act which results in the death of another person.[10] Under the Prevention of Organised Crimes Act, 'If as a result of the act referred to in section 3(n) a person dies[11], the member of the organized criminal group shall on conviction be liable to imprisonment for life.[12] A person who 'by use of physical force, or by threat or intimidation of any kind compels

[4] Penal Code, Section 26 (2)
[5] Ibid, section 42
[6] Ibid, section 205
[7] Ibid, section 220
[8] Ibid, section 332
[9] Sexual Offences Act, Section 8 (2)
[10] Prevention of Terrorism Act, 2012, section 4 (2)
[11] Section 3 (n) lists 'being a member of an organized criminal group endangers the life of any person or causes serious damage to the property of any person' as an organized criminal activity.
[12] Prevention of Organised Crimes Act, 2010 sec 4 (2)

another person to take such oath or engagement in the nature of an oath, commits an offence and shall on conviction be liable to imprisonment for life'.[13] Furthermore, 'any person who—(a) is found in possession of any of the specified firearms without a license or permit or other lawful justification; or (b) being licensed to possess, hold, trade in or otherwise have custody of any of the specified firearms, ammunition or parts of such firearm or ammunition hires or otherwise unlawfully permits another person to take possession of or use that firearm or ammunition to advance the course of organized criminal activity, commits an offence and is liable to imprisonment for life'.[14]

2.2 International Treaty Law on the Life Sentence - The Evolution of Views on Criminal Justice Sanctions from:

2.2.1 Abolition of the Death Sentence

Over the years, there has been a global trend towards the abolition of the death penalty. Many countries and international organizations have recognized the inherent flaws and irreversible nature of capital punishment, leading to an increased focus on alternative forms of punishment, including life imprisonment.[15] Several international human rights treaties have addressed the issue of the death penalty and life imprisonment. For instance, The Universal Declaration of Human Rights (UDHR establishes the right to life as a fundamental human right.[16] The International Covenant on Civil and Political

[13] Ibid, section 5 (1) (d)
[14] Ibid, section 26
[15] Mugambi, J. N. (2020). The Death Penalty in Kenya: The Need for a Review. *Nairobi Law Monthly*, Issue 94, 30-32.
[16] Universal Declaration of Human rights (UDHR), art 3 available at *https://www.un.org/en/about-us/universal-declaration-of-human-rights accessed 1* August 2023

Rights (ICCPR) reaffirms the right to life and imposes restrictions on the application of the death penalty.[17]

In addition, The Second Optional Protocol to the ICCPR calls for the abolition of the death penalty and aims to end capital punishment worldwide.[18] The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) explicitly prohibits torture, which includes prolonged or indefinite detention.[19] As understanding of human rights has evolved, there has been a growing recognition that certain punishment practices, such as the death penalty and cruel or inhuman treatment, are incompatible with fundamental human rights.[20]The concept of restorative justice has gained traction, emphasizing rehabilitation, reconciliation, and reintegration of offenders into society over punitive measures.[21]In addition, international law has increasingly emphasized the principles of proportionality and non-discrimination in the application of criminal sanctions, seeking to avoid disproportionate or discriminatory punishments.[22]The principle of human dignity also underpins much of the evolving international views on criminal

[17] The International Covenant on Civil and Political Rights (ICCPR) art 6 available at *https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights* accessed 1 August 2023

[18] The Second Optional Protocol to the ICCPR available at *https://treaties.un.org/doc/Treaties/1991/07/19910711%2007-32%20AM/Ch_IV_12p.pdf accessed 1* August 2023

[19]The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) available at *https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading* accessed 1 August 2023

[20] Mugambi, J. N. (2020). The Death Penalty in Kenya: The Need for a Review. *Nairobi Law Monthly*, Issue 94, 30-32.

[21] Ibid

[22] Ibid

justice sanctions, guiding a shift towards more humane treatment of offenders.[23]

While there is a growing global trend towards the abolition of the death penalty, the issue of life imprisonment remains complex. Some argue that life imprisonment, especially when imposed without the possibility of parole or mitigation, can also be considered a form of cruel and inhumane punishment, as it denies individuals any hope of release or redemption. Others argue that life imprisonment offers deterrence and justice for victims of serious offences and should be upheld.

2.2.2 Commutation of the Death Sentence to Life Sentence

The evolution of views on criminal justice sanctions, particularly the commutation of the death sentence to life imprisonment, has been influenced by various factors, including changing societal attitudes, human rights considerations, and international legal developments.

One of the primary drivers for the evolution of views on criminal justice sanctions is the increasing recognition of human rights and the rejection of cruel and inhumane punishments.[24] The death penalty has been historically associated with significant cruelty and irreversibility. As international human rights norms developed, there was a growing realization that the death penalty violated the right to life and constituted a form of cruel and degrading punishment.[25]

Over time, there has been a shift in emphasis from solely punitive measures to a more rehabilitative approach to criminal justice. The

[23] Ibid

[24] Owino, G. O. (2019). The Elusive Abolition: The Constitutional Future of the Death Penalty in Kenya. *Journal of East African and International Law*, 8(2), 206-228.

[25] Ibid

idea that offenders might be capable of reform and reintegration into society gained prominence. This shift in focus led to a questioning of the utility and ethics of the death penalty, prompting many countries to consider alternatives such as life imprisonment with a possibility of parole.[26]

The adoption of regional and international legal instruments further reinforced the trend towards considering life imprisonment as an alternative to the death penalty. For instance, the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), aiming at the abolition of the death penalty, encouraged states to limit the use of capital punishment and consider alternatives.[27] In some cases, countries instituted moratoriums on executions, signaling a willingness to review their capital punishment policies. These moratoriums often opened the door for discussions on potential alternatives, including the commutation of death sentences to life imprisonment.[28]

Furthermore, high-profile cases of wrongful convictions and exonerations highlighted the risk of irreversible error in capital punishment cases. These instances added to the growing skepticism towards the death penalty and contributed to the consideration of life imprisonment as a more just alternative.[29]

While the commutation of death sentences to life imprisonment represents progress in the context of criminal justice sanctions, it is essential to recognize that life imprisonment itself remains a subject of debate and human rights concerns. The issue of lengthy or

[26] Ibid
[27] Ibid
[28] Ibid
[29] Ibid

indefinite detention without a realistic chance of release has been criticized as potentially violating the principle of human dignity and the right to hope for redemption and rehabilitation. Therefore, even as the views on the death penalty evolve, discussions on the appropriate scope and duration of life sentences continue in international legal and human rights forums.[30]

2.2.3 Rejection of the Life Sentence as a Serious Violation of Human Rights

The evolution of views on criminal justice sanctions, particularly the life sentence, has seen shifts from outright rejection to nuanced considerations regarding its application.

Historically, there have been strong voices in the human rights community advocating for the abolition of life imprisonment due to concerns about its inherent cruelty and violation of human rights. Critics argue that life imprisonment, especially without the possibility of parole, amounts to "civil death" and denies individuals the chance of redemption and rehabilitation. [31] As the focus on rehabilitation and restorative justice has gained traction, some human rights advocates have questioned the effectiveness of indefinite or lengthy sentences, including life imprisonment. The emphasis has been on finding more humane ways to address criminal behavior and reintegrate offenders into society rather than resorting to extreme punitive measures.[32]

Over time, attention has been drawn to the conditions of imprisonment and the potential for inhumane treatment within the

[30] Ibid
[31] Matofari, J. W. (2017). The Future of the Death Penalty in Kenya: A Critical Analysis of the Abolitionist Discourse. *Nairobi Law Monthly*, Issue 66, 24-26
[32] Ibid

prison system, including cases of overcrowding, inadequate healthcare, and violence. Such concerns have raised questions about the ethics of life imprisonment as a form of punishment.[33] The international community has increasingly recognized the need for special protections for juvenile offenders, acknowledging their potential for rehabilitation and reform. This recognition has led to the rejection of life sentences without the possibility of parole for juveniles in some jurisdictions.[34]

Furthermore, international human rights bodies and treaties have played a significant role in shaping the discourse on life sentences. For instance, the United Nations Standard Minimum Rules for the Treatment of Prisoners (known as the Nelson Mandela Rules) provide guidance on the treatment of prisoners, emphasizing the need for respect for human rights and dignity.[35]

Some advocates have called for a review of life sentences to ensure that they are reserved for the most severe and heinous crimes and are not applied indiscriminately. This approach seeks to strike a balance between accountability for crimes and the principles of human rights and human dignity.[36]

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[33] Ibid

[34] Ibid

[35]United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) available at *https://www.un.org/en/un-chronicle/nelson-mandela-rules-protecting-rights-persons-deprived-liberty#:~:text=to%20sentenced%20prisoners.-,The%20Rules%20are%20based%20on%20an%20obligation%20to%20treat%20all,disciplinary%20measures%20to%20medical%20services.* Accessed 1 August 2023

[36] Matofari, J. W. (2017). The Future of the Death Penalty in Kenya: A Critical Analysis of the Abolitionist Discourse. *Nairobi Law Monthly*, Issue 66, 24-26

While there has been an evolution in the views on the life sentence, opinions still differ among different countries and individuals. Some argue that life imprisonment can serve as an appropriate punishment for certain grave crimes, while others continue to advocate for its abolition or substantial reform to ensure fair and humane treatment of offenders.[37]

3. Inconsistent Judicial Decisions and the Legal Debate on the Constitutionality of Life Sentence in Kenya

3.1 Challenges to the Constitutionality of the Death Sentence *Francis Karioko Muruatetu v Republic* (2019) Eklr

The Court in its Judgement declared the mandatory nature of the death sentence as provided for under Section 204 of the Penal Code unconstitutional and issued orders for the establishment of a framework to deal with the sentence re-hearing of the applicable cases. The court also directed the legislative making bodies to enact legislation to the effect of repealing sections that made provision for the death penalty.[38]

The court averred as follows:

To our minds, what Section 204 of the Penal Code is essentially saying to a convict is that he or she cannot be heard on why, in all the circumstances of his or her case, the death sentence should not be imposed on him or her, or that even if he or she is heard, it is only for the purposes of the record as at that time of mitigation because the court has to impose the death sentence nonetheless... Try as we might, we cannot decipher the possible rationale for this provision. We think

[37] Ibid

[38] Para 112; *Francis Karioko Muruatetu & another v Republic* [2017] eKLR (*Muruatetu*)

that a person facing the death sentence is most deserving to be heard in mitigation because of the finality of the sentence.[39]

We are of the view that mitigation is an important congruent element of fair trial. The fact that mitigation is not expressly mentioned as a right in the Constitution does not deprive it of its necessity and essence in the fair trial process. In any case, the rights pertaining to fair trial of an accused pursuant to Article 50(2) of the Constitution are not exhaustive.[40] Indeed the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in Article 10 of the Universal Declaration of Human Rights, and in the same vein Article 25(c) of the Constitution elevates it to a non-derogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which the Rule of Law and public faith in the justice system would inevitably collapse.[41]

Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right.[42] Failing to allow a Judge discretion to take into consideration the convicts' mitigating circumstances, the diverse character of the convicts, and the circumstances of the crime,

[39] Para 45 Ibid
[40] Para 46; Ibid
[41] Para 47, Ibid
[42] Para 48, Ibid

but instead subjecting them to the same (mandatory) sentence thereby treating them as an undifferentiated mass, violates their right to dignity.[43]

If a Judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability. Further, imposing the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability fails to reflect the exceptional nature of the death penalty as a form of punishment. Consequently, failure to individualize the circumstances of an offence or offender may result in the undesirable effect of 'over punishing' the convict.[44]

This judgment marked a significant development in the legal debate on the constitutionality of the death sentence in Kenya. The court emphasized the significance of mitigation in the fair trial process. Mitigation allows the accused to present arguments and evidence to persuade the court to consider factors that could reduce the severity of the sentence.

The court underscored that judicial discretion in sentencing is vital in upholding justice. The imposition of a mandatory death sentence deprived judges of the ability to take into account individual circumstances and variations in criminal culpability, leading to potential injustices and disproportionate punishments.

[43] Paragraph 50, Ibid
[44] Para 53, Ibid

The paper avers that this judgment represents a crucial step in the legal debate on the constitutionality of the death sentence in Kenya, reflecting a growing recognition of the importance of fair trial principles and individualized sentencing in the criminal justice system.

3.2 Declaration of the Life Sentence as Unconstitutional- *Julius Kitsao Manyeso v Republic* (2023)

This judgment declaring the life sentence as unconstitutional is a significant development in the legal debate on criminal justice sanctions in Kenya. It builds upon the principles established in *Muruatetu* which declared the mandatory death sentence as unconstitutional.

The court held as follows:

This fact notwithstanding, we are of the view that the reasoning in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR equally applies to the imposition of a mandatory indeterminate life sentence, namely that such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation. This is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under Article 27 of the Constitution. In addition, an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under Article 28 and we are in this respect persuaded by the reasoning of the European Court of Human Rights in *Vinter and others vs The United Kingdom* (Application nos. 66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013) that an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment, and that it is now a principle in international law that all

prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved.[45]

We are equally guided by this holding by the Supreme Court of Kenya, (*Muruatetu*) and in the instant appeal, we are of the view that having found the sentence of life imprisonment to be unconstitutional, we have the discretion to interfere with the said sentence. [46] ...We accordingly set aside the sentence of life imprisonment imposed on the Appellant and substitute therefor a sentence of 40 years in prison to run from the date of his conviction.[47] The paper argues that the court noted that individuals sentenced to life imprisonment are not allowed to present arguments and evidence to persuade the court to consider factors that could lead to a reduction in the severity of the sentence. This denial of mitigation is considered unjustifiable discrimination and unfair, violating the principle of equality before the law under Article 27 of the Kenyan Constitution. The change in sentencing highlights the court's recognition of the need to address the unconstitutionality of the life sentence and to impose a sentence that allows for the possibility of rehabilitation and eventual release, taking into account the principles of human rights and proportionality.

The paper posits that the judgments in both *Muruatetu* and *Manyeso* cases demonstrate the evolving understanding of criminal justice sanctions in Kenya and the increasing scrutiny of severe sentences, such as the death penalty and life imprisonment. These judgments reflect a growing recognition of the importance of fair trial rights, individualized sentencing, and the preservation of human dignity in

[45] *Julius Kitsao Manyeso v Republic* (2023) eKLR (Manyeso) Para 21
[46] Id, para 26
[47] Id, para 27

the criminal justice system. As Kenya continues to grapple with these complex legal issues, the judiciary's consideration of international human rights principles contributes to the broader global discourse on the appropriate treatment of offenders and the protection of human rights within the criminal justice context.

3.3 Affirmation of the Constitutionality of the Life Sentence

3.3.1 Obadiah Kiriabu Magara v Republic (2023) eKLR.

This judgment by the Court of Appeal, where the court affirmed the constitutionality of the life sentence, presents a conflicting decision to the previous cases discussed. In this case, the Court enhanced a 26-year term of imprisonment to a life sentence for the appellant's conviction of defilement of a 9-year-old child, contrary to Section 8(1)(2) of the Sexual Offences Act.

The court held as follows:

The appellant was convicted of the offence of defilement contrary to Section 8 (1) (2) of the Sexual Offences Act. The girl defiled was proved to have been 9 years old at the material time. That provision of law prescribes a sentence of life imprisonment for an offender who defiles a minor aged 11 years and below.[48]

The Supreme Court issued directions in *Francis Karioko Muruatetu & Another v Republic* [2021] eKLR to the effect that the Judgment in the case applied only to murder cases.[49] The appellant defiled a 9-year-old child...The sentence prescribed for that offence carried a sentence of imprisonment for life. The ODPP having given and served notice to enhance the sentence, we find that the appropriate sentence in the

[48] *Obadiah Kiriabu Magara v Republic* (2023) Eklr (*Magara*) page 9
[49] Ibid

case was the sentence awarded by the trial court. We set aside that part of the Judgment of the High Court sentencing the appellant to 26 years imprisonment, substituting it with life. Accordingly, the appeal on conviction fails and is dismissed. The appellant is sentenced to serve imprisonment for life.[50]

The judgment in *Magara* shows that, in certain offenses where the law prescribes a life sentence, the Court of Appeal upheld the constitutionality of such sentences. The conflicting decisions from different cases might indeed lead to confusion on where the courts stand on the constitutionality of life sentences in Kenya. It reflects the complexity of the legal debate on criminal justice sanctions and underscores the need for further clarity from the higher courts on this matter.

The judiciary's treatment of life sentences in Kenya continues to be a subject of debate, and further developments and judgments are likely to shape the country's stance on this issue in the future.

3.3.2 *Onesmus Musyoki Muema v Republic* [2023] eKLR

In *Onesmus Musyoki Muema v Republic*, the court opined that 'the sentence of life imprisonment imposed on the appellant is a lawful and legal sentence, and this court has no legal basis upon which to interfere with it'.[51] The appellant had been charged with defilement of a child aged 10 years which punishment as already described above attracts a life imprisonment.

3.4 Resulting Confusion and Lack of Clarity

The paper argues that the conflicting and inconsistent judgments on the constitutionality of the life sentence in Kenya has resulted in

[50] Id page 10-11
[51] [2023] eKLR Page 17

confusion and lack of clarity in the country's criminal justice system. This confusion has had adverse impacts on various aspects of criminal justice in Kenya:

First, the conflicting judgments create uncertainty in the sentencing of offenders, particularly those convicted of serious crimes. The lack of clear guidance on the constitutionality of life sentences leaves judges and magistrates unsure about the appropriate punishment to impose, leading to inconsistent and unpredictable sentencing outcomes.

Secondly, the lack of clarity on the constitutionality of life sentences can lead to inequality in the administration of justice. Defendants convicted of similar offenses might receive different sentences based on the jurisdiction and the specific judge presiding over the case, undermining the principle of equality before the law.

Thirdly, the confusion surrounding life sentences can result in prolonged legal battles and appeals, as defendants seek to challenge their sentences based on the divergent interpretations of the law. This can lead to delays in the dispensation of justice and contribute to the backlog of cases in the courts.

Fourthly, inconsistent sentencing decisions can also have an adverse impact on victims and their families. Victims of serious crimes may feel that justice is not being served adequately when offenders receive vastly different sentences for similar offenses, leading to feelings of frustration and disillusionment with the criminal justice system in general.

In addition, the paper argues that uncertainty in sentencing can impact the deterrent effect of punishment and the prospects for

offender rehabilitation. If offenders perceive that sentencing outcomes are unpredictable and arbitrary, it may reduce the potential deterrent effect of the criminal justice system.

4. The Way Forward: Some Proposed Reform Measures

4.1 The Case for Continued Relevance of the Life Sentence in Kenya

The case for the continued relevance of the life sentence in Kenya is grounded in several arguments and considerations.

