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Editor's Note

We are pleased to launch another issue of the *Journal of Conflict Management and Sustainable Development,* Volume 11, No.4.

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

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

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

This issue contains papers on key thematic areas of Conflict management and Sustainable Development including: *Abating Air Pollution for a Healthy Environment; Supranationalism and Supremacy: The East Africa Court of Justice (EACJ) versus The Supreme Court of The Republic of Kenya (SCORK) SCORK Reference No.1 of 2022; In The Matter of an Advisory Opinion: Attorney General and Hon. Martha Karua, Sc; Carving An Afro-Centric Framework Towards Effective Settlement of Maritime Boundary Disputes Among African States; The Significance of Public Participation in Environmental Conservation in South Sudan; Empowering Kenya's Anti-Counterfeit Authority to Combat Transnational Organised Crime: A Call to Implement the Anti-Counterfeit Act, 2008; Transforming Agri-food Systems via Inclusive, Rights-based Governance for Food Security and Economic Empowerment in Kenya; Right to a clean and healthy environment in South Sudan: Reality or rhetoric?; Strengthening the Role of Psychologists in the Kenyan Criminal Justice System: An Analysis of the Counsellors and Psychologists Act, 2014; An*

Appraisal of Kenya's Anti-Money Laundering and Combating of Terrorism Financing Laws (Amendment) Act, 2023; and *Oil Exploration in South Sudan and Environmental Sustainability*. The Journal also contains a review of *Journal of Appropriate Dispute Resolution (ADR) & Sustainability, Volume 2, Issue 1 (2024)* and a Book Review *Delivering Justice for Environmental Sustainability (2024).*

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

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

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

Hon. Prof. Kariuki Muigua Ph.D, FCIArb, Ch.Arb, OGW.
Editor, Nairobi,
July, 2024.

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

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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He has experience in over 60 Arbitrations and Mediations, as arbitrator, Mediator and Party Representative. He has published a book, Commercial and Investment Arbitration: An African Perspective; and over 20 Articles on the subject in peer reviewed

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His has published the following articles; *Adopting Information Technology in the Legal Profession in Kenya as a Tool of Access to Justice*, Towards *Effective Management of Community Land Disputes in Kenya for Sustainable Development*, *Mediation as a Tool of Conflict Management in Kenya: Challenges and Opportunities, Applicability of Arbitration in Management of Community Land Disputes, Arbitration as a Tool for Management of Community Land Conflicts in Kenya*

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Abating Air Pollution for a Heathy Environment

By: ***Hon. Prof. Kariuki Muigua****

Abstract

Environmental pollution is one of the major global challenges facing humanity and a key cause of morbidity and mortality. It is one of the triple planetary crisis alongside climate change and biodiversity loss. Environmental pollution occurs in various forms including water pollution; land pollution; noise pollution; and air pollution. It has been identified as a key threat to not only the Sustainable Development agenda but also to the very existence of the humankind. Addressing this problem is therefore necessary for Sustainable Development and the good health and well-being of humanity. This paper critically discusses the problem of air pollution. It defines air pollution and examines its causes and effects. The paper argues that air pollution is a key threat to Sustainable Development and good health and well-being of humanity. It further posits that abating air pollution is necessary for the sustainability of both nature and humankind. The paper critically examines some of the measures adopted towards addressing air pollution noting to highlight their strength and weaknesses. It also suggests approaches towards abating air pollution for a healthy environment.

1.0 Introduction

Pollution has been defined as the indirect or direct alteration of the biological, thermal, physical, or radioactive properties of any medium in such a way as to create a hazard or potential hazard to

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human health or to the health, safety or welfare of any living species[1]. In addition, the *Environmental Management and Co-ordination Act (EMCA)*[2] of Kenya defines pollution as any direct or indirect alteration of the physical, thermal, chemical, biological, or radio-active properties of any part of the environment by discharging, emitting, or depositing wastes so as to affect any beneficial use adversely, to cause a condition which is hazardous or potentially hazardous to public health, safety or welfare, or to animals, birds, wildlife, fish or aquatic life, or to plants[3]. Further, environmental pollution has been defined as 'the contamination of the physical and biological components of the earth/atmosphere system to such an extent that normal environmental processes are adversely affected[4]. It can also refer to any discharge of material or energy into water, land, or air that causes or may cause acute (short-term) or chronic (long-term) detriment to the Earth's ecological balance or that lowers the quality of life[5]. It has been noted that a substance that causes pollution is known as a pollutant[6]. These substances can exist in solid,

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[1] United Nations Environment Programme., 'Pollution' Available at *https://leap.unep.org/en/knowledge/glossary/pollution#:~:text=The%20indirect%20or%20direct%20alteration,welfare%20of%20any%20living%20species.%20(* (Accessed on 11/03/2024)

[2] Environmental Management and Co-Ordination Act, No. 8 of 1999, Government Printer, Nairobi

[3] Ibid, S 2

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

[5] Coker, A.O,. "Environmental Pollution: Types, Causes, Impacts and Management for the Health and SocioEconomic Well-Being of Nigeria," p.1. Available at https://pdfs.semanticscholar.org/8e7b/a9595bab30d7ea87715533353c53f7452811.pdf (Accessed on 11/03/2024)

[6] Khasanova. S., & Alieva. E., 'Environmental Pollution: Types, Causes and Consequences' Available at http://dx.doi.org/10.1051/bioconf/20236307014 (Accessed on 11/03/2024)

liquid, or gaseous form[7]. Pollution occurs in various forms including water pollution; land pollution; noise pollution; and air pollution[8].

Environmental pollution has been identified as one of the major global challenges facing humanity and a key cause of morbidity and mortality[9]. Alongside climate change and biodiversity loss, pollution is among the triple planetary crisis which is a term that refers to the three main interlinked issues that humanity currently faces[10]. According to the World Bank, pollution is the largest environmental cause of disease and premature death[11]. It points out that pollution causes more than nine million premature deaths, the majority of them as a result of air pollution[12]. The World Bank further notes that pollution of all types hinder development outcomes[13]. For example, air pollution, exposure to lead and other chemicals, and hazardous waste including exposure to improper e-waste disposal, causes debilitating and fatal illnesses, create harmful living conditions, and destroys ecosystems[14]. In addition, pollution stunts economic growth, exacerbates poverty and inequality in both urban and rural areas, and

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[7] Ibid
[8] Coker, A.O,. "Environmental Pollution: Types, Causes, Impacts and Management for the Health and SocioEconomic Well-Being of Nigeria," Op Cit
[9] Khasanova. S., & Alieva. E., 'Environmental Pollution: Types, Causes and Consequences' Op Cit
[10] United Nations Climate Change., 'What is the Triple Planetary Crisis?' Available at *https://unfccc.int/news/what-is-the-triple-planetary-crisis#:~:text=The%20triple%20planetary%20crisis%20refers,change%2C%20pollution%20and%20biodiversity%20loss*. (Accessed on 11/03/2024)
[11] World Bank Group., 'Pollution' Available at https://www.worldbank.org/en/topic/pollution (Accessed on 11/03/2024)
[12] Ibid
[13] Ibid
[14] Ibid

significantly contributes to climate change[15]. It has also been pointed out that poor people, who cannot afford to protect themselves from the negative impacts of pollution, end up suffering the most[16].

According to the United Nations Environment Programme (UNEP), environmental contamination significantly contributes to non-infectious diseases like cancer and respiratory illnesses, causing approximately nine million deaths annually[17]. UNEP further notes that air pollution alone is responsible for nearly seven million deaths[18]. In addition, pollution, through air, freshwater and ocean contamination, accumulates toxic chemicals in the food chain, harming humans and animals[19]. Environmental pollution is therefore a threat to not only the Sustainable Development agenda but also to the very existence of the humankind[20]. Addressing this problem is therefore necessary for Sustainable Development and the good health and well-being of humanity.

This paper critically discusses the problem of air pollution. It defines air pollution and examines its causes and effects. The paper argues that air pollution is a key threat to Sustainable Development and good health and well-being of humanity. It further posits that abating air pollution is necessary for the sustainability of both nature and

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[15] Ibid

[16] Ibid

[17] United Nations Environment Progaramme., 'Pollution and Health' Available at https://www.unep.org/topics/chemicals-and-pollution-action/pollution-and-health (Accessed on 11/03/2024)

[18] Ibid

[19] Ibid

[20] Muigua. K., 'Safeguarding the Environment through Effective Pollution Control in Kenya' Available at https://kmco.co.ke/wp-content/uploads/2019/09/Safeguarding-the-Environment-through-Effective-Pollution-Control-in-Kenya-Kariuki-Muigua-28th-SEPT-2019.pdf (Accessed on 11/03/2024)

human kind. The paper critically examines some of the measures adopted towards addressing air pollution noting to highlight their strength and weaknesses. It also suggests approaches towards abating air pollution for a healthy environment.

2.0 Air Pollution: Causes and Effects

Air pollution refers to the introduction of chemicals, particulate matter, or biological materials that cause harm or discomfort to humans or other living organisms, or cause damage to the natural environment or built environment, into the atmosphere[21]. The World Health Organization (WHO) defines air pollution as the contamination of the indoor or outdoor environment by any chemical, physical or biological agent that modifies the natural characteristics of the atmosphere[22]. It has been noted that household combustion devices, motor vehicles, industrial facilities and forest fires are some of the common sources of air pollution[23]. Further, according to UNEP, air pollution comes from many sources – from cookstoves and kerosene lamps to coal-fired power plants, vehicle emissions, industrial furnaces, wildfires, and sand and dust storms among others[24].

It has been asserted that air pollution is the greatest environmental threat to public health globally and accounts for an estimated seven

[21] Sharma, S. B., Jain, S., Khirwadkar, P., & Kulkarni, S., 'The Effects of Air Pollution on the Environment and Human Health,' *Indian Journal of Research in Pharmacy and Biotechnology*, Volume 1, No. 3 (2013)

[22] World Health Organization., 'Air Pollution' Available at https://www.who.int/health-topics/air-pollution#tab=tab_1 (Accessed on 12/03/2024)

[23] Ibid

[24] United Nations Environment Programme., 'About Air' Available at https://www.unep.org/explore-topics/air/about-air (Accessed on 12/03/2024)

million premature deaths every year[25]. UNEP notes that air pollution is the most-pressing environmental health crisis of our time, responsible for an estimated seven million premature deaths every year[26]. It further notes that approximately nine in ten people around the world breathe unclean air, which increases the risk of asthma, heart disease and lung cancer[27].

WHO notes that outdoor and indoor air pollution cause respiratory and other diseases and are important sources of morbidity and mortality[28]. It further points out that the burden of disease attributable to air pollution is now estimated to be on a par with other major global health risks such as unhealthy diets and tobacco smoking[29]. Air pollution has also been identified as a risk factor for some noncommunicable diseases such as ischemic heart disease, stroke, chronic obstructive pulmonary disease, asthma and cancer[30]. It is estimated that almost all of the global population (approximately ninety nine per cent) breathe air that exceeds WHO guideline limits and contains high levels of pollutants, with low- and middle-income countries suffering from the highest exposures[31]. Further, according to UNEP, most recorded air pollution-linked deaths occur in developing countries, where laws are weak or not applied, vehicle emission standards are less stringent and coal power stations more

[25] United Nations Environment Programme., 'Pollution Action Note – Data you Need to Know' Available at https://www.unep.org/interactives/air-pollution-note/ (Accessed on 12/03/2024)
[26] United Nations Environment Programme., 'Five Cities Tackling Air Pollution' Available at https://www.unep.org/news-and-stories/story/five-cities-tackling-air-pollution (Accessed on 12/03/2024)
[27] Ibid
[28] World Health Organization., 'Air Pollution' Op Cit
[29] Ibid
[30] Ibid
[31] Ibid

prevalent[32]. Air pollution is therefore a major global concern especially in developing countries.

Air pollution is also linked to climate change[33]. UNEP notes that air pollution is also fundamentally altering the climate, with profound impacts on the health of the planet[34]. It has been correctly asserted that many of the drivers of air pollution (such as combustion of fossil fuels) are also sources of greenhouse gas emissions[35]. As a result, policies to reduce air pollution, therefore, offer a win-win strategy for both climate and health, lowering the burden of disease attributable to air pollution, as well as contributing to the near- and long-term mitigation of climate change[36]. Abating air pollution is thus a vital tool in climate change mitigation[37].

Air pollution is thus an undesirable phenomenon that does not only damage human health, but also hampers the planet and the economy in many ways[38]. Abating air pollution is therefore of utmost importance for the health of humanity and nature. WHO correctly takes the position that clean air is fundamental to health[39]. Further, it has been argued that clean air is a human right, and a necessary pre-condition for addressing climate change as well as achieving many

[32] United Nations Environment Programme., 'Air Pollution Hurts the Poorest Most' Available at https://www.unep.org/news-and-stories/story/air-pollution-hurts-poorest-most (Accessed on 12/03/2024)
[33] United Nations Environment Programme., 'About Air' Op Cit
[34] Ibid
[35] World Health Organization., 'Air Pollution' Op Cit
[36] Ibid
[37] Ibid
[38] United Nations Environment Programme., 'Air Pollution Hurts the Poorest Most' Op Cit
[39] World Health Organization., 'Air Pollution' Op Cit

Sustainable Development Goals (SDGs)[40]. Improving our air quality will bring health, development, and environmental benefits[41]. The global nature of the challenge of air pollution calls for an enhanced global response in order to effectively abate the problem[42].

3.0 Abating Air Pollution: Progress and Challenges

The need to abate pollution is recognized under the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*[43] which enshrines the right of every person to the enjoyment of the highest attainable standard of physical and mental health[44]. In order to realize this right, the Covenant urges states to take relevant measures including those necessary for the improvement of all aspects of environmental and industrial hygiene[45].It has been argued that these provisions of the ICESCR recognise the right of every person to be free from all forms of pollution including air pollution[46].

In addition, the *United Nations Framework Convention on Climate Change (UNFCCC)*[47] is an international legal instrument that seeks to confront climate change by stabilizing greenhouse gas concentrations

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[40] United Nations Environment Programme., 'Air Pollution Hurts the Poorest Most' Op Cit

[41] United Nations Environment Programme., 'Pollution Action Note – Data you Need to Know' Op Cit

[42] World Health Organization., 'Air Pollution' Op Cit

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

[44] Ibid, article 12 (1)

[45] Ibid, article 12 (2) (b)

[46] Muigua. K., 'Safeguarding the Environment through Effective Pollution Control in Kenya' Op Cit

[47] United Nations General Assembly, 'United Nations Framework Convention on Climate Change' Resolution / Adopted by the General Assembly, 20 January 1994, A/RES/48/189.

at a level that would prevent dangerous anthropogenic (human induced) interference with the climate system[48]. Achieving the objectives of the UNFCCC is also vital in abating air pollution[49]. It has been correctly argued that air quality and climate change are interconnected because the chemical substances that lead to a degradation in air quality are normally co-emitted with greenhouse gases[50]. Therefore, changes in one inevitably cause changes in the other[51]. As a result, efforts to combat climate change by avoiding or limiting greenhouse gas emissions are also important in tackling air pollution[52]. It is therefore necessary to achieve the objectives of the UNFCCC by combating climate change in order to simultaneously abate air pollution.

WHO Global Air Quality Guidelines[53] seek to enhance the global response to air pollution. According to the Guidelines, clean air is fundamental to health[54]. The Guidelines offer quantitative health-based recommendations for air quality management, expressed as long- or short-term concentrations for a number of key air pollutants[55]. According to WHO, exceedance of the air quality

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[48] Ibid, article 2
[49] United Nations Climate Change., 'Air Quality Sinks as Climate Change Accelerates' Available at https://unfccc.int/news/air-quality-sinks-as-climate-change-accelerates#:~:text=%E2%80%9CAs%20the%20globe%20warms%2C%20wildfires,says%20WMO%20Secretary%2DGeneral%20Prof. (Accessed on 12/03/2024)
[50] Ibid
[51] Ibid
[52] Ibid
[53] World Health Organization., 'Global Air Quality Guidelines' Available at https://iris.who.int/bitstream/handle/10665/345329/9789240034228-eng.pdf?sequence=1 (Accessed on 12/03/2024)
[54] Ibid
[55] Ibid

guideline levels is associated with major risks to public health[56]. Though the Guidelines are not legally binding standards; they do provide WHO Member States with an evidence-informed tool that can shape legislation and policy on air pollution[57]. Ultimately, the goal of the WHO Guidelines is to provide guidance to help reduce levels of air pollutants in order to decrease the enormous health burden resulting from exposure to air pollution worldwide[58]. WHO sets out several measures that are necessary for implementation of the Guidelines including the existence and operation of air pollution monitoring systems; public access to air quality data; legally binding, globally harmonized air quality standards; and air quality management systems[59]. Implementing the WHO Guidelines is therefore necessary to abate air pollution. According to the Guidelines, abatement refers to the reduction or elimination of pollution, which involves either legislative measures or technological procedures, or both[60].

Further, the United Nations General Assembly (UNGA) has recognized the human right to a clean, healthy and sustainable environment[61]. According to the United Nations, this right includes the right to clean air[62]. According to the United Nations, the impact of climate change, the unsustainable management and use of natural resources, the *pollution of air*, land and water, the unsound management of chemicals and waste, the resulting loss of

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[56] Ibid
[57] Ibid
[58] Ibid
[59] Ibid
[60] Ibid
[61] United Nations General Assembly (UNGA)., 'The Human Right to a Clean, Healthy and Sustainable Environment.' UNGA Resolution 'A/76/L.75.'
[62] Ibid

biodiversity and the decline in services provided by ecosystems interfere with the enjoyment of a clean, healthy and sustainable environment and that environmental damage has negative implications, both direct and indirect, for the effective enjoyment of all human rights(Emphasis added)[63]. It has been argued that the UNGA Resolution is a watershed moment in the fight against the triple planetary crises of climate change, biodiversity loss and pollution[64]. It has also been pointed out that upholding the right to a clean, healthy, and sustainable environment is vital in protecting the planet and its people from air pollution among other environmental problems[65]. It is thus imperative to safeguard the human right to a clean, healthy, and sustainable environment as part of the measures towards abating air pollution.

At a national level, the *Constitution of Kenya*[66] enshrines the right of all Kenyans to a clean and healthy environment[67]. It has been noted that this right includes the right to clean air[68]. Realizing the right to a clean and healthy environment in Kenya as envisioned under the Constitution is therefore necessary in abating air pollution. In addition, the Constitution of Kenya gives powers to county

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[63] Ibid

[64] United Nations Environment Programme., 'Advancing the Right to a Healthy Environment' Available at *https://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/advancing-right-healthyenvironment#:~:text=Over%20150%20countries%20have%20binding,change%2C%20biodiversity%20loss%20and%20pollution (Accessed on 12/03/2024)*

[65] Climate & Clean Air Coalition., 'UN Declares Healthy Environment – Including Clean Air – A Human Right' Available at *https://www.ccacoalition.org/news/un-declares-healthy-environment-including-clean-air-human-right* (Accessed on 12/03/2024)

[66] Constitution of Kenya, 2010., Government Printer, Nairobi

[67] Ibid, article 42

[68] United Nations General Assembly (UNGA)., 'The Human Right to a Clean, Healthy and Sustainable Environment.' Op Cit

governments to control of air pollution and noise pollution among other public nuisances[69]. County governments therefore have a key role to play in abating air pollution in Kenya.

In addition, EMCA requires the Cabinet Secretary in charge of matters relating to environment and natural resources on the recommendation of the National Environment Management Authority (NEMA) to establish Air Quality Standards[70]. According to EMCA, the Air Quality Standards should provide for the criteria and guidelines for air pollution control for both mobile and stationary sources[71]. Further, EMCA requires the Cabinet Secretary to issue Guidelines to minimize emissions of greenhouse gases and identify suitable technologies to minimize air pollution; and do all such things as appear necessary for the monitoring and controlling of air pollution[72]. Pursuant to these provisions, the *Air Quality Regulations, 2014*[73] were enacted. The objective of these Regulations is to provide for the prevention, control and abatement of air pollution to ensure clean and healthy ambient air[74]. The Regulations further seek to ensure that there is establishment of emission standards for various sources such as mobile sources like motor vehicles and stationary sources such as industries as outlined under EMCA[75]. The Regulations prohibit any person from acting in a way that directly or indirectly causes, or is likely to cause immediate or subsequent air

[69] Constitution of Kenya, 2010., Fourth Schedule, Part 2
[70] Environmental Management and Co-ordination Act, No. 8 of 1999, S 78, Government Printer, Nairobi
[71] Ibid, S 78 (1) (b) (iii)
[72] Ibid, S 78 (1) (d) & (e)
[73] Environmental Management and Co-ordination Act., The Environmental Management and Co-ordination (Air Quality) Regulations, 2014, Legal Notice No. 34
[74] Ibid, Regulation 4
[75] Ibid

pollution[76]. They also set out several mechanisms for ensuring air quality including inspection and monitoring[77]. Further, in order to ensure clean and healthy ambient air, the Regulations makes it an offence to commit acts of air pollution in Kenya[78]. Under the Regulations, a person who contravenes their provisions commits an offence and is liable on conviction to a fine of five hundred thousand shillings or imprisonment for a term not exceeding six months[79].

Despite the existence of laws, policies and regulations aimed at preventing air pollution, the problem continues to persist at all levels with developing countries being the most affected[80]. It has been posited that developing nations have limited air quality management systems due to inadequate legislation and lack of political will, among other challenges[81]. In addition it has been contended that maintaining a balance between economic development and environmental management is usually a challenge in developing countries with there being no adequate investments in pollution prevention technologies[82]. Air pollution is a major threat to human health, environmental sustainability, and economic development[83]. Improving our air quality will bring health, development, and environmental benefits[84]. It is therefore necessary to abate air pollution in order to realize a healthy environment.

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[76] Ibid, Regulation 5 (1) (a)
[77] Ibid, Part XI
[78] Ibid, Regulation 76
[79] Ibid
[80] Muigua. K., 'Safeguarding the Environment through Effective Pollution Control in Kenya' Op Cit
[81] Ibid
[82] Ibid
[83] United Nations Environment Programme., 'Air Pollution Hurts the Poorest Most' Op Cit
[84] United Nations Environment Programme., 'Pollution Action Note – Data you Need to Know' Op Cit

4.0 Way Forward

In order to abate air pollution, it is necessary to realize the right to a Clean, Healthy, and Sustainable environment[85]. This right encompasses various elements including clean and balanced ecosystems, *clean air*, rich biodiversity and a stable climate (Emphasis added)[86]. A safe, clean, healthy and sustainable environment is considered to be integral to the full enjoyment of a wide range of human rights, including the rights to life, health, food, water and sanitation[87]. The right to a Clean, Healthy and Sustainable Environment is an essential human right that has been equated to the right to life[88]. The importance of this right has been upheld by UNGA which recognized the human right to a clean, healthy and sustainable environment[89]. It has been argued that realization of the right to a Clean, Healthy, and Sustainable environment can aid in tackling environmental challenges such as pollution, climate change, and unsustainable management of natural resources[90]. It is therefore

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[85] Muigua. K., 'Realizing the Right to a Clean, Healthy and Sustainable Environment' Available at https://kmco.co.ke/wp-content/uploads/2023/06/Realizing-the-Right-to-a-Clean-Healthy-and-Sustainable-Environment.pdf (Accessed on 13/03/2024)

[86] Zimmer K, 'The Human Right That Benefits Nature' Available at https://www.bbc.com/future/article/20210316- how-the-human-right-to-a-healthy-environment-helps-nature (Accessed on 13/03/2024)

[87] Muigua. K., 'Recognising a Human Right to Safe, Healthy and Sustainable Environment.' Available at http://kmco.co.ke/wp-content/uploads/2021/04/Recognising-a-Human-Right-to-Safe-Healthy-andSustainable-Environment-Kariuki-Muigua-1st-April-2021.pdf (Accessed on 13/03/2024)

[88] Peter K. Waweru v Republic, Misc. Civil Application No. 118 of 2004, (2006) eKLR

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

[90] Muigua. K., 'Realizing the Right to a Clean, Healthy and Sustainable Environment' Op Cit

necessary to realize the right to a Clean, Healthy, and Sustainable Environment in order to abate air pollution alongside other environmental problems.

In addition, there is need to strengthen air quality laws and regulations including through monitoring[91]. Air quality across the globe continues to deteriorate due to air pollution threatening human health and contributing to climate change and biodiversity loss[92]. In addition, it has been argued that air quality monitoring and transparent access to data is critical for humanity since it helps us understand how air pollution impacts people, places and planet[93]. Through monitoring, it is possible to identify air pollution hotspots and take targeted action to protect and improve human and environmental well-being[94]. However, it has been noted that air quality monitoring is yet to be fully embraced in developing countries meaning that people may be disproportionately impacted by air pollution in such countries[95]. It is therefore necessary to enhance air quality monitoring by implementing air quality laws and investing in technology and infrastructure to improve data reliability[96]. Investing in technology will enable government agencies to achieve real time air pollution monitoring which can go a long way in ensuing that pollutants are kept within acceptable levels as defined by the WHO

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[91] Muigua. K., 'Safeguarding the Environment through Effective Pollution Control in Kenya' Op Cit

[92] United Nations Environment Programme., 'How is Air Quality Measured?' Available at https://www.unep.org/news-and-stories/story/how-air-quality-measured#:~:text=Some%20use%20lasers%20to%20scan,nitrogen%20dioxide%20and%20sulfur%20dioxide. (Accessed on 13/03/2024)

[93] Ibid

[94] Ibid

[95] Ibid

[96] Ibid

standards[97].

Further, it is imperative to fully operationalize and enhance the enforcement of laws and regulations on air pollution[98]. For example, in Kenya, it has been argued that it is vital to fully operationalize the Air Quality Regulations in order to ensure clean and healthy ambient air[99]. In addition, there is need for strict enforcement of compliance with the emission standards for various sources such as mobile sources including motor vehicles and stationary sources such industries as stipulated in the Air Quality Regulations and EMCA[100]. One of the key ways that can be used to achieve this goal is effective enforcement of the polluter pays principle[101]. According to this principle, the costs of pollution should be borne by the polluter[102]. The aim of this principle is to distribute the costs of pollution from governments to organisations and people that engage in acts of pollution[103]. Under the *Rio Declaration on Environment and Development*[104], national authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the *polluter should,*

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[97] Muigua. K., 'Safeguarding the Environment through Effective Pollution Control in Kenya' Op Cit
[98] Ibid
[99] Ibid
[100] Ibid
[101] Muigua. K., 'Enforcing the Right to Clean and Healthy Environment in Kenya through the Polluter Pays principle' Available at https://kmco.co.ke/wp-content/uploads/2023/02/Enforcing-the-Right-to-Clean-and-Healthy-Environment-in-Kenya-Through-the-Polluter-Pays-principle-Kariuki-Muigua-February-2023.pdf (Accessed on 13/03/2024)
[102] Ibid
[103] Ibid
[104] United Nations General Assembly., 'Report of the United Nations Conference on Environment and Development: Rio Declaration on Environment and Development.' A/CONF. 151/26 (Vol.1)

in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment(Emphasis added)[105]. Further, under EMCA, the cost of cleaning up any element of the environment damaged by pollution, compensating victims of pollution, cost of beneficial uses lost as a result of an act of pollution and other costs that are connected with or incidental to the foregoing, is to be paid or borne by the person convicted of pollution under this Act or any other applicable law[106]. It is therefore necessary to implement this principle in order to ensure that organizations and persons found liable of air pollution alongside other forms of pollution bear the costs of such pollution[107]. It has been argued that making violators bear the cost of environmental restoration will go a long way in not only guaranteeing the right to clean environment but also in achieving Sustainable Development[108].

Courts also have a role to play in abating air pollution at all levels[109]. It has been pointed out that courts provide a platform for realizing access to justice which is key in enforcing human rights including the right to a Clean, Healthy, and Sustainable environment[110]. For example, in Kenya, the Constitution grants jurisdiction to courts to enforce environmental rights through measures such as orders to prevent, stop or discontinue any act or omission that is harmful to the

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[105] Ibid, Principle 16
[106] Environmental Management and Co-ordination Act., No. 8 of 1999, S 2, Government Printer, Nairobi
[107] Muigua. K., 'Enforcing the Right to Clean and Healthy Environment in Kenya through the Polluter Pays principle'
[108] Ibid
[109] Muigua. K., 'The Role of Courts in Safeguarding Environmental Rights in Kenya: A Critical Appraisal.' Available at http://kmco.co.ke/wp-content/uploads/2019/01/The-Role-of-Courts-in-SafeguardingEnvironmental-Rights-in-Kenya-A-Critical-Appraisal-Kariuki-Muigua-17th-January-2019-1.pdf (Accessed on 13/03/2024)
[110] Ibid

environment; orders to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; orders to provide compensation for any victim of a violation of the right to a clean and healthy environment among others[111]. It has been argued that there is need for courts to promote the realization of the right to a clean, healthy and sustainable environment by enhancing the principles of Sustainable Development and developing sound jurisprudence in environmental matters including cases concerning air pollution[112]. Further, it is necessary to enhance access to justice including access to courts in order to allow victims of air pollution among other environmental malpractices to realize environmental justice[113].

Finally, it is of utmost importance to combat climate change[114]. It has been noted that air quality and climate change are interconnected since the chemical substances that lead to a degradation in air quality are normally co-emitted with greenhouse gases[115]. Therefore, changes in one inevitably cause changes in the other[116]. As a result, efforts to combat climate change by avoiding or limiting greenhouse gas emissions are also important in tackling air pollution[117]. According to the World Bank, air pollution and climate change are two sides of the same coin, but they are typically addressed separately[118]. It asserts

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[111] Constitution of Kenya, 2010, Article 70., Government Printer, Nairobi
[112] Muigua. K., 'The Role of Courts in Safeguarding Environmental Rights in Kenya: A Critical Appraisal.' Op Cit
[113] Ibid
[114] United Nations Climate Change., 'Air Quality Sinks as Climate Change Accelerates' Op Cit
[115] Ibid
[116] Ibid
[117] Ibid
[118] World Bank Group., 'What You Need to Know About Climate Change and Air Pollution' Available at https://www.worldbank.org/en/news/feature/2022/09/01/what-you-

that they should be tackled jointly, with a focus on protecting peoples' health particularly in low and middle-income countries in order to strengthen human capital and reduce poverty[119]. Therefore, efforts to reduce greenhouse gas emissions provide dual benefits: of better air quality and improved health in localities and the global benefit of mitigating climate change[120]. It is therefore crucial to confront climate change in order to simultaneously abate air pollution.

5.0 Conclusion

Air pollution is the most-pressing environmental health crisis of our time, responsible for an estimated seven million premature deaths every year[121]. Air pollution also contributes to climate change[122]. Improving our air quality will bring health, development, and environmental benefits[123]. It is therefore necessary to abate air pollution for a healthy environment for the benefit of both humanity and nature. This can be achieved through to realizing the right to a Clean, Healthy, and Sustainable Environment[124]; strengthening air quality laws and regulations including through monitoring[125]; full operationalization and enhancing the enforcement of laws and regulations on air pollution[126]; enhancing access to environmental

need-to-know-about-climate-change-and-air-pollution (Accessed on 13/03/2024)

[119] Ibid

[120] Ibid

[121] United Nations Environment Programme., 'Five Cities Tackling Air Pollution' Op Cit

[122] United Nations Environment Programme., 'About Air' Op Cit

[123] United Nations Environment Programme., 'Pollution Action Note – Data you Need to Know' Op Cit

[124] Muigua. K., 'Realizing the Right to a Clean, Healthy and Sustainable Environment' Op Cit

[125] Muigua. K., 'Safeguarding the Environment through Effective Pollution Control in Kenya' Op Cit

[126] Ibid

justice[127]; and combating climate change[128]. Abating air pollution for a healthy environment is the way to go towards ensuring the sustainability of our planet.

[127] Muigua. K., 'The Role of Courts in Safeguarding Environmental Rights in Kenya: A Critical Appraisal.' Op Cit
[128] United Nations Climate Change., 'Air Quality Sinks as Climate Change Accelerates' Op Cit

References

Climate & Clean Air Coalition., 'UN Declares Healthy Environment – Including Clean Air – A Human Right' Available at https://www.ccacoalition.org/news/un-declares-healthy-environment-including-clean-air-human-right

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

Constitution of Kenya, 2010., Government Printer, Nairobi

Environmental Management and Co-Ordination Act, No. 8 of 1999, Government Printer, Nairobi

Environmental Management and Co-ordination Act., The Environmental Management and Co-ordination (Air Quality) Regulations, 2014, Legal Notice No. 34

Khasanova. S., & Alieva. E., 'Environmental Pollution: Types, Causes and Consequences' Available at http://dx.doi.org/10.1051/bioconf/20236307014

Muigua. K., 'Enforcing the Right to Clean and Healthy Environment in Kenya through the Polluter Pays principle' Available at https://kmco.co.ke/wp-content/uploads/2023/02/Enforcing-the-Right-to-Clean-and-Healthy-Environment-in-Kenya-Through-the-Polluter-Pays-principle-Kariuki-Muigua-February-2023.pdf

Muigua. K., 'Realizing the Right to a Clean, Healthy and Sustainable Environment' Available at https://kmco.co.ke/wp-content/uploads/2023/06/Realizing-the-Right-to-a-Clean-Healthy-

and-Sustainable-Environment.pdf

Muigua. K., 'Recognising a Human Right to Safe, Healthy and Sustainable Environment.' Available at http://kmco.co.ke/wp-content/uploads/2021/04/Recognising-a-Human-Right-to-Safe-Healthy-andSustainable-Environment-Kariuki-Muigua-1st-April-2021.pdf

Muigua. K., 'Safeguarding the Environment through Effective Pollution Control in Kenya' Available at https://kmco.co.ke/wp-content/uploads/2019/09/Safeguarding-the-Environment-through-Effective-Pollution-Control-in-Kenya-Kariuki-Muigua-28th-SEPT-2019.pdf

Muigua. K., 'The Role of Courts in Safeguarding Environmental Rights in Kenya: A Critical Appraisal.' Available at http://kmco.co.ke/wp-content/uploads/2019/01/The-Role-of-Courts-in-SafeguardingEnvironmental-Rights-in-Kenya-A-Critical-Appraisal-Kariuki-Muigua-17th-January-2019-1.pdf

Peter K. Waweru v Republic, Misc. Civil Application No. 118 of 2004, (2006) eKLR

Sharma, S. B., Jain, S., Khirwadkar, P., & Kulkarni, S., 'The Effects of Air Pollution on the Environment and Human Health,' *Indian Journal of Research in Pharmacy and Biotechnology*, Volume 1, No. 3 (2013)

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

United Nations Climate Change., 'Air Quality Sinks as Climate Change Accelerates' Available at https://unfccc.int/news/air-quality-sinks-as-climate-change-

accelerates#:~:text=%E2%80%9CAs%20the%20globe%20warms%2C%20wildfires,says%20WMO%20Secretary%2DGeneral%20Prof.

United Nations Climate Change., 'What is the Triple Planetary Crisis?' Available at https://unfccc.int/news/what-is-the-triple-planetary-crisis#:~:text=The%20triple%20planetary%20crisis%20refers,change%2C%20pollution%20and%20biodiversity%20loss.

United Nations Environment Progaramme., 'Pollution and Health' Available at https://www.unep.org/topics/chemicals-and-pollution-action/pollution-and-health

United Nations Environment Programme., 'About Air' Available at https://www.unep.org/explore-topics/air/about-air

United Nations Environment Programme., 'Advancing the Right to a Healthy Environment' Available at *https://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/advancing-right-healthyenvironment#:~:text=Over%20150%20countries%20have%20binding,change%2C%20biodiversity%20loss%20and%20pollution*

United Nations Environment Programme., 'Air Pollution Hurts the Poorest Most' Available at https://www.unep.org/news-and-stories/story/air-pollution-hurts-poorest-most

United Nations Environment Programme., 'Five Cities Tackling Air Pollution' Available at https://www.unep.org/news-and-stories/story/five-cities-tackling-air-pollution

United Nations Environment Programme., 'How is Air Quality Measured?' Available at https://www.unep.org/news-and-stories/story/how-air-quality-measured#:~:text=Some%20use%20lasers%20to%20scan,nitrogen%2

0dioxide%20and%20sulfur%20dioxide.

United Nations Environment Programme., 'Pollution Action Note – Data you Need to Know' Available at https://www.unep.org/interactives/air-pollution-note/

United Nations Environment Programme., 'Pollution' Available at https://leap.unep.org/en/knowledge/glossary/pollution#:~:text=The%20indirect%20or%20direct%20alteration,welfare%20of%20any%20living%20species.%20

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

United Nations General Assembly, 'United Nations Framework Convention on Climate Change' Resolution / Adopted by the General Assembly, 20 January 1994, A/RES/48/189.

United Nations General Assembly., 'Report of the United Nations Conference on Environment and Development: Rio Declaration on Environment and Development.' A/CONF. 151/26 (Vol.1)

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

World Bank Group., 'Pollution' Available at https://www.worldbank.org/en/topic/pollution

World Bank Group., 'What You Need to Know About Climate Change and Air Pollution' Available at

https://www.worldbank.org/en/news/feature/2022/09/01/what-you-need-to-know-about-climate-change-and-air-pollution

World Health Organization., 'Air Pollution' Available at https://www.who.int/health-topics/air-pollution#tab=tab_1

World Health Organization., 'Global Air Quality Guidelines' Available at https://iris.who.int/bitstream/handle/10665/345329/9789240034228-eng.pdf?sequence=1

Zimmer K, 'The Human Right That Benefits Nature' Available at https://www.bbc.com/future/article/20210316- how-the-human-right-to-a-healthy-environment-helps-nature

Supranationalism and Supremacy: The East Africa Court of Justice (EACJ) versus The Supreme Court of the Republic of Kenya (SCORK) SCORK Reference No.1. of 2022; In The Matter of an Advisory Opinion: Attorney General and Hon. Martha Karua, Sc

By: ***Dr. Wilfred Mutubwa*** *

Various angles to the debate surrounding the decision of the SCORK on the effect of the decisions of the EACJ in Kenya, and the extent of the latter's remit, have been offered in recent days by commentators and academics alike. The view I take of the matter is through the prism of the philosophies of the two courts on economic, and even political integration. In my considered view, the extent of the reach of the EACJ's jurisdictional tentacles can also be understood by interrogating whether the court engenders supranational jurisdiction or not.

Supranationalism and Supremacy of Regional and International Courts

A supranational union or institution is an entity whose authority transcends the sovereignty of the member states and their respective territorial boundaries.[1] Unlike states in a federal union, member states retain ultimate sovereignty, although some sovereignty is

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[1] Weiler, Joseph. "The community system: the dual character of supranationalism." *Yearbook of European law* 1, no. 1 (1981): 267-306, 267.

exercised by, shared with, or added to the supranational body.[1] Since it is an agreement between sovereign states, it is usually based on treaties or agreements.[2]

Joseph Weiler, a foremost supranationalism theorist, classifies supranationalism into two categories: the juridical/normative approach and the political/decisional approach.[3] A more contemporary view, in the context of the EU integration is, according to Weiler, characterised by different levels of supranationalisation and integration.[4] The 1958-1968 period is, for instance, distinguished from the current EU supranationalism model. The current period is characterised by the institutional domain, monetary domain and geographical extension of the common market.[5]

Normative supranationalism addresses three main principles: the doctrines of direct effect, supremacy and the pre-emption.[6] The doctrine of direct effect relates to the vesting of authority in main autonomous institutions, such as was done in the early days of

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[1]Karhu Kimmo, "The European Constitution Making" *Centre for European Policy Studies* (2004) http://aei.pitt.edu/32581/1/20._EU_Constitution.pdf. accessed on 10th June 2024, 21-26, 21.

[2] Ibid.

[3] See Weiler, Joseph (n) 1.

[4] Ibid. *(*See also generally Davey, William J. "PJG Kapteyn & P. VerLoren van Themaat, Introduction to the Law of the European Communities After the Coming into Force of the Single European Act." *Fordham International Law Journal* 13, no. 2 (1989): 257.)

[5] J Weiler Joseph, (n) 1.

[6] Leal-Arcas, Rafael. "Theories of Supranationalism in the EU." *Journal of Law in Society* 8, no. 1 (2007): 96.

European integration through the ECSC, in order to adopt self-executing member state law.[7] The doctrine of supremacy means that there is a hierarchy of norms with the integration organ law being superior to the member state law.[8] The pre-emption principle, on the other hand, means that the integration unit has policy making competence where state members are precluded from enacting legislation contradictory to the integration unit's law and are pre-empted from taking such action at all.[9]

The EU is often cited as the foremost example of supranationalism. This is primarily because its institutions exercise authority over member states and may supplant national organs. The EU parliament passes laws that apply to the entire membership overriding national laws or legislation.[10] The Court of Justice of the European Union

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[7] Ibid.

[8] Bruno De Witte. 'Direct Effect, Supremacy and the Nature of Legal Order', in P. Craig and G. De Burca (eds.), *The Evolution of EU Law, Oxford, Oxford University Press*, (1999). pp. 177-213.

[9] Fagbayibo B, "Common Problems Affecting Supranational Attempts in Africa: An Analytical Overview" (2013) 16(1) PER/PELJ 32, at 33.

[10] The CJEU is established under by the Treaty of Lisbon which came into force enforces European Union Law including annulling the decisions, regulations and directives of EU and state member organs and ensuring compliance with EU obligations by states and even individuals. CJEU and the Treaty of Lisbon are available at <https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en.> accessed on 10th June 2024. The ECHR was established in 1959 and has jurisdiction to rule on state and individuals' allegations of violations of civil and political rights. Set out in the European Convention on Human Rights. The Courts' decisions are binding on state parties and have led governments to alter their legislation and administrative practices in a wide range of areas. See

(CJEU) and the European Court of Human Rights (ECHR) have original jurisdiction in matters regarding the interpretation of the constituting treaty, treaties entered into by the state parties, trade and investment claims and violations of human rights.[11] The Courts' jurisdiction applies across the entire EU membership.[12] State members cannot extricate themselves from the coercive force of the EU organs. EU treaties, decisions of the EU Commission, Parliament, Courts and other organs must be complied with by member states and their organs.[13]

The principles of direct effect of EU law, supremacy of the CJEU over national courts and the overriding effect of its decisions were first demonstrated in the 1963 case of *Van Gend en Loos v Nederlandse Administraitie der Belastingen*[14] in which the court held that provisions of the EC treaty have direct effect in the community bestowing enforceable rights as between individuals and the member states.[15]

Is the EACJ a Supranational Institution?

Unlike its predecessor, the pre-1977 EACA, before the collapse of the first post-independence EAC, the EACJ in its current form does not engender supranational jurisdiction. Its jurisdiction is limited to the

<https://echr.coe.int/Pages/home.aspx?p=home.> accessed on 27th June 2024.

[11] Sweet, Alec Stone, and Thomas L. Brunell. "Constructing a supranational constitution: Dispute resolution and governance in the European Community." *American Political Science Review* 92, no. 1 (1998): 63-81.

[12] Ibid.

[13] Ibid.

[14] [1963] ECR1, 11-12.

[15] R Leal-Arcas, (n) 7.

interpretation of the EAC Treaty and other instruments, to issue advisory opinions, arbitration, as well as employment and labour disputes that may arise between the EAC and its staff.[16]

While there is no issue with the EACJ's jurisdiction in interpreting the EAC Treaty and regulating relationships between the Community's members and organs, it is not clear whether the Court exhibits the direct effect or supremacy principles of supranationalism. Article 33 of the Treaty provides that the decisions of the EACJ on the interpretation of the EAC Treaty have precedence over those of national courts on similar subject matter. Article 43 directs national courts and tribunals to refer a matter to the EACJ, if they consider that a ruling is necessary to enable the national court to give a judgement. This approach ensures harmony in the interpretation and application of the treaty by the partner states on the interpretation of the EAC Treaty.

Article 30 of the EAC Treaty permits the EACJ to admit cases brought by legal and natural persons who are resident in the partner states. Individuals can therefore challenge the legality of an act, regulation, directive, decision or act of a Partner State, or an institution of the Community on the grounds of its unlawfulness, or infraction of the treaty. Unlike other similar treaties, the EAC Treaty is silent on the requirement for a person to exhaust local remedies before moving the Court. The doctrine of subsidiarity is therefore not applicable, rendering the EACJ accessible as a court of first instance. To this extent, the doctrines of direct effect and access are underscored by the

[16]Articles 23, 36, 31 and 32 of the EAC Treaty.

Treaty.

Three decisions of the EACJ are useful in placing this discussion into context. In the case of *Anyang' Nyong'o v Attorney General of Kenya*[17], which involved the election of members of the EALA representing Kenya, the applicant contended that Kenya's representatives had been nominated in violation of Article 50 of the EAC Treaty.[18] The Court held that a country cannot invoke its domestic laws as a justification for failure to meet its treaty obligations. This decision seems to suggest an inclination of the court towards an interpretation that favours supremacy of the EAC laws over national laws of member states.

However, a subsequent decision of the same court seems to take an entirely different trajectory in respect of the supremacy principle. In its decision in the case of *East African Civil Society Organization Forum v The Attorney General of the Republic of Burundi &2 others*[19], the Court held that it lacked the requisite jurisdiction to interfere with decisions

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[17] (Reference No. 1 of 2006 (Judgment)) [2007] EACJ 6 (30 March 2007) *https://www.eacj.org/?cases=prof-peter-anyang-nyongo-and-others-vs-attorney-general-of-kenya-and-others*. Accessed 10th June, 2024.

[18]Article 50 stipulates that *"The National Assembly of each partner state shall elect …nine members of the Assembly, who shall represent as much as is feasible, the various political parties represented in the National Assembly, shades of opinion, gender and other interest groups in that Partner State, in accordance with such procedure as the National Assembly of each Partner State shall determine."*.

[19] (Appeal 1 of 2020) [2021] EACJ 34 (25 November 2021) <*http://eacj.eac.int/?cases=application-no-5-of-2015-arising-from-reference-no-2-of-2015-east-african-civil-society-organisations-forum-eacsof-vs-attorney-general-of-burundi-2-others.*> accessed on 10th June, 2024.

of constitutional courts of member states or to sit on appeal on decisions of such courts.

