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Editor's Note

We are pleased to launch another issue of the *Journal of Conflict Management and Sustainable Development,* Volume 12, No.2.

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

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

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

This issue contains papers on key thematic areas of Conflict management and Sustainable Development including: *Protecting the Human Rights of Indigenous Peoples for Posterity; Alternative Dispute Resolution Mechanisms in Realization of Inter-Governmental Relations Disputes' Resolution and Strengthened Sustainable Devolution; Judicial Intervention in Alternative Dispute Resolution: A Review of the Implications of Churchill v Merthyr Tydfil CBC on the Court's Power to Compel ADR in England and Wales; Making Business Registration Information More Accessible in Kenya: A Call to Operationalize the Access to Information Act, 2016; Accessing Justice Through Pre-Litigation Mechanisms as a Means of Settling Misdemeanours in Kenya; The Role of International Arbitration in Cross-Border Dispute Resolution: Challenges and Opportunities; Strategic and Effective Ways to Inject Oil Revenue into The Economy of South Sudan;* and *Midwifing the Peacebuilding and Conflict Management among Pastoral Communities: An Assessment of Contributions of*

Alternative Dispute Resolution Mechanisms in Northern Kenya. The Journal also contains a review of *Journal of Appropriate Dispute Resolution (ADR) & Sustainability Volume 3 Issue 1.*

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 admin@kmco.co.ke and editor@journalofcmsd.net

Hon. Prof. Kariuki Muigua Ph.D,FCIArb,Ch.Arb,OGW.
Editor, Nairobi,
May 2025.

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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 (CASELAP), Wangari Maathai Institute for Peace and Environmental

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In addition to ADR, Stephen is keen on issues pertaining to Corporate Governance particularly, Environmental Social Governance (ESG) and is currently pursuing his Certified Secretaries course. He is also apt on issues surrounding International Humanitarian Law and participated in the 44th edition of the Jean Pictet Competition. His other interests include Technology Law, Commercial Law and Human Rights. Stephen is also a Paralegal and has gained experience while performing this role in conveyancing transactions, drafting pleadings, creation and registration of trusts as well as carrying out legal research.

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Protecting the Human Rights of Indigenous Peoples for Posterity

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

Abstract

This paper critically discusses how the human rights of indigenous peoples all over the world can be protected. The paper argues that indigenous peoples globally continue to face human rights violations undermining their important role in the Sustainable Development agenda. It highlights some of the major human rights concerns facing indigenous peoples. The paper also critically examines the efficacy of the measures adopted globally towards protecting the human rights of indigenous peoples. It also proposes interventions towards effectively upholding the human rights of indigenous peoples for posterity.

1.0 Introduction

Indigenous Peoples have been identified as distinct social and cultural groups that share collective ancestral ties to the lands and natural resources where they live, occupy or from which they have been displaced[1]. They have also been described as people who inhabited a land before it was conquered by colonial societies and who consider themselves distinct from the societies currently governing those territories[2]. The United Nations provides a criteria

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[1] World Bank Group., 'Indigenous Peoples' Available at https://www.worldbank.org/en/topic/indigenouspeoples#:~:text=Indigenous%20Peoples%20are%20distinct%20social,which%20they%20have%20been%20displaced (Accessed on 23/04/2025)

[2] The Rights of Indigenous Peoples., Available at http://hrlibrary.umn.edu/edumat/studyguides/indigenous.html (Accessed on 23/04/2025)

for identifying indigenous peoples[3]. This includes: self-identification as indigenous peoples at the individual level and accepted by the community as their member[4]; historical continuity with pre-colonial and/or pre-settler societies[5]; a strong link to territories and surrounding natural resources[6]; distinct social, economic and political systems; distinct language, culture, and beliefs[7]; being non-dominant groups of society[8]; and the ability to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities[9]. It is estimated that there are over 476 million indigenous people living in 90 countries across the world, accounting for nearly 6 per cent of the global population[10].

Indigenous peoples are crucial in the Sustainable Development agenda. It has been argued that with their traditional knowledge and deep connection to their environments, indigenous peoples are guardians of biodiversity and ecosystems[11]. They play a pertinent role in conserving and managing the environment and natural resources for Sustainable Development[12]. It has been argued that the knowledge and practices of indigenous people can help humanity to effectively confront climate change and biodiversity loss among other challenges undermining the quest for Sustainable Development[13].

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[3] United Nations., 'Who are Indigenous Peoples' Available at https://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf (Accessed on 23/04/2025)
[4] Ibid
[5] Ibid
[6] Ibid
[7] Ibid
[8] Ibid
[9] Ibid
[10] United Nations., 'Indigenous Peoples' Available at https://www.un.org/en/fight-racism/vulnerable-groups/indigenous-peoples (Accessed on 23/04/2025)
[11] Indigenous Peoples., Available at https://www.ifad.org/en/indigenous-peoples (Accessed on 23/04/2025)
[12] Ibid
[13] Ibid

Further, it is estimated that indigenous peoples manage or hold tenure rights to nearly a quarter of the world's surface area, accounting for a significant portion of the world's biodiversity, nearly half of the earth's protected areas, and over half of the planet's remaining intact forests[14]. The United Nation's Environment Programme (UNEP) recognises the contribution of indigenous peoples and their knowledge gained through trans-generational experiences, observations, and transmission in sustainable ecosystem management and development[15]. Harnessing the contribution of indigenous peoples is therefore crucial in actualising the Sustainable Development agenda.

Despite their crucial contribution in the Sustainable Development agenda, the human rights of indigenous peoples have been violated for many years[16]. Indigenous Peoples all over the world have for a long time experienced inequality and exclusion threatening their cultural survival and vital knowledge systems[17]. In light of these concerns, it is imperative to protect the human rights of indigenous peoples for Sustainable Development.

This paper critically discusses how the human rights of indigenous peoples all over the world can be protected. The paper argues that indigenous peoples globally continue to face human rights violations undermining their important role in the Sustainable Development agenda. It highlights some of the major human rights concerns facing indigenous peoples. The paper also critically examines the efficacy of the measures adopted globally towards protecting the human rights of indigenous peoples. It also proposes interventions towards effectively upholding the human rights of indigenous peoples for posterity.

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[14] World Bank Group., 'Indigenous Peoples' Op Cit
[15] United Nations Environment Programme., 'Indigenous Peoples and their Communities' Available at https://www.unep.org/civil-society-engagement/major-groups-modalities/major-group-categories/indigenous-peoples-and (Accessed on 23/04/2025)
[16] World Bank Group., 'Indigenous Peoples' Op Cit
[17] Ibid

2.0 Indigenous Peoples and Human Rights

It has been argued that the rights of indigenous peoples globally are far from being realised[18]. The rights of indigenous peoples are constantly violated by states and their entities while they also face high levels of marginalization and discrimination[19]. Due to high levels of marginalization and discrimination, indigenous peoples experience high levels of poverty[20]. Despite comprising just about 6 per cent of the global population, it is estimated that indigenous peoples account for nearly 18 percent of those living in extreme poverty worldwide[21]. According to the World Bank, the poverty rate among indigenous peoples is much larger than that of non-indigenous population in nearly every country[22]. Due to marginalization, discrimination and extreme levels of poverty, indigenous peoples globally face barriers in accessing basic services such as healthcare, water and sanitation services, education, infrastructure, and job opportunities undermining their fundamental rights[23].

Another major human rights challenge being experienced by indigenous peoples globally relates to pressures on their lands, territories and resources as a result of activities associated with development and the extraction of natural resources[24]. According to the United Nations, indigenous peoples continue to

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[18] Amnesty International., 'Indigenous Peoples' Rights' Available at https://www.amnesty.org/en/what-we-do/indigenous-peoples/ (Accessed on 23/04/2025)

[19] Ibid

[20] World Bank Group., 'Indigenous Peoples' Op Cit

[21] Ibid

[22] World Bank Group., 'Poverty and exclusion among Indigenous Peoples: The global evidence' Available at https://blogs.worldbank.org/en/voices/poverty-and-exclusion-among-indigenous-peoples-global-evidence#:~:text=Present%20in%20over%2090%20countries,3%20of%20the%20rural%20poor. (Accessed on 23/04/2025)

[23] Ibid

[24] Office of the United Nations High Commissioner for Human Rights., 'Indigenous Peoples and the United Nations Human Rights System' Available at https://www.ohchr.org/sites/default/files/Documents/Publications/fs9Rev.2.pdf (Accessed on 23/04/2025)

face threats to their land rights (from natural resource extraction, infrastructure projects, large scale agriculture and conservation)[25]. In some cases, there is a heightened risk of statelessness, particularly for those indigenous peoples whose ancestral lands cross national borders[26]. Indigenous peoples worldwide often face eviction from the ancestral lands they have inhabited for generations in order to support the extraction of natural resources, agricultural activities and infrastructure projects[27]. In addition, indigenous human rights defenders are intimidated, attacked, and sometimes even killed, often with the support of the state[28]. It has been observed that attacks on indigenous peoples' human rights defenders have increased globally in recent years for defending their collective rights to lands, territories and resources[29]. Indigenous Peoples continue to suffer from high levels of land insecurity, social dislocation and violence while defending their ancestral lands[30].

The cultures of indigenous peoples globally are also being threatened. For instance, it has been argued that in most countries, the approach towards education for indigenous peoples is not only inappropriate, but it also threatens their very existence[31]. For example, education policies and systems

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[25] Office of the United Nations High Commissioner for Human Rights., 'About Indigenous Peoples and human rights' Available at https://www.ohchr.org/en/indigenous-peoples/about-indigenous-peoples-and-human-rights (Accessed on 23/04/2025)
[26] Ibid
[27] Amnesty International., 'Indigenous Peoples' Op Cit
[28] Ibid
[29] Office of the United Nations High Commissioner for Human Rights., 'OHCHR and Indigenous Peoples' Available at https://www.ohchr.org/en/indigenous-peoples (Accessed on 23/04/2025)
[30] International Institute for Sustainable Development., 'No Sustainable Development without Indigenous Peoples' Available at Available at https://sdg.iisd.org/commentary/guest-articles/no-sustainable-development-without-indigenous-peoples/ (Accessed on 23/04/2025)
[31] World Economic Forum., 'Indigenous Peoples have a Right to Quality Education: But so far, we have failed them' Available at

have often been used as a means to systemically discriminate against indigenous peoples, assimilate them (and at times "civilize" them) into the broader society, therefore destroying their culture, languages, identity and rights, and displacing them of their lands, territories and natural resources[32]. The United Nations points out that the cultures of indigenous peoples are threatened with extinction[33]. Due to the fact that indigenous peoples are often excluded from the decision-making and policy frameworks in states when they live, they have been subjected to processes of domination and discrimination and their cultures are viewed as being inferior, primitive, and irrelevant and as something to be eradicated or transformed[34]. Further, their languages are in danger of becoming extinct due to domination by languages spoken by the often majority non-indigenous population[35].

Indigenous peoples also face extreme vulnerability to climate change and its impacts[36]. Indigenous peoples are usually among the first people to face the direct consequences of climate change due to their dependence and close relationship with the environment and natural resources[37]. It has been correctly observed that climate change worsens the difficulties already faced by indigenous communities including political and economic marginalization, loss of land and resources, human rights violations, discrimination and unemployment[38]. The livelihoods of millions of indigenous peoples globally

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https://www.weforum.org/agenda/2016/08/indigenous-people-have-a-right-to-quality-education-but-so-far-we-ve-failed-them/ (Accessed on 23/04/2025)

[32] Ibid

[33] United Nations., 'Culture' Available at https://www.un.org/development/desa/indigenouspeoples/mandated-areas1/culture.html (Accessed on 23/04/2025)

[34] Ibid

[35] Ibid

[36] United Nations., 'Climate Change' Available at https://www.un.org/development/desa/indigenouspeoples/climate-change.html (Accessed on 23/04/2025)

[37] Ibid

[38] Ibid

are being negatively affected by climate change as a result of increased frequency and intensity of extreme weather events such as floods, droughts, storms and heatwaves[39]. According to the United Nations, climate change poses threats and dangers to the survival of indigenous peoples worldwide despite their little contribution to greenhouse gas emissions[40]. Confronting climate change is therefore crucial in protecting the rights and livelihoods of indigenous peoples.

From the foregoing, it emerges that indigenous peoples globally continue to face several human rights concerns including marginalization and discrimination[41]; lack formal recognition of their lands, territories and natural resources[42]; eviction from their ancestral lands[43]; little public investments in basic services such as health, education, water and sanitation, and infrastructure[44]; exclusion from decision-making processes[45]; threats to their cultures and languages[46]; and high vulnerability to climate change threatening their livelihoods and well-being[47].

In light of the foregoing challenges, it is vital to protect the human rights of all indigenous peoples globally for posterity.

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[39] Filho. W.L et al., 'Impacts of climate change to African indigenous communities and examples of adaptation responses' Available at https://www.nature.com/articles/s41467-021-26540-0 (Accessed on 23/04/2025)
[40] United Nations., 'Climate Change' Op Cit
[41] Office of the United Nations High Commissioner for Human Rights., 'About Indigenous Peoples and human rights' Op Cit
[42] Ibid
[43] Ibid
[44] World Bank Group., 'Indigenous Peoples' Op Cit
[45] Office of the United Nations High Commissioner for Human Rights., 'About Indigenous Peoples and human rights' Op Cit
[46] United Nations., 'Culture' Op Cit
[47] United Nations., 'Climate Change' Op Cit

3.0 Protecting the Human Rights of Indigenous Peoples

Indigenous peoples globally continue to face human rights violations which threaten their well-being and survival and undermine their crucial role as agents of Sustainable Development. It is therefore necessary to uphold the human rights of all indigenous peoples globally for posterity. This ideal is succinctly captured at the global level under the *Indigenous and Tribal Peoples Convention*[48]. The Convention notes that in many parts of the world, indigenous and tribal peoples are unable to enjoy their fundamental human rights to the same degree as the rest of the population of the states within which they live, and that their laws, values, customs and perspectives have often been eroded[49].

According to the Convention, governments have a responsibility for developing, with the participation of indigenous and tribal peoples, coordinated and systematic action to protect their rights and to guarantee respect for their integrity[50]. These measures include ensuring that indigenous and tribal peoples enjoy the same rights and opportunities accorded to other members of the population[51]; promoting the full realisation of the social, economic and cultural rights of indigenous and tribal peoples with respect for their social and cultural identity, their customs and traditions and their institutions[52]; and eliminating socio-economic gaps that exist between indigenous and tribal peoples and the rest of the population[53]. It further urges states to ensure that indigenous and tribal peoples enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination[54]. In particular, the Convention urges states to recognise the

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[48] International Labour Organization (ILO), *C169 - Indigenous and Tribal Peoples Convention, 1989*, No.169, 27 June 1989
[49] Ibid, Preamble
[50] Ibid, article
[51] Ibid
[52] Ibid
[53] Ibid
[54] Ibid, article 3 (1)

rights of ownership and possession of indigenous and tribal peoples over the lands which they traditionally occupy[55]. It also requires the rights of indigenous and tribal peoples to the natural resources pertaining to their lands to be specially safeguarded[56]. Implementing this Convention is therefore vital in protecting the human rights of indigenous and tribal peoples globally.

In addition, *the United Nations Declaration on the Rights of Indigenous Peoples*[57] further recognizes the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources[58]. The Declaration provides that all indigenous peoples globally have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as enshrined in the Charter of the United Nations, the Universal Declaration of Human Rights, and international human rights law[59]. It further notes that all indigenous peoples are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination in exercising their rights[60].

The Declaration sets out a broad range of human rights that all indigenous peoples globally are entitled to. These rights include the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions[61]; the right to a nationality[62]; the rights to life, physical and mental

[55] Ibid, article 14
[56] Ibid
[57] The United Nations Declaration on the Rights of Indigenous Peoples., Available at https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf (Accessed on 24/04/2025)
[58] Ibid
[59] Ibid, article 1
[60] Ibid, article 2
[61] Ibid, article 5
[62] Ibid, article 6

integrity, liberty and security of person[63]; the right not to be subjected to forced assimilation or destruction of their culture[64]; the right not be forcibly removed from their lands or territories[65]; the right of all indigenous peoples to practice and revitalize their cultural traditions and customs[66]; the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures[67]; the right of indigenous peoples to establish and control their educational systems and institutions[68]; and the right to participate in decision making processes[69]. The Declaration thus captures the fundamental rights and freedoms of indigenous peoples and provides crucial guidance towards fulfilling these rights and freedoms. There is need to actualise this Declaration in order to protect the human rights of indigenous peoples for posterity.

Protecting the human rights of indigenous peoples is also a pertinent agenda in Africa. It has been observed that Africa has a large population of indigenous peoples mostly nomadic and semi-nomadic pastoralists and hunter-gatherers[70]. Indigenous peoples in Africa face multiple human rights violations including dispossession from their lands, territories and resources, forced assimilation into the way of life of the dominant groups, marginalization, poverty, illiteracy, and extreme vulnerability to climate change and environmental degradation[71]. The *African Charter on Human and Peoples'*

[63] Ibid, article 7
[64] Ibid, article 8
[65] Ibid, article 10
[66] Ibid, article 11
[67] Ibid, article 13
[68] Ibid, article 14
[69] Ibid, article 18
[70] United Nations., 'Indigenous Peoples in the African Region' Available at https://www.un.org/esa/socdev/unpfii/documents/2013/Media/Fact%20Sheet_Africa_%20UNPFII-12.pdf (Accessed on 24/04/2025)
[71] Ibid

Rights[72] sets out fundamental rights and freedoms for all peoples in Africa including indigenous peoples. These rights include the right to equality, the right to dignity, protection against discrimination, right to self-determination, and the promotion of cultural development and identity[73]. Fulfilling the provisions of the African Charter on Human and Peoples' Rights is vital towards protecting the human rights of indigenous peoples in Africa for posterity.

Protecting the human rights of indigenous peoples is therefore a key ideal both globally and in Africa. In order to achieve this ideal, it is imperative to foster the right to self-determination for all indigenous peoples. Self-determination has been described as an ongoing process of ensuring that indigenous peoples are able to make decisions about matters that affect their lives[74]. According to the United Nations, the right to self-determination gives indigenous peoples the power to determine their own policies and strategies with respect to their cultural heritage and traditional systems[75]. By virtue of the right to self-determination, indigenous peoples can decide their political status and freely pursue their economic, social and cultural development[76]. Upholding the right to self-determination is therefore key in protecting the rights of indigenous peoples for posterity.

It is also vital to protect the rights of indigenous peoples to their lands, territories and resources[77]. It has been observed that indigenous peoples' land

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[72] Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), 27 June 1981
[73] Ibid
[74] Australian Human Rights Commission., 'Self-Determination and Indigenous Peoples' Available at https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/self-determination-and-indigenous (Accessed on 24/04/2025)
[75] United Nations., 'Indigenous Peoples' Op Cit
[76] Ibid
[77] Office of the United Nations High Commissioner for Human Rights., 'OHCHR and Indigenous Peoples' Op Cit

ownership rights are often widely abused[78]. In many cases, indigenous peoples have been uprooted from their land due to discriminatory policies or armed conflict[79]. Indigenous peoples are regularly cut off from resources and traditions that are vital to their identity, well-being and survival[80]. It is therefore necessary for all countries to recognise and protect land rights of all indigenous peoples. This includes upholding the principle of Free, Prior and Informed Consent (FPIC) of indigenous peoples in instances where development and relocation is necessary and ensuring just and fair compensation and, where possible, with the option of returning to their ancestral lands[81].

It is also imperative to tackle discrimination and marginalization against indigenous peoples[82]. Discrimination and marginalization against indigenous peoples fuels poverty and inequitable access to basic services such as healthcare, education, infrastructure, water and sanitation, and employment[83]. It is therefore necessary for states to put in place adequate measures including legal and policy reforms to combat discrimination and marginalization against indigenous peoples and ensure that they have equitable access to basic services including healthcare, education, water and sanitation, and employment in order to fulfill their rights[84].

Finally, there is need to protect and preserve the culture of indigenous peoples[85]. Governments have been urged to support cultural preservation through investing in efforts to preserve and transmit indigenous knowledge to

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[78] Amnesty International., 'Indigenous Peoples' Rights' Op Cit
[79] Ibid
[80] Ibid
[81] The United Nations Declaration on the Rights of Indigenous Peoples., Article 10
[82] Office of the United Nations High Commissioner for Human Rights., 'OHCHR and Indigenous Peoples' Op Cit
[83] Ibid
[84] Ibid
[85] The United Nations Declaration on the Rights of Indigenous Peoples., Op Cit

future generations[86]. This is essential in ensuring that indigenous knowledge is not lost and can be passed to future generations for utilization in ecological conservation among other areas[87]. Indigenous culture and knowledge systems have proved useful in fostering sound environmental conservation and Sustainable Development for many centuries[88]. Preserving indigenous culture and knowledge systems is therefore key in upholding the rights of indigenous peoples now and in the future for Sustainable Development[89]. Governments should therefore invest in preserving and transmission of indigenous culture and knowledge through strengthening indigenous education systems and documenting oral traditions and cultural practices in order to effectively fulfill the rights of all indigenous peoples now and in the future[90].

4.0 Conclusion

Indigenous peoples globally play a pertinent role in the Sustainable Development agenda. However, they are facing several human rights challenges including marginalization and discrimination[91]; lack formal recognition of their lands, territories and natural resources[92]; eviction from their ancestral lands[93]; little public investments in basic services such as health,

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[86] Latief. A., 'Harnessing Indigenous Knowledge for Climate Change Resilience in Africa' Available at https://www.linkedin.com/pulse/harnessing-indigenous-knowledge-climate-change-africa-aatifahlatief/?utm_source=share&utm_medium=member_android&utm_campaign=share_via (Accessed on 24/04/2025)

[87] Ibid

[88] Ibid

[89] Ibid

[90] United Nations., 'Indigenous People's Traditional Knowledge Must Be Preserved, Valued Globally, Speakers Stress as Permanent Forum Opens Annual Session' Available at https://press.un.org/en/2019/hr5431.doc.htm (Accessed on 24/04/2025)

[91] Office of the United Nations High Commissioner for Human Rights., 'About Indigenous Peoples and human rights' Op Cit

[92] Ibid

[93] Ibid

education, water and sanitation, and infrastructure[94]; exclusion from decision-making processes[95]; threats to their cultures and languages[96]; and high vulnerability to climate change threatening their livelihoods and well-being[97] undermining their role as agents of change and development. It is therefore necessary to protect the human rights of all indigenous peoples. This can be achieved by upholding the rights of indigenous peoples to self-determination, protecting the rights of indigenous peoples to their lands, territories and resources, tackling discrimination and marginalization against indigenous peoples and enhancing their access to basic services such as healthcare, education, infrastructure, water and sanitation, and employment, and preserving indigenous culture and knowledge systems[98]. Protecting the human rights of all indigenous peoples globally is therefore a crucial objective that can be realised for posterity.

[94] World Bank Group., 'Indigenous Peoples' Op Cit
[95] Office of the United Nations High Commissioner for Human Rights., 'About Indigenous Peoples and human rights' Op Cit
[96] United Nations., 'Culture' Op Cit
[97] United Nations., 'Climate Change' Op Cit
[98] The United Nations Declaration on the Rights of Indigenous Peoples., Op Cit

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United Nations., 'Climate Change' Available at https://www.un.org/development/desa/indigenouspeoples/climate-change.html

United Nations., 'Culture' Available at https://www.un.org/development/desa/indigenouspeoples/mandated-areas1/culture.html

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World Economic Forum., 'Indigenous Peoples have a Right to Quality Education: But so far, we have failed them' Available at https://www.weforum.org/agenda/2016/08/indigenous-people-have-a-right-to-quality-education-but-so-far-we-ve-failed-them/

Alternative Dispute Resolution Mechanisms in the Realization of Inter-Governmental Relations Disputes' Resolution and Strengthened Sustainable Devolution

By: ***Charles Kanjama SC*, *, Mukami Nthiga PhD** and Kola Muwanga****

Abstract

The realization of sustainable devolution in Kenya is intricately tied to the effective resolution of inter-governmental relations (IGR) disputes. The 2010 Constitution of Kenya ushered in a devolved system of governance, creating two distinct yet interdependent levels of government national and county and envisaged a cooperative model of governance based on consultation and consensus. However, the proliferation of disputes between and within levels of government has posed significant threats to the functionality and integrity of devolution. This paper explores the role of Alternative Dispute Resolution (ADR) mechanisms including negotiation, mediation, and arbitration in facilitating the amicable, timely, and efficient settlement of IGR disputes. It critically analyzes the legal and institutional framework governing IGR and ADR in Kenya, particularly the Constitution (Articles 6, 159 and 189), the Intergovernmental Relations Act, 2012, and relevant jurisprudence.

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The paper further examines how ADR promotes dialogue, preserves inter-governmental relationships, reduces the burden on courts, and fosters a culture of mutual respect and cooperative governance. Through doctrinal and empirical analyses, including case studies with key stakeholders in county and national government structures, it reveals gaps in implementation and institutional design that hinder the full potential of ADR in this context. The paper argues that for ADR to truly serve as a vehicle for dispute resolution and sustainable devolution, there is a need for structured capacity-building, robust institutional support (such as strengthening the Intergovernmental Relations Technical Committee), and a cultural shift toward non-adversarial governance.

Introduction

On 27th August 2010, Kenyans promulgated a new Constitution[1] which significantly transformed the system of governance in the country.[2] The Constitution,[3] provides for the two levels of governance;[4] the national and county governments,[5] thus, Article 1(4) of the Kenyan Constitution says that the sovereign power of the people is exercised at-the national level; and the county level.

Article 1(3) of the Constitution delegates the sovereign power under the Constitution to the following State organs, which shall perform their functions in accordance with the Constitution;

Parliament and the legislative assemblies in the county governments, the

[1] (2010)
[5]Mutakha Kangu, Constitutional Law of Kenya on Devolution (Strathmore University Press 2015)1.
[3] Supra, note 4
[4] Ibid
[5] Ibid

national executive and the executive structures in the county governments. The Constitution also provides that each of these government is distinct in its functions as espoused under Schedule IV of the Constitution. The Constitution creates two distinct and interdependent levels of government, namely the national and county governments.[6] At the national level, there exists three arms of government which are the Bicameral Parliament (National and Senate), Executive, and Judiciary.[7] Parliament is empowered to make, amend and repeal laws.[8] On the other hand, at the county level, county governments are divided into county assemblies and county executives.[9] Besides creating the two levels of government, the Constitution also creates geographic constituent units and fixes them in it.[10] For this reason, there are forty-seven counties entrenched and constitutionally protected under the Constitution.[11] Their names can only be changed through a constitutional amendment.[12]

Purely, by the design and architecture of the Constitution and by the clear language of Article 1 (3) and (4) of the Constitution,[13] the people of Kenya intended that their sovereign power be exercised at two levels of government; the national and county levels.[14] The Constitution also declares that the two levels are distinct but inter-dependent.[15] They are expected, indeed, bound to conduct their mutual relations on the basis of consultation and cooperation.[16]

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[6] See Article 1 of the Constitution, 2010.
[7] Vianney Sebayiga, Resolving Intergovernmental Disputes in Kenya through Alternative Dispute Resolution (ADR) mechanisms
[8] Constitution of Kenya, Article 94 (5).
[9] Ibid, Art. 176
[10] Ibid Article 6(1) and the First Schedule.
[11] Supra, note 3
[12] Kangu (n 4).
[13] Senate & 2 others v Council of County Governors & 8 others (Petition 25 of 2019) [2022] KESC 7 (KLR) (Constitutional and Human Rights) (17 February 2022)
[14] Ibid
[15] Ibid
[16] Ibid

However, to avoid gridlock in their operations, even as they consult and cooperate, the two levels of government must perform their functions and exercise their powers in a manner that respects the functional and institutional integrity of each other.[17] At the county level, the county government consists of a county assembly and a county executive.[18] The executive authority at the county is vested in, and exercised by a county executive committee, consisting of the county governor,[19] the deputy county governor and members appointed by the county governor, while the county assembly exercises legislative authority at that level.[20]

As already alluded to, there are two levels of governance in Kenya. This is underscored and affirmed under Article 6(2), which states that the two levels of government are distinct and inter-dependent and are called upon to conduct their mutual relations on the foundation of consultation as well as cooperation. Article 189 makes it clear that each of these levels of governance has to perform and exercise its constitutionally-bound power in a manner that does not undermine proper working and execution of functional and institutional integrity of the other level of government.[21] No one should not encroach on the province of the other.[22] To buttress this position, the reading of the Inter-Governmental Relations Act (IGRA),reveals that there exist elaborate legal and institutional underpinnings for consultation, cooperation and dispute resolution between the two tiered governments as the Act establishes the national and county government coordination summit, the intergovernmental relations technical committee and the council of county governors. The IGRA, 2012 further provides for the creation of inter-governmental sector forums on

[17] Ibid
[18] Ibid
[19] Ibid
[20] Ibid. See Articles 6 (2), 189 (1), 176(1), 177 and 179(1) of the Constitution.
[21] Ibid
[22] Ibid

sector to address sector-related matters of common interests to both governments. Put differently, the conduct of mutual relations between the two levels of government has been characterized by recurrent conflicts which often escalate into disputes resulting in the erosion of the spirit of consultation and cooperation.[23] This calls for effective conflict management and dispute resolution strategies that guarantee good governance[24] and conducive environment for effective service delivery at both levels of government in the spirit of consultation and cooperation.[25] However, the prevailing constitutional order[26] and the extant statutory framework are not well suited to facilitate effective conflict management and expeditious dispute resolution among the key players in our devolved system of government,[27] not to mention the gaping lacunar in the extant mechanisms for the resolution of contractual disputes.[28]

Whereas, article 159 (2)(c) of the Constitution of Kenya, 2010 gives rise a solid refuge for ADR by mandating judicial institutions like the courts and tribunals to social engineer and facilitate the spirit of "alternative form of dispute resolution mechanisms", the critics argue that this is not the safest path upon which disputes emanating from two levels of governments can be resolved. To actualize the Constitutional and national aspiration of promoting national unity through sharing and devolving power devolution, the Fourth Schedule of the Constitution sets forth the functions of both levels of governments. Article 187 (2) (a) of the Constitution asserts that resources necessary for the performance of a transferred function or power from one level of government to another should be equally transferred. The Council of Governors coined the phrase '***money follow function***', emphasizing that funds should follow devolved functions without delay. Furthermore, Article 119 (1) of the

[23] K I Laibuta; The Place of ADR in the Intergovernmental Disputes
[24] Ibid
[25] Ibid
[26] Ibid
[27] Ibid
[28] Ibid

Constitution enshrines the right of every person to petition Parliament, while Article 174 (c) identifies participation of the people as an object of the devolution of government. The County Governments Act, 2012 mandates county governments to ensure participation of the people when exercising their powers or performing any of their functions.

The Uniqueness and Salient Features of Two-Tier Governance Systems.

i. Cooperative yet Distinct Governments.

Article 6 (2) *supra*, provides that the governments at the two levels are indeed distinct and as such interdependent. That the two shall conduct and transact their mutual relations based on premises of consultation and cooperation. This is the very foundation that forms Kenya's cooperative form of devolved government, which has for the last fourteen years combined and attained some certain measures of autonomy on each level of governance; there is a measure of joint and collaborative action and decision-making so far witnessed. This model is heavily employed in South Africa and Kenya borrowing a leaf, has in turn experienced some bountiful fruits of devolution.[29] This is contrary to competitive model of devolved governments

Diversity in unity

In a country where existence of different religious and linguistic groups, this model has made it possible to tolerate and reasonably accommodate both national unity and cultural diversity

Guiding Principle of Autonomy.

Within the state structure, power is allocated based on the principle of subsidiarity.[30] Communes, which are the smallest political entity, are accorded

[29] Animating Devolution in Kenya: The Role of the Judiciary
[30] Ibid

as much autonomy as possible.[31] This is done so that they can carry out as many tasks as possible themselves.[32] The communes, for example, maintain and manage their own infrastructure, including roads and public buildings such as schools.[33] The cantons take on higher-level duties including the school system and policing,[34] while the Confederation is responsible for national security and foreign policy.[35] **Article 44** of her Constitution provides for guidance on how the Confederation and the Cantons shall collaborate,[36] and shall support each other in the fulfillment of their tasks.[37] They owe each other mutual consideration and support. They shall grant each other administrative and judicial assistance[38] and further obligates that dispute between Cantons, or between Cantons, and the Confederation shall, to the extent possible, be resolved through negotiation or mediation.[39]

This was emphasized in the case of ***Re the matter of the Interim Independent Electoral Commission***,[40] where it was stated that there is therefore, in reality, a close connectivity between the functioning of the national and county governments. This was further affirmed in the case of ***Speaker of the Senate and Another vs. Attorney General and Others***,[41] where it was argued that "the core value of devolution is hinged upon the twin principles of cooperation and

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[31] Ibid
[32] Ibid
[33] Ibid
[34] Ibid
[35] Ibid
[36] Constitution of Switzerland, 1999 (rev. 2002), Article 44
[37] Ibid (1)
[38] Ibid (2)
39 Ibid (3)
[40] In the Matter of the Interim Independent Electoral Commission (Applicant) (Constitutional Application 2 of 2011) [2011] KESC 1 (KLR)
[41] Speaker of the Senate & another v Attorney-General & another; Law Society of Kenya & 2 others (Amicus Curiae) (Advisory Opinion Reference 2 of 2013) [2013] KESC 7 (KLR) (1 November 2013) (Advisory Opinion)

interdependence." The beads in a chain may have different appearances; however, when joined by a thread, they all become part of one ring; one cannot stand without the other.[42]Out of the abundance of our transformative and progressive laws, the Constitution which a living charter, speaks. In such cases, unhealthy sibling rivalry can be a common factor if not well identified and addressed at the earliest stages of its "signs" and "symptoms".

Obligation for Non-Interference and Non-Litigation.

In *Uthukele District Municipality and Others v President of the Republic and Others*,[43] the Court commented on the stringency with which it views the efforts by organs of state to avoid litigation, in that, "***The obligation to settle disputes is an important aspect of co-operative government, which lies at the heart of chapter 3 of the Constitution.[44] If this court is not satisfied that the obligation has been duly performed, it will rarely grant direct access to organs of State involved in litigation with one another."[45]***

To buttress the above judgment from the similar jurisdiction, the court in ***National Gambling Board v Premier, KwaZulu-Natal and Others,***[46] the Court commented on the obligation which it places on parties to proactively engage creative solutions to settle a dispute in that,[47] "…organs of State's obligations to avoid litigation entails much more than an effort to settle a pending court case.[48] It requires of the organ of State to re-evaluate the need …to consider

[42] Ibid
[43] *Uthukele District Municipality and Others v President of the Republic and Others 2003 (1) SA678 (CC), at para 33*
[44] Ibid
[45] Ibid
[46] *National Gambling Board v Premier, KwaZulu-Natal and Others* 2002 (2) SA 715 (CC),
[47] Ibid
[48] Ibid

alternative possibilities and compromises and to do so with the regard to the expert advice the other organs of State have obtained."[49]

This is what the framers of the Constitution, 2010 envisioned under Article 189 (1)(a). It places a legal burden and constitutional obligation of these levels of governments to act and conduct themselves in a mutual respect for not only the functions and institutional integrity but also observance of the constitutional status and more importantly, the institutions and structures of each one of them by the other. It calls for these governments to perform their core mandates and duties and execute powers in a manner that respects the institutional apparatus and functional integrity of either of them. This way, drafters of this article sought to ensure that there is protection and respect on the integrity and constitutional status of each one of them.

Respect for the integrity and Constitutional status of these governments and their other organs or institutions was further aimed at laying an emphasis on the appreciating the lifeline of autonomy and the distinctiveness or uniqueness of each level of government, while affirming their treatment as separate legal creature who enjoy limited powers and roles but firmly protected from peripheral attacks, adulterated and unwarranted interferences. These functions and powers held by each level of government is donated to them by the Sovereigns, we the people of either jurisdiction as underscored under Article 1 (1)(2)(3)(4). This obligation as outlined in a case law is guided by some key principles which ought to be observed in respect to this mandate;

i. that one level of government may not use its powers in such a manner as to undermine the effective functioning of another organ of the state;[50]

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[49] *National Gambling Board v Premier, KwaZulu-Natal and Others 2002 (2) SA 715 (CC) at para 36.*

[50] County government of Kiambu & another vs. Senate & another (2017) eKLR

ii. that this is a non-encroachment obligation requiring the governments not to encroach on the domain of the other. Thus, non-interference in functions and powers of each other;[51] and

iii. that the actual integrity of each sphere of government and organ must be understood in light of the powers and purpose of that entity.[52] The powers and functions of one level of the government must be determined by also examining the countervailing powers and functions of the other level.[53]

Additionally, the two governments are called upon to exercise respect and self-restraint. This system provides for checks and balances that is self-executing and although the powers of the three branches may inevitably collide with one another, the Constitution does not envisage a system that is adversarial in nature.[54] In this regard, the Constitution envisages some measure of self-restraint that is determined on the necessity of compromise and accommodation of the legitimate interests and demands of the three branches as they interact.[55] This means that they must act with care and comity having regard to the national values and principles in the Constitution.[56] Furthermore, the principle of separation of powers is one of the pillars of constitutional democracy which seeks to ensure equilibrium of power among the three branches of government by distributing the legal and political authority of government.[57] Its primary purpose is to prevent the combination, in the hands of an individual or group, of the legislative, executive and judicial functions

[51] Ibid
[52] Ibid
[53] Ibid
[54] AN ADVISORY OPINION ON THE DISPUTES INVOLVING VARIOUS STATE ORGANS (EXECUTIVE, PARLIAMENT, JUDICIARY AND THE GOVERNORS)
[55] Ibid
[56] Ibid
[57] Ibid

and powers of government.[58] This, it realizes by confining the Legislature to legislative powers, the Executive to executive powers and the judicial powers to the Judiciary.[59] Through this, it ensures checks and balances in the execution of governmental power thereby limiting the authority of one of the branches to arrogate to itself the core functions and powers of another branch.[60]

Further, the principle is based on the assumption that the exercise of the powers granted would be for public good alone, and that none of the arms is subordinate to the other, but all are co-ordinate, independent and co-equal.[61] The principle of separation of powers is embedded in the Constitution of Kenya, 2010.[62] This is reflected under Chapter 8 of the Constitution that gives the legislative authority to the Parliament consisting of the National Assembly and the Senate at the National level,[63] Chapter 9 that gives executive power to the Executive consisting of the President, Deputy President and the Cabinet,[64] and Chapter 10 that gives judicial authority to the Judiciary consisting of the courts and tribunals established by or under the Constitution.[65] This constitutional framework envisages distinct functions of the three branches of government,[66] but which are inter-dependent. This framework did not create ranks or superiority of one branch over the others.[67]

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[58] Ibid
[59] Ibid
[60] Ibid
[61] Ibid
[62] Elijah Oluoch Asher's, Separation of Powers in Kenya: The Judicial Function and Judicial Restraint; Whither Goeth the Law?
[63] [Art. 94(1)]
[64] [Art. 130(1)]
[65] [Art. 159(1)]
[66] Supra, note 77
[67] Ibid

Consultation requires that one level of government invites the other to present its views on the matter.[68]The consulted government is then afforded an adequate opportunity and a reasonable opportunity to share its considered views.[69] Following this, the consulting government must consider the views of the consulted government in good faith before making a decision.[70] Notably, the other government should not be consulted as a mere formality, but with the commitment to consider the views shared where they add value to the decision being made.[71] Be that as it may, where the views are not accepted or considered, the consulting government should give reasons justifying non-acceptance.[72] Dialogue is a precursor for mutual and continuous consultations within and among these levels of governments as laid down under Article 6(2).[73] It invites each government to present views to the other level of government.

This was observed in the case of ***Robertson and another vs. City of Cape Town***[74]where the court held that mutual reciprocity was key among the parties. Secondly, it calls for a reasonable opportunity to present views as was held in the case of ***Hayes and another vs. Minister for Housing and Others***.[75] Thirdly, it ensures active bi-lateral engagement.[76]Lastly, that the views are to be considered in good faith.[77] Thus, consultation is hinged on the

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[68] Githinji, The two levels of government in Kenya. blog.afro.co.ke/levels-of-government-in-kenya/ <accessed on 5 May 2025>

[69] Peter Wanyande & Gichira Kibara, 'Kenya's Devolution Journey: an Overview' in Intergovernmental Relations Technical Committee (IGRTC) (ed) Deepening Devolution and Constitutionalism in Kenya: A Policy Dialogue (IGRTC 2021) 68.

[70] Ibid

[71] Supra, note 7

[72] Supra, note 35

[73] Constitution of Kenya, 2010; Art. 6(2) supra.

[74] [2004] ZACC 21 (29 November 2004).

[75] [2003] (4) SA. 598 (C) at 616D–I

[76] Supra (note 26)

[77] Ibid

understanding that an obligation has to consider the views of other government in utmost good faith before any decision that will affect any of them is made;[78] therefore, consultation is the means and not an end in itself.[79] The Article further states that these governments are supposed to cooperate (an obligation to cooperate) with each other.[80] This is to make sure that parties work together in areas of concurrence roles. Furthermore, the law requires the two governments to assist and support each other.[81]

Closely related to the principle of separation of power is the doctrine of the rule of law within a democratic system of government.[82] It posits that no person is above the law and that everybody is subject to the law irrespective of his position or status in society.[83] Further, it requires governance to be based on established laws and principles rather than the personal whims of the rulers.[84] One of the principles that run through the Constitution from the preamble to the Sixth Schedule is the principle of the rule of law.[85]

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[78] Ibid
[79] Ibid
[80] Supra, note 6 (2)
[81] Supra, note
[82] Supra, note 83
[83] Ibid
[84] Ibid
[85] Ibid. This is evidenced by the provisions on the Preamble, sovereignty of the people (Art. 1), supremacy of the Constitution (Art. 2), protection and respect for the Constitution (Art. 3) and national values and principles of governance (Art. 10) among others. In particularly, Article 3(1) of the Constitution obligates 'every person to respect, uphold and defend the Constitution.' Further, the national values and principles of governance, of which the rule of law is part, require compliance by 'all State Organs, State Officers, Public Officers and all persons whenever undertake any function or exercise any power' [Art.10(1)]. In relation to the legislative authority, the Constitution obligates Parliament under Article 94(4) 'to protect the Constitution and promote the democratic governance of the Republic. Regarding the executive authority, Article 129 obligates the National Executive to exercise the authority in

The Legal Regimes and Frameworks for the Inter-Governmental Relations.