First, Life imprisonment serves as a severe punishment for individuals convicted of heinous crimes, such as murder, Robbery with Violence, terrorism, treason, certain categories of organized criminal activity and certain sexual offenses *inter alia*. For crimes that have caused significant harm to victims and society, there is an argument that life imprisonment ensures that offenders face appropriate consequences for their actions.[52]

Secondly, the imposition of life sentences may act as a deterrent to potential offenders, discouraging them from committing serious crimes due to the prospect of spending their entire lives in prison. The existence of life sentences may also contribute to public safety by keeping dangerous individuals who pose a risk to society off the streets.[53]

Thirdly, life sentences are often seen as a means of providing justice for victims and their families, especially in cases where the loss of life

[52] Muhlhausen D: Theories of Punishment and Mandatory Minimums' The Heritage Foundation, 27 May 2010, available at *http://ww/;%3C,'oheritageoorg/testimony/theories-punishment-and-mandatory-minimum-sentences* accessed 2 August 2023

[53] Ibid

is irreparable. The idea of a life sentence may offer a sense of closure and retribution to those affected by the crime.[54]

Furthermore, life sentences can be seen as a way to avoid resorting to capital punishment or other forms of harsh punishment. For countries that have abolished the death penalty, life imprisonment serves as an alternative that avoids state-sanctioned violence while still providing accountability.[55]

While there are arguments in favor of the continued relevance of life sentences in Kenya, it is essential to recognize that this perspective is not without its critics. Some of the counterarguments against life sentences include concerns about the effectiveness of long-term incarceration as a deterrent, issues of prison overcrowding and associated costs, potential for wrongful convictions, and the debate over the ethics and humanity of lengthy or indefinite detention.[56]

The question of whether life imprisonment remains a just and appropriate form of punishment is a complex and contentious issue that requires careful consideration and a balanced approach. As the legal and human rights landscape continues to evolve, the debate on the relevance and constitutionality of life sentences will likely persist, prompting further discussions on the appropriate balance between accountability, rehabilitation, and the protection of human rights.

4.2 Statutory Amendment by Parliament

Proposed statutory amendments by Parliament can play a crucial role in addressing the challenges and uncertainties surrounding the life sentence in Kenya. These reforms can help clarify the law, establish a

[54] Ibid
[55] Ibid
[56] Ibid

consistent legal framework, and ensure that sentencing practices align with international human rights standards.[57]

Parliament could consider abolishing mandatory life sentences for certain offenses. This would give judges the discretion to impose appropriate sentences based on the circumstances of each case, taking into account mitigating factors and the principle of proportionality.[58] Parliament could introduce parole mechanisms for certain life sentences. This would allow for periodic reviews of the offender's progress and rehabilitation during their imprisonment, providing an opportunity for eventual release if it is determined that the offender is no longer a threat to society.[59]

In addition, Parliament could establish clear guidelines for judges to follow when sentencing individuals to life imprisonment. These guidelines could take into account the nature of the offense, the offender's criminal history, and other relevant factors to ensure consistency and fairness in sentencing.[60]

Statutory amendments could include explicit provisions that affirm and protect the human rights of prisoners, including those serving life sentences. This could ensure that all prisoners, regardless of the length of their sentence, are treated with dignity and provided with access to rehabilitation and support programs.[61]

Parliament could also institute a review of past cases where individuals were sentenced to life imprisonment under mandatory

[57] Manahan J and Skeem J (2015) Risk Assessment in Criminal Sentencing', *Berkeley*
[58] Ibid
[59] Ibid
[60] Ibid
[61] Ibid

sentencing laws. This review could identify cases where the imposition of the life sentence might have been unjust or disproportionate, leading to potential remedies or resentencing.[62]

Parliament could explore alternatives to long-term incarceration, such as community-based rehabilitation programs, restorative justice initiatives, or diversionary measures for non-violent offenders. These alternatives may be more effective in promoting rehabilitation and reducing recidivism.[63]

Furthermore, as part of the reform process, Parliament could engage in public consultation and seek input from relevant stakeholders, including legal experts, human rights organizations, victims' advocates, and the general public. This would help ensure that any proposed reforms are comprehensive and reflect the diverse perspectives on the issue.[64]

Finally, Parliament could look to international best practices and experiences of other countries in handling life sentences and sentencing reform. Learning from the experiences of other jurisdictions can provide valuable insights and guide the development of effective and fair reforms.[65]

4.3 Request for Advisory Opinion from the Supreme Court

Requesting an advisory opinion from the Supreme Court of Kenya can be a valuable approach to address the confusion and lack of clarity surrounding the constitutionality of the life sentence.[66]

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[62] Ibid
[63] Ibid
[64] Ibid
[65] Ibid
[66] Ibid

By seeking an advisory opinion, the government or relevant authorities can ask the Supreme Court to provide a definitive interpretation of the constitutionality of the life sentence. This would give the court an opportunity to thoroughly examine the legal and constitutional aspects of life imprisonment and issue a comprehensive opinion that can serve as a guiding precedent for lower courts and stakeholders.[67]

An advisory opinion would help unify the legal interpretation of life sentences in Kenya. All parties involved in the criminal justice system would have a clear understanding of the constitutionality of life imprisonment, helping to promote consistency and fairness in sentencing.[68]

In addition, The Supreme Court can take into account international human rights standards and comparative jurisprudence when rendering its advisory opinion. This would enable the court to align Kenya's approach to life sentences with evolving global human rights principles, ensuring that the country's legal system reflects international best practices.[69]

Requesting an advisory opinion from the Supreme Court can also encourage legal and public engagement on the issue. Various stakeholders, including legal experts, human rights organizations, academics, and the public, can provide their perspectives and arguments, enriching the court's understanding of the matter.[70]

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[67] *In the Matter of Interim Independent Electoral Commission [2011] eKLR para 93*
[68] Ibid
[69] Ibid
[70] Ibid

4.4 Comprehensive Review of Sanctions for Serious Crimes by Kenya Law Reform Commission

A comprehensive review of sanctions for serious crimes by the Kenya Law Reform Commission (KLRC) is a proactive and systematic approach to address the challenges related to sentencing, including the life sentence. [71] This review process involves a thorough examination of the country's criminal laws and penalties, with the goal of recommending appropriate reforms and aligning the legal framework with evolving societal values and international human rights standards.

The KLRC is a body of legal experts and professionals with specialized knowledge and expertise in law and criminal justice. A comprehensive review led by the KLRC would involve in-depth research, analysis, and consultations, resulting in well-informed and evidence-based recommendations.[72]

The review would not focus solely on life sentences but would take a holistic approach to examine all sanctions for serious crimes in Kenya. This approach ensures that the entire spectrum of sentencing options, from fines and probation to imprisonment, is thoroughly evaluated.[73]The review would assess the existing legal framework, including statutes, regulations, and guidelines related to sentencing. It would identify areas of inconsistency, ambiguity, or potential conflicts within the current laws.[74]

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[71]Mbote P and Akech M, (2011) Kenya: The Justice Sector and the Rule of Law, *The Open Society Initiative for Eastern Africa*

[72] Ibid

[73] Ibid

[74] Ibid

The KLRC would take into account international human rights instruments and jurisprudence, as well as comparative practices in other jurisdictions. This would help ensure that the proposed reforms align with Kenya's human rights obligations and international best practices.[75]

In addition, a comprehensive review would involve engagement with the public, legal practitioners, human rights organizations, victims' advocates, and other stakeholders. Public consultations and soliciting feedback from relevant groups would allow for a diversity of perspectives and ensure a transparent and inclusive process.[76]

Based on the research and analysis, the KLRC would make recommendations for potential sentencing reforms. These may include changes to mandatory sentencing laws, the introduction of alternative sentencing options, and measures to ensure proportionality and individualization of sentences.[77]The KLRC could draft legislative proposals to enact the recommended reforms. These proposals would be submitted to Parliament for consideration and potential enactment into law.[78]

5. Conclusion

The debate on the constitutionality and relevance of life sentences in Kenya's criminal justice system is a complex and multifaceted issue.[79] The paper's comprehensive exploration has shed light on the various aspects surrounding this contentious topic, ranging from domestic legal provisions to international human rights standards and the

[75] Ibid
[76] Ibid
[77] Ibid
[78] Ibid
[79] Ibid

impacts of conflicting judicial decisions. The domestic law on life sentences in Kenya reveals a range of offenses that attract severe punishment. However, the lack of clear guidelines and the absence of judicial discretion in some cases have led to inconsistent sentencing practices and confusion within the legal system.[80]

Internationally, the evolution of views on criminal justice sanctions has emphasized the importance of fair trial rights, individualized sentencing, and the protection of human dignity.[81] This growing recognition has challenged the notion of mandatory life sentences, advocating for more nuanced and proportional approaches to punishment. Inconsistent judicial decisions have created uncertainty and adverse impacts on the criminal justice system.[82] Victims, offenders, and society at large bear the consequences of a fragmented approach to sentencing, causing delays, inequality, and potential human rights violations.[83]

Proposed reform measures, such as statutory amendments, seeking advisory opinions, and comprehensive reviews, present viable ways forward to address the confusion surrounding life sentences. These measures, coupled with public and stakeholder engagement, aim to foster clarity, consistency, and fairness in sentencing practices while upholding human rights principles.[84] Amidst the various perspectives on the continued relevance of life sentences, the challenge lies in striking a balance between the pursuit of justice for serious crimes and the need to safeguard individual rights and dignity. It is imperative to consider alternative sentencing

[80] *Christopher Ochieng v Republic [2018] eKLR*
[81] Supra note 2
[82] *Public International Law and Policy Group, 'The Legality of Life Imprisonment: Comparative Analysis of International, European and Dutch Law'*
[83] Supra note 81
[84] Supra note 2

approaches, embrace rehabilitative measures, and ensure that the punishment fits the crime while promoting a just and humane criminal justice system.

As Kenya moves forward, it must seize the opportunity to reform its sentencing practices, guided by international human rights standards and the principle of proportionality. By charting a path that acknowledges the complexities of the issue and engaging in robust public dialogue, Kenya can strengthen its criminal justice system, ensuring fairness, transparency, and respect for the rights of all individuals involved. Ultimately, a holistic approach that respects the rule of law, protects human rights, and seeks the rehabilitation and reintegration of offenders can pave the way towards a more equitable and just society. As Kenya embarks on this journey, the pursuit of a balanced and compassionate criminal justice system remains an ongoing endeavor—one that acknowledges the evolving landscape of justice and human rights in the pursuit of a better, more harmonious future.

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Renewable Energy, The Promised Land: Obligations Under The Unfccc (1992) & Steps Towards Fulfilling Kenya Vision 2030 On Renewable Energy.

By: ***Andrew Derrick****

Abstract

Renewable energy sources provide for environment and climate friendly mechanisms for harnessing natural resources. They are also important in meeting energy demands due to the increasing social and economic activities brought about by rise in population. Kenya is not an exception to implementing this mode of energy generation. To that effect, Kenya is mandated by various international instruments such as the United Nations Framework Convention on Climate Change as well as domestic laws and policies such as, inter alia, the Energy Act (2019) and the National Energy Policy (2018). Consequently, various institutions are also established to that effect. In the long-run Kenya also seeks to fulfil the objectives of the Kenya Vision 2030 Plan holistically and consequently fulfil goals in the plan seeking to improve the energy sector in Kenya. Some of the goals relating to the energy sector involve those revolving around the question of increase in utility of renewable energy sources in Kenya. This paper seeks to discuss the progress Kenya has made towards attaining substantial utility of renewable energy with a goal to fulfil the Kenya Vision 2030 Plan as well as recommendations to fulfil this milestone. Furthermore, this paper will also discuss Kenya's obligations under the UNFCCC (1992), which is one of the vital and progressive conventions averring on ecofriendly energy utility.

* *University of Nairobi Parklands Campus – School of Law, Bachelor of Laws (LLB) Finalist*

1.0 Introduction

Environmental and Climate conduciveness and tranquility is a pivotal aspect for any nation.[1] For other developments revolving around social, political and economic to take place, positive status of the aforementioned aspects must be of utmost consideration.[2] One of such ways is utilization of environmental and climate friendly mechanisms in various sectors of the state.[3] The Energy Sector for example is one of the pivotal spheres of any state including Kenya. In fulfilling the aforementioned environmental and climate goals, investment in, and utility of renewable energy is one of the most Important facets of development. This paper discusses the essence of utilizing renewable energy sources, Kenya's obligation towards the Convention on Climate Change (1992) with regards to renewable energy, the track towards fulfilling Kenya Vision 2030 with regards to renewable energy and the legal, policy & institutional framework governing renewable energy in Kenya. It also looks at the challenges and recommendations towards making further considerable process towards utility of renewable energy in Kenya.

2.0 The United Nations Framework Convention on Climate Change (UNFCCC)

2.1 Overview of the UNFCCC

The United Nations Framework Convention on Climate Change is one of the most far-reaching treaties ever negotiated The United

[1] European Environment Agency, 'Healthy Environment Is a Must for Sustainable Economy and Equitable Society' (2019).
[2] Organisation for Economic Cooperation and Development, 'THE ECONOMIC SIGNIFICANCE of NATURAL RESOURCES: KEY POINTS for REFORMERS in EASTERN EUROPE, CAUCASUS and CENTRAL ASIA' (2011).
[3] Ibid

Nations Framework Convention on Climate Change (UNFCCC) is an international environmental treaty established in 1992. [4] The Earth Summit, also known as the United Nations Conference on Environment and Development (UNCED), which took place in Rio de Janeiro, Brazil, saw the treaty's adoption.[5] During its adoption, it was signed by 154 states which vowed to be bound by the provisions of this convention. It entered into force on 21 March 1994.[6]

Its main goals are to address stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system and allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.[7]

The Conference of the Parties (COP) is the supreme decision-making body of the UNFCCC. [8] It brings together representatives from member countries to review progress, negotiate agreements, and make decisions on various climate-related issues.[9]

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[4] United Nations, 'United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, 3-14 June 1992' (*United Nations*1992) <*https://www.un.org/en/conferences/environment/rio1992*> accessed 21 September 2023.
[5] Ibid
[6] United Nations Climate Change, 'What Is the United Nations Framework Convention on Climate Change?' (*Unfccc.int*2022) <*https://unfccc.int/process-and-meetings/what-is-the-united-nations-framework-convention-on-climate-change#:~:text=The%20UNFCCC%20entered%20into%20force*> accessed 21 September 2023.
[7] United Nations Framework Convention on Climate Change, Article 2
[8] Ibid, Article 7
[9] Ibid

The UNFCCC has had significant essence in championing for protection of climate. One of such is laying a foundation for other international treaties such as the Paris Agreement (2015) and the Kyoto Protocol (1997).[10] The Paris Agreement is a landmark global agreement under the UNFCCC that was adopted in 2015.[11] Its goal is to limit global warming well below 2 degrees Celsius above pre-industrial levels and pursue efforts to limit the temperature increase to 1.5 degrees Celsius. [12] The Kyoto Protocol operationalizes the UNFCCC, committing industrialized countries and economies in transition to limit and reduce greenhouse gases (GHG) emissions in accordance with agreed individual targets. The Convention itself only asks those countries to adopt policies and measures on mitigation and to report periodically.[13]

2.2 Kenya and Implementation of the UNFCCC

Kenya ratified the United Nations Framework Convention on Climate (UNFCCC) in 1994[14], and since then the country has been

[10] Graham Research Institute on Climate Change and the Environment, 'What Is the UN Framework Convention on Climate Change (UNFCCC)?' (24 October 2022) <*https://www.lse.ac.uk/granthaminstitute/explainers/what-is-the-un-framework-convention-on-climate-change-unfccc/#:~:text=Signed%20in%201992%2C%20the%20United,the%20Paris%20Agreement%20(2015).*> accessed 21 September 2023.

[11] United Nations Climate Change, 'The Paris Agreement' (*Unfccc.int*2023) <*https://unfccc.int/process-and-meetings/the-paris-agreement#:~:text=The%20Paris%20Agreement%20is%20a*> accessed 21 September 2023.

[12] Conference of the Parties, Adoption of the Paris Agreement, Dec. 12, 2015

[13] Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997

[14] National Environment Management Authority (NEMA), 'Second National Communication to the United Nations Framework Convention on Climate Change' (National Environment Management Authority, Government of Kenya 2015), Foreword

working towards the achievement of the objectives of the Convention. As a party to the UNFCCC, Kenya is required to periodically report to the Convention through a National Communication that accounts for common but differentiated responsibilities and specific national and regional development priorities, objectives and circumstances. [15] Like all parties to the convention, Kenya is obligated to submit national communications as required by the UNFCCC.[16] The Communication must be prepared in accordance with the provisions of the Articles 4.1 and 12.1 of the UNFCCC.

To fulfil this obligation, Kenya prepared its First National Communication (FNC) to the Conference of the Parties in 2002.[17] The Second National Communication (SNC) which is the latest one was done in 2015.[18] It averred on Kenya's situation with regard to national circumstances and responses to climate change.[19] It must also entail other updates to the convention such as those pertinent to the level of emission of GHG and measures the member state wishes to implement to mitigate their harm to climate and environment.[20]

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[15] Article 12 of the UNFCCC (1992) mandates member states to communicate to the Conference of the Parties, information related to implementation of the convention

[16] Ibid

[17] Ministry of Environment and Natural Resources, National Environment Secretariat, 'First National Communication to the Conference of the Parties' (2002).

[18] National Environment Management Authority (NEMA), 'Second National Communication to the United Nations Framework Convention on Climate Change' (National Environment Management Authority, Government of Kenya 2015).

[19] Ibid, foreword

[20] United Nations Framework Convention on Climate Change, Article 12

Pursuant to Article 4 of the UNFCCC that requires all parties to develop, periodically update, publish and make available to the Conference of the Parties, in accordance with Article 12, national inventories of anthropogenic emissions by sources and removals by sinks of all greenhouse gases[21], Kenya took an inventory on emission of GHG in the year 2000. [22] The IPCC Guidelines for National Greenhouse Gas Inventories (1996)[23] and the Good Practice Guidance and Uncertainty Management in National Greenhouse Gas Inventories [24] were used as the basis to undertake the necessary calculations on GHG emissions and removals. In 2000, Kenya's total GHG emissions were, among other gases, approximately 55 million tons of Carbon (IV) Oxide gas coming from all the UNFCCC sectors such as Energy, waste, Industrial processes and product use, Agriculture, forestry, and other land use.[25]

2.3 The UNFCCC on Renewable Energy

The transition towards renewables such as solar and wind energy is critical part of meeting the goals of not only the UNFCCC, but also

[21] Ibid, Article 4

[22] Kenya Second National Communication to the United Nations Framework Convention on Climate Change (2015)

[23] These are guidelines for preparing national greenhouse gas (GHG) inventories. However, it must be noted that the IPCC periodically updates its guidelines to incorporate scientific advancements and improve the accuracy and completeness of GHG inventories. The latest version of the IPCC guidelines is the 2006 IPCC Guidelines for National Greenhouse Gas Inventories.

[24] Good Practice Guidance and Uncertainty Management in National Greenhouse Gas Inventories complements the IPCC guidelines and provides additional information and best practices for improving the quality and accuracy of GHG inventories. The latest version of the Good Practice Guidance was published in 2000.