Articles 33 and 34 of the EAC Treaty are clear that the EACJ is not an appellate court from decisions of member state courts. The Court's decision in the *East African Civil Aviation case* also seems to clarify this position. However, in its decision in the case of *Sitenda Sebalu v Secretary General of EAC and Attorney General of the Republic of Uganda*[20], the EACJ *seems to* suggest that an appeal from national courts could be entertained by the Court. In the said case, the Applicant had brought the case as an appeal from the decision of the Supreme Court of Uganda. He averred that the continuous delay in establishing the East African Court of Appeal as stipulated by Article 27 of the Treaty is a blatant violation of the rule of law and the Treaty. The Court agreed with the Applicant and directed a quick operationalisation of the relevant Protocol. The Council of Ministers instead amended the draft Protocol to exclude the appellate and human rights jurisdiction to the EACJ as had been proposed.

The Role of the EACJ in promoting Constitutionalism as a regional court

A closer look at the concept of constitutionalism with regards to the jurisdiction of the EACJ and the national courts, the same provides a distinct approach. Constitutionalism refers to the adherence to fundamental principles outlined in a constitution, including the

[20]EACJ Ref. No. 1 of 2010. http://eacj.eac.int/?cases=honorable-sitenda-sebalu-vs-secretary-general-of-the-eac-attorney-general-of-the-republic-of-uganda-honorable-sam-k-njuba-and-the-electoral-commission-of-uganda. Accessed on 10th June, 2024.

protection of individual rights, separation of powers, and the rule of law. Regional courts, such as the East African Court of Justice (EACJ), play a pivotal role in promoting constitutionalism within the context of regional integration frameworks. Constitutionalism refers to the adherence to fundamental principles enshrined in a constitution, including the protection of individual rights, the separation of powers, and the rule of law. In the regional context, these principles transcend national borders and become essential pillars for the effective functioning and legitimacy of regional organizations.[21]

The EACJ's decision in the case of ***Katabazi and 21 Others v Secretary General of the East African Community and Another***[22] (the Katabazi case) is a landmark ruling that exemplifies the court's commitment to upholding constitutional values and promoting the rule of law and respect for human rights within the East African Community (EAC). In this case, the EACJ addressed allegations of human rights violations by Ugandan security agents who interfered with the execution of a lawful court order, thereby contravening the principles of the rule of law and good governance enshrined in the EAC Treaty. The court emphasized that the interference with the judicial process violated fundamental principles of the rule of law and undermined

[21] Rosenfeld, Michel. "The rule of law and the legitimacy of constitutional democracy." *S. Cal. L. Rev.* 74 (2000): 1307. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=262350. Accessed 10th June, 2024.

[22] (Ref. No. 1 of 2007) [2007] EACJ 3 (1 November 2007). https://www.eacj.org/?cases=james-katabazi-and-21-other-vs-secretary-general-of-the-east-african-community-and-attorney-general-of-the-republic-of-uganda. Accessed 10th June, 2024.

the due administration of justice.

By asserting its competence to interpret the EAC Treaty in a manner that promotes respect for human rights and the rule of law, the EACJ played a crucial role in shaping the regional legal landscape and fostering constitutionalism within the EAC framework. The court's decision underscored the importance of regional judicial bodies in safeguarding constitutional values and ensuring that member states adhere to their treaty obligations. The Katabazi case highlighted several key aspects of the EACJ's role in promoting constitutionalism. The EACJ's ruling affirmed the principle of the rule of law as a fundamental tenet of the EAC Treaty. By condemning the interference with the judicial process, the court sent a strong message about the importance of respecting the independence of the judiciary and the sanctity of court orders, both at the national and regional levels.[23]

While the EACJ does not have explicit jurisdiction over human rights disputes, its interpretation of the EAC Treaty in the Katabazi case demonstrated a willingness to address allegations of human rights violations within the context of treaty obligations. This broader interpretation of the court's mandate contributes to the protection of human rights within the regional integration framework. The EACJ's jurisprudence has the potential to shape regional norms and legal standards. By affirming the principles of the rule of law and respect for human rights, the court's decisions can influence the behavior of

[23] Lando, Victor. "The domestic impact of the decisions of the East African Court of Justice." *African Human Rights Law Journal* 18, no. 2 (2018): 464.

member states and promote the adoption of constitutional values throughout the region.

The EACJ's role in promoting constitutionalism and upholding treaty obligations can contribute to stronger regional cooperation and integration. When member states adhere to shared constitutional principles and respect the rule of law, it fosters trust and mutual respect, which are essential for effective regional cooperation. However, it is essential to recognize the limitations and challenges faced by regional courts like the EACJ in their efforts to promote constitutionalism. The court's jurisdiction is ultimately derived from the EAC Treaty, and its ability to enforce its decisions relies on the cooperation and compliance of member states.[24] Additionally, the EACJ's jurisprudence may sometimes conflict with domestic legal systems, leading to tensions between national sovereignty and regional integration objectives.

The EACJ's decision in the Katabazi case exemplifies the crucial role regional courts can play in promoting constitutionalism, the rule of law, and respect for human rights within regional integration frameworks. By interpreting and applying regional treaties in a manner that upholds constitutional values, regional courts contribute to the development of a robust regional legal order, foster regional cooperation, and ultimately strengthen the legitimacy and effectiveness of regional organizations.

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[24] Possi, Ally. "Striking a balance between community norms and human rights: The continuing struggle of the East African Court of Justice." *African Human Rights Law Journal* 15, no. 1 (2015): 213.

A Comparative Analysis of other Regional Courts in Africa

A comparative analysis of the jurisdictional remit and supranational character of regional courts in Africa, such as the ECOWAS Court of Justice and the SADC Tribunal, provides a broader perspective on the challenges faced by regional courts in asserting their authority over national courts.

For instance, the Community Court of Justice of the Economic Community of West African States (ECOWAS) plays a vital role in the West African region. Established under the provisions of the Revised Treaty of ECOWAS, this court consists of five independent judges appointed by the Authority of Heads of State and Government from member states. Its mandate includes ensuring the observance of law, equity, and the interpretation and application of the ECOWAS Treaty and subsidiary legal instruments.[25] Notably, the ECOWAS Court has jurisdiction to determine cases of human rights violations that occur within any member state.

The Southern African Development Community (SADC) Tribunal was created to address disputes within the SADC region. However, its journey has been marked by challenges. In 2008, the SADC Tribunal demonstrated its ability to adjudicate human rights cases when it ruled on a land rights dispute in Zimbabwe. Unfortunately, this decision led to its suspension in 2010. Member states disagreed over the Tribunal's competence to handle human rights matters,

[25] Nathan Laurie. 'The Disbanding of the SADC Tribunal: A Cautionary Tale' (2013) *35 Human Rights Quarterly* 870. https://www.researchgate.net/publication/265724911.TheDisbanding_of_the_SADC_Tribunal_A_Cautionary_Tale. Accessed 10th June, 2024.

revealing the delicate balance between national sovereignty and regional integration objectives. Although the Tribunal's suspension was later lifted, its power to adjudicate individual human rights cases was terminated in 2014, taking a step backward in regional justice access.[26]

The delicate interplay between national sovereignty and regional cooperation remains a central challenge for these courts. While they strive to uphold regional integration objectives, they must also respect the autonomy of individual member states. Finding this delicate balance is essential for ensuring effective justice delivery and promoting harmonious relations within the African continent.

Interaction with the Doctrine of Subsidiarity

The doctrine of subsidiarity is a crucial principle in the context of regional integration and the relationship between regional courts and domestic legal systems. It holds that matters should be addressed at the lowest possible level of governance, and higher-level authorities should intervene only if the objectives cannot be adequately achieved at the lower level.

In the case of the East African Court of Justice (EACJ), the interaction with the doctrine of subsidiarity is particularly relevant when it comes to the requirement of exhausting local remedies before accessing the regional court. The EAC Treaty itself is silent on this issue, allowing individuals to directly petition the EACJ without

[26] Ibid.

necessarily exhausting domestic remedies first.[27]

This approach deviates from the strict application of the subsidiarity principle, which would typically mandate that individuals exhaust all available legal avenues within their national jurisdictions before escalating a matter to the regional level. By granting direct access, the EACJ effectively positions itself as a court of first instance in certain cases, potentially bypassing domestic judicial systems. However, it is essential to note that the EACJ's jurisprudence on this matter has been somewhat inconsistent.[28]

For instance, as discussed earlier, in the Anyang' Nyong'o v Attorney General of Kenya case, the EACJ asserted its authority to adjudicate matters without requiring the exhaustion of local remedies, implying a departure from the subsidiarity principle. On the other hand, in the *East African Civil Society Organization Forum v The Attorney General of the Republic of Burundi* case, the EACJ held that it lacked jurisdiction to interfere with decisions of constitutional courts of member states or to sit on appeal over such courts.[29] This decision aligns more closely with the subsidiarity doctrine, acknowledging the primary role of national legal systems in adjudicating constitutional matters. The *Sitenda Sebalu v Secretary General of EAC and Attorney General of the Republic of Uganda* case further muddied the waters, with the EACJ suggesting that it could entertain appeals from national courts,

[27] Aloo A, 'Exhaustion of Local Remedies and the East African Court of Justice: Circumventing a Territoriality Trap' (2020) 20 African Human Rights Law Journal 383.
[28] Ibid.
[29] See (note 20).

potentially undermining the principle of subsidiarity.[30]

The interaction between the EACJ's jurisdiction and the doctrine of subsidiarity raises complex questions about the appropriate balance between regional integration, harmonization of laws, and respect for national sovereignty. On the one hand, allowing direct access to the EACJ without exhausting local remedies can facilitate efficient adjudication of regional matters and promote the uniform interpretation and application of the EAC Treaty. It also provides an avenue for individuals to seek redress when domestic legal systems fail to adequately address their grievances.

On the other hand, bypassing domestic judicial systems could undermine the principle of subsidiarity and potentially lead to conflicts between regional and national jurisprudence. It could also be perceived as encroaching upon the sovereignty of member states and their ability to adjudicate matters within their own legal frameworks. Ultimately, the resolution of this tension may lie in striking a careful balance and clearly delineating the respective jurisdictions of the EACJ and national courts. The EACJ could potentially play a complementary role to domestic legal systems, intervening only when there are clear violations of the EAC Treaty or when national remedies have been exhausted or proven ineffective.[31]

Alternatively, a more structured approach could be adopted, where certain categories of cases are designated as falling within the

[30] See (note 21).
[31] Nathan Laurie (See note 26)

exclusive jurisdiction of the EACJ, while others are required to follow the subsidiarity principle and exhaust local remedies first. Regardless of the approach taken, ongoing dialogue and cooperation between the EACJ and national judicial systems will be crucial to ensuring coherence, respect for national sovereignty, and the effective implementation of the principles of direct effect and supremacy within the framework of regional integration.

Concluding Reflections

In sum, two points accrue from the discussion forgoing.

Firstly, most regional integration efforts in Africa were originally conceived as economic integration blocs. Their dispute resolution organs were primarily meant to resolve trade disputes, mainly between states, states organs, the international body and its organs, and in some cases, investment disputes. Regional and sub-regional courts have since metamorphosed, by default, design or adaptation to current affairs, into tribunals with wide and far reaching jurisdictional mandates. For example, the EACJ, ECOWAS, and SADC Tribunals have, through judicial craft and creativity, pushed the limits of their treaty jurisdiction to include human rights and political questions. They have also admitted quite regularly and freely, claims by individuals, NGOs and civil society organisations. This has largely been achieved through liberal and flexible interpretation of their treaty mandates. Their jurisdictions are no longer circumspect by treaty provisions. It is this creeping expansionist mission through decisions/case law that has begotten the current "crises" in jurisdictional remit of regional courts such as the EACJ.

Unlike the EU, African integration efforts did not consciously or deliberately choose supranationalism; in fact, most are styled as intergovernmental bodies. Yet, in the execution of their functions, African regional courts such as the EACJ have developed jurisprudence that is inspired by the CJEU and EHRC to reflect or project supranationalism. This has had the effect of some member states of RECs questioning the propriety and continued existence of the regional courts. [32] This debate has not only been had in Africa but also in solid supranational jurisdictions like the EU. The UK for example, questioned the extent of the "over reach" of the CJEU and EHRC into the realm of domestic and political matters.[33] One will recall that this was a central theme in the Brexit discourse in the UK.[34]

Secondly, is the sort of chicken and egg situation we find ourselves caught in. In essence, which one comes first, international or national law; and which one should prevail over the other in case of conflict. This is a conundrum that is at the centre of the jurisdictional quagmire of international courts such as the EACJ. There are two diametrically opposed propositions. The first one is aptly exemplified by the writings of Sir Hersch Lauterpacht, a pre-eminent international law scholar, practitioner and jurist of the 20th century, who posed that

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[32] PJ Ngandwe, "The Predicament of African Regional Courts: lessons from the Southern African Development Community Tribunal" 2012 (1) *The Pan African Yearbook of Law* 47-66; L Nathan, "The Disbanding of the SADC Tribunal: A Cautionary Tale" 2013 (35) *Human Rights Quarterly* 870-892.

[33] See for example, Raphael Hogarth. IfG analysis, Brexit and the European Court of Justice. *Institute of Government.* (2017). https://www.instituteforgovernment.org.uk/sites/default/files/publications/IfG_Brexit_Euro_Court_JusticeWEB.pdf.Accessed 10th June, 2024

[34] *Ibid*

"National Sovereignty ends where international obligations begin."[35]

Lauterpacht was of the firm conviction that international law takes precedence over domestic law. According to him, states are creatures of international law, and that statehood is a concept borne out of recognition by international law. In other words, there is no state or domestic law without international recognition. States and their domestic law exist only because there is an international legal system that acknowledges the sovereignty of the state as against peer states. Sir Lauterpacht, himself a one-time judge of the ICJ, expressed himself on the relationship between international and domestic law thus: "The self-evident principle of international law is that a state cannot invoke its municipal law as a reason for non fulfilment of its international obligations." [36] In this vein, it appears that international law, on matters regarding international customary obligations, treaty rights and obligations, trumps domestic laws, including national constitutions.

Yet, there is an opposite view, too, with equal force of persuasion. There are those who view international law as a creature of the exercise of sovereignty by states. That states willingly cede some of their sovereign authority to a centre, for common good. And, therefore, that states are free to recall this authority at any point This thinking is founded on the principle that it is the mandate or duty of

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[35] See Lauterpacht, Eli. "Sovereignty-myth or reality?." *International Affairs (Royal Institute of International Affairs 1944-)* (1997): 149.

[36] H Lauterpatch, *The Development of International Law by the International Court* (Cambridge University Press Cambridge 1982) 262.

executive arms of states to enter into international agreements. It is also anchored on the view that the inherent sovereign authority of a state cannot be taken away, not even by international law. It is for this reason that dualist states prefer the *incorporation* of international law into domestic law through legislative processes rather than dualist transformational acceptance of international laws and agreements as part and parcel of nation; laws upon ratification thereof.

In the upshot, the approach taken largely depends on the philosophical anchorage and persuasion one takes with regard to the place of international law in the domestic sphere. The real challenge, however, identified by the decision under review is the ever-expanding elasticity of international law through case law, as international courts and tribunals flex their jurisdictional muscles in an effort to remain relevant and address emerging issues in the international plane.

Bibliography

Aloo A, 'Exhaustion of Local Remedies and the East African Court of Justice: Circumventing a Territoriality Trap' (2020) 20 African Human Rights Law Journal 383.

Bruno De Witte. 'Direct Effect, Supremacy and the Nature of Legal Order', in P. Craig and G. De Burca (eds.), The Evolution of EU Law, Oxford, Oxford University Press, (1999). pp. 177-213.

Davey, William J. "PJG Kapteyn & P. VerLoren van Themaat, Introduction to the Law of the European Communities After the Coming into Force of the Single European Act." Fordham International Law Journal 13, no. 2 (1989): 257.)

East African Civil Society Organizations Form v Attorney General of the Republic of Burundi and Others (Appeal 1 of 2020) [2021] EACJ 34 (25 November 2021)

Fagbayibo B, "Common Problems Affecting Supranational Attempts in Africa: An Analytical Overview" (2013) 16(1) PER/PELJ 32, at 33.
H Lauterpatch, The Development of International Law by the International Court (Cambridge University Press Cambridge 1982) 262.

Karhu Kimmo, "The European Constitution Making" Centre for European Policy Studies (2004) http://aei.pitt.edu/32581/1/20._EU_Constitution.pdf.

Katabazi and 21 Others v Secretary General of the East African Community and Another (Ref. No. 1 of 2007) [2007] EACJ 3 (1 November 2007).

Lando, Victor. "The domestic impact of the decisions of the East African Court of Justice." *African Human Rights Law Journal* 18, no. 2 (2018): 464.

Lauterpacht, Eli. "Sovereignty-myth or reality?." International Affairs (Royal Institute of International Affairs 1944-) (1997): 149.

Leal-Arcas, Rafael. "Theories of Supranationalism in the EU." Journal of Law in Society 8, no. 1 (2007): 96.

Nathan Laurie. 'The Disbanding of the SADC Tribunal: A Cautionary Tale' (2013) 35 Human Rights Quarterly 870. https://www.researchgate.net/publication/265724911.TheDisbandingoftheSADCTribunalACautionary_Tale.

PJ Ngandwe, "The Predicament of African Regional Courts: lessons from the Southern African Development Community Tribunal" 2012 (1) The Pan African Yearbook of Law 47-66; L Nathan, "The Disbanding of the SADC Tribunal: A Cautionary Tale" 2013 (35) Human Rights Quarterly 870-892.

Possi, Ally. "Striking a balance between community norms and human rights: The continuing struggle of the East African Court of Justice." African Human Rights Law Journal 15, no. 1 (2015): 213.

Prof. Peter Anyang' Nyong'o and Others v Attorney General of Kenya and Others (Reference No. 1 of 2006 (Judgment)) [2007] EACJ 6 (30 March 2007)

Prof. Peter Anyang' Nyong'o and Others vs Attorney General of Kenya and Others - East African Court of Justice" (East African Court of Justice) https://www.eacj.org/?cases=prof-peter-anyang-nyongo-and-others-vs-attorney-general-of-kenya-and-others.

Raphael Hogarth. IfG analysis, Brexit and the European Court of Justice. Institute of Government. (2017). https://www.instituteforgovernment.org.uk/sites/default/files/publications/IfG_Brexit_Euro_Court_JusticeWEB.pdf.

Rosenfeld, Michel. "The rule of law and the legitimacy of constitutional democracy." *S. Cal. L. Rev.* 74 (2000): 1307. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=262350.

Sitenda Sebalu v Secretary General of EAC and Attorney General of the Republic of Uganda, (EACJ Ref. No. 1 of 2010)

Sweet, Alec Stone, and Thomas L. Brunell. "Constructing a supranational constitution: Dispute resolution and governance in the European Community." *American Political Science Review* 92, no. 1 (1998): 63-81.

Weiler, Joseph. "The community system: the dual character of supranationalism." Yearbook of European law 1, no. 1 (1981): 267-306, 267.

Carving an Afro-Centric Framework Towards Effective Settlement of Maritime Boundary Disputes Among African States

By: ***Harriet Njoki Mboce, HSC****

Abstract

The article advances the author's arguments from previous publications on the need for an Afro-centric approach in addressing maritime boundary disputes in Africa. Based on literature review, the article argues that sufficient seeds have been sown to support an Afro-centric framework, thereby presenting a clearer way forward. Ubuntu, African renaissance, pan-Africanism, post-colonial theory, African socialism, endogenous development theory, and indigenous knowledge systems are offered as the strong strands through which – and in appropriate doses – the proposed *framework can be sewn.*

Key words: ***Afro-centric, Africa, Maritime Boundary Disputes***

I. Introduction

Maritime boundary disputes stem from a complex interplay of domestic and international triggers, including historical, humanitarian, legal, social, political, and resource tensions.[1] This

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[1] Timothy D Walker, 'A Brief Historical Overview of the Maritime Indian Ocean World (Ancient Times to 1950)', *The Indian Ocean and its Role in the Global Climate System* (Elsevier 2024) <https://www.sciencedirect.com/science/article/pii/B9780128226988000056> accessed 10 June 2024; Christian Bueger and Timothy Edmunds, *Understanding Maritime Security* (Oxford University Press 2024) <https://books.google.com/books?hl=en&lr=&id=D7MCEQAAQBAJ&oi

demands robust and nuanced interventions in order to promote cooperative regional relationships, development, legal clarity on jurisdiction, peace, resource ownership, security, and stability.[2] Effective settlement of maritime boundary disputes is also necessary for development and implementation of both international maritime security policies and strategies.[3]

The 1982 United Nations Convention on the Law of the Sea (1982 UNCLOS/the Convention) is often lauded for its 'comprehensive' regime of maritime governance, which includes a mechanism for settling maritime boundary disputes.[4] Nonetheless, the Convention

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=fnd&pg=PP1&dq=Why+Africa+must+resolve+its+maritime+boundary+disputes+Timothy+Walker&ots=pNOqbAFy0-&sig=g4zUqmpbBhF57B44J-1h70jlOg0> accessed 10 June 2024; Timothy Walker, 'Why Africa Must Resolve Its Maritime Boundary Disputes'.

[2] Emilia Justyna Powell and Krista E Wiegand, *The Peaceful Resolution of Territorial and Maritime Disputes* (Oxford University Press 2023) <https://books.google.com/books?hl=en&lr=&id=laa7EAAAQBAJ&oi=fnd&pg=PP1&dq=This+demands+robust+and+nuanced+interventions+in+order+to+promote+cooperative+regional+relationships,+development,+legal+clarity+on+jurisdiction,+peace,+resource+ownership,+security,+and+stability+&ots=OhGN8EHkLs&sig=sImL18Q4v1HS3zoU7-QjjuZSpx4> *accessed* 20 June 2024.

[3] Michael Sutherland, 'Marine Boundaries and Good Governance of Marine Spaces' <*https://unbscholar.lib.unb.ca/bitstreams/409cce21-4931-4947-bb02-6cfd299135a2/download*> accessed 17 June 2024.

[4] United Nations, Division for Ocean Affairs and the Law of the Sea, 'Oceans: The Lifeline of Our Planet Anniversary of the United Nations Convention on the Law of the Sea: 20 Years of Law and Order on the Oceans and Seas (1982-2002)' (*United Nations, Division for Ocean Affairs and the Law of the Sea*) <*https://www.un.org/depts/los/convention_agreements/convention_20years/oceansthelifeline.htm*> accessed 22 October 2020 The Convention's dispute resolution framework is an integral and inseverable component of the Convention itself .

is seemingly ill-equipped to deal with the evolving nature of maritime boundary disputes among African States. This limitation is revealed by the complexity of contemporary appropriation demands over the African maritime space as illustrated in the article, "*Examining the Role of Delimitation of the Continental Shelf and the Exclusive Economic Zone in relation to Maritime Boundary Disputes in Africa*".[5] A key recommendation of the said article is the need for Africa to prioritise a more cohesive approach to settling her maritime boundary disputes.[6] The present article contributes to the topic by presenting proposals on how Africa can achieve this recommendation.

To do so, this article shows how the dispute settlement framework of the 1982 UNCLOS contradicts tenets of Afro-centrism, and therefore often fails to address the unique contexts of African countries. This leads to sub-optimal outcomes as laid out in Section III below.[7] Ultimately, this article presents the Afro-centric paradigm as the most effective model for settling maritime boundary disputes among African States. It therefore advocates for a paradigm shift towards solutions that are not only for African countries but are also created by and with them.[8] One of the platforms through which this process

[5] Njoki Mboce, Kariuki Muigua, and Peter Munyi, 'Examining the Role of Delimitation of the Continental Shelf and the Exclusive Economic Zone in Relation to Maritime Boundary Disputes in Africa' (*Kenya Law*) <http://kenyalaw.org/kl/fileadmin/pdfdownloads/KLReviewJournal/Final-Joint-Article.pdf> accessed 9 April 2023.

[6] Ibid.

[7] Theodore Okonkwo, 'Maritime Boundaries Delimitation and Dispute Resolution in Africa' (2017) 08 Beijing Law Review 55.

[8] Ngozi Okonjo-Iweala, *Reforming the Unreformable: Lessons from Nigeria* (Mit Press 2014) <https://books.google.com/books?hl=en&lr=&id=HuV1DwAAQBAJ&oi

can be undertaken is through the African Union.

To demonstrate the ripeness of an Afro-centric approach in this case and Africa's capacity to harness such a framework, the article shares existing perspectives on Afro-centrism from at least ten African leaders from both academia and the political world. These perspectives can be applied in shaping an Afro-centric approach towards settling of maritime boundary disputes among African States. This article adopts the approach that the thought systems of societies generally influence their attitudes and behaviours.

In addressing these issues, the article seeks to contribute to the broader discourse on international peacekeeping and conflict resolution, emphasizing the importance of adapting global frameworks to regional realities. The article also seeks to contribute to the broader discourse on global sustainable blue economy. This is crucial not only for the stability of African States but also for the credibility and effectiveness of the United Nations—upon which the 1982 UNCLOS is anchored— in its mission to promote global peace.

=fnd&pg=PR7&dq=Okonjo-Iweala,+N.+(2012).+Reforming+the+Unreformable:+Lessons+from+Nigeria.+MIT+Press.&ots=ObLgHWpkMc&sig=woRhUZz5sCdBjM0A8d3VHfeYW_I> accessed 17 June 2024; Dambisa Moyo, *Dead Aid: Why Aid Is Not Working and How There Is a Better Way for Africa* (Macmillan 2009); Wangari Maathai, *The Green Belt Movement: Sharing the Approach and the Experience* (Lantern Books 2003) <https://books.google.com/books?hl=en&lr=&id=4bDghrBcXzUC&oi=fnd&pg=PR7&dq=Maathai,+W.+(2004).+The+Green+Belt+Movement:+Sharing+the+Approach+and+the+Experience.+Lantern+Books.&ots=_jxFEsGKhr&sig=rZugsBCtwgzDHJriGDDn1ASGmNI> accessed 17 June 2024; Thandika Mkandawire, 'Thinking about Developmental States in Africa' (2001) 25 Cambridge journal of economics 289.

Due to time limitations, this article cannot cover all aspects regarding the application of Afro-centrism in settling maritime boundary disputes among African States. It therefore aims to provoke thought and encourage further inquiry on the topic.

This article is divided into nine sections. Section I —the present section— lays the foundation and structure for the rest of the article. Section II discusses the drivers of maritime boundary disputes among African States. Section III highlights the Convention's approach to settling maritime boundary disputes. Sections IV and V are the backbone of this article. This is because section IV and parts of section V present cases where African States have applied indigenous systems in settlement of disputes. Section V further presents specific values upon which these indigenous systems are based, and which then offer the genetic makeup for an Afro-Centric Approach. Section VI presents a summary of the findings while section VII discusses the challenges to the establishment of an Afro-centric approach for settlement of maritime boundary disputes among African States. Section VIII highlights the article's recommendations and section IX sums up the discussions.

II. Drivers of Maritime Boundary Disputes among African States

One of the triggers of maritime boundary disputes among African States is the colonial legacy.[9] The arbitrary borders drawn by colonial powers ignored the geographical and cultural realities of African societies, leading to ambiguities and overlaps in maritime boundaries

[9] João Sarmento, 'Colonialism, Post-Colonialism, and Its Heritage Imprint', *Cultural Heritage and Tourism in Africa* (Routledge 2023) <https://www.taylorfrancis.com/chapters/edit/10.4324/9781003153955-14/colonialism-post-colonialism-heritage-imprint-jo%C3%A3o-sarmento> accessed 20 June 2024.

after independence.[10] Additionally, ambiguities in treaties inherited from colonial times or made post-independence have often led to differing interpretations of maritime boundaries. Discrepancies in historical maps and documents further complicate the issue.[11] This colonial and post-colonial domination of processes directly related to Africa sketches some of the struggles in defining and establishing Afro-centrism in postcolonial times.[12]

Another factor is the 'paradoxical resource curse'.[13] Africa is blessed with valuable offshore resources such as oil, gas, and fisheries which stir domestic and international appetite for control over.[14] Many international actors increasingly fund exploration and exploitation of

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[10] Lindsay Frederick Braun, 'Cartography in Colonial Africa', *Oxford Research Encyclopedia of African History* (2024) <https://oxfordre.com/africanhistory/display/10.1093/acrefore/9780190277734.001.0001/acrefore-9780190277734-e-632> accessed 10 June 2024; Njoki Mboce, Kariuki Muigua, and Peter Munyi (n 5); Ewan W Anderson, *International Boundaries: A Geopolitical Atlas* (Psychology Press 2003) <https://books.google.com/books?hl=en&lr=&id=E7-menNPxREC&oi=fnd&pg=PR11&dq=Anderson,+E.+W.+(2003).+International+Boundaries:+A+Geopolitical+Atlas.+Routledge.&ots=Ge6K39jY8l&sig=3soyxj8DIEQ8TdrF_PGR18r1siE> accessed 9 June 2024.

[11] Robert D Hodgson and E John Cooper, 'The Technical Delimitation of a Modern Equidistant Boundary' (1976) 3 Ocean Development & International Law 361.

[12] Sarmento (n 9).

[13] James Boafo and others, 'The Race for Critical Minerals in Africa: A Blessing or Another Resource Curse?' (2024) 93 Resources Policy 105046; Njoki Mboce, Kariuki Muigua, and Peter Munyi (n 5).

[14] Hans B Christensen, Mark Maffett and Thomas Rauter, 'Reversing the Resource Curse: Foreign Corruption Regulation and the Local Economic Benefits of Resource Extraction' (2024) 16 American Economic Journal: Applied Economics 90.

maritime resources in Africa.[15] To safeguard their interests, they also invest in curtailing any competing claims.[16] This latter factor raises the possibility that the number of disputes—or at least their magnitude— would be lower if the appetite was purely domestic.[17]

Limited precise legal and technical knowledge in defining maritime boundaries also contributes to disputes.[18] While the 1982 UNCLOS provides a framework for settling maritime disputes, not all African States have the capacity or willingness to fully implement its provisions.[19] This often leads to reliance on bilateral negotiations which are often supported by invested third parties, often making them contentious and protracted.[20] This relatively minimal investment in developing the necessary capacity suggests that maritime boundary delimitation is not necessarily the natural highest ranking of priority for African States. This buttresses the proposal for

[15] Clive Schofield, 'Competing Claims to Maritime Jurisdiction in the Indian Ocean' [2009] Fisheries Exploitation in the Indian Ocean: Threats and Opportunities 104.
[16] Ibid; Clive Schofield and I Arsana, 'The Delimitation of Maritime Boundaries: A Matter of Life or Death for East Timor?' <https://ro.uow.edu.au/lawpapers/300/> accessed 10 June 2024.
[17] Linnet Hamasi and Xavier Ichani, 'Kenya-Somalia Maritime Border Dispute: Genesis, Prospects and Challenges' Current Developments, Peace and Stability in the Horn of Africa 61.
[18] H Njoki Mboce, 'India–Africa Co-Operation on Maritime Security: Need for Deeper Engagement' (2019) 43 Strategic Analysis 261.
[19] Santiago Salvador and Marta Chantal Ribeiro, 'Socio-economic, Legal, and Political Context of Offshore Renewable Energies' (2023) 12 WIREs Energy and Environment e462; Áslaug Ásgeirsdóttir and Martin Steinwand, 'Dispute Settlement Mechanisms and Maritime Boundary Settlements' (2015) 10 The Review of International Organizations 119.
[20] Robert Beckman, 'The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea' (2013) 107 American Journal of International Law 142.

Africa to deliberately steer her concerns and approaches to them. Moreover, geopolitical rivalries and differing national interests can cause and exacerbate maritime boundary disputes.[21]

These drivers give an indication of African States' context, capacity, and priorities in relation to maritime boundaries, which is crucial in examining an effective mechanism for settlement of their disputes.

III. The 1982 UNCLOS Approach to Settling Maritime Boundary Disputes

The Convention provides a framework for the establishment of maritime zones, outlines principles for their delimitation, stipulates State jurisdiction in respect of each zone, and establishes a framework for settling boundary delimitation disputes.[22] This demonstrates the Convention's approach of division of resources. The framework requires State Parties to settle disputes concerning interpretation or application of the Convention by peaceful means.[23] In this regard, States can either pick from the various procedures set out in the Convention, or they would otherwise be bound by its compulsory procedures.[24] This demonstrates the Convention's universality and compulsory nature of its dispute settlement mechanism.

Various elements have limited the efficacy of the Convention's framework for settling of disputes. One is jurisdictional limitations

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[21] Andreas Østhagen, 'Maritime Boundary Disputes: What Are They and Why Do They Matter?' (2020) 120 Marine Policy 104118; Okonkwo (n 7).
[22] '1982 UNCLOS' <https://www.un.org/depts/los/convention_agreements/texts/unclos/UNCLOS-TOC.htm> accessed 27 January 2020.
[23] Ibid, article 279.
[24] Ibid, Part XV.

especially arising from optional exceptions.[25] This is because States can exclude certain categories of disputes from the Convention's compulsory procedures.[26] The exclusions often relate to disputes concerning maritime boundaries. Another is non-ratification and non-recognition of the Convention and its mandate by some major maritime powers, such as the United States, which undermines the universal application and enforcement of its dispute resolution mechanisms.[27] Even among signatories, there are instances of non-compliance with decisions of the Convention's adjudicative organs, which diminishes the perceived authority of the Convention and its organs. Such example is the rejection by China of the 2016 South China Sea arbitration ruling.[28]

Further, lack of an easily accessible enforcement mechanism to ensure compliance with its dispute resolution outcomes is a significant

[25] Eirik Bjorge and Andreas Motzfeldt Kravik, 'Settlement of Disputes by the International Court of Justice: Two Souls in the Court's Breast' in Maren Heidemann (ed), *The Transformation of Private Law – Principles of Contract and Tort as European and International Law*, vol 2 (Springer International Publishing 2024) <https://link.springer.com/10.1007/978-3-031-28497-7_11> accessed 17 June 2024.

[26] '1982 UNCLOS' (n 22) Articles 297 and 298.

[27] Sam Bateman, 'UNCLOS and Its Limitations as the Foundation for a Regional Maritime Security Regime' (2007) 19 Korean Journal of Defense Analysis 27.

[28] Alfredo C Robles Jr, *The Defaulting State and the South China Sea Arbitration* (Springer Nature 2023) <https://books.google.com/books?hl=en&lr=&id=uzzBEAAAQBAJ&oi=fnd&pg=PR5&dq=China+rejects+South+China+Sea+arbitration+ruling&ots=eheOHZFdLt&sig=21L85zzc3evt7OZmn68xBTC6I-8> accessed 20 June 2024.

hamper.[29] The 1982 UNCLOS largely relies on states to voluntarily comply with rulings, which can be problematic when national interests are at stake.[30] Related to this is the fact that enforcement of decisions by the Conventions adjudicative organs can be influenced by diplomatic and political pressures, reducing the impartiality and effectiveness of dispute resolution processes.[31] Moreover, the procedures for dispute resolution under 1982 UNCLOS can be costly and time-consuming, deterring states from pursuing legal action and opting for bilateral negotiations or other means instead.[32] The Convention also contains provisions that are open to interpretation, leading to varying understandings and implementations by different states. This can complicate dispute resolution and lead to inconsistent

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[29] Alfredo C Robles Jr, 'The Defaulting State and the Jurisdiction of Annex VII Arbitral Tribunals', *The Defaulting State and the South China Sea Arbitration* (Springer 2023).

[30] Richard Collins, 'Navigating Choppy Waters: UNCLOS Dispute Settlement Coming of Age?', *The changing character of international dispute settlement* (Cambridge University Press 2023) <*https://www.academia.edu/download/76125230/Collins_Navigating_Choppy_Waters_Academia_Draft_.pdf*> accessed 17 June 2024; Shuo Li, 'Unilateral Actions in the Development of the Law of the Sea' (2023) 153 Marine Policy 105658.

[31] Patrick Vidija, 'Uhuru Kenyatta: Kenya Will Not Cede an Inch of Its Soil to Anyone' (*The Standard*) <*https://www.standardmedia.co.ke/national/article/2001418905/uhuru-kenyatta-kenya-will-not-cede-an-inch-of-its-soil-to-anyone*> accessed 7 April 2022.

[32] Najeeb Al-Nauimi and Richard Meese, *International Legal Issues Arising under the United Nations Decade of International Law* (Martinus Nijhoff Publishers 2023) <https://books.google.com/books?hl=en&lr=&id=dMX7EAAAQBAJ&oi=fnd&pg=PR3&dq=The+United+Nations+Convention+on+the+Law+of+the+Sea+is+expensive+&ots=y0A4nS64Lu&sig=rxeSP3Hun2Jt5Oqg1hrL7xo0vgw> accessed 17 June 2024.

outcomes.[33]

It is therefore evident that the Convention's approach to maritime delimitation is greatly characterised by division of resources. The buy-in to its mechanism for settlement of delimitation and decisions is limited. This is a stark contrast to the Afro-centric approach discussed below.

IV. The Afro-centric Paradigm

Afro-centrism has severally passed the efficacy test in settlement of disputes. For instance, many African societies have long relied on councils of elders and traditional leaders to mediate and resolve disputes. Examples of this include the *Gacaca* courts used within Rwanda to mediate and settle disputes related to the 1994 genocide.[34] Another example is the traditional *Oromo Gadaa* socio-political system in Ethiopia, where elected leaders and councils of elders manage community affairs and resolve disputes.[35] The *Ashanti* Kingdom in Ghana which relies on a council of elders, known as the *Asanteman* Council, to resolve disputes and govern local matters is another example.[36] Additionally, the *baraza* system in Kenya uses elders in

[33] Njoki Mboce, Kariuki Muigua, and Peter Munyi (n 5).
[34] Philip Clark and Zachary Daniel Kaufman, *After Genocide: Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond* (Hurst London 2008) <https://www.academia.edu/download/109715979/S00084239100007882 0231228-1-p326lc.pdf> accessed 17 June 2024.
[35] Legesse Asmarom, *Gada: Three Approaches to the Study of African Society* <https://zelalemkibret.wordpress.com/wp-content/uploads/2012/05/gada-asmerom-legese.pdf> accessed 17 June 2024.
[36] Kofi Abrefa Busia, *The Position of the Chief in the Modern Political System of Ashanti: A Study of the Influence of Contemporary Social Changes on Ashanti*

mediating conflicts and making communal decisions.[37] A further example is the *Bashingantahe* traditional institution in Burundi where elders, known as *Bashingantahe*, mediate disputes and uphold justice within the community.[38]

A multi-jurisdictional example is the adoption of post-colonial boundaries by African States.[39] The adoption was first through the Organisation of African Unity — the precursor to the African Union —

Political Institutions (Routledge 2018) <https://www.taylorfrancis.com/books/mono/10.4324/9781351030823/position-chief-modern-political-system-ashanti-busia> accessed 17 June 2024.

[37] Dr Francis Kariuki, 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities' [2015] Challenges and Opportunities (July 9, 2015) <*https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3646985*> *accessed 17 June 2024; Northern Kenya, 'Conflict in Northern Kenya'* <*https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=9ccfc235dd082676deb1154b84dfdca38a608430*> accessed 17 June 2024.

[38] Philippe Ntahombaye and Gaspard Nduwayo, 'Identity and Cultural Diversity in Conflict Resolution and Democratisation for the African Renaissance: The Case of Burundi' (2007) 7 African Journal on Conflict Resolution 239.

[39] 'Uti Possidetis Juris' (*LII / Legal Information Institute*) <https://www.law.cornell.edu/wex/uti_possidetis_juris> accessed 15 June 2024; 'Uti Possidetis Iuris' (*obo*) <https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0065.xml> accessed 15 June 2024; Paul R Hensel, Michael E Allison and Ahmed Khanani, 'The Colonial Legacy and Border Stability: Uti Possidetis and Territorial Claims in the Americas', *International Studies Association meeting, Montreal* (2004); Giuseppe Nesi, '*Uti Possidetis Doctrine*' [2008] Max Planck Encyclopaedia of Public International Law Loosely translated from Latin to mean 'as [you] possess under law' is a principle of customary international law that serves to preserve the boundaries of colonies emerging as States. Originally applied to establish the boundaries of decolonized territories in Latin America, the principle has become a rule of wider application, notably in Africa.

and later by the African Union.[40] This approach was primarily to maintain stability and prevent conflicts over borders following de-colonization.[41] Notably, the approach has been reinforced through various decisions by the International Court of Justice. This demonstrates that if Africa was to firmly present a crystal Afro-centric criteria for settlement of its maritime boundary disputes, the 1982 UNCLOS institutions would be bound by the same because, as discussed in Section III, the Convention allows for States to elect their dispute resolution procedures.[42] These examples also demonstrate the efficacy of African indigenous systems—based on local customs, values, and knowledge—in settlement of disputes.

This section draws out existing perspectives from more than ten African proponents of Afro-centrism both from academia and the political world. This provides context, relevance, and significance for the present article. It is also an opportunity to evaluate the existing perspectives and build on them towards advancing the case for Afro-centrism, especially in respect of settlement of maritime boundary disputes. The reliance on a myriad of African proponents is deliberate to demonstrate that Afro-centrism as a concept is relatively firmly developed and embraced by Africans, therefore locally owned and

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[40] African Union, 'Speeches and Statements Made at the First Organisation of African Unity (OAU) Summit, 1963 | African Union' (*African Union*) <https://au.int/en/speeches/19630508/speeches-and-statements-made-first-organisation-african-unity-oau-summit-1963> accessed 29 September 2020.

[41] Ibid.

[42] '1982 UNCLOS' (n 22) Articles 287, 280, 281, and 282 of the 1982 UNCLOS collectively provide States with the flexibility to elect their preferred dispute resolution mechanisms, whether through bodies established or recognised by the Convention, or alternative means agreed upon by the State Parties involved. .

ripe for adoption.

Molefi Kete Asante is credited with the scholarly development and eventual emergence of the "*Afrocentric Idea*" in the mid-20th century.[43] He presents Afro-centricity as a philosophical paradigm focusing on the agency of African people to generate theories and methods of analysis and correctives to the social, economic, and cultural conditions of the African people.[44] He pivots Afro-centricity's innovation in approaching knowledge related to the African people on the assertion that African agency is the central instrument in a cultural re-orientation and narratives in relation to the African realm.[45]

Further to Asante's postulation, Osei-Hwedie's article, "*Afro-Centrism: The Challenge of Social Development*", also aligns with three strands of this present article.[46] Firstly, it explores the concept of Afro-centrism which it presents as a framework emphasizing African identity and heritage in addressing social issues.[47] Secondly, it

[43] Reynaldo Anderson, 'Molefi Kete Asante: The Afrocentric Idea and the Cultural Turn in Intercultural Communication Studies' (2012) 36 International Journal of Intercultural Relations 760; Molefi K Asante, 'Afrocentricity: The Theory of Social Change' <https://cir.nii.ac.jp/crid/1130000797971063808> accessed 15 June 2024.
[44] Molefi Kete Asante, 'Afrocentricity', *Routledge Handbook of Pan-Africanism* (Routledge 2020) <https://www.taylorfrancis.com/chapters/edit/10.4324/9780429020193-10/afrocentricity-molefi-kete-asante> accessed 15 June 2024.
[45] Ibid.
[46] Kwaku Osei-Hwedie, 'Afro-Centrism: The Challenge of Social Development' (2007) 43 Social Work/Maatskaplike Werk <https://socialwork.journals.ac.za/pub/article/view/279> accessed 15 June 2024.
[47] Ibid.

advocates for reclaiming African cultural and intellectual traditions in development strategies and critiques the inadequacies of the Western models for often ignoring the unique contexts of African countries.[48] Thirdly, it champions for an Afro-centric approach that centres African values, cultures, and perspectives.[49] Osei-Hwedie highlights the lasting effects of colonialism, including the marginalization of African knowledge systems, and calls for policies rooted in African realities.[50] He stresses the importance of education in fostering African identity and pride, and advocates for integrating modernity with African traditions.[51]

Osei-Hwedie advocates for a balanced approach that integrates beneficial aspects of modernity with African traditions and values.[52] This perspective is crucial to this article as it supports the idea that, whilst the 1982 UNCLOS reflects globalization and modernity, its interpretation and application in Africa must consider the local context. The article outlines practical steps for implementing Afro-centric strategies, such as: educational reforms (that incorporate African history, languages, and values to empower future generations), inclusive governance, economic self-reliance, and protecting cultural heritage, while discussing African values like *ubuntu/botho*, socialism, and neoliberalism in development.

The subsequent discussions will focus on specific values that constitute the strands of Afro-centrism including *African Renaissance, and pan-Africanism*. The subsequent discussions will also crystallise

[48] Ibid.
[49] Ibid.
[50] Ibid.
[51] Ibid.
[52] Ibid.

on the 'endogenous development theory'.

V. Afro-Centric Values -The Strands for an Afro-Centric Approach

Notably, during the negotiations leading to the 1982 UNCLOS, African States were keen on ensuring the enjoyment of maritime resources by all African States.[53] In this regard, the OAU's joint position to the third United Nations Conference on the Law of the Sea argued that the resources of the seabed are the common heritage of humankind, not to be exploited by whoever is wealthy enough to get there first.[54] Additionally, the OAU worked to ensure that the Convention would establish exclusive economic zones (EEZs) and recognise certain maritime rights for landlocked States.[55] They also pushed for an international seabed authority (ISA) with the power to engage in seabed mining, and to control use by others through

[53] C Odidi Okidi and Sidney B Westley, 'Management of Coastal and Offshore Resources in Eastern Africa' <http://erepository.uonbi.ac.ke/bitstream/handle/11295/2023/op28-319140.pdf?sequence=3> accessed 20 June 2024; Andronico O Adede, *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea: A Drafting History and a Commentary*, vol 10 (Brill 1987) <https://books.google.com/books?hl=en&lr=&id=iQ9-gxEG3c8C&oi=fnd&pg=PA3&dq=limitations+of+the+United+Nations+Convention+on+the+Law+of+the+Sea+in+Africa&ots=dHsqXiwoB3&sig=6rylzQR0sHWzdBEXGTkxTu6Xjmk> accessed 20 June 2024.

[54] Edwin Egede, 'UNCLOS 82: Africa's Contributions to the Development of Modern Law of the Sea 40 Years Later' (2023) 148 Marine Policy 105463.

