

Journal of Conflict Management & Sustainable Development



Enhancing Low Carbon Development for Sustainability

Hon. Prof. Kariuki Muigua

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Climate Crisis and Sexual Reproductive Health Rights in Africa

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Editor's Note

Welcome to Volume 11 Issue 2 of the Journal of Conflict Management and Sustainable Development. This is the first issue of the Journal in the year 2024 demonstrating our commitment towards spearheading scholarly discourse on the themes of Conflict Management and Sustainable Development.

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

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

This volume covers relevant topics and themes on Conflict Management and Sustainable Development which include: Enhancing Low Carbon Development for Sustainability; From Rising Tides to Shrinking Rights: Probing the Intersection of Climate Crisis and Sexual Reproductive Health Rights in Africa; The Problematic Practice of Prosecuting Murder Offences Exclusively at the High Court: An Access to Justice Critique; Examining the Socioeconomic Effects of Attaining Homeownership: A review of Dawoodi Bohra Community Housing Initiatives; Taking Urgent Action to Combat Climate Change; Is it time for Part-Time Adjudicators? The Untapped Potential in the Small Claims Court Kenya; Analyzing the Holistic Impact of Islamic Microfinance: A Dual Perspective on Social Welfare and Institutional Dynamics; Tackling the Challenge of Prosecuting No-Body Murder Cases in Kenya: Legal Guidance from South Africa and Australia; The Privatization Conundrum: A look at the Historical

Perspective of Privatization through to its Current Outlook in Kenya; Rethinking Territorial-Border Security in The Mano River Region; Experiences of The Ebola Impacts On Peace and Development; and Analysing the Factors and Consequences of Trade Credit in Karachi's Retail Hardware Market: An Exploratory Study. The Journal also contains a review of *Alternative Dispute Resolution (ADR) Journal*, Volume 12, Issue 1.

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

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

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

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

Prof. Kariuki Muigua Ph.D, OGW; Ch.Arb,
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Prof. 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.

Prof. 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. Prof. Muigua teaches law at the Centre for Advanced Studies in Environmental Law and Policy

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Journal of Conflict Management and Sustainable Development

Volume 11 Issue 2

Content	Author	Page
Enhancing Low Carbon Development for Sustainability	Hon. Prof. Kariuki Muigua	1
From Rising Tides to Shrinking Rights: Probing the Intersection of Climate Crisis and Sexual Reproductive Health Rights in Africa	Murithi Antony	38
The Problematic Practice of Prosecuting Murder Offences Exclusively at the High Court: An Access to Justice Critique	Michael Sang	65
Examining the Socioeconomic Effects of Attaining Homeownership: A review of Dawoodi Bohra Community Housing Initiatives	Abbas Abdul Hussain	97
Taking Urgent Action to Combat Climate Change	Hon. Prof. Kariuki Muigua	133
Is it time for Part-Time Adjudicators? The Untapped Potential in the Small Claims Court Kenya	Henry Murigi	173
Analyzing the Holistic Impact of Islamic Microfinance: A Dual Perspective on Social Welfare and Institutional Dynamics	M Huzaifa Shk M. Indorewala	192
Tackling the Challenge of Prosecuting No-Body Murder Cases in Kenya: Legal Guidance from South Africa and Australia	Michael Sang	231
The Privatization Conundrum: A look at the Historical Perspective of Privatization through to its Current Outlook in Kenya	Maryanne N. Kariuki Thuita	273
Rethinking Territorial-Border Security in The Mano River Region: Experiences of The Ebola Impacts On Peace and Development	Mohamed Sallieu Barrie	290
Analysing the Factors and Consequences of Trade Credit in Karachi's Retail Hardware Market: An Exploratory Study	Hamza Shabbir	333
Journal Review: Alternative Dispute Resolution (ADR) Journal, Volume 12, Issue 1	James Njuguna	370

Enhancing Low Carbon Development for Sustainability

By: *Hon. Prof. Kariuki Muigua**

Abstract

The paper critically explores the concept of low carbon development as a tool for combating climate change and fostering Sustainable Development. It discusses global, regional and national efforts towards embracing the idea of low carbon development. The paper further examines the promises and drawbacks facing the realization of low carbon development. It also proposes measures towards enhancing low carbon development for sustainability.

1.0 Introduction

Climate change has emerged as the most pressing global challenge that affects both developed and developing countries in their efforts towards the realization of the Sustainable Development agenda¹. As a result, there have been global calls on governments and all other stakeholders to put in place measures towards responding to the threat of climate change and ensuring that economies are climate resilient². Responding to climate change is one of the fundamental goals under the United Nation's 2030 Agenda for Sustainable Development³. Sustainable Development Goal 13 calls upon

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¹ Muigua. K., 'Achieving Sustainable Development, Peace and Environmental Security.' Glenwood Publishers Limited, 2021

² Ibid

³ United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1.

countries to take urgent actions towards combating climate change and its impacts⁴.

Responding to climate change involves a two-pronged approach that entails mitigation and adaptation mechanisms⁵. Mitigation involves reducing the flow of heat-trapping greenhouse gases into the atmosphere, either by reducing sources of these gases (for example, the burning of fossil fuels for electricity, heat, or transport) or enhancing the “sinks” that accumulate and store these gases (such as the oceans, forests, and soil)⁶. Mitigation therefore envisages making the impacts of climate change less severe by preventing or reducing the emission of greenhouse gases (GHG) into the atmosphere⁷. The goal of mitigation is to avoid significant human interference with Earth's climate, “stabilize greenhouse gas levels in a timeframe sufficient to allow ecosystems to adapt naturally to climate change, ensure that food production is not threatened, and to enable economic development to proceed in a sustainable manner”⁸. Adaptation on the other hand means anticipating the adverse effects of climate change and taking appropriate action to prevent or minimise the damage they can cause, or taking advantage of

⁴ Ibid, Sustainable Development Goal 13

⁵ NASA., ‘Responding to Climate Change.’ Available at [\(https://climate.nasa.gov/solutions/adaptation-mitigation/#:~:text=Responding%20to%20climate%20change%20involves%20two%20possible%20approaches%3A%20reducing%20and,pipeline%20\(%E2%80%99Adaptation%E2%80%99D\)\)](https://climate.nasa.gov/solutions/adaptation-mitigation/#:~:text=Responding%20to%20climate%20change%20involves%20two%20possible%20approaches%3A%20reducing%20and,pipeline%20(%E2%80%99Adaptation%E2%80%99D)) (Accessed on 07/09/2023)

⁶ Ibid

⁷ European Environment Agency., ‘What is the Difference between Adaptation and Mitigation?’ Available at [\(https://www.eea.europa.eu/help/faq/what-is-the-difference-between#:~:text=In%20essence%2C%20adaptation%20can%20be,\(GHG\)%20into%20the%20atmosphere\)](https://www.eea.europa.eu/help/faq/what-is-the-difference-between#:~:text=In%20essence%2C%20adaptation%20can%20be,(GHG)%20into%20the%20atmosphere) (Accessed on 07/09/2023)

⁸ NASA., ‘Responding to Climate Change.’ Op Cit

opportunities that may arise⁹. Examples of adaptation measures include large-scale infrastructure changes, such as building defenses to protect against sea-level rise, as well behavioral shifts, such as individuals reducing their food waste¹⁰. The aim of mitigation is to reduce our risks from the harmful effects of climate change such sea-level rise, more intense extreme weather events, or food insecurity¹¹. It also includes making the most of any potential beneficial opportunities associated with climate change for example, longer growing seasons or increased yields in some regions¹².

One of the mitigation mechanism that has been embraced in efforts towards confronting climate change is the idea of low carbon development¹³. The concept of low carbon development which is also expressed using the term Low-Emission Development Strategies (LEDS) also known as low-carbon development strategies, or low-carbon growth plans refers to forward-looking national economic development plans or strategies that encompass low-emission and/or climate-resilient economic growth¹⁴. Low carbon development has also been defined as forward-looking, climate-friendly growth strategies that can highlight a country's priority actions for climate mitigation and adaptation, and a country's role in the global effort against climate change¹⁵. The idea of low-carbon

⁹ European Environment Agency., 'What is the Difference between Adaptation and Mitigation?' Op Cit

¹⁰ Ibid

¹¹ NASA., 'Responding to Climate Change.' Op Cit

¹² Ibid

¹³ United Nations., 'Low Carbon Development.' Available at <https://sustainabledevelopment.un.org/index.php?menu=1448#:~:text=The%20concept%20of%20low%20carbon,low%2Dcarbon%20growth%20plans> (Accessed on 07/09/2023)

¹⁴ Ibid

¹⁵ United Nations Economic and Social Commission for Asia and the Pacific., 'Low-Carbon Development Plan.' Available at

development aims to achieve the goals of reducing greenhouse gas emissions, exploiting low-carbon energy, and ensuring economic growth¹⁶. It has been observed that LEDS have attracted interest in the climate negotiations as a soft alternative to voluntary or obligatory GHG emission reduction targets in developing countries¹⁷. Low carbon development focuses on addressing and integrating climate change with development objectives and is therefore a more useful approach for developing countries¹⁸. The idea of low carbon development has been advocated as the inevitable choice to confront climate change and achieve Sustainable Development ¹⁹. To effectively reduce greenhouse gas emissions while fostering economic growth, different countries have begun to search for new development paths among which low-carbon development has become a widely advocated one²⁰.

The paper critically explores the concept of low carbon development as a tool for combating climate change and fostering Sustainable Development. It discusses global, regional and national efforts towards embracing the idea of low carbon development. The paper further examines the promises and drawbacks facing the realization of low carbon development. It also proposes measures towards enhancing low carbon development for sustainability.

<https://www.unescap.org/sites/default/files/45.%20FS-Low-Carbon-Development-Plan.pdf> (Accessed on 07/09/2023)

¹⁶ Yuan. H, Zhou. P, & Zhou. D., 'What is Low-Carbon Development? A Conceptual Analysis.' *Energy Procedia*, 5 (2011) 1706-1712

¹⁷ ¹⁷ United Nations., 'Low Carbon Development.' Op Cit

¹⁸ Ibid

¹⁹ Xin. X, Yuding. W, & Jianzhong. W., 'The Problems and Strategies of the Low Carbon Economy Development.' *Energy Procedia* 5 (2011) 1831-1836

²⁰ Yuan. H, Zhou. P, & Zhou. D., 'What is Low-Carbon Development? A Conceptual Analysis.' Op Cit

2.0 Legal Framework on Low Carbon Development

The concept of low carbon development has its roots in the *United Nations Framework Convention on Climate Change* (UNFCCC)²¹ adopted in 1992. The objective of the UNFCCC is to achieve stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system²². According to the UNFCCC, such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner²³. The UNFCCC further provides that policies and measures to protect the climate system against human-induced change should be appropriate for the specific conditions of each party and should be integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change²⁴. The UNFCCC therefore envisions low carbon development through states pursuing economic development while integrating climate change mitigation and adaptation measures in their national development programmes. It further stipulates several commitments by state parties which are vital in realizing low carbon development such as promoting and cooperating in the development; application and diffusion, including transfer, of technologies; practices and processes that control, reduce or prevent anthropogenic emissions of greenhouse gases; promoting sustainable management, and promoting and cooperating in the conservation and enhancement, as appropriate, of sinks and reservoirs of all greenhouse gases; cooperating in preparing for

²¹ United Nations Framework Convention on Climate Change, United Nations, 1992., Available at <https://unfccc.int/resource/docs/convkp/conveng.pdf> (Accessed on 07/09/2023)

²² Ibid, Article 2

²³ Ibid

²⁴ Ibid, Article 3 (4)

adaptation to the impacts of climate change and taking climate change considerations into account, to the extent feasible, in relevant social, economic and environmental policies and actions; and employing appropriate methods, for example impact assessments towards confronting climate change²⁵. Achieving the commitments stipulated under the UNFCCC is vital in enhancing low carbon development at the global level.

Fostering low carbon development was also a major point of concern under the *Kyoto Protocol* ²⁶ to the UNFCCC which sought to operationalize the United Nations Framework Convention on Climate Change by committing industrialized countries and economies in transition to limit and reduce greenhouse gases emissions in accordance with agreed individual targets ²⁷. The Protocol required these countries to implement measures and policies geared towards low carbon development by achieving their emission limitation and reduction commitments²⁸. These measures include enhancement of energy efficiency; promotion of sustainable forms of agriculture in light of climate change considerations; research on, and promotion, development and increased use of, new and renewable forms of energy, of carbon dioxide sequestration technologies and of advanced and innovative environmentally sound technologies and cooperation between states to enhance the individual and combined effectiveness of their policies and measures adopted towards confronting climate change²⁹. The Kyoto Protocol also required

²⁵ Ibid, Article 4

²⁶ United Nations Framework Convention on Climate Change., 'Kyoto Protocol to the United Nations Framework Convention on Climate Change.' Available at <https://unfccc.int/resource/docs/convkp/kpeng.pdf> (Accessed on 07/09/2023)

²⁷ Ibid

²⁸ Ibid, Article 2

²⁹ Ibid

member states to formulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change and measures to facilitate adequate adaptation to climate change³⁰.

Among the salient provisions of the Kyoto Protocol geared towards fostering low carbon development is the idea of clean development mechanisms³¹. According to the Protocol, the purpose of a clean development mechanism is to assist parties in achieving Sustainable Development and in contributing to the ultimate objective of the UNFCCC by achieving compliance with their quantified emission limitation and reduction commitments³². The Clean Development Mechanism(CDM) was aimed at enabling parties to benefit from project activities resulting in certified emission reductions and using the certified emission reductions accruing from such project activities to contribute to compliance with part of their quantified emission limitation and reduction commitments³³. The Clean Development Mechanism set out under the Kyoto Protocol was vital in enhancing low carbon development by stimulating Sustainable Development and emission reductions, while giving industrialized countries some flexibility in how they meet their emission reduction or limitation targets ³⁴ . The Kyoto Protocol established the first global, environmental investment and credit scheme of its kind, providing a standardized instrument for offsetting emissions, known as certified emission reductions³⁵. The Kyoto Protocol was vital in fostering low

³⁰ Ibid, Article 10 (a)

³¹ Ibid, Article 12

³² Ibid, Article 12 (2)

³³ Ibid, Article 12 (3)

³⁴ United Nations Framework Convention on Climate Change., 'The Kyoto Protocol Mechanisms.' Available at https://cdm.unfccc.int/about/cdm_kpm.pdf (Accessed on 07/09/2023)

³⁵ Ibid

carbon development at the global level until the adoption of the Paris Agreement³⁶.

The *Paris Agreement*³⁷ was adopted to strengthen the global response to the threat of climate change, in the context of Sustainable Development and efforts to eradicate poverty³⁸. It seeks to achieve this goal through measures such as holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change; increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production and making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development³⁹. A key provision of the Paris Agreement aimed at fostering low carbon development is the requirement of state parties to communicate and maintain successive Nationally Determined Contributions (NDCs) that they intend to achieve⁴⁰. The Paris Agreement further requires parties to pursue domestic mitigation measures, with the aim of achieving the objectives of such NDCs⁴¹. Nationally Determined Contributions envisaged under the Paris Agreement are vital in combating climate change and unleashing national actions and investments towards a

³⁶ Ibid

³⁷ United Nations Framework Convention on Climate Change., 'Paris Agreement.' Available at https://unfccc.int/sites/default/files/english_paris_agreement.pdf (Accessed on 07/09/2023)

³⁸ Ibid, Article 2 (1)

³⁹ Ibid

⁴⁰ Ibid, Article 4 (2)

⁴¹ Ibid

low carbon and sustainable future⁴². States through their NDCs have set out ambitious targets towards reducing greenhouse gas emissions through measures such as investments in renewable energy, adopting sustainable agricultural practices and fostering green transport and infrastructure⁴³. The Paris Agreement is therefore of utmost importance in enhancing low carbon development.

At the regional level, the *East African Community Climate Change Policy*⁴⁴ recognizes the adverse impacts of climate change as a major challenge to socio-economic development globally. The Policy is aimed at contributing to Sustainable Development in the East African Community region through harmonized and coordinated regional strategies, programmes and actions to respond to climate change⁴⁵. It further seeks to address the adverse impacts of climate change in the region and harness any potential opportunities posed by climate change in the context of the principle of Sustainable Development⁴⁶. The Policy also seeks to support the integration of climate change into regional development processes and planning including disaster risk management and gender development among other targets⁴⁷.

Towards fostering low carbon development in the region, the Policy emphasizes the importance of mainstreaming climate change adaptation and mitigation into national and regional development plans, taking a sectoral approach, with an emphasis on key socio-

⁴² Fragkos, P et al., 'Energy System Impacts and Policy Implications of the European Intended Nationally Determined Contribution and Low-Carbon Pathway to 2050.' *Energy Policy* 100 (2017) 216–226

⁴³ Ibid

⁴⁴ East African Community., 'East African Community Climate Change Policy.' Available at <https://www.eac.int/environment/climate-change/eac-climate-change-policy-framework> (Accessed on 07/09/2023)

⁴⁵ Ibid

⁴⁶ Ibid

⁴⁷ Ibid

economic sectors and sub-sectors adversely impacted by climate change and with potential opportunities to contribute to mitigation efforts and Sustainable Development of the East African region⁴⁸. These sectors include, but are not limited to: water resources, agriculture and food security (crop, livestock, fisheries production), energy, biodiversity and ecosystem services (forests, wildlife, wetlands, coastal and marine ecosystems), land use and soil protection, human health, tourism, industry, transport and infrastructure, disaster risk management, gender and community development, education, training and research and development⁴⁹.

The Policy also acknowledges that climate change mitigation presents an opportunity for East Africa to benefit from project activities that result in Certified Emission Reductions (CERs) under the CDM as provided for under the *Kyoto Protocol* to the UNFCCC or under similar provisions of any other future agreement⁵⁰. It further acknowledges that CDM can foster Sustainable Development in the region while at the same time contributing to the ultimate objective of the UNFCCC which is to reduce greenhouse gas emissions and further assisting the region in securing funding of certified project activities within the sectors with significant mitigation such as energy, forestry, agriculture, waste management and transport⁵¹. In addition, the Policy urges East African countries to exploit opportunities in Reducing Emissions from Deforestation and Forest Degradation (REDD) and REDD+ through a suite of relevant policies for conservation and sustainable management of forests and enhancement of forest carbon stocks⁵². The Policy is vital in enhancing low carbon development in the East African region since

⁴⁸ Ibid, Part 3.0

⁴⁹ Ibid

⁵⁰ Ibid, Part 3.2

⁵¹ Ibid

⁵² Ibid

it recognizes the critical need for the development of climate change adaptation and mitigation strategies to secure economic growth, social development and environmental sustainability of the region⁵³. Actualizing this Policy is crucial in enhancing low carbon development in the region.

Enhancing low carbon development is also a pertinent objective under the climate change agenda in Kenya as envisioned under the *Climate Change Act*⁵⁴. The Act seeks to provide for a regulatory framework for enhanced response to climate change; to provide for mechanism and measures to achieve low carbon climate development among other purposes⁵⁵. The Act has since been amended by the *Climate Change (Amendment) Act*⁵⁶, 2023 in order to enhance climate change mitigation and adaption measures in Kenya. The Amendment Act introduces the idea of carbon trading in Kenya and defines a carbon market as a mechanism that enables and allows public and private entities to transfer and transact emission reduction units, mitigation outcomes or offsets generated through carbon initiatives, programmes and projects subject to compliance of national and international laws⁵⁷. It also introduces the idea of carbon offset which refers to a reduction or removal of emissions of carbon dioxide or other greenhouse gases made in order to compensate for emissions made elsewhere⁵⁸.

The Amended Act further requires national and county governments to provide guidance in the development and implementation of

⁵³ Ibid

⁵⁴ Climate Change Act., No. 11 of 2016., Government Printer, Nairobi

⁵⁵ Ibid

⁵⁶ Climate Change (Amendment) Act, 2023

⁵⁷ Ibid, S 2

⁵⁸ Ibid

carbon markets and nonmarket approaches in compliance with international obligations⁵⁹.

Part IV A of the Amended Act provides the framework for the regulation of carbon markets in Kenya⁶⁰. It requires the state to formulate a policy direction on carbon markets which should prescribe carbon reduction credits that aim to reduce emissions from current sources through projects, removal or sequestration credits that take carbon dioxide out of the atmosphere and either use or store it via afforestation, reforestation, nature-based solutions or technology-based removal and technologies and projects towards this end⁶¹. The Act requires the trade in carbon markets in Kenya to ensure that transactions in carbon trading aim towards a reduction of greenhouse gas emissions as per the prescribed carbon standards⁶². The Act envisions the participation in carbon markets through bilateral or multilateral trading agreement, trading with private entities and voluntary carbon markets⁶³. Towards this end, the Act gives the Cabinet Secretary in charge of the Ministry of Environment, Climate Change and Forestry power to enter into a bilateral or multilateral agreement with another state party to trade carbon for emission reductions and removals⁶⁴. In pursuance of the principles of Sustainable Development, the Act requires every carbon trading project authorized to undergo an Environmental and Social Impact Assessment in accordance Environmental Management and Coordination Act, 1999⁶⁵. It also requires every carbon project undertaken pursuant to the Act to take into consideration and aim to

⁵⁹ Ibid, S 3

⁶⁰ Ibid, Part IV A

⁶¹ Ibid, S 23 A

⁶² Ibid, S 23 B

⁶³ Ibid, S 23 C (1)

⁶⁴ Ibid, S 23 C (2)

⁶⁵ Ibid, S 23 D (1)

improve the economic, social and cultural wellbeing of the community around the project⁶⁶.

The amended Climate Change Act is an important milestone in fostering low carbon development in Kenya by providing the legal framework for carbon trading. Although the Climate Change Act, 2016 was intended to enhance national response to climate change and provided mechanisms and measures to achieve low carbon climate-resilient development, it did not envisage the concept of carbon trading⁶⁷. The Amended Act has the potential to facilitate the effective implementation of carbon markets and trading making it possible for Kenya to engage a broader range of stakeholders and support its emissions reduction goals⁶⁸. It has been pointed out that if well designed, carbon markets can be an effective, credible and transparent tool for helping to achieve low-cost emissions reductions in ways that mobilize private sector actors, attract investment, and encourage international cooperation⁶⁹. A price on carbon makes clean energy more profitable, allows energy efficiency to earn a greater return, makes low-carbon products more competitive, and values the carbon stored in forests⁷⁰. The amended Climate Change Act can therefore usher in an era of low carbon development in Kenya by

⁶⁶ Ibid, S 23 E (7)

⁶⁷ Section 3 of the Climate Change Act, 2016 stipulates mechanisms and measures to enhance climate change resilience and low carbon development for the Sustainable Development of Kenya. However, it does not embrace the idea of carbon trading

⁶⁸ Kipkemoi. F., 'Key Highlights of Amended Climate Change Act.' Available at <https://www.the-star.co.ke/news/realtime/2023-09-01-key-highlights-of-amended-climate-change-act/> (Accessed on 07/09/2023)

⁶⁹ Natural Justice., 'Kenya's Climate Change Bill: Paving the Way for Sustainable Development and Carbon Markets.' Available at <https://naturaljustice.org/kenyas-climate-change-bill-paving-the-way-for-sustainable-development-and-carbon-markets/> (Accessed on 07/09/2023)

⁷⁰ Ibid

incorporating carbon markets and participation in them as a way to enhance national response to climate change.

Enhancing low carbon development in Kenya is also a priority under the *Energy Act*⁷¹ and the *National Climate Change Action Plan*⁷² (NCCAP) 2023-2027. The Energy Act requires the state to take measures towards harnessing opportunities offered under CDM and other mechanisms including, but not limited to, carbon credit trading to promote the development and exploitation of renewable energy sources⁷³. The NCCAP seeks to enhance low carbon development through measures such as developing carbon market frameworks for climate change adaptation and mitigation programs and providing incentives for investments in carbon markets and developing and operationalizing ecosystem and carbon benefit sharing framework⁷⁴. The NCCAP outlines key priority climate action areas, with adaptation and mitigation actions across policy and regulatory environments; capacity building; knowledge management; technology and innovation; climate finance; and monitoring; reporting and verification⁷⁵. Kenya has therefore adopted an ambitious plan towards enhancing low carbon development. Enhancing low carbon development in Kenya is necessary in meeting the country's NDC target of a 32% reduction in greenhouse gas emissions by 2030⁷⁶.

⁷¹ Energy Act., No. 1 of 2019, Government Printer, Nairobi

⁷² Ministry of Environment, Climate Change and Forestry., 'Draft Strategic Plan: 2023-2027' Available at <https://www.environment.go.ke/wp-content/uploads/2023/05/MoECCF-Strategic-Plan-Draft-07.05.2023-updated.pdf> (Accessed on 07/09/2023)

⁷³ Energy Act, S 75 (2) (g)

⁷⁴ Ministry of Environment, Climate Change and Forestry., 'Draft Strategic Plan: 2023-2027' Op Cit

⁷⁵ Ibid

⁷⁶ NDC Partnership., 'Kenya Unveils Comprehensive Legal Framework to Accelerate Climate Action.' Available at

From the foregoing, it is evident that there are global, regional and national efforts towards enhancing low carbon development for sustainability.

3.0 Enhancing Low Carbon Development for Sustainability: Promises and Drawbacks

Enhancing low carbon development has become a global concern in light of the persisting threat of climate change. The COP 27 cover decision known as the *Sharm El-Sheikh Implementation Plan*⁷⁷ highlights that a global transformation to a low-carbon economy is expected to require investments of at least USD 4 trillion to USD 6 trillion a year⁷⁸. It points out that the world needs USD 4 trillion per year needs to be invested in renewable energy up until 2030 to be able to reach net zero emissions by 2050, and that, furthermore, a global transformation to a low-carbon economy is expected to require investment of at least USD 4–6 trillion per year⁷⁹.

Various techniques and approaches have been adopted towards fostering the idea of low carbon development. These include carbon offsets which have become a popular tool in global efforts to mitigate climate change⁸⁰. Carbon offset programs work by offering regulated polluters the opportunity to increase their own emissions if they subsidize equivalent emission reductions in unregulated markets⁸¹. Carbon offsets allow emission reductions in one location to

<https://ndcpartnership.org/news/kenya-unveils-comprehensive-legal-framework-accelerate-climate-action> (Accessed on 07/09/2023)

⁷⁷ United Nations Framework Convention on Climate Change., 'Decision - /CP.27: Sharm El-Sheikh Implementation Plan.' Available at <https://unfccc.int/documents/624444> (Accessed on 08/09/2023)

⁷⁸ Ibid

⁷⁹ Ibid

⁸⁰ Calel. R, 'Do Carbon Offsets Offset Carbon?' Available at <https://cep.lse.ac.uk/pubs/download/dp1808.pdf> (Accessed on 08/09/2023)

⁸¹ Ibid

compensate for emissions made elsewhere⁸². They create flexible mechanisms for states, companies, organizations, and individuals to purchase carbon credits when their direct emission reductions are too costly or difficult to implement⁸³. These mechanisms were institutionalized at the global level through the Kyoto Protocol through its flexible mechanisms, including the CDM⁸⁴. Carbon offsets have since been embraced as a technique to enhance low carbon development⁸⁵.

The world's largest carbon offset program, the CDM has supported more than USD 90 billion of renewable energy investments in developing countries, equivalent to 13% of their total renewable energy investments⁸⁶. The CDM allows emission-reduction projects in developing countries to earn certified emission reduction (CER) credits, each equivalent to one tonne of CO₂⁸⁷. These CERs can be

⁸² Andonova. L., & Sun. Y., 'Private Governance in Developing Countries: Drivers of Voluntary Carbon Offset Programs.' Available at https://d1wqtxts1xzle7.cloudfront.net/81071680/glep_a_00496-libre.pdf?1645352500=&response-contentdisposition=inline%3B+filename%3DPrivate_Governance_in_Developing_Countri.pdf&Expires=1694170071&Signature=Acp6vkhp64d5t9RD97FC5hc6lin0n4b1ABB4pFgANsbO1nEGWXXh4TTvnWNC09BbBz5HAn~XJENfkHFyLu12V-gfCZq5-x9LMbqCe7wRFutQFLsRoSC8dChKGIDcGwzx-5AG9mKhYaEkHwfV9a4FGCSkLSBj-wI3ZdlJBA1N~XVIIpY8UO75deHZOLY2TTG~A~arO~eRbGMF-MOI7eflT2R4tZCYtPwE29wNW4APrdvpmompl~jbpEvA08CsOfq2oqAEv-OXWKUpN6W4f3mYJJ0WzM02vGv1kBMcx3jnn~AGCYnuHQJ9RwQXSYruaf6fQXiaMLDgv2oH6TnM1xEN~Q__&Key-Pair-Id=APKAJLOHF5GGSLRBV4ZA (Accessed on 08/09/2023)

⁸³ Ibid

⁸⁴ Kyoto Protocol, Article 12

⁸⁵ Andonova. L., & Sun. Y., 'Private Governance in Developing Countries: Drivers of Voluntary Carbon Offset Programs.' Op Cit

⁸⁶ Calel. R, 'Do Carbon Offsets Offset Carbon?' Op Cit

⁸⁷ United Nations Framework Convention on Climate Change., 'What is the Clean Development Mechanism?.' <https://cdm.unfccc.int/about/index.html#:~:text=The%20CDM%20allow>

traded and sold, and used by industrialized countries to meet a part of their emission reduction targets under the Kyoto Protocol⁸⁸. It has been observed that the CDM mechanism stimulates Sustainable Development and emission reductions, while giving industrialized countries some flexibility in how they meet their emission reduction limitation targets⁸⁹.

The United Nations has also developed a Carbon Offset Platform, an e-commerce platform where a company, an organization or a regular citizen can purchase units (carbon credits) to compensate greenhouse gas emissions or towards supporting climate action⁹⁰. The platform features UNFCCC certified projects that reduce, avoid or remove greenhouse gas emissions from the atmosphere⁹¹. The projects are majorly implemented in developing countries and are rewarded with Certified Emission Reductions (CERs), a type of carbon offset measured in tonnes of CO₂ equivalent⁹². The CERs are available for everyone to purchase to offset emissions or in support of the projects⁹³. This platform has aided low carbon development in developing countries through investments in renewable sources of energy such as wind power, hydro power, natural gas and biomass based renewable energy⁹⁴. Carbon offsets are therefore very essential in enhancing low carbon development. In addition to emission reductions, they also support Sustainable Development in the

s%20emission%2Dreduction,tar%20get%20s%20under%20the%20Kyoto%20Protoco
l (Accessed on 08/09/2023)

⁸⁸ Ibid

⁸⁹ Ibid

⁹⁰ United Nations Framework Convention on Climate Change., 'United Nations Carbon Offset Platform.' Available at <https://unfccc.int/climate-action/united-nations-carbon-offset-platform> (Accessed on 08/09/2023)

⁹¹ Ibid

⁹² Ibid

⁹³ Ibid

⁹⁴ Ibid

communities where environmentally friendly projects are implemented, ensuring job creation and continuity, health improvements and many more co-benefits⁹⁵.

The idea of emissions trading has also been adopted as a mechanism for enhancing low carbon development as envisaged under the Kyoto Protocol⁹⁶. According to the UNFCCC, emissions trading allows countries that have emission units to spare - emissions permitted them but not "used" - to sell this excess capacity to countries that are over their targets through carbon markets⁹⁷. It has been pointed out that emissions or carbon trading is a vital instrument in reducing greenhouse gases and enhancing the global fight against climate change⁹⁸. Carbon trading works by getting companies and other entities to pay for every ton of CO₂ emitted into the atmosphere⁹⁹. This can be achieved through a carbon tax, which is a fixed price that must be paid for every ton of CO₂ emitted and a 'trade and cap' system which is a concept that caps an organisation's total emissions, and allows it to trade any excess allocation¹⁰⁰. The UNFCCC opines that emissions trading schemes may be established as climate policy instruments at the national level and the regional level whereby governments set emissions obligations to be reached by the participating entities¹⁰¹. Countries such as the United States of

⁹⁵ Ibid

⁹⁶ Kyoto Protocol, Article 17

⁹⁷ United Nations Framework Convention on Climate Change., 'Emissions Trading.' Available at <https://unfccc.int/process/the-kyoto-protocol/mechanisms/emissions-trading> (Accessed on 08/09/2023)

⁹⁸ Channel News Asia., 'CNA Explains: What is Carbon Trading and How Does it Work?.' Available at <https://www.channelnewsasia.com/sustainability/cna-explains-carbon-trading-tax-climate-change-global-warming-3424796> (Accessed on 08/09/2023)

⁹⁹ Ibid

¹⁰⁰ Ibid

¹⁰¹ United Nations Framework Convention on Climate Change., 'Emissions Trading.' Op Cit

America (USA) have unveiled voluntary carbon trading market schemes with the aim of boosting private investment in clean energy projects in developing countries¹⁰². At the regional level, the African Carbon Markets Initiative (ACMI) has been developed in order to unlock the potential of voluntary carbon markets for financing Africa's energy, climate and development goals¹⁰³. The ACMI was inaugurated at COP 27 and aims to support the growth of carbon credit production and create jobs in Africa¹⁰⁴. This idea has been introduced in Kenya under the amended *Climate Change Act* which introduces carbon markets as a mechanism that enables and allows public and private entities to transfer and transact emission reduction units, mitigation outcomes or offsets generated through carbon initiatives, programmes and projects subject to compliance of national and international laws¹⁰⁵. Giving effect to the provisions of the Act on emissions trading will enhance low carbon development in Kenya. Carbon markets are therefore vital in enhancing low carbon development. Carbon markets offer an incredible opportunity to unlock billions for the climate finance needs of African economies while expanding energy access, creating jobs, protecting biodiversity, and driving climate action¹⁰⁶. It is thus imperative to embrace carbon markets in Africa for low carbon development.

¹⁰² Milman. O, & Lakhani. N., 'US Introduces New Carbon Trading Scheme to Boost Investment in Developing Countries.' Available at <https://www.theguardian.com/environment/2022/nov/09/cop27-us-carbon-trading-scheme> (Accessed on 08/09/2023)

¹⁰³ Sustainable Energy for All., 'Africa Carbon Markets Initiative (ACMI).' Available at <https://www.seforall.org/our-work/initiatives-projects/ACMI> (Accessed on 08/09/2023)

¹⁰⁴ Ibid

¹⁰⁵ Climate Change (Amendment) Act, 2023, S 2

¹⁰⁶ Climate Champions., 'Africa Carbon Markets Initiative Launched to Dramatically Expand Africa's Participation in Voluntary Carbon Market.' Available at https://climatechampions.unfccc.int/africa-carbon-markets-initiative/?gclid=CjwKCAjwjOunBhB4EiwA94JWsJZ_t3NzOzhvgrVH504

In addition, fostering green growth through initiatives such as low carbon infrastructure, smart agricultural practices and sustainable cities is essential in enhancing low carbon development¹⁰⁷. It has been asserted that approximately 79% of global greenhouse gas emissions come from infrastructure construction and operations such as power plants, buildings, and transport¹⁰⁸. In order to curb this situation while maintaining infrastructure as a priority sector for climate action, and national growth in general, climate experts have argued that governments need to radically rethink how infrastructure is planned, delivered and managed in order to make it suitable for a low-emission and resilient future¹⁰⁹.

Low-carbon infrastructure development is therefore necessary in enhancing low carbon development since it generates fewer carbon emissions than traditional infrastructure and helps build resilience in vulnerable countries while protecting against exposure to extreme climate change events¹¹⁰. Low carbon infrastructure projects such as railway infrastructure, urban transport projects, such as Metros and Light Rail projects which reduce car usage and renewable energy projects including solar, wind, and hydropower are therefore crucial

25NnhonFqhjUleIc_hKi8OzQKEaq4xFBFwBoC6tIQAvD_BwE (Accessed on 08/09/2023)

¹⁰⁷ Xin. X, Yuding. W, & Jianzhong. W., 'The Problems and Strategies of the Low Carbon Economy Development.' Op Cit

¹⁰⁸ Brickstone., 'Low-Carbon Infrastructure in Curbing Climate Change.' Available at <https://brickstone.africa/low-carbon-infrastructure-in-climate-change/#:~:text=Urban%20transport%20projects%2C%20such%20as,emissions%20compared%20to%20fossil%20fuels> (Accessed on 08/09/2023)

¹⁰⁹ Ibid

¹¹⁰ Kennedy. C, Ibrahim. N, & Hoornweg. D., 'Low-Carbon Infrastructure Strategies for Cities.' Available at https://www.researchgate.net/profile/Nadine-Ibrahim-2/publication/262954714_Low-carbon_infrastructure_strategies_for_cities/links/5705559e08ae13eb88b9644e/Low-carbon-infrastructure-strategies-for-cities.pdf (Accessed on 08/09/2023)

in enhancing low carbon development¹¹¹. In addition, cities are increasingly adopting Low Carbon City Development Programmes which stipulate a framework and set of comprehensive requirements to help in planning, implementation, monitoring, and accounting for low carbon investments and climate change mitigation actions across all sectors¹¹². Further, climate smart agriculture is vital in enhancing the resilience of the agriculture sector, promoting food security while curbing greenhouse gas emissions¹¹³. Climate smart agriculture is an integrated approach to managing landscapes including cropland, livestock, forests and fisheries that addresses the interlinked challenges of food security and accelerating climate change¹¹⁴. Embracing climate smart agricultural practices can therefore accelerate low carbon development.

Finally, climate finance has also been embraced as a strategy to enhance low carbon development. Climate finance refers to local and global financing of public and private investment that seeks to support mitigation of and adaptation to climate change¹¹⁵. It has also been defined as finance for activities aimed at mitigating or adapting to the impacts of climate change¹¹⁶. Climate finance is vital in climate

¹¹¹ Ibid

¹¹² The World Bank., 'Rio de Janeiro Low-Carbon City Development Program.' Available at <https://www.worldbank.org/en/topic/urbandevelopment/publication/rio-low-carbon-city-program> (Accessed on 08/09/2023)

¹¹³ The World Bank., 'Climate-Smart Agriculture.' Available at <https://www.worldbank.org/en/topic/climate-smart-agriculture> (Accessed on 08/09/2023)

¹¹⁴ Ibid

¹¹⁵ Hong. H., Karolyi. G. A., & Scheinkman. J.A., 'Climate Finance.' *Review of Financial Studies*, Volume 33, Issue 3 (2020)

¹¹⁶ The London School of Economics and Political Science., 'What is Climate Finance?' Available at <https://www.lse.ac.uk/granthaminstitute/explainers/what-is-climate-finance-and-where-will-it-comefrom/> (Accessed on 08/09/2023)

change mitigation and adaptation by accelerating clean energy transitions and building resilience in the most vulnerable countries¹¹⁷. The UNFCCC acknowledges the importance of climate finance and seek to mobilise USD 100 billion in climate finance per year to support developing countries¹¹⁸. At COP27, a breakthrough agreement was reached to provide loss and damage funding for vulnerable countries hit hard by floods, droughts and other climate disasters¹¹⁹. This decision has been lauded as historic since it recognizes the need for finance to respond to loss and damage associated with the severe consequences of climate change¹²⁰. It has also been argued that creation of the Loss and Damage Fund will have a positive impact on the adoption of the carbon market as an addition avenue for climate finance¹²¹. Climate finance is therefore an essential tool of enhancing low carbon development.

¹¹⁷ Hill. A., & Babin. M 'Why Climate Finance is Critical for Accelerating Global Action.' Available at <https://www.cfr.org/in-brief/why-climate-finance-critical-accelerating-global-action> (Accessed on 08/09/2023)

¹¹⁸ United Nations Framework Convention on Climate Change., 'Introduction to Climate Finance.' Available at https://unfccc.int/topics/introduction-to-climatefinance?gclid=EAIaIQobChMI18L91LDRgAMVaIpoCR2_kQzJEAAyAIAAEgI4cfD_BwE (Accessed on 08/09/2023)

¹¹⁹ United Nations Framework Convention on Climate Change., 'Decision - /CP.27 -/CMA.4: Funding Arrangements for Responding to Loss and Damage Associated with the Adverse Effects of Climate Change, Including a Focus on Addressing Loss and Damage.' Available at https://unfccc.int/sites/default/files/resource/cma4_auv_8f.pdf (Accessed on 08/09/2023)

¹²⁰ United Nations Framework Convention on Climate Change., 'Five Key Takeaways from COP 27.' Available at https://unfccc.int/process-and-meetings/conferences/sharm-el-sheikh-climate-change-conference-november-2022/five-key-takeaways-from-cop27?gclid=EAIaIQobChMI-5_C16jRgAMVDzAGAB1IkW6NEAAYASAAEgL_QfD_BwE (Accessed on 08/09/2023)

¹²¹ Climate Trade., 'Top 5 Carbon Market Developments at COP 27.' Available at <https://climatetrade.com/top-5-carbon-market-developments-at-cop27/> (Accessed on 08/09/2023)

From the foregoing discussion, it can be deduced that there has been progress towards enhancing low carbon development. However, despite the efficacy of low carbon development in enhancing sustainability, there are several drawbacks hindering its practice. In the field of carbon trading, it has been pointed out that major polluters might relocate across borders to more lenient jurisdictions in a move known as carbon leakage¹²². Carbon leakage has resulted in companies moving emissions-intensive operations abroad to escape regulation impeding many, perhaps most, mitigation policy options given the perceived risk of these shifting to jurisdictions with weaker climate policies¹²³.

Carbon markets have also been accused of resulting in minimal emissions reductions while burnishing the green reputations of large companies¹²⁴. Consequently, it has been asserted that the idea of carbon offsetting allows polluters to keep polluting instead of reducing greenhouse gas emissions¹²⁵. In addition, transparency concerns have been raised in relation to carbon markets¹²⁶. It has been argued that carbon trading focus could encourage dubious carbon accounting and offsetting practices¹²⁷. There is also the risk of double

¹²² Channel News Asia., 'CNA Explains: What is Carbon Trading and How Does it Work?.' Op Cit

¹²³ Grubb, M., 'Carbon Leakage, Consumption, and Trade.' *Annual Review of Environment and Resources.*, 2022. 47:753–95

¹²⁴ Milman. O, & Lakhani. N., 'US Introduces New Carbon Trading Scheme to Boost Investment in Developing Countries.' Op Cit

¹²⁵ Ibid

¹²⁶ Luhn. A., 'COP27 Boosts Carbon Trading and 'Non-Market' Conservation: But Can they Save Forests?' Available at <https://news.mongabay.com/2022/11/cop27-boosts-carbon-trading-and-non-market-conservation-but-can-they-save-forests/> (Accessed on 09/09/2023)

¹²⁷ Ibid

counting in unregulated voluntary carbon market because they do not fall under jurisdiction of the UNFCCC¹²⁸.

Further, another pertinent concern is the potential of human rights violation since such schemes often involve forests and agricultural land where indigenous and pastoral communities have lived sustainably resulting in widespread reports of land grabs and higher food prices linked to carbon markets in some countries¹²⁹. It has been argued that carbon markets have historically failed to fulfil climate goals and often profoundly harm communities and undermine human rights¹³⁰. Carbon markets have been associated with challenges such as exploitation, inequalities and perverse speculations and financial bubbles¹³¹. There is need to effectively implement carbon markets in order to enhance their role in low carbon development.

Finally, fostering low carbon development in most countries has been hindered by challenges such as economic barriers, infrastructural and operational challenges, lack of proper policy mechanisms and market barriers¹³². There is need to address these challenges in order to enhance low carbon development.

¹²⁸ Crook. J., 'Was COP 27 the Beginning of the End for Corporate Offsetting?' Available at <https://carbonmarketwatch.org/2022/12/07/was-cop27-the-beginning-of-the-end-for-corporate-offsetting/> (Accessed on 09/09/2023)

¹²⁹ Milman. O, & Lakhani. N., 'US Introduces New Carbon Trading Scheme to Boost Investment in Developing Countries.' Op Cit

¹³⁰ Michaelowa. A., 'Failures of Global Carbon Markets and CDM?.' Available at <https://www.tandfonline.com/doi/pdf/10.3763/cpol.2010.0688> (Accessed on 09/09/2023)

¹³¹ Ibid

¹³² Luthra. K et al., 'Analysing the Adoption Barriers of Low-Carbon Operations: A Step Forward for Achieving Net-Zero Emissions.' Available at <https://repository.derby.ac.uk/item/9vz84/analysing-the-adoption-barriers-of-low-carbon-operations-a-step-forward-for-achieving-net-zero->

4.0 Way Forward

In order to enhance low carbon development, it is vital for countries to fulfill their obligations as stipulated under the international climate change framework including the UNFCCC and the Paris Agreement¹³³. The *Paris Agreement* seeks to confront climate change by holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels¹³⁴. The United Nations observes that in order to keep global warming to no more than 1.5°C – as called for in the Paris Agreement – emissions need to be reduced by 45% by 2030 and reach net zero by 2050¹³⁵. It is therefore important for countries to significantly strengthen their Nationally Determined Contributions (NDCs) and take bold, immediate steps towards reducing emissions in order to realize low carbon development and confront climate change¹³⁶.

Further, there is need to establish an international carbon market in order to allow countries to offset their emissions with credits based on greenhouse gas-reducing projects elsewhere as envisaged under the Paris Agreement¹³⁷. The Paris Agreement envisages the development of carbon markets through internationally transferred

emissions#:~:text=The%20results%20also%20show%20that,and%20achievi
ng%20net%2Dzero%20emissions (Accessed on 09/09/2023)

¹³³ United Nations., 'For a Livable Climate: Net-Zero Commitments Must be Backed by Credible Action,' Available at <https://www.un.org/en/climatechange/net-zero-coalition> (Accessed on 09/09/2023)

¹³⁴ Paris Agreement, Article 2 (1)

¹³⁵ United Nations., 'For a Livable Climate: Net-Zero Commitments Must be Backed by Credible Action,' Op Cit

¹³⁶ Ibid

¹³⁷ Nasralla. S, & Abnett. K., 'U.N. Carbon Market Talks to Drag Beyond COP27 as Deals Elusive.' Available at <https://www.reuters.com/business/cop/un-carbon-market-talks-drag-beyond-cop27-deals-elusive-2022-11-17/> (Accessed on 09/09/2023)

mitigation outcomes and voluntary cooperation between countries among other measures¹³⁸. It is imperative to fulfill these provisions in order to develop carbon markets as tools of low carbon development. The outcome of COP 27 was vital in enhancing carbon markets through initiatives such as the establishment of the Loss and Damage Fund and development of the African Carbon Markets Initiative¹³⁹. There is need to further these efforts through appropriate global and regional initiatives including COP 28 in order to strengthen the role of carbon markets in enhancing sustainability¹⁴⁰.

It is also imperative for countries to embrace carbon market initiatives including emissions trading as climate policy instrument at the national level¹⁴¹. There has been progress towards realizing this goal in Kenya through the enactment of the *Climate Change (Amendment) Act* which introduces carbon markets as a mechanism that enables and allows public and private entities to transfer and transact emission reduction units, mitigation outcomes or offsets generated through carbon initiatives, programmes and projects subject to compliance of national and international laws¹⁴². Global and regional cooperation in this sector is also vital in enhancing low carbon development¹⁴³.

¹³⁸ Paris Agreement, Article 6

¹³⁹ United Nations Framework Convention on Climate Change., 'Five Key Takeaways from COP 27.' Op Cit

¹⁴⁰ Climate Trade., 'Top 5 Carbon Market Developments at COP 27.' Op Cit

¹⁴¹ United Nations Framework Convention on Climate Change., 'Emissions Trading.' Op Cit

¹⁴² Climate Change (Amendment) Act, 2023, S 2

¹⁴³ United Nations Framework Convention on Climate Change., 'Emissions Trading.' Op Cit

Low carbon development can also be achieved by countries 'greening' their economies¹⁴⁴. The concept of 'greening' economies has become a pertinent concern in global politics in the wake of challenges facing the planet including the threat of climate change¹⁴⁵. The idea of 'green economy' is a policy focus that emphasizes environmentally sustainable economic progress to foster low-carbon, socially inclusive development ¹⁴⁶. Countries should therefore embrace the idea of green economies through measures such as embracing renewable sources of energy including solar, wind and hydropower, adopting climate smart agricultural techniques, fostering sustainable cities and infrastructure and adoption of sustainable waste management techniques¹⁴⁷. It is also vital for countries to embrace the concept of REDD+, or Reducing Emissions from Deforestation and Forest Degradation in Developing Countries, as a mechanism for sustainable management of forests¹⁴⁸. Forests absorb vast amounts of carbon dioxide and can be a source of greenhouse gas emissions when destroyed or damaged¹⁴⁹. REDD + can enhance low carbon development through sustainable

¹⁴⁴ Bergius. M., 'Towards a Green Modernization Development Discourse: The New Green Revolution in Africa.' *Journal of Political Ecology*, 2019

¹⁴⁵ Ibid

¹⁴⁶ United Nations Economic and Social Commission for Asia and the Pacific., 'Green Growth Uptake in Asia-Pacific Region.' Available at https://unece.org/fileadmin/DAM/env/cep/CEP20/ppp/Item10_b_ESCAP_GreenGrowthUptake_e_sm.pdf (Accessed on 09/09/2023)

¹⁴⁷ Muigua. K., 'Actualizing Africa's Green Dream.' Available at <http://kmco.co.ke/wp-content/uploads/2023/07/Actualizing-Africas-Green-Dream.pdf> (Accessed on 09/09/2023)

¹⁴⁸ Luhn. A., 'COP27 Boosts Carbon Trading and 'Non-Market' Conservation: But Can they Save Forests?' Op Cit

¹⁴⁹ United Nations Framework Convention on Climate Change., 'What is REDD+?' Available at <https://unfccc.int/topics/land-use/workstreams/redd/what-is-redd> (Accessed on 09/09/2023)

management of forests and the conservation and enhancement of forest carbon stocks¹⁵⁰.

Finally, it is essential for countries to unlock climate finance as an essential tool of confronting climate change and enhancing low carbon development¹⁵¹. Climate finance is vital in climate change mitigation and adaptation by accelerating clean energy transitions and building resilience in the most vulnerable countries¹⁵². The outcome of COP 27, the *Sharm El-Sheikh Implementation Plan*,¹⁵³ highlights the world needs USD 4 trillion per year needs to be invested in renewable energy up until 2030 to be able to reach net zero emissions by 2050, and that, furthermore, a global transformation to a low-carbon economy is expected to require investment of at least USD 4–6 trillion per year¹⁵⁴. It is therefore imperative for countries to identify and mobilize effective and appropriate financing for climate action in order to enhance their resilience and effectively confront climate change¹⁵⁵.

These measures are integral in enhancing low carbon development for sustainability.