Intergovernmental relations (IGR) constitute one of the key structural features of federal or devolved systems of government.[86] It is best defined as the interaction between and among governments within a non-centralized system of government.[87] Avoidance of substantial interaction and interdependence between different levels of government is impossible.[88] Indeed, intergovernmental relations, being the processes and institutions through which the governments of federal or devolved systems coordinate public policy making, have become the "workhorse of any federal system".[89] The governments must share information; in cases of shared competences determine who does, or should do, what; or clarify their respective roles in cases of exclusive functions and powers.[90] To effectively deliver services to their respective constituencies, the governments must coordinate policies, programs, and expenditures; conclude formal agreements;[91] and create joint institutions and agencies on the basis and through which they may discharge some of their functions.[92] Intergovernmental relations encompass all the complex and interdependent relations among various levels of government as well as the coordination of public policies among national and sub-national governments through mechanisms such as programs reporting requirements,

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accordance with the Constitution in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit.' For the Judiciary, the Constitution obligates them to exercise judicial authority in a manner that protects and promotes 'the purpose and principles of the Constitution.'

[86] FRAMEWORK OF GUIDELINES FOR INTERGOVERNMENTAL RELATIONS

[87] Intergovernmental Relations Technical Committee 'Report on emerging issues on devolution and best practices in intergovernmental relations' (2018) 5. (IGRTC Report on emerging issues).

[88] Supra, note 102

[89] Ibid

[90] Ibid

[91] Ibid

[92] Ibid

grants-in-aid, the planning and budgetary processes, and informal communication among officials.[93] IGR also refer to the fiscal and administrative processes by which levels of government share revenues and other resources generally accompanied by special conditions that must be satisfied as prerequisites to receiving assistance.[94]

This encumbers these levels of governments to come up with the mechanisms and structures that ensures success in the coordination of policy and practices in such governments with a broader understanding to undertake deliberate steps to attain common goals and outcomes. To facilitate smooth, seamless and flawless inter-governmental relations to its success, the Inter-Governmental Act,[95] provides the mechanism for advancement of consultation and cooperation.[96] These mechanisms are geared towards ensuring that the institutional structures that facilitate governments' policies are strengthened and also ensures proper safeguards upon which means for transferring functions from any level of government are in place and fully clothed to enjoy legal operational.[97] By design, intergovernmental relations take a variety of forms.[98] These include, vertical interactions between two or more levels of government; horizontal interactions among governments in the same level of government;[99] formal interactions in the sense that they are provided for and structured by provisions of the constitution and/or legislation;[100] informal interactions where they are not provided for and structured by the constitution and/or legislation;[101] and both formal and informal interactions where some

[93] Ibid
[94] Ibid
[95] (2012)
[96] Ibid
[97] Ibid
[98] Supra, note 110
[99] Ibid
[100] Ibid
[101] Ibid

are provided for and structured by the constitution and or legislation while others are not so provided for.[102]

The two also draw their validity from the National and County Government Coordination Summit, the Inter-Governmental Technical Committee and the Council of Governors.[103] The summit, is the pinnacle or apex body in the order of the Act.[104] This brings the President of the Republic of Kenya and the forty-seven County Chiefs.[105] The summit is empowered to ensure the two levels of governments enjoy tranquility of coordinating and co-working smoothly in their operations while monitoring and implementing the joint plans and more so, transfer of functions, roles and duties as enshrined under Articles 186 and 187 of the Constitution, 2010. The technical committee is clothed with power to ensure that it deals with and addresses matters that relate to the two levels of governments' relationships in both vertical and horizontal spheres.[106]

It further addresses the disputes that may arise amongst these governments and the possible routes of escape; the dispute resolution between and among them.[107] It envisions harmonious and effective intergovernmental relations.[108] IGRTC's mission is to support successful devolution through cooperative, consultative, and coordinated intergovernmental relations.[109] The IGRTC is responsible for the day-to-day administration of the Summit and the Council of Governors.[110] This is through facilitating the activities and implementing the

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[102] Ibid
[103] MANUAL FOR THE ESTABLISHMENT AND OPERATIONALIZATION OF INTERGOVERNMENTAL SECTOR FORUMS
[104] Ibid
[105] Ibid
[106] IGRA
[107] Ibid
[108] Ibid
[109] IGRTC, Strategic Plan 2021-2025,28
[110] Supra, note, Section 12(a).

decisions of the summit and Council of Governors.[111] As a result, the IGRTC serves as the secretariat between the summit and the Council of Governors.[112] Its Secretariat is responsible for implementation and monitoring of the decisions of the Summit, Council of Governors, and IGRTC.

Secondly, the IGRTC was also responsible for the finalization of the residual functions of the defunct Transition Authority (TA).[113] Prior to the formation of IGRTC, the TA was the institution mandated to oversee the functional changeover to the devolved governance system from the previous centralized authority.[114] Upon expiry of the TA's term on March 4, 2016, there were still a number of issues that had not been concluded.[115] Therefore, those residual functions are undertaken by the IGRTC.[116] Thirdly, the IGRTC is mandated to convene a meeting of the forty-seven County Secretaries within thirty days preceding every Summit meeting.[117] Additionally, it is important to note that the IGRTC is also empowered to perform any other function conferred on it by the Summit, CoG, or any other legislation.[118] Legally speaking, the IGRA empowers the IGRTC to establish sectorial working groups or committees for better execution of its functions.[119] Last but not least, the IGRTC handles intergovernmental disputes reported to it by any of the parties through ADR

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[111] Ibid

[112] Ibid; Section 15 which establishes the Intergovernmental Relations Secretariat headed by the Secretariat of the IGRTC and consists of a secretary appointed by the IGRTC. The secretary is mainly responsible for the implementation of the decisions of the Summit, the Council and IGRTC and any other duties assigned by the said structures.

[113] Ibid Section12(b)

[114] Transition to Devolved Government Act 2012, Section 4

[115] Kisumu Workshop (n 23) 81.

[116] IGRA, Section 12(b).

[117] Ibid Section 12(c).

[118] Ibid Section12(d).

[119] Ibid Section 13(1).

mechanisms.[120] Furthermore, the IGRTC handles emerging issues on intergovernmental relations that are referred to it by the Summit and the CoG.[121]

The Council of Governors on the other hand is donated with power to ensure that it oversees and prefects the common matters arising and affecting county governments dispute resolution,[122] built capacity and also ensures the implementation of the inter-county agreements and inter-county programs, projects and plans.[123] It is further clothed with unfettered power to establish other inter-governmental forums for instance the establishment of the inter-city and municipal forums.[124] It provides for both formal and Alternative Dispute Resolution mechanisms.[125] To function properly, the Council of Governors is empowered to facilitate horizontal relations among the forty-seven county entities. It is vested with the following responsibilities;[126]

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[120] Ibid Section 33(2).
[121]IGRTC, Strategic Plan 2021-2025,2.
[122] STRATEGIC PLAN 2022 – 2027 JUNE 2022
[123] Ibid
[124] Ibid
[125] Ibid
[126] The CoG is vested with the following responsibilities: sharing information on the performance of the counties in the execution of their functions with the objective of learning and promotion of best practice and where necessary, initiating preventive action; considering matters of common interest to County Governments; dispute resolution between counties within the framework provided under the IGRA; facilitating capacity building for Governors; receiving reports and monitoring implementation of inter-county agreements on inter-county projects; consideration of matters referred to the council by a member of the public; consideration of reports from other intergovernmental forums on matters affecting national and County interests or relating to the performance of counties; and performing any other function as may be conferred on it by the IGRA or any other legislation or that it may consider necessary or appropriate

To put this into the right perspective, Section 33 of the Inter-Governmental Relations Act provides that in the event of a dispute; that is before any of the party formally declares the existence of a dispute, all parties to such a dispute will prioritize with utmost good faith and make necessary and reasonable efforts to ensure amicable resolution of the sticky matters at the stake. It is our opinion that the parties are advised to look beyond their interests and initiate direct negotiations with the other party(ies) through the help of an intermediary who is to steer the ship to its steady, safe and stable landing. The Act further states that it is only when all options have been explored in futility that a party to such a dispute may formally declare it a dispute and as such, the declaring party may refer the matter to the apex arm on the stratum; the summit, the joint council or any other inter-governmental structure as established by the IGRA.[127]

The Nature and Extent of Relationship between the National Government and the County Governments and their Intergovernmental Disputes.

The guiding principles as enumerated in the IGTRC is the starting point.[128] According to the principles elaborated therein, the intergovernmental disputes are to be classified in various categories.[129] However, it is worth noting that at this moment, it is not possible to account and give an all-inclusive, one-stop list or rather an exhaustive catalogue of the disputes. For the interest of this research, some of the categories of intergovernmental disputes are herein briefly discussed. They include but not limited to intergovernmental legislative and jurisdictional, intergovernmental functional, intergovernmental fiscal /financial resources and resource base and their allocation, intergovernmental legislative and administrative, intergovernmental service delivery in the

[127] Ibid

[128] Devolution and Intergovernmental Relations. https://www.devolution.go.ke/devolution-and-intergovernmental-relations <accessed on 5 May 2025>

[129] Ibid

context of certain shared functions, shared or guaranteed investment programs/projects; encroachment by the national government and public organs on functions assigned to county governments; mutual joint undertakings between county governments in the context of the emerging regional economic blocks and joint undertakings between national and county governments.[130]

Furthermore, the financial/fiscal or monetary relationship come into play with understanding that power of each tier of government have been delineated by decree[131] while administrative relationship is premised on the pillar of governance which underscores that the ministries and agencies of the central government usually have the power to regulate,[132] supervise[133] and mentor local councils in their respective fields of concern.[134] Lastly, they aver that judicial relationship is embedded on the power of judicial officers to be able to review, declare as null and void, ultra-verse, unconstitutional and with no effect any law made by the federal or state government which is contrary to constitutional provisions.[135]

The Sources and Causes of the Intergovernmental Disputes in Kenya.

Although the framers of our Constitution, 2010 gave prominence to the cooperative and consultative government, designed as mechanisms of avoiding the inter-governmental conflicts and disputes, the nature of the multi-layered structure of governance is such that there are instances when its practicability of and avoidance fails and as such protracted disputes especially

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[130] Ibid
[131] Eliagwu, J.I. (2001). The Federal Republic of Nigeria: Constitutional formula for revenue allocation.
[132] Supra (note 228)
[133] Ibid
[134] Ibid
[135] Ijimakinwa et al; Local government and intergovernmental relations in Nigeria

over functions, power and resources that are believed to be scarce, will arise. Conflict is defined as an active disagreement between people with opposing opinions or principles.[136]It can also be defined as disagreements, discrepancies, and frictions that occur when the actions or beliefs of one or more members of the group are unacceptable to one or more other group members and are rejected by them.[137]

Accordingly, conflict has been defined to mean contradictory interests that are represented by different people or groups of people and who are dependent on each other in achieving their interests.[138]According to Professor Muigua, conflicts arise when people pursue irreconcilable goals and end up compromising or opposing the interests of another.[139] He contends that disputes are a product of unresolved conflicts, they arise when conflicts are not adequately managed.[140] The conduct of mutual relations between the two levels of government has been characterized by recurrent conflicts which often escalate into disputes.[141]In the case of ***County Government of Nyeri v Cabinet***

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[136] Cambridge Dictionary.

[137] Donelson R. Forsyth: ''Group Dynamics.'' 7th edition. Cengage, 2018, ISBN 978-1-337-40885-1. Chapter 13: ''Conflict.'' P. 411–443.

[138] Gerhard Schwarz: *Konfliktmanagement.* 9. Auflage. Gabler Verlag eBooks, 2014. doi:10.1007/978-3-8349-4598-3. ISBN 978-3-8349-4597-6, p. 36. Nach Pesendorfer, 2004.

[139] Kariuki Muigua, 'Dealing with Conflicts in Project Management' [2018] Alternative Dispute Resolution,4.

[140] Kariuki Muigua, Accessing Justice through ADR (Glenwood Publishers Limited, Nairobi 2022) 76.

[141] Kibaya Imaana Laibuta, 'Facilitation of a Consultative Forum on the Development of the Proposed Intergovernmental Dispute Resolution Mechanisms' available at < https://ciarbkenya.org/wpcontent/uploads/2021/03/the-place-of-adr-in-intergovernmental-disputes.pdf> accessed on 1 November 2024.

Secretary, Ministry of Education Science & Technology & another,[142] the court held that;

"For a dispute to qualify as an intergovernmental dispute under the IGRA, it must meet the certain criteria. First, the dispute must involve a specific disagreement concerning a matter of fact, law, or denial of another.[143] ***Second, it must be of a legal nature which means that the dispute is capable of being the subject of judicial proceedings.***[144] ***Third and most importantly, the dispute must be an intergovernmental one.***[145] ***This essentially means that such a dispute must involve various organs of state and arises from the exercise of powers of function assigned by the Constitution, a statute or an agreement or instrument entered into pursuant to the Constitution or a statute.***[146] ***The inclusion of an agreement implies that even a commercial agreement between the national and county government qualifies as an intergovernmental dispute.***[147] ***Therefore, intergovernmental disputes are not limited to the exercise of powers of the two governments as specified in the Constitution.***[148] ***Fourth, the dispute may not be subject to any of the previously enumerated exceptions."***[149]

The above holding was affirmed by the court in the matter of ***Kenya Ports Authority v William Odhiambo Ramogi & Others,***[150] ***it was reiterated in the Court of Appeal that;*** the test of determining the matter as an intergovernmental dispute was simply not to look at the parties to the dispute

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[142] (2014) eKLR, para 10.
[143] Ibid
[144] Ibid
[145] Ibid
[146] Ibid
[147] Ibid
[148] Isiolo County Assembly Service Board & another vs Principal Secretary (Devolution) Ministry of Devolution and Planning & another (2016) eKLR.
[149] Supra (2014) eKLR note 98
[150] (2014) eKLR

but the nature of the claims in question.[151]In the view of the foregoing and by the reading of section 30(2)(b) of the Inter-Governmental Relations Act, it is safe to say that intergovernmental disputes may arise between the two levels of governments; due to their vertical interaction (the national and county governments) or amongst county governments due to their horizontal interactions (the county vs. county). Owing to this understanding, a dispute of intergovernmental in nature cannot be said to be between a person or state officer in his individual capacity seeking to achieve his own interest or rights.[152]

a) The Supremacy Battles pitting the National Assembly and the Senate.[153]

Within four months of their existence, the then Kenya's new political institutions were already sparring with each other.[154] Central to the emerging tensions were the constitutional roles and hierarchical relationships between Parliament's two chambers: the National Assembly (NA) and the newly created Senate.[155] Beyond key disagreements over hierarchical supremacy, some MPs even questioned the Senate's relevance and called for its abolition.[156] For its part, the Senate has accused MPs of 'childish' conduct while claiming the title of 'Upper House'.[157] Was this chest-thumping indicative of an emergent and functioning Kenyan democracy, design defects of the then new Constitution or simply evidence of a crop of leaders bereft of a basic understanding of their constitutional roles?[158]

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[151] [2019] eKLR.

[152] Supra (note 240)

[153] *Mugambi Laibuta, Turf battles in the new Kenyan Parliament - Democracy at work or politics as usual?*

[154] Ibid

[155] Ibid

[156] Ibid

[157] Ibid

[158] Ibid. For quite some times, in the corridors of power and power brokerage, Kenya witnessed the ping-pong of our so called "honorable" Members of the National

Basically, one chamber is supposed to be given an opportunity to review the laws and decisions of the other chamber.[159] However, the Senate is restricted to dealing only with Bills concerning Counties while the National Assembly isn't.[160] A Bill concerning Counties can originate from either the Senate or the National Assembly.[161]

In the Matter of the Speaker of the Senate,[162] the court observed that the most contentious one arose on the exclusion of the Senate in the consideration of the Division of Revenue Bill deemed to be affecting the county governments.[163] The Senate objected to the exclusion by way of preference to the Supreme Court seeking for an Advisory Opinion on the matter.[164] In its Advisory, the Supreme Court held that the consideration of Bills to be passed was not a unilateral exercise exclusive to either of the two Houses; rather, the Speaker of both houses had to engage and consult.[165] The Supreme Court observed that the two Houses had an obligation to work together in the spirit of consultation and cooperation in the discharge of their constitutional mandate.[166]

b) **Disputes emanating from the Transfer of Functions, Roles and Powers**

Article 187 of the Constitution, 2010 allows for the transfer of power and

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Assembly and the Senate embroiled in a tag-of-war, sometimes not for the greater good of the public but for their own selfish gains. From the heated debate over which of the two Houses was superior to the other to heckling and name calling to two chambers at time over stepped their mandate as they try to assume powers that had not been provided for them in the Constitution. The Constitution of Kenya, 2010, seems to operate on a lacuna given that it does not expressly mention which House/Chamber is above the other.

[159] Supra, note 160

[160] Ibid

[161] Ibid

[162] The Speaker of the Senate & Another v Attorney General & 4 Others (2013) eKLR.

[163] Ibid

[164] Ibid para 197

[165] Ibid para 125.

[166] Ibid para 125.

functions alongside supporting resources from one level of government to the other. However, observers warn that this has to be done cautiously as it can be counter-productive as was the case here. Section 9 of the Deed of Transfer provided the duration and termination of the agreement. It stated that the deed was to be effective for 24 months and was only to be terminated by the mutual written consent of both parties expressed in a common document. They argued that the deed was designed in a manner that it had no clear implementation matrix. This brewed accusations and counteraccusations and also claims and counterclaims which proved costly and counterproductive.

c) Disputes between County Assemblies and Governors

In 2024, the country witnessed a strong wave of impeachment scare ranging from the incumbent Kericho County governor narrowly survived the guillotine chopping board by a whisker on 14th October, 2024. The county boss had faced charges of gross violation of the Constitution, 2010 and other laws, abuse of office, flouting the Leadership and Integrity Act, violation of the Public Finance Management Act, 2012, misappropriation of public funds, illegal drawing of county revenue, and engaging in indecent sexual acts.[167]This is just a latest version of the flurry of both attempted and botched onslaught of messy and noisy impeachment calls.

Makueni County's case was *sui generis*, the conflict was so serious that it threatened its existence. This led to the head of State constituting the Commission of inquiry as per the dictates of the constitution. The commission was to inquire on what bedeviled the count. The findings were to be reported to the president and on advice the president was to make a decision on whether or not the county government was to be dissolved. For instance, in 2022, the Supreme Court confirmed the impeachment of Mike Sonko of the Nairobi County Assembly on grounds of gross violation of the Constitution, abuse of

[167]https://ntvkenya.co.ke/news/kericho-governor-erick-mutai-survives-impeachment-trial/ <accessed on 2 November 2024>

office, violation of national laws, and a lack of mental capacity to run the county government. The Supreme Court found that the impeachment had been properly conducted in accordance with the Constitution.[168]

d) Territorial or Border/Boundary (Transboundary) Disputes

The boundary disputes in Kenya manifest in various designs and forms and for various reasons.[169] Resolving boundary disputes in Kenya is a critical aspect of land administration and governance.[170] However, disputes over land boundaries can arise due to various factors, including conflicting claims, historical grievances, and ambiguous demarcations.[171] Historically, there have been unresolved ever-increasing boundary cases.[172] They stem from conflicting territorial claims, competition over scarce natural resources, historical grievances and geopolitical reasons.[173] Others are poor or lack of delimitation and demarcation of boundaries, mismanagement of inter-county wealth/resources and the existential misunderstanding of functions and purposes of county boundaries.[174] In the case of ***Okoiti v Parliament of Kenya & 2 others***,[175] the court acknowledged and held that land and land-related disputes remained very emotive issues.[176] Land had for years been the primary basis of disputes leading to mass displacement and killings in the country.[177] The Constitution of Kenya, 2010 dedicated a whole chapter to address the

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[168] Sonko v Clerk, County Assembly of Nairobi City & 11 others (Petition 11 (E008) of 2022) [2022] KESC 26 (KLR) (15 July 2022) (Judgment).

[169] Resolving boundary disputes in Kenya. https://www.denvers.co.ke/resolving-boundary-disputes-in-kenya/ <accessed on 5 May 2025>

[170] Ibid

[171] Ibid

[172] Ibid

[173] Ibid

[174] Ibid

[175] Okitah Omutatah Okoiti v Parliament of Kenya & 2 others; County Government of Taita Taveta & 3 others (Interested Parties) (Petition 33 of 2021) [2022] KEELC para 10

[176] Ibid

[177] Ibid

issues of land.[178]This land and land-related disputes are within the borders of two or more counties.[179] The Supreme Court in ***Advisory Opinion No. 2 of 2014***,[180] *In the Matter of the* ***National Land Commission [2015] eKLR***[181] captured this when it stated thus:

> ***"Land, as a factor in social and economic activity in Kenya, has been a subject of constant interest, and of controversy, especially from a political standpoint. Thus, the special importance of Chapter Five of the Constitution…"***[182]

e) Disputes between Governors and Senators over Financial Accountability Question.

As already observed, the implementation of our incumbent governance structure has had its fair share of drama and melodrama. The has been another limb of tension, bare knuckles and cold battle between the governors (representing the counties) and senators (in the national government).[183]

In the case of ***Senate v Council of County Governors & 6 others,***[184] the Supreme Court of Kenya clarified that the Senate was within its armpits of power to summon the governors. The court held that in the performance of its oversight role over county revenue, the Senate had powers to summon county governors to answer any questions or provide any requisite information.[185] The court

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[178] Ibid

[179] Ibid

[180] National Land Commission v Attorney-General & 5 others; Kituo Cha Sheria & another (Amicus Curiae) (Advisory Opinion Reference 2 of 2014) [2015] KESC 3 (KLR) (2 December 2015) (Advisory Opinion)

[181] County Government of Isiolo & 10 others v Cabinet Secretary, Ministry of Interior and Coordination of National Government & 3 others [2017] eKLR

[182] Ibid

[183] Senate v Council of County Governors & 6 others (Petition 24 & 27 of 2019 (Consolidated)) [2022] KESC 57 (KLR) (7 October 2022) (Judgment)

[184] Ibid

[185] Ibid

further held that the Senate's oversight authority was not limited to nationally allocated revenue but extended to locally generated revenue by the counties.[186] The court also held that county assemblies had the power of first tier oversight over county government revenue, whether nationally allocated or locally generated.[187] The court held that;

"Article 185(3) of the Constitution provided that a County Assembly, while respecting the principle of separation of powers, could exercise oversight over the county executive committee and any other county executive organs. Article 185(3), although permissively framed, conferred powers upon county assemblies to oversight the county executive. That therefore meant that among other things, county assemblies could question the county executives' management of county affairs, including the use of revenue. What the County Assemblies could not do was to usurp the role of the county executive under the guise of oversight, for that would offend the principle of separation of powers. The County Assemblies could not for example, take over the role of implementing Government policies and projects. Their role was to provide checks and balances to the county executives so as to promote transparency and accountability in the manner county affairs were run."[188] Article 96(2) of the Constitution, which conferred legislative powers upon the Senate regarding Bills concerning county governments, had to be read together with articles 109 to 113 of the Constitution.[189]

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[186] Ibid

[187] Ibid

[188] Supra (note 191), para 4

[189] *Those provisions entrusted the Senate with the mandate of legislating for county governments in fields that spanned the entire spectrum of governance. With regard to county finances, the foregoing provisions did not limit Senate's legislative power to the nationally allocated revenue. A holistic reading of all the relevant provisions of the Constitution and the law, put in context, led to the conclusion that both the Senate and County Assemblies had the power to oversight county revenue whether nationally allocated or locally generated. The fact that county revenue was locally generated did not remove it from the purview of Senate oversight. Such revenue fell within the rubric of public finance whose use had to remain under*

f) Disputes between the Controller of Budget and the County Assemblies.

Article 228 of the Constitution, 2010 establishes an independent office of the Controller of Budget. The office is among other functions mandated to enhance accountability in the expenditure of public resources. It oversees the implementation of the county and national government budgets. The office bearer is exercises oversight role by authorizing the withdrawals from the public funds. The holder is also empowered to give advice to the legislature on financial matters. Additionally, the Controller of Budget is legally mandated to set mandatory ceilings for financial allocations to County Assemblies.

The Institutional Framework of ADR in Intergovernmental Disputes

So that we are not tempted to undo the gains that the current legislative mechanisms have since achieved and further avoid duplication and multiplicity of the same, the pressing question that lingers is that in what best form, shape, design or color should we frame either the institutional or legislative structures that we put in place to strengthen the cause even more. Already we have the intergovernmental relations (ADR) regulations, 2021. Are

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the radar of scrutiny and oversight by the State organs established for that purpose. Similarly, the fact that county revenue was nationally allocated did not place it beyond the oversight of county assemblies.

The purpose of the Constitution was to entrench good governance, the rule of law, accountability, transparency, and prudent management of public finances at both levels of Government. Such grand purpose could not be served if either the Senate or county assemblies began to develop centers of oversight/influence. In that regard, the county assemblies provided the first tier of oversight while the Senate provided the second and final tier of oversight. By exercising its oversight role in the manner determined, the Senate could not be said to be violating the principle of separation of powers. There was no potential danger of encroachment upon the mandate of the independent offices of the Controller of Budget or the Auditor General. What the Senate could not do under the guise of oversight, was to usurp the county executives' mandates or to purport to supervise County Assemblies.

they sufficient enough given the rate at which the intergovernmental disputes are mutating and manifesting? Before these regulations (2021), there was no clear-cut framework to addressing the intergovernmental disputes. Intergovernmental relations bodies such as the Council of Governors and the IGRTC had to use their internal procedures in resolving such disputes.[190]

This led to uncertainty and inconsistencies in how intergovernmental disputes were resolved.[191] With the gazettement of the Intergovernmental Relations (ADR) Regulations 2021, there is predictability, certainty, and clarity in the resolution of intergovernmental disputes through ADR in conformity with the IGRA and the Constitution.[192] Strengths of the ADR Regulations To begin with, the regulations (2021) provide a wide scope of ADR mechanisms that parties can agree and settle on. They include dispute avoidance strategies such as providing for negotiation and consultations between the parties and other constitutional commissions and offices, line ministries, and intergovernmental forums.[193] The inclusion of such strategies will ensure that conflicts are resolved before they escalate to disputes. Away from dispute avoidance strategies, the regulations provide for detailed provisions of resolving intergovernmental disputes through conciliation, mediation, traditional dispute resolution mechanisms (TDRMs), and arbitration.[194]

Notably, the inclusion of TDRMs is commendable and reflect an inclusive and broad appreciation of the role played by elders in impacting country politics and resolution of disputes. TDRM principles such as social cohesion, harmony,

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[190] Supra, note 11

[191] Ibid

[192] Ibid

[193] The Intergovernmental Relations (ADR) Regulations 2021, Regulation 6(2)(a).

[194] Ibid Regulations 10-12.

peaceful co-existence, respect, and tolerance are in tandem with the constitutional principles of consultation and cooperation.[195] Secondly, the objects and purpose of the regulations align with the dictates of Articles 6(2), 189, 159(2)(c) of the Constitution.[196] To begin, the regulations reinforce the constitutional principles of consultation and co-operation.[197] This is evident in various consultation procedures. For instance, parties are obligated to take all necessary measures to amicably resolve disputes through negotiations, conciliation, and consultations before declaring a dispute.[198]

Thirdly, another strength that is close to the above mentioned (2) objects and purpose, is that the regulations are guided by critical principles. One among many other significant principles is the prudent use of public funds in the resolution of intergovernmental disputes.[199] Fourthly, the regulations provide clear provisions on the parties to intergovernmental disputes.[200] They also cater for disputes between county governments and agencies of the national government.[201] The regulations enshrine that they apply to disputes between the national government and county government, and amongst county governments.[202] Furthermore, the Regulations outlines an extensive list of intergovernmental disputes.[203] These reflect the tensions and controversies witnessed in the last couple of devolution years.[204] Intergovernmental disputes

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[195] Francis Kariuki, 'African Traditional Justice Systems' [2017] Journal for Conflict Management and Sustainable Development, 165

[196] Vianney Sebayiga (Supra note 317)

[197] Ibid

[198] ADR Regulations (n 235) Regulations 3(b), (c), (d), and Regulation 6(2).

[199] ibid Regulation 4(b).

[200] Ibid

[201] See County Government of Nyeri v Cabinet Secretary of Education, Science, and Technology [2014] eKLR and Board of Management, Frere Town Primary School v County Government of Mombasa [2022] eKLR.

[202] Regulations 6(5)(b), 8(c)

[203] Ibid

[204] Ibid

may relate to the assignment or implementation of functions, a financial matter, written agreement between the parties, boundary disputes, natural resource management, and any other intergovernmental dispute.[205]

Alternative Dispute Resolution Mechanisms that can be utilized in Intergovernmental Relation in Kenya.

"*Justice is clothed in various forms and cannot be limited to legal justice. The Romans clearly articulated justice as the desire to give a person his due right. Accordingly, in the Kenyan society that is diverse in terms of religion, ethnicity and culture, and has a legal pluralism system is the sole reliance on formal or legal justice practicable.*[206] Alternative Dispute Resolution mechanisms refer to all other dispute resolution or decision making processes that are an alternative to litigation.[207] The Charter of the United Nations[208] makes provision for the use of Alternative Dispute Resolution mechanism.[209] It states that parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.[210] Additionally, Section 7 (1)(j) of the Legal Aid 2016[211] mandates the National Legal Aid Service (NLAS) to promote and facilitate the settlement of disputes through Alternative Dispute Resolution.[212]

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[205] Ibid

[206] Emily Kinama, 'Exploring Traditional Justice Systems as a form of Alternative Dispute Resolution Mechanism under Article 159 (2) (c) of the Constitution of Kenya.' This paper was presented in the Strathmore Annual Law Conference, 2014 held at Strathmore University on 3rd and 4th July, 2014.

[207] Kariuki Muigua: Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya.

[208] Art 33 (1), 24th October 1945.

[209] Ibid

[210] Ibid

[211] Legal Aid Act, 2016

[212] Ibid

The main alternative dispute resolution (ADR) methods available in Kenya are arbitration, reconciliation, negotiation, traditional dispute resolution mechanisms and mediation as espoused under Article 159 (2) (c).[213] Their sole objective is to complement without delay or foster procedural technicality, the conventional litigation means to accessing justice.[214] This is with the understanding that they are not bound rigors and complexities that are associated with the abnormally tedious straight jacket courts' processes.[215] It prides itself for being a simple, quick, flexible and accessible dispute resolution system compared to litigation.[216] They also aim at curing the menace that has bedeviled and crippled the court system which in some cases led to miscarriage of the same justice that it ought to realize. Professor Muigua opines that access to justice is considered to be a critical part of universal human rights.[217]

That the Constitution of Kenya 2010 was promulgated as a conclusion to an ambitious national progress that aimed at reversing many years of mis-governance and social decay.[218] As a transformative Constitution, it seeks to make a break with the previous governance system. It aims not only to change the purposes and structures of the state, but also society.[219] A transformative Constitution is considered to be "value laden, going beyond the state, with emphasis on social and sometimes economic change, stipulation of principles

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[213] Constitution of Kenya, 2010

[214] Kariuki Muigua, December, 2015. Alternative Dispute Resolution and Access to Justice in Kenya

[215] Ibid

[216] Z. Xie, "The Facilitative, Evaluative and Determinative Processes in ADR," 2011-10-12, available at http://www.xwqlaw.com/info/c47f5ff15b464882ad5c9a7f97338652, (accessed on 6/02/2025).

[217] Supra, note 32

[218] Ibid

[219] Ghai, Y.P., "Interpreting Kenya's Transformative Constitution," Awaaz Magazine, Friday, 12 September 2014, available at http://awaazmagazine.com/previous/index.php/editors/item/535-interpreting-kenya-s-transformative constitution

which guide the exercise of state power, requiring state organs, particularly the judiciary, to use the constitution as a framework for policies and acts for broader shaping of state and society".[220]

Mediation

Mediation is defined as "the intervention in a standard negotiation or conflict of an acceptable third party who has limited or no authoritative decision-making power but who assists the involved parties in voluntarily reaching a mutually acceptable settlement of issues in dispute.[221] Similarly, the West Virginia, Supreme Court Order, Rule 2 defines mediation as follows: '…as an informal non-adversarial process whereby neutral third person, the mediator, assists parties to a dispute to resolve by agreement some or all of the differences between them.[222] In mediation, decision-making authority remains with the parties,[223] the mediator has no authority to render a judgment on any issue of the dispute.[224] The role of the mediator is to encourage and assist the parties to reach their own mutually-acceptable settlement by facilitating communication, helping to clarify issues and interests; identifying what additional information should be collected or exchanged, fostering joint problem-solving, exploring settlement alternatives and other similar means.[225] The procedures for mediation are extremely flexible, and may be tailored to fit the needs of the parties to a particular dispute.[226]

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[220] Ibid

[221] Christopher Moore, *The Mediation Process: Practical Strategies for Resolving Conflict*, 3rd., (San Francisco: Jossey-Bass Publishers, 2004). <http://books.google.com/books/about/The_Mediation_Process.html?id=8hKfQgAACAAJ>. <accessed on 5 May 2025>

[222] Livinus I. Okere, Diplomatic Methods of Conflict Resolution (A CASE STUDY OF ECOWAS)

[223] Ibid

[224] Ibid

[225] Ibid

[226] Ibid

The process seeks to persuade disputant parties to reach satisfactory terms of reference and no provisions for settling the dispute are to be prescribed, thus the goal of mediation is for a neutral third party to help disputants come to a consensus on their own.[227] Rather than imposing a solution,[228] a professional mediator works with the conflicting sides to explore the interests underlying their positions.[229] Mediation can be effective at allowing parties to vent their feelings and fully explore their grievances.[230] Working with parties together and sometimes separately,[231] mediators can try to help them hammer out a resolution that is sustainable, voluntary, and nonbinding.[232]Accordingly, it is the opinion of the authors that this process could be conducted by an individual or individuals who aim at encouraging parties to open up for dialogue despite their antagonism or sharply protracted or rather fever pitch contention, which eventually implore parties to reaching an amicable and peaceable settlement. In essence, a mediator, who is usually neutral, helps participants to present their points of view and facts.[233]

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[227] Frank E. A. Sander and Lukasz Rozdeiczer, *The Handbook of Dispute Resolution* (Jossey-Bass, 2005).

[228] Ibid

[229] Ibid

[230] Ibid

[231] Ibid

[232] Ibid

[233] They also help participants to identify the disputed issues, develop options and try to reach an agreement. The mediator does not give advice or make a decision on the facts of the dispute or its outcome. They may give advice on, or choose how the process of mediation is conducted. Mediation may be voluntary, court ordered, or required as part of a contract or an external dispute resolution arrangement. As an alternative to the lengthy and rigid court processes in Kenya which are an impediment to access to justice; mediation, in particular, offers a flexible, speedy and cost effective way to resolve disputes. It is a confidential process that enables both parties to explain and then discuss what their needs and concerns are to each other in the presence of an independent third party, the mediator so that they reach an agreement between themselves.

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Reflecting on the role of the Courts, and in particular of the Supreme Court, and in relation to the long-established American governance system, Prof. Archibald Cox[239] thus observed: ***"Government is more pragmatic than ideal. In a practical world there is, and I suspect had to be, a good deal of play at the joints. If one arm of government cannot or will not solve an insistent problem, the pressure falls upon another. Constitutional adjudication must recognize that the peculiar nature of the Court's business gives it a governmental function which cannot be wholly discharged without the simple inquiry, 'which decision will be the best for the country?' "...[T]he Court can seldom be wholly neutral upon the social, political, or philosophical questions***

[234] Supra, note 248
[235] Ibid
[236] Ibid
[237] Ibid
[238] Ibid
[239] In The Warren Court: Constitutional Decision as an Instrument of Reform(Cambridge, Mass: Harvard University Press, 1968), at p.118.

underlying constitutional litigation. Its opinions shape as well as express our national ideals."

In the case of ***Speaker of the Senate & another v Attorney-General & another; Law Society of Kenya & 2 others (Amicus Curiae),***[240] the apex court in Kenya held that a fundamental element in the scaffolding structure for the said constitutional principles and values, is the institutional scheme of bicameralism in the legislative arrangement; and this is the dual-Chamber set-up in the institutions of law-making. The Constitution provides for a bicameral system, with each unit playing its role as prescribed. Article 93 stipulates:

" (1) There is established a Parliament of Kenya, which shall consist of the National Assembly and the Senate.

(2) The National Assembly and the Senate shall perform their respective functions in accordance with this Constitution."

Kenya's renowned constitutional law Professors, Yash Ghai and Jill Cottrell Ghai, commenting on the provisions of Article 174, observe that: ***"These objectives are elaborations of the national values and principles and show the importance of devolution to the new system of government. An essential purpose of devolution is to spread the power of the state throughout the country; and reduce the centralization of power which is the root of our problems of authoritarianism, marginalization of various communities, disregard of minority cultures, lack of accountability, failure to provide services to people outside urban areas and even within them."*** Devolution is a fundamental principle of the Constitution. It is pivotal to the facilitation of Kenya's socio-economic and political growth of a nation and nationhood.

One of the cardinal principles of the Constitution that can be gleaned from its

[240](Advisory Opinion Reference 2 of 2013) [2013] KESC 7 (KLR)

architecture and wording is, "the more checks and balances, the better" for good governance.[241] The relationship between the two Parliamentary Chambers should be reinforced by this principle. After all, legislative authority is derived from the people.[242] Both Houses of Parliament represent the same people, and the resources at the core of this dispute, are owned by the people of Kenya. In the equitable distribution of resources owned by the people of Kenya, the principles of checks and balances, mediation, dialogue, collaboration, consultation, and interdependence are not necessarily conflictual, granted that they are all invoked in the interests of the people of Kenya.[243] Since judicial authority is also derived from the people of Kenya, the constitutional duty of the Supreme Court in this Reference is to reinforce these principles, so as to ensure that the rights and interests (economic, social, political and cultural) of the people of Kenya trump once and for all, the narrative of which of the two Houses is superior.[244]

In comparative judicial experience, the South African case,[245] gave a fitting precedent. The court accepted the submissions of counsel which stated: ***"To preserve the comity between the judicial branch of government, on the one hand, and the legislative and executive branches of government, on the other hand, ...ensuring that only the highest Court in constitutional matters intrudes into the domain of the principal legislative and executive organs of State"*** [para.29]

In the writer's considered opinion, Kenyan inter-governmental parties in dispute can use this alternative to determine and remedy their differences.

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[241] Ibid
[242] Ibid
[243] Ibid
[244] Ibid
[245] The President of the Republic of South Africa & Others v. South African Rugby Football Union & Others (CCT 16/98) 1998 ZACC 21

a) Negotiation

Scholars have opined that of all the alternatives available for resolving the protracted differences especially among and between the inter-state agencies or actors, negotiation is the simplest and utilized option.[246] Negotiation is an informal process and one of the most fundamental methods of conflict resolution, offering parties maximum control over the process.[247] It involves the parties meeting to identify and discuss the issues at hand so as to arrive at a mutually acceptable solution without the help of a third party.[248] It has also been described as a process involving two or more people of either equal or unequal power meeting to discuss shared and/or opposed interests in relation to a particular area of mutual concern.[249] As such the focus of negotiations is the common interests of the parties rather than their relative power or position.[250] The goal is to avoid the overemphasis of how the dispute arose but to create options that satisfy both the mutual and individual interests.[251] The most common form of negotiation depends upon successfully taking and giving up of a sequence of positions.[252]

They argue that positional bargaining is not the best form of negotiation because arguing over positions produces unwise agreements, is inefficient, endangers an ongoing relationship and also leads to formation of coalition among parties whose shared interests are often more symbolic than

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[246] Malcolm N. Shaw, International Law, 9th edition page 882 - 883

[247] Kariuki Muigua, "Alternative Dispute Resolution and Article 159 of the Constitution"

[248] Ibid

[249] See generally, "Negotiations in Debt and Financial Management", United Nations Institute of Training and Research, (UNITAR), (December 1994).

[250] Supra, note 264

[251] Ibid

[252] Ibid

substantive.[253] Accordingly the aim in negotiations is to arrive at "win-win" solutions to the dispute at hand.[254] Although it is not enlisted among its peers under Article 159, the writers hold that it is one of the most viable options that can be utilized so as to avert the impasse and stalemate whenever intergovernmental disputes arise. Where there is an obligation to negotiate, this would imply also an obligation to pursue such negotiations as far as possible with a view to concluding agreements.[255] The Court held in the ***North Sea Continental Shelf*** cases that:

"the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition…..they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of then1 insists upon its own position without contemplating any modification of it.[256]

In our considered opinion, this procedure may yield more sustainable dispute settlement outcome since the disputing parties are called upon to own their

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[253] Roger Fischer and William Ury, Getting to Yes: Negotiating Agreement Without Giving In, (Penguin Books, New York, 1981), p.4.

[254] Supra, note 268

[255] See the Railway Trafic between Lithuania and Poland case, PCIJ, Series AIB, No. 42, p. 116; 6 AD, pp. 403, 405. Section I, paragraph 10 of the Manila Declaration declares that when states resort to negotiations, they should 'negotiate meaningfully, in order to arrive at an early settlement acceptable to the parties: Article 4(e) of the International Law Association's draft International Instrument on the Protection of the Environment from Damage Caused by Space Debris provides that 'to negotiate in good faith.. . means inter alia not only to hold consultations or talks but also to pursue them with a view of reaching a solution': see Report of the Sixty-sixth Conference, Buenos Aires, 1994,p. 319.

[256] ICJ Reports, 1969, pp. 3,47; 41 ILR, pp. 29, 76. The Court has noted that, 'like all similar obligations to negotiate in international law, the negotiations have to be conducted in good faith', Cameroon v. Nigeria, ICJ Reports, 2002, para. 244.

differences and the outcome therefrom, with the understanding that they have fully participated in every phase required. This is also exemplified from the position upon which both the national or a county government or their agents may establish a joint committee with a specific mandate where such a committee is necessary for the achievement of the objects and principles of devolution as enshrined in the Intergovernmental Act, 2012. As one of the principles in community development studies, there are high probability of success in any community engagement whenever parties or community members are actively involved.[257] This fosters mutual trust, ownership and sustainability of the end product, including the dispute settlement outcomes.[258] This principle is premised on the view that what is created within can only be better managed from within and that external forces are strangers to the realities that exist in any given society and that such outsiders who may not have the interests of the parties in the first place, could be used to exacerbate and fuel acrimony and fan animosity.[259] Therefore, before parties participating in the process commit themselves to meeting their obligations, they must believe that they have joint ownership of the process.[260] Negotiations allows room for dialogue.[261]

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[257] Principles of Community Development Programme. https://www.future.edu/2022/10/community-development/#:~:text=Community%20development%20involves%20the%20principles,%2C%20participative%20democracy%2C%20and%20equality <accessed on 5 May 2025>

[258] Ibid

[259] Ibid

[260] Ibid

[261] Hans-Joachim Giessmann, Negotiations, dialogue and mediation Which approach leads to intra-state peace?. https://berghof-foundation.org/news/negotiations-dialogue-and-mediation#:~:text=They%20allow%20for%20voices%20which%20hold%20no,ethnic%20or%20religious%20minorities%2C%20women%2C%20and%20others.&text=Peace%20dialogues%20can%20only%20be%20successful%2C%20when,trust%20betwee

Borrowing a leaf from political science class, the doctrine of negotiated democracy looms large. It is a political framework in which members of a community or society discuss how to allocate power among the various sectors that make up society.[262] This arrangement is deemed critical for assuring representation in decision-making, equitable distribution of community resources, peaceful resolution of political conflicts and the reduction of enmity within communities with considerable cultural/identity disparities.[263] Members of the clan council of elders negotiate for elective posts in the system, which functions under traditional governing structures.[264] The councils then seek out people to fill the positions. In Kenya, negotiated democracy has been witnessed in Northern Kenya. The councils' choices affected and drove regional voting trends.[265] A term widely used in Kenya to refer to the practice of agreeing how to distribute political positions in advance of an election.[266]This arrangement is unique in nature.[267] The speed with which negotiated democracy has spread in Northern Kenya since 2013 has seen others

n%20the%20parties%2C%20interests%20become%20balanced. <accessed on 5 May 2025>

[262] Kathure et al, "Negotiated democracy against the Constitution." www.the-star.co.ke/siasa/2022-03-06-kathure-and-ogonda-negotiated-democracy-against-the-constitution <accessed on 7 February 2025>

[263] Ibid

[264] Mary Wambui Kanyi, University of Nairobi: Negotiated democracy in North Eastern Kenya and Women's participation in elective politics in Kenya

[265] Ibid

[266] Nic Cheeseman, Eloïse Bertrand, and Sa'eed Husaini: A dictionary of African Politics.