[55] Jamal Barnes and Daniel Baldino, 'A Network Maritime Security Approach to Intelligence Sharing in the IOR' (2018) 14 Journal of the Indian Ocean Region 315; C Odiai Okidi, 'The Kenya Draft Articles on Exclusive Maritime Economic Zone Concepts: Analysis and Comments on the Original Proposal' Development Studies or the University of Nairobi. This paper is not for quotation without permission of the authors, as specified in the Copyright Act, Cap 130 of the Laws of Kenya.

licenses.[56] Profits from the ISA mining activities and royalties from the licences would be distributed among all states as the common heritage of mankind.[57] This approach by African States was a clear demonstration of compassion, mutual care, and community, which is emphasised by the philosophy of ***ubuntu.***

The philosophy of ***ubuntu*** which emphasizes interconnectedness of all people, compassion, mutual care, and community served as a powerful foundation for dispute resolution in post-apartheid South Africa. It is an African philosophy whose early proponents include Desmond Tutu and Nelson Mandela.[58] It argues that solutions to African problems should be rooted in communal values and local contexts including reconciliation.[59] Tutu and Mandela have both

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[56] Charles Emeka Ochem and Anwulika Joy Debski, 'Historical Development to the 1982 United Nations Conventions on the Law of the Sea and the New International Economic Order.' (2021) 2 Igbinedion Universuity journal of jurisprudence and international law <https://rgu-repository.worktribe.com/output/1544298> accessed 20 June 2024.

[57] Ibid.

[58] *Long Walk to Freedom* (2017) <https://www.hachettebookgroup.com/titles/nelson-mandela/long-walk-to-freedom/9780759521049/> accessed 31 May 2024; 'Conversations with Myself' (*Macmillan Publishers*) <https://us.macmillan.com/books/9781429988391/conversationswithmyself> accessed 31 May 2024; *In His Own Words* (2017) <https://www.hachettebookgroup.com/titles/nelson-mandela/in-his-own-words/9780316110198/> accessed 31 May 2024; Desmond Tutu, 'Speech: No Future without Forgiveness' <https://digitalcommons.unf.edu/cgi/viewcontent.cgi?article=1007&context=archbishoptutupapers> accessed 31 May 2024.

[59] *Long Walk to Freedom* (n 58); 'Conversations with Myself' (n 58); *In His Own Words* (n 58); 'President Nelson Mandela: 1994 State of the Nation Address | South African Government' <https://www.gov.za/news/speeches/president-nelson-mandela-1994-

highlighted the importance of Ubuntu in fostering social cohesion and collective problem-solving in Africa.[60] This 'communal' ubuntu approach is a stark contrast against the 'selfish appropriation' characteristic of the 1982 UNCLOS framework. This demonstrates that an Afrocentric approach rooted in *Ubuntu* can foster reconciliation and healing, which are vital for resolving conflicts and building lasting peace.

Another is African Renaissance a philosophical and political movement propagated by among others, Thabo Mbeki.[61] This approach calls for a revitalization of African culture, economic development, and political governance as the strategy towards African solutions to African problems.[62] It emphasizes the need for self-reliance, regional cooperation, and leveraging Africa's unique

state-nation-address-24-may-1994> accessed 31 May 2024; 'President Nelson Mandela: 1994 Presidential Inauguration | South African Government' <https://www.gov.za/news/speeches/president-nelson-mandela-1994-presidential-inauguration-10-may-1994> accessed 31 May 2024.

[60] 'President Nelson Mandela: 1994 State of the Nation Address | South African Government' (n 59); 'President Nelson Mandela: 1994 Presidential Inauguration | South African Government' (n 59).

[61] 'ANC.Pdf - Statement of Deputy President Thabo Mbeki, on Behalf of The African National Congress, on the Occasion of the Adoption of the Constitutional Assembly of "The Republic of South Africa Constitution Bill 1996": Cape Town, May 8, 1996' <https://justice.gov.za/constitution/history/MEDIA/ANC.PDF> accessed 31 May 2024.

[62] Ibid; John Sodiq Sanni and Madalitso Zililo Phiri, 'Monuments and Memory in Africa' <https://api.taylorfrancis.com/content/books/mono/download?identifierName=doi&identifierValue=10.4324/9781003432876&type=googlepdf> accessed 31 May 2024.

cultural heritage.[63] The proposal for managing inter-state conflict through cooperation instead of judicial and military interventions is timeless.[64]

Further, pan-Africanism, whose earliest documented proponents were Kwame Nkrumah and W.E.B. Du Bois promotes solidarity among all people of African descent and advocates for collective self-reliance and unity across the continent.[65] Nkrumah and Du Bois argue that Africa must unite to overcome colonial legacies and socio-economic challenges.[66] They urge African States to develop solutions that reflect their shared history and aspirations.[67] The approach advanced by this philosophy of Africa as one collective unit contradicts the nationalistic approach of the 1982 UNCLOS framework.

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[63] Patricia Agupusi, 'The African Union and the Path to an African Renaissance' (2021) 39 Journal of Contemporary African Studies 261.
[64] Sandy Nur Ikfal Raharjo, Tri Nuke Pudjiastuti and Hayati Nufus, 'Cross-Border Cooperation as a Method of Conflict Management: A Case Study in the Sulu-Sulawesi Sea' (2024) 24 Conflict, Security & Development 277.
[65] Kwame Nkrumah, Roberta Arrigoni and Giorgio Napolitano, *Africa Must Unite* (Heinemann London 1963) <https://www.marxists.org/subject/africa/nkrumah/1963/africa-must-unite.pdf> accessed 17 June 2024; William Edward Burghardt Du Bois and Manning Marable, *Souls of Black Folk* (Routledge 2015) <https://api.taylorfrancis.com/content/books/mono/download?identifierName=doi&identifierValue=10.4324/9781315631998&type=googlepdf> accessed 17 June 2024.
[66] Nkrumah, Arrigoni and Napolitano (n 65); Arthur Chatora, '10 Quotes from Kwame Nkrumah' (*This is africa*, 21 September 2015) <https://thisisafrica.me/politics-and-society/10-quotes-by-kwame-nkrumah/> accessed 29 September 2020; Du Bois and Marable (n 65).
[67] Chatora (n 66); Nkrumah, Arrigoni and Napolitano (n 65); Du Bois and Marable (n 65).

Another perspective is the ***post-colonial theory*** whose proponents include Chinua Achebe and Ngũgĩ wa Thiong'o.[68] It emphasizes the importance of rejecting colonial frameworks and valuing indigenous knowledge systems.[69] This perspective argues that Africa's development should be guided by its own cultural, historical, and social contexts, rather than by external models imposed by former colonial powers.[70]

A further perspective is ***"African Socialism"***, whose proponents include Julius Nyerere and Leopold Senghor, which argues for a model of development that combines traditional African communal values with modern socialist principles.[71] This philosophy promotes self-reliance, social justice, and the use of indigenous institutions and practices to address contemporary challenges.[72] In line with this perspective, this article supports the argument that while maritime boundary delimitation is one way by which States define the limits of their maritime entitlements where they have the potential to overlap with the claims of other States, it is neither the only way to address

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[68] Chinua Achebe, *Things Fall Apart* (Doubleday, Anchor Books 1994) <https://www.centralschool.edu.vu/uploads/1/1/4/4/114402701/things-fall-apart.pdf>; Ngugi wa Thiong'o, *Decolonising the Mind: The Politics of Language in African Literature.* <*https://marxistnkrumaistforum.wordpress.com/wp-content/uploads/2013/12/wa-thiong_o-decolonising-the-mind-the-politics-of-language-in-african-literature.pdf*> accessed 17 June 2024; Ngugi wa Thiong'o and Ngũgĩ wa Thiong'o, *Weep Not, Child* (Heinemann 1987).

[69] Achebe (n 68)(n 68); Thiong'o and Thiong'o (n 68).

[70] Achebe (n 56) (n 56); Thiong'o and Thiong'o (n 56).

[71] Walter AE Skurnik, 'Leopold Sedar Senghor and African Socialism' (1965) 3 The Journal of Modern African Studies 349; Julius K Nyerere, 'Ujamma – The Basis of African Socialism' <https://www.jpanafrican.org/edocs/e-DocUjamma3.5.pdf>.

[72] Skurnik (n 71); Nyerere (n 71).

this situation, nor is it the end of the process.[73] Maritime joint development zones can—and have been applied— to areas of overlapping maritime claims, often in lieu of delimiting a maritime boundary.[74]

The ***endogenous development theory*** whose proponents include Paul Kagame, Calestous Juma, Thandika Mkandawire Akin Mabogunje, and Ngugi Thiong'o emphasize the importance of local knowledge, resources, and cultural practices in driving sustainable development. Paul Kagame has also advocated for policies that leverage local strengths and address specific African contexts, promoting a model of development that is self-sustaining and contextually relevant.[75]

Closely related to the endogenous development theory as well as Asante's and Osei-Hwedie's propositions on the use of indigenous knowledge as a way forward is the concept of ***indigenous knowledge systems*** whose proponents include Odora Hoppers, George Dei, Paul Sillitoe, and Akwe Masango. Hoppers argues for the integration of indigenous knowledge systems with Western scientific knowledge to

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[73] Clive Schofield, 'Parting the Waves: Claims to Maritime Jurisdiction and the Division of Ocean Space' (2012) 1 Penn St. JL & Int'l Aff. iii.
[74] Njoki Mboce, Kariuki Muigua, and Peter Munyi (n 5); Schofield (n 73).
[75] 'Mo Ibrahim in Conversation with H.E. President Paul Kagame, Chairperson of the African Union' (*Mo Ibrahim Foundation*) <https://mo.ibrahim.foundation/news/2018/mo-ibrahim-conversation-he-president-paul-kagame-chairperson-african-union> accessed 17 June 2024; Calestous Juma, *The New Harvest: Agricultural Innovation in Africa* (Oxford University Press 2015); Mkandawire (n 8); Akin L Mabogunje, 'Institutional Radicalization, the State, and the Development Process in Africa' (2000) 97 Proceedings of the National Academy of Sciences 14007(n 68).

create a holistic and inclusive approach to development.[76] She emphasizes the importance of recognizing and valuing indigenous knowledge as a legitimate and critical component of the global knowledge economy.[77] Hoppers discusses the challenges and opportunities of incorporating indigenous knowledge systems into South African academic institutions.[78] She highlights the need for educational reforms that acknowledge and integrate indigenous knowledge to enhance cultural relevance and academic inclusivity.[79] Dei examines the role of indigenous knowledge in African development, arguing that it is essential for sustainable development.[80] He stresses that indigenous knowledge provides valuable insights and solutions that are culturally appropriate and environmentally sustainable.[81] Sillitoe, Dixon, and Barr advocate for participatory approaches that respect and utilize the knowledge of local communities to ensure more effective and sustainable

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[76] Catherine Alum Odora Hoppers, *Indigenous Knowledge and the Integration of Knowledge Systems: Towards a Philosophy of Articulation* (New Africa Books 2002) <https://books.google.com/books?hl=en&lr=&id=h9HDYNhYqfAC&oi=fnd&pg=PR3&dq=Hoppers,+Catherine+A.+Odora+(Ed.).+Indigenous+Knowledge+and+the+Integration+of+Knowledge+Systems:+Towards+a+Philosophy+of+Articulation.+Claremont:+New+Africa+Books,+2002&ots=X_mX0ApS71&sig=MIJUUKiLY1HqAVRuyZz9nm4_PR0> accessed 31 May 2024.

[77] Ibid.

[78] Catherine A Odora Hoppers, 'Indigenous Knowledge Systems and Academic Institutions in South Africa' (2001) 19 Perspectives in education 73.

[79] Ibid.

[80] George J Dei, Budd L Hall and Dorothy Goldin Rosenberg, *Indigenous Knowledges in Global Contexts: Multiple Readings of Our World.* (ERIC 2000) <https://eric.ed.gov/?id=ED456007> accessed 31 May 2024.

[81] Ibid.

development outcomes.[82] They provide a comprehensive guide to methodologies for incorporating indigenous knowledge into development practices.[83] Masango explores the protection of indigenous knowledge within South Africa's intellectual property framework.[84] He argues that existing laws are inadequate and calls for reforms to ensure that indigenous knowledge is properly recognized, protected, and compensated, preventing exploitation and preserving cultural heritage.[85]

It is apparent that Afro-centric traditional conflict resolution techniques offer great prospects for peaceful "win-win" co-existence and harmonious relationships in post-conflict periods because they provide opportunity to interact with the parties concerned, promote consensus-building, social bridge reconstructions and enactment of order in the society.[86] The 1982 UNCLOS adjudicative institutions on the other hand adopt the "winner takes it all approach".[87]

VI. Summary of findings

These discussions show that Afrocentrism offers a framework that is deeply rooted in African values, experiences, and knowledge

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[82] Paul Sillitoe, Peter Dixon and Julian Barr, 'Indigenous Knowledge Inquiries: A Methodologies Manual for Development' [2005] (No Title) <https://cir.nii.ac.jp/crid/1130000793810342016> accessed 17 June 2024.
[83] Ibid.
[84] Charles A Masango, 'Indigenous Traditional Knowledge Protection: Prospects in South Africa's Intellectual Property Framework?' (2010) 76 South African Journal of Libraries and Information Science 74.
[85] Ibid.
[86] Adeyinka Theresa Ajayi and Lateef Oluwafemi Buhari, 'Methods of Conflict Resolution in African Traditional Society' (2014) 8 African research review 138.
[87] Ibid.

systems. The Afro-centric values discussed place an apparent emphasis on responsibility rather than rights—which are mutually inclusive rather that dialectically opposed. Cross cutting specific values include interconnectedness of all people, compassion, mutual care, and community. These values diminish obsessions with delimitation and *'winner takes it all approach to disputes"* which is characteristic of the decisions by the adjudicative institutions of the 1982 UNCLOS. Effectively, an Afro-centric approach leans towards prioritisation of joint development and cooperation agreements.

Afro-centrism emphasizes self-reliance, endogenous development, and the importance of local knowledge and context. An Afro-centric paradigm is one that is specifically tailored to address the unique dynamics of African states. By embracing Afro-centricity, African States can develop more effective, legitimate, and sustainable dispute resolution mechanisms that truly reflect the continent's unique cultural and historical context. Additionally, this approach promotes greater unity, empowerment, and resilience across the region.

The arguments for Afro-centric solutions to African problems have both been influenced by a body of pre-independence and post-independence African practices and leaders. It contradicts the liberal internationalism or liberal institutionalism arguments for a global framework (under the United Nations), which emphasize the importance of international organizations and multilateral cooperation to address global issues effectively.

These discussions collectively underscore the importance of local agency in achieving effective settlement of maritime boundary disputes among African States. They argue that African solutions to African problems must be driven by Africans themselves, utilizing

indigenous knowledge and local resources to create policies and strategies that are relevant and effective within their unique contexts. This approach not only fosters self-reliance but also ensures that efforts towards settlement of maritime boundary disputes among African States are contextually appropriate and more likely to succeed.

VII. Challenges to the establishment of an Afro-Centric Approach for Settlement of Maritime Boundary Disputes Among African States

The above discussions demonstrate the optimism and framework for the attainment of an Afro-Centric approach towards effective settlement of maritime boundary disputes among African States. Nonetheless, this article is cognisant of various roadblocks. One is the risk of oversimplification and dangers of exclusivity also expressed by Abu Shardow Abarry.[88] In supporting Afro-centrism, Abarry cautions that it should not reduce African experiences to monolithic or homogenized narratives, as this can undermine the diversity and richness of African traditions and histories.[89] Conversely, Afrocentric scholarship should recognize and celebrate the varied cultural, social, and political contexts of African peoples—including the diverse experiences and identities within the African diaspora— rather than imposing a singular perspective.[90]

Abarry stresses the importance of self-criticism and dialogue within the Afrocentric community to avoid dogmatism and to ensure the

[88] Abu Shardow Abarry, 'Afrocentricity: Introduction' (1990) 21 Journal of Black Studies 123.
[89] Ibid.
[90] Ibid.

continual evolution and relevance of Afrocentric thought.[91] To achieve this, he calls for critical engagement within Afrocentric scholarship, urging scholars to rigorously interrogate and refine Afrocentric theories and methodologies.[92]

This article also agrees with Brel Grâce Mangalala's conclusion in the article, "*Understanding the Pan-Africanists in Africa*", that differences between the Pan-Africanists of yesterday and those of today in in their pursuit of Afro-centrism critically hampers the necessary strides relevant towards attaining Afro-centrism.[93] For instance, while the earlier generation was radical, determined, and had a clear agenda for Africa's liberation and unification, today's Pan-Africanists lack revolutionary spirit, purpose, and the courage to implement their ideas due to fear of Western retaliation.[94] The latter also suffer from a lack of solidarity, unity, and commitment, and are often corrupted.[95] This results in misunderstandings, contradictions, and divisions in the Pan-African struggle, with some acting as agents of imperialism, colonialism, and neo-colonialism.[96]

This article agrees with Mangalala's recommendation for a new generation of uncorrupted Pan-African revolutionaries who possess a revolutionary spirit, unity, and a common goal for Africa's benefit,

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[91] Ibid.
[92] Ibid.
[93] BG Mangalala, 'Understanding the Pan-Africanists in Africa' [2023] Global Social <*https://www.humapub.com/admin/alljournals/gssr/papers/D9OFu9eSvt.pdf*> accessed 17 June 2024.
[94] Ibid.
[95] Ibid.
[96] Ibid.

as well as a new type of African citizen, one who is dedicated, modest, honest, and informed.[97] However, based on the described circumstances, and the present author's own encounters and challenges in the course of advancing Afro-centrism in settling maritime boundary disputes among African States, the author agrees, the author acknowledges the difficulty in implementation of Mangalala's recommendations.

VIII. Recommendations

There is great need for highlighting and harnessing the role of indigenous knowledge systems in the development of a concrete Afro-centric approach towards effective settlement of maritime boundary disputes among African States. This would help in overcoming dependency through a homegrown approach that creates and implements institutional capacity, fosters synergy and African States and their citizens, provides a mechanism that encourages a real commitment of African leaders to generate resources to fund the Union's programme internally, and generates implementation buy-in and good will.[98]

To achieve this, it is necessary to deliberately involve an expansive list of local, national, regional, and international stakeholders who would be instrumental towards fostering the necessary culturally and contextually relevant Afro-centric strategies. Local agency is specifically critical as it requires deliberate action and involvement of a myriad of domestic stakeholders across the various walks and sectors of life. This includes involving educators and academic institutions, researchers and scholars, community leaders and

[97] Ibid.
[98] Agupusi (n 63).

organizations, political and social leaders, policy makers and government agencies, parents and guardians, media and publishers, artists and cultural practitioners, business and economic leaders, international organizations and diaspora communities, and activists and advocacy groups. Through deliberate concerted efforts, of these stakeholders a supportive environment for Afro-centric approaches can be developed, ensuring that African perspectives and contributions are recognized and valued in various domains.

IX. Conclusion

Principally, this article is a call to action for rethinking settlement of maritime boundary disputes in Africa through an Afro-centric lens, emphasizing the importance of cultural identity, historical, and social contexts, and local agency in achieving sustainable development. It affirms that any meaningful and authentic solution to maritime boundary disputes in Africa must pivot on Africa as the central subject, and not a peripheral object. Afro-centric lens emphasizes the importance of self-reliance, unity, and the value of indigenous knowledge and practices. By drawing on these philosophies, African countries can develop tailored, context-specific approaches to addressing maritime boundary disputes and achieve sustainable development. This article suggests that transboundary cooperation espouses an Afro-centric approach.

Bibliography

'1982 UNCLOS' <https://www.un.org/depts/los/convention_agreements/texts/unclos/UNCLOS-TOC.htm> accessed 19 June 2024

Abarry AS, 'Afrocentricity: Introduction' (1990) 21 Journal of Black Studies 123

Achebe C, *Things Fall Apart* (Doubleday, Anchor Books 1994) <https://www.centralschool.edu.vu/uploads/1/1/4/4/114402701/things-fall-apart.pdf>

Adede AO, *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea: A Drafting History and a Commentary*, vol 10 (Brill 1987) <*https://books.google.com/books?hl=en&lr=&id=iQ9-gxEG3c8C&oi=fnd&pg=PA3&dq=limitations+of+the+United+Nations+Convention+on+the+Law+of+the+Sea+in+Africa&ots=dHsqXiwoB3&sig=6rylzQR0sHWzdBEXGTkxTu6Xjmk*> *accessed 20 June 2024*

African Union, 'Speeches and Statements Made at the First Organisation of African Unity (OAU) Summit, 1963 | African Union' (*African Union*) <https://au.int/en/speeches/19630508/speeches-and-statements-made-first-organisation-african-unity-oau-summit-1963> accessed 19 June 2024

Agupusi P, 'The African Union and the Path to an African Renaissance' (2021) 39 Journal of Contemporary African Studies 261

Ajayi AT and Buhari LO, 'Methods of Conflict Resolution in African Traditional Society' (2014) 8 African research review 138

Al-Nauimi N and Meese R, *International Legal Issues Arising under the United Nations Decade of International Law* (Martinus Nijhoff Publishers 2023) <*https://books.google.com/books?hl=en&lr=&id=dMX7EAAAQBAJ&oi=fnd&pg=PR3&dq=The+United+Nations+Convention+on+the+Law+of+the+Sea+is+expensive+&ots=y0A4nS64Lu&sig=rxeSP3Hun2Jt5Oqg1hrL7xo0vgw*> accessed 17 June 2024

'ANC.Pdf - Statement of Deputy President Thabo Mbeki, on Behalf of The African National Congress, on the Occasion of the Adoption of the Constitutional Assembly of "The Republic of South Africa Constitution Bill 1996": Cape Town, May 8, 1996' <https://justice.gov.za/constitution/history/MEDIA/ANC.PDF> accessed 31 May 2024

Anderson EW, *International Boundaries: A Geopolitical Atlas* (Psychology Press 2003) <*https://books.google.com/books?hl=en&lr=&id=E7-menNPxREC&oi=fnd&pg=PR11&dq=Anderson,+E.+W.+(2003).+International+Boundaries:+A+Geopolitical+Atlas.+Routledge.&ots=Ge6K39jY8l&sig=3soyxj8DIEQ8TdrF_PGR18r1siE*> accessed 9 June 2024

Anderson R, 'Molefi Kete Asante: The Afrocentric Idea and the Cultural Turn in Intercultural Communication Studies' (2012) 36 International Journal of Intercultural Relations 760

Asante MK, 'Afrocentricity: The Theory of Social Change' <https://cir.nii.ac.jp/crid/1130000797971063808> accessed 15 June 2024

Asante MK, 'Afrocentricity', *Routledge Handbook of Pan-Africanism* (Routledge 2020)

<https://www.taylorfrancis.com/chapters/edit/10.4324/9780429020193-10/afrocentricity-molefi-kete-asante> accessed 15 June 2024

Ásgeirsdóttir Á and Steinwand M, 'Dispute Settlement Mechanisms and Maritime Boundary Settlements' (2015) 10 The Review of International Organizations 119

Barnes J and Baldino D, 'A Network Maritime Security Approach to Intelligence Sharing in the IOR' (2018) 14 Journal of the Indian Ocean Region 315

Bateman S, 'UNCLOS and Its Limitations as the Foundation for a Regional Maritime Security Regime' (2007) 19 Korean Journal of Defense Analysis 27

Beckman R, 'The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea' (2013) 107 American Journal of International Law 142

Bjorge E and Kravik AM, 'Settlement of Disputes by the International Court of Justice: Two Souls in the Court's Breast' in Maren Heidemann (ed), *The Transformation of Private Law – Principles of Contract and Tort as European and International Law*, vol 2 (Springer International Publishing 2024) <https://link.springer.com/10.1007/978-3-031-28497-7_11> accessed 17 June 2024

Boafo J and others, 'The Race for Critical Minerals in Africa: A Blessing or Another Resource Curse?' (2024) 93 Resources Policy 105046

Braun LF, 'Cartography in Colonial Africa', *Oxford Research Encyclopedia of African History* (2024) <https://oxfordre.com/africanhistory/display/10.1093/acrefore/9780190277734.001.0001/acrefore-9780190277734-e-632> accessed 10 June 2024

Bueger C and Edmunds T, *Understanding Maritime Security* (Oxford University Press 2024) <https://books.google.com/books?hl=en&lr=&id=D7MCEQAAQBAJ&oi=fnd&pg=PP1&dq=Why+Africa+must+resolve+its+maritime+boundary+disputes+Timothy+Walker&ots=pNOqbAFy0-&sig=g4zUqmpbBhF57B44J-1h70jlOg0> accessed 10 June 2024

Busia KA, *The Position of the Chief in the Modern Political System of Ashanti: A Study of the Influence of Contemporary Social Changes on Ashanti Political Institutions* (Routledge 2018) <https://www.taylorfrancis.com/books/mono/10.4324/9781351030823/position-chief-modern-political-system-ashanti-busia> accessed 17 June 2024

Chatora A, '10 Quotes from Kwame Nkrumah' (*This is africa*, 21 September 2015) <https://thisisafrica.me/politics-and-society/10-quotes-by-kwame-nkrumah/> accessed 9 June 2024

Christensen HB, Maffett M and Rauter T, 'Reversing the Resource Curse: Foreign Corruption Regulation and the Local Economic Benefits of Resource Extraction' (2024) 16 American Economic Journal: Applied Economics 90

Clark P and Kaufman ZD, *After Genocide: Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond* (Hurst London 2008)

<https://www.academia.edu/download/109715979/S0008423910000078820231228-1-p326lc.pdf> accessed 17 June 2024

Collins R, 'Navigating Choppy Waters: UNCLOS Dispute Settlement Coming of Age?', *The changing character of international dispute settlement* (Cambridge University Press 2023) <https://www.academia.edu/download/76125230/Collins_Navigating_Choppy_Waters_Academia_Draft_.pdf> accessed 17 June 2024

'Conversations with Myself' (*Macmillan Publishers*) <https://us.macmillan.com/books/9781429988391/conversationswithmyself> accessed 31 May 2024

Dei GJ, Hall BL and Rosenberg DG, *Indigenous Knowledges in Global Contexts: Multiple Readings of Our World.* (ERIC 2000) <https://eric.ed.gov/?id=ED456007> accessed 31 May 2024

Du Bois WEB and Marable M, *Souls of Black Folk* (Routledge 2015) <https://api.taylorfrancis.com/content/books/mono/download?identifierName=doi&identifierValue=10.4324/9781315631998&type=googlepdf> accessed 17 June 2024

Egede E, 'UNCLOS 82: Africa's Contributions to the Development of Modern Law of the Sea 40 Years Later' (2023) 148 Marine Policy 105463

Hamasi L and Ichani X, 'Kenya-Somalia Maritime Border Dispute: Genesis, Prospects and Challenges' Current Developments, Peace and Stability in the Horn of Africa 61

Hensel PR, Allison ME and Khanani A, 'The Colonial Legacy and Border Stability: Uti Possidetis and Territorial Claims in the Americas', *International Studies Association meeting, Montreal* (2004)

Hodgson RD and Cooper EJ, 'The Technical Delimitation of a Modern Equidistant Boundary' (1976) 3 Ocean Development & International Law 361

Hoppers CAO, 'Indigenous Knowledge Systems and Academic Institutions in South Africa' (2001) 19 Perspectives in education 73

Hoppers CAO, *Indigenous Knowledge and the Integration of Knowledge Systems: Towards a Philosophy of Articulation* (New Africa Books 2002) <https://books.google.com/books?hl=en&lr=&id=h9HDYNhYqfAC&oi=fnd&pg=PR3&dq=Hoppers,+Catherine+A.+Odora+(Ed.).+Indigenous+Knowledge+and+the+Integration+of+Knowledge+Systems:+Towards+a+Philosophy+of+Articulation.+Claremont:+New+Africa+Books,+2002&ots=X_mX0ApS71&sig=MIJUUKiLY1HqAVRuyZz9nm4_PR0> accessed 31 May 2024

In His Own Words (2017) <https://www.hachettebookgroup.com/titles/nelson-mandela/in-his-own-words/9780316110198/> accessed 31 May 2024

Juma C, *The New Harvest: Agricultural Innovation in Africa* (Oxford University Press 2015)

Kariuki DF, 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities' [2015] Challenges and Opportunities (July 9, 2015) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3646985> accessed 17 June 2024

Kenya N, 'Conflict in Northern Kenya' <https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=9ccfc235dd082676deb1154b84dfdca38a608430> accessed 17 June 2024

Legesse Asmarom, *Gada: Three Approaches to the Study of African Society* <https://zelalemkibret.wordpress.com/wp-content/uploads/2012/05/gada-asmerom-legese.pdf> accessed 17 June 2024

Li S, 'Unilateral Actions in the Development of the Law of the Sea' (2023) 153 Marine Policy 105658

Long Walk to Freedom (2017) <https://www.hachettebookgroup.com/titles/nelson-mandela/long-walk-to-freedom/9780759521049/> accessed 31 May 2024

Maathai W, *The Green Belt Movement: Sharing the Approach and the Experience* (Lantern Books 2003) <https://books.google.com/books?hl=en&lr=&id=4bDghrBcXzUC&oi=fnd&pg=PR7&dq=Maathai,+W.+(2004).+The+Green+Belt+Movement:+Sharing+the+Approach+and+the+Experience.+Lantern+Books.&ots=_jxFEsGKhr&sig=rZugsBCtwgzDHJriGDDn1ASGmNI> accessed 17 June 2024

Mabogunje AL, 'Institutional Radicalization, the State, and the Development Process in Africa' (2000) 97 Proceedings of the National Academy of Sciences 14007

Mangalala BG, 'Understanding The Pan-Africanists In Africa' [2023] Global Social

<https://www.humapub.com/admin/alljournals/gssr/papers/D9OFu9eSvt.pdf> accessed 17 June 2024

Masango CA, 'Indigenous Traditional Knowledge Protection: Prospects in South Africa's Intellectual Property Framework?' (2010) 76 South African Journal of Libraries and Information Science 74

Mboce HN, 'India–Africa Co-Operation on Maritime Security: Need for Deeper Engagement' (2019) 43 Strategic Analysis 261

Mkandawire T, 'Thinking about Developmental States in Africa' (2001) 25 Cambridge journal of economics 289

'Mo Ibrahim in Conversation with H.E. President Paul Kagame, Chairperson of the African Union' (*Mo Ibrahim Foundation*) <https://mo.ibrahim.foundation/news/2018/mo-ibrahim-conversation-he-president-paul-kagame-chairperson-african-union> accessed 17 June 2024

Moyo D, *Dead Aid: Why Aid Is Not Working and How There Is a Better Way for Africa* (Macmillan 2009)

Nesi G, 'Uti Possidetis Doctrine' [2008] Max Planck Encyclopaedia of Public International Law

Ngugi wa Thiong'o, *Decolonising the Mind: The Politics of Language in African Literature.* <https://marxistnkrumaistforum.wordpress.com/wp-content/uploads/2013/12/wa-thiong_o-decolonising-the-mind-the-politics-of-language-in-african-literature.pdf> accessed 17 June 2024

Njoki Mboce, Kariuki Muigua, and Peter Munyi, 'Examining the Role of Delimitation of the Continental Shelf and the Exclusive Economic

Zone in Relation to Maritime Boundary Disputes in Africa' (*Kenya Law*) <http://kenyalaw.org/kl/fileadmin/pdfdownloads/KLReviewJournal/Final-Joint-Article.pdf> accessed 9 April 2023

Nkrumah K, Arrigoni R and Napolitano G, *Africa Must Unite* (Heinemann London 1963) <https://www.marxists.org/subject/africa/nkrumah/1963/africa-must-unite.pdf> accessed 17 June 2024

Ntahombaye P and Nduwayo G, 'Identity and Cultural Diversity in Conflict Resolution and Democratisation for the African Renaissance: The Case of Burundi' (2007) 7 African Journal on Conflict Resolution 239

Nyerere JK, 'Ujamma – The Basis of African Socialism' <https://www.jpanafrican.org/edocs/e-DocUjamma3.5.pdf>

Ochem CE and Debski AJ, 'Historical Development to the 1982 United Nations Conventions on the Law of the Sea and the New International Economic Order.' (2021) 2 Igbinedion Universuity journal of jurisprudence and international law <https://rgu-repository.worktribe.com/output/1544298> accessed 20 June 2024

Okidi CO, 'The Kenya Draft Articles on Exclusive Maritime Economic Zone Concepts: Analysis and Comments on the Original Proposal' Development Studies or the University of Nairobi. This paper is not for quotation without permission of the authors, as specified in the Copyright Act, Cap 130 of the Laws of Kenya.

Okidi CO and Westley SB, 'Management of Coastal and Offshore Resources in Eastern Africa'

<http://erepository.uonbi.ac.ke/bitstream/handle/11295/2023/op28-319140.pdf?sequence=3> accessed 20 June 2024

Okonjo-Iweala N, *Reforming the Unreformable: Lessons from Nigeria* (Mit Press 2014) <https://books.google.com/books?hl=en&lr=&id=HuV1DwAAQBAJ&oi=fnd&pg=PR7&dq=Okonjo-Iweala,+N.+(2012).+Reforming+the+Unreformable:+Lessons+from+Nigeria.+MIT+Press.&ots=ObLgHWpkMc&sig=woRhUZz5sCdBjM0A8d3VHfeYW_I> accessed 17 June 2024

Okonkwo T, 'Maritime Boundaries Delimitation and Dispute Resolution in Africa' (2017) 08 Beijing Law Review 55

Osei-Hwedie K, 'Afro-Centrism: The Challenge of Social Development' (2007) 43 Social Work/Maatskaplike Werk <https://socialwork.journals.ac.za/pub/article/view/279> accessed 15 June 2024

Østhagen A, 'Maritime Boundary Disputes: What Are They and Why Do They Matter?' (2020) 120 Marine Policy 104118

Powell EJ and Wiegand KE, *The Peaceful Resolution of Territorial and Maritime Disputes* (Oxford University Press 2023) *<https://books.google.com/books?hl=en&lr=&id=laa7EAAAQBAJ&oi=fnd&pg=PP1&dq=This+demands+robust+and+nuanced+interventions+in+order+to+promote+cooperative+regional+relationships,+development,+legal+clarity+on+jurisdiction,+peace,+resource+ownership,+security,+and+stability+&ots=OhGN8EHkLs&sig=sImL18Q4v1HS3zoU7-QjjuZSpx4>* accessed 20 June 2024

'President Nelson Mandela: 1994 Presidential Inauguration | South African Government' <https://www.gov.za/news/speeches/president-nelson-mandela-1994-presidential-inauguration-10-may-1994> accessed 31 May 2024

'President Nelson Mandela: 1994 State of the Nation Address | South African Government' <https://www.gov.za/news/speeches/president-nelson-mandela-1994-state-nation-address-24-may-1994> accessed 31 May 2024

Raharjo SNI, Pudjiastuti TN and Nufus H, 'Cross-Border Cooperation as a Method of Conflict Management: A Case Study in the Sulu-Sulawesi Sea' (2024) 24 Conflict, Security & Development 277

Robles Jr AC, 'The Defaulting State and the Jurisdiction of Annex VII Arbitral Tribunals', *The Defaulting State and the South China Sea Arbitration* (Springer 2023)

——, *The Defaulting State and the South China Sea Arbitration* (Springer Nature 2023) <https://books.google.com/books?hl=en&lr=&id=uzzBEAAAQBAJ&oi=fnd&pg=PR5&dq=China+rejects+South+China+Sea+arbitration+ruling&ots=eheOHZFdLt&sig=21L85zzc3evt7OZmn68xBTC6I-8> accessed 20 June 2024

Salvador S and Ribeiro MC, 'Socio-economic, Legal, and Political Context of Offshore Renewable Energies' (2023) 12 WIREs Energy and Environment e462

Sanni JS and Phiri MZ, 'Monuments and Memory in Africa' <https://api.taylorfrancis.com/content/books/mono/download?i

dentifierName=doi&identifierValue=10.4324/9781003432876&type=googlepdf> accessed 31 May 2024

Sarmento J, 'Colonialism, Post-Colonialism, and Its Heritage Imprint', *Cultural Heritage and Tourism in Africa* (Routledge 2023) <https://www.taylorfrancis.com/chapters/edit/10.4324/9781003153955-14/colonialism-post-colonialism-heritage-imprint-jo%C3%A3o-sarmento> accessed 20 June 2024

Schofield C, 'Competing Claims to Maritime Jurisdiction in the Indian Ocean' [2009] Fisheries Exploitation in the Indian Ocean: Threats and Opportunities 104

——, 'Parting the Waves: Claims to Maritime Jurisdiction and the Division of Ocean Space' (2012) 1 Penn St. JL & Int'l Aff. iii

Schofield C and Arsana I, 'The Delimitation of Maritime Boundaries: A Matter of Life or Death for East Timor?' <https://ro.uow.edu.au/lawpapers/300/> accessed 10 June 2024

Sillitoe P, Dixon P and Barr J, 'Indigenous Knowledge Inquiries: A Methodologies Manual for Development' [2005] (No Title) <https://cir.nii.ac.jp/crid/1130000793810342016> accessed 17 June 2024

Skurnik WA, 'Leopold Sedar Senghor and African Socialism' (1965) 3 The Journal of Modern African Studies 349

Sutherland M, 'Marine Boundaries and Good Governance of Marine Spaces' <https://unbscholar.lib.unb.ca/bitstreams/409cce21-4931-4947-bb02-6cfd299135a2/download> accessed 17 June 2024

Thiong'o N wa and Thiong'o N wa, *Weep Not, Child* (Heinemann 1987)

Tutu D, 'Speech: No Future without Forgiveness' <https://digitalcommons.unf.edu/cgi/viewcontent.cgi?article=1007&context=archbishoptutupapers> accessed 31 May 2024

United Nations, Division for Ocean Affairs and the Law of the Sea, 'Oceans: The Lifeline of Our Planet Anniversary of the United Nations Convention on the Law of the Sea: 20 Years of Law and Order on the Oceans and Seas (1982-2002)' (*United Nations, Division for Ocean Affairs and the Law of the Sea*) <https://www.un.org/depts/los/convention_agreements/convention_20years/oceansthelifeline.htm> accessed 22 October 2020

'Uti Possidetis Iuris' (*obo*) <https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0065.xml> accessed 15 June 2024

'Uti Possidetis Juris' (*LII / Legal Information Institute*) <https://www.law.cornell.edu/wex/uti_possidetis_juris> accessed 15 June 2024

Vidija P, 'Uhuru Kenyatta: Kenya Will Not Cede an Inch of Its Soil to Anyone' (*The Standard*) <https://www.standardmedia.co.ke/national/article/2001418905/uhuru-kenyatta-kenya-will-not-cede-an-inch-of-its-soil-to-anyone> accessed 7 June 2024

Walker T, 'Why Africa Must Resolve Its Maritime Boundary Disputes'

Walker TD, 'A Brief Historical Overview of the Maritime Indian Ocean World (Ancient Times to 1950)', *The Indian Ocean and its Role in the Global Climate System* (Elsevier 2024) <https://www.sciencedirect.com/science/article/pii/B9780128226988000056> accessed 10 June 2024

The Significance of Public Participation in Environmental Conservation in South Sudan

By: ***Bona Bol Madut Ayii****

Abstract

Public participation is often defined as a process and not a single event. This is because it is an ongoing and dynamic process usually incorporated into decision-making processes. For meaningful public participation, all stakeholders must be involved and the process carried out transparently and impartially.

The paper aims to determine whether the right to public participation is entrenched in the resource governance of South Sudan concerning environmental conservation. Whether the views and the needs of the people are taken into consideration in the oil concession agreements. If so, its elaborate procedures, and whether the people feel included in such decision-making processes?

The underlying principles of public participation are mainly transparency, inclusion, and the right to information. This is a requirement espoused in the Constitution of South Sudan. The right is also guaranteed in other domestic legislations. Consequently, its significance cannot be overlooked. Various groups of people, in this case, the local communities, civil society groups, oil exploration companies, and the government play a crucial role in ensuring that every affected party is included in crucial decision-making processes.

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Keywords: natural resources, oil exploration companies, oil exploration activities, right to transparency, right to public participation, right to information, procedural justice, social learning concept, Environment Policy of South Sudan, 2010 (Draft), and Environment and Social Management Framework (ESMF).

Introduction

Every living organism relies on its habitat for sustenance. The environment is this very habitat that nurtures life. With our ever-growing needs, it is paramount that we utilize our natural resources responsibly. If left unchecked, our activities will eventually result in environmental degradation.[1]

To curb this looming danger, numerous efforts have been made towards the preservation of the environment. Various organizations in collaboration with other people have planted trees, adopted the use of renewable energy, and environment-friendly farming methods in a bid to prevent the depletion of natural resources.[2] To achieve this milestone, certain mechanisms were put in place. These mechanisms aim to enhance environmental protection through international and domestic laws. At the heart of these is participation.[3]

Public participation is a human right; a procedural element in the right to a clean, healthy, and sustainable environment.[4] If the latter is

[1] *What is the Right to a Healthy Environment?* United Nations Environment Programme (UNEP)
[2] *What is the Right to a Healthy Environment?* United Nations Environment Programme (UNEP)
[3] "Achieving Sustainable Development and Promoting Development Cooperation"
[4] *What is the Right to a Healthy Environment?* United Nations Environment Programme (UNEP)

infringed or is threatened to be infringed, the aggrieved party can seek legal recourse. Furthermore, being a multifaceted right, he/she is entitled to the right to information which would only flow from having participated in the decision-making process that involved the very thing that infringed or threatened to infringe on the right to a clean environment.[5] As demonstrated above, public participation is intertwined with other rights such that it cannot be realized without others.

What is public participation?

Public participation is the process by which stakeholders (affected parties) express their views about an act or omission that may have a direct impact on their lives.[6] It is a legal requirement for governments or companies to carry out public participation before embarking on projects that may adversely affect certain target groups.[7] For example, the Constitution, 2011 of South Sudan, requires its government to adhere to the procedure. The same is buttressed by the Environment Policy of South Sudan, 2010 (Draft) as well as the Environment and Social Management Framework (ESMF).[8]

Public participation in this context, basically entails free, active, and meaningful participation of the affected people in environmental matters. It emanates from the concept of Procedural Justice and Social Learning which focuses on aiding communities affected by environmental degradation in identifying hidden issues and inspiring creative but practical solutions.[9] It achieves this through;

[5] "What are the principles of the right to access information"
[6] "Public Participation Guide: Introduction to Public Participation"
[7] Ibid
[8] *Citizen Participation in Natural Resource Governance: A Case of Oil in South Sudan,* Esther Kibe, Maria Nzomo, and Fred Jonyo
[9] Megan J. "Procedural Justice and Social Learning"

fairness, voice (public participation), transparency, and impartiality. Hence, people are more likely to take part in the decision-making process only if it is a fair process.[10]

The concept of Procedural Justice stresses the procedures rather than the outcome. Therefore, if the participants perceive the process as irregular or rather unfair, they will not pay regard to the outcome. They will likely oppose it.[11]

To adhere to these procedural requirements, one must be cognizant of the following underlying principles: -[12]

1. **Representation**
Ensuring that all affected groups or communities are fairly represented throughout all stages of the process.

2. **Equality**
This entails applying fair procedures to all the participants by treating everyone equally without bias.

3. **Accessible and accurate information**
Ensuring that the necessary information is accessible and available to everyone, taking into consideration their age group, literacy skills, ethnicity, and gender among other things.

4. **Suppression of bias/Impartiality**
One's self-interest should not cloud their judgment and mare the process with irregularities.

[10] *Procedural Justice and Social Learning,* Megan Justice
[11] *Procedural Justice and Social Learning,* Megan Justice
[12] *Procedural Justice and Social Learning*, Megan Justice

5. Ethics

The process and the applied procedures should be compatible with the participants' moral values.

On the other hand, public participation also originates from the concept of Social Learning which suggests that fully engaged participants often gain a holistic view of the matter and acquire the requisite skills needed to participate effectively in the decision-making process. And it is through active engagement that they come up with mutually acceptable solutions. This concept is divided into two limbs: -[13]

a. Cognitive enhancement; and
b. Moral development

Cognitive Enhancement

Under cognitive enhancement, the participants gain technical competence and collectively learn each other's values and preferences.[14] This involves learning about: -

a. The state of the problem;
b. The likely outcomes/possible solutions;
c. Required communication skills; and
d. Other people's interests in the matter.

Moral Development

This is often someone's ability to make reasonable judgments about right or wrong.

[13] *Procedural Justice and Social Learning,* Megan Justice
[14] Ale M. and Gabriel P. "Smarter Than Thou, Holier Than Thou: The Dynamic Interplay Between Cognitive and Moral Enhancement"

After meeting this threshold, the stakeholders are under a duty to make informed decisions about the effects of the actions or inactions of the government or companies in light of prevailing circumstances. One can only make informed decisions based on the information divulged. As such, full disclosure is expected.[15] Taking into account the participants' age, sex, literacy, et cetera, the government or companies should give access to information to all the participants. For instance, if the public participation is about the set-up of an oil exploration company, the government has a primary duty to safeguard the well-being of its citizens. It should make full disclosure on whether the affected groups will be fully and promptly compensated in the event of relocation or pollution, whether their right to a clean and healthy environment will be protected, and whether their right to justice will be upheld if the corporations fail to uphold its end of the bargain.

The local communities should be fully aware of the extent of the risks involved. It will only be after they have appreciated the risks that one may presume, they gave their informed consent.[16] Further, the process of public participation is a perpetual activity.[17] It only ends at the termination of the project or in this case, closure of the oil exploration company.[18]

Public participation has also been known to improve the quality and legitimacy of the decision-making process.[19] The process is expected

[15] "The New York State Department of Financial Services (the "Department") promulgated the First Amendment to Insurance Regulation 187 (11 NYCRR 224)."
[16] Ibid
[17] "Challenges of Public Participation"
[18] Ibid
[19] Ibid

to be meaningful so that it does not lead to the perception of illegitimacy. If the rules are not upheld, the original objective of the exercise will be lost.[20]

It has also been established that those who live close to natural resources are better suited to the management and conservation of the environment.[21] Their participation in the exercise would prove useful.[22] These platforms give them an audience to be heard and explore alternative solutions. Having been near natural resources, the local communities may have better insight on how to improve the depleted areas by coming up with friendly ways of utilizing the remaining resources.[23] Hence, playing a crucial role in promoting a clean, healthy, and sustainable environment.