¹⁵⁰ Ibid

¹⁵¹ Muigua. K., 'Unlocking Climate Finance for Development.' Available at <http://kmco.co.ke/wp-content/uploads/2023/08/Unlocking-Climate-Finance-for-Development.pdf> (Accessed on 09/09/2023)

¹⁵² Hill. A., & Babin. M 'Why Climate Finance is Critical for Accelerating Global Action.' Op Cit

¹⁵³ Sharm El-Sheikh Implementation Plan.' Op Cit

¹⁵⁴ Ibid

¹⁵⁵ United Nations Framework Convention on Climate Change., 'Climate Finance Access and Mobilization Strategy for The Least Developed Countries In Asia: 2022-2030.' Available at https://unfccc.int/sites/default/files/resource/UNFCCC_NBF_SD_Asian_LDCA_final.pdf (Accessed on 09/09/2023)

5.0 Conclusion

The idea of low carbon development has been advocated as the inevitable choice to confront climate change and achieve Sustainable Development¹⁵⁶. The need for low carbon development has been recognized at the global, regional and national levels with various efforts being undertaken towards realizing this ideal¹⁵⁷. Despite progress being made towards realizing carbon development, concerns such as economic barriers, infrastructural and operational challenges, lack of proper policy mechanisms and market barriers are hindering its effective realization¹⁵⁸. Low carbon development can be realized through mechanisms such as countries fulfilling their obligations as stipulated under the international climate change framework including the UNFCCC and the Paris Agreement, establishing an international carbon market, countries embracing carbon market initiatives including emissions trading as climate policy instrument at the national level, greening of economies and accelerating climate finance¹⁵⁹. Enhancing low carbon development for sustainability is an achievable mandatory objective in light of the Sustainable Development agenda.

¹⁵⁶ Xin. X, Yuding. W, & Jianzhong. W., 'The Problems and Strategies of the Low Carbon Economy Development.' Op Cit

¹⁵⁷ Yuan. H, Zhou. P, & Zhou. D., 'What is Low-Carbon Development? A Conceptual Analysis.' Op Cit

¹⁵⁸ Luthra. K et al., 'Analysing the Adoption Barriers of Low-Carbon Operations: A Step Forward for Achieving Net-Zero Emissions.' Op Cit

¹⁵⁹ Yuan. H, Zhou. P, & Zhou. D., 'What is Low-Carbon Development? A Conceptual Analysis.' Op Cit

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text=The%20concept%20of%20low%20carbon,low%2Dcarbon%20gr
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From Rising Tides to Shrinking Rights: Probing the Intersection of Climate Crisis and Sexual Reproductive Health Rights in Africa

*By: Murithi Antony**

Abstract

In the wake of the intensifying climate change crisis, several challenges have emerged that transcend beyond the boundaries of environmental concerns. The crisis has affected multiple aspects of human life, and one crucial yet often disregarded area is sexual and reproductive health rights (SRHR). This article delves into the intricate nexus between the climate change crisis and its cascading impact on access to sexual and reproductive health rights across Africa. The writer sheds light on the disproportionate burden borne by marginalized communities, particularly women and girls, as they cope with exacerbated vulnerabilities stemming from climate change. The article explores various mechanisms through which the advancement of sexual and reproductive health rights can be effectively pursued amidst the challenges posed by the climate change crisis. Concluding with a resounding appeal, the writer rallies the engagement of young individuals, policymakers, and stakeholders, urging them to proactively champion climate change mitigation and the progress of SRHR throughout the African continent.

Key Words: *Climate Change, Human Rights, Equality, Mitigation, Reproductive Health.*

1. Introduction.

As the opening scenes of the popular television series “The 100” unfold, the earth is shown to be a desolate

and uninhabitable place.¹ The planet has suffered a catastrophic environmental collapse caused by centuries of human exploitation and neglect. In this dystopian world, the remaining survivors of the human race are forced to eke out a living in space, waiting for the day when they can return to a planet that is once again capable of sustaining life.² As one watches this series with curious and inquisitive mindset, several questions linger in the mind: But what if this bleak future is not just a thing of science fiction? What if the world is already on the brink of a climate crisis that threatens to render large parts of the planet uninhabitable, particularly in Africa?

That the devastating effects of climate change are not mere figments of our imagination, is axiomatic.³ They are real, and they are happening right now.⁴ The effects of climate change crisis on fundamental human rights call for proactive measures and the formulation of remedies to mitigate these adverse impacts, and to protect human rights.

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¹ The 100, Season 1, Episode 1, "Pilot."

² *Ibid.*

³ See, Martin Beniston, 'Climate change and its impacts: growing stress factors for human societies,' International Review of the Red Cross; Volume 92 Number 879 September 2010, available at < <https://international-review.icrc.org/sites/default/files/irrc-879-beniston.pdf>> accessed on 3rd July 2023.

⁴ Scott, M. J., et al. "Consequences of Climatic Change for the Human Environment." *Climate Research*, vol. 1, no. 1, 1990, pp. 63-79. JSTOR, <http://www.jstor.org/stable/24863378>. Accessed 11 Dec. 2023.

It is upon this contextualization that the article begins by explaining, albeit briefly, the concept of climate change. The article delves into a concise exploration of sexual reproductive health rights (SRHR) in Africa. The interconnection between these two concepts is then examined, culminating in recommendations on advancing SRHR amidst the challenges posed by the climate change crisis.

2. Decoding Climate change

Before delving into an analysis of the concept of climate change, it is essential to first establish a clear understanding of the terms 'weather and climate'. Weather is the temperature, humidity, precipitation, cloudiness and wind that we experience in the atmosphere at a given time in a specific location.⁵ Climate, on the other hand, refers to the comprehensive statistical representation of weather patterns, encompassing the mean and variability of temperature, precipitation, and wind over a designated period, which can range from months to millions of years.⁶ The standard period for such analysis typically spans an average duration of 30 to 35 years.⁷ The concept further encompasses the interrelated conditions prevalent within oceans, land surfaces, and their intricate interactions, incorporating anthropogenic disturbances, as well as ice sheets.⁸ Climate

⁵ *Ibid.*

⁶ Aliyu Baba Nabegu, 'Understanding Climate Change' (2016) available at <https://www.researchgate.net/publication/310844056_understanding_climate_change> (accessed on 3 July 2023).

⁷ United Nations Framework Convention on Climate Change (UNFCCC). (2006). Inventory of Anthropogenic Emissions of Greenhouse Gases. Retrieved from <https://unfccc.int/sites/default/files/resource/docs/2006/06%20%20national%20inventories/general/15.pdf>

⁸ Hoyt, D. V. and K. H. Schatten, *The Role of the Sun in Climate Change* (Oxford University Press, 1997)

change, therefore, is the long term change in the average weather patterns of a region or the whole world.⁹

Climate change is primarily caused by human activities,¹⁰ with the combustion of fossil fuels like coal, oil, and natural gas being the largest contributor.¹¹ When these fuels are burned for energy production, transportation, and industrial processes, they release greenhouse gases such as carbon dioxide into the atmosphere.¹² Deforestation, another human activity, reduces the earth's capacity to absorb carbon dioxide, as trees play a crucial role in carbon sequestration.¹³ Additionally, industrial processes release potent greenhouse gases like methane and nitrous oxide which intensify the natural greenhouse effect, trapping

https://library.uniteddiversity.coop/Climate_Change/The_Role_of_the_Sun_in_Climate_Change.pdf (accessed on 3 July 2023).

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¹¹ Aliyu Baba Nabegu, 'Understanding Climate Change' (2016) available at https://www.researchgate.net/publication/310844056_understanding_climate_change (accessed on 3 July 2023).

¹² Florides, Georgios & Christodoulides, Paul. (2008). Global warming and carbon Dioxide through sciences. *Environment international*. 35. 390-401. 10.1016/j.envint.2008.07.007.

¹³ Chen, Li and Gao, Jiti and Vahid, Farshid, *Global Temperatures and Greenhouse Gases: A Common Features Approach* (September 30, 2019). Available at SSRN: <https://ssrn.com/abstract=3461418> or <http://dx.doi.org/10.2139/ssrn.3461418>

more heat from the sun and leading to global warming, which in turn drives fuels climate change.¹⁴

3. Sexual and Reproductive Health Rights: An examination.

Access to sexual and reproductive health rights constitutes a fundamental human right across all life phases.¹⁵ However, this concept continues to evade numerous individuals in Africa, particularly affecting the vulnerable and marginalized communities, especially women and children.¹⁶ The persistence of this challenge within various communities impedes the bedrock of societal stability, causing development disparities and hindrances to access to justice.¹⁷ These challenges are further compounded by the adverse effects of climate change, which necessitates urgent interventions.¹⁸

¹⁴ Chen, Li and Gao, Jiti and Vahid, Farshid, Global Temperatures and Greenhouse Gases: A Common Features Approach (September 30, 2019). Available at SSRN: <<https://ssrn.com/abstract=3461418>> or <<http://dx.doi.org/10.2139/ssrn.3461418>>

¹⁵ United Nations, 'Reproductive Rights are Human Rights: A handbook on National Human Rights Institutions,' (2014). Available at <<https://www.unfpa.org/sites/default/files/pub-pdf/NHRIHandbook.pdf>> accessed on 29th August 2023.

¹⁶ Ayanleye, Oluwakemi, Women and Reproductive Health Rights in Nigeria (January 18, 2014). OIDA International Journal of Sustainable Development, Vol. 06, No. 05, pp. 127-140, 2013, Available at SSRN: <<https://ssrn.com/abstract=2381324>> accessed on 29th August 2023.

¹⁷ UNEP, 'Climate Change and Human Rights,' (2015) available at <https://wedocs.unep.org/bitstream/handle/20.500.11822/9530/-Climate_Change_and_Human_Rightshuman-rights-climate-change.pdf.pdf> accessed on 29th August 2023.

¹⁸ UNEP, 'Climate Change and Human Rights,' (2015) available at <https://wedocs.unep.org/bitstream/handle/20.500.11822/9530/-Climate_Change_and_Human_Rightshuman-rights-climate-change.pdf.pdf> accessed on 29th August 2023.

Sexual and Reproductive Health Rights (SRHR) encompass, *inter alia*, the right of all persons to make informed decisions regarding their sexual and reproductive well-being without discrimination, coercion, or violence.¹⁹ These rights include the right to access comprehensive sexual education, affordable and quality healthcare services related to reproductive health, family planning, contraception, safe and legal abortion, prevention and treatment of sexually transmitted infections (STIs), and the ability to make choices about one's own body and reproductive life.²⁰ Sexual and Reproductive Health Rights aim to ensure that individuals can exercise control over their sexual and reproductive life, promoting physical and mental well-being, gender equality, and the overall advancement of human rights.²¹

The International Conference of Population and Development (ICPD) defined Reproductive health as;

“a state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes”. Men and women should be able to enjoy a satisfying and safe sex life, have the capability to reproduce and the freedom to decide if, when and how often to do so. This requires informed

¹⁹ Mohammed, Majed, The Impact of Tropical Deforestation on Climate Change (May 26, 2021). Available at SSRN: <https://ssrn.com/abstract=3853646>.

²⁰ Megan Daigle, Alexandra Spencer, 'Reproductive justice, sexual rights and bodily autonomy in humanitarian action: what a justice lens brings to crisis response,' available at

< <https://odi.org/en/publications/reproductive-justice-sexual-rights-and-bodily-autonomy-in-humanitarian-action-what-a-justice-lens-brings-to-crisis-response/>> accessed on 1st September 2023.

²¹ See, International Conference of Population and Development.

choice and access to safe, effective, affordable and acceptable health-care services.²²

It further defines Reproductive Health Care as;

“the constellation of methods, techniques and services that contribute to reproductive and sexual health and wellbeing by preventing and solving reproductive health problems. It also includes sexual health, the purpose of which is the enhancement of life and personal relations and not merely counselling and care related to reproduction and sexually transmitted diseases”.

Further, various other international human rights instruments acknowledge and emphasize the importance of upholding sexual and reproductive health rights. For instance, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa stipulates that States Parties have an obligation to guarantee the respect and advancement of women's right to health, which encompasses sexual and reproductive health.²³ The protocol goes further and lists what these rights encompass as:-

- a) the right to control their fertility;*
- b) the right to decide whether to have children, the number of children and the spacing of children;*
- c) the right to choose any method of contraception;*
- d) the right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS;*

²² International Conference of Population and Development.

²³ Article 14, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

- e) *the right to be informed on one's health status and on the health status of one's partner, particularly if affected with sexually transmitted infections, including HIV/AIDS, in accordance with internationally recognized standards and best practices;*
- f) *the right to have family planning education.*²⁴

These provisions are further echoed by other human instruments in Africa such as the Banjul Charter;²⁵ the Africa Children's Charter;²⁶ ICESCR;²⁷ ICCPR;²⁸ CEDAW;²⁹ among others, all of which have been ratified by most countries in Africa. The importance of sexual and reproductive health and rights is further underscored by their enshrinement in the constitutions of different African countries, hence underscoring their significance. For instance, the Constitution of Kenya guarantees the right to the highest attainable standard of healthcare, encompassing access to reproductive health services.³⁰

Regrettably, notwithstanding these recognitions, the realization of sexual and reproductive health rights in Africa is but a distant aspiration, hindered by numerous obstacles such as insufficient

²⁴ UNEP, 'Climate Change and Human Rights,' (2015) available at < https://wedocs.unep.org/bitstream/handle/20.500.11822/9530/-Climate_Change_and_Human_Rightshuman-rights-climate-change.pdf.pdf> accessed on 29th August 2023.

²⁵ *African Charter on Human and Peoples' Rights.*

²⁶ *African Charter on Rights and Welfare of the Child.*

²⁷ *International Covenant on Economic, Social and Cultural Rights.*

²⁸ *International Covenant on Civil and Political Rights.*

²⁹ *Convention on the Elimination of All Forms of Discrimination Against Women.*

³⁰ Article 43, the Constitution of Kenya 2010.

resources,³¹ expertise,³² and political commitment.³³ These challenges are exacerbated by the detrimental effects of the climate crisis.³⁴

4. The Interplay of Climate Change and Sexual and Reproductive Health Rights: Unveiling a Vital Connection

The impacts of climate change manifest in a multifaceted array of impacts that significantly affect various aspects of human life globally. The scope of this article however discusses impacts related to access to sexual and reproductive health rights. These impacts include the disruption of healthcare infrastructure, food and water scarcity, conflicts, displacements and migrations, heightened inequalities, and increased gender-based violence, alongside psychological and mental health effects, as shall be expounded in the ensuing discourse.

4.1. Disruption of Access to Health Care

Hurricanes, floods, and prolonged droughts, are just some of the ways in which climate change manifest itself, all of which significantly disrupt healthcare systems.³⁵ A notable illustration occurred in 2020 when East

³¹ Gwatimba, Leah, et al. "Obstacles to the Realization of Women's Reproductive Health Rights in Zimbabwe." *African Journal of Reproductive Health / La Revue Africaine de La Santé Reproductive*, vol. 24, no. 3, 2020, pp. 146-53. JSTOR,

<https://www.jstor.org/stable/27086549>. Accessed 11 Dec. 2023.

³² *Ibid.*

³³ *Ibid.*

³⁴ Shalev, Carmel. "Rights to Sexual and Reproductive Health: The ICPD and the Convention on the Elimination of All Forms of Discrimination against Women." *Health and Human Rights*, vol. 4, no. 2, 2000, pp. 38-66. JSTOR, <https://doi.org/10.2307/4065196>. Accessed 11 Dec. 2023.

³⁵ Rousseau C. Climate change and sexual and reproductive health: what implications for future research? *Sex Reprod Health Matters*. 2023 Dec;31(1):2232196. doi: 10.1080/26410397.2023.2232196. PMID: 37594319; PMCID: PMC10444000.

Africa experienced severe floods that obliterated hospitals, adversely affecting numerous individuals.³⁶ Additionally, the deterioration of infrastructure, particularly roads, hampers the provision of essential emergency medical services, especially those related to sexual and reproductive health rights.³⁷ The repercussions extend to the accessibility of healthcare facilities for mothers and young girls, impeding their ability to obtain crucial services including family planning, prenatal care, and safe childbirth assistance.³⁸ Further, the combined impact of flooding and high temperatures expands the geographical distribution of disease vectors such as mosquitoes, consequently elevating the prevalence of diseases like malaria, Zika Virus, and Dengue fever.³⁹ These illnesses can have severe repercussions on reproductive health, leading to birth defects and pregnancy complications.⁴⁰

³⁶ Reuters, 'Ugandan Hospital, Somali town washed away by floods,' (May 8, 2020) available at < <https://www.reuters.com/article/us-health-coronavirus-africa-floods-idUSKBN22K1UChttps://www.reuters.com/article/us-health-coronavirus-africa-floods-idUSKBN22K1UC>> accessed on 30th August 2023.

³⁷ Grace K. Considering climate in studies of fertility and reproductive health in poor countries. *Nat Clim Chang.* 2017;7:479-485. doi: 10.1038/nclimate3318. Epub 2017 Jun 30. PMID: 29937922; PMCID: PMC6009846.

³⁸ Grace K. Considering climate in studies of fertility and reproductive health in poor countries. *Nat Clim Chang.* 2017;7:479-485. doi: 10.1038/nclimate3318. Epub 2017 Jun 30. PMID: 29937922; PMCID: PMC6009846.

³⁹ Bhukta, Dr. Ashok, Impact of Climate Change on Health Sector in India (October 10, 2019). *Climate Change, Agriculture and Environment, Vol.1, No. 1, Pp. 265-277.* Chapter-16, 2019, Available at SSRN: <https://ssrn.com/abstract=3589504https://ssrn.com/abstract=3589504> accessed on 1st September 2023.

⁴⁰ Bhukta, Dr. Ashok, Impact of Climate Change on Health Sector in India (October 10, 2019). *Climate Change, Agriculture and Environment, Vol.1, No. 1, Pp. 265-277.* Chapter-16, 2019, Available at

4.2. Food Insecurity and Water Scarcity

Agriculture stands out as one of the sectors highly affected by the challenges posed by the climate change crisis.⁴¹ Prolonged droughts and severe floods contribute to a reduction in crop yields, consequently undermining food security.⁴² This, in turn, heightens the vulnerability to malnutrition and nutrition deficiency diseases.⁴³ The repercussions of inadequate nutrition are particularly pronounced among adolescent girls, manifesting as irregular menstruation, pregnancy-related complications, and even infertility.⁴⁴ These ramifications not only impact these young mothers but also cast a shadow on the well-being of newborns with most of them being born as underweight or before the full pregnancy period, thereby unsettling the very foundations of the society. Furthermore, the scarcity of water poses obstacles to accessing proper sanitation facilities such as clean water and washrooms, which

SSRN: <https://ssrn.com/abstract=3589504><https://ssrn.com/abstract=3589504> accessed on 1st September 2023.

⁴¹ Chang-Gil Kim, 'The Impact of Climate Change on the Agricultural Sector: Implications of the Agro-Industry for Low Carbon, Green Growth Strategy and Roadmap for the East Asian Region,' available at <<https://www.unescap.org/sites/default/files/5.%20The-Impact-of-Climate-Change-on-the-Agricultural-Sector.pdf><https://www.unescap.org/sites/default/files/5.%20The-Impact-of-Climate-Change-on-the-Agricultural-Sector.pdf>> accessed on 1st September 2023.

⁴² Wall, E., B. Smit, and J. Wandel. eds. 2007. *Farming in a Changing Climate: Agricultural Adaptation in Canada*. Toronto, Canada: UBC Press.

⁴³ Wall, E., B. Smit, and J. Wandel. eds. 2007. *Farming in a Changing Climate: Agricultural Adaptation in Canada*. Toronto, Canada: UBC Press.

⁴⁴ Grace K. Considering climate in studies of fertility and reproductive health in poor countries. *Nat Clim Chang*. 2017;7:479-485. doi: 10.1038/nclimate3318. Epub 2017 Jun 30. PMID: 29937922; PMCID: PMC6009846.

are integral to addressing sexual and reproductive health challenges faced by young women and adolescent girls.⁴⁵

4.3. Conflicts, Displacements and Migrations

Climate change contributes to the depletion of essential resources, exacerbating the challenge of meeting increasing demands, or even mere basic needs.⁴⁶ This intensifies the competition for scarce commodities like water and arable land, potentially heightening pre-existing disputes or inciting new ones.⁴⁷ Consequently, this phenomenon instigates displacements and migrations in search for resources,⁴⁸ disrupting long-established traditional lifestyles and cultural norms.⁴⁹ These disruptions

⁴⁵ Grace K. Considering climate in studies of fertility and reproductive health in poor countries. *Nat Clim Chang*. 2017;7:479-485. doi: 10.1038/nclimate3318. Epub 2017 Jun 30. PMID: 29937922; PMCID: PMC6009846.

⁴⁶ Kushawaha, Jyoti & Borra, Sivaiah & Kushawaha, Abhishek & Singh, Gurudatta & Singh, Pardeep. (2021). Climate change and its impact on natural resources. 10.1016/B978-0-12-820200-5.00002-6.

⁴⁷ Michael Werz and Laura Conley, 'Climate Change, Migration, and Conflict,' available at < https://www.americanprogress.org/wp-content/uploads/sites/2/2022/06/climate_migration.pdf > https://www.americanprogress.org/wp-content/uploads/sites/2/2022/06/climate_migration.pdf > Accessed on 31st August 2023.

⁴⁸ Michael Werz and Laura Conley, 'Climate Change, Migration, and Conflict,' available at < https://www.americanprogress.org/wp-content/uploads/sites/2/2022/06/climate_migration.pdf > https://www.americanprogress.org/wp-content/uploads/sites/2/2022/06/climate_migration.pdf > Accessed on 31st August 2023.

⁴⁹ Marie D. Hoff, 'Effects of Global Warming on Human Cultural Diversity,' available at < <https://www.eolss.net/sample-chapters/c12/E1-04-03-03.pdf> > <https://www.eolss.net/sample-chapters/c12/E1-04-03-03.pdf> > accessed on 31st August 2023.

can subsequently reshape gender dynamics and familial structures.⁵⁰ Particularly, conflict-stricken areas often witness the neglect of sexual and reproductive health services, thereby elevating the risks of early and unwanted pregnancies, unsafe abortions, and sexually transmitted infections.⁵¹ Furthermore, the conflicts break societal frameworks hence perpetrating gender-based violence, with women and children highly affected.⁵² In the face of these challenges, individuals cannot exercise autonomy over their own bodies.⁵³ Equally, displaced populations often seek shelter in refugee camps and provisional accommodations, amplifying the challenges to access comprehensive sexual and reproductive health services, encompassing restricted availability of contraception and maternal care among others.

4.4. Mental Health Impacts

The psychological impact of climate change-related incidents can never be underestimated. Instances of natural disasters and prolonged environmental shifts have the potential to give rise to conditions such as

⁵⁰ Marie D. Hoff, 'Effects of Global Warming on Human Cultural Diversity,' available at < <https://www.eolss.net/sample-chapters/c12/E1-04-03-03.pdf><https://www.eolss.net/sample-chapters/c12/E1-04-03-03.pdf>> accessed on 31st August 2023.

⁵¹ Chinkin, Christine and Yoshida, Keina, Women's Human Rights and Climate Change: State Obligations and Standards (July 16, 2020). LSE Law - Policy Briefing Paper No. 43, Available at SSRN: <https://ssrn.com/abstract=3653520><https://ssrn.com/abstract=3653520>

⁵² UN (2020), Gender, Climate & Security Sustaining inclusive peace on the frontlines of climate change, p.46; available at: https://dppa.un.org/sites/default/files/gender_climate_and_security_report.pdf accessed on 31st August 2023.

⁵³ Murithi Antony, "Reproductive Rights: An Holistic Approach to Abortion Rights in Kenya." Reproductive Justice, Law & Policy eJournal, Vol. 13, No. 63: Dec 1. 2022.

anxiety, depression, and trauma.⁵⁴ These mental health challenges can subsequently exert adverse effects on sexual and reproductive health, influencing elements such as libido, fertility, and general psychological welfare.⁵⁵ Furthermore, these mental health complications can exacerbate interpersonal tensions, thereby complicating conversations concerning sexual and reproductive health within familial and communal contexts.⁵⁶

5. Advancing Sexual and Reproductive Health Rights in the Face of the Climate Crisis

Having analyzed the intricate nexus between the climate change crisis and the vital domain of sexual and reproductive health rights, it becomes imperative to embark upon a discourse concerning the strategies by which these fundamental rights may be advanced amidst the formidable challenges posed by the climate change crisis. Several viable avenues to effectuate this advancement exist, which include but are not limited the following as discussed in the next subtopics.

5.1. Empowering Climate-Resilient Healthcare Services:

As previously discussed, the impacts of climate change have adversely effected healthcare systems in diverse ways, including destruction of

⁵⁴ UN (2020), Gender, Climate & Security Sustaining inclusive peace on the frontlines of climate change, p.46; available at: https://dppa.un.org/sites/default/files/gender_climate_and_security_report.pdf accessed on 31st August 2023.

⁵⁵ UN (2020), Gender, Climate & Security Sustaining inclusive peace on the frontlines of climate change, p.46; available at: https://dppa.un.org/sites/default/files/gender_climate_and_security_report.pdf accessed on 31st August 2023.

⁵⁶ Murithi Antony, "Reproductive Rights: An Holistic Approach to Abortion Rights in Kenya." Reproductive Justice, Law & Policy eJournal, Vol. 13, No. 63: Dec 1. 2022.

infrastructure.⁵⁷ These undermines the capacity of communities to easily access sexual and reproductive healthcare services.⁵⁸ Accordingly, it becomes imperative that, in order to advance sexual and reproductive health and rights amidst the challenges posed by climate change, a critical emphasis be placed upon fortifying healthcare infrastructure to withstand disruptions stemming from climatic exigencies such as storms and floods.⁵⁹ This will ensure that there is an uninterrupted accessibility of SRH services.⁶⁰ Moreover, the healthcare system can be suitably equipped to adeptly address and manage emergent sexual and reproductive health crises that are fueled by climate crisis.⁶¹

⁵⁷ S. Nazrul Islam and John Winkel, 'Climate Change and Social Inequality,' DESA Working Paper No. 152, October 2017, available at < https://www.un.org/esa/desa/papers/2017/wp152_2017.pdf> accessed on 31st August 2023.

⁵⁸ Linda C. Giudice and Others, 'Climate change, women's health, and the role of obstetricians and gynecologists in leadership,' available at < https://www.figo.org/sites/default/files/2021-10/ijgo_13958_Climate_change_womens%20health_role_OBGYNs_leadership.pdf> Accessed on 31st August 2023.

⁵⁹ Ebi, K.L., P. Berry, D. Campbell-Lendrum, G. Cissé, J. Hess, N. Ogden, and R. Schnitter, 2019. "Health System Adaptation to Climate Variability and Change." Rotterdam and Washington, DC. Available online at www.gca.org.

⁶⁰ S. Nazrul Islam and John Winkel, 'Climate Change and Social Inequality,' DESA Working Paper No. 152, October 2017, available at < https://www.un.org/esa/desa/papers/2017/wp152_2017.pdf> accessed on 31st August 2023.

⁶¹ S. Nazrul Islam and John Winkel, 'Climate Change and Social Inequality,' DESA Working Paper No. 152, October 2017, available at < https://www.un.org/esa/desa/papers/2017/wp152_2017.pdf> accessed on 31st August 2023.

5.2. Collaborative Partnerships and Cross-Sector Collaboration for comprehensive solutions.

The need to advance sexual and reproductive health rights necessitates a collaborative approach across sectors.⁶² This entails fostering a partnership among government institutions, non-governmental organizations (NGOs), international entities, climate change advocates, and healthcare providers.⁶³ This, when done, can help to effectively pool resources, expertise, and strategies together to counteract the detrimental ramifications of climate change on sexual and reproductive health rights and other societal dynamics.⁶⁴ This cross-sectoral collaboration, further, can act as catalysts for sustainable development.⁶⁵

⁶² NACEPT 2016 Report: Environmental Protection Belongs to the Public, A Vision for Citizen Science at EPA. ((2016, December 16). Available at <https://www.epa.gov/citizen-science/nacept2016-report-environmental-protection-belongs-public-visioncitizen-science>. Accessed on 31st August 2023.

⁶³ Sinclair, F. et al., 2019: Background Paper the Contribution of Agroecological Approaches To Realizing Climate-Resilient Agriculture. Global Commission on Adaptation, Rotterdam, Netherlands, and Washington, DC, USA, 12 pp. www.gca.org/wp-content/uploads/2020/12/TheContributionsOfAgroecologicalApproaches.pdf. Accessed on 31st August 2023.

⁶⁴ Beek, K., Drysdale, R., Kusen, M. *et al.* Preparing for and responding to sexual and reproductive health in disaster settings: evidence from Fiji and Tonga. *Reproductive Health* **18**, 185 (2021). <https://doi.org/10.1186/s12978-021-01236-2>. accessed on 31st August 2023.

⁶⁵ Inogwabini, Bila-Isia. (2018). Climate Change and Sustainable Development. 10.1007/978-3-319-63951-2_462-1.

5.3. Strengthening Community-Based SRH Advocacy:

For a long time, the discussion on sexual and reproductive health rights has regrettably remained inexistence in various African communities,⁶⁶ despite its centrality in the foundations of the society. This has been further exacerbated by the ramifications of climate change, thereby underscoring the need to entrench sexual and reproductive health rights within the fabric of communal interactions.⁶⁷ Consequently, nurturing localized advocacy initiatives concerning sexual and reproductive health rights has the capacity to endow indigenous communities with the means to assert and safeguard their rights in the face of climate change crisis.⁶⁸ These endeavors also possess the potential to cultivate community-centric strategies for preemptive response to disasters, wherein the integration of sexual and reproductive health rights guarantees unhindered access to indispensable resources during emergencies fueled by climate change.⁶⁹ These measures can as well ameliorate issues such as gender-based violence and sexual violence

⁶⁶ Murithi Antony, *"Reproductive Rights: An Holistic Approach to Abortion Rights in Kenya."* Reproductive Justice, Law & Policy eJournal, Vol. 13, No. 63: Dec 1. 2022.

⁶⁷ Zampas, Christina, Promoting Accurate and Objective Sexuality Education (2007). Interights Bulletin, A Review of the International Centre for the Legal Protection of Human Rights, 2007, Volume 15, No. 4, Available at SSRN: <<https://ssrn.com/abstract=2039720>> Accessed on 31st August 2023.

⁶⁸ Zampas, Christina, Promoting Accurate and Objective Sexuality Education (2007). Interights Bulletin, A Review of the International Centre for the Legal Protection of Human Rights, 2007, Volume 15, No. 4, Available at SSRN: <<https://ssrn.com/abstract=2039720>> accessed on 31st August 2023.

⁶⁹ Beek, K., Drysdale, R., Kusen, M. *et al.* Preparing for and responding to sexual and reproductive health in disaster settings: evidence from Fiji and Tonga. *Reprod Health* **18**, 185 (2021). <https://doi.org/10.1186/s12978-021-01236-2>.. accessed on 31st August 2023.

within the community, thereby effectuating a transformative paradigm shift in these societies.⁷⁰

5.4. Sowing Legal Protection for sexual and reproductive health rights

Judicial institutions, legal practitioners and administrative bodies bear a solemn duty to safeguard and advance fundamental human rights, with essential facets like reproductive and sexual health rights included, alongside the furtherance of environmental democracy and climate justice.⁷¹ Legal practitioners, for instance, play a pivotal role in the crafting policy and legislative frameworks with the aim to augment these fundamental rights.⁷² The judiciary in its interpretation of these legal frameworks,⁷³ is entrusted to do it holistically and fostering not only the development of the law but also adhering to its letter and spirit.⁷⁴ Through the cultivation of a legal milieu that staunchly upholds these rights, a heritage of empowerment destined for the posterity is created.

⁷⁰ Beek, K., Drysdale, R., Kusen, M. *et al.* Preparing for and responding to sexual and reproductive health in disaster settings: evidence from Fiji and Tonga. *Reprod Health* **18**, 185 (2021). <https://doi.org/10.1186/s12978-021-01236-2>. accessed on 31st August 2023.

⁷¹ Fahed Abul-Ethem, 'The Role of the Judiciary in the Protection of Human Rights and Development: A Middle Eastern Perspective,' (Fordham International Law Journal), Volume 26, Issue 3, 2002. Available at <<https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1883&context=ilj>> accessed on 31st August 2023.

⁷² Rouhi, Ebad & Raisi, Leila & Jalali, Mahmoud. (2016). The Role of Lawyer in Establishment of Rule of Law and Protection of Human Rights. *Mediterranean Journal of Social Sciences*. 7. 10.5901/mjss.2016.v7n4p28.

⁷³ Judiciary is the arm on government that interprets the laws legislated by the Parliament.

⁷⁴ Justice Michael Kirby, 'Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?' (2000) 24 Melbourne University Law Review 1, 8.

6. Conclusion

In conclusion, the climate change crisis has had profound impacts not only on the environment but also on fundamental facets of human life, including sexual and reproductive health rights, which are often overlooked. From the disruption of healthcare system to the exacerbation of conflicts and displacements, the adverse impacts of climate change profoundly impinge upon these fundamental aspects of human life. Although legal and policy frameworks intended to ameliorate climate change crisis exist, they have encountered formidable challenges, spanning from inadequate financial resources and technical capacity lack of proper implementation.

To propel the advancement of sexual and reproductive health rights, an imperative mandate emerges for cross-sectoral collaboration. It is imperative that all people recognize the incontrovertible reality of climate change and its all-encompassing effects on human life. Further, grassroots empowerment and advocacy initiatives addressing the intersections of climate change and sexual reproductive health rights hold the potential to significantly enhance the realization of these fundamental human rights amidst the prevailing climate crisis. By doing this, the achievement of a sustainable future is guaranteed.

*From Rising Tides to Shrinking Rights:
Probing the Intersection of Climate Crisis
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(2024) Journal of cmsd Volume 11(2)

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*From Rising Tides to Shrinking Rights:
Probing the Intersection of Climate Crisis
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*From Rising Tides to Shrinking Rights:
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The Problematic Practice of Prosecuting Murder Offences Exclusively at the High Court: An Access to Justice Critique

*By: Michael Sang **

Abstract

This paper examines the problematic practice of prosecuting murder offences exclusively at the High Court in Kenya and presents recommendations for urgent legal reform. It delves into the legal framework for instituting murder charges, including case law, The Constitution of Kenya 2010 and relevant sections of the Penal Code and Criminal Procedure Code, as well as the customary practice of prosecuting murder cases. The discussion explores the concept of access to justice under Article 48 of the 2010 Constitution and the accused person's right to a fair trial under Article 50. Problematic outcomes of the exclusive prosecution at the High Court are identified, including inefficient case management, reduced chances for appeal, denial of justice, and potential corruption. Specific recommendations for urgent legal reform are presented, focusing on the adoption of a reform agenda by the Kenya Law Reform Commission, interpretation of progressive precedents, amendment of criminal court practice rules, and the use of the "interests of justice" argument as an exception to the current law. These reforms aim to address the identified gaps, enhance access to justice, and ensure fair and effective prosecution of murder offences in Kenya.

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Key Words: Prosecuting murder offences, Unlimited Original jurisdiction of the High Court of Kenya, Access to Justice, Legal Reform, Constitution of Kenya, 2010.

1.0 Introduction

The prosecution of murder offences exclusively at the High Court in Kenya has been a longstanding practice, guided by the Penal Code and Criminal Procedure Code.¹ However, this approach has raised concerns regarding access to justice, procedural and substantive gaps, and problematic outcomes.² In this discussion, I have examined the legal framework for instituting murder charges, including case law, The Constitution of Kenya 2010 and the relevant sections of the Penal Code and Criminal Procedure Code. I have also explored the customary practice of prosecuting murder cases in Kenya, highlighting the need for reform. Moreover, I have delved into the concept of access to justice under Article 48 of the 2010 Constitution and the accused person's right to a fair trial under Article 50. Additionally, I have discussed the problematic outcomes of prosecuting murder suspects exclusively at the High Court, such as inefficient case management, reduced chances for appeal, denial of justice, and the creation of opportunities for corruption. Lastly, I have presented specific recommendations for urgent legal reform, including the adoption of a reform agenda by the Kenya Law Reform Commission, interpretation of progressive precedents by the courts, and amendment of criminal court practice rules.

¹ Penal Code Statutes' (LawAfrica Publishing Ltd, 16 October 2020) <<https://www.lawafrica.com/?product=penal-code-statutes>> accessed 24 January 2024

² Ibid

2.0 Prosecuting Murder Offences in Kenya: Legal Basis and Customary Practice

2.1 The Legal Framework for Instituting Murder Charges in Kenya

2.1.1 The Constitution of Kenya 2010

Article 165(3) of the Constitution sets out the jurisdiction of the High Court. It provides thus: “Subject to Clause (5), the High Court shall have: - (a) Unlimited original jurisdiction in criminal and civil matters.” Murder being a criminal offense, this therefore implies that the High Court can hear such cases.

2.1.2 Penal Code

Section 203 of the Penal Code in Kenya defines murder as the act of causing the death of another person with malice aforethought through an unlawful act or omission. “Malice aforethought” refers to the intention to cause death or grievous harm to another person, which may be expressed or implied. The section emphasizes that the act or omission leading to death must be unlawful.

Section 204 of the Penal Code states that any person convicted of murder shall be sentenced to death. This provision reflects the traditional approach to punishment for murder in Kenya, which imposes the most severe penalty available, namely capital punishment.

In Kenya, while the law prescribes the death penalty for murder, the actual application of this punishment has evolved over time. In 2017, the Kenyan Supreme Court ruled that the mandatory imposition of

the death penalty for murder offenses was unconstitutional.³ This ruling allowed judges to exercise discretion in sentencing, taking into account the circumstances of each case:

“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.⁴ In *Woodson* as cited above, the Supreme Court in striking down the mandatory death penalty for murder decried the failure to individualize an appropriate sentence to the relevant aspects of the character and record of each defendant, and consider appropriate mitigating factors. The Court was of the view that a mandatory sentence treated the offenders as a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death thereby dehumanizing them.⁵ 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 dignity⁶. ... 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.⁷ Consequently, failure to individualize the circumstances of an offence

³*Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR.

⁴ *Ibid* para 48

⁵ *Ibid* para 49

⁶ *Ibid* para 50

⁷ *Ibid*, para 53

or offender may result in the undesirable effect of ‘over punishing’ the convict.”⁸

The court in *Philip Mueke Maingi & 5 Others v. DPP & Another* stipulated that Sentencing is a matter within the discretion of the trial court.⁹ The court’s assertion was supported by the Kenya Judiciary Sentencing Policy Guidelines where it is appreciated that: Whereas mandatory and minimum sentences reduce sentencing disparities, they however fetter the discretion of courts, sometimes resulting in grave injustice particularly for juvenile offenders.¹⁰

Indeed, the Criminal Procedure Code emphasizes this concept. Section 216 provides:

“The Court may, before passing sentence or making an order against an accused person under section 215 receive such evidence as it thinks fit in order to inform itself as to the sentence or order to be passed or made.” Section 329 of the Criminal Procedure Code provides: “The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.” This is further buttressed in *Edwin Wachira & 10 Others vs. Republic*¹¹ which stipulated that

“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

⁸ Ibid

⁹ Petition E017 of 2021

¹⁰ Ibid para 96

¹¹ [Petition No. 97 of 2021] para 20

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.”¹²

The court therefore came up with five principles that courts should adhere to in sentencing and punishments. The first principle is that the infliction of punishment is pre-eminently a matter for the discretion of the trial court.¹³ The second, is that of the individualization of punishment, which requires proper consideration of the individual circumstances of each accused person.¹⁴ The third principle is that sentencing remains a discretionary power, exercisable by the court and it involves the deliberation of the appropriate sentence.¹⁵ 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.¹⁶ 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.¹⁷

¹² Ibid, para 20

¹³ Ibid, para 24

¹⁴ Ibid, para 24

¹⁵ Ibid, para 25

¹⁶ Ibid, para 27

¹⁷ Ibid, para 32

2.1.3 Criminal Procedure Code

Section 4 of the Criminal Procedure Code in Kenya provides a general guideline regarding the courts that have jurisdiction to try offenses under the Penal Code, including murder. According to this section, an offense under the Penal Code may be tried either by the High Court or by a subordinate court if the offense is shown in the fifth column of the First Schedule to be triable by that particular subordinate court.

The First Schedule of the Criminal Procedure Code lists various offenses from the Penal Code along with the corresponding courts that have jurisdiction to hear those offenses. However, murder does not have a specific court indicated in the fifth column of the First Schedule. This absence of a specific court listed for trying murder cases implies that murder offenses are considered to be exclusively within the jurisdiction of the High Court. As a result, murder cases are typically prosecuted and tried at the High Court level in Kenya.¹⁸ The decision to assign murder cases exclusively to the High Court may be due to the seriousness of the offense and the potential for severe punishment, including the death penalty. High Courts are generally considered to have greater resources, infrastructure, and expertise to handle complex cases like murder.¹⁹

¹⁸ Muthoga, Rachel, and Robert Bowman. "A Brief Survey of Sentencing Law and Its Practice in Kenya." *Federal Sentencing Reporter*, vol. 22, no. 4, 2010, pp. 249–53. JSTOR, <https://doi.org/10.1525/fsr.2010.22.4.249> Accessed 1 July 2023.

¹⁹ Ibid

The court in *Peter Kariuki Muibau & 11 others v Attorney General & another*²⁰ had the opportunity to interpret the constitutionality of this section. It stipulated thus:

“Going by the dictum in the above cited cases on jurisdiction, the principles of interpretation of the Constitution and the provisions of Article 165 (3), it is clear to me that the jurisdiction of the High Court, to hear murder trials and indeed any other criminal trial for that matter is a mandate that is prescribed and regulated by the Constitution. The commencement of other criminal trials before the Subordinate Court, as opposed to the High Court, is a matter that is regulated by statute, in this case, section 4 of the CPC and the impugned Schedule. To my mind therefore, the mere fact that trials of all criminal cases, except murder and treason, commence before the lower court does not make section 4 of the CPC unconstitutional.” However, as shall be discussed, the assignment of murder cases exclusively to the High Court has raised concerns regarding access to justice. It places a significant burden on the High Court, potentially leading to delays in the disposal of cases and causing backlogs. This situation can impede timely justice for both the accused and the victims’ families.²¹

2.1.4 ODPP Manual

The Office of the Director of Public Prosecutions (ODPP) Manual is a comprehensive guidebook that provides guidance and instructions to prosecutors in Kenya. The ODPP is responsible for conducting

²⁰ 2018] eKLR para 32

²¹ Muthoga, Rachel, and Robert Bowman. “A Brief Survey of Sentencing Law and Its Practice in Kenya.” *Federal Sentencing Reporter*, vol. 22, no. 4, 2010, pp. 249–53. JSTOR, <https://doi.org/10.1525/fsr.2010.22.4.249> Accessed 1 July 2023.

criminal prosecutions on behalf of the state and plays a crucial role in the criminal justice system.²²

The ODPP Manual serves as a reference document for prosecutors, outlining the procedures, principles, and best practices to be followed during the prosecution process.²³ It provides guidance on various aspects of criminal prosecution, including case management, evidence collection, charging decisions, trial preparation, and courtroom advocacy. The manual aims to ensure consistency, fairness, and efficiency in the prosecution of criminal cases. It provides prosecutors with a framework to make informed decisions based on the available evidence and the applicable laws and regulations. By following the guidelines outlined in the manual, prosecutors are expected to uphold the principles of justice, fairness, and the rule of law.²⁴

The ODPP Manual is periodically updated to reflect changes in legislation, legal precedents, and evolving best practices in criminal prosecution. These updates are necessary to keep the manual relevant and aligned with the dynamic nature of the criminal justice system. The manual serves as a valuable resource for both experienced prosecutors and those new to the profession, providing them with guidance and support throughout the prosecution process. It helps ensure that prosecutors adhere to the highest professional standards and that the interests of justice are served.²⁵

²² Article 157 of the Constitution of Kenya 2010

²³ ODPP Manual Kenya

²⁴ Ibid

²⁵ Ibid

2.2 The Customary Practice of Instituting Murder Charges in Kenya

The practice in our courts has been that trials of all criminal cases commence before the lower courts except trials for the offences of murder and treason which commence before the High Court. Indeed, the impugned column of the First Schedule of the CPC is categorical that trials for all offences except murder and treason may commence before the lower court.²⁶

2.3 Access to Justice and the Current Procedural; and Substantive Gaps

2.3.1 The Concept of Access to Justice

Under Article 48 of the 2010 Constitution of Kenya, the concept of access to justice is recognized and protected. The article states that the state has an obligation to ensure access to justice for all individuals. It also emphasizes that any fees required for accessing justice should be reasonable and should not hinder or impede individuals' ability to seek justice.

Access to justice is a fundamental principle that ensures equal and effective participation in the legal system, regardless of a person's socio-economic status, gender, ethnicity, or other factors. It encompasses not only the ability to initiate legal proceedings but also the availability of fair and impartial processes, legal aid services, and remedies.²⁷

²⁶ *Peter Kariuki Muibau & 11 others v Attorney General & another* [2018] eKLR para 26

²⁷ Okiro, P. M. (2018). Access to Justice in Kenya: An Overview of the Legal Aid Act, 2016. *The Comparative and International Law Journal of Southern Africa*, 51(1), 59-81.

While Article 48 enshrines the right to access to justice, there are procedural and substantive gaps that can hinder its realization in practice. These gaps can include:

1. **Affordability:** The cost of legal proceedings, including court fees, legal representation, and related expenses, can pose a significant barrier to accessing justice, particularly for individuals from disadvantaged backgrounds. Despite the constitutional requirement that fees be reasonable, their affordability remains a challenge for many.²⁸
2. **Geographical Accessibility:** Unequal distribution of courts and legal services can limit access to justice, particularly in remote or marginalized areas. Limited physical infrastructure and transportation options can make it difficult for individuals to reach courts or legal aid offices, thereby restricting their ability to seek justice.²⁹
3. **Procedural Complexity:** The complexity and technicality of legal processes can be intimidating and confusing for individuals without legal expertise. Lack of legal literacy and limited access to legal information can impede meaningful participation and understanding of one's rights and responsibilities within the justice system.³⁰
4. **Delays and Backlogs:** Lengthy court procedures, case backlogs, and administrative inefficiencies can undermine access to justice.

²⁸ Ibid

²⁹ Ibid

³⁰ Ibid

Prolonged delays can hinder individuals' ability to have their cases heard in a timely manner, causing frustration and discouragement.³¹

2.3.2 The Accused Person's Right to Fair Trial

Article 50 of the 2010 Constitution of Kenya guarantees the right to a fair trial for every accused person. The article outlines various rights and safeguards that ensure fairness and due process throughout the trial process including presumption of innocence, notification of charges, adequate time for defense, expeditious trial, right to appeal among others.

These provisions aim to safeguard the accused person's rights to a fair trial, ensure due process, and prevent miscarriages of justice. It promotes transparency, accountability, and the protection of individuals' fundamental rights within the criminal justice system. 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 25I 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.³²

2.3.3 Procedural and Substantive Gaps in Instituting Murder Charges in Kenya

In the context of instituting murder charges in Kenya, there can be procedural and substantive gaps that impact the effectiveness and

³¹ Ibid

³² *Edwin Wachira & 10 Others vs. Republic* [Petition No. 97 of 2021], para 47

fairness of the criminal justice system. These gaps can hinder the proper investigation, prosecution, and adjudication of murder cases. For instance, insufficient or flawed investigation procedures can result in a lack of crucial evidence or the failure to identify and apprehend the responsible parties. Incomplete or poorly conducted investigations can weaken the case and undermine the prospects of a successful prosecution.³³

Secondly, Limited forensic capabilities and inadequate evidence handling procedures can compromise the integrity and reliability of evidence. Proper collection, preservation, and analysis of evidence are essential for building a strong case and establishing the guilt or innocence of the accused.³⁴

Thirdly, protecting witnesses, especially in high-profile murder cases, is crucial for ensuring their safety and willingness to come forward and testify. Failure to provide adequate witness protection measures can result in intimidation, threats, or even violence, which can hinder the prosecution's ability to present a compelling case.³⁵

In addition, overburdened courts, case backlogs, and lengthy trial proceedings can delay justice and cause frustration for both the accused and the victims' families. Delays can result in prolonged pretrial detention and may compromise the fairness of the trial due to fading memories or the unavailability of witnesses.³⁶

³³ Owino, P. O., & Odhiambo, G. O. (2018). Prosecution of Homicide Offences in Kenya: The Dilemma of Jurisdictional Competence. *Journal of Legal Studies*, 6(1), 1-23

³⁴ Ibid

³⁵ Ibid

³⁶ Ibid

Addressing these procedural and substantive gaps requires comprehensive reforms and targeted interventions. It involves strengthening investigative capacities, improving forensic capabilities, providing adequate legal aid services, ensuring witness protection mechanisms, addressing case backlogs, and enhancing training and expertise among justice sector professionals.³⁷

3. Problematic Outcomes of Prosecuting Murder Suspects Exclusively at the High Court

3.1 The Difficulty of Prosecuting Multiple Offences in the Same Transaction

Prosecuting murder suspects exclusively at the High Court can lead to problematic outcomes, particularly when multiple offenses are involved in the same transaction. To illustrate this, I consider a hypothetical case study involving charges of murder, rape, torture, and indecent exposure.

In this case, the difficulty arises from the fact that all the offenses fall under different legal frameworks and require distinct elements to be proven. The High Court, while capable of handling serious offenses like murder, may not possess the specialized knowledge and resources to effectively address each offense individually within a single trial.

Prosecuting multiple offenses within the same transaction involves complex legal proceedings. Each offense requires a separate examination of evidence, witnesses, and legal arguments. The High Court, which primarily focuses on murder charges, may face

³⁷ Ibid

challenges in efficiently addressing the complexities and nuances of each offense, potentially resulting in delays and increased legal complexities.³⁸

The High Court's capacity may be strained when dealing with multiple offenses within the same trial. The court may face challenges in managing the increased workload, including the need for additional resources, expertise, and time. This can potentially impede the court's ability to provide prompt justice and contribute to case backlogs.³⁹

Bundling multiple offenses in the same trial can also impact the fairness of the proceedings. The accused may face challenges in mounting a proper defense due to the varied nature of the charges and the need to address distinct legal and factual aspects. This can potentially undermine the accused's ability to present a robust defense for each offense.⁴⁰

Given these challenges, it may be more appropriate to consider alternative approaches for cases involving multiple offenses within the same transaction. This could include exploring the possibility of separate trials, specialized courts or divisions, or streamlining procedures to ensure each offense receives the necessary attention and expertise for a fair and effective adjudication.

³⁸ Owino, P. O., & Odhiambo, G. O. (2018). Prosecution of Homicide Offences in Kenya: The Dilemma of Jurisdictional Competence. *Journal of Legal Studies*, 6(1), 1-23

³⁹ Ibid

⁴⁰ Ibid

3.2 Problematic Outcomes of Exclusive Prosecution of Murder Suspects at the High Court

3.2.1 Inefficient Case Management

One of the problematic outcomes of exclusively prosecuting murder suspects at the High Court is inefficient case management.⁴¹ This inefficiency can manifest in various ways and can have significant implications for the timely resolution of cases.