[25] Kenya Second National Communication to the United Nations Framework Convention on Climate Change (2015)

other conventions such as the Paris Agreement, which aims to limit the rise of global average temperatures to well below 2 degrees Celsius, and ideally below 1.5 degrees Celsius above pre-industrial levels.[26] To fulfil this, utility of fossil fuels that emit GHG in countries such as Kenya must be mitigated and reduced.

The first principle of the UNFCCC is that 'The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities'.[27] Other principles include exhorting the parties to give special consideration for developing countries, take 'precautionary measures,' promote sustainable development, and promote a 'supportive and open international economic system. [28] From the objective of the UNFCCC as set out in Article 2 of the convention, fossil fuels as is the bone of contention herein, have been discovered as a contributor to climate harm in various ways. One of such is emission of greenhouse gases. Greenhouse gases are defined in the UNFCCC as gaseous constituents of the atmosphere, both natural and anthropogenic, that absorb and re-emit infrared radiation. [29] Greenhouse gases trap heat and make the planet warmer. Human activities are responsible for almost all of the increase in greenhouse gases in the atmosphere over the last 150 years.[30]

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[26] United Nations Climate Change, 'The Paris Agreement' (*Unfccc.int*2023) <*https://unfccc.int/process-and-meetings/the-paris-agreement#:~:text=The%20Paris%20Agreement%20is%20a*>.accessed 21 September 2023

[27] United Nations Framework Convention on Climate Change, Article 3

[28] Ibid

[29] Ibid, Article 1

[30] IPCC, 2013: Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change [Stocker, T.F., D. Qin, G.-K.

This convention seeks to advocate for utility of methods that mitigate, reduce or extinguish climate harm. The Paris Agreement (2015) and the Kyoto Protocol (1997) which reinforce provisions of the UNFCCC as afore discussed, also speak on the need to utilize renewable energy sources in efforts to enhance environmental and climate protection and preservation.

Sparking this conversation is the question on the use of fossil fuels and renewable sources of energy. Article 4.1(c) of the UNFCCC calls for all parties to the convention to "promote sustainable development and to promote and cooperate in the development, application, and diffusion of, and take into account, the best available scientific, technical, economic, and social practices, including the development of renewable forms of energy".[31]

Further, Article 4.5 emphasizes the importance of transferring environmentally sound technologies, including renewable energy technologies, to developing countries to support their efforts in mitigating and adapting to climate change.[32]

The UNFCCC has been able to spearhead utility of renewable sources of energy through partnerships and cooperation with other organizations. The International Renewable Energy Agency (IREA) is one of such bodies. IREA is a leader in scaling up the deployment of renewable energy around the world. IREA promotes the widespread adoption and sustainable use of all forms of renewable energy,

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Plattner, M. Tignor, S.K. Allen, J. Boschung, A. Nauels, Y. Xia, V. Bex and P.M. Midgley (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA, 1535 pp

[31] United Nations Framework Convention on Climate Change, Article 4.1 (c)

[32] Ibid, Article 4.5

including bioenergy, geothermal, hydropower, ocean, solar and wind energy.[33]

3.0 The Kenya Vision 2030 Plan

3.1 Overview of the Kenya Vision 2030 Plan

The Kenya Vision 2030 is a long-term development blueprint for Kenya that was launched in 2008.[34] It outlines the country's development goals and strategies to transform Kenya into a globally competitive, middle-income country by the year 2030. The plan focuses on three key pillars. These include the economic pillar, social pillar, and political governance pillar.[35]

To implement the Kenya Vision 2030, the plan also emphasizes the need for strong partnerships between the GOK, private sector, civil society, and development partners.[36] It emphasizes the importance of good governance, effective resource mobilization, and monitoring and evaluation mechanisms to track progress towards the goals.[37]

In a nutshell, the Kenya Vision 2030 represents a comprehensive roadmap for Kenya's socio-economic development and guides the

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[33] United Nations Framework Convention on Climate Change Resources, International Cooperation, *https://unfccc.int/resource/climateaction2020/tep/thematic-areas/renewable-energy/index.html*> accessed 21 September 2023

[34] Government of the Republic of Kenya, 'KENYA VISION 2030 (the POPULAR VERSION)' (2008) <*https://nairobi.aics.gov.it/wp-content/uploads/2019/01/Kenya-Vision-2030.pdf*> accessed 21 September 2023.

[35] Government of Kenya (2008) Kenya Vision 2030: A Globally Competitive and Prosperous Kenya. National Economic and Social Council (NESC), Nairobi.

[36] Ibid, p 160

[37] Ibid, p 53

country's policies, strategies, and investments to achieve sustainable development and improve the quality of life for its citizens.

3.2 Need for Renewable Energy?

One of the three Vision 2030 pillars' infrastructure enablers is energy.[38] A nation's commercial energy consumption is a significant indicator of its level of economic development and growth.[39] On the way to 2030, Kenya is therefore anticipated to utilize more energy in the commercial sector. Household energy demand will rise along with rising earnings and accelerated urbanization. The Kenya Vision 2030 Plan, as shall be hereinafter seen, envisages appropriate preparations for increased energy use, due to increase in demand for energy.

During development of the plan, Commercial energy in Kenya is seen to be dominated by petroleum and electricity as the prime movers of the modern sector of the economy, while wood fuel provides energy needs of the traditional sector including rural communities and the urban poor.[40] Renewable sources such as solar energy, are also used but not as much as the aforementioned energy giants.[41] Electricity remains the most sought after energy source by Kenya society and access to electricity is normally associated with rising or high quality of life.[42]

The plan addresses weaknesses in the energy sector that seem to shed light on the need to adopt renewable sources of energy. The plan recognizes that Kenya's global competitiveness in the energy sector

[38] Ibid, p 16
[39] Ibid
[40] Ibid
[41] Ibid, p15
[42] Ibid, p17

is still weak, due to a myriad of reasons. Energy cost in Kenya is high per kWh. This compares poorly with countries such as Mexico, Taiwan, China, Colombia and South Africa.[43] The blue print also points out the demerits of overreliance of hydroelectricity as the main mode of production of power. It avers that this over-reliance may hamper production and other sectoral activities in the event of an outage. [44] Consumption in Kenya is extremely low at 121 kWh per capita (compared to 503 kWh in Vietnam or 4,595 kWh for South Africa) and national access rate at about 15%. The access rate in the rural areas is estimated at 4%.[45] All that is changing rapidly as the country invests more resources in power generation, in addition to policy and institutional reforms in the sector and bringing in new providers.[46] From the foregoing, this calls for more investment in other modes of energy production such as renewables to increase energy production.

Development projects recommended under Vision 2030 and overall economic growth, will increase demand on Kenya's energy supply. Currently, Kenya's energy costs are higher than those of her competitors. Kenya must, therefore, generate more energy through renewable sources and increase efficiency in energy consumption.[47] The GOK is committed to continued institutional reforms in the energy sector, including a strong regulatory framework and encouraging private generators of power.[48] New sources of energy will be found through exploitation of geothermal power, coal,

[43] Ibid, p12
[44] Ibid
[45] Ibid , p16
[46] Ibid, p17
[47] Ibid, p viii
[48] Ibid

renewable energy sources, and connecting Kenya to energy-surplus countries in the region.[49]

3.3 Progress to fulfilling the Kenya Vision 2030 Plan

Since the conception of the Kenya Vision 2030 Plan, the GOK as well as private investors have invested in various renewable energy projects. Among others include:

a) Lake Turkana Wind Power Project[50] (Marsabit County) - The Lake Turkana Wind Power Project is one of the largest wind farms in Africa. It has a capacity of 310 megawatts (MW) and consists of 365 wind turbines. The project started operations in 2018 and significantly contributes to Kenya's renewable energy generation.
b) Ngong Hills Wind Power Project[51] (Ngong Hills) - This Wind Power Project was one of the first utility-scale wind farms in Kenya. It has a capacity of 25.5 MW and consists of 16 wind turbines. The project has been operational since 2009.
c) Alten Keesses One[52] (Uasin Gishu County) – This is one of the largest solar projects in Kenya. It has capacity of 51.5 Mw. The electricity generated from the farm could power 245,000 homes through the national grid. Its construction started in December 2018 and is by date 3rd of the largest solar projects in Kenya.

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[49] World Bank, 'OPEN ENERGY DATA ASSESSMENT NAIROBI, KENYA' (2015).

[50] Rodl and Partner, Wind Energy in Kenya, < *https://www.roedl.com/insights/renewable-energy/2021/february/wind-energy-kenya*> accessed 21 September 2023

[51] Ibid

[52] Solar Projects in Kenya: 10 Largest Solar Power Plants in MW < *https://solarfinanced.africa/solar-projects-in-kenya-10-largest-solar-power-plants/*> accessed 21 September 2023

d) Garissa Solar Power Plant[53] (Garissa County) - This is one of the largest solar power plants in East Africa. It has a capacity of 54.6 MW and comprises over 200,000 solar panels. The plant began operations in 2018 and provides clean electricity to the national grid.
e) Olkaria Geothermal Power Plants[54] (Great Rift Valley) - These plants tap into the geothermal resources of the area. Olkaria I, Olkaria II, Olkaria III, and Olkaria IV have capacities of 45 MW, 105 MW, 140 MW, and 140 MW, respectively. They contribute significantly to Kenya's geothermal power generation.

4.0 Legal, Institutional and Policy Framework on Renewable Energy in Kenya

4.1 Legal Framework

4.1.1 Constitution of Kenya (2010)

The essence of utility of renewable sources of energy in the COK begins at the preamble. [55] The Preamble recognizes the need to be respectful of the environment, which is our heritage, and also puts emphasis that the COK is determined to sustain it for the benefit of future generations.[56] This can be fulfilled by harnessing energy from renewable sources due to their environmental friendliness.

It is notable that the language of the COK does not expressly aver on renewable energy sources. However, it contains provisions on

[53] Ibid
[54] Peter Omenda and others, 'Geothermal Energy in Kenya - Country Update Report for Kenya 2015-2019' (Proceedings World Geothermal Congress 2021).
[55] Constitution of Kenya 2010, Preamble
[56] Ibid

natural resources. Natural resources pursuant to Article 260 of the COK means the physical non-human factors and components, whether renewable or non-renewable, including energy sources.[57] The question of renewable energy sources is therefore interconnected with natural resources.[58]

The state is mandated by Article 69 to ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits[59] and utilize the environment and natural resources for the benefit of the people of Kenya.[60]

Part 1 of the Fourth Schedule of the COK mandates the national government to protect the environment and natural resources with a view to establishing a durable and sustainable system of development, including, an energy policy.[61]

The COK also expresses the need for different state institutions to collaborate to ensure protection and sustainable utility of renewable sources of energy. Article 67 for example mandates the National Land Commission to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities.[62] The appropriate authority in the context of renewable

[57] Ibid, Article 260
[58] Kariuki Muigua, 'Towards Energy Justice in Kenya Kariuki Muigua' (2020) <*https://kmco.co.ke/wp-content/uploads/2020/02/Towards-Energy-Justice-in-Kenya-00000005.pdf*> accessed 21 September 2023.
[59] Constitution of Kenya 2010, Article 69.1(c)
[60] Ibid, Article 69.1(h)
[61] Ibid, Fourth Schedule
[62] Ibid, Article 67.2(d)

energy sources, as is the subject herein is the Energy and Petroleum Regulatory authority as hereafter discussed.

4.1.2 Energy Act (2019)

This is the main statute that governs the energy sector in Kenya.[63] Kenya adopted the Act No. 1 of 2019 (the Energy Act) to, among other objectives, promote the generation of renewable energy in Kenya. The act refers defines renewable energy as non-fossil energy generated from natural non-depleting resources including but not limited to solar energy, wind energy, biomass energy, biological waste energy, hydro energy, geothermal energy and ocean and tidal energy.[64] Provisions to that effect, are discussed in this subsection.

To begin with, the Cabinet Secretary in charge of the MoE is mandated by section 5 of the act to consultation with the relevant stakeholders and consequently develop, publish and review energy plans in respect of coal, renewable energy and electricity to ensure delivery of reliable energy services at least cost.[65]

Section 10 also mandates EPRA, as hereinafter discussed, to regulate, among other factors, production, conversion, distribution, supply, marketing and use of renewable energy.[66] Other bodies that the

[63] See the Energy Act (2019) Long Title, An act of parliament to consolidate the laws relating to energy, to provide for National and County Government functions in relation to energy, to provide for the establishment, powers and functions of the energy sector entities; promotion of renewable energy; exploration, recovery and commercial utilization of geothermal energy; regulation of midstream and downstream petroleum and coal activities; regulation, production, supply and use of electricity and other energy forms; and for connected purposes
[64] Energy Act (2019), s2
[65] Ibid, s5
[66] Ibid, s10

Energy Act (2019) establishes is the Rural Electrification and Renewable Energy Corporation (REREC) [67] and the Renewable Energy Resource Advisory Committee[68], whose functions in relation to renewable energy are hereinafter discussed in the institutional framework.

Part Four of the act specifically avers on renewable energy. Section 73 postulates on proprietary rights of renewable energy resources. All unexploited renewable energy resources under or in any land vests in the National Government subject to any rights which, by or under any written law, have been or are granted or recognized as being vested in any other person.[69] The Cabinet Secretary in charge of energy is also mandated by the act to carry out a countrywide survey and a resource assessment of all renewable energy resources and prepare resource maps and a renewable energy resources inventory.[70] On promotion of utility of renewable energy the Cabinet Secretary in charge of the MoE is also obligated to promote the development and use of renewable energy technologies, including but not limited to biomass, biodiesel, bioethanol, charcoal, fuelwood, solar, wind, tidal waves, hydropower, biogas and municipal waste.[71]

The Consolidated Energy Fund is also an important element in the development and promotion of utility of renewable energy in Kenya. Section 216 of the act avers on its importance. The Consolidated Energy Fund is to cater for, inter alia, hydro risk mitigation, promotion of renewable energy initiatives, energy efficiency and conservation and applied research, technology development and

[67] Ibid, s43
[68] Ibid, s76
[69] Ibid, s73
[70] Ibid, s74
[71] Ibid, s75

innovation allied to energy sector including technology needs assessment, deployment and scaling up.[72]

The Energy Act (2019) also establishes the Renewable Energy Feed-in Tariff System (FiT), whose objective is to catalyze the generation of electricity through renewable energy sources and reducing greenhouse gas emissions by lessening reliance on nonrenewable energy resources.[73] With regards to regulation of the feed-in-tariff system, the Cabinet Secretary may upon recommendation of EPRA, make regulations necessary for the administration and implementation of the FiT system such as those on the priority of purchase by distribution licensees of electrical energy generated using renewable energy sources.[74]

Net Metering, as hereinafter discussed is also addressed in the act. This is a system that operates in parallel with the distribution system of a licensee and that measures, by means of one or more meters, the amount of electrical energy that is supplied by the distribution licensee or retailer to a consumer who owns the renewable energy generator, and by the consumer who owns the renewable energy generator to the distribution licensee or retailer.[75]

It is also important to note that although the Energy Act (2019) repealed the Energy Act (2006), some subsidiary legislation and regulations under the repealed act are still operational as savings, under the new act. An example of such regulations that govern renewable energy sources include The Energy (Solar Photovoltaic

[72] Ibid, s216
[73] Ibid, 91
[74] Ibid, s92
[75] Ibid, s162

Systems) Regulations (Legal Notice 103 of 2012) that legally prescribes on Solar Photovoltaic Systems as a renewable source of energy.[76]

4.1.3 Environmental Management and Coordination Act (1999)

This is an Act of Parliament to provide for the establishment of an appropriate legal and institutional framework for the management of the environment.[77] It is an important piece of legislation in Kenya that provides the legal framework for environmental management and conservation in the country. The act was enacted in 1999 and has since undergone amendments to strengthen its provisions and address emerging environmental issues.[78]

In its efforts to champion for environmental conservation and protection, the EMCA advocates for use of renewable energy sources.[79] This is because, as inferred from this paper, that they have less detrimental effects to the environment unlike other sources like fossil fuels. Section 49 of the EMCA affirms on Conservation of energy and planting of trees or woodlots. It mandates the National Environment Management Authority (NEMA), in consultation with the relevant lead agencies, promote the use of renewable sources of energy by promoting research in appropriate renewable sources of energy, creating incentives for the promotion of renewable sources of

[76] See the Energy (Solar Photovoltaic Systems) Regulations, 2012
[77] Environmental Management and Coordination Act (1999), Long Title
[78] Since its enactment, EMCA has been amended by Act No. 6 of 2006, Act No. 17 of 2006, Act No. 5 of 2007,Act No. 6 of 2009, Act No. 5 of 2015, Act No. 25 of 2015, Act No. 12 of 2017,8, Act No. 18 of 2018 and L.N. 31/2019.
[79] Environmental Management and Coordination Act (1999), s2. EMCA advocates for environmentally friendly activities that does not cause harm or degradation to the environment

energy and promoting measures for the conservation of non-renewable sources of energy.[80]

4.1.4 Climate Change Act (2016)

This is an act of parliament to provide for a regulatory framework for enhanced response to climate change; to provide for mechanism and measures to achieve low carbon climate development. [81] In championing for matters revolving around climate change, this act also avers on renewable energy sources.[82]

The Cabinet Secretary responsible for matters relating to climate change is mandated by section 13 of the act to formulate a National Climate Change Action Plan. The function of the National Climate Change Action Plan is to prescribe measures and mechanisms that, inter alia, enhance energy conservation, efficiency and use of renewable energy in industrial, commercial, transport, domestic and other uses. [83]

Most notable from this act is the introduction of incentives for promotion of climate change initiatives. Section 26 of the act mandates The Cabinet Secretary responsible for matters relating to climate change in conjunction with the National Treasury to grant to persons who encourage and put in place measures for the elimination of climate change including reduction of greenhouse emissions and use of renewable energy such incentives as may be necessary for the advancement of the elimination of and mitigation against climate

[80]Ibid, s49
[81] Climate Change Act (2016), Long Title
[82] Ibid, s13 and s26
[83]Ibid, s13

change and the effects of climate change.[84] This is a milestone in promotion of utility of renewable energy sources in Kenya.