Public Participation in South Sudan

In an ideal society, public participation should mirror the above description. However, more often than not governments do not adhere to these principles.[24] They enter into contracts with corporations at the expense of their citizens.[25] This ultimately results in rogue companies polluting the environment while endangering the lives of the citizens, and wildlife.[26]

Due to the political instability of South Sudan implementation of the

[20] "Justifying Limitations on the Freedom of Expression"
[21] Ibid
[22] *Citizen Participation in Natural Resource Governance: A Case of Oil in South Sudan,* Esther Kibe, Maria Nzomo, and Fred Jonyo
[23] "The Sustainable Use of Natural Resources: The Governance Challenge"
[24] "Public Participation Guide: Introduction to Public Participation"
[25] Ibid
[26] Ibid

existing laws is impossible.[27] The World Bank's Environment and Social Management Framework (ESMF) meant to conserve the country's environment is rarely adhered to.[28] Even in the wake of this framework, the citizens of South Sudan are still being overlooked.[29] They have no say in the process of resource governance. They take no part in these decisions, yet they bear the consequences. Alienating the citizens from these dialogues only emboldens the corporations while their actions are left unchecked. It is inevitable that after depleting the environment, these companies relocate to other places spreading the pollution.

The lack of public participation in the decision-making process poses serious challenges to the people of South Sudan as well as the environment. With the trajectory the country is taking, one may imply that the government is deliberately secluding its citizens from these important decisions to assert control and avoid public scrutiny.[30]

Conclusion

Every citizen in South Sudan is entitled to the Right to Public Participation as it is enshrined in their Constitution, 2011, it is provided for in the Environment Policy of South Sudan, 2010 (Draft) and the Environment and Social Management Framework (ESMF).

Sadly, the government alienates its citizens in critical matters such as the environment. Lack of participation in such arenas may bring about feelings of helplessness and discord to the people. Their

[27] Ibid
[28] "Environmental and Social Framework"
[29] Ibid
[30] Ibid

engagement is limited and sometimes completely lacking but the government continues to make decisions on their behalf with no disregard for their well-being.[31] On the other hand, the environment is gradually depleting and pollution quickly spreading due to the lack of strict laws, regulations, implementations, and the stifling of Civil Society Organisations.

Hopefully, with time the government will encourage collective participation and every stakeholder will be actively incorporated in the process. With public participation, they can air their concerns, express preferences, and bring about accountability in the operations of the corporations.

Recommendations

In light of the above discussion, the following are the recommendations for the current role of public participation in South Sudan: -

1. Strict implementation of the existing laws and regulations- the Constitution, 2011, and the Environment and Social Management Framework (ESMF);

2. The Legislature to pass the Environmental Management Bill;

3. Civil Society Organisationss to bring attention to the environmental degradation in the country;

4. The government to facilitate public participation in the decision-making process;

[31] "Emerging Recognition Of The Importance Of Participation" https://www.un.org/esa/socdev/unyin/documents/ch10.pdf

5. The government to conduct environmental assessment;
6. The government to finance regulatory institutions; and
7. The government to conduct fair and transparent public participation.

References

Constitution

Constitution of South Sudan, 2011

Legislations
Environment Policy of South Sudan, 2010 (Draft)

International Laws/Regulations
Environment and Social Management Framework (ESMF)

International Journals
C*itizen Participation in Natural Resource Governance*: A Case of Oil in South Sudan, Esther Kibe, Maria Nzomo, and Fred Jonyo
What is the Right to a Healthy Environment? United Nations Environment Programme (UNEP)

Online Article
Procedural Justice and Social Learning, Megan Justice

Empowering Kenya's Anti-Counterfeit Authority to Combat Transnational Organised Crime: A Call to Implement the Anti-Counterfeit Act, 2008

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

Abstract

This paper delves into the multifaceted landscape of countering transnational organized crime through the lens of Kenya's Anti-Counterfeit Act, 2008. My exploration combines an analysis of progressive legislative aspects and a critical examination of defective implementation. The legislative framework, while exhibiting commendable strides in intellectual property rights protection, grapples with significant challenges in execution. From limited integration of information and communication technology (ICT) to a lopsided emphasis on trademark protection, the discussion exposes the gaps demanding urgent rectification. The paper advocates for a proactive stance, emphasizing Section 34B for the recordal of intellectual property rights and proposing a Technology-driven National Anti-Counterfeit Information Management System. Insights from international experiences, particularly the United Kingdom, guide the recommendations to fortify Kenya's defences against counterfeiting. Border control measures, inspired by Israel's enforcement rules, and lessons from South Africa's civil and criminal litigation enforcement underscore the need for comprehensive rules, mandatory custodial sentences, and an inter-agency approach. The abstract concludes by advocating for empowering Kenya's Anti-Counterfeit Authority with extrajudicial reliefs, including settling disputes out of court, to complement its power to destroy counterfeit products. Collectively, these recommendations present a transformative approach to safeguarding

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Kenya's economy, consumers, and intellectual property rights from the pervasive threat of transnational organized crime driven by counterfeiting.
Key Words*: Anti-Counterfeit Authority, Kenya, Transnational Organised Crime, Anti-Counterfeit Act, Intellectual Property Rights, Implementation.*

1. Introduction

Counterfeiting, a thriving form of transnational organized crime, poses a formidable threat to economies, consumer safety, and intellectual property rights.[1] In response, Kenya enacted the Anti-Counterfeit Act, a pivotal legal framework designed to stem the tide of counterfeit goods.[2] This comprehensive exploration navigates the intricate terrain of Kenya's Anti-Counterfeit Act, weaving through the progressive aspects, the defective implementation, and the critical imperatives for effective enforcement.

The paper commences with a meticulous analysis of the Progressive Aspects of Kenya's Anti-Counterfeiting Legislation. I dissect the legal intricacies of the Act, assessing its alignment with international standards and delving into the broader intellectual property landscape in Kenya. This includes a comprehensive examination of relevant statutes and case law that collectively shape the anti-counterfeiting framework, with a particular focus on the role and functions of the Anti-Counterfeit Authority (ACA).

Transitioning seamlessly, the discourse navigates towards the Defective Implementation of the Anti-Counterfeit Act. Identifying

[1] National Action Plan and Implementation Framework to Combat Illicit Trade 2019-2022 (2019) A Publication of the State Department of Trade available at *https://www.aca.go.ke/images/downloads/publications/national-action-plan-to-combat-illicit-trade.pdf* accessed 11 January 2024

[2] Ibid

shortcomings such as limited use of ICT, narrow consumer-focused actions, and a skewed balance between trademark protection and safety interests, I advocate for holistic reforms and proactive measures to fortify the Act's efficacy against the multifaceted challenges of transnational organized crime.

The narrative then pivots to a Call for the Effective Implementation of Kenya's Anti-Counterfeit Act, proposing preventive measures and strategies. Section 34B of the Act takes center stage, advocating for the pro-active recordal of intellectual property rights. International experiences, particularly lessons drawn from the United Kingdom, serve as a valuable resource to inform potential improvements. In the quest for enhanced effectiveness, the paper delves into the prospect of a Technology-driven National Anti-Counterfeit Information Management System. Drawing inspiration from global models, I examine the United Kingdom's approach and distil lessons applicable to strengthening the Anti-Counterfeit Authority Integrated Management System in Kenya.

Further, the analysis encompasses Border Control Measures, drawing insights from Israel's comprehensive rules for border enforcement. Lessons for Kenya include empowering customs authorities to intervene in goods-in-transit and export cases, adding a crucial layer to the nation's defence against transnational organized crime. Turning attention to Civil and Criminal Litigation Enforcement, the South African experience provides a poignant case study. The '*Puma AG Rudolph Dassler Sport v Rampar Trading (Pty) Ltd* ' case[3] becomes a focal point, emphasizing the importance of mandatory minimum custodial sentences and the adoption of an inter-agency approach to

[3] [2010] ZASCA 140

enforce intellectual property rights.

The exploration culminates with an examination of the Availability of Extrajudicial Reliefs. Making reference to South Africa's Counterfeit Goods Act, I advocate for empowering the Anti-Counterfeit Authority in Kenya to settle disputes out of court, complementing its existing power to destroy counterfeit products. In this comprehensive exploration, the paper asserts the urgent need to empower Kenya's Anti-Counterfeit Authority, presenting nuanced recommendations to fortify the nation's defence against the perils of transnational organized crime facilitated by counterfeiting.

2. The Statutory Role of Kenya's Anti-Counterfeit Authority

2.1 Objectives of the Anti-Counterfeit Act, 2008

Long Title of the Anti-Counterfeit Act, 2008:
"An Act of Parliament to prohibit trade in counterfeit goods, to establish the Anti-Counterfeit Authority, and for connected purposes."

Objectives of the Anti-Counterfeit Act, 2008:
The primary objective of the Act is to prevent and prohibit the trade in counterfeit goods.[4] Counterfeit goods refer to imitations or replicas of genuine products, often produced with the intent to deceive consumers by misrepresenting the quality or origin of the goods.[5]

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[4] Anti-Counterfeit Act 2008, long title

[5] National Action Plan and Implementation Framework to Combat Illicit Trade 2019-2022 (2019) A Publication of the State Department of Trade available at *https://www.aca.go.ke/images/downloads/publications/national-action-plan-to-combat-illicit-trade.pdf* accessed 11 January 2024

The Act establishes the Anti-Counterfeit Authority (ACA) as a key institution to oversee and enforce measures against counterfeit activities.[6]

2.2 The Role of the Anti-Counterfeit Authority

According to Section 5 of the Act, the functions of the Anti-Counterfeit Authority include:

(a) Enlightening and Informing the Public:

The ACA is tasked with the responsibility of enlightening and informing the public on matters related to counterfeiting.[7] This involves raising awareness among the public about the risks and consequences of dealing with counterfeit goods, as well as educating them on how to identify and avoid such products.

(b) Combating Counterfeiting:

The primary function of the ACA is to combat counterfeiting, trade, and other dealings in counterfeit goods within the borders of Kenya.[8] This involves taking measures and implementing strategies outlined in the Act to prevent, investigate, and prosecute those involved in counterfeiting activities.

(c) Devising and Promoting Training Programmes:

The ACA is mandated to devise and promote training programs aimed at equipping relevant stakeholders, including law enforcement agencies, with the necessary skills and knowledge to effectively combat counterfeiting.[9]

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[6] Anti-Counterfeit Act 2008, long title
[7] Ibid, sec 5
[8] Ibid
[9] Ibid

(d) Coordinating with Organizations:

The Authority is expected to coordinate with national, regional, or international organizations that are involved in combating counterfeiting.[10] This emphasizes the importance of collaboration and information-sharing on a global scale to address the transnational nature of counterfeiting activities.

(da) Advising the Government:

The ACA is required to advise the government, through the Cabinet Secretary, on policies and measures concerning the necessary support, promotion, and protection of intellectual property rights, as well as the extent of counterfeiting. This reflects the role of the Authority in influencing and guiding policy decisions related to intellectual property and counterfeiting issues.[11]

(db) Conducting Inquiries, Studies, and Research:

The ACA is empowered to carry out inquiries, studies, and research into matters relating to counterfeiting and the protection of intellectual property rights. This function underscores the importance of staying informed and updated on emerging trends and challenges in the realm of counterfeiting.[12]

2.3 Expanded powers under the Statute Law (Miscellaneous Amendment) Act, 2018

The Statute Law (Miscellaneous Amendment) Act, 2018 expanded the powers of the Anti-Counterfeit Authority, particularly in relation to advising the government and conducting inquiries, studies, and research. The relevant sections are as follows:

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[10] Ibid
[11] Ibid
[12] Ibid

(da) Advising the Government:

Under the amended Act, the ACA's role in advising the government through the Cabinet Secretary was strengthened. This includes providing recommendations on policies and measures related to the necessary support, promotion, and protection of intellectual property rights, as well as addressing the extent of counterfeiting.[13]This expanded advisory role enhances the Authority's influence on intellectual property policies at the national level.

(db) Conducting Inquiries, Studies, and Research:

The amended Act maintained and possibly reinforced the Authority's authority to carry out inquiries, studies, and research into matters concerning counterfeiting and the protection of intellectual property rights.[14] This underscores the importance of a research-driven approach in understanding and addressing the evolving challenges posed by counterfeiting.

***Republic v Anti-Counterfeit Agency Ex Parte Caroline Mangala t/a Hairworks Salon* [2019] eKLR:**

In this case, the court considered the functions of the Anti-Counterfeit Authority as outlined in Section 5 of the Anti-Counterfeit Act. The court held that the Authority's functions, including advising the government and conducting inquiries, studies, and research, are crucial for fulfilling its mandate.[15]

The court's decision emphasized the importance of the ACA's role in advising the government on policies related to intellectual property

[13] Statute Law (Miscellaneous Amendment) Act, 2018

[14] Ibid

[15] *Republic v Anti-Counterfeit Agency Ex Parte Caroline Mangala t/a Hairworks Salon* [2019] eKLR:

rights and counterfeiting. Additionally, the recognition of the Authority's authority to conduct inquiries, studies, and research reflects the judiciary's acknowledgment of the need for a comprehensive and informed approach to combating counterfeiting. The case underscores the significance of the Anti-Counterfeit Authority's functions in contributing to the overall objectives of the Anti-Counterfeit Act. It reinforces the legal basis for the Authority's involvement in policy recommendations and research activities as essential components of its efforts to combat counterfeiting effectively.

2.4 Statutory Regulations

Anti-Counterfeit (Recordation) Regulations, 2021

The Anti-Counterfeit (Recordation) Regulations, 2021 outline procedures and requirements for recording intellectual property rights related to goods imported into Kenya[16]. Here's a brief overview of key provisions:

1. Application for Recordation

Intellectual property owners seeking to record their rights for goods imported into Kenya must submit an application in the specified Form ACA1B along with the prescribed fee. The Anti-Counterfeit Authority (ACA) is required to notify the applicant within thirty days of the approval or denial of the application. Importers are responsible for ensuring that intellectual property rights related to the imported goods are recorded.[17]

[16] Anti-Counterfeit (Recordation) Regulations, 2021
[17] Ibid, reg 3

2. Submission of Particulars of Imported Goods:
Individuals intending to import goods, excluding registrants, must notify the Authority using Form ACA 2B, accompanied by the prescribed fee.[18]

3. Change of Ownership:
In case of a change in ownership of a recorded intellectual property right, the new owner must apply to continue with the recordation using Form ACA 3B, along with the fee. If the new owner wishes to discontinue the recordation, they must notify the Authority within thirty days using Form ACA 4B.[19]

4. Change of Name:
In the event of a change in the name of the registrant, the registrant must immediately inform the Authority using Form ACA 5B, accompanied by the specified fee.[20]

5. Renewal of Recordation:
An application for the renewal of recordation must be submitted in Form ACA 6B, along with the fee, not later than thirty days before the expiration of the current recordation.[21]

6. Cancellation or Revocation of Recordation:
The Authority is required to notify the registrant within thirty days if the recordation of an intellectual property right is cancelled or revoked.[22]

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[18] Ibid, reg 4
[19] Ibid, reg 5
[20] Ibid, reg 6
[21] Ibid, reg 7
[22] Ibid, reg 8

7. Appointment of Agents:
Intellectual property rights owners can appoint agents to act on their behalf in recordation processes, following the provisions outlined in the Anti-Counterfeit Regulations, No. 126 of 2010.[23]

8. False Declaration:
Providing false information or committing certain offenses in relation to applications under the regulations may lead to fines or imprisonment.[24]

Anti-Counterfeit (Amendment) Regulations, 2021
The Anti-Counterfeit (Amendment) Regulations, 2021 introduce amendments to the Anti-Counterfeit Regulations and focuses on the appointment and regulation of agents, the development of a Code of Conduct, de-registration of agents, exemption from certain requirements, and the compounding of offenses. Here's a brief overview of the key amendments:

1. Appointment of an Agent:
Intellectual property right owners can appoint agents by completing Form ACA 15 and paying the specified fee. Applicants residing outside Kenya or having a principal place of business outside Kenya may be represented by an agent. Individuals seeking to operate as agents must apply for admission using Form ACA 17, with a yearly renewal requirement. The Authority maintains a register of all admitted agents. Owners can revoke agent appointments by notifying the Authority.[25]

[23] Ibid, reg 12
[24] Ibid, reg 13
[25] Anti-Counterfeit (Amendment) Regulations, 2021 reg 18

2. De-registration of Agents:

The Authority may de-register an agent on grounds such as gross misconduct, non-compliance with the Act or Code of Conduct, non-performance for at least six months, in the interest of the public, or other reasonable causes. Agents have the right to be heard before de-registration, and they can apply to the High Court for judicial review.[26]

3. Compounding of Offenses

Individuals charged with offenses under the Act can apply for compounding of the offense using Form ACA 20 and paying the specified fees. The Executive Director may either approve the application, making an order in Form ACA 21, or reject it within fourteen days. Out-of-court settlements between complainants and suspects require the concurrence of the Authority. The Executive Director may allow the payment by instalment of fees arising from alternative dispute mechanisms under appropriate circumstances, not exceeding twelve months.[27]

2.5 Anti-Counterfeit Agency Strategic Plan 2017-2022

The Anti-Counterfeit Agency's Strategic Plan for 2017-2022 outlines the organization's commitment to fulfilling its mandate by addressing various challenges related to counterfeiting.

Vision:

A Counterfeit-Free Kenya.[28]

Mission:

[26] Ibid, reg 18B
[27] Ibid, reg 20A
[28] Anti-Counterfeit Agency Strategic Plan 2017-2022

Prohibit Counterfeiting through Promotion and Enforcement of Intellectual Property Rights.[29]

Key Objectives and Result Areas:

The plan focuses on four key result areas: Enforcement, Awareness, Market Research, and Institutional Capacity. These result areas are actioned through nine strategic objectives: To strengthen efforts in enforcing protected intellectual property rights; To increase public awareness and outreach initiatives to combat counterfeiting; To build the capacity of stakeholders in understanding and addressing counterfeiting issues; To provide information that supports the development of effective policies, enforcement strategies, and awareness campaigns; To improve the satisfaction of stakeholders and clients involved in anti-counterfeiting activities; To invest in the development and capacity building of the agency's personnel; To practice prudent financial management for effective resource utilization; To leverage Information and Communication Technology (ICT) for efficient agency operations; To adhere to principles of good governance in the agency's operations.[30]

The plan aligns with Kenya's Vision 2030, the Constitution of Kenya, 2010, and other legal and policy documents. It reflects the agency's commitment to supporting the national goals and ongoing public sector reform process for enhanced service delivery. The plan acknowledges the complex challenges posed by poverty, crime, corruption, and unfair business practices, calling for a coherent and comprehensive approach. It aims to consolidate institutional and management capacity to effectively implement policies and

[29] Ibid
[30] Ibid

programs. The plan covers the period from 1st July 2017 to 30th June 2022, guiding the agency's operations and demonstrating its role in achieving national goals.[31]

3. Progressive Aspects and Defective Implementation of Kenya's Anti-Counterfeiting Legislation

3.1 Progressive Aspects of the Anti-Counterfeit Act and Statute Law (Miscellaneous Amendment) Act, 2018

3.1.1 Regulatory complaints mechanism

The regulatory complaints mechanism is a progressive aspect of the Anti-Counterfeit Act, as outlined in Section 33. It empowers various stakeholders to take action when they have reasonable cause to suspect that an offense under the Act is being committed. Any holder of an intellectual property right, successor in title, licensee, or agent is authorized to lay a complaint. The complaint can be filed in respect of protected goods where there is a reasonable cause to suspect an offense under Section 32 (offenses related to counterfeiting) is being committed, has been committed, or is likely to be committed. The complaint is lodged with the Executive Director of the Anti-Counterfeit Authority.[32]

The amendment introduced by the Statute Law (Miscellaneous Amendment) Act, 2018 expands the scope of complainants, extending the regulatory complaints mechanism to consumers and purchasers of goods. Notwithstanding the provisions for intellectual property rights holders, consumers, and purchasers of goods are granted the

[31] Ibid
[32] Anti-Counterfeit Act, sec 33

authority to lay complaints. Similar to the original provision, a complainant, whether an intellectual property rights holder or a consumer, must have reasonable cause to suspect an offense under the Act. The complaint is still directed to the Executive Director of the Anti-Counterfeit Authority. The Executive Director is obligated to cause appropriate steps to be taken in accordance with the provisions of the Act.[33]

The inclusion of consumers and purchasers as potential complainants is a progressive aspect, broadening the range of individuals who can contribute to the enforcement of anti-counterfeiting measures. This expansion aligns with consumer protection and ensures that those directly affected by counterfeit goods can actively participate in reporting and addressing potential offenses.

The regulatory complaints mechanism, therefore, facilitates a collaborative approach to combating counterfeiting, involving both intellectual property rights holders and end consumers. This inclusivity enhances the effectiveness of enforcement measures and contributes to a more comprehensive anti-counterfeiting strategy.

3.1.2 Warrantless search and seizure

Paul Nduba v Attorney General and Anti-Counterfeit Agency [2016] eKLR

In the case of *Paul Nduba v Attorney General and Anti-Counterfeit Agency*[34], the petitioner challenged the constitutionality of Section 23(c) of the Anti-Counterfeit Act No. 13 of 2008. The section

[33] Statute Law (Miscellaneous Amendment) Act, 2018

[34] *Paul Nduba v Attorney General and Anti-Counterfeit Agency* [2016] eKLR

empowered inspectors to conduct warrantless searches and seizures. The petitioner sought several declarations, including the unconstitutionality of Section 23(c). The petitioner, Paul Kihara Nduba, operated a business known as 'Shikanisha Shoe Collection.' Inspectors from the Anti-Counterfeit Agency seized various goods (shoes) worth about Ksh 1.0 million from the petitioner's shop on March 27, 2015. The petitioner contested the legality of the seizure, arguing that he was only a retailer and not the manufacturer of the goods, and the inspectors had no authority to confiscate the goods without charging him. The petitioner further claimed that the inspectors threatened to destroy the seized goods without a court order.[35]

The court found that the petition was partly incompetent as the petitioner failed to demonstrate how Section 23(a) and (b) of the Anti-Counterfeit Act were inconsistent with the Constitution. However, substantive issues regarding the legality of the actions of the Anti-Counterfeit Agency were deemed competent. The petitioner argued that the inspectors needed a complaint from the owner of intellectual property before entering and searching premises. The court clarified that Section 34(4) of the Act allows inspectors to act on their initiative without a prior complaint. The court emphasized that the inspector's actions did not amount to an invasion of privacy as they were acting pursuant to the law to combat counterfeiting. The continued detention of seized goods for up to three months, as provided by Section 28(1) of the Act, was deemed lawful. The petitioner had filed the petition within this period. The court concluded that the inspector's actions were lawful, and the petitioner failed to demonstrate any infringement of his rights. The petitioner's

[35] Ibid

argument that he was neither the manufacturer nor importer of the goods did not satisfy the conditions for the return of seized goods under Section 25(3) of the Act.[36] The petition was dismissed in its entirety.

The court's decision upheld the legality of warrantless searches and seizures conducted by the Anti-Counterfeit Agency, emphasizing the agency's statutory authority. The judgment highlighted the importance of the Anti-Counterfeit Act in combating counterfeiting, protecting intellectual property rights, and allowing inspectors to act proactively. The dismissal of the petition affirmed the constitutionality of Section 23(c) and supported the agency's role in enforcing anti-counterfeiting measures.

3.1.3 Statutory presumptions in favour of IP rights holder

The concept of progressive aspects and statutory presumptions in favour of IP (Intellectual Property) rights holders is rooted in the legal framework established to protect intellectual property rights. These aspects are designed to provide a proactive and advantageous environment for those holding intellectual property rights, such as patents, trademarks, copyrights, and trade secrets.[37]

Intellectual property laws evolve to keep pace with technological advancements and changes in society. Legislation often incorporates mechanisms that can adapt to emerging challenges in the digital age or new forms of intellectual property.[38]

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[36] Ibid

[37] Mutua, N. (2011). *Counterfeiting in Kenya: The KEBS Challenge*. Nairobi: Longhorn Publishers.

[38] Ibid

Some legal systems establish presumptions that favour IP rights holders, shifting the burden of proof to alleged infringers. Certain actions might be presumed as infringing unless proven otherwise, making it more straightforward for rights holders to assert their claims. Statutory presumptions act as protective measures, recognizing the inherent value of intellectual property and the need to provide effective remedies against infringement.[39]

Examples of Statutory Presumptions

Trademark Infringement: Presumption that the unauthorized use of a registered trademark constitutes infringement.

Copyright Infringement: Presumption that the reproduction, distribution, or public display of copyrighted works without authorization is an infringement.

Patent Rights: Presumption that the patent owner has the exclusive right to make, use, and sell the patented invention.[40]

While statutory presumptions benefit rights holders, there's an ongoing effort to strike a balance that prevents misuse and abuse of intellectual property claims. Courts may still consider the specifics of each case to ensure fairness and prevent unwarranted or overly aggressive enforcement.

[39] Ibid
[40] Ibid

3.2 Defective Implementation of the Anti-Counterfeit Act

3.2.1 Restriction of border control enforcement measures

The restriction of border control enforcement measures is a concept often associated with the implementation of laws related to combating counterfeiting and intellectual property rights infringement, such as the Anti-Counterfeit Act[41]. Border control measures are implemented to prevent the entry or exit of goods that infringe on intellectual property rights, including counterfeit products. These measures typically involve inspections, searches, and seizures of goods at border points to identify and detain counterfeit or infringing products. In certain situations, the law may impose restrictions on the extent to which border control measures can be enforced.[42]

There is often a need to balance the enforcement of intellectual property rights with other legal considerations, such as the free flow of legitimate trade and protection of individual rights. The specific provisions within the Anti-Counterfeit Act or similar legislation may outline the scope and limitations of border control enforcement. Countries may be bound by international agreements that provide guidelines for border control measures to ensure consistency in the global enforcement of intellectual property rights.[43]

Insufficient resources, both in terms of personnel and technology, can hinder effective border control enforcement. Deficiencies or ambiguities in the legal framework can lead to challenges in implementing and enforcing border control measures. Defective

[41] Ibid
[42] Ibid
[43] Ibid

implementation may increase the risk of counterfeit or infringing products entering the market, causing financial losses and reputational damage to rights holders. If border control measures are restricted, the deterrent effect on potential infringers may be diminished. Countries may undertake legal reforms to address gaps or ambiguities in existing legislation, strengthening the framework for border control enforcement. Investments in training and technology can enhance the capacity of border control authorities to effectively implement and enforce measures.[44]

3.2.2 Duplicity of roles of Anti-Counterfeit Agency and Kenya Copyright Board

Match Masters Limited v Kenafric Matches Limited and Anti-Counterfeit Agency [2021] eKLR

In the case of *Match Masters Limited v Kenafric Matches Limited and Anti-Counterfeit Agency*[45] Match Masters Limited (MML), the plaintiff, and Kenafric Matches Limited (Kenafric), the first defendant, were involved in a trademark dispute related to safety matches. MML sought various orders against Kenafric, including injunctions to restrain Kenafric from manufacturing, marketing, selling, distributing, trading, or dealing in safety matches branded "Big Five." MML owned several brands of safety matches, including Rhino, Kifaru, Simba, and '*Paka*', which incorporated the names of Kenya's "big five" animals. Kenafric applied to register two marks, "Big Five" (word mark) and "Big Five" (word and device), which were opposed by MML through proceedings before the Registrar of Trademarks.[46]

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[44] Ibid
[45] *Match Masters Limited v Kenafric Matches Limited and Anti-Counterfeit Agency* [2021] eKLR
[46] Ibid

MML claimed that Kenafric commenced production and sale under the contested get-ups before the opposition proceedings were determined. MML accused Kenafric of infringing its trademarks by copying base yellow colours, matchbox design, slogans, and other elements. MML sought orders, including an injunction against Kenafric and an order for the Anti-Counterfeit Authority to seize and confiscate all "Big Five" branded safety matches. The Anti-Counterfeit Agency (the second defendant) was accused by MML of failing to institute investigations and proceedings against Kenafric, endorsing counterfeiting, and not fulfilling its mandate under the Anti-Counterfeit Act.[47]

Kenafric argued that the main issue was whether its marks were similar or confusingly similar to MML's marks and whether they were registrable under the Trade Marks Act. The court considered the elements of passing off and trademark infringement, emphasizing the need for MML to establish goodwill and reputation associated with its marks. The court observed similarities in the get-ups of matchboxes and wrappings between MML's marks and Kenafric's marks, potentially leading to confusion among consumers. While the court did not find Kenafric's products to be counterfeits, it granted an injunction against Kenafric from continued sale of products with the contested marks, pending the determination of the main suit. The court required MML to furnish an undertaking as to damages for a specified amount within a given timeframe. Prayer 6 of MML's application, which sought to have the Anti-Counterfeit Authority seize and confiscate Kenafric's products, was declined.[48]

[47] Ibid
[48] Ibid

This case highlights the complexities of trademark disputes, involving issues of similarity, likelihood of confusion, passing off, and the role of regulatory bodies such as the Anti-Counterfeit Authority.

3.2.3 Limited use of ICT and technological tools

In the context of the Defective Implementation of the Anti-Counterfeit Act, the limited use of Information and Communication Technology (ICT) and technological tools can pose significant challenges. The effective enforcement of anti-counterfeit measures requires a robust technological infrastructure and the integration of digital tools. Limited use of ICT may result in inadequate data management and analysis capabilities. Efficient handling of data related to counterfeit activities, investigations, and legal proceedings is crucial for informed decision-making.[49]

Counterfeiters often exploit gaps in tracking and monitoring systems. With limited use of technology, it becomes challenging to implement effective tracking mechanisms for goods, making it easier for counterfeit products to enter the market unnoticed. ICT plays a vital role in facilitating coordination and communication among relevant stakeholders, including law enforcement agencies, regulatory bodies, and businesses. Limited technological tools may hinder seamless information sharing, reducing the overall effectiveness of anti-counterfeit efforts. The rise of e-commerce platforms as channels for counterfeit goods requires advanced technological solutions. Limited use of ICT may result in difficulties in monitoring online marketplaces, identifying illicit activities, and taking prompt action

[49]Wekesa, M. & Sihanya, B. (2009). Intellectual Property Rights in Kenya. Konrad Adenauer Stiftung, Sportslink Limited.

against online counterfeiters.[50]

Technologies such as holograms, QR codes, and RFID tags are essential for product authentication. Limited integration of these technologies makes it easier for counterfeiters to replicate products and deceive consumers. Effective anti-counterfeit measures often involve digital enforcement strategies, including online brand protection and digital forensics. The absence of robust technological tools may hinder the ability to combat counterfeiting in the digital realm.[51]

3.2.4 Narrow consumer-focused actions

Narrow consumer-focused actions, such as consumer awareness programs, play a crucial role in addressing the defective implementation of the Anti-Counterfeit Act. These initiatives aim to educate and empower consumers, fostering a sense of awareness and responsibility in their purchasing decisions.[52] Consumer awareness programs should focus on educating the public about how to identify counterfeit goods. This includes recognizing signs of fake products, understanding packaging details, and being aware of common counterfeit practices. Knowledgeable consumers act as a frontline defence against counterfeit products entering the market.[53]

Consumers may be unaware of the potential health and safety risks associated with counterfeit goods. Consumer-focused actions should highlight instances where counterfeit products have led to health hazards, emphasizing the importance of buying from legitimate

[50] Ibid
[51] Ibid
[52] Ibid
[53] Ibid

sources. Encouraging responsible purchasing habits is vital. Consumers need to understand the impact of buying counterfeit goods on the economy, legitimate businesses, and employment. Consumer awareness campaigns can emphasize the role individuals play in supporting a counterfeit-free market through responsible buying behaviour.[54]

Consumer awareness programs should utilize various channels such as social media, traditional media, and community events to reach a diverse audience. Engaging content, testimonials, and real-life stories can effectively convey the message about the dangers of counterfeit products.

Consumer awareness can be enhanced by incorporating technology-driven tools. QR codes, mobile apps, and online platforms can empower consumers to verify the authenticity of products before making a purchase. These tools make it easier for consumers to differentiate between genuine and counterfeit items.

Consumer-focused actions should include information on legal rights and recourse mechanisms available to individuals who unknowingly purchase counterfeit goods. Empowering consumers with knowledge about reporting mechanisms and legal remedies strengthens the overall fight against counterfeit trade.[55]

3.2.5 Skewed balance between trademark protection and safety interests

The defective implementation of the Anti-Counterfeit Act may

[54] Ibid
[55] Ibid

manifest in a skewed balance between trademark protection and safety interests. This imbalance often involves an excessive focus on safeguarding trademarks and intellectual property without adequately addressing the adverse consequences associated with counterfeit products.

In some instances, authorities might prioritize the protection of trademarks and intellectual property over other crucial aspects of public interest. While trademarks are essential for brand integrity and economic considerations, an excessive focus on this aspect alone can result in neglecting the broader implications of counterfeit goods. Counterfeit products, beyond infringing on trademarks, often pose serious threats to consumer safety. Defective materials, substandard manufacturing processes, and improper quality controls in counterfeit goods can lead to health hazards and safety risks.[56] A defective implementation of the Anti-Counterfeit Act might not adequately address these pressing safety concerns.

The primary focus should be on protecting consumers from potential harm caused by counterfeit products. This includes counterfeit pharmaceuticals, electronics, and other items that may pose health and safety risks. A defective implementation that tilts heavily towards trademark protection may overlook the urgent need to address these risks, leaving consumers vulnerable. Effective enforcement should strike a balance between protecting trademarks and prioritizing public health and safety. A myopic focus on intellectual property alone might lead to insufficient efforts in

[56] Yager, L. (2010). Intellectual Property: Observations on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods. Diane Publishing Co.

monitoring and preventing the distribution of counterfeit goods that endanger consumers.[57]

4. A Call for the Effective Implementation of Kenya's Anti-Counterfeit Act

4.1 Preventive Measures and Strategies

4.1.1 Pro-active Recordal of IP Rights

In the context of preventing counterfeiting, pro-active recordal of intellectual property (IP) rights is a critical preventive measure. This involves the systematic registration and documentation of trademarks related to goods that are to be imported into the country[58]. The Anti-Counterfeit Act, through Section 34B, establishes a framework for this pro-active recordal. Trademarks related to imported goods must be recorded with the Authority, regardless of their place of registration. This is a pro-active step to create a comprehensive database of trademarks associated with imported products.[59]

The Act outlines a detailed application process, specifying the information that must be included in the application, such as the trademark owner's details, places of manufacture, and details of authorized users. Once an application for recordation is approved, the protection under the Act becomes effective. This ensures that recorded trademarks receive legal safeguards against counterfeiting activities. The Act includes provisions for the renewal of recordation, ensuring that the information remains current. It also allows for

[57] Ibid
[58] Ibid
[59] Anti-Counterfeit Act, sec 34B

updates in case of changes in ownership or names, promoting the accuracy of the recorded data.[60]

The Authority is empowered to issue a certification mark in the form of an anti-counterfeit security device for goods that comply with the recordation requirements. This serves as a visible indicator of authenticity. The Authority is granted the authority to seize and destroy goods found within the country that lack the prescribed anti-counterfeit security device. This strengthens enforcement mechanisms against counterfeit products.[61]

4.1.2 Lessons for Kenya - Implementation of Section 34B

Kenya can draw valuable lessons from Section 34B to enhance its anti-counterfeit strategies. Kenya can benefit from a comprehensive recordal system that gathers detailed information about trademarks associated with imported goods. This aids in creating a robust database for effective monitoring. The Act's provision for notifying applicants of the approval or denial of their application in a prescribed manner ensures transparency. Kenya can implement a similar system to keep applicants informed.

Extending the provisions to cover copyrights, trade names, and other forms of intellectual property ensures a holistic approach. Kenya can consider adopting similar measures to address a wide range of IP-related challenges. The issuance of a certification mark as an anti-counterfeit security device adds an extra layer of protection. Kenya can explore incorporating such visible markers to distinguish genuine products.

[60] Ibid
[61] Ibid

Granting the Authority, the power to seize and destroy non-compliant goods within the country acts as a deterrent. Kenya can strengthen its enforcement capabilities by adopting similar measures.

4.2 Technology-driven National Anti-Counterfeit Information Management System

The United Kingdom has demonstrated a commitment to combating counterfeiting through the implementation of a robust Technology-driven National Anti-Counterfeit Information Management System[62]. The UK employs digital platforms to centralize information related to counterfeit activities. This involves the integration of databases, surveillance systems, and communication networks to create a comprehensive information management system. The system in the UK allows for real-time monitoring of intellectual property infringements. This involves the use of advanced technologies such as artificial intelligence and data analytics to identify, track, and combat counterfeiting activities as they occur.[63]

The UK's approach emphasizes collaboration between law enforcement agencies, regulatory bodies, and private stakeholders. Information sharing is facilitated through the technology-driven system, enabling a coordinated response to counterfeiting challenges.[64]

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[62] Julia Dickenson, Jason Raeburn and Katrina Thomson (2019) Procedures and strategies for anti-counterfeiting: United Kingdom. *Baker McKenzie*

[63] Ibid

[64] Ibid

Lessons for Kenya - Strengthening the Anti-Counterfeit Authority Integrated Management System

Kenya can draw valuable lessons from the UK's experience to enhance its own Anti-Counterfeit Authority Integrated Management System.

Kenya can focus on further integrating its various anti-counterfeit initiatives into a centralized digital platform. This involves connecting databases, surveillance systems, and communication channels to create a unified information management system.

Leveraging advanced technologies like artificial intelligence and data analytics can enable real-time monitoring of counterfeiting activities. This enhances the authorities' ability to respond promptly and effectively to emerging threats.

Strengthening collaboration between different stakeholders, including law enforcement agencies, regulatory bodies, and private industries, is crucial. Kenya can explore the development of digital collaboration platforms to facilitate seamless information sharing and joint efforts.

Furthermore, embracing mobile applications, websites, and social media platforms can enhance public awareness campaigns. Kenya can develop user-friendly digital resources to educate consumers about the dangers of counterfeit products and promote a culture of authenticity.

As the information management system becomes more technology-driven, Kenya should prioritize robust data security measures. This involves implementing encryption, access controls, and regular

cybersecurity assessments to safeguard sensitive information.

Finally, training and supporting users, including law enforcement personnel and other relevant stakeholders, on utilizing the integrated management system is crucial. Kenya can invest in training programs and user-friendly interfaces to ensure effective utilization of the technology-driven platform.

4.3 Border Control Measures

Israel

Israel has implemented robust border control measures to combat counterfeiting effectively. Israel has introduced comprehensive rules for border enforcement. These rules empower customs authorities to proactively identify and detain suspected counterfeit goods at border entry points. This involves close collaboration between customs officials and intellectual property rights holders to ensure a swift and decisive response.[65]

Israel has empowered its customs authorities to intervene in goods-in-transit and export cases. This allows for the inspection and potential seizure of goods suspected of being counterfeit, even if they are in transit or intended for export. Such measures act as a preventive mechanism to stop counterfeit products from entering or leaving the country. The use of advanced technologies, including scanning equipment and data analytics, enhances Israel's ability to identify and intercept counterfeit goods at border checkpoints. This proactive approach leverages technology to streamline the inspection

[65] Dor Cohen Zedek, Yossi Markovich and Omri Ben-Natan (2021) 'Procedures and strategies for anti-counterfeiting: Israel'. *Pearl Cohen Zedek Latzer Baratz*

process and improve the accuracy of detecting illicit goods.[66]

Lessons for Kenya

Kenya can learn from Israel's effective border control measures and consider the following strategies:

Kenya should consider introducing comprehensive rules for border enforcement, clearly outlining the procedures and authorities involved in identifying and detaining suspected counterfeit goods. Collaboration between customs authorities and rights holders should be emphasized to strengthen the overall enforcement framework.

Empowering Kenya's customs authorities to intervene in goods-in-transit and export cases is crucial. This grants them the legal authority to inspect, detain, and seize goods suspected of being counterfeit, irrespective of their destination. This intervention capability acts as a deterrent and prevents the transit of counterfeit products through Kenyan territory.

Kenya can explore the integration of advanced technologies at border checkpoints. Implementing scanning equipment, data analytics, and other technological tools enhances the efficiency of customs inspections. This modernization allows for quicker and more accurate identification of counterfeit goods, reducing the risk of illicit products entering the market.

In addition, providing training to customs officials on identifying counterfeit goods and enforcing border control measures is essential. Building the capacity of customs authorities ensures that they are

[66] Ibid

well-equipped to handle the challenges posed by counterfeiters effectively.

4.4 Civil and Criminal Litigation Enforcement

South African Experience: '*Puma AG Rudolph Dassler Sport v Rampar Trading (Pty) Ltd* [2010] ZASCA 140'

In the case of *Puma AG Rudolph Dassler Sport v Rampar Trading (Pty) Ltd*[67], Puma, a renowned sportswear brand, took legal action against Rampar Trading for trademark infringement. Rampar Trading was found to be importing and distributing counterfeit Puma products in South Africa. The case highlighted the economic harm and damage to the brand's reputation caused by counterfeit activities. The South African Supreme Court of Appeal ruled in favour of Puma, emphasizing the importance of protecting intellectual property rights. The decision reinforced the legal consequences for trademark infringement and counterfeiting.[68]

Lessons for Kenya

Introduction of Mandatory Minimum Custodial Sentences:

Kenya can consider introducing mandatory minimum custodial sentences for individuals convicted of intellectual property (IP) rights infringement, including counterfeiting. This serves as a strong deterrent and emphasizes the seriousness of IP-related offenses. The South African experience demonstrates that a robust legal framework, coupled with strict penalties, contributes to a more effective deterrence against counterfeit activities. Kenya can learn from this and explore legislative amendments to introduce

[67] *Puma AG Rudolph Dassler Sport v Rampar Trading (Pty) Ltd* [2010] ZASCA 140

[68] Ibid

mandatory minimum custodial sentences for convicted offenders.

Adoption of Inter-Agency Approach to Enforce IP Rights:

Collaborative efforts among various government agencies, law enforcement, and IP rights holders are crucial for effective enforcement. Kenya can adopt an inter-agency approach, where relevant bodies work together to combat counterfeiting comprehensively. South Africa's experience showcases the importance of cooperation between authorities and rights holders. Kenya can establish mechanisms for seamless information sharing, joint operations, and coordinated efforts to address counterfeiting at both civil and criminal levels. Training programs and awareness initiatives can be implemented to enhance the capabilities of law enforcement agencies, prosecutors, and the judiciary in handling IP-related cases.

4.5 Availability of Extrajudicial Reliefs

South Africa's Counterfeit Goods Act

South Africa's Counterfeit Goods Act provides for extrajudicial reliefs to address counterfeit issues efficiently. The Act empowers rights holders and authorities to take swift actions outside the traditional court processes. The Counterfeit Goods Act allows for extrajudicial measures such as the seizure and destruction of counterfeit goods by customs officials, rights holders, and designated officers without the need for a court order. The Act facilitates a quicker resolution of disputes related to counterfeit goods, enabling rights holders to protect their intellectual property without lengthy legal proceedings.[69]

[69] Counterfeit Goods Act, 1997

Lessons for Kenya

Kenya can consider empowering the Anti-Counterfeit Authority (ACA) to settle disputes related to counterfeit goods out of court. This extrajudicial authority would be in addition to the existing power to seize and destroy counterfeit products. Providing ACA with the authority to mediate and resolve disputes efficiently can lead to a more streamlined process for rights holders. This would contribute to a faster response in combating counterfeiting and protecting intellectual property.

Implementing measures similar to South Africa's Counterfeit Goods Act can enhance the overall effectiveness of the Anti-Counterfeit Act in Kenya. Extrajudicial reliefs can act as a complementary tool for rights holders and authorities in addressing counterfeiting issues promptly.

Conclusion

In navigating the complex landscape of countering transnational organized crime facilitated by counterfeiting, this exploration of Kenya's Anti-Counterfeit Act, 2008 reveals both promising aspects and critical shortcomings. The legislative framework, while progressive in its intent, grapples with defective implementation, necessitating urgent and comprehensive reforms. The analysis of progressive aspects unveils the intricate legal landscape governing intellectual property rights in Kenya. Through an examination of relevant statutes, case law, and the functions of the Anti-Counterfeit Authority (ACA), the paper recognizes the foundational elements aimed at curbing counterfeiting.

However, the defective implementation of the Anti-Counterfeit Act

unravels a series of challenges. From limited use of information and communication technology (ICT) to narrow consumer-focused actions and a skewed emphasis on trademark protection at the expense of safety concerns, the gaps in implementation demand swift attention. The call for effective implementation is rooted in pragmatic strategies. Section 34B emerges as a focal point, advocating for the proactive recordal of intellectual property rights. Drawing lessons from international experiences, particularly the United Kingdom, offers a roadmap for Kenya to bolster its defences against transnational organized crime.

The proposition for a Technology-driven National Anti-Counterfeit Information Management System further strengthens this call. Insights from the United Kingdom provide valuable ideas for enhancing the Anti-Counterfeit Authority Integrated Management System, ensuring a technologically robust defence against counterfeit threats. Border control measures, inspired by Israel's comprehensive enforcement rules, present an additional layer of defence. The empowerment of Kenya's customs authorities to intervene in goods-in-transit and export cases emerges as a critical imperative to safeguard against illicit trade.

In the realm of civil and criminal litigation enforcement, the South African experience, exemplified by the '*Puma AG Rudolph Dassler Sport v Rampar Trading (Pty) Ltd*' case, underscores the need for mandatory minimum custodial sentences and an inter-agency approach to fortify intellectual property rights enforcement. The availability of extrajudicial reliefs, as demonstrated by South Africa's Counterfeit Goods Act, propels the advocacy for empowering the Anti-Counterfeit Authority in Kenya. This involves granting the authority the ability to settle disputes out of court, complementing its

existing power to destroy counterfeit products.

In summation, empowering Kenya's Anti-Counterfeit Authority is not merely a legal imperative; it is a strategic necessity in the face of evolving transnational organized crime networks. Through a nuanced approach that combines legal reforms, technological advancements, and international best practices, Kenya can fortify its defences, ensuring that the Anti-Counterfeit Act becomes a formidable deterrent against the perils of counterfeit-driven criminal activities. The collective implementation of these recommendations marks a transformative step towards safeguarding the nation's economy, consumers, and intellectual property rights from the pervasive threat of counterfeiting.