The High Court may already have a heavy caseload, including matters beyond murder cases. When murder cases are exclusively prosecuted at the High Court, it can further contribute to case backlogs, resulting in delays in the administration of justice. The backlog of cases may lead to prolonged pretrial detention for the accused, undermining their right to a speedy trial.⁴²

Furthermore, murder trials often involve complex evidence, multiple witnesses, and intricate legal arguments.⁴³ These factors, combined with limited resources, can result in protracted trial proceedings at the High Court. Lengthy trials not only contribute to the backlog of cases but also place a burden on the accused, victims, witnesses, and their families, as well as the overall efficiency of the justice system.⁴⁴

⁴¹ Comms IK, 'Ensure Fairness during Trial of GBV Victims Accused of Murder - ICJ Kenya' (ICJ Kenya - International Commission of Jurists, 11 October 2023) <<https://icj-kenya.org/news/ensure-fairness-during-trial-of-gbv-victims-accused-of-murder/>> accessed 24 January 2024

⁴² Maina, M. N. (2017). Administration of Criminal Justice System in Kenya: Challenges and Prospects. *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction*, 9(2), 04517007.

⁴³ Ibid

⁴⁴ Ibid

In *Charles Henry Nyaoke v Cabinet Secretary, Ministry of Interior and Co-ordination of National Government & 4 others*⁴⁵ the court was categorical as follows:

“Nevertheless, we take judicial notice that murder trials take an unduly long time to be concluded at the High Court. Some of the reasons have to do with other players in the justice chain; and, the limited number of judges’ vis a vis the volume of criminal and civil cases filed annually. Article 48 of the Constitution obligates the State to ensure access to justice for all persons. We thus find that from the standpoint of access to and expeditious delivery of justice, murder suspects would significantly benefit if their trials were held in the magistrates’ court. As we have stated earlier, there is no longer sufficient justification for holding these trials at the High Court.”⁴⁶ However, the court in *Peter Kariuki Muibau & 11 others v Attorney General & another*⁴⁷ was of a different view. It stipulated thus:

“Lastly, the setting of the hierarchy of courts is for administrative efficiency so that minor matters are heard locally or by lower courts and major matters by higher courts. This ensures that the administration of justice is streamlined thereby reducing court delays, backlog and costs because court personnel under such a system have specialized knowledge and can process cases quickly.”⁴⁸ The court went on as follows:

⁴⁵ [2020] eKLR

⁴⁶ Ibid para 134 and 135

⁴⁷ [2018] eKLR

⁴⁸ Ibid para 42

“My take, however, is that the law makers had valid reasons for placing murder and treason cases in a different category from other criminal cases and this must have informed their decision to make provisions that their trials commence before the High Court. The seriousness of a murder charge cannot be gainsaid as it is an offence that may pose danger to the very existence of the human race if left unchecked.”⁴⁹

The court was however alive to the fact that:

“In view of the fact that currently, all subordinate courts are manned by magistrates and prosecutions conducted by state counsel who in most cases have the same training and experience in law as judges of the High Court, perhaps it is a high time that the law makers relooked the impugned section 4 of the CPC with a view to amending so as to make it relevant to the present realities and to make it possible for murder trials to commence before the magistrates court.”⁵⁰

3.2.2 Reduction of Chances for Appeal and Discriminatory Effect

Another problematic outcome of exclusively prosecuting murder suspects at the High Court is the reduction of chances for appeal and the potential for a discriminatory effect. By prosecuting murder suspects exclusively at the High Court, there are limited opportunities for appeal.⁵¹

⁴⁹ Ibid para 43

⁵⁰ Ibid para 44

⁵¹ Charles Henry Nyaoke v Cabinet Secretary, Ministry of Interior and Co-ordination of National Government & 4 others [2020] eLR

Appeals serve as a crucial safeguard to rectify errors, ensure fairness, and address any miscarriages of justice.⁵² However, when lower courts are bypassed, the accused may be deprived of the chance to have their case reviewed by higher judicial authorities. This can undermine the principle of due process and the right to a fair trial.⁵³ In *Charles Henry Nyaoke v Cabinet Secretary, Ministry of Interior and Co-ordination of National Government & 4 others*⁵⁴ the court stipulated thus:

“But the point to be made is that initiating a murder trial in the High Court compromises an essential element of the right to a fair trial. We thus readily find that under the hierarchy of courts provided by Articles 162 and 169 of the Constitution, a murder convict is denied a vital step in the appellate chain.”⁵⁵

However, the court in *Peter Kariuki Muibau & 11 others v Attorney General & another*⁵⁶ was of a different opinion. It held as follows:

“In the instant case I note that the petitioners’ complaint was not that they were denied an opportunity to appeal, but rather that they were not able to have a second chance on appeal as other suspects whose hearings commenced before the subordinate court. I am however not persuaded by the petitioners’ argument that because they did not have a chance to a second appeal, this amounted to the denial to a right to fair hearing as Article 50 (2) (q) of the Constitution

⁵² Ibid

⁵³ Maina, M. N. (2017). Administration of Criminal Justice System in Kenya: Challenges and Prospects. *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction*, 9(2), 04517007.

⁵⁴ [2020] eKLR

⁵⁵ Ibid para 116

⁵⁶ [2018] eKLR

on the right of appeal does not stipulate that such a right must occur twice.”⁵⁷

Focusing exclusively on the High Court for murder prosecutions can have a discriminatory effect on individuals who may face additional barriers in accessing justice. For example, marginalized groups or those with limited financial resources may struggle to navigate the complexities of the High Court system, including securing legal representation or presenting a robust defense. This can lead to an imbalance in the justice system, perpetuating inequalities and potential discrimination in the treatment of murder suspects.⁵⁸

3.2.3 Abuse of Process/Denial of Justice

Another problematic outcome of exclusively prosecuting murder suspects at the High Court is the potential for abuse of process and denial of justice. This can occur when the prosecution takes advantage of procedural loopholes or engages in unethical practices to secure a conviction. The high-stakes nature of murder cases, coupled with limited scrutiny in lower courts, may create an environment conducive to such abuses. This undermines the integrity of the justice system and compromises the rights of the accused.⁵⁹

Exclusive prosecution at the High Court can create a heightened focus on securing convictions, potentially overshadowing the pursuit

⁵⁷ Ibid para 41

⁵⁸ Maina, M. N. (2017). Administration of Criminal Justice System in Kenya: Challenges and Prospects. *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction*, 9(2), 04517007.

⁵⁹ Ibid

of justice.⁶⁰ The pressure to obtain a guilty verdict in high-profile murder cases may lead to rushed investigations, compromised evidence, and a diminished commitment to ensuring a fair trial. This emphasis on conviction rates can undermine the principle of presumption of innocence and compromise the overall integrity of the justice system.⁶¹

Furthermore, The High Court, with its caseload and limited resources, may have difficulty giving individualized attention to each murder case.⁶² Defendants' unique circumstances, such as mental health issues, trauma, or other mitigating factors, may not receive sufficient consideration when cases are exclusively prosecuted at the High Court. This can result in less nuanced and tailored judgments, potentially leading to disproportionate or unjust outcomes.⁶³

3.2.4 Creation of Opportunities for Corruption

Another problematic outcome of exclusively prosecuting murder suspects at the High Court is the creation of opportunities for corruption. Concentrating murder cases solely at the High Court can increase the risk of corruption within the judicial system.⁶⁴

⁶⁰ Accessing justice in Kenya: An analysis of case backlog in Nakuru ...
<<https://su-plus.strathmore.edu/server/api/core/bitstreams/33ef4a59-6082-449e-ab0a-27d8bc82b903/content>> accessed 24 January 2024

⁶¹ Ibid

⁶² Ibid

⁶³ Ibid

⁶⁴ Kenya administration of Justice suffers generally from inadequate ...
<https://www.icj.org/wp-content/uploads/2001/08/kenya_attacks_justice_2000.pdf> accessed 24 January 2024

Murder cases are often high-profile and carry significant social, political, and emotional weight.⁶⁵ The gravity of these cases, combined with the potential for intense public scrutiny and media attention, can create an environment where corruption becomes more likely.⁶⁶ Individuals may be tempted to engage in corrupt practices to influence the outcome of the case or manipulate the judicial process.⁶⁷ In addition, Murder cases, especially those that garner public attention, may involve substantial financial resources, including legal fees, expert witnesses, and other related expenses.⁶⁸ The prospect of financial gain can incentivize corruption, such as bribing officials, influencing the selection of judges, or tampering with evidence. Exclusive prosecution at the High Court can amplify these financial incentives, as the stakes are higher, increasing the potential for corruption to take place.⁶⁹

Corruption can also thrive within patronage networks, where influential individuals or groups seek to exert undue influence over the judicial system. The exclusive prosecution of murder cases at the High Court may provide an opportunity for these networks to exert

⁶⁵ Goldberg SG, 'Getting Away with Murder: Acquittals in High-Profile Cases' (2014) 5959 *PsychCRITIQUE*

⁶⁶ *Ibid*

⁶⁷ Karanja, D. W. (2013). The Prosecution of Offences: An Analysis of Prosecutorial Discretion and the Doctrine of *Nolle Prosequi* in Kenya. *University of Nairobi Law Journal*, 3(1), 83-108

⁶⁸ Thompkins G, 'High-Profile Murder Case Holds Kenya's Attention' (NPR, 27 November 2006)

<<https://www.npr.org/templates/story/story.php?storyId=6542590>> accessed 24 January 2024

⁶⁹ *Ibid*

their influence, leading to compromised judicial decisions, biased outcomes, and a lack of justice for the parties involved.⁷⁰

4. Specific Recommendations for Urgent Legal Reform

4.1 Adoption as a Reform Agenda by the Kenya Law Reform Commission

The adoption of urgent legal reform as an agenda by the Kenya Law Reform Commission can play a crucial role in addressing the problematic outcomes of exclusively prosecuting murder suspects at the High Court. The Kenya Law Reform Commission should undertake a comprehensive review of the criminal justice system, with a specific focus on the prosecution of murder cases. This review should assess the effectiveness, efficiency, and fairness of the current system and identify areas in need of reform.⁷¹

The Commission can recommend expanding the jurisdiction of lower courts to handle murder cases. This would ensure that defendants have the opportunity for a fair trial and access to justice at multiple levels of the judicial system. It would also help alleviate the burden on the High Court, allowing it to focus on complex and high-profile cases.⁷²

The Commission can recommend procedural reforms to streamline the process of prosecuting murder cases. This may include improving case management, ensuring timely and efficient trial proceedings, and implementing measures to protect the rights of the accused.

⁷⁰ Ibid

⁷¹ Odhiambo, G. O., & Kivai, E. W. (2018). Criminal Justice Reforms in Kenya: Challenges and Prospects. *Journal of African Law*, 62(1), 1-25.

⁷² Ibid

Procedural reforms should prioritize fairness, transparency, and adherence to due process principles.⁷³

The Commission can also explore the potential for alternative dispute resolution mechanisms in murder cases. This could involve encouraging mediation, reconciliation, or restorative justice approaches, particularly in cases where the parties involved express a willingness to engage in such processes. Alternative dispute resolution can provide opportunities for healing, closure, and community involvement in the justice process.⁷⁴

Furthermore, The Commission should actively engage with relevant stakeholders, including legal professionals, civil society organizations, and the public, to solicit their input on the urgent legal reform agenda. This will help ensure that the reforms are comprehensive, inclusive, and responsive to the needs and aspirations of the society.⁷⁵

Finally, The Commission should establish mechanisms for monitoring and evaluating the impact of the recommended legal reforms. This will help assess the effectiveness of the reforms, identify any challenges or unintended consequences, and make necessary adjustments to improve the justice system continuously.⁷⁶

⁷³ Ibid

⁷⁴ Ibid

⁷⁵ Ibid

⁷⁶ Ibid

4.2 Interpretation by Courts of Progressive Precedents

One important aspect of urgent legal reform is the interpretation by courts of progressive precedents.

It is crucial to provide comprehensive and ongoing training to judges and legal professionals on interpreting and applying progressive precedents. This training should emphasize the principles of equality, human rights, and access to justice. By enhancing the understanding of judges regarding progressive legal concepts and evolving societal norms, the courts can contribute to more consistent and equitable interpretations of the law.⁷⁷

Public awareness and education about progressive precedents and their implications are essential. Efforts should be made to inform the legal community, including judges, lawyers, and legal academics, as well as the general public about landmark judgments and their potential impact on the justice system. This can be achieved through publications, workshops, seminars, and other forms of outreach.⁷⁸

The Kenya Law Reform Commission can develop guidelines or directives for courts on the interpretation of progressive precedents. These guidelines should provide a framework for judges to apply principles of equality, non-discrimination, and human rights in their decision-making process. Clear and well-articulated guidelines can promote consistency and predictability in the interpretation of progressive precedents across different courts.⁷⁹

⁷⁷ Mulwa, A. M. (2014). Judicial Reforms in Kenya: The Journey so Far. *Journal of Law, Policy and Globalization*, 26, 77-90.

⁷⁸ Ibid

⁷⁹ Ibid

4.3 Amendment of Criminal Court Practice Rules

Amending the criminal court practice rules is another important aspect of urgent legal reform. The criminal court practice rules should be amended to introduce streamlined procedures for the prosecution of murder cases. This includes setting clear timelines for various stages of the trial, ensuring efficient case management, and minimizing delays in the justice process. Simplifying and expediting the procedures can contribute to more timely and effective resolution of murder cases.⁸⁰ They should also be amended to specify that magistrate's courts can also hear murder cases, with well outlined procedural guidelines.

By amending the criminal court practice rules, the legal system can adapt to the specific needs and complexities of prosecuting murder cases. The aim should be to ensure fairness, efficiency, and access to justice for all parties involved while upholding constitutional rights and principles.⁸¹

4.4 Use of The 'Interests of Justice' Argument as an Exception to the Current Law

The use of the "interests of justice" argument as an exception to the current law can be a significant recommendation for urgent legal reform. Introducing the "interests of justice" as a discretionary exception allows judges to consider individual circumstances and the broader context of a case. This flexibility enables them to deviate from strict application of the law when necessary to achieve a just outcome. It recognizes that the law cannot always anticipate every unique

⁸⁰ Ibid

⁸¹ Ibid

situation and provides judges with the discretion to act in the interest of justice.⁸²

The "interests of justice" argument allows judges to balance various factors, such as fairness, equity, and the specific circumstances of the case. This includes considering the severity of the crime, the vulnerability of the parties involved, the impact on the victim and the community, and any mitigating or aggravating circumstances. By taking a holistic approach, judges can ensure that justice is served in individual cases, even if it means deviating from strict application of the law.⁸³

While the "interests of justice" exception provides flexibility, it is essential to establish clear guidelines and principles to ensure consistent and principled decision-making. This can be achieved through the development of case law, judicial training, and regular monitoring and evaluation of how the exception is applied. Transparent and accountable use of the exception helps guard against arbitrary or discriminatory decisions.⁸⁴

In addition, for the effective use of the "interests of justice" exception, it may be necessary to have legislative support and clarity. This can be achieved through legislative amendments or the formulation of guidelines that outline the scope and considerations to be taken into account when invoking the exception. Legislative backing provides a

⁸² Odhiambo, G. O., & Kivai, E. W. (2018). Criminal Justice Reforms in Kenya: Challenges and Prospects. *Journal of African Law*, 62(1), 1-25.

⁸³ Ibid

⁸⁴ Ibid

solid foundation for the proper implementation of the exception within the legal system.⁸⁵

5. Conclusion

The exclusive prosecution of murder offences at the High Court in Kenya has revealed several areas of concern that require urgent legal reform. The existing legal framework, while providing the basis for prosecuting murder cases, exhibits procedural and substantive gaps that hinder access to justice. The customary practice of prosecuting murder cases also raises issues regarding fairness and effectiveness. The concept of access to justice, as enshrined in Article 48 of the 2010 Constitution, emphasizes the need for reasonable fees and unhindered access to justice for all individuals. Additionally, Article 50 underscores the accused person's right to a fair trial, encompassing various rights and safeguards. However, the exclusive jurisdiction of the High Court for murder cases poses challenges to these fundamental principles.

The problematic outcomes associated with prosecuting murder suspects exclusively at the High Court include inefficient case management, reduced chances for appeal, denial of justice, and the potential for corruption. These outcomes undermine the goal of achieving timely and fair resolution of murder cases. To address these challenges, urgent legal reform is recommended. The Kenya Law Reform Commission should adopt a reform agenda focused on comprehensive changes to the existing legal framework. The interpretation of progressive precedents by the courts can guide the application of the law in a manner that aligns with constitutional principles and promotes access to justice.

⁸⁵ Ibid

Amendment of the criminal court practice rules is also essential to ensure streamlined procedures, fair disclosure of evidence, protection of witnesses and vulnerable individuals, and the provision of adequate legal aid. Furthermore, considering the "interests of justice" as an exception to the current law can enable judges to address unique circumstances and achieve just outcomes on a case-by-case basis.

By implementing these specific recommendations, Kenya can foster a more equitable and efficient system for prosecuting murder offences. It is imperative to prioritize access to justice, safeguard the accused person's right to a fair trial, and address the challenges and gaps that currently exist within the legal framework. Initiating murder trials at the magistrates' courts will significantly lower the costs of the trial, reduce the distance to court and expedite delivery of justice. This will result in better realization of access to justice which is a fundamental right guaranteed by Articles 48, 50 and 159(2)(a) and (b) of the Constitution.⁸⁶

Reforming the prosecution of murder offences in Kenya is necessary to enhance access to justice, promote fairness, and ensure effective criminal justice outcomes. The proposed recommendations, if implemented, have the potential to improve the system and better serve the needs of all stakeholders involved in murder cases.

⁸⁶ *Charles Henry Nyaoke v Cabinet Secretary, Ministry of Interior and Co-ordination of National Government & 4 others* [2020] ekLR para 108 and 109

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Examining the Socioeconomic Effects of Attaining Homeownership: A review of Dawoodi Bohra Community Housing Initiatives

*By: Abbas Abdul Hussain**

Abstract

The benefits of homeownership in comparison to renting remains a widely debated issue in recent times, especially after the Housing Crisis of 2008. Before the crisis, most countries favoured strategies that allowed their citizens to easily purchase their own homes and often ignored or discouraged rental tenures. However, in the aftermath of the crisis, a growing number of scholars and policymakers have begun favouring rental tenure as the ideal mode of dwelling for individuals. In order to show how homeownership might improve an individual's socioeconomic conditions, this paper examines the socioeconomic effects of homeownership among the Dawoodi Bohra Community members in India. Employing a Mixed Method research design, the study investigates the "Fayze-Enayate-Amakinal-Anwar" (FEA) housing initiative, analysing survey data from 414 beneficiaries across 2020 and 2021 to assess its effectiveness in improving the overall well-being of community members. Both the quantitative and qualitative results indicate that attaining homeownership through community initiatives has effectively enhanced the financial stability of community members, improved their psychological health and enriched the social well-being of occupants. The paper concludes on the notion that homeownership does indeed have a positive socioeconomic impact on occupants and is still an effective means towards achieving socioeconomic upliftment.

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Keywords: Homeownership, Dawoodi Bohra Community, Community Housing Initiative, Socioeconomic Upliftment

Introduction

Housing is universally acknowledged as one of the most essential and fundamental necessities for human beings (Thiele, 2002). In technical terms, a house is defined as a unit that offers physical shelter and lodging to individuals or groups (U.S Department of Housing, 1942). However, the term has grown to encompass several essential qualities that have far-ranging effects on its occupants' lives. The effects of a home on its occupants are three-fold. The physical need is accompanied by a psycho-social need for a space in which one is not only sheltered but feels at home and part of a community (Noonan & Watson, 2017). Therefore, an ideal home offers a secure place for occupants to live with dignity while promoting their physical, mental and social well-being. The notion of owning one's home or land has a long historical tradition in human societies. For example, it can be found in discussions of family farm ownership's advantages over rental arrangements in early agricultural economies dating back to 3000 BC, Mesopotamia (Powelson, 1987). The modern-day concepts of homeownership can be traced back to colonialism and the industrial revolution. At the onset of globalisation, homeownership has seen exceptional growth in countries like Japan, Australia, Spain, Singapore and Norway, among many others (Ronald, 2008). According to a national census of Indian households in 2011, the homeownership rate in the country stands at an incredible 86% (Census Commissioner of India, 2011).

The 2008 financial crisis, stemming from the burst of the massive U.S. housing bubble, marked the most significant disruption to the U.S.

housing market since the Great Depression. This crisis led to a nearly 5% increase in renters in the 50 largest U.S. metropolitan areas, climbing from 36.1% in 2006 to 41.1% in 2014, while homeownership declined by 5% (Garber, 2016). Post-crisis, researchers are reevaluating the perceived benefits of homeownership, advocating for more consideration of rental tenure as a viable strategy for socioeconomic upliftment (Calhoun, 2018). Before the crisis, countries typically favoured policies promoting easy homeownership, but a shift has occurred, challenging the notion that homeownership is the ideal path for empowerment. Organizations like the United Nations argue that the advantages of homeownership were overstated and contributed to crises like the 2008 Housing Crisis (United Nations, 2007), prompting a growing need for extensive research in the field of "socioeconomic upliftment studies" to establish homeownership's genuine effectiveness.

The Dawoodi Bohra Community places a unique importance on suitable housing conditions for its members and has linked homeownership with a positive impact on all aspects of one's life (His Holiness Syedna Mohammed Burhanuddin, 2015). In 2005, His Holiness Syedna Mohammed Burhanuddin established the *Fayze-Enayate-Amakinal-Anwar* (FEA) housing department to realize his vision of improving housing for the community (FEA, 2016). Operating from Mumbai, India, the FEA aims to assist community members in acquiring homeownership and to aid those community members whose housing conditions are below standards by helping them renovate their existing dwellings in a manner that fulfils both their physical and mental needs (FEA, 2016). The FEA employs a unique financing model, with eligible households receiving one-third of the funding from the FEA, another third from an affluent

community member or *Qardan Hasanā* (an interest-free loans), while the final third is arranged by the household itself (FEA, 2021). This financial model not only achieves the initiative's goals but also promotes self-sufficiency among beneficiaries. Research suggests that involving recipients in securing resources fosters self-sufficient behaviours, particularly when it comes to homeownership (United Nations DESA, 2012).

Over the years, the FEA has established an efficient approval process for providing housing assistance to eligible households, ensuring both accessibility and transparency for those involved (FEA, 2019). Using a digital platform and the assistance of the community's local leaders, the process involves recommendations, digital applications, verification, on-site visits, and final evaluations. The FEA aims to efficiently serve as many community members as possible within 15-20 days of initial application (FEA, 2019). In addition to individual projects, the community is engaged in the ambitious "Saifee Burhani Upliftment Project" in Bhendi Bazar, Mumbai, aiming to redevelop almost 280 structures into 17 towers and provide better living conditions for over 3,200 households (Master, 2015). A notable feature is that tenants will become property owners once the project is completed (Master, 2015).

In a span of 16 years, the FEA has assisted almost 17,302 Dawoodi Bohra Community households (from 2005 to 2021), demonstrating the initiative's effectiveness (FEA, 2021). In the era of the 52nd leader of the community (from 2005 to 2015), the FEA successfully uplifted the housing conditions of nearly 11,053 households, out of which 7,984 projects involved providing assistance to either purchase or build new dwellings for community members (FEA, 2016).

Continuing this legacy, His Holiness Syedna Aaliqadar Mufaddal Saifuddin, the current leader of the community has expanded the FEA's reach, personally visiting dilapidated dwellings to expedite aid delivery (M. Yamani, personal communication, September 10, 2022). The initiative has made an impact in 17 cities in India, empowered by local volunteers, showcasing its commitment to enhancing housing conditions globally (FEA, 2021).

Literature Review

Throughout the past century, extensive research has been dedicated to homeownership, examining its various aspects and impacts. While some studies emphasize the benefits of homeownership, others advocate for rental tenure as a path to socioeconomic upliftment. Researchers have thoroughly explored the effects of homeownership from multiple angles, categorizing the literature into three main areas: financial, physiological and psychological, and social effects. In terms of financial effects, several studies have established homeownership as a crucial mechanism for accumulating wealth and ensuring financial stability (Daniel et al., 2019; Habitat for Humanity International, 2020; Harvard, 2015; Herbert et al., 2013; Sinai & Souleles, 2005). Some studies have found that maintaining homeownership, even during economic crises, proves advantageous for households in the long run (Goodman & Mayer, 2018). The influence of housing tenure on individuals' occupations has also been explored, with research indicating that homeownership facilitates entrepreneurship by providing the necessary financial security, space, and flexibility for entrepreneurial endeavours (Harding & Rosenthal, 2017; Reuschke, 2016; Reuschke & Houston, 2016). Regarding psychological and physical wellbeing, a substantial body of research highlights positive impacts of homeownership on

occupants. Homeowners, compared to renters, exhibit better physical health, self-esteem, and life satisfaction, as well as improved mental wellbeing across all age groups (Lam, 1985; Macintyre et al., 1998; Rohe et al., 2002; Rohe & Basolo, 1997; Rohe & Stegman, 1994; Zumbro, 2014). Studies suggest that owning a home, in contrast to renting, is associated with a 13 to 23% higher quality home environment, fostering greater cognitive ability in children and reducing the likelihood of behavioural problems (Boehm & Schlottmann, 2002; Haurin et al., 2002). According to empirical studies, homeownership is linked to a sense of control over dwellings, thereby inducing perceived control and personal autonomy crucial for psychological wellbeing (Charry et al., 2020; Galster, 1987; Saunders, 1984). Homeowners are also more likely to ensure home upkeep and accumulate additional wealth through home price appreciation, contributing to overall life satisfaction (Courtin et al., 2018).

In the realm of social effects, empirical research emphasizes varying benefits conferred by homeownership to individuals and communities. The literature categorizes social benefits into two sections: effects on social and political participation, and effects on occupants' local neighbourhoods and social capital (Fischer, 1982; Zavisca & Gerber, 2016). The prevailing argument is that homeownership, representing a significant investment for occupants, fosters a heightened concern for the well-being of their immediate neighbourhoods compared to renters (Cox, 1982; Rohe & Stegman, 1994). Similarly, owner-occupied households accumulate more social capital than rental households, fostering better relationships with neighbours (DiPasquale & Glaeser, 1999; Logan & Molotch, 1987; McCabe, 2012; Rohe & Lindblad, 2013). This is attributed to

homeowners' significantly longer tenure in a community, increasing the likelihood of forming social capital (Blum & Kingston, 1984). Overall, homeownership is seen as a catalyst for community well-being and social capital accumulation.

Currently, in order to assist low-income households in attaining homeownership, different types of organisations have implemented various schemes around the world. In general, research on homeownership initiatives has found three distinct types of organisations providing assistance to households. Among these, government entities, such as the U.S Department of Housing and Urban Development (HUD), play a significant role, utilizing public funding to facilitate homeownership (Collins, 2007). Additionally, Non-Government Organizations (NGOs) and Community-Based Organizations (CBOs) also contribute to housing assistance independently of state oversight (Babawale, 2007). Despite sharing a common goal, a notable distinction between these organizations lies in their scope: CBOs are locally oriented, aiding individuals within a specific community, while NGOs, typically governed by external individuals, address the needs of impoverished groups, either domestically or internationally (Turner, 1988). A case in point for a well-examined NGO in the realm of housing assistance is "Habitat for Humanity" (Husock, 1995) whereas the Dawoodi Bohra Community's Housing initiative exemplifies a Community-Based Organization.

Despite extensive research on the socioeconomic benefits of homeownership, its status as the most ideal housing tenure has faced numerous challenges from scholars. While some studies have questioned the causal link between homeownership and individual benefits (Dietz & Haurin, 2003; Herbert et al., 2013; Keightley, 2019;

Retsinas & Belsky, 2002; Rohe & Lindblad, 2013), others assert that the system is rigged in favour of homeownership, and if given the chance, renting could be a better solution to our housing needs (Atterhög, 2005; Kemeny, 1981; Khaire & Jha, 2022; Kohl, 2019). As per certain studies, attaining homeownership is increasingly associated with higher mortgage and maintenance cost, potentially impacting a household's financial well-being (Forrest & Yip, 2013; Retsinas & Belsky, 2002; Ronald, 2018). Moreover, homeownership may struggle to compete with the returns offered by more lucrative investments, leaving homeowners more vulnerable during a housing price decline due to their inability to diversify their wealth (Beracha & Johnson, 2012; Herbert et al., 2013). Similarly, studies supporting rental housing as a viable avenue for socioeconomic upliftment argue that households opting for renting may enjoy the freedom and increased mobility provided by this housing tenure (Elsinga, 1995). In summary, a review of the literature on homeownership reveals a pertinent need to demonstrate the benefits of homeownership initiatives in comparison to rental assistance for low-income households. The current study has utilized a Mixed-Method Research Design to examine the effects of homeownership initiatives on Dawoodi Bohra Community members. A review of these initiatives and an analysis of their results has yet to be done. The results of the study will not only portray the effectiveness of the homeownership assistance strategies employed by the Community, but also showcase the general benefits of the homeownership in empowering individuals.

Data and Methodology

Research Methodology

The study has utilized a descriptive approach as it primarily seeks to evaluate and describe the socioeconomic impact of homeownership on individuals who became homeowners through community initiatives.

Research Design

The study employs a Mixed Method Research Design, integrating various research methods to enhance the understanding of the research problem (Creswell & Clark, 2018). The data analysed includes both quantitative and qualitative measures in the form of close-ended and open-ended interview questions. The quantitative approach provides a comprehensive overview of the effects of attaining homeownership, while the qualitative approach captures detailed participant experiences, offering a contextual understanding of the effects of homeownership in comparison to renting.

Research Process

The study has utilised the convergent approach in studying the data. The chosen approach involves concurrently collecting quantitative and qualitative data, then analysing the two data sets separately and ultimately merging the results during its interpretation (Bryman, 2006). The reason for selecting the said approach is that both data sets are complimentary in nature, and by combining the findings a more comprehensive understanding of homeownership can be gleaned.

Data Collection

The data utilized in this study is derived from interviews conducted by the *Fayze-Enayate-Amakinal-Anwar* (FEA) Housing Department of

the Dawoodi Bohra Community in the years 2020 and 2021. The author initiated contact with the FEA Head Office in Mumbai, India, submitted a research proposal, and obtained raw survey data along with other essential information regarding the housing projects organized by the institution. Utilizing existing data on homeownership beneficiaries within the Dawoodi Bohra Community enabled the study to access a relatively larger sample size that might have been challenging to reach independently, facilitating a timely completion of the research. Even though, the usage of secondary data is limited by the variables contained in the data sets, the study has attempted to minimize the limitations present in the data by critically evaluating the identified data sets (Cheng & Phillips, 2014).

Data Collection Instrument

The study analysed raw data from the FEA Housing Department's annual surveys. The department employs a computer-assisted telephone interviewing (CATI) technique annually to assess the impact of FEA's initiatives on its intended beneficiaries. The CATI technique involves administering a computerized questionnaire to respondents over the telephone, with interviewers reading questions from the computer screen and recording responses directly into the computer (Shino & McCarty, 2020). In this case, the FEA used the free-to-use survey platform "Google Forms" to record survey participants' responses, which were automatically transferred to "Google Sheets," the primary software used for the study's analysis. The interview designed by the department consists of five generic questions, eight open-ended questions, and three dichotomous or close-ended questions, totalling 18 questions.

Sample Population

The sampling technique employed in the survey is purposive sampling which involves using respondents who are selected to capture a range of experiences and characteristics relevant to the study (Robinson, 2014). While purposive sampling is associated with various shortcomings, the FEA's survey addresses this by ensuring the sample is representative of the study population. The survey sample covers almost 10% of the FEA's overall beneficiaries for the specified years. According to data from the FEA Department, there were 284 respondents in 2020 and 130 in 2021, all residing in different cities in India. In total, the study analysed responses from 414 community members to assess the impact of housing initiatives in the community.

The paper specifically targeted Dawoodi Bohra Community members who have acquired homeownership through community initiatives, excluding those who achieved it independently. This focus is deliberate, aiming to examine individuals who are financially unable to secure homeownership on their own and have received assistance from the community, ultimately seeking to understand how this support contributes to their socioeconomic advancement.

Data Analysis

According to Creswell and Clark (2018), data analysis in Mixed Method Research consists of analyzing the quantitative data using quantitative methods and the qualitative data using qualitative methods (Creswell & Clark, 2018). This study first used descriptive statistics to analyze the close-ended question responses from the survey. In the second stage, the study utilized Thematic Analysis to examine the open-ended question responses to provide a more

detailed and nuanced account of the impact of homeownership on individuals. The steps followed by the researcher were as follows; First, the responses were studied in a general manner in order to gain familiarization with the data. Next, the data was combed through to identify various codes from the responses. The researcher found a total of 15 relevant codes from the data. These codes provide a condensed overview of the main points and common meanings that recur throughout the data. Finally, by combining relevant codes, themes were generated to represent the pertinent points in the data. After performing both analysis methods, the results will be discussed simultaneously to obtain a thorough understanding of the effects of homeownership on Dawoodi Bohra Community Members.

Ethical Considerations

In addressing ethical considerations, the author has diligently considered key aspects such as voluntary participation, confidentiality, and integrity in this study. The telephone surveys administered by the FEA were conducted without coercion or persuasion, with respondents willingly contributing to the survey. Similarly, consent was also obtained from the FEA Department for utilizing survey data. Moreover, throughout the study, stringent confidentiality measures were implemented to safeguard the anonymity and privacy the FEA's beneficiaries. While recognizing the potential conflict of interest arising from the author's affiliation with the Dawoodi Bohra Community, the author transparently confronts this issue, emphasizing a commitment to impartiality and adherence to academic norms. These ethical considerations collectively enhance the study's validity and reliability (Emanuel et al., 2008).

Results & Discussion

To explore the socioeconomic effects of homeownership on the beneficiaries of the Dawoodi Bohra Community’s primary housing initiative, the FEA, the current study has analyzed the survey reports of community members for the years 2020 and 2021. Table 1 summarizes the key statistics of the survey data. As mentioned in Table 1, 284 individuals responded to the department’s telephone survey in 2020 and 130 individuals responded in 2021. In total, the author has analysed the responses of 414 community members to assess the impact of housing initiatives in the community. These responses have allowed sufficient information to be obtained to answer the study’s research questions.

General Statistics	2020	2021	Total
Total Housing Projects	1,710	2,116	3,826
Percentage	(100%)	(100%)	(100%)
Total Survey Respondents	284	130	414
Percentage of Projects	(16%)	(6%)	(10%)
House Work is Completed	248	114	362
Percentage of Total Respondents	(87%)	(87%)	(87%)
Responded to Close-Ended Ques	242	104	346
Percentage of Total Respondents	(85%)	(80%)	(83%)
Responded to Open-Ended Ques	247	114	361

Percentage of Total Respondents	(86%)	(87%)	(87%)
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Table 1: General Statistics of Total Survey Data

General Overview

The interview designed by the Department comprises of 18 questions in total, five of which are generic questions. These are followed by three close-ended questions (Quantitative data) which were responded by 83% of the total survey participants and eight open-ended questions (Qualitative data) which were responded by 87% of the survey participants. The respondents of the telephone survey were first inquired regarding the progress of their housing project and only those beneficiaries whose housing projects were completed were asked to answer the remaining survey questions.

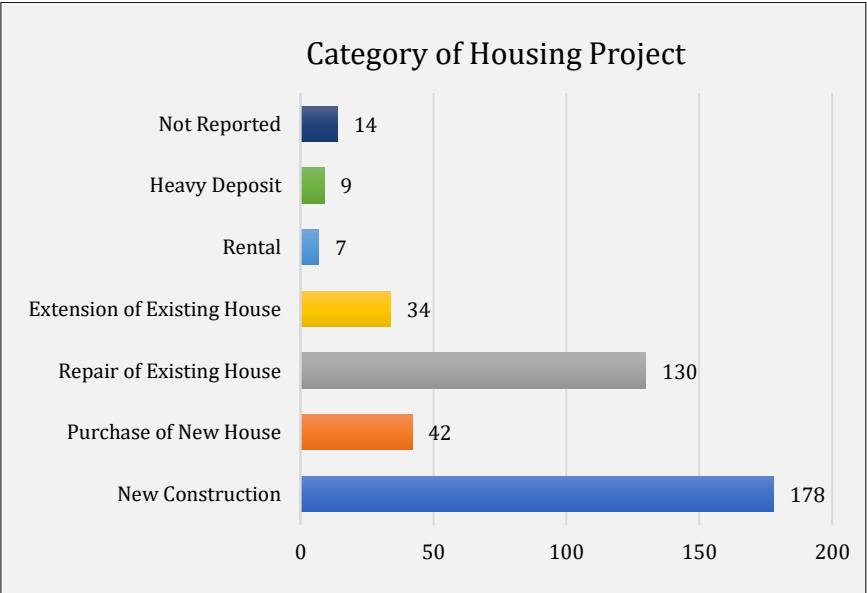


Figure 1: Category of Housing Projects for Survey Respondents

It should be noted that the survey conducted by FEA includes respondents who have been provided six different types of housing assistance. As depicted in Figure 1, the majority of FEA's housing projects involve two distinct kinds of assistance. These include renovation assistance to those individuals whose housing conditions were below adequate standards (extension and repair of existing houses), and homeownership assistance (purchase and construction of new house) which is the subject of this study. In summary, 53% of respondents were provided homeownership assistance while, 47% of survey respondents were offered other modes of assistance. The author has analysed the responses of all the survey respondents, without making any distinction between modes of assistance. However, to ensure clarity, only the responses of the beneficiaries of homeownership assistance are presented and discussed throughout the article.

The key figures of the quantitative data obtained from the survey are depicted in Table 2. The respondents were asked four close-ended questions in regard to the benefits of the housing assistance provided to them by the FEA. Each question roughly corresponds to one of the three primary socioeconomic factors that have been characterised as the essential aspects of an individual's socioeconomic status by scholars (Navarro et al., 2020). These include economic effects, social factors and physical and psychological well-being. As evident in the findings presented in Table 2, the responses to the close-ended questions were overwhelmingly positive. However, further details will be discussed in the forthcoming sections.

Quantitative Data of Homeownership Respondents			
Quantitative Data	Positive Responses	Total	Sample Mean
Increased Financial Stability	168	188	89%
Better Physical and Psychological Health	169	188	89%
Improvement in Children’s Education	122	188	64%
Increased Religious Engagement	178	188	94%

Sr.	Data Codes	Frequency	Data Themes	Respo ndents	Sample Mean
1	Financial stability	85	Financial Benefits	192	44%
2	Savings from rental payments	51	Financial Benefits	192	27%
3	New job opportunity	10	Financial Benefits	192	5%
4	New business opportunity	26	Financial Benefits	192	14%
5	Better physical health	31	Psychological Benefits	192	16%
6	Improved standard of living	44	Psychological Benefits	192	23%
7	Contentment	98	Psychological Benefits	192	51%
8	Improved mental health	57	Psychological Benefits	192	30%
9	Sense of independence	28	Psychological Benefits	192	15%
10	Improvement in children's education	4	Psychological Benefits	192	2%

11	Better able to cope with lockdown	78	Psychological Benefits	192	41 %
12	Enhanced social participation	38	Social Benefits	192	20%
13	Freedom to practice religious activities	51	Social Benefits	192	27%
14	Increased community engagement	15	Social Benefits	192	8%
15	Better marital opportunity	11	Social Benefits	192	6%

Table 2: Quantitative Data - Summary of Respondents

The qualitative data featuring eight open-ended questions, was subjected to Thematic Analysis to assess the initiative's impact on individuals' lives. Following established procedures, the author identified 15 codes from participant responses, encapsulating recurring socioeconomic effects of housing projects. These codes, outlined in Table 3, were then synthesized into themes, offering a comprehensive representation of the data's key points. In summary, the analysis of both quantitative and qualitative data revealed three overarching categories of socioeconomic benefits related to homeownership; namely, financial gains, improved physical and psychological well-being, and social advantages. This underscores

the profound influence of homeownership on residents and its potential for promoting socioeconomic upliftment.

Table 3: Qualitative Data - Key Results of Thematic Analysis for H.O Respondents

Economic Effects of Homeownership

The results of the survey data indicate an overwhelmingly positive correlation between attaining homeownership and economic development. As portrayed in Table 2, out of the 188 homeownership beneficiaries who attempted the close-ended questions, 168 participants claim to have experienced improved financial stability after attaining homeownership through the FEA housing initiative. As for the results of the Thematic Analysis, the responses of survey participants have revealed three distinct economic benefits of homeownership (Depicted in Table 3). Firstly, community members have seen an increase in their household wealth and are more confident regarding their financial health after attaining homeownership. Secondly, participants have also witnessed an apparent advancement in their occupation. Some of them have either found better employment opportunities or have experienced a career growth in their existing occupation. Finally, some participants have gained new business opportunities after shifting from rental tenure to owner-occupied housing.

An in-depth examination of participant responses reveals two primary factors contributing to the financial benefits of homeownership. Firstly, the savings accrued from imputed rental payments contribute to increased financial stability, aligning with previous studies on the advantages of imputed rent for low-income homeowners (Daniel et al., 2019). Secondly, individuals' perceptions

of allocating income for housing costs play a crucial role in achieving financial freedom, with homeownership being more appealing than rental payments in the long term. Despite potential limitations in the study, such as the focus on new homeowners and the absence of household financial data, the findings strongly advocate for the financial benefits of homeownership, particularly when attained through interest-free means. In regard to the employment opportunities experienced by survey participants, a potential factor influencing job opportunities could be the psychological traits associated with homeownership. Research indicates that homeownership fosters traits such as responsibility and accountability (Rohe et al., 2002), which promote occupational development among individuals, leading to promotions and increased financial well-being.

Furthermore, the study indicates that homeownership empowers individuals to start or develop businesses. This entrepreneurial inclination may be attributed to positive psychological traits mentioned earlier. Additionally, homeownership offers crucial elements like financial security, space, and flexibility, which are conducive to entrepreneurship (Reuschke, 2016). This became particularly significant during the Covid-19 pandemic and resulting lockdowns, where homeowners, leveraging their residences as business premises, demonstrated resilience and adaptability. Corroborating these results, various studies have found that homeownership not only provides a conducive environment for entrepreneurship but also plays a pivotal role in mitigating the impact of economic crises on individuals' business endeavours (Goodman & Mayer, 2018).

Physical and Psychological Effects of Homeownership

The analysis of FEA's survey data has found a significant correlation between attaining homeownership and an improved physical and psychological health among respondents. When asked whether they had experienced any health benefits after attaining homeownership, 90% (169 participants out of 188) of the respondents gave a positive response. Moreover, while responding to the open-ended questions, the beneficiaries of FEA's housing projects have provided quite detailed descriptions of the health benefits they have experienced in their lives. After a thorough review of this qualitative data, the study has found five broad themes that emerged from the analysis. These include an enhancement in the physical health conditions of occupants after attaining homeownership. Secondly, improved standards of living among occupants which is accompanied with an increase in their self-esteem. Thirdly, community members have experienced contentment and have felt an improvement in their mental health. Finally, homeownership has brought about psychological benefits for children and has played a major role in ensuring the mental well-being of individuals during the Covid-19 Pandemic.

When analysing the responses of individuals who have undergone positive health transformations, the first plausible explanation that comes in to mind is the change in the physical attributes of the dwelling, which could potentially improve the living conditions of occupants. However, upon closer inspection, psychological perceptions seem to play a much more significant role in determining the physical health conditions of participants. These findings are in line with studies that have found that psychological perception of living in owner-occupied housing has a more substantial impact on

occupants' physical wellbeing (Adler & Ostrove, 1999; Mulatu & Schooler, 2002). Moreover, a credible explanation for the notable increase in self-esteem and dignity among individuals after attaining homeownership, could be the result of increased stability and permanence associated with homeownership. Studies indicate that the prospect of eviction is a highly stressful situation for tenants, leading to feelings of loss of control, fear, worry, and lasting mental health impacts (Acharya et al., 2022). Community members acquiring homeownership through the FEA's housing program have effectively cultivated a sense of belonging and ownership, contributing to increased satisfaction and contentment.

Furthermore, respondents reported lower stress and anxiety levels after attaining homeownership. This can be attributed to the financial security and freedom enjoyed by homeowners to modify their homes according to their preferences. However, the study acknowledges that further research considering variables like financial resources is needed to establish a clear causation between mental health and rental tenure. In addition to these psychological benefits, homeownership revealed another noteworthy outcome: improved education outcomes for children. The study suggests that the geographic stability and higher self-esteem levels of homeowners contribute to creating better home environments, ultimately enhancing children's cognitive abilities. These findings align with previous studies on homeownership (Haurin et al., 2002), reinforcing the positive effects it can have on various aspects of individuals' lives. The analysis of open-ended responses from FEA survey participants has revealed an intriguing finding regarding the physical and psychological effects experienced by respondents. Out of the total participants, approximately 22 individuals (comprising 7

homeownership assistance beneficiaries and 12 renovation assistance beneficiaries) have reported either no positive effects (no improvement in living conditions) or negative impacts on their housing conditions after receiving assistance from the FEA. Upon closer examination, it becomes evident that the primary cause of these unfavourable effects is not related to the participants' housing tenure but rather stems from structural deficiencies in the renovation and construction of the dwellings themselves. Although the number of respondents facing these issues is relatively small (only 7 homeownership beneficiaries), the findings underscore the critical importance of proper execution in enhancing individuals' housing conditions. To optimize the benefits of homeownership for all beneficiaries, the FEA should ensure the implementation of the highest quality standards in its housing projects.

Social Effects of Homeownership

Survey participants have also expressed a variety of social benefits experienced by them after attaining homeownership through the FEA's housing projects. An analysis of the qualitative data (open-ended responses) has revealed three prominent themes; enhanced social participation among community members after attaining homeownership, freedom to practice religious activities and better marital opportunities for occupants.

In regard to the enhanced social relationships experienced by participants, a likely factor could be the stability afforded by homeownership, allowing individuals to maintain social connections and enhance their overall social well-being. Existing research supports these findings, indicating that homeownership contributes to the formation of social capital, strengthening community bonds

(DiPasquale & Glaeser, 1999). Survey respondents also indicated that homeownership empowered them to actively participate in their local neighbourhoods and engage in community initiatives and programs. Previous studies, like Logan and Molotch (1987), affirm that homeowners are more likely to participate in community programs because in comparison to renters, they are more likely to become emotionally attached to their homes and neighbourhoods (Logan & Molotch, 1987).

The analysis further indicates that nearly 178 community members claim to have improved their religious engagement after attaining homeownership. This effect can be attributed to homeowners having the ability to design or modify their homes to accommodate their religious needs. For Muslims, a dwelling essentially embodies their cultural values and thus necessitates that they are designed and customized to fulfil their religious and practical needs (Omer, 2017). This became especially relevant during the Covid-19 lockdowns, where homes transformed into places of worship and learning. In contrast, rental tenure may limit religious activities due to restrictions imposed by landlords. In a surprising finding, a small number of respondents (11 participants) mentioned that homeownership facilitated better marital opportunities. Possible explanations include improved self-esteem and increased participation in social activities, enhancing chances of finding suitable partners. Other studies have also explored the relationship between homeownership and marital stability, with some suggesting that in comparison to married renters, married homeowners were 60% to 69% less likely to divorce (Grinstein-Weiss et al., 2014).

Limitations

The paper's findings are constrained by their reliance on existing data from the FEA, the organization providing housing assistance to community members. A key limitation is that the survey questions employed by the FEA lack specificity in capturing data, with the socioeconomic effects of homeownership categorized in a manner deemed too broad by the researcher. However, independently reaching out to FEA beneficiaries was impractical due to the confidentiality of assistance records and the considerable time required to approach each and every beneficiary individually. Additionally, the study's scope is limited as it solely examines the personal experiences of new homeowners, without considering financial data at the household level. Future research could overcome these limitations by conducting independent empirical studies on FEA beneficiaries, incorporating precise variables, including financial statistics, for a more comprehensive exploration of the socioeconomic benefits of homeownership.

Implications and Recommendations

The findings of this study have indicated how community initiatives can successfully tackle the challenges faced by individuals in the pursuit of attaining homeownership. Furthermore, the study has exposed the flaws of rental tenure and illustrated its shortcomings in providing adequate housing conditions for the socioeconomic well-being of individuals. Based on these conclusions, policy makers, NGOs and CBOs committed to enhancing the housing conditions of individuals can reassess their operating policies in order to better enable the socioeconomic upliftment of their beneficiaries. To better understand the implications of these results future studies could compare the effectiveness of FEA's operational procedures with those

used by other housing initiatives around the world. This would enable the identification of the most effective means towards attaining homeownership and enabling socioeconomic upliftment among individuals.

Conclusion

The study, based on both quantitative and qualitative analysis of survey data from the FEA, identified three significant socioeconomic effects of homeownership among Dawoodi Bohra Community members. Firstly, there was a strong positive correlation between homeownership and economic development, manifesting in increased financial stability and occupational advancement. Secondly, homeownership was linked to improved physical and psychological health, evidenced by enhanced physical well-being, a higher standard of living, and improved mental health. Finally, FEA's beneficiaries reported various social benefits, including increased community engagement, freedom to practice religious activities, and improved marital opportunities. In summary, the research highlights the substantial socioeconomic upliftment experienced by Dawoodi Bohra Community members upon attaining homeownership through community initiatives.

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*Examining the Socioeconomic Effects of
Attaining Homeownership: A review of
Dawoodi Bohra Community Housing
Initiatives: Abbas Abdul Hussain*

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Taking Urgent Action to Combat Climate Change

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Abstract

The paper probes the global response towards climate change. It examines measures adopted towards combating climate change at the global, regional and national levels including legal, institutional and policy approaches. It also explores the idea of climate action and the role of other stakeholders in confronting climate change. The paper further discusses the efficacy of the measures adopted towards tackling climate change and suggests recommendations towards enhancing the global response to climate change.

1.0 Introduction

Climate change refers to the long term shift in global or regional climate patterns and is often associated with the rise in global temperatures from the mid-20th century to present¹. It has also been described as the global phenomenon of climate transformation characterized by the changes in the usual climate of the planet (regarding temperature, precipitation, and wind) that are especially caused by human activities². The *United Nations Framework Convention*

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¹ National Geographic., 'Climate Change.' Available at <https://education.nationalgeographic.org/resource/climate-change/> (Accessed on 20/09/2023)

² Climate Change., 'Meaning, Definition, Causes, Examples and Consequences.' Available at

on *Climate Change* (UNFCCC) defines climate change as a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods³. Climate change therefore refers to long term shifts in temperatures and weather patterns. It has been observed that such shifts can be natural, due to factors such as changes in the sun's activity or large volcanic eruptions⁴. However, human activities have been the main drivers of climate change due to the burning of fossil fuels like coal, oil and gas⁵. Human activities have increased the concentration of atmospheric carbon dioxide resulting to the greenhouse effect which contributes to global warming and climate change⁶.