[267] The phrase became popular following the introduction of devolution in 2010, when political and community leaders in some of the forty-seven newly created counties decided to come to pre-election agreements about the distribution of seats between rival ethnic groups. Part of the logic behind these deals was that arranging the outcome of multiparty politics in this way would reduce the stakes of the election and hence the prospects for ethnic violence. However, in some cases these negotiations themselves proved to be highly controversial, especially after some of the participants claimed that the initial terms of the deals that they had struck had not been honoured.

calling for it to be embraced at the national level as an antidote to the fractious and fraught national politics.[268]

According to Luvate, he argues in favor of negotiated democracy where he avers that it seeks to resolve election-related conflicts especially in Kenya's Mandera County.[269] In South Africa, a combination of internal and external factors created conditions that led both the ANC and the NP towards the realization that their aims might be best met through political negotiations.[270] The apparent problems of governing South Africa by apartheid were compounded by inherent economic inefficiencies.[271] To respond to the then political crisis, South African political parties negotiated the 1991 National Peace Accord (NPA) aimed at preventing violence.[272] It created an unprecedented country-wide network of structures to implement the agreement by addressing the behavior of political parties and the security forces, issues related to justice, and conflict management through participatory processes of localized mediation and monitoring coordinated at the regional and national level.[273] Although aimed at ending the violence, its principles and structures provided an important safety net for national negotiations.[274]

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[268] Dalle Abraham, Negotiated Democracy, Mediated Elections and Political Legitimacy. The elephant. https://www.theelephant.info/analysis/2021/09/03/negotiated-democracy-elections-and-political-legitimacy/ <accessed on 7 February 2025>

[269] Ibid

[270] Catherine Barnes,

[271] Ibid

[272] Ibid

[273] Ibid

[274] Ibid

Arbitration.

Arbitration is provided for in various statutes of the Kenyan laws. For instance, in Section 59 of the Civil Procedure Act (Cap 21, Revised 2010)[275] provides that all references to arbitration by an order in a suit, and all proceedings there under, shall be governed in such manner as may be prescribed by rules. Further, Order 46 of the Civil Procedure Rules, inter alia, provides that at any time before judgment is pronounced, interested parties in a suit who are not under any disability may apply to the court for an order of reference wherever there is a difference. In addition, the Arbitration Act, 1995 defines arbitration to mean "any arbitration whether or not administered by a permanent arbitral institution." (Arbitration Act, as Amended in 2009).[276] This is not very elaborate and regard has to be had to other sources. Accordingly, arbitration is a private consensual process where parties in dispute agree to present their grievances to a third party for resolution.[277] It is an adversarial process and, in many ways, resembles litigation.[278]

Conciliation.

The Commission for Conciliation, Mediation and Arbitration (CCMA) defines a conciliation hearing as a process where a commissioner (or a panellist, in the case of a bargaining council or agency) meets with the parties in a dispute explores ways to settle the dispute by agreement.[279] Parties to a dispute may agree to submit it to a peaceful settlement procedure which would, on the one

[275] Civil Procedure Act, Revised Edition 2010(2008), Government Printer, Nairobi.
[276] The Arbitration Act, Act No. 4 of 1995 (as Amended in 2009), Government Printer, Nairobi.
[277] Farooq Khan, Alternative Dispute Resolution, A paper presented at Chartered Institute of Arbitrators- Kenya Branch Advanced Arbitration Course held on 8-9th March 2007, at Nairobi.
[278] Ibid
[279] The CCMA is a dispute resolution body established in terms of the Labour Relations Act, 66 of 1995 (LRA) of the Republic of South Africa.

hand, provide them with a better understanding of each other's case by undertaking objective investigation and evaluation of all aspects of the dispute and, on the other hand, provide them with an informal third-party machinery for the negotiation and non-judicial appraisal of each other's legal and other claims, including the opportunity for defining the terms for a solution susceptible of being accepted by them.[280]

They would thus submit the dispute to conciliation, the peaceful settlement procedure which combines the elements of both inquiry and mediation.[281]This process entails a third party who undertakes an investigation and undertaken mainly by commissions to establish the basis of the dispute in question. According to Kirkby,[282] "justice and forgiveness require a transparent acknowledgement of the transgression,"[283] as was evidenced in the work of the Truth and Reconciliation Commission in South Africa.[284]

In ***Kenya Ports Authority vs Modern Holdings [E.A] Ltd,***[285] the court was of the view that the Constitution in Article 159 (2) (b) recognized the application of alternative forms of dispute resolution mechanisms and enjoined the courts and tribunals in exercise of their judicial authority to be guided by and to promote all forms of alternative dispute resolution mechanisms, including reconciliation.[286] In 1977, the unprecedented collapse of the East African Community (Kenya, Uganda and Tanzania) led to the formation of the commission led by the Swiss diplomat, Victor Umbricht. He led conciliatory mission from 1977 to 1984, making profound proposals in respect to the distribution of the assets jointly owned by the three aforementioned nations.

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[280] Handbook on the Peaceful Settlement of Disputes between States
[281] Ibid
[282] (Kirkby, C., 2006)35
[283] Ibid
[284] Ibid
[285] Civil Appeal No. 108 Of 2016
[286] Ibid

Given its inquisitorial nature, the conciliatory and inquisitive nature, the disputants can address the deep rooted disagreements and challenges.

Traditional dispute resolution mechanisms.

Informal justice systems, such as customary and traditional dispute resolution mechanisms, are often more accessible and affordable than formal justice systems.[287] One of the core principles laid down in the Constitution to guide the administration of justice and the exercise of judicial authority, is the requirement to embrace alternative forms of dispute resolution, including traditional dispute resolution mechanisms.[288] This requirement is a fundamental shift from the approach to the idea and concept of justice, especially to our Kenyan context.[289] Kenya's communities have, for generations, developed their own justice systems that have and continue to hold societies together.[290] While justice dispensed by the Courts has occupied the centre-stage in the administration of justice, the reality is that the vast majority of disputes (the Policy estimates around 90 percent) among Kenyans are resolved through justice systems that are outside the formal Court

[287] Recognizing the importance of Alternative Justice Systems (AJS) and in line with the constitutional directive in Article 159(2)(c) of the Constitution, the Judiciary significant efforts have been undertaken to enhance these systems. The most notable of these efforts is the development and implementation of the Alternative Justice Systems Policy (AJS Policy). Formulated by the Judiciary in consultation with various stakeholders, this policy seeks to recognize, regulate, and enhance the use of AJS in Kenya. The policy also aligns the operation of AJS with the principles and values of the Constitution of Kenya, 2010, and international human rights standards. It also underscores the need for a pluralistic approach to justice that is sensitive to the cultural, socio-economic, and geographic diversity of the population.

[288] David K. Maraga, EGH: Alternative Justice Systems Framework Policy Alternative Justice Systems Baseline Policy (2020)

[289] Ibid

[290] Ibid

process.[291] Therefore, the constitutional guidance to embrace and recognize Alternative Justice Systems is located within a wider frame of response that addresses, holistically, the concept of justice in the Kenyan context.[292]

Traditional Justice Systems, entail all those people-based and local approaches that communities innovate and utilize in resolving localized disputes, to attain safety and access to justice by all.[293] TJS are viewed as being accessible, impartial and affordable.[294] It is also '…incorruptible, proceedings and language are familiar, accessible at all times, affordable, utilizes local resources, decisions are based on consensus, and seek to heal and unite disputing parties.[295] This is unlike the formal system that is seen as breeding hatred.[296] Among major reasons for the relevance and importance of such systems in place include: the incomplete reach of the state's legal structures.[297] People face geographical and financial constraints in accessing the formal justice systems.[298] Most courts are situated at the administrative headquarters and are therefore not easily accessible to individuals;[299] the cost of traveling to court is prohibitive and especially when a litigant is required to make several visits to court as matters are rarely concluded at the first hearing;[300] Legal fees,

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[291] Ibid
[292] Ibid
[293] FIDA Kenya; 'Traditional Justice Systems in Kenya: A study of Communities in Coast Province Kenya' Page 1.
[294] Supra, note 19
[295] Ibid
[296] ICJ: A Report on Community Justice Systems Study in Kenya: Case Studies of Communities in Wajir, Isiolo, Laikipia, Meru North, Turkana Districts and Nairobi (Mukuru and Kibera) page 5.
[297] Supra, note 76
[298] Ibid
[299] Ibid
[300] Ibid

that is money paid to court as filing fees and advocates fees contribute to raise financial cost of litigation;[301]

The long delays; Cumbersome procedures; and technicality of legal proceedings, coupled with legal illiteracy exacerbate the alienation of the population from the court process.[302] The main objective of this mechanism is to bring back the era when traditional justice systems used to deal with matters that were within the communal purview.[303] In the TJS when someone broke traditional laws, or harmed other members of the community, the members of the community had to decide how to deal with the person.[304] Led by their elder, they would get together and decide how to deal with the offender.[305] The offense was seen as a "breaking" of the relationship with the group.[306] Today we call this approach a Restorative Justice Approach.[307]

Given the foregoing, in the recent past, the courts in Kenya have been invited to render their opinions on whether such alternatives can hear and determine some matters of grave weight like murder. This was addressed in one landmark decisions by R. Lagat Korir J, where in his respectful opinion allowed the use of the TJS to resolve a murder case.[308] In this case, the court allowed a TJS resolution of a murder case despite being a criminal matter in nature. The High court endorsed it as constitutional and lawful. It was of the view that the complainant was satisfied with the compensation (the camels and goats), and secondly, it was because the prosecutor had faced difficulties in securing

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[301] Ibid
[302] See Scharf, W. (1998), Non-State Justice Systems in Southern Africa: How Should Governments Respond? Institute of Criminology, University of Cape Town.
[303] Supra, note 78
[304] Ibid
[305] Ibid
[306] Ibid
[307] Ibid
[308] Republic vs Mohammed Abdow Mohamed (2013) eKLR

witnesses as they were no longer interested in coming to court nor adduce evidence.

Similarly, in the case of ***Seth Michael Kaseme v Selina K. Ade,***[309] the Court of Appeal took cognizance of the role of the Gasa Council of Elders of Northern Kenya to arbitrate a land dispute.[310] These two cases illustrate the use of TJS in land and property disputes in Kenya.[311] This is a unique dispute resolution mechanism which should be promoted in light of Kenya's historical injustices regarding land.[312] Hence this is a good step to enhance traditional justice systems which are an alternative form of dispute resolution under the Kenyan Constitution (Constitution, 2010)[313] and hence reduce the backlog of cases to the courts that can be dealt with by this mechanism.[314] It is worth noting that since the inception of the national Alternative Justice System Policy document in 2020, other counties have emulated the same and enacted the such policy documents to govern the modalities of dispute resolution within their jurisdictions, among them the Nakuru County AJS Action Plan launched in May, 2022 and the Kajiado County AJS Action Plan Model launched on 19th October 2021. Furthermore, the Judiciary has also launched AJS Suites (Ukumbi) in Isiolo, Kajiado, Nakuru and Lamu counties.

The implementation of the AJS Policy has had tangible impacts on access to justice in Kenya. It has facilitated the resolution of a significant number of disputes that would have otherwise burdened the formal courts. Owing to this significant revelation, it is therefore prudent in the interest of justice to extend the jurisdiction of such alternative systems to address such matters that can

[309] Civil Appeal 25 of 2012; [2013] eKLR.
[310] Ibid
[311] Supra, note 83
[312] Ibid
[313] Article 159 (2) (c).
[314] Supra, note 94

arise between some conflicts that arise between two levels of government. The High Court in Meru referred the dispute between Meru Governor Kawira Mwangaza and local MCAs over a looming impeachment motion to arbitration by the Njuri Ncheke Council of Elders.[315] Justice Linus Phogon Kassan ordered the elders to submit a report on the outcome of an earlier mediation process ordered by President William Ruto.[316] In a ruling on Monday, July 29, 2024, the judge directed Ms Mwangaza, the MCAs and their lawyers to appear before the council of elders by Wednesday, July 31, for talks.[317]

Justice Kassan said the court was committed to encouraging parties to accept the role of elders in alternative dispute resolution and deferred the case to August 20, to assess the progress of the talks.[318] Ms Mwangaza said that after the previous impeachment attempt was thwarted by the Senate, she extended an olive branch to her opponents to bring peace through talks.[319] "I particularly went out of my way to meet with the leaders and even attended a retreat for Members of the County Assembly to bridge any distance between the leaders…"[320] On his part, the trial judge, Justice Kassan noted that the matter was of great public interest as it was the fourth planned impeachment motion against Ms Mwangaza,[321] the other three attempts have failed. He said it was

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[315] Charles Wanyoro, Nation TV correspondence. https://ntvkenya.co.ke/news/court-refers-mwangaza-mcas-feud-to-njuri-ncheke-elders/ <accessed on 5 May 2025>

[316] Ibid

[317] Ibid

[318] Ibid

[319] Ibid

[320] Kawira Mwangaza, former governor - Meru County.

[321] Supra, note 339

in the interest of the public that the petition be decided at that stage to avoid waste of resources and judicial time and to ensure peaceful co-existence.[322]

Good Offices.

The term 'Good Offices' first appeared in the case of ***Schooner Exchange vs. M'Faddon***,[323] as was noted by Justice Marshall.[324] On the international plane, one of the methods that have been used to resolve disputes between states is the use of good office.[325] This method entails the use of an individuals whom their moral standing is not in question. Good office[326] can be used to encourage the protagonists to resume negotiations or simply acts as a channel to facilitate

[322] Ibid

[323] The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812)

[324] Ibid

[325] Chapter VI of the UN Charter, Art. 33 (1)

[326] Good Offices are a different part of Alternative Dispute Resolution (ADR). This process involves a neutral third party or a state that seeks to help the parties in conflict. They do this either on their own or when asked, using diplomatic methods to encourage the parties to negotiate directly or find other ways to resolve their issues. Good Offices can come from international organizations or neutral countries that want to help settle disputes peacefully. While they offer various services and support, they do not actively participate in negotiations. Their role ends when the parties start talking to each other. Good Offices aim to bring unwilling parties together for discussion, without getting involved in the negotiation process itself. Article 33 of the UN Charter states that any dispute that may threaten international peace and security should first be handled through negotiation, mediation, or other peaceful means.
The phrase "other peaceful means" includes Good Offices in the international dispute resolution process. Similarly, Article 33 of the UN Watercourses Convention requires parties to resolve their disputes by seeking Good Offices or requesting mediation or conciliation. Good Offices involves a third party who helps bring the parties in conflict together, without joining in the discussions. This approach works well for regional disputes because it can lead to faster resolutions than court processes. It allows parties to maintain control over the situation with little interference from outside parties. Good Offices focus on encouraging communication and understanding between those involved, helping them find solutions together.

communications between the parties that on their own are not willing to communicate or dialogue.[327]

A third party for instance a prominent figure like the pope or religious leader could be invited to try and appease the warring parties so that he can encourage them to dialogue and settle dispute. He brings the parties together to facilitate open communications via structured dialogues.[328] In 1993, the Norway government offered its services to facilitate "secret" talks on their territory between the Palestinian Liberation Organization (PLO) and the Israel leading to the signing of the Oslo Accord.[329]

Additionally, Harold Wilson[330] provided his good offices to India and Pakistan which resulted the parties to reach an agreement to refer Kutch issue to an Arbitral Tribunal.[331] In the year 1949, the Security Council rendered good offices in the dispute between the Netherland Government and Republic Indonesia.[332] In the case of ***Punjab v. Allahabad,***[333] the Supreme Court of India

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[327] Ibid

[328] An individual who presides over the proceeding vide "good office".

[329] The first Oslo Accord, known as Oslo I, was signed on September 13, 1993. The agreement between the Israeli and Palestinian leadership saw each side recognize the other for the first time. Both sides also pledged to end their decades-long conflict. A second accord, known as Oslo II, was signed in September 1995 and went into more detail on the structure of the bodies that the peace process was supposed to form. The Oslo Accords were supposed to bring about Palestinian self-determination, in the form of a Palestinian state alongside Israel. This would mean that Israel, which was formed on the land of historic Palestine in 1948 in an event Palestinians known as the Nakba, would accept Palestinian claims to national sovereignty. The claims, however, would only be limited to a fraction of historic Palestine, with the rest left to Israel's sovereignty.

[330] The former United Kingdom Prime Minister

[331] https://lawadhoctutorials.com/what-is-mediation-and-its-process/

[332] Ibid

[333] Punjab & Sind Bank vs Allahabad Bank & Anr on 28 March, 2006

directed the government to set up a committee to monitor disputes between government departments and public sector undertakings. Although not also enlisted under our statutes as the form of ADR, the authors are of the opinion that this mechanism can be utilized in our Kenyan territory especially where there are octane and high tension disputes between both the horizontal and vertical intergovernmental governance systems.

Implications and Cost Analysis of Litigation on Intergovernmental Relations

A 2017 study was conducted by the IGRTC and shockingly revealed that the litigation was mainly between national government and county government, among county governments, county governments and state agencies, county organ and another organ within the same county, National Assembly and Senate, and between state agencies.[334]

The disputes were mainly resulting from the interpretation and implementation of powers transferred and implementation of functions as provided in the Fourth Schedule to the Constitution; transfer of functions and policies, impeachments, county boundaries, and employment relations.[335] The study further revealed that the recurrent inter- and intra-governmental disputes being filed in courts for judicial resolution had had a great impact on the budgetary allocation, in terms of legal fees, to both levels of government.[336]

Has the place of ADR in Intergovernmental Dispute Resolution been fully cemented and can ADR deal with Constitutional Interpretation?

Having looked at the impact and implication of litigation above, it will be

[334] IGRTC, Cost of Litigation in Inter/Intragovernmental Litigation in Kenya, May 2017, 47

[335] 3 IGRTC Members, End Term Report 2015 – 2020, 111.

[336] Ibid

injurious and gravious harm if this paper does not amplify the voice and echo a place of ADR, as an alternative in place of imperious and unwinding litigation to already bitter-sweet intergovernmental relations. Laibuta JA, opines that such a mechanism must be characterized by (a) expedition;[337] (b) cost-effectiveness;[338] (c) party autonomy (where both levels of government have an equal voice in the process);[339] (d) complete independence from the parties; (e)[340] quality procedures;[341] (f) quality outcomes;[342] and (g) party satisfaction.[343]

Regrettably, our judicial system is not reputed for delivering a justice system that can be identified with all of the foregoing characteristics.[344] On the second limb, the authors are of the opinion that the ADR practitioners lack jurisdictions to interpret the constitutional dictates in respect to intergovernmental disputes on their own volitionGiven the high legal costs associated with litigation as discussed above, ADR mechanisms such as negotiation, conciliation, mediation, and arbitration should be used in resolving intergovernmental disputes.[345] With the exception of arbitration that culminates in an arbitral award, the other ADR mechanisms result in mutually

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[337] K. I Laibuta; The Place of ADR in Intergovernmental Dispute Resolution

[338] Ibid

[339] Ibid

[340] Ibid

[341] Ibid

[342] Ibid

[343] Ibid

[344] Ibid; It is painstakingly slow, costly and inappropriate for parties who are bound under the Constitution to undertake service delivery in the spirit of consultation and cooperation. Litigation is inappropriate to resolve disputes between state organs that are in reality the aggregate of one whole, but for the governance model of devolution of power and the decentralization of service delivery.

[345] 2 nd Annual Devolution Conference Held at Tom Mboya Labour College Kisumu County, 2015 21st April - 23rd April, 2014

generated outcomes.[346] ADR seeks to find non-confrontational ways of resolving disputes and promoting harmony, tolerance and peaceful coexistence between concerned parties thus fostering parties' satisfaction.[347] The adversarial nature of litigation pits parties against each other which injures the relationship between parties.[348] As a result, it would worsen the relationship between the levels of government, which are expected to work together through consultation and corporation as provided for by the Constitution.[349]

Closely related to this, ADR mechanisms would enhance confidentiality in intergovernmental disputes and reduce embarrassment occasioned by exposure of such disputes in public through litigation.[350] Also, ADR mechanisms except for arbitration are less formal than litigation. In most cases, the rules of procedure are flexible, without formal pleadings, extensive written documentation, or strict rules of evidence.[351] This leads to expeditious and cost-effective resolution of intergovernmental disputes. As a result, this ensures that there are no delays in implementation of policies and service delivery.[352] A critical examination of Articles 159 and 189(4) of the Constitution read together with Section 81(b) of the IGRA reveals that ADR mechanisms are complementary, and not alternative to judicial processes.[353]

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[346] Laibuta (n 125) 8

[347] Council of Governors, 2nd Annual Devolution Conference held at Tom Mboya Labour College Kisumu County, from 21st April to 23rd April 2015, 14. See also NCIA, Research Report on Awareness, Perception and Uptake of Alternative Dispute Resolution in Kenya, 2021, 9.

[348] David Ngwira, '(Re) Configuring 'ADR' as Appropriate Dispute Resolution? Some Wayside Reflections' [2018] Alternative Dispute Resolution, 194.

[349] Oseko and Wambui (n 147),155.

[350] Muigua (n 124) 601. Kisumu Workshop (n 23) 80.

[351] Scott Brown, Christine Cervenak, and David Fairman, Alternative Dispute Resolution Practitioners Guide (Conflict Management Group 1998) 6

[352] Muigua (n 124) 602.

[353] Henry Murigi, 'Institutionalization of Alternative Dispute Resolution' [2020] Journal of Conflict Management and Sustainable Development,246.

The Role of Courts in Constitutional Interpretation Regarding Intergovernmental Disputes.

Article 159(2)(c) obligates the Judiciary to promote AJS. This means that the AJS framework adopted in Kenya will have to interact with the Courts and therefore a human rights framework - an appropriate balance between civic autonomy and constitutional values is essential. AJS expands human rights because its mechanisms are based on three human rights-based avenues: Article 48 which mandates the State to ensure access to justice for all; Article 10 and 28 which provide for the national values and the right to dignity; and Article 44 which enshrines every one's right to use the language and to participate in the cultural life of their choice. This human rights framework is not just philosophical, it also reflects the practical considerations of AJS.

The goal of the Constitution is to institute social change and reform by addressing the social inequalities that existed in Kenya. This means that the barriers to social equality have to be removed and replaced by a system that facilitates social inclusion. The Judiciary therefore has to ensure that the transformative character of the Constitution is sustained in all AJS processes at all times.

Recommendations and Final Thoughts.

The realization of sustainable devolution in Kenya is intricately tied to the effective resolution of inter-governmental relations (IGR) disputes. The 2010 Constitution of Kenya ushered in a devolved system of governance, creating two distinct yet interdependent levels of government national and county and envisaged a cooperative model of governance based on consultation and consensus. However, the proliferation of disputes between and within levels of government has posed significant threats to the functionality and integrity of devolution. Intergovernmental disputes in Kenya often arise due to the complex distribution of powers and responsibilities between the national government, county governments, and other entities under the devolved system established by the Constitution of Kenya, 2010.

These disputes may concern issues such as revenue allocation, devolution of functions, and the interpretation of constitutional provisions. Effective resolution of these disputes is crucial for ensuring the stability of the devolved system and promoting harmonious intergovernmental relations. Kenya has established several mechanisms for resolving intergovernmental disputes. These include constitutional provisions and institutional frameworks such as the Intergovernmental Relations Technical Committee (IGRTC), which plays a key role in fostering cooperation and dialogue between the national and county governments. Additionally, the Supreme Court of Kenya has been mandated with the authority to resolve disputes between national and county governments, particularly those concerning the interpretation of the Constitution or the division of functions between the levels of government.

The use of Alternative Dispute Resolution (ADR) mechanisms, such as mediation, arbitration, and negotiation, has proven to be an effective tool in resolving intergovernmental disputes in Kenya. ADR offers a more flexible, cost-effective, and timely means of resolving disputes compared to traditional litigation, which can be lengthy and adversarial. The constitutional recognition of ADR in resolving disputes, as reflected in Article 159 of the Constitution, encourages the use of these mechanisms in matters involving both public and private parties, including intergovernmental conflicts. Mediation, in particular, has become increasingly popular in the Kenyan context due to its ability to facilitate dialogue and build consensus between parties. The National Land Commission and the Judiciary have embraced mediation as an alternative to litigation, particularly in cases involving land and devolved governance.

ADR promotes collaboration, reduces the burden on the courts, and helps preserve working relationships between conflicting parties, which is particularly important in the context of intergovernmental disputes where continued cooperation is essential for governance. In summary, while Kenya has a robust legal framework for resolving intergovernmental disputes, the use

of ADR mechanisms is increasingly recognized as an important tool in ensuring the smooth functioning of the devolved system. ADR promotes dialogue, reduces conflicts, and ensures that disputes are resolved in a manner that upholds the principles of fairness, equity, and cooperation. To further enhance the effectiveness of ADR in intergovernmental dispute resolution, there is a need for continuous capacity building, institutional strengthening, and a commitment to ensuring that all stakeholders, including county governments and national institutions, have access to skilled mediators and facilitators.

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Judicial Intervention in Alternative Dispute Resolution: A Review of the Implications of *Churchill v Merthyr Tydfil CBC* on the Court's Power to Compel ADR in England and Wales

By: ***Gavamukulya Charles****

Abstract

Mediation has emerged as a key alternative dispute resolution (ADR) mechanism, offering parties a structured yet flexible forum to negotiate solutions with the assistance of a neutral mediator. English courts have increasingly recognised the benefits of mediation, aligning with the overriding objective under the Civil Procedure Rules to handle disputes efficiently and fairly. This paper examines the legal framework supporting mediation in England and Wales, the extent to which courts can encourage or mandate ADR, and the sanctions imposed on parties who unreasonably refuse to engage in mediation. It explores the evolution of judicial attitudes in the courts of England and Wales from the restrictive stance in Halsey v Milton Keynes General NHS Trust to the more flexible and pragmatic approach in Churchill v Merthyr Tydfil CBC. The analysis highlights how courts balance the right to access justice with the necessity of promoting ADR, drawing from key cases and comparative insights from European jurisdictions. This paper underscores the growing role of mediation in the civil justice system and its implications for future legal practice.

Introduction

Alternative Dispute Resolution (ADR) mechanisms, particularly mediation, have gained prominence as effective tools for resolving disputes outside traditional litigation (Milgo, 2021). Mediation, characterised by its voluntary nature and facilitated negotiation, empowers parties to develop mutually beneficial resolutions while maintaining control over the outcome (Blake et al., 2016). The courts of England and Wales have increasingly encouraged

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mediation to uphold the Civil Procedure Rules' overriding objective of achieving just and proportionate case management (Richbell, 2009).

The judicial perspective on mediation has evolved over time, with courts gradually recognising its advantages in terms of cost savings, time efficiency, and preserving business or personal relationships (Blake et al., 2016). However, a critical debate persists regarding the extent to which courts can compel parties to engage in mediation. The landmark case of *Halsey v Milton Keynes General NHS Trust* initially suggested that mandatory mediation would violate the right to a fair trial under Article 6 of the European Convention on Human Rights. Yet, subsequent decisions, including *Churchill v Merthyr Tydfil CBC*, have challenged this notion, affirming that courts possess the authority to stay proceedings and direct parties to engage in ADR under specific conditions.

This paper explores the judicial stance on mediation, the legal principles governing court-ordered ADR, and the consequences for parties that unreasonably refuse to mediate. By analysing key case law and legal developments, it aims to clarify the judiciary's evolving approach to mediation and its broader impact on dispute resolution within the civil justice system.

Mediation as an Alternative Dispute Resolution Mechanism

Mediation is best characterised as a type of negotiation facilitated by a neutral party as highlighted in the case of *Aird v Prime Meridian Ltd*[1]. Unless mandated by a contract, it is a voluntary process that offers flexibility within a structure of joint and private meetings where the mediator assists the parties in identifying key issues and developing their own resolution (Richbell, 2009). The parties remain in control over the dispute they wish to address and with the mediator's help, they can arrive at a solution that meets their genuine needs and interests (Blake et al., 2016). The practice of using mediation to resolve disputes is increasingly common in England and Wales as evidenced by data

[1] [2006] EWCA Civ 1866 (per May LJ at [5]).

from Alternative Dispute Resolution (ADR) providers indicating that approximately 70 to 80 per cent of cases are being resolved through mediation (Blake et al., 2016). Consequently, the court in *Dunnet v Railtrack*[2] recognised that a mediator might provide solutions which are beyond the powers of the court to provide. The primary advantages contributing to the rise in mediation usage include lower costs compared to litigation, quicker resolution times, flexibility of the process, the parties' control over the proceedings and preservation of shared future interests which may not be possible with the more adjudicative dispute resolution mechanisms (Richbell, 2009).

The overriding objective of the courts in England and Wales

The court, guided by its primary aim to handle cases fairly and at a reasonable cost, as outlined in the Civil Procedure Rules 1998 (herein referred to as "Civil Procedure Rules") from rule 1.1 to rule 1.4 and paragraph 8 of the Practice Direction on Pre-action Conduct and Protocols, has supported and promoted the use of ADR. Specifically, Civil Procedure Rule 1.4(2)(e) permits courts to encourage parties to engage in ADR during active case management in order to further court's overriding objective. In the case of *R (on the application of Cowl) v Plymouth City Council*[3] court emphasized that parties should seek to avoid litigation whenever possible. In *Dyson v Leeds City Council*[4] court recognised that utilising ADR aligns with court's overriding objective leading judges to actively promote use of ADR among parties. This is reinforced in *MD v Secretary of State for the Home Department*[5] where court held that it would not permit proceedings if issues could be resolved outside of litigation. As such, the court may order early or limited document disclosure to support ADR as demonstrated in *Mann v Mann*[6]. Additionally, parties have a responsibility to

[2] [2002] 1 WLR 2434 (per Brooke LJ at [14]).
[3] [2001] EWCA Civ 1935 (per Lord Woolf at [1] and [25]).
[4] [2000] CP Rep 42 (per Lord Woolf at [16]).
[5] [2011] EWCA Civ 453.
[6] [2014] EWHC 537.

continually consider ADR throughout the litigation process as held in *Garritt-Critchley v Ronnan*[7]. It is also crucial to acknowledge that both parties and their lawyers have an obligation to assist the court in achieving the overriding objective in Civil Procedure Rule 1.3 as was held in the case *of Gotch & Another v Enelco Ltd*[8].

When can courts encourage parties to engage in ADR?

Courts have the authority to encourage parties to explore ADR during case management conferences or pre-trial reviews (Blake et al., 2016). Mediation is particularly suitable for resolving disputes that involve negotiable issues regardless of the underlying cause of action (Blake et al., 2016). Therefore, courts have emphasized that ADR rather than litigation is the appropriate method for resolving certain cases on various occasions. For instance, in the case of *Northrop Grumman Mission Systems Europe Ltd v BAE Systems (Al Diriyah C41)*[9] court held that mediation is a viable option for resolving disputes involving contractual interpretation. In *R v Hampshire County Council*[10], court held that if a reasonable complaints or alternative process exists, then litigation may be disproportionate. In disputes between neighbours, courts have favoured settlement over litigation as shown in the case of *Faidi v Elliot Corporation*[11]. In complex property disputes between individuals where litigation costs are disproportionate to the amount in dispute, ADR is generally preferred as seen in the case of *Dribble v Pfluger*[12].

However, certain factors may render ADR unsuitable for resolving specific disputes. For example, when a case requires setting a legal precedent such as interpretation of a clause in a standard form contract as in the case of *McCool v*

[7] [2014] EWHC 1774 (at paras 25-28).
[8] [2015] EWHC 1802.
[9] [2014] EWHC 3148.
[10] [2009] EWHC 2537 (Admin).
[11] [2012] EWCA Civ 287 (per Jackson LJ).
[12] [2010] EWCA Civ 1005.

Lobo[13], ADR may not be appropriate. Other situations include cases involving allegations of fraud, the need for an urgent injunctive relief, resolving a complex point of law, or instances where the case serves as a test case (Blake et al., 2016). It should be noted that if a party unjustifiably fails to adhere to a rule, Practice Direction, or relevant Pre-Action Protocol, the court may require that party to deposit a sum of money into court under Civil Procedure Rule 3.1 (5). This measure, as held in the case of *Lazari v London and Newcastle (Camden) Ltd*[14], can be used to encourage serious consideration of ADR by the courts.

Sanctions for parties that unreasonably refuse to engage in ADR

In *Halsey v Milton Keynes General NHS Trust*[15], court outlined six non-exhaustive factors to determine whether a winning party acted unreasonably by refusing to engage in ADR. These factors are: (1) the nature of the dispute, (2) the strength of the case on its merits, (3) the extent to which other settlement efforts have been made, (4) whether the costs of the ADR process would be disproportionately high, (5) whether setting up and attending ADR would have caused prejudicial delays and (6) whether the ADR process had a reasonable likelihood of success (Blake et al., 2016). In the case of *R (on the application of Cowl)*[16], court emphasized the need for parties to justify their refusal to pursue ADR. As such, court may impose sanctions on parties who unreasonably decline to comply with an order to attempt ADR as shown in the case of *Wilson v Haden (t/a Clyne Farm Centre)*[17] where a defendant incurred a cost penalty for failing to engage in ADR despite the presence of a court directive to do so.

Following *Halsey*[18], the courts have most commonly used adverse cost orders

[13] [2002] EWCA Civ 1760.
[14] [2013] EWHC 97 (TCC).
[15] [2004] EWCA Civ 576.
[16] R (on the application of Cowl) (n 3).
[17] [2013] EWHC 1211 (QB).
[18] Halsey (n 15).

against successful claimants who refuse to engage in ADR as a means of compelling parties to engage in ADR (Milgo, 2021). Under Civil Procedure Rules 44.2(6) and 44.2(7), courts possess broad authority to issue cost orders. For instance, in *Thornhill v Nationwide Metal Recycling*[19] , the claimant was ordered to cover 80 per cent of the defendant's costs for failing to comply with the provisions of the then applicable Practice Direction on Pre-action Conduct. Courts may also impose other sanctions such as striking out proceedings, as seen in the case of *Binns v Firstplus Financial Group Plc*[20], staying litigation proceedings, as in *Andrew v Barclays Bank Plc*[21] or awarding indemnity costs as demonstrated in *Forstater v Python (Monty) Pictures Ltd*[22].

Can courts compel parties to engage in ADR? - Outlook from *Halsey*

The issue of whether courts can compel parties to engage in ADR has been a subject of debate (Milgo, 2021). In *Halsey*[23] , Dyson LJ commented that forcing parties to use ADR would constitute an unacceptable restriction on their right of access to the courts as established in *Bremer Vulcan Schiffbau und Maschinenfabrik v South India Shipping Corp Ltd*[24], and would therefore breach Article 6 of the European Convention on Human Rights. Following this, in *Mann*[25], court declined to enforce an agreement that barred a party from seeking judicial enforcement until mediation had occurred, ruling that such a requirement would unjustifiably limit the right of access to the courts. Consequently, the court held that it could not compel parties to participate in mediation.

[19] [2011] EWCA Civ 919.
[20] [2013] EWHC 2436 (QB).
[21] [2012] CTLC 115.
[22] [2013] EWHC 3759 (Ch).
[23] Halsey (n 12).
[24] [1981] E.C.C 151 at [9].
[25] Mann (n 6).

The Court of Appeal's reasoning in *Halsey*[26] sparked controversy since it overlooked earlier rulings in cases such as *Shirayama Shokusan Co Ltd v Danovo Ltd (No.2)*[27], *Muman v Nagasema*[28] and *Guinle v Kirreh*[29] where it had been established that courts could direct parties to attempt ADR even if one party objected. Ahmed (2024) criticized *Halsey*[30] for its reliance on the European Court of Human Rights case *Deweer v Belgium*[31], arguing that the Court of Appeal failed to distinguish between arbitration, which permanently halts court proceedings and mediation, which merely imposes a temporary delay without infringing on the right to a fair trial. As a result, *Halsey*[32] led courts to favour penalising parties through cost sanctions for unreasonably refusing ADR (Milgo, 2021). This focus on cost penalties gave rise to two divergent judicial approaches (Ahmed, 2024). The first, exemplified in *Gore v Naheed*[33],aligns with *Halsey*[34] by rejecting compulsory ADR in favour of safeguarding the parties' right to judicial determination. The second, seen in *Thakkar v Patel*[35], effectively compels parties to engage in ADR through the threat of cost sanctions. Consequently, the case law following *Halsey*[36] has been marked by inconsistency and contradiction (Ahmed, 2024).

European jurisdictions have addressed the issue of whether courts can mandate parties to engage in mediation as a prerequisite to initiating proceedings. In *Alassini v Telecom Italia SpA*[37], the Court of Justice of the

[26] Halsey (n 15).
[27] [2004] EWHC 390 (Ch).
[28] [2000] 1 WLR 299 CA.
[29] [2000] C.P. Rep. 62 Ch D.
[30] Halsey (n 12).
[31] (A/35) [1980] E.C.C. 169; (1979-80) 2 E.H.R.R. 439 ECtHR.
[32] Halsey (n 15).
[33] [2017] EWCA Civ 369.
[34] Halsey (n 12).
[35] [2017] EWCA Civ 117; [2017] 2 Costs L.R. 233.
[36] Halsey (n 15).
[37] (C-301/08, C-319/08 and C-320/08) EU:C:2010: 14; [2010] C.M.L.R. 15.

European Union (CJEU) held that requiring parties to participate in a non-adjudicative process would not violate Article 6 provided they retain the option to proceed to court if no settlement is reached. This principle was reaffirmed in *Menini v Banco Popolare Societa Cooperativa*[38] where the CJEU upheld the legality of compulsory mediation. In a more recent development, *Lomax v Lomax*[39], confirmed that courts could compel unwilling parties to participate in judicial Early Neutral Evaluation under Civil Procedure Rule 3.1(2)(m). However, despite these advancements, courts continued to treat *Halsey*[40] as binding as seen in the case of *Mills and Reeve Trust Corp v Martin*[41] (Milgo, 2021).

The Court of Appeal's decision in *Churchill v Merthyr Tydfil CBC*

In *Churchill v Merthyr Tydfil CBC*[42] court examined whether *Halsey*[43] was binding and whether court could stay proceedings for, or order, the parties to engage in a non-court-based dispute resolution process. Court held that *Halsey*[44] was not binding because Dyson LJ's comments were *obiter dicta* as defined in *R (on the application of Youngsam) v Parole Board*[45], rather than *ratio decidendi*. This was so because the Court of Appeal in *Halsey*[46] focused on whether cost sanctions should be imposed on successful parties who refused mediation rather than on whether courts had the authority to compel parties to engage in ADR (Ahmed, 2024). Court further held that it has the authority to lawfully stay proceedings or direct parties to engage in ADR provided such orders do not undermine the essence of a claimant's right to a fair trial, are

[38] (C-75/16) EU:C: 2017:457.
[39] [2019] EWCA Civ 1467.
[40] Halsey (n 15).
[41] [2023] EWHC 654.
[42] [2023] EWCA Civ 1416; [2024] Costs L.R. 249.
[43] Halsey (n 15).
[44] Ibid.
[45] [2019] EWCA Civ 229.
[46] Halsey (n 12).

aimed at a legitimate objective, and are proportionate to achieving that objective (Ahmed, 2024). Staying proceedings is a power of the court under Civil Procedure Rules 3.1(2)(f) and 26.4 and proceedings can resume automatically when the stay no longer applies as seen in the case of *UK Highways A55 Ltd v Hyder Consulting (UK) Ltd*[47]. While courts can initially stay proceedings for one month, they may extend this period under Civil Procedure Rule 26.4(3). Lastly, court declined to create a definitive list of factors to guide decisions on compelling ADR reasoning that such determinations should be based on the specific circumstances of each case.

Implications of the Court of Appeal's decision in *Churchill*

The reasoning in *Churchill*[48] is supported by its alignment with the public aspect of procedural proportionality which emphasizes the equitable use and management of the courts' finite resources (Ahmed, 2024). This principle ensures that no single claim consumes more than its fair share of these resources and is consistent with the overriding objective outlined in Civil Procedure rules 1.1 to 1.4 and affirmed in *Gotch & Another*[49]. The connection between ADR and the principle of proportionality was explained in *PGF II SA v OMFS Co 1 Ltd*[50] where court highlighted that ADR's cost efficiency contributes to proportionality by helping parties and the court to manage limited resources effectively (Ahmed, 2024). Consequently, courts can engage in constructive dialogue early in the process to identify the most suitable ADR procedure for the dispute which facilitates significant resource savings for both the parties and the judicial system.

The decision in *Churchill*[51] clarifies the misunderstanding surrounding

[47] [2012] EWHC 3505 (TCC).
[48] Churchill (n 42).
[49] Gotch & Another (n 8).
[50] [2013] EWCA Civ 1288.
[51] Churchill (n 42).

compulsory ADR by affirming the courts' authority to control and regulate their own processes (Ahmed, 2024). This effectively overcomes the restrictive interpretation in *Halsey*[52] which had been noted in *AB v Ministry of Defence*[53] and highlighted through the conflicting judicial approaches in *Thakkar*[54] and *Gore*[55]. It confirms that courts have the power to delay judicial determination to facilitate ADR (Ahmed, 2024). This aligns with the ruling in *Watson v Sadiq*[56] where it was held that courts encouraging settlement through frequent adjournments for negotiation does not violate common law principles of fairness of Article 6 of the European Convention on Human Rights.

Churchill[57] also addresses the challenges arising from using cost sanctions as an indirect method for compelling parties to engage in ADR. Courts can now impose appropriate sanctions for breaches of ADR orders which may include penalising the defaulting party in costs as shown in *Conway v Conway*[58]. This sets the stage for courts to adopt a more consistent and principled approach to compulsory ADR (Ahmed, 2024).