4.2 Institutional Framework

4.2.1 Energy and Petroleum Regulatory Authority (EPRA)

Section 9 of the Energy Act (2019) establishes the EPRA[85] to, among other functions: regulate production, conversion, distribution, supply, marketing and use of renewable energy; collect and maintain energy data; ensure, in collaboration with the Kenya Bureau of Standards, that only energy-efficient and cost-effective appliances and equipment are imported into the country; and co-ordinate the development and implementation of a national energy efficiency and conservation action plan.[86]

The powers of the Authority include, but are not limited to, the power to: issue and renew licences and permits for all undertakings and activities in the energy sector; manage electric power tariffs and tariff structures; investigate tariff charges; formulate, set, enforce and review environmental, health, safety and quality standards for the energy sector; approve electric power purchase and network service contracts for all persons engaging in electric power undertakings; investigate and determine complaints or disputes between parties over any matter relating to licences and licence conditions under the Energy Act; and impose such sanctions and fines as may be appropriate for violation.[87]

[84] Ibid, s26
[85] See Energy Act (2019), s9
[86] Ibid, s10
[87] Ibid, s11

EPRA is responsible for regulating the energy sector in Kenya, including promoting the development and use of renewable energy sources.[88] EPRA works to create policies, regulations, and standards that encourage the use of renewable energy technologies and increase investment in the sector.[89]

4.2.2 Rural Electrification and Renewable Energy Corporation (REREC)

Section 43 of the Energy Act (2019) establishes the Rural Electrification and Renewable Energy Corporation.[90] Some of the functions of the corporation include develop and update the renewable energy master plan taking into account county specific needs and the principle of equity in the development of renewable energy resources, undertake feasibility studies and maintain data with a view to availing the same to developers of renewable energy resources, formulate, in conjunction with the Nuclear Power and Energy Agency (NPEA), a national strategy for coordinating research in renewable energy and undertake, in conjunction with NPEA, research, development and dissemination of appropriate renewable energy technologies.[91]

With regards to funding of REREC to carry out its functions, section 53 of the Energy Act (2019) postulates on the sources such as monies from the Rural Electrification Programme Fund[92], allocation by parliament, money's allocated from the consolidated energy fund for promotion and development of renewable energy initiatives, interest

[88] Ibid, s10
[89] Ibid
[90] Ibid, s43
[91] Ibid, s44
[92] Ibid, s143

from bank deposits and revenue from other sources including loans, grants, gifts or donations approved by the Cabinet Secretary. [93]

In a nutshell, the main purposes of the REREC are to spearhead development of renewable energy resources in Kenya and to accelerate the pace of rural electrification in the country.[94] The REREC is mandated under the Energy Act to undertake feasibility studies and maintain data with a view to availing the same to developers of renewable energy resources and provide an enabling framework for the efficient and sustainable production, conversion, distribution, marketing and utilization of renewable sources in Kenya. In light of their functions and mandate, the following projects by the REREC are underway:

a) ***The 50 mW Garissa Solar Power Plant.***[95] This is said to be the largest grid connected solar power plant in East and Central Africa. The project was developed with the aim of diversifying the power generation mix and reduce energy costs in Kenya.
b) ***Electrification of Public Utilities Project.***[96] This project is being implemented under the Rural Electrification Programme and the Digital Learning Programme through grid extension for public facilities within the grid network and installation of solar PV systems for facilities in off-grid areas particularly in northern Kenya. The utilities include public secondary schools, trading

[93] Ibid, s53
[94] Ibid, s44
[95] Solar Projects in Kenya: 10 Largest Solar Power Plants in MW < *https://solarfinanced.africa/solar-projects-in-kenya-10-largest-solar-power-plants/*> accessed 22 September 2023
[96] Kenya National Electrification Strategy (KNES) Key Highlights, *https://pubdocs.worldbank.org/en/413001554284496731/Kenya-National-Electrification-Strategy-KNES-Key-Highlights-2018.pdf* accessed 22 September 2023

centres and health centres, public primary schools, polytechnics, administrative offices, churches, mosques, coffee factories and processing plants, police posts, tea buying centres and water projects.

c) ***Transformer Maximization Project.*** [97] This project aims to increase electricity access and connectivity in areas with large populations that are beyond the 600-metre radius transformer limitation. Priority areas are currently being identified for implementation of the project.

d) ***The Kenya Off-Grid Solar Access Project (K-OSAP).*** [98] This is aimed at increasing modern energy services in 14 out of the 47 counties in Kenya that have been defined as marginalized by the Commission on Revenue Allocation. The counties include: Garissa, Isiolo, Kilifi, Kwale, Lamu, Mandera, Marsabit, Narok, Samburu, Taita Taveta, Tana River, Turkana, Wajir and West Pokot.

4.2.3 Renewable Energy Resource Advisory Committee

Section 76 of the Energy Act (2019) establishes the Renewable Energy Resource Advisory Committee.[99]

The Committee is intended to play an advisory role to the Cabinet Secretary for the MoE and Petroleum on the criteria for allocation of renewable energy resource, licensing of renewable energy resource areas, management of water towers and catchment areas,

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[97] Rural Electrification and Renewable Energy Corporation, Kenya Off-Grid Solar Access Project (KOSAP), <https://www.rerec.co.ke/K-OSAP.php> accessed 22 September 2023

[98] Rural Electrification and Renewable Energy Corporation, Kenya Off-Grid Solar Access Project (KOSAP), <*https://www.rerec.co.ke/transformer-maximization.php*> accessed 22 September 2023

[99] Energy Act (2019), s76

development of multi-purpose projects such as dams and reservoirs for power generation and management and development of renewable energy resources.[100]

The Renewable Energy Resource Advisory Committee may upon request advise the County Governments on matters relating to renewable energy resources.[101]

4.2.4 Kenya Renewable Energy Association (KEREA)

There also exist independent institutions in the Renewable Energy sector in Kenya. The Kenya Renewable Energy Association (KEREA) is an independent non-profit association dedicated to facilitating the growth and development of renewable energy business in Kenya. [102] KEREA was formed in August 2002 by members of the Renewable Energy Resources Technical Committee of the Kenya Bureau of Standards (KEBS) and is registered under section 10 of the Societies Act.[103]

KEREA is a professional association that brings together stakeholders in the renewable energy sector in Kenya. It promotes the development and utilization of renewable energy sources, advocates for favorable policies and regulations, and provides a platform for collaboration and knowledge sharing among industry players.[104]

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[100] Ibid, s76 (4)

[101] Ibid, s76 (5)

[102] Jack Salter, Jordan Levey Kenya Renewable Energy Association (KEREA) : Spotlight (2022) <*https://www.africaoutlookmag.com/company-profiles/1486-kenya-renewable-energy-association-kerea*> accessed 23 September 2023

[103] Enacted in 1968, this is an Act of Parliament to make provision for the registration and control of societies.

[104] Supra, 43

Amongst its key roles are promoting the interests of members of the renewable energy industry among government, public sector, the general public and any other organizations that may impact on the development of the industry; and the creation of a forum for the dissemination and exchange of information and ideas on matters relating to renewable energy development and utilization in Kenya.[105]

4.3 Policy Framework

4.3.1 The National Energy Policy.

The most vital policy governing the energy sector in Kenya is the National Energy Policy (2018) Pursuant to this policy, the GOK has committed to the provision of affordable quality energy for all Kenyans to be achieved through the provision of clean, sustainable, affordable, competitive, reliable and secure energy services at the least cost while protecting the environment. The policy also recognizes that renewable energy has potential to enhance energy security, mitigate climate change, generate income, create employment and generate foreign exchange savings.[106]

Connected to the aforementioned averment is the question on the environment vis a vis renewable energy sources. Generally, renewable energy is considered an environmentally friendly option for energy development. However, some concerns exist raising the need for mitigation measures to be incorporated in projects to ensure minimal impact and sustainability.[107]

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[105] KEREA, 'Association Overview - KEREA | Kenya Renewable Energy Association' (15 December 2015) <*https://kerea.org/association-overview/*> accessed 23 September 2023.
[106] National Energy Policy (2018), s7
[107] Ibid, s6.2

The National Energy Policy (2018) recognizes renewable sources of energy such as geothermal energy, hydropower, biomass, biofuels, biogas, solar energy and wind energy.[108] This policy is far reaching and also addresses the challenges encountered in energy generation from each source, as well as short term, mid-term and long-term policies and strategies to mitigate the challenges and improve efficiency.

The need for investment in generation of energy using renewable sources is reiterated in the policy. The funding required for the energy sector is substantial. New investments are needed for exploration, utilization, generation, transmission and distribution activities.[109] Long-term financing options that involve both foreign and domestic financing resources are required. However, foreign investment capital and national foreign earnings provide the greater proportion of needed funds. The GOK shall continue to encourage private sector investment in the energy sector. Experience has shown that Independent Power Producers (IPPs) require incentives to mitigate the perceived political and economic risks.[110]

In addition to the role of the National Government in promoting utility and development of renewable energy, the policy also addresses on devolution and provision of energy services. County Governments have a role to play in preparation of county energy plans, incorporating renewable energy and electricity master plans, establishment of energy centres for promotion of renewable energy technologies, energy efficiency and conservation.[111]

[108] Ibid, Chapter 3
[109] Ibid, Chapter 8
[110] Ibid
[111] Ibid, Chapter 7

These are some of the ways in which the National Energy Policy (2018) champions for the utility of renewable sources in Kenya. From the foregoing, this policy acts as a vital framework in giving a blueprint for the energy sector in Kenya. This also extends to the renewable energy sector as we garner pace towards achieving the Kenya Vision 2030 Plan.

4.3.2 The Feed-in-Tariff Policy

The Energy Act (2019) provides for a Feed-in-Tariff (FiT) System aimed at diversifying the generation of electricity through renewable energy sources.[112] This consequently encourages locally generated and distributed energy thereby reducing demand on the network and the technical losses associated with transmission and distribution of electricity over long distances Other benefits of the FiT Policy include encouraging uptake of, and stimulating innovation in, renewable energy technology; and reducing greenhouse gas emissions by lessening reliance on non-renewable energy resources.[113]

The Energy Act (2019) mandates the Cabinet Secretary to make regulations necessary for the administration and implementation of the FiT system as earlier discussed.[114] Currently, there exists a FiT Policy (2021)[115] which set out the procedures for applying for and implementing the FiT system. The objectives of the FiT Policy are to facilitate resource mobilization by providing investment security and market stability for investors in electricity generation from renewable energy sources; reduce transaction and administrative costs and delays associated with the conventional procurement processes;

[112] Energy Act (2019), s2
[113] Ibid, s91
[114] Supra 38
[115] Ministry of Energy Feed-in-Tariffs policy for Biomass, Small Hydros, and Biogas 3rd revision, January 2021

Encourage private investors to operate their power plants prudently and efficiently and encourage local investors to participate in power generation.[116]

The first FiT Policy (2008) set out the applicable tariffs for wind, small hydro and biomass sources, for plants with capacities not exceeding 50 MW, 10 MW and 40 MW respectively. The current FiT Policy applies to renewable energy power plants not exceeding 20MW in Biomass, Biogas and Small Hydro technologies.[117] Previously, the 2012 FiT Policy prescribed FiT thresholds for wind, solar, small hydro, biomass, biogas and geothermal energy plants for small projects (of up to 10MW) and medium projects (of up to 70MW) as applicable. The 2021 FiT Policy has now been limited to small-scale biomass, biogas and small hydro projects (of up to 20 MW).[118] All solar and wind power projects, as well as other renewable energy projects larger than 20MW will be procured under the Auctions Policy rather than the FiT Policy. The exception to the above is geothermal projects that will be procured under the Policy on Licensing of Geothermal Greenfields.[119]

The policy also specifies the contents of a Standardized Power Purchase Agreement (which applies to all technologies) for both up to and above 10 MW plants connected to the grid. The FiT applicable at the time when a Power Purchase Agreement (PPA) is signed is the

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[116] Ibid, s7

[117] Ibid, s18

[118] Beatrice Nyabira, Judy Muigai and Christine Murangi, The FiT Policy, 2021 and the Renewable Energy Auctions Policy, 2021 *https://www.dlapiperafrica.com/en/kenya/insights/2021/The-FiT-Policy-2021-and-The-Renewable-Energy-Auctions-Policy-2021-Key-Highlights.html* accessed 24 September 2023

[119] Ibid

fixed value which will apply over the 20-year life of the PPA. Renewable energy projects which are larger than 10 MW of installed capacity may be considered. However, they must pass load flow and system stability tests.[120]

The Feed-in-Tariffs policy is subject to review every three years from the date of publication. However, a policy review may be undertaken earlier than three years in exceptional cases. Any changes made during such reviews shall only apply to renewable energy power plants developed after the revised policy is published.[121]

4.3.3 *Renewable Energy Auctions Policy*

The Renewable Energy Auctions Policy, 2021 is issued pursuant to the Act which provides that EPRA may run a competitive process before awarding a generation licence under the Act.[122]

The primary objective of the Auctions Policy is to procure renewable energy capacity at competitive prices aligned to the Least Cost Power Development Plan (LCPDP) and the Integrated National Energy Plan (INEP).[123] The Auctions Policy applies to all solar and wind power projects, as well as other renewable energy projects larger than 20MW. Auctions will be announced by MoE, upon advice by the LCPDP/INEP Committee on the appropriate timing and targeted capacity.[124]

[120] Ministry of Education Feed-in-Tariffs policy for Biomass, Small Hydros, and Biogas 3rd revision, January 2021
[121] Ibid, s48
[122] Energy Act (2019), s119
[123] Ministry of Energy, Renewable Energy Auctions Policy (2021)
[124] Ibid

The MoE through the Renewable Energy Auctions Committee, will be responsible for the implementation of the Auctions Policy.[125] According to the 2021 FiT Policy, the MoE will outline requirements for site selection to participate in the auctions. It is unclear as to whether the auctions will be site specific based on the requirements given by the MoE or whether bidders will be free to bid based on their preferred locations. We however note that as part of the prequalification process, interested bidders will be required to demonstrate land rights/access for the project and interconnection infrastructure.[126]

4.3.4 Net Metering Policy

The Net Metering Policy allows consumers to install small-scale renewable energy systems, such as rooftop solar panels, and offset their electricity consumption against the electricity generated. Excess electricity can be fed back into the grid, and consumers receive credit for it. This is also provided for by section 162 of the Energy Act (2019).[127]

The Energy Act allows grid-connected consumers who own an electric power generator of a capacity not exceeding one megawatt to supply the excess power to a distribution licensee or retailer, if that consumer has a generation facility that is located in the area of supply of the distribution licensee or retailer such as KPLC.[128] Under the Energy Act, every distribution licensee/retailer is mandated, upon receipt of an application, to make available the net metering service to any electricity consumer that the licensee serves.[129]

[125] Ibid, s4
[126] Ibid, s12
[127] Energy Act (2019), s162
[128] Ibid
[129] Ibid

According to a report titled Grid Connection of Solar PV: Technical and Economical Assessment of Net-Metering in Kenya, compiled by GIZ on behalf of the German Federal Ministry of Economics and Technology in 2014, Kenya's solar potential is not sufficiently tapped, hence the need for developments such as net metering within the energy sector.[130] This new development would pave the way for developers to exploit the opportunity and presents a cheaper energy solution for consumers.

In the oversight and regulation of the Net-Metering Policy, EPRA has drafted the Energy (Net-metering) Regulations, 2022 to that effect.

5.0 Way Forward Towards Realizing the Kenya Vision 2030 Plan

As discussed in Chapter 3, the GOK will promote development of renewable energy as an alternative source of energy. This includes generation of energy from solar, wind, biogas ("Biogas for Better Life") and development of bio-energy including bio-ethanol and diesel value chains. The use of improved cooking stoves and charcoal kilns, and re-afforestation of water towers will be promoted. National Renewable Energy Master Plan and updated renewable energy database will be developed.[131]

Kenya has set ambitious goals to increase its use of renewable energy sources as part of its Vision 2030 development plan.[132] However,

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[130] 'Grid Connection of Solar PV: Technical and Economical Assessment of Net-Metering in Kenya', GIZ on behalf of the German Federal Ministry of Economics and Technology (2014)

[131] Kenya Vision 2030, Development of New and Renewable Sources of Energy, *https://vision2030.go.ke/project/development-of-new-and-renewable-sources-of-energy/* accessed 25 September 2023

[132] Leandro Berg, 'Powering Kenya's Progress: Support to GoK on the Energy Sector White Paper' (*Dalberg*September 2023) <*https://dalberg.com/our-ideas/powering-kenyas-progress-support-to-gok-on-the-energy-sector-white-paper/*> accessed 25 September 2023.

there are several challenges that the country faces in achieving these goals.

One major challenge is the high cost of renewable energy technologies compared to traditional fossil fuels.[133] This makes it difficult for many Kenyans, especially those living in poverty, to access renewable energy sources. Production of hydroelectricity in Kenya can be looked at as an example. Kenya has an estimated hydropower potential of up to 6,000 MW comprising large hydro (sites with capacity of more than 10MW)[134] and also a potential of small hydro, but several of the potential some sites are expensive to develop and/or development of hydro power at the sites have considerable environmental issues.[135] Additionally, the lack of adequate financing and investment in renewable energy projects has slowed down the country's progress towards achieving its renewable energy goals. To this assertion is the utilization of Nuclear Power in Kenya. Nuclear power has been suggested for Kenya and is included in this comparison with a large plant, 1000 MW or larger. As such, it is costly to establish and develop nuclear plants in Kenya.[136]

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[133] AfricaNews, 'Kenya Championing Greater Use of Renewable Energy in Africa' (*Africanews*2023) <*https://www.africanews.com/2023/09/05/kenya-championing-greater-use-of-renewable-energy-in-africa//#:~:text=However%2C%20solar%20technology%20that%20is*> accessed 25 September 2023.

[134] National Energy Policy October 2018.pdf *https://kplc.co.ke/img/full/BL4PdOqKtxFT_National%20Energy%20Policy%20October%20%202018.pd*f accessed 25 September 2023

[135] East African Civil Society for Sustainable Energy and Climate Action, Plan for 100% Renewable Energy Scenario in Kenya by 2050 (2020), 2.1.6

[136] Kenya Least Cost Power Development Plan 2011-2031 identifies nuclear together with coal power as the more expensive than other power options, being wind power, geothermal power and a large hydropower project. Assuming the large increase in demand for power, the plan includes, however, nuclear power at a later stage when the cheaper options have been

Another challenge is the lack of infrastructure to support renewable energy development. For example, there is a need for more transmission lines and grid upgrades to accommodate the increasing amount of renewable energy being generated.[137] The East African CSOs for Sustainable Energy and Climate Action (EASE-CA) Project Report points out this as one of the challenges facing the energy sector in Kenya. [138] Much of the distribution network does not have adequate capacity to effectively manage the present demand; the distribution network suffers from poor reliability and quality of supply, which is generally due to underinvestment.[139] The country also needs to invest in energy storage technologies to ensure a reliable and consistent supply of renewable energy.[140]

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exhausted. Sine this study was made in particular solar power and also wind power have reduced in price, making other alternatives, as nuclear power less competitive. See plan at *https://www.renewableenergy.go.ke/downloads/studies/LCPDP-2011-2030-Study.pdf* accessed 26 September 2023

[137] Srishti Slaria, Molly Robertson and Karen Palmer, 'Expanding the Possibilities: When and Where Can Grid-Enhancing Technologies, Distributed Energy Resources, and Microgrids Support the Grid of the Future?' (*Resources for the Future*21 September 2023) <*https://www.rff.org/publications/reports/expanding-the-possibilities-when-and-where-can-grid-enhancing-technologies-distributed-energy-resources-and-microgrids-support-the-grid-of-the-future/#:~:text=New%20lines%20can%20increase%20reliability*> accessed 21 September 2023.