Climate change is an undesirable phenomenon that affects realization of the Sustainable Development agenda across the world by affecting the sustainability of the planet's ecosystems, the stability of the global economy and the future of humankind⁷. The consequences of climate change such as intense droughts, water scarcity, severe fires, rising sea levels, flooding, melting polar ice, catastrophic storms and declining biodiversity are being witnessed across the world⁸. Rising

<https://youmatter.world/en/definition/climate-change-meaning-definition-causes-and-consequences/> (Accessed on 20/09/2023)

³ United Nations Framework Convention on Climate Change., United Nations, 1992., Available at <https://unfccc.int/resource/docs/convkp/conveng.pdf> (Accessed on 20/09/2023)

⁴ United Nations., 'What is Climate Change?' Available at <https://www.un.org/en/climatechange/what-is-climate-change> (Accessed on 20/09/2023)

⁵ Ibid

⁶ Ibid

⁷ Climate Change., 'Meaning, Definition, Causes, Examples and Consequences.' Op Cit

⁸ United Nations., 'What is Climate Change?' Available at

temperatures caused by climate change have made storms and droughts more severe⁹. For example, climate change has resulted in the worst drought in 40 years in the Horn of Africa after five consecutive years of below-average rainfall¹⁰. The drought has affected approximately 50 million people resulting in food insecurity, displacement of people and further threatening human health as a result of malnutrition¹¹.

Further, catastrophic storms brought about by climate change have destroyed lives and homes¹². From June to October 2022, Pakistan suffered extreme flooding which resulted in the deaths of over 1,700 people, destroyed around 2 million homes, and swept away almost half the country's cropland¹³. The flooding was caused by heavier than usual monsoon rains and melting glaciers in the country's northern region that followed a severe heat wave all which are factors linked to climate change¹⁴. Recently, in September 2023, Libya suffered devastating floods that resulted in the death of over 5,000

<https://www.un.org/en/climatechange/what-is-climate-change>
(Accessed on 20/09/2023)

⁹ UN Women., 'SDG 13: Take Urgent Action to Combat Climate Change and its Impacts.' Available at <https://www.unwomen.org/en/news/in-focus/women-and-the-sdgs/sdg-13-climate-action> (Accessed on 20/09/2023)

¹⁰ Harvey. F., 'Human-Driven Climate Crisis Fuelling Horn of Africa Drought – Study.' Available at <https://www.theguardian.com/environment/2023/apr/27/human-driven-climate-crisis-fuelling-horn-of-africa-drought-study> (Accessed on 20/09/2023)

¹¹ Ibid

¹² UN Women., 'SDG 13: Take Urgent Action to Combat Climate Change and its Impacts.' Op Cit

¹³ Giles. M., 'The Principles of Climate Justice at CoP27.' Available at <https://earth.org/principles-of-climate-justice/#:~:text=That%20response%20should%20be%20based,the%20consequences%20of%20climate%20change> (Accessed on 20/09/2023)

¹⁴ Ibid

people and destruction of property¹⁵. Climate change has been attributed as one of the causes of the flooding by intensifying the severity of Storm Daniel that resulted in the severe rainfalls¹⁶.

In addition, sea level rise threatens low-lying areas such as small island nations. It has been observed that sea level rise, increasing temperatures and frequency and intensity of tropical cyclones, and storm surges are some of the climate change impacts facing island nations, some of which are in low-lying areas of just 5 meters above sea level at the highest point making them more vulnerable to these impacts¹⁷. Climate change therefore hinders the Sustainable Development agenda by affecting human health, food security, housing, safety and work while simultaneously threatening the environment and natural ecosystems¹⁸.

Due to the foregoing concerns, climate change has been described as the most defining challenge of our time¹⁹. It is the main global challenge that is affecting both developed and developing countries in their efforts towards realization of the Sustainable Development agenda²⁰. The United Nations 2030 Agenda for Sustainable Development acknowledges that climate change is one of the greatest challenges of our time and its adverse impacts undermine the ability

¹⁵ Marshall. M., 'Libya Floods: How Climate Change Intensified the Death and Devastation.' Available at <https://www.nature.com/articles/d41586-023-02899-6> (Accessed on 20/09/2023)

¹⁶ Ibid

¹⁷ Bafana. B., 'Climate Change is No 'Future Scenario' for Pacific Island Nations; Climate Change is 'Real' Available at <https://reliefweb.int/report/world/climate-change-no-future-scenario-pacific-islandnations-climate-change-real> (Accessed on 20/09/2023)

¹⁸ United Nations., 'What is Climate Change?' Op Cit

¹⁹ Muigua. K., 'Achieving Sustainable Development, Peace and Environmental Security.' Glenwood Publishers Limited, 2021

²⁰ Ibid

of all countries to achieve Sustainable Development²¹. It has been argued that if left unchecked, climate change will undo a lot of the development progress made over the past years and will also provoke mass migrations that will lead to instability and wars²². Climate change has thus risen to the top of the policy agenda, at local, national, and global levels²³. There have been global calls on governments and all other stakeholders to put in place measures towards responding to the threat of climate change and ensuring that economies are climate resilient²⁴. Urgent and transformative action is required to combat climate change and achieve Sustainable Development²⁵. Responding to climate change is one of the fundamental goals under the United Nation's 2030 Agenda for Sustainable Development²⁶. Sustainable Development Goal 13 calls upon countries to take urgent actions towards combating climate change and its impacts²⁷.

The paper probes the global response towards climate change. It examines measures adopted towards combating climate change at

²¹ United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1

²² United Nations., 'Goal 13: Take Urgent Action to Combat Climate Change and its Impacts.' Available at <https://www.un.org/sustainabledevelopment/climate-change/> (Accessed on 20/09/2023)

²³ United Nations Department of Economic and Social Affairs., 'Forum on Climate Change and Science and Technology Innovation.' Available at <https://www.un.org/en/desa/forum-climate-change-and-science-and-technology-innovation> (Accessed on 20/09/2023)

²⁴ Muigua. K., 'Achieving Sustainable Development, Peace and Environmental Security.' Op Cit

²⁵ United Nations., 'Goal 13: Take Urgent Action to Combat Climate Change and its Impacts.' Op Cit

²⁶ United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' Op Cit

²⁷ Ibid, Sustainable Development Goal, 13

the global, regional and national levels include legal, institutional and policy approaches. It also explores the idea of climate action and the role of various stakeholders in confronting climate change. The paper further discusses the efficacy of the measures adopted towards tackling climate change and suggests recommendations towards enhancing the global response to climate change.

2.0 Global Response to Climate Change

The threat of climate change has resulted in international, regional and national responses aimed at confronting the problem²⁸. The 2030 Agenda for Sustainable Development emphasizes the need to protect the planet from degradation, including through sustainable consumption and production, sustainably managing its natural resources and taking urgent action on climate change, so that it can support the needs of the present and future generations²⁹. Sustainable Development Goal (SDG) 13 urges all countries to take urgent action to combat climate change and its impacts through several mechanisms³⁰. These include strengthening resilience and adaptive capacity to climate-related hazards and natural disasters in all countries; integrating climate change measures into national policies, strategies and planning; improving education, awareness-raising, human, and institutional capacity on climate change mitigation, adaptation, impact reduction and early warning; implementing the commitment undertaken by developed country parties to the UNFCCC to mobilize jointly \$ 100 billion annually by 2020 to support developing countries and promoting mechanisms for raising capacity

²⁸ Muigua. K., 'Achieving Sustainable Development, Peace and Environmental Security.' Op Cit

²⁹ United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' Op Cit

³⁰ United Nations., 'Sustainable Development Goal 13' Available at <https://sdgs.un.org/goals/goal13> (Accessed on 21/09/2023)

for effective climate change-related planning and management in least developed countries and small island developing states, including focus on women, youth and local and marginalized communities³¹. SDG 13 therefore sets the global threshold towards responding to climate change by stipulating actions designed to help all countries take urgent action to combat climate change.

The *United Nations Framework Convention on Climate Change* (UNFCCC) is the primary international, intergovernmental forum for negotiating the global response to climate change³². The UNFCCC entered into force on 21st March 1994 as the first international legal instrument that focuses on climate change and sets out measures towards addressing the problem³³. The objective of the UNFCCC is to stabilize greenhouse gas concentrations at a level that would prevent dangerous anthropogenic (human induced) interference with the climate system³⁴. It states that such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened, and to enable economic development to proceed in a sustainable manner³⁵.

³¹ Ibid

³² United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' Op Cit

³³ United Nations Framework Convention on Climate Change., 'What is the United Nations Framework Convention on Climate Change?' Available at <https://unfccc.int/process-and-meetings/what-is-the-united-nations-framework-convention-on-climate-change> (Accessed on 20/09/2023)

³⁴ United Nations Framework Convention on Climate Change., United Nations, 1992., Available at <https://unfccc.int/resource/docs/convkp/conveng.pdf> (Accessed on 20/09/2023)

³⁵ Ibid, Article 2

The Convention acknowledges the vulnerability of all countries to the effects of climate change and calls for special efforts to ease the consequences, especially in developing countries which lack the resources to do so on their own³⁶. Industrialized nations agree under the Convention to support climate change activities in developing countries by providing financial support for action on climate change above and beyond any financial assistance they already provide to these countries³⁷. Among the key principles of the Convention is the idea of *Common But Differentiated Responsibilities*(CBDR)³⁸. Under this principle, 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 capabilities³⁹. The UNFCCC further enshrines various commitments by member states towards confronting climate change. These include promoting and cooperating in the development, application and diffusion, including transfer, of technologies, practices and processes aimed at combating climate change; cooperating in preparing for adaptation to the impacts of climate change; taking climate change considerations into account in social, economic and environmental policies; promoting and cooperating in scientific, technological, technical, socio-economic and other research on climate change and promoting and cooperating in education, training and public awareness related to climate change⁴⁰. The UNFCCC is therefore an important milestone in the global response towards climate change. The UNFCCC gave birth to

³⁶ Ibid

³⁷ Ibid

³⁸ Ibid, Article 3 (1)

³⁹ Ibid

⁴⁰ Ibid, Article 4

the *Kyoto Protocol*⁴¹ and *Paris Agreement*⁴² which have enhanced the global response to climate change.

The *Kyoto Protocol* to the UNFCCC was adopted on 11th December 1997⁴³. The Protocol operationalizes the UNFCCC by committing industrialized countries and economies in transition to limit and reduce greenhouse gases (GHG) emissions in accordance with agreed individual targets⁴⁴. The Protocol only binds developed countries, and places a heavier burden on them under the principle of *Common But Differentiated Responsibilities and respective capabilities* since it recognizes that they are largely responsible for the current high levels of greenhouse gas emissions in the atmosphere⁴⁵. It requires these countries to implement measures and policies geared towards achieving their emission limitation and reduction commitments towards combating climate change⁴⁶. These include enhancement of energy efficiency; promotion of sustainable forms of agriculture in light of climate change considerations; research on, and promotion, development and increased use of, new and renewable

⁴¹ United Nations Framework Convention on Climate Change., 'Kyoto Protocol to the United Nations Framework Convention on Climate Change.' Available at <https://unfccc.int/resource/docs/convkp/kpeng.pdf> (Accessed on 20/09/2023)

⁴² United Nations Framework Convention on Climate Change., 'Paris Agreement.' Available at https://unfccc.int/sites/default/files/english_paris_agreement.pdf (Accessed on 20/09/2023)

⁴³ United Nations Framework Convention on Climate Change., 'Kyoto Protocol to the United Nations Framework Convention on Climate Change.' Op Cit

⁴⁴ United Nations Climate Change., 'What is the Kyoto Protocol?' Available at https://unfccc.int/kyoto_protocol (Accessed on 21/09/2023)

⁴⁵ Ibid

⁴⁶ United Nations Framework Convention on Climate Change., 'Kyoto Protocol to the United Nations Framework Convention on Climate Change.' Article 2

forms of energy, of carbon dioxide sequestration technologies and of advanced and innovative environmentally sound technologies and cooperation between states to enhance the individual and combined effectiveness of their policies and measures adopted towards confronting climate change⁴⁷.

During the first commitment period of the Kyoto Protocol which ran from 2008 to 2012, 37 industrialized countries and economies in transition and the European Community committed to reduce greenhouse gas emissions to an average of five percent against 1990 levels⁴⁸. During the second commitment period, Parties committed to reduce greenhouse gas emissions by at least eighteen percent below 1990 levels in the eight-year period from 2013 to 2020⁴⁹. The Kyoto Protocol establishes flexible market mechanisms which are based on the trade of emissions permits to help countries achieve emission reduction targets including International Emissions Trading, Clean Development Mechanism and Joint Implementation⁵⁰.

The *Paris Agreement* is a legally binding international treaty on climate change⁵¹. It was adopted by 196 Parties at the United Nations Climate Change Conference (COP 21) in Paris, France, on 12th December 2015 and entered into force on 4th November 2016⁵². The Agreement seeks to strengthen the global response to the threat of

⁴⁷ Ibid

⁴⁸ United Nations Climate Change., 'What is the Kyoto Protocol?' Op Cit

⁴⁹ Ibid

⁵⁰ United Nations Framework Convention on Climate Change., 'Kyoto Protocol to the United Nations Framework Convention on Climate Change.' Op Cit

⁵¹ United Nations Climate Change., 'The Paris Agreement.' Available at <https://unfccc.int/process-and-meetings/the-paris-agreement> (Accessed on 21/09/2023)

⁵² Ibid

climate change, in the context of Sustainable Development and efforts to eradicate poverty through holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels; increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production; and making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development⁵³.

The Paris Agreement also requires parties to prepare, communicate and maintain successive national climate action plans known as Nationally Determined Contributions (NDCs) that they intend to achieve which entail inter alia their emission reduction targets⁵⁴. Each successive NDC is meant to reflect an increasingly higher degree of ambition compared to the previous version⁵⁵. The Paris Agreement further requires parties to pursue domestic mitigation measures, with the aim of achieving the objectives of such NDCs⁵⁶. The Agreement further acknowledges the special circumstances of developing countries some which are more vulnerable to the effects of climate change and requires developed countries to support them in their efforts to confront climate change through measures such as provision of financial resources and technology transfer⁵⁷. The Paris Agreement represents a major milestone in enhancing the global response to climate change because for the first time, a binding

⁵³ Paris Agreement., Article 2 (1)

⁵⁴ Ibid, Article 4 (2)

⁵⁵ Ibid

⁵⁶ Ibid

⁵⁷ Ibid, Articles 9 (1) & 10

agreement brings all nations together to combat climate change and adapt to its effects⁵⁸.

3.0 Combating Climate Change in Africa

Combating climate change is also a matter of priority in Africa. Despite its low contribution to greenhouse gas emissions with just about two to three percent of global emissions, Africa remains the most vulnerable continent to the impacts of climate change⁵⁹. It has been pointed out that Africa faces exponential collateral damage from the impacts of climate change posing systemic risks to its economies, infrastructure investments, water and food systems, public health, agriculture, and livelihoods, threatening to undo its modest development gains and slip the continent into higher levels of extreme poverty⁶⁰. The vulnerability of Africa to the impacts of climate change is compounded by the fact that 95% Sub-Saharan Africa depends on rain-fed agriculture and that a large share of its Gross Domestic Product (GDP) and employment is dependent on climate sensitive agricultural sectors including farming, herding and fishing⁶¹. Climate change is therefore a major threat to the attainment of the Sustainable Development agenda in Africa. Climate change is harming food security, ecosystems and economies, fueling displacement and migration and worsening the threat of conflict over dwindling resources including land, water and pastures⁶². The

⁵⁸ United Nations Climate Change., 'The Paris Agreement.' Op Cit

⁵⁹ African Development Bank Group., 'Climate Change in Africa.' Available at <https://www.afdb.org/en/cop25/climate-change-africa> (Accessed on 21/09/2023)

⁶⁰ Ibid

⁶¹ Ibid

⁶² World Meteorological Organization., 'Africa Suffers Disproportionately from Climate Change.' Available at <https://public.wmo.int/en/media/press-release/africa-suffers-disproportionately-from-climate-change> (Accessed on 21/09/2023)

impacts of climate change including heatwaves, heavy rains, floods, tropical cyclones, and prolonged droughts are having devastating impacts on communities and economies in Africa, with increasing numbers of people at risk⁶³. Taking urgent action to combat climate change is therefore vital in Africa if the continent is to realize the SDGs⁶⁴. Laws and policies on climate change have been adopted at regional and national levels towards strengthening the response towards climate change in Africa.

In the East African Region, the *East African Community Climate Change Policy*⁶⁵ recognizes the adverse impacts of climate change as a major challenge to socio-economic development globally. According to the Policy, the African continent including the East African region is particularly vulnerable to climate change since its impacts affect key economic drivers in the continent such as water resources, agriculture, energy, transport, health, forestry, wildlife, land and infrastructure, disaster risk management among others ⁶⁶. The purpose of the policy is to foster Sustainable Development within the East African region through harmonized and coordinated regional strategies, programmes and actions to respond to climate change⁶⁷. It sets out several measures aimed at confronting climate change in the region which include establishing a regional framework to guide the harmonization, coordination and implementation of climate change initiatives amongst partner states; identifying priority adaptation and mitigation action areas and roles of partner states and other

⁶³ Ibid

⁶⁴ African Development Bank Group., 'Climate Change in Africa.' Op Cit

⁶⁵ East African Community., 'East African Community Climate Change Policy.' Available at <https://www.eac.int/environment/climate-change/eac-climate-change-policy-framework> (Accessed on 21/09/2023)

⁶⁶ Ibid

⁶⁷ Ibid

stakeholders to address climate change in the region; promoting public awareness and socio-economic importance of climate change including vulnerability, impacts, risks, and response measures in the region; and promoting capacity building efforts through inter alia education, training, research, technology development and transfer, information and knowledge management⁶⁸. It is imperative to realize the vision of this policy in order to effectively combat climate change in the East African region.

Tackling climate change is also a pertinent issue in Kenya due to its devastating impacts in the country. Kenya's economy is largely dependent on tourism and rain fed agriculture which are both susceptible to climate change and extreme weather events⁶⁹. It has been observed that increasing heat and prolonged droughts are contributing to severe crop and livestock losses, leading to famine, food insecurity, displacement of people, and other threats to human health and wellbeing in Kenya⁷⁰. Adverse impacts of climate change such as extreme drought has affected economic activities including pastoralism in the northern parts of Kenya due to dwindling of natural resources including water and pasture⁷¹. Drought has also resulted in death of wildlife in rangeland ecosystems in the northern parts of Kenya affecting tourism activities⁷². Further, Kenya's predominantly low-lying coastline and surrounding islands are at a great risk from sea level rise, with significant implications for the

⁶⁸ Ibid

⁶⁹ Climatelinks., 'Climate Change in Kenya.' Available at <https://www.climatelinks.org/countries/kenya> (Accessed on 21/09/2023)

⁷⁰ Ibid

⁷¹ Mokku. J., 'Climate Change Destroys the Livelihoods of Kenyan Pastoralists.' Available at <https://www.un.org/africarenewal/magazine/january-2023/climate-change-destroys-livelihoods-kenyan-pastoralists> (Accessed on 21/09/2023)

⁷² Ibid

fisheries sector and storm surge protection⁷³. Climate change is therefore a major hindrance in the achievement of Sustainable Development agenda.

Kenya enacted the *Climate Change Act*⁷⁴ in order to enhance the national response to climate change and achieve low carbon climate development for Sustainable Development⁷⁵. The Act sets out several ways of achieving this goal such as mainstreaming climate change responses into development planning, decision making and implementation; build national resilience and enhancing adaptive capacity to the impacts of climate change; formulating programmes and plans to enhance the resilience and adaptive capacity of human and ecological systems to the impacts of climate change; mainstreaming intergenerational and gender equity in all aspects of climate change responses; promoting low carbon technologies, improving efficiency and reducing emissions intensity by facilitating approaches and uptake of technologies that support low carbon, and climate resilient development; and facilitating capacity development for public participation in climate change responses through awareness creation, consultation, representation and access to information⁷⁶.

The Climate Change Act has since been amended by the *Climate Change (Amendment) Act*⁷⁷ 2023 in order to enhance climate change mitigation and adaptation measures in Kenya through the concept of carbon trading. The Amendment Act introduces the idea of carbon trading in Kenya and defines a carbon market as a mechanism that

⁷³ Climatelinks., 'Climate Change in Kenya.' OpCit

⁷⁴ Climate Change Act., No. 11 of 2016, Government Printer, Nairobi

⁷⁵ Ibid, S 3(1)

⁷⁶ Ibid, S 3 (2)

⁷⁷ Climate Change (Amendment) Act, 2023, Government Printer, Nairobi

enables and allows public and private entities to transfer and transact emission reduction units, mitigation outcomes or offsets generated through carbon initiatives, programmes and projects subject to compliance of national and international laws⁷⁸. It also introduces the concept of carbon offset which refers to a reduction or removal of emissions of carbon dioxide or other greenhouse gases made in order to compensate for emissions made elsewhere⁷⁹. The Amended Act further requires national and county governments to provide guidance in the development and implementation of carbon markets and nonmarket approaches in compliance with international obligations⁸⁰. The amended Climate Change Act is an important milestone in fostering low carbon development in Kenya by providing the legal framework for carbon trading. Although the Climate Change Act, 2016 was intended to enhance national response to climate change and provided mechanisms and measures to achieve low carbon climate-resilient development, it did not envisage the concept of carbon trading⁸¹. Kenya has also formulated a *National Climate Change Policy*⁸² and a *National Climate Change Action Plan*⁸³ (NCCAP) 2023-2027 to strengthen its response to climate change. It is

⁷⁸ Ibid, S 2

⁷⁹ Ibid

⁸⁰ Ibid, S 3

⁸¹ Section 3 of the Climate Change Act, 2016 stipulates mechanisms and measures to enhance climate change resilience and low carbon development for the Sustainable Development of Kenya. However, it does not embrace the idea of carbon trading

⁸² Sessional Paper No. 5 of 2016., 'National Climate Change Framework Policy.' Available at <http://aiap.or.ke/wp-content/uploads/2018/10/Climate-Change-Framework-PolicyMay2017.pdf> (Accessed on 21/09/2023)

⁸³ Ministry of Environment, Climate Change and Forestry., 'Draft Strategic Plan: 2023-2027' Available at <https://www.environment.go.ke/wp-content/uploads/2023/05/MoECCF-Strategic-Plan-Draft07.05.2023-updated.pdf> (Accessed on 21/09/2023)

vital for the country to implement these legal instruments and take urgent actions to combat climate change in order to foster Sustainable Development.

4.0 Taking Urgent Action to Combat Climate Change: Progress and Challenges

SDG 13 encapsulates several targets that are vital in helping countries take urgent action to combat climate change. These include strengthening resilience and adaptive capacity to climate-related hazards and natural disasters in all countries; integrating climate change measures into national policies, strategies and planning; improving education, awareness-raising, human, and institutional capacity on climate change mitigation, adaptation, impact reduction and early warning; implementing the commitment undertaken by developed country parties to the UNFCCC to mobilize jointly \$ 100 billion annually by 2020 to support developing countries in the context of meaningful mitigation actions and promoting mechanisms for raising capacity for effective climate change-related planning and management in least developed countries and small island developing states, including focus on women, youth and local and marginalized communities.⁸⁴ There has been progress towards meeting these targets as a means of taking urgent action to combat climate change at the global, regional and national levels.

There have been efforts towards strengthening resilience and adaptive capacity to climate-related hazards and natural disasters as envisaged under SDG 13.1⁸⁵. Resilience has been defined as the ability of a system, community or society at risk to withstand, absorb, adapt to, and recover from the effects of disaster in a timely and effective

⁸⁴ United Nations., 'Sustainable Development Goal 13' Op Cit

⁸⁵ Ibid, SDG 13.1

manner, including by preserving and restoring basic structures and functions through risk management⁸⁶. It has been observed that climate change is a slow but irreversible process, and therefore it is important not only to mitigate the effects of climate change by limiting greenhouse gas emissions, but also to strengthen resilience and the capacity to adapt to climate change⁸⁷. This has been achieved through raising awareness of climate threats and risks, increasing the level of preparedness of both communities and civil protection providers for natural disasters, improving early warning and public awareness systems and practices, and introducing nature-based solutions among other ways⁸⁸.

In addition, there has been progress towards integrating climate change measures into national policies, strategies and planning as enshrined under SDG 13.2⁸⁹. These has been achieved through measures such as enactment and adoption of laws and policies on climate change. In Kenya, the *Climate Change Act*⁹⁰, the *National Climate Change Policy*⁹¹ and the *National Climate Change Action Plan*⁹² (NCCAP) 2023-2027 have been adopted to strengthen the country's legal regime on climate change. The country's development blueprint, *Vision 2030*, further recognizes the threat of climate change in Kenya and seeks to integrate climate change considerations into

⁸⁶ United Nations Development Programme., 'Strengthening Resilience to Natural Disasters in Ukraine.' Available at <https://www.undp.org/sites/g/files/zskgke326/files/migration/ua/Strengthening-resilience-to-natural-disasters.pdf> (Accessed on 21/09/2023)

⁸⁷ Ibid

⁸⁸ Ibid

⁸⁹ United Nations., 'Sustainable Development Goal 13.2' Op Cit

⁹⁰ Climate Change Act., No. 11 of 2016, Government Printer, Nairobi, Op Cit

⁹¹ Sessional Paper No. 5 of 2016., 'National Climate Change Framework Policy.' Op Cit

⁹² Ministry of Environment, Climate Change and Forestry., 'Draft Strategic Plan: 2023-2027' Op Cit

development planning⁹³. Integrating climate change considerations into national policies, strategies and planning has enabled countries to pursue low carbon development through measures such as embracing renewable sources of energy, climate resilient agricultural practices and sustainable transport and infrastructure as part of the development agenda⁹⁴.

SDG 13.3 further sets out improving education, awareness-raising, human, and institutional capacity on climate change mitigation, adaptation, impact reduction and early warning as one of the ways of taking urgent action to combat climate change⁹⁵. It has been asserted that educational initiatives play a pertinent role in combating climate change by raising awareness of Sustainable Development and the natural world, including the impacts of climate change⁹⁶. Education gives people the knowledge and tools they need to adapt to the impacts of climate change and the risks it poses to lives, livelihoods and well-being⁹⁷. It can also be a powerful driver for more Sustainable

⁹³ Republic of Kenya., 'Sessional paper On Kenya Vision 2030.' Available at <https://vision2030.go.ke/wp-content/uploads/2018/05/Sessional-paper-No.-10-of-2012-On-Kenya-Vision-2030.pdf> (Accessed on 21/09/2023)

⁹⁴ Muigua. K., 'Enhancing Low Carbon Development for Sustainability.' Available at <http://kmco.co.ke/wp-content/uploads/2023/09/Enhancing-Low-Carbon-Development-for-Sustainability-.pdf> (Accessed on 21/09/2023)

⁹⁵ United Nations., 'Sustainable Development Goal 13.3' Op Cit

⁹⁶ Sustainable Development Goal 13: Climate Action., Available at <https://www.gcint.org/sdg-13-climate-action#:~:text=13.3%20Improve%20education%2C%20awareness%2Draising,impact%20reduction%20and%20early%20warning.&text=Our%20educational%20initiatives%20raise%20an,the%20impacts%20of%20climate%20change.> (Accessed on 21/09/2023)

⁹⁷ Global Partnership for Education., 'Confronting Climate Change through Education.' Available at <https://www.globalpartnership.org/node/document/download?file=document/file/2023-04-confronting-climate-change-through-education.pdf> (Accessed on 21/09/2023)

Development, including a transition to greener societies⁹⁸. It is thus vital to build knowledge and capacity at all levels in order to combat climate change⁹⁹.

One of the key tools geared towards taking urgent action to combat climate change as envisaged under SDG 13 is implementing the commitment undertaken by developed country parties to the UNFCCC to mobilize jointly \$ 100 billion annually by 2020 to support developing countries in the context of meaningful mitigation actions¹⁰⁰. Despite being a global phenomenon, some people and communities are more vulnerable to climate impacts, especially people and communities living in small island nations and developing countries¹⁰¹. This situation is compounded by the fact that such communities and countries have contributed very little to climate change therefore raising justice concerns¹⁰². Climate finance is therefore seen as a vital tool in enhancing the capacity of developing countries to respond to climate change and foster Sustainable Development ¹⁰³. There has been progress towards fostering climate finance in developing countries through initiatives such as funding from the UNFCCC through the Green Climate Fund, funding from developed countries and international and regional financial institutions such as the World Bank and the African

⁹⁸ Ibid

⁹⁹ The Global Goals., '13: Climate Action.' Available at <https://www.globalgoals.org/goals/13-climate-action/> (Accessed on 21/06/2023)

¹⁰⁰ United Nations., 'Sustainable Development Goal 13.a' Op Cit

¹⁰¹ Sultana. F., 'Critical Climate Justice' Available at <https://www.farhanasultana.com/wpcontent/uploads/Sultana-Critical-climate-justice.pdf> (Accessed on 21/09/2023)

¹⁰² Ibid

¹⁰³ Hill. A., & Babin. M 'Why Climate Finance is Critical for Accelerating Global Action.' Available at <https://www.cfr.org/in-brief/why-climate-finance-critical-accelerating-global-action> (Accessed on 21/09/2023)

Development Bank and national initiatives including public and private funding¹⁰⁴. Further, at COP 27, a breakthrough agreement was reached to provide loss and damage funding for vulnerable countries hit hard by floods, droughts and other climate disasters¹⁰⁵.

Further, under the principle of Common but Differentiated Responsibilities (CBDR), everyone is to act on climate change but justice demands that those who have contributed more to the problem assume a greater responsibility for solving it¹⁰⁶. The principle therefore requires developed countries to first and fast in cutting emissions and also to provide financial support to countries with more limited means so they can keep up with enormous financial burdens as climate change accelerates¹⁰⁷. Pursuant to this principle, at COP 15 held in Copenhagen Denmark in 2009, developed countries committed to a collective goal of mobilizing \$ 100 billion annually by 2020 for climate action in developing countries¹⁰⁸. However, developed countries have failed to deliver on

¹⁰⁴ Muigua. K., 'Unlocking Climate Finance for Development.' Available at <http://kmco.co.ke/wp-content/uploads/2023/08/Unlocking-Climate-Finance-for-Development.pdf> (Accessed on 21/09/2023)

¹⁰⁵ United Nations Framework Convention on Climate Change., 'Decision - /CP.27 -/CMA.4: Funding Arrangements for Responding to Loss and Damage Associated with the Adverse Effects of Climate Change, Including a Focus on Addressing Loss and Damage.' Available at https://unfccc.int/sites/default/files/resource/cma4_auv_8f.pdf (Accessed on 21/09/2023)

¹⁰⁶ United Nations., 'Finance and Justice.' Available at <https://www.un.org/en/climatechange/raisingambition/climate-finance> (Accessed on 21/09/2023)

¹⁰⁷ Ibid

¹⁰⁸ United Nations Framework Convention on Climate Change., 'COP 15 - Decisions.' Available at <https://unfccc.int/process-and-meetings/conferences/past-conferences/copenhagen-climate-change-conference-december-2009/cop-15/cop-15-decisions> (Accessed on 21/09/2023)

the agreed target of \$100 billion annually by 2020¹⁰⁹. This has resulted in inadequacy, imbalance and unpredictability of climate finance flows to developing countries affecting implementation of mitigation and adaptation measures¹¹⁰. There is need for developed countries to realize their climate finance commitments pursuant to the principle of common but differentiated responsibilities in order to enable developing countries take urgent actions to combat climate change.

Finally, SDG 13.b requires countries to promote mechanisms for raising capacity for effective climate change-related planning and management in least developed countries and small island developing states, including focus on women, youth and local and marginalized communities¹¹¹. It has been observed that the impacts of climate change are more severe on certain groups including women since they depend more heavily on natural resources like water and firewood, meaning that if these items become scarce, they may need to travel further to access them¹¹². In addition, gender inequalities within communities may leave women more vulnerable to the immediate aftermath of natural disasters occasioned by the effects of climate change, or excluded from the decision-making table when disaster risk reduction solutions and other climate change responses are designed and implemented¹¹³. The youth are also more vulnerable to the effects of climate change since they are likely to experience the negative effects of climate change for many years

¹⁰⁹ Kone. T., 'For Africa to meet its Climate Goals, Finance is Essential.' Available at <https://climatepromise.undp.org/news-and-stories/africa-meet-its-climate-goals-finance-essential> (Accessed on 21/09/2023)

¹¹⁰ Ibid

¹¹¹ United Nations., 'Sustainable Development Goal 13.b.' Op Cit

¹¹² Pearse. R., 'Gender and Climate Change.' WIREs Climate Change, 2016

¹¹³ Ibid

compared to older generations¹¹⁴. In addition, marginalized people including persons with disabilities may be severely affected by the effects of climate change due to the difficulty in accessing vital resources in case of food insecurity and water scarcity and difficulties in responding to emergencies in case of disasters associated with climate change such as floods¹¹⁵. It has been pointed out that these groups have a right to all capacities needed to protect themselves, and to participate in decisions with profound implications for people and the planet¹¹⁶. It has also been argued that women can play a fundamental role in climate action and offer valuable insights into better managing the climate and its risks through their experiences and traditional knowledge as stewards of many natural resources¹¹⁷. There has been progress towards realizing this goal through measures such as gender-inclusive climate-change-related planning; public and community participation in climate action; and enhancing specialized support for least developed countries and small island developing states through finance, technology and capacity-building, for mechanisms for raising capacities for effective climate change-related planning and management, including focusing on women, youth and local and marginalized communities¹¹⁸.

¹¹⁴ United Nations Children's Fund., 'What is Climate Justice? And what can we do Achieve It?' Available at <https://www.unicef.org/globalinsight/what-climate-justice-and-what-can-we-do-achieve-it> (Accessed on 21/09/2023)

¹¹⁵ Almomani. S., 'Climate Justice for People with Disabilities.' Available at <https://www.worldforgottenchildren.org/blog/climate-justice-for-people-with-disabilities/154> (Accessed on 21/09/2023)

¹¹⁶ United Nations Women., 'SDG 13: Take Urgent Action to Combat Climate Change and its Impacts.' Available at <https://lac.unwomen.org/en/noticias-y-eventos/en-la-mira/women-and-the-sdgs/sdg-13-climate-action> (Accessed on 21/09/2023)

¹¹⁷ Ibid

¹¹⁸ Sustainable Development Goals Data., 'SDG 13: Climate Action.' Available at <https://sdg.data.gov/13-b-1/> (Accessed on 21/09/2023)

Despite the progress made towards combating climate change, the threat is still present. It has been asserted that due to rising greenhouse gas emissions, climate change is occurring at rates much faster than anticipated¹¹⁹. This situation increasing the frequency and intensity of extreme weather events such as heat waves, severe droughts, floods and tropical cyclones, aggravating water management problems, reducing agricultural productivity and food security, increasing health risks, damaging vital infrastructure and interrupting the provision of basic services such as water and sanitation, education, energy and transport¹²⁰. Climate change is therefore a major threat to the realization of the global Sustainable Development agenda. According to the United Nations, if left unchecked, climate change will undo a lot of the development progress made over the past years and will also provoke mass migrations that will lead to instability and wars¹²¹. There is need for countries to take urgent action to combat climate change. The United Nations asserts that urgent and transformative action going beyond mere plans and promises is crucial in combating climate change¹²².

5.0 Way Forward

It is imperative for the world to take urgent action to combat climate change. This can be achieved through the measures discussed below.

¹¹⁹ United Nations., 'Goal 13: Take Urgent Action to Combat Climate Change and its Impacts.' Available at <https://www.un.org/sustainabledevelopment/climate-change/> (Accessed on 21/09/2023)

¹²⁰ United Nations Environment Programme., 'Goal 13: Climate action.' Available at <https://www.unep.org/explore-topics/sustainable-development-goals/why-do-sustainable-development-goals-matter/goal-13> (Accessed on 21/09/2023)

¹²¹ United Nations., 'Goal 13: Take Urgent Action to Combat Climate Change and its Impacts.' Op Cit

¹²² Ibid

5.1 Building Climate Resilient and Low Carbon Economies

In order to effectively combat climate change, it is imperative for countries to take urgent actions and build climate resilient and low-carbon economies¹²³. Resilience has been defined as the ability of a system, community or society at risk to withstand, absorb, adapt to, and recover from the effects of disaster in a timely and effective manner, including by preserving and restoring basic structures and functions through risk management¹²⁴. Low carbon development refers to forward-looking national economic development plans or strategies that encompass low-emission and/or climate-resilient economic growth¹²⁵. The objective of low-carbon development is to reduce greenhouse gas emissions, exploit low-carbon energy, and ensure economic growth¹²⁶. Low carbon and climate resilient development can accelerate efforts towards combating climate change by strengthening national climate change coordination processes; contributing towards fostering access to clean and efficient energy sources; improving national and local decision making on climate change interventions and contributing towards minimizing the impacts of extreme climate events for improved and resilient livelihoods¹²⁷. Governments at national and local levels have an important role to play in building climate-resilient and low carbon

¹²³ African Development Bank Group., 'Climate Change in Africa.' Op Cit

¹²⁴ United Nations Development Programme., 'Strengthening Resilience to Natural Disasters in Ukraine.' Op Cit

¹²⁵ United Nations., 'Low Carbon Development.' Available at <https://sustainabledevelopment.un.org/index.php?menu=1448#:~:text=T he%20concept%20of%20low%20carbon,low%20carbon%20growth%20plans> (Accessed on 22/09/2023)

¹²⁶ Yuan. H, Zhou. P, & Zhou. D., 'What is Low-Carbon Development? A Conceptual Analysis.' *Energy Procedia*, 5 (2011) 1706-1712

¹²⁷ United Nations Development Programme., 'Low Emissions and Climate Resilient Development In Kenya (LECRD).' Available at <https://www.undp.org/kenya/projects/low-emission-and-climate-resilient-development-kenya-lecrd> (Accessed on 22/09/2023)

economies by integrating climate change measures into national policies, strategies, and planning¹²⁸. This will ensure that climate change concerns guide the development process towards achieving climate-resilient and low carbon economies¹²⁹.

5.2 Enhancing Climate Change Mitigation and Adaptation Efforts

It is also vital for countries to accelerate their efforts towards climate change mitigation and adaptation. Mitigation and adaptation are vital tools in enhancing global, national and local responses to climate change¹³⁰. Climate change mitigation involves reducing greenhouse gas emissions and stopping the problem of climate change from growing¹³¹. Adaptation on the other hand involves learning how to live with the existing threat of climate change and protecting humanity from the future effects of climate change¹³². It is vital for countries to transform their energy, industry, transport, food, agriculture and forestry systems in order to limit global temperature rise¹³³. Embracing renewable sources of energy such as solar, wind and hydro power; climate smart agricultural practices; green transport and infrastructure and sustainable waste management are

¹²⁸ Council of Europe., 'SDG 13: Take Urgent Action to Combat Climate Change and its Impacts.' Available at <https://www.coe.int/en/web/congress/goal-13> (Accessed on 22/09/2023)

¹²⁹ Ibid

¹³⁰ World Vision., 'How is the World Responding to Climate Change?' Available at https://www.worldvision.com.au/docs/default-source/school-resources/how-is-the-worldrespondingto-climate-change.pdf?sfvrsn=32021b89_0 (Accessed on 22/09/2023)

¹³¹ Ibid

¹³² Ibid

¹³³ United Nations., 'Goal 13: Take Urgent Action to Combat Climate Change and its Impacts.' Op Cit

essential practices in enhancing climate change mitigation¹³⁴. It is also vital for countries to fulfill their emission reduction commitments as envisaged under the Paris Agreement by strengthening their Nationally Determined Contributions (NDCs) and taking bold, immediate steps towards reducing emissions in order to realize low carbon development and confront climate change¹³⁵. It is therefore vital for countries to take urgent action to combat climate change by investing in climate change mitigation and adaptation.

5.3 Improving Climate Education

In order to effectively combat climate change, it is vital to improve education, awareness-raising, and human and institutional capacity¹³⁶. Education plays a pertinent role in combating climate change by raising awareness of Sustainable Development and the natural world, including the impacts of climate change¹³⁷. It gives people the knowledge and tools they need to adapt to the impacts of climate change and the risks it poses to lives, livelihoods and well-being¹³⁸. Education can encourage people to change their attitudes and behavior and make informed decisions that are vital in combating climate change such as adoption of renewable sources of energy, embracing sustainable waste management and use of

¹³⁴ Muigua. K., 'Reflections on Confronting Climate Change in Africa.' Available at <http://kmco.co.ke/wp-content/uploads/2023/08/Reflections-on-Confronting-Climate-Change-in-Africa.pdf> (Accessed on 22/09/2023)

¹³⁵ United Nations., 'For a Livable Climate: Net-Zero Commitments Must be Backed by Credible Action,' Available at <https://www.un.org/en/climatechange/net-zero-coalition> (Accessed on 22/09/2023)

¹³⁶ Council of Europe., 'SDG 13: Take Urgent Action to Combat Climate Change and its Impacts.' Op Cit

¹³⁷ Sustainable Development Goal 13: Climate Action., Op Cit

¹³⁸ Ibid

sustainable agricultural practices¹³⁹. In addition, education increases 'climate literacy' which is vital in helping people understand, respond and adapt to climate change and its impacts¹⁴⁰. Education is thus a vital tool in combating climate change. It is therefore vital for all stakeholders including governments, Non-Governmental Organizations (NGOs), schools and local community organizations to undertake educational and public awareness campaigns on climate change, and to ensure public participation in programmes and information access on the issue¹⁴¹.

5.4 Unlocking Climate Finance

Further, there is an urgent need for the world to unlock climate finance at the international, regional and national levels in order to effectively combat climate change¹⁴². Finance plays a vital role in the climate agenda by enhancing the mitigation and adaptation capabilities of countries especially in the developing world¹⁴³. However, the current global climate finance landscape falls way short of what is required to mitigate the worst impacts of climate change and to deal with the unavoidable consequences¹⁴⁴. A critical concern in the climate finance landscape is that developed countries have

¹³⁹ United Nations., 'Education is Key to Addressing Climate Change.' Available at <https://www.un.org/en/climatechange/climate-solutions/education-key-addressing-climate-change> (Accessed on 22/09/2023)

¹⁴⁰ Ibid

¹⁴¹ United Nations., 'Education is Key to Addressing Climate Change.' Available at <https://www.un.org/en/climatechange/climate-solutions/education-key-addressing-climate-change> (Accessed on 22/09/2023)

¹⁴² Muigua. K., 'Unlocking Climate Finance for Development.' Available at <http://kmco.co.ke/wp-content/uploads/2023/08/Unlocking-Climate-Finance-for-Development.pdf> (Accessed on 22/09/2023)

¹⁴³ Steckel. J. C., 'From Climate Finance toward Sustainable Development Finance.' *WIREs Climate Change*, 2017

¹⁴⁴ Hong. H., Karolyi. G. A., & Scheinkman. J.A., 'Climate Finance.' *Review of Financial Studies*, Volume 33, Issue 3 (2020)

failed to deliver on an agreed climate finance target of \$100 billion annually by 2020 resulting in inadequacy, imbalance and unpredictability of climate finance flows to developing countries thus affecting implementation of mitigation and adaptation measures¹⁴⁵.

There is need for all stakeholders including the UNFCCC through its entities such as the Green Climate Fund, developed countries and international and regional financial institutions such as the World Bank to enhance access to climate finance in order to aid developing countries in their climate mitigation and adaptation strategies¹⁴⁶. Further, the Loss and Damage Fund adopted at COP 27 should be actualized in order to promote access to finance needed to respond to the loss and damage associated with climate change¹⁴⁷. It is also imperative for developing countries to unlock climate finance at the national level by strengthening public and private initiatives¹⁴⁸. Through these initiatives, developing countries and the world at large will have access to finance which can then be channeled into urgent actions needed to combat climate change including mitigation, adaptation and responding to loss and damage associated with climate change¹⁴⁹.

5.5 Embracing Inclusive Participation in Climate Action

It is imperative to embrace inclusive participation in climate action and climate decision making by giving voice to women, youth and

¹⁴⁵ Kone. T., 'For Africa to meet its Climate Goals, Finance is Essential.' Op Cit

¹⁴⁶ Muigua. K., 'Unlocking Climate Finance for Development.' Op Cit

¹⁴⁷ Muigua. K., 'Interrogating the Viability and Efficacy of the COP 27 Loss and Damage Fund.' Available at <http://kmco.co.ke/wp-content/uploads/2023/09/Interrogating-the-Viability-and-Efficacy-of-the-COP-27-Loss-and-Damage-Fund.pdf> (Accessed on 22/09/2023)

¹⁴⁸ Muigua. K., 'Unlocking Climate Finance for Development.' Op Cit

¹⁴⁹ Ibid

marginalized communities including persons with disabilities¹⁵⁰. These groups are more vulnerable to the impacts of climate change due to several factors including gender roles and disparities, age and ability to access vital resources and respond to the impacts of climate change¹⁵¹. It has been asserted that inclusive climate action is pivotal in reducing the effects of climate change on the most vulnerable and ensuring the benefits and burdens of climate action are equitably distributed¹⁵². Women can play a fundamental role in climate action and offer valuable insights into better managing the climate and its risks through their experiences and traditional knowledge as stewards of many natural resources¹⁵³. Further, youth can play a pertinent role in climate action since they are more concerned about the long term impacts of climate change compared to older generations¹⁵⁴. Further, due to their vulnerability, the adverse impacts of climate change require adequate measures that take into account the specific requirements of persons with disabilities and ensure their participation in disaster response planning for emergency situations and evacuations, humanitarian emergency response and healthcare services¹⁵⁵. It is therefore necessary to foster inclusive participation in climate action in order to effectively combat climate change.

¹⁵⁰ United Nations., 'Sustainable Development Goal 13.b' Op Cit

¹⁵¹ USAID., 'Inclusive Climate Action: An Emerging Perspective.' Available at https://pdf.usaid.gov/pdf_docs/PA00VPHQ.pdf (Accessed on 22/09/2023)

¹⁵² Ibid

¹⁵³ Ibid

¹⁵⁴ United Nations Children's Fund., 'What is Climate Justice? And what can we do Achieve It?' Available at <https://www.unicef.org/globalinsight/what-climate-justice-and-what-can-we-do-achieve-it> (Accessed on 21/09/2023)

¹⁵⁵ Office of the High Commissioner for Human Rights., 'The Impact of Climate Change on the Rights of Persons with Disabilities.' Available at <https://www.ohchr.org/en/climate-change/impact-climate-change-rights-persons-disabilities#:~:text=The%20adverse%20impacts%20of%20climate,for%20emergency%20situations%20and%20evacuations%2C> (Accessed on 22/09/2023)

6.0 Conclusion

Climate change is an undesirable phenomenon that affects realization of the Sustainable Development agenda across the world by affecting the sustainability of the planet's ecosystems, the stability of the global economy and the future of humankind¹⁵⁶. It is the most defining challenge of our time and the main global challenge that is affecting both developed and developing countries in their efforts towards realization of the Sustainable Development agenda¹⁵⁷. If left unchecked, climate change will undo a lot of the development progress made over the past years and will also provoke mass migrations that will lead to instability and wars¹⁵⁸. Sustainable Development Goal 13 calls upon countries to take urgent actions towards combating climate change and its impacts¹⁵⁹. It is imperative for all countries to answer this call by building climate resilient and low carbon economies, enhancing climate change mitigation and adaptation efforts, improving climate education, unlocking climate finance and embracing inclusive participation in climate action¹⁶⁰. The time is now for the world to take urgent action to combat climate change.

¹⁵⁶ Climate Change., 'Meaning, Definition, Causes, Examples and Consequences.' Op Cit

¹⁵⁷ Muigua. K., 'Achieving Sustainable Development, Peace and Environmental Security.' Op Cit

¹⁵⁸ United Nations., 'Goal 13: Take Urgent Action to Combat Climate Change and its Impacts.' Op Cit

¹⁵⁹ United Nations., 'Sustainable Development Goal 13' Op Cit

¹⁶⁰ United Nations., 'Goal 13: Take Urgent Action to Combat Climate Change and its Impacts.' Op Cit

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Sustainable Development Goal 13: Climate Action., Available at <https://www.gcint.org/sdg-13-climate-action#:~:text=13.3%20Improve%20education%2C%20awareness%20Draising,impact%20reduction%20and%20early%20warning.&text=Our%20educational%20initiatives%20raise%20an,the%20impacts%20of%20climate%20change>.

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Is it time for Part-Time Adjudicators: The Untapped Potential in the Small Claims Court Kenya

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Abstract

History is replete with attempts by different States to create and sustain Courts that will handle straight jacket claims that do not require legal contestations. The thinking around this idea is that the disputes should be determined in formal institutions however small. Without going into the rich historical outlay of small claims world over and accounting for all the perspectives to the formulation of the idea of small claims courts which is another rich area for empirical inquiry, this paper focuses on the very narrow aspect of the historical outlay in the events leading to the legislative attempts to the creation of the Small Claims Court in Kenya and then considers the debates arising into the process. The paper attempts to project the statistical reality that should be anticipated and proposes as one of the ways to prepare for it is to recruit and equip private adjudicators as envisaged in the Act.

Introduction

One of the easiest ways to assess effervescence of a society is to check how it treats those within it who are weak and most vulnerable¹. The structure of the African society is generally organized in a way that the bottom of the pyramid carries the heaviest weight in terms of financial power when considered cumulatively yet it also hosts the greatest number of poor and vulnerable in society. This calls for creative solutions to address this increase in numbers. Paul Collier²

1-.pdf, Conflict and Convergence in The Application of International Humanitarian Law and Human Rights Law in Guantanamo Bay Naval Base, Africa Nazarene University Law Journal, 2019, Volume 7 (2) <https://www.jutajournals.co.za/conflict-and-convergence-in-the-application-of-international-humanitarian-law-and-human-rights-law-in-guantanamo-bay-naval-base/>,

¹ Thorlindsson, Thorolfur, and Jón Gunnar Bernburg. "Durkheim's Theory of Social Order and Deviance: A Multi-Level Test." *European Sociological Review* 20, no. 4 (2004): 271–85. <http://www.jstor.org/stable/3559561>.