The decision in *Churchill*[59] also encourages a shift in how the judiciary views and promotes ADR procedures. For instance, in *Jones v Tracey*[60] court made a distinction between mediation and ADR in general. This indicates a broader judicial understanding and appreciation of ADR as involving various methods and not just mediation as had earlier been construed which allows to further the overriding objective in encouraging and facilitating appropriate ADR procedures. (Ahmed, 2024).

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[52] Halsey (n 15).
[53] [2009] EWHC 3516 (Admin).
[54] Thakkar (n 28).
[55] Gore (n 27).
[56] [2013] EWCA Civ 822.
[57] Churchill (n 42).
[58] [2024] EW Misc 19 (CC).
[59] Churchill (n 42).
[60] [2023] EWHC 2242 (Ch).

Although *Churchill*[61]primarily addresses the authority of courts to stay proceedings in favour of ADR, it also has significance for the pre-action stage of disputes. This is because pre-action protocols which govern how parties behave before going to court have become more closely linked with the court process as noted by the court in *Jet2 Holidays Ltd v Hughes*[62]. Therefore, by moving away from *Halsey*[63] and confirming that compulsory ADR is lawful, the *Churchill*[64] decision has not only boosted ADR's role within the civil justice system but it has also reinforced the connection between ADR and the civil court process (Ahmed, 2024).

In conclusion, the decision in *Churchill*[65] is important since it departs away from the controversy that was initiated by Dyson LJ's comments in *Halsey*[66] which have led to contradicting case law on the issue of the ability of courts to compel parties to engage in ADR. Churchill is even more important because it aligns with the court's overriding objective to deal with cases justly and in a proportionate manner since it allows for the use of ADR which already espouses virtues of fairness, cost-effectiveness and time-efficiency.

[61] Churchill (n 42).
[62] [2019] EWCA Civ 1858.
[63] Halsey (n 15).
[64] Churchill (n 42).
[65] Ibid.
[66] Halsey (n 15).

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4. Andrew v Barclays Bank Plc [2012] CTLC 115.
5. Binns v Firstplus Financial Group Plc [2013] EWHC 2436 (QB).
6. Bremer Vulcan Schiffbau und Maschinenfabrik v South India Shipping Corp Ltd [1981] E.C.C 151 at [9].
7. Churchill v Merthyr Tydfil CBC [2023] EWCA Civ 1416; [2024] Costs L.R. 249.
8. Conway v Conway [2024] EW Misc 19 (CC).
9. Deweer v Belgium (A/35) [1980] E.C.C. 169; (1979-80) 2 E.H.R.R. 439 ECtHR.
10. Dribble v Pfluger [2010] EWCA Civ 1005.
11. Dunnet v Railtrack [2002] 1 WLR 2434 (per Brooke LJ at [14]).
12. Dyson v Leeds City Council [2000] CP Rep 42 (per Lord Woolf at [16]).
13. Faidi v Elliot Corporation [2012] EWCA Civ 287 (per Jackson LJ).
14. Forstater v Python (Monty) Pictures Ltd [2013] EWHC 3759 (Ch).
15. Garritt-Critchley v Ronnan [2014] EWHC 1774 (at paras 25-28).
16. Gotch & Another v Enelco Ltd [2015] EWHC 1802.
17. Gore v Naheed [2017] EWCA Civ 369.
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25. McCool v Lobo [2002] EWCA Civ 1760.

26. MD v Secretary of State for the Home Department [2011] EWCA Civ 453.
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Making Business Registration Information More Accessible in Kenya: A Call to Operationalize the Access to Information Act, 2016

By: Michael Sang *

Abstract

This paper examines the imperative of making business registration information more accessible in Kenya, emphasizing the operationalization of the Access to Information Act, 2016. It explores the critical role of such information in crime prevention, evaluates Kenya's current legal frameworks, and draws lessons from the UK and US to address deficiencies. By advocating for reforms that enhance transparency and regulatory compliance, the study underscores the significance of accessible business data in fostering a conducive environment for economic growth and accountability.

***Key Words**: Business Registration Information; Access to Information Act, 2016, Kenya*

1. Introduction

The pursuit of making business registration information more accessible in Kenya underscores a critical avenue for enhancing transparency, fostering economic development, and combating corruption.

[1] This paper underscores the notion of operationalizing the Access to Information Act, 2016, as a vital step towards achieving this goal. It explores the current landscape of business registration in Kenya, identifying gaps in accessibility and efficiency that hinder stakeholder engagement and regulatory compliance. By drawing parallels with global best practices, this discussion emphasizes the importance of robust legal frameworks and technological integration in facilitating access to business information, ultimately advocating

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[1] Commission on Administrative Justice. (2020). *Handbook on best practices on implementation on access to information in Kenya*. AHADI Toolkit. Available at https://countytoolkit.devolution.go.ke/node/117 accessed 5 February 2024

for systemic reforms to empower citizens, investors, and regulatory bodies alike.

In this paper, I embark on a comprehensive examination of the significance of making business registration information more accessible in Kenya, with a focused lens on the operationalization of the Access to Information Act, 2016. This sets the stage by outlining the pivotal role of business registration information in the prevention and detection of crime, serving as a cornerstone for law enforcement and regulatory oversight. By analysing the legal frameworks underpinning business registration, including the Companies Act, 2015, and the amendments introduced by the Anti-Money Laundering and Combating of Terrorism Financing Laws (Amendment) Act, 2023, the paper delves into the nuances of Kenya's approach towards ensuring transparency and compliance in the business sector.

Further, the paper explores the deficiencies within Kenya's current system and draws lessons from the regulatory practices of the United Kingdom and the United States, particularly in the realms of beneficial ownership disclosure and public interest exceptions. This comparative analysis aims to shed light on the potential pathways Kenya can adopt to enhance its legal and institutional mechanisms for business registration. Moreover, the discussion extends to the innovative measures introduced by the Conflict-of-Interest Bill 2023, examining its role in complementing the Access to Information Act by establishing a robust framework for managing conflicts of interest among public officials, thereby reinforcing the principles of transparency and accountability. Through this, the study establishes a foundational understanding of the challenges and opportunities present in Kenya's quest to improve access to business registration information. By integrating insights from global best practices, this paper endeavours to propose strategic recommendations that can significantly bolster Kenya's legislative and regulatory infrastructure, ultimately fostering a transparent, accountable, and conducive business environment.

2. The Role of Business Registration Information in Prevention and Detection of Crime

2.1 Business Registration Information as a Law Enforcement Tool

Business registration information plays a pivotal role in the prevention and detection of crime, serving as a fundamental tool for law enforcement agencies.[2] By mandating businesses to register and disclose specific information, authorities can maintain a comprehensive database that aids in ensuring transparency, compliance with legal standards, and the integrity of economic transactions within the market.[3] This information becomes crucial in three main areas:

1. Source of Facts

Business registration records serve as a verifiable source of facts about the existence, ownership, and legal status of businesses operating within a jurisdiction.[4] This information is crucial for law enforcement agencies in the investigation of financial crimes, such as fraud, money laundering, and tax evasion. By having access to accurate and up-to-date business information, authorities can quickly ascertain the legitimacy of businesses and their transactions.[5] This is particularly important in today's global economy, where businesses can operate across borders and may engage in complex financial arrangements that can be exploited for illegal purposes[6].

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[2] ibid
[3] Farrell, B.R., and Franco, J.R. (1999). "The Role of the Auditor in the Prevention and Detection of Business Fraud: SAS No. 82." Western Criminology Review, 2(1). Available at: http://www.westerncriminology.org/documents/WCR/v02n1/farrell/farrell.html accessed 5 February 2024
[4] ibid
[5] ibid
[6] ibid

2. Record of Transactions

Businesses are often required to keep detailed records of their financial transactions as part of their registration and compliance requirements.[7] These records can be critical in investigations involving financial crimes. They allow law enforcement agencies to trace the flow of money, identify suspicious transactions, and establish connections between different entities involved in illegal activities.[8] For example, in cases of money laundering, authorities can use these records to uncover the layering and integration of illicit funds into the legitimate economy.[9]

3. Basis of Evidence

Finally, business registration information can serve as a basis of evidence in legal proceedings against entities accused of engaging in criminal activities.[10] The documentation provided at the time of registration, along with any subsequent filings and transaction records, can be used to establish patterns of behaviour, prove the existence of fraudulent schemes, or demonstrate non-compliance with legal obligations.[11] This evidence is crucial in securing convictions and enforcing the law.[12]

Operationalizing the Access to Information Act, 2016

For Kenya, the operationalization of the Access to Information Act, 2016, is a significant step towards making business registration information more accessible to not only law enforcement agencies but also to the public, including potential investors and other stakeholders. By improving access to this information, the Act can help enhance transparency, foster a more conducive business environment, and strengthen the mechanisms for crime

[7] ibid
[8] ibid
[9] ibid
[10] ibid
[11] ibid
[12] ibid

prevention and detection.

2.2 Types of Criminal Justice Processes Requiring Business Registration Information

Business registration information is indispensable across various criminal justice processes, particularly in investigations and prosecutions involving economic crimes.[13] The complexity and sophistication of modern financial systems mean that such information is critical for unveiling illegal activities hidden within legitimate business operations.[14] There are various ways business registration information is utilized in the context of specific types of crimes:

1. Insider Trading

Insider trading involves trading a public company's stock or other securities (such as bonds or stock options) by individuals with access to non-public, material information about the company.[15] Business registration information helps in identifying the relationships between corporate insiders and their associates, facilitating the detection of illicit trades based on privileged information.[16]

2. Securities Fraud

Securities fraud includes a wide range of illegal activities, such as misrepresenting a company's financials, conducting Ponzi schemes, or manipulating stock prices.[17] Business registration data is crucial for law enforcement agencies to verify the legitimacy of companies and their financial statements, track ownership and affiliations, and investigate claims of

[13] ibid
[14] ibid
[15] ibid
[16] ibid
[17] ibid

fraudulent activities.[18]

3. Accounting Fraud

Accounting fraud involves the manipulation of a company's financial statements to present a falsely positive picture of its financial health.[19] Access to business registration information allows investigators to cross-reference the reported financial data, ownership details, and the history of compliance filings, aiding in the detection of discrepancies and fraudulent reporting.[20]

4. Embezzlement

Embezzlement is the act of withholding assets for the purpose of conversion of such assets, by one or more individuals to whom the assets were entrusted.[21] Business registration information provides a framework for understanding the structure of a company and the roles of individuals who may have the opportunity to misappropriate funds, thereby serving as a basis for investigating suspected embezzlement cases.[22]

5. Tax Evasion

Tax evasion is the illegal evasion of taxes by individuals, corporations, and trusts.[23] Business registration information, including ownership details and financial records, is vital for tax authorities to assess the accuracy of tax returns filed by businesses, identify undeclared income, and detect other forms of tax non-compliance.[24]

[18] ibid
[19] ibid
[20] ibid
[21] ibid
[22] ibid
[23] ibid
[24] ibid

6. Money Laundering and Terrorism Financing

Money laundering is the process of making large amounts of money generated by a criminal activity, such as drug trafficking or terrorist funding, appear to be earned legally.[25] Terrorism financing involves providing financial support to terrorists or terrorist organizations.[26] Business registration information is critical in tracing the flow of money through various entities, identifying suspicious transactions, and uncovering the networks involved in these illegal activities.[27] It helps in mapping out the financial infrastructure used by criminals and terrorists to launder money and finance their operations.[28]

In each of these cases, business registration information not only aids in initiating investigations but also in gathering evidence for prosecutions.[29] It enables law enforcement agencies to establish the legal existence of entities, understand their business operations, trace financial transactions, and identify the individuals involved.[30] The effectiveness of criminal justice processes in addressing these crimes significantly depends on the accessibility, accuracy, and comprehensiveness of business registration data.[31]

2.3 Examples of Kenyan Cases

The COVID billionaires scandal in Kenya is a prominent example where business registration information was crucial for criminal justice processes. This scandal involved individuals and companies allegedly benefiting unlawfully from COVID-related tenders, with accusations of multi-billion deals being awarded and the failure to supply the required emergency

[25] ibid
[26] ibid
[27] ibid
[28] ibid
[29] ibid
[30] ibid
[31] ibid

materials, leading to significant public fund misappropriation.[32] The Ethics and Anti-Corruption Commission (EACC) conducted investigations into these allegations, focusing on the irregular expenditure of public funds through the Kenya Medical Supplies Authority (KEMSA).[33] This case underscores the importance of business registration information in tracing and addressing corruption and misappropriation related to public procurement and emergency response funds.[34]

The National Youth Service (NYS) scandal in Kenya is another significant case demonstrating the critical role of business registration information in criminal justice processes, especially in uncovering and prosecuting cases of corruption and fraud. This scandal involved the misappropriation of funds amounting to approximately Ksh 791 million.[35] High-profile individuals and entities were implicated, highlighting complex networks of corruption within public institutions and the private sector.[36]

In recent developments, a Nairobi court ruled that businesswoman Josephine Kabura and four others had a case to answer in connection to the NYS corruption case.[37] This decision came after a thorough examination of the evidence and the failure of some key witnesses to testify, which led to the acquittal of other suspects, including former NYS Director General Nelson Githinji, former Principal Secretary Peter Mangiti, and businessman Ben Gethi, due to insufficient evidence linking them to the theft.[38] The prosecution's reliance on general information, not substantiated by concrete electronic and

[32] ibid
[33] ibid
[34] Geoffrey Lutta (2023) "EACC Explains Progress of Covid Billionaires Investigations." Available at: Kenyans.co.ke accessed 5 February 2024
[35] ibid
[36] ibid
[37] ibid
[38] ibid

documentary evidence, played a role in these acquittals.[39]

These cases underline the complexities involved in prosecuting financial crimes and the importance of having robust systems for business registration and monitoring. They also illustrate the challenges law enforcement and judicial systems face in gathering and presenting sufficient evidence to secure convictions in corruption cases. The outcomes of these cases continue to shape public discourse on accountability and the effectiveness of anti-corruption efforts in Kenya.

3. An Appraisal of the Kenyan Legal Framework for Access to Business Registration Information

3.1 Companies Act.

The Companies Act represents a significant legal framework in Kenya aimed at streamlining business operations by making it easier for entities to establish a presence and operate within the country. This comprehensive piece of legislation incorporates developments in technology and procedure to enhance the ease of doing business and codifies principles of corporate governance.[40]

3.1.1 Notable Features of the Companies Act.

- Simplification for Entrepreneurs: The Act introduces the concept of sole membership[41] for private companies, removing the previous requirement for at least two members for company incorporation. This change is designed to facilitate entrepreneurial activity in Kenya.

- Flexibility in Company Structure: It allows private companies to have a single director and eliminates the need for a company secretary for companies with a paid-up capital not exceeding Ksh. 5 million.[42]

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[39] Richard Kamau (2023) "Ben Gethi and Co-Defendants Cleared of Sh791m NYS Scandal Charges." Available at: Nairobi Wire accessed 5 February 2024
[40] Companies Act
[41] Companies Act, sec 193
[42] Ibid, sec 243 (1)

- Modern Governance Standards: Codification of directors' fiduciary duties[43] and introduction of comprehensive financial reporting requirements[44] align with international best practices in corporate governance.

- Enhanced Transparency and Accountability: Requirements for the filing of financial statements and other critical documents with the Registrar of Companies aim to boost transparency and accountability.[45]

- **Adaptation to Technological Advancements**: The Act permits companies to notify shareholders of announcements through their website[46] and allows for electronic and written resolutions by members.[47]

3.1.2 Weaknesses of the Companies Act.

While the Companies Act has introduced several progressive measures, there are areas where improvements could be beneficial.

- Complexity and Volume: The Act is quite voluminous, which might pose a challenge for smaller entities in terms of compliance and understanding all the provisions.

- Implementation and Enforcement Challenges: As with any legislative framework, the effectiveness of the Companies Act depends on the implementation and enforcement mechanisms, which can be challenging and require time to fully materialize.

The Companies Act marks a significant step towards modernizing Kenya's legal framework for businesses. By addressing the identified weaknesses and building on the strengths of the Act, Kenya can enhance its business environment, making it more attractive for both local and international investors.

3.2 Anti-Money Laundering and Combating of Terrorism Financing Laws (Amendment) Act, 2023

The Anti-Money Laundering and Combating of Terrorism Financing Laws

[43] Ibid, section 140-147
[44] Ibid, sec 645,
[45] Ibid, sec 635-652
[46] Ibid, sec 670, 672, 283
[47] Ibid, sec 272, 273

(Amendment) Act, 2023, introduces significant updates to Kenya's legal framework to enhance the fight against money laundering and terrorism financing. Notable features include the introduction of simplified extradition processes for fugitive criminals[48], expanded definitions and amendments to existing laws to tighten control and oversight, and enhanced powers for regulatory authorities to conduct inspections[49], impose sanctions[50], and ensure compliance. These amendments aim to strengthen Kenya's capacity to prevent, detect, and prosecute financial crimes effectively.

However, potential weaknesses may arise from challenges in implementing these broad and complex amendments, including the need for sufficient resources, training for enforcement agencies, and international cooperation. Ensuring the effectiveness of these changes may require ongoing assessment and possibly further refinement to address any practical obstacles encountered during their application.

3.3 Access to Information Act, 2016

The Access to Information Act enacts provisions to enhance transparency and accountability by granting public access to information held by government entities and certain private bodies.[51] Notably, it outlines the right to information,[52] procedures for accessing information[53], and exceptions to

[48] Anti-Money Laundering and Combating of Terrorism Financing Laws (Amendment) Act, 2023 Sec 10A of The Extradition (Contiguous and Foreign Countries)) Act (Cap. 76) & 13A of Extradition (Commonwealth Countries) Act (Cap. 77)

[49] Ibid, sec 12B of Capital Markets Act (Cap. 485A), sec 196 B of Insurance Act (Cap. 487), sec 33D of Banking Act (Cap. 488), sec 36B & 36C of The Proceeds of Crime and Anti-Money Laundering Act, 2009 (No. 9 of 2009).

[50] The Proceeds of Crime and Anti-Money Laundering Act, 2009 (No. 9 of 2009), sec 36C

[51] Access to Information Act, long title; art 35, Constitution of Kenya 2010

[52] Access to Information Act, part II

[53] Ibid, part III

disclosure[54]. It also establishes mechanisms for appealing decisions related to information requests[55] and specifies offenses and penalties for non-compliance.[56]

However, potential weaknesses include the broad scope of exemptions which could limit access to information, the act's implementation challenges, and the reliance on discretionary decisions by information officers, which may affect the consistency of information access. Additionally, the effectiveness of the Act could be hindered by limited public awareness and the capacity of public entities to manage information requests efficiently.

3.4 The Conflict-of-Interest Bill 2023

The Conflict-of-Interest Bill 2023 presents a comprehensive framework aimed at managing and regulating conflicts of interest within the public sector.[57] This statute introduces a legal duty for public officers to avoid conflicts of interest,[58] disclose personal interests that may affect their official duties,[59] and mandates the establishment of registers for conflict of interest[60] and gifts received[61]. This aligns with the Access to Information Act, 2016, by promoting transparency, accountability, and integrity among public officials.[62] By requiring disclosures and regulating conflicts, the bill complements the Access to Information Act's objectives, ensuring that public access to information is not compromised by undisclosed interests or conflicts within the public service. Together, these statutes enhance the legal infrastructure supporting ethical governance and public trust in Kenya.[63]

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[54] Ibid, sec 6
[55] Ibid, sec 9 (4) (d)
[56] Ibid, sec 28
[57] The Conflict-of-Interest Bill 2023, long title
[58] Ibid, sec 9
[59] ibid
[60] Ibid, sec 24
[61] Ibid, sec 16
[62] ibid
[63] ibid

4. Operationalizing Access to Business Registration Information in Kenya: Lessons from United Kingdom and United States of America

4.1 Reasonable Access to Beneficial Ownership Information

4.1.1 Deficiencies of the Kenyan system and Lessons from United States of America

To operationalize access to business registration information in Kenya, examining the United Kingdom and the United States' systems reveals valuable lessons. The Companies Act provides that a Company should keep a register of beneficial owners.[64] However, Kenya's system shows deficiencies in providing reasonable access to beneficial ownership information, often due to limited transparency. In contrast, the United States emphasizes comprehensive disclosure requirements for beneficial ownership to combat money laundering and financial crimes, ensuring greater transparency.[65] By adopting similar rigorous disclosure standards and enhancing the regulatory framework, Kenya can improve access to beneficial ownership information, thereby strengthening its financial oversight and combating illicit activities.

4.2 Public Interest Basis for Exceptional Disclosure

4.2.1 Deficiencies of the Kenyan system and Lessons from United Kingdom

Kenya's system faces deficiencies in balancing transparency with privacy, particularly regarding exceptional disclosures in the public interest. In contrast, the United Kingdom's approach underlines the importance of public interest in guiding the disclosure of sensitive information, emphasizing accountability and the prevention of financial crimes.[66] The UK model teaches the value of clear guidelines and safeguards to ensure that disclosures serve

[64] Companies Act, sec 93A

[65] FinCEN 'Beneficial Ownership Information Reporting'. Available at https://www.fincen.gov/boi accessed 6 February 2024

[66] Information Commissioner's Office (ICO) ICO Guidance on Substantial Public Interest Conditions. Available at https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/lawful-basis/special-category-data/what-are-the-substantial-public-interest-conditions/ accessed 6 February 2024

the public interest, suggesting that Kenya could benefit from integrating similar principles to enhance its regulatory framework for business registration information.

4.3 Register of Overseas Entities

4.3.1 Deficiencies of the Kenyan system and Lessons from United Kingdom

Kenya's system for managing information on overseas entities and their business activities within its jurisdiction faces challenges in tracking and regulating foreign investments effectively. The United Kingdom's approach, particularly the establishment of a Register of Overseas Entities, offers valuable lessons. It mandates overseas entities owning or buying property to declare their beneficial owners, enhancing transparency and combating illicit financial flows.[67] Adopting a similar registry in Kenya could address deficiencies by ensuring better oversight and accountability of foreign investments, thus strengthening economic security and regulatory compliance.

4.4 Inclusion of a Legal Duty to Update Business Registration Information

4.4.1 Deficiencies of the Kenyan system and Lessons from United Kingdom

Kenya's system currently lacks a robust legal duty for entities to regularly update their business registration information, leading to outdated or inaccurate data in the business registry. The United Kingdom addresses this issue by imposing strict legal obligations on companies to update their information annually or face penalties. This ensures that the business registry remains current and reliable, enhancing transparency and trust in business operations.[68] Kenya could benefit from adopting similar legal duties, ensuring that businesses provide up-to-date information, facilitating better governance and compliance monitoring.

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[67] The Register of Overseas Entities came into force in the UK on 1 August 2022 through the new Economic Crime (Transparency and Enforcement) Act 2022.

[68] Companies House (2023): 'Guidance: Filing your company's confirmation statement. Available at https://www.gov.uk/guidance/confirmation-statement-guidance accessed 6 February 2024

Conclusion

Enhancing the accessibility of business registration information in Kenya, through the operationalization of the Access to Information Act, 2016, is pivotal for promoting transparency, accountability, and economic growth. This paper has highlighted the critical role of accessible business information in combating crime, informed by lessons from the UK and US, and underscored by Kenya's legislative efforts. Moving forward, Kenya must address existing deficiencies by embracing technological advancements and adopting best practices from global counterparts to foster a more transparent, efficient, and inclusive business environment.

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7. Companies House (2023): 'Guidance: Filing your company's confirmation statement. Available at https://www.gov.uk/guidance/confirmation-statement-guidance
8. Constitution of Kenya 2010
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10. Extradition (Commonwealth Countries) Act (Cap. 77)
11. Farrell, B.R., and Franco, J.R. (1999). "The Role of the Auditor in the Prevention and Detection of Business Fraud: SAS No. 82." Western Criminology Review, 2(1). Available at: http://www.westerncriminology.org/documents/WCR/v02n1/farrell/farrell.html
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19. The Proceeds of Crime and Anti-Money Laundering Act, 2009 (No. 9 of 2009)

Closing the Biodiversity Financing Gap

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

Abstract

This paper critically examines the need to close the biodiversity financing gap. The paper argues that biodiversity financing plays a vital role in strengthening the conservation of biodiversity at all levels. However, the paper notes that access to biodiversity financing remains a challenge especially in developing countries undermining biodiversity conservation efforts. The paper proposes measures towards closing the biodiversity financing gap towards sound biodiversity conservation for Sustainable Development.

1.0 Introduction

Biodiversity and the ecosystem services it underpins are essential for Sustainable Development and human well-being. Biodiversity supports vital resources including food, air, water, and energy which are necessary for sustaining life on the planet[1]. Biodiversity has been described as the foundation of healthy communities[2]. It drives the multitude of ecosystem services that support our daily lives[3]. It has been argued that from the pollination of crops by bees, to the natural filtration of water by wetlands, to the crucial carbon

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[1] Buttke. D., Allen. D., & Higgins. C., 'Benefits of Biodiversity to Human Health and Well-being' Available at https://www.nps.gov/articles/parksciencev31-n1_buttke_etal-htm.htm (Accessed on 12/04/2025)

[2] Smith. M., 'Biodiversity as the Foundation of Healthy Communities' Available at https://edenthriving.org/biodiversity-as-the-foundation-of-healthy-communities/ (Accessed on 12/04/2025)

[3] Ibid

capture performed by vast forests, biodiversity is key to the endurance and adaptability of ecosystems[4]. According to the World Health Organization (WHO), healthy communities rely on well-functioning ecosystems and their rich biodiversity[5]. Such ecosystems provide clean air, fresh water, medicines and ensure food security[6]. They also limit disease and stabilize the climate[7].

Despite being vital for human health and well-being, the planet is witnessing a rapid decline and disappearance of biological diversity including animals, plants and ecosystems[8]. The loss of biodiversity is impacting the availability of critical ecosystem services including food, water, clean air, and energy[9]. Global biodiversity loss threatens essential ecosystem services, including pollination, soil fertility, and water purification, with direct consequences for human health. It is also fueling public health risks globally[10]. Further, it has been argued that changes in biodiversity and ecosystems can affect livelihoods, income, local migration and may even cause or increase conflicts[11]. As a result, biodiversity conservation has become a vital goal for the global community.

The *Convention on Biological Diversity*[12] seeks to achieve sound conservation of biodiversity for Sustainable Development. In order to achieve this goal, the Convention aims to foster the conservation of biological diversity, the

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[4] Ibid
[5] World Health Organization., 'Biodiversity and Health' Available at Available at https://www.who.int/news-room/fact-sheets/detail/biodiversity-and-health#:~:text=Biodiversity%20loss%20can%20have%20significant,cause%20or%20exacerbate%20political%20conflict (Accessed on 12/04/2025)
[6] Ibid
[7] Ibid
[8] United Nations Climate Change., 'What is the Triple Planetary Crisis?' Available at https://unfccc.int/news/what-is-the-triple-planetary-crisis (Accessed on 12/04/2025)
[9] Ibid
[10] World Health Organization., 'Biodiversity and Health' Op Cit
[11] Ibid
[12] Convention on Biological Diversity, 5 June 1992 (1760 U.N.T.S. 69)

sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources[13]. In addition, the United Nations *2030 Agenda for Sustainable Development*[14] also sets out the need for sound conservation of biodiversity for Sustainable Development. Under the Agenda, Sustainable Development Goal (SDG) 15 seeks to *inter alia* halt the loss of biodiversity for Sustainable Development[15]. It urges countries to take urgent and significant action to reduce the degradation of natural habitats, halt the loss of biodiversity, and protect and prevent the extinction of threatened species[16]. Further, the *Kunming-Montreal Global Biodiversity Framework (GBF)*[17] was adopted towards strengthening efforts to conserve biodiversity worldwide for Sustainable Development. The Framework aims to halt and reverse biodiversity loss and ensure sustainable use of biodiversity towards meeting the objectives of the Convention on Biological Diversity and enhancing the role of biodiversity in Sustainable Development[18]. Sound biodiversity conservation is therefore a crucial global ideal towards Sustainable Development.

This paper critically examines the need to close the biodiversity financing gap. The paper argues that biodiversity financing plays a vital role in strengthening the conservation of biodiversity at all levels. However, the paper notes that access to biodiversity financing remains a challenge especially in developing countries undermining biodiversity conservation efforts. The paper proposes

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[13] Ibid, article 1
[14] United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Available at https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainabl e%20Development%20web.pdf (Accessed on 12/04/2025)
[15] Ibid
[16] Ibid
[17] Convention on Biological Diversity., 'Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity: 15/4. Kunming-Montreal Global Biodiversity Framework' Available at https://www.cbd.int/doc/decisions/cop-15/cop-15-dec-04-en.pdf (Accessed on 12/04/2025)
[18] Ibid

measures towards closing the biodiversity financing gap towards sound biodiversity conservation for Sustainable Development.

2.0 Biodiversity Finance: Promises and Pitfalls

Biodiversity finance involves raising and managing capital and using financial and economic tools and incentives to support sound biodiversity conservation globally[19]. It entails leveraging and effectively managing economic incentives, policies, and capital to achieve the long-term well-being of nature and our society[20]. It has been pointed out that biodiversity finance covers expenditures that contribute to biodiversity conservation, restoration or sustainable use, whether by directly targeting these objectives or by having positive effects on them ('nature-positive')[21].

Biodiversity finance is drawn from various sources including public domestic expenditures, international financial flows, and private sector funding through philanthropy, market-based instruments, and green bonds among others[22]. According to the Biodiversity Finance Initiative, biodiversity finance flows include all private and public financial resources used to conserve and restore biodiversity, investments in commercial activities that produce positive biodiversity outcomes and the value of the transactions in biodiversity-related markets such as habitat banking[23]. It has been observed that biodiversity finance includes a wide range of instruments such as grants, debt and equity including green bonds, market-based incentives, regulatory approaches such

[19] The Biodiversity Finance Initiative., 'The State of Biodiversity Finance' Available at https://www.biofin.org/sites/default/files/content/publications/workbook_2018/1-2.html (Accessed on 12/04/2025)
[20] Ibid
[21] European Commission., 'Brief me on biodiversity financing' Available at https://knowledge4policy.ec.europa.eu/biodiversity/brief-me-biodiversity-financing_en (Accessed on 12/04/2025)
[22] Ibid
[23] The Biodiversity Finance Initiative., 'The State of Biodiversity Finance' Op Cit

as fines, and risk management approaches[24].

Access to biodiversity finance is vital in ensuring sound biodiversity conservation for Sustainable Development. It has been correctly asserted that in order to ensure continued human well-being and economic prosperity, it is imperative to protect, repair, and properly value biodiversity and ecosystem services that are being damaged and degraded globally due to human activities[25]. Biodiversity finance supports the transition to new production and consumption patterns that allow nature to heal and regenerate therefore ensuring sound biodiversity conservation[26]. Further, it has been argued that access to adequate and well-targeted financial resources are a critical factor for halting and reversing biodiversity loss worldwide[27].

The value of biodiversity finance is recognised under the Convention on Biological Diversity[28]. The Convention acknowledges that the provision of new and additional financial resources can make a substantial difference in the world's ability to address the loss of biological diversity[29]. It requires each contracting state to provide financial support and incentives in respect of those national activities which are intended to foster biodiversity conservation in accordance with its national plans, priorities and programmes[30]. Further, the Convention requires the developed country parties to provide new and

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[24] The Biodiversity Finance Initiative., 'What is Biodiversity Finance?' Available at https://www.biofin.org/about-biofin/what-biodiversity-finance (Accessed on 12/04/2025)

[25] International Finance Corporation., 'Biodiversity Finance: Protect the Planet, Strengthen Livelihoods' Available at https://www.ifc.org/en/stories/2023/biodiversity-finance-interview-with-irina-likhachova#:~:text=To%20ensure%20continued%20economic%20prosperity,nature%20to%20heal%20and%20regenerate. (Accessed on 12/04/2025)

[26] Ibid

[27] European Commission., 'Brief me on biodiversity financing' Op Cit

[28] Convention on Biological Diversity., Op Cit

[29] Ibid, Preamble

[30] Ibid, article 20 (1)

additional financial resources to enable developing country parties achieve the ideal of sound biodiversity conservation[31]. It urges all states to embrace bilateral, regional and other multilateral channels in order to strengthen access to biodiversity finance[32]. Unlocking biodiversity finance is therefore crucial in attaining the objectives of the Convention on Biological Diversity.

In addition, the Kunming-Montreal GBF sets out the importance of biodiversity finance[33]. The GBF acknowledges that its full implementation requires adequate, predictable and easily accessible financial resources[34]. Target 19 under the GBF seeks to substantially and progressively increase the level of biodiversity finance from all sources, in an effective, timely and easily accessible manner, including domestic, international, public and private resources to implement national biodiversity strategies and action plans[35]. It aims to mobilize at least US $200 billion per year in form of biodiversity finance by 2030[36].

Access to biodiversity finance is therefore vital in ensuring sound biodiversity conservation globally. However, it has been noted that the world is currently facing huge biodiversity financing gap[37]. It is estimated that currently, US $143 billion is spent on biodiversity conservation every year globally which is far below the estimated US $824 billion needed to protect and restore nature for Sustainable Development[38]. The Kunming-Montreal GBF estimates that there

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[31] Ibid, article 20 (2)
[32] Ibid, article 20 (3)
[33] Convention on Biological Diversity., 'Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity: 15/4. Kunming-Montreal Global Biodiversity Framework' Op Cit
[34] Ibid
[35] Ibid
[36] Ibid
[37] The Biodiversity Finance Initiative., 'What is Biodiversity Finance?' Op Cit
[38] Ibid

is a biodiversity finance gap of US $700 billion per year globally[39]. This huge gaps undermines biodiversity conservation efforts globally and the ability of countries to implement their national biodiversity strategies and actions plans[40]. It is therefore necessary to close the biodiversity financing gap globally in order to strengthen biodiversity conservation for Sustainable Development.

3.0 Closing the Biodiversity Financing Gap

It is imperative to close the biodiversity financing gap. The estimated biodiversity finance gap of US $700 billion per year globally represents a huge shortfall of financial resources required to protect and restore nature[41]. The planet is currently witnessing an alarming rate of biodiversity loss[42]. It is estimated that more than 1 million species are facing the threat of extinction[43]. Despite the worsening rate of global biodiversity loss, current biodiversity funding remains inadequate to effectively restore and protect nature.

The Kunming-Montreal GBF calls for a significant scaling up of investment from public and private sources to ensure the conservation and sustainable use of biodiversity. It urges the global community to close the biodiversity financing gap through increasing total biodiversity- related international financial resources from developed countries to developing countries; significantly increasing domestic resource mobilization, facilitated by the preparation and implementation of national biodiversity finance plans; leveraging private finance, embracing blended finance instruments;

[39] Convention on Biological Diversity., 'Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity: 15/4. Kunming-Montreal Global Biodiversity Framework' Op Cit
[40] Ibid
[41] Convention on Biological Diversity., 'Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity: 15/4. Kunming-Montreal Global Biodiversity Framework' Op Cit
[42] United Nations Environment Programme., 'Five drivers of the nature crisis' Available at https://www.unep.org/news-and-stories/story/five-drivers-nature-crisis (Accessed on 13/04/2025)
[43] Ibid

implementing strategies for raising new and additional resources; and encouraging the private sector to invest in biodiversity conservation efforts' utilising innovative schemes such as payment for ecosystem services, green bonds, biodiversity offsets and credits, and benefit-sharing mechanisms, with environmental and social safeguards; strengthening the role of indigenous peoples, local communities, and non-market based approaches towards sound biodiversity conservation; and enhancing the effectiveness, efficiency and transparency of resource provision and use[44]. It is therefore necessary to implement the targets of the Kunming-Montreal GBF in order to close the biodiversity financing gap.

Closing the biodiversity financing gap requires all countries to develop and implement national biodiversity finance action plans[45]. This requires good political will and domestic resource mobilization towards protecting and restoring nature[46]. It is also vital to scale up private finance in order to close the biodiversity financing gap[47]. It has been argued that the private sector can play a central role in halting and reversing biodiversity loss by financing biodiversity conservation through grants, donations, and investments in biodiversity conservation actions[48]. In addition, it has been argued that redirecting and realigning public and private finance flows from nature- and climate-harmful to nature-positive expenditures and subsidies can aid in

[44] Ibid
[45] International Finance Corporation., 'Biodiversity Finance: Protect the Planet, Strengthen Livelihoods' Op Cit
[46] Ibid
[47] The Biodiversity Finance Initiative., 'Finance solutions involving the private sector' Available at https://www.biofin.org/sites/default/files/content/publications/workbook_2018/1.5-2.html#:~:text=The%20private%20sector%20can%20play,of%20private%20businesses%20to%20biodiversity (Accessed on 13/04/2025)
[48] Ibid

closing the biodiversity financing gap[49]. Causing less harm to nature can reduce the funding gap since it results in lower funding need for halting and reversing the damage done to nature[50]. Enhancing transparency in global, regional, national, and local financial flows is also vital in closing the biodiversity financing gap by ensuring that finances are directed to biodiversity conservation efforts[51]. In addition, there is need for developed countries to strengthen financial flows to developing countries in order to support their biodiversity conservation efforts[52].

4.0 Conclusion

The world is currently witnessing an alarming rate of biodiversity loss. This requires huge financial resources to halt and reverse biodiversity loss towards Sustainable Development[53]. The Kunming-Montreal GBF notes that the world is facing a biodiversity financing gap of US $700 billion per year undermining biodiversity conservation efforts globally[54]. It urges the global community to close the biodiversity financing gap in order to strengthen biodiversity conservation efforts globally[55]. It is therefore necessary to close the biodiversity financing gap including through upscaling public and private finance flows, ensuring transparency in biodiversity finance, and enhancing financial flows

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[49] United Nations Development Programme., 'Biodiversity Finance' Available at https://www.undp.org/nature/our-work-areas/biodiversity-finance (Accessed on 13/04/2025)

[50] The Biodiversity Finance Initiative., 'Closing the Biodiversity Funding Gap: With ambitious Post-2020 Global Biodiversity Framework Targets' Available at https://www.biofin.org/news-and-media/biodiversity-funding-gap-global-biodiversity-framework (Accessed on 13/04/2025)

[51] Ibid

[52] Convention on Biological Diversity., 'Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity: 15/4. Kunming-Montreal Global Biodiversity Framework' Op Cit

[53] The Biodiversity Finance Initiative., 'What is Biodiversity Finance?' Op Cit

[54] Convention on Biological Diversity., 'Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity: 15/4. Kunming-Montreal Global Biodiversity Framework' Op Cit

[55] Ibid

from developed to developing countries[56]. Closing the biodiversity financing gap is thus necessary and possible towards ensuring sound biodiversity conservation for Sustainable Development.

[56] Ibid

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Convention on Biological Diversity, 5 June 1992 (1760 U.N.T.S. 69)

Convention on Biological Diversity., 'Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity: 15/4. Kunming-Montreal Global Biodiversity Framework' Available at https://www.cbd.int/doc/decisions/cop-15/cop-15-dec-04-en.pdf

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International Finance Corporation., 'Biodiversity Finance: Protect the Planet, Strengthen Livelihoods' Available at https://www.ifc.org/en/stories/2023/biodiversity-finance-interview-with-irina-likhachova#:~:text=To%20ensure%20continued%20economic%20prosperity,nature%20to%20heal%20and%20regenerate

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k_2018/1.5-2.html#:~:text=The%20private%20sector%20can%20play,of%20private%20businesses%20to%20biodiversity

The Biodiversity Finance Initiative., 'The State of Biodiversity Finance' Available at https://www.biofin.org/sites/default/files/content/publications/workbook_2018/1-2.html

The Biodiversity Finance Initiative., 'What is Biodiversity Finance?' Available at https://www.biofin.org/about-biofin/what-biodiversity-finance

United Nations Climate Change., 'What is the Triple Planetary Crisis?' Available at https://unfccc.int/news/what-is-the-triple-planetary-crisis

United Nations Development Programme., 'Biodiversity Finance' Available at https://www.undp.org/nature/our-work-areas/biodiversity-finance

United Nations Environment Programme., 'Five drivers of the nature crisis' Available at https://www.unep.org/news-and-stories/story/five-drivers-nature-crisis

United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Available at https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainabl e%20Development%20web.pdf

World Health Organization., 'Biodiversity and Health' Available at Available at https://www.who.int/news-room/fact-sheets/detail/biodiversity-and-health#:~:text=Biodiversity%20loss%20can%20have%20significant,cause%20or%20exacerbate%20political%20conflict

Accessing Justice through Pre-Litigation Mechanisms as A Means of Settling Misdemeanours in Kenya

By: ***Stephen Mwaura Kamaara****

Abstract

This paper focuses on the lacuna that currently exists in the criminal justice system on the application of pre-litigation mechanisms and how it has significantly contributed to case backlog. Reports show that disputants have opted to use informal methods of resolving disputes. These informal methods are conducted using alternative dispute resolution or traditional justice systems. This paper champions for the use of systems such as pre-litigation mechanisms. Through the history of Kenya's criminal justice system, the author shows how Kenya's criminal justice system has evolved from the pre-colonial era to date and the importance of integrating these pre-litigation mechanisms. The author thereafter does a comparative analysis with South Africa which has legislated the use of traditional justice systems as a pre-litigation mechanism to formal criminal proceedings. Lastly, the paper gives recommendations on the implementation of pre-litigation mechanisms in Kenya.

Introduction

Justice is an expensive and elusive commodity in Kenya.[1] Over the years it has only been accessed through the Judiciary as the custodian of judicial processes.[2] Accessing justice by citizens is hampered by unfavorable factors which include complex procedures and lack of legal knowhow.[3] This makes

[1] J Wangui, 'Kenyans face expensive justice as court fees rise,' 8 September 2021, Business Daily Africa can be accessed at <https://www.businessdailyafrica.com/bd/economy/kenyans-face-expensive-justice-as-court-fees-rise-3542322> accessed on 5 May 2025.

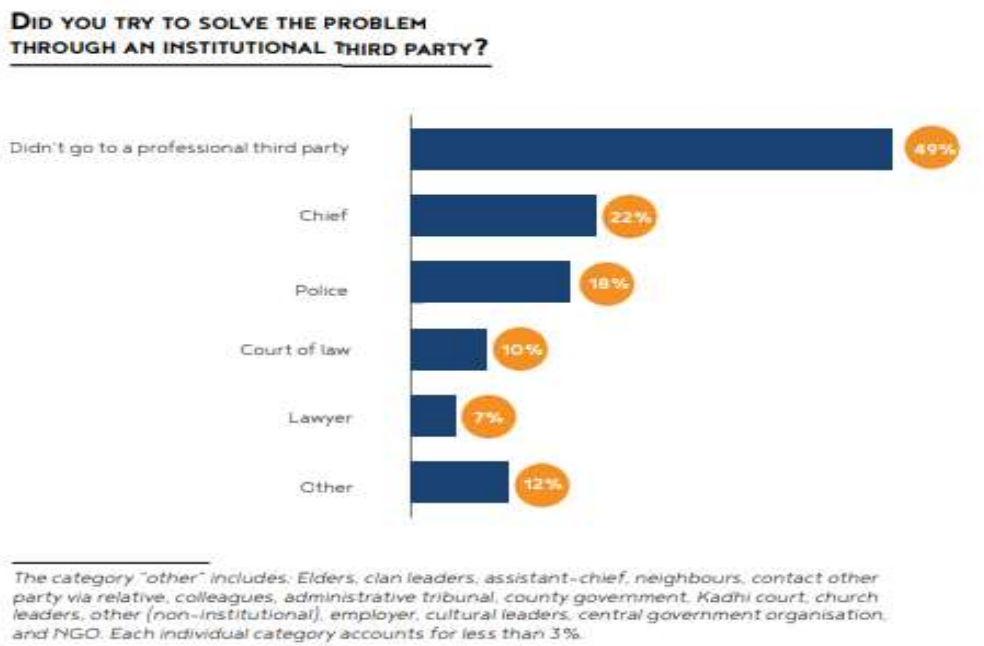
[2] The Judiciary, 'The Judiciary; Overview,' can be accessed at <https://judiciary.go.ke/overview/> accessed on 6 May 2025.