References

Anti-Counterfeit (Amendment) Regulations, 2021

Anti-Counterfeit (Recordation) Regulations, 2021

Anti-Counterfeit Act 2008

Anti-Counterfeit Agency Strategic Plan 2017-2022

Counterfeit Goods Act, 1997

Dor Cohen Zedek, Yossi Markovich and Omri Ben-Natan (2021) 'Procedures and strategies for anti-counterfeiting: Israel'. *Pearl Cohen Zedek Latzer Baratz*

Julia Dickenson, Jason Raeburn and Katrina Thomson (2019) Procedures and strategies for anti-counterfeiting: United Kingdom. *Baker McKenzie*

Match Masters Limited v Kenafric Matches Limited and Anti-Counterfeit Agency [2021] eKLR

Mutua, N. (2011). *Counterfeiting in Kenya: The KEBS Challenge*. Nairobi: Longhorn Publishers.

National Action Plan and Implementation Framework to Combat Illicit Trade 2019-2022 (2019) A Publication of the State Department of Trade available at https://www.aca.go.ke/images/downloads/publications/national-action-plan-to-combat-illicit-trade.pdf

Paul Nduba v Attorney General and Anti-Counterfeit Agency [2016] eKLR

Puma AG Rudolph Dassler Sport v Rampar Trading (Pty) Ltd [2010] ZASCA 140

Republic v Anti-Counterfeit Agency Ex Parte Caroline Mangala t/a Hairworks Salon [2019] eKLR:

Statute Law (Miscellaneous Amendment) Act, 2018

Wekesa, M. & Sihanya, B. (2009). Intellectual Property Rights in Kenya. Konrad Adenauer Stiftung, Sportslink Limited.

Yager, L. (2010). Intellectual Property: Observations on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods. Diane Publishing Co.

Transforming Agri-food Systems via Inclusive, Rights-based Governance for Food Security and Economic Empowerment in Kenya

By: ***Kariuki Muigua****

Abstract

A huge section of Kenyan communities has suffered from chronic food insecurity for the longest time since independence due to various factors that include poverty, land degradation, unsustainable land use practices, erratic weather patterns due to climate change, among others. This paper makes a case for the transformation of food production methods in Kenya through adopting an inclusive, rights-based approach to governance of the agricultural sector as a way of promoting food security, eradicating poverty and guaranteeing the socio-economic rights of all. The paper argues that unless these challenges are effectively addressed, achieving food security for the Kenyan people will remain a dream.

1. Introduction

In 2020, the United Nations Development Programme (UNDP) released a report documenting that 26% of Kenya's GDP comes from the agricultural sector, and 70% of Kenyans living in rural areas depend on it for their livelihood.[1] A negative shock might be harmful

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[1] Ochieng, O. (2021) 'Crisis impacts on rural lives and livelihoods in Kenya - Southern Voice', 8 February. Available at: https://southernvoice.org/crisis-impacts-on-rural-lives-and-livelihoods-in-kenya/,

to the agriculture industry, which is essential for creating jobs, generating revenue, and ensuring food security.[2]

The Food and Agriculture Organization of the United Nations (FAO) 2023 Report on "*The State of Food Security and Nutrition in the World 2023*" states that as urbanisation rises, the boundaries between rural and urban regions are becoming increasingly hazy and entangled.[3] FAO observes that an rising number of small and medium-sized cities and rural towns are experiencing population expansion, which "bridges" the gap between the rural hinterland and huge metropolises.[4] They thus point out in the 2023 Report that agrifood systems are altering as a result of the shifting demographic agglomeration patterns along this rural-urban continuum.[5] This presents possibilities as well as problems in ensuring that everyone has access to reasonably priced, healthful diets. FAO thus advocates for a thorough grasp of the interactions between the agrifood systems and the rural-urban continuum as necessary to guide actions and policy initiatives that will help overcome the obstacles and take advantage of the possibilities.[6]

Indeed, Kenya has not been spared from shifting changes in land use and urbanisation has greatly affected the available land for farming

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http://southernvoice.org/crisis-impacts-on-rural-lives-and-livelihoods-in-kenya/ (Accessed: 4 May 2024).

[2] Ibid.

[3] AO, IFAD, UNICEF, WFP and WHO. 2023. *The State of Food Security and Nutrition in the World 2023. Urbanization, agrifood systems transformation and healthy diets across the rural–urban continuum*. Rome, FAO. Available at: https://doi.org/10.4060/cc3017en (Accessed: 4 May 2024).

[4] Ibid.

[5] Ibid.

[6] Ibid.

in favour of housing projects in places such as Kiambu County and the other areas surrounding fast developing towns.[7] The data that is currently available from the National Council for Population and Development demonstrates that landholding sizes and cultivated areas in Kenya have been decreasing over time and are inversely correlated with population density.[8] In the most crowded regions,

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[7] Musa, M. and Odera, P. (2015) 'Land Use Land Cover Changes and their Effects on Agricultural Land: A Case Study of Kiambu County -Kenya', *Kabarak Journal of Research and Innovation*, 3, pp. 74–86; see also Museleku, E.K., 2013. *An Investigation into Causes and Effects of Agricultural Land Use Conversions in the Urban Fringes: A Case Study of Nairobi-Kiambu Interface* (Doctoral dissertation, University of Nairobi,); Macharia, C.K., 2018. *Implications for conversion of agricultural land use in peri urban areas of Gitothua Ward, Ruiru Sub County* (Doctoral dissertation, School of Built Environment, University of Nairobi); *Rapid urbanisation in Kiambu has brought about misery* (2020) *Nation*. Available at: https://nation.africa/kenya/blogs-opinion/blogs/dot9/rapid-urbanisation-in-kiambu-has-brought-about-misery--157498 (Accessed: 4 May 2024); Njiru, E.B.K., 2019. Urban expansion and loss of agricultural land: A GIS based study of Kiambu County. *International Journal of Science and Research*, *8*(9), p.915; Simiyu, L.B., 2002. *Effects of urbanization on the use and control of land: A Case of Ngong fringe* (Doctoral dissertation, University of Nairobi); Kioko, V.M., Mwendwa, P.K. and Imteyaz, A., 2022. The effects of urban sprawl on agricultural land use on the rural fringes of Towns; a case of Machakos town, Kenya. *J Afr Interdiscip Stud*, *6*(10), pp.196-212; Bon, B., Simonneau, C., Denis, E. and Delville, P.L., 2023. *Ordinary changes in land use linked to urbanisation in the global South Housing, capitalisation, agricultural changes* (Doctoral dissertation, Comité Technique" Foncier et développement"); Abuya, D.O., 2020. *Management of The Effects of Land Use Changes On Urban Infrastructure Capacity: A Case Study of Ruaka Town, Kiambu County, Kenya* (Doctoral dissertation, University of Nairobi); Njiru, B.E., 2016. Evaluation of urban expansion and its implications on land use in Kiambu County, Kenya. *Kenyatta University*.

[8] The National Council for Population and Development, *Effects of Population Growth and Uncontrolled Land Use On Climate Change in Kenya*, Policy Brief No. 60, June 2018. Available at: https://ncpd.go.ke/wp-

smallholders' landholdings have been declining, and in certain counties, like Kiambu, there's a chance that there won't be any land left for small-scale farming very soon.[9] Furthermore, as a result of Kenya's fast population growth, additional agricultural land is currently being turned into settlements in a number of the country's counties.[10] Land fragmentation, or the division of land among the adult members of a family, is a result of growing populations and larger families, which has caused a continual decrease in farm sizes.[11] Furthermore, it has been noted that there are detrimental effects on food security, social welfare, and agricultural productivity when

content/uploads/2021/02/60-PB-Effects-of-polpulation-Growth-on-climate.pdf (Accessed: 4 May 2024).

[9] Ibid., p. 1; Jayne, T. and Muyanga, M. (2012) 'Land constraints in Kenya's densely populated rural areas: Implications for food policy and institutional reform', *Food Security*, 4. Available at: https://doi.org/10.1007/s12571-012-0174-3.

[10] Ibid., p.1; 'Implications of Agricultural Land Subdivision in Kenya – KIPPRA' (no date). Available at: https://kippra.or.ke/implications-of-agricultural-land-subdivision-in-kenya/ (Accessed: 4 May 2024).

[11] Ibid., p.1; *Land Fragmentation - an overview | ScienceDirect Topics* (no date). Available at: https://www.sciencedirect.com/topics/earth-and-planetary-sciences/land-fragmentation (Accessed: 4 May 2024); Smith, K. and Cubbage, F. (2024) 'Land Fragmentation and Heirs Property: Current Issues and Policy Responses', *Land*, 13(4), p. 459. Available at: https://doi.org/10.3390/land13040459; Niroula, G. and Thapa, G. (2005) 'Impacts and causes of land fragmentation, and lessons learned from land consolidation in South Asia', *Land Use Policy*, 22, pp. 358–372. Available at: https://doi.org/10.1016/j.landusepol.2004.10.001; Alemu, G.T., Berhanie Ayele, Z. and Abelieneh Berhanu, A. (2017) 'Effects of Land Fragmentation on Productivity in Northwestern Ethiopia', *Advances in Agriculture*, 2017, p. e4509605. Available at: https://doi.org/10.1155/2017/4509605; Macharia, M. (2020) *Effects of Land Fragmentation on Land Use and Food Security Case Study of Nyamira, Laikipia, Nandi, Trans Nzoia, Taita Taveta, Kiambu, Kajiado, Nakuru, Tana River, Makueni, Isiolo, Kisumu and Vihiga.*

farms are too small to be economically viable.[12] These effects result in a lack of investment in land improvement, particularly in Arid and Semi-Arid Areas (ASALs), which causes land degradation and out-migration from Kenya.[13] As a result, growing food crops for the people is getting harder on the already deteriorated agricultural land in the majority of Kenya.[14]

Notably, apart from the population and land tenure challenges in the country, the erratic rainfall patterns in Kenya due to climate change also make a great contribution to the food insecurity in the country.[15] This has not only hampered the realisation of the socio-economic right to food but has also affected the other related rights such as the right to health, education and economic empowerment, among others.[16]

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[12] The National Council for Population and Development, *Effects of Population Growth and Uncontrolled Land Use On Climate Change in Kenya*, Policy Brief No. 60, June 2018., p.1.

[13] Ibid., p.1.

[14] Ibid., p.1.

[15] *High levels of acute food insecurity prevail following fifth consecutive below-average rainy season | FEWS NET* (no date). Available at: https://fews.net/east-africa/kenya/food-security-outlook-update/december-2022 (Accessed: 4 May 2024); *Food insecurity hits hard in Kenya's urban and rural centres* (2022) *RFI*. Available at: https://www.rfi.fr/en/africa/20220808-food-insecurity-hits-hard-in-kenya-s-urban-and-rural-centres (Accessed: 4 May 2024); *Soberly address food insecurity | Nation* (no date). Available at: https://nation.africa/kenya/blogs-opinion/opinion/-soberly-address-food-insecurity-4202994 (Accessed: 4 May 2024); *The chronic hunger song is exasperating- leaders need to change the hymnbook | Heinrich Böll Stiftung | Nairobi Office Kenya, Uganda, Tanzania* (no date). Available at: https://ke.boell.org/en/2021/12/01/chronic-hunger-song-exasperating-leaders-need-change-hymnbook (Accessed: 4 May 2024).

[16] 'Kenya: Acute Food Insecurity Situation February 2023 and Projection for

Increasing food and nutrition security, alleviating poverty, particularly in low-income countries (LICs), and achieving climatic and environmental goals for sustainable development are all made possible by well-functioning agrifood systems.[17] Given the current state of affairs with growing costs and food insecurity, they are especially crucial.[18]

It is for the foregoing reasons that this paper makes a case for the need to transform agri-food systems through putting in place inclusive, rights-based governance for food security and economic empowerment in Kenya. The paper argues that unless there is a paradigm shift in production and governance approach to agricultural sector, Kenya will not only continue experiencing acute food insecurity but will also report higher cases due to the growing population and other intervening factors, both locally and internationally.

2. Food Security and Sustainable Development Goals

SDG 2 requires countries to end hunger, achieve food security and improved nutrition and promote sustainable agriculture.[19] Countries are expected to ensure that by 2030, they end hunger and ensure

March – June 2023' (no date). Available at: https://aiap.or.ke/index.php/2023/05/08/kenya-acute-food-insecurity-situation-february-2023-and-projection-for-march-june-2023/ (Accessed: 4 May 2024).

[17] *Building inclusive, productive, and sustainable agrifood systems | Independent Evaluation Group* (2022). Available at: https://ieg.worldbankgroup.org/blog/building-inclusive-productive-and-sustainable-agrifood-systems (Accessed: 4 May 2024).

[18] Ibid.

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

access by all people, in particular the poor and people in vulnerable situations, including infants, to safe, nutritious and sufficient food all year round.[20] They are also to ensure that by 2030, they end all forms of malnutrition, including achieving, by 2025, the internationally agreed targets on stunting and wasting in children under 5 years of age, and address the nutritional needs of adolescent girls, pregnant and lactating women and older persons.[21] By 2030, they are also to double the agricultural productivity and incomes of small-scale food producers, in particular women, indigenous peoples, family farmers, pastoralists and fishers, including through secure and equal access to land, other productive resources and inputs, knowledge, financial services, markets and opportunities for value addition and non-farm employment.[22]

In addition, by 2030, they are to ensure sustainable food production systems and implement resilient agricultural practices that increase productivity and production, that help maintain ecosystems, that strengthen capacity for adaptation to climate change, extreme weather, drought, flooding and other disasters and that progressively improve land and soil quality.[23]

By 2020, countries are to maintain the genetic diversity of seeds, cultivated plants and farmed and domesticated animals and their related wild species, including through soundly managed and diversified seed and plant banks at the national, regional and international levels, and promote access to and fair and equitable

[20] SDG 2, Target 2.1.
[21] SDG 2, Target 2.2.
[22] SDG 2, Target 2.3.
[23] SDG 2, Target 2.4.

sharing of benefits arising from the utilization of genetic resources and associated traditional knowledge, as internationally agreed.[24]

As a way of achieving SDG 2, countries are also expected to increase investment, including through enhanced international cooperation, in rural infrastructure, agricultural research and extension services, technology development and plant and livestock gene banks in order to enhance agricultural productive capacity in developing countries, in particular least developed countries.[25] They are also to correct and prevent trade restrictions and distortions in world agricultural markets, including through the parallel elimination of all forms of agricultural export subsidies and all export measures with equivalent effect, in accordance with the mandate of the Doha Development Round.[26] Countries are also required to adopt measures to ensure the proper functioning of food commodity markets and their derivatives and facilitate timely access to market information, including on food reserves, in order to help limit extreme food price volatility.[27]

SDG 12 requires countries to ensure sustainable consumption and production patterns.[28] Target 12.3 thereof requires countries to ensure that by 2030, they halve per capita global food waste at the retail and consumer levels and reduce food losses along production and supply chains, including post-harvest losses.[29]

The *Sustainable Development Goals Report 2023: Special Edition* records

[24] SDG 2, Target 2.5.
[25] SDG 2, Target 2.a.
[26] SDG 2, Target 2.b.
[27] SDG 2, Target 2.c.
[28] SDG 12.
[29] SDG 12, Target 12.3.

that Since 2015, there has been an increase in the number of people experiencing food insecurity and hunger, which has been made worse by the pandemic, conflicts, climate change, and widening disparities.[30] According to the Report, approximately 735 million individuals, or 9.2% of the global population, suffered from chronic hunger in 2022; this is 122 million more people than in 2019.[31] 2.4 billion people, or 29.6% of the world's population, were thought to be moderately or severely food insecure, which means they lacked access to enough food. This number represents a startling 391 million additional individuals than in 2019.[32]

The Special Report thus proposes that urgent coordinated action and policy solutions are necessary to address systemic injustices, restructure food systems, finance sustainable agricultural practices, and lessen the negative effects of conflict and the pandemic on global nutrition and food security if we are to achieve zero hunger by 2030.[33] The Report documents that investing in agriculture is essential to reducing poverty and hunger as well as enhancing production, efficiency, and income development.[34] The agricultural orientation index (AOI), which measures the sector's contribution to GDP, decreased from 0.50 in 2015 to 0.45 in 2021, despite record-high nominal state investment on agriculture of $700 billion in 2021 during the pandemic.[35] With the exception of Europe and North America, where governments implemented historically large stimulus

[30] United Nations Department of Economic and Social Affairs, 2023. *The Sustainable Development Goals Report 2023: Special Edition*. UN, p. 14.
[31] Ibid., p. 14.
[32] Ibid., p.14.
[33] Ibid., p. 14.
[34] Ibid., p.14.
[35] Ibid., p.14.

packages, this fall was noted around the world.[36]

In reference to the escalating cost of food, the report notes that, while the percentage of nations suffering moderately to excessively high food prices decreased from 48.1% in 2020 to 21.5% in 2021, it remained higher than the average of 15.2% for the years 2015–2019.[37] The prolonged price rises were caused by a number of factors, including growing demand, rising input (fertiliser and energy) and transportation prices, interruptions in the supply chain, and changes in trade policy.[38] In the meanwhile, pricing pressures were exacerbated by internal causes such as unfavourable weather, depreciating currencies, unstable political environments, and production shortages.[39] The least developed nations (LDCs) and sub-Saharan Africa faced extra problems due to macroeconomic issues, deteriorating security situations, and a high degree of reliance on imported food and agricultural inputs.[40]

The *2015 Paris Agreement*[41] recognizes the fundamental priority of safeguarding food security and ending hunger, and the particular vulnerabilities of food production systems to the adverse impacts of climate change.[42] Article 2 thereof states that this Agreement, in

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[36] Ibid., p.14.
[37] Ibid., p. 15.
[38] Ibid., p.15.
[39] Ibid., p. 15.
[40] Ibid., p.15.
[41] United Nations, *Paris Agreement*, United Nations, Treaty Series, vol. 3156, p.79. Paris Agreement was adopted on 12 December 2015 at the twenty-first session of the Conference of the Parties to the United Nations Framework Convention on Climate Change held in Paris from 30 November to 13 December 2015.
[42] Ibid., preamble.

enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by, *inter alia*: 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.[43]

The SDGs form a firm basis for implementation of policies, laws, programmes and plans aimed at modernizing agricultural production in Kenya and achieving the universal right to food and other related socio-economic rights for all.

3. Agriculture and Food Production Systems in Kenya: Challenges and Prospects

It has been accurately noted that systemic hunger has become the norm in Kenya over the course of more than 50 years. Mzee Jomo Kenyatta, the founder of Kenya, pledged in one of his addresses to combat sickness, famine, and illiteracy.[44] These three basic rights include access to food, healthcare, and education. But even after Kenya gained independence over 60 years ago, these rights are still illusory.[45] Access to and cost of food affects more people than only

[43] Ibid., Article 2(1)(b).

[44] *The chronic hunger song is exasperating- leaders need to change the hymnbook | Heinrich Böll Stiftung | Nairobi Office Kenya, Uganda, Tanzania* (no date). Available at: https://ke.boell.org/en/2021/12/01/chronic-hunger-song-exasperating-leaders-need-change-hymnbook (Accessed: 4 May 2024).

[45] Ibid; *Analysis warns of food insecurity for 5.4 million Kenyans* (2023) *AP News*. Available at: https://apnews.com/article/kenya-government-william-ruto-nairobi-climate-and-environment-6e0955fc8c399135bc7c8e566cca522f (Accessed: 4 May 2024); *Officials talk biodiversity as drought stunts Kenya wildlife* (2022) *AP News*. Available at: https://apnews.com/article/united-

the impoverished in rural areas, despite popular belief.[46] Due to growing population density and mobility, it has spread throughout suburbs and into cities. In Nairobi, for instance, just one out of every five homes has enough food, and almost half of all households are classified as "food-insecure with both adult and child hunger."[47]

With the reduced agricultural land, climate change, population growth and urbanisation, Kenya has moved more towards relying on food aid as well as importation of food from other countries.[48] This is

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nations-animals-elephants-kenya-biodiversity-4ac99955ffc7816bfc4513e742bac790 (Accessed: 4 May 2024); week, S. up to date on the editors' picks of the (2023) *Severe food insecurity rate doubles in Kenya*, *Business Daily*. Available at: https://www.businessdailyafrica.com/bd/economy/severe-food-insecurity-rate-doubles-in-kenya--4405802 (Accessed: 4 May 2024).

[46] *The chronic hunger song is exasperating- leaders need to change the hymnbook | Heinrich Böll Stiftung | Nairobi Office Kenya, Uganda, Tanzania* (no date). Available at: https://ke.boell.org/en/2021/12/01/chronic-hunger-song-exasperating-leaders-need-change-hymnbook (Accessed: 4 May 2024).

[47] Ibid.

[48] 'Kenya aims to reduce its reliance on food imports – Kenya News Agency' (2023), 30 November. Available at: https://www.kenyanews.go.ke/kenya-aims-to-reduce-its-reliance-on-food-imports/ (Accessed: 5 May 2024); Emongor, R.A., 2014. Food price crisis and food insecurity in Kenya. *Kenya Agricultural Research Institute*. Available at: https://elibrary.acbfpact.org/acbf/collect/acbf/index/assoc/HASH01b5/cd96f147/6ca2937f/79e1.dir/Food%20crisis%20and%20food%20insecurity%20in%20Kenya.pdf [Accessed 5 May 2024]; D'Alessandro, S.P., Caballero, J., Lichte, J. and Simpkin, S., 2015. Kenya: Agricultural sector risk assessment; Huho, J.M. and Mugalavai, E.M., 2010. The effects of droughts on food security in Kenya. *The International Journal of Climate Change: Impacts and Responses*, 2(2), p.61; European Court of Auditors (2020) *EU development aid to Kenya*. LU: Publications Office (Special report No ... (European Court of Auditors. Online)). Available at: https://data.europa.eu/doi/10.2865/843768 (Accessed: 5 May 2024);

well demonstrated by the adverse impacts on food security that the Ukraine-Russia war had on Kenya.[49] According to the Kenya Institute for Public Policy Research and Analysis (KIPPRA), Russia and Ukraine provide Kenya with wheat, oil, steel, iron, and fertilisers. Wheat imports into East Africa are primarily from Russia and Ukraine.[50] The wheat that is consumed in Kenya comes from three countries: Russia (67%), Ukraine (22%), and the rest of the world

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Lokuruka, M.N.I. (2020) 'Food and Nutrition Security in East Africa (Kenya, Uganda and Tanzania): Status, Challenges and Prospects', in *Food Security in Africa*. IntechOpen. Available at: https://doi.org/10.5772/intechopen.95036; *Agriculture, Food and Water Security | Kenya* (2023) *U.S. Agency for International Development*. Available at: https://www.usaid.gov/kenya/agriculture-food-and-water-security (Accessed: 5 May 2024); Birch, I., 2018. Agricultural productivity in Kenya: barriers and opportunities. *K4D Helpdesk Report. Brighton, UK: Institute of Development Studies*, *19*; Nyaura, J.E., 2014. Urbanization Process in Kenya: The Effects and Consequences in the 21 st Century. *International Journal of Novel Research in Humanity and Social Sciences*, *1*(2), pp.33-42; *How Africa Can Escape Chronic Food Insecurity Amid Climate Change* (2022) *IMF*. Available at: https://www.imf.org/en/Blogs/Articles/2022/09/14/how-africa-can-escape-chronic-food-insecurity-amid-climate-change (Accessed: 5 May 2024); Gutu Sakketa, T. (2023) 'Urbanisation and rural development in sub-Saharan Africa: A review of pathways and impacts', *Research in Globalization*, 6, p. 100133. Available at: https://doi.org/10.1016/j.resglo.2023.100133.

[49] Ochieng, D.J., Oscar (2023) 'Kenya's Battle with Famine and Food Insecurity - Southern Voice', 8 February. Available at: https://southernvoice.org/kenyas-battle-with-famine-and-food-insecurity/, https://southernvoice.org/kenyas-battle-with-famine-and-food-insecurity/ (Accessed: 4 May 2024); *What Does the Ukraine-Russia War Mean for Kenya? – KIPPRA* (no date). Available at: https://kippra.or.ke/what-does-the-ukraine-russia-war-mean-for-kenya/ (Accessed: 4 May 2024).

[50] *What Does the Ukraine-Russia War Mean for Kenya? – KIPPRA* (no date). Available at: https://kippra.or.ke/what-does-the-ukraine-russia-war-mean-for-kenya/ (Accessed: 4 May 2024).

(11%).[51] The majority of fertiliser exported by Russia is sent to East Africa, making it the largest fertiliser exporter in the world.[52]

a. The Constitution of Kenya 2010 and Agriculture

Article 43 (1) of the Constitution of Kenya[53] on economic and social rights guarantees that every person has the right, *inter alia*—to the highest attainable standard of health, which includes the right to health care services, including reproductive health care; to be free from hunger, and to have adequate food of acceptable quality; to clean and safe water in adequate quantities; and to social security.

The Fourth Schedule to the Constitution on Distribution of Functions Between the National Government and the County Governments provides for the functions of the National Government as including: protection of the environment and natural resources with a view to establishing a durable and sustainable system of development, including, in particular—fishing, hunting and gathering; protection of animals and wildlife; water protection, securing sufficient residual water, hydraulic engineering and the safety of dams; and energy policy; and agricultural policy.[54]

The functions and powers of the county are—Agriculture, including—crop and animal husbandry; livestock sale yards; county abattoirs; plant and animal disease control; and fisheries; County planning and development, including—statistics; land survey and mapping; and boundaries and fencing; Implementation of specific national government policies on natural resources and

[51] Ibid.
[52] Ibid.
[53] Republic of Kenya, The Constitution of Kenya, 27 August 2010, Nairobi.
[54] Constitution of Kenya, Fourth Schedule, Part One.

environmental conservation, including—soil and water conservation; and forestry; and Ensuring and coordinating the participation of communities and locations in governance at the local level and assisting communities and locations to develop the administrative capacity for the effective exercise of the functions and powers and participation in governance at the local level.[55]

It is therefore evident that fixing the agricultural sector is a shared responsibility between the two levels of Government, which must work together if any significant progress is to be realised in the sector.[56]

There are a number of laws, policies and plans that hold a promise for Kenya in pursuit of food security, if effectively implemented.

b. Kenya Agricultural and Livestock Research Act, Cap 319

The Kenya Agricultural and Livestock Research Act[57] was enacted to provide for the establishment and functions of the Kenya Agricultural and Livestock Research Organization; to provide for organs of the Organization; to provide for the coordination of agricultural research activities in Kenya, and for connected purposes.[58] The Kenya Agricultural and Livestock Research Organization is established is to—promote, streamline, co-ordinate

[55] Constitution of Kenya, Fourth Schedule, Part Two.
[56] Timamy, M., 2019. Is Agriculture a National or County Governments' Policy Function in Kenya: Interrogating Section 4 of the AFA Act Together with the Fourth Schedule and Article 191 of the Constitution. *Strathmore L. Rev.*, *4*, p.155.
[57] Kenya Agricultural and Livestock Research Act, Cap 319, Laws of Kenya.
[58] Ibid., preamble.

and regulate research in crops, livestock, genetic resources and biotechnology in Kenya; promote, streamline, co-ordinate and regulate research in crops and animal diseases; and expedite equitable access to research information, resources and technology and promote the application of research findings and technology in the field of agriculture.[59]

c. Agriculture and Food Authority Act, Cap 317

The Agriculture and Food Authority Act[60] was enacted to provide for the consolidation of the laws on the regulation and promotion of agriculture generally, to provide for the establishment of the Agriculture and Food Authority, to make provision for the respective roles of the national and county governments in agriculture excluding livestock and related matters in furtherance of the relevant provisions of the Fourth Schedule to the Constitution and for connected purposes.[61]

The Agriculture and Food Authority is mandated with, in consultation with the county governments, to perform the following functions—administer the Crops Act (Cap. 318), in accordance with the provisions of these Acts; promote best practices in, and regulate, the production, processing, marketing, grading, storage, collection, transportation and warehousing of agricultural products excluding livestock products as may be provided for under the Crops Act (Cap. 318); collect and collate data, maintain a database on agricultural products excluding livestock products, documents and monitor agriculture through registration of players as provided for in the

[59] Ibid., sec. 5(1).
[60] Agriculture and Food Authority Act, Cap 317, Laws of Kenya.
[61] Ibid., Preamble.

Crops Act (Cap. 318); be responsible for determining the research priorities in agriculture and to advise generally on research thereof; advise the national government and the county governments on agricultural levies for purposes of planning, enhancing harmony and equity in the sector; carry out such other functions as may be assigned to it by this Act, the Crops Act (Cap. 318), and any written law while respecting the roles of the two levels of governments.[62]

Part iv of the Act provides for Policy Guidelines on Development, Preservation and Utilization of Agricultural Land. Section 21 (1) requires the Cabinet Secretary shall, on the advice of the Authority, and in consultation with the National Land Commission, provide general guidelines, in this Act referred to as land development guidelines, applicable in respect of any category of agricultural land to the owners or the occupiers thereof.[63] These guidelines may require the adoption of such system of management or farming practice or other system in relation to land in question (including the execution of such work and the placing of such things in, on or over the land, from time to time) as may be necessary for the proper development of land for agricultural purposes.[64]

In addition, the Cabinet Secretary is required to, on the advice of the Authority, and in consultation with the National Land Commission, make general rules for the preservation, utilization and development of agricultural land either in Kenya generally or in any particular part thereof.[65] These rules may—prescribe the manner in which owners (whether or not also occupiers) shall manage their land in accordance

[62] Ibid., sec. 4.
[63] Ibid., sec. 21(1).
[64] Ibid., sec. 21(3).
[65] Ibid., sec. 22(1).

with rules of good estate management; prescribe the manner in which occupiers shall farm their land in accordance with the rules of good husbandry; advise on the control or prohibition of the cultivation of land or the keeping of stock or any particular kind of stock thereon; advise on the kinds of crops which may be grown on land; provide for controlling the erection of buildings and other works on agricultural land; and provide for such exemptions or conditional exemptions from the provisions thereof as may be desirable or necessary.[66]

National and county governments are required to execute their respective mandates under the Act as per their roles as provided for under the Fourth Schedule to the Constitution of Kenya.[67]

Notably, section 40(1) provides for participation of farmers where it states that for purposes of ensuring effective participation of farmers in the governance of the agricultural sector in Kenya, there shall be close consultation with all registered stakeholder organisations in the development of policies or regulations and before the making of any major decision that has effect on the agricultural sector.[68]

d. Agricultural Development Corporation Act, Cap 444

The Agricultural Development Corporation Act[69] was enacted to provide for the establishment of the Agricultural Development Corporation and for connected purposes.[70] The functions of the Corporation are— to promote the production of Kenya's essential agricultural inputs as the Corporation may decide from time to time,

[66] Ibid., sec. 22(2).
[67] Ibid., sec.29.
[68] Ibid., sec. 40(1).
[69] Agricultural Development Corporation Act, Cap 444, Laws of Kenya.
[70] Ibid., preamble.

such as seeds and pedigree and high grade livestock including, hybrid seed maize, cereal seed, potato seed, pasture seed, vegetable seed, pedigree and high grade cattle, sheep, goats, pigs, poultry and bees; to undertake such activities as the Corporation may decide from time to time for the purpose of developing agricultural production in specific areas or specific fields of production; and to participate in activities in agricultural production which are related to the primary and secondary functions of the Corporation and which in the view of the Corporation are commercially viable.[71] In the performance of its functions under this Act the Corporation is to have proper regard to the economic and commercial merits of any undertakings it plans to initiate, assist or expand.[72]

The Corporation has power, *inter alia*—to provide credit and finance by means of loans or the subscription of loan or share capital or otherwise for agricultural undertakings in Kenya.[73]

e. Special Economic Zones Act, 2015

The Special Economic Zones Act, 2015[74] was enacted to provide for the establishment of special economic zones; the promotion and facilitation of global and local investors; the development and management of enabling environment for such investments, and for connected purposes.[75] Under the Act, The Cabinet Secretary shall, on the recommendation of the Authority, and in consultation with the Cabinet Secretary responsible for matters relating to finance declare, by notice in the Gazette, any area as a Special Economic Zone as set

[71] Ibid., sec. 12(1).
[72] Ibid., sec. 12(2).
[73] Ibid., sec. 13(2)(a).
[74] Special Economic Zones Act, No. 16 of 2015, Laws of Kenya.
[75] Ibid., preamble.

out in the First Schedule.[76]

An area declared as a special economic zone under this section may be designated as a single sector or multiple sector special economic zone, and may include, but not limited to, *inter alia*- agricultural zones; and livestock zones.[77] Under the Act, "agricultural zone" means a special economic zone declared as such under section 4 to facilitate the agricultural sector, its services and associated activities while "livestock zone" means a special economic zone declared as such under section 4, in which the following activities are carried out: livestock marshalling and inspection; livestock feeding or fattening, abattoir and refrigeration; deboning; value addition; manufacture of veterinary products, and other related activities.[78]
In the wake of indiscriminate conversion of agricultural land into commercial land and residential areas around the country, this law can go a long way in designating certain areas as agricultural zone to protect them from the pressures of urbanization.

f. National Spatial Plan 2015-2045

By identifying the key sites of the flagship projects outlined in Kenya Vision 2030 and offering a framework for mitigating their spatial implications, the National Spatial Plan facilitates the implementation of important national projects.[79] It attempts to bridge the long-

[76] Ibid., sec. 4(1).
[77] Ibid., sec. 4(6)(f) & (i).
[78] Ibid., sec. 2.
[79] 'Kenya National Spatial Plan (2015 – 2045) | Kenya Vision 2030' (no date), Government of Kenya, First published in 2016. Available at: https://vision2030.go.ke/publication/kenya-national-spatial-plan-2015-2045/ (Accessed: 4 May 2024).

standing gap between physical and economic planning by offering a coordinating framework for sectoral planning, which has been absent in the nation.[80]

The Plan is crucial at this stage of devolution because it will serve as a roadmap for the counties' development planning as they carry out their mandate to create county and local plans.[81] The county-level plans are supposed to express and disseminate the physical planning policies provided by the National Spatial Plan. Rich agricultural land protection, preservation of designated ecologically sensitive regions, urban confinement, and encouragement of industrial growth are a few of these strategies.[82]

According to the Plan, the main danger to agricultural land is land fragmentation brought on by rapid population increase and competing land uses like urbanisation. The underutilization of prospective agricultural regions results in a reduction in land production. Rich farmland has also been lost to urban development applications such as real estate development.[83]

According to the Plan, compared to investments in other sectors, agricultural investment reduces poverty five times more effectively. It contributes to the upkeep of rural areas and makes them desirable places to live for a new generation of farmers, fishermen, and small business owners.[84] Almost half of farmers in developing countries are women, who are held back by the unequal access to resources, and

[80] Ibid.
[81] Ibid.
[82] Ibid.
[83] Ibid., p. 94.
[84] Ibid., p. 113.

rural development may help solve this issue by providing equitable access to resources.[85]

This Plan holds a great potential for revolutionizing agricultural production in Kenya, if fully implemented.

g. Ministry of Agriculture and Livestock Development: Agriculture Strategic Plan 2023 – 2027

The Strategic Plan 2023-2027[86] was developed by the Ministry of Agriculture and Livestock Development and identifies strategic issues as; Inadequate agricultural policy, legal and institutional framework; Low agricultural production and productivity; Limited value addition, market access and trade; Food and nutrition insecurity; Low involvement of youth, women and vulnerable groups in agriculture.[87]

The Ministry is attempting to address the issues and challenges raised by concentrating on five major strategic objectives, which are: creating a legal, institutional, and policy framework that is appropriate for sustainable agricultural development; increasing agricultural productivity and production; improving agricultural value addition, market access, and trade; improving food and nutrition security; and increasing the involvement of youth, women, and vulnerable groups in agricultural value chains.[88] The following major outcome areas will be implemented in order to meet the goal: Agricultural value addition, market access, trade, food and nutrition

[85] Ibid., p. 113.
[86] Republic of Kenya, *Ministry of Agriculture and Livestock Development: Agriculture Strategic Plan 2023 – 2027*.
[87] Ibid., p. xi.
[88] Ibid., p. xi-xii.

security, agricultural policy, institutional and legal frameworks, productivity, and social inclusion in agriculture.[89]

This Strategic Plan should not be executed by the ministry unilaterally but should instead involve the other stakeholders such as communities in order to not only succeed but also to ensure that their interests and goodwill are secured. This is important considering that the participants in the agriculture sector, the activities these actors carry out, and the broader supportive environment make up agrifood systems.[90] Farmers, agribusiness companies, processors, distributors, and consumers are all represented by the performers. Policies, guidelines, and financial commitments that impact market accessibility and sustainable production are all part of the enabling environment.[91]

h. Ministry of Agriculture and Livestock Development: Livestock Strategic Plan 2023 – 2027

With its ability to secure food and nutrition, supply raw materials for production, generate revenue, create jobs, and generate cash through exports, the livestock industry significantly boosts the economy.[92]
The Livestock Strategic Plan identifies several challenges and corresponding mitigation measures which are being addressed through this Plan's strategic objectives and proposed interventions.[93]

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[89] Ibid.
[90] *Building inclusive, productive, and sustainable agrifood systems | Independent Evaluation Group* (2022). Available at: https://ieg.worldbankgroup.org/blog/building-inclusive-productive-and-sustainable-agrifood-systems (Accessed: 4 May 2024).
[91] Ibid.
[92] Republic of Kenya, *Ministry of Agriculture and Livestock Development: Livestock Strategic Plan 2023 – 2027*.
[93] Ibid., p.x.

Key among them are: inadequate human, physical and financial resources; inadequate capacity within the livestock training institutions, farms, stations and laboratories; lack of structured data and knowledge management systems and bureaucracy on information sharing; livestock diseases and pests that affect productivity, quality of livestock products and trade; inadequate legal framework and weak regulation of the livestock sector; unsecured and encroachment of institutional land; inadequacy of quality livestock feed and inadequate pasture due to recurrent and prolonged droughts; high cost of inputs for livestock production; climate change and diminishing livestock resource base; poor breeding and management of livestock resulting to low producing livestock; sanitary and phytosanitary concerns affecting livestock and livestock trade such as aflatoxin and antibiotic residues; and livestock resources based conflicts, among others.[94]

In order to tackle these obstacles, the State Department has adopted a number of strategic objectives that will be carried out through tactical interventions, strategies, and activities.[95] These include: creating a framework of laws, policies, and institutions that facilitates the development of livestock resources; raising productivity and production levels; improving value addition, market accessibility, and trade for livestock and livestock products by enhancing the safety of food derived from animals; and bolstering resilience for durable livestock development. Last but not least, the Strategic Plan offers an implementation matrix along with a monitoring and assessment system.[96]

[94] Ibid., p. x.
[95] Ibid., p.x.
[96] Ibid., p. x.

i. National Irrigation Policy 2017

The National Irrigation Policy 2017 seeks to accelerate the growth and enhance the performance of the irrigation sector in order to provide food security, wealth and employment creation, and poverty reduction.[97] In more detail, the Policy suggests that in order to fully utilise irrigation potential, 40,000 ha more area should be covered annually; creative technologies such as water harvesting, wastewater treatment, flood control, and sustainable groundwater exploitation should be used to increase the amount of water available for irrigation; and the Government should mobilise resources for investments from a variety of stakeholders in order to increase irrigation funding to at least 2% of the annual national budget.[98]

Some of the other main goals are to conduct research and development on irrigation, develop the technical staff and irrigators' capacity, encourage stakeholder participation in irrigation development and management, adopt an integrated approach to sustainable commercial irrigation farming, and create an institutional, legal, and regulatory framework that is appropriate for the industry.[99]

j. Irrigation Act, 2019

The Irrigation Act, 2019[100] was enacted to provide for the development, management and regulation of irrigation, to support

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[97] Republic of Kenya, 'National Irrigation Policy 2017 – National Irrigation Authority' (no date). Available at: https://irrigation.go.ke/download/national-irrigation-policy-2017/ (Accessed: 4 May 2024).
[98] Ibid.
[99] Ibid.
[100] Irrigation Act, No. 14 of 2019, Laws of Kenya.

sustainable food security and socioeconomic development in Kenya, and for connected purposes.[101] The provisions of this Act are to apply to matters relating to the development, management, financing, provision of support services and regulation of the entire irrigation sector in Kenya.[102] The Act also establishes the National Irrigation Authority[103] whose functions are to —develop and improve irrigation infrastructure for national or public schemes; provide irrigation support services to private medium and smallholder schemes, in consultation and cooperation with county governments and other stakeholders; provide technical advisory services to irrigation schemes in design, construction supervision, administration, operation and maintenance under appropriate modalities, including agency contracts, as may be elaborated in regulations to this Act.[104] With the frequent floods experienced in the country, there is a need for the Authority to work closely with the Cabinet Secretary and the water resources management bodies to harvest the water especially in the arid and semi-arid areas in order to use the same during dry and drought periods for both crop and livestock production by the vulnerable communities.[105]

k. Physical and Land Use Planning Act, 2019

The Physical and Land Use Planning Act, 2019[106] was enacted to make provision for the planning, use, regulation and development of land

[101] Ibid., preamble.
[102] Ibid., sec. 3(1).
[103] Ibid., sec. 7.
[104] Ibid., sec. 8.
[105] Nabinejad, S. and Schüttrumpf, H. (2023) 'Flood Risk Management in Arid and Semi-Arid Areas: A Comprehensive Review of Challenges, Needs, and Opportunities', *Water*, 15(17), p. 3113. Available at: https://doi.org/10.3390/w15173113.
[106] Physical and Land Use Planning Act, No. 13 of 2019, Laws of Kenya.

and for connected purposes.[107] The objects of this Act are to provide, *inter alia* —the principles, procedures and standards for the preparation and implementation of physical and land use development plans at the national, county, urban, rural and cities level; the administration and management of physical and land use planning in Kenya; the procedures and standards for development control and the regulation of physical planning and land use; a framework for the co-ordination of physical and land use planning by county governments; a framework for equitable and sustainable use, planning and management of land; the functions of and the relationship between planning authorities; a robust, comprehensive and responsive system of physical and land use planning and regulation; and a framework to ensure that investments in property benefit local communities and their economies.[108]

Every person engaged in physical and land use planning and regulation is required to adhere to the principles and norms of physical and land use planning, *inter alia* —physical and land use planning shall promote sustainable use of land and liveable communities which integrates human needs in any locality; physical and land use planning shall take into consideration long-term optimum utilization of land and conservation of scarce land resource including preservation of land with important functions; and physical and land use planning shall be inclusive and must take into consideration the culture and heritage of people concerned.[109]

Under section 60(1), within seven days of receiving an application for

[107] Ibid., preamble.
[108] Ibid., sec. 3.
[109] Ibid., sec. 5.

development permission, the county executive committee member is required to give a copy of the application to the relevant authorities or agencies to review and comment and the relevant authorities or agencies shall comment on all relevant matters including, *inter alia*— agriculture and livestock; and environment and natural resources.[110] The contents of national, inter-county and county physical and land use development plans should include the situational analysis of *inter alia* Economy- industry, agriculture, commerce, mining and quarrying, fisheries.[111] The contents of local physical and land use development plans should also include *inter alia* Economic analysis focusing on; Agricultural potential of the urban region; and Problems of transforming the agricultural land into urban use.[112]

Before commencing preparation of a local spatial development plan a survey report should be prepared providing details on *inter alia*— problems of transforming the agricultural land into urban use.[113]

In ensuring development control, if any development application requires subdivision or change of user of any agricultural land, the county government shall require the applicant to obtain consent from the relevant Board.[114] Under the Act, planning authorities shall also require applications for major developments to be subjected to environmental and social impact assessment.[115]

The institutions empowered under this law should work closely and

[110] Ibid., sec. 60(1) (c) (f).
[111] Ibid., First schedule.
[112] Ibid., second schedule, Part A, para. 5(c).
[113] Ibid., second schedule, Part B, para. 8(i).
[114] Ibid., Third Schedule, para. 3.
[115] Ibid., Third Schedule, para. 4.

curb the indiscriminate conversion of agricultural land into commercial and residential land which has had and continues to adversely affect agricultural production.

4. Transforming Agri-food Systems via Inclusive, Rights-based Governance for Food Security and Economic Empowerment in Kenya

Kenya's food security is founded on human rights, according to Article 43 (1) (c) of the Constitution on Social and Economic Rights, which declares that "every person has a right to be free from hunger, and to have adequate food of acceptable quality."[116] Even if this constitutional clause is seen as a step in the right direction towards the realisation of the right to food, over 12 million people lack access to food.[117] Notwithstanding the assurances given by successive governments, the grim facts show that Kenyans are sleeping with empty bellies.[118]

Temperatures and the ratio of yearly rainfall to potential evaporation are used to split the nation into seven agroclimatic zones.[119] All agroclimatic zones are used for the production of crops and livestock, although the types and amounts of rainfall, soil conditions, other meteorological factors, market demand, production costs, and the availability of technologies to support the chosen enterprises are just

[116] *The chronic hunger song is exasperating- leaders need to change the hymnbook | Heinrich Böll Stiftung | Nairobi Office Kenya, Uganda, Tanzania* (no date). Available at: https://ke.boell.org/en/2021/12/01/chronic-hunger-song-exasperating-leaders-need-change-hymnbook (Accessed: 4 May 2024).
[117] Ibid.
[118] Ibid.
[119] Republic of Kenya, *Kenya National Spatial Plan (2015 – 2045)*, p. 94.

a few of the many determining factors.[120] All these factors thus ought to be considered in transforming agri-food systems in the country in order to ensure the highest returns on investments for maximum food production.