² (Collier, *Bottom Billion : Why the Poorest Countries Are Failing and What can be Done* 2007)

argued that majority of African states remain underdeveloped yet they are in the billions. This is a realization that how a state handles dispute or management of conflict is a panacea to development of a state³. The Small Claims Court (the Court) is so far a dazzling innovation that appears to sit in well with the philosophy bottom-up approach to dispute resolution in Kenya. Indeed, in the financial year 2021/2023 the small claims court resolved 9,315 cases valued at KSh1,431 billion⁴. It is very clear that one of the institutional frameworks to come up this institution was pursuant to a need to deal with the bottom billion case in the Country. This paper attempts to document the historical event leading to the establishment of the Small Claims Court vide the Act, highlights some of the pejorative perceptions and creative insights that can be adopted to realize the potential of the Court and suggests some of the blind spots that the practitioners need to become aware of. This is paper is methodologically anchored on active observation, comments made from unsuspecting respondents who are practitioners and parties⁵.

Situating the Debates, on the architectural foundation of the Court

The idea of small claims court is premised on the pillar access to justice which has seen numerous initiatives in Kenya⁶. There have been several attempts to enhance access to justice such as 2003,

³ (Aboh 2014)

⁴ State of the Judiciary and Administration of Justice Annual Report 2021/2023. Pg. xxvi

⁵ Miranda, Valérie Vicky. "The Africa-EU Peace and Security Partnership and the Role of Civil Society." Edited by Nicoletta Pirozzi. Strengthening the Africa-EU Partnership on Peace and Security: How to Engage African Regional Organizations and Civil Society. Istituto Affari Internazionali (IAI), 2012. <http://www.jstor.org/stable/resrep09848.8>.

⁶ Kariuki Njenga Advocates "Operationalization of the Small Claims Court" 2021

Governance, Justice, Law and Order Sector Reform Program⁷, Economic Recovery and Strategy for Wealth and Employment Creation⁸, Justice William Ouko Taskforce on Judicial Reform⁹ all of which agree and point toward urgency and need increase in the number of judicial officers. The first attempt to enact the Small Claims Court was in 2007¹⁰ which fell through the cracks following the more urgent matters of national and judicial reform. After the raft of judicial reform, the agenda was revisited in 2015 with the clamour to have another level of courts to deal with the bulk of cases¹¹.

The Small Claims Court was established by the Small Claims Act 2016 which was assented to on 1st April 2016¹². The Act as enacted then was found to be unsatisfactory giving rise to a series of debates both in an out of parliament which led to the first amended by the Small Claims Court (Amendment) Act, 2020, assented to on 30th April 2020¹³. The Court was eventually gazetted vide Gazette Notice No. 3791 of 2021. The enactment of the Act was part of an initiative to aimed at implementing judicial reforms geared toward reduction of backlog of cases, enhance access to justice to those at the bottom of the pyramid and promote ease of doing business in Kenya¹⁴. The debates of the current structure and framework of the Court tell a nuanced tale of the foundations of the Court. This paper considers the

⁷ Kenya Governance Justice Law and Order (GJLOS) Sector Program 4th Program Review Administrative Data Collection and Analysis Report 2007

⁸ Report of the Taskforce on Judicial Reform July 2010

⁹ Economic Recovery and Strategy for Wealth and Employment Creation Policy (2003-2007)

¹⁰ Small Claims Court Bill, 2007

¹¹ Shipley, Thomas, and Transparency International Kenya. "Integrity Risks for International Businesses in Kenya." Transparency International, 2018.

¹² Small Claims Court Act 2016

¹³ Ibid

¹⁴ Kariuki Njenga Advocates "Operationalization of the Small Claims Court" 2021

jurisdictional debate and representation debate of the Court to demonstrate that though the ideological foundation of the small claims Court has been tested and improved there is still room for improvement.

The jurisdiction of the Court is limited to six categories of cases¹⁵ (1) claims arising from contract for sale and supply of goods or services; (2) a contract relating to money held and received; (3) liability in tort in respect of loss or damage (4) caused to any property or for the delivery or recovery of movable property; (5) compensation for personal injuries; and (6) set-off and counterclaim under any contract. It appears that majority of cases filed (7,137) and resolved (6,968) arise from contracts while the second largest category relate to the personal injury claims or what is referred to in legal circles as 'running down cases'¹⁶. The adjudicators are expected to be advocates of not less than three years in practice¹⁷.

Pecuniary Jurisdictional Debates

The first debate arose from the jurisdiction of the Court. It started with a proposal to have a pecuniary jurisdiction of Kshs 100,000/- or such sums as the Chief Justice would gazette¹⁸. The documented feedback on this account came from International Commission of Jurist who recommended that the amount should be revised upwards as the Chief Justice would determine¹⁹. This was not found satisfactory since some of the stakeholders felt that the amount should be raised. Eventually the pecuniary jurisdiction was enhanced

¹⁵ Section 12 of the Small Claims Court Act

¹⁶ State of the Judiciary and Administration of Justice Annual Report 2021/2023 pg. 90 Figure 2.37

¹⁷ Ibid

¹⁸ Section 7 (2) of Small Claims Bill, 2007

¹⁹ ICJ Report on Strengthening Judicial Reforms Volume 15: A Review and Commentary on The Small Claims Court Bill 2015.

to Kshs 200,000/-²⁰ with the Chief Justice having discretion to enhance the amount by way of Kenya Gazette²¹. This made itself to the Act that was assented to by the President but was found to be unsatisfactory.

There were several suggestions for increase of the pecuniary jurisdiction. Joseph Were and the Office of Chief Registrar expressed their view and suggested that the amount should be set at Kshs 500,000/-²² on the one hand. On the other hand, the Law Society vide Nelson Havi, then President, Nguyo Wachira felt the amount should be raised to Kshs 1,000,000/-²³. On the other hand, Prof Tom Ojienda and Wilberforce Okello felt that the proposal to increase the pecuniary jurisdiction should be abandoned and Kshs 1,000,000/- was too high for a small Claims Court and he felt that *"the proposal to increase the amount would create enormous injustice as the small claims Court will be burdened by numerous cases thereby defeating the intention of the Act...."*²⁴. They quoted comparative practice of South Africa (Kshs 100,000) and United States (Kshs 250,000/-), Australia (Kshs 800,000/-)²⁵. Ken Ogutu Advocate opined that there should be two separate jurisdictions one for Small and Medium Enterprises and another for individuals the former being limited to Kshs 200,000/= and the later Kshs 1,000,000/-. The Amendment carried the day and the pecuniary jurisdiction is now set for matters not exceeding Kshs.

²⁰ Section 13 (3) of the Small Claims Court Act, 2016. (Before the 2020 Amendment)

²¹ Section 13 (4) of the Small Claims Court Act, 2016 (Before the 2020 Amendment)

²² Report on Consideration of the Small Claims Court (Amendment) Bill, 2020 (National Assembly Bill No. 4) April 2020 See Annex 4.

²³ Ibid

²⁴ Ibid

²⁵ Ibid

1,000,000/=²⁶. This is unique to Kenya noting that other jurisdictions have adopted different amounts which are much less. This call for a further study to establish at least from a comparative practice point of view whether there is any convergence and divergence in terms of either qualitative and quantitative outputs for jurisdiction with high and those with low pecuniary jurisdictional amounts.

Representation Debate

The second debate on this Act relates to the issue of representation by Counsel in the small claims Court. It must be remembered that the ideological foundation of small claims court world over abhors legal-technical hurdles which are the bread and butter for lawyers²⁷. However, it is important to note that as a Constitutional imperative every person is entitled representation. As such no one should be denied representation on the basis of the size of their claim.

Section 27 (3) of the 2007 Bill provided that “Any party is entitled, but not required to be represented by an advocate”. On this ICJ opined that it was appropriate to ensure that there was a level playing field and recommended thus;

“It is recommended that the Bill should stipulate that for both natural and legal persons, there is no automatic right to legal representation, but provision for the right to representation at the appeal stage should be made. For legal persons, the Bill should

²⁶ Section 12 (3)

²⁷ Steele, E. (1981). The Historical Context of Small Claims Courts. American Bar Foundation Research Journal, 6(2), 293-376. doi:10.1111/j.1747-4469.1981.tb00356.x

stipulate that they shall be represented by a director or other nominated officer or representative".²⁸

It appears that this debate was not to end with the 2007 bill as it later found its way back into the subsequent legislative initiatives. The 2016 bill adopted a more abrasive stance and did not countenance the participation of Advocates in the Court. Indeed, while it anticipated representation of parties in Court, Section 20 (2) specifically provided that "*The representative referred to in subsection (1) **shall not be a legal practitioner***". This did not sit very well with stakeholders mainly lawyers. Why would Parliament take away the work of lawyers and give it to others who would be vetted by the Court, the lawyers wondered. In addition, they agonized albeit with a motive of profit, over what then would happen to Constitutional imperatives of legal representation. Parliament, perhaps relied on the growing thinking world over that there was no need to include lawyers in the Small Claims Court. In the end, it is no surprise that the first amendment to the small claims Court related to Section 20 (2) on representation from lawyers.

Nelson Havi, Prof Tom Ojienda, Wilberforce Okello, Guyo Wachira and Hon Adan Mohammed (the Cabinet Secretary) all supported the inclusion of legal representative by lawyers as proposed in the Amendment Bill (2020) with Kennedy Ogutu being the documented outlier on this issue who opposed the proposed amendment²⁹. Indeed, Hon Adan Mohammed suggested the inclusion of the timeline for resolution of the disputes within 60 days from the date of

²⁸ ICJ Report on Strengthening Judicial Reforms Volume 15: A Review and Commentary on The Small Claims Court Bill 2015.

²⁹ Report on Consideration of the Small Claims Court (Amendment) Bill, 2020 (National Assembly Bill No. 4) April 2020 See Annex 4.

lodging of a claim³⁰. As it stands now, lawyers are allowed to represent parties in the small claims Court. Indeed, majority who practice in this Court find it very attractive since it is a quick way to have disputes resolved by the parties³¹.

The other peripheral issue (in terms of this paper) that arose is to the constitutional challenge on Section 38 of the Act that provides for the appellate mechanism. Kennedy Ogutu argued that the fact that representation by counsel was limited constitutionally since, as he argued, the Advocates would have an opportunity to represent parties on appeal³². However, the legislative foundational structure of the Appellate process anticipated in the Small Claims Act, that an appeal to the High Court was final, could not withstand the Constitutional scrutiny when Justice Ogola held “ *In my view, Article 164(3) of the Constitution does not provide a right of appeal to the appellant; it merely confers jurisdiction on the Court of Appeal to hear appeals from the High Court; indeed, there is no right of appeal save for that which is conferred by statute; hence there is no right of appeal subsumed in Article 164(3) of the 2010 Constitution. From the foregoing, it is my view that Section 38 of the Small Claims Act is not unconstitutional*”³³. At the very least, we can see that there has been room for improvement of the Small Claims Court in Kenya.

The central thesis for this paper is anchored on Section 6 (4) of the Small Claims Court Act which provides for the appointment of an adjudicator on a **part-time basis**. The emphasis is on part-time basis. Here we make the following arguments; First, the data availed in the

³⁰ Ibid

³¹ Kariuki Njenga Advocates “Operationalization of the Small Claims Court” 2021

³² Ibid

³³ Mombasa Law Society v Attorney General & another [2021] eKLR

State of Judiciary and Administration of Justice Annual Report 2021/22³⁴ tells a tale of increase in backlog contrary to the intentions of the Act. The data shows that 8,978 were filed in the financial year 2021/22 and at the close of the reporting period 1,239 cases were pending. This adds to the existing backlog of cases which is against the intended initiative to clear backlog.

Second, although the report does not give details of the closure rate, we assume that backlog in terms of Small Claims Court would mean any case not determined within 60 days. Here we also assume that the 1,239 pending cases are not backlog but were filed within fifty-nine days before the close of the reporting period. The other point here is that the 8,978 cases were handled by 22 adjudicators/judicial officers meaning that every adjudicator handled about 408. This also means that each adjudicator potentially rendered 17 decisions/rulings every month or at least one for every working day and some days two or three³⁵.

Assuming the 22 adjudicators are each concluding 17 cases in a month, it is possible that they are experiencing a heavy workload, which could have a number of potential pitfalls, including: First decreased quality of work since if adjudicators are under significant time pressure to resolve cases quickly, there may be a risk of errors, oversights, or rushed decisions that could compromise the quality of their work. Second, burnout and stress due to the heavy workload can lead to burnout and stress, which can impact the mental health and well-being of adjudicators. This, in turn, could negatively impact the quality of their work, increase the risk of errors, and contribute to turnover or absenteeism. Third, backlogs and delays will become the

³⁴ State of Judiciary and Administration of Justice Annual Report 2021/22

³⁵ State of the Judiciary and Administration of Justice Annual Report 2021/2023

order of the day since the workload will become too heavy to manage and there is a risk that cases could begin to pile up, resulting in backlogs and delays. This could lead to longer wait times for litigants, decreased public trust in the court system, and increased pressure on adjudicators to resolve cases quickly, which could exacerbate the other potential pitfalls. Fourth, uneven case distribution of workload will arise as some of the judicial officers may be overworked while others may have a lighter workload. This could create inequities within the court system and impact the quality and efficiency of the decision-making process.

Possible Scenario

Based on the data presented in the financial year 2021/2022³⁶, it might be difficult to project exactly how this might play out in the next five years, as there are many variables that could impact the caseload and workload of the adjudicators/judicial officers. However, based on the information provided, here are a few possible scenarios; First, there might be an increase in caseload since if the number of cases filed continues to increase at a similar rate, the number of pending cases could grow significantly over the next five years. This could put additional strain on the adjudicators/judicial officers and potentially lead to longer wait times for cases to be resolved. Second, there might be improved efficiency by seasoned adjudicators since as they continue to handle cases at a similar rate and the court system implements measures to improve efficiency especially such as better case management software or streamlined processes, it is possible that the backlog of pending cases could be reduced over the next five years. However, this might come at the cost of quality of cases. Third, changes in workload: It's possible that the workload of the

³⁶ State of the Judiciary and Administration of Justice Annual Report 2021/2023

adjudicators/judicial officers could change over the next five years, based on factors such as retirements, new hires, or changes in case assignments. This could impact the number of cases each adjudicator handles and the overall efficiency of the court system. Overall, there are many factors that could impact the caseload and workload of the court system over the next five years, and it's difficult to predict exactly how this data might play out. However, monitoring trends in case filings and caseload management could help inform decisions about staffing and resource allocation to ensure that the court system is able to handle its workload effectively.

Silent Discomfort Amongst Magistrates

When the statistics are placed alongside the unfair and inaccurate pejorative connotations that are assigned to small courts, a dim picture of the future of the Adjudicators emerge calling for either rotation of Magistrates or creative innovations on how to motivate these judicial officers. We must add at this time the option of private adjudicators to neutralize this subtle threat. Although some of the perceptions are not universally held by magistrates or legal professionals who see small claims court as a valuable tool for providing access to justice for those who might not otherwise be able to afford or navigate the court system, there are some silent connotations that have been observed. First, due to its simplified procedures and lack of legal representation in all the cases, the Court is unfairly viewed as a "kangaroo court". This term implies that the court is not legitimate or fair and that its decisions may be biased or arbitrary. Second, another derogatory term that has been used to describe small claims court is "small minds court," which suggests that the cases heard in these courts are trivial or unimportant. In addition, Small claims courts can have high caseloads and limited resources, which can lead to long wait times, delayed hearings, and overworked magistrates. This can impact the quality of decisions and

lead to frustration for magistrates. Third, it is viewed as a "dumping ground" for cases that are not deemed important enough to be heard in other courts. This perception can lead to a lack of resources and support for small claims court, as well as a negative attitude toward litigants who choose to use this court. Small claims courts are often seen as less prestigious or challenging than other courts, which can lead to a perception that the magistrates who preside over them are less experienced or less knowledgeable about the law. Put differently they are sometimes seen as a "lesser" court, which can lead to a perception that the work done there is not as important or valuable as the work done in other courts.

Fourth, the courts are typically limited in their jurisdiction, meaning that they can only hear cases that meet certain criteria, such as a maximum amount or specific types of disputes. Some magistrates may feel that this limits the ability of small claims courts to address more complex or nuanced legal issues. This is coupled with the fact that the courts often use simplified procedures to resolve cases quickly and efficiently, which can sometimes lead to a perception that the process is not as rigorous or fair as other courts. Due to the limited jurisdiction the Small claims courts may not have similar access to the resources as other courts, such as libraries, research databases, or administrative support due to the avalanche of cases. Some magistrates may feel that this limits their ability to make informed decisions and provide adequate support to litigants.

A Case for Part-time Adjudicators

There are several reasons why Small Claims Courts should consider the option of part-time adjudicators. First part-time adjudicators can offer greater flexibility in scheduling and staffing, which can be helpful for small claims courts that may not have a consistent caseload or need to accommodate the availability of the adjudicators.

Second, hiring part-time adjudicators may be more cost-effective than hiring full-time staff, particularly if the caseload is not sufficient to justify a full-time position. This can help small claims courts operate within budget constraints while still providing access to justice. Third, part-time adjudicators may bring a range of professional experiences and backgrounds to their work, which can help ensure a diverse perspective in the decision-making process. Fourth, the small claims courts may benefit from part-time adjudicators who have specialized expertise in certain areas, such as contract law or landlord-tenant disputes. Fifth, retired judges may choose to work part-time in small claims courts as a way to continue contributing to the justice system while also enjoying a more flexible schedule in retirement. In some parts of Canada, private adjudicators may be appointed to hear certain types of small claims disputes. Similarly, in some states in the United States, private individuals or organizations may be appointed to act as mediators or arbitrators to help parties reach a settlement outside of court.

While part-time adjudicators can help to alleviate some of the pressures on the court system, they can also create a number of problems that can negatively impact the fairness and efficiency of the system. Some of the pitfalls for having part-time adjudicators include Lack of expertise since part-time adjudicators may not have the same level of expertise or experience as full-time judges, which can lead to inconsistent or incorrect decisions. Second, there is the risk of inconsistent availability since they may only be available to hear cases on certain days or at certain times, which can lead to delays and backlogs in the court system. Third, part-time adjudicators may not be able to provide consistent rulings on similar cases, as they may not be available to hear all cases in a particular jurisdiction. Fourth, these adjudicators may be more susceptible to bias or conflicts of interest, as they may not have the same level of oversight or accountability as

full-time judges. There is the fifth difficulty of attracting and retaining qualified candidates leading to turnover and inconsistency in the court system.

Conclusion

Here are some antidotes to address these challenges. First the part-time adjudicators should receive thorough training on small claims procedures, laws and ethical considerations. This training should cover legal principles, court procedures, and ethical considerations. In addition, there should be ongoing education and mentoring programs to ensure consistency and information sharing. Second, there should be adequate oversight and monitoring of part-time adjudicators to ensure that they are making fair and consistent decisions. Part-time adjudicators should be subject to the same oversight and accountability mechanisms as full-time adjudicators. This can include regular performance evaluations, adherence to ethical guidelines, and ongoing professional development.

Third, the judiciary should provide more flexible scheduling options for part-time adjudicators to help ensure consistent availability and reduce backlogs. In addition, part-time adjudicators should be offered flexible scheduling options that allow them to hear cases outside of traditional working hours. Fourth, competitive compensation and benefits packages should be offered to attract and retain qualified part-time adjudicators. Fifth, the judiciary should develop targeted recruitment efforts to attract diverse and highly qualified candidates, including advocates with relevant experience such as mediators, arbitrators and conciliators who have evidence of resolving disputes or retired magistrates who opt to practice as private adjudicators. Sixth, utilize technology such as virtual sessions to increase the availability of part-time adjudicators and improve the efficiency of the court system. This should be coupled with adequate etiquette training on virtual court sessions. In addition, encourage

Is it time for Part-Time Adjudicators? (2024) *Journal of cmsd Volume 11(2)*
The Untapped Potential in the Small
Claims Court Kenya: Henry Murigi

collaboration and knowledge-sharing between part-time adjudicators and full-time judges to promote consistency in rulings and procedures.

The Judiciary Strategic Plan (2019-2023) and the STAJ which is the vision of the Judiciary. These initiatives include: expansion of the Small Claims Court (SCC); automation of judicial functions; recruitment and retention of adequate and quality workforce; establishment, construction and renovation of courts; strengthening of the Tribunals Secretariat; continuous research to inform policy and administrative decisions; entrenchment of Alternative Dispute Resolution (ADR) mechanisms for expeditious resolution of disputes; and strategic and collaborative partnerships with external stakeholders to enhance the administration of justice.

Is it time for Part-Time Adjudicators? (2024) *Journal of cmsd Volume 11(2)*
The Untapped Potential in the Small
Claims Court Kenya: Henry Murigi

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Analyzing the Holistic Impact of Islamic Microfinance: A Dual Perspective on Social Welfare and Institutional Dynamics

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Abstract

This paper offers an in-depth investigation of the diverse effects of Islamic Microfinance Institutions (IMFIs) on social welfare and institutional dynamics. This study employs a dual perspective framework in form of a literature review to analyse the welfarist and institutionalist views, elucidating the significance of IMFIs in fostering societal welfare and along with sustainable longevity. The dual perspective provides a combined view of Islamic Microfinance in terms of its social welfare and its long-term sustainability which will help in the development of the overall Islamic micro-financial industry. From a welfarist standpoint, our examination uncovers the positive consequences linked to IMFIs, including the alleviation of poverty, the promotion of financial inclusivity, the empowerment of women, and the provision of assistance to small and medium-sized firms (SMEs). Nevertheless, this highlights the necessity for doing further comprehensive study in order to tackle the issue of urban poverty, meet the needs of vulnerable groups, and examine the psychological advantages of assistance provided by IMFI. The present study also investigates the possibility of IMFIs' involvement in augmenting social capital and community development, specifically through the use of contracts such as Qard al-hasan and Musharaka. Furthermore, it is well acknowledged that education and training aid play a crucial role in the reduction of poverty. In terms of the institutional aspects, many crucial elements are recognised as influential in determining the sustainability of IMFIs. These characteristics encompass government backing, the presence of diverse financial products, the composition of capital, adherence to Shariah rules, and the intricate equilibrium between social outreach and financial

feasibility. The significance of government partnerships and subsidies in enhancing accessibility to Islamic microfinance services is underscored. In addition, we propose the broader use of equity-based contracts, such as Musharaka and Qard al-hasan, as a means to decrease reliance on donors and improve long-term viability. In summary, the comprehensive comprehension of the societal and financial systems' function of Islamic microfinance is achieved through the convergence of the welfarist and institutionalist viewpoints. In order to optimise their efficacy in poverty alleviation and the promotion of financial inclusivity, IMFIs must adeptly manage the complex interrelationship between social and financial goals. The achievement of this equilibrium is contingent upon many critical initiatives, including collaboration between governments and IMFIs, the promotion of equity-based contracts, and the fostering of innovation in financial instruments.

Introduction

In an era characterised by increasing economic inequalities and the enduring issue of poverty, Islamic microfinance has emerged as an alternative progressive and ethical financial tool (R. A. Ahmad & Ahmad, 2021). It aims to harmonise the goals of financial sustainability with the principles of social welfare. By an inspiration from the data analysis by (Widiarto & Emrouznejad, 2015) it could be derived that the examination of its impact on the social welfare and institutional dynamics provides a valuable dual perspective to the future of the industry in terms of the alignment of the objective and its sustainable growth. Islamic microfinance is often regarded as a more efficient alternative to traditional microfinance due to its incorporation of ethical principles and the availability of specialised financial tools (Kaleem & Ahmed, 2010). In a detailed comparison (Abdul Rahman, 2007) has summarised the characteristics of the conventional microfinance and Islamic microfinance which are as follows:

Differences and Characteristics of Conventional and Islamic MFIs

Characteristics	Conventional MFIs	Islamic MFIs
Liabilities (Sources of Funds)	External Funds, Savings of Clients	External Funds, Savings of Clients, Islamic Charitable Sources
Assets (Mode of Financing)	Interest-Based	Islamic Financial Instruments
Financing the Poorest	Poorest are left out	Poorest can included by integrating Zakah with microfinancing
Funds Transfer	Cash Given	Good Transferred
Deductions at inception of contract	Part of the funds deducted at inception	No deductions at inception
Target Group	Women	Family
Objective of targeting Women	Empowerment of Women	Ease of availability
Liability of the loan	Recipient	Recipient and spouse
Work incentive of employees	Monetary	Monetary and Religious
Dealing with the default	Group/Center pressure and threats	Group/center/spouse guarantee, and Islamic ethics

Social Development Program	Secular (or un-Islamic) behavioral, ethical, and social development.	Religious (includes behavior, ethics, and social)
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Table 1. Differences and Characteristics of IMFIS and MFIS (Abdul Rahman, 2007)

In his research, (Rahim Abdul Rahman, 2010) has conducted an in-depth analysis of the potential of the Islamic microfinance. He argues that Islamic finance offers various ethical schemes and instruments that can be advanced and adapted for the purpose of microfinance. Comparatively, Qard al-hasan, Murabaha, and Ijarah schemes are relatively easy to manage and will ensure the capital needs (Qard al-hasan), equipments (murabaha) and leased equipments (ijarah) for potential micro-entrepreneurs and the poor. Participatory schemes such as mudarabah and musharakah, on the other hand, have great potentials for microfinance purposes as these schemes can satisfy the risk sharing needs of the microentrepreneurs. Several traditional microfinance organisations, although sharing the common objective of promoting social welfare, often deviate from their humanitarian mission as a result of imposing exorbitant interest rates (Mitra, 2009). (Hudon & Sandberg, 2013) confirm the high interest rate charges imposed by the conventional MFIs and justify the rationale behind the interest as relatively high operational costs than that of the Banks. In contrast, IMFIs offer financial solutions that adhere to Shariah principles, which play a crucial role in alleviating poverty and promoting welfare specially among marginalised populations. (Rahim Abdul Rahman, 2010) has described such principles and concepts extensively in his research. Over the course of time, a

diverse range of Islamic microfinance institutions has emerged, encompassing rural Islamic microfinance banks, non-governmental organisations (NGOs), and other microfinance organisations.

Throughout the progression of the Islamic financial sector, several institutions have prioritised the objective of poverty alleviation. According to (Frasca, 2008) and (Macias Alonso, 2015) among these organisations, the Mit Ghamr bank, formed in Egypt in 1963, stands out as one of the pioneering Islamic financial institutions. Subsequently, the Islamic commercial finance industry saw significant growth, with the primary objective of poverty eradication not being the foremost purpose of any Islamic commercial organization. In a field research performed on 46 Islamic banks (Salma Sairally, 2013) found that the practices of the Islamic financial institutions reflected a more limited approach to the corporate social responsibility (CSR). Most of the Islamic financial institutions were observed to be focused on meeting their legal, economic and Shari'ah responsibilities, and were concerned with the goals of profit maximisation and for their transactions to meet Shari'ah compliance. CSR was practised as a peripheral activity by the Islamic financial institutes as opposed to being an integral, well thought-out and deliberate policy decision of management. Similarly, (Abdul-Baki & Uthman, 2017) found that the Islamic banks tend to pursue their profit maximization goals which results in a failure to adhere the social goals of the Islamic finance.

However, this paradigm shifted with the emergence of Islamic microfinance institutions. The field of microfinance had significant growth subsequent to the formation of the Grameen Bank in Bangladesh, under the leadership of Mohammed Yunus (Mia & Ramage, 2018). On the contrary to collateral-based lending model,

(Yunus, 1999) states that the Grameen bank does not follow the conventional wisdom. Researchers (Wahid & Hsu, 2000) have explained the money lending process of the Grameen bank in a detailed article. They have expressed that “the lending decisions in a microfinance institution such as the Grameen bank are taken on the basis of group credit worthiness. The borrower must form a group of five co-borrowers based on their preferences. Before the formation of a group, the members go through a training session to learn the bank's rules and regulations. This training session also teaches the participants fundamentals such as how to sign their names and how to make key decisions. A chairperson and a secretary are elected by the group members. Within the group the first two neediest members get the loan first and they must repay on schedule before the next two receive the loan. Often the group chairperson is the last one who receives the loan. The size of the loans provided under the Grameen bank lending model ranges from \$100 to \$300.” The Grameen Bank does not adhere to the Shariah principles as it operates on a lending model that involves the charging of interest. The rise of Islamic microfinance organisations was afterwards influenced by analysing the potential of Islamic tenets in providing microfinance and by the introduction of innovative microfinance solutions based on Shariah principles along with a primary objective of social welfare (Rahim Abdul Rahman, 2010). Islamic microfinance has witnessed a subsequent progression and dissemination of microfinance sectors, particularly in developing nations. As of 2019, Islamic microfinance institutions have established their presence in over 15 countries spanning across Asia, including Afghanistan, Indonesia, Bangladesh, Pakistan, and Malaysia. Additionally, these institutions have also expanded their operations in the Middle East and North Africa region, encompassing Bahrain, Egypt, Iraq, Jordan, Lebanon, Palestine, Sudan, and Yemen (Tamanni & Haji Besar, 2019).

Furthermore, Islamic microfinance institutions have extended their reach to Central Asian countries such as Kazakhstan and Kyrgyzstan, as well as certain Eastern European nations like Bosnia Herzegovina and Kosovo (Tamanni & Haji Besar, 2019).

According to a literature review by (Mohamed & Fauziyyah, 2020) the academia has widely acknowledged the effectiveness of Islamic microfinance organisations in addressing poverty and promoting social welfare. This literature review also substantiates the influence of Islamic microfinance institutions on economic development, the reduction of poverty, the expansion of small and medium enterprises, the empowerment of women, the enhancement of living standards, and even the rates of employment. Hence, the effectiveness and the potential of IMFI in eradicating poverty is already recognized and acknowledged. Despite the fact that researchers are largely in agreement regarding the positive effects of IMFI, there are a number of challenges inherent to the IMFI sector that highlight the need for a nuanced understanding of the complex dynamics at play. For instance (Azmi & Thaker, 2020) in their literature review have identified several sustainability concerns such as sustainability, governance, and regulatory frameworks for IMFI continue to be the primary concerns of researchers and institutions for their future growth from an institutional standpoint. This research provides a multidimensional view of IMFI from an institutionalist and as well as a welfarist perspective.

Existing research has comprehensively investigated both the social welfare effects or the institutional dynamics of Islamic microfinance in isolation; this study bridges the gap by providing a comprehensive and integrated analysis. This research provides an extensive and nuanced understanding of the topic by simultaneously assessing the

effectiveness of Islamic microfinance in reducing poverty, promoting economic growth, and enhancing social welfare, along with an in-depth review of the underlying institutional structures, governance mechanisms, regulatory environments, sustainability, and financial stability. As a result, it not only enriches the academic discourse but also provides valuable insights for policymakers, practitioners, and stakeholders in the Islamic microfinance sector, allowing them to make more informed decisions and develop strategies that promote both social welfare and institutional resilience. This dual perspective approach thus considerably contributes to the existing literature concerning Islamic microfinance and its multifaceted impact on society and financial systems. Firstly, the objective of this paper is to investigate the impact of Islamic microfinance on poverty reduction and economic development, using a welfarist perspective as the analytical framework.

Secondly, this paper explores the analysis of how the institutional structure of Islamic microfinance institutions influences their long-term viability, governance practises, and financial resilience. Moreover, this paper aims to clarify the degree of alignment or divergence between welfarist and institutionalist perspectives when assessing the effectiveness of Islamic microfinance in promoting social welfare and economic progress. Lastly, this paper aims to investigate how the Islamic microfinance sector may effectively and durably maintain its impact on social welfare, in order to get a comprehensive understanding of the subject matter.

Literature Review

Islamic microfinance is a well researched topic among the academia. Researchers have examined its complex effects on numerous facets of society and communities through theoretical and primary research.

This literature review offers a thorough examination of the institutionalist and welfare perspectives on IMFIs provided by the researchers. This study examines the vast corpus of research that gives light on the efficiency and limitations of IMFIs, including topics like poverty reduction, financial inclusion, women's empowerment, and their involvement in small and medium-sized firms (SMEs). It also looks at the important elements affecting the sustainability and growth of IMFIs. By a combined analysis of these perspectives, significant contributions and limitations of IMFIs have been identified that are crucial in addressing societal issues and the policy considerations that could shape their future. This review serves as a comprehensive resource for anyone seeking to understand the nuanced role of IMFIs in the evolving landscape of global finance and social development.

1.0 Welfarist Perspective

1.1 Effectivity of IMFIs in Poverty Alleviation

Multiple studies have indicated the efficacy of IMFIs in mitigating poverty and providing social welfare services to its clientele. (Naveed Aslam, 2014) performed an empirical study that examined the role of Islamic microfinance in poverty alleviation in Pakistan. The research studied the impacts of Islamic microfinance, measured the degree of satisfaction among individuals, and explored the future prospects of Islamic microfinance institutions in Pakistan. The analysis has determined that Islamic microfinance plays a significant role in enhancing the standard of living, per capita income, educational attainment, ethical values, profitability, sustainability, infrastructure development, employment rates, and addressing issues of inflation and wealth inequality within society. The individual posited the significance and impact of religiosity on the expansion of the IMFIs.

(Zahid Mahmood et al., 2017) conducted a study examining the impact of borrowing from Islamic microfinance institutions, specifically Akhuwat, Farz, and Naymet, on various socio-economic indicators in Pakistan. Through regression analysis, the researchers found that borrowing from these institutions had a significant positive effect on monthly income, expenditures on food, education, and health, as well as the accumulation of household assets. However, it was also observed that an increase in the borrowed loan amount had a negative impact on the income of the poor. In their critical examination of the Akhuwat Foundation, (Akhter, 2009) reached the conclusion that the organisation extends its services to those residing below the poverty line, including those categorised as the "extreme poor." The authors also assert that interest-free loans can serve as a potent instrument in combating poverty. Furthermore, they suggest that the incorporation of philanthropic contracts, such as Qard al-hasan, might enhance the effectiveness of the contracts in poverty alleviation.

In the context of Indonesia, a case study is undertaken to examine the operations and practises of BMT MMU Sidogiri. According to a study conducted by (Adnan & Ajija, 2015), it has been demonstrated that Baitul Maal wat Tamwil (BMT) finance exhibits efficacy in mitigating poverty. The majority of participants saw a rise in their income subsequent to getting BMT funding. The use of BMT products, particularly Bay' Bithaman Ajil (BBA) and Mudarabah, has demonstrated efficacy in facilitating the economic empowerment of impoverished individuals through their engagement in diverse productive enterprises, hence resulting in a notable reduction in both the scope and intensity of poverty. In a research conducted by (Rokhman, 2013), an empirical investigation was carried out including a sample of 150 borrowers sourced from 20 IMFIs. The

results of the empirical tests demonstrate that microfinance plays a substantial role in enhancing income levels, promoting children's education, and fostering business advancement. Nevertheless, the research could not identify any substantial impact of microfinance on the availability of healthcare services. In their study, (Quraissy et al., 2017) has also provided empirical evidence supporting the positive impact of BMTs in Indonesia on the well-being and quality of life of the participants.

According to (Elwardi, 2015), the implementation of Islamic microfinance in Bangladesh has demonstrated a favourable influence on the alleviation of poverty in rural regions. This effect is particularly notable when borrowers possess adequate material resources and social connections. (Bhuiyan, 2013), a highly referenced academic researcher in the field of Islamic microfinance, did a comparison analysis between the Grameen bank and MFIs in Bangladesh. The study determined that the provision of credit has had a significant role in enhancing the sustainable livelihoods of borrowers from both microfinance institutions. Additionally, the study's results indicate that participants from Islamic banks who received microcredit shown a higher propensity to use credit for income-generating endeavours, hence lowering vulnerability and enhancing their overall livelihood status in comparison to participants from the Grameen Bank microcredit programme. According to (Khandker, 2005), a prominent economist affiliated with the Poverty Reduction and Economic Management Division and the Development Research Group at the World Bank, his research findings indicate that Microfinance Institutions (MFIs) play a significant role in fostering rural village development and promoting women's empowerment.

Based on the findings by (Hamdan et al., 2012), Amanah Ikhtiar Malaysia (AIM) has emerged as the most effective IMFI in Malaysia in terms of its impact on poverty reduction. (Othman, 2016) has also presented comparable findings, accompanied by an examination of the prospects for sustainable growth within the organization. During previous periods, several IMFIs have been formed across the African continent. According to the findings of (Gumel et al., 2014), their research on the influence of IMFIs in Nigeria revealed a noteworthy and comprehensive impact on poverty alleviation. This impact was shown through the good outcomes observed in terms of household income, children's education, and purchase of assets. The influence of IMFIs in Mogadishu was investigated by (Xalane & Mohd Salleh, 2019). The study revealed that the existing implementation of Islamic microfinance in Mogadishu demonstrates its efficacy in servicing impoverished individuals. Specifically, these microfinance initiatives have shown beneficial in facilitating access to loans, improving living standards, and demonstrating the utility of the system. However, it is evident that there exists a limited degree of awareness among the local population regarding the accessibility and availability of Islamic microfinance options.

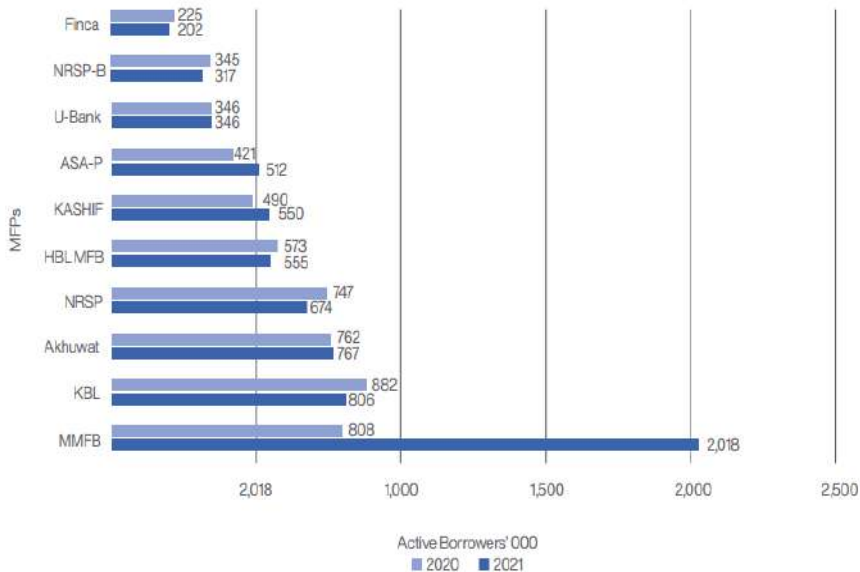
In addition to the broader implications of IMFIs on the reduction of poverty, scholars in their scholarly discussions have recognised the particular components offered by IMFIs that contribute to the well-being of society and individuals experiencing poverty. The literature review elucidates to some of the most discussed topics among the academia.

1.2 Financial Inclusion

IMFIs possess the capacity to assume a pivotal role in promoting and enhancing financial inclusion, particularly within regions that are

both developing and neglected. Financial inclusion encompasses the endeavour to guarantee that both individuals and companies are provided with accessible and cost-effective financial services that are suitable for their needs, including savings, credit, and payment systems. According to (Rhule, 2016), it is argued that governments and religious scholars should actively promote the area of IMFI in order to fully realise the advantageous outcomes of financial inclusion inside the Islamic microfinance system.

The Pakistan Microfinance Network have stated that the outreach indicators for Pakistan in the year 2021 revealed a closing value of the gross loan portfolio amounting to 373 billion PKR. The extensive range of IMFI institutions in Pakistan is likewise deserving of attention. The following exhibit presents a visual representation of the ten largest IMFIs in Pakistan and their respective loan portfolios for the year 2021 (Aqil et al., 2021).



**Figure 2. The Ten Largest IMFIS in Pakistan and Their
Respective Loan Portfolios for The Year 2021**

According to (Muhammad et al., 2023), the financial inclusion rate of both men and women in Bangladesh is a significant concern. According to available data, around 46% of males and 74% of females are considered to be excluded from accessing financial services. The author expounds upon and proposes several potential ramifications for the future advancement of the industry. (Nabi et al., 2017) performed a thorough literature study to analyse the IMFI models and find effective strategies for promoting financial inclusion among the Muslim community in Bangladesh.

In the specific context of Indonesia, (Wulandari, 2019) finds there is a need for BMT institutions to strengthen their role in order to successfully incorporate the financially underserved people at the base of the socioeconomic pyramid into the range of financial services

offered by these organisations. The research reveals that the implementation of BMT (Baitul Maal wat Tamwil) in Indonesia necessitates the establishment of distinct structures and responsibilities tailored to each stage in order to achieve optimal effectiveness. There is a distinct necessity to differentiate the function of Baitul Maal from Baitul Tamwil in order to augment its efficacy in providing Qard al-hasan finance to those situated at the lower echelons of the socioeconomic hierarchy. In their study, (Abdullahi et al., 2021) employed a quantitative research methodology to investigate the factors influencing the desire to embrace Islamic financing in Nigeria. The findings had a beneficial outcome. The author suggests that players within the Nigerian financial system should initiate educational programmes aimed at enhancing public perception of the role of Islamic microfinance banks in facilitating financial inclusion and reducing poverty. (Onakoya & Onakoya, 2014) have likewise arrived at comparable findings.

1.3 Women Empowerment

IMFIs and the Islamic microfinance sector play a crucial role in promoting women's empowerment inside Muslim-majority nations and communities. Islamic microfinance plays a significant role in promoting the economic, social, and cultural empowerment of women via the provision of financial services, entrepreneurial possibilities, and financial education. The process of empowerment yields advantages not just for women on an individual level, but also generates favourable consequences that extend to their families and communities. (Islam, 2020) did a main research study that involved a sample of 389 female respondents who were recipients of services provided by the IMFIs in Bangladesh. The researcher discovered that Islamic micro financial services have had a noteworthy and favourable influence on various aspects of households' financial well-

being. These services have resulted in increased income, savings, and expenditure for households, leading to an improved standard of living and the development of human capital. Furthermore, they have contributed to the enhancement of three dimensions of empowerment: economic empowerment, socio-cultural empowerment, and familial empowerment. In contrast, (Rahayu, 2020) posits in her empirical study conducted in Indonesia that the inclination of the BMT system towards women is mostly driven by commercial and pragmatic factors. By strategically focusing on women as creditworthy customers, these institutions can enhance their ability to meet operating costs and create the necessary revenues to continue their microfinance programmes in the long run, as well as expand their outreach to a larger population of underprivileged consumers. (Shafique & Siddique, 2020) have established a positive association between Islamic microfinance services and women empowerment in Pakistan.

1.4 Impact on SMEs and unemployment rates

Based on a study conducted by (Najeeb Jamal & Sheikh, 2013) in Pakistan, they discovered that the Islamic Microfinance model encompasses various dimensions and a regulatory framework. This model aims to address the social, financial, humanitarian, and religious objectives of micro entrepreneurs and SMEs, which are often overlooked by conventional microfinance institutions. In a scholarly article, (Antonio, 2011) asserts that SMEs in Indonesia have a range of challenges when dealing with conventional financial institutions. However, the author suggests that these obstacles can be alleviated by the adoption of an Islamic financial alternative. In a study conducted by (Herlinawati et al., 2017), a sample of 30 individuals was analysed to determine the impact of Islamic microfinance institutions on the growth of SMEs in Indonesia. The

findings revealed that about 67.5 percent of the development of SMEs in Indonesia can be attributed to the role played by Islamic microfinance institutions, particularly in terms of financing. The remaining 32.5 percent was impacted by other variables that were not specifically explored in the study. (Rokhman & Abduh, 2019) conducted a study to evaluate the levels of satisfaction and loyalty among clients of IMFIs in the region of Central Java, Indonesia. The study sample consisted of 246 respondents. It has been observed that the existing Islamic microfinance initiatives have not yet succeeded in enhancing the financial well-being and quality of life of their clientele. Additionally, clients continue to have difficulties in differentiating between conventional and Islamic microfinance offerings. Contrarily, (Nugroho & Utami, 2021) conducted a study on customers of the Micro-Banking Division of Bank Syariah Mandiri, wherein it was discovered that a majority of respondents expressed satisfaction with the credit and its associated attributes, including loan size, cost, collateral requirements, processing time, and application form. The provision of credit facilitated the enhancement of their business operations, leading to an increase in sales and overall revenue. Nevertheless, the significance of the religious aspect of the Islamic Microfinance organisation was deemed rather insignificant in the process of choosing a microfinance organization. In Yemen, research was undertaken by (Fararah & Al-Swidi, 2013) on a sample of 320 respondents within the IMFI industry. The researcher discovered a significant impact of business development services offered by IMFIs on the satisfaction and perceived advantages experienced by SME owners while engaging with the Islamic microfinance system. (Adeyemi, 2015) and (Jafori & Afzal, 2016) arrived at comparable findings in their respective studies, which involved conducting research interviews to examine the possible

influence of IMFIs on social welfare in relation to the undisclosed poverty within the nation.

2. Discussion on the Welfarist Approach

The literature review highlights certain favourable outcomes associated with IMFIs in relation to poverty alleviation, financial inclusion, women's empowerment, and support for SMEs. However, there exist certain gaps pertaining to the long-term sustainability of these impacts, the extent of awareness and outreach of IMFIs, and the necessity to strike a balance between commercial viability and adherence to religious principles. The outcomes pertaining to the welfare effects of Islamic microfinance exhibit heterogeneity across different geographical areas. This implies that the attainment of success is not consistent and can be influenced by geographical areas, methodologies, and several other variables.

The existing body of research pertaining to Islamic microfinance has not adequately addressed the several aspects that should be considered within the welfarist approach. The unacknowledged poverty within industrialised nations is a challenge that IMFIs appear to struggle to address. Although several studies have investigated the impact of Islamic microfinance on reducing rural poverty, further investigation is required to assess its efficacy in tackling urban poverty and narrowing the gap between rural and urban areas. Examining the potential impact of Islamic microfinance on urban populations' access to economic opportunities and welfare enhancement is a significant area of scholarly inquiry. This will further contribute to the determination of the true extent of financial inclusion among IMFIs on a global scale. In a similar vein, while several studies have addressed the issue of poverty reduction, there exists a requirement for more comprehensive research that delves

into the particular effects of Islamic microfinance on vulnerable and marginalised groups, including refugees, internally displaced people, and minority communities. Inclusive development necessitates a comprehensive comprehension of the distinct problems and welfare requirements faced by individuals.

The examination of scholarly literature pertaining to the psychological advantages associated with IMFIs financial support may contribute to a better understanding of the impact of IMFIs on the holistic welfare of impoverished communities. Additionally, evaluating the ease of implementation of IMFIs might be beneficial in terms of their financial systems and the level of pleasure they offer to impoverished individuals.

Islamic microfinance banks frequently operate inside tightly-knit communities. Examining the impact of involvement in these establishments on social capital, community cohesiveness, and wider community development endeavours can offer valuable insights into their contribution to promoting social well-being. Based on existing scholarly research on IMFIs, it is evident that Qard al-hasan, a benevolent loan contract, holds significant value in terms of poverty alleviation and community cohesion and development. Several frameworks have not yet examined or applied different principles of Qard al-hasan. The notion of Kafil, which refers to a sponsor or guarantor, has the potential to bolster the social dimension of those experiencing poverty. By creating a fostered helper who possesses a higher standard of living, income, and general well-being, this idea can contribute to the improvement of the impoverished individual's social circumstances. The construction of a repository facilitated by a Kafil has the potential to enhance the integration of impoverished individuals within their society, therefore contributing to the overall

reduction of poverty. At now, it appears that the Murabaha contract holds a prominent position within the market of IMFIs. Musharaka and Mudaraba had the ability to offer more welfare, particularly to emerging SMEs, in comparison to contracts based on debt. The integration of seasoned Muslim business professionals with emerging entrepreneurs with limited financial means, in exchange for a minority ownership stake, has the potential to increase the performance of their respective enterprises through the provision of valuable guidance and insights from the more experienced individuals. Such schemes have the potential to be advantageous in the context of poverty alleviation. These initiatives can also have a significant impact on the promotion of financial literacy among aspiring entrepreneurs from economically disadvantaged neighbourhoods. The provision of educational assistance has the potential to provide a novel avenue for poverty reduction, as it can yield more effect than the monetary aid often offered by IMFIs.

3. Institutional Perspective

In comparative research conducted by (Marwa Fersi & Mouna Boujelbéne, 2016), the sustainability of 333 MFIs and 49 IMFIs was studied. The findings revealed that the proportion of borrowers impacted by IMFIs was significantly lower in comparison to their conventional counterparts. Furthermore, the economic magnitude and established status of MFIs contribute to the enhancement of their social performance. In terms of financial aspects, MFIs mainly depend on loan financing and the effectiveness of their staff to achieve financial performance. Nevertheless, the IMFIs primarily depend on the allocation of financial capital and the efficiency of its workforce. IMFIs exhibit more potential for ensuring their sustainability by relying more on social performance as compared to the conventional. MFIs exhibit superior financial performance

compared to Islamic MFIs in their pursuit of long-term viability. The organization's ability to sustain its customer base is contingent upon its organisational and financial success. According to (Obaidullah & Khan, 2008), microfinance providers have significant obstacles at the micro level, which arise from their varied organisational structures, concerns over adherence to Shariah principles, limited product variety, and inadequate connections with banks and capital markets. Several strategic initiatives are proposed as potential solutions. These include promoting a collective approach to resolving Shariah issues, expanding the range of products through research and financial engineering, and increasing the involvement of banks in microfinance by offering credit guarantees and safety nets. The conventional MFIs have demonstrated superior performance in terms of sustainability and institutionalisation compared to IMFIs. The academic discourse around the future and sustainability of IMFIs has identified many key aspects that have been essential to the ongoing discussions pertaining to the potential expansion of IMFIs. Several major factors have been studied below.

3.1 The Government and the Sustainability of the IMFIs

According to (Azmi & Thaker, 2020), the government plays a crucial role in ensuring the sustainability and effectiveness of Islamic microfinance organisations. One potential avenue for government aid to financial institutions is the provision of enhanced infrastructure and related amenities, with the aim of facilitating access to financial assistance for economically disadvantaged individuals residing in rural regions. Furthermore, it is suggested that governmental assistance and subsidies be provided to nascent Islamic microfinance institutions in order to facilitate their establishment and subsequent self-sufficiency within the market. In addition to this, it is recommended that the IMFIs should enhance

their efforts in raising awareness and promoting the sector. Moreover, they should prioritise educating a larger population about the business, aiming to expand the reach of those who may avail themselves of the goods and services offered.

According to (Abbas & Shirazi, 2015) study conducted in Pakistan, a significant proportion of micro-entrepreneurs and petty traders surveyed expressed the belief that the government of Pakistan does not provide sufficient support for the development of Islamic microfinance initiatives aimed at benefiting individuals from low-income backgrounds. According to the findings of (Ayaz et al., 2019), the involvement of the Pakistan government in the IMFI sector is relatively limited. One of the primary issues contributing to the limited presence of banks in the Islamic microfinance market is the perceived lack of government backing. The study conducted by (Aspiranti et al., 2021) asserts that the internal management concerns, particularly those pertaining to government contacts, play a pivotal role in facilitating the efficient operations of Islamic non-banking MFIs and their capacity to provide money to other Islamic financial firms.