[138] East African CSOs for Sustainable Energy and Climate Action (EASE-CA) Project Report, p91

[139] Ibid

[140] Demetrios Papathanasiou, 'Why Energy Storage Matters for the Global Energy Transition' (blogs.worldbank.org30 June 2023) <*https://blogs.worldbank.org/energy/why-energy-storage-matters-global-energy-transition*> accessed 25 September 2023.

Despite these challenges, Kenya has made significant progress in increasing its use of renewable energy sources in recent years. Notably, the GOK has implemented policies and strategies such as the introduction of incentives and the feed-in tariff system to encourage investment in renewable energy and to promote the development of small-scale renewable energy projects.[141]

Kenya can fulfill its vision 2030 on renewable energy by implementing policies and strategies that promote the use of renewable energy sources such as wind, solar, geothermal, and hydropower. One of such policies and strategies is streamlining approval processes.[142] This creates a favorable investment climate and encourages private sector participation. Secondly is developing Investment cost Frameworks to guide private sector investment in renewable energy sources especially for high capital intensive like mini-grids and grid extension for rural electrification.[143] There is also need to review the existing policies and provisions to protect the private sectors in energy sector from exploitation in energy research, innovations, production and benefits by the government as a way to facilitate sustainable partnerships.[144]

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[141] S Wagura Ndiritu and Monica Katungi Engola, 'The Effectiveness of Feed-In-Tariff Policy in Promoting Power Generation from Renewable Energy in Kenya' (2020) 161 Renewable Energy.

[142] Deborah Murphy and Melissa Harris, 'Policy and Regulatory Barriers in Kenya's National Climate Change Action Plan: Areas for Private Sector Action a Report Delivered under the "Kenya --Communicating Climate Compatible Development with the Private Sector" Project' (2014).

[143] Policy Advisory Services and Capacity Building Directorate (PACB) of International Renewable Energy Agency (IRENA), 'Financial Mechanisms and Investment Frameworks for Renewables in Developing Countries' (2012).

[144] United Nations Development Programme (2020). Engaging private sector in NDC implementation - Assessment of private sector investment potential in the energy sector, Executive Summary - Kenya, UNDP, New York

Increased investment should also be key in fulfilling the Kenya Vision 2030 in general and on renewable energy as is the subject herein. Both domestic and international investments should be mobilized in renewable energy projects.[145] Investing in modern energy solutions with energy efficiency and cleaner, renewable energy should be priorities. This can be achieved through partnerships with development finance institutions, public-private partnerships, and targeted incentives for renewable energy investments. [146]

Diversification of Renewable Sources should also be prioritized enroute to fulfilling the Kenya Vision 2030 plan.[147] The MoE should diversify the energy mix into different renewables to reduce over-reliance on finite resources like hydro-generation and petroleum sources of energy without creating new dependencies on energy imports.[148] While Kenya has made significant progress in geothermal, wind, and solar energy, there is a need to diversify the renewable energy mix. Exploration of other potential sources such as biomass, small hydropower, and tidal energy to maximize the country's renewable energy potential is very crucial.[149]

Raising public awareness of more efficient energy use, including energy efficiency measures, local use of renewable energy, and new technology developments would also advance progress towards

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[145] UNCTAD, 'World Investment Report 2023, Investing in Sustainable Energy for All' (2023) <*https://unctad.org/system/files/official-document/wir2023_ch04_en.pdf*> accessed 25 September 2023.
[146] Ibid
[147] National Energy Policy (2018),
[148] Ibid
[149] Avtar and others, 'Exploring Renewable Energy Resources Using Remote Sensing and GIS—A Review' (2019) 8 Resources 149 http://dx.doi.org/10.3390/resources8030149 accessed 25 September 2023

utility of renewable sources in Kenya.[150] There is a need to raise awareness of the potentials and benefits of renewable energy, including biogas and solar energy for electricity and heat.[151] Local communities must be included in decisions on siting of renewable energy installations (solar, wind, geothermal, hydro), and have benefits that at least compensate for the change in land-use that affects them.[152] The benefits should be long lasting and can include job opportunities, affordable power supply, and infrastructure as better water supply. Renewable energy installations shall create local development.[153]

6.0 Conclusion

From the foregoing, an inference can be made that Kenya is making considerable steps in harnessing energy from renewable sources. This is in line with international treaty engagements, domestic legal obligations as well as development plans and goals such as the Kenya Vision 2030 plan. Despite certain setbacks, many projects to tap energy from renewable sources are still undergoing while some are projected to start. With Kenya being endowed with natural resources, there is need to tap more energy from renewable energy sources to meet the constantly increasing demand in Kenya.

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[150] Ministry of Energy, Kenya National Energy Efficiency and Conservation Strategy (2020)

[151] See for example Part VIII of the Energy Act 2019, section 193-196, proposes specific roles of county governments in promoting energy efficiency and conservation measures which includes awareness creation on renewable energy.

[152] Abdullahi Gira Ali, 'EFFECT of COMMUNITY INVOLVEMENT on EFFECTIVE IMPLEMENTATION of WIND POWER PROJECTS in KENYA' (2023) 5 African Journal of Emerging Issues 99.

[153] Marula Tsagkari, Jordi Roca and Phedeas Stephanides, 'Sustainability of Local Renewable Energy Projects: A Comprehensive Framework and an Empirical Analysis on Two Islands' (2022) 30.

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Separation of Powers and Judicial Overreach in Kenya: Legal Safeguards against Usurpation of Parliamentary Powers by Courts

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

Abstract

This paper delves into the doctrine of separation of powers and the notion of judicial overreach in the Kenyan context. It explores legal safeguards against the usurpation of parliamentary powers by the courts, emphasizing the need to strike a balance between judicial independence and judicial overreach. It does this by examining a number of case law and legislations. The paper examines the concept of rational judicial deference, the promotion of a constitutional partnership between the courts and Parliament, the prioritization of constitutionalism, and the distinction between administrative policy and legal rights. Through these insights, the paper aims to strengthen legal safeguards, preserve democratic governance, and uphold the integrity of the Constitution in Kenya.

Key Words*: Separation-of-Powers, Judicial-Overreach, Constitutionalism, Judicial-Discretion, Legislature, Judiciary, Judicial-Independence.*

1. Introduction

In constitutional democracies, the principle of separation of powers stands as the cornerstone, fostering a delicate equilibrium between the three branches of government: the legislature, the executive, and the judiciary.[1] Each branch operates independently, with distinct

[*] *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] Kibet & Wangeci, 'A perspective on the doctrine of the separation of powers based on the response to court orders in Kenya' *Strathmore Law Review* 2016, 222.

roles and responsibilities, ensuring checks and balances to prevent the abuse of power. While the judiciary plays a critical role in safeguarding individual rights, upholding the constitution, and providing oversight through judicial review, concerns over judicial overreach have emerged.[2]

This paper delves into the complex dynamics surrounding the doctrine of separation of powers and the notion of judicial overreach, with a specific focus on the Kenyan context. Exploring the delicate balance between the powers of Parliament and the courts, the paper seeks to address the fundamental question of how to strengthen legal safeguards against the usurpation of parliamentary powers by the judiciary while preserving judicial independence and constitutional integrity.

The first section discusses the concept of separation of powers and its relevance in the Kenyan context. Analyzing the distribution of powers among the three branches, the paper highlights the vital role of each institution in ensuring effective governance and democratic accountability.

Moving forward, the discussion centers on the notion of judicial overreach. Through a critical examination of case laws and constitutional provisions, the paper explores instances where the judiciary may have exceeded its constitutional mandate, encroaching upon matters that are inherently the domain of Parliament or the executive. This section also delves into the implications of such overreach, shedding light on its potential impact on democratic principles and the rule of law.

[2] Ibid

The paper then proceeds to analyze the concept of rational judicial deference, constitutional partnership between the courts and Parliament, constitutionalism and the distinction between administrative policy and legal rights.

This paper seeks to shed light on the multifaceted challenges surrounding the doctrine of separation of powers and judicial overreach in Kenya. By exploring the concepts of rational judicial deference, constitutional partnership, and the prioritization of constitutionalism, the paper aims to provide valuable insights into reinforcing legal safeguards, preserving judicial independence, and upholding the integrity of the constitution in the Kenyan context.

2. The Doctrine of Separation of Powers and the Notion of Judicial Overreach

2.1 Separation of Powers

The concept of separation of powers is a fundamental principle in democratic systems that aims to distribute and balance governmental authority among different branches of government.[3] It is based on the idea that concentrating power in a single entity can lead to tyranny and abuse of power. By dividing powers among distinct branches, the separation of powers seeks to establish a system of checks and balances that prevents any one branch from becoming too dominant.[4] Traditionally, the three branches of government that are subject to separation of powers are the legislative, executive, and judicial branches. Each branch has specific functions and powers, and they

[3] Montesquieu, Charles de Secondat. "The Spirit of the Laws." Translated by Thomas Nugent, edited by Anne M. Cohler, Basia Carolyn Miller, and Harold Samuel Stone, Cambridge University Press, 1989.
[4] Ibid

are expected to operate independently while exercising their respective authority.

2.2 Judicial Overreach

Judicial overreach refers to a situation where the judiciary exceeds its constitutional authority or interferes with the powers and functions of other branches of government, such as the legislature or the executive.[5] It occurs when the judiciary takes actions or decisions that go beyond the proper limits of its role in interpreting and applying the law.[6]

In the context of separation of powers, judicial overreach raises concerns because it can disrupt the balance of power among the branches and undermine the principle of checks and balances. The judiciary's role is primarily to interpret the law and ensure its constitutionality, rather than making or implementing policy decisions that fall within the domain of the legislative or executive branches.[7]

Examples of such overreach include; when courts engage in legislative activism, they take an active role in shaping public policy by making decisions that go beyond mere interpretation of the law. This can involve creating new rights or imposing obligations on the legislature or executive that were not explicitly provided for in the constitution or statutes.[8] Another example is Judicial Legislation. This occurs when courts effectively legislate by making laws through their decisions. Instead of interpreting existing laws, they go beyond their

[5] Vermeule, Adrian (2018) "Judicial Review and Judicial Power." *Harvard Law Review*, Vol. 131
[6] Ibid
[7] Ibid
[8] Ibid

interpretative role and establish new legal standards or requirements. This can be problematic because the power to create laws is constitutionally vested in the legislative branch.[9]

Judicial overreach can also involve the judiciary interfering with the executive branch's powers. This can occur when courts issue orders or judgments that directly interfere with executive decision-making or administration, beyond the scope of their judicial function.[10]

However, not all judicial decisions that have a significant impact on public policy or government actions should be automatically categorized as judicial overreach.[11] Courts may sometimes need to step in to protect constitutional rights or address issues where the legislative or executive branches have failed to act. The key factor is whether the judiciary's actions exceed the boundaries of its constitutional authority and undermine the separation of powers.[12]

2.3 Relevance for the Kenyan Context

In the Kenyan context, the doctrine of separation of powers and the issue of judicial overreach holds significant relevance due to the country's constitutional framework and its history of governance.[13] Understanding this relevance is crucial for analyzing the relationship between the branches of government and assessing the safeguards in place against judicial overreach.

Kenya has a constitutional framework that explicitly enshrines the principle of separation of powers. As discussed later, the 2010

[9] Ibid
[10] Ibid
[11]Ibid
[12] Ibid
[13] Mutunga, Willy. "The Constitution of Kenya: A Commentary." *Strathmore University Press*, 2011.

Constitution establishes a clear division of powers among the three branches of government: the legislature, the executive, and the judiciary. It sets out the functions and powers of each branch and establishes mechanisms for checks and balances.

Kenya has experienced challenges related to governance and abuses of power in the past. Prior to the adoption of the 2010 constitution, Kenya had a history of centralized power and limited checks on executive authority. This history underscores the importance of separation of powers in preventing abuses and ensuring accountability.[14]

The independence of the judiciary is crucial for upholding the separation of powers. In Kenya, the judiciary is expected to exercise its powers and functions without interference from other branches. This independence allows the judiciary to act as a check on potential overreach by the executive or legislative branches.[15]

The power of judicial review granted to the judiciary is particularly relevant in Kenya. The Constitution empowers the courts to review the constitutionality of laws and government actions, providing a mechanism to safeguard against legislative or executive overreach. Judicial review ensures that the actions of the other branches comply with constitutional provisions and protects individual rights and freedoms.[16]

The Kenyan judiciary has been subject to debates and criticisms regarding instances of potential judicial overreach. Some argue that the judiciary has sometimes engaged in judicial activism, going

[14] Ibid
[15] Ibid
[16] Ibid

beyond interpretation to make policy decisions or create new rights. These instances highlight the importance of discussing the boundaries of judicial authority and examining the legal safeguards in place.[17]

Kenya has mechanisms in place to address concerns of judicial overreach. These include the appellate process, where higher courts can review and correct errors, and the accountability mechanisms for judicial conduct. Analyzing the effectiveness of these safeguards in preventing and addressing overreach is essential to ensure the proper functioning of the separation of powers.[18]

3. Separation and Delimitation of Powers Under Kenyan Constitutional Law

3.1 The Constitutional Supremacy Framework

Article 1 (3) - This provision establishes the organs to which sovereign power is delegated under the Constitution. It identifies Parliament, the national executive, and the judiciary as the key state organs responsible for exercising delegated powers. Each organ is expected to perform its functions in accordance with the Constitution.

Article 115

Article 115 of the Kenyan Constitution, which deals with the presidential assent and referral of bills, has implications for the separation of powers in Kenya.

Article 115 outlines the interaction between the executive (represented by the President) and the legislature (represented by Parliament) in the lawmaking process. The provision allows the

[17] Ibid
[18] Ibid

President to exercise influence over legislation by either assenting to a bill or referring it back to Parliament for reconsideration.[19] This interaction reflects the checks and balances inherent in the separation of powers, as it ensures that the executive has a say in the legislative process.

The provision grants the President the power to refer a bill back to Parliament if the President has reservations about it.[20] This veto power acts as a safeguard against potential legislative overreach. It allows the President, as the head of the executive branch, to check and balance the actions of the legislature, ensuring that bills align with the government's policies and objectives.

Article 115 also highlights the role of Parliament in the lawmaking process. After a bill is referred back by the President, Parliament has the opportunity to reconsider and amend it.[21] This emphasizes the importance of Parliament as a separate and independent branch of government with the power to shape legislation and respond to the concerns raised by the executive.

The study argues that the provision establishes a delicate balance between the executive and legislative branches. While the President can refer a bill back for reconsideration, Parliament retains the power to pass the bill without amendment if it chooses to do so, provided it meets the required majority support.[22] This balance reflects the principles of separation of powers, where neither branch can unilaterally dominate the legislative process.

[19] Constitution of Kenya 2010, art 115 (1)
[20] Ibid
[21] Ibid art 115 (2)
[22] Ibid art 115 (4)

Furthermore, the study posits that article 115 indirectly relates to the prevention of judicial overreach. By allowing the President to refer a bill back to Parliament, it provides an opportunity for executive intervention in response to perceived unconstitutional or problematic provisions. This mechanism acts as a check on potential judicial overreach by ensuring that the President, as the head of the executive branch, can influence the legislative process in cases where constitutional concerns may arise.

Article 131 (3)

It stipulates that 'The President shall not hold any other State or public office'. The study posits that this provision establishes a restriction on the President's holding of any other state or public office. This serves to prevent the concentration of powers in a single individual, ensuring that the President's focus remains on the executive duties and responsibilities.

Article 152 (3)

It stipulates that 'A Cabinet Secretary shall not be a Member of Parliament'. This provision further contributes to the separation of powers by preventing an overlap of roles between the executive and legislative branches.

3.2 The legislature

The Legislature in Kenya plays a critical role in the country's governance and the separation of powers. The Kenyan Legislature consists of two houses: the National Assembly and the Senate.[23] This bicameral structure is intended to ensure representation and balance among different interests and regions within the country. The National Assembly comprises elected representatives known as Members of Parliament (MPs) who represent constituencies. They are

[23] Ibid art 93

responsible for representing the people, making and passing laws, and overseeing the actions of the executive branch.[24]

The Senate represents the interests of the counties in Kenya. The Senate participates in the law-making function of Parliament by considering, debating and approving Bills concerning counties, as provided in Articles 109 to 113. The Senate determines the allocation of national revenue among counties, as provided in Article 217, and exercises oversight over national revenue allocated to the county governments. The Senate participates in the oversight of State officers by considering and determining any resolution to remove the President or Deputy President from office in accordance with Article 145.[25]

The primary function of the Legislature is to make laws. Members of Parliament, both from the National Assembly and the Senate, propose, debate, and pass legislation through bills that affects various aspects of Kenyan society.[26] This lawmaking function is crucial for governing the country, addressing societal needs, and promoting development and progress.

The Legislature provides a platform for diverse voices and interests to be represented. Members of Parliament, elected through democratic processes, act as representatives of their constituencies and are responsible for voicing the concerns and needs of their constituents. The Legislature also provides an avenue for public participation, where citizens can engage with their representatives and contribute to the lawmaking process.[27]

[24] Ibid art 95
[25] Ibid, art 96
[26] Ibid, art 109
[27] Ibid, arts 118 & 119.

3.3 The Executive

The executive branch in Kenya holds significant power and is responsible for implementing and executing laws.

The President is the head of state and the chief executive officer of Kenya. The President is elected through a general election and serves as both the head of government and the head of the executive branch. The President has various powers and responsibilities, including policy-making, appointing government officials, and representing the country both domestically and internationally.[28]

The President is supported by a Cabinet composed of Cabinet Secretaries appointed by the President. Cabinet Secretaries head various government ministries and are responsible for implementing government policies and overseeing specific areas of governance, such as finance, health, education, and infrastructure.[29]

The executive branch is responsible for making decisions and implementing policies that affect various aspects of governance, including economic development, public service delivery, security, and foreign affairs. The executive branch formulates and implements national development plans, annual budgets, and public policies aimed at addressing societal challenges and achieving national objectives.

The executive branch is subject to oversight by other branches of government, particularly the Legislature. Members of Parliament have the power to question Cabinet Secretaries and other government

[28] Ibid, art 132
[29] Ibid, art 152

officials, hold them accountable for their actions, and scrutinize the executive's performance.[30]

3.4 The Judiciary

The judiciary in Kenya is an independent branch of government responsible for interpreting and applying the law, ensuring justice, and safeguarding the rights and freedoms of individuals.[31]

The Kenyan judiciary operates independently of the other branches of government, namely the executive and the legislature. This independence is crucial for upholding the rule of law, ensuring impartiality, and preventing undue influence or interference in judicial decisions.[32]

The primary function of the judiciary is to adjudicate disputes and resolve legal conflicts. It includes civil, criminal, constitutional, and administrative matters. The judiciary ensures that justice is administered fairly, applying legal principles, statutes, and the Constitution to reach decisions.[33]

The judiciary in Kenya has a crucial role in upholding the Constitution. It has the power of judicial review, enabling it to assess the constitutionality of laws, government actions, and the conduct of public officials. This power serves as a check on the other branches of government, ensuring that their actions comply with constitutional provisions.[34]

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[30] Ibid, art 152
[31] Ibid, chapter 10
[32] Ibid, art 160
[33] Ibid, chapter 10
[34] Ibid, art 165

The judiciary plays a vital role in safeguarding individual rights and freedoms. It ensures that the rights enshrined in the Constitution are respected and protected by interpreting and applying the law in a manner that upholds these rights. This includes the protection of human rights, civil liberties, and access to justice.[35]

The Judicial Service Commission (JSC) is a constitutional body tasked with safeguarding the independence and integrity of the judiciary. It oversees the recruitment, appointment, and discipline of judges, promoting transparency, accountability, and merit-based judicial appointments.[36]

The study argues that understanding the role and functions of the judiciary in Kenya is essential for assessing the separation of powers and examining potential issues of judicial overreach. It allows for an analysis of the judiciary's independence, its impact on the protection of rights, and the mechanisms in place to ensure accountability and uphold the rule of law.