Kenya's wide and varied agricultural potential is highlighted in the National Spatial Plan 2015–2045.[121] This is because the country is home to several agroclimatic and agroecological zones, as well as natural resources including lakes, rivers, and mountains.[122] Among the capacities are grain basket areas, whose primary purpose is to produce the basic foods of the country, wheat and maize.[123] Both agricultural and livestock production may be done in the transition zones. The places that have the ability to receive irrigation offer a chance to increase agricultural potential, as well as a means of boosting output and yielding high-value products.[124]

The ASALS regions serve as a nation's "meat basket," producing livestock on a vast scale and exporting both live animals and livestock products.[125] Fish farming is supported in the places with promise for aquaculture and marine culture. While regions with ocean and sea fishing potential may sustain the large-scale fishing industry, locations with lake and river fishing potential serve the purpose of producing fish under natural conditions.[126]

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[120] Ibid., p. 94
[121] Ibid., pp. 123-126.
[122] Ibid., p. 125.
[123] Ibid., p. 125.
[124] Ibid., p. 125.
[125] Ibid., p. 126.
[126] Ibid., p. 126.

a. Promoting Safe and Sustainable Urban-Based Agriculture for Food Security

Kenya is quickly urbanising, which is raising demand for agricultural products since there is a greater need for food supply in the expanding cities and towns.[127] Some urban people are forced to partially adopt livelihood options based on urban agriculture due to high unemployment rates, urban poverty, and food and nutrition insecurity.[128]

Urban agriculture has rightfully gained the right to require recognition as a valid urban land use in order for these operations to be properly planned, regulated, and managed.[129] Additionally, by including provisions for community gardens and other group cultivation activities in open spaces, as well as taking into consideration home cultivation activities within public housing programmes and slum upgrading schemes, urban agriculture should be easier to incorporate into municipal land use and management plans.[130] Norms and standards that support environmentally friendly production techniques and microenterprises connected to the short food supply chain can be created in the event that this land use is recognised.[131] It can be aided in placemaking, urban greening, and urban redevelopment initiatives, and it has the potential to be a very

[127] Omondi, S.O., Oluoch-Kosura, W. and Jirström, M., 2017. The role of urban-based agriculture on food security: Kenyan case studies. *Geographical research*, *55*(2), pp.231-241.
[128] Ibid.
[129] Steenkamp, J. *et al.* (2021) 'Food for Thought: Addressing Urban Food Security Risks through Urban Agriculture', *Sustainability*, 13(3), p. 1267. Available at: https://doi.org/10.3390/su13031267.
[130] Ibid.
[131] Ibid.

successful community development project.[132]

Nairobi and other rapidly growing cities and towns around the country should consider incorporating urban agricultural practice within their borders to address food security for their most vulnerable population. Past research has shown that when compared to households who do not farm, a greater proportion of those involved in urban farming and urban-based rural agriculture generally have higher food security.[133] Urban food strategies should incorporate urban farming as it has the potential to increase family food security and provide fungible revenue.[134]

b. Diversifying Production and Behavioral Changes Towards Sustainable Practices and Standards

Supporting farmers and agribusiness companies to diversify their production beyond conventional staples to include high-value and more nutritious food products like fruit trees, vegetables, food legumes, fish, poultry, and animals is something the World Bank strongly pushes for.[135] According to them, smallholder farmers and SMEs stand to gain from sustainable diversification since they frequently struggle to expand their agricultural businesses or production to include high-value goods that will boost agricultural

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[132] Ibid.

[133] Omondi, S., Kosura, W. and Jirström, M. (2017) 'The role of urban-based agriculture on food security: Kenyan case studies: Urban-based agriculture and food security', *Geographical Research*, 55, pp. 231–241. Available at: https://doi.org/10.1111/1745-5871.12234.

[134] Ibid.

[135] *Building inclusive, productive, and sustainable agrifood systems | Independent Evaluation Group* (2022). Available at: https://ieg.worldbankgroup.org/blog/building-inclusive-productive-and-sustainable-agrifood-systems (Accessed: 4 May 2024).

productivity and supply nutrient-dense foods that are currently either scarce or prohibitively expensive for low-income consumers.[136] In order for producers to gain access to competitive, regional, and international markets, it will be necessary to supply them with adequate financing, assist them in adhering to food safety and quality requirements, and support farmers and agribusiness companies as they implement sustainable practices.[137] Climate-smart methods that preserve biodiversity, consume less water and land, and leave fewer environmental footprints should be promoted to producers and other value-chain participants.[138]

c. Investing in Forest Ecosystem for Enhanced Productivity

The ability of humans to generate enough food and pasture for their animals is impacted by the destruction of forests and its connection to climate change.[139] Forest ecosystems have the potential to

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[136] Ibid.

[137] Ibid; see also Faour-Klingbeil, D. and Todd, E.C.D. (2018) 'A Review on the Rising Prevalence of International Standards: Threats or Opportunities for the Agri-Food Produce Sector in Developing Countries, with a Focus on Examples from the MENA Region', *Foods*, 7(3), p. 33. Available at: https://doi.org/10.3390/foods7030033.

[138] Ibid; von Braun, J., Ulimwengu, J.M., Nwafor, A. and Nhlengethwa, S., 1 Empowering African Food Systems for the Future. *Africa's Food Systems for the Future*, p.14; Matteoli, F., Schnetzer, J. and Jacobs, H. (2021) 'Climate-Smart Agriculture (CSA): An Integrated Approach for Climate Change Management in the Agriculture Sector', in J.M. Luetz and D. Ayal (eds) *Handbook of Climate Change Management: Research, Leadership, Transformation*. Cham: Springer International Publishing, pp. 409–437. Available at: https://doi.org/10.1007/978-3-030-57281-5_148.

[139] 'Leveraging Forest Ecosystem to Boost Food Security in Kenya – KIPPRA' (no date). Available at: https://kippra.or.ke/leveraging-forest-ecosystem-to-boost-food-security-in-kenya/ (Accessed: 4 May 2024).

significantly improve food security in the following ways: they protect soil and water resources, which improves soil fertility and enrichment; they regulate climate and act as a home for naturally occurring pollinators of food crops; they support a wide variety of edible plants, fungi, and fruits, which increases dietary diversity and availability; they provide a sustainable source of bioenergy, which lessens the strain on conventional energy resources and indirectly supports food production; and finally, forests generate income and employment opportunities, particularly for the communities that are close by, improving economic access to food.[140]

Thus, people's capacity to grow, get, and consume food efficiently is threatened by forest degradation and inadequate forest governance, putting the populace at risk of a food insecurity catastrophe.[141]

Promoting a mixed farming approach where farmers also actively engage in afforestation can potentially have the advantage of achieving food security while also promoting forests conservation to achieve the desired tree cover of at least 10% as per Article 69 of the Constitution of Kenya 2010.

d. Investing in the Bottom-up Economic Transformation Agenda

The agricultural industry is given priority under the government's "Bottom-up Economic Transformation Agenda (BETA)," which focuses on increased agricultural productivity, value addition, and marketing.[142] The value chains for tea, textiles and clothing, rice,

[140] Ibid.
[141] Ibid.
[142] Republic of Kenya, *Ministry of Agriculture and Livestock Development: Agriculture Strategic Plan 2023 – 2027*.

dairy, cattle, and leather development are the ones that are given priority. According to the BETA plan, Kenya has enormous potential to improve its agricultural sector based on three agricultural pillars: increasing exports, reducing food imports, and ensuring food security.[143]

Agrifood systems are necessary for human life and for a world free from hunger; without them, no goal—including the end of poverty and hunger—can be accomplished.[144] It is also true that agrifood systems contribute significantly to harmful emissions, are imbalanced, and have the potential to perpetuate inequity.[145] We have to isolate the components of agrifood systems that thrive on inequity and environmental degradation if we are to make them firmly the solution rather than the issue.[146] We have to start at the local community level in order to accomplish this effectively and perfectly.[147]

Combining production and market techniques is necessary, according to the World Bank: For the most part, Low Income Countries (LICs) and nations that are still developing their agrifood systems have inadequately connected production operations with markets.[148] Reducing poverty and enhancing food security is

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[143] Ibid.

[144] *Agrifood systems transformation and the SDGs* (no date). Available at: https://doi.org/10.4060/cc2063en.

[145] Ibid.

[146] Ibid.; *Climate-Smart Agriculture* (no date). Available at: https://www.worldbank.org/en/topic/climate-smart-agriculture (Accessed: 4 May 2024).

[147] Ibid.

[148] *Building inclusive, productive, and sustainable agrifood systems | Independent Evaluation Group* (2022). Available at:

hampered by the low agricultural production that many LICs face.[149] Due to their restricted access to markets and value chains, low productivity, and vulnerability to different shocks, smallholders and small producers in local economic communities continue to live in poverty.[150] Transitioning from semi-subsistence farming to more commercial agrifood businesses is a challenge for many of them.[151]
If effectively implemented, this approach may not only guarantee food security but would also economically empower communities thus improving their socio-economic status.

5. Conclusion

It is critically important to address the use of food as a political weapon, particularly during election seasons, as well as the absence of genuine political commitment as would be demonstrated by the implementation of existing laws and policies.[152] The existing and legal frameworks in the country, especially the National Spatial Plan 2015-2045 have very viable recommendations on how best to address challenges in all the agro climatic zones in the country. The various institutions established under the laws, policies and plans ought to work together towards modernizing agriculture while addressing the climate change challenges affecting agricultural production in the country. Physical planning challenges should be addressed urgently in order to safeguard the viable agricultural land available against

https://ieg.worldbankgroup.org/blog/building-inclusive-productive-and-sustainable-agrifood-systems (Accessed: 4 May 2024).

[149] Ibid.

[150] Ibid.

[151] Ibid.

[152] *The chronic hunger song is exasperating- leaders need to change the hymnbook | Heinrich Böll Stiftung | Nairobi Office Kenya, Uganda, Tanzania* (no date). Available at: https://ke.boell.org/en/2021/12/01/chronic-hunger-song-exasperating-leaders-need-change-hymnbook (Accessed: 4 May 2024).

encroachment by urbanisation. This is important considering that the backdrop of development in Kenya is heavily impacted by land ownership and usage. As a result, for almost all groups, land has enormous cultural, spiritual, and political value.[153] Most Kenyans rely on smallholder farming for their livelihoods, which is why the industry is dominated by them.[154]

These efforts should be informed by a human rights approach that is geared towards realising the socio-economic rights as guaranteed under article 43 of the Constitution of Kenya, economic empowerment and ensuring that all the players including communities are included in the plans and programmes for them to embrace them and ensure that they succeed.

Unless these challenges are adequately and urgently addressed, food security in Kenya will remain a mirage.

Transforming Agri- food systems via Inclusive Rights-based governance for Food Security and Economic Empowerment in Kenya is an ideal whose time is now.

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[153] Komba, E., Odary, K.V. and Letura, A., 2018. Land Reform in The Context of Devolution: Lessons from Kajiado County, Kenya. *African Journal of Land Policy and Geospatial Sciences*, *1*(2), pp.31-40.

[154] Ali, A.H. and Farah, S.A., 2019. Understanding the influence and effects of devolution on agricultural development: A case study of Garissa county, Kenya. *International Journal of Contemporary Research and Review*, *10*(10), pp.110-114.

References

'Implications of Agricultural Land Subdivision in Kenya – KIPPRA' (no date). Available at: https://kippra.or.ke/implications-of-agricultural-land-subdivision-in-kenya/ (Accessed: 4 May 2024).

'Kenya aims to reduce its reliance on food imports – Kenya News Agency' (2023), 30 November. Available at: https://www.kenyanews.go.ke/kenya-aims-to-reduce-its-reliance-on-food-imports/ (Accessed: 5 May 2024).

'Kenya National Spatial Plan (2015 – 2045) | Kenya Vision 2030' (no date), Government of Kenya, first published in 2016. Available at: https://vision2030.go.ke/publication/kenya-national-spatial-plan-2015-2045/ (Accessed: 4 May 2024).

'Kenya: Acute Food Insecurity Situation February 2023 and Projection for March – June 2023' (no date). Available at: https://aiap.or.ke/index.php/2023/05/08/kenya-acute-food-insecurity-situation-february-2023-and-projection-for-march-june-2023/ (Accessed: 4 May 2024).

'Leveraging Forest Ecosystem to Boost Food Security in Kenya – KIPPRA' (no date). Available at: https://kippra.or.ke/leveraging-forest-ecosystem-to-boost-food-security-in-kenya/ (Accessed: 4 May 2024).

Abuya, D.O., 2020. *Management of The Effects of Land Use Changes On Urban Infrastructure Capacity: A Case Study of Ruaka Town, Kiambu County, Kenya* (Doctoral dissertation, University of Nairobi).

Agricultural Development Corporation Act, Cap 444, Laws of Kenya.

Agriculture and Food Authority Act, Cap 317, Laws of Kenya.

Agriculture, Food and Water Security | Kenya (2023) *U.S. Agency for International Development*. Available at: https://www.usaid.gov/kenya/agriculture-food-and-water-security (Accessed: 5 May 2024).

Agrifood systems transformation and the SDGs (no date). Available at: https://doi.org/10.4060/cc2063en.

Alemu, G.T., Berhanie Ayele, Z. and Abelieneh Berhanu, A. (2017) 'Effects of Land Fragmentation on Productivity in Northwestern Ethiopia', *Advances in Agriculture*, 2017, p. e4509605. Available at: https://doi.org/10.1155/2017/4509605.

Ali, A.H. and Farah, S.A., 2019. Understanding the influence and effects of devolution on agricultural development: A case study of Garissa county, Kenya. *International Journal of Contemporary Research and Review*, *10*(10), pp.110-114.

Analysis warns of food insecurity for 5.4 million Kenyans (2023) *AP News*. Available at: *https://apnews.com/article/kenya-government-william-ruto-nairobi-climate-and-environment-6e0955fc8c399135bc7c8e566cca522f* (Accessed: 4 May 2024).

AO, IFAD, UNICEF, WFP and WHO. 2023. *The State of Food Security and Nutrition in the World 2023. Urbanization, agrifood systems transformation and healthy diets across the rural–urban continuum*. Rome, FAO. Available at: https://doi.org/10.4060/cc3017en (Accessed: 4 May 2024).

Birch, I., 2018. Agricultural productivity in Kenya: barriers and

opportunities. *K4D Helpdesk Report. Brighton, UK: Institute of Development Studies*, *19*.

Bon, B., Simonneau, C., Denis, E. and Delville, P.L., 2023. *Ordinary changes in land use linked to urbanisation in the global South Housing, capitalisation, agricultural changes* (Doctoral dissertation, Comité Technique" Foncier et développement").

Building inclusive, productive, and sustainable agrifood systems | Independent Evaluation Group (2022). Available at: https://ieg.worldbankgroup.org/blog/building-inclusive-productive-and-sustainable-agrifood-systems (Accessed: 4 May 2024).

Climate-Smart Agriculture (no date). Available at: https://www.worldbank.org/en/topic/climate-smart-agriculture (Accessed: 4 May 2024).

D'Alessandro, S.P., Caballero, J., Lichte, J. and Simpkin, S., 2015. Kenya: Agricultural sector risk assessment.

Emongor, R.A., 2014. Food price crisis and food insecurity in Kenya. *Kenya Agricultural Research Institute*. Available at: https://elibrary.acbfpact.org/acbf/collect/acbf/index/assoc/HASH01b5/cd96f147/6ca2937f/79e1.dir/Food%20crisis%20and%20food%20insecurity%20in%20Kenya.pdf [Accessed 5 May 2024].

European Court of Auditors (2020) *EU development aid to Kenya*. LU: Publications Office (Special report No ... (European Court of Auditors. Online)). Available at: https://data.europa.eu/doi/10.2865/843768 (Accessed: 5 May

2024).

Faour-Klingbeil, D. and Todd, E.C.D. (2018) 'A Review on the Rising Prevalence of International Standards: Threats or Opportunities for the Agri-Food Produce Sector in Developing Countries, with a Focus on Examples from the MENA Region', *Foods*, 7(3), p. 33. Available at: https://doi.org/10.3390/foods7030033.

Food insecurity hits hard in Kenya's urban and rural centres (2022) *RFI*. Available at: https://www.rfi.fr/en/africa/20220808-food-insecurity-hits-hard-in-kenya-s-urban-and-rural-centres (Accessed: 4 May 2024).

Gutu Sakketa, T. (2023) 'Urbanisation and rural development in sub-Saharan Africa: A review of pathways and impacts', *Research in Globalization*, 6, p. 100133. Available at: https://doi.org/10.1016/j.resglo.2023.100133.

High levels of acute food insecurity prevail following fifth consecutive below-average rainy season | FEWS NET (no date). Available at: https://fews.net/east-africa/kenya/food-security-outlook-update/december-2022 (Accessed: 4 May 2024).

How Africa Can Escape Chronic Food Insecurity Amid Climate Change (2022) *IMF*. Available at: https://www.imf.org/en/Blogs/Articles/2022/09/14/how-africa-can-escape-chronic-food-insecurity-amid-climate-change (Accessed: 5 May 2024).

Huho, J.M. and Mugalavai, E.M., 2010. The effects of droughts on food security in Kenya. *The International Journal of Climate Change: Impacts and Responses*, *2*(2), p.61.

Irrigation Act, No. 14 of 2019, Laws of Kenya.

Jayne, T. and Muyanga, M. (2012) 'Land constraints in Kenya's densely populated rural areas: Implications for food policy and institutional reform', *Food Security*, 4. Available at: https://doi.org/10.1007/s12571-012-0174-3.

Kenya Agricultural and Livestock Research Act, Cap 319, Laws of Kenya.

Kioko, V.M., Mwendwa, P.K. and Imteyaz, A., 2022. The effects of urban sprawl on agricultural land use on the rural fringes of Towns; a case of Machakos town, Kenya. *J Afr Interdiscip Stud*, *6*(10), pp.196-212.

Komba, E., Odary, K.V. and Letura, A., 2018. Land Reform in The Context of Devolution: Lessons from Kajiado County, Kenya. *African Journal of Land Policy and Geospatial Sciences*, *1*(2), pp.31-40.

Land Fragmentation - an overview | ScienceDirect Topics (no date). Available at: https://www.sciencedirect.com/topics/earth-and-planetary-sciences/land-fragmentation (Accessed: 4 May 2024).

Lokuruka, M.N.I. (2020) 'Food and Nutrition Security in East Africa (Kenya, Uganda and Tanzania): Status, Challenges and Prospects', in *Food Security in Africa*. IntechOpen. Available at: https://doi.org/10.5772/intechopen.95036.

Macharia, C.K., 2018. *Implications for conversion of agricultural land use in peri urban areas of Gitothua Ward, Ruiru Sub County* (Doctoral dissertation, School of Built Environment, University of Nairobi).

Macharia, M. (2020) *Effects of Land Fragmentation on Land Use and Food Security Case Study of Nyamira, Laikipia, Nandi, Trans Nzoia, Taita Taveta, Kiambu, Kajiado, Nakuru, Tana River, Makueni, Isiolo, Kisumu and Vihiga.*

Matteoli, F., Schnetzer, J. and Jacobs, H. (2021) 'Climate-Smart Agriculture (CSA): An Integrated Approach for Climate Change Management in the Agriculture Sector', in J.M. Luetz and D. Ayal (eds) *Handbook of Climate Change Management: Research, Leadership, Transformation*. Cham: Springer International Publishing, pp. 409–437. Available at: https://doi.org/10.1007/978-3-030-57281-5_148.

Musa, M. and Odera, P. (2015) 'Land Use Land Cover Changes and their Effects on Agricultural Land: A Case Study of Kiambu County - Kenya', *Kabarak Journal of Research and Innovation*, 3, pp. 74–86.

Museleku, E.K., 2013. *An Investigation into Causes and Effects of Agricultural Land Use Conversions in the Urban Fringes: A Case Study of Nairobi-Kiambu Interface* (Doctoral dissertation, University of Nairobi,).

Nabinejad, S. and Schüttrumpf, H. (2023) 'Flood Risk Management in Arid and Semi-Arid Areas: A Comprehensive Review of Challenges, Needs, and Opportunities', *Water*, 15(17), p. 3113. Available at: https://doi.org/10.3390/w15173113.

Niroula, G. and Thapa, G. (2005) 'Impacts and causes of land fragmentation, and lessons learned from land consolidation in South Asia', *Land Use Policy*, 22, pp. 358–372. Available at: https://doi.org/10.1016/j.landusepol.2004.10.001.

Njiru, B.E., 2016. Evaluation of urban expansion and its implications on land use in Kiambu County, Kenya. *Kenyatta University*.

Njiru, E.B.K., 2019. Urban expansion and loss of agricultural land: A GIS based study of Kiambu County. *International Journal of Science and Research*, *8*(9), p.915.

Nyaura, J.E., 2014. Urbanization Process in Kenya: The Effects and Consequences in the 21 st Century. *International Journal of Novel Research in Humanity and Social Sciences*, *1*(2), pp.33-42.

Ochieng, D.J., Oscar (2023) 'Kenya's Battle with Famine and Food Insecurity - Southern Voice', 8 February. Available at: *https://southernvoice.org/kenyas-battle-with-famine-and-food-insecurity/, https://southernvoice.org/kenyas-battle-with-famine-and-food-insecurity/* (Accessed: 4 May 2024).

Ochieng, O. (2021) 'Crisis impacts on rural lives and livelihoods in Kenya - Southern Voice', 8 February. Available at: *https://southernvoice.org/crisis-impacts-on-rural-lives-and-livelihoods-in-kenya/, http://southernvoice.org/crisis-impacts-on-rural-lives-and-livelihoods-in-kenya/* (Accessed: 4 May 2024).

Officials talk biodiversity as drought stunts Kenya wildlife (2022) *AP News*. Available at: https://apnews.com/article/united-nations-animals-elephants-kenya-biodiversity-4ac99955ffc7816bfc4513e742bac790 (Accessed: 4 May 2024).

Omondi, S.O., Oluoch-Kosura, W. and Jirström, M., 2017. The role of urban-based agriculture on food security: Kenyan case studies. *Geographical research*, *55*(2), pp.231-241.

Physical and Land Use Planning Act, No. 13 of 2019, Laws of Kenya.

Rapid urbanisation in Kiambu has brought about misery (2020) *Nation*. Available at: *https://nation.africa/kenya/blogs-opinion/blogs/dot9/rapid-urbanisation-in-kiambu-has-brought-about-misery--157498* (Accessed: 4 May 2024).

Republic of Kenya, 'National Irrigation Policy 2017 – National Irrigation Authority' (no date). Available at: *https://irrigation.go.ke/download/national-irrigation-policy-2017/* (Accessed: 4 May 2024).

Republic of Kenya, *Ministry of Agriculture and Livestock Development: Agriculture Strategic Plan 2023 – 2027*.

Republic of Kenya, *Ministry of Agriculture and Livestock Development: Livestock Strategic Plan 2023 – 2027*.

Republic of Kenya, The Constitution of Kenya, 27 August 2010, Nairobi.

Simiyu, L.B., 2002. *Effects of urbanization on the use and control of land: A Case of Ngong fringe* (Doctoral dissertation, University of Nairobi).
Smith, K. and Cubbage, F. (2024) 'Land Fragmentation and Heirs Property: Current Issues and Policy Responses', *Land*, 13(4), p. 459. Available at: https://doi.org/10.3390/land13040459.

Soberly address food insecurity | Nation (no date). Available at: https://nation.africa/kenya/blogs-opinion/opinion/-soberly-address-food-insecurity-4202994 (Accessed: 4 May 2024).

Special Economic Zones Act, No. 16 of 2015, Laws of Kenya.

Steenkamp, J., Cilliers, E.J., Cilliers, S.S. and Lategan, L., (2021) 'Food for Thought: Addressing Urban Food Security Risks through Urban Agriculture', *Sustainability*, 13(3), p. 1267. Available at: https://doi.org/10.3390/su13031267.

The chronic hunger song is exasperating- leaders need to change the hymnbook | Heinrich Böll Stiftung | Nairobi Office Kenya, Uganda, Tanzania (no date). Available at: *https://ke.boell.org/en/2021/12/01/chronic-hunger-song-exasperating-leaders-need-change-hymnbook* (Accessed: 4 May 2024).

The National Council for Population and Development, *Effects of Population Growth and Uncontrolled Land Use On Climate Change in Kenya*, Policy Brief No. 60, June 2018. Available at: https://ncpd.go.ke/wp-content/uploads/2021/02/60-PB-Effects-of-polpulation-Growth-on-climate.pdf (Accessed: 4 May 2024).

The National Council for Population and Development, *Effects of Population Growth and Uncontrolled Land Use On Climate Change in Kenya*, Policy Brief No. 60, June 2018.

Timamy, M., 2019. Is Agriculture a National or County Governments' Policy Function in Kenya: Interrogating Section 4 of the AFA Act Together with the Fourth Schedule and Article 191 of the Constitution. *Strathmore L. Rev.*, *4*, p.155.

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

United Nations Department of Economic and Social Affairs, 2023. *The Sustainable Development Goals Report 2023: Special Edition*. UN.

United Nations, *Paris Agreement*, United Nations, Treaty Series, vol. 3156, p.79, 12 December 2015.

von Braun, J., Ulimwengu, J.M., Nwafor, A. and Nhlengethwa, S., 1 Empowering African Food Systems for the Future. *Africa's Food Systems for the Future*, p.14.

Week, S. up to date on the editors' picks of the (2023) *Severe food insecurity rate doubles in Kenya*, *Business Daily*. Available at: *https://www.businessdailyafrica.com/bd/economy/severe-food-insecurity-rate-doubles-in-kenya--4405802* (Accessed: 4 May 2024).

What Does the Ukraine-Russia War Mean for Kenya? – KIPPRA (no date). Available at: https://kippra.or.ke/what-does-the-ukraine-russia-war-mean-for-kenya/ (Accessed: 4 May 2024).

Right to a clean and healthy environment in South Sudan: A Reality or a rhetoric?

By: ***Bona Bol Madut Ayii****

Abstract

Although the right to a clean and healthy environment is a universally recognized fundamental human right, it is hardly prioritized. Developing countries such as South Sudan are often caught in difficult situations which demand the prioritizing of certain activities at the exclusion of others. In this respect, the country has largely invested in the oil industry compared to sustainable means of generating revenue.

This paper interrogates the right to a clean and healthy environment vis a vis the need for socio-economic development in light of the existing laws and regulations. Particularly concerning South Sudan, a country which has historically grappled with political unrest and currently faces the looming danger of environmental degradation brought about by unregulated oil exploration activities. Reported cases of environmental pollution, health complications, and rampant death of people and animals are risks associated with the economic activity. On the face of these emerging issues there is a clear trend in the lack of accountability on the part of the oil exploration companies and the government.

The Paper argues for the place of the human right to a clean and healthy environment. Its features, sound understanding and implementation. It outlines the various stakeholders involved, the effects of oil exploration on the environment and the suitable recommendations to mitigate the adverse effects associated with environmental degradation.

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Key words: the right to a clean and healthy environment, pollution, environmental degradation, public participation, the right to information, right to justice, laws and regulations.

Introduction

Every living organism derives life and sustenance from the environment.[1] It is from this realization that the world has taken the conservation trajectory to minimize the harshness of human activities on the environment. For survival and sustenance, humans must indulge in socio-economic activities.[2] However, certain aspects of these activities endanger the environment as well as our well-being. Nature in itself is interdependent.[3] The cycle of life demands that for one to survive, he/she must preserve their source of sustenance, whether it is food, water, shelter, minerals et cetera.[4]

Over time, humans have prioritized their needs at the expense of certain things such as the environment.[5] Among these activities is oil exploration.[6] The economic activity has been introduced and expanded in several Countries. This is mainly because of its lucrative nature as oil is needed in most of our daily activities, from fueling our vehicles to running industries. As such it has earned the name "black gold".[7]

Due to this, oil companies have expanded their activities and quickly

[1] Explained: How organisims interact with each other and their environment.
[2] *Recover better: Economic and Social challenges and opportunities.*
[3] Philippe Lzaro, *Plant with Purpose; Causes Effects and Solutions to Environmental Degradation*.
[4] Christian Erni; Shifting Cultivation, Livelihood and Food Security.
[5] *International Institute on Sustainable Development.*
[6] Ibid
[7] Aahil R. Oil: The World's Black Gold?

taken over the market in their respective territories.[8] The implication of this has been environmental degradation. These activities have had far-reaching effects on the land, the people and the climate as well.[9] The people who once enjoyed clean air, water, healthy food and adequate sanitation are now faced with an uncertain future due to the health complications arising from oil exploration.[10]

These grievances have led to Environmental conservation talks that have borne no fruits.[11] The laws and regulations that were to offer a safeguard have proven to be nothing but smoke and mirrors. An illusion intended to blindly lead the citizens on while the companies line their pockets. Hence, the question, **"Is the right to a clean environment a reality or a rhetoric"?**

The right to a clean and healthy environment is a human right.[12] The fundamental aspect of human rights is that they are inalienable, indivisible, interdependent, universal, and inherent.[13] Given these characteristics, it is expected that none of the rights encompassed under this umbrella can exist without the other.[14] An example of such a human right is the right to a clean and healthy environment.[15]

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[8] U.S. Energy Information Administration, "Crude Oils Have Different Quality Characteristics."
[9] Human Impact on the Environment.
[10] World Health Organization: Sanitization.
[11] Report of the World Commission on Environment and Development: Our Common Future.
[12] "What is the Right to a Healthy Environment?" United Nations Environment Programme (UNEP)
[13] *What is the Right to a Healthy Environment?* United Nations Environment Programme (UNEP)
[14] UNFPA: Human Rights Principles
[15] Ibid

The right to a clean and healthy environment is universally recognized.[16] Despite being in the Sustainable Development Goals, it was only until July, 2022 that the United Nations General Assembly became cognizant of its critical impact on society and acknowledged it as a human right.[17] Regardless, the organization is making strides in sensitizing people through its member states and ensuring that the right is protected.[18]

What is the right to a clean and healthy environment?

There is a consensus that there is no universally accepted definition of the right to a clean and healthy environment. However, at its root, the right is said to comprise some substantive and procedural features.

The substantive features include access to; healthy food, safe water, clean air, sanitation, and healthy and sustainable ecosystems.[19] On the other hand, the procedural aspect touches on access to justice, information, and public participation.[20]

South Sudan being a member state of the United Nations is expected to fully realise this right and ensure its citizens and their environs are not adversely affected by drastic environmental change.[21] Despite this, the country has been afflicted by chronic environmental

[16] Ibid
[17] *What is the Right to a Healthy Environment?* United Nations Environment Programme (UNEP)
[18] Ibid
[19] Ibid
[20] Wilsom M. "Access to Justice for Persons with Disabilities in Kenya From Principles to Practice"
[21] "South Sudan Adapts to Climate Change By Restoring Its Ecosystems" United Nations Environment Programme (UNEP)

degradation.[22] This could be attributed to various factors such as climate change, drought, oil pollution and deforestation among other things.[23] However, oil pollution in South Sudan stands out due to the extensive oil extraction in the country.[24]

Over the years South Sudan has derived most of its revenue from oil exploration which makes up approximately 40% of its GDP.[25] The government gains from the revenue, and the contracted companies from the oil coupled with cheap labour from the locals.[26] At a glance, these concessions seem to benefit every other party but the citizens.[27] The reality is that the citizens got the shorter end of the stick, or none at all. While the government "grows" the economy, it has turned a blind eye to the problems caused by oil exploration.[28] The expected benefits from these concessions have turned into the citizens' worst nightmares.[29] The land they once derived their livelihood from, has gradually turned into their graves.

Complaints of pollution have been raised by those who live near oil fields. These complaints range from health complications to adverse environmental impacts caused by oil extraction. Locals have been faced with peculiar cases of child deformities, deaths of animals and

[22] Wen H. Hooi Hooi L. "Environmental degradation is an alarming issue in the planet."
[23] Ibid
[24] Sam M. "South Sudan ignores reports on oil pollution and birth defects"
[25] Bortoluzzi G. "South Sudan Country Profile – Economy"
[26] Ibid
[27] Ibid
[28] Tim Jackson "Prosperity without growth? The transition to a sustainable economy"
[29] Ibid

plants, and infertility among other things.[30] Taking into account how the activities of the companies have impacted their surroundings, a correlation can be drawn between oil pollution and the evident environmental degradation.[31]

Research has shown that most upstream oil extraction takes place near human settlements.[32] As a result, these activities affect or influence people's health and livelihoods.[33] It has been determined that exposure to harmful chemicals released during the oil extraction process is the leading cause of liver damage, child deformities, stillbirths, infertility, cancer and other related health complications.[34] Mediums by which people come into contact with these harmful chemicals include: -

Water

Water is life, and nothing can live off contaminated water.[35] The same principle applies to the land, if it is misused it will affect every other thing dependent on it.[36] Since surface and groundwater are beneath the ground, it is only imperative that their quality is influenced by land use.[37]

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[30] *Wailing of the people of South Sudan from oil contamination (overview of oil production and effects on people health)*, Peter Bol Gai Kuany, Prof, Xuefei Zhou, Dr. Ahmed A. Abdelhafez, Islam A. Abdelhafeez
[31] *Impact of upstream oil extraction and environmental public health: a review of the evidence,* Jill E. Johnston, Esther Limb, Hannah Roha
[32] Ibid
[33] Ibid
[34] Ibid
[35] "Clean water: what happens to humans without it?"
[36] Ibid
[37] *Impact of upstream oil extraction and environmental public health: a review of the evidence,* Jill E. Johnston, Esther Limb, Hannah Roha

Research has shown that during oil drilling activities, wastewater is released into water sources either through leakage, spillage, dumping or other means which leads to changes in the chemical composition of water.[38]

Air pollution

Oil drills usually release emissions into the air.[39] These emissions contain certain chemicals such as sulphuric acid which are carcinogenic and sometimes linked to reproductive health complications.[40]

Soil pollution

This usually takes place during transportation when the oil or the fluids essential in the drilling process are spilt.[41] If the spillage is not effectively contained, it will lead to soil pollution and polluted soil will cause health complications for those who depend on their crops and animals for livelihood.[42] Sometimes the damage can be caused by inhaling contaminated soil particles.[43]

Radioactive materials

It has been determined that oil drilling activities emit radioactive materials and those exposed to such are more likely to develop cancer

[38] Lindsey Konkel "Salting the Earth: The Environmental Impact of Oil and Gas Wastewater Spills"
[39] "Drilling Pollution and Solutions"
[40] *Impact of upstream oil extraction and environmental public health: a review of the evidence,* Jill E. Johnston, Esther Limb, Hannah Roha
[41] Ibid
[42] "Soil pollution a risk to our health and food security" United Nations Environment Programme (UNEP)
[43] *Impact of upstream oil extraction and environmental public health: a review of the evidence,* Jill E. Johnston, Esther Limb, Hannah Roha

compared to those who are not.[44] Substances such as radium can be inhaled from the surface by livestock as they graze.[45] Humans can also come into contact with the harmful chemical by consuming food grown in contaminated soil.[46]

Measures taken by South Sudan

South Sudan has laws such as the **Petroleum Act, 2012** to prevent or in certain situations control the extent of pollution.[47] The Act mandates the companies to maintain a clean and healthy environment. They are tasked with ensuring that their waste is contained and properly disposed of. Therefore, the companies owe a duty of care to the neighbouring communities.[48] However, due to a lack of strict implementation, these laws are ineffective.[49]

A clear example of the laxity of these laws was seen in Rubkona, Upper Nile where there was an oil spill that covered about four (4) square kilometres and no action was taken by the company until two (2) days later when it got notified by the locals.[50] Another example is the inaction of the government towards the health and environmental impact despite the public outcry from affected areas such as the

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[44] "Radioactive Waste Material from Oil and Gas Drilling" United States Environmental Protection Agency.
[45] "Toxicological Profile for Radium" Agency for Toxic Substances and Disease Registry U.S. Public Health Service.
[46] *Impact of upstream oil extraction and environmental public health: a review of the evidence,* Jill E. Johnston, Esther Limb, Hannah Roha
[47] Ibid
[48] "Kenya Environmental Sanitation and Hygiene Policy" Ministry of Health Republic of Kenya.
[49] David B. "The Implementation Gap: What Causes Laws to Succeed or Fail?"
[50] *South Sudan pledges to clean up oil pollution after locals' protests,* East African: The Nation Media Group.

Ruweng Administrative Area.[51]

In view of the foregoing, the silence of the government has emboldened the activities of these companies. The companies are not transparent in their waste and environmental regulation, and neither do they take accountability for the harm they have done to the environment or the neighbouring people.[52]

Due to this lack of oversight and accountability, the people of South Sudan are widely exposed to hazardous chemicals, especially during flooding.[53]

One may infer that the government of South Sudan never prioritised the environment or its people when it entered into these agreements.

Recommendations

South Sudan is a member state of the United Nations which champions the right to a clean and healthy environment.[54] Furthermore, it has its own internal laws and regulations to facilitate the implementation and oversight of this right.

The environmental degradation in the country can mainly be attributed to the activities of the oil companies.[55] However, the government too owes a duty of care to its people by ensuring that

[51] *South Sudan pledges to clean up oil pollution after locals protests*, East African: The Nation Media Group
[52] Ataur R. Stuart M. "Corporate environmental responsibility and accountability: What chance in vulnerable Bangladesh?"
[53] "Toxic Floods? Climate, Natural Hazards and Risks to South Sudan's Oil Infrastructure."
[54] Ibid
[55] Ibid

they live in a habitable environment.

The right to a clean and healthy environment is a human right. Therefore, realisation of other rights also stems from it. A clear indication of stifling of other rights is evident from the impact of the unregulated oil drilling. These people's right to health, right to life, right to education has been limited because of the lack of regulation in the oil drilling sector. For these citizens to fully realise their rights it is upon their government to firmly regulate the oil sector.

The following are recommendations that may positively impact the oil drilling sector: -[56]

1. Implementation of laws. South Sudan enacted the Petroleum Act, 2012 and the National Environment Act, 2001. These legislations place a duty on the oil drilling companies to take measures to ensure that they have rigorous safety measures.

2. Relocation of the affected people. As discussed, oil drilling companies are located where there are human settlements which eventually exposes the people to hazardous chemicals. The government should come up with a policy that addresses the need to relocate these people to safer areas when it is discovered that their health and livelihood is compromised by the oil drilling activities. The government could also relocate the people to be likely affected by these activities before granting permission to these companies.

[56] *What is the Right to a Healthy Environment?* United Nations Environment Programme (UNEP)

3. The government should ensure that the companies fence off their oil plants. This is to keep off animals from the site and prevent contact with hazardous chemicals.

4. Public participation: Since it is the people who are ultimately affected by the oil drilling activities, they should be actively involved in the decision-making process. Their views and concerns should be taken into consideration and reflected in the agreements between the government and the companies.

5. The government should carry out an extensive environmental impact assessment on the affected areas. Various regions in South Sudan have reported cases of health complications, mysterious deaths of animals and other adverse effects on the environment. Such issues should not go unresolved. It is the duty of the government to protect the interests of its people.

6. The government to do away with the existing oversight authorities by replacing them with robust institutions.

7. Due to the negative impact the oil drilling processes have had on the environment, it is only prudent for the government to employ improvements in the affected areas through rehabilitation.

8. An urgent need to establish the Environmental Management Authority (EMA) as provided by the Revitalised Agreement on Resolution of Conflict in South Sudan to be mandated as a Regulatory Body.

9. Deploying qualified cadres into regulatory institutions.

10. Parliament to pass the Environmental Management Act which has been a Bill since 2012.

11. Financing the regulatory institutions.

12. To conduct an environmental audit.

References

Legislations
National Environment Act, 2001
Petroleum Act, 2012

Online Journals

Impact of upstream oil extraction and environmental public health: a review of the evidence, Jill E. Johnston, Esther Limb, Hannah Roha
What is the Right to a Healthy Environment? United Nations Environment Programme (UNEP)

Wailing of the people of South Sudan from oil contamination (overview of oil production and effects on people health), Peter Bol Gai Kuany, Prof, Xuefei Zhou, Dr. Ahmed A. Abdelhafez, Islam A. Abdelhafeez

Websites and Blogs

South Sudan pledges to clean up oil pollution after locals protests, East African: The Nation Media Group

Strengthening the Role of Psychologists in the Kenyan Criminal Justice System: An Analysis of the Counsellors and Psychologists Act, 2014

By: Michael Sang [*]

Abstract

This comprehensive study delves into the intricate interplay between psychology and Kenya's criminal justice system, highlighting its paramount contribution to expanding access and understanding of criminal behavior. Grounded in real-life cases like the Shaka Hola Forest incident and the unsettling actions of individuals such as Onyancha, the paper explores the nuanced dynamics of extremist ideologies, ritualistic violent crimes, and terrorist radicalization. The examination extends beyond Kenya's borders, drawing lessons from international experiences in the United Kingdom and South Africa. The UK's emphasis on a unified professional body, rehabilitative interventions, and validated screening tools provides valuable insights. Meanwhile, South Africa's legal frameworks, including the Criminal Procedures Act and the Mental Health Care Act, offer comprehensive models for evaluating criminal responsibility and protecting the rights of individuals with mental disorders. Crucially, the study scrutinizes Kenya's own legal landscape, focusing on the Counsellors and Psychologists Act, 2014. This legislation, while making strides in regulating the profession, is critically analyzed, pointing out merits and demerits. The paper advocates for the alignment of this Act with international best practices, suggesting amendments to address deficiencies, including a lack of unified professional bodies and screening tools. In proposing measures to enhance the integration of psychology into Kenya's criminal justice system,

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the study recommends the establishment of a unified professional body, explicit requirements for psychologists in assessments, recognition of different categories of psychologists, and a stage-wise process for determining criminal capacity. Ultimately, the paper contends that by collaboratively intertwining psychological insights with legal frameworks, Kenya can pave the way for a more informed, compassionate, and effective criminal justice system.

***Key Words**: Psychologists, Kenya, Criminal Justice System, Counsellors and Psychologists Act*

1. Introduction

In Kenya, the intersection of psychology and the criminal justice system holds immense potential for unraveling the complexities surrounding criminal behavior. Cases such as the Shaka Hola Forest massacre[1] the chilling actions of serial killers like Onyancha,[2] ritualistic violent crimes, and the troubling phenomena of terrorist radicalization and violent extremism underscore the critical need for professional insights into the intricate patterns of human behavior and mental states. These cases pose unique challenges that extend beyond conventional criminal investigations, demanding a nuanced understanding of the psychological dimensions involved.

[1] Fiorillo, Chiara (2023). "Four cult members starve to death in Kenyan forest after 'fasting to meet Jesus'". *The Mirror*. Retrieved 13 April 2024.
[2] Paul Ogemba (2021) 'Self-confessed serial killer Philip Onyancha freed for lack of evidence' *The Standard* available at https://www.standardmedia.co.ke/article/2001417753/self-confessed-serial-killer-philip-onyancha-freed accessed 13 April 2024.

The Shaka Hola Forest incident[3] for instance, exposed the influence of psychological factors on individuals willing to follow extreme ideologies. The discovery of emaciated followers and shallow graves highlights the need for a profound comprehension of the psychological dynamics that lead individuals to engage in self-destructive behaviors driven by religious fervor. This incident calls for a comprehensive examination of the role psychology can play in identifying and mitigating the risks associated with radical ideologies that endanger lives.

Similarly, the case of Onyancha, who confessed to the gruesome murder of 17 women and claimed to drink their blood,[4] presents a stark illustration of the intricate relationship between mental health and criminal behavior. Despite the court ruling[5] that he was not legally insane, Onyancha's admission of being disturbed by life events that destabilized his mental state emphasizes the importance of psychological insights in evaluating and addressing the mental health aspects of criminal conduct.

In the face of such complex criminal cases, the contribution of psychology becomes paramount. Beyond merely solving crimes, the discipline offers a unique lens to comprehend the underlying causes of criminality. By delving into the realms of human cognition,

[3] The Senate (2023). Report of the Ad-Hoc Committee to Investigate the Proliferation of Religious Organizations and Circumstances Leading to More Than 95 Deaths in Shakahola, Kilifi County.

[4] Dennis Onsarigo (2017). The Devil Told Me to Kill 100 Women – 'Reformed' Serial Killer Onyancha. Accessed 13 April 2024.

[5] Paul Ogemba (2021) 'Self-confessed serial killer Philip Onyancha freed for lack of evidence' *The Standard* available at *https://www.standardmedia.co.ke/article/2001417753/self-confessed-serial-killer-philip-onyancha-freed accessed 13 April 2024.*

emotions, and behavior, psychologists can provide critical insights into the motives, triggers, and patterns that drive criminal actions. Understanding these factors is integral to developing effective strategies for crime prevention, rehabilitation, and ensuring public safety.

This discourse explores the pivotal role that psychology can play in expanding access to criminal justice in Kenya. Through the lens of notable cases like Shaka Hola and Onyancha, it delves into the necessity of professional psychological expertise in deciphering the intricacies of criminal behavior. As Kenya grapples with evolving challenges in its criminal justice landscape, harnessing the insights of psychology becomes not just a necessity but a key avenue for enhancing our understanding of crime and developing targeted interventions to address offending behavior.