[3] K Muigua,: *"Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework" (2015)* can be accessed at <https://kmco.co.ke/wp-content/uploads/2018/08/LEGITIMISING-ALTERNATIVE-DISPUTE-RESOLUTION-MECHANISMS-IN-KENYA.pdf> last accessed on 6 January 2025.

accessing justice a preserve of a select few.[4] Article 48 of CoK denotes access to justice as a right enshrined in the Bill of Rights.[5] Furthermore, Article 159 (2) (c) suggests that informal processes can only be used after the court's reference which contributes to case backlog.[6]

The Judiciary is overburdened by cases and had 272,678 cases as at June 2023.[7] Backlog is still experienced by the Judiciary. Studies show that backlog and other factors have caused parties to use informal procedures to resolve disputes. In 2017, a survey showed that only 10% of disputants used court processes below;[8]

[4] K Muigua [n1 above].
[5] Constitution of Kenya, 2010, art. 48.
[6] Constitution of Kenya, art. 159 (2) (c).
[7] The Judiciary: "State of the Judiciary Report," (2022/23) can be accessed at <https://judiciary.go.ke/wp-content/uploads/2023/11/SOJAR-2022-2023-1.pdf> last accessed on 6 January 2025.
[8] HiiL Report: "Justice Needs and Satisfaction in Kenya," (2017) <https://www.hiil.org/wp-content/uploads/2018/07/hiil-report_Kenya-JNS-web.pdf> last accessed on 6 January 2025.



If the problem is not addressed, it will lead to the numerous filing of cases which deviate the court's time from felonies such as murder and sexual offences. This paper highlights the need for the introduction of pre-litigation mechanisms (PLM) for misdemeanours.[9]

1. Background

1.1 Historical Background

Before colonization, communities were guided by traditional justice system (TJS) also known as traditional dispute resolution mechanisms (TDRMs) which did not differentiate between civil and criminal offences.[10] TJS was

[9] Black's Law Dictionary describes misdemeanours as: offenses lower than felonies and generally those punishable by fine or imprisonment otherwise than in penitentiary.

[10] F Kariuki: *"African Traditional Justice Systems" (2017)* Volume 1 Journal of Conflict Management and Sustainable Development Issue 1 <https://journalofcmsd.net/wp-content/uploads/2017/09/FINAL-Francis-Kariuki-African-Customary-Law-and-African-Justice-Systems-Autosaved-Copy-1.pdf> last accessed 2 January 2025.

characterised by informal procedures of resolving conflict through conciliation talks and compensation where food and rituals symbolised the end of animosity.[11] These methods were presided by heads of the family or clan, council of elders and traditional healers.[12] The aim of TJS was restorative justice to restore amity within the community.[13] Restorative justice entails involving the disputants in determining the best method to undo the harm caused by an offence.[14] Stakeholders in restorative justice are victims, offenders and their communities, whose needs are, obtaining reparation, taking responsibility and achieving reconciliation.[15]

During colonization, the justice system shifted to formal judicial processes with litigation taking precedence.[16] The criminal justice system (CJS) was and still is characterised by formalities that were not privy to the ordinary person and proved difficult when parties did not have lawyers.[17]After independence,

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[11] F Kariuki [n8 above].

[12] F Kariuki [n8 above].

[13] F Kariuki: *"Community, Customary and Traditional Justice Systems in Kenya: Reflecting on and Exploring the Appropriate Terminology"* can be accessed on <https://land.igad.int/index.php/documents-1/countries/kenya/conflict-3/535-community-customary-and-traditional-justice-systems-in-kenya-reflecting-on-and-exploring-the-appropriate-terminology/file> last accessed on 2 January 2025.

[14] T Wachtell:*"Defining Restorative Justice".* (2016) IIRP Graduate School <https://www.nassauboces.org/cms/lib/NY01928409/Centricity/Domain/1699/Defining%20Restorative.pdf> last accessed 13 January 2025.

[15] K Muigua [n1 above].

[16] Unpublished: N Barasa: *"Evaluating the Place of Alternative Justice Mechanisms as a form of restorative justice in Kenya: Interrogating best practices from South Africa's Criminal Justice System."* (2021) unpublished Master's Thesis University of Nairobi can be accessed on <http://erepository.uonbi.ac.ke/bitstream/handle/11295/161000/Barasa_Evaluating%20the%20Place%20of%20Alternative%20Justice%20Mechanisms%20as%20a%20Form%20of%20Restorative%20Justice%20in%20Kenya.pdf?sequence=3> last accessed on 8 January 2025.

[17] National Crime Research Centre, 'Public Perceptions And Experiences On The Access To Criminal Justice In Kenya,' can be accessed at < Https://Www.Crimeresearch.Go.Ke/Wp-Content/Uploads/2023/08/REPORT-ON-

Kenya adopted the common law system which is still applied.[18] Kenya has attempted to integrate alternative dispute resolution (ADR) and TDRMs into the CJS through amendments to the Criminal Procedure Code (CrPC). An example of such an amendment is the inclusion of Section 176 of the CrPC states that courts may promote reconciliation and encourage the settlement of misdemeanours such as common assault.[19]

The promulgation of CoK brought Article 159 which gave a new lease of life on the application of ADR in Kenya by allowing courts to adopt ADR.[20] However, the letter of Article 159 (2) (c) seems to suggest that ADR processes in criminal proceedings can only be through referral by courts, [21] while there exists other justice systems.[22] Currently, the State has failed to fulfil its obligation in protecting the right of accessing justice by not providing alternative mechanisms for minor offences.[23]

Fourteen years after CoK, the judiciary is still the custodian of justice and reports show that the judiciary is overwhelmed and under-resourced to

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Public-Perceptions-And-Experiences-On-The-Access-To-Criminal-Justice-In-Kenya-Report.Pdf> accessed on 7 May 2025.

[18] S F Joireman, 'The evolution of the common law: Legal development in Kenya and India,' can be accessed at <<https:www.tandfonline.com/doi/pdf/10.1080/14662040600831636?casa_token=6X0_Pu8jCm0AAAAA:_jLN4csnSalbhjmEB75C7aTs2LUf3agst-Zdlx2cyUFOuf-SVYlen0EwmOBCbXinhUyifQtxBfV8-Ds>> accessed on 7 May 2025.

[19] Criminal Procedure Code, Cap. 75, Laws of Kenya, s. 176.

[20] Constitution of Kenya, 2010 [n5 above].

[21] Constitution of Kenya, 2010 [n5 above].

[22] Unpublished: D Orago*: "Alternative Dispute Resolution in the Criminal Justice System in Kenya,"* unpublished Master's Thesis, University of Nairobi, 2020 can be accessed at <http://erepository.uonbi.ac.ke/bitstream/handle/11295/154149/Final..A.D.R%20Dissertation%20Nov%202020%20%281%29.pdf?sequence=1&isAllowed=y> last accessed 9 January 2025.

[23] Constitution of Kenya, 2010 [n4 above].

perform its role well.[24] Although the judiciary has formulated policies such as Court-Annexed Mediation (C-AM) to curb case backlog, it remains prevalent within the courts. Many law courts have a C-AM Registry, however, only civil cases are referred to mediation leaving litigants in criminal cases who are desirable of an out-of-court settlement to their own devices.[25] Some criminal cases are referred to negotiation with a view of achieving restorative justice. Most of these cases present trivial issues that parties could have settled without court intervention leading to the misuse of public resources and wasting the court's precious time.

1.2 Literature Review

Orago highlights the use of ADR in CJS in Kenya and uncertainties in its application. [26] She states that the referral powers to ADR lie with the court and the prosecutor has the authority to object to such an application. Furthermore, she talks about the gap that exists whereby a criminal case must be instituted for the court to refer parties to ADR and compares Kenya's problem with other jurisdictions that use PLMs. [27] Her paper shows that there is a need for PLMs mostly for petty offences as this will help clear case backlog.

Kariuki intimates that the country should institutionalize TJS and it should be entirely autonomous and non-binding.[28] This would promote several international instruments that the State has ratified such as the Rio

[24] State of the Judiciary Report [n6 above].

[25] This is highlighted through the gazettement of the Civil Procedure (Court-Annexed Mediation) Rules 2022 which particularly states that Court Annexed Mediation is solely applicable to civil disputes referred from civil courts.

[26] Orago [n18 above].

[27] Orago [n18 above].

[28] F Kariuki.; "*African Traditional Justice Systems*," *(2017)* 1(1) Journal of Conflict Management and Sustainable Development Can be accessed at <https://journalofcmsd.net/wp-content/uploads/2017/09/FINAL-Francis-Kariuki-African-Customary-Law-and-African-Justice-Systems-Autosaved-Copy-1.pdf >last accessed on 10 January 2025.

Convention,[29] and ILO Convention 169.[30] He promotes the Africanisation of CJS. Kariuki explains how TJS can be used as a PLM and this paper portrays how it has been implemented in its comparative analysis.

Sang's paper evaluates how mediation can be employed in criminal cases as a PLM as well as how Kenya has embraced restorative justice principles which emphasize repairing suffering caused by offenders. [31] Sang in his subsequent work talks about the benefits of integrating ADR into CJS such as providing *inter alia* greater access to justice and better complementarity of State and Customary Justice Systems. [32] Both works add on to what this paper seeks to justify on the need of PLMs in criminal cases.

1.3 Legal Background

1.3.1 ADR Generally

Article 159(2) (c) promotes the use of ADR by stating that judicial bodies shall promote alternative forms of resolving disputes as discussed above.[33] However, TDRMs are not to be used haphazardly as dictated by Article 159(3) which states that they shall not be used in ways that contravene the Bill of

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[29] Report of the United Nations Conference on Environment and Development: *"Rio Declaration on Environment and Development," (1992)* can be accessed on < https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf> last accessed on 10 January 2025.

[30] International Labor Organization Convention 169 on Indigenous and Tribal Peoples in Independent Countries, 1989 can be accessed at <https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169> last accessed on 10 January 2025.

[31] M Sang: *"Pre-Litigation Mediation as a Means to Enhance Judicial Economy in Kenya's Criminal Justice System,"* (2023) 12(1) Alternative Dispute Resolution Journal 56.

[32] M Sang: *"Integrating Alternative Dispute Resolution Mechanisms into Kenya's Criminal Justice System: Some Reform Proposals,"* (2023) 12(1) Alternative Dispute Resolution Journal 201.

[33] Constitution of Kenya [n4 above].

Rights and repugnant to justice and morality.[34] This means that ADR and TDRMs can be used as long as they are not repugnant to justice.

CoK as the *grund norm* has influenced legislation in a positive way whereby several statutes and policies that guide procedure in courts and tribunals have inculcated ADR and TDRMs in their dispute resolution process. For instance, Section 5 of the NLC Act provides that the NLC shall encourage the application of TDRMs in land conflicts.[35] Furthermore, Part VI of the Civil Procedure Act has specific provisions for special proceedings such as mediation *inter alia*.[36] However, it must be noted there is a limited legal framework for the administration of justice outside the court system through the use of ADR. The only available legislation relates to arbitration through the Arbitration Act, 1995.

1.3.2 ADR in CJS

CJS in Kenya is also steered by the principles set out in Article 159.[37] This has been embedded in the CrPC which was amended in 2010 and revised in 2012 through the introduction of plea agreements and other forms of ADR in CJS. Section 2 of CrPC defines a plea agreement as an agreement entered into between the prosecution and accused persons in a criminal trial. [38] Section 137A promotes ADR through referrals to negotiation where the prosecutor and the accused may discuss and concur on appropriate means of resolving the dispute either by reduction of a charge to a lesser offence, withdrawal of the charge or a stay of other charges.[39] ODPP established under Article 157,[40] has operationalized the sections relating to plea agreements through the

[34] Constitution of Kenya, 2010, art. 159(3).
[35] National Land Commission, Cap. 280, Laws of Kenya, s.5.
[36] Civil Procedure Act, Cap. 21, Laws of Kenya, Part VI.
[37] Constitution of Kenya [n4 above].
[38] Criminal Procedure Code, Cap. 75, Laws of Kenya, s.2.
[39] Criminal Procedure Code, Cap. 75, Laws of Kenya, s.137A.
[40] Constitution of Kenya, 2010, art. 157.

implementation of the Plea Bargaining Guidelines. [41]

Furthermore, ODPP has a National Prosecutorial Policy which denotes a test in making the decision to charge.[42] This test states whether the available evidence is admissible and sufficient and whether public interest requires prosecution.[43] Section 176 of the CrPC promotes ADR by providing negotiation as a means of ADR in CJS as discussed above.[44]

The courts have embraced ADR as seen in ***R v Mohamed Abdow Mohamed***. The accused was charged with murder and the victim's family applied to ODPP for withdrawal as both sides reached an agreement under Islamic law. ODPP applied for withdrawal under Article 157 and it was allowed, the case was marked as settled.[45] Although this decision has been criticised for the misapplication of TDRMs to felonies, it is noted that the application of TDRMs has no limit once parties fully submit to it portraying the doctrine of party autonomy in ADR.[46] The Judiciary's AJS Baseline Policy has upheld this decision by stating that it was fully autonomous and the ODPP as an agent through the Agency Theory, has the capacity to withdraw cases after ADR agreements have been entered into by parties.[47]

However, ADR in CJS has not gained popularity as seen in ***Republic v Abdullahi Noor Mohamed*** the court dismissed an application for adoption of a settlement agreement made by the victims and accused persons families on

[41] Office of the Director of Public Prosecutions: *"Plea Bargaining Guidelines,"* (2019) can be accessed on <https://www.odpp.go.ke/wp-content/uploads/2019/10/ODPP-Plea-Bargaining-Guidelines.pdf >last accessed on 10 January 2025.
[42] Office of the Director of Public Prosecutions: *"National Prosecutorial Policy."*
[43] National Prosecutorial Policy [n37 above] p 6.
[44] Criminal Procedure Code [n15 above].
[45] *R v Mohamed Abdow Mohamed (2013) eKLR.*
[46] F Kariuki [n8 above].
[47] The Judiciary: *"Alternative Justice Systems Baseline Policy," (2020)* can be accessed at <https://www.unodc.org/documents/easternafrica//Criminal%20Justice/AJS_Baseline_Policy_2020_Kenya.pdf> last accessed on 11 January 2025.

the grounds that ODPP was not involved as he is the custodian of prosecutorial powers and felonies cannot be subjected to ADR and TDRMs as per Section 176 of the CrPC. [48] Contrarily, based on *Mohamed Abdow above* more precedents have emerged such as ***Republic v Musili Ivia & another*** where the judge terminated the proceedings in a murder case after parties had reconciled using TDRMs.[49] The aforementioned cases show that there exists a lacuna on the boundaries of ADR in CJS.[50] First contestation comes from a human rights approach based on the saying "*your rights end where mine begin,*" emphasizing the balancing of victim and offender rights. Second argument is the overall objective of criminal law being that of deterrence and retribution.

The Universal Declaration of Human Rights (UDHR) as a normative precursor to the human rights framework states that everyone is entitled in full equality to a fair hearing by an independent tribunal, in the determination of his duties and any criminal charge against him. [51] This provision promotes ADR as it does not narrow down the fora in which criminal justice is applied.[52] Second, the Draft Convention on Justice and Support for Victims of Crime and Abuse of Power provides that State Parties shall provide victims with access to justice and redress which is expeditious and accessible, as provided for by domestic legislation, through informal mechanisms for the resolution of disputes, and customary justice processes where appropriate, to facilitate conciliation and redress for victims.[53] Although it is a draft convention its provisions are part

[48] *Republic v Abdulahi Noor Mohamed [2016] eKLR.*
[49] *Republic v Musili Ivia & Another [2017] eKLR.*
[50] Orago [n19 above] p 32.
[51] Universal Declaration of Human Rights, art. 11 Can be accessed at <https://www.un.org/sites/un2.un.org/files/2021/03/udhr.pdf> last accessed on 11 January 2025.
[52] Universal Declaration of Human Rights [n46 above].
[53] Draft Convention on Justice and Support for Victims of Crime and Abuse of Power, art. 5 Can be accessed at <https://www.ohchr.org/sites/default/files/Documents/HRBodies/CCPR/GConArticle9/Submissions/WorldSocietyOfVictimologyDraftConvention.pdf> last accessed on 11 January 2024.

of customary international law from state practice. Universal state practice has promoted ADR in CJS by formulating PLMs such as traditional courts.[54] However, it is unfortunate that Kenya has not yet implemented these mechanisms in fulfilling its obligations in protecting Article 48.

1.4 Conclusion

The above shows Kenya's journey in promoting ADR in CJS. The complexities related with the criminal trial process would deny justice to both the victims and the accused persons as they are not in a position to understand the processes and afford the services of advocates.[55] Furthermore, it is commendable that ODPP has come up with Plea Bargaining Guidelines and Diversion Guidelines to integrate ADR in CJS, however, there exists a significant gap that needs to be filled by PLMs.[56] The Judiciary has tried to fill this gap through the formulation of an AJS Baseline Policy but policies are not binding.[57] Legislation is needed and should be implemented by actors such as the NCAJ, the ODPP, the Judiciary and other NGOs in order to fulfil the obligation of respecting Article 48.

2. Impact of The Lacuna

2.1 Persons Affected

The accused persons and their families stand prejudiced by inadequate

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[54] United Nations Office of the High Commissioner on Human Rights: *"Traditional Justice Systems in Africa,"* (2016) p22 can be accessed at <https://www.ohchr.org/sites/default/files/Documents/Publications/HR_PUB_16_2_HR_and_Traditional_Justice_Systems_in_Africa.pdf> last accessed on 11 January 2024.

[55] An example of such complex matters are plea bargaining agreements, the accused needs to know the consequences of entering such an agreement.

[56] M Sang [n32 above].

[57] P Daly, 'How binding are binding guidelines? An analytical framework,' can be accessed at https://onlinelibrary.wiley.com/doi/pdf/10.1111/capa.12519accessed on 7 May 2025.

legislation.[58] As seen in the ***Abdullahi Noor*** case, both families agreed to settle the matter, however, due to the non-involvement of the ODPP in the negotiations, the settlement was rejected by the court. This presents an interesting conundrum because both families were in agreement but the State was in disagreement with the parties concerned.

2.2 Impact on Accused Persons

The lack of PLMs has led to negative impact on accused persons. It occasions unnecessary delays, financial constraints, trauma to families and denied justice as discussed herein.

Unnecessary delays

The judiciary is facing a case backlog crisis caused by adjournments because of unavailability of the police file, lack of collaboration by the investigative authorities and recently civil unrest that has hindered the bringing of accused persons to court.[59] This has led to the decline in the quality of service delivery in CJS.[60] This can be alleviated through PLMs where both the accused and complainant discuss with a view of resolving the dispute without going through formal court processes. Although, due to ongoing debates, this should be applied on a case by case basis.

Financial constraints

The accused is sometimes forced to part with a large amount of money so as to

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[58] *Abdullahi Noor Mohamed* [n44 above], both families had agreed to settle the dispute through the payment of 'blood money', however, due to the lack of the involvement of the ODPP and clear procedures for the use of ADR in CJS, the court dismissed the application for settlement.

[59] The protests that ensued on June 25th 2024 caused a massive disruption to everyday activities in Kenya as depcicted by CNN, 'Chaos in Kenya as Protestors Storm Parliament,' can be accessed at https://edition.cnn.com/world/live-news/protest-kenya-nairobi-06-25-24 accessed 8 May 2025.

[60] The Judiciary, "State of the Judiciary Annual Report," 2023/2024, recorded an increase in the number of pending cases from 625,643 to 649,310.

secure bail. Some accused persons are unable to raise bail and are subjected to detention in remand for a long period before the conclusion of their case,[61] of which some are actually withdrawn either by the complainant or by ODPP after applying ADR. This can be averted where both the complainant and the accused enter into a compensation plan during PLMs to achieve restorative justice.[62]

2.3 Reasons for the Issue

The Nature of Crimes

Many people believe that criminal offences cannot be referred to ADR which has faced judicial scrutiny through the decisions elaborated.[63] There is a need for a further examination as to the boundaries of the application of ADR in criminal cases.[64]

Society's perspective

Unfortunately, due to the absorption of Western philosophies, Kenya has slowly lost its stand on restorative justice which was promoted largely through TJS.[65] Society's view of CJS is that it must deter and cause retribution so as to achieve a 'just result' and that this can only be achieved through the litigious

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[61] For further emphasis on long periods in remand, this video shows a man explaining his experiences after 4 years in remand. It can be accessed on < https://www.youtube.com/watch?v=3C1Z3nfgDGY&t=923s> last accessed on 12 January 2025.

[62] This would also be in line with the provisions of the Victim Protection Act, Cap. 79A, Laws of Kenya.

[63] *Abdullahi Noor Mohamed* [n44 above].

[64] A Oseko, 'The Criminal Justice System in Kenya: The Role of Alternative and Traditional Dispute Resolution Mechanisms,' (2015) 81 (1) Arbitration, Chartered Institute of Arbitrators.

[65] Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of Republic v Mohamed Abdow Mohamed [2013] eKLR can be accessed at http://kmco.co.ke/wp-content/uploads/2018/08/download1352184239.pdf accessed on 6 May 2025.

court system.[66]

Inadequate legislation

Currently, Kenya lacks legislation on the application of PLMs in CJS.[67] This has caused disputants to refer to the court as a means of accessing justice only for the court to refer the dispute to ADR.[68] Due to this, Kenyan courts have a large case backlog when in essence many disputes could have been resolved before the court's intervention.[69]

Potential for misuse

There exists a great chance of misusing PLMs especially in cases of tramped charges of sexual assault and ADR cannot be used as it falls under the exemptions in the application of ADR in CJS.[70]

2.4 Efforts Made To Resolve

First, the AJS Baseline Policy speaks on the implementation of AJS as a method of resolving the dispute without necessarily needing court's intervention.[71] Although there are some aspects of this policy which talk about Court-Annexed AJS Institutions. [72] Second, ODPP has developed the Diversion

[66] Alternative Justice Systems Baseline Policy.
[67] The closest Kenya has come to legislating ADR in the criminal justice system is through the formulation and implementation of the Alternative Justice System Baseline Policy.
[68] Alternative Justice Systems Baseline Policy, Court Annexed AJS – this is a process where criminal cases in the courts are referred to alternative justice systems, the AJS Baseline Policy highlights Isiolo Law Courts as a court in which this is used.
[69] HiiL Report [n8 above].
[70] PLMs can be greatly misused in this aspect by both the victim and the wrongdoer as a means of manipulation.
[71] Alternative Justice Systems Baseline Policy [n42 above].
[72] Alternative Justice Systems Baseline Policy [n42 above] p 65.

Policy,[73] Diversion Guidelines and Explanatory Notes,[74] and the Plea Bargaining Guidelines.[75] Both efforts revert to court intervention for implementation.

2.5 Conclusion

This part shows the impact of the issue on accused persons and reasons for not having PLMs in CJS. It is important to note that although policies/guidelines have been made, they are not binding. Their application is at the judicial officer's discretion which contributes to case backlog therefore necessitating the need for legislation on the use of PLMs.[76] Furthermore, the policies are only implemented once the accused has gone through the formal court processes which means that accused persons may be detained until the court/prosecution exercises its discretion for the implementation of these policies.[77]

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[73]Office of the Director of Public Prosecutions: *"Diversion Policy,"* Can be accessed at <https://www.odpp.go.ke/wp-content/uploads/2022/04/DIVERSION-POLICY.pdf >last accessed on 12 January 2025.

[74] Office of the Director of Public Prosecutions: *"Diversion Guidelines and Explanatory Notes,"* Can be accessed at <https://www.odpp.go.ke/wp-content/uploads/2019/10/ODPP-Diversion-Guidelines-Explanatory-Notes.pdf> last accessed on 12 January 2025.

[75] Office of the Director of Public Prosecutions, *"Plea Bargaining Guidelines,"* can be accessed at <https://www.odpp.go.ke/wp-content/uploads/2019/10/ODPP-Plea-Bargaining-Guidelines.pdf> last accessed on 12 January 2025.

[76] The Criminal Procedure Code, Cap. 75, Laws of Kenya, couches the referral to reconciliation processes in a discretionary manner and such powers are only within the purview of judicial officers, not parties.

[77] Ibid [n73 above].

3. A Comparative Study: South Africa's Case

3.1 Why South Africa?

Though South Africa's population and area is larger than Kenya,[78] they are members of the Commonwealth and use common law judicial processes.[79] Both countries have a rich cultural heritage.[80] Moreover, subject to recent publications on how different countries have adopted TJS, South Africa is stated to have taken significant steps in adopting TJS in criminal cases. [81]

3.2 What has South Africa done?

In 2022, South Africa enacted the Traditional Courts Act 9 of 2022 which provides a framework applying customary laws in traditional courts as an alternative to formal judicial processes.[82] These courts can also deal with a myriad of criminal offences which range from theft, malicious damage to property, assault without grievous bodily harm, breaking or entering premises with intent to commit an offence, receiving any stolen property, and *crimen injuria*.[83] However, these crimes are capped at R 15,000. [84]

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[78] Department of Statistics of the Republic of South Africa: "Population Census of South Africa as at 2022,"<https://census.statssa.gov.za/#/ >accessed on 13 January 2025.

[79] Commonwealth Secretariat, 'Members of the Commonwealth,' can be accessed at < https://thecommonwealth.org/our-member-countries> accessed on 8 May 2025.

[80] Government of South Africa, 'South Africa's People,' can be accessed at < https://www.gcis.gov.za/sites/default/files/docs/resourcecentre/yearbook/2012/03_SA_People.pdf> accessed on 8 May 2025. The government of South Africa reveals that it has four main groups with several sub-groups consisting of different languages and cultures, this is similar to Kenya which has major ethnic groups (Bantu, Nilotes and Cushites) and within them several other different language groups.

[81] Traditional Justice Systems in Africa [n50 above].

[82] Traditional Courts Act 9 of 2022, South Africa can be accessed at <https://www.gov.za/sites/default/files/gcis_document/202310/49373traditionalcourtsact92022.pdf>accessed on 13 January 2025.

[83] Act 9 of 2022 [n58 above] Schedule 2.

[84] Act 9 of 2022 [n58 above] Schedule 2. (The equivalent of R15,000 is Kshs. 101,400/= as per conversion rates on 13 January 2025) *Kshs. 6.76 = R 1.*

The Act states that decisions of these courts can be reviewed by the High Court if procedures have not been complied. Furthermore, parties may appeal to the Magistrates Courts after exhausting all appellate procedures within the traditional courts. [85] This adequately shows that the traditional courts in South Africa are used as a PLM.

Furthermore in South Africa, the police and prosecution may allow withdrawal of a complaint before the charge is preferred for reasons given to them and this applies to both misdemeanours and felonies.[86]

3.3 Limitations to measures undertaken by South Africa

The customary laws for the communities in South Africa are not the same.[87] This poses a risk in the practice in traditional courts due to diverse cultures.[88]

3.4 Conclusion

Some measures undertaken by South Africa include the legislation of the Traditional Courts Act and the practice that police and prosecutors can withdraw complaints made by victims before preferring charges.[89]

4. Conclusion And Recommendations

4.1 Conclusion

This paper has established that there exists a gap in the application of PLMs in

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[85] Act 9 of 2022 [n58 above].
[86] N. Barasa [n14 above] p 62.
[87] Wikipedia, 'Customary Law in South Africa,' can be accessed at < https://en.wikipedia.org/wiki/Customary_law_in_South_Africa#:~:text=of%20customary%20law.-,Ethnicity,within%20tribes%20and%20between%20tribes.> accessed 8 May 2025.
[88] Wikipedia, 'Ethnic Groups in South Africa,' can be accessed at < https://en.wikipedia.org/wiki/Ethnic_groups_in_South_Africa> accessed 8 May 2025.
[89] Traditional Courts Act 9 of 2022 [n78 above].

Kenya. It establishes that this contributes to case backlog as all criminal cases are taken through formal judicial processes which are costly and drag for long. The contextual analysis of the station shows that there are deserving cases that can be resolved using PLMs because parties were willing, circumstances allowed and could be resolved without court intervention. The paper has done a comparative analysis with South Africa on the measures that can be taken to access justice through PLMs.

4.2 Recommendations

This paper therefore recommends;

1. Legislation should be developed to provide a framework for PLMs. Kenya currently lacks adequate legal framework around PLMs, Kenya's only attempt has been the formulation of the AJS Baseline Policy, which is not necessarily binding on parties.
2. Creation of a tribunal that exclusively deals with PLMs by applying either TJS or ADR processes. Kenya should borrow a leaf from South Africa on how she has developed a Traditional Court Act legitimizing traditional courts with jurisdiction to determine disputes using the customary law of the parties appearing before it.
3. Various stakeholders should embark on promoting TJS as a pre-litigation mechanism. Kenya's legal system is fixated on litigation as the first point of call before attempting alternative dispute resolution. This should not be the case, TJS should be applied by police officers, investigative authorities and victims where the circumstances of the case permit.
4. The Judiciary should formulate boundaries on the application of ADR in judicial processes. This is pegged on the fact that there are still disparities on the manner of cases that are 'ADR-able,' there is a school of thought suggesting that all matters can be referred to ADR including murder cases, while the other school of thought argues that only misdemeanours can be referred to ADR and even such misdemeanours are only 'ADR-able' according to the court's discretion.

5. The Judiciary should embark on training various stakeholders on various TJS and ADR processes. The Judiciary can undertake this training with a view of reducing the case backlog in the courts.

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Journal of Appropriate Dispute Resolution (ADR) & Sustainability Volume 3 Issue 1 Review

Journal Review by Mwati Muriithi*

Published in March 2025, Journal of Appropriate Dispute Resolution (ADR) & Sustainability, Volume 3, Issue 1 is the first issue of the Journal in the year 2025 and is aimed at a worldwide audience, focused on disseminating knowledge and creating a platform for scholarly debate on pertinent and emerging areas in the fields of Dispute Resolution and Sustainability.

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 a 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 '*Strengthening Women Voices to advance Human Rights, Peace and Sustainable Development*'. The paper examines how the voices of women can be strengthened to foster human rights, peace and Sustainable Development. The paper argues that human rights and peace are vital ingredients in the quest

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towards Sustainable Development.

'Balancing Cultural Relevance and Modernity in Traditional Dispute Resolution Mechanisms (TDRMs) for Enhanced Access to Justice in Kenya' by David N. Njoroge investigates the critical role of cultural relevance in shaping the effectiveness of Traditional Dispute Resolution Mechanisms (TDRMs) within Kenya's justice system. The paper advocates for harmonization strategies that preserve cultural relevance while ensuring compliance with constitutional values, emphasizing the importance of inclusive, locally grounded approaches to justice delivery.

David Onsare in *'Rethinking Arbitration Agreements: The Kenyan Perspective'* examines how arbitration agreements shape access to justice in Kenya. It analyzes the constitutional framework supporting arbitration under Articles 48 and 159. The paper concludes with practical steps for legal practitioners and policymakers.

'Reaffirming the Constitutional Validity of Mandatory Sentences in Kenya's Criminal Law: A Review of the Supreme Court's Judgment in Republic v Joshua Gichuki Mwangi and Others [2024] eKLR' by Michael Sang critically examines the constitutional validity of mandatory sentences in Kenya's criminal law through the lens of the Supreme Court's judgment in Republic v Joshua Gichuki Mwangi and Others [2024].

Darryl Isabel in '*The Emotional Core of Conflict Resolution: Integrating Emotional Intelligence into Mediation'* explores the critical role of EI in mediation, emphasizing its importance in resolving emotionally charged disputes and enhancing conflict resolution.

'Boosting Efficiency in Environmental Governance' by Hon Prof. Kariuki Muigua critically interrogates the concept of environmental governance. The paper argues that sound environmental governance provides a pathway towards Sustainable Development. In addition, the paper offers ideas towards boosting

efficiency in environmental governance for Sustainable Development.

Michael Sang in '*Reinforcing the Duty of the State to Compensate Victims of Terrorism in Kenya: A Review of the Judgment in the Garissa University Terrorist Attack Case'* examines the landmark judgments in *Legal Advice Centre T/A Kituo Cha Sheria and 84 Others v The Cabinet Secretary, Ministry of Education and 7 Others [2024] and Hassan & Another v Republic (Criminal Appeal 150 & 151 of 2019)*, focusing on their implications for State accountability and victim compensation in the context of terrorism in Kenya.

Mwati Muriithi critically reviews '*Securing Lasting Peace and Justice in Africa through Appropriate Dispute Resolution'* by Hon. Prof. Kariuki Muigua Ph.D; FCIArb; OGW; C. Arb. This masterpiece is 347 pages long and is dedicated to the idea that lasting peace and justice in Africa is possible and that Appropriate Dispute Resolution can be utilized to secure lasting Peace and Justice in Africa. This book is aimed at researchers, students, peacemakers, environmental defenders and the general reader.

'*Contextualizing Arbitration -The Role of Culture, Politics and Economics'* by Paige Wanjiru Kiarie examines the influence of culture on the state level adoption and practice of commercial arbitration within the socio-legal cultural systems of China, Hong Kong and England.

Paul Dhel Gum in '*Fragility of EAC Federation: Integration of Rich and Disintegration of Poor'* explores the fragility of the EAC Federation, focusing on the integration of affluent regions and the marginalization of poorer areas.

'*Impact of political dynamics in Kenya's construction industry*' by Stanley Kebathi explores the impacts of politics on the construction industry, examining how key aspects such as tendering processes, public procurement, government policies, and regulation are shaped by political forces. The paper delves into the uncertainty created by election cycles, the effects of political influence on land ownership, and the role of devolution in shaping county-level

construction projects.

Lastly, Michael Sang in *'Legislative Solutions to Conflict of Interest Affecting Public Officials in Kenya: A Review of the Conflict-of-Interest Bill, 2023'* evaluates the Conflict-of-Interest Bill, 2023, in Kenya, focusing on its strengths and shortcomings in addressing conflicts of interest among public officials. Drawing on best practices from the United States of America and Canada, the paper proposes amendments to enhance the Bill's effectiveness.

The Role of International Arbitration in Cross-Border Dispute Resolution: Challenges and Opportunities

By: ***Grace Wanjiru****

Abstract

International arbitration is the most prevalent way of settling cross-border disputes owing to its procedural flexibility, enforceability, and neutrality. This paper discusses prominent legal instruments, such as the New York Convention, UNCITRAL Model Law, and ICSID Convention, and considers major challenges such as jurisdictional issues, difficulties in enforcement, and imbalance of power in investor-state arbitration. It addresses new trends like innovation in technology, the rise of regional arbitration, and transparency reforms and mentions future trends that will enhance the efficiency, fairness, and legitimacy of international arbitration in a globalized legal order.

1.0. Introduction

With the rapid increase of globalization, investment opportunities have changed the scope of doing business within a nation, leading to international conflicts becoming a regular occurrence.[1] Litigation in domestic courts is not ideally suited to resolve these conflicts because of contrast jurisdiction issues, home court bias, and procedural differences.[2] Hence, international arbitration emerges as the best option since it is neutral, flexible, and more importantly, enforceable.[3]

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[1] Verma, Anjika. "Introduction to International Arbitration." *Available at SSRN 3693704* (2020).

[2] Gaillard, Emmanuel. *Legal theory of international arbitration*. Vol. 15. Leiden: Martinus Nijhoff Publishers, 2010.

[3] Bantekas, Ilias. *An introduction to international arbitration*. Cambridge University Press, 2015.< https://www.cambridge.org/core/books/an-introduction-to-international-arbitration/5E8E5216D659623C2AE97DE266E27891.> Accessed on 5th March 2025.

One of the most important features of international arbitration is the flexibility it possesses when dealing with different cross-border intangible issues.[4] It breaks through the barriers of varying laws and legal systems by offering the parties control over the procedure, the constituting members of the arbitral tribunal, and the applicable law.[5] In absence of national courts, the flexibility of the arbitrator becomes very useful when jurisdictions created biased assessments.[6]

Despite its advantages, the arbitral process itself has not been free from criticism and continues to be an area of contention.[7] In particular, asymmetries of power in investor-state arbitration give rise to issues of transparency and justice.[8] This article seeks to provide a general overview of the legal skeleton of international arbitration, its daily functioning through case law, and gaps that exist within it.[9] Furthermore, it locates arbitration in the context of global legal pluralism demonstrating that arbitration is a transnational legal order.[10]

2.0. Understanding Cross-Border Disputes

Cross-border disputes are those disputes which arise between parties whose national jurisdictions differ.[11] Cross-border disputes are an unavoidable result of an increasing trend in the direction of globalization, with companies,

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[4] Gritsenko, Kat. "Arbitration as a Dispute Resolution Mechanism for Cross-Border Intellectual Propery Disputes." *Cybaris*® 15, no. 3 (2024): 4.
[5] *Ibid.*
[6] *Ibid.*
[7] Benson, Bruce L. "To arbitrate or to litigate: that is the question." *European Journal of Law and Economics* 8 (1999): 91-151.
[8] Carbonneau, Thomas E. "Arbitral Justice: The Demise of Due Process in American Law." *Tul. L. Rev.* 70 (1995): 1945.
[9] Kanowitz, Leo. "Alternative Dispute Resolution and the Public Interest: The Arbitration Experience." *Hastings LJ* 38 (1986): 239.
[10] Bermann, George A. "The gateway problem in international commercial arbitration." *Yale J. Int'l L.* 37 (2012): 1.
[11] Riyanto, R. Benny, Emmanuel Laryea, Nurul Fibrianti, and Dian Latifiani. "Cross-Border Trade Disputes: A Comparative Analysis of Indonesia and Australia." *Journal of Indonesian Legal Studies* 9, no. 1 (2024).

investors, and individuals conducting cross-border transactions daily.[12] These disputes have been worsened by the collision of so many different cultural, legal, and procedural systems.[13] There is always an answerable question to these disputes, which is, what law governs and at what jurisdictional point is the dispute settled?[14]

Legal pluralism is one characteristic of cross-border disputes, meaning there is a concurrency of multiple systems of law and order.[15] For instance, a dispute arising out of an agreement between a high-tech U.S. firm and a Chinese supplier using the contract laws of a U.S. state while employing the arbitration laws of another different state and procedural laws from yet another state where enforcement is intended.[16] This multitude of laws encourages "forum shopping", where parties prefer a particular forum where it is most favorable to arbitrate or litigate.[17] In this situation, arbitration is often preferred because it is guaranteed to have some form of uniformity and international acceptance under international agreements, which alleviates the unpredictability of transnational lawsuits.[18]

Cross-border commercial contract disputes are the most common form of

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[12] Singh, Kumar Bal Govind. "Online Dispute Resolution in Cross-Border Disputes: A Comprehensive Analysis." *Available at SSRN 4643682* (2023).
[13] Mandel, Robert. "Roots of the modern interstate border dispute." *Journal of Conflict Resolution* 24, no. 3 (1980): 427-454.
[14] *Ibid.*
[15] Tusseau, Guillaume. "Debating Legal Pluralism and Constitutionalism: New Trajectories for Legal Theory in the Global Age." In *General Reports of the XXth General Congress of the International Academy of Comparative Law-Rapports généraux du XXème Congrès général de l'Académie internationale de droit comparé*, pp. 507-556. Springer International Publishing, 2021.
[16] *Ibid.*
[17] Muir Watt, Horatia. "Conflicts of laws unbounded: the case for a legal-pluralist revival." *Transnational Legal Theory* 7, no. 3 (2016): 313-353.
[18] Lynch, Katherine, and Katherine L. Lynch. *The forces of economic globalization: Challenges to the regime of international commercial arbitration*. Kluwer Law International BV, 2003.

cross-border legal disputes, and they arise because of non-delivery, payment, and interpretation of contracts.[19] The disputes are often compounded by language differences and conflicting legal systems.[20] Arbitration ensures a level playing field and a dependable method of resolving such disputes, which allows parties to select governing law and neutral arbitrators, doing away with home-court bias.[21] Nevertheless, conflict of laws remains the principal problem.[22] In *Sulamérica v. Enesa (2012),* the English Court of Appeal had to decide the law applicable to an arbitration agreement even though the contract had a connection to Brazilian law.[23] Choice-of-law clauses and multi-level dispute mechanisms can also trigger procedural hurdles.[24] In *Emirates Trading Agency v. Prime Mineral (2014),* the English courts enforced a multi-tier dispute clause, under which parties were required to negotiate before submitting issues to arbitration.[25] These cases illustrate the possibility of arbitration to mediate multi-jurisdiction legal uncertainty.[26]

Investor-State Dispute Settlement (ISDS) gives foreign investors the power to

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[19] De Carolis, Daniele. "The process of harmonisation of the law of international commercial arbitration: drafting and diffusion of uniform norms." (2010). <https://unov.tind.io/record/39119.> Accessed on 6th March 2025.

[20] Mistelis, Loukas. "International arbitration-corporate attitudes and practices-12 perceptions tested: Myths, data and analysis research report." *American Review of International Arbitration* 15 (2004): 525.

[21] Coe, Jack J., Cedric C. Chao, Ruth V. Glick, Nathan D. O'Malley, and Young Hye Chun. "Arbitration and Mediation in Cross Border Disputes: Possibilities and Limitations." *Pepp. Disp. Resol. LJ* 19 (2019): 231.

[22] De Carolis, Daniele. "The process of harmonisation of the law of international commercial arbitration: drafting and diffusion of uniform norms." (2010). <https://unov.tind.io/record/39119.> Accessed on 6th March 2025.

[23] Pearson, Sabrina. "Sulamérica v. Enesa: The Hidden Pro-Validation Approach Adopted by the English Courts with Respect to the Proper Law of the Arbitration Agreement." *Arbitration International* 29, no. 1 (2013): 115-126.

[24] *Ibid.*

[25] Garimella, Sai Ramani, and Nizamuddin Ahmad Siddiqui. "The Enforcement of Mutli-Tiered Dispute Resolution Clauses: Contemporary Judicial Opinion." *IIUMLJ* 24 (2016): 157.