3.5 Distinction Between Beneficial Judicial Independence and Harmful Judicial Overreach

The distinction between beneficial judicial independence and harmful judicial overreach lies in the proper exercise of judicial authority within the bounds of the law and the Constitution.[37]

Beneficial judicial independence refers to the ability of the judiciary to act impartially and free from external influences, ensuring fair and

[35] Ibid, art 165
[36] Ibid, art 172
[37] Githu, Muigai (2013) "The Constitution of Kenya: An Introductory Commentary." LawAfrica Publishing Ltd.

just decisions.[38] Judicial independence is crucial for upholding the rule of law, protecting individual rights, and serving as a check on potential abuses of power by other branches of government. It allows judges to make decisions based on their interpretation of the law and the facts presented before them, without fear of reprisal or undue influence.[39]

Beneficial judicial independence involves judges faithfully interpreting and applying the Constitution, statutes, and legal principles. Judges should interpret the law in a manner that upholds the Constitution and protects fundamental rights and freedoms. By doing so, they contribute to a just and equitable legal system that respects the rule of law.[40]

Judicial overreach occurs when the judiciary exceeds its constitutional authority and encroaches upon the functions and powers of the other branches of government.[41] Harmful judicial overreach occurs when judges engage in policymaking or legislative functions, usurping the authority of the legislature or executive. This can disrupt the balance of powers and undermine the democratic process.[42]

Beneficial judicial independence involves judges limiting their role to adjudicating disputes and interpreting the law, rather than creating new laws or policies. Judges should exercise restraint and defer to the legislature in matters that require legislative judgment and policy-

[38] Ibid
[39] Ibid
[40] Ibid
[41] Ibid
[42] Ibid

making. By respecting the separation of powers, judges contribute to the proper functioning of a democratic system.[43]

Beneficial judicial independence respects the checks and balances established by the Constitution. It recognizes that the judiciary has the power of judicial review to assess the constitutionality of laws and government actions. Judicial decisions that strike down unconstitutional laws or protect constitutional rights can be seen as beneficial exercises of judicial independence. However, such decisions should be grounded in a careful interpretation of the Constitution, guided by legal principles and precedents.[44]

Beneficial judicial independence is compatible with accountability and ethical conduct.[45] Judges should be subject to codes of conduct and disciplinary mechanisms that ensure they uphold the highest standards of professionalism, integrity, and impartiality. Accountability mechanisms promote public trust and confidence in the judiciary, reinforcing the importance of judicial independence.[46]

4. Problematic Instances of Judicial Overreach in Kenya and its Implications for Criminal Justice

4.1 Focus on Criminal Justice

Judicial overreach can occur when courts overturn criminal convictions without proper legal basis or without following established legal procedures. [47] Such actions can undermine the

[43] Ojienda, Tom (2010) "The Constitution of Kenya: A New Legal Framework." LawAfrica Publishing Ltd
[44] Ibid
[45] Ibid
[46] Ibid
[47] Oduor, Rose J (2014) "Judicial Activism and the Judiciary in Kenya: A Critical Analysis." *Strathmore Law Journal*, Vol. 2

finality and certainty of criminal verdicts, leading to a lack of confidence in the justice system.

Judicial overreach in criminal justice can involve courts assuming legislative functions by creating new legal standards or requirements through their decisions. This can result in the judiciary effectively making or amending criminal laws, which should be the prerogative of the legislature. It can lead to confusion, inconsistency, and potential infringement on the separation of powers.[48]

Judicial overreach may manifest as an excessive exercise of judicial discretion in criminal cases. This occurs when judges impose sentences or make determinations that go beyond what is reasonable or proportionate according to established legal principles. Excessive judicial discretion can undermine the consistency and predictability of sentencing, potentially leading to unequal treatment of defendants.[49]

Judicial overreach can also involve courts interfering with the prosecutorial powers by imposing obligations on the prosecution that are not provided for in the law. This can impede the effective investigation and prosecution of criminal cases, potentially resulting in a miscarriage of justice.[50]

In addition, when the judiciary goes beyond its role of interpreting laws and imposes its own policy preferences or societal views, it can undermine the original legislative intent behind criminal statutes. This can result in laws being applied in unintended ways or the

[48] Ibid
[49] Ibid
[50] Ibid

disregard of specific legislative provisions meant to address certain criminal behaviors.[51]

Problematic instances of judicial overreach can erode public trust in the criminal justice system. They can create uncertainty, inconsistency, and unpredictability in the application of criminal laws, which are essential for maintaining law and order. This may undermine the deterrence effect of the criminal justice system and impact the willingness of the public to report crimes and cooperate with law enforcement.[52]

Important to note, not all judicial decisions that are seen as problematic necessarily constitute overreach. Judicial review and interpretation are essential aspects of the judiciary's function. However, when the judiciary exceeds its constitutional authority or undermines the separation of powers, it can have far-reaching implications for the criminal justice system, affecting both the rights of defendants and the overall administration of justice.[53]

4.2 The Mandatory Death Sentence

Francis Karioko Muruatetu & another Vs Republic [2017] eKLR

The Court in its Judgement declared the mandatory nature of the death sentence as provided for under Section 204 of the Penal Code unconstitutional and issued orders for the establishment of a framework to deal with the sentence re-hearing of the applicable cases. The court also directed the legislative making bodies to enact

[51] Ibid
[52] Ibid
[53] Ibid

legislation to the effect of repealing sections that made provision for the death penalty.[54]

The court averred as follows:
To our minds, what Section 204 the Penal Code is essentially saying to a convict is that he or she cannot be heard on why, in all the circumstances of his or her case, the death sentence should not be imposed on him or her, or that even if he or she is heard, it is only for the purposes of the record as at that time of mitigation because the court has to impose the death sentence nonetheless... Try as we might, we cannot decipher the possible rationale for this provision. We think that a person facing the death sentence is most deserving to be heard in mitigation because of the finality of the sentence.[55]

We are of the view that mitigation is an important congruent element of fair trial. The fact that mitigation is not expressly mentioned as a right in the Constitution does not deprive it of its necessity and essence in the fair trial process. In any case, the rights pertaining to fair trial of an accused pursuant to Article 50(2) of the Constitution are not exhaustive.[56] Indeed the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in Article 10 of the Universal Declaration of Human Rights, and in the same vein Article 25(c) of the Constitution elevates it to a non-derogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which the Rule of Law and public faith in the justice system would inevitably collapse.[57]

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[54] Para 112; *Francis Karioko Muruatetu & another v Republic* [2017] eKLR (*Muruatetu*)
[55] Para 45 Ibid
[56] Para 46; Ibid
[57] Para 47, Ibid

Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right.[58] Failing to allow a Judge discretion to take into consideration the convicts' mitigating circumstances, the diverse character of the convicts, and the circumstances of the crime, but instead subjecting them to the same (mandatory) sentence thereby treating them as an undifferentiated mass, violates their right to dignity.[59]

If a Judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability. Further, imposing the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability fails to reflect the exceptional nature of the death penalty as a form of punishment. Consequently, failure to individualize the circumstances of an offence or offender may result in the undesirable effect of 'over punishing' the convict.[60]

[58] Para 48, Ibid
[59] Paragraph 50, Ibid
[60] Para 53, Ibid

In this context, the paper argues that the court's decision represents a beneficial exercise of judicial independence and discretion rather than judicial overreach.

The court's decision reflects a commitment to upholding constitutional rights, including the right to fair trial and the prohibition of cruel, inhuman, and degrading treatment. The court recognized the significance of allowing mitigating circumstances to be considered, ensuring that the sentence imposed is proportionate to the individual's culpability and the circumstances of the crime.

Furthermore, the court's decision involved interpreting the Constitution and assessing the compatibility of the mandatory death sentence with constitutional provisions. Judicial interpretation and application of the Constitution are essential aspects of the judiciary's role in safeguarding constitutional rights and upholding the rule of law.

By declaring the mandatory death sentence unconstitutional, the court recognized the importance of individualizing justice and considering the unique circumstances of each case. This approach aligns with principles of fairness, proportionality, and human rights, ensuring that the punishment fits the crime and the individual's level of culpability.

In addition, the court's directive for the legislative making bodies to enact legislation to repeal the sections that provided for the death penalty indicates the court's recognition of its role in interpreting the law and clarifying legislative intent. It demonstrates an appropriate exercise of judicial authority within the bounds of the separation of powers, as it does not repeal the laws itself but directs parliament to do so.

4.3 Mandatory Minimum Sentences for Sexual Offenders-Philip Mueke Maingi and five (5) others Vs DPP and Another (2021) KEHC 13118 (KLR)

The court held that the mandatory minimum sentences under the Sexual Offences Act are unconstitutional. There was a need for legislative amendments to the Sexual Offences Act. A strict application of some of the provisions of the Sexual Offences Act may cause injustice. The court further averred that to the extent that the Sexual Offences Act prescribed mandatory minimum sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fell afoul of article 28 of the Constitution. However, the court was at liberty to impose sentences prescribed thereunder so long as the same were not deemed to be the mandatory minimum prescribed sentences.[61]

In this context, the paper argues that the court's decision can be seen as a beneficial exercise of judicial independence and discretion rather than judicial overreach. The court's decision to declare the mandatory minimum sentences as unconstitutional demonstrates its commitment to safeguarding constitutional rights. In this case, the court recognized the right to fair sentencing and the importance of allowing judges the discretion to determine appropriate sentences based on the specific circumstances of each case.

By striking down the mandatory minimum sentences, the court upheld the rule of law and the principle that laws should be consistent with the Constitution. This decision aligns with the judiciary's role in interpreting and applying the Constitution to ensure the protection of individual rights and prevent potential injustices.

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[61] Introduction summary, *Philip Mueke Maingi and 5 others v DPP and another* (2021) KEHC 13118 (KLR) (*Maingi)*

The court's ruling acknowledged that the strict application of mandatory minimum sentences could lead to unjust outcomes. Allowing for judicial discretion permits judges to consider mitigating factors, individual circumstances, and the gravity of the offense when determining sentences, resulting in more just and proportionate outcomes.

The court's decision did not replace or rewrite the law. Instead, it identified a specific aspect of the Sexual Offences Act that was incompatible with the Constitution and called for legislative amendments. This approach respects the separation of powers, as the court clarified its role in interpreting and reviewing laws while leaving the legislative function to the appropriate authority.

The court's ruling struck a balance between recognizing the unconstitutionality of mandatory minimum sentences and acknowledging that courts still had the discretion to impose sentences within the framework of the law. This balance allows for flexibility in sentencing while ensuring adherence to the Constitution.

Edwin Wachira and nine (9) others v Republic; consolidated with Adan Maka Thulu Vs DPP; Robert Mwangi Vs DPP; Kazungu Kalama Jojwa Vs DPP (2022) eKLR

The court made reference to the *Maingi case*[62] and *Muruatetu*[63] and held as follows:

[62] Para 17; Edwin *Wachira and 9 others v Republic*; consolidated with *Adan Maka Thulu v DPP*; *Robert Mwangi v DPP; Kazungu Kalama Jojwa v DPP* (2022) eKLR (*Wachira)*
[63] Para 20; *Wachira*

A court faced with a case where the minimum sentencing provisions apply, will have no choice, but to impose the prescribed sentence. This will happen regardless of what the court might regard as the appropriate sentence in the circumstances and accordingly, the court's discretion in the circumstances is fettered... Sentence discretion is a vital element of our law of sentencing and at the heart of that discretion is the principle that each case should be treated on its own facts or merits and it is precisely for this reason that the sentencing discretion lies with the trial court.[64]

The court formulated five key principles. The first principle is that the infliction of punishment is pre-eminently a matter for the discretion of the trial court. The second is that of the individualization of punishment, which requires proper consideration of the individual circumstances of each accused person.[65] The third principle is that sentencing remains a discretionary power, exercisable by the court and it involves the deliberation of the appropriate sentence.[66] The fourth principle is that court's advantage centers on the fact that they try individual cases and they can thus make sentencing decisions based on the particular facts of each case as they possess information pertaining to a particular accused.[67] The fifth principle is that the citizen in a given case of mandatory/minimum sentence has a right to put in a plea in mitigation to show that the imposition of the mandatory minimum sentence is not warranted in his case.[68]
The court continued as follows:

[64] Para 23; *Wachira*
[65] Para 24; *Wachira*
[66] Para 25; *Wachira*
[67] Para 27; *Wachira*
[68] Para 32; *Wachira*

Lucky for me the Supreme Court in *Muruatetu* one was categorical that mitigation forms an intergyral part of a fair trial, so, the fact that an accused person is deprived the right to mitigate curtails his rights under Article 50(1). Similarly, taking away judicial discretion and the fact that the mandatory minimum sentences deprive the court the discretion to prescribe a sentence taking into account the individual circumstances of the accused is unfair to the accused and it impinges on the right to a fair trial. Sentencing is an integral part of a judicial function and an important element of a fair trial process. Similarly, the provisions under challenge deprive the accused person the benefit of a lesser sentence informed by the circumstances of each offence. Lastly, unlike in other offences, the mandatory minimum sentences are discriminatory because they deprive the accused person the full benefit of the law contrary to Article 2.[69]

For avoidance of doubt, a mandatory minimum sentence is not per se unconstitutional. The legislature in the exercise of its legislative powers is perfectly entitled to indicate the type of the sentence which would fit the offence it creates. It has never been suggested that the sphere of judicial power is invaded when Parliament provides for a maximum or minimum penalty for offences which are duly proved in courts of law. What is decried is absence of judicial discretion to determine an appropriate sentence taking into account the individual circumstances of an accused person, depriving an accused person the right to be heard in mitigation and/or depriving the court the discretion to determine an appropriate sentence.[70]

The court declared that sentencing remains a discretionary power, exercisable by the court and involves the deliberation of the appropriate sentence. The court added that to the extent that the

[69] Para 35; *Wachira*
[70] Para 36; *Wachira*

provisions of sections 8(2), (3), (4), 11 (1), 20 (1) and 3(3) of the Sexual Offences Act deprive the court the discretion to determine the appropriate punishment taking into account the individual circumstances of each case and mitigation, the said provisions offend the notion of a fair trial contemplated under Article 50 of the Constitution.[71]

In this context, the paper argues that the court's decision can be seen as a beneficial exercise of judicial independence and discretion rather than judicial overreach. The court's decision reflects its commitment to upholding constitutional rights, particularly the right to a fair trial as enshrined in Article 50 of the Constitution. By striking down provisions that deprived the court of its discretion and the accused of their right to be heard in mitigation, the court protected the principles of fairness and justice.

The court acknowledged that the legislature has the authority to prescribe penalties for offenses, including maximum or minimum sentences. It did not question the idea of mandatory minimum sentences per se but rather the absence of judicial discretion in determining appropriate sentences.

The court clarified the essential role of the judiciary in sentencing, emphasizing that it is pre-eminently a matter for the discretion of the trial court. By asserting that sentencing remains a discretionary power, the court reinforced the principle that each case should be treated based on its unique facts and circumstances.

In addition, the court highlighted the importance of individualizing punishment, which requires considering the specific circumstances of each accused person. By depriving the court of the discretion to do

[71] *Para 38*; Wachira

so, the mandatory minimum sentences were deemed incompatible with the principles of fairness and proportionality.

The court recognized that the mandatory minimum sentences could be discriminatory, as they did not allow for a lesser sentence informed by the individual circumstances of each offense. This highlights the court's role in preventing unfair treatment and ensuring equal protection under the law.

4.4 Application for Revisions - DPP Vs Milimani Chief Magistrate's Anti-corruption Court 2020 eKLR

The court held that the High Court's power of criminal revision (revisionary jurisdiction) is provided for in Article 165 (6) and (7) of the Constitution, as well as Section 362 of the Criminal Procedure Code, as read together with Section 364 of the same.[72] An appeal turns largely on the merits of the impugned decision, while revision largely turns on technicalities relating to legality, propriety, regularity or correctness of the decision.[73]

The court further averred that a revision unlike an appeal, does not deal with the merits of the decision or proceeding but its "legality, correctness, legality, propriety or regularity".[74] The court added that the freelance and wanton revisions (especially interlocutory revisions), not only interferes with the decisional independence of subordinate courts, and the smooth running of their proceedings, but may in some extreme extents amount to arm-twisting of those

[72] Para 19 *DPP V Milimani Chief Magistrate's Anti-corruption court (Milimani)*
[73] Para 20, *Milimani*
[74] Para 21, *Milimani*

courts.[75] Revision unlike an appeal, is a discretionary remedy left to judicial discretion.[76]

The paper argues that this court decision is relevant as it emphasizes the importance of preserving the decisional independence of subordinate courts. The court cautions against freelance and wanton revisions, especially interlocutory revisions, which may interfere with the smooth running of court proceedings and undermine the independence of lower courts.

The discretionary nature of the power of revision also reinforces the idea of judicial independence, as it allows the higher courts to exercise their judgment in determining when and how to intervene in lower court decisions. This discretion is essential for maintaining the balance between the roles of higher and lower courts and preventing unnecessary interference in the judicial process.

Furthermore, the court's distinction between revision and appeal highlights the different roles of these remedies. While an appeal considers the merits of the decision and is based on the substance of the case, revision focuses on the procedural and technical aspects of the decision-making process. This distinction reinforces the notion of fair and just procedures in the administration of justice and prevents the abuse of revisionary powers to re-litigate the merits of a case.