3.2 Preferred Modes of Financing

In their study, (Smolo & Ismail, 2011) have compiled a comprehensive inventory of the financial instruments employed by IMFIs on a global scale in order to facilitate the provision of their services. The products available in this context can be categorised as follows: (i) Mudhā`raba, which involves profit and loss sharing (PLS); (ii) Mushā`raka, which refers to a partnership arrangement; (iii) Ijā`rah, which pertains to leasing; (iv) Ijā`rah wa iqtinā`, which involves a lease-to-purchase arrangement; (v) Qard al-hasan, which refers to a benevolent loan; (vi) Murā`bahah, which entails cost-plus

financing; (vii) Bay' al-sala^ṁ, which involves a pre-paid purchase; (viii) Bay' al-istisna^ʿ, which pertains to progressive financing; and (ix) Musha^ṁ-raka mutana^ṁ-qisah, which refers to a diminishing partnership. The financial instruments may be categorised into two distinct groups: profit-based products and charity-based products. The items that generate profit may be classified into two distinct categories: debt-based products and equity-based products. Ijarah, Murabaha, Bay al-istisna, and Bay al-salam may be classified as debt-based financial goods, whilst Musharaka and Mudharaba can be categorised as equity-based financial products. One may argue that Qard al-hasan is also regarded as a form of debt-based financial instrument. Nevertheless, a number of scholars have classified Qard al-hasan with other forms of charitable contracts, such as Zakah and Waqf, due to its altruistic characteristics.

Based on the findings of (Hassan et al., 2013), the Murabaha contract emerges as the most favoured contract within IMFIs. This preference is attributed to the absence of a requirement for the client's credit record, the presence of clearly specified contracts, and the reduced administrative expenses associated with this particular contract. (S. Ahmad et al., 2020) conducted a study which revealed that among various Islamic financial products, murabaha, a kind of debt-based financing, is the most prevalent. Their findings indicate that 64.7 percent of the Islamic microfinance institutions included in their sample provide this product. Equity-based products, such as Musharaka, are offered by a limited number of MFIs due to the significant level of risk involved. The conventional MFIs demonstrated superior performance in comparison to the IMFIs primarily because the latter lacked a comprehensive and resilient financial instrument framework. According to (Abdul Rahman & Dean, 2013), their study findings indicate that Islamic

microfinance has predominantly focused on the murabaha financing mode. Despite being considered a "ideal" form of finance, profit or loss sharing arrangements are rarely utilised. The current quantity of Zakah, Awqaf, and Qard al-hasan institutions falls well short of their potential, while other services like as savings deposits and insurance remain unavailable. The provision of a more extensive array of shariah-compliant products and services would enhance accessibility for a diverse clientele. In addition to the prevalent utilisation of Murabaha, another significant concern is to the adherence to Shariah principles in Murabaha contracts, commonly known as the Murabaha Syndrome within academic discourse (Miah & Suzuki, 2020).

3.3 Capital Structure of the IMFIs

As noted by (Azmi & Thaker, 2020), there exists a robust demand for Islamic microfinance goods and services; nonetheless, the expansion of the Shariah-compliant microfinance industry continues to exhibit sluggish progress. The primary factor contributing to this phenomenon is the reliance on specialised entities such as non-governmental organisations (NGOs) and donors to offer the facilities and services of Islamic microfinance, as opposed to Islamic banks. In similar research, (Tamanni & Haji Besar, 2019) discovered that the future of IMFIs is confronted with two significant challenges: the acquisition of sustainable funding due to the diminishing availability of donor money and government subsidies, and the need to strike a delicate balance between poverty outreach and financial sustainability. (Abdul Rahman & Dean, 2013) assert that the economic viability of most donations MFIs and IMFIs are compromised by the insufficient mobilisation of funds and the burden of excessive administrative expenses. Certain detractors argue that the Grameen Bank's financial operations would incur losses in the absence of funding. The resolution of the sustainability

dilemma cannot be effectively achieved just through voluntary contributions. According to the findings of (Tamanni, 2017), the IMFIs do not prioritise sustainability objectives at now. This is because their financing mechanism is capable of supporting their primary focus on poverty reduction. Nevertheless, due to the ongoing push for commercialization and increasing competition, particularly with the growing selectivity of foreign funders, it is imperative for IMFIs to reduce their dependence on subsidies or grants.

4. Discussion on the Institutional perspective

As previously mentioned, the viability of Islamic microfinance institutions is contingent upon several factors, encompassing governmental backing, a diverse range of financial products, the structure of capital, adherence to Shariah principles, a harmonious integration of social outreach and financial sustainability, and a diminished reliance on external donors. By considering these variables and achieving a harmonious equilibrium between their societal objectives and economic viability, IMFIs can persist in their pivotal role of reducing poverty and promoting financial inclusivity in areas mostly inhabited by Muslims. The provision of government aid, subsidies, and the construction of infrastructure can play a crucial role in enhancing the accessibility of Islamic microfinance services, particularly in rural regions. It is imperative to engage in partnerships with governmental entities in order to enhance infrastructure and foster the dissemination of knowledge regarding Islamic microfinance. Governments have the capacity to provide assistance to emerging IMFIs.

The selection of financial instruments, namely the widespread adoption of Murabaha, has a significant impact on sustainability. The

prevalence of debt-based products, such as Murabaha, is notable, although the availability of equity-based products, like Musharaka, is limited primarily owing to perceived dangers. Governments and financial institutions appear to prioritise the establishment of debt-based contracts over equity and charity-based contracts, therefore institutionalising the former. As elucidated within the framework of the welfarist approach, it is imperative for governments to further institutionalise Musharakah and Qard al-hasan, as these financial mechanisms possess considerable potential. The problem of IMFIs relying on donors can be addressed by governments' sustained funding and the implementation of more efficient Shariah-based schemes, as opposed to Shariah-compliant ones. The problem of reconciling social outreach initiatives, such as poverty reduction, with financial sustainability represents a vital concern for IMFIs. Excessive dependence on poverty reduction efforts has the potential to undermine the long-term financial viability of a given system or organisation. Hence, it is imperative for IMFIs to formulate methods that effectively reconcile their objective of alleviating poverty with the need of maintaining financial viability. The organisation has the potential to prioritise the promotion of financial inclusion across a wider range of clients, while concurrently diminishing reliance on subsidies over time.

Based on the extant literature pertaining to Murabaha and the capital structures of contemporary IMFIs, it is evident that both the conventional and Islamic banking frameworks exhibit inefficiencies in effectively reconciling their social and financial objectives. IMFIs should refrain from adopting conventional and commercial Islamic banking structures due to the profit-oriented nature of these institutions, which ultimately results in a deviation from the objective of both IMFIs and MFIs. Alternatively, the implementation of a

financial framework centred around Qard al-hasan or Musharaka holds potential for enhancing the welfare and sustainability of IMFI, contingent upon government support.

5. Addressing the IMFI's Welfare and Sustainability dilemma

The welfarist perspective places a primary focus on the overall well-being and welfare of both people and communities. The literature analysis highlights the significant impact of IMFI in several areas such as poverty reduction, financial access, empowerment of women, and assistance for SMEs. Welfarists hold the belief in the inherent worth of these results, placing emphasis on the improvement of individuals' standard of living as the central objective of IMFI. The welfare impacts are often seen as crucial indications of success, serving as tangible evidence of the positive transformation that these institutions may foster within marginalised groups. The institutional approach viewpoint examines the formal and informal mechanisms in which IMFI function, including their governance, legal frameworks, financial structures, and compliance with Shariah rules. The literature study underscores the need of adhering to Islamic values, promoting a diverse range of financial products, maintaining an appropriate capital structure, and receiving government backing as essential elements for ensuring institutional survival. The institutionalist perspective argues that the efficacy and durability of IMFI are closely linked to the robustness and flexibility of these organisations.

In order to address the existing predicament encountered by IMFI, governments might employ many approaches, including the establishment of public-private partnerships with IMFI and the implementation of co-financing programmes alongside IMFI. Public-private partnerships have the potential to produce a revenue

stream for the government, while co-financing programmes can assist IMFI in securing funds. Moreover, from a welfare standpoint, such collaborations have the potential to facilitate the expansion of IMFI to the unexplored regions. SME-specific initiatives have the potential to contribute to a reduction in unemployment rates and foster the growth of diverse business sectors within the country. From a welfare standpoint, it is possible to accomplish comprehensive development for the emerging entrepreneur over an extended period of time. Musharaka and Qard al-hasan are highly significant resources for the effective implementation of such initiatives. Training camps and educational assistance have the potential to significantly contribute to the alleviation of poverty. Governments and IMFI have the potential to collaborate in order to harness the untapped potential of the people through the establishment of government-funded companies. Instead of providing financial assistance, the government and IMFI should consider employing the impoverished people in co-funded companies. This approach would enable them to earn a daily wage, while also being cost-effective owing to the establishment of a consistent revenue stream. The issue of women empowerment may also be effectively tackled via the utilisation of this particular strategy. Governments can also employ the nudge hypothesis as a means of effectively securing increased money from donors. While dependence only on donors is not a reliable and enduring source of funding, marketing initiatives supported by the government have the potential to produce a significant pool of charitable donations, and therefore enhancing the funding of IMFI.

6. Conclusion

In summary, this paper conducted a comprehensive examination of the Islamic microfinance sector by employing a thematic analysis approach to study the existing literature on Islamic microfinance.

From a welfarist standpoint, our examination underscores the favourable consequences linked to IMFI, encompassing the alleviation of poverty, the promotion of financial inclusivity, the empowerment of women, and the provision of assistance to small and medium-sized enterprises. Nevertheless, it is crucial to emphasise the necessity for further extensive investigation in order to tackle the issue of urban poverty, susceptible demographics, and the psychological advantages associated with help from IMFI. Moreover, it is imperative to conduct additional exploration into the social capital and community development potential that may be derived from engaging with IMFI, specifically through contracts such as Qard al-hasan and Musharaka. Education and training support can significantly contribute to the reduction of poverty.

The sustainability of IMFI is contingent upon several institutional elements, encompassing government backing, a diverse range of financial products, the composition of capital, adherence to Shariah rules, and the equilibrium between social outreach and financial feasibility. Governments have the potential to improve the accessibility of Islamic microfinance services by establishing partnerships and providing subsidies. These measures can facilitate the growth and expansion of IMFI, allowing them to cater to a broader range of clients. Furthermore, it is imperative to promote the utilisation of equity-based contracts such as Musharaka and Qard al-hasan in order to mitigate reliance on donors and foster long-term viability.

The convergence of the welfarist and institutionalist viewpoints provides a holistic comprehension of the societal and financial ramifications of Islamic microfinance. In order to uphold their efficacy in poverty reduction and facilitation of financial inclusion,

IMFIs must effectively manage the intricate equilibrium between social and financial goals. The achievement of this balance necessitates the establishment of collaborations between governments and IMFIs, the promotion of equity-based contracts, and the study of novel financial instruments.

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Tackling the Challenge of Prosecuting No-Body Murder Cases in Kenya: Legal Guidance from South Africa and Australia

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Abstract

This paper provides a comprehensive examination of the intricate challenges and complexities involved in prosecuting no-body murder cases. Focusing on the legal, evidential, and procedural aspects, the discussion explores the fundamental concept of corpus delicti, the burden of proof, and the critical role of circumstantial evidence. By drawing insights from international experiences in South Africa and Australia and assessing Kenya's current legal framework, this paper offers valuable lessons and guidance for enhancing the pursuit of justice in such cases. It underscores the significance of victimology and motive, providing a roadmap for legal practitioners, policymakers, and scholars to navigate these challenging legal landscapes.

Keywords: No-Body Murder Cases, Corpus Delicti, Evidential Challenges, Circumstantial Evidence, Legal Framework, Justice, Criminal Law, Prosecution, Kenya

1. Introduction

Tackling the challenge of prosecuting no-body murder cases is a complex and demanding endeavour within the realm of criminal law¹. In the context of Kenyan jurisprudence, where legal guidance

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¹ DiBiase, T.A. (2023). No-Body Homicide Cases: A Practical Guide to Investigating, Prosecuting, and Winning Cases When the Victim Is Missing

often draws from international precedents, including countries like South Africa and Australia, the pursuit of justice in such cases takes centre stage. This discussion delves into the legal intricacies, evidential challenges, procedural hurdles, and the current legal framework in Kenya, while also drawing invaluable lessons from the experiences of South Africa and Australia in handling no-body murder prosecutions.

The legal problem posed by no-body murder cases revolves around the fundamental concept of *corpus delicti*, which essentially requires the prosecution to establish both the fact of the crime and the identity of the victim.² The absence of the victim's body poses a significant hurdle in meeting this requirement, and it is here that the principles of *corpus delicti* rule, evidential challenges, and the use of circumstantial evidence come into sharp focus.

Within the courtroom, discharging the burden of proof falls squarely on the shoulders of the prosecution, necessitating a meticulous and compelling presentation of evidence to convince the court of the accused's guilt.³ Procedural challenges further complicate the path to justice, including the charge to prefer and the decision to opt for single or cumulative charges, making each case a unique legal puzzle⁴ In examining the current legal framework in Kenya, it becomes evident that there are no express provisions in the Penal Code addressing no-body murder cases, revealing a potential gap in the

(2nd ed.). CRC Press. <https://doi.org/10.4324/9781032618098> accessed 27 October 2023

² Ibid

³ Ibid

⁴ Academic.oup.com

<https://academic.oup.com/edited-volume/45636/chapter/396152318> accessed 23 January 2024

law. The Criminal Procedure Code, while lacking direct provisions, does offer some tools that could be relevant in such prosecutions. Additionally, the Evidence Act does not provide specific guidelines for handling cases where the victim's body is not recovered.

Drawing from the experiences of South Africa and Australia, this discussion provides valuable insights into the opportunities and challenges presented by no-body murder prosecutions. South Africa's case law, exemplified by *the state v MA 082/2017*, showcases the judicial approach to such cases and the significance of circumstantial evidence in securing convictions. Meanwhile, the Australian cases of *The Lane case*, *Bruce Allan Burrell*, and *the Claremont serial killings* illustrate the complexities of prosecuting no-body murders, including the role of motive, circumstantial evidence, and victimology.

The lessons learnt from these international examples provide a roadmap for Kenya, offering guidance on how to navigate the legal intricacies and evidential challenges inherent in no-body murder cases. This discussion aims to shed light on the multifaceted nature of these prosecutions, with the ultimate goal of enhancing the pursuit of justice in Kenya's legal landscape.

2. The Legal Problem Posed by No-Body Murder Prosecutions

2.1 The *Corpus Delicti* Rule

The *Corpus Delicti* Rule is a fundamental principle in criminal law that refers to the body of the crime.⁵ In essence, it establishes that there must be sufficient evidence to prove that a crime has occurred before

⁵ Ibid

someone can be convicted of it. This rule ensures that convictions are based on concrete evidence rather than mere suspicion or conjecture.⁶ In the context of no-body murder cases, the *Corpus Delicti* Rule presents a significant challenge. In traditional murder cases, the body of the victim serves as crucial evidence to establish the fact of the crime, the cause of death, and the identity of the victim.⁷ However, in cases where the victim's body has not been found, proving the crime becomes much more complicated.⁸

One of the main challenges is establishing that the victim is, in fact, deceased.⁹ In traditional murder cases, the presence of a body provides clear evidence of death. In no-body cases, other forms of evidence, such as circumstantial evidence or forensic evidence, may be used to demonstrate that the victim is deceased.¹⁰

Even if it can be proven that the victim is dead, determining the cause of death can be challenging without a body.¹¹ This may require extensive forensic analysis and expert testimony. Identifying the victim is also complicated when there is no body.¹² DNA evidence,

⁶ Ibid

⁷ DiBiase TA, 'No-Body Murder Case Statistics' [2023] No-Body Homicide Cases 57

⁸ Ibid

⁹ Death investigation: A guide for the scene investigator <https://www.ojp.gov/pdffiles/167568.pdf> accessed 23 January 2024

¹⁰ Ibid

¹¹ Forensic Autopsy--a Body of Clues' (Officer, 6 July 2012) <https://www.officer.com/investigations/article/10249533/forensic-autopsya-body-of-clues> accessed 23 January 2024

¹² 'No-Body Homicide Cases: A Practical Approach' (FBI, 9 November 2016) <https://leb.fbi.gov/articles/featured-articles/no-body-homicide-cases-a-practical-approach> accessed 23 January 2024

dental records, or other means of identification may be used.¹³ No-body cases often rely heavily on circumstantial evidence, which can be more challenging to present convincingly in court.¹⁴ Prosecutors need to build a strong case based on such evidence, connecting the accused to the crime beyond a reasonable doubt.¹⁵

In the context of Kenya, it can be beneficial to look at legal guidance from countries with experience in prosecuting no-body murder cases, such as South Africa and Australia. These countries have faced similar challenges and have developed legal strategies and precedents that may be relevant in Kenyan cases.

2.2 Evidential Challenge

The evidential challenge in no-body murder prosecutions primarily revolves around the absence of the victim's body, which is a critical piece of evidence in traditional murder cases.¹⁶ Without a body, several evidential challenges arise in the following contexts:

2.2.1 Circumstantial Evidence

Circumstantial evidence plays a pivotal role in no-body murder prosecutions as it often constitutes the primary means of establishing

¹³ Hinchliffe J, 'Forensic Odontology, Part 1. Dental Identification' (Nature News, 12 March 2011) <https://www.nature.com/articles/sj.bdj.2011.146> accessed 23 January 2024

¹⁴ Evidence law: Convictions based on circumstantial evidence <https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=1043&context=judgesbook> accessed 23 January 2024

¹⁵ Ibid

¹⁶ Canberra Law Review' (AustLII)

<https://www5.austlii.edu.au/au/journals/CanLawRw/2022/9.html> accessed 23 January 2024

guilt.¹⁷ Circumstantial evidence involves drawing inferences from facts or circumstances that indirectly suggest the commission of a crime.¹⁸ In no-body murder cases, where direct evidence (e.g., the victim's body) is missing, circumstantial evidence takes centre stage.¹⁹ Circumstantial evidence doesn't directly prove the accused's guilt but relies on inferences.²⁰ Prosecutors must present a chain of circumstances that reasonably leads to the conclusion that the accused committed the crime²¹. Establishing motive, means, and opportunity is crucial in no-body cases.²² Circumstantial evidence may be used to demonstrate that the accused had a motive to commit the crime, the means to do so, and the opportunity to carry it out.²³

Eyewitnesses or individuals who can provide information about the victim's interactions with the accused before their disappearance can provide essential circumstantial evidence²⁴. Testimonies regarding disputes, threats, or unusual behaviour can help establish motive and opportunity²⁵. The defence may present an alibi as circumstantial

¹⁷ Ferguson C, Pooley K, Australian no-body homicides: Exploring common features of solved cases, *Journal of Forensic and Legal Medicine*, <https://doi.org/10.1016/j.jflm.2019.06.007> accessed 27 October 2023

¹⁸ Ibid

¹⁹ Ibid

²⁰ Circumstantial Evidence (Legal Information Institute) https://www.law.cornell.edu/wex/circumstantial_evidence accessed 23 January 2024

²¹ Jellema H, 'Reasonable Doubt from Unconceived Alternatives' [2022] *Erkenntnis*

²² Ibid

²³ Ibid

²⁴ Thomas Edison State University and Sanchez D, 'Eyewitness Testimony and Memory Biases' (An Introduction to Social Psychology) <https://opened.tesu.edu/introsocialpsychology/chapter/eyewitness-testimony-and-memory-biases/> accessed 23 January 2024

²⁵ Ibid

evidence to challenge the prosecution's case.²⁶ Alibi witnesses can testify that the accused was not present at the scene of the crime when it allegedly occurred.²⁷

Circumstantial evidence can include forensic findings like bloodstains, DNA evidence, or weapon analysis²⁸. These findings can help build a case against the accused by linking them to the crime scene or the victim.²⁹ Evidence related to the accused's behaviour, such as inconsistent statements, attempts to conceal evidence, or unexplained changes in lifestyle, can be used as circumstantial evidence indicating guilt.³⁰ Evidence of prior acts or criminal behaviour may be introduced to establish a pattern or modus operandi, suggesting that the accused is likely responsible for the crime.³¹

Circumstantial evidence can be used to establish causation, connecting the accused to the cause of death or the circumstances leading to the victim's disappearance.³² Multiple pieces of

²⁶ Cowan S [2021] Is an alibi a paper shield? an investigation of the factors that influence alibi credibility judgments

²⁷ Ibid

²⁸ Qureshi S, Prakash R and Gupta SC, 'Role of DNA Profiling in Criminal Investigation Based Leading Case Laws' (2021) 16 Journal of Mountain Research

²⁹ Ibid

³⁰ Van Oorschot RAH; Szkuta B; Meakin GE; Kokshoorn B; Goray M, 'DNA Transfer in Forensic Science: A Review' (Forensic science international. Genetics) <https://pubmed.ncbi.nlm.nih.gov/30399535/> accessed 23 January 2024

³¹ Ibid

³² Circumstantial Evidence (Legal Information Institute) https://www.law.cornell.edu/wex/circumstantial_evidence accessed 23 January 2024

circumstantial evidence, when considered together, can strengthen the prosecution's case.³³ The more aspects of the case that circumstantial evidence covers, the more compelling the overall argument becomes.³⁴ Expert witnesses, such as forensic experts and psychologists, can provide opinions and interpretations of circumstantial evidence, making it more understandable and persuasive to the jury.³⁵

2.2.2 Discharging the Burden of Proof

Discharging the burden of proof is a critical aspect of any criminal trial, including no-body murder prosecutions.³⁶ In such cases, where the victim's body is missing, the burden of proof remains on the prosecution to establish the accused's guilt beyond a reasonable doubt.³⁷

As previously discussed, circumstantial evidence plays a significant role in no-body murder cases. The prosecution must use this evidence to construct a convincing case that demonstrates the accused's guilt. This involves presenting a clear and coherent narrative that links the accused to the crime. To discharge the burden of proof, the prosecution should show that the accused had a motive to commit the crime, the means to do so, and the opportunity to carry it out. This

³³ Ibid

³⁴ 2.4 the Burden of Proof' (Criminal Law, 17 December 2015) <https://open.lib.umn.edu/criminallaw/chapter/2-4-the-burden-of-proof/> accessed 23 January 2024

³⁵ Ibid

³⁶ Rhode C, 'The Burden of Proof' [2023] *The Burden of Proof upon Metaphysical Methods* 35

³⁷ 'Guilt beyond a Reasonable Doubt' (Legal Information Institute) <https://www.law.cornell.edu/constitution-conan/amendment-5/guilt-beyond-a-reasonable-doubt> accessed 23 January 2024

can be achieved through witness testimonies, evidence of prior conduct, and other circumstantial evidence.³⁸

In cases where the cause of death is in question, the prosecution must discharge its burden by providing evidence that directly or indirectly links the accused to the cause of death, even without the victim's body.³⁹ This might involve presenting medical or forensic evidence. The prosecution's case should leave no reasonable doubt about the accused's guilt.⁴⁰ If the court has any significant doubts or uncertainties about the case, they should acquit the defendant.⁴¹

2.3 Procedural Challenge

2.3.1 The Charge to Prefer

The charge to prefer in no-body murder prosecutions is the formal accusation or charge brought against a defendant, specifying the offense they are alleged to have committed.⁴² In these cases, several procedural challenges come into play:

The charge should be specific, clearly identifying the offense of murder, and it should provide as much detail as possible about the alleged crime, considering the absence of the victim's body.⁴³ It

³⁸ Ibid

³⁹ Republic Vs Michael Mucheru Gatu [2002] Eklr

⁴⁰ Beyond doubt: The case against not proven)
<https://wrap.warwick.ac.uk/156002/7/WRAP-Beyond-doubt-the-case-against-Not-Proven-2021.pdf> accessed 23 January 2024

⁴¹ Ibid

⁴² Ibid

⁴³ Ibid

should outline the circumstances of the disappearance, any evidence of foul play, and other relevant details.⁴⁴

The charge should use language that reflects the absence of direct evidence, such as "causing the death of [victim's name] by unknown means" or a similar formulation that acknowledges the unique circumstances of the case.⁴⁵ Depending on the evidence, the prosecution may consider alternative charges, like manslaughter, in addition to the primary murder charge, allowing for flexibility in the event that the evidence does not support a murder conviction.⁴⁶

The charge should include allegations related to motive and intent, providing reasons why the accused is believed to have committed the crime based on the available evidence.⁴⁷ The charge may explicitly reference the circumstantial evidence that will be presented during the trial, helping to clarify the prosecution's case.⁴⁸ If new evidence arises during the trial, the charge may be amended to reflect the evolving understanding of the case, following proper legal procedures and court approval.⁴⁹

⁴⁴ Häkkinen-Nyholm H, Weizmann-Henelius G, Salenius S, Lindberg N, Repo-Tiihonen E. 'Homicides with mutilation of the victim's body'. *Journal of Forensic Science*. 2009

⁴⁵ Judiciary of Kenya Criminal Procedure Bench Book <http://kenyalaw.org/kl/fileadmin/pdfdownloads/JudiciaryCriminalProcedureBenchBook.pdf>

⁴⁶ Ibid

⁴⁷ Ibid

⁴⁸ Direct and circumstantial evidence distribute and reasonably believed ...https://us.sagepub.com/sites/default/files/upm-assets/68103_book_item_68103.pdf accessed 23 January 2024

⁴⁹ Ibid

It must include all jurisdictional and legal elements required by the applicable criminal law, such as the location of the crime, the identity of the accused, and the *mens rea* necessary for a murder conviction.⁵⁰ The charge should adhere to established legal standards and precedents relevant to no-body murder prosecutions to meet the requirements of the legal system.⁵¹

2.3.2 Single or Cumulative Charges

In no-body murder prosecutions, the prosecutor may choose to file either single or cumulative charges against the accused. Single charges involve accusing the defendant of a specific offense, such as murder.⁵² In no-body murder cases, this means charging the accused with only one count of murder based on the available evidence.⁵³ The focus is on proving the accused's guilt for the primary charge beyond a reasonable doubt. Single charges can simplify the trial process, but they may be riskier if the evidence for the primary charge is insufficient.⁵⁴

Cumulative charges involve accusing the defendant of multiple offenses, often including a primary charge (e.g., murder) and

⁵⁰ Mens Rea - a defendant's mental state - findlaw
<https://www.findlaw.com/criminal/criminal-law-basics/mens-rea-a-defendant-s-mental-state.html> accessed 23 January 2024

⁵¹ Ibid

⁵² No-Body Homicide Cases: A Practical Approach (FBI, 9 November 2016)
<https://leb.fbi.gov/articles/featured-articles/no-body-homicide-cases-a-practical-approach> accessed 23 January 2024

⁵³ The Felony Murder Rule in Criminal Law' (Justia, 16 October 2023)
<https://www.justia.com/criminal/offenses/homicide/felony-murder/>
accessed 23 January 2024

⁵⁴ Ibid

alternative charges (e.g., manslaughter or concealment of a body).⁵⁵ In no-body murder cases, cumulative charges provide flexibility in the event that the evidence for the primary charge is weak.⁵⁶ It allows the court to consider other potential offenses. If the evidence supports multiple charges, the accused may be convicted of one or more offenses. Cumulative charges can provide a more robust legal strategy for the prosecution.⁵⁷

The choice between single or cumulative charges depends on the strength of the evidence and the legal strategy of the prosecution. Single charges can simplify the case but carry the risk of acquittal if the evidence for the primary charge is insufficient.⁵⁸ Cumulative charges provide more options for conviction but may complicate the trial and require careful management by the prosecution.⁵⁹ Ultimately, the decision should be made based on the specific circumstances and evidence of the case.⁶⁰

⁵⁵ Hlr, 'Stacked: Where Criminal Charge Stacking Happens - and Where It Doesn't' (Harvard Law Review, 1 May 2023) <https://harvardlawreview.org/print/vol-136/stacked-where-criminal-charge-stacking-happens-and-where-it-doesnt/> accessed 23 January 2024

⁵⁶ Person, A.(Tad) T and DiBiase, 'No-Body Homicide Cases: A Practical Guide to Investigating, Prosecuti' Taylor & Francis, 13 November 2023) <https://www.taylorfrancis.com/books/mono/10.4324/9781032618098/body-homicide-cases-thomas-tad-dibiase> accessed 23 January 2024

⁵⁷ Ibid

⁵⁸ Mitchell, Ojmarrh, Daniela Oramas Mora, Tracey L. Sticco, and Lyndsay N. Boggess. "Are progressive chief prosecutors effective in reducing prison use and cumulative racial/ethnic disadvantage? Evidence from Florida." *Criminology & Public Policy* 21, no. 3 (2022)

⁵⁹ Ibid

⁶⁰ Ibid

3. The Current Legal Framework for Prosecuting No-Body Murder Cases

3.1 Penal Code

The absence of express provisions in the Penal Code for no-body murder cases can indeed present challenges in the legal framework. When laws do not explicitly address unique situations, it can create uncertainties in how such cases should be handled and may lead to potential gaps in the law.⁶¹

However, the Penal Code provides that any person who, when a woman is delivered of a child, endeavours by any secret disposition of the dead body of the child to conceal the birth, whether the child died before, at or after its birth, is guilty of a misdemeanour.⁶² The provision is relevant to the discussion of no-body murder cases. This provision recognizes cases where individuals attempt to conceal the birth of a child, and it can be applied in situations where there is an attempt to hide the fact that a child was born and, in some cases, that the child may have died.

In the context of no-body murder cases, this provision may be used to address the act of concealing the birth and potentially the death of a child, which could be a key element of the case.⁶³ However, it's important to consider that this provision addresses a different offense (concealment of birth) rather than murder. To establish a murder

⁶¹ Republic v Lewis (Criminal Case E077 of 2021) [2021] KEHC 272 (KLR) (Crim) (1 November 2021) (Ruling)

⁶² Penal Code, Cap 63, Laws of Kenya, sec 227

⁶³ Corpus delicti?: Forensic dimensions of the no-body murder https://www.researchgate.net/publication/365407807_Corpus_Delicti_Forensic_Dimensions_of_the_No-Body_Murder accessed 23 January 2024

charge, additional evidence, such as the intent to kill and the causation of death, would typically be required.

3.1 Criminal Procedure Code

The code provides that when a person is charged with the murder or infanticide of a child or with killing an unborn child and the court is of the opinion that he is not guilty of any of those offences, and if it appears in evidence that the child had recently been born and that the person did, by some secret disposition of the dead body of the child, endeavour to conceal the birth of that child, he may be convicted of the offence of endeavouring to conceal the birth of that child although he was not charged with it.⁶⁴ While it doesn't directly relate to murder cases, it demonstrates that the legal system recognizes circumstances where an offense may be related to concealing a body or circumstances of death.

The court also provides for directions in the nature of *habeas corpus*. The High Court may whenever it thinks fit direct that the body of a defendant within those limits be brought in on a return of *cepi corpus* to a writ of attachment.⁶⁵ This provision can be relevant in no-body murder cases if there are concerns if a defendant's body needs to be produced.

3.2 Evidence Act

The Evidence Act typically provides rules and guidelines for the admissibility and use of evidence in legal proceedings.⁶⁶ While it may not contain specific provisions related to "no-body murder cases," it still plays a crucial role in how such cases are handled.

⁶⁴ Criminal procedure code, Cap 75, Laws of Kenya, sec 181 (4)

⁶⁵ *Ibid*, sec 389

⁶⁶ Evidence Act, Cap 80, Laws of Kenya

The Evidence Act is relevant in establishing the admissibility of circumstantial evidence, which is often central in no-body murder cases. It sets out the rules and standards for presenting circumstantial evidence and its probative value.⁶⁷In cases where forensic or medical evidence is presented to establish the cause of death or other crucial aspects, the Evidence Act may provide guidelines for the admissibility and presentation of expert testimony.⁶⁸

The Act contains rules concerning the admissibility of hearsay evidence, which can be particularly important in cases where witnesses may testify about statements or actions of individuals who are not present, such as the victim in a no-body murder case.⁶⁹The Act also addresses issues of relevancy and the weight given to different types of evidence. This is critical in determining which evidence is admissible and how much weight it carries in the case.⁷⁰

4. Opportunities for Prosecuting No-Body Homicides: Legal Guidance from South Africa and Australia

4.1 No-Body Murder Prosecutions in South Africa

4.1.1 Brief Overview

No-body murder prosecutions in South Africa, as in many other jurisdictions, present unique challenges due to the absence of the victim's body. South Africa, like many countries, relies on its existing legal framework for murder prosecutions. While the law may not specifically address no-body murder cases, it provides a basis for charging and prosecuting individuals when there is substantial

⁶⁷ Ibid, sec 164

⁶⁸ Ibid, sec 48, 49, 63

⁶⁹ Ibid, sec 63

⁷⁰ Ibid, Ch 2

evidence of their involvement in a murder, even in the absence of the victim's body.⁷¹

The South African legal system recognizes the value of circumstantial evidence.⁷² In no-body murder cases, circumstantial evidence is often the primary means of proving guilt.⁷³ This can include evidence related to motive, opportunity, and the accused's behaviour before and after the alleged murder. Expert witnesses, such as forensic pathologists, forensic scientists, and behavioural experts, can play a critical role in providing opinions and interpretations that support the circumstantial evidence and help establish the case against the accused.⁷⁴

Over time, South African courts have had the opportunity to consider and decide no-body murder cases, creating legal precedents and standards for how such cases should be handled.⁷⁵ These precedents can provide guidance to legal professionals and help ensure consistency in the legal approach. Prosecutors in South Africa have the opportunity to develop strategies for presenting strong

⁷¹ van der Linde, Delano. (2022). 'No *corpus delicti* in Murder Cases: A Review of South African Judgments Dealing with Murder Cases without a Body'. 36. 165.

⁷² 'Circumstantial Evidence Revisited: Tony Healy and Associates' (Tony Healy and Associates | Labour Law | Labour Relations | Labour Consultants, 6 February 2019) <https://tonyhealy.co.za/circumstantial-evidence-revisited/> accessed 23 January 2024

⁷³ Ibid

⁷⁴ Ibid

⁷⁵ (No corpus delicti in murder cases: A review of South African judgments ...)

https://www.researchgate.net/publication/362620350_No_corpus_delicti_in_Murder_Cases_A_Review_of_South_African_Judgments_Dealing_with_Murder_Cases_without_a_Body accessed 23 January 2024

circumstantial cases in no-body murder trials. This involves careful planning, the presentation of compelling evidence, and the ability to address the challenges posed by the absence of the victim's body.⁷⁶

4.1.2 The State v MA 082/2017⁷⁷

In the case of *The State v MA*, the accused, Mr. MA, was charged with the murder of his wife, Ms. NA, even though her body had not been found. The State alleged that on the evening of March 13, 2015, Mr. MA assaulted and killed Ms. NA and then concealed or hid her body, subsequently reporting her as missing. The case presented a classic example of a no-body murder prosecution, where the primary challenge was to prove not only that the victim was dead but that she had been murdered, all without the presence of the victim's body.⁷⁸ The prosecution relied on circumstantial evidence to build its case, including:

Blood Evidence: Blood traces found in a room, on Ms. NA's track pants, and a pillowcase were introduced as evidence. Experts indicated that the blood on the floor and her pants indicated that something had been moved or smeared. The blood on the pillowcases was found to be a mixture of the accused's and Ms. NA's blood.⁷⁹

Witness Testimonies: Neighbours testified that they heard screams coming from the accused's residence during the time of the alleged assault. Additionally, other witnesses provided insights into the

⁷⁶ Ibid

⁷⁷ *The state v MA 082/2017* available at <https://www.saflii.org/za/cases/ZAGPJHC/2018/695media.pdf> accessed 26 October 2023

⁷⁸ Ibid

⁷⁹ Ibid

physically abusive nature of the relationship between the accused and Ms. NA.⁸⁰

Protection Order: Evidence showed that Ms. NA had obtained an interim protection order against the accused due to assaults she had suffered during their marriage.⁸¹

Borrowed Car: The accused borrowed a car from a former romantic partner, and his reasons for borrowing it were found to be misleading. The distance he travelled with the car raised suspicions. Inconsistent Statements: The accused's statements and actions were inconsistent with the circumstances of Ms. NA's disappearance.⁸²

Ultimately, the court considered the circumstantial evidence and held that the absence of the victim's body was not an insurmountable obstacle to finding the accused guilty of murder. The court relied on established legal principles, including the requirement that circumstantial evidence must have the necessary probative force to warrant a conviction. It concluded that the evidence, consisting of many probative factors, pointed to the accused having planned and committed the murder, disposing of the victim's body, and that only he knew its location.⁸³

As a result, the court found the accused guilty of murder and defeating or obstructing the course of justice.⁸⁴ This case underscores the challenges and complexities of no-body murder prosecutions and

⁸⁰ Ibid

⁸¹ Ibid

⁸² Ibid

⁸³ Ibid

⁸⁴ Ibid

demonstrates how circumstantial evidence can be used to establish guilt when the victim's body is missing. It also highlights the importance of applying legal principles and standards in such cases.

4.1.3 The State v Nkuna⁸⁵

In this case, the court ruled on issues related to circumstantial evidence and the prosecution of murder cases when the victim's body is not found. The case is often cited as a reference in South African legal discussions about no-body murder prosecutions.

In "The State v Nkuna," the court held that the absence of the victim's body (*corpus delicti*) is not an insurmountable bar to finding an accused guilty of murder.⁸⁶ The court emphasized that there must be a reasonable explanation for why the body is missing, and it is proper for a court to convict an accused on circumstantial evidence, provided it has the necessary probative force to warrant a conviction. The case clarified the principles and standards that apply in cases where murder is alleged, but the victim's body has not been recovered.⁸⁷

The principles established in this case, as well as similar cases, have been influential in shaping the legal framework for prosecuting no-body murder cases in South Africa. They underscore the importance of evidence that excludes reasonable doubt and demonstrate how circumstantial evidence can be used effectively to prove guilt when direct evidence, such as the victim's body, is not available.

⁸⁵ *The state v Nkuna* 2012 (1) SACR 167 (8)

⁸⁶ *Ibid*

⁸⁷ *Ibid*

4.1.4 Lessons for Kenya

4.1.4.1 Similar-Fact Evidence

Indeed, there are valuable lessons from South African cases that can be applied to no-body murder prosecutions in Kenya. One such lesson pertains to the use of similar-fact evidence. Similar-fact evidence, also known as evidence of other bad acts or prior misconduct, involves presenting evidence of a defendant's previous actions or conduct that are similar to the alleged offense⁸⁸.

South African cases demonstrate that similar-fact evidence can be a powerful tool in prosecuting no-body murder cases. Evidence of prior abusive behaviour, threats, or assaults in the accused's relationship with the victim can establish a pattern of conduct that supports the prosecution's case.

Similar-fact evidence can serve to corroborate the circumstantial evidence presented in the case. It helps to establish a consistent pattern of behaviour or motive that supports the prosecution's theory of the crime.⁸⁹

Courts should carefully evaluate the admissibility of similar-fact evidence. In both Kenya and South Africa, the evidence must meet a balancing test, ensuring that its probative value outweighs any potential prejudice to the accused. Courts should consider the relevance, necessity, and fairness of admitting such evidence.

⁸⁸ van der Linde, Delano. (2022). 'No *corpus delicti* in Murder Cases: A Review of South African Judgments Dealing with Murder Cases without a Body'. 36. 165.

⁸⁹ Ibid

Similar-fact evidence can strengthen the circumstantial case and increase the chances of a successful prosecution. The courts in Kenya should recognize its importance and allow it when it meets the legal criteria.

4.1.4.2 Instrumental Role of Victimology

The instrumental role of victimology is another valuable lesson that can be applied to Kenya from South African cases involving no-body murder prosecutions. Victimology is the study of victims and their experiences in the context of criminal investigations and trials.⁹⁰

Victimology involves a comprehensive understanding of the victim's life, background, and relationships. This information can help build a profile of the victim and provide insights into their vulnerability, social interactions, and potential motives for the crime.⁹¹

Examining the victim's history and relationships can shed light on potential motives for the crime. Understanding any conflicts, disputes, or tensions in the victim's life can help establish a motive for the alleged murder. Victimology can corroborate witness testimonies and other evidence in the case. For example, if there is evidence of prior abuse or threats, victimology can provide context for this behaviour and strengthen the prosecution's case.⁹²

Victimology can offer insights into the psychological impact of the crime on the victim's family and loved ones. This can help the court better understand the emotional and psychological consequences of the alleged murder. Victimology can also inform legal advocacy

⁹⁰ Ibid

⁹¹ Ibid

⁹² Ibid

strategies. Prosecutors can use victimology to build a compelling case, while defence attorneys can use it to challenge the prosecution's narrative and evidence.⁹³

Victimology also plays a critical role in providing support to the victim's family during the legal process. It can help address their needs, concerns, and emotional well-being, ensuring that they are informed and involved in the legal proceedings. In Kenya, recognizing the instrumental role of victimology in no-body murder cases can lead to more comprehensive and effective investigations and legal proceedings. It can help ensure that the victim's voice is heard, even when their body has not been recovered, and that justice is served not only for the accused but also for the victim and their loved ones. Legal professionals, law enforcement, and victim support organizations can collaborate to implement victimology in the legal process effectively.

4.1.4.3 Strategic Use of Case Theory

The strategic use of case theory is a critical lesson that can be applied to Kenya from South African cases involving no-body murder prosecutions. Developing a well-structured and persuasive case theory is essential in such cases. A case theory provides a structured and coherent narrative of what happened. In no-body murder cases, the prosecution must construct a plausible narrative that explains the alleged crime, the motive, and the method used to dispose of the victim's body.⁹⁴

The case theory should be consistent with the available evidence, whether it's direct, circumstantial, or similar-fact evidence. It should

⁹³ Ibid

⁹⁴ Zeffertt and Paizes *the South African Law of Evidence* (2017) 101-135

align with the facts established during the investigation and presented at trial. Clearly outline the motive for the crime and how the accused had the opportunity to commit the murder. In many no-body cases, the prosecution relies on circumstantial evidence related to the accused's actions, behaviour, and the victim's background to establish motive and opportunity.⁹⁵

If experts, such as forensic pathologists or behavioural analysts, are part of the case, the theory should integrate their testimonies effectively. Expert opinions should support the overall narrative. The case theory should anticipate and address alternative explanations for the evidence or the absence of the victim's body. Being prepared to counter the defence's arguments is essential.⁹⁶

By strategically using a well-constructed case theory in no-body murder cases, the prosecution can present a clear and persuasive narrative that relies on the available evidence to prove the accused's guilt. Effective case theory development is crucial for ensuring that justice is served in these challenging cases. It also helps maintain the fairness and integrity of the legal process.

4.2 No-Body Murder Prosecutions in Australia

4.2.1 Brief Overview

No-body murder prosecutions in Australia, like in many other countries, pose unique challenges due to the absence of the victim's body. Australia's legal framework for murder prosecutions, like South Africa, relies on existing laws that do not specifically address no-body murder cases. However, the law provides a basis for

⁹⁵ Ibid

⁹⁶ Ibid

charging and prosecuting individuals when there is substantial evidence of their involvement in a murder, even without the victim's body.⁹⁷

Just like in South Africa, circumstantial evidence plays a central role in these cases. The prosecution relies on building a case based on circumstantial evidence, such as motive, opportunity, behaviour, and the accused's actions before and after the alleged murder. Expert witnesses, including forensic scientists, pathologists, and behavioural experts, are often called upon to provide specialized knowledge that supports the circumstantial evidence and helps establish the case against the accused.⁹⁸

Over time, Australian courts have had opportunities to consider and decide no-body murder cases, leading to the establishment of legal precedents and standards for handling such cases. These precedents provide guidance for legal professionals and ensure consistency in legal approaches. Prosecutors in Australia work on strategies to present strong circumstantial cases in no-body murder trials. This involves careful planning, the presentation of compelling evidence, and addressing the challenges posed by the absence of the victim's body.⁹⁹

⁹⁷ Ferguson C, Pooley K, Australian no-body homicides: 'Exploring common features of solved cases', *Journal of Forensic and Legal Medicine*, <https://doi.org/10.1016/j.jflm.2019.06.007> accessed 27 October 2023

⁹⁸ Ibid

⁹⁹ Ibid

4.2.2 The Lane case¹⁰⁰

The case of Keli Lane is a prominent example of a no-body murder prosecution in Australia. Keli Lane was convicted of murdering her two-day-old daughter, Tegan Lane, in a case that relied entirely on circumstantial evidence, as Tegan's body was never found.¹⁰¹

Tegan Lane was born on September 12, 1996, but she was last seen two days later when Keli Lane left the hospital with her. Tegan's disappearance went unnoticed for several years until a social worker discovered that her birth had never been registered, leading to a police investigation and a Coronial Inquest. The prosecution's case against Keli Lane was based on circumstantial evidence, as there was no direct evidence of the murder or the discovery of Tegan's body. The absence of the victim's body raised questions about the intent and the manner of Tegan's death.¹⁰²

The Crown argued that Keli Lane had multiple secret pregnancies in the 1990s, two of which ended in termination and two in adoption. This pattern of behaviour was presented as evidence of her motive and intent. Lane provided several inconsistent statements about what had happened to Tegan when she left the hospital in 1996. The Crown argued that these inconsistent statements indicated a guilty conscience and a desire to keep the birth of Tegan a secret. The Crown suggested that Lane's motive for the murder was to keep the birth a

¹⁰⁰ *Lane v R* [2013] NSWCCA 317 (13 December 2013) available at <https://www.ruleoflaw.org.au/keli-lane-case-note/> accessed 26 October 2023

¹⁰¹ *Ibid*

¹⁰² *Ibid*

secret and protect her reputation. The inconsistent statements were presented as lies, further supporting the prosecution's case.¹⁰³

Lane's defence argued that the Crown failed to prove that Tegan was dead, let alone that Lane was responsible for her death. Lane maintained that she had given Tegan to her natural father, who could not be located. Keli Lane's case went to trial in the Supreme Court of New South Wales, where she was convicted of murder and false swearing charges. She was sentenced to 18 years of imprisonment, with a non-parole period of 13 years and 5 months. Lane appealed her murder conviction to the Court of Criminal Appeal, but her appeal was dismissed. She was not able to secure bail pending the outcome of her appeal.¹⁰⁴

The case highlights the use of strong circumstantial evidence to secure a conviction, even in the absence of the victim's body. The Court of Appeal emphasized that a motive is not essential to prove murder, and evidence of motive was just one element in a circumstantial case.

This case underscores the complexities of no-body murder prosecutions and the significance of circumstantial evidence. It demonstrates that, with a strong case built on circumstantial evidence and expert testimony, it is possible to secure a murder conviction, even when the victim's body is never found. The legal process, including the trial and appeals, played a crucial role in determining Keli Lane's guilt or innocence.

¹⁰³ Ibid

¹⁰⁴ Ibid

4.2.3 The Burrell case¹⁰⁵

Bruce Allan Burrell's case is indeed an example of a no-body murder prosecution in Australia, and it illustrates the challenges and legal proceedings associated with such cases. Bruce Allan Burrell was convicted of the double murder of Dorothy Davis in 1995 and Kerry Whelan in 1997, neither of whose bodies were ever found. Additionally, he was charged with the kidnapping of Kerry Whelan. Kerry Whelan's disappearance was linked to a high-profile kidnapping case, where her husband received a \$1 million ransom note. Despite the ransom note, Kerry Whelan's body was never located.¹⁰⁶

Burrell's legal proceedings included charges being dropped and then re-instated in 2002 after a formal inquest. His first trial in 2005 ended with a hung jury, but he was convicted on the second trial in 2006. Burrell received a life sentence for the murder of Kerry Whelan and a 16-year jail sentence for the kidnapping charge. Burrell appealed his conviction and sentence. The case reached the High Court of Australia, which held that the Court of Criminal Appeal had made factual errors and remitted the matter back to that court. In the case of Dorothy Davis, Burrell was charged with her murder and found guilty by a jury. Financial gain was cited as a motive for the murder. Burrell received a 28-year prison sentence with a non-parole period of 21 years. Burrell's appeals against his conviction and sentence were dismissed, and his request for special leave to appeal to the High Court was refused.¹⁰⁷

¹⁰⁵ *Bruce Allan Burrell v R* [2007] NSWCCA 65; *Burrell v The Queen* [2008] HCA 34; *Burrell v R* [2009] NSWCCA 163

¹⁰⁶ *Ibid*

¹⁰⁷ *Ibid*

The Burrell case highlights the difficulties faced by the prosecution in no-body murder cases and the legal complexities involved in securing convictions in the absence of the victim's body. It also emphasizes the importance of evidence, motive, and circumstantial factors in building a case against the accused. Despite these challenges, successful prosecutions can be achieved, as illustrated in Burrell's case.

4.2.4 The *Edward* case¹⁰⁸

The case of Bradley Robert Edwards, known as the Claremont serial killings case, is another notable example of a complex criminal prosecution in Australia. This case involved a series of murders and abductions of young women in the Claremont area of Perth during the mid-1990s. The case involves the disappearance and presumed murders of three young women: Sarah Spiers, Jane Rimmer, and Ciara Glennon. All three women went missing after nights out in the Claremont entertainment district in Perth between 1996 and 1997.¹⁰⁹ Bradley Robert Edwards was arrested in 2016 and charged with the wilful murders of Jane Rimmer and Ciara Glennon. He was also charged with the abduction and rape of a 17-year-old girl in Claremont in 1995 and the indecent assault of an 18-year-old woman in 1988. Edwards' trial took place in the Western Australia Supreme Court, lasting from November 2019 to June 2020. The case against Edwards relied on four key pieces of evidence. These included Edwards' confession to the rape of the 17-year-old girl and the assault of the 18-year-old woman, both of which occurred in Claremont. DNA evidence linked Edwards to these crimes.¹¹⁰

¹⁰⁸ *The State of Western Australia - V-Edwards* [2020] WASCSR 49

¹⁰⁹ *Ibid*

¹¹⁰ *Ibid*

Edwards' DNA was also found under Ciara Glennon's thumb and middle fingernail during testing in 2008. Edwards admitted the DNA was his but claimed not to know how it got there. The state argued that his confession to the other crimes cast doubt on his denial of involvement in the Claremont killings. The state presented evidence of 98 critical fibres found on the victims, which matched the unique colour of "Telstra navy." This matched the pants Edwards would have worn as a Telstra technician in the 1990s. Fibres found in the victims' hair also matched the seat insert and carpet fabric used in a 1996 VS Holden Commodore, the same make and model of car Edwards drove at the time.¹¹¹

Edwards had a history of violence during emotionally distressing times. He was involved in an assault on a social worker during his employment as a Telecom technician. Edwards was found guilty of the murders of Jane Rimmer and Ciara Glennon but acquitted of the murder of Sarah Spiers. He was also convicted for the other crimes he had confessed to. He received a life sentence for the murders. While it was more challenging for the prosecution to prove a connection between Edwards and Sarah Spiers, the state argued that his ambush-style attacks on the 17- and 18-year-old women were similar to the *modus operandi* in Spiers' case.¹¹²

This case is significant not only for its successful conviction but also because it is one of Australia's most high-profile criminal investigations, spanning many years. It demonstrates the importance of strong evidence, DNA analysis, and forensic evidence in complex criminal trials. The conviction of Edwards for two of the Claremont serial killings marked a significant moment in the long-running case.