2. The Contribution of Psychologists to Criminal Justice Processes: An Overview

2.1 Types of Psychologists

2.1.1 Clinical Psychologists

Clinical psychologists play a crucial role in the criminal justice system by applying their expertise in mental health to understand, assess, and intervene in various aspects of the legal process.[6] Clinical psychologists are trained to conduct comprehensive psychological assessments.[7] In the criminal justice context, this involves evaluating

[6] Kibira LM & Kipchirchir (2023). 'Between Arrest and Sentence: Treatment of Persons With Intellectual and Psychosocial Disabilities in Kenya' in Ambani & Sipalla (eds), *Mental Health and the Criminal Justice System* 77.
[7] Ibid

individuals for mental health disorders, assessing their cognitive functioning, and determining their psychological state. This information is valuable in understanding the accused, witnesses, or victims.[8]

Clinical psychologists can assess individuals for mental health issues, such as depression, anxiety, or psychosis.[9] Identifying these conditions is vital for understanding how they may impact a person's behavior, decision-making, and culpability in criminal activities.[10] Clinical psychologists often engage in forensic assessment, which involves applying psychological principles to legal issues.[11] They may assess issues like competency to stand trial, criminal responsibility, and risk assessment for potential future dangerousness.[12]

Clinical psychologists can provide therapeutic interventions to individuals involved in the criminal justice system.[13] This may include counseling for defendants, victims, or even prison inmates.[14] Addressing mental health concerns can contribute to rehabilitation and reduce the likelihood of reoffending. Clinical psychologists may

[8] Zarbo, C., Tasca, G. A., Cattafi, F., & Compare, A. (2016). Integrative Psychotherapy Works. *Frontiers in Psychology*. doi: 10.3389/fpsyg.2015.02021
[9] Kibira LM & Kipchirchir (2023). 'Between Arrest and Sentence: Treatment of Persons with Intellectual and Psychosocial Disabilities in Kenya' in Ambani & Sipalla (eds), *Mental Health and the Criminal Justice System* 77.
[10] Ibid
[11] Ibid
[12] Ibid
[13] Hollin CR (2013). Psychology and Crime: An Introduction to Criminological Psychology.
[14] Ibid

also serve as expert witnesses in court.[15] They can provide insights into the psychological aspects of a case, helping judges and juries understand complex mental health issues that may influence legal decisions.[16]

Psychologists can contribute to the development and implementation of rehabilitation programs within the criminal justice system.[17] This can include programs focused on anger management, substance abuse treatment, and other interventions aimed at reducing criminal behavior. In situations involving crises, such as hostage negotiations or incidents with emotionally distressed individuals, clinical psychologists can offer their expertise to law enforcement to help manage the situation more effectively.[18]

2.1.2 Forensic Psychologists

Forensic psychologists specialize in the intersection of psychology and the legal system.[19] Their contributions in the criminal justice context are crucial for understanding and addressing various legal issues.[20] Forensic psychologists may be involved in criminal profiling, a process that involves analyzing crime scenes, evidence, and behavioral patterns to create a profile of potential offenders. This information can assist law enforcement in investigations.[21]

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[15] Blau TH (2008). The Psychologist as Expert Witness.
[16] Ibid
[17] Kibira LM & Kipchirchir (2023). 'Between Arrest and Sentence: Treatment of Persons With Intellectual and Psychosocial Disabilities in Kenya' in Ambani & Sipalla (eds), *Mental Health and the Criminal Justice System* 77.
[18] Ibid
[19] Ibid
[20] Ibid
[21] Ibid

Forensic psychologists assess an individual's competency to stand trial.[22] This involves determining whether a defendant has the mental capacity to understand the legal proceedings against them and assist in their defense. Forensic psychologists play a critical role in evaluating claims of insanity.[23] They assess whether a defendant was mentally impaired at the time of the crime, which can impact their criminal responsibility.[24]

Forensic psychologists conduct risk assessments to evaluate the likelihood of an individual reoffending.[25] This information is valuable in sentencing decisions and the development of parole or probation plans.[26] They examine the reliability of eyewitness testimony and the accuracy of memory recall. They can provide insights into the factors that may influence the reliability of witness accounts in criminal cases. Forensic psychologists may work with victims of crime, providing support and counseling. They can help victims cope with trauma and navigate the legal process.[27]

Forensic psychologists may engage in research to inform policies within the criminal justice system. This research can address issues such as the effectiveness of rehabilitation programs, the impact of legal interventions, and the development of evidence-based practices.[28]

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[22] Brown J, Shell Y & Cole T (2015). Forensic Psychology: Theory, Research, Policy and Practice.
[23] Ibid
[24] Ibid
[25] Ibid
[26] Ibid
[27] Ibid
[28] Ibid

2.1.3 Criminal Psychologists

Criminal psychologists, often referred to as criminal or forensic psychologists, specialize in understanding and applying psychological principles to criminal behavior, legal processes, and the functioning of the criminal justice system.[29] Criminal psychologists may engage in profiling to create a psychological profile of an offender based on crime scene analysis, behavioral patterns, and other relevant factors.[30] This information can assist law enforcement in investigations. They assess the risk of reoffending among individuals within the criminal justice system. This involves evaluating various factors, including the individual's history, behavior, and potential for rehabilitation.[31]

Criminal psychologists contribute to the development and implementation of treatment and rehabilitation programs for offenders.[32] This includes addressing issues such as anger management, substance abuse, and other factors contributing to criminal behavior. Criminal psychologists may serve as expert witnesses in court, providing insights into the psychological aspects of criminal cases. This can aid judges and juries in understanding the motivations and mental state of individuals involved in criminal activities.[33]

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[29] Yoon, I. A., Slade, K., & Fazel, S. (2017). Outcomes of psychological therapies for prisoners with mental health problems: A systematic review and meta-analysis. *Journal of Consulting and Clinical Psychology*, 85(8), 783-802.

[30] Chan HC & Adjorlolo (2021). Crime, Mental Health and the Criminal Justice System in Africa: A Psycho-Criminological Perspective.

[31] Ibid

[32] Ibid

[33] Ibid

They study patterns of criminal behavior, looking at the psychological factors that contribute to criminal acts. This analysis can inform preventive measures and intervention strategies. Criminal psychologists may work with victims of crime, providing psychological support and helping them cope with the trauma associated with criminal incidents.[34]

2.2 Emerging Prominence of Victimology in the Criminal Justice Process

Victimology has gained increasing prominence in the criminal justice process as psychologists recognize the importance of understanding and addressing the experiences and needs of crime victims. Victimology emphasizes the rights of crime victims, recognizing them as integral stakeholders in the criminal justice process. This includes the right to be treated with dignity, to be informed about the progress of the case, and to receive support and assistance.[35]

Psychologists involved in victimology assess the psychological impact of crime on victims. This involves understanding trauma, stress, and coping mechanisms, which can inform interventions and support services. Victimology promotes the provision of immediate crisis intervention and long-term counseling for crime victims. Psychologists play a crucial role in offering psychological support, helping victims process their experiences, and assisting in the recovery process.[36]

Psychologists contribute to assessing the ongoing risks and safety concerns for victims, especially in cases of domestic violence or

[34] Ibid
[35] Ibid
[36] Ibid

stalking.[37] They collaborate with law enforcement and victim advocates to develop safety plans tailored to individual circumstances. Victimology encourages restorative justice practices, which aim to involve victims, offenders, and the community in addressing the harm caused by the crime. Psychologists contribute by facilitating communication between victims and offenders, promoting empathy, and facilitating restitution.[38]

2.3 The Necessity of Psychologists in Kenya's Criminal Justice System

In the Investigation Process:

Psychologists can contribute to the investigation process by advising law enforcement on effective and ethical interrogation techniques. They can help design interviews that minimize false confessions and ensure the reliability of information obtained from suspects. Psychologists may assist in identifying and managing psychological factors that could impact the accuracy of statements made during police interviews.[39]

In the Trial Process:

Psychologists can provide insights into juror or court behavior, decision-making processes, and factors influencing perception and memory. They may assist legal professionals in jury selection, helping to identify potential biases or preconceptions that could affect the trial outcome. Understanding the psychology of witnesses, including stress and memory issues, can inform how evidence is presented and

[37] Ibid
[38] Ibid
[39] Rogers, C. (1956). The Necessary and Sufficient Conditions of Therapeutic Personality Change. *Journal of Consulting Psychology*, 21, 95-103.

evaluated in the courtroom.[40]

Psychologists can serve as expert witnesses to explain complex psychological concepts relevant to the case, such as the impact of trauma on memory, the reliability of eyewitness testimony, or the mental state of the accused. They contribute to the court's understanding of the psychological factors that may have influenced the actions of individuals involved in the case.[41]

In Sentencing:
Psychologists play a crucial role in conducting comprehensive psychological assessments of individuals involved in the criminal justice system. They assess factors such as mental health, risk of reoffending, and rehabilitation potential, providing valuable information for sentencing decisions. This information assists judges in tailoring sentences that consider the individual's psychological well-being and the likelihood of successful rehabilitation. They can design and implement interventions focused on mental health treatment, substance abuse counseling, and skill-building to reduce the risk of reoffending.[42]

3. Analysis of Kenya's Legislation on the Role of Psychologists in Criminal Justice: Counsellors and Psychologists Act 2014

3.1 Merits of Counsellors and Psychologists Act

1. Professional Standards and Regulation:
The Act establishes a regulatory framework for the training,

[40] Ibid
[41] Ibid
[42] Ibid

registration, and licensing of counsellors and psychologists. This is crucial for ensuring that individuals practicing in these professions meet specific educational and ethical standards.[43]

2. Quality Assurance in Training:
By outlining requirements for training programs[44], the Act contributes to the maintenance of high standards in the education and training of counsellors and psychologists. This, in turn, enhances the quality of services provided to individuals within the criminal justice system.

3. Ethical Practice:
The Act includes provisions related to ethical guidelines and professional conduct for counsellors and psychologists. This ensures that practitioners adhere to ethical standards, promoting trust and integrity in their interactions with clients, including those involved in the criminal justice system.[45]

4. Licensing and Registration:
Licensing and registration requirements are essential components of the Act, ensuring that only qualified and competent individuals are authorized to practice as counsellors and psychologists.[46] This helps protect the public and maintains the credibility of the professions.

The Counsellors and Psychologists Board (Functions):[47]
The Act assigns various functions to the Counsellors and

[43] Counsellors and Psychologists Act, 2014, long title
[44] Counsellors and Psychologists Act, 2014
[45] Ibid
[46] Ibid
[47] Ibid, Part II

Psychologists Board, which include accreditation of Training Programs, licensing and Registration, development of Professional Standards, ethical Oversight and Continuing Professional Development among others.[48]

3.2 Demerits of the Psychologists and Counsellors Act

3.2.1 Lack of a Unified Professional Body

One significant demerit of the Psychologists and Counsellors Act is the presence of numerous fragmented professional associations within the fields of psychology and counseling. This fragmentation could result in a lack of consistency in qualification requirements, accreditation processes, and practice standards across different associations. Professionals may belong to various associations, each with its own set of rules and standards, potentially leading to confusion among practitioners and the public.[49]

The absence of a unified professional body may contribute to a lack of standardized qualification requirements for psychologists and counsellors. Different associations might have varied criteria for educational background, training, and experience, making it challenging to establish a universal benchmark for professional qualifications. This lack of uniformity could impact the overall credibility and coherence of the professions.[50]

The presence of multiple professional associations may lead to

[48] Ibid

[49] Kamoyo, J. M., Barchok, H. K., Mburugu, B. M., & Nyaga, V. K. (2015). Effects of imprisonment on depression among female inmates in selected prisons in Kenya. *Research on Humanities and Social Sciences*, 5(16), 55-59.

[50] Ibid

inconsistent accreditation processes for educational and training programs. Programs accredited by one association may not necessarily meet the standards set by another, creating challenges for aspiring psychologists and counsellors in choosing accredited and recognized educational paths. [51]

3.2.2 Due Process Shortfalls

Due process typically involves a fair and transparent disciplinary process for professionals accused of misconduct or ethical violations. Due process shortfalls may arise if the Psychologists and Counsellors Act lacks clarity in outlining the specific procedures and steps involved in investigating and addressing complaints against psychologists and counsellors. The absence of well-defined processes can lead to confusion and potential injustices in disciplinary proceedings. Due process is designed to protect the rights of professionals accused of misconduct, ensuring fair treatment and a proper opportunity to respond to allegations.[52]

A robust due process includes the provision of appeal mechanisms for professionals dissatisfied with disciplinary decisions. If the Psychologists and Counsellors Act lacks clear and accessible avenues for appeal, professionals may find it challenging to contest decisions that they believe to be unjust or based on procedural errors. Due process requires consistent and unbiased enforcement of regulations and disciplinary actions.[53]

Due process should protect individuals who report misconduct (whistleblowers) from retaliation. If the Act fails to provide adequate

[51] Ibid
[52] Ibid
[53] Ibid

safeguards for whistleblowers, professionals may be hesitant to report unethical behavior, fearing reprisals, which can impede the effectiveness of the regulatory system.[54]

3.2.3 Lack of Screening Tools

A significant demerit of the Psychologists and Counsellors Act is the absence of standardized screening tools or guidelines for conducting assessments. Without clear and consistent screening tools, psychologists and counsellors may use varying methods, leading to inconsistent assessment reports. This lack of uniformity can affect the reliability and credibility of the information provided in legal contexts. The lack of screening tools can result in variability in the quality and reliability of expert evidence provided by psychologists and counsellors. In legal proceedings, where expert testimony is crucial, inconsistencies in assessment reports may undermine the overall value of psychological evidence and impact the court's confidence in the information presented.[55]

In the absence of standardized screening tools, psychologists and counsellors may face challenges during cross-examination in court. Legal professionals may question the validity and reliability of assessments, potentially leading to doubts about the credibility of psychological evidence presented in the case. Without standardized screening tools, the risk of inaccuracies or biases in psychological assessments may increase, potentially influencing sentencing, competency determinations, or other legal judgments.[56]

[54] Ibid
[55] Ibid
[56] Ibid

3.2.4 Non-compliance with Convention on the Rights of Persons with Disabilities

The Convention on the Rights of Persons with Disabilities (CRPD) emphasizes the rights and dignity of individuals with disabilities, including those with mental health conditions or intellectual disabilities[57]. A demerit of the Psychologists and Counsellors Act is its non-compliance with the principles and provisions outlined in the CRPD. This could include shortcomings in safeguarding the rights and well-being of individuals with mental or intellectual disabilities.[58]

The Act's failure to make a clear distinction between mental illness and intellectual disability is notable. Mental illnesses and intellectual disabilities are distinct conditions with unique characteristics and implications for treatment and support. If the Act lacks clarity in distinguishing between these two categories, it may lead to inappropriate interventions and services.[59]

The Act's non-compliance with the CRPD may result in inadequate protections for the rights of persons with disabilities within the fields of psychology and counseling. This may include insufficient provisions for reasonable accommodations, accessibility, and inclusive practices in psychological services, potentially leading to discrimination or neglect of individuals with disabilities.[60]

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[57] Convention on the Rights of Persons with Disabilities, art 1, 25, 26

[58] Agasa, E. O. (2015). Effects of imprisonment on inmates at Industrial Area Remand and Lang'ata Women prisons in Kenya. IOSR *Journal of Humanities and Social Science*, 20(11), 11-20.

[59] Ibid

[60] Ibid

The lack of a clear distinction between mental illness and intellectual disability may impact how psychologists and counsellors assess and treat individuals. Differentiating between these conditions is crucial for tailoring appropriate interventions. Failure to do so may lead to misunderstandings, misdiagnoses, and inappropriate treatment plans. Non-compliance with the CRPD and the lack of distinction between mental illness and intellectual disability may contribute to stigma and discrimination against individuals with these conditions. Clear guidelines in the Act can help promote a more inclusive and supportive approach to psychological services, aligning with the principles of the CRPD.[61]

3.2.5 Inclusivity Gaps

One demerit of the Psychologists and Counsellors Act is its failure to adequately represent diverse perspectives and experiences. If the Act lacks provisions that consider the needs and concerns of various demographic groups, including those from different cultural, ethnic, religious, or socioeconomic backgrounds, it may result in services that are not inclusive or culturally competent. Inclusivity gaps arise when the Act does not address the concept of intersectionality, which recognizes that individuals may face multiple forms of discrimination or disadvantage based on various intersecting factors such as race, gender, and socioeconomic status.[62]

The Act has shortcomings when it does not explicitly address the needs of marginalized communities, including LGBTQIA+ individuals, persons with disabilities, and other groups that may face discrimination or marginalization. Lack of attention to these

[61] Ibid
[62] Ibid

communities may result in psychological and counseling services that do not adequately meet their unique needs.[63]

Inclusivity gaps may manifest in limited accessibility to psychological and counseling services for certain populations. This could include individuals in rural areas, economically disadvantaged communities, or those facing language barriers. If the Act does not address these accessibility issues, it may contribute to disparities in mental health care. The Act may fall short if it does not emphasize the importance of cultural competence in the practice of psychology and counseling. Lack of guidance on cultural competence may result in practitioners who are ill-equipped to understand and address the diverse cultural backgrounds and perspectives of their clients.[64]

3.2.6 Deficiencies of Forensic Psychological Services

One demerit involves inconsistencies in the training standards for forensic psychologists outlined in the Act. Without clear and standardized requirements, forensic psychologists may have varying levels of expertise and competence, leading to inconsistencies in the quality of forensic services provided. The Act does not adequately recognize and define forensic psychology as a specialized field within the broader discipline. This lack of specialization recognition may result in practitioners without specific training or experience in forensic settings, potentially compromising the quality of forensic psychological services.[65]

Forensic psychologists often conduct assessments for legal purposes,

[63] Ibid
[64] Ibid
[65] Ibid

such as competency evaluations or risk assessments.[66] Deficiencies in the Act include a lack of detailed guidelines or standards for conducting these assessments, potentially leading to variations in the methodologies employed and the reliability of the results. Forensic psychologists face unique ethical challenges when working within the legal system. The Act does not provide sufficient guidance on navigating these challenges, such as maintaining objectivity, avoiding conflicts of interest, and ensuring the protection of clients' rights in legal proceedings.[67]

4. Strengthening the Role of Psychologists in the Kenyan Criminal Justice System

4.1 United Kingdom

4.1.1 Psychology Professionals in the UK Criminal Justice System

In the United Kingdom, psychology professionals play integral roles within the criminal justice system, contributing expertise in various areas. Forensic psychologists in the UK are extensively involved in areas such as criminal profiling, risk assessment, and the rehabilitation of offenders. They contribute to the understanding of criminal behavior, provide expert testimony in court, and assess the mental health and risk factors of individuals within the criminal justice system. Clinical psychologists work with individuals in the criminal justice system to assess and treat mental health issues. They may be involved in therapeutic interventions, such as cognitive-behavioral therapy, and contribute to the development of

[66] Ibid
[67] Ibid

rehabilitation programs.[68]
Counselling psychologists provide support and counseling services to individuals affected by crime, including victims and witnesses. They may also work within rehabilitation programs to address psychological factors contributing to criminal behavior.[69]

Lessons for Kenya:

4.1.2.1 Establishing a Unified Professional Body
The UK has established professional bodies such as the British Psychological Society (BPS), which provides a unified platform for psychologists. BPS offers accreditation, ethical guidelines, and a collective voice for psychologists, ensuring consistent professional standards.[70]

Kenya can benefit from establishing a unified professional body for psychologists involved in the criminal justice system. This body can set standards, offer accreditation, and provide a centralized resource for training and professional development.

4.1.2.2 Rehabilitative Interventions:
The UK emphasizes evidence-based rehabilitative interventions within the criminal justice system. Psychologists contribute to designing and implementing programs focused on addressing the underlying causes of criminal behavior.[71]

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[68] Jacobson, J., Heard, C., & Fair, H. (2017). *Prison: Evidence of its Use and Over-Use from Around the World*. London: Institute for Criminal Policy Research
[69] Ibid
[70] Ibid
[71] Ibid

Kenya should prioritize the integration of psychological expertise in the development and implementation of rehabilitation programs. Psychologists can play a key role in designing interventions that address mental health issues, substance abuse, and other factors contributing to criminality.

4.1.2.3 Validated Screening Tools:

Forensic psychologists in the UK use validated screening tools for assessments, ensuring reliability and accuracy. These tools are evidence-based and contribute to informed decision-making within the criminal justice system.[72]

Kenya should focus on implementing standardized screening tools for psychological assessments. Validated tools can enhance the quality and consistency of assessments, aiding in decision-making processes related to competency evaluations, risk assessments, and other psychological interventions within the criminal justice system.

4.2 South Africa

4.2.1 Criminal Procedures Act

Section 77 Criminal Procedures Act

Section 77 focuses on the accused's fitness to stand trial[73]. It allows for a court inquiry into the accused's mental capacity to understand the proceedings and assist in their defense.

[72] Ibid

[73] Criminal Procedures Act, sec 77

Section 78 Criminal Procedures Act

Section 78 deals with the retrospective mental state of the accused at the time of the alleged offense. It considers whether the accused was criminally responsible due to a mental disorder when the offense occurred.[74]

Section 79 Criminal Procedures Act

Section 79 requires the appointment of two or three psychiatrists (and potentially a clinical psychologist) to assess the accused's mental state. The aim is to provide expert input in determining the accused's fitness to stand trial and their mental state at the time of the offense.[75]

4.2.2 Mental Health Care Act 2002

The Mental Health Care Act of 2002 in South Africa is a significant piece of legislation that provides a comprehensive framework for the care, treatment, and protection of individuals with mental disorders.[76] The Act places a strong emphasis on protecting the rights of individuals with mental disorders, ensuring that they are treated with dignity and respect. It outlines procedures for the involuntary admission and treatment of individuals with mental disorders, balancing the need for care with the protection of individual rights.[77]

The Act establishes Mental Health Review Boards, independent bodies tasked with reviewing cases of involuntary admission and treatment to safeguard the rights of patients. There is a focus on community-based mental health care, promoting treatment and support in the least restrictive environment possible. The Act

[74] Ibid, sec 78
[75] Ibid, sec 79
[76] Mental Health Care Act, 2002
[77] Ibid

provides a broad and inclusive definition of a mental disorder, encompassing various conditions that may affect a person's mental well-being. It enumerates the rights of mental health care users, including the right to confidentiality, informed consent, and the right to be treated in the least restrictive environment.[78]

The Act distinguishes between different categories of patients, including voluntary mental health care users, assisted mental health care users, and involuntary mental health care users. It outlines the roles and responsibilities of mental health care practitioners, including psychiatrists, clinical psychologists, and other professionals involved in the treatment and care of individuals with mental disorders. The Act provides for appeal processes, allowing individuals to challenge decisions related to their involuntary admission or treatment.[79]

4.2.3 The Case of S v Chretien (1981):

In the case of S v Chretien,[80] a significant precedent was set in South African criminal law, particularly regarding the defense of automatism. The Appellate Division ruled that even automatism arising from voluntary intoxication can serve as an absolute defense, leading to a total acquittal if the accused drinks to the extent that they lack criminal capacity. This decision had notable consequences, allowing for the complete exoneration of individuals who committed criminal acts while in a state of involuntary intoxication.[81]

However, seven years later, the legislature intervened to address the

[78] Ibid
[79] Ibid
[80] *S v Chretien* (1981)
[81] Ibid

perceived destructive consequences of this decision. The Criminal Law Amendment Act introduced section 1(1), modeled on the German penal code, to create a special statutory offense. This offense pertains to committing a prohibited act while in a state of criminal incapacity induced by the voluntary consumption of alcohol. The legislative amendment shifted the burden to the prosecution to prove, beyond a reasonable doubt, that the accused is not liable for a common-law offense due to the lack of capacity resulting from self-induced intoxication.[82]

The complexities arise from the requirement that the prosecution prove both the lack of capacity and the connection to self-induced intoxication. This statutory provision presents challenges when the intoxication only impairs intention rather than capacity. The section has been criticized, and there is a call for reform or replacement with a more appropriately worded provision.[83]

This case exemplifies the evolving legal responses to cases involving mental states influenced by intoxication. It highlights the delicate balance between recognizing the impact of self-induced intoxication on criminal capacity and the need for legal frameworks that appropriately address the complexities of such cases.

Lessons for Kenya:

Unified Professional Body:
Kenya can learn from South Africa's emphasis on a unified

[82] Naidoo, S., & Mkize, D. L. (2012). Prevalence of mental disorders in a prison population in Durban, South Africa. *African Journal of Psychiatry*, 15(1), 30-35.
[83] Ibid

professional body. Kenya should establish a single professional body for psychologists to ensure standardized training, ethical guidelines, and consistent professional standards.

Explicit Requirement of Three Psychologists:
South Africa's requirement for the appointment of three psychologists in the assessment process is noteworthy. Kenya can consider explicit guidelines on the number and types of psychologists involved in similar assessments, ensuring comprehensive evaluations.

Different Categories of Psychologists:
Recognizing different categories of psychologists (e.g., clinical psychologists) in the legal process is vital. Kenya can benefit from acknowledging and leveraging the diverse expertise of psychologists in various specialties within the criminal justice system.

Stage-Wise Process of Determining Criminal Capacity:
South Africa's stage-wise process for determining criminal capacity ensures a thorough assessment. Kenya can consider adopting a structured, multi-stage process for evaluating an accused's mental state to enhance accuracy and fairness.

Judicial Management of State Patients:
The judicial management of state patients is crucial for their well-being. Kenya may explore mechanisms for judicial oversight and management of individuals found not criminally responsible due to a mental disorder.

By incorporating these lessons, Kenya can strengthen the role of psychologists in its criminal justice system, aligning procedures with

international best practices and ensuring a comprehensive and fair evaluation of mental health issues within legal contexts.

Conclusion:

The exploration of the role of psychology in Kenya's criminal justice system has illuminated the critical need for professional insights into the complex and multifaceted nature of criminal behavior. The cases discussed, including the *Shaka Hola* Forest incident and the unsettling actions of individuals like Onyancha, underscore the intricate interplay of psychological factors in criminality. The Shaka Hola Forest incident revealed the susceptibility of individuals to extreme ideologies, prompting a call for a heightened understanding of the psychological dimensions that drive people towards self-destructive behaviors in the name of religion. Onyancha's case, marked by gruesome murders and claims of spiritual possession, emphasizes the integral role of psychology in evaluating and addressing the mental health aspects of criminal conduct.

The key contribution of psychology lies not only in solving crimes but, more importantly, in enhancing understanding of the root causes of criminal behavior. By delving into the realms of human cognition, emotions, and behavior, psychologists offer invaluable insights that can inform effective strategies for crime prevention, rehabilitation, and the maintenance of public safety. As Kenya grapples with evolving challenges in its criminal justice landscape, the incorporation of psychological expertise emerges as an indispensable asset. Establishing a unified professional body, integrating psychological insights into rehabilitation programs, implementing standardized screening tools, and learning from international experiences, such as those in the United Kingdom and South Africa, are imperative steps to strengthen the role of psychologists in the

Kenyan criminal justice system.

In essence, psychology stands as a beacon for expanding access to criminal justice in Kenya, illuminating the path towards a more informed, compassionate, and effective approach to understanding and addressing criminal behavior. Through collaborative efforts between the legal and psychological domains, Kenya has the opportunity to build a criminal justice system that is not only responsive to the nuances of human behavior but also committed to the principles of fairness, justice, and the protection of individual rights.

References

Agasa, E. O. (2015). Effects of imprisonment on inmates at Industrial Area Remand and Lang'ata Women prisons in Kenya. *IOSR Journal of Humanities and Social Science*, 20(11), 11-20.

Convention on the Rights of Persons with Disabilities

Counsellors and Psychologists Act, 2014

Criminal Procedures Act

Fiorillo, Chiara (2023). "Four cult members starve to death in Kenyan forest after 'fasting to meet Jesus'". *The Mirror*. Retrieved 13 December 2023.

Jacobson, J., Heard, C., & Fair, H. (2017). *Prison: Evidence of its Use and Over-Use from Around the World*. London: Institute for Criminal Policy Research

Kamoyo, J. M., Barchok, H. K., Mburugu, B. M., & Nyaga, V. K. (2015).

Effects of imprisonment on depression among female inmates in selected prisons in Kenya. *Research on Humanities and Social Sciences*, 5(16), 55-59.

Mental Health Care Act, 2002

Naidoo, S., & Mkize, D. L. (2012). Prevalence of mental disorders in a prison population in Durban, South Africa. *African Journal of*

Psychiatry, 15(1), 30-35.
Paul Ogemba (2021) 'Self-confessed serial killer Philip Onyancha freed for lack of evidence' The Standard available at https://www.standardmedia.co.ke/article/2001417753/self-confessed-serial-killer-philip-onyancha-freed

Rogers, C. (1956). The Necessary and Sufficient Conditions of Therapeutic Personality Change. *Journal of Consulting Psychology*, 21, 95-103. *S v Chretien* (1981)

Yoon, I. A., Slade, K., & Fazel, S. (2017). Outcomes of psychological therapies for prisoners with mental health problems: A systematic review and meta-analysis. *Journal of Consulting and Clinical Psychology*, 85(8), 783-802.

Zarbo, C., Tasca, G. A., Cattafi, F., & Compare, A. (2016). Integrative Psychotherapy Works. Frontiers in Psychology. doi: 10.3389/fpsyg.2015.02021

Journal Review: Journal of Appropriate Dispute Resolution (ADR) & Sustainability, Volume 2, Issue 1

By: ***Mwati Muriithi****

Published in April 2024, Journal of Appropriate Dispute Resolution (ADR) & Sustainability, Volume 2, Issue 1 has continued to grow as a key academic resource in the fields of Dispute Resolution, Sustainability 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 peer reviewed and refereed in order to adhere to the highest quality of academic standards and credibility of information. Papers submitted to the Journal are taken through a rigorous review by our team of internal and external reviewers.

It is edited by Hon. Prof. Kariuki Muigua Ph.D,FCIArb,Ch.Arb, OGW who has earned his reputation as a distinguished legal practitioner in Kenya and a leading environmental scholar in Africa and the world. It adopts an open publication policy and does not discriminate against authors on any grounds.

Hon. Prof. Kariuki Muigua Ph.D,FCIArb,Ch.Arb, OGW has demonstrated his prowess and sound understanding of Sustainable Development in his paper *'Maximizing Diplomacy, Peace-Making and Peace-Keeping for Sustainable Development in Africa'*. The paper

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critically discusses the role of diplomacy, peace-making, and peace-keeping in the Sustainable Development agenda in Africa. It argues that fostering these concepts is necessary in accelerating the continents journey towards the SDGs. The paper defines diplomacy, peace-making, and peace-keeping and examines their role in the Sustainable Development agenda. It also suggests ways through which Africa can maximize diplomacy, peace-making, and peace-keeping for Sustainable Development.

'Designing Legislation to Counter Digital Currency-Based Crimes in Kenya: Lessons from Cryptocurrency Laws in the United States of America and United Kingdom' by Michael Sang delves into the multifaceted realm of digital currency-based crimes and the regulatory challenges faced by Kenya. Drawing vital lessons from the cryptocurrency laws and legislative measures of the United States and the United Kingdom, it offers valuable insights to strengthen Kenya's regulatory framework and enhance its capabilities in combating illicit activities. The discussion encompasses regulatory gaps, criminal exploitation of cryptocurrencies, cases of cryptocurrency-related crimes, and considerations for a Central Bank Digital Currency (CBDC).

James Njuguna in *'Managing Natural Resource Based Conflicts in Kenya through ADR: A Critical Analysis of Community Land Disputes in Kenya'* critically discusses the role of Alternative Dispute Resolution (ADR) mechanisms in managing natural resource-based conflicts in Kenya with reference to community land conflicts and disputes. The paper argues that ADR mechanisms are a viable option in managing community land conflicts in Kenya. It highlights some of the key features and advantages of ADR processes which makes them suitable in managing community land disputes in Kenya. The paper further points out challenges and potential drawbacks inherent in ADR mechanisms and proposes interventions in order to enhance the

role of ADR mechanisms in managing community land conflicts and disputes in Kenya.

Mwati Muriithi critically reviews the Alternative Dispute Resolution Journal, Volume 12 Issue 3 which provides a platform for scholarly debate and in-depth investigations into both theoretical and practical questions in Alternative Dispute Resolution. The Journal covers pertinent and emerging issues across all ADR mechanisms. It is now one of the most cited publications in the fields of ADR and Access to Justice in Kenya and across the globe.

'*Applying Environmental Ethics for Sustainability*' by Hon. Prof. Kariuki Muigua critically examines the role of environmental ethics in the sustainability agenda. It argues that environmental ethics can be a vital tool in fostering sustainability. The paper defines environmental ethics and discusses how this concept can enhance sustainability. It also discusses some of the concerns with utilizing environmental ethics as a tool for sustainability. Further, the paper suggests ideas towards applying environmental ethics for sustainability.

Antony Mwenda Kinyua in '*Njurincheke Among The Ameru Community: A Cultural Beacon For Community Conflict Resolution*' examines the economic and political problems that affect the Ameru people of Kenya from the perspective of alternative dispute resolution (ADR) mechanisms, though the Njuri Ncheke. It goes on analyzing the history and the major Components of the Njuri Ncheke code in the Ameru cultures as a way of mediating in conflicts that involve land disputes, marital disputes among others.

'*Net Zero Carbon Buildings: Global Case Studies and Lessons for The Construction Industry in Africa*' by Dr. Cyrus Babu Ong'ondo delves into net-zero carbon buildings through case studies, offering insights

into lessons learned and challenges faced in achieving carbon neutrality within the built environment. The paper zeroes into practical applications, showcasing real-world examples to inform sustainable building practices and foster a deeper understanding of the path toward a net-zero carbon future in Africa.

Michael Sang in '*Legal Deficiencies in the Disposal of Evidence in Closed Criminal Cases in Kenya: An Agenda for Urgent Legal Reform'* delves into the critical issue of evidence disposal in closed criminal cases in Kenya, highlighting the pressing need for urgent legal reform. Examining the current landscape, the study explores the challenges and deficiencies in evidence management, focusing on the key role of judicial precedent. Notably, the paper scrutinizes relevant Kenyan judicial decisions and international best practices from South Africa and the UK to offer a comprehensive analysis of the shortcomings in evidence preservation and disposal.

An Appraisal of Kenya's Anti-Money Laundering and Combating of Terrorism Financing Laws (Amendment) Act, 2023

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

Abstract

This paper provides an in-depth appraisal of the Anti-Money Laundering and Combating of Terrorism Financing Laws (Amendment) Act, 2023 in Kenya. The legislative amendments discussed in this appraisal encompass various critical aspects of Kenya's Anti-Money Laundering (AML), Combating the Financing of Terrorism (CFT) and Counter Proliferation Financing (CPF) framework, aiming to align the nation's laws and regulations with international standards. The amendments range from expanding definitions of economic crimes to empowering regulatory authorities, simplifying extradition measures, and enhancing operational independence for key institutions. By addressing compliance deficits, including terrorism financing as an extraditable offense, and harmonizing licensing regimes with Financial Action Task Force (FATF) standards, Kenya demonstrates its commitment to combating financial crimes, money laundering, and terrorism financing effectively. These reforms not only strengthen Kenya's domestic financial system but also contribute to global efforts to curtail the flow of illicit funds and dismantle networks facilitating financial crimes.

Key Words: Anti-Money- Laundering- and -Combating- of -Terrorism - Financing- Laws- (Amendment) Act- 2023, FATF, Financial-Crimes

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1. Introduction

The Anti-Money Laundering and Combating of Terrorism Financing Laws (Amendment) Act of 2023 represents a pivotal development in Kenya's ongoing efforts to bolster its legal and regulatory framework in the fight against financial crimes, money laundering, and the financing of terrorism. This comprehensive legislative reform touches upon various aspects of Kenya's Anti-Money Laundering (AML) and Combating the Financing of Terrorism (CFT) regime, with a clear focus on aligning the nation's laws and regulations with international standards and best practices. The amendments discussed in this appraisal encompass a range of critical areas, including the expansion of definitions, enhanced supervision by regulatory authorities, extradition measures, and operational independence for key institutions. These changes collectively aim to reinforce Kenya's commitment to combating illicit financial activities, strengthening its position on the global stage in the ongoing battle against money laundering and terrorism financing. In this overview, I delve into the specific amendments, their implications, and the broader impact they have on Kenya's AML/CFT/CPF landscape.

2. The International AML/CFT/CPF Framework

2.1 International Treaty Framework

2.1.1 United Nations Convention Against Transnational Organized Crime

The United Nations Convention against Transnational Organized Crime, also known as the Palermo Convention, is an important international treaty designed to combat transnational organized

crime.[1] The Palermo Convention was adopted in 2000 and entered into force in 2003. Its primary purpose is to promote international cooperation and coordination among nations in addressing and preventing transnational organized crime.[2] The convention includes three key protocols that address specific aspects of transnational organized crime: a. **Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children**: This protocol aims to combat human trafficking, protect victims, and prosecute traffickers. It highlights the need for victim assistance and the prevention of human trafficking; b. **Protocol against the Smuggling of Migrants by Land, Sea and Air**: This protocol addresses the issue of migrant smuggling and seeks to prevent and combat the illegal and dangerous transportation of migrants across international borders; c. **Protocol against the Illicit Manufacturing and Trafficking in Firearms, Their Parts and Components, and Ammunition**: This protocol focuses on curbing the illegal trade in firearms and ammunition, which often fuels various forms of organized crime.[3]

The Palermo Convention and its protocols emphasize several core principles, including the need for countries to criminalize and prosecute transnational organized crime, cooperate in investigations and prosecutions, and take measures to prevent and suppress such

[1]United Nations Convention against Transnational Organised Crime available at *https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THERETO.pdf* accessed 6 October 2023

[2] Ibid

[3] Ibid

criminal activities.[4]
Countries that are parties to the Palermo Convention are expected to adopt legislative and administrative measures to implement its provisions. This includes enacting laws that criminalize various forms of transnational organized crime and establishing mechanisms for international cooperation.[5]

The convention has had a significant impact in promoting international collaboration in combating transnational organized crime. It has led to the enactment of laws and the establishment of specialized law enforcement units in many countries to address these challenges.[6]

2.1.2 United Nations Convention Against Corruption
the United Nations Convention against Corruption (UNCAC) is a significant international treaty aimed at combating corruption worldwide. UNCAC was adopted in 2003 and came into force in 2005. Its primary purpose is to promote and strengthen measures to prevent corruption, facilitate international cooperation in investigating and prosecuting corruption-related offenses, and promote asset recovery.[7]

UNCAC encourages countries to adopt and implement effective anti-corruption policies and practices, including measures to prevent corruption in the public and private sectors. It requires member states

[4] Ibid
[5] Ibid
[6] Ibid
[7] United Nations Convention against corruption available at https://www.unodc.org/unodc/en/treaties/CAC/ accessed 6 October 2023

to criminalize various forms of corruption, including bribery, embezzlement, and money laundering.[8]

UNCAC emphasizes international cooperation in the investigation and prosecution of corruption cases. It encourages the extradition of offenders and the sharing of information and evidence across borders. One of the crucial aspects of UNCAC is the promotion of asset recovery. It facilitates the return of stolen assets to their countries of origin.[9]

The convention calls for transparency and accountability in government operations and public administration. UNCAC establishes a mechanism for monitoring the implementation of its provisions through a peer review process known as the "Review of Implementation of the Convention." This process assesses each country's progress in adhering to the convention's requirements. UNCAC has played a significant role in fostering international cooperation in the fight against corruption. It has led to the enactment of anti-corruption laws and the establishment of anti-corruption agencies in many countries.[10]

2.1.3 The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988

The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, commonly known as the 1988 Drug Trafficking Convention, is an international treaty aimed at

[8] Ibid
[9] Ibid
[10] Ibid

combating drug trafficking and related offenses.[11] The 1988 Drug Trafficking Convention was adopted in response to the growing global concern over the illicit production, trafficking, and abuse of narcotic drugs and psychotropic substances. Its primary purpose is to enhance international cooperation and coordination to prevent and combat drug-related crimes.[12]

The Convention establishes strict controls on the production, distribution, and possession of narcotic drugs and psychotropic substances. It classifies these substances into different schedules based on their potential for abuse and harm.[13]The Convention encourages member states to extradite individuals involved in drug trafficking offenses, making it easier to prosecute offenders across borders. It provides measures for the seizure and confiscation of assets and proceeds derived from drug trafficking, weakening the financial incentives for drug-related criminal activities.[14]

The Convention promotes international cooperation among law enforcement agencies, including information sharing and joint operations to combat drug trafficking networks. It underscores the importance of drug abuse prevention, treatment, and rehabilitation programs, recognizing that addressing demand for drugs is as crucial as targeting supply. Member states are expected to adopt domestic

[11]The United Nations Convention against Illicit traffic in narcotic drugs and psychotropic substances, 1988 available at *https://www.incb.org/incb/en/precursors/1988-convention.html#:~:text=It%20provides%20comprehensive%20measures%20against,deliveries%20and%20transfer%20of%20proceedings*. Accessed 6 October 2023

[12] Ibid

[13] Ibid

[14] Ibid

laws and measures to implement the convention's provisions, including criminalizing drug trafficking, establishing controls over precursor chemicals used in drug production, and cooperating with other countries to combat drug-related crimes.[15]

The 1988 Drug Trafficking Convention has played a significant role in strengthening international efforts to combat drug trafficking. It has led to the enactment of stringent drug control laws in many countries and has facilitated international cooperation in tackling drug-related crimes.[16]

2.2 Institutional Arrangements

2.2.1 Financial Action Task Force

The Financial Action Task Force (FATF) is an intergovernmental organization established to combat money laundering, terrorist financing, and other threats to the integrity of the international financial system.[17] FATF was founded in 1989 by the Group of Seven (G7) countries. Its primary objective is to set international standards and promote effective measures for combating money laundering and terrorist financing. FATF aims to protect the global financial system from being used for illicit activities.[18]

FATF has 39 member countries and territories, including major economies and financial centers. Additionally, there are associate members and observer organizations. FATF develops and regularly

[15] Ibid
[16] Ibid
[17] Financial Action Task Force (FATF) available at https://www.fatf-gafi.org/en/home.html accessed 6 October 2023
[18] Ibid

updates a set of 40 recommendations, commonly known as the FATF Recommendations. These recommendations provide a comprehensive framework for countries to combat money laundering and terrorist financing[19].

FATF conducts mutual evaluations of member and non-member jurisdictions to assess their compliance with the FATF Recommendations. These evaluations help identify weaknesses in AML/CFT/CPF systems and encourage countries to improve their measures. FATF identifies and publishes lists of jurisdictions with deficiencies in their AML/CFT/CPF systems, urging global financial institutions to apply enhanced due diligence measures when dealing with these jurisdictions.[20]

FATF works to spread awareness about AML/CFT/CPF issues and provides guidance to countries and financial institutions to strengthen their defenses against money laundering and terrorist financing. FATF encourages international cooperation among countries, law enforcement agencies, and financial institutions to combat money laundering and terrorist financing effectively[21].

FATF's recommendations and assessments have had a profound impact on the global fight against money laundering and terrorist financing. Many countries have strengthened their AML/CFT/CPF laws and regulations to align with FATF standards. The organization's public statements and evaluations influence international financial institutions, which often implement stricter

[19] Ibid
[20] Ibid
[21] Ibid

AML/CFT/CPF measures in response to FATF assessments.[22]

2.2.2 Basel Committee on Banking Supervision

The Basel Committee on Banking Supervision is an international organization that plays a crucial role in setting global standards for prudential banking regulation and supervision.[23] The Basel Committee was established in 1974 by the central bank governors of the Group of Ten (G10) countries. Its primary goal is to enhance the stability and integrity of the international banking system by developing and promoting effective banking supervisory standards and guidelines.[24]

The committee consists of senior representatives from central banks and banking supervisory authorities of member countries. Its membership has expanded to include more than 40 countries and jurisdictions, making it a global body. The Basel Committee is best known for developing the Basel Accords, a series of international banking standards that provide guidelines for capital adequacy, risk management, and prudential supervision. The most notable of these accords are Basel I, Basel II, and Basel III.[25]

The committee focuses on risk management practices in banking, including credit risk, market risk, and operational risk. It provides guidance on how banks should assess and manage these risks. It issues supervisory guidelines and recommendations to ensure that banks and financial institutions are adequately regulated and

[22] Ibid

[23]Basel Committee on Banking Supervision available at https://www.bis.org/bcbs/ accessed 6 October 2023

[24] Ibid

[25] Ibid

supervised to prevent financial crises and systemic risks.[26]

The Basel Committee monitors the implementation of its standards in member countries and conducts peer reviews to assess compliance with these standards. It plays a role in developing frameworks for handling banking crises and cross-border banking resolutions. The Basel Committee's standards, particularly Basel III, have had a significant impact on the global banking industry. These standards aim to enhance the resilience of banks, improve risk management, and reduce the likelihood of banking crises.[27]Many countries have adopted Basel standards into their banking regulations and supervision practices, contributing to a more stable international banking system.

2.2.3 Egmont Group

The Egmont Group is an international organization of financial intelligence units (FIUs) from various countries around the world. It was established in 1995 in Brussels, Belgium. Its primary purpose is to facilitate international cooperation and information exchange among FIUs to combat money laundering, terrorist financing, and other financial crimes effectively.[28]

The Egmont Group comprises more than 160 member FIUs from different countries. Each member FIU is responsible for collecting, analyzing, and disseminating financial intelligence to combat financial crimes within its jurisdiction. The Egmont Group serves as

[26] Ibid
[27] Ibid
[28]The Egmont Group available at https://egmontgroup.org/ accessed 6 October 2023

a platform for member FIUs to share information, expertise, and best practices related to financial intelligence and money laundering investigations.[29]

Member FIUs collaborate on joint investigations and provide assistance to one another in pursuing cross-border financial crime cases. The group supports capacity-building efforts in member countries, helping them develop effective systems and procedures for detecting and combating financial crimes. Egmont members advocate for stronger international cooperation in combating money laundering and terrorist financing, working with other organizations like the Financial Action Task Force (FATF).[30]

The Egmont Group has significantly improved international cooperation in the fight against money laundering and terrorist financing. It has facilitated the exchange of critical financial intelligence, enabling countries to identify and disrupt criminal and terrorist networks. The group's work has contributed to the global effort to strengthen AML/CFT/CPF regimes, making it more difficult for criminals to exploit the international financial system.[31]

2.3 International Organizations

2.3.1 ESAAMLG

The Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) is an international organization that focuses on combating money laundering and the financing of terrorism in the eastern and southern regions of Africa. It was established in 1999 in

[29] Ibid
[30] Ibid
[31] Ibid

Arusha, Tanzania, following a meeting of the Eastern and Southern Africa Heads of State or Government.[32]

The primary purpose of ESAAMLG is to enhance the capacity of its member countries to combat money laundering and terrorist financing. It aims to create a regional framework for cooperation and collaboration in the fight against financial crimes. ESAAMLG's membership includes countries from the eastern and southern African regions. Member countries collaborate to develop and implement effective anti-money laundering (AML) and countering the financing of terrorism (CFT) measures.[33]

ESAAMLG conducts mutual evaluations of its member countries to assess their compliance with international AML/CFT/CPF standards and to identify areas for improvement. The organization provides training and technical assistance to member countries to help them strengthen their AML/CFT/CPF regimes, develop legislation, and enhance the skills of their law enforcement and financial institutions.[34]

ESAAMLG facilitates the exchange of information and best practices among member countries to improve their understanding of AML/CFT/CPF issues and effective response strategies. Member countries collaborate on regional initiatives and strategies to combat money laundering and terrorist financing effectively. ESAAMLG engages with international organizations such as the FATF to align

[32] The Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) available at https://www.esaamlg.org/ accessed 6 October 2023

[33] Ibid

[34] Ibid

regional AML/CFT/CPF efforts with global standards. It has played a crucial role in helping member countries develop and implement robust AML/CFT/CPF regimes. This has contributed to improved financial integrity and stability in the eastern and southern African regions. Through mutual evaluations and peer reviews, ESAAMLG has helped member countries identify and address vulnerabilities and deficiencies in their AML/CFT/CPF systems.[35]

2.3.2 The Asset Recovery Inter-Agency Network for Eastern Africa (ARIN-EA)

The Asset Recovery Inter-Agency Network for Eastern Africa (ARIN-EA) is a regional initiative focused on enhancing cooperation among countries in Eastern Africa to recover assets obtained through illegal means, such as corruption and other financial crimes.[36] ARIN-EA was established in 2017 as a collaborative effort among Eastern African countries to address the challenge of asset recovery. The primary goal of ARIN-EA is to facilitate cross-border cooperation and coordination among law enforcement agencies and other relevant authorities in the region for the recovery of assets acquired through corruption and other illicit activities.[37]

Its membership consists of countries in the Eastern Africa region that are committed to combating corruption, money laundering, and related financial crimes. Member countries work together to share

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[35] Ibid

[36]The Asset Recovery Inter-Agency Network for Eastern Africa (ARIN-EA) available at *https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2018-June-6-7/Presentations/ARIN_EA_Presentation.pdf* accessed 6 October 2023

[37] Ibid

information, resources, and expertise. ARIN-EA member agencies collaborate to trace and recover assets that have been stolen or acquired through corrupt practices and hidden in other countries. The network serves as a platform for member countries to exchange information, experiences, and best practices in asset recovery and related investigations.[38]

ARIN-EA provides training and technical assistance to member agencies to strengthen their capabilities in asset recovery efforts. The network promotes awareness and advocacy for the importance of asset recovery and the return of stolen assets to their rightful owners, including governments and victims of corruption. It works with international organizations and other asset recovery networks to enhance its effectiveness and align its efforts with global standards.[39] ARIN-EA's collaborative approach has the potential to significantly enhance the capacity of Eastern African countries to recover stolen assets and combat corruption. By fostering regional cooperation and sharing best practices, ARIN-EA contributes to strengthening the legal frameworks and institutions involved in asset recovery in the Eastern Africa region.