Supervisory Vs Revisionary Jurisdiction of the High Court - Reuben Mwangi Nguri Vs R (2021) eKLR

The court made reference to Section 362 of the Criminal Procedure Code which provides as follows:

[75] Para 28, *Milimani*
[76] Para 29, *Milimani*

The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.[77]

The court further held that the powers of the High Court to exercise revisionary jurisdiction are provided for under Section 364 of the Criminal Procedure Code which provides for the following:

In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders or which otherwise comes to its knowledge the High Court may: (a) In the case of a conviction exercise any of the powers conferred on it as a court of appeal by section 354, 357 and 358 and may enhance the sentence. (b) In the case of any other order other than an order of acquittal alter or reverse the order. 2. No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own Defence.[78]

The court continued as follows:

The prayer of revision vested in this court under Section 362 of the Criminal Procedure Code is principally to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to regularity of any proceedings of any subordinate court. Accordingly, revision is by no means to be taken as an appeal by the aggrieved party to the High Court. In criminal cases where such orders are being sought under Section 364 on

[77] Para 3; *Reuben Mwangi Nguri v R* (2021) eKLR (*Reuben Mwangi)*
[78] Para 4 Ibid

revision the court should steer clear from trespassing into the realm of appellate jurisdiction.[79]

It is plain from the above passage that the High Court is vested into wide revisionary powers to look into the orders, decisions, proceedings, sentences where any of the following circumstances manifest themselves: (a) Where the decision is grossly erroneous (b) Where there is no compliance with the provisions of the law. (c) Where the finding of fact affecting the decision as not based on the evidence or it is result of mis-reading or non-reading of evidence on record (d) Where the material evidence on the parties is not considered. (e) Where the judicial discretion is exercised arbitrarily or perversely if the lower court ignores facts and tries the accused of lesser offence.[80]

It is to be appreciated that the ambit created by the provisions of section 362 of the code empowers this court to exercise discretion as to the correctness, legality and propriety of the order or proceedings... The subordinate court is therefore a subject of supervisory and superintendent by this court in both judicial and administrative function. The court can therefore annul, review, vary or issue further directions on the matter complained of by an aggrieved party or which came into the attention of the court suo-moto. The only rider in the circumstances of this jurisdiction is to ensure the accused has an opportunity to be heard or his legal counsel before any decision is reached.[81]

The paper posits that this court decision reaffirms the importance of maintaining a clear distinction between appellate and revisionary jurisdiction, while also emphasizing the supervisory role of the High

[79] Para 5 Ibid
[80] Para 9 Ibid
[81] Para 13, Ibid

Court over subordinate courts. This distinction is crucial in preventing the High Court from overstepping its role and encroaching on the functions of the appellate courts. The court also ensures that revision is limited to rectifying errors of law or procedure, maintaining the integrity of the justice system, and protecting the rights of the accused.

The court acknowledges that the provisions of the Criminal Procedure Code empower the High Court to exercise discretion in revisionary matters. This discretion allows the High Court to carefully assess the circumstances of each case and determine the appropriate course of action.

Vincent Echesa Okote Vs Republic (2019) eKLR - Revision Versus Appeals

The court asserted that the High Court is vested with supervisory powers over subordinate courts. Supervisory power is exercised through either appeal or revision. The power to exercise both appellate and supervisory jurisdiction over decisions of subordinate courts is conferred by Article 165(3) (e) (6) (7) of the Constitution,[82] which stipulates:

3 … the High Court shall have — (e) any other jurisdiction, original or appellate, conferred on it by legislation. (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court. (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in

[82] Para 5, *Vincent Echesa Okote v Republic* [2019] eKLR *(Echesa*)

clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.[83]

After considering the constitutional and statutory provisions on appellate and revisionary powers of the High Court, as well the judicial pronouncements, the court viewed that an appeal is broader than a revision, and that a revision is subsumed in an appeal. The court held that a person who approaches a court on revision is only asking the court to take a rather narrow look at the proceedings of the trial court where the focus ought to be on the regularity or propriety or correctness of the proceedings conducted or the decision arrived at. In other words, the challenge is more or less on the regularity or correctness or propriety of the process rather than on the merits the final determination of the trial court.[84] By contrast, an appellant invites the appellate court to consider the particular grounds raised, and the law requires the court to have a holistic approach to the matter so as to satisfy itself that the proceedings were conducted properly and regularly, and that the final verdict was supported by the evidence adduced and was within the law. That would mean that on appeal the appellate court looks for the propriety or regularity or correctness of the proceedings or order, as well as the merits of the decision that is the subject of the appeal.[85]

The court held that the applicant ought not to have brought an application for revision, instead he should have lodged an appeal against the decision.[86] The court noted that the applicant was not raising any questions of lack of correctness nor impropriety nor irregularity with the subject proceedings or decision. Instead, the

[83] Ibid
[84] Paragraph 11, *Echesa*
[85] Paragraph 12, *Echesa*
[86] Paragraph 14, Ibid

challenge was on the merits.[87]However, the court decided to proceed to determine the matter on its merits, as if it was an appeal.[88]

The paper argues that this court decision reinforces the importance of adhering to the proper procedures and remedies available to parties, and the need for the court to be mindful of its jurisdictional limits. This decision also underscores the limited scope of revision and the need for the court to focus on procedural matters.

The court also notes that an appeal's broader scope allows the appellate court to conduct a holistic review of a matter. Furthermore, despite the applicant's error in choosing the remedy, the court decided to proceed with the matter on its merits, as if it were an appeal. This flexibility in the court's approach allowed for the proper examination of the issues raised and ensured that justice was served, even if the initial choice of remedy was incorrect.

5. Strengthening Legal Safeguards against Usurpation of Parliamentary Powers by the Courts

5.1 Prioritization of Constitutionalism

Prioritization of constitutionalism is a fundamental aspect of ensuring legal safeguards against the usurpation of parliamentary powers by the courts. Constitutionalism refers to the adherence to and supremacy of the constitution as the highest law of the land[89]. It establishes the framework for the distribution of powers among different branches of government, the protection of individual rights, and the limitations on governmental authority.

[87] Paragraph 13, Ibid
[88] Paragraph 16, Ibid
[89] Makau, M. G (2011) "Judicial Independence and Accountability in Kenya." *Fordham International Law Journal*, Vol. 34

The constitution should be recognized as the supreme law of the land, and all laws, actions, and decisions of government institutions, including the judiciary, must be consistent with its provisions. No branch of government, including the courts, should be above the constitution or act in contravention of its principles.[90]

Prioritizing constitutionalism requires a commitment to the rule of law, which means that all individuals and institutions, including the government, are subject to and governed by the law. The judiciary plays a crucial role in upholding the rule of law by interpreting and applying the constitution impartially and fairly.[91]

Adhering to constitutionalism involves respecting the principle of separation of powers, which ensures that each branch of government operates independently and within its allocated sphere of authority. The judiciary, as one of the branches of government, should exercise its powers within the limits defined by the constitution.[92]

To strengthen legal safeguards against judicial overreach, it is essential to maintain the independence of the judiciary. This means safeguarding judges' tenure, ensuring their freedom from external pressures or influences, and protecting them from unwarranted interference in their decision-making processes.[93]

Constitutionalism encourages a system of checks and balances, where each branch of government acts as a check on the others to prevent the abuse of power. The courts, as an independent branch, should

[90] Ibid
[91] Ibid
[92] Ibid
[93] Ibid

exercise judicial review to scrutinize the actions of the legislature and executive, ensuring that they conform to constitutional principles.[94] Furthermore, upholding constitutionalism involves protecting and promoting fundamental rights and liberties enshrined in the constitution. The courts have a vital role in safeguarding these rights and striking down laws or actions that violate them.[95]

Finally, in interpreting the constitution, the judiciary should apply principles such as the purposive approach, taking into account the intention of the framers and the evolving societal norms. This ensures that constitutional interpretation remains relevant and responsive to contemporary issues.[96]

5.2 Clarifying the Distinction Between Administrative Policy and Legal Rights

Clarifying the distinction between administrative policy and legal rights is an important step in strengthening legal safeguards against the usurpation of parliamentary powers by the courts. This distinction helps maintain the separation of powers and ensures that courts do not encroach upon the domain of the legislature or the executive when it comes to matters of policy-making and governance. Administrative policy refers to the decisions, guidelines, and directives formulated and implemented by the executive branch of government to address various administrative and governance issues. [97] These policies often involve matters of public administration, management of government resources, and the implementation of laws passed by the legislature. Administrative

[94] Ibid
[95] Ibid
[96] Ibid
[97] Akech, M (2005) "Judicial Review and Judicial Activism in Kenya: The Implications for Constitutional Democracy." African Journal of Legal Studies, Vol. 2

policies are within the purview of the executive and are subject to change depending on the government's priorities and goals.[98]

Legal rights, on the other hand, are derived from the constitution, statutes, and other laws. They are enforceable entitlements that protect individuals and groups from government actions that may infringe upon their freedoms, liberties, or interests. Legal rights are inherent and cannot be arbitrarily changed or denied by the government without due process and adherence to the law.[99]

Clarifying the distinction between administrative policy and legal rights is crucial in recognizing the role of the legislature in enacting laws that protect citizens' rights and set the framework for government actions. Courts must respect the legislative intent behind these laws and avoid substituting their judgment for that of the legislature.[100]

In addition, the distinction helps maintain the separation of powers among the three branches of government – legislature, executive, and judiciary. The judiciary should not be involved in making or implementing administrative policies, as this falls within the domain of the executive[101].

5.3 Use of Rational Judicial Deference

Rational judicial deference is a principle that recognizes the expertise and institutional competence of other branches of government, particularly the legislature and the executive, in certain policy matters. It involves the judiciary showing respect and restraint in

[98] Ibid
[99] Ibid
[100] Ibid
[101] Ibid

cases where the government's actions are based on reasonable and rational grounds.[102]

Rational judicial deference upholds the principles of separation of powers by recognizing the distinct roles and competencies of each branch of government. It acknowledges that the judiciary should not intervene in matters that fall primarily within the purview of the legislature or the executive.[103]

Courts generally presume that laws and policies enacted by the legislature are constitutional and valid. Rational judicial deference respects the democratic process and the accountability of elected representatives to their constituents. Courts refrain from second-guessing legislative decisions unless they are shown to be irrational or unconstitutional.[104]

Furthermore, when reviewing governmental actions, the judiciary employs different standards of review depending on the nature of the issue. For matters of policy and socio-economic considerations, courts tend to apply a deferential standard, such as the "rational basis" or "reasonableness" test. This standard gives more latitude to the government's choices, provided they are based on rational and logical grounds.[105]

Rational judicial deference recognizes that the legislature and the executive have access to specialized knowledge and expert advice, making them better suited to address complex policy issues. The

[102] Othieno, Caleb O. (2014) "The Role of Courts in Governance: The Case of Kenya." *Journal of African Law*, Vol. 58, 2014.
[103] Ibid
[104] Ibid
[105] Ibid

courts, as a general rule, do not interfere in matters that require specialized expertise or administrative discretion.[106]

By deferring to the expertise and decisions of the elected branches, rational judicial deference protects democratic accountability. It ensures that the people's representatives are held responsible for their policy choices and decisions. [107] By demonstrating restraint and respect for the functions of other branches, the judiciary maintains its independence and avoids the perception of judicial activism.[108]Rational judicial deference contributes to legal stability and predictability. It reduces the likelihood of abrupt changes in policies due to judicial intervention. It allows the government to function more efficiently and implement policies without undue interference, as long as they are rational and not arbitrary.[109]

5.4 Promotion of Constitutional Partnership Between Courts and Parliament

Such a partnership encourages constructive engagement, cooperation, and mutual respect between the two branches of government, while ensuring that each branch operates within its constitutional boundaries.[110]

A constitutional partnership entails fostering a culture of dialogue and consultation between the judiciary and Parliament. Regular engagement allows both branches to share their perspectives,

[106] Ibid
[107] Ibid
[108] Ibid
[109] Ibid
[110] Githu, Muigai. (2013) "The Constitution of Kenya: An Introductory Commentary." LawAfrica Publishing Ltd,

concerns, and interpretations of the constitution and laws, leading to better-informed decision-making.[111]

The courts play a vital role in interpreting the constitution, while Parliament is responsible for enacting laws. By promoting a constitutional partnership, both institutions can work collaboratively to ensure that legislation aligns with constitutional principles and that the courts' interpretations respect the intent of the legislature.[112] A constitutional partnership involves a clear acknowledgment of the distinct roles and competencies of the judiciary and Parliament. The courts should respect Parliament's lawmaking authority, while Parliament should recognize the judiciary's role in upholding the constitution and protecting fundamental rights.[113]

Furthermore, when dealing with cases involving potential conflicts between constitutional rights and legislative actions, the courts should adopt a proportionality analysis. This approach involves balancing the competing interests and considering the impact of judicial interventions on legislative policy choices.[114]

6. Conclusion

Throughout this comprehensive exploration of the doctrine of separation of powers, judicial overreach, and legal safeguards against the usurpation of parliamentary powers by the courts in the Kenyan context, the paper has unearthed critical insights into the delicate dynamics of democratic governance. The paper has highlighted the significance of striking a fine balance between judicial independence

[111] Ibid
[112] Ibid
[113] Ibid
[114] Ibid

and constitutional integrity, ensuring the harmonious functioning of the three branches of government.

The concept of separation of powers has been found to be of paramount importance in upholding democratic principles and preventing the concentration of power. It assigns distinct roles and responsibilities to each branch, ensuring that no single institution becomes dominant or unaccountable. However, instances of judicial overreach have emerged, where the judiciary may have encroached upon the policy-making sphere of Parliament or the executive, raising concerns about the sanctity of the separation of powers. The paper has critically examined various case laws that outline the distinction between beneficial judicial independence and judicial overreach.

To counteract such instances of judicial overreach, the paper has explored various legal safeguards that can be employed. The principle of rational judicial deference emerged as a vital mechanism, recognizing the expertise and competencies of other branches, particularly the legislature and the executive. By exercising restraint and respecting the lawmaking authority of Parliament, the judiciary can uphold democratic accountability and avoid undermining the legislative process.

A constitutional partnership between the courts and Parliament has been proposed as a constructive means of fostering dialogue, cooperation, and mutual respect between the two institutions. Such a partnership would enable both branches to work collaboratively in interpreting and implementing the constitution, thereby ensuring effective governance and respect for constitutional principles.

Furthermore, the prioritization of constitutionalism has been emphasized as a fundamental aspect of strengthening legal

safeguards. By adhering to the supreme law of the land, all branches of government can act within their prescribed boundaries, enhancing transparency, accountability, and public trust in the democratic process.

Additionally, the distinction between administrative policy and legal rights has been underscored to clarify the limits of judicial review. This distinction ensures that courts focus on matters of legality, regularity, and propriety, rather than delving into the merits of policy decisions, which fall within the purview of the legislature and the executive.

The pursuit of a balanced and accountable system of governance in Kenya necessitates a robust understanding of the doctrine of separation of powers, judicial overreach, and the promotion of legal safeguards. By promoting rational judicial deference, encouraging a constitutional partnership, prioritizing constitutionalism, and clarifying the boundaries of judicial review, the nation can strengthen democratic governance, preserve judicial independence, and uphold the sanctity of the constitution. With these safeguards in place, Kenya can continue on its path towards a just, equitable, and democratic society, where each branch of government plays its vital role in securing the rights and aspirations of its citizens.

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Book Review: Achieving Climate Justice for Development

By: ***James Njuguna****

Title: Achieving Climate Justice for Development
Author: Dr. Kariuki Muigua, PhD
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The idea of Climate Justice is significant for the entire world since it seeks to achieve an agenda that links the struggle for a prosperous safe future for all with a fight against inequalities and exclusion. The book "Achieving Climate Justice for Development" is informed by the need to achieve climate justice as a prerequisite for sustainable development. It explores the idea of climate justice and discusses the efficacy of the measures adopted towards achieving climate justice for development. The book not only adds to the already existing debates in this area but also offers solutions for achieving climate justice for development. The discussion also explores the global and regional approaches to achieving climate justice for development.

This book is aimed at the students, general practitioners, researchers, decision-makers and academics, among others, interested in keeping themselves updated in the study and practice Climate Justice for Development. This book is a companion to the compilation of peer-reviewed articles and published book chapters by Dr. Kariuki Muigua, PhD titled "Combating Climate Change for Sustainability."

The author of the book, Dr. Kariuki Muigua, PhD is the Africa's leading Environmental Lawyer, Environmental, Social and

* *LLB (Hons), LLM (UON), PG Dip. (KSL), Dip. Management (KIM), Dip. Law (CILEX), MCIArb; Lecturer Embu University*

Governance Scholar, Climate Change Expert and leading Alternative Dispute Resolution, Conflict Management and Climate Justice Guru. Dr. Kariuki Muigua is Senior Advocate of Kenya, a Chartered Arbitrator, Kenya's ADR Practitioner of the Year 2021 (Nairobi Legal Awards), ADR Lifetime Achievement Award 2021 (CIArb Kenya), African Arbitrator of the Year 2022 (Africa Arbitration Awards) and Africa ADR Practitioner of the Year 2022 (African Arbitration Association), Member of Permanent Court of Arbitration nominated by Republic of Kenya and Member of National Environment Tribunal (NET). Dr. Kariuki Muigua is a foremost Environmental Law and Natural Resources Lawyer and Scholar, Sustainable Development Advocate and Conflict Management Expert in Kenya. Dr. Kariuki Muigua is a Senior Lecturer of Environmental Law and Dispute resolution at the University of Nairobi School of Law and The Center for Advanced Studies in Environmental Law and Policy (CASELAP).

Chapter One offers an introduction to climate change and climate justice. The author notes that Climate change mitigation has taken centre stage in many development plans and activities around the world due to the disastrous effects that climate change has had not only on economies but also on people's livelihoods. He adds that Kenya has not been left behind, either in mitigation measures or in suffering the effects of this change. It has been acknowledged that if the world is to achieve the United Nations 2030 Agenda for Sustainable Development Goals, then much more needs to be done in a coordinated way that not only focuses on all sectors of the economy but also brings all stakeholders on board. Hence, the book adds to the existing literature on this topic with a focus on Kenya and its diverse topics are useful not only to environmental law researchers and students but also to policymakers in their efforts towards mitigating climate change and building a climate resilient economy for the current and future generations.

Chapter Two discusses Climate Change and Sustainability and underscores that achieving environmental sustainability has become a pertinent concern in the wake of global environmental challenges. These problems include global warming, loss of biodiversity, pollution, deforestation, ocean acidification, food and water insecurity, soil degradation and depletion of natural resources through overfishing, unsustainable mining among others. According to the author, these environmental problems have been worsened by the threat of climate change which is the most defining challenge of our time. The impacts of climate change such as warmer temperatures, intense droughts, water scarcity, severe wild fires, rising sea levels, flooding, melting polar ice, catastrophic storms and declining biodiversity are being witnessed across the world. These environmental problems, including climate change affect environmental sustainability by affecting natural ecosystems as evidenced by loss of biodiversity and depletion of natural resources.

Chapter Three deals with the legal and institutional framework on Climate Justice in Kenya. The concept of Climate Justice has emerged to deal with the justice concerns brought about by climate change. Climate Justice seeks to address the causes and impacts of climate change in a manner that recognizes and fosters the rights and concerns of vulnerable people, communities and countries. The chapter seeks to critically discuss the legal and institutional framework necessary for promoting Climate Justice in Kenya. It is worth pointing out that responding to climate change requires involvement of all stakeholders. Further, the chapter conceptualizes Climate Justice and analyzes its enabling legal framework at the global, regional and national levels.