[26] *Ibid.*

bring claims against host states regarding breaches of international investment agreements like bilateral investment treaties (BITs).[27] It protects investors from government actions such as expropriation and discriminatory regulation.[28] The ICSID Convention is the most important instrument for ISDS, offering binding arbitration and direct enforceability, with a guarantee of an independent process outside national legal systems.[29] Regulatory expropriation is one of the largest controversies of ISDS, wherein government regulation devalues the property of an investor short of outright taking.[30] The example case was effectively in *Philip Morris Asia Ltd. v. Australia (2015),* where Australia was being sued by Philip Morris regarding its plain packaging law.[31] Even though the tribunal confirmed dismissal on grounds of jurisdiction, tensions between state sovereignty and investor protection were unleashed.[32] There has also been a lack of transparency leveled against ISDS, which typically holds hearings in secret.[33] Accordingly, UNCITRAL took transparency rules prescribing open hearings and public availability to balance investor rights with policy space of government and public interest.[34]

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[27] Tienhaara, Kyla. "Investor–state dispute settlement." *REGULATORY THEORY* (2017): 675.

[28] Sappideen, Razeen, and Ling Ling He. "Dispute resolution in investment treaties: balancing the rights of investors and host states." *Journal of World Trade* 49, no. 1 (2015).

[29] Kryvoi, Yarik. "International centre for settlement of investment disputes (ICSID)." (2023): 1-432.

[30] Mrisho, Mlinga Idrisa, Tran Thi Kim Dung, Hafiz Usman Ghani, and Kassim Bakari Kipanga. "Investor-State Dispute Settlement and the Application of the Rule of Law under the ICSID Convention." *US-China L. Rev.* 20 (2023): 297.

[31] Rimmer, Matthew. "The Chilling Effect: Investor-State Dispute Settlement, Graphic Heath Warnings, the Plain Packaging of Tobacco Products, and the Trans-Pacific Partnership." *Victoria UL & Just. J.* 7 (2017): 77.

[32] Wharton, Patrick. "The battle against tobacco regulation through international tribunals: Phillip Morris V Australia and Uruguay." *TransJus Working Papers; 1/2016* (2016).

[33] Adeleke, Fola. "The role of law in assessing the value of transparency and the disconnect with the lived realities under Investor-State Dispute Settlement." *SECO/WTI Academic Cooperation Project Working Paper Series* 6 (2015).

[34] *Ibid.*

Intellectual property (IP) cases represent another significant category of cross-border legal disputes, especially with international business increasingly relying on technology and innovation.[35] These cases typically involve multinational players safeguarding patents, trademarks, copyrights, and trade secrets in multiple jurisdictions.[36] The territorial nature of IP rights, where protection is provided by distinct national legal systems, renders cross-border enforcement more problematic.[37] Arbitration offers a single and confidential forum for multi-jurisdictional IP dispute resolution, bypassing the risk of conflicting judgments.[38] For example, in *Huawei v. Samsung (2018),* arbitration was used to resolve global SEP disputes, preventing conflicting judgments from different national courts.[39] There are, however, limits to public policy under arbitrability, and they are problematic, with some jurisdictions precluding arbitration of matters involving fundamental public interests.[40] The Swiss Federal Supreme Court held in *Sanofi-Aventis v. Genentech (2013*) that the validity of patents could not be determined independently by arbitrators due to public policy concerns.[41] Notwithstanding the limitations above, arbitration

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[35] Baldia, Sonia. "The transaction cost problem in international intellectual property exchange and innovation markets." *Nw. J. Int'l L. & Bus.* 34 (2013): 1.

[36] Campi, Mercedes, Marco Dueñas, Matteo Barigozzi, and Giorgio Fagiolo. "Intellectual property rights, imitation, and development. The effect on cross-border mergers and acquisitions." *The Journal of International Trade & Economic Development* 28, no. 2 (2019): 230-256.

[37] Schmiele, Anja. "Intellectual property infringements due to R&D abroad? A comparative analysis between firms with international and domestic innovation activities." *Research Policy* 42, no. 8 (2013): 1482-1495.

[38] Surendran, Nanda, and S. Mini. "Arbitration as a means to resolve Intellectual Property Disputes." (2021).< https://www.afjbs.com/uploads/paper/95fff26d81e6922b9e512deb11906a93.pdf.>Accessed on 6th March 2025.

[39] Zingales, Nicolo. "The legal framework for SEP disputes in the EU post-Huawei: whither harmonization?" *Yearbook of European Law* 36 (2017): 628-682.

[40] Cook, Trevor, and I. Alejandro Garcia. "International intellectual property arbitration." (2010): 1-496.

[41] Grierson, Jacob, and Thomas Granier. "Betamax: Has the Privy Council Gone Too Far In Seeking To Ensure That The Second Look Test Does Not Become A Second Guess Test." *Journal of International Arbitration* 38, no. 6 (2021).

is still a preferred option for dispute resolution in emerging areas such as artificial intelligence, biotechnology, and data protection owing to specialist knowledge and procedural flexibility.[42] With the development of technology and international trade, arbitration will persist in changing to combat jurisdictional fragmentation, public scrutiny, and increased complexity of emerging technologies.[43]

3.0. The Legal Framework for International Arbitration

The effectiveness of international arbitration relies on a robust legal framework for effective, fair, and enforceable settlement of cross-border disputes.[44] The regime is supported by international conventions, model law, and institutional rules governing arbitration in and between borders.[45] These instruments provide model procedural details and enforcement measures of arbitral awards to capture jurisdictional risks involved in cross-border disputes.[46] The three key instruments governing international arbitration are the New York Convention (1958), the UNCITRAL Model Law, and the ICSID Convention.[47] The models all together offer a good model for the settlement of disputes and protection of the interests of sovereign states and private parties.[48]

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[42] Scherer, Maxi, Mohamed S. Abdel Wahab, and Niuscha Bassiri. "International arbitration and the COVID-19 revolution." (2020): 1-408.

[43] *Ibid.*

[44] Lo, Chang-Fa. "Desirability of a new international legal framework for cross-border enforcement of certain mediated settlement agreements." *Contemp. Asia Arb. J.* 7 (2014): 119.

[45] Oliveira, Nicole Borba. "The role of international arbitration in resolving cross-border smart contract disputes: opportunities and challenges." *PQDT-Global* (2023).

[46] Li, Annie X. "Challenges and Opportunities of Chinese International Arbitral Institutions and Courts in a New Era of Cross-Border Dispute Resolution." *BU Int'l LJ* 38 (2020): 352.

[47] van den Berg, Albert Jan. "Appeal mechanism for ISDS awards: interaction with the New York and ICSID Conventions." *ICSID Review-Foreign Investment Law Journal* 34, no. 1 (2019): 156-189.

[48] Nariman, Fali S. "International arbitration in the twenty-first century: Concepts, instruments and techniques." *Trade L. & Dev.* 1 (2009): 308.

3.1. The New York Convention (1958)

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention, is the foundation for the enforcement of international arbitral awards.[49] The Convention was ratified by over 170 countries and obligates the signatory states to recognize and enforce arbitral awards issued by other member states.[50] This legal regime reduces risks of cross-border enforcement and offers a clear regime for challenging awards on narrow procedural grounds, promoting greater reliability and effectiveness of international arbitration.[51]

One of the strongest features of the New York Convention is its pro-enforcement bias that requires enforcement of arbitral awards by national courts except where exceptions are applicable.[52] Under Article V, enforcement can be refused on grounds of invalid arbitration agreements, procedural irregularities, or contravention of public policy.[53] In *Dallah Real Estate v. Pakistan (2010),* for instance, the UK Supreme Court refused enforcement of an ICC award, ruling that Pakistan was not a party to the arbitration agreement.[54] The case shows the manner in which the Convention accommodates award

[49] Kronke, Herbert, Patricia Nacimiento, Dirk Otto, and Nicola Christine Port, eds. *Recognition and enforcement of foreign arbitral awards: a global commentary on the New York Convention*. Kluwer Law International BV, 2024.

[50] Bermann, George A. "Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts." In *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts*, pp. 1-78. Springer International Publishing, 2017.

[51] *Ibid.*

[52] Lu, May. "The New York convention on the recognition and enforcement of foreign arbitral awards: Analysis of the seven defenses to oppose enforcement in the United States and England." *Ariz. J. Int'l & Comp. L.* 23 (2005): 747.

[53] Article V of the New York Convention.

[54] Lu, May. "The New York convention on the recognition and enforcement of foreign arbitral awards: Analysis of the seven defenses to oppose enforcement in the United States and England." *Ariz. J. Int'l & Comp. L.* 23 (2005): 747.

enforcement and judicial control.[55] However, the Convention is not perfect, particularly in disparate application of public policy exceptions.[56] In *China Agribusiness v. Malaysia (2023),* Malaysian courts denied recognition of a Chinese arbitral award on the basis of public policy, illustrating how the courts of the state can undermine the Convention's goal of uniform enforcement.[57]

3.2. UNCITRAL Model Law

The Model Law of International Commercial Arbitration of UNCITRAL is a unified model of the arbitral process and has been adopted by over 80 states as the model of their national arbitration law.[58] Prepared by the United Nations Commission on International Trade Law (UNCITRAL), it encompasses significant aspects of arbitration, i.e., arbitration agreements, appointment of arbitrators, conduct of arbitral procedure, and recognition and enforcement of awards.[59] The Model Law is designed to provide a uniform law on international arbitration that reduces inconsistency from one jurisdiction to another.[60]

One of the most powerful aspects of the UNCITRAL Model Law is its flexibility. States can adopt the law in its entirety or modify it to fit their own

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[55] Bermann, George A. "The UK Supreme Court Speaks to International Arbitration: Learning from the Dallah Case." *Am. Rev. Int'l Arb.* 22 (2011): 1.
[56] *Ibid.*
[57] Forbes, Vivian Louis. *Malaysia's Maritime Jurisdictional Limits: An Appraisal*. Springer Nature.<https://link.springer.com/book/10.1007/978-3-031-78783-6#:~:text=About%20this%20book,the%20Law%20of%20the%20Sea> Accessed on 5th March 2025.
[58] Hoellering, Michael F. "The uncitral model law on international commercial arbitration." *The International Lawyer* (1986): 327-339.
[59] Ungar, Kenneth T. "The Enforcement of Arbitral Awards Under UNCITRAL's Model Law on International Commercial Arbitration." *Colum. J. Transnat'l L.* 25 (1986): 717.
[60] Venter, Debra. "The UNCITRAL model law on international commercial arbitration as basis for international and domestic arbitration in South Africa." PhD diss., North-West University, 2010. < https://www.grafiati.com/en/literature-selections/international-arbitration-law/dissertation/.> Accessed on 5th March 2025.

domestic legislation.[61] Singapore's International Arbitration Act, for example, adheres to the Model Law, cementing the latter's status as a leading arbitration hub.[62] The Model Law also adopts the principle of kompetenz-kompetenz, which gives arbitral tribunals the power to rule on their own jurisdiction, which dissuades judicial intervention and encourages arbitration autonomy.[63]

3.3. ICSID Convention

The International Centre for Settlement of Investment Disputes (ICSID) Convention, created under the backings of the World Bank, regulates disputes between foreign investors and host states.[64] In contrast to the New York Convention, ICSID awards themselves are enforceable in member states without stamp of approval from domestic courts, which raises the level of investment protection and certainty.[65]

The ICSID Convention is at the vanguard of Investor-State Dispute Settlement (ISDS), allowing foreign investors to sue governments for actions like expropriation or discriminatory regulation.[66] In *Micula v. Romania (2019),* the European Commission opposed enforcement of an ICSID award on the basis of incompatibility with EU state aid rules, highlighting tensions between

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[61] Viscasillas, Pilar Perales. "The UNCITRAL Model Law on International Commercial Arbitration: interpretation, general principles and arbitrability." *Journal of Law, Society and Development* 3, no. 1 (2016): 67-84.

[62] Ribeiro, João, and Stephanie Teh. "The time for a new arbitration law in China: Comparing the arbitration law in China with the UNCITRAL model law." *Journal of International Arbitration* 34, no. 3 (2017).

[63] *Ibid.*

[64] Greenberg, Jonathan D., and Evan Darwin Winet. "International investment law and dispute resolution." In *Handbook on the Geopolitics of Business*, pp. 227-255. Edward Elgar Publishing, 2013.

[65] Osmanski, Emily. "Investor-state dispute settlement: is there a better alternative." *Brook. J. Int'l L.* 43 (2017): 639.

[66] Rowat, Malcolm D. "Multilateral approaches to improving the investment climate of developing countries: the cases of ICSID and MIGA." *Harv. Int'l. LJ* 33 (1992): 103.

international and regional legal orders and international arbitration.[67] Although it has been endowed with powerful enforcement powers, the ICSID mechanism has been accused of insufficient transparency and neutrality and reform calls have been forthcoming, including the suggestion of a Multilateral Investment Court as an alternative to ISDS.[68]

4.0. Benefits of International Arbitration in Cross-Border Disputes

International arbitration is the preferred method of resolving cross-border disputes due to its significant superiority over domestic litigation.[69] Its popularity lies in the fact that it is neutral, enforceable, procedurally flexible, confidential, and has access to specialized expertise and hence is the most preferred by commercial parties and sovereign states alike.[70] A key benefit is neutrality and objectivity and steering clear of home-court advantages.[71] Arbitration allows one to select a neutral forum and arbitrators to ensure equity particularly in politically sensitive cases like *Yukos v. Russia (2014*). Impartiality is significant when state interests or political sensitivities are at stake.[72]

Another key strength is enforceability. The New York Convention of 1958 facilitates easy recognition and enforcement of arbitral awards in over 170

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[67] Galvez, Josep. "The United States Court of Appeal on Micula: US Courts and Common Law Uphold Investor Rights amid EU Law Tensions." *Rom. Arb. J.* 18 (2024): 93.

[68] *Ibid.*

[69] Chaisse, Julien. "Arbitration in cross-border data protection disputes." *Journal of International Dispute Settlement* 15, no. 4 (2024): 534-551.

[70] Abed, Ammar. "The Role of Arbitration and Mediation in Resolving International Trade Disputes." *Utu Journal of Legal Studies (UJLS)* 1, no. 1 (2024): 10-17.

[71] Abed, Ammar. "The Role of Arbitration and Mediation in Resolving International Trade Disputes." *Utu Journal of Legal Studies (UJLS)* 1, no. 1 (2024): 10-17.

[72] Gaukrodger, David. "Appointing Authorities and the Selection of Arbitrators in Investor-State Dispute Settlement: An Overview Consultation Paper." (2018). <https://www.researchgate.net/publication/332341272_International_Investment_Law_and_Non-Economic_Issues.>

nations, compared to domestic court judgments, which are simple to enforce.[73] The *Chevron v. Ecuador* case of 2011 illustrates how arbitral awards are binding even when attempts are made to vacate them, demonstrating the finality and cross-border enforceability of arbitration awards.[74]

Procedural flexibility allows the parties to customize the arbitral process to their requirements, to choose the governing law, place, language, and time period.[75] This flexibility suits various legal regimes and styles of culture.[76] Confidentiality also protects intimate business secrets from public exposure, since arbitral proceedings are not disclosed to the public, while court proceedings are.[77] This aspect is extremely valued in technological disputes, where trade secrets could be revealed publicly.[78]

Finally, access to expertise allows parties to appoint arbitrators with specialized knowledge, encouraging sound decision-making in technical areas like intellectual property and finance.[79] For instance, in *Samsung v. Huawei (2018),* specialist arbitrators successfully determined multi-jurisdictional IP conflicts, preventing conflicting national court decisions.[80]

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[73] Lewis, David. "The Adoption of International Arbitration as the Preferred ADR Process in the Resolution of International Intellectual Property Disputes." *Białostockie Studia Prawnicze* 5, no. 26 (2021): 41-62.
[74] *Ibid.*
[75] Rustambekov, Islambek, and Islam Yerniyazov. "The Application of Arbitration in Resolving Disputes in International Road Construction Contracts." *Beijing L. Rev.* 14 (2023): 1634.
[76] Arzandeh, Ardavan. "Interpreting multiple dispute-resolution clauses in cross-border contracts." *The Cambridge Law Journal* 83, no. 2 (2024): 244-273.
[77]*Ibid.*
[78] *Ibid.*
[79] Łągiewska, Magdalena. "New technologies in international arbitration: a game-changer in dispute resolution?." *International Journal for the Semiotics of Law-Revue internationale de Sémiotique juridique* 37, no. 3 (2024): 851-864.
[80] *Ibid.*

5.0. Challenges in International Arbitration

International arbitration is faced with a range of persistent issues, including jurisdictional complexity, enforcement issues, high costs, the transparency-confidentiality contradiction, and asymmetry of power in investor-state arbitration (ISDS).[81] All these issues cast uncertainty over the fairness, effectiveness, and conclusiveness of the arbitration process.[82]

Jurisdictional complexity is among the most significant issues, particularly when arbitration agreements are vague or disputed.[83] Although the kompetenz-kompetenz doctrine allows arbitral tribunals to determine their jurisdiction, national courts can challenge and overturn such determinations.[84] This was observed in *Yukos v. Russia* (2014), when the Permanent Court of Arbitration (PCA) awarded $50 billion to Yukos shareholders.[85] Despite the tribunal's ruling, Russia challenged the award, which was set aside by the Hague District Court in 2016, showing how court interference takes away from arbitral finality.[86]

Enforcement of awards remains a problem despite the New York Convention (1958), enabling enforcement in over 170 jurisdictions.[87] Local courts can refuse enforcement on narrowly drawn grounds, e.g., public policy or procedural

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[81] Hanotiau, Bernard. "International arbitration in a global economy: The challenges of the future." *Journal of International Arbitration* 28, no. 2 (2011).

[82] Corrie, Clint A., Maynard Beirne, and L. L. P. Parsons. "Challenges in international arbitration for non-signatories." *Comparative Law Yearbook of International Business* 29 (2007): 45-74.

[83] Baker, Mark, and Lucy Greenwood. "Are Challenges Overused in International Arbitration?" *J. Int'l Arb.* 30 (2013): 101.

[84] Gélinas, Fabien. "Arbitration and the Challenge of Globalization." *Journal of International Arbitration* 17, no. 4 (2000).

[85]

[86] *Ibid.*

[87] Ghaeminasab, Fateme. "Challenges of International Arbitral Awards." *CIFILE Journal of International Law* 5, no. 10 (2024): 65-85.

flaws varying by jurisdiction.[88] For example, in *China Agribusiness v. Malaysia (2023),* Malaysian courts refused a Chinese arbitral award based on grounds of public policy, demonstrating how national interests can hamper international enforcement.[89] Enforcement against states is also more difficult due to the sovereign immunity doctrine that protects states from mandatory enforcement.[90]

Cost and time problems are another significant issue.[91] Although arbitration is deemed more efficient than litigation, complex cases turn out to be too expensive.[92] Costs are incurred in the form of arbitrator fees, lawyer fees, and administrative fees, which make arbitration inaccessible to developing nations and small and medium-sized enterprises (SMEs).[93] The *Chevron v. Ecuador (2011)* case is a typical example of such an issue, as the arbitration had lasted for ten years and cost millions of dollars in legal expenses.[94]

The confidentiality vs. transparency debate is especially controversial.[95] While commercial arbitration emphasizes confidentiality in order to guard trade secrets, ISDS proceedings, being typically based on public money and state policies, require more openness.[96] The UNCITRAL Transparency Rules (2014)

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[88] Lynch, Katherine, and Katherine L. Lynch. *The forces of economic globalization: Challenges to the regime of international commercial arbitration*. Kluwer Law International BV, 2003.<https://books.google.com/books/about/The_Forces_of_Economic_Globalization.html?id=PZKHwaTNz1oC.> Accessed on 6th March 2025.

[89] Ha, Hoang Thi, and Daljit Singh, eds. "Southeast Asian Affairs 2023." (2023).

[90] *Ibid.*

[91] Benson, Bruce L. "To arbitrate or to litigate: that is the question." *European Journal of Law and Economics* 8 (1999): 91-151.

[92] Stipanowich, Thomas J. "Arbitration: The new litigation." *U. Ill. L. Rev.* (2010): 1.

[93] *Ibid.*

[94] *Ibid.*

[95] Xiaoyu, Fan. "The confidentiality and transparency debate under investor-state mediation." *Groningen Journal of International Law* 9, no. 2 (2022): 325-351.

[96] Zhao, Mary. "Transparency in international commercial arbitration: adopting a balanced approach." *Va. J. Int'l L.* 59 (2019): 175.

settled the issue by requiring public hearings and award disclosure.[97] However, commercial parties still prefer confidentiality in order to escape reputational damage and protect trade secrets.[98]

Finally, power disparities within ISDS have been accused of being pro-multinational and pro-big business at the cost of sovereign states.[99] ISDS has been accused of limiting state sovereignty and enabling companies to challenge public interest policies.[100] This was seen in *Philip Morris v. Australia (2015),* where the tobacco giant challenged Australia's plain packaging policy.[101] Although the tribunal dismissed the complaint on grounds of jurisdiction, the case highlighted the ways in which corporations could potentially use arbitration to challenge environmental and public health measures.[102] This led to demands that ISDS is reformed, with proposals calling for the development of a freer and fairer system which preserves state sovereignty but also has protections for investors.[103]

6.0. Current Trends in International Arbitration

Emerging international arbitration trends are reshaping the practice to make it

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[97] *Ibid.*

[98] Carmody, Matthew. "Overturning the presumption of confidentiality: should the UNCITRAL rules on transparency be applied to international commercial arbitration." *Int'l Trade & Bus. L. Rev.* 19 (2016): 96.

[99] Franck, Susan D., James Freda, Kellen Lavin, Tobias Lehmann, and Anne Van Aaken. "The diversity challenge: exploring the invisible college of international arbitration." *Colum. J. Transnat'l L.* 53 (2014): 429.

[100] *Ibid.*

[101] Gruszczynski, Lukasz. "Australian plain packaging law, international litigations and regulatory chilling effect." *European Journal of Risk Regulation* 5, no. 2 (2014): 242-247.

[102] Stipanowich, Thomas. "Reflections on the state and future of commercial arbitration: challenges, opportunities, proposals." *Columbia American Review of International Arbitration* 25 (2014).

[103] Lynch, Katherine, and Katherine L. Lynch. *The forces of economic globalization: Challenges to the regime of international commercial arbitration*. Kluwer Law International BV, 2003.

more efficient, fair, accessible and to address legitimate concerns.[104] At the forefront of them are technological innovation, regionalization, transparency-promoting reforms, and fast-track arbitration procedures, all aimed at improving procedural efficiency, cost savings, and public confidence in arbitration.[105]

Technological innovation driven by the COVID-19 pandemic has led premier arbitration centers like the International Chamber of Commerce (ICC) and the Singapore International Arbitration Centre (SIAC) to initiate virtual hearings, electronic filing, and AI-based case management.[106] These innovations minimize costs and make it more accessible, particularly to small and medium-sized enterprises (SMEs) and emerging economies.[107]

Regionalization is reorienting arbitration away from traditional Western hubs like London and Paris to new hubs in Asia and Africa, like the Nairobi Centre for International Arbitration (NCIA) and the China International Economic and Trade Arbitration Commission (CIETAC).[108] This is due to fears of Western legal hegemony and offers low-cost solutions tailored to regional legal cultures.[109]

To counter growing criticism over the transparency of Investor-State Dispute Settlement (ISDS), UNCITRAL Working Group III is developing a Multilateral Investment Court (MIC) with review on appeal and public access to

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[104] Craig, W. Laurence. "Some trends and developments in the laws and practice of international commercial arbitration." *Tex. Int'l LJ* 30 (1995): 1.
[105] *Ibid.*
[106] Solhchi, Mohammad Ali, and Faraz Baghbanno. "Artificial Intelligence and Its Role in the Development of the Future of Arbitration." *Int'l JL Changing World* 2 (2023): 56.
[107] *Ibid.*
[108] Sweet, Alec Stone, and Florian Grisel. *The evolution of international arbitration: judicialization, governance, legitimacy*. Oxford University Press, 2017.< https://global.oup.com/academic/product/the-evolution-of-international-arbitration-9780198739722.> Accessed on 6th March 2025.
[109] *Ibid.*

proceedings, increasing accountability.[110] Institutional codes such as the 2021 ICC Arbitration Rules now mandate the disclosure of third-party funding and broader access to jurisdictional decisions.[111]

Finally, expedited arbitration also overcomes concerns regarding the cost and time of arbitration.[112] ICC Expedited Procedure Rules provide streamlined procedures for claims under $2 million, providing quicker and more affordable decisions.[113] All these advances bring arbitration into the modern age, enabling it to keep up with expectations of a globalized world while at last addressing long-standing issues regarding cost, transparency, and neutrality.[114]

Conclusion

International arbitration is a dynamic and lively international dispute resolution mechanism.[115] Despite offering such significant advantages as neutrality, enforceability, and technical expertise, it nevertheless develops along with the issues of jurisdiction, cost, and claims of imbalance of power.[116] Current developments in high technology and procedural reform will make it even more efficient and equitable, cementing its place as a long-term fixture in

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[110] Abraham, Faith Abel. "The Establishment of a Multilateral Investment Court: Lessons Learned from the WTO." PhD diss., World Trade Institute, Universität Bern, 2023.< https://www.wti.org/research/publications/?&all=true&start=4.> Accessed on 5th March 2025.

[111] Guven, Brooke, Frank J. Garcia, Karl Lockhart, and Michael R. Garcia. "Regulating Third-Party Funding in Investor-State Arbitration Through Reform of ICSID and UNCITRAL Arbitration Rules: Holding Global Institutions to Their Development Mandates." *Boston College Law School Legal Studies Research Paper* 627 (2020).

[112] Lord, Eleanor L. "International arbitration." *The Annals of the American Academy of Political and Social Science* 2, no. 4 (1892): 39-55.

[113] Broklyn, Chris, and Rhema Tioluwani. "The Impact of Institutional Arbitration Rules on Corporate Dispute Resolution Efficiency." (2025).

[114] *Ibid.*

[115] Blackaby, Nigel, Constantine Partasides, Alan Redfern, and Martin Hunter. "An overview of international arbitration." *Redfern & Hunter on International Arbitration* (2009): 1-83.

[116] *Ibid.*

an increasingly changing international legal landscape.[117]

[117] Rubino-Sammartano, Mauro. *International arbitration law and practice*. Juris Publishing, Inc., 2014.

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34. **Tusseau, Guillaume.** "Debating Legal Pluralism and Constitutionalism: New Trajectories for Legal Theory in the Global

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Strategic and Effective Ways to Inject Oil Revenue into the Economy of South Sudan

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

Abstract

This paper explores strategic and effective ways to inject oil revenue into the economy of South Sudan, drawing lessons from other jurisdictions that have successfully managed their natural resource wealth. It further explores the role of oil in South Sudan's economy effectively achieving economic growth. The paper examines the means of effectively integrating oil revenue into the country's economy. It entails research work which was carried out on the basis of systematic analysis and methods. It identifies modern features of management and effective use of oil revenue making various proposals to that effect.

Keywords: sustainable economic development, oil revenue, economic diversification, effective governance, transparency.

Introduction

South Sudan, the world's youngest nation, is endowed with substantial oil reserves, which represent a critical economic asset.[1] Since gaining independence in 2011, oil revenue has become the backbone of South Sudan's economy, contributing to over 90% of government revenue and nearly all of its export earnings.[2] However, the country faces significant challenges, including

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[1] Government of South Sudan Initial National Communication to the United Nations Framework Convention on Climate Change. Government of South Sudan, Ministry of Environment and Forestry, 2018.

[2] African Development Bank, South Sudan: Economic Outlook 2023 (AfDB, 2023) < https://www.afdb.org/en/countries/east-africa/south-sudan/ >

political instability, lack of infrastructure, and a dire humanitarian situation, which hinder its ability to effectively harness this resource.[3]

Current State of South Sudan's Oil Industry

South Sudan produces around 170,000 barrels of oil per day, with its major oil fields located in the Upper Nile and Unity states.[4] Despite its potential, the oil sector is plagued by several issues, including outdated infrastructure, frequent shutdowns due to conflict, and fluctuating global oil prices.[5] Additionally, there is a lack of diversification, making the economy highly vulnerable to oil price shocks.[6] Addressing these challenges requires a multifaceted approach, focusing on sustainable development and effective governance.[7]

Strategic Approaches to Utilize Oil Revenue

Infrastructure Development

Investing in infrastructure is crucial for economic development.[8] Improved transport networks, such as roads and railways, can facilitate trade and movement, while enhanced communication infrastructure can promote business activities and integration into the global economy.[9] Additionally, developing energy infrastructure, including electricity generation and distribution, is vital for industrial growth and improving living standards.[10]

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[3] Ibid

[4] Government of South Sudan Initial National Communication to the United Nations Framework Convention on Climate Change. Government of South Sudan, Ministry of Environment and Forestry, 2018.

[5] Ibid.

[6] Ibid

[7] Richard Auty, *Sustaining Development in Mineral Economies: The Resource Curse Thesis* (Routledge 1993).

[8] United Arab Emirates Ministry of Infrastructure Development, 'Infrastructure Development in UAE' (2023) <https://www.moid.gov.ae/en/about-us/infrastructure-development>

[9] Ibid.

[10] Ibid

Human Capital Development

Investing in education and healthcare is essential for building a skilled and healthy workforce.[11] Establishing quality educational institutions and vocational training programs can equip the population with the necessary skills to participate in and drive economic growth.[12] Similarly, improving healthcare services can enhance productivity and quality of life, contributing to overall economic stability.[13]

Economic Diversification

Relying solely on oil revenue is unsustainable.[14] Diversification into sectors such as agriculture, manufacturing, and tourism can provide alternative sources of income and employment.[15] For instance, revitalizing agriculture can ensure food security and reduce dependency on imports, while promoting tourism can leverage South Sudan's natural and cultural heritage to attract visitors and generate revenue.[16]

Effective Governance and Transparency

Anti-Corruption Measures

Combating corruption is crucial for ensuring that oil revenue is used effectively.[17] Establishing robust anti-corruption frameworks and institutions

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[11] "UAE Economic Diversification," UAE Government Portal <https://u.ae/en/information-and-services/economy-and-finance/economic-diversification>

[12]Malaysian Ministry of Education, 'Malaysian Education Blueprint 2013-2025' (2013) <https://www.moe.gov.my/en/malaysia-education-blueprint-2013-2025>

[13] Helge Ryggvik, *The Norwegian Oil Experience: A Toolbox for Managing Resources?* (Universitetsforlaget 2010).

[14] Richard Auty, *Sustaining Development in Mineral Economies: The Resource Curse Thesis* (Routledge 1993)

[15] Ibid.

[16] Ibid.

[17] Orkhan Tashakkul; Effective Ways to Inject Oil Revenues into the Economy in Oil Countries.

can help monitor and control the use of funds.[18] Implementing transparent procurement processes and strict penalties for corrupt practices can deter misuse of resources.[19]

Transparent Revenue Management

Adopting transparent revenue management practices can build public trust and ensure accountability.[20] Publishing detailed reports on oil revenue and expenditures, along with independent audits, can provide oversight and prevent misappropriation.[21] Countries like Norway have successfully implemented such measures, contributing to their economic stability and growth.[22]

Investment in Social Programs

Poverty Alleviation

Allocating oil revenue to social programs aimed at poverty alleviation can significantly improve living standards.[23] Initiatives such as cash transfer programs, microfinance schemes, and support for small and medium enterprises can empower marginalized communities and stimulate economic activity.[24]

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[18] Ibid

[19] United Arab Emirates Ministry of Infrastructure Development, 'Infrastructure Development in UAE' (2023) <https://www.moid.gov.ae/en/about-us/infrastructure-development>

[20] Ibid

[21] Ibid

[22]Norwegian Ministry of Finance, 'The Government Pension Fund Global' (2023) <https://www.regjeringen.no/en/topics/the-economy/the-government-pension-fund/id2006130/>

[23] Orkhan Tashakkul; Effective Ways to Inject Oil Revenues into the Economy in Oil Countries.

[24] Kazakhstan Ministry of National Economy, 'Private Sector Development Policy' (2023) <https://www.economy.kz/en/private-sector-development>

Social Safety Nets

Establishing social safety nets, including unemployment benefits and pensions, can provide a buffer against economic shocks and protect vulnerable populations.[25] These programs can help stabilize the economy during downturns and ensure a basic standard of living for all citizens.[26]

Community Development

Investing in community development projects, such as building schools, clinics, and clean water facilities, can enhance the quality of life and promote social cohesion.[27] Engaging local communities in decision-making processes ensures that development projects address their needs and priorities.[28]

Functioning Solutions from Other Jurisdictions

Norway: Sovereign Wealth Fund

Norway's Government Pension Fund Global, one of the world's largest sovereign wealth funds, is a prime example of effective oil revenue management.[29] The fund invests oil profits in global markets, ensuring long-term financial stability and intergenerational equity.[30] Norway's model emphasizes transparency, accountability, and ethical investment practices.[31]

Botswana: Diamond Revenue Management

Botswana has successfully managed its diamond revenue through prudent fiscal policies and strategic investments. The country established the Pula

[25] Ibid
[26] Ibid
[27] Orkhan Tashakkul; Effective Ways to Inject Oil Revenues into the Economy in Oil Countries.
[28]Botswana Ministry of Agriculture, 'National Agricultural Development Policy' (2022) <https://www.gov.bw/documents/national-agricultural-development-policy >
[29] Norwegian Ministry of Finance, 'The Government Pension Fund Global' (2023) <https://www.regjeringen.no/en/topics/the-economy/the-government-pension-fund/id2006130/>
[30] Ibid
[31] Ibid

Fund, a sovereign wealth fund aimed at stabilizing the economy and saving for future generations.[32] Botswana's approach highlights the importance of diversification and sustainable development.[33]

UAE: Diversification through Investment

The United Arab Emirates has effectively used its oil wealth to diversify its economy.[34] Investments in sectors such as tourism, aviation, and real estate have reduced the country's dependency on oil.[35] The UAE's vision for a diversified and knowledge-based economy serves as a model for South Sudan's long-term development.[36]

Alberta, Canada: Heritage Savings Trust Fund

Alberta's Heritage Savings Trust Fund was created to manage the province's oil and gas revenues.[37] The fund focuses on saving for the future, supporting social programs, and investing in economic diversification.[38] Alberta's experience underscores the value of strategic long-term planning and fiscal prudence.[39]

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[32] Botswana Ministry of Agriculture, 'National Agricultural Development Policy' (2022) <https://www.gov.bw/documents/national-agricultural-development-policy>

[33] "Botswana's Pula Fund," Bank of Botswana <https://www.bankofbotswana.bw/pula-fund >

[34] United Arab Emirates Ministry of Infrastructure Development, 'Infrastructure Development in UAE' (2023) <https://www.moid.gov.ae/en/about-us/infrastructure-development>

[35] Ibid

[36]"UAE Economic Diversification," UAE Government Portal <https://u.ae/en/information-and-services/economy-and-finance/economic-diversification>

[37] Alberta Heritage Savings Trust Fund," Government of Alberta <https://www.alberta.ca/heritage-savings-trust-fund.aspx accessed 10 July 2024>

[38] Ibid

[39] Orkhan Tashakkul; Effective Ways to Inject Oil Revenues into the Economy in Oil Countries. Kazakstan.

Policy Recommendations for South Sudan

Policy Recommendations for South Sudan's Oil Sector

South Sudan's oil sector is crucial to the country's economy, yet it faces numerous challenges, including poor governance, environmental degradation, and security threats. To promote sustainable development, enhance transparency, and maximize economic benefits, a series of policy interventions are necessary.

Transparency in Government

A robust regulatory framework is essential to ensure that the oil sector operates efficiently and fairly. The government should strengthen existing laws and align them with international best practices, ensuring clarity and consistency in oil sector regulations.[40] Corruption remains a major concern, and addressing it requires the establishment of independent oversight bodies tasked with monitoring revenue collection, allocation, and spending.[41] These bodies should be empowered to audit financial transactions and hold stakeholders accountable. Additionally, transparency in revenue management is crucial; the government should publish regular reports on oil revenues, contracts, and expenditures to foster public trust and accountability.[42] Public participation must also be prioritized, allowing civil society organizations, local communities, and independent auditors to engage in decision-making processes, ensuring inclusivity and fairness.[43]

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[40] African Development Bank, *South Sudan: Economic Outlook 2023* (AfDB, 2023) <https://www.afdb.org/en/countries/east-africa/south-sudan/ >

[41] Global Witness, *Capture on the Nile: South Sudan's State-Owned Oil Company, the Government and the Military* (Global Witness, 2018) < https://www.globalwitness.org/en/campaigns/oil-gas-and-mining/capture-on-the-nile/ >

[42] International Monetary Fund, *South Sudan: Selected Issues* (IMF Country Report No. 22/101, 2022) < https://www.imf.org/en/Publications >

[43] Ibid.

Diversification of the Economy

South Sudan's over-reliance on oil revenues makes the economy vulnerable to global price fluctuations.[44] To mitigate this risk, the government should invest in alternative sectors such as agriculture, manufacturing, and services to create a more resilient economic base.[45] A strong local content policy is also necessary to ensure that South Sudanese citizens benefit directly from oil production. Oil companies should be required to prioritize local labor, suppliers, and service providers, creating more employment opportunities and strengthening the domestic economy.[46] Furthermore, investment in technical education and vocational training programs is crucial to equip the local workforce with the necessary skills to participate in the oil industry, reducing dependency on foreign expertise.[47]

Sustainable Economic Development

The environmental impact of oil extraction in South Sudan has been severe, with issues such as oil spills, gas flaring, and water contamination affecting communities and ecosystems.[48] The government must implement and enforce strict environmental regulations to ensure that oil companies adhere to sustainable practices.[49] Environmental monitoring agencies should conduct regular assessments to prevent ecological damage and hold polluting firms accountable.[50] Additionally, a comprehensive community compensation mechanism should be established to provide fair restitution for communities

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[44] World Bank, *South Sudan Economic Update: Towards a Jobs Agenda* (World Bank, 2023) < https://www.worldbank.org/en/country/southsudan/publication/south-sudan-economic-update >

[45] Ibid.

[46] Jok JM, *Breaking Sudan: The Search for Coherence in a Nation at War* (Oxford University Press 2017).

[47] Ibid.

[48] United Nations Environment Programme, *Environmental Assessment of South Sudan's Oil Sector* (UNEP, 2020) https://www.unep.org/resources/report/environmental-assessment-south-sudan-oil-sector

[49] Ibid.

[50] Ibid.

affected by environmental degradation.[51] Compensation packages should include financial support, land rehabilitation, and alternative livelihood programs. In the long term, South Sudan should also explore renewable energy investments to diversify its energy sources and reduce reliance on fossil fuels, aligning with global efforts toward sustainability.[52]

Advancements in Security Measures and Conflict Prevention

Security challenges in oil-producing regions have led to instability, reducing investor confidence and affecting production.[53] Strengthening security in these areas is essential to prevent conflicts between oil companies and local communities. This can be achieved by deploying well-trained security forces while ensuring that their presence does not lead to human rights violations.[54] Fair resource allocation is another crucial factor in conflict prevention. The government must develop an equitable revenue-sharing framework that ensures oil wealth is distributed fairly among national, regional, and local stakeholders.[55] Addressing land rights issues is also key; recognizing and protecting local communities' land rights will help prevent disputes, forced displacements, and resentment toward oil companies operating in these areas.[56]

Climate Based Infrastructural Development

A modern and efficient oil infrastructure is necessary to enhance productivity and reduce losses in the sector.[57] South Sudan should invest in upgrading its pipelines, refineries, and storage facilities to improve efficiency and

[51] Ibid.
[52] African Development Bank, *South Sudan: Economic Outlook 2023* (AfDB, 2023) https://www.afdb.org/en/countries/east-africa/south-sudan/
[53] Ibid (n42)
[54] Ibid
[55] Ibid (n45)
[56] Ibid (n47)
[57] Ibid (n43)

sustainability.[58] Encouraging private sector participation and foreign direct investment can further support infrastructure development. However, attracting investment requires a stable and predictable business environment.[59] The government should focus on reducing bureaucratic hurdles, ensuring legal certainty, and protecting investors' rights to make South Sudan a more attractive destination for oil sector investment.[60] Additionally, regional cooperation with neighboring countries, particularly Sudan, is vital to securing stable oil exports.[61] Strengthening bilateral relations and negotiating favorable terms for oil transit will help South Sudan maximize its export potential and reduce dependency on a single route.[62]

Conclusion

South Sudan has the potential to transform its oil wealth into sustainable economic growth and development. By adopting strategic approaches and learning from successful models in other jurisdictions, the country can overcome its challenges and build a prosperous future. Effective governance, transparent revenue management, and investment in infrastructure, human capital, and economic diversification are key to achieving this vision.[63]

[58] Ibid.
[59] Ibid (n53)
[60] Ibid.
[61] Ibid.
[62] Ibid.
[63] "UAE Economic Diversification," UAE Government Portal <https://u.ae/en/information-and-services/economy-and-finance/economic-diversification>

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2. Richard Auty, *Sustaining Development in Mineral Economies: The Resource Curse Thesis* (Routledge 1993).

3. Government of South Sudan Initial National Communication to the United Nations Framework Convention on Climate Change. Government of South Sudan, Ministry of Environment and Forestry, 2018. https://unfccc.int/sites/default/files/resource/South%20Sudan%20INC.pdf

4. "Botswana's Pula Fund," Bank of Botswana https://www.bankofbotswana.bw/pula-fund

5. "UAE Economic Diversification," UAE Government Portal https://u.ae/en/information-and-services/economy-and-finance/economic-diversification

6. "Alberta Heritage Savings Trust Fund," Government of Alberta https://www.alberta.ca/heritage-savings-trust-fund.aspx accessed 10 July 2024.