3. Compliance Deficits in Kenya's AML/CFT/CPF Regime Previously Identified by FATF

3.1 Reporting Entities

The compliance deficit in Kenya's Anti-Money Laundering, Combating of Financing of Terrorism and Counter proliferation Financing (AML/CFT/CPF) regime related to the reporting of

[38] Ibid
[39] Ibid

advocates and certified public secretaries as reporting entities under the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA) highlights a significant issue in the country's AML/CFT/CPF framework.

In the context of AML/CFT/CPF regulations, "reporting entities" are entities or professionals that are required by law to report suspicious transactions or activities that may involve money laundering or terrorism financing to the designated authorities, typically the Financial Intelligence Unit (FIU). These reporting entities play a crucial role in detecting and preventing financial crimes by identifying and reporting suspicious activities to the authorities for investigation.[40]

Advocates and certified public secretaries are professionals who provide legal and corporate services in Kenya. These professionals often handle financial transactions and legal matters for their clients, making them potentially vulnerable to being used as intermediaries in money laundering schemes. The compliance deficit identified by FATF indicates that Kenya had not included advocates and certified public secretaries as reporting entities under its AML/CFT/CPF laws, specifically the POCAMLA.[41]

This omission meant that these professionals were not legally obligated to report suspicious transactions or activities related to money laundering or terrorist financing to the appropriate authorities. The failure to include advocates and certified public

[40] ESAAMLG (September 2022) 'Kenya's Mutual Evaluation Report: Technical Competence-Proposals to address deficiencies.
[41] Ibid

secretaries as reporting entities can create vulnerabilities in the AML/CFT/CPF framework. Criminals may exploit this gap by using these professionals to facilitate money laundering or terrorism financing without fear of detection.[42]

This compliance deficit can result in the underreporting of suspicious activities and hinder the effectiveness of Kenya's efforts to combat money laundering and terrorist financing. In response to the compliance deficit identified by FATF, it is essential for Kenya to amend its AML/CFT/CPF laws to include advocates and certified public secretaries as reporting entities. By doing so, Kenya can strengthen its AML/CFT/CPF framework, enhance its ability to detect and prevent financial crimes, and align with international standards and best practices in combating money laundering and terrorism financing.[43]

3.2 Beneficial Ownership Information

Section 93 A of the Companies Act provides that every company shall keep a register of its beneficial owners. A company shall enter in its register of beneficial owners, information relating to its beneficial owners as prescribed in the regulations. A company shall lodge with the Registrar a copy of its register of beneficial owners, within thirty days after completing its preparation. A company other than a public listed company shall lodge with the Registrar a copy of any amendment to its register of beneficial owners within fourteen days after making the amendment.[44]

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[42] Ibid
[43] Ibid
[44] Companies Act, 2015, sec 93A

The Trustees (Perpetual Succession) Act states that where the settlor declares a trust in respect to a property which he does not own at the time of the declaration, no rights or duties shall arise under the trust instrument at the time of constitution of the trust and the trust shall be deemed to come into existence at the time the settlor becomes beneficially or legally entitled to the property which was the subject of the declaration.[45] It also states that subject to the terms of the trust, a beneficiary may disclaim his or her interest or any part of it, whether or not he has received any benefit from the trust. A disclaimer shall be in writing addressed to the trustees.[46]

The compliance deficit related to beneficial ownership information and the regulation of trusts in Kenya's AML/CFT/CPF regime, as previously identified by FATF, points to a gap in the country's efforts to enhance transparency and combat money laundering and terrorism financing. Beneficial ownership information refers to identifying the individuals who ultimately own or control a legal entity, such as a company. This information is crucial for detecting and preventing money laundering and other financial crimes because it helps reveal the true beneficiaries behind legal structures.[47]

The identified compliance deficit relates to the lack of specific measures or provisions to ensure access to beneficial ownership information and control of trusts under the Companies Act and the Trustee (Perpetual Succession) Act. This deficit means that there may be difficulties in obtaining and verifying beneficial ownership

[45] The Trustees (Perpetual Succession) Act Sec 3E
[46] Ibid, sec 3I
[47] ESAAMLG (September 2022) 'Kenya's Mutual Evaluation Report: Technical Competence-Proposals to address deficiencies.

information of companies, including those operating through trusts, which could hinder efforts to prevent money laundering and terrorist financing.[48]

To address this compliance deficit, Kenya may need to consider amending its regulatory framework to explicitly include measures that ensure access to beneficial ownership information and control of trusts. This could involve developing regulations or guidelines that specify how beneficial ownership information should be collected, maintained, and made accessible to relevant authorities. Additionally, it may require clarifying the obligations and responsibilities of trustees in relation to AML/CFT/CPF efforts to improve transparency and compliance in this area.[49]

3.3 Misuse of Technological Advancements for Money-Laundering and Terrorism Financing

The compliance deficit regarding the misuse of technological advancements for money laundering and terrorism financing in Kenya's AML/CFT/CPF regime, as identified by FATF, underscores the absence of enforceable requirements for financial institutions to implement measures aimed at preventing the illicit use of technology. Technological advancements have led to new opportunities for criminals to facilitate money laundering and terrorism financing through digital means, such as online transactions, cryptocurrencies, and digital payment systems.[50] Financial institutions, including banks and other entities in the financial sector, play a critical role in preventing and detecting financial crimes. To address the misuse of

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

technology for money laundering and terrorism financing, it is essential to establish clear and enforceable requirements for these institutions.[51]

The compliance deficit identified by FATF points to a gap in Kenya's AML/CFT/CPF framework. It suggests that there are no specific and enforceable regulations or guidelines in place that mandate financial institutions to implement measures and controls to prevent the misuse of technology for illicit financial activities. Without such requirements, financial institutions may lack the necessary guidance and incentives to adopt technological solutions and practices that can effectively identify and deter money laundering and terrorism financing conducted through digital channels.[52]

Addressing this compliance deficit would likely involve developing and implementing regulatory frameworks that specifically address the risks associated with the use of technology in financial crimes. This might include requirements for customer due diligence (CDD) in online transactions, the monitoring of digital financial activities, and reporting of suspicious digital transactions. Additionally, providing guidance on the use of technology for AML/CFT/CPF purposes and fostering cooperation between financial institutions and relevant authorities in the digital realm could enhance the country's ability to combat financial crimes in the digital age.[53]

3.4 Reporting Obligations of Accountants

The compliance deficit related to reporting obligations of accountants

[51] Ibid
[52] Ibid
[53] Ibid

in Kenya's AML/CFT/CPF regime, as identified by FATF, signifies a gap in the country's regulatory framework concerning the reporting of suspicious financial transactions by accountants.

Reporting obligations of accountants refer to the legal requirements for accountants, including certified public accountants (CPAs), to report suspicious financial transactions or activities related to money laundering and terrorism financing. The compliance deficit indicates that there might be a lack of specific and enforceable regulations or guidelines in Kenya that mandate accountants to report suspicious transactions to relevant authorities.[54]

Without clear reporting obligations, accountants may not be legally obligated to identify and report transactions or activities that could potentially involve money laundering or terrorism financing. Addressing this compliance deficit would involve introducing and enforcing regulations or guidelines that explicitly require accountants to report suspicious financial transactions or activities to designated authorities, such as the Financial Intelligence Unit (FIU) in Kenya. These reporting obligations would help strengthen the country's AML/CFT/CPF efforts by expanding the network of professionals who play a role in detecting and reporting financial crimes, ultimately contributing to a more robust and effective AML/CFT/CPF framework.[55]

[54] Ibid
[55] Ibid

4. An Appraisal of the Anti-Money Laundering and Combating of Terrorism Financing Laws (Amendment) Act, 2023

4.1 Expanded Definition of Economic Crime

The Anti-money laundering and combating of terrorism financing laws (amendment) Act 2023 amended Anti- Corruption and Economics Crimes Act in the definition of "economic crime" by inserting the following new paragraph- an offence involving the laundering of the proceeds of corruption.[56]

I argue that the expansion of the definition of "economic crime" in the Anti-Money Laundering and Combating of Terrorism Financing Laws (Amendment) Act 2023 to include "an offence involving the laundering of the proceeds of corruption" represents a significant development in Kenya's legal framework to combat financial crimes. In the context of legal and regulatory frameworks, "economic crime" typically refers to a broad category of offenses that involve financial or economic misconduct, such as fraud, embezzlement, corruption, and money laundering.[57]

The definition of "economic crime" is crucial because it determines the scope of offenses that fall under the purview of the Anti-Money Laundering (AML) and Combating the Financing of Terrorism (CFT) laws. The amendment expands the definition of "economic crime" to explicitly include "an offence involving the laundering of the proceeds of corruption." This means that money laundering activities specifically related to corruption, which was not explicitly covered

[56] Anti-money laundering and combating of terrorism financing laws (amendment) Act 2023

[57] Anti- Corruption and Economics Crimes Act, sec 2

before, are now considered economic crimes under the law.

Including money laundering of corruption proceeds within the definition of "economic crime" is a crucial step in enhancing Kenya's legal framework to combat financial crimes, particularly those associated with corruption. It aligns with international standards and best practices in AML/CFT/CPF efforts by recognizing the importance of addressing the financial aspects of corruption, which often involves the illicit flow of funds through the financial system. This expansion empowers authorities to investigate and prosecute money laundering offenses that are directly tied to corrupt activities more effectively.

4.2 Proliferation Financing

The amendment Act provides that the Capital Markets Authority shall regulate, supervise and enforce compliance for anti-money laundering, combating the financing of terrorism and countering proliferation financing purposes by institutions supervised by the Authority and whom the provision of the Proceeds of crime apply.[58] The Central Bank may disclose any information including information on anti-money laundering, counter-terrorism financing and countering proliferation financing to any monetary authority , fiscal or tax agency , fraud investigations agency , domestic or foreign counter parts, or the Financial Reporting Centre. The Central Bank may also issue regulations, guidelines, directions, rules instructions for anti-money laundering, combating the financing of terrorism and countering proliferation financing purposes.[59]

[58] Anti-money laundering and combating of terrorism financing laws (amendment) act 2023, Sec 12 A

[59] Ibid, sec 36B

These provisions represent a comprehensive approach to enhancing the regulatory framework to counter the financing of proliferation activities. The amendment empowers the Capital Markets Authority to take on a role in regulating, supervising, and enforcing compliance with AML/CFT/CPF and proliferation financing measures for institutions that fall under its supervision. These institutions may be subject to provisions outlined in the Proceeds of Crime Act.

I argue that this provision recognizes that institutions within the capital markets, such as securities firms, investment funds, and other financial entities, can be vulnerable to being used for the financing of proliferation activities. By bringing them under the oversight of the CMA, there is a better chance of detecting and preventing such financing within the capital markets.

The amendment also authorizes the Central Bank to share information, including details related to anti-money laundering, counter-terrorism financing, and countering proliferation financing, with various entities. This provision promotes international cooperation and information exchange in the fight against proliferation financing. The Central Bank is granted the authority to issue regulations, guidelines, directions, rules, and instructions specifically for anti-money laundering, combating the financing of terrorism, and countering proliferation financing purposes.

I aver that these regulations and guidelines serve as a crucial tool for ensuring that financial institutions and entities under its supervision have clear and effective measures in place to prevent and detect proliferation financing activities.

4.3 Operational Independence of the Financial Reporting Centre

The Amendment Act seeks to amend the State Corporations Act (Cap. 446) to exclude the application of the Act to the Financial Reporting Centre thereby facilitating the operational independence of the Financial Reporting Centre in conformity with the Financial Action Task Force (FATF) Standards.[60]

The amendment to exclude the application of the State Corporations Act (Cap. 446) to the FRC is a significant step toward ensuring the operational independence of the FRC in line with Financial Action Task Force (FATF) standards. Operational independence is a fundamental principle for Financial Intelligence Units (FIUs) like the FRC. FIUs are responsible for receiving, analyzing, and disseminating financial intelligence related to money laundering, terrorist financing, and other financial crimes.[61]

Operational independence ensures that FIUs can carry out their functions effectively and without undue influence or interference from external entities, including the government. I posit that by exempting the FRC from the State Corporations Act, the amendment enhances the FRC's operational independence and flexibility in carrying out its responsibilities related to financial intelligence and AML/CFT/CPF activities.

This amendment aligns with FATF standards and recommendations, which emphasize the importance of operational independence for

[60] Ibid, Memorandum of objects and reasons

[61]Financial Intelligence Units (FIUs) available at https://www.cid.go.ke/index.php/sections/investigationunits/financial-investigations-unit-fiu.html accessed 6 October 2023

FIUs. FIUs should be able to function autonomously, free from political or other external influences, to ensure the effectiveness of their work in combating financial crimes.

Operational independence of the FRC enhances its ability to collect, analyze, and disseminate financial intelligence effectively, which is crucial for supporting law enforcement agencies and AML/CFT/CPF efforts in the country. It also contributes to building trust and confidence in the financial system's integrity and Kenya's commitment to combat money laundering and terrorist financing.

4.4 Extradition

The Amendment Act provides that a fugitive criminal being sought by a requesting state may consent to be extradited to that requesting State without conducting formal extradition proceedings.[62] It seeks to amend the Extradition (Contiguous and Foreign Countries) Act (Cap. 76) by providing for simplified extradition measures and expressly providing for the offence of terrorism financing as an extraditable offence.[63] The Bill also seeks to amend the Extradition (Commonwealth Countries) Act (Cap. 77) by providing for simplified extradition measures and expressly providing for the offence of terrorism financing as an extraditable offence [64].

The proposed amendments are significant steps in streamlining and facilitating extradition procedures, particularly concerning offenses related to terrorism financing. The amendment act introduces

[62] Anti-money laundering and combating of terrorism financing laws (amendment) act 2023, sec 10A

[63] Ibid, memorandum of objects and reasons

[64] Ibid

provisions that allow a fugitive criminal to consent to extradition to a requesting state without the need for formal extradition proceedings. This simplification streamlines the process and may expedite the extradition of individuals suspected of criminal activities.

The amendment act also expressly includes the offense of terrorism financing as an extraditable offense. This means that individuals accused or convicted of terrorism financing can be subject to extradition to face charges or serve sentences in the requesting state. This inclusion aligns with international efforts to combat terrorism financing, as it allows for the extradition of individuals involved in financing terrorist activities, which is crucial for global security.

I postulate that by providing for simplified extradition measures and expressly including terrorism financing as an extraditable offense, Kenya enhances its cooperation with other countries in combating international crime and terrorism. Simplified procedures and clear provisions for extraditing individuals involved in terrorism financing contribute to global efforts to dismantle terrorist networks and prevent the flow of funds to terrorist organizations.

These amendments align with international standards and conventions on extradition, including those recommended by bodies like the United Nations and INTERPOL. They reflect Kenya's commitment to fulfilling its international obligations in the fight against terrorism and transnational crime.

4.5 Authorization of Capital Markets Authority

The Act seeks to amend the Capital Markets Act (Cap. 485A) to empower the Capital Markets Authority to supervise its licensees under the Act to whom the provisions of the Proceeds of Crime and

Anti-Money Laundering Act apply.[65]

The proposed amendment is also a significant development in strengthening the regulatory framework for combating money laundering and terrorist financing within the capital markets. This amendment grants the Capital Markets Authority (CMA) the authority to supervise and regulate its licensees who fall under the purview of the Proceeds of Crime and Anti-Money Laundering Act. Licensees within the capital markets include various financial institutions and entities, such as securities firms, investment funds, and other market participants. I argue that by extending regulatory oversight to these entities in matters related to AML/CFT/CPF, the CMA can play a more active role in preventing financial crimes within the capital markets.

This amendment aligns with international AML/CFT/CPF standards and recommendations, which emphasize the importance of robust regulatory supervision of financial institutions and other entities susceptible to money laundering and terrorist financing as discussed above. It reflects Kenya's commitment to meeting international obligations in combating financial crimes and ensuring that its regulatory authorities are equipped to address AML/CFT/CPF challenges effectively.

Empowering the CMA to supervise its licensees under the Proceeds of Crime and Anti-Money Laundering Act contributes to the overall strengthening of Kenya's AML/CFT/CPF framework. Effective supervision and regulation within the capital markets can help identify and mitigate potential vulnerabilities and risks associated

[65] Ibid

with money laundering and terrorist financing activities.

4.6 Insurance Regulatory Authority

The Act seeks to amend the Insurance Act (Cap. 487) to empower the Insurance Regulatory Authority (IRA) to supervise its licensees and their agents under the Insurance Act to whom the provisions of the Proceed s of Crime and Anti-Money Laundering Act, 2009, apply.[66] It also seeks to harmonize the licensing regime under the Act with the Financial Action Task Force (FATF) Standards.

This empowerment allows the IRA to take a more active role in ensuring that insurance companies and their agents adhere to AML/CFT/CPF regulations and requirements. The amendments aim to harmonize the licensing regime under the Insurance Act with the Financial Action Task Force (FATF) Standards. Aligning the licensing regime with FATF Standards reflects Kenya's commitment to meeting international AML/CFT/CPF obligations and ensuring that its regulatory authorities are equipped to address AML/CFT/CPF challenges effectively.

The amendments also enhance the oversight and supervision of the insurance sector in matters related to anti-money laundering and countering the financing of terrorism. Effective supervision can help identify and mitigate potential vulnerabilities and risks associated with money laundering and terrorist financing activities within the insurance industry.

4.7 Supervisory Role of the Central Bank of Kenya

The Act seeks to amend the Central Bank of Kenya Act (Cap.491) to

[66] Ibid

empower the Central Bank of Kenya to supervise its licensees under the Act to whom the provisions of the Proceeds of Crime and Anti-Money Laundering Act, 2009, apply.[67]

I argue that this empowerment allows the CBK to take a more active role in ensuring that financial institutions, such as banks and other entities under its purview, adhere to AML/CFT/CPF regulations and requirements. The amendment also enhances the CBK's oversight and supervision of financial institutions in matters related to anti-money laundering and countering the financing of terrorism. Effective supervision by the CBK can help identify and mitigate potential vulnerabilities and risks associated with money laundering and terrorist financing activities within the financial sector.

In addition, empowering the CBK to supervise its licensees in compliance with AML/CFT/CPF provisions aligns Kenya's financial sector with international standards and recommendations, including those set by FATF as discussed herein above. It demonstrates Kenya's commitment to meeting international AML/CFT/CPF obligations and ensuring that its regulatory authorities have the necessary tools to combat financial crimes effectively.

Conclusion

The Anti-Money Laundering and Combating of Terrorism Financing Laws (Amendment) Act of 2023 signifies Kenya's proactive and multifaceted approach to strengthening its legal and regulatory framework against financial crimes. This legislative overhaul has addressed critical compliance deficits identified by the FATF while aligning Kenya's laws and regulations with international standards

[67] Ibid

and best practices in the realms of AML/CFT/CPF.

The discussed amendments encompass a wide spectrum of areas, from expanding definitions of economic crimes and enhancing the operational independence of regulatory authorities to simplifying extradition measures and empowering key supervisory bodies, such as the Capital Markets Authority and the Insurance Regulatory Authority. Furthermore, the inclusion of terrorism financing as an extraditable offense and the alignment of licensing regimes with FATF standards underscore Kenya's commitment to global efforts to combat financial crimes and terrorist financing.

These legislative changes are pivotal in reinforcing Kenya's ability to effectively combat money laundering, terrorism financing, and other financial crimes within its borders. By expanding the definitions of economic crimes, enhancing supervision, and empowering regulatory authorities, Kenya aims to mitigate vulnerabilities and risks associated with illicit financial activities. Furthermore, the operational independence of institutions like the Financial Reporting Centre and the harmonization of licensing regimes demonstrate Kenya's dedication to fulfilling international obligations and fostering cooperation on the global stage.

In light of these amendments, Kenya's AML/CFT/CPF framework has evolved to meet the evolving challenges posed by transnational organized crime and the misuse of technological advancements. These legislative reforms not only strengthen Kenya's domestic financial system but also contribute to international efforts to curtail the flow of illicit funds and dismantle networks that facilitate financial crimes.

As the global landscape of financial crimes and terrorist financing continues to evolve, Kenya's commitment to robust and compliant AML/CFT/CPF measures serves as a commendable example. The Anti-Money Laundering and Combating of Terrorism Financing Laws (Amendment) Act of 2023 sets a foundation for Kenya to play a proactive role in safeguarding its financial integrity and contributing to the global fight against money laundering and terrorism financing.

References

Anti- Corruption and Economics Crimes Act, 2003

Anti-money laundering and combating of terrorism financing laws (amendment) Act 2023

Basel Committee on Banking Supervision available at https://www.bis.org/bcbs/

Companies Act, 2015

ESAAMLG (September 2022) 'Kenya's Mutual Evaluation Report: Technical Competence-Proposals to address deficiencies.

Financial Action Task Force (FATF) available at https://www.fatf-gafi.org/en/home.html

Financial Intelligence Units (FIUs) available at *https://www.cid.go.ke/index.php/sections/investigationunits/financial-investigations-unit-fiu.html*

The Asset Recovery Inter-Agency Network for Eastern Africa (ARIN-EA) available at *https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2018-June-6-7/Presentations/ARIN_EA_Presentation.pdf*

The Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) available at https://www.esaamlg.org/

The Egmont Group available at https://egmontgroup.org/

The Trustees (Perpetual Succession) Act

The United Nations Convention against Illicit traffic in narcotic drugs and psychotropic substances, 1988 available at *https://www.incb.org/incb/en/precursors/1988-convention.html#:~:text=It%20provides%20comprehensive%20measures%20against,deliveries%20and%20transfer%20of%20proceedings*

United Nations Convention against corruption available at https://www.unodc.org/unodc/en/treaties/CAC/

United Nations Convention against Transnational Organised Crime available at *https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THERETO.pdf*

Oil Exploration in South Sudan and Environmental Sustainability

By: ***Bona Bol Madut Ayii****

Abstract

Environmental sustainability is the human development without compromising the natural resources. Simply, it is the use of the available resources while leaving enough for future generations. For proper adoption of the principle, certain changes in the environment must be analyzed and a direct correlation drawn between existing activities and the adverse environmental impacts.

To meet this standard, the paper takes into account the economic activities related to environmental degradation in South Sudan. Current developments suggest that the degradation is substantially associated with oil exploration activities in the country. Their invasive extraction methods employed during oil extraction and reckless abandonment of oil fields expose the country to serious sustainability challenges mainly compounded by lax laws and regulations. However, due to the current wave of the green economy, the country has no option but to conform to the expected international standards.

It is formidable that South Sudan has made steps towards conserving the environment by enacting laws such as the Petroleum Act of 2012 and the Draft National Environmental Bill of 2013. It is also a party to international agreements aimed at conserving the environment. Therefore, it is expected that it conforms to the desired standards. Oversight bodies, local communities, civil society organizations and Environmental Human

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Rights Defenders are expected to champion the universal right to sustainable development.

The paper aims to offer insight into the measures taken by the country in realizing its duties in conserving the environment while also promoting economic growth.

Keywords: environmental sustainability, environmental degradation, oil exploration companies, oil exploration activities, pollution, laws, and regulations.

Introduction

Oil exploration involves the processes and methods needed to locate potential oil wells for extraction.[1] It is a lucrative venture.[2] The industry has enjoyed and continues to enjoy immeasurable profits due to our contemporary society that abundantly relies on oil for its operations. It is common knowledge that the increased use of oil and its by-products pose a great risk to ourselves and the environment.[3]

Initially, search views were considered to be morally motivated, an ethical stance to nudge the companies into a more morally accepted direction.[4] Such opinions persisted until scientists proved a direct correlation between oil exploration activities and their negative impact on the environment.[5]

[1] Michael D. Tusiani and Gordon Shearer, LNG: A Nontechnical Guide (Tulsa, OK: PennWell Corp, 2007), 70.
[2] Ibid
[3] Ibid
[4] Andreas T. Bart E. "The ethics of nudging: An overview"
[5] Tutilo M. Benjamin S. Sophia J. "The implications of global oil exploration for the conservation of terrestrial wildlife"

On the other hand, Environmental sustainability is a principle concerned with the interdependence of all human activities.[6] It requires that the environment be considered as part of all policies and activities, including those intended to promote socio-economic development.[7] The most widely used definition is that of the Bruntland Commission of 1987: "Sustainable development is the development that meets the needs of the present without compromising the ability of future generations to meet their own needs".[8]

In a bid to curb degradation various international instruments such as the 1997 Kyoto Protocol, the Rio Declaration, and the United Nations Framework Convention on Climate Change, govern the sustainable use of the environment.[9] Some of the principles in these international regulations include the polluter pays principle, transparency, public participation, and emission standards to limit the extent of pollution by corporations.[10] The same principles have been reflected in South Sudan's domestic laws. Some of these include:

1. The Transitional Constitution of South Sudan 2011 as amended under the Bill of Rights whose purpose is to ensure the proper management of the environment and natural resources to achieve sustainable development;

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[6] Justice Mensah Sandra Ricant "Sustainable development: Meaning, history, principles, pillars, and implications for human action: Literature review"
[7] The four pillars of sustainability: Introducing the four pillars of sustainability; Human, Social, Economic and Environmental.
[8] *Multilateral Environmental Agreements,* International Environmental Law, Ministry of Natural Resources and Environment Department of Legal Affairs May, 2017
[9] "The Kyoto Protocol was adopted on 11 December 1997" United Nations Framework Convention on Climate Change.
[10] Ibid

2. The Petroleum Act of 2012; and
3. The Draft National Environmental Bill of 2013.

The underpinning principles of these legislations are to monitor and sustain the quality of natural resources such as water, air, vegetation and the protection of wildlife.[11] These principles encourage the responsible use of natural resources without depleting the environment.[12] Therefore, people are expected to meet their needs through environmentally friendly methods. For instance, adopting the use of solar and hydropower instead of petroleum-generated electricity.[13] A majority of these measures are achievable if strictly adhered to.

Oil exploration in South Sudan

Since the discovery of oil in 1978 in South Sudan, it has been the country's main source of revenue.[14] Most of its crude oil is generated from the Muglad and Melut Basins near Bentiu.[15] These wells act as giant magnets to oil exploration companies which then set up industries after entering into concession agreements with the government.[16] Consequently, the discovered oil becomes the producer's property or on other occasions, depending on the terms of the agreement, the government remains with the ownership and participation rights.[17]

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[11] Ibid
[12] Kariuki Muigua "Fostering the Principles of Natural Resources Management in Kenya"
[13] *Oil and Gas Exploration*, United Nations Environment Programme (UNEP) 27th November, 2012
[14] Dr. Rita Abrahamsen "The Role of Oil in South Sudan"
[15] *Sudan, Oil, and Human Rights*, Human Rights Watch.
[16] Ibid
[17] Ibid

It is evident that oil exploration is a lucrative business; its driving force being a ready market.[18] The only disadvantage of investing in this industry is that oil is non-renewable, and with the current overzealous exploration, it is bound to deplete.[19] Additionally, the explorations may lead to the demise of the oil industry.[20] The root cause would lie not in the extraction of the commodity but in the methods employed in its extraction. Experts have proven these methods to be invasive and dangerous to the surroundings.[21] As a result, alternative sources of energy are being explored.

It has also been reported that the oil wells in the country are almost depleted. Relocation of the companies to other jurisdictions or other areas within the country is inevitable.[22] The state having been dependent on oil for economic growth will undoubtedly be left stranded. Moreover, it will also be grappling with the deterioration of its environment.[23] To avoid this desperate state of affairs the government should consider actively advocating for strict conservation measures.[24] It may borrow from the best practices such as those employed by Norway. Achieving this goal would be a daunting process considering the duration these oil companies have been in operation.[25] Nonetheless, the active participation of all stakeholders is warranted.

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[18] Ibid
[19] "Sector Licensing Studies: Mining Sector"
[20] Ibid
[21] Ibid
[22] Mark Olalde "The Rising Cost of the Oil Industry's Slow Death"
[23] Ibid
[24] David R. "Human rights-based approaches to conserving biodiversity: equitable, effective and imperative"
[25] Roberto Nava, Triziano Rivolta "Large project management in oil and gas"

The main cause of the depletion of natural resources is greatly attributed to the companies. Fingers can also be pointed at the government because it holds public land in trust for its people.[26] It is mandated to put the land to best use and ensure that the rights of its citizens are also protected.[27]

However, the oversight bodies tasked with the regulation of the exploration companies have failed in their duties. They rarely implement laws or listen to the grievances of the citizens. Time and again they have been responsible for unsustainable management of resources, poor decision-making, and stifling the long-term growth of the country.[28]

It is expected that with the right approach, natural resources should catalyze a country's growth and development. Consequently, it is becoming common knowledge that economic development should not come at the expense of environmental protection.[29] These two aspects should not be incompatible, but rather complementary. The co-existence can only be realized by balancing competing interests and assertively weighing the associated risks against the expected benefits.[30]

Experts are of the view that better institutions reduce environmental degradation. Thus, oil exploration can be sustainable. With strict

[26] "Depletion of Natural Resources"
[27] Ibid
[28] *The Environmental Resource Curse Hypothesis: The Forest Case*, Oliver Damette, Philippe Delacote September, 2009.
[29] David M. "Environmental protection or economic growth? The effects of preferences for individual freedoms"
[30] *The Environmental Resource Curse Hypothesis: The Forest Case*, Oliver Damette, Philippe Delacote September, 2009.

supervision, oil-related activities such as drilling and extraction should have minimal to no impact on the environment. The nuance lies in the approach. If done correctly, oil exploration should be manageable.[31]

Risks associated with oil exploration

Extensive oil exploration, depending on the site and method of extraction, may pose certain risks to the environment. These include:

Pollution: affects the air, water, soil, plants and animals. People or animals who consume or come into contact with contaminated air, water, soil, or plants tend to exhibit health complications. Some experts have linked certain deformities and cancer to this type of pollution.[32]

Displacement: the local communities are usually the victims of the harsh climatic conditions created by extensive oil exploration.[33] Because they rely on land for livelihood, they often relocate to other places when the land is polluted.

Animals alike are affected by these changes in the environment. The noise, air, and water pollution force them out of their natural habitats in search of better places.

Regions such as Unity and Upper Nile State with unique ecosystems

[31] *The Environmental Resource Curse Hypothesis: The Forest Case*, Oliver Damette, Philippe Delacote September, 2009.
[32] *Environmental Impacts of the Oil Industry*, Jacqueline Barboza Mariano, Emiliano Lebre La Rovere
[33] Janpeter S. "Facing old and new risks in arid environments: The case of pastoral communities in Northern Kenya"

e.g. the world's largest wetlands are polluted by flooded oil fields.[34]

Damage to the ecosystems: the pollution from these companies renders the environment inhabitable to most living organisms.[35] Some species die while others migrate to safer places.

Small earthquakes: the earthquakes are caused by the seismic slips that bring about abrupt fault movements at a later stage of the exploration.[36] Further, already existing faults may result in landslides.[37]

The exclusion of local communities/affected people: the communities who live near the oil fields are systematically excluded from participating in the decision-making processes that lead to the setup of these companies.[38] They are rarely engaged in public participation despite its provision by the law.

The historically marginalized communities are almost helpless in these situations as they are unseen and they fear that their needs may never be met.[39]

Lack of access to information: the right to a clean and healthy environment is intrinsically tied to the right to information. The local communities are rarely kept in the loop about the exploration

[34] *Toxic Floods? Climate, Natural Hazards and Risks to South Sudan's Oil Infrastructure,* PAX, 23rd May, 2023
[35] Howell B. "What Are the 6 Most Common Sources of Ocean Pollution?"
[36] British Geological Survey "What causes earthquakes?"
[37] *Earthquakes from oil field wastewater,* Josie Garthwaite, 19th May, 2022
[38] Agusta C. "The impact of oil industry-related social exclusion on community wellbeing and health in African countries"
[39] Moree D. "Qualitative Approaches to Studying Marginalized Communities"

companies and the aftermath of their activities.[40]

A perceived lack of benefit by local communities/affected parties: the oil exploration companies and the government reap benefits from oil extraction. Sadly, the local people do not share in the benefits. Not only are they victims of environmental degradation caused by these arrangements but they never receive any form of compensation for the utilization of their land.

Oil spills: oil spills have a long-lasting impact on the environment. Prolonged exposure to the soil, water, or wildlife causes loss of vegetation and wildlife. Sometimes, oil spills result in fire outbreaks which endanger the lives of people.[41]

Abandoned oil wells: these pose a great risk to everyone. It is expected that once the wells are no longer productive, they will be sealed to restore the land to its former state. On the contrary, most of these wells are left open and unattended threatening the lives of unsuspecting people and animals as they risk falling or injuring themselves at these sites.[42]

Flooding oil wells: lax oversight and poor environmental regulations have led to the flooding of these wells which pose a great danger to the neighboring communities especially during heavy rainy seasons. People risk grievous injuries if not drown.[43]

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[40] Muigua K. "Realizing the Right to a Clean, Healthy and Sustainable Environment"
[41] *The Negative Impacts of Oil Exploration and Discovery on the Turkana Community,* The Horn Policy Brief 30th August, 2018
[42] Prof. Mohamoud Khraishi "Legal Medicine & Medical Ethics"
[43] *Toxic Floods? Climate, Natural Hazards and Risks to South Sudan's Oil Infrastructure,* PAX, 23rd May, 2023

Conclusion

In consideration of the above discussion, South Sudan must adopt strict measures to curb the environmental degradation that is drastically afflicting it. As a country, it derives its revenue from oil exploration while its citizens derive their source of living from the environment. It is only commendable that the two interests should mutually exist, and not to the exclusion of the other. With proper insight into how to balance these interests and adopt the best practices, the country can make meaningful steps toward environmental sustainability.

Civil Society Organisations, individuals, and communities should also contribute towards the preservation and sustainability of the environment.

As all living things depend on the environment, the environment also depends on us. Without collaboration from respective stakeholders, the environment will certainly be depleted.

Recommendations

1. Strict implementation of the existing laws and regulations such as the Transitional Constitution of South Sudan of 2011 and the Petroleum Act of 2012 whose purpose is to ensure the proper management of the environment and natural resources to achieve sustainable development;

2. Oil exploration companies relocate to other viable sites after drilling a site for a certain duration. This is to reduce the risk of repeated drilling in one place that may destabilize the ground.

3. The creation of dispute resolution mechanisms to solve the emerging conflicts or misunderstandings between the government, the companies, and the local communities.

4. Creation of functional oversight institutions.

5. Creation of realistic policies that reflect the emerging issues in the environmental sector.

6. Impose hefty penalties on those who cause pollution.

7. Encourage recycling and reuse of certain waste materials.

8. Treatment of wastewater from the exploration companies.

9. Enact regulations that limit noise pollution. The companies should meet certain standards before starting operations.

10. Incorporate the views of the local communities to realize sustainable development.

11. Foster strong partnerships with all stakeholders and encourage active participation in decision-making.

12. Promote transparency and accountability in the operations of the companies.

13. Sensitize the people, especially the historically marginalized on their right to a clean and healthy environment, right to information, and right to justice.

14. Fair distribution of the economic benefits derived from oil exploration and conservation of the environment. This is (The Rio Declaration, 1992)to prevent unfair exploitation of the communities' resources and also instill a sense of belonging in the locals.

15. Proactively address issues affecting the environment. The government should not necessarily wait for an issue to emerge for it to come up with solutions. It can take the necessary steps to avert unforeseen problems which may in turn hinder or undermine sustainable development.

References

(UNEP), U. N. (2012). Oil and Gas Exploration.

Brief, T. H. (2018). The Negative Impacts of Oil Exploration and Discovery on the Turkana Community.

Garthwaite, J. (2022). Earthquakes from oil field wastewater.

The Draft National Environmental Bill. (2013).

Jacqueline Barboza, E. L. (n.d.). Environmental Impacts of the Oil Industry.

Kyoto Protocol. (1997).

May, M. O. (2017). Multilateral Environmental Agreements, International Environmental Law.

Nations, U. (1992). The United Nations Framework Convention on Climate Change.

Oliver Damette, P. D. (2009). The Environmental Resource Curse Hypothesis: The Forest Case.

Organisations, T. S. (n.d.). The Sudanese Oil Standards.

PAX. (2023). Toxic Floods? Climate, Natural Hazards and Risks to South Sudsan's Oil Infrastructure.

The Environmental Protection Act. (2001).

The Petroleum Act. (2012).

The Rio Declaration. (1992).

Watch, H. R. (n.d.). Sudan, Oil, and Human Rights.

Book Review: Delivering Justice for Environmental Sustainability

By: ***James Ndungu and Mwati Muriithi***

Title: Delivering Justice for Environmental Sustainability
Author: Hon. Prof. Kariuki Muigua Ph.D; FCIArb; OGW; C. Arb
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This book brings together a collection of Hon. Prof. Kariuki Muigua's papers under the theme: 'Delivering Justice for Sustainability'.

The author, Hon. Prof. Kariuki Muigua Ph.D; FCIArb; OGW; C. Arb, is a Member of the Permanent Court of Arbitration (PCA) nominated by the Republic of Kenya and served as a Member of the National Environment Tribunal. He is a distinguished law scholar, Environmental Consultant, an accredited mediator and a Chartered arbitrator. He has widespread training and experience in both international and national commercial arbitration and mediation. He has received numerous awards and honours due to his exemplary work in academia and Alternative Dispute Resolution.

He was appointed as a member of the Protem Committee for the Asian International Arbitration Centre (Malaysia) (AIAC) Court of Arbitration. Chambers and Partners Global Guide 2024 ranked him in Band 1 of Dispute Resolution (Arbitrators), the ranking which recognizes the Top 6 Arbitrators in Kenya noting that he is "highly recommended as a leading lawyer". He was awarded the 'Academic Champion of ADR' at the inaugural Women in ADR Awards 2024. He was also awarded the Outstanding Mentor Award by his mentees

in recognition of his guidance, care and support. He was recognized and awarded for his role as the Chartered Institute of Arbitrators (CIArb) Africa Trustee from 2019 to 2022 by CIArb Kenya Branch at the CIArb Kenya Branch ADR Excellence Awards 2022. Chambers and Partners Global Guide 2023 ranked him in Band 1 of Dispute Resolution (Arbitrators), the ranking which recognizes the Top 6 Arbitrators in Kenya noting that he is "highly recommended as a leading lawyer". His book, *Settling Disputes through Arbitration in Kenya*,4th Edition; Glenwood publishers 2022, was awarded the Publication of the Year Award 2022 by CIArb Kenya Branch at the CIArb Kenya Branch ADR Excellence Awards 2022. He is the winner of ADR Practitioner of the Year Award at the AfAA Awards 2022. He is also 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. In 2022, Chambers and Partners ranked him in Band 1 of Dispute Resolution (Arbitrators) noting that "He has been involved in several ground-breaking arbitrations," "has an astute understanding of arbitration" and "is respected for litigation." He was awarded the Inaugural CIArb (Kenya Branch) ADR Lifetime Achievement Award 2021 as well as the ADR Publication of the Year Award 2021 by the Chartered Institute of Arbitrators (Kenya Branch). He also received the ADR Practitioner of the Year Award 2021 by the Law Society of Kenya, Nairobi Branch at the Nairobi Legal Awards. He is a recipient of the 8th C.B. Madan Prize of 2020 for commitment and outstanding scholarly contribution to constitutionalism and the rule of law in Kenya.

Hon. Prof. Muigua PhD. has on various occasions been appointed by leading arbitral institutions including the Chartered Institute of Arbitrators (CIArb-Kenya), the Nairobi Centre for International

Arbitration (NCIA), the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA) among other institutions, as both a sole arbitrator and a member of an arbitral tribunal in arbitrations involving commercial disputes.

Hon. Prof. Muigua PhD. also serves as the Editor in Chief of three leading peer reviewed journals in East Africa, the *Alternative Dispute Resolution Journal,* the *Journal of Conflict Management and Sustainable Development* and *Journal of ADR & Sustainability*.

He notes that Justice is at the heart of the Rule of Law. It means many things but at the very least it connotes fairness to all. He further notes that Justice must be accessible. In the realm of the environment, it connotes both Procedural Justice and Substantive Justice.

This work widens the concept of Environmental Justice to include fair and just treatment of the environment itself. The discourse is both anthropocentric and ecocentric in approach.

Justice in this work is discussed in the context of Sustainability. Sustainability is a social goal for people to coexist on Earth over a long time.

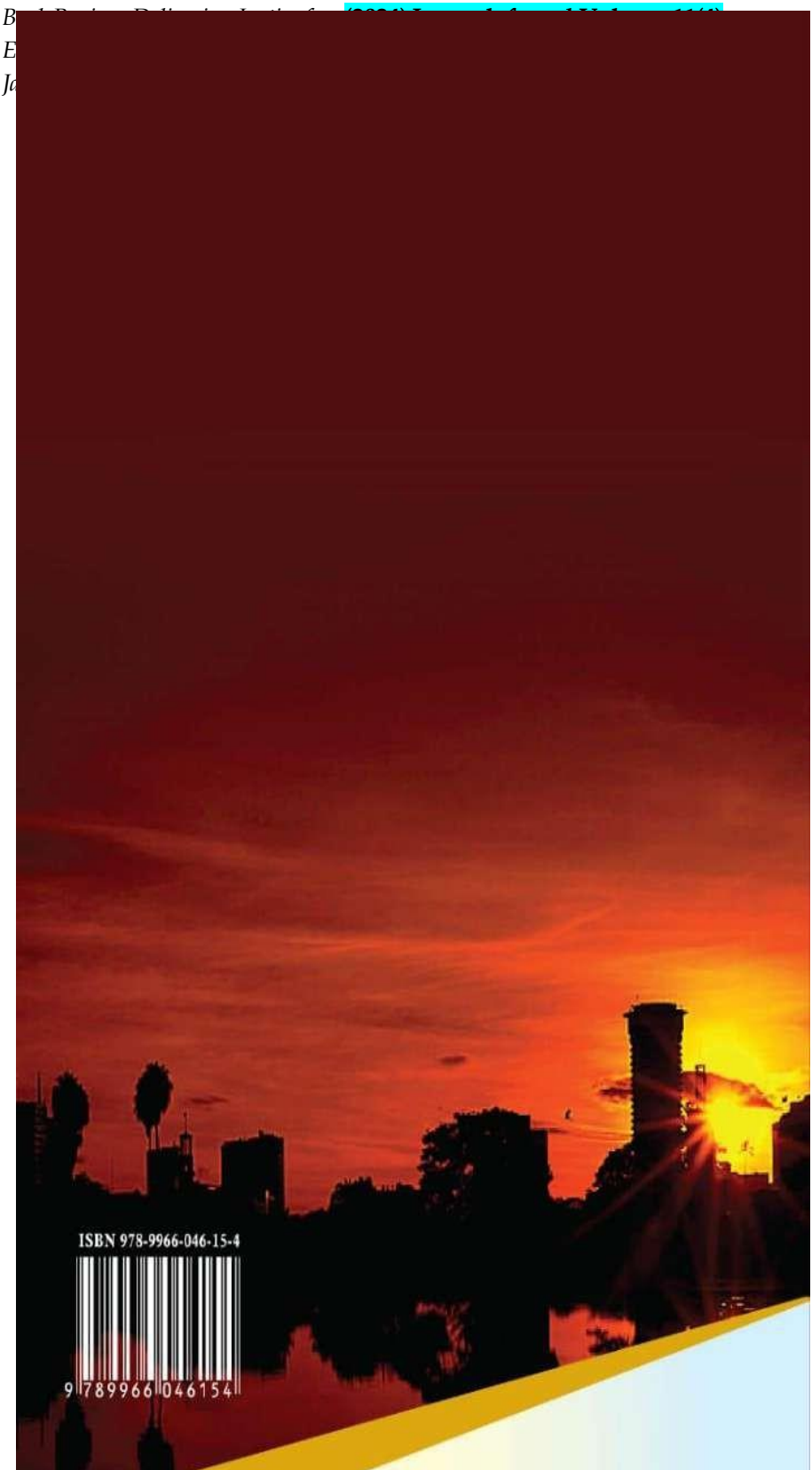
Hon. Prof. Kariuki Muigua has demonstrated his prowess and sound understanding of Sustainability. He posits that Sustainability is a social goal for people to coexist on Earth over a long time. He points out that it can also be looked at as the notion of meeting our own needs without compromising the ability of future generations to meet their own needs.

The papers covered in this volume mainly focus on delivery of Environmental Justice; Sustainability; Environmental Governance;

Conflict Management; Climate Justice; Sustainable Development; Energy Transition and Energy Justice; Green growth and Environmental, Social and Governance (ESG).

This book is a must read for researchers, students and academicians who have an interest in Delivering Justice for Sustainable Development.

Hon. Prof. Kariuki Muigua PhD; Ch. Arb; OGW offered the book for free download in his law firm Kariuki Muigua & Co. Advocates website in a quest to realize the key objective of its publication, promoting knowledge on Delivering Justice for Sustainable Development.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