Chapter Four addresses entrenching Gender in Climate Change Mitigation and Adaptation. The United Nations 2030 Agenda for Sustainable Development envisages a world of universal respect for

human rights and human dignity, the rule of law, justice, equality, and non-discrimination, among others. This calls for the concerted efforts of all players if all this is to be achieved. The Sustainable Development Goals (SDGs) is a set of 17 Sustainable Development Goals and 169 targets that seek to build on the Millennium Development Goals to realize the human rights of all and to achieve gender equality and the empowerment of all women and girls, and are integrated and indivisible and balance the three dimensions of sustainable development: the economic, social and environmental.

Chapter Five deals with Climate Justice and Environmental Conflicts. Over the years, there has been an appreciation of the impact that climate may have in economic results, as well as rising public concern about climate change. The term "climate" refers to observations of climatic factors such as temperature, rainfall, and water availability, as well as climate indices that serve as proxy measures for these variables. While climatic circumstances do not generate conflict on their own, they can modify the environment under which particular social interactions take place, potentially altering the risk of conflict. The environmental principle of polluter pays, which holds that polluters should be held accountable for destroying the environment, justifies the concept of resolving climate change disputes through restorative dispute management approaches. The chapter critically discusses the place of Climate Change in the rise and trends in environmental conflicts.

Chapter Six of the book deals with tapping into Africa's Blue Economy: Challenges and Promises. Blue Economy is defined as a 'sustainable ocean-based economic model that is largely dependent on coastal and marine ecosystems and resources, but one that employs environmentally-sound and innovative infrastructure, technologies and practices, including institutional and financing arrangements, for meeting the goals. The chapter critically discusses

the concept of blue economy in Africa. It explores the problems and promises of Blue Economy in Africa. The chapter further recommends the way forward towards fostering Africa's Blue Economy for Sustainable Development.

Chapter Seven is about embracing Green Economy for Climate Change Mitigation. The author notes that during the Africa Climate Summit, held in Nairobi, Kenya, from 4th to 6th September 2023, African Heads of State and Government committed to advance green industrialization across the Continent by prioritizing energy-intense industries to trigger a virtuous cycle of renewable energy deployment and economic activity, with a special emphasis on adding value to Africa's natural endowments. The chapter critically examines actualization of Africa's green dream. It explores the progress made towards greening economies in Africa. The chapter further discusses opportunities and challenges facing the attainment of green growth in Africa. It also suggests recommendations towards actualizing Africa's green dream for Sustainable Development.

Chapter Eight discusses the concept of sustainability audit as a means of increasing the percentage of businesses that comply with environmental regulations in Kenya. The author explores the topic of environmental compliance by corporations, discusses the challenges that are associated with it, and argues that a sustainability audit is one of the approaches that may be used to address these difficulties. The framework known as Environmental, Social, and Governance (ESG) serves as the foundation for the discussion. The chapter also critically discusses the concept of greenwashing as a strategy used by the corporate world to create the impression that they are compliant with Environmental, Social and Governance (ESG) while hiding the true level of compliance, through marketing, and makes recommendations on how to address the same.

Chapter Nine is dedicated to Application of Science, Technology and Innovation to Climate Change Mitigation and Resilience. The chapter discusses the role of science, technology and innovation in fostering Sustainable Development. It has been argued that science, technology and innovation are vital tools in promoting Sustainable Development. The United Nations Development Programme further acknowledges that creativity, knowhow, technology and financial resources from all of society is necessary to achieve the SDGs in every context. The chapter critically examines ways through which science, technology and innovation can promote Sustainable Development. It argues a case for embracing science, technology and innovation in addressing climate change in order to accelerate the attainment of Sustainable Development across the globe.

Chapter Ten deals with Climate Change Litigation, in particular the Role of Law, Lawyers and Courts in Climate Change Mitigation. The Chapter discusses the concept of climate change litigation and how these challenges can be overcome, especially in the context of Kenya. It posits that while the current trend of climate litigation may not have yet gained significant traction in Kenya, it is anticipated that this will change in due course. This shift is expected to occur as a growing number of individuals become cognizant of their environmental rights and develop higher expectations from the government and other stakeholders in terms of their response to the impacts of climate change on their livelihoods. In the pursuit of achieving sustainable development, the author argues that the promotion of climate litigation in Kenya might serve as a substantial element in effectively tackling this global predicament.

Chapter Eleven is on Climate Financing in Africa. It has been observed that finance plays a vital role in the climate agenda by enhancing the mitigation and adaptation capabilities of countries especially in the developing world. This chapter explores the concept

of climate finance and its role in climate change mitigation and adaptation. It defines climate finance and discusses some of the national, regional and global efforts towards embracing this idea. The chapter critically examines the efficacy of climate finance as a tool of climate change mitigation and adaptation. It further examines the problems inherent in the idea of climate finance. The chapter concludes by proposing reforms towards unlocking climate finance at the national, regional and global levels in order to foster development.

Chapter Twelve tackles some of the contemporary issues in climate justice. The author notes that since GHG emissions are transboundary by nature, global warming is indeed global, and the climate system is shared at the planetary level, meaning we are all affected by climate change phenomena. The emitter and/or beneficiary of GHG emissions is not necessarily the party most affected by such emissions and climate disruption. This has deep implications in terms of the behaviour to be expected from States. In particular, all States must act decisively in order to curb GHG emissions and, in so doing, avoid crossing a dangerous threshold of climate disruption, but also why one State alone is a simple and helpless bystander. Therefore, climate change is the ultimate example of a problem requiring global cooperation between all States. In that context, the chapter highlights some of the contemporary issues on various sectors that arise from the quest for climate justice.

Chapter Thirteen offers conclusion and way forward and not only rehashes the theme of the book but also discusses the need for promoting low carbon development in the country. So far, there have been efforts to foster Climate Justice through measures such as adoption of the principles of Climate Justice in laws and policies, climate funding and climate litigation. However, in the wake of continued climate injustices, there is need to foster Climate Justice

through promoting public participation and access to information, giving voice to women, youth and person with disabilities in climate action, increasing climate funding to developing countries, complying with NDCs especially for developed countries and enhancing climate litigation. Through these measures, the ideal of Climate Justice will be fostered at the national, regional and global levels in the quest towards Sustainable Development.

Review: Journal of Appropriate Dispute Resolution (ADR) and Sustainability, Vol. 1, Issue 1 (2023)

By: ***Mwati Muriithi***[1]

Title: Journal of Appropriate Dispute Resolution (ADR) and Sustainability, Vol. 1, Issue 1 (2023)
Author: Dr. Kariuki Muigua, PhD
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Dr. Kariuki Muigua, PhD, the founding Editor-in-Chief of Journal of Appropriate Dispute Resolution (ADR) and Sustainability, states as follows in its introduction: "Alternative Dispute Resolution mechanisms ought to be considered 'Appropriate' and not 'Alternative' in access to justice as these mechanisms have been part and parcel of African societies since time immemorial and were always the first point of call in the management of disputes owing to their advantages. The Journal proposes interventions towards reframing conflict management in order to fully capture the spirit of ADR as 'Appropriate' Dispute Resolution." This is the third ADR journal founded and edited by Dr. Kariuki Muigua, PhD, Member of Permanent Court of Arbitration (PCA), Member of the National Environment Tribunal (NET) and CIArb African Trustee Emeritus. Dr. Kariuki Muigua is the also the founder and Editor-in-Chief of the Journal of Conflict Management and Sustainable Development and Alternative Dispute Resolution (ADR) of the Chartered Institute of Arbitrators (Kenya Branch). Here is a brief review of the articles in the inaugural edition of *Journal of Appropriate Dispute Resolution (ADR) & Sustainability, Volume 1, Issue 1, 2023*.

[1] *LLB (Hons) KU; Dip. In Law (KSL); ACIArb; Advocate of the High Court of Kenya; Legal Researcher*

In the article "*Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution"* Hon. Dr. Kariuki Muigua critically discusses the need to reframe conflict management in the East African Community (EAC) in order to fully capture the spirit of Alternative Dispute Resolution (ADR) mechanisms. He argues that ADR mechanisms in African societies including the EAC ought to be considered 'Appropriate' and not 'Alternative' in access to justice. It posits that ADR mechanisms have been part and parcel of African societies since time immemorial and were always the first point of call in management of disputes owing to their advantages. The paper explores the ADR framework within the EAC as set out under the Treaty Establishing the EAC. It further highlights challenges facing ADR mechanisms within the EAC. The paper further proposes interventions towards reframing conflict management in the EAC in order to fully capture the spirit of ADR as 'Appropriate' Dispute Resolution.

In "*Arbitration as a Tool for Management of Community Land Conflicts in Kenya"* James Ndung'u Njuguna notes that Arbitration and other forms of Alternative Dispute Resolution (ADR) mechanisms have been designated as some of the methods of dealing with disputes and conflicts involving community land as expressly provided under section 39 (1) of Community Land Act. However, the Community Land Act fails to appreciate the distinction between disputes settlement and conflicts resolution. This paper therefore focuses on the management of community land conflicts through arbitration in Kenya. While the Community Land Act 2016 envisages the use of various ADR mechanisms as conflict management mechanisms, the paper focuses on examining the effectiveness of arbitration as a tool for management of community land conflicts. The paper makes a contribution to the legal debate by suggesting the best way forward

in making arbitration and by extension ADR, more effective tool for the management of community land conflicts in Kenya.

Emmanuel Mwati Muriithi in "*Application of ADR Mechanisms to Manage Sports Disputes in Kenya"* analyses the implementation and impact of the Alternative Dispute Resolution Mechanisms in efficient management of sports disputes in Kenya. The paper critically examines the Alternative Dispute Resolution (ADR) mechanisms that may be applied to manage sports disputes in Kenya and under what circumstances they may be applied. This includes the unique features of these mechanisms, their advantages as well as any challenges that may be encountered in the application of these ADR mechanisms. Finally, the paper offers practical recommendations that can be used to ensure that the sports dispute resolution and settlement process in Kenya is top notch and that parties to sports disputes have confidence that these mechanisms can be able to manage their disputes amicably and ensure that there is harmonization in the society.

In "*Pre-Litigation Mediation as a Means to Enhance Judicial Economy in Kenya's Criminal Justice System,"* Michael Sang offers comprehensive discussion of the transformative potential of prelitigation mediation within Kenya's criminal justice system. Pre-litigation mediation, a concept encompassing scenarios where individuals have not yet been charged but face investigative files or pending trials, is examined within the framework of international and domestic legal foundations. Drawing inspiration from international instruments such as the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, the discourse underscores Kenya's constitutional imperative to consider alternative dispute resolution, including mediation.

In "*Navigating the Digital Dispute Resolution Landscape: Challenges and Opportunities,*" Hon. Dr. Kariuki Muigua interrogates digital dispute resolution. The paper defines digital dispute resolution and discusses the progress made towards embracing this concept. It further highlights some of the platforms and processes that have fostered digital dispute resolution and explores the challenges and opportunities presented by digital dispute resolution. The paper also offers proposals towards enhancing the digital dispute resolution landscape. In "*Embracing Climate Technologies in Climate Change Mitigation and Adaptation for Sustainable Development"* Anne Wairimu Kiramba postulates that there is need to embrace climate technologies for climate change mitigation and adaptation in order to foster Sustainable Development. The paper makes a case for the challenges and opportunities for climate technologies in climate change mitigation and adaptation towards Sustainable Development. It provides actionable insights that address climate change issues.

In "*Effective Justice for Kenyans: Is ADR Really Alternative?"* Hon. Dr. Kariuki Muigua critically examines whether ADR is really an alternative method of managing conflicts in the search for effective justice for Kenyans. Further, this paper seeks to critically analyse the place of Alternative Dispute Resolution (ADR) in the management of disputes and conflicts in Kenya. The writer briefly looks at the earliest development or practice of ADR in various regions across the world including Africa and Kenya in particular. Also examined is whether the now common notion that ADR is alternative to the formal court process is a fallacy and if this perception has continually affected its effective application in conflict management in the country.

Michael Sang in the paper "*Integrating Alternative Dispute Resolution Mechanisms into Kenya's Criminal Justice System: Some Reform Proposals"* explores the integration of Alternative Dispute Resolution

(ADR) mechanisms and restorative justice practices into Kenya's criminal justice system. Drawing insights from international experiences, including South Africa, India, and Canada, the paper examines the constitutional basis for ADR in Kenya and highlights the potential benefits and challenges of reform proposals. Lessons from these jurisdictions emphasize victim empowerment, offender accountability, community involvement, and efficient case resolution. The discussion concludes with reform proposals that prioritize legislative support, cultural sensitivity, victim-centered approaches, and public awareness, offering a path toward a more equitable, efficient, and compassionate criminal justice system in Kenya.

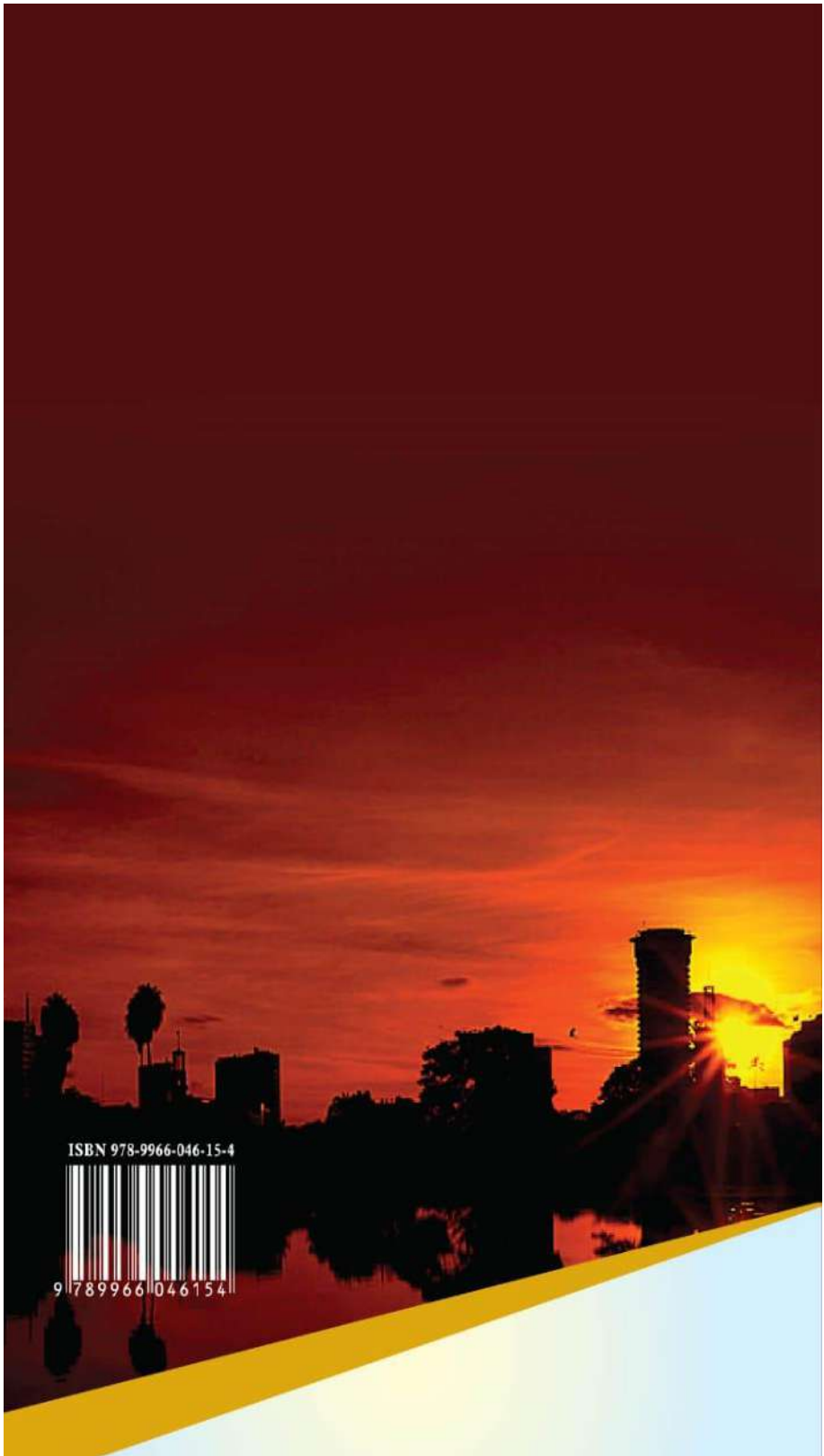
In "*Fostering Efficient Management of Community Land Conflicts in Kenya for Sustainable Development"* James Njuguna notes that land is a important natural resource and one of the primary factors of production. However, land has also been one of the most conflict prone areas in Kenya due to concerns such as historical land injustices and discrimination in the allocation, management and use of land. The Constitution of Kenya, 2010 was enacted with this in mind with among other aims being to address the land concerns in Kenya. The Constitution classifies land to include public land, private land and community land. This paper critically discusses the concept of community land in Kenya. It defines community land. The paper further analyses the nature and causes of community land conflicts in Kenya and approaches towards management of such conflicts. The paper then proposes measures towards efficient management of community land conflicts in Kenya for Sustainable Development.

In "*Linking Alternative Dispute Resolution (ADR) and Environmental, Social and Governance (ESG) Tenets for Sustainable Development"* Hon Dr. Kariuki Muigua focuses on the nexus between Alternative

Dispute Resolution (ADR) mechanisms and Environmental, Social and Governance (ESG) tenets. It argues that linking ADR and ESG tenets can foster the realization of the Sustainable Development agenda. The paper gives an overview of the concepts of ADR, ESG and Sustainable Development. It then critically examines the relationship between ADR mechanisms and ESG tenets and highlights some of the fundamental concerns thereof. The paper further suggests measures through which ADR mechanisms can be linked with ESG tenets in order to achieve Sustainable Development. In "*Harnessing technology to foster biodiversity conservation for Sustainable Development"* Anne Wairimu Kiramba underscores that conservation of biodiversity is among the major global environmental concerns. The quality and quantity of biodiversity is affected by human activities, habitat destruction, pollution and climate change. These challenges create the need for efficient mechanisms aimed at conserving biodiversity in order to realize Sustainable Development. The paper discusses the role of technology in biodiversity conservation. It argues that technology can foster effective biodiversity conservation. The paper examines various technologies that can be harnessed to foster biodiversity conservation for Sustainable Development.

Mwati Muriithi undertakes a book review of Dr. Kariuki Muigua's book "*Accessing Justice Through ADR (Glenwood Publishers Limited, Nairobi, 2022)"* noting that the 1171 Page book contains a collection of independent peer-reviewed articles on Alternative Dispute Resolution (ADR) written over time and published in Journals and book chapters. The publication is necessitated by the need to consolidate the author's work in ADR and make its' access easy for the general readers, scholars, judges and academics. Finally, James Njuguna undertakes a Book Review of Kenya's First Climate Change Book: *Dr. Kariuki Muigua, Combating Climate Change for Sustainability*

(Glenwood, Nairobi, October 2023). He notes that the book not only adds to the already existing literature in the area of climate change and suitability in Africa, but it is the first book containing research and scholarship dedicated exclusively to climate change law in Kenya. The book offers solutions for combating climate change for sustainability and includes discussion on the global and regional approaches to combating climate change for sustainability.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