7. Norwegian Ministry of Finance, 'The Government Pension Fund Global' (2023) https://www.regjeringen.no/en/topics/the-economy/the-government-pension-fund/id2006130/

8. United Arab Emirates Ministry of Infrastructure Development, 'Infrastructure Development in UAE' (2023) https://www.moid.gov.ae/en/about-us/infrastructure-development

9. Malaysian Ministry of Education, 'Malaysian Education Blueprint 2013-2025' (2013) https://www.moe.gov.my/en/malaysia-education-blueprint-2013-2025

10. Botswana Ministry of Agriculture, 'National Agricultural Development Policy' (2022) https://www.gov.bw/documents/national-agricultural-development-policy
11. Chilean Copper Commission, 'Copper Revenue Management' (2023) https://www.cochilco.cl/english/revenue-management.
12. Kazakhstan Ministry of National Economy, 'Private Sector Development Policy' (2023) https://www.economy.kz/en/private-sector-development
13. Orkhan Tashakkul; Effective Ways to Inject Oil Revenues into the Economy in Oil Countries.
14. Common financial strategies found among top 10 oil and gas firms, New York Times. <https://www.ogj.com/generalinterest/companies/article/17226244/common-financial-strategies-found-among-top-10-oil-and-gas-firms >
15. African Development Bank, *South Sudan: Economic Outlook 2023* (AfDB, 2023) https://www.afdb.org/en/countries/east-africa/south-sudan/
16. Global Witness, Capture on the Nile: South Sudan's State-Owned Oil Company, the Government and the Military (Global Witness, 2018) https://www.globalwitness.org/en/campaigns/oil-gas-and-mining/capture-on-the-nile/
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https://www.unep.org/resources/report/environmental-assessment-south-sudan-oil-sector

Midwifing the Peacebuilding and Conflict Management among Pastoral Communities: An Assessment of Contributions of Alternative Dispute Resolution Mechanisms in Northern Kenya

By: ***Kola Muwanga****

Abstract

Conflicts and conflict resolutions among pastoral communities are not new phenomena. Among the pastoral communities living in arid and semi arid environments of Kenya, conflicts driven by competition over and control of and access to scarce natural resources, cattle rustling, ethnic rivalries and historical grievances are a common phenomena. Persistent violent conflicts have been a commonplace theme for decades, which has plagued and haunted the pastoralist communities especially the Northern Kenya – a semi-arid region inhabited by said pastoral communities. For decades, in the absence of robust state structures and accessible formal justice systems, these communities have developed and relied on alternative dispute resolution (ADR) mechanisms rooted in indigenous customs and communal norms to manage and resolve conflicts.

This paper critically evaluates the contribution of ADR mechanisms in fostering sustainable peace among pastoral communities in counties such as Turkana, Marsabit, Wajir, and Samburu. It adopts a legal pluralism framework to analyze the interaction between traditional justice systems, community peace committees, and hybrid interventions involving non-state actors and government agencies. Drawing from case studies, notably the Wajir Peace Accord, the paper highlights the strengths,

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limitations, and evolving dynamics of ADR in these regions. The findings reveal that while ADR has significantly reduced localized violence and promoted reconciliation, its long-term effectiveness depends on legal recognition, institutional support, gender inclusivity, and integration with formal state systems. The paper offers targeted policy reasoning to enhance the coherence, legitimacy, and impact of ADR processes in Northern Kenya's peace architecture.

Introduction

"The more we sweat or rather labour in peace, the less we bleed in war."[1] Although Kenya is considered to be peaceful unlike her neighbors, a closer scrutiny reveals an unprecedented wave of internal and cross-border conflicts.[2] These conflicts, mainly manifesting themselves as political, economic, environmental, land and inter-ethnic conflicts are sending bad signals to those living outside the country.[3] Pastoralists in Kenya have borne much of the brunt of internal conflicts and these communities have put in place interventions aimed at addressing conflicts using local communal strategies for conflict resolution and peace building.[4] Conflict is a manifest in structural inequity and unequal distribution of power.[5] It is a situation with at least two identifiable groups in conscious opposition to each other as they pursue incompatible goals.[6] It is a felt struggle between two or more interdependent individuals over perceived incompatible differences in beliefs,[7] values,[8] and goals,[9] or over

[1] Vijaya Lakshmi Pandit
[2] James Chebon Chepkoiywo; 'The Impact of Community-led Strategies on Conflict Resolution and Peace Building among Pastoralist Communities in Kenya: A Case Study of Olmoran Division of Laikipia West District.'
[3] Ibid
[4] Ibid
[5] Conflict Theory in Sociology: The Complete Guide
[6] Joyce L. Hocker, William W. Wilmot (2011), Interpersonal Conflicts
[7] Ibid
[8] Ibid
[9] Ibid

differences in desires for esteem,[10] control,[11] and connectedness.[12] There is no secret that the pastoral communities of Kenya have incessantly been facing security threats, challenges and cyclical conflicts.[13]

The "democratic" terrains due to political change in Kenya has created a lee-way for competing politicians to engage vigilantes on behalf these communities. It is worth noting that beyond these causes which are rather to be sought for at a macro-level there are a number of factors located at the micro-level. Rampant food insecurity linked to population increase coupled with a stagnant economic system, changes from a pastoral mode of production to more sedentary lifestyles and a continued focus on a heroic warrior ideal contribute to the situation.[14] Some members of these communities have been perpetrators and at the same time victims within a vicious cycle of violent conflict that has claimed lives and destroyed property of unknown value over a long period of time in equal measure.[15]

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[10] Ibid

[11] Ibid

[12] Ibid

[13] Assessment of Peace and Conflict Dynamics in Pastoralist Regions of Kenya: A Case of Baringo, Elgeyo Marakwet, Isiolo and Samburu Counties

[14] Adan Abass Tawane. Banditry and Insecurity in Pastoral Kenya: A Critical Discourse

[15] These conflicts among these communities have been attributed to the proliferation of small arms and light weapons, intolerance and incitement of the political class, competition over scarce and ever-diminishing water and pastures among other resources, celebration of a culture of heroism that elevates the social status of raiders, the decline of the role community elders, marginalization by successive governments and little presence of state security if at all any. Among these communities' violent conflict can be seen in a cycle of revenge killings and chronic cattle raids that often starts with morans from one community raiding a rival community either to replenish stock or to feed the highly profitable cattle market that booms in some of these regions and beyond. This spirals into attacks and counter attacks that after a while leads to long periods of hostilities.

Community-led strategies for conflict resolution and peace building have emerged as important elements in the resolution of community-based, national and regional conflicts and in understanding their causes.[16] Conflicts are as old as human societies themselves.[17] Historically, individuals, social groups and societies have disputed and competed against one another over scarce commodities and resources, for instance, land, money, political power, and ideology.[18] They have even fought one another and bitterly sought the elimination and/or subjugation of rivals, in order to control these resources and commodities.[19] But at the same time, human societies and groups have found their own ways and means for averting and/or resolving conflicts.[20] Some of these common, rampant and marauding conflicts include; banditry, cattle rustling, repeated reprisal inter-communal attacks that result in deaths, injuries and displacements.[21]

Interestingly, these conflicts are mainly caused by a set of complex issues that are interwoven including poverty, population pressures, contested territorial claims, undefined or shifted resource boundaries that often do not align with administrative boundaries, weakened customary institutions and increased availability of firearms.[22] The regions may, at times, seem peaceful, however a pop up of a trigger factor such as; prolonged drought, cattle raid incident or a

[16] Ibid
[17] Ibid
[18] Ibid
[19] Ibid
[20] Ibid
[21] Musau, D. M, Ichani, F. X & Mulu, F. (2023). Assessment of Banditry, Cattle Rustling and Insecurity Nexus in North West Kenya. Journal of African Interdisciplinary Studies, 7(4), 132 – 148.
[22] Read more at: IFAD, How to Prevent Land Use Conflicts in Pastoral Areas, retrieved on 25/3/2023, at; https://www.ifad.org/documents/38714170/40184028/LandUseConflicts.pdf/4da68519-6c21-bc00-67dfd7e75aba9543 <accessed on 17 February 2025>

divisive political statement among others, changes everything and violent conflicts explode.[23] Compared to other regions in Kenya, the pastoral regions are least developed with rough terrain, harsh climatic conditions and have been marginalized since pre-independence.[24]

During the colonial era, the British colonial administration did not see economic value in these regions other than just securing the colony's territorial and administrative structures.[25]

A closed district policy was enacted and the region was isolated from the rest of the colony and largely left underdeveloped.[26] The post-colonial government adopted the policy and thus these regions have been left behind in terms of development.[27] As a result; loss of lives, destruction of properties, loss of livelihoods, displacement of persons, disruption of economic activities and underdevelopment largely characterize the pastoral regions. Furthermore, Conflict and insecurity have devastating consequences on the livelihoods and vulnerability of pastoralist societies in Kenya. They represent major obstacles to the long-term development of these regions or counties as was envisaged in the Kenya's incumbent Constitution. Loss of human life and livestock, food insecurity, displacement, restricted or blocked access to key resources and to livelihood opportunities are among the most immediate outcomes of

[23] Security Research and Information Center; Assessment of Peace and Conflict Dynamics in Pastoralist Regions of Kenya: A Case of Baringo, Elgeyo Marakwet, Isiolo and Samburu Counties

[24] Ibid

[25] Ibid

[26] Aukot, E. (2008). Northern Kenya: A Legal-Political Scar. Retrieved on 25/3/2023 from;
https://cohesion.or.ke/index.php/resources/downloads?download=61:impediments-to-peace-in-the-north-rift <accessed on 17 February 2025>

[27] Ibid

violence.[28] Limited private sector investments, reversal of development gains, stunted economic growth, breakdown of social fabric, and further marginalization are more of the long-term negative effects of conflict.[29] Limited investments and slow economic growth in pastoral areas may be seen as both cause and result of conflict.[30]

Towards the 2022 general elections, the National Cohesion and Integration Commission (NCIC)[31] conducted a countrywide conflict hotspot mapping and assessment, under the bunner ***"Towards a Violence-Free 2022 Elections"***, with an objective of a detailed understanding of the peace and security situation in the country.[32] From the assessment, Baringo, Isiolo and Samburu Counties were ranked to hold a medium to high-risk potential for electoral violence with index of 62.8%, 61% and 57.9% respectively while Elgeyo Marakwet was ranked within the medium to low-risk category with an index of 52.6%4.[33] From the study, pre-existing conflict factors such as cyclic inter-communal violence as a result of competition over natural resources,[34] cattle rustling, organized gangs,[35] bandits,[36] cross-border conflicts[37] and high proliferation of the Small Arms and Light Weapons (SALW) were identified as the key drivers

[28] Sara Pavanello et al; Conflict resolution and peace building in the drylands in the Greater Horn of Africa
[29] Ibid
[30] Ibid
[31] A statutory body mandated to promote national unity, equity and the elimination of all forms of ethnic discrimination by facilitating equality of opportunities, peaceful resolution of conflicts and respect for diversity among Kenyan communities. See https://cohesion.or.ke/index.php/about-us/ncic-at-a-glanc <accessed on 18 February 2025>
[32] Supra, note 4
[33] Ibid
[34] Supra, note 5
[35] Ibid
[36] Ibid
[37] Ibid

for electoral violence.[38] A post August 2022 elections peace and cohesion assessment by NCIC; ***"Elections Bila Noma 2022, the Kenyan Experience"***[39] - depicted a rather peaceful country during and after the August general elections.[40] According to the study, more than 91% of Kenyans indicated that the elections were the most peaceful under the Constitution, 2010, with 8% indicating somewhat peaceful and a paltry 1% indicating that the elections were not peaceful.[41] The peacefulness, as reported by the study, was attributed to tremendous investments by state and non-state peace actors in promoting peaceful coexistence, Kenya's legislative reforms to improve election management and the effects of increasing cost of living.[42]

There is a general sense of feeling or rather consensus that seems to point to a huge trust deficit between communities in conflict as one of the key recipes for

[38] Ibid
[39] Ibid
[40] Ibid
[41] Ibid
[42] Ibid; Indeed, the study infers that the elections did not disrupt levels of peace hence peace and conflict dynamics remained the same before, during and after the elections. However, this position may not be true for the pastoralist regions. Reports from different media outlets portray a different picture regarding the status of peace and security in those regions. Just five (5) months after elections, many incidences of insecurity, including cattle rustling and banditry have been reported in Baringo, Elgeyo Marakwet, Isiolo, Laikipia, Marsabit, Samburu, Turkana, and West Pokot counties. The rising insecurity has necessitated the local leaders and residents to appeal to the government to reinstate National Police Reserves (NPR). The NPRs had been withdrawn in 2019 after being accused of aiding cattle rustlers and bandits in addition to misusing their firearms. Despite this withdrawal, the National Police Service (NPS) crime statistics indicate an increasing trend of cattle rustling and stock theft from 254 cases in 2019 to 662 and 817 in 2020 and 2021 respectively. In addition to increasing insecurity in the North Rift, the resurgence of political rallies over the last few months, post-election political re-alignments, drought and high cost of living are all believed to be potential threats to the post-election peace in the country.

such conflicts.[43] This is informed by the fact that among these regions, it is hard to bring together the different conflicting or warring communities since they viewed each other as enemies.[44] This state of affairs was even worsened where the residents from these regions may refuse to freely interact or mingle in any community engagements, most of whom cite that they will be uncomfortable sharing the space with members of a different community.[45] There is also a low level of trust on the ability of law enforcement agencies (LEAs) to guarantee security to the communities across the counties that experience these perennial challenges which explains the proliferation of small arms among different communities in the four counties.[46] A key informant once summarized this by lamenting that:

".....the government disarmed the NPRs claiming that they were able to guarantee us security…… reinstating them again, like it has always happened, is a sign of defeat or their inability…."[47]

Conflict experts argue that the drivers of violent conflict operate at several levels: local (intra-community), national (intra-state and civil wars), regional (inter-state) and even beyond, to global dimensions[48] in a 'complex web of interlocking armed conflicts.' Thus, they observe that the challenge is local, national, regional and global at the same time, with drivers and effects of conflict at one level having profound repercussions at other levels and all manifesting in violence on the ground.[49] The destructive conflicts endured by

[43] Reconciliation After Violent Conflict A Handbook
[44] Ibid
[45] Ibid
[46] Supra, note 2
[47] A comment by a key informant in Baringo County
[48] Since the global war on terror, the long-standing intra-state conflict in Somalia, for example, has developed a global dimension, since Somalia is seen as harbouring terrorist groups that threaten international security.
[49] A New Era of Conflict and Violence. https://www.un.org/en/un75/new-era-conflict-

the Northeastern counties in Kenya for decades since gaining our self-rule have been indicative.[50] Majority of these counties share a history of mutual destabilization, fueling conflict by providing support to insurgents in neighbouring counties because of ethnic ties with rebel groups, or as part of their alien policies and cultural inclinations aiming to destabilize regimes and peaceful co-existence with which they have antagonistic relations.[51] Additionally, private companies seeking to gain control of resources such as oil and land have also played a role in fueling and sustaining internal conflicts by providing arms and funds to different factions in inter-communal and intra-county disputes.[52]

Notably, the inter- and intra-county conflicts and insurgencies intensify the occurrence and effects of local inter-personal violence like murder, domestic abuse and rape, particularly acute in refugee camps, criminal violence like the commercialized livestock raiding and inter-communal violence such as inter-ethnic, inter-clan clashes in these regions.[53] Institutions that would otherwise dispense justice, resolve conflict and control crime are weak, opportunities for redress are low, and local communities are often both victims and perpetrators of violence.[54] According to Sara Pavanello, an array of factors in the

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and-violence#:~:text=Unresolved%20regional%20tensions%2C%20a%20breakdown%20in%20the,change%2C%20have%20become%20dominant%20drivers%20of%20conflict. <accessed on 4 May 2025>

[50] Gayatri Safgal; Clan Conflict and Violent Extremism in the North-Eastern Counties of Kenya

[51] Conflict Analysis and Mapping for Isiolo and Marsabit. https://minorityrights.org/app/uploads/2023/12/peace-or-into-pieces.pdf <accessed on 4 May 2025>

[52] Land and Conflict Lessons from the Field on Conflict Sensitive Land Governance and Peacebuilding

[53] Supra, note 13

[54] Ibid

institutional, political economy and social spheres interact to fuel and sustain violence in the affected and impacted counties.[55] She further alludes that institutional factors include contested borders, weak land-tenure rights, and failures of policing and justice; political economic factors include extractive commercial enterprises, land alienation, divisive politics and corrupt local administrations; and social factors relate to broad processes of exclusion and issues of identity, gender and ethnicity.[56] That the multi-layered and dynamic nature of violent conflict in the region makes it impractical to single out individual or primary causes and drivers.[57] Indeed, conflicts that may appear limited and localized to pastoralist dryland areas may be driven and exacerbated by factors found elsewhere.[58] This also helps explain the difficulty of building sustained peace in the region, when efforts at one level are undermined by processes at another.[59] The history of Sudan's civil wars, for example, is characterized by the role of private oil companies funding different factions.[60]

The Pastoral Lifestyle of a Wandering Man and his Family.

The predictable cycle of violent conflicts that has ensued among different communities' resident in Kenya that include pastoralists has severely disrupted lives and livelihoods of the affected communities. Halakhe Waqo,[61] notes that in Kenya, the pastoralist communities occupy the largest percentage over 70% of the country's total land area with majority of them living in the vast arid and semi-arid region of northern Kenya where they keep cattle,

[55] Ibid
[56] Ibid
[57] Ibid
[58] Ibid
[59] Ibid
[60] Ibid
[61] (2003)

camels, goats, sheep, and donkeys.[62] He adds that these pastoralists move from one area to another in search of pasture and water for their livestock.[63] These movements are not restricted to one area or even country as the pastoralists move into and out of neighbouring countries such as Somalia, Ethiopia and Uganda.[64]

Pastoral communities in Northern Kenya have long been affected by intercommunal conflicts, driven by factors such as resource competition, ethnic tensions, and historical grievances. These conflicts have had detrimental effects on the social fabric, livelihoods, and overall development of these communities.[65] A story is told of a man who together with his family left his home in and set out for the foreign land.[66] His wife and the extended relations came with him, but so did an unspecified number of people and possessions. Soon, the man would become very wealthy, having acquired servants and livestock as well as silver and gold.[67] He received people and animals from foreign land's king during his stay there, and the precious metals would have been the result of commercial transactions.[68] Evidence that the man and his people had become successful lied in the endless squabbles and quarrelling that broke out between the herders for each family over the inability of the land to support so many grazing animals.[69]

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[62] Supra, note 54
[63] Supra, note 38
[64] Ibid
[65] Molu Amina Dibo and Pius Wanyonyi Kakai: Peacebuilding and Conflict Management among Pastoral Communities: An Assessment of Contribution of Concern Worldwide in Northern Kenya
[66] Theology of work project; Genesis :1-25. https://www.theologyofwork.org/old-testament/genesis-12-50-and-work/abraham-genesis-121-2511/<accessed on 18 February 2025>
[67] Ibid
[68] Ibid
[69] Ibid

Anthropological studies of this period and region suggest the families in these narratives practiced a mix of semi-nomadic pastoralism and herdsman husbandry.[70] These families needed seasonal mobility and thus lived in tents of leather, felt, and wool. They owned property that could be borne by donkeys or, if one was wealthy enough, also camels.[71] Finding the balance between the optimal availability of usable pasture land and water required good judgment and intimate knowledge of weather and geography.[72] The wetter months afforded grazing on the lower plains, while in the warmer and drier months,[73] the shepherds would take their flocks to higher elevations for greener vegetation and flowing springs.[74] Because a family could not be entirely supported through shepherding, it was necessary to practice local agriculture and trade with those living in more settled communities.[75]

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[70] Ibid

[71] Ibid

[72] Ibid

[73] Ibid

[74] Ibid

[75] Ibid; Pastoral nomads cared for sheep and goats to obtain milk and meat, wool and other goods made from animal products such as leather. The skills required to maintain these herds would have involved grazing and watering, birthing, treating the sick and injured, protecting animals from predators and thieves, as well as locating strays. Fluctuations in weather and the size of growth in the population of the flocks and herds would have affected the economy of the region. Weaker groups of shepherds could easily become displaced or assimilated at the expense of those who needed more territory for their expanding holdings. In this way of life, shared values were essential for survival. Mutual dependence among the members of a family or tribe and awareness of their common ancestry would have resulted in great solidarity, as well as vengeful hostility toward anyone who would disrupt it. Leaders had to know how to tap the wisdom of the group in order to make sound decisions about where to travel, how long to stay, and how to divide the herds. They must have had ways of communicating with shepherds who took the flocks away at some distance. Conflict-resolution skills were necessary to settle inevitable disputes over grazing land and water rights to wells and springs. The high mobility of life in the country and one's

Theoretical perspective of Conflicts in the Northern Kenya.

This research is premised on some isolated conflict theories. They include but not limited to the following:

I. **The Frustration-Aggression model of conflict theory**.

This theory underscores that the cycle of conflict starts with a party (or the parties) to conflict becoming frustrated in its (their) desire to achieve an objective. This frustration leads parties into aggression against the parties they hold responsible for their woes.[76] The aggression then leads to conflict and violence.[77] Simply put, the theory posits that when individuals feel frustrated due to perceived injustices or unmet needs, they are more likely to act aggressively towards the source of their frustration, potentially leading to conflict and violence.[78] The progression from frustration to aggression is the basic driver of violent confrontation between and among groups. In essence, people take to violence because they are aggrieved, and the extent or severity of the violence is reflected in the aggrieved person's or group's estimation of frustration.[79]

Frustration, the harbinger of aggression, comes from different sources.[80] The inability of an individual to accomplish what he wills, or prevent others from activating desires contrary to his own, often leads the individual to resent the

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vulnerability to marauders made hospitality much more than a courtesy. It was generally considered a requirement of decent people to offer refreshment, food, and lodging.

[76] Anifowose, Remi 2006. Violence and politics in Nigeria: The Tiv and Yoruba experience. Lagos, First Academic Publisher

[77] Ibid

[78] Ibid

[79] Ibid

[80] Ibid

factors he thinks are responsible for the situation.[81] Thus, this individual who is frustrated ends up venting his anger at an objects of his frustration via a defence mechanism emanating from his unconscious faculty of the body system.[82] This venting of anger is aggression.[83] On many occasions, frustration and aggression occur as a result of a sense of injustice and/or inequity among individuals or groups.[84] Meier, Hinsz and Heimerdinger[85] in their framework for explaining aggression involving groups aver that 'the extent of violence or aggression to be committed depends on the composition of both source (i.e. perpetrators – group or individual) and target (i.e. victims – group or individual) entities'.[86]

II. Conflict Theory

Marx's conflict theory[87] is anchored on the fundamental foundation that in any society, there exits two clustered opposing groups, for instance; the wealthy and the poor, the haves and have nots or the bourgeoisie and proletariat.[88] The theory mirrors what happens when in their course of existence, one group attempts to rival and rebel against the other group together with the ever-divergent pursuits of life coupled with various roles a group of people (or one person) has over another group of people.[89] The theory further analyses the social systems and their control and power imbalance that the rich have

[81] Ibid
[82] Ibid
[83] Ibid
[84] Ibid
[85] Meier, Brian, Verlin Hinsz and Sarah Heimerdinger 2007. A framework for explaining aggression involving groups. Social and Personality Psychology Compass, 1 (2007). Available from: [Accessed 16 February 2025]
[86] Ibid
[87] Karl, Marx (1971): Class Conflict Theory.
[88] Ibid
[89] Ibid

enjoyed over centuries against the masses.[90] Additionally, Marx was of the view that a society, institution or an organization only functions in order to try and better their social situation at the expense of the opposite party, which if not well checkmated can result in some type of social inequalities, deep rooted imbalances and unprecedented upheavals; all the recipes for conflict and to the extreme, anarchy.[91] The Marx's theory underscores different types of conflicts that include conflict regarding class, conflict regarding race and ethnicity,[92] conflict regarding gender, conflict regarding religion, and conflict regarding regions.[93]

Marxian conflict theory can be applied to a number of social disputes as it relates to how one group controls the rest,[94] the struggles within the oppressed group, and the way that the controlling group maintains power.[95] According to Marx, the existence of different social classes in human society is the continuous source of inevitable conflict,[96] and changes on the social structure occur through violent upheavals affecting class composition.[97] Marx lays emphasis on the importance of interests over norms and values, and the ways in which the pursuit of interests generates various types of conflict as normal aspects of social life,[98] rather than abnormal or dysfunctional occurrences.[99] He sees the human society as a collection of competing interest groups and individuals, each with their own motives and expectations.[100] The principal

[90] Ibid
[91] Ibid
[92] Ibid
[93] Ibid
[94] Ibid
[95] Ibid
[96] Ibid
[97] Ibid
[98] Ibid
[99] Ibid
[100] Ibid

assumption underlying Marx's theory is that all members in society do not have the same values, interests or expectations.[101] Values, interests or expectations vary according to one's position, privileges, ability, class, and wealth.[102]

III. Coping Theory

Scholars argue that this theory is a dynamic process, with a series of reciprocity of responses between and among individuals and their immediate environment.[103] That the theory, has its origins in psychoanalytic theories of unconscious defense mechanisms which holds that in the presence of stressors, people tend to develop skills to help them adjust to the life stressors.[104] They state that how a person adjusts to life stresses is a major component of his or her ability to lead a fulfilling life in terms of psychological and physical health and well-being.[105] The theory sees systems as adjusting to life stresses as a major component of their ability to lead a fulfilling life.[106]

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[101] Ibid

[102] Agreement tends to exist among those groups of people in society who share similar privileges. As a result, this is likely to encourage unequal distribution of the scarce but valuable resources and opportunities resulting in divisions in society that leads to hostility and opposition. The inter-ethnic conflicts characterized by clashes over resources and cattle rustling would be viewed as part of the struggle by the have not's (poor pastoralists, landless poor and those in marginalized areas) to gain access to resources in the community but which are in the hands of the wealthy class (rich pastoralists, ranchers, conservationists, and large-scale farmers). In view of these differentials, Marx's conflict theory would explain that it is probable that people in Northen Kenya suffer hostilities and conflicts that include inter-ethnic conflicts, banditry and cattle rustling due to these differentials. However, although Karl Marx claims that growth and development occurs through the conflict between opposing parties, cooperation is also a source of healthy growth.

[103] Miguel Salazar et al (2022).The role of generalized reciprocity and reciprocal tendencies in the emergence of cooperative group norms.

[104] Ibid

[105] Ibid

[106] Richard S. Lazarus and Susan Folkman in 1984

Populations hit by the adverse effects of climatic variability such as drought will respond by struggling to cope in the manner they best know, including by engaging in acts of lawlessness such as crime and conflicts. Under such circumstances, the coping theory states, every factor from physiological, psychological, social, to cultural,[107] will both affect and is affected by the coping strategies.[108] According to the theory, a phenomenon such as nomadic pastoralism and distress migration occasioned by drought may work to improve the chances of survival for the migrants from imminent death at their point of migration.[109] However, such coping strategies, the theory would argue, may have its negative social, cultural, or even psychological consequences.[110] The theory would see the use of community-led strategies for conflict resolution and peace building as a response and a coping mechanism to the stress that results from the conflict and its associated effects.[111] The theory would also argue that by choosing to adopt community-led strategies to resolve the conflict,[112] the community may succeed in managing and resolving the conflicts thus realizing peace and security.[113]

However, the theory would argue that the success of the community-led strategies in helping resolve the conflict and to bring about peace will be dependent on personal characteristics of the persons involved in the strategies, situational demands,[114] and even the social and physical characteristics of the setting.[115] In view of this, the community-led strategies adopted by the

[107] Ibid
[108] Ibid
[109] Ibid
[110] Ibid
[111] Ibid
[112] Ibid
[113] Ibid
[114] Ibid
[115] Ibid

community may help the community manage and resolve conflicts or it may subject the community further to a state of conflict characterized by banditry, cattle rustling, disease, human-wildlife conflict, or even involvement in what would be considered cultural taboos by the communities.[116] In such cases, the theory would argue, the communities may have the illusion that they are effectively coping with the stress occasioned by conflict,[117] while what they are really doing is creating many other stressors that would affect the community's peace and security.[118]

IV. Restorative Justice (RJ) Theory.

This theory was espoused by Charles Burton. According to Barton,[119] traditional wisdom is gradually considering adapting restorative justice interventions, which views the just and fair or the most appropriate response to a criminal act cannot best be addressed by formal justice professionals.[120] Accordingly, the critical decisions of a formal justice response (concerning justice, prevention, and welfare) are best made by the principal parties (victim and offender) themselves, preferably in dialogue with one another in the presence of their respective communities (typically family and friends).[121]

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[116] Ibid

[117] Ibid

[118] Ibid

[119] (2000)

[120] Ibid

[121] Ibid; Generally, this is often the case wherever there is an identifiable victim and responsibility for the offence is not in dispute, and both parties are willing to meet in an attempt to settle the matter through a process of discussion and negotiation in ways that are meaningful and right for them. However, their agreements must fall within the law and are not obviously harmful to the public interest (Kamau, 2007). Key principles of Restorative Justice (RJ) include a view of crime as a conflict between individuals rather than between offender and the State. Closely related to this is a belief that the responsibility for governance of security, crime and disorder is to be shared among all members of the community. Restorative justice is viewed as a humanitarian approach that brings to the foreground ambitions of forgiveness, healing, reparation

V. Cooperation and Competition Theory.

This theory was initially postulated by Morton Deutsch[122] and elaborated by Johnson.[123] The theory is premised on two basic ideologies;[124] the interdependence among goals of the people involved in a conflict[125] and the other is the type of action taken by the two people involved.[126] He identifies two types of goal independence.[127] The first is positive and the other negative.[128]

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and reintegration (Zehr and Mika, 1998). Therefore, RJ programs bring together the offender, victim, their respective families, friends and community representatives, and attempt to engage them in a process of reconciliation and reparation. The aim is to allow offenders and victims to meet in a face-to-face context (although indirect contact is often employed), to voice their experiences and understandings, and to achieve a mutually agreeable resolution.

[122] (1949)

[123] David Johnson was one of Deutsch 's first graduate students at Teachers College in 1966. Dean Tjosvold is an extended member in that he completed his graduate work with David in 1972 at the University of Minnesota. https://link.springer.com/chapter/10.1007/978-94-015-9492-9_8 <accessed on 4 May 2025>

[124] Supra, note 123

[125] Ibid

[126] Ibid

[127] Ibid

[128] The positive is where the probability of a person's goal attainment is positively correlated with the amount of another attaining his goal. The negative is where the goal is linked in such a way that the amount of the goal attainment is negatively correlated with the amount of the others goal attainment. This means, if you are positively linked with another person, then you sink or swim together (Deutsch, 2010). Therefore, if the other sinks, you swim and if the other swims, you sink. In this theory, there are two basic types of action by a person. These are effective actions, which improve a person's chances of attaining a goal and bungling actions, which worsens a person's chances of obtaining a goal. The findings in this theory are similar to those by Morton and Marcus (2010) who concluded that either the cooperative or the competitive nature of the participants in a conflict determines the course of the outcome. They further noted that people have an inborn tendency to act positively to

Brief Historical development of Conflicts in Northern Regions.

Kenya's Vision 2030[129] is anchored on a three-legged development pillars namely: economic, social and political pillars.[130] The Social Pillar of the Vision 2030 seeks to invest in the people where it has been pointed out that 'Kenya's journey towards widespread prosperity also involves the building of a just and cohesive society that enjoys equitable social development in a clean and secure environment'.[131] Notably, the Political pillar of Vision 2030 also envisions "a democratic political system that is issue based,[132] people-centred, result-oriented and accountable to the public" and 'a country with a democratic system reflecting the aspirations and expectations of its people,[133] in which equality is entrenched, irrespective of one's race, ethnicity, religion, gender or socio-economic status;[134] a nation that not only respects but also harnesses the diversity of its people's values, traditions and aspirations for the benefit of all'.[135]

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the beneficial and negatively to the harmful and these act as the foundation for human potentials for cooperation and love as well as competition and hate. According to Johnson (1989) studies indicate that cooperation process leads to greater group productivity, more favourable interpersonal relationships, better psychological health and higher self-esteem. His research has further proven that more constructive resolution of conflict results from cooperation as opposed to competitive processes.

[129] Republic of Kenya, Vision 2030 (Government Printer, Nairobi, 2007) < http://vision2030.go.ke/> accessed 1 February 2025.

[130] 'About Vision 2030 | Kenya Vision 2030'; http://vision2030.go.ke/ <accessed 21 February 2025.

[131] 'Social Pillar | Kenya Vision 2030' http://vision2030.go.ke/social-pillar/ <accessed 21 February 2025.

[132] Kariuki Muigua; Towards Effective Peacebuilding and Conflict Management in Kenya

[133] Ibid

[134] Ibid

[135] 'Foundation for The Pillars | Kenya Vision 2030' https://vision2030.go.ke/enablers-and-macros/ <accessed 21 February 2025

Over the years, communities have endured frequent conflicts over natural resources; it can be attributed to increased competition for shrinking resources, particularly land.[136] This is essence means that most of these conflicts are between and among these communities are deemed to be resource based resulting from competition over pasture and water.[137] A cattle rustling is the act of forceful raiding of livestock from one community by another using guns and leaving behind destruction of property and loss of lives.[138] In their work with these communities in their regions or counties, a number of state, non-state and community-based actors and stakeholders also note the trend of revenge killings that has marred and strained the inter-county coexistence:[139]
"...indeed the infamous Murkutwo massacre of March 12, 2001 where 53

[136] Toolkit and Guidance for Preventing and Managing Land and Natural Resources Conflict. Renewable Resources and Conflict. https://www.un.org/en/land-natural-resources-conflict/pdfs/GN_Renew.pdf <accessed on 4 May 2025>

[137] Ibid

[138] This concept should be understood alongside cattle raids which involve stealing livestock from one community by another without destroying property or killing people. Communities practiced cattle raids using crude weapons such as; sticks, spears, bows, arrows and clubs. These raids are practiced as means of reciprocity, for poor families to acquire livestock and restock particularly after droughts or epidemics. However, in 1990s this cultural practice transformed itself and is now referred to as 'cattle rustling', with the main weapons used being guns. Prior to 1990 cattle raids are meant to steal livestock, by scaring away their owners, but cattle rustling involves destruction of property and murder. Cattle rustling have become a commercial entity along the boundaries of pastoral communities and stolen livestock are never recovered. The actors in cattle rustling involve politically linked and power wielding personalities sometimes not pastoralist. Since independence, the severity of conflicts in terms of loss of lives has been immense and with far reaching ramifications. These conflicts mutate in different forms, shape and colour and as such in most cases, they have taken patterns of retaliatory attacks accompanied by massive loss of human lives and that of the livestock.

[139] Willis Okumu. Trans-local Peace Building among Pastoralist Communities in Kenya-Case of the Laikipia Peace Caravan.

villagers – most of them women and children –died at the hands of Pokot raiders can be explained from this perspective.[140] A month earlier, the Marakwet had attacked Pokot herdsmen and stole hundreds of cattle.[141] The Pokot's request for the return of the cattle fell on deaf ears. Knowing fully well that the Marakwet would have either sold or slaughtered the cattle by the time they counter-raided,[142] the Pokot kept warning that if they would not recover their cattle,[143] they would not fail to kill women and children as a lesson to the Marakwet".[144]

Mkutu[145] also reports on the trajectory of revenge killings among pastoralist communities, here it is also worth noting the alliances built by different communities during times of need, such as the Turkana-Karamojong alliance against the Dodoth.[146] The January 1998 attack and stealing of fifteen goats by Pokot raiders from a Kikuyu farmer in Laikipia triggered a series of intermittent violent conflict pitting warriors from Pokot, Samburu and Turkana against the agricultural Kikuyu.[147] The fact that Kikuyu youths also retaliated by stealing animals from the Pokot led to increased tension in the area, prompting the local District Officer to call a peace meeting between Pokot and Kikuyu communities.[148] The diminishing power of traditional elders as well as the incapacity of state security apparatus is further laid bare by the killing of four Kikuyus accompanied by "burning and looting of houses in Olmoran", by a contingent of Pokot, Samburu and Turkana immediately after

[140] Ibid
[141] Ibid
[142] Ibid
[143] Ibid
[144] Ibid
[145] Mkutu Kennedy 2001; Pastoralism and conflict in the Horn of Africa, Africa Peace Forum (AFPO), Saferworld, Bradford University.
[146] Ibid
[147] Ibid
[148] Ibid

the government initiated peace meeting.[149] Accordingly, this attack then triggered further violence leading to the displacement of 2,000 people.[150]

While pastoralist lands are not affected by armed conflict, they do suffer sporadic outburst of violence, often confronting communities.[151] The cross-border nature of these confrontations, and the fact that many go underreported, adds complexity to the challenge of addressing them.[152] These regions have actually been the theatres of instability and violence for a solid five decades or so, driven by the following main factors: transnational organized crime, climate change, and marginalization.[153] Consequently, building peace requires addressing these key issues. These are disputed areas are also characterized with porous borders that are used as conduits and entry and exit points for transnational criminal activities of trafficking and smuggling of persons and goods.[154]

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[149] Ibid

[150] Ibid

[151] Mohamed Daghar: Chronic violence and peacebuilding in Eastern African's Pastoralists Lands

[152] Ibid

[153] Ibid

[154] Ibid; The proliferation of small arms and light weapons have made these areas a haven of criminal activities by transforming traditional cultural practices like cattle raiding to transnational organized crime of cattle rustling. An illustration of it are the many violent incidents of cattle theft that took place in 2021 alone in Uganda, South Sudan, Ethiopia and Kenya and left scores of people dead and property damaged. In 2019, firearms, both licitly and illicitly acquired by civilians in East and Horn Africa, are estimated to be close to 8 million. Most of these firearms are trafficked by criminal actors to pastoralist areas and used to steal cattle. Cattle theft used to take days, sometimes weeks. With massive circulation of illicit firearms in pastoralist areas, criminals steal, transport and sell livestock as far as to overseas markets in less than 24 hours. Climate change has intensified natural calamities like drought and famine to excessive levels. Arid areas already receive less rainfall, and when it successively fails over some time, vegetation does not grow. This puts pressure on pastoralists to seek their food sources and that of their livestock in other areas, which often results in

Conflict Dynamics at Play – The "Theatre of Conflicts."

For the lovers of sports, there is one of mega stadium around the world that is referred to as the; the "Theatre of Dreams." The name 'Theatre of Dreams' came from one of club's icons, Sir Bobby Charlton. The legendary player coined the phrase, "This is..... football club, this is the theatre of dreams." This phrase was published in John Riley's 1987 book, titled 'Soccer' and it stuck. Since that book was published, the term 'Theatre of Dreams' has been associated with the club's home ground. With one of its coaches causing this dream realized at the helm during the team's peak, fans' dreams came true as they saw their team conquer all before them. Ask two people what they know of the Democratic Republic of Congo and you may be surprised to find remarkably different reactions.[155] One might talk about the five million deaths over the last decade, due to war and its consequences:[156] more deaths anywhere in the world since World War II.[157] The other may smile and start to cite the names of famous Congolese musicians and artists such as Papa Wemba or Kofi Olomide, who, in the words of some keep Africa dancing.[158]

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conflict with other communities. Erratic and prolonged rainfall also results in disasters such as flooding and outbreak of diseases such as epidemic typhoid and malaria. And last, continuous marginalization and lack of affirmative interventions by successive governments have neglected these areas leaving communities to fend for themselves. Lack of decentralization of state resources such as allocating adequate budget for socio-economic programmes and developing civil infrastructures such as roads and water dams have turned pastoralist lands into 'ungoverned spaces'. In these large spaces, anything can happen, and the governments may not even be aware or rather may not have the capacity to respond.

[155] Lena Slachmuijlder: Participatory Theatre for Conflict Transformation Training Manual

[156] Ibid

[157] Ibid

[158] Ibid

We live in a world of differences - of ideology, belief systems, ethnicity, social and cultural values.[159] These differences are completely natural. They are not something that we are going to be able to banish or get rid of.[160] Nor would we want to - in fact, these differences enrich our lives. But these differences can become the basis for conflicts when two or more people or parties believe that the other is an obstacle to getting what they want.[161] Such conflicts take many different forms, from private disputes to widespread wars.[162] They occur between adversaries as well as between friends and family members.[163] They can be over something physical or emotional and they can take many different forms.[164] It is when disagreement devolves into violence that conflict can destroy communities, countries and relationships.[165] A conflict that is "transformed" can have numerous benefits.[166] In fact, all social change stems from conflict.[167] Without conflict, our society would not evolve, injustices would never be called into question, and relations would remain frozen.[168] Conflicts can create progress, dialogue, better understanding of each other and even greater trust and intimacy.[169]

"We hear about 'development theatre', "theatre for the oppressed", popular theatre," 'community theatre', and 'intervention theatre', 'protest theatre' and 'theatre for social change'".

[159] Ibid
[160] Ibid
[161] Ibid
[162] Ibid
[163] Ibid
[164] Ibid
[165] Ibid
[166] Ibid
[167] Ibid
[168] Ibid
[169] Ibid

These are often used interchangeably and are associated with a transformation of a social reality, by using community and individual participation. Participatory theatre is an approach in which the actors interact with the public, based on a real problem.[170] Throughout the participatory event, the public participates to adapt,[171] change or correct a situation, an attitude or a behaviour that is developed during the show.[172] This form of theatre aims to join entertainment with an exploration of attitudes and to share knowledge in order to stimulate positive social changes.[173]

Pastoral Conflicts in Present Day in Kenya.

In recent decades, pastoralists and other inhabitants of remote rangelands have faced new threats from increasing statelessness and multiplying insurgencies.[174] Violence and instability have increased in the border regions and other spaces where pastoralists have historically operated.[175] Increasing numbers of civilians are losing their lives in conflicts that are related to pastoralism in four ways:[176]

a) Everyday confrontations stemming from grievances like damage to crops or livestock;[177]

[170] Participatory Theatre for Conflict Transformation Training Manual. https://cnxus.org/wp-content/uploads/2022/04/Participatory-Theatre-Manual-EN.pdf <accessed on 4 May 2025>

[171] Ibid

[172] Ibid

[173] Ibid

[174] Eria Olowo Onyango. Pastoralists in Violent Defiance of the State. The case of the Karimojong in Northeastern Uganda.

[175] Mike Jobbins et al; Pastoralism and Conflict: Tools for Prevention and Response in the Sudano-Sahel

[176] Ibid

[177] Ibid

b) The escalation of everyday disputes into chronic cycles of revenge between pastoralist ethnic groups or between pastoralists and farmers;[178]
c) Armed groups or state security forces targeting pastoralist communities and their livestock;[179] and
d) Pastoralists participating in criminal activities or non-state armed groups (NSAG), whether because they seek to achieve political goals, safe passage, or financial gain.[180]

The Economic Impact and Manifestation of Conflict and Related Disputes.
The conflicts have a direct impact on legal trade, production, and economic growth throughout Sub-Saharan Africa.[181] A 2016 World Bank study noted that livestock partially or fully supports the livelihoods of about 110–120 million people, or roughly 70 percent of the rural drylands' population of West and East Africa.[182] As outlined below, the impact of conflict is often easiest to decipher in terms of the formal rural economic growth lost but is also a function of the increase in illicit economic activity, such as smuggling, cattle raiding, or human trafficking.[183] Pastoralists, many of whom are already struggling with structural poverty, are vulnerable to shocks from extreme weather patterns, civil unrest, wildly fluctuating prices, and outbreaks of zoonotic (animal-based) diseases.[184] In the last decade, conflicts across the Western Sahel have displaced more than 1 million people, a significant share

[178] Ibid
[179] Ibid
[180] Ibid
[181] Cornelis de Haan; A WORLD BANK STUDY: Prospects for Livestock-Based Livelihoods in Africa's Drylands. https://documents1.worldbank.org/curated/en/485591478523698174/pdf/109810-PUB-Box396311B-PUBLIC-DOCDATE-10-28-16.pdf <accessed 22 February 2025>
[182] Ibid
[183] Ibid
[184] Ibid

of whom are livestock herders.[185] The international community has responded by providing an annual flow of about $1 billion in humanitarian emergency aid, aid that impacts an average of 5 million people per year.[186]

According to Augusto Boal, "Theatre is a form of knowledge: It should and can also be a means of transforming society. Theatre can help us build our future, rather than just waiting for it." Furthermore, on the other hand, Paolo Fereire once said that; ***"I engage in dialogue because I recognize the social and not merely the individualistic character of the process of knowing. In this sense, dialogue presents itself as an indispensable component of the process of both learning and knowing."***

a) Urban versus Rural conflict.

The assessment was informed of a simmering conflict between the rural pastoralists and urbanites.[187] The warriors living in the interior parts of the counties blame their counterparts in urban centers for neglecting them especially during times of conflicts.[188] Based on this alleged negligence, any peacebuilding effort is viewed as 'accommodating opponents' hence received with hostility.[189] This state of affair may explain why peacebuilding initiatives such as ceasefire and peace talks have not been successful.[190] This was buttressed by a comment by a key informant who observed thus:
"The perpetrators never attend peace meetings but innocent elders or urbanites who have no say in the communities."[191]

[185] Ibid
[186] Ibid
[187] Supra, note 14
[188] Ibid
[189] Ibid
[190] Ibid
[191] Quoted from the Informants

b) Cattle raiding and Banditry.

Largely, pastoralists raid cattle both as a response to drought adversities and or as a cultural practice.[192] This tradition, which in most cases remained a bloodless cultural practice has now graduated to indiscriminate killing of people,[193] burning of schools, homes and massive displacements.[194] The assessment was informed that the raids that have occurred in the last five years, has left numerous people dead including women and innocent children.[195] Different assessment participants explained that it was no longer about the cattle, rather there was another motive behind the cattle raids:

"… … …we no-longer understand what the raiders want. They come with guns and just shoot people indiscriminately……the other day a mother and her 10-month-old baby were shot dead. This was not linked to any cattle…..found in the house and just eliminated… …it is increasingly appearing as if these people just want to kill our people…"[196]

c) Gender Based Violence

Gender based violence; domestic violence, Female Genital Mutilation, rape, defilement and sodomy cases were said to be high in pastoral regions.[197] Men are the main perpetrators, while women mostly are the victims.[198] These issues were attributed to culture, especially patriarchal orientations and social problems such as poverty, unemployment, drug and substance abuse.[199] Communities seemed to support some of the practices like early forced

[192] Supra, note 191
[193] Ibid
[194] Ibid
[195] Ibid
[196] Ibid
[197] Ibid
[198] Ibid
[199] Ibid

marriages and FGM.[200] ***"…….a woman who has not undergone FGM cannot take care of their son who has undergone traditional rite of passage, so this forces them to engage in the vice to protect the family's honour."***[201]

d) Conflicts related to Extractives

This is a new and emerging conflict issue. The study was informed that the various mineral deposits being discovered in some areas within the pastoralist region were increasingly influencing peace and conflict dynamics in those regions. In Isiolo County, for instance, the discovery of some gold deposits in Kom area, was said to be attracting 'invaders' including immigrants from Ethiopia, Congo and South Sudan in what participants referred to as 'gold rush".[202] As a result, there have been simmering tensions and conflicts between the residents and the immigrants resulting to deaths, injuries and displacements.[203] Land grabbing around areas where these discoveries have been made was reported to be the new norm which has led to fierce conflicts between the local communities and the invaders.[204]

e) Human-Wildlife Conflicts

Current rates of species extinction are unprecedented[205] and are destined to increase without adequate conservation actions.[206] Large-bodied mammals have suffered significant population declines over the past century and are further threatened by continued habitat loss, unsustainable use, and human–

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[200] Ibid
[201] Ibid
[202] Ibid
[203] Ibid
[204] Ibid
[205] Díaz, S. et al. Pervasive human-driven decline of life on Earth points to the need for transformative change. *Science* **1327**, eaax3100 (2019).
[206] Tilman, D. et al. Future threats to biodiversity and pathways to their prevention. *Nature* **546**, 73–81 (2017).

wildlife conflict.[207] The transformation of natural habitat to agriculture and intensive livestock husbandry has not only contracted these species' ranges and largely restricted their distribution to the confines of protected areas[208] but the closer proximity of human activity to wildlife has also increased the dangers posed to people, livestock, and crops.[209] Human–wildlife conflict involves the tangible and/or perceived impacts of wildlife on people,[210] including human injury and death,[211] direct and indirect economic damage to crops, livestock, and property,[212] food insecurity,[213] and diminished psychological wellbeing.[214] Unmitigated conflict decreases local support for biodiversity conservation[215] and frequently escalates into retaliatory killing of wildlife.[216] Implementing effective human–wildlife conflict-mitigation

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[207] Ripple, W. J., Wolf, C., Newsome, T. M., Hoffmann, M. & Wirsing, A. J. Extinction risk is most acute for the world' s largest and smallest vertebrates. *Proc. Natl Acad. Sci. USA* **114**, 10678–10683 (2017).

[208] Pacifici, M., Di Marco, M. & Watson, J. E. M. Protected areas are now the last strongholds for many imperiled mammal species. *Conserv. Lett*. **13**, e12748 (2020).

[209] Ripple, W. J. et al. Status and ecological effects of the world's largest carnivores. Science 343, 1241484 (2014).

[210] Nyhus, P. J. Human – wildlife conflict and coexistence. Annu. Rev. Environ. Resour. 41, 143–171 (2016).

[211] Packer, C., Ikanda, D., Kissui, B. & Kushnir, H. Lion attacks on humans in Tanzania. Nature 436, 927–928 (2005).

[212] Mackenzie, C. A. & Ahabyona, P. Elephants in the garden: financial and social costs of crop raiding. Ecol. Econ. 75, 72–82 (2012).

[213] Kaswamila, A., Russell, S. & Mcgibbon, M. Impacts of wildlife on household food security and income in Northeastern Tanzania. Hum. Dimens. Wildl. 12, 391–404 (2007).

[214] Barua, M., Bhagwat, S. A. & Jadhav, S. The hidden dimensions of human-wildlife conflict: health impacts, opportunity and transaction costs. Biol. Conserv. 157, 309–316 (2013).

[215] Madden, F. Creating coexistence between humans and wildlife: global perspectives on local efforts to address human–wildlife conflict. Hum. Dimens. Wildl. 9, 247–257 (2004).

[216] Ikanda, D. & Packer, C. Ritual vs. retaliatory killing of African lions in the Ngorongoro Conservation Area, Tanzania. Endanger. Species Res. 6, 67–74 (2008).

strategies has,[217] therefore, become a growing priority for engaging rural communities and preventing localized wildlife extinctions.

The human footprint is expanding globally, encroaching on wildlife habitat and traditional animal migratory routes, and as a result putting people and wildlife in closer and more frequent contact with resultant loss of crops and/or livestock.[218] Communities living on the border of natural reserves or in the migratory corridors that connect protected areas suffer disproportionately from other communities that are further removed from high contact areas.[219]

The human-wildlife conflicts were highly reported in Isiolo and Elgeyo Marakwet Counties.[220] "Wild animals were said to be invading people's farms, making it difficult for anyone to eke a living through farming."[221] Majority of people interviewed for the assessment in Isiolo raised concerns of parks which are not fenced all round therefore allowing the free movement of animals into and outside of the park.[222] It was reportedly alleged that during the drought periods, some pastoralists moved their cattle inside the parks in search of pasture which at times led to attacks from the wild animals.[223] The Kenya Wildlife Services was accused of not doing any compensation whenever the animals destroyed farms or harmed human beings.[224]
In the case of **Galsaracho Teteya & 5 others v Kenya Wildlife Service [2021] eKLR**, it was observed that our courts have jurisdiction to entertain cases related to human-wildlife conflict. The Court relied on the decision of the

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217 Enrico Di Minin et al (2021), A Pan-African spatial assessment of human conflicts with lions and elephants

218 Foley J.A, et al (2005), Global Consequences of Land Use

219 Joel N. Hartter et al (2016), Perceptions of risk in communities near parks in an African biodiversity hotspot

220 Ibid

221 Informants in the region

222 Supra, note 206

223 Ibid

224 Ibid

Court of Appeal decision in **Kenya Wildlife Service vs Joseph Musyoka Kalonzo** Nairobi Civil Appeal No.306 of 2015 (2017) eKLR where it was held:

> "**In our view, even from a literal interpretation, this provision does not oust the jurisdiction of the High Court to hear any matters raised under that act. If the Act meant to remove those matters from the realm of the High Court or the other courts, then it would have expressly stated so. It gives an aggrieved party an option to go to the committee as a first option. This in our view was meant to ease matters for the poor people whose crops and domestic animals are ravaged by wild animals occasionally, and which people may be far removed from the structured judicial systems. We do note that most of the areas that are prone to wildlife/human conflict are in areas that are outside urban areas where courts are situated. The Act in our view meant to make it easier for such people to access justice that is more accessible in terms of not travelling long distances and also in terms of simplicity in lodging their claims. It could not have been meant to shut out everybody else who would prefer to pursue their claims before the conventional courts. That would explain the use of the word 'MAY' and the absence of any provision expressly limiting or ousting the jurisdiction of the High Court."**

f) Land Disputes

For a long time, the pastoral region has suffered inter-communal boundary disputes between and within the counties.[225] Almost in every county there exists contested spaces which are said to be a trigger of conflicts.[226] For instance, in Isiolo county there is a boundary dispute with Meru County while around Kom, another dispute exists between Isiolo, Samburu and Marsabit.[227]

[225] Communal Conflicts in the Karamoja Cluster (Kenya)
[226] Supra, note 210
[227] Ibid

Equally, Burat is contested between Laikipia and Samburu East who believe they own some of the land.[228] The issue with the Meru County (Tigania East) was said to be more emotive as there were allegations that members of the Meru community were being allocated land that other communities in Isiolo believed was theirs.[229] In Baringo County, boundary conflicts are rife in the border areas of Baringo North and South with Tiaty,[230] and border areas with Elgeyo Marakwet at Kerio Valley.[231]

The court in the case of **John Ngimor & 554 others v Northern Rangelands Trust & 3 others[232]** was invited to canvass and determine that parties are bound to apply the existing mechanisms before coming to court as that would have been,[233] in accordance with the policy engendered in **Article 60(1) (g)** and **Article 159 (c**) of the Constitution.[234] The respondents in the Ngimor's case *(supra)* further cited the cases of **Ibrahim Mohamud Ibrahim & Another Vs Kenya Wildlife Service & 4 Others (2020) eKLR, Narok County Council Vs Trans Mara County Council (2000) 1 EA 161,** and **Wildlife Direct Vs Kenya Wildlife Services & 4 Others (2020) eKLR, where they** submitted that the alternative statutory mechanisms are more appropriate than the court in that the court is "*culturally and geographically removed from the suit land.*"

g) Territorial expansion

When asked what would be the reason for the indiscriminate killings, vandalization of infrastructure, burning of schools and homes, most of the

[228] Ibid
[229] Ibid
[230] Ibid
[231] Ibid
[232] [2021] eKLR
[233] Ibid
[234] Ibid

participants mentioned territorial expansionism.[235] It was alleged that such acts were meant to oppress, intimidate and create fear so that communities could leave their land thereby creating space for occupation.[236]

"Kama ni nyasi... kwanini wauwe watoto na kina mama, kwa nini wanashambulia shule?[237] ***Kama ni Ng'ombe, wanaenda Arror, Elgeyo Marakwet kufanya nini na hakuna Ngombe?***[238] ***Bona wasichukue ng'ombe na waachane na watu?*** Which loosely translates to (If they are searching for grazing land, why kill innocent people, especially defenseless children and women?[239] If it's just cattle raiding, why are they going all the way to attack innocent people in Arror in Elgeyo Marakwet where there is no much livestock?.[240]

h) Resource-Based Conflicts

The pastoralist regions have been ravaged by severe drought.[241] This has occasioned stiff competition for water and pasture among the neighboring communities.[242] As a consequence, to this competition, there has been more drought related disasters such as land and boundary disputes, human-wildlife disputes, inter-communal conflicts, and banditry.[243] The impact of such conflicts have been reportedly increased human suffering; loss of lives, destruction of livelihoods, destruction of critical infrastructures, disintegration of families and massive displacements.[244] This has also led to vicious

[235] Supra, note 217
[236] Ibid
[237] A Key informant narration from Baringo County, March 2023
[238] Ibid
[239] Supra, note 219
[240] Ibid
[241] Impact of drought: Turkana and Marsabit counties
[242] Supra, note 223
[243] Ibid
[244] Ibid

competitions emanating from inadequate resources to respond to ever-increasing populations and their livestock. Section 117 of the Wildlife Conservation and Management Act states as follows:

> Disputes,
>
> **(1) Any dispute that may arise in respect of wildlife management, protection or conservation shall in the first instance be referred to the lowest possible structure under the devolved system of government as set out in the Devolution of Government Act including traditional resolution mechanisms.**
>
> **(2) Any matter that may remain un-resolved in the manner prescribed above, shall in all appropriate cases be referred to the National Environment Tribunal for determination, pursuant to which an appeal subsequent thereto shall, where applicable, lie to the Environment and Land Court as established under the Environment and Land Court Act, 2011.**

Furthermore,
Section 39 of the **Community Land Act**[245] states as follows:

> **Dispute resolution mechanisms.**
>
> **(1) A registered community may use alternative methods of dispute resolution mechanisms including traditional dispute and conflict resolution mechanisms where it is appropriate to do so, for purposes of settling disputes and conflicts involving community land;**[246]
>
> **(2) Any dispute arising between members of a registered community, a registered community and another registered community shall, at first instance, be resolved using any of the internal dispute resolution**

[245] (2016)
[246] Ibid

mechanisms set out in the respective community by-laws;[247]

(3) Where a dispute or conflict relating to community land arises, the registered community shall give priority to alternative methods of dispute resolution;[248]

(4) Subject to the provisions of the Constitution and of this Act, a court or any other dispute resolution body shall apply the customary law prevailing in the area of jurisdiction of the parties to a dispute or binding on the parties to a dispute in settlement of community land disputes so far as it is not repugnant to justice and morality and inconsistent with the Constitution."[249]

The Traditional Conflict Resolution Systems

In efforts to address and manage the conflicts among various communities, a myriad of strategies have been employed for decades, key among them being ignoring the conflict. Others have prioritized litigation, where aggrieved parties approach the courts or tribunals for hearing and determination of their grievances, although has been argued to exacerbate and fuel more animosity as it breeds a winner-loser outcome. Put differently, there are a number of ways of dealing with a conflict, ranging from violence at one extreme to ignoring the conflict at the other, with a variety of approaches in between.[250] Towards the more hostile end of the spectrum is litigation,[251] in which parties take their grievances to a court or tribunal[252], which applies predetermined legal rules to

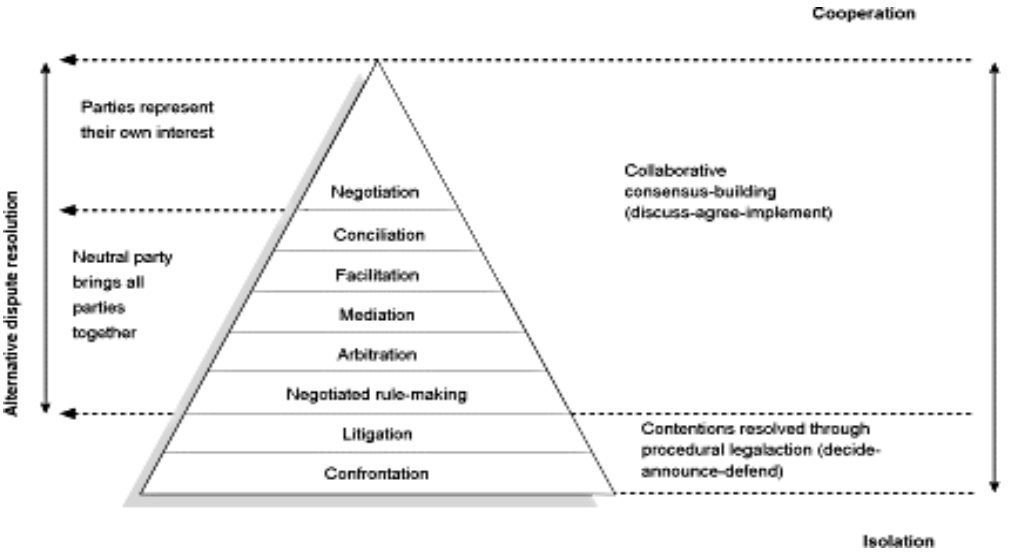
[247] Ibid
[248] Ibid
[249] Ibid
[250] *Conflict Resolution in Integrated Coastal Area Management.* https://www.fao.org/4/w8440e/w8440e24.htm#:~:text=However%2C%20parties%20are%20turning%20increasingly,sustainable%20in%20the%20longer%20term. <*accessed on 5 May 2025*>
[251] Ibid
[252] Ibid

the conflict and issues a decision that is binding upon the parties,[253] producing a winner and a loser.[254] However, all is not lost as due to creation of awareness, communities and parties to a conflict are increasing resorting to Alternative Dispute Resolution (ADR) mechanisms as espoused under Article 159 (2) of our incumbent Constitution.[255] These include negotiation, traditional disputes resolution mechanisms, mediation and conciliation,[256] which in most cases have heralded to be more flexible and produce results that are more acceptable[257] to the parties involved and at the same time leads to a sustainable and continued neighbourlihood. ADR is increasingly being utilized in conflicts over the environment and natural resources[258] and has considerable advantages over traditional contentious methods.[259]

[253] Ibid
[254] Ibid
[255] (2010)
[256] Ibid
[257] Supra, note 232
[258] Ibid
[259] **Ibid**

Conflict Management and Dispute Resolution Conceptual Model[260]

The term `conflict resolution' has been described as `a process by which two or more conflicting parties improve their situation by cooperative action allowing



the parties to expand the pie, or to prevent it from shrinking, giving each party a larger slice'.[261] This definition highlights the fact that conflict resolution aims to bring about benefits for the parties.[262] It does not simply mean the cessation of conflict;[263] if it did, it could include war and litigation, but war and litigation

[260] Ibid
[261] Melling, T. (1994). "Dispute Resolution within Legislative Institutions." Stanford Law Review, 46 (6)
[262] Supra, note 238
[263] Ibid

usually leave one, if not both parties, worse off.[264] A common way of conceptualizing the process is to ask whether the conflict is a `zero-sum game',[265] in which gain for one party causes loss for another, or a `plus-sum game', which creates the possibility of `win-win' solutions in which both parties gain overall through collaborative effort.[266]

Conflict resolution through cooperative action aims to find win-win solutions and leave both parties better off with the outcome.[267] In determining whether conflict resolution is appropriate, an important consideration is whether it results in a better situation than if the conflict is allowed to take its natural course.[268] Conflict is not always negative; it may be a necessary stage in progress towards a better state of affairs.[269] It may galvanize community organizations, put important issues on the public agenda and ultimately help to bring about essential societal and institutional changes that may result in a more equitable and sustainable use of resources.[270] It is arguable that, if conflict is nipped in the bud, these important benefits may be lost.[271] Early intervention in a dispute, for example, could be used as a mask behind which powerful interests work to advance their own interests.[272] As noted `...conflict is the

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[264] Ibid
[265] Ibid
[266] Ibid
[267] Ibid. However, it may not always be the best option for all the parties. In some situations, a party may actually capture the largest share of the benefits through unilateral action. Some dispute resolution theorists refer to this as a party's `best alternative to a negotiated settlement', or BATNA. If a party's BATNA is better than any collaborative outcome, it will have no incentive to explore options and possible solutions collaboratively, but will instead simply pursue unilateral action.
[268] Supra, note 239
[269] Ibid
[270] Ibid
[271] Ibid
[272] Ibid

inevitable accompaniment of change.[273] They argue that conflict naturally arises during periods of change,[274] emphasizing that the focus should not be on preventing conflict but rather on effectively managing it to achieve constructive outcomes.[275] The challenge is therefore not to prevent conflict arising, but to identify the outcome of the conflict and the best ways to manage it.'[276]

Building Resilient and Peaceful Co-existence among the Disputant Communities

It should not be lost to us that peace and security are commodities that residents of Northern Kenya have had in short supply for decades.[277] This is due to frequent conflicts in the region marooned by livestock raiding which has become more frequent and the order of the day.[278] While conflict between ethnic pastoral groups in Kenya has always been present as espoused by Robinson,[279] there has been a transformation in this conflict from battles among spear wielding warriors into indiscriminate assaults on populations using semi-automatic weapons. These conflicts have caused horrendous destruction and affected development in the district in terms of loss of human lives and

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[273] Brown, M. e*t al.* (1995), A Conceptual Framework for Conflict Resolution.

[274] Ibid

[275] Ibid

[276] Ibid

[277] Isabel Wamuyu; The Effects of Livestock Rustling on Livelihoods of Pastoral Communities in the Turkwell River Belt along the Turkana/ Pokot Border. https://erepository.uonbi.ac.ke/bitstream/handle/11295/77003/Wamuyu_The%20effects%20of%20livestock%20rustling%20on%20livelihoods%20of%20pastoral%20communities%20in%20the%20Turkwell%20river%20belt%20along%20the%20Turkana,%20pokot%20border.pdf?sequence=3#:~:text=As%20pastoralism%20revolves%20around%20livestock,and%20an%20articulation%20of%20conflict. <accessed on 5 May 2025>

[278] Ibid

[279] 1985

dislocation of populations, destruction of property, and loss of livelihoods.[280] Community participation in peace-building initiatives in the recent past has led to major developments in conflict management, resolution and peace-building. Although this was not widely recognized initially particularly by the state, the success of community-led conflict resolution and peace-building strategies in some parts of the country has earned them respect and recognition.[281] However, despite these, a study to understand the impacts of community-led strategies on conflict resolution and peace building among pastoralist communities still remains unexplored.[282] The argument is that peace is a common good that everyone, including local communities, should be keen on safeguarding, promoting and sharing.[283] Although various peace ambassador and goodwill actors including various regimes of governments since independence, civil society and religious organizations making several efforts to bring elusive peace and stability in the region through efforts such as preaching peace, prosecuting perpetrators, declaring illicit fire-arm surrender amnesties and establishing peace committees,[284] the people living in these regions have seen the area come closer to the prospects of peace, and perhaps just that.[285] This is because despite all these efforts, insecurity and violent conflicts associated with resource competition, livestock raids, and human wildlife conflicts prevails, and have become widespread and of increasing security concern.[286]

Mechanisms employed and deployed to realize and sustain Peace.

One cardinal duty of any sound and functioning government is to ensure and

[280] Supra, note 37
[281] Ibid
[282] Ibid
[283] Ibid
[284] Ibid
[285] Ibid
[286] Ibid

assure peaceful co-existence to her citizenry.[287] Under our laws, peace and security of a nation cannot be overemphasized.[288] With these recurrent conflicts among pastoralist communities, the affected people often resort to local communal strategies and structures for selp-help among other viable conflict resolution and peace building strategies or mechanisms.[289] Some have borne fruits while others have degenerated to raging more havoc. These strategies are informed in part by traditional governance institutions for conflict resolution, for example, councils of elders.[290] Other methods include use of resource management agreements, African customary law, community meetings (barazas), and peace meetings.[291] Through community-led strategies, local communities have played and still continue to play a vital role in making decisions that are absolutely binding in arbitrating and resolving conflicts and making peace.[292]

Different people use different strategies for managing conflicts. According to Ho-Won Jeong,[293] in coping with conflict, people employ particular styles, strategies, and tactics.[294] Adjudication[295] and arbitration[296] in the recent past proved to be the most predominant methods of conflict management

287 Ruth Mba; Community Participation and National Security

288 Statement delivered by Walid Badawi on International Day of Peace Commemoration. https://www.undp.org/kenya/speeches/statement-delivered-walid-badawi-international-day-peace-commemoration

289 Supra, note 3

290 Ibid

291 Ibid

292 Ibid

293 (2003)

294 Ibid

295 Supra, note 293

296 James Ndungu Njuguna, Arbitration as a Tool for Management of Community Land (2019) Journal of cmsd Volume 3(1) Conflicts in Kenya.

recognized under law in Kenya.[297] However, with rapid developments and globalization, there seems to be a wind of change blowing.[298] Additionally, Adan and Pkalya state that courts of law were the arbiters of disputes either between the citizen and the state and/or between citizens themselves.[299] That courts were and still are the epi-centre for dispute resolution in the modern state.[300] The author observes that, courts by their very nature however, are highly formal incumbered by the red-tapism and bureaucracies, conflict resolution through the judicial system is made difficult by a population poorly informed of its legal rights and responsibilities, high costs and complex procedural technicalities, inadequate staffing of the judiciary, and sometimes strong links between the executive and judiciary. Thus, simply put, according to Professor Muigua, access to justice, especially by the marginalized, poor, uneducated and underprivileged in the society, has been hindered by several factors. These factors include, but are not limited to, lack of infrastructure, high advocacy fees, illiteracy, lack of information, long distance to the courts and the long durations of time it takes to resolve disputes.[301] Due to this among other disadvantages associated with courts, there is a discernible shift to alternative methods of dispute resolution that include traditional justice system, arbitration, negotiation and mediation.[302] It is therefore imperative to embrace ADR and arbitration from an African perspective in order to fully capture the spirit of conflict management inherent in African societies for

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[297] Ibid

[298] Umar Nazir; The Winds of Change are Blowing: Globalization's Impact on Renewable Energy and Environmental Challenges

[299] Supra, note 293

[300] Ibid

[301] Muigua K, (2018), 'Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya'

[302] Muigua K, 'Preparing for the Future: ADR and Arbitration from an African Perspective'

enhanced access to justice.[303]

The Role of the Alternative Dispute Resolution and Indigenous Community based Institutions for Internal Cross-Border Peacebuilding.

The institution of traditional leadership has its origin from ancient times when communities sharing the same beliefs and kinship were allocated land for occupation and grazing.[304] Indigenous institutions were used to address internal and external conflicts in pastoral communities of the study area.[305] In the traditional institutions of the study area, tribal elders are engaged in conflict resolution, and management.[306] These institutions are effective in managing conflicts within their own ethnic groups, and they also sometimes play a role in resolving conflict outside their ethnic group in cross border conflicts.[307] In each there is a peace and security committee including tribal leaders or elders which is mandated to prevent, and settle conflicts in its area and also can participate in cross border conflict resolution and prevention if they are selected by the community.[308]

Traditional Justice Mechanisms.

As already observed above, in Kenya, reliance on informal conflict management mechanisms still exists due, in part, to lack of faith in the judiciary and the sheer expense of court procedures which at times offends the

[303] Muigua. K., & Kariuki. F., 'ADR, Access to Justice and Development in Kenya.' Available at https://kmco.co.ke/wp-content/uploads/2018/08/ADR-access-to-justice-and-development-in-KenyaRevised-version-of-20.10.14.pdf (Accessed on 5/5/2025)

[304] Asmare Shetahun: Peacebuildıng for Internal And Cross-Border Resource Based Conflıcts In South Omo Ethıopıa

[305] Ibid

[306] Ibid

[307] Ibid

[308] Ibid

supreme law of the land.[309] It is therefore imperative to argue that an example of the infusion of traditional mechanisms in modern conflict management is the system of elders under the Land Disputes Tribunals Act.[310] Under this Act, there is a requirement on the State and other actors that all disputes relating to land be referred to appointed elders at the local level, whose decisions, on the matters in question is final. Despite the system having its own share of imperfections, stemming from weaknesses in the statue in question, it has served to ease the pressure on and clear notorious of backlog from courts of law and to provide disputants with an alternative option of redressing their disputes.

However, it is important to note that Kenyan communities have varied traditional methods on how they handle and manage their conflicts, which have served to complement the efforts of the government operatives in dealing with protracted violence or conflicts in some parts of the country.[311] In some situations, institutional structures built on these processes, for example, the Modagashe Declaration in North Eastern Province have had their declarations and resolutions enforced by the government.[312] Other methods employed or utilized include the following:

a) Council of elders

The primary indigenous conflict resolution institution among majority of Kenyan communities is the council of elders.[313] The study shows that most traditional societies had a council of elders, which was the premier institution

[309] Article 159 (2) (c)(d)
[310] 1990
[311] Supra, note 296
[312] Ibid
[313] Ruto, Mohamud and Masinde (2004): Indigenous conflict resolution mechanisms amongst the pastoralist Pokot, Turkana, Marakwet and Samburu.

charged with the responsibility of managing and resolving conflicts.[314] The institution of elders was greatly respected and that these elders were seen as trustworthy and knowledgeable people in the community affairs thus enabling them to make informed and rational decisions.[315] Their age gave them accumulated experience and practical wisdom useful for making decisions which were not only for the parties to the conflict but also for the better good of the whole community.[316] The council of elders used to sit and adjudicate disputes.[317] The primary consideration was the need to maintain family harmony and peaceful co-existence in the society.[318] As much as possible, the process encouraged reconciliation of the parties.[319]

b) Inter-ethnic marriages

Use of interethnic political marriages was another common mechanism employed in traditional African societies to solve conflicts and to foster peace.[320] The creation of bonds between two or more communities through marriage helped to eliminate fighting or the likelihood to fight between members of these communities.[321] The reasoning behind this was that, it was an abomination to fight with one's in-laws however the magnitude of an offence committed against each other.[322] Therefore, one mechanism that was employed by the conflict-prone clans was diffused and neutralized through

[314] Ibid
[315] Ibid
[316] Ibid
[317] Ibid
[318] Ibid
[319] Ibid
[320] Supra, note 313
[321] Ibid
[322] Ibid

inter-clan marriages.[323] Suffice to say, in some parts of Kenya, some pastoralist and warring communities have and continue to use this ancient mechanism in resolving their conflicts.[324]

c) Resource Management Agreements

According to some evidence, pastoralists and other communities with scarce natural resources frequently discussed and reached an agreement on how to best utilize such resources.[325] According to Adan and Pkalya (2006), before the movements begin, the clan elders negotiated such movements and a general agreement was reached on access to water and pasture. These negotiations were intense during periods of drought and as a result, the visiting herders used pastures and water and move back to their original homes when the situation improves.[326] This was colloquially likened to Greek ecclesiastical understanding that "the law is my shepherd;[327] I shall not want.[328] It causes me to lie besides still waters and leads me in green pastures and that even though I walk in the valley of shadows of death,[329] I shall not fear."[330]

d) Ethnic Groups Alliances

Structured agreements and covenants among different ethnic groups are sometimes considered where the alliances or adversarial and antagonists "agree" to burry their hatchet and daggers so as to protect each other from

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[323] Apiyo Jackline Adhiambo, "Indigenous Conflict Resolution Mechanisms among Pastoralist Communities in the Karamoja Cluster - A Case Study of the Turkana"
[324] Ibid
[325] Supra, note 323
[326] Ibid
[327] Psalms 23:1 (KJV)
[328] Ibid
[329] Ibid
[330] Ibid

aggression.[331] These ethnic groups would view themselves as members of one group and jointly repulse attacks from any group(s) that were not part of the alliance.[332] This mechanism was, by design, deterrent since the result of such alliances was to send a clear message to potential aggressors that the tribe they intended to attack did not exist in isolation but had allies who could come to its aid in time of need.[333] The other effect was to reduce the possibility of conflict between the communities in question.[334] This is therefore to mean that conflicts were managed through a progressive process influenced by the social context of the society.[335] Emphasis throughout the process was placed on understanding the motives of the parties.[336]

e) African Customary Law

The Constitution of Kenya, under Article 2 (5) (6), underscores the use of customary laws within our borders. This statement by Khamoni,J. was approved by the court of Appeal in the case of Mukangu –vs- Mbui, KLR (E&L)1,622 where the court stated as follows at page 633;-

"We have also examined other authorities and we think it cannot be argued too strongly that the proper view of the qualification or proviso to Section 28 is that trusts arising from customary law claims are not excluded in the proviso. Additionally, in the case of **Peter Moturi Ogutu v. Elmelda Basweti Matonda & 3 others (2013) e KLR** it was stated:

"In the court of appeal cases of, **Muthuita .vs. Muthuita (1982-88) 1 KAR**

[331] Supra, note 327
[332] Ibid
[333] Ibid
[334] Ibid
[335] Ibid
[336] Ibid

> **42 at 44 and Njenga Chogera .vs. Maria Wanjira Kimani & Others [2005] e KLR,** it was held that customary law trust is proved by leading evidence on the history of the suit property and the relevant customary law on which the trust is founded.

Aywa and Oloo,[337] underscore that African societies had customs and beliefs that had to be adhered to by all members.[338] They argue that African customary law required people to carry out certain tasks while restraining them from undertaking others.[339] This is to be buttressed by Article 2 (4),[340] which states that "any law including customary law is part of Kenyan laws." Thus, the disregard of some of these beliefs and norms were believed to attract the wrath of the gods in addition to ridicule and reprimand from members of the society.[341] This helped to ensure that persons shunned conflict-causing conduct[342] and that this customary law has been applied both in formal courts and traditional justice processes and in relation to interpersonal and community based conflicts.[343] However, it is worth noting that under the current Constitutional order, application of customary law is restricted to matters of personal law and as such, its application in other matters relating to conflict bear minimal legal recognition and enforcement.

Kariuki Muigua[344] opines that "due to the resilience of customary laws in the way social and cultural aspects of most Kenyans there was a need to

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[337] (2001), The role of traditional societies in conflict management emphasis the importance of traditions, customs and norms.
[338] Ibid
[339] Ibid
[340] Supra, note 115
[341] Supra, note 119
[342] Ibid
[343] Ibid
[344] Traditional Dispute Resolution Mechanisms Under Article 159 of the Constitution of Kenya 2010

incorporate customary laws within the legal framework.[345] It is on this basis that traditional dispute resolution mechanisms are now recognized and protected in the supreme law of the land.[346] He asserts that they have been recognized as some of the mechanisms for managing conflicts in Kenya.[347] Article 159 (2) (c) of the Constitution provides that in exercising judicial authority, the courts and tribunals shall be guided by certain principles."[348]

The learned Professor is of the opinion that "one of these principles is that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted provided that they do not contravene the Bill of Rights, they are not repugnant to justice and morality or result to outcomes that are repugnant to justice or morality and if they are not inconsistent with the constitution or any written law." He also agrees that though there are certain aspects of customary laws that do not augur well with human rights standards,[349] the subjection of customary laws to the repugnancy clause has been used by courts to undermine the efficacy of these laws.[350] Thus according to him, there is need for customary laws to be recognized at the same pedestal just like formal laws as their usefulness in certain social and cultural aspects is now settled bearing in mind international human rights standards.[351]

Therefore, he holds the view that there is need for a change of attitude by the courts and the formal legal systems towards customary laws.[352] This bias

[345] Ibid
[346] Ibid
[347] Ibid
[348] Ibid
[349] Ibid
[350] Ibid
[351] Ibid
[352] Ibid

against customary laws has roots to the colonial days when the judicial attitude was that, though acceptable as being applicable in courts of law, customary laws were inferior to formal/English laws.[353] This is the attitude depicted in Article 159 (3) of the Constitution.[354]

f) Facilitating Inter-Community Dialogue vide Peace Caravans.

The Peace Caravans approach to inter-community peace-building has been through facilitating dialogue among the communities in conflicts.[355] The Focus group discussions with community members and the peace caravan membership, there is a recurring sentiment that the role of the such initiatives is to act as an avenue for community members to ventilate their issues openly and seek amicable solutions.[356] To this effect therefore, several meetings involving warriors are usually organized particularly in common grazing areas.[357] This helps in facilitating the formation of grazing and peace committees in areas where communities share common.[358]

g) Negotiation

This is the most widely used mechanism for dispute resolution.[359] It is customary and an everyday affair to see people sitting down informally and agreeing on certain issues, such as the allocation of resources and coming up with amicable solutions without resort to courts.[360] In Kenya today, many

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[353] Ibid
[354] Ibid
[355] Felix W. Watakila: Pastoralism and Conflict Management in the Horn of Africa: A Case Study of the Borana in North Eastern Kenya
[356] Ibid
[357] Ibid
[358] Ibid
[359] Supra, note 153
[360] Ibid

conflicts are being resolved through negotiation.[361] Even in the traditional or daily lives of many Kenyans many conflicts were resolved through negotiations.[362] In negotiation, parties meet to identify and discuss the issues at hand so as to arrive at a mutually acceptable solution without the help of a third party.[363] Negotiation is thus voluntary and it allows party autonomy in the process and over the outcome.[364] It is non-coercive thus allowing parties room to come up with creative solutions[365].

h) Mediation

Mediation is defined as "the intervention in a standard negotiation or conflict of an acceptable third party who has limited or no authoritative decision-making power but who assists the involved parties in voluntarily reaching a mutually acceptable settlement of issues in dispute.[366] Similarly, the West Virginia, Supreme Court Order, Rule 2 defines mediation as follows: '…as an informal non-adversarial process whereby neutral third person, the mediator, assists parties to a dispute to resolve by agreement some or all of the differences between them.[367] In mediation, decision-making authority remains with the parties,[368] the mediator has no authority to render a judgment on any issue of the dispute.[369] The role of the mediator is to encourage and assist the

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[361] Ibid

[362] Ibid

[363] Ibid

[364] Ibid

[365] Ibid

[366] Christopher Moore, *The Mediation Process: Practical Strategies for Resolving Conflict*, 3rd., (San Francisco: Jossey-Bass Publishers, 2004). <http://books.google.com/books/about/The_Mediation_Process.html?id=8hKfQgAACAAJ>. <accessed on 5 May 2025>

[367] Livinus I. Okere, Diplomatic Methods of Conflict Resolution (A CASE STUDY OF ECOWAS)

[368] Ibid

[369] Ibid

parties to reach their own mutually-acceptable settlement by facilitating communication, helping to clarify issues and interests; identifying what additional information should be collected or exchanged, fostering joint problem-solving, exploring settlement alternatives and other similar means.[370] The procedures for mediation are extremely flexible, and may be tailored to fit the needs of the parties to a particular dispute.[371]

The process seeks to persuade disputant parties to reach satisfactory terms of reference and no provisions for settling the dispute are to be prescribed, thus the goal of mediation is for a neutral third party to help disputants come to a consensus on their own.[372] Rather than imposing a solution,[373] a professional mediator works with the conflicting sides to explore the interests underlying their positions.[374] Mediation can be effective at allowing parties to vent their feelings and fully explore their grievances.[375] Working with parties together and sometimes separately,[376] mediators can try to help them hammer out a resolution that is sustainable, voluntary, and nonbinding.[377]Accordingly, it is the opinion of the author that this process could be conducted by an individual or individuals who aim at encouraging parties to open up for dialogue despite their antagonism or sharply protracted or rather fever pitch contention, which eventually implore parties to reaching an amicable and

[370] Ibid
[371] Ibid
[372] Frank E. A. Sander and Lukasz Rozdeiczer, *The Handbook of Dispute Resolution* (Jossey-Bass, 2005).
[373] Ibid
[374] Ibid
[375] Ibid
[376] Ibid
[377] Ibid

peaceable settlement. In essence, a mediator, who is usually neutral, helps participants to present their points of view and facts.[378]

Conclusion.

The value of pastoralism practiced in Kenya is not well appreciated, even though it is said to be enormous.[379] The available statistics tend to underestimate this value from the point of view of its contribution to the local and national economies,[380] due to the inadequacy of data and application of inappropriate valuation methodologies.[381] About 80% of Kenya is characterized as arid and semi-arid lands (ASAL) with pastoralism as the main source of livelihood to millions of people residing in these lands.[382]

There is a general consensus that pastoralism contributes between 10 and 44% of the gross domestic product (GDP) of African countries with approximately

[378] They also help participants to identify the disputed issues, develop options and try to reach an agreement. The mediator does not give advice or make a decision on the facts of the dispute or its outcome. They may give advice on, or choose how the process of mediation is conducted. Mediation may be voluntary, court ordered, or required as part of a contract or an external dispute resolution arrangement. As an alternative to the lengthy and rigid court processes in Kenya which are an impediment to access to justice; mediation, in particular, offers a flexible, speedy and cost effective way to resolve disputes. It is a confidential process that enables both parties to explain and then discuss what their needs and concerns are to each other in the presence of an independent third party, the mediator so that they reach an agreement between themselves.

[379] Nyariki D. M. et al (2018), The value of pastoralism in Kenya: Application of total economic value approach

[380] Ibid

[381] Ibid

[382] Amwata, D.A., D.M. Nyariki, and N.R.K. Musimba. 2015. Factors influencing agro pastoral and pastoral households' vulnerability to food insecurity in the drylands of Kenya: A case study of Kajiado and Makueni Counties. *Journal of International Development*. https://doi.org/10.1002/jid.3123.

1.3 billion people benefiting from the livestock value chain.[383] According to Nyariki (2004),[384] the 'economic contribution' of pastoralism should integrate economic and social systems of a country or community or group of communities.[385] A 'social system' refers to the interdependent relationships between the economic factors of production (land, labour and capital)[386] and non-economic factors including attitudes towards life and work, administrative structures, patterns of kinship and religion, cultural traditions and systems of land tenure.[387]

Pastoralism is said to make a significant contribution to Kenya's economy with livestock production accounting for 50% of agricultural GDP, which is 20–30% of the total GDP.[388] However, the use of GDP to estimate the value of pastoral livestock is inadequate since it only considers livestock and livestock products that are marketed,[389] ignoring the non-marketed products including the value of livestock in subsistence and socio-cultural values which are core components of pastoralism.[390]

The incomes and means of livelihood are held hostage because of environmental stress and harsh weather. Conflicts among the pastoralists'

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[383] Karaimu, P. 2013. Making visible the 'invisible benefits' of African pastoralism will spur national and pastoral economies both. https://clippings.ilri.org/2013/06/24/making-visible-the-invisible—benefits-of-african- <accessed on 5 May 2025>

[384] Nyariki, DM. 2004. The contribution of pastoralism to the local and national economies in Kenya. Unpublished report, April 2004. RECONCILE/IIED.

[385] Ibid

[386] Ibid

[387] Ibid

[388] Fitzgibbon, C. 2012. Economics of resilience study – Kenya country report. https://www.gov.uk/government/TEERR_Kenya_Background_Report.pdf/ . <accessed on 5 May 2025>

[389] Ibid

[390] Ibid

regions largely revolved around competition over control of and access to pasture and water resources emanating from extreme climatic events.[391] A significant argument reason advanced by the author is that governments do not give priority to the impact of resource-based conflicts and consequent peacebuilding practices. The communities living in these volatile regions are starved by the absence of peace and they are living in conditions of insecurity. Multiple approaches of peacebuilding are practiced to reduce conflict and to sustain peace among the community but not effective to create long lasting peace. The conflict dynamics are now seasonally increased and there is no guaranteed sustainability of peace in such areas.

[391] Brenda Kwamboka Nyabuto, Conflict and Environmental Security among the Pastoral Communities in Northern Kenya: The Case Study of Turkana. https://erepo.usiu.