¹¹¹ Ibid

¹¹² Ibid

Bradley Robert Edwards' acquittal in the case of Sarah Spiers, one of the Claremont serial killings, underscores the unique challenges that prosecutions face in "no-body" murder cases where the victim's body is never found. In such cases, the absence of a body makes it difficult to establish key elements of the crime and can create significant hurdles for the prosecution. It also emphasizes the importance of strong and compelling evidence in cases where physical evidence (the victim's body) is lacking. Edwards' acquittal in the Spiers case highlights how the legal system demands a high standard of proof, and the absence of a body can create reasonable doubt in the minds of jurors and judges. This aspect of the case serves as a poignant illustration of the complexities and difficulties involved in prosecuting no-body murder cases.

4.2.5 Lessons for Kenya

4.2.5.1 The Key Role of Victimology

The key role of victimology, as demonstrated by the Australian cases, is an important lesson for Kenya in handling no-body murder cases. Victimology plays a pivotal role in understanding and presenting these cases effectively.

In the Australian cases, a deep understanding of the victims' backgrounds, behaviours, and relationships was crucial. Victimology involves delving into the lives of the victims to build a comprehensive profile. This understanding helps establish motives, relationships with the accused, and patterns of behaviour, which can be critical in proving the case.

Victimology can help establish motives for the crime. Knowing the victims' personal histories, relationships, and any potential conflicts

can shed light on why they may have been targeted. It also helps in establishing the accused's opportunity to commit the crime.

Victimology can reveal patterns in the accused's behaviour, especially in cases where there are multiple victims. Understanding the similarities between cases can help strengthen the prosecution's argument and establish a *modus operandi*.

Victimology assists in creating a narrative that connects the accused to the crimes. It helps in presenting a coherent and compelling story to the court, which can be crucial in establishing guilt beyond a reasonable doubt.

In no-body murder cases, understanding the victims' lives and the circumstances of their disappearance becomes even more critical. Victimology can help address the challenges posed by the absence of a body by providing a detailed account of the victims' last known activities and relationships, which can indirectly point to their demise.

In Kenyan legal practice, understanding the key role of victimology can help improve the investigation and prosecution of no-body murder cases. This entails thorough research into the lives of the victims, their relationships, and the circumstances of their disappearance. It can provide prosecutors with a powerful tool to build compelling cases even when the victim's body is never found. Additionally, victimology can enhance empathy and understanding of the emotional toll on the victims' families, which can be a crucial factor in the courtroom.

4.2.5.2 Circumstantial Evidence

The lesson on circumstantial evidence is indeed significant when dealing with no-body murder cases, as demonstrated by the Australian cases. Circumstantial evidence can be powerful and persuasive in establishing guilt in no-body murder cases. It may be the primary form of evidence available, especially when the victim's body is not recovered.

To secure a conviction, it's essential to meticulously build a strong circumstantial case. This involves connecting multiple pieces of evidence to create a compelling narrative that points to the accused's guilt. Circumstantial evidence can help establish patterns of behaviour on the part of the accused. This may include similarities between the current case and past crimes or behaviours that suggest motive and opportunity.

Circumstantial evidence can be used to demonstrate the accused's motive and opportunity to commit the crime. This can involve proving a history of conflict or demonstrating that the accused was in the vicinity at the time of the victim's disappearance. Circumstantial evidence can therefore help address the challenges posed by the absence of the victim's body. It allows the prosecution to present a comprehensive case even when there is no direct physical evidence of the crime.

Expert witnesses can be valuable in explaining the significance of circumstantial evidence to the court. This can include forensic experts, behavioural analysts, and other specialists who can interpret the evidence. In no-body murder cases, the burden of proof remains high. Circumstantial evidence should be presented in a way that leaves no reasonable doubt about the accused's guilt.

In Kenyan legal practice, the lesson on circumstantial evidence highlights the importance of skilfully using the available evidence to build a convincing case. While the absence of the victim's body may present challenges, a well-constructed circumstantial case can be compelling and lead to a conviction. It underscores the need for a thorough and comprehensive investigation that connects various pieces of evidence to demonstrate guilt beyond a reasonable doubt.

4.2.5.3 Focus on the Suspect's Motive

Focusing on the suspect's motive is a critical lesson from the Australian cases for Kenya, particularly in the context of prosecuting no-body murder cases. Investigating and presenting the suspect's motive is essential. Motive provides a plausible reason for the accused to commit the crime. It helps in answering the "why" behind the crime, which can be persuasive in court.

Motive can be a highly persuasive element in establishing guilt, especially in cases where direct evidence is lacking. It helps create a coherent narrative that connects the accused to the crime. By focusing on the suspect's motive, the prosecution can build a compelling story for the court. This narrative should align with the evidence and provide a clear and logical explanation for the crime. Examining the suspect's past behaviour and history can reveal patterns that support the motive. This includes any prior conflicts, relationships, or actions that indicate a motive for the crime.

Alongside motive, it's crucial to establish that the accused had the opportunity to commit the crime. Motive alone may not be sufficient; the prosecution should demonstrate that the suspect was in a position to act on their motive.

Utilizing expert witnesses, such as behavioural analysts or psychologists, can help explain the significance of the suspect's motive to the court. These experts can provide insights into human behaviour and motivations. In cases where the victim's body is not found, focusing on motive becomes even more vital. It helps compensate for the lack of physical evidence and provides a logical explanation for the crime.

In Kenyan legal practice, the lesson on focusing on the suspect's motive underscores the need for a thorough and comprehensive investigation that goes beyond the physical evidence. Understanding and presenting the motive can be instrumental in securing convictions in no-body murder cases. It is an essential element of the prosecution's case that helps create a coherent and compelling narrative for the court, even when the victim's body is not recovered.

5. Conclusion

The pursuit of justice in no-body murder cases presents unique and intricate challenges within the legal systems of various countries, including Kenya, South Africa, and Australia. This comprehensive discussion has provided a deep exploration of the legal and evidential complexities involved in prosecuting cases where the victim's body is never recovered. It has also drawn valuable lessons from international experiences to guide legal practitioners, policymakers, and scholars in Kenya.

The legal problem posed by no-body murder cases hinges on the principle of *corpus delicti*, which requires the prosecution to establish not only the fact of the crime but also the identity of the victim. In the absence of the victim's body, the *corpus delicti* rule becomes a focal

point, demanding that the prosecution produce sufficient evidence to prove the crime beyond a reasonable doubt.

Evidential challenges in no-body murder prosecutions are manifold, as they necessitate a heavy reliance on circumstantial evidence. The meticulous assembly of such evidence and its presentation in a compelling manner become crucial elements in securing convictions. The burden of proof lies with the prosecution, making it imperative to build a robust case that persuades the court of the accused's guilt. Procedural challenges further complicate these cases, with considerations ranging from the charge to prefer to the decision of pursuing single or cumulative charges against the accused. Kenya's current legal framework, notably the Penal Code, does not provide specific provisions for no-body murder cases, highlighting a potential gap in the law.

In contrast, South Africa and Australia offer valuable insights into the opportunities and challenges of prosecuting such cases. The South African case of *The State v MA* exemplifies the importance of circumstantial evidence in securing convictions, while Australian cases like *the Lane case*, *Bruce Allan Burrell*, and *the Claremont serial killings* illustrate the complexities of prosecuting no-body murders. They underscore the vital role of motive, circumstantial evidence, and victimology in building a compelling case before the court.

The lessons drawn from these international experiences offer guidance to Kenya in its quest for justice in no-body murder cases. They emphasize the need for a nuanced understanding of motive, the strategic use of circumstantial evidence, and the key role of victimology in building a persuasive case. By addressing the challenges and drawing upon these lessons, Kenya can enhance its

legal framework and practices for prosecuting no-body murder cases, ensuring that justice is served even when the victim's body remains elusive.

The pursuit of justice in no-body murder cases is a testament to the resilience and adaptability of the legal system. It underscores the importance of continuous learning and the application of international experiences to refine legal procedures, thereby fostering a more just and equitable legal landscape. As Kenya continues its journey in the realm of criminal law, the insights shared in this discussion can serve as a guiding light for the pursuit of justice, even in the face of the most challenging of circumstances.

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The Privatization Conundrum: A look at the Historical Perspective of Privatization through to its Current Outlook in Kenya

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Abstract

This paper explores the history of privatization in Kenya, examining key events, policies and their impacts on the economy. Through a historical lens, it aims to provide insight into the evolution of privatization in Kenya and the implications on the nation's economic trajectory. This perspective is particularly important as the country has just passed new legislation to implement an ambitious plan to privatize thirty-five (35) state corporations.

Introduction

Post-independence, the government through Sessional Paper No. 10 of 1965 established public entities and parastatals to: accelerate economic and social development; redress regional economic imbalances; promote citizen's participation in the economy, indigenous entrepreneurship and foreign investments through joint ventures.¹ Further, state corporations addressed emerging issues of national interest such as Kenya BioVax Institute and facilitated

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¹ Ministry of Planning and National Development (1965) Sessional Paper No. 10 on African Socialism and its Application to Planning in Kenya, Government Printer, Nairobi. Available at <http://repository.kippira.or.ke/handle/123456789/2345>

untapped opportunities such as those in the Blue and Digital Economies.²

Parastatals played a major role in providing essential services and infrastructure development.³ They were responsible for sectors such as energy, telecommunications, transportation, and water supply. However, over time, it became evident that many of these parastatals were inefficient and faced financial challenges.⁴

History of Privatization

A comprehensive review of the Public Enterprises Performance was carried out in 1979 (the Report on the Review of Statutory Boards)⁵ and 1982 (the Report of the Working Party on Government Expenditures).⁶

The Report on Review of Statutory Boards⁷ pointed out that:

- The expansion of the Parastatal sector did not result in the development of efficient systems and services;
- There was clear evidence of prolonged inefficiency, financial mismanagement, waste and malpractices in many parastatals;

² The National Treasury & Economic Planning (2023) *Privatization Programme*

³ Privatization Commission (2008) *Privatization Programme*, Government Printer, Nairobi.

⁴ Ibid, Note 2

⁵ Ministry of Finance (1979) *Report on Review of Statutory Boards*, Government Printer, Nairobi.

⁶ Working Party on Government Expenditures (1982). *Report and Recommendations*. Government Printer, Nairobi.

⁷ Ibid, Note 1.

- Government investments had largely been at the initiative of private promoters with government being brought in either as an indispensable partner or to undertake rescue measures;
- Many of the parastatals had moved away from their primary functions, especially the regulatory boards most of which had translated their regulatory role into executive one, resulting in waste and confusion; and
- There was danger of over-politicizing production and distribution through establishment of too many parastatals.

The Report on the Working Party on Government Expenditures⁸ concluded that productivity of state corporations was quite low despite heavy state investments resulting in long-term fiscal problems. The report observed that:

- Nationalization had remained merely presentational through government ownership;
- State corporations' operations had become inefficient and unprofitable, partly due to multiplicity of objectives;
- Existence of parastatals in commercial activities had stifled private sector initiatives; and
- Many of the joint ventures had failed, requiring the Government to shoulder a major financial burden.

The Report on the Working Party on Government Expenditures concluded that some of the resources diverted to the government to finance the state corporations' activities could have contributed more

⁸ Working Party on Government Expenditures (1982). Report and Recommendations. Government Printer, Nairobi.

to national development if these state corporations were left in the private sector.⁹ The report recommended that:

- The Government should act as a creator of favorable setting within which people can develop themselves and the economy;
- The Government should divest from its investments in commercial and industrial enterprises to transfer active participation to more Kenyans through participation in shareholding;
- The Government should reduce exposure to risk in areas in which the Private Sector can assume risk without government intervention;
- The Government should dismantle some of the existing administrative hurdles which discourage private sector initiative and provide needless opportunities for corruption; and
- The Government should reorganize legal and institutional framework regarding monitoring and supervision of parastatals.

Following the two reviews, government turned to privatization, which started in the 1980s and gained momentum in the 1990s as part of the Structural Adjustment Program.¹⁰ The objectives of privatization in Kenya were to improve efficiency, attract private

⁹ Ibid, Note 7.

¹⁰ Republic of Kenya, Economic Reforms for 1996-1998: The policy framework paper prepared by the government of Kenya in collaboration with International Monetary Fund and World Bank.

investment, increase competitiveness, reduce the fiscal burden on the government, and stimulate economic growth.¹¹

First wave of Privatization: (1992 - 2002)

In July 1992, through the issuance of the Policy Paper on Public Enterprise Reform and Privatization, the Government outlined the scope of the Public Sector Reform Programme, the institutional framework and the guidelines and procedures for privatizing Public Enterprises.¹² The Policy Paper identified 240 commercial PEs with public sector equity participation and classified them into two categories:¹³

1. 207 Non-strategic commercial PEs which were to be privatized; and
2. 33 Strategic Commercial PEs which were to be re-structured and retained under public sector control.

By the end of the first phase of the privatization programme in 2002, most of the non-strategic commercial enterprises had either been fully or partially privatized.¹⁴ At that time, the direction of thinking regarding restructuring and retention of a number of strategic corporations under Government operation and control had also changed due to: inadequacy of public resources to finance the

¹¹ Department of Government Investment and Public Enterprises, (1998) *Policy paper on Public Enterprises Reform and Privatization*, Government Printer, Nairobi.

¹² Department of Government Investment and Public Enterprises, (1992) *Policy paper on Privatization and Public Enterprise Reform Programme*, Government Printer, Nairobi.

¹³ Ibid, Note 12.

¹⁴ Privatization Commission, Completed Privatizations 1992-2002, Available at www.pc.go.ke

requisite investment in infrastructure facilities; the need to arrest continued deterioration in infrastructure services; lesson from other countries which had succeeded in improving their infrastructure services through Public Private Partnerships; and restructuring which resulted in separation of commercial activities from regulatory functions, making it possible to privatize commercial activities while ensuring Government continued presence in the privatized sectors through establishment of strong legal and institutional regulatory frameworks.¹⁵

The procedure in the First phase

The privatization process in Kenya involved several steps:¹⁶

1. First, the Parastatal Reform Programme Committee identified the parastatals and public entities to be privatized. The enterprise selection criteria will be that the government has majority ownership, the firm requires minimal restructuring before sale, the firm is profitable, the enterprises are selected from diverse sectors in the economy, the financial and operational records of the firm should be up to date and available, the divestiture should require minimal regulatory adjustments and result in minimal redundancies, and the sale should result in a reduction of budgetary drain.
2. Second, the Committee conducted valuations of these entities to determine their worth and potential for profitability through preparation of memoranda on the technical issues,

¹⁵ Ibid, Note 14.

¹⁶ Department of Government Investment and Public Enterprises, (1998) *Policy paper on Public Enterprises Reform and Privatization*, Government Printer, Nairobi.

financial issues, legal issues, marketing prospects, asset valuation, operational and financial projections and sensitivity analysis.

3. Third, the Parastatal Reform Programme Committee developed a plan for the privatization process, including the method of sale (such as public offering on the Nairobi Stock Exchange, sale of shares by private sector placement, negotiated sales, employee/management buyout, sale of enterprise assets including liquidation), the timeline for the sale, and the conditions for potential buyers.
4. The Parastatal Reform Programme Committee then began the marketing and promotion of the privatization program to attract potential investors followed by the publication of a tender notice in local and foreign publications inviting prospective bidders to obtain the sales prospectus.
5. Interested parties were invited to submit bids or proposals, and the government evaluated these proposals based on criteria such as capability, experience, financial standing, and proposed price or offer.
6. After the evaluation, the Parastatal Reform Programme Committee on the basis of the recommendation by the appointed Tender Evaluation Committee selects the preferred bidder and entered into negotiations for the sale of the assets or shares.
7. The final step was the execution of the sale agreement and the transfer of ownership from the government to the private sector entity.

The process is guided by principles outlined in the 1998 reform report¹⁷ namely: competitiveness as no purchaser would obtain an unregulated monopoly or special protection; government as minority would not exercise any specific or extraordinary voting rights except on a limited, predetermined and well defined areas; privatization would be on a cash basis only except where shares are sold to the workforce; inclusivity as no class of purchasers would be excluded. The sale of a portion to another public institution is not considered privatization. All privatization transactions will also be conducted in an open and transparent manner including publication of relevant disclosures by both the firms to be sold and investing firms, valuation of the firm to be sold, bidding procedures and criteria and the terms of the sale.¹⁸

After the first wave of privatization, the government established the State Corporations Advisory Committee (SCAC)¹⁹ to streamline the management of the state corporations by reviewing the affairs of state corporations and making recommendations to the government. However the performance of most of the corporations continued to deteriorate, primarily because of continued reliance on limited public sector financing which was inadequate to meet the sector's needs, over employment, which caused most of the revenue to be used in payment of salaries, non-viable ventures which siphoned away resources from the enterprises, corruption and mismanagement in general. ²⁰ In addition most of the parastatals were under capitalization from the time of incorporation as they were mainly financed from loans without due regard to the establishment of a

¹⁷ Ibid, Note 16 .

¹⁸ Ibid, Note 16.

¹⁹ Section 26, State Corporations Act, Cap 446.

²⁰ Report No. 21409: Kenya: World Bank Assistance Evaluation Report.

strong financial base.²¹ Most of them also continued to spread their resources thinly due to multiplicity of objectives and poor accountability.²²

Second wave of Privatization: (2003 - 2008)

Under the Economic Recovery Strategy for Wealth and Employment Creation (ERSWEC) 2003-2007, the Government implemented a number of key privatization transactions. These included the Kenya Electricity Generating Company (KenGen) through Initial Public Offer (IPO), the concession of the Kenya Railways operations, Mumias Sugar Company Second Offer, Kenya Reinsurance Corporation IPO, Sale of 51% Telkom Kenya shareholding to a strategic partner and the Safaricom IPO. Through these transactions, the country mobilized over Kshs.80 billion which was used to support the country's recovery and overall development agenda.²³

The procedure in the Second phase

The procedure for privatization remained the same but to further streamline it, the government enacted the Privatization Act in 2005.²⁴ The Act established the Privatization Commission which was mandated formulating and implementing privatization programmes and privatization proposals replacing the Parastatal Reform Programme Committee.²⁵ The Act formalized the privatization procedure, requirements for privatization proposals and methods of

²¹ Mitine, G, The Privatization and Parastatal Reform Programme (2000): Kenya experience

²² Ibid, Note 18.

²³ Privatization Commission (2008) Privatization Programme, Government Printer, Nairobi.

²⁴ Privatization Act Chapter 485 C (2005) (Rev 2009)

²⁵ Sections 3 and 4, Privatization Act 2005.

privatization.²⁶ The Act further required the approval of Cabinet and Parliament for the implementation of privatization programmes and proposals in order to safeguard public entities from corrupt schemes.²⁷

Proposed Alternative to Privatization: Parastatal Reforms proposed by the Presidential Taskforce: (2013 - 2022)

The fourth President Uhuru Kenyatta in a reversal of the previous regimes advocated for the rehabilitation of parastatals. To this end, he appointed the Presidential Task Force on Parastatal Reforms in 2013.²⁸ The report recommended that parastatals be reduced from 262 to 187 of which a total of 42 parastatals, mostly in the agricultural sector should be dissolved, 28 merged, 22 others have their roles transferred to other institutions and 21 agencies to be reclassified as professional bodies.²⁹ The idea was to rationalize the operations of the state-owned enterprises by removing overlaps, duplication and redundancies to eliminate wastage of public funds, enhance efficiency and bolster productivity.³⁰ However, the government has only managed to merge parastatals in agriculture, by establishing the Agriculture and Food Authority.³¹ The only real impact of the taskforce was the development of *Mwongozo*, the code of governance for state corporations. This is due to institutional infighting, lack of

²⁶ Parts III and IV Privatization Act 2005.

²⁷ Sections 17(2) and 23(2) Privatization Act 2005.

²⁸ <https://www.scac.go.ke/presidential-taskforce>

²⁹ Report of the Presidential Task Force on Parastatal Reforms (October 2013), <<https://www.scac.go.ke/2015-02-16-09-56-36/reports?download=1:report-of-the-presidential-taskforce-on-parastatal-reforms>> accessed on 7th December 2023.

³⁰ Ibid, Note 29.

³¹ Established by the Agriculture and Food Authority Act, No. 13 of 2013 which consolidates laws on regulation of agriculture.

political goodwill, lack of cooperation from the Treasury and the failure to pass the Government Owned Entities Bill and the National Sovereign Wealth Fund Bill were drafted to facilitate the mergers.³²

Proposed Third phase of Privatization: (2023 onwards)

The government of Kenya entered into extended fiscal arrangements with the International Monetary Fund in exchange of the government committing to reform more than 35 State Owned Enterprises.³³ In this line, the Ministry of Treasury released a statement on the 27th November 2023, revealing the government's plan to dispose of 11 parastatals through privatization.³⁴ The 11 include: the Kenyatta International Convention Centre, Kenya Pipeline Company, New Kenya Cooperative Creameries, Kenya Seed Company Limited, National Oil Corporation of Kenya, Kenya Literature Bureau, Western Kenya Rice Mills Ltd, Numerical Machining Complex Limited, 35% of Vehicle Manufacturers Limited, Rivatex East Africa Limited and the Mwea Rice Mills Ltd.³⁵

To facilitate this new wave of privatizations, the president enacted the Privatization Act 2023.³⁶ This Act proposed replacing the Privatization Commission with the Privatization Authority and mandated it with implementation of privatization programmes.³⁷ The major and hotly contested changes from the 2005 Act are that the

³² The National Treasury & Planning, (July 2021) Press Release: Update on Reforms of State Corporations

³³ International Money Fund Press Release No. 23/395. Available at <https://www.imf.org/en/News/Articles/2023/11/15/pr23395-kenya-imf-reaches-sla-sixth-rev-ecf-rev-rsf-concludes-2023-aiv-consultation>

³⁴ The National Treasury & Economic Planning (2023) *Privatization Programme*

³⁵ Ibid, Note 30.

³⁶ Privatization Act 2023, No. 11 of 2023

³⁷ Sections 8 and 9, Privatization Act 2023, No. 11 of 2023

new act proposes that it removes the requirement of parliamentary approval of the Privatization Authority, that the cabinet secretary has unfettered discretionary powers to identify public entities to be included in the Privatization program without public participation and oversight, and that privatization proposals are approved by the Board of the Authority with the concurrence of the Cabinet Secretary without approval by cabinet or parliament.³⁸ These provisions of the Act however have been contested in court and conservatory orders being issued by Justice Mwita.³⁹

Privatization: Challenges and Opportunities in Kenya

The opportunities posed by privatization include:⁴⁰

1. The improvement of infrastructure and delivery of public services by the involvement of private capital and expertise.
2. The reduction of the demand for government resources. As the government would stop pumping resources into these public entities, hence funds would be diverted into development. The proposed sale of 11 state companies is projected at saving the government 500 billion shillings in budgetary allocations.
3. The generation of additional government revenues by receiving compensation for privatization. Although numerous enterprises were privatized during the first, the impact on the economy was limited because: most of the enterprises privatized under this Phase were relatively small

³⁸ Operation Linda Jamii (Operation Linda Gatuji) v AG & National Assembly of Kenya, Constitutional Petition E491 of 2023

³⁹ Ibid, Note 32.

⁴⁰ Ibid, Note 16.

and self-sufficient, and the privatization programme lacked procedural and institutional framework. The second phase was more impactful, generating over 80 billion shillings as larger entities with significant value were privatized.

4. The improvement of the regulation of the economy by reducing conflicts between the public sector's regulatory and commercial functions.
5. The improvement of the efficiency of the Kenyan economy by making it more responsive to market forces.
6. The broadening of the base of ownership in the Kenyan economy from government to more diverse ownership.
7. The enhancement of the capital markets.

Privatization has also faced significant challenges such as:⁴¹

1. Government interference. This has been very prominent in entities where the government is a minority shareholder as seen in Mumias Sugar, East African Portland Cement and recently some attempts in Safaricom PLC. These actions often result in ultra vires actions such as the president appointing Board chairpersons despite being the majority, or attempts to dilute majority shares.
2. Gaps in legislation. There are gaps in legislation that should be addressed to streamline privatization process such as mandatory requirement for public participation, clearly delineating the rights of investors and powers of government in minority, lack of adequate controls by giving the cabinet

⁴¹ Trendy Consulting International Limited (March 2020), Comparative Analysis of Privatization and Government Divestiture: Challenges and Opportunities, Privatization Commission.

secretary in charge of Treasury discretionary powers to approve proposal and disposal of proceeds.

3. Lack of clearly defined processes and an effective communications strategy also exposed the Programme to accusation of corruption.
4. There was also limited participation by individual Kenyans in most of the transactions due to the transaction methods applied. Further, there isn't a requisite minimum citizen participation requirement.
5. Risk of natural monopolies despite operation in a free market that promotes competition and consumer choice. A good example would be KPLC which is a statutory monopoly. It also results in loss of control by the government and inversely an increase in the market power of a few private companies.
6. Privatization is also primarily profit driven hence it sacrifices quality, cherry picks only profitable services and may result in a fragmented, wasteful system.

Conclusion

The privatization process is aimed at addressing the inefficiency and financial challenges faced by these entities, improve efficiency, attract private investment, reduce fiscal burden on the government, increase competitiveness in the market, and stimulate economic growth.⁴² However, the process faces challenges in the legislative framework and balancing the financial incentives and the benefits to common citizens.

Despite these challenges, privatization has led to improved performance, technology advancements, and new management

⁴² The National Treasury & Economic Planning (2023) *Privatization Programme*

*The Privatization Conundrum: A look at the
Historical Perspective of Privatization through
to its Current Outlook in Kenya:
Maryanne Njoki Kariuki Thuita*

(2024) Journal of cmsd Volume 11(2)

practices in many cases. Overall, privatization has had mixed results in Kenya.

The Privatization Conundrum: A look at the Historical Perspective of Privatization through to its Current Outlook in Kenya: (2024) *Journal of cmsd Volume 11(2)*
Maryanne Njoki Kariuki Thuita

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Rethinking Territorial-Border Security in The Mano River Region: Experiences of The Ebola Impacts On Peace and Development

By: *Mohamed Sallieu Barrie**

Abstract

The Mano River Region, which includes Guinea, Liberia, Sierra Leone, and Côte d'Ivoire have experienced decades of conflict and instability. Due to its underdeveloped healthcare infrastructure and porous borders, this region is particularly susceptible to infectious illness outbreaks. This paper explores the Ebola outbreak in post-conflict era as a captivating case study, illuminating the complex interplay between health, cross-border security, and peace. The Ebola outbreak that ravaged West Africa between 2014 and 2016 showed the numerous difficulties the Mano River Region has faced. It emphasises the value of cross-border cooperation, prompt information exchange, and a strong healthcare system in responding to such emergencies which undermine peace and development in the region. This event acted as a stimulus for improving regional and international preparedness and response systems. This study examines the takeaways from the Mano River Region's response to the Ebola outbreak, placing particular emphasis on the value of cross-border collaboration, community participation, and sustainable healthcare capacity building. Understanding these processes are essential to enhancing health security not only in this region but also in other fragile and conflict-affected environments around the world.

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Key Words: Cross-Border, Security, Health, Ebola, Mano River, Peace, and Development.

1. Introduction.

West Africa's borders present a significant challenge for effective border protection. The unrestricted movement of people between nations has contributed to the spread of the Ebola in the sub-region. The Mano River Region countries which include Sierra Leone, Liberia, Guinea and Cote Ivoire have been affected by violent conflict in the past and the Region's health systems are extremely underdeveloped and unable to effectively stop the spread of the Ebola Virus Disease. According to Dr. Thomas R. Frieden, the American director of the Centres for Disease Control and Prevention:

*"Many of the health systems in the affected countries in West Africa were weak prior to the Ebola outbreak, and do not reach into rural areas effectively. Health care workers are often too few and not reliably present at facilities, and those facilities have limited capacity. Poor infection control in routine health care in these three countries, along with traditions such as public funerals and preparing bodies of the deceased for burial, make efforts to contain the illness more difficult. Furthermore, the porous land borders among countries and remoteness of many villages have greatly complicated control efforts."*¹

¹ Dr. Thomas R. Frieden, Centres for Disease Control and Prevention, USA.

The Democratic Republic of Congo and South Sudan saw the first cases of the Ebola virus disease in 1976. When two unconnected Ebola Haemorrhagic Fever (EHF) epidemics occurred 800 kilometres apart in Southern Sudan and Northern Zaire (Yambuku), the illness was identified (Nzara). Thereafter it was given the name "Ebola" in honour of a nearby tiny river that served as the epicentre of the 1976 Ebola Virus outbreak. In ten nations in Central and West Africa, there have been a total of twenty-four outbreaks throughout the past few decades. More than ten thousand people have died because of the Ebola outbreak in West Africa, which is the greatest recorded case of the disease in history and has afflicted many people in Guinea, Liberia, and Sierra Leone. The inaugural "One Africa, One Health" conference hosted by the Southern African Centre for Infectious Disease Surveillance (SACIDS) offered a thorough examination of the many species linked to the Ebola Virus. It was discovered that the five genetically unique members of the "Filoviridae family," namely the Zaire Ebolavirus (ZEBOV), Sudan Ebolavirus (SEBOV), Cote D'Ivoire Ebola Virus (CEBOV), Bundibugyo Ebola Virus (BEBOV), and Reston Ebola Virus, are the main causes of Ebola Haemorrhagic Fever (EHF) (REBOV). With a patient fatality rate as high as 90%, the Ebola haemorrhagic fever is known to cause significant human epidemics.

The World Health Organization (WHO) released its first announcement reporting a new Ebola epidemic in West Africa on March 23, 2014. This outbreak started in December 2013 in the Republic of Guinea in a forest named Gueckedou and

extended 80 kilometres to Macenta in the country's eastern region. A few months after the Ebola virus was discovered in Guinea, the disease continued to spread to nearby nations, with the first Ebola cases being reported in Liberia and Sierra Leone respectively.

The table below shows Ebola fatalities in the Mano River Region between 2014 and 2016:

Table 1. Mano River Union Countries with widespread transmission during the Ebola Crisis.

Country	Years	Total Cases (Probable, Suspected, Confirmed)	Total Confirmed Cases	Total Deaths
Guinea	2014 – 2016	3, 814	3,358	2,544
Liberia	2014 – 2016	10,678	3,163	4,810
Sierra Leone	2014 – 2016	14,124	8,706	3,956
Total	-	14, 630	15, 227	11, 310

Source: Centre for Disease Control and Prevention (CDC)²

1.1 Ebola virus disease causes and spread:

² Centre for Disease Control and Prevention (CDC)

The handling of contaminated animal corpses is how the Ebola Virus Disease is spread among human populations. As a result, an infected woodland animal served as the first point of transmission. A prevalent habitat for the Ebola Virus epidemic is Africa's tropical forests, which support a diverse range of animal life. Moreover, human to animal transmission typically happens when individuals come into touch with the tissues and body fluids of sick animals, particularly with diseased non-human primates such as infected gorillas, chimpanzees, antelope, or bats. Human-to-human transmission can also happen when a person comes into direct touch with an infected individual's body fluids, such as blood, saliva, or excretions.

1.2 Border Security in the Mano River Region:

The Mano River Region still has a very difficult period regulating its borders in a way that protects its territory and sovereignty. Under the guise of regional integration, unrestricted migration from one nation to another without adequate security measures in place has harmed the security and prosperity of that region. Apart from the fact that border agencies frequently lack the necessary tools, funding, and training to perform their duties successfully, border security measures are not consistently included in national security policies. Also, the Mano River Region national governments' disregard for maintaining strong border security has significantly contributed to the occurrence of security risks including cross-border crime, illness, and instability in the area. Particularly in comparison to other parts of the world, African border security measures are unique.

Map. 1 geographic arrangement of the countries within the Mano River Region: Guinea, Liberia, Sierra Leone, and Cote d'Ivoire.³



As stated in the United Nations Office of Drugs and Crimes' 2010 Annual Reports,

“West Africa is a paradise for organized crime, offering ideal conditions for trafficking contraband: a strategic location, ‘porous borders’, weak governance, widespread poverty and extensive corruption.”⁴

³ Map of the geographic arrangement of the countries within the Mano River Region: Sierra Leone, Guinea, Cote d'Ivoire, and Liberia (ACCORD). A total of 28,616 cases of Ebola Virus Disease cases and 11,310 deaths were reported in Guinea, Liberia, and Sierra Leone.

⁴ United Nations Office of Drugs and Crimes' 2010 Annual Report.

1.3 Cross-Border Security and its implications on Peace and Development

The absence of efficient border control mechanisms is one of the biggest issues now confronting the Mano River Region of West Africa. The region has been negatively impacted by migration, undermining opportunities for growth and security. Because there is no efficient system in place to adequately monitor movements and illicit activities across these borders, the porous borders continue to fuel transnational organized crime and instability in the subregion. Major cross-border issues were highlighted in the 2004 United Nations Secretary General's Report on how to handle sub-regional and border challenges in West Africa, which stressed the continuous deterioration of the security sectors and national institutions of West African nations. Effective border control mechanisms have been severely weakened by the ongoing rise in cross-border trade and migration of individuals from West African nations in quest of better economic prospects elsewhere. In 2014, the Ebola Virus Disease spread due in part to migration from one nation to another in the Mano River Region without efficient border control mechanisms.

Although a few nations in West Africa have acknowledged the importance of efficient border control measures, few have border control security plans that they have also failed to put into practice. Significant security problems, such as infections and cross-border crimes, have resulted from national governments in West Africa's inability to regulate their borders properly. The World Health Organization (WHO) published a

report on the first Ebola case that occurred in the Republic of Guinea in West Africa in December 2013 on March 23, 2014. The report states that Guinea was the first nation in the West African sub-region to report cases of the Ebola virus disease. Nonetheless, the illness persisted in spreading to nearby nations, first to Liberia and later to Sierra Leone. The United Nations' report (2014) states that the Ebola Virus Disease in the Mano River Region constitute a danger to global peace and security after evaluating the trend and nature of the epidemic. Amide also claims that Ebola virus Disease in the Mano River region is exceptional due to the following reasons:

First, this outbreak's death toll exceeds that of the previous 25 Ebola epidemics put together. Second, the West African Ebola outbreak is substantially different from earlier ones, which exclusively affected regions or populations. It has nearly completely consumed the three nations that have been worst hit, including both rural and urban areas. Also, it has taken longer since cases from the West African subregion are still being recorded and none of the three main epidemic locations had direct experience with the virus before.

2. Border security and immigration:

Nicholas Vaughan-Williams contends that there are significant linkages between migration and state borders. This is because important choices about who is legitimate or not, who constitutes a security concern or not, and who is allowed and who is not are typically decided at border crossing locations. In addition, according to figures from the United Nations on

migration, there were roughly 191 migrants in 2005; by 2013, however, there were 232 million migrants, or 3.2% of the world's population. Migration can occur for a variety of reasons, including the desire to be closer to family members who live overseas, the need to flee war, oppression, and persecution, and the pursuit of economic opportunity. As a result of migration being seen as a security concern, border security and monitoring programs have improved in other parts of the world. These improved programs include the issuance of visas, passport checks at crossing points, passenger movement monitoring, and the introduction of biometric technologies into border crossings. However, this is not the case in the Mano River Region, where many nations, particularly those closest to the Ebola virus epicentres of Guinea, Liberia, and Sierra Leone, frequently face difficult challenges in effectively and efficiently managing their borders and safeguarding their territorial sovereignty in general. The issues with border security have been made worse by these governments' poor institutions as well as their lack of cross-border collaboration and integration.

According to Wafula Okumu, (2008), border security is an essential factor of border management. The idea that states should secure their territories and protect their citizens from both internal and external threats to their livelihoods as recognized under international law is argued to be missing in the African context. Moreover, a nation's strategic position affects the kind of activities that might occur along its borders; according to Wafula Okumu, (2008): "*Some nations are more at*

*risk from the insecurity of other nations' borders than they are from their own."*⁵

Prosper Addo (2006) also contends that maintaining peace and stability requires the management and regulation of cross-border operations. He claims that West Africa's porous borders, however, have been exploited by criminals because of the state's inability to adequately address such dangers and difficulties.

In his book "Migration in West Africa: Patterns, Issues and Challenges," (Yaro, 2018), lists several factors that are related to migration, including "long-distance trade, the search for pasture, urbanization and the growth of administrative centres, the demands of mining opportunities, industrial production and plantation agriculture, armed conflict, land degradation, drought, and rural poverty. Meanwhile, the Economic Community of West African States (ECOWAS) strongly supports the free movement of people within its sphere of influence, even though inadequate border security measures are said to be a contributing factor in the spread of the Ebola virus in West Africa and calls to increase border security that will restrict the flow of people from one country to another have not yet been successful. However, the ECOWAS Common Approach on Migration is a reflection of the obligation placed on member states as stated in Article 59 of the ECOWAS Revised Treaty, which states that member states' citizens have the right of entry, residence, and establishment and that

⁵ Wafula Okumu, (2008).

member states must recognize these rights of Community citizens in their territories in accordance with the provisions of the Protocols relating thereto, such as Resolution 60/277 of the United Nations General Assembly on the subject. Borders, in Anderson's view, is of utmost importance, because they define the actual location of nations in the global system. The state runs the danger of losing a sizable portion of the money generated by the trade that passes through these routes, and it also allows for the access of smuggled items. As a result, the state's integrity was in a chaotic situation. Unsafe borders can eventually threaten stability and progress, which raises the possibility of conflict both within and beyond of a state's boundaries. Lack of a strong border security system, which is important in preventing spoilers from disrupting the state, is one of the characteristics of post-conflict nations. Borders may either bring prosperity by facilitating the exchange of products and services between collaborating governments, or they can be porous entry points for illegal activities including the trafficking of small guns, people, and narcotics. Weak/post-war nations like Sierra Leone and Liberia must defend themselves on the inside and engage in international trade by lawfully transferring people, products, and services, or else they risk relapsing into violence. Post-conflict governments need to restructure their border security to successfully create peace.

Moreover, (Anderson, 1999), contends that maintaining secure borders is a difficult endeavour with many facets. Hence, it requires a variety of government organizations, expert skill

sets, border officers, customs, import and export restrictions, surveillance of land crossings, air, and seaports, as well as transaction control. All of these are essential for managing dangers from illegal trafficking, facilitating legal mobility and trade, and stopping the spread of illnesses globally.

2.1 Public Health and Security:

Security and development in the West African sub-region have been severely impacted by the Ebola Virus Disease. Thus, the West African Ebola outbreak has a high potential to endanger state existence and ultimately lead to state failure in the West African sub-region. Also, in accordance with Dr. Thomas R. Frieden, the director of the Centres for Disease Control and Prevention, he described the Ebola epidemic in West Africa as the most complex challenge the world has ever faced:

*"The current epidemic in Guinea, Liberia, and Sierra Leone is the first time an outbreak has been recognized in West Africa, the first-ever Ebola epidemic, and the biggest and most complex Ebola challenge the world has ever faced.... Many of the health systems in the affected countries in West Africa were weak prior to the Ebola outbreak."*⁶

Given the inadequate healthcare system in the West African sub-region, this remark captures the scope of the Ebola outbreak and the catastrophic ramifications that would follow. The Ebola outbreak in the West African sub-region has had an impact on security as well as development in this region. In its

⁶ Dr. Thomas R. Frieden, Centres for Disease Control and Prevention, USA.

Human Development Report, the United Nations Development Program notes:

“The concept of security goes beyond military considerations. It must be constructed in terms of the security of the individual citizen to live in peace with access to necessities of life while fully participating in the affairs of his/her society in freedom and enjoying all fundamental human rights.”

The Human Development Report outlined seven components of human security that should be taken into great consideration by policy makers; one of those is health security.

Furthermore, the Commission on Human Security (CHS) has expanded the definition of human security. It states that: *“Human security in its broadest sense embraces far more than the absence of violent conflict. It encompasses human rights, good governance, access to education and health care and ensuring that everyone has opportunities and choices to fulfil his or her own potential.... Freedom from want, freedom from fear and the freedom of the future generations to inherit a healthy natural environment-these are the interrelated building blocks of human and therefore national security.”* As stated in the World Health Organization’s charter: *‘the health of all peoples is fundamental to the attainment of peace and security.’*

According to Stefan Elbe, establishing human security depends on the security of the health system. In addition, he points out that while preserving life is at the core of human security, this

cannot be done without simultaneously bringing down the prevalence of deadly illnesses. Because endemic illnesses provide a significant threat to various other aspects of human security when they are present, they directly endanger human security. The new insecurity that mankind is experiencing, according to Colleen O' Manique and Pieter Fourie, is exemplified by health problems. So, to address health challenges that cut beyond national lines, such risks necessitate more complex types of governance as well as global public health governance.

2.2 Border Security and Development:

While economic growth was originally considered to be the sole indicator of development, this definition of progress has since been expanded. According to Frances Stewart, there are other dimensions of human well-being that should be considered, such as people's health, education, and security, therefore "economic growth" cannot be the sole metric used to support development. The United Nations Development Program's Human Development Index (HDI) acknowledges that *"development is much more than just the expansion of income and wealth"*, but also ascertain that human development is *"the process of enlarging people's choices."*

Although these decisions may alter over time, each of these stages is crucial to human development to live a long and healthy life and have access to resources for a respectable and standard of living.

Amartya Sen (1999) asserts that development goals should include *“the enhancement of peoples’ capabilities and opportunities open to them to do a variety of things.”*⁷

Thus, the growth of peoples’ options and capacities should not just be restricted to revenue earning but also to health, education, and work. Hence, development in this sense refers not just to economic expansion but also to human development, which also encompasses human security. Moreover, studies have shown that security and development are intimately linked. Observations show that to attain global security, emerging nations need to be provided genuine development possibilities. In addition to many other vices, poor countries are characterized by great poverty, starvation, and illnesses. These vices directly endanger human existence, and these nations also serve as a breeding ground for other dangers including civil wars and opportunities for people and drug trafficking.

2.3 The development costs of insecurity:

Security and development go hand in hand. For instance, Columba Peoples and Nick Vaughan-Williams claim that the idea of human security develops from the idea of human progress. Duffield (2001) adds that: *“development concerns have become increasingly important in relation to how security is understood.”* Meanwhile, according to Frances Stewart, *“some development costs are obvious.”* He adds that advancements and unfolding events have intricate relationships with one another.

⁷ Amartya Sen (1999).

West Africa's experience with the Ebola virus disease is not unique. The Ebola virus disease epidemic in West Africa has had an impact on the individuals and society as a whole because of the inadequate institutional ability and health infrastructure to control it. Several people have lost their little wages because of the interruption of economic activity and revenue creation among the population. On a national scale, the Ebola Virus Disease has shown the frailty and inadequacy of the afflicted states, including their lack of readiness to handle such medical catastrophes. State development is severely endangered when security fails. Insecurity has costs, many of which are clear.

Furthermore, the way the government is run has a big influence on how insecure people feel in society. The growth of weak nations might be further hampered by security threats, as was the case for Sierra Leone in the 1990s and Uganda in the 1970s and 1980s. Nonetheless, notwithstanding the spillover effects, one important method for estimating and comprehending the development cost of insecurity is to contrast the performance of war-affected nations with that of comparable countries in the same region that have not been touched by conflict.

It is true that there are a wide variety of sources of insecurity, such as terrorism, war, natural catastrophes, people trafficking, and more. In two foundational papers, the Millennium Plan on Organized Crime and the Council Framework Decision on Combating Terrorism, the European Union began to elaborate on the effects of organized crime and terrorism as costs of

growth. Officials from the European Union identified and thoroughly analysed the threat posed by organized crime and terrorism in these documents. They also made extensive use of words like “loss,” “harm,” “damage,” “destruction,” and “instability” in describing the likely effects and consequences that the two threats may have on states.

3. Conceptualizing Public Health Security, Migration and Cross-Border Management:

The notions of security and development, which have received a lot of attention from academics, will be discussed. Although, in a larger sense, border management and border security are crucial parts of security, they will be discussed individually to provide the reader a thorough knowledge of these ideas.

3.1 The concept of Security:

The United Nations Development Programme (UNDP) expanded the definition of security in its 1994 Report to include “human security,” which complements the prior emphasis on state security. The idea of “freedom from fear and freedom from want” implies that individuals should be safe from any risks, including violence, illness, and deprivation. Moreover, the United Nations Development Programme (UNDP) states in its 1994 Report that:

“The concept of security has for too long been interpreted narrowly: as security of territory from external aggression, or as protection of national interests in foreign policy or as global security from the threat of nuclear holocaust. It has been related to nation- states more than

people, forgotten were the legitimate concerns of ordinary people who sought security in their daily lives. For many of them, security symbolized protection from the threat of disease, hunger, unemployment, crime, social conflict, political repression, and environmental hazards.”⁸

It is crucial to remember that weak nations specifically face security challenges due to the interaction of internal threats and state weakness.

Governmental trust and confidence are continuously undermined by the state’s incapacity to provide the peace, security, and order that its citizens need. The topic of whether national governments in the West African sub-region can ensure security for the people has been raised in the wake of the Ebola epidemic in West, which has resulted in the deaths of thousands of people and a breakdown in economic activity.

As a result, the term “security” in this sense refers to both “state security,” which entails defending a state’s sovereignty against foreign aggression, as well as “personal security,” which is focused on the safety and well-being of specific persons. The UNDP’s definition of human security goes beyond meeting their most basic material requirements to include the absence of serious challenges to their economic or political security, including dangers to their jobs, income, health, environment, and safety from criminal activity. While dealing with

⁸ United Nations Development Programme Report (1994).

conventional security notions, national and international policy tools were not better taken into consideration. In essence, human security aims to lessen and, wherever feasible, eliminate the uncertainties that permeate people's lives.

3.2 Border Security:

Essentially, a country's boundaries indicate where its administrative and judicial authority stops and determine the sovereignty of its area. With the definition of people's lives, customs, and languages, borders also more strongly denote national identity. Control, surveillance, protection, and administration of borders are all considered to be part of border security. For effective border security, the problems with cross-border migration have proven to be challenging and complicated.

Threats to security that result from migration have been linked to several problems, including terrorism and crime. As a result, border management now heavily considers concerns of border security. One of the numerous factors used to determine whether a state is strong, weak, or unsuccessful is its capacity to properly guard its borders. Moreover, border security, which includes border control, is typically broken down into two categories: borderline security and port security. Controlling border activity is covered in the first section, followed by control of different ports, including airports, border posts, harbours, and points of entry and exit. Wafula Okumu claims that: "border security is about asserting territorial sovereignty

by enforcing the boundary and protecting it through permanent surveillance.”

3.3 The concept of Border Management:

The idea of border management, which is a crucial component of border security, comprises managing and controlling the movement of people, products, and services over a nation's borders with the goal of safeguarding national interests, particularly for the maintenance of peace and security. It is the duty of the state to defend its territory from foreign threat; these activities are generally carried out by government officials from departments like customs and immigration, with a mix of other agencies in accordance with local legislation. Kama, meanwhile, views border security as *“the legitimate control upon unauthorised and illegal endeavours that may arise at or around the state border due to political fluctuations or discrepancies in the internal security provision, as well as controlling lawful and unlawful trade, and the movement of illegal or unauthorised persons who may generate problems in internal security or lack the necessary authority to enter and reside in a territory.”*

To control how the States' boundaries are drawn, there are different requirements. Borders can be managed in a variety of ways. By implementing an Open Border System, which requires only a transit pass or a simple form of identification, states may secure their borders.

Moreover, border management is “a manifestation of state sovereignty,” according to Wafula Okuma, therefore a state's

inability to control its borders successfully may seriously erode its legitimacy. Border security in Wafula encompasses a wide range of concepts, including border administration, surveillance, control, and protection. Securing borderlines (activities along the border) and managing ports (harbours, border posts, and airports) of entry are two aspects of border security that aim to either assist or restrict the movements of people, animals, plants, and products into and out of a nation. Border agents are entrusted with a lot of responsibility, including establishing rules for when people can legally cross borders with valid identification, such as a passport or visa; ensuring that plants and animals don't spread disease; ensuring that excise taxes are implemented for goods; and suppressing illegal activity at the border.

3.4 The Coordinated Border Management (CBM) Concept:

“Coordinated border management” (CBM) is a technique for managing borders in which public service groups work together across portfolio boundaries to achieve a single goal, providing a persuasive government response to the challenges of border management. To ensure efficient processes and procedures are used by all regulatory agencies involved in border security and regulatory requirements that apply to people, goods, and vehicles crossing international borders, CBM can be understood as a methodical approach to managing border operations.

A coordinated border management system must also provide safe crossings to promote trade and speed up traveller clearance (WCO, 2009).

3.5 The Concept of Development:

With the end of the Second World War in 1945, the way that development is conceptualized has changed. The ideological conflict between the two main political blocs in the world – the capitalist West and the socialist East – had a considerable impact on the meaning and understanding of it. It was difficult to conceptualize development itself because of this challenge with development concepts and ideas. On the one hand, it is stated that economic growth results in development, while on the other, economic growth and development are obtained from structural adjustments, savings, and investments in an economy. The idea of development encompasses not just “economic growth” or advancement, but also the expansion of human options, such as access to food, security, and facilities for medical care. The idea of “human security” was devised by the United Nations Development Programme (UNDP) to include not just concentrating on state development but also the protection of individuals from all types of dangers to their development, such as hunger, sickness, catastrophes, and education. The UNDP claims that these are the “growing problems of security around the world.” Insecurity, however, has the potential to harm these development goals. Due to its terrible repercussions, the Ebola outbreak has negatively impacted the likelihood of development. The total cessation of operations because of the emergency health rules put in place

to control the epidemic has had a profound influence on the sociocultural, political, and economic fabric of society.

To address issues of unemployment, poverty, disease, hunger, illiteracy, and steadily rising crimes and wars, economic growth in most developing and developed countries around the world to deliver corresponding social goods in the late 1970s. This required new thinking and a redefinition of development from an economic growth-centered perspective to a human-centered approach. Hence, development is viewed as a more inclusive notion that considers both the physical and psychological factors that influence a person's well-being. It is a complicated phenomenon that is more state-than-human-centered.

4. Research Design and Methodology:

A range of approaches, including primary and secondary sources of data collection, was employed in this study as relevant academic works on the subject were reviewed.

These approaches were selected to complement the limitations of the academic literature and to produce reliable and unbiased results of the study. This study adopts a case study approach as it takes into consideration the Ebola crises as a major focus in explaining health security, cross-border dynamics, and sustainable peace in the Mano River Region. The study is conducted in two (2) border communities between Sierra Leone and Guinea (Pamlap border crossing), and Sierra Leone and Liberia (Bo-Waterside border crossing) respectively. Due to the nature of the research design, a qualitative method to data

analysis was used in this study. As data are analysed inductively, this provides a thorough understanding of research findings. This research used both primary and secondary sources of data since they offer a wide range of information about the subject being studied.

Table 2. Selection of Interviewee Participants in two (2) border crossings.

Category of participants	Male	Female	Location
Security Personnel	5	5	Pamlap/ Bo-Waterside Border Crossing
Immigration Officers	10	10	Pamlap/ Bo-Waterside Border Crossing
Health Practitioners	10	10	Pamlap/ Bo-Waterside Border Crossing
Border Community Stakeholders	5	5	Pamlap/ Bo-Waterside Border Crossing
Total	30	30	

Source: Interviews of selected participants through purposive sampling technique.

4.1 Research Population:

This study uses a small n qualitative data by recruiting sixty (60) participants, including border community stakeholders, security personnel, immigration officers, and healthcare

professionals. This offers a comprehensive grasp of the nature of regional health, cross-border security, and sustainable peace. The participants' distribution by sex is shown in the table below.

4.2 Instruments for Data Collection:

The main instrument applied in this study was unstructured interview to gain deeper understanding of the subject under study.

This method provided a detailed description of the nexus between cross-border dynamics, health security and sustainable peace in the Mano River Region.

4.3 Ethical Considerations:

Ethical considerations of the research are central in this study as participants choices and data policy are prioritized. This gives credibility and reliability of the study. Some of the limitations that arise during the research is the challenge in accessing government data.

5. Findings and Discussions

The rapid spread of the Ebola virus disease in the Mano River sub-region is the result of insufficient border management mechanisms. Some of the factors responsible for poor control systems include but are not limited to the followings:

5.1 Porosity of borders:

The porous nature of Africa's land borders makes them a threat to effective security. Because there is no suitable method to

adequately monitor people's movements across these boundaries, cross-border crimes and insecurity continue to plague the sub-region. Due to its porous nature, it also serves as an economic opportunity and livelihood for borderland communities. According to Daniel Hernandez Joseph:

“The dynamism produced by these borderland communities expands the challenges and demands of border management beyond the traditional issues of law enforcement and surveillance and into the whole greater agenda of public administration: health, education, infrastructure, social and economic development, culture, arts, and most notably trade and transnational modes of production.”

5.2 Lack of Institutional capacity:

The poor border control and management systems also result from weak or lack of effective and efficient government institutions. Most West African countries do not have the required institutions needed to effectively manage their borders, and some of these countries such as Liberia and Sierra Leone have been affected by civil wars which destroyed the available states' infrastructure. There are also problems of inadequate border personnel deployed on the borders and those available sometimes lack the necessary skills required to effectively manage these borders. Also, the lack of facilities and equipment to effectively secure and manage these borders has added to the problems.

5.3 Lack of regional cooperation and integration:

The lack of cooperation at all levels; local, sub-regional and regional spheres of development have greatly affected the way African borders are managed. For instance, most border management programmes do not include border communities into their planning and implementation. Security personnel are normally deployed into these borders with the exclusion of local interests or community members, even though they are more familiar with the border terrain and have intimate knowledge on the area to be secure. At regional level, there is usually little or no cooperation between different countries' security departments such as immigration, customs, police, and intelligence. Therefore, this failure of collaboration between countries in the Mano River Region to effectively secure their borders have added to the problems associated with border management, as effective border security requires close cooperation and intelligence sharing at all three levels discussed above.

5.4 Lack of political will and commitment:

It is also important to note that; in addition to lack of regional cooperation and integration, there is also lack of commitment especially with resources that could be used to provide an effective border management system in the Mano River sub-region.

5.5 Lack of proper border demarcation:

Border insecurity in Africa has been greatly exacerbated by improper border demarcations in addition to the

aforementioned factors. As a result, managing African borders has become quite challenging. More than 75% of the borders that define Africa are either inadequately or not designated. Helmoed-Romer Heitman added that "one cannot govern what one does not patrol." For instance, due to a lack of resources to patrol them, Africa's maritime borders are more challenging to control and unsafe. It is evident that very few maritime borders have been established to yet, which has raised the dangers to national security. Many of these maritime borders are not signposted, patrolled, or otherwise supervised, therefore they have increasingly turned into transit points.

5.6 Corruption amongst border security personnel:

Another major factor contributing to poor control and management system in Africa is high level corruption amongst border security personnel, such as immigration officials. The issue of illegal border crossing is widely known in Africa; for instance, illegal border crossing points also known as "*mice or rat routes*", are normally used by smugglers who are often charged a fee depending on the circumstances and difficulty of border crossing. Meanwhile, due to high level of corruption amongst immigration officials, the president of Sierra Leone; Ernest Bai Koroma, accused immigration officials of selling Sierra Leonean passports to foreigners, and the issue of police fleeing passengers at checkpoints. According to president Koroma, he notes that: "a Sierra Leonean passport can be bought by any African for \$250 to \$500."⁹ This depicts the level

⁹ Ernest Bai Koroma, former president of the Republic of Sierra Leone.

of corruption that exists in the borders of the Mano River Region as free movements of people from one country to another are unavoidable due to corrupt public officials.

6. Summary, Conclusion, and Recommendations:

6.1 Strengthening health systems:

According to the research findings, it is evident that the current health systems of the Mano River Region countries are not good enough to address epidemics such as the Ebola Virus Disease. In as much as the experience of civil wars may have contributed to the problems, the Mano River Region leaders need to improve their current health systems. This could be achieved through effective and efficient national, regional, and international cooperation with civil society organizations, governments, and the international community. The Ebola virus disease had a significant impact on the region's health systems, which also caused companies to close, which had a negative impact on people's ability to support themselves. Education was also disrupted, and progress completely stopped. To address this problem and prevent similar outbreaks in future, health systems need to be improved. Improving facilities in rural communities by providing good health systems in rural areas and provide facilities such as good roads to access these areas, clean water, and electricity in these communities. Increasing community hygiene and developing a conducive environment that minimises other health problems such as malaria and diarrhoea.

6.2 Increasing resources for good health infrastructure:

To achieve good health system in the Mano River Region; affected countries should allocate a reasonable budget for health programmes. This can also be achieved through effective collaboration and partnership with civil society organizations, non-governmental organizations, national governments, and the international community. Special funding needs to be allocated to build strong health infrastructure across the region. Building strong health infrastructure such as hospitals, providing good medicines and ambulances. Increasing staffs in the health sector and encouraging young people to enrol in health programs. It is evident that the limitation of qualified staffs in the health sector also contributed to the rapid spread of the disease in the Mano River Region. Therefore, by increasing resources in both human and financial resources, it will help greatly in addressing such epidemics.

Due to poor health care systems in affected countries, leaders of these countries highly depended on the international community for support in terms of health staffs, finances, and health instruments.

6.3 Building capacity for health workers:

Capacity building is a strong way of addressing epidemics such as the Ebola Virus Disease. Health workers should be well trained in various areas of expertise. Effective trainings and mentorship should adequately be provided to health workers so that they will have the motivation and confidence to do their work effectively. Also, resources; wages and health care facilities

should be adequately provided for health care workers, so that their work cannot be comprised and affected for not being adequately paid or not having the necessary tools to do their work. Also, national governments should encourage young people to enrol in health care systems, provide opportunities for them to develop their skills and build their capacities.

6.4 Increasing awareness on health issues for all communities:

Community empowerment should be a central plan of action for West African governments. This is because, they are the most affected both in terms of their livelihood and security. By increasing awareness for all communities on health issues will minimize the level of transmission of future health outbreaks such as the Ebola Virus Disease. Due to lack of knowledge and cultural issues such as burial method; washing of deceased, the Ebola Virus Disease spread rapidly. Therefore, by addressing this issue, national governments, civil society organizations, local organizations, non-governmental organizations, and the international community, should ensure that rural communities are properly educated and empowered to contain future outbreaks of similar character. The lack of community empowerment is a major factor that contributed to the rapid spread of the Ebola Virus Disease in West Africa.

Therefore, community sensitization, empowerment and education should be provided to all communities in West Africa, so that they feel part of the process and not marginalised.

6.5 Building trust and confidence between governments and community people:

Trust building is a key factor that can build relationships. Due to lack of trust of people on their governments in providing the security they deserve; this also undermines the efforts of governments and non-governmental organizations in the fight against the Ebola Virus Disease in West Africa. This generally affected the process because people have lost trust and confidence on their governments in West African countries affected by the Ebola Virus Disease. Some people have the perception that, it is a clear negligence of governments to address the menace.

Meanwhile, others have the view that, the Ebola Virus Disease is a made weapon to fight Africans; this lack of education, trust and confidence of people contributed to the rapid spread of the Ebola Virus disease in West Africa. Also, people fail to adhere to precautionary measures put in place by West African governments through World Health Organization's advice. This undermines the process and thus contributed to the rapid spread of the disease. Therefore, West African governments should serve as custodians to the people; provide them with the security they need and build trust and confidence. People feel that the 'social contract' between West African governments and the people is not provided. Civil society organizations and non-governmental organizations should play a great role in improving relationships between the people and the governments.

6.6 Incorporating health programs in the school curriculum:

One of the major problems affecting West African countries affected by the Ebola Virus Disease is the limitation of health curriculums in their schools' programmes. The lack of basic knowledge of most students of West African countries contributed in the poor level of awareness of the Ebola Virus disease. School children have little or no knowledge about the Ebola Virus Disease and its precautionary measures. It is evident that the Ebola Virus Disease affected all sectors of society including education, but the lack of basic knowledge also contributed to the spread of the Ebola Virus Disease. This is because school children do not have the basic understanding as to how to prevent transmission, and their parents too at home may not give them adequate information that could have been provided in school.

Therefore, the Mano River Region countries affected by the Ebola Virus Disease should ensure that health education is provided across all levels of education; primary, secondary, and tertiary, irrespective of the field or career a student may want to specialise in.

6.7 Building capacity and incorporating inhabitants across borders:

One of the major problems affecting border management of West African countries affected by the Ebola Virus Disease is the marginalization of local inhabitants across borders to participate in border security. This situation continues to be the case of affected countries. Due to the fact local inhabitants have

a good knowledge on these borders; they would serve as great contributors to effectively manage these borders. In building the capacities of these people through education and trainings, they would contribute to effective border security.

6.8 Ensuring effective and efficient cooperation of West African countries in border management:

Poor border security has been identified in this dissertation as a major factor for the rapid spread of the Ebola Virus Disease in West Africa.

To ensure effective border security of West African countries affected by the Ebola Virus Disease, national governments of West Africa need to embark on high level of regional cooperation in border management. This is because the level of cooperation at the time of the Ebola outbreak was not good enough to contain the disease. Although, affected countries have had high level of meetings to address the situation, this must be continuous and should not be ignored when the disease is declared free across these countries. There should a continuous regional cooperation of governments of West Africa so that border security is not only limited to national priority, but also regional priority.

6.9 Increasing capacities and skills of border security personnel:

One of the major problems affecting West African countries in effectively managing their borders is the lack of trained and qualified security personnel. This situation contributed to the

spread of the Ebola Virus Disease across these porous borders. Therefore, as part of the recommendations, it is important to build the capacities of border security personnel through education and training so that they will have vast experience on security issues. Therefore, through capacity building, borders across West Africa should be more secured; there should also be a sub-regional cooperation of affected countries, with the support of civil society groups and non-governmental organizations. The process should not be abandoned, but rather should be done on the regular basis so that security personnel will acquire the necessary skills needed to effectively secure their borders.

6.10 Improving wages for border security personnel:

Border security personnel should be provided with strong support to do their work effectively and efficiently. The minimum wages provided to border security personnel would contribute in less performance and this could undermine the efforts of national governments, civil society groups, non-governmental organizations and the international community at large.

Security personnel would be forced to collect bribes due to poor wages allocated to them, and this would affect both security and development of these countries. Therefore, in order to maintain effective and efficient border security of West African countries affected by the Ebola Virus Disease, security personnel should be encouraged by improving their wages, as this will limit bribery and ensure good performance. A

collaborative effort is needed by all affected governments, civil society groups, non-governmental organizations, and the international community to achieve this.

6.11 International Partnership and foreign relations with countries across the globe:

West African countries should improve on their foreign policy relations especially on security issues. This is a lacuna that needs to be closed; due to poor level of interaction and collaboration with international governments on security issues, these borders could be classified as ‘porous’, and could not provide the desired security for inhabitants across West Africa. West African governments should be more prepared to improve on their foreign policy relations on security. This is because; security is paramount and is a major pointer for any country’s development. The Ebola outbreak that spread across West Africa is a typical example to this, all sectors of society is affected, and development collapsed.

Therefore, security issues should be a major focus of West African countries and allocate a reasonable amount of budget through partnership and collaboration with foreign governments.

6.12 Addressing corruption in Border Communities:

Corruption has been identified as a major problem across West Africa. Every sector is affected by corruption, and this trend highly undermines the level of performance. If West Africa is to move from underdeveloped to developed status, corruption

should be addressed entirely. Border security is also affected because of the level of corruption that exists across these borders. Migration across West Africa becomes simpler when money is spent. Security personnel accept bribes due to poor wages allocated to them, and this situation has become a 'culture' rather than a habit. West African countries affected by the Ebola Virus disease should learn lessons from countries such as Nigeria, Senegal, and Ivory Coast, to manage their borders effectively and efficiently. Corruption cannot be addressed alone; it must be a collaborative effort from all sectors of society; national governments, civil society groups, non-governmental organizations, and the international community. A major focus of West African countries affected by the Ebola Virus Disease is to address the issue of corruption and provide opportunities such as increasing wages of employees.

This will limit the level of corruption and possibly eradicate it at once; and the outcome of this will be high performance of workers.

6.13 Improving border instruments and tools:

West African borders has been labelled as 'porous' because they lack the necessary tools and instruments needed to maintain effective border system. The lack of instruments such as scanners has contributed to the increased in transnational organised crimes and activities. Drug and human trafficking occur frequently across these borders. Small arms and light weapons are smuggled by criminals to facilitate their work.

This is a common event that happens across Sierra, Liberia, and Guinea. In relation to the Ebola outbreak in West Africa, migration became a daily activity; people choose to migrate everyday across these countries to seek better job opportunities. However, these people are not properly screened and there is a possibility they might be carrying the Ebola Virus Disease, although symptoms are not shown. Due to the complexities of diseases such as the Ebola Virus Disease, and its window period is between 1 to 21 days, border instruments need to be provided by West African countries through a collaborative effort between national governments, civil society groups, non-governmental organizations, and the international community.

6.14 Effective collaboration between governments, civil society organizations, non-governmental organizations, and the international community:

Effective collaboration and partnership are important in addressing issues of security and development. Although national governments are the primary focus of every citizen; it is important to note that national governments cannot absolutely achieve the desired security without the collaboration of other important sectors such as non-governmental organizations, civil society groups and the international community. Therefore, effective collaboration is needed between all sectors of society to ensure effective security and development.

6.15 Creating an effective checks and balances to effectively manage West African borders:

Another important factor in ensuring effective border security in West Africa is to have a checks and balances' system that could limit corruption, increase performance, and promote development. This is important because it provides employees such as border security staffs with designated roles and responsibilities and ensures there is transparency and accountability in all borders across the Mano River Region. This is also another lacuna that needs to be closed, and it is essential to maintain this process throughout and should not be only implemented on short term basis but rather it should be a continuous process.

If West African borders is to move from a 'porous' status to a more developed and improved one, the idea of checks and balances in the security sector has to be fully implemented. Once this instrument is put in place, it reduces the chances of corruption and under performance. It increases trust and confidence between governments and the governed, due to transparency and accountability also and promotes security and development in the West African sub region. Finally, the above recommendations address some of the problems identified during the research and thus serve as suggestions for governments and policy makers in the West African sub region to effectively respond to them.

6.16 Promoting the culture of peace in border communities:

Facilitation of dialogue in border communities to address the unique challenges faced with respect to cross-border dynamics in the region is a significant initiative to foster cooperation and maintain border stability. This also requires empowering local stakeholders to take the lead in promoting peace and awareness especially in porous border areas.

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Analysing the Factors and Consequences of Trade Credit in Karachi's Retail Hardware Market: An Exploratory Study

By: **Hamza Shabbir***

Abstract

The use of trade credit in markets and its recurrence in business operations by merchants have been a subject of study. Previous research has investigated trade credit's benefits, incentives, drawbacks and associated costs. Based on interviews with four retail traders in the hardware market of Karachi, this paper identified the critical effects of trade credit and the factors driving its utilisation. To accomplish this, the paper expanded its scope by distributing a survey questionnaire containing these identified factors to other traders in the same market. This was done to generalise the results obtained from the interviews and validate them. From the analysis of both qualitative and quantitative data, the paper concluded that the adverse effects of trade credit outweighed the positive ones on the traders in Karachi's Retail hardware market. The data analysis results indicate that trade credit has a more detrimental impact on the traders' economic, social, and psychological well-being. The motivating factors behind the use of trade credit in their business operations originated from suppliers, buyers, and the trade itself, compelling traders to rely on trade credit in their commercial activities.

Keywords: Trade Credit, Retail Hardware Market, Karachi, well-being.

Introduction

Over the past few decades, a complex relationship has unfolded between economic prosperity and the extensive reliance on credit to achieve it (Hodson et al., 2014). In the late 1990s, the world

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experienced a seemingly robust period of prosperity marked by rising living standards (Bernthal et al., 2005), often irrespective of income level (Soederberg, 2013). However, this period was characterised by a significant shift (Roach et al., 2019) where debt became an easily accessible tool to augment consumption patterns. (Bergman, 2022) While momentarily enhancing the illusion of prosperity (Christen et al., 2005), the unrestrained use of credit led to a precarious consumption bubble (Lloyd et al., 2022), exposing the inherent flaws in debt-driven "prosperity" (Kose et al., 2021).

In response to these developments, researchers began scrutinising the repercussions of this relentless pursuit of debt-fueled consumption (Qamar et al., 2022) on a global (ECB 2020; UNICEF, 2021), corporate (Facundo et al., 2020; Bartik et al., 2020) and household level (Sweet et al., 2013; Santos et al., 2014). Their investigations unveiled a complex interplay between the pursuit of social status and the normalisation of a culture (Peñaloza, 2011) heavily reliant on excessive debt (Lupica, 2009; Llyod et al., 2022; Ritzer, 2005; Schor, 1999; Page, 1990). It becomes evident that a strong consumer culture, driven by the constant desire for social status (Banuri, 2020), has been the driving force behind this debt-driven phenomenon (Sotiropoulos et al., 2012), emphasising the overarching theme of a consumption society (Roach, 2019).

Within this broader exploration, researchers have increasingly acknowledged the pivotal role of trade credit in shaping the business landscape (Atanasova et al., 2003; Olegario, 2009; WTO, 2021; Wilson et al., 2002). Trade credit, often overshadowed by consumer credit in research, serves as the lifeblood of numerous enterprises, facilitating business growth (Ferrando et al., 2011; Westerfield, 1938), attracting customers (Burkart et al., 2004), and fostering competitiveness (Osiichuk et al., 2021). Notably, the

consequences of this debt-driven culture transcend national boundaries and resonate globally, cutting across cultural diversity. However, unanswered questions persist, particularly regarding the impacts of the rising prevalence of trade credit on individual businesses and the intricate power dynamics within the retail sector, where buyers and suppliers play central roles. This research gap underscores the pressing need for a deeper dive into this domain, challenging conventional assumptions and unravelling the nuances of the real-world scenario.

The subsequent research delves into the implications of trade credit within a market characterised by recurrent adverse transactions, shedding light on traders' perspectives and their role in shaping a global debt culture. It seeks to comprehend the effects of trade credit on retailers and the market, particularly its economic repercussions and the motivations driving the adoption of credit cycle systems in businesses. Uncovering the detrimental impact of trade credit on merchants, the study addresses a research gap, emphasising its negative correlation with business growth. Specifically focused on the hardware market in Karachi, the research considers economic, social, and psychological dimensions while underscoring that it does not propose solutions, emphasising that the study needs to generalise to all regions and markets. Data from interviews with local retailers in Karachi and generalising it within the same sample population supports the exploration's validity.

Literature Review

The research on trade credit, its incentives, drawbacks, and the relationship between trade credit and debt culture has gained prominence in recent years. Providing a comprehensive understanding of the various aspects of trade credit and its implications for large and small businesses is essential.

Trade credit, a form of informal lending (Gaudiyse et al., 2016), is crucial in facilitating business transactions (Fisman, 2003). While previous studies (Paul, 201; Astvansh et al., 2022; Atanasova et al., 2003; Bruno et al., 1997; Burkart, 2004; Cuñat, 2007, 2012; Cosci et al., 2020; Canto-Cuevas et al., 2019; Seifert et al., 2013; Fabbri et al., 2010; Deloof et al., 1996; Teruel et al., 2010; Neeltje, 2004; Dongya et al., 2016; Mahmud et al., 2022; Mateut et al., 2018; Bussoli et al., 2018; Smith, 1987; Tsuruta, 2013; Wilson et al., 2002; Osiichuk et al., 2021; Murfin et al., 2015; Martínez et al., 2012; Kapkiyai et al., 2015) have explored its benefits, drawbacks, and incentives, this paper adds to the existing body of research by focusing on retailers in the Hardware market of Karachi and the impact of trade credit on their operations.

Trade credit is an essential aspect of commerce and a significant factor in shaping the global business landscape. (Canto et al., 2019) It is a means by which businesses extend credit to their customers, enabling them to purchase goods without immediate payment. (Huyghebaert, 2006) Trade credit fosters customer loyalty (Wilson, 2002; Long et al., 1993; Smith, 1987), supports business growth (Ferrando, 2013; Kapikiyai et al., 2015), and enhances market competitiveness (Neeltje, 2004; Fabbri et al., 2016). Additionally, it is an economical source of external financing for companies with limited access to traditional bank credit or public capital markets (Atanasova et al., 2003; Deloof et al., 1996).

Several studies have demonstrated that trade credit positively influences sales and profits (Nadiri, 1969). Businesses that offer trade credit tend to enjoy higher sales volumes and increased profitability (Nguyen, 2011; Babalola et al., 2013). It attracts financially constrained customers who rely on credit for purchases, especially during economic stability (Atanasova et al., 2003). By

retaining customers and sustaining long-term business relationships, (Hwang et al., 1995), trade credit helps companies face adverse shocks (Martin et al., 2009), such as decreased customer demand or cash flow disruptions (Bussoli et al., 2018; Wang et al., 2019; Bruno et al., 1997).

While the benefits of trade credit are well-documented, drawbacks and financial costs are also associated. The primary concern is that trade credit may lead to excessive business debt. (Mateut et al., 2018) This can make capital illiquid and hinder investment projects, impacting overall growth and budgetary expenses (Gomez, 2018). Numerous studies have highlighted the complex relationship between trade credit and firm performance. While trade credit can be advantageous at low levels, excessive use can increase marginal costs, leading to diminishing returns (Martinez et al., 2012). Small businesses may be particularly vulnerable to the adverse effects of trade credit, as they have less bargaining power, tolerate payment delays, and experience difficulties with credit constraints (Gianetti et al., 2011; Murfin et al., 2015; Wilson et al., 2002). Regarding financial costs, trade credit can result in several expenses for suppliers and merchants. Defaulting on trade credit debt can lead to additional costs (Cosci et al., 2020), including the present value of the debt, overdue payment interests (Smith, 1987), and penalties imposed by buyers on sellers (Olegario, 2009). Another concern is the potential impact of trade credit and bad debt on mental health (Brown et al., 2005). Studies have indicated that increasing debt is associated with psychological distress, depression, sleep disorders, and anxiety (Bridges et al., 2010). Trade credit and bad debt can lead to economic costs and adverse effects on the mental health of merchants, particularly sole proprietors (Ferreira et al., 2021; Scourfield et al., 2012).

As Hart states, prior studies allow us to identify the gap between previous scientific investigations. It also allows them to justify how the proposed research contributes to the current body of knowledge, its significance, the historical scope, research methodologies employed within its field, and the avoidance of unproductive approaches (Hart, 2018). Reviewing the literature on trade credit and the instability of its benefits and costs for a small business retailer calls to explore the impact of trade credit on a specific market initially to understand the impact of trade credit. Hence, this paper aims to uncover the impact of trade credit on small business retailers by mapping its correlation with business growth and guiding future research for discussing the solutions.

Methodology

Exploratory Research Methodology: The article explores the factors and reasons (exploring a phenomenon) that led traders in the hardware market in Karachi to establish and use the credit cycle system. It also seeks to explore the effects that this system has on them. Essentially, exploratory research is used when the subject is new, has not been previously studied with a specific sample or group of individuals, or when current theories do not apply to a particular sample or group (Creswell, 2017). In research related to social sciences, this methodology is designed to discover generalisations that contribute to describing and understanding various aspects of social or psychological life (Stebbins, 2001). This study will use a mixed-method approach to explore and uncover the factors and consequences of trade credit on retailers of the hardware market in Karachi by collecting and analysing quantitative and qualitative data.

Research Design: This study uses a mixed methods approach, combining qualitative and quantitative methods to understand the

research problem better (Creswell et al., 2018). It expands their understanding of the research questions (Cresswell, 2009). For example, qualitative research in this study is used to identify the phenomena of trade credit in the chosen population based on the detailed experiences of participants, providing a contextual understanding of the data (Maxwell, 2012). On the other hand, quantitative research allowed for collecting data from a larger participant pool, facilitating the generalisation and validation of study results (Bryman, 2012). This study uses qualitative methods in the form of interviews and quantitative methods by preparing a survey questionnaire to ensure its findings' validity, generalizability, contextuality, and credibility (Fetters et al., 2013).

Research Process: This study adopts a sequential exploratory design in data collection and analysis, consisting of three stages: qualitative, quantitative instrument development, and quantitative analysis (Dawadi et al., 2021). The rationale for choosing this approach is twofold: firstly, to initiate the research by exploring the unknown factors that led traders in the hardware market to establish the credit cycle system, as these are not well-documented (Creswell et al., 2018); secondly, to clarify the potential for generalising qualitative results to the hardware market, which occurs in the third stage of this process, making it an evolutionary approach.

Data Collection

Qualitative: The study utilised semi-structured, in-depth interviews as the primary qualitative data collection method. These interviews involved open-ended questions directed at willing participants, all business owners responsible for managing their businesses, the primary subject of the study (Lowe et al., 2010). Before conducting the interviews, the necessary permissions were

obtained from the participants. They were conducted via phone (Gubrium et al., 2012), focusing on the motivating factors behind the credit cycle system's implementation by traders and its consequences in Karachi's hardware market.

The interviews featured open-ended questions that served exploratory purposes (Dawadi et al., 2021). As this exploratory study aimed to uncover the motivating factors behind the credit cycle system's adoption and its consequences, a phenomenon not extensively studied before, the open-ended questions allowed participants to freely express their thoughts and experiences, contributing to a rich dataset (Sage Encyclopedia, 2017; Creswell et al., 2007). The researcher contacted participants to explain the study's objectives, ensuring they met the criteria as users of the credit cycle system in their businesses. Following their consent, interviews were scheduled via Zoom. To enhance study validity and minimise bias, a second researcher from the same university was involved, working collaboratively to maintain credibility and objectivity.

Quantitative-Developing Instrument and Collecting Data: The researcher analysed the emerging themes after collecting and analysing qualitative data. For the research design's third stage, the researcher chose a survey (Ponto, 2015) as the data collection method. The survey was distributed among traders in the hardware market in Karachi to achieve generalisability of the findings. Google Forms was the primary tool for data collection, but paper-based questionnaires were also used, administered store by store, and made phone calls. The quantitative data was collected through a survey containing closed-ended questions to generalise the results obtained from qualitative data.

Sample Population: In this study, the researcher employed purposive sampling (Maxwell, 2012; Campbell, 2020), choosing four traders (Marshall, 1996; Creswell et al., 2007; Creswell et al., 2018) from Karachi's hardware market for the qualitative phase and 130 traders from the same population (Onwuegbuzie et al., 2015) for the quantitative phase. The number 130 represented the total trader population in the market, with 50 traders participating in the survey to generalise the qualitative findings. Karachi was chosen as the study's focal point due to its prominence and the researcher's prior interactions with hardware traders, aiming to understand the implementation of the credit cycle system's impact on their businesses, particularly retail traders, who often adopt the mentioned practice due to limited capital.

Data Analysis: In the first stage of this study, a thematic analysis approach was used to analyse qualitative data collected from interviews. Thematic analysis is a qualitative method of data analysis that involves reading through the dataset, identifying different codes within the data, and abstracting these codes to provide a concise overview of key themes and common meanings recurring across the interviews.

In the second stage, the study used a survey to generalise and disseminate the qualitative results. The study employed descriptive statistical analysis to analyse the quantitative data collected from the survey. Descriptive statistics summarise and organise data by describing the relationship between variables within the specified sample. After analysing both data sets using the appropriate methods, the discussion and results are presented together to provide a comprehensive understanding.

Ethical Considerations: In conducting this research, strict adherence to ethical principles was paramount to maintain the study's integrity. The researcher prioritised ethical considerations by securing voluntary consent from participants, safeguarding their personal information, and striving for impartiality to avoid potential bias. Participants were informed of their voluntary participation, and their personal details were carefully protected. The study's impartiality

S.NO	Codes	Frequency	Themes	Participants	Average %
1.	Increasing varieties of goods	3	The buyers (supply side from the traders' perspective).	4	75
2.	Acquiring Customer trust	3		4	75
3.	Catering to Customer demand to prevent loss	4		4	100
4.	Marketing New Products	3	The suppliers (demand side from the traders' perspective)	4	50
5.	Dependence on Suppliers	4		4	100
6.	Lack of credit regulation	2		4	50
7.	Fear of suppliers	3		4	75
8.	Limited Capital	4	The Trade Itself	4	100
9.	Maximising Profits	3		4	75

10.	Gaining a Competitive Advantage	4		4	100
11.	Suspicious Sales Quality	2		4	50
12.	Market Reputation	3	Buyers and Suppliers	4	75

was emphasised to mitigate any conflict of interest, underscoring the commitment to ethical conduct and the well-being of the participants.

Results:

As discussed, the research is based on a sequential exploratory design, in which qualitative data and its analysis become the base to acquire quantitative data, validating the research. The qualitative data was acquired through interviews, from which codes and themes were analysed in the thematic analysis framework.

The study went through the process of sequential exploratory design, analysing the qualitative and quantitative data to explore the positive and negative relation of trade credit on retailers in the hardware market in Karachi regarding its factors and consequences. The first phase of this design was to collect and analyse qualitative data for the basis of quantitative research.

Qualitative results

Qualitative data was divided into the motivating factors for retailers to implement the credit cycle system in their business operations and the consequences of trade credit on retailers in various aspects of their lives. The same was analysed by developing codes from the interviews conducted through inductive coding. Combining these relevant codes, the researcher formed themes representing the data extracted from the interviews. Table 1 and 2 illustrates the codes, frequencies, and themes developed from the data regarding the factors and consequences, respectively.

Table 1: Factors for implementing trade credit in Retail Hardware Market

S.NO	Codes		Frequency	Themes	Participa nts	Average %
1.	Increased Sales		4	Economic	4	100
2.	Attracting Buyers		4		4	100
3.	Capital Tied		3		4	75
4.	Decreased Cash Flow		3		4	75
5.	Lack of Liquidity		3		4	75
6.	Profit Reduction		2		4	50

7.	Reduced Operating Expenses		3		4	75
8.	Non-Liquid Inventory		3		4	75
9.	Reduced Inventory quantity (Inflation)		2		4	50
10.	Stress-Increased Debt		3	Psychological	4	100
11.	Anxiety and Depression		3		4	100
12.	Anger Arousal		2		4	75
13.	Supplier Exploitation		2	Social	4	50
14.	Neglecting Family Responsibilities		2		4	50

15.	Buyer Exploitation		2		4	50
16.	Competitive Advantage		3		4	75
17.	Market Reputation		3		4	75
18.					4	

Table 2: Consequences of trade credit on retailers of the hardware market

The analysis presents three compelling themes as the motivating factors driving traders to implement the practice of trade credit in their businesses. Factors that emerged are thematically divided into the supply and demand sides from the traders' perspectives and the trade itself. The factors exemplified are witnessed as captivating traders in the cycle of trade credit for running their business in the hardware market of Karachi.

Similarly, the analysis projects three stimulating themes as the consequences and effects of trade credit on the retailers, categorised into economic, psychological, and social aspects.

As most of the consequences are inclined towards affecting the retailers negatively in all aspects, a negative impact of trade credit on retailers of the hardware market in Karachi is to be found.

Quantitative results

After obtaining qualitative results, the study's second phase was to develop an instrument to collect quantitative data. A questionnaire

was developed to validate and generalise the qualitative results by integrating the views of a larger population of traders in the same market. The factors and consequences from those results were utilised to make questions for the survey accordingly.

Table 3 and 4 illustrates the codes, frequencies, themes, positive and negative responses, and their sample mean from the quantitative data regarding the factors and consequences, respectively. The result of the quantitative data was mainly based on positive and negative responses to the survey. A sample mean for every response was calculated to locate the centre of the data and its impact. The calculated means from the survey responses were positive and supported qualitative data analysis, validating the study's overall results.

S.NO	Code s	Themes	Participan ts	Positive Responses (N=participa nts)	Negative responses (N=partici pants)	Sample Mean (% of Positive Responses)	
1.	Increas ing variety of goods	The buyers (supply side from the traders' persp	50	40		10	80
2.	Acquir ing Custo mer trust		50	29		21	58
3.	Caterin g to Custo		50	25		25	50

	mer deman d to preven t loss	ectiv e).				
4.	Market ing New Produc ts	The suppl iers (dem and side from the trade rs' persp ectiv e)	50	33	17	66
5.	Depen dence on Suppli ers		50	32	18	64
6.	Lack of credit regulat ion		50	13	37	26
7.	Fear of supplie rs		50	-	-	-
8.	Limite d Capital	The Trad	50	45	5	90
9.	Maxim ising Profits		50	30	20	60

1	Gain in Competitive Advantage	e Itself	50	19	31	38
1	Suspicious Sales Quality		50	17	33	34

Table 3: Factors for implementing trade credit in Retail Hardware Market

S.N O	Codes	Themes	Participants	Positive Responses (N=participants)	Negative responses N=participants)	Sample Mean (% of Positive Responses)
1	Increased Sales	Economic	50	23	27	46
2	Attracting Buyers		50	29	21	58
3	Capital Tied		50	27	23	54
4	Decreased Cash Flow		50	31	19	62
5	Lack of Liquidity		50	40	10	80

6	Profit Reduction		50	35	15	70
7	Reduced Operating Expenses		50	38	12	76
8	Non- Liquid Inventory		50	40	10	80
9	Reduced Inventory quantity (Inflation)		50	39	11	78
10	Stress- Increased Debt	Psychological	50	42	8	84
11	Anxiety and Depression		50	42	8	84
12	Anger Arousal		50	39	11	78

13	Supplier Exploitation	Social	50	32	18	64
14	Neglecting Family Responsibilities		50	29	21	58
15	Buyer Exploitation		50	35	15	70
16	Competitive Advantage		50	27	23	54
17	Market Reputation		50	24	16	18

Table 4: Consequences of trade credit on retailers of the hardware market

Discussion

Integration of qualitative and quantitative results
Factors

The factors driving the implementation of the trade credit retail business cycle were influenced by three entities: buyers (supply side of the trade), suppliers (demand side of the trade), and trade itself.

The study identifies three driving factors for trade credit from the supply side (trader's perspective): Firstly, the abundance of diverse goods in the market encourages retailers to employ trade credit,

enabling them to stock a broader range of products without incurring immediate costs. Secondly, gaining customer trust by offering credit for future purchases is essential, fostering solid customer-retailer relationships. Lastly, the market's competitive nature makes it crucial for traders to provide goods on credit to meet customer demands, mitigating the risk of losing sales. The study's findings validate these drivers using quantitative data, confirming the impact of product variety, customer trust, and competitive fears on the use of trade credit in Karachi's hardware market.

Similarly, the study identifies the motivation behind suppliers encouraging retailers to utilise trade credit. This motivation arises from marketing new products, as suppliers facilitate access to these products by extending credit to retailers—additionally, the fear of suppliers pressuring traders to accept credit. Quantitative data confirms that most retailers are compelled to employ commercial credit due to the necessity of marketing new products, the benefits derived from supplier reliance, and apprehensions of supplier influence.

Lastly, the study highlights the circumstances of the business itself that drive traders to use trader credit. It emphasises the lack of capital to stock all demanded goods and the need to inspect product quality as key factors compelling traders to choose trade credit. Participants in the qualitative data assumed that using credit would enhance profits, but quantitative data analysis showed that the reality differed. It concluded that traders resort to credit out of necessity, and while it may offer short-term advantages, it does not guarantee long-term profitability, contradicting their initial assumptions.

Consequences

Economic

The economic impact of trade credit on retailers focuses on two key aspects: increased sales and liquidity challenges. Traders interviewed in the study emphasised the role of trade credit in boosting sales, as it allowed them to acquire goods without immediate payment, thus attracting buyers who could make large credit-based purchases. This positive impact was supported by both qualitative and quantitative data, underscoring the effectiveness of commercial credit in drawing in buyers.

However, the article also sheds light on the downside of trade credit, primarily revolving around liquidity issues. Delayed payments by buyers disrupt the cash flow within the trade cycle, affecting both traders and suppliers. The lack of liquidity and a debt culture lead to difficulties in repaying credit. These findings align with existing research, highlighting the adverse economic impact of trade credit on liquidity.

Furthermore, the article underscores that traders have identified reduced profits as a significant indirect consequence of trade credit. Several factors contribute, including lower profit margins on goods purchased on credit, delayed buyer payments causing price increases, and credit usage affecting daily operational expenses due to cash flow disruptions. The study validates these effects in Karachi's hardware market, confirming a negative influence on profits.

Social

The social effects of trade credit on the market encompass positive and negative aspects. Four key social impacts were identified:

supplier exploitation, buyer exploitation, competitive advantage, and market reputation. Supplier exploitation occurs when traders needing additional funds are taken advantage of by suppliers aware of their financial vulnerability. It negatively affects the market environment. Similarly, buyer exploitation arises when buyers pressure traders to take goods on credit. While trade credit may offer a competitive edge and status in the market, the cost often outweighs the benefit. Overall, the article highlights that trade credit has more negative social effects regarding the market environment.

The economic ramifications of credit influence traders' behaviour in trade, at home, and in society. It includes increased anger, strained relationships with family members, and negligence of familial responsibilities due to heightened stress caused by mounting debt. Quantitative data from the surveyed hardware market in Karachi supports the negative impact of increasing debt via trade credit on traders' social lives.

Psychological

Psychologically, trade credit can lead to negative economic impacts, including reduced profits and capital. This financial stress triggers feelings of anxiety, depression, and behavioural changes among traders, causing tension in their personal lives. Empirical data gathered from interviews with traders corroborates these psychological effects and aligns with existing research on the subject. The study also highlights a concerning issue: the potential for suicide among traders experiencing extreme financial distress due to traders' credit.

Conclusion

The paper concludes that trade credit has predominantly negative economic effects on trade, leading to reduced profits, liquidity problems, and cash flow constraints. It emphasises creating a negative relationship environment between suppliers, buyers, and traders due to exploitation, causing social implications and impacting market dynamics. Furthermore, the article asserts that trade credit has negative psychological and social effects on individual traders. These indirect impacts stem from the economic repercussions, causing heightened anxiety, altered behaviours, neglect of responsibilities, and, in extreme cases, suicidal tendencies. The article interconnects these effects in a comprehensive overview, indicating that economic repercussions, such as increased worry and anxiety, lead to psychological consequences, like anger and behavioural changes, affecting the individual trader's social life.

Additionally, the paper underscores the need to investigate the motivating factors for retailers in Karachi's hardware market to employ credit transactions. These factors are divided into those driven by suppliers (demand-side factors), buyers (supply-side factors), and the trader's internal trade objectives. Understanding these factors is crucial as it can pave the way for exploring alternatives to replace credit transactions and optimising business operations. The paper underscores commercial credit's adverse economic, social, and psychological effects on trade. It encourages further exploration of motivating factors and potential solutions for the trade sector in Karachi.

Recommendations

This paper recommends further research to understand the factors driving traders to adopt credit transactions. It suggests examining

potential solutions that could replace or modify the credit model in commercial operations. The paper also advises delving into detailed studies that thoroughly investigate the different effects of commercial credit, such as its economic, psychological, and social impacts. This comprehensive approach will help provide a deeper understanding of the subject matter.

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Journal Review: Alternative Dispute Resolution (ADR) Journal, Volume 12, Issue 1

By: James Njuguna¹

Alternative Dispute Resolution (ADR) Journal is a peer-reviewed/refereed publication of the Chartered Institute of Arbitrators Kenya (CIArb-K), engineered and devoted to provide a platform and window for relevant and timely issues related to Alternative Dispute Resolution mechanisms. The role of ADR in access to justice has been recognised under the Constitution of Kenya, 2010. The Journal covers pertinent and emerging issues across all ADR mechanisms. Edited by CIArb African Trustee Emeritus and Member of Permanent Court of Arbitration Hon. Dr. Kariuki Muigua, OGW, PhD who was recently awarded Order of Grand Warrior by H.E. the President of the Republic of Kenya for his distinguished service to the Nation as a Dispute Resolution and Environmental Law Expert, Scholar and Practitioner, this Volume 12 Issue 1 of ADR Journal covers emerging topics and themes in Arbitration, Mediation, PPPs, Maritime Law, Technology and AI, Criminal Law, Construction and Engineering Law.

In “(Re) Examining the Doctrine of Emergency Arbitration,” Hon. Prof. Kariuki Muigua critically examines how the idea of emergency arbitration has been embraced in international commercial arbitration. He also discusses problems in emergency arbitration and suggests recommendation towards enhancing the efficiency of emergency arbitration. Mogesi Joel in “Promoting International Arbitration in Kenya Through Third-Party Funding: Prospects, Challenges & Lessons – A Call for Reform” examines the impact

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third-party funding of arbitration can help improve the attractiveness of Kenya as a seat of arbitration. The article identifies scope for reform in the law and makes suggestions to create a more liberal legislative and judicial framework for third-party funding of arbitration to promote Kenya as a preferred seat for arbitration.

In “Pre-Litigation Mediation as a Means to Enhance Judicial Economy in Kenya’s Criminal Justice System,” Michael Sang illuminates how pre-litigation mediation can reshape Kenya’s criminal justice system. He argues that by embracing international principles, aligning with constitutional imperatives, and enacting comprehensive legislation, Kenya has the potential to usher in a new era of justice—one that prioritizes victims’ rights, empowers offenders to reintegrate into society, and enhances judicial efficiency. Andrew Derrick and Nigel Clint in “Traditional Dispute Resolution Mechanisms: The Antiquity; Sociological Orientation; Integration into the Kenyan Judicial System; and Approaches by Kenyan Courts” looks at the crucial role TDRMs play in dispute resolution and how they complement and supplement the formal justice system. Further, they discuss the opinion of the courts with regards to utility of TDRMs in dispute resolution as well as the restorative justice and retributive justice contention between TDRMs and the Formal Justice System.

Hon. Prof. Kariuki Muigwa, OGW, PhD in “Maritime Arbitration in Africa: Reflecting on the Current Status and Future Development” critically reflects on the status and future development of maritime arbitration in Africa. He examines the progress made towards embracing maritime arbitration in Africa and proposes reforms towards strengthening the future development of maritime arbitration in Africa. In “Arbitration in the Age of Artificial Intelligence (AI)” Juvenalis Ngowi attempts to identify some challenges associated with the use of AI in arbitration and tries to provoke a debate on how stakeholders in arbitration should deal with

the use of technology generally and AI in particular. The challenges include a variation of certain contractual aspects, such as fundamental principles for a valid contract, moral and ethical issues and confidentiality in arbitral proceedings.

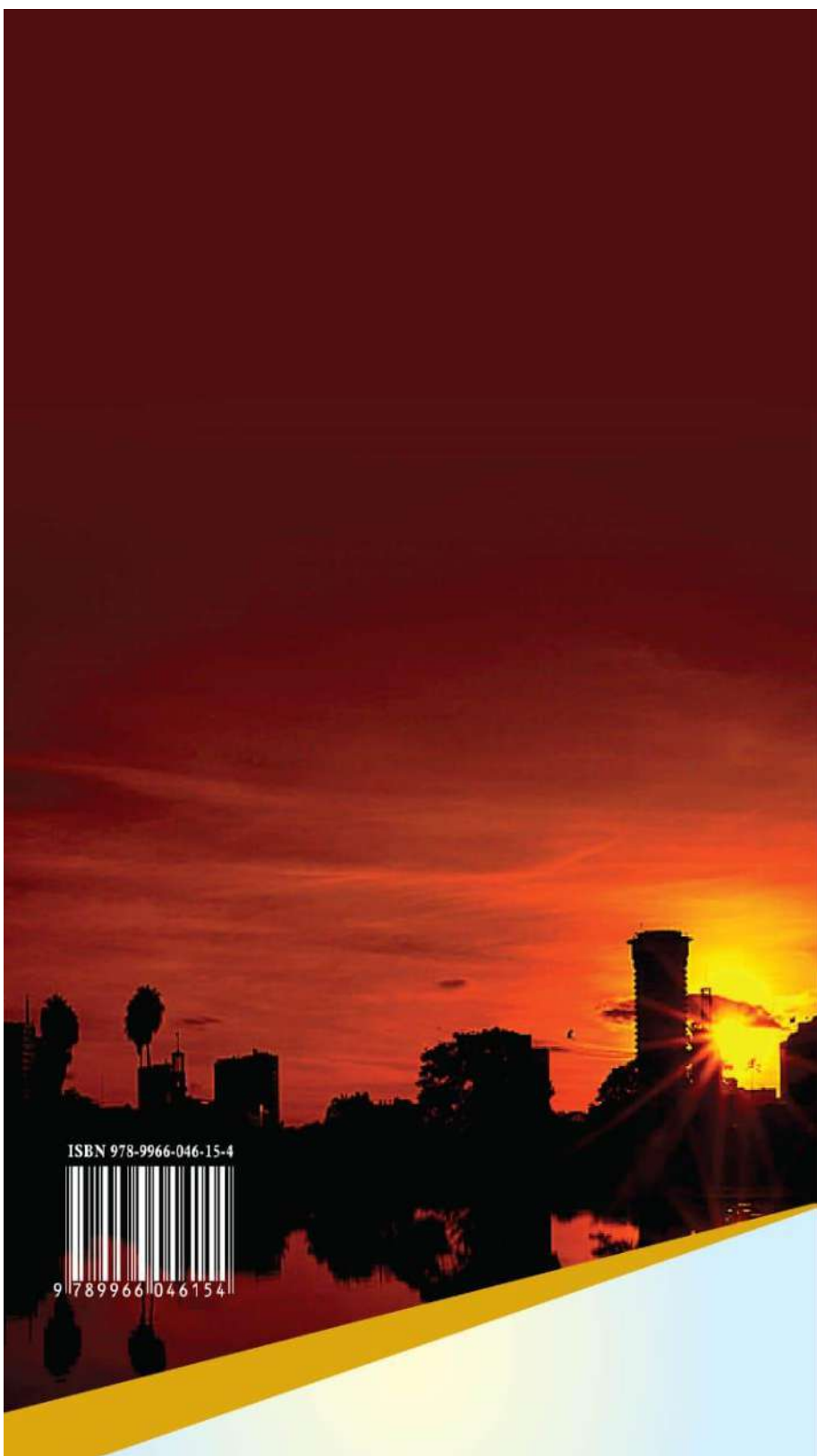
Prince Kanokanga in “Inaugurating South Africa as a Hub for International Commercial Arbitration in Africa: The International Arbitration Act 2017” discusses the adoption of the Model Law for use in international commercial disputes in South Africa, and how the country, has now become a hub for international commercial arbitration within the African continent. In “Technology and The Arbitral Seat: New Considerations for Procedural Law”, David Onsare explores the evolving relationship between technology and the arbitral seat, examining how digital platforms and virtual environments are influencing the rules, regulations and legal frameworks that govern arbitration procedures. He offers strategic recommendations for legal practitioners, policymakers and academics to navigate the emerging intersection of technology and arbitration law.

In “Integrating Alternative Dispute Resolution Mechanisms into Kenya’s Criminal Justice System: Some Reform Proposals” Michael Sang continues the discussion on the integration of Alternative Dispute Resolution (ADR) mechanisms and restorative justice practices into Kenya’s criminal justice system by drawing insights from international experiences, including South Africa, India, and Canada to examine the constitutional basis for ADR in Kenya and highlight the potential benefits and challenges of reform proposals. Eng. Odhiambo Aluoch in the article “Mediation as an Alternative Dispute Resolution (ADR) Mechanism for Construction Disputes in Kenya” undertakes empirical research to establish the future of mediation of disputes in the construction Industry in Kenya against the backdrop of the failures of arbitration and backlog of the cases in

the courts. He recommends further research by the practitioners to assist on realizing the benefits of mediation process as a form of ADR. Ibrahim Kitoo & Oliver Dundo in "Public Private Partnerships in Kenya: Navigating the Legal Pitfalls in Infrastructure Projects Tendering and Contracting" note that despite private sector increasing appetite for public sector infrastructure development and financing, PPP projects success rates remain worryingly low, with only about ten percent (10%) of such projects reaching financial close. They proceed to show that legal, regulatory and related challenges during the conceptualization, tendering and contracting phases form part of the reasons for project false-starts or delays. In "The Pros and Cons of Third Party Funding in International Arbitration: Balancing Risks and Opportunities" Paula Kilusi explores the advantages and disadvantages of third party funding of arbitration, the areas of concern that have arisen, and the best way forward for its sustainable use.

In "An examination of Kenya's divergent approach to the meaning of 'delivery' of an arbitral award in contrast to other Model Law jurisdictions" Prince Kanokanga focusses on the examination of the tendency by the judiciary in Kenya to adopt what can only be described as a divergent approach as to the meaning of the term 'delivery' in the context of the communication of arbitral awards to the parties. Michael Sang in "The Viability of Plea Bargaining as Alternative Dispute Resolution in Kenya's Criminal Justice System" offers a comprehensive exploration into the intricate world of plea bargaining within the context of the Kenyan criminal justice system and using comparative experiences other jurisdictions unveils the challenges, inconsistencies, and potential enhancements surrounding plea bargaining practices in Kenya. In "Alternative Dispute Resolution (ADR) Mechanisms for Engineering Contracts: Opportunities and Challenges for Engineers," Eng. Odhiambo Aluoch analyses the existing literature on the causes of dispute in

engineering contracts and the place of ADR in resolving such disputes and presents practical and working solutions including the opportunities available in the ADR world for Engineers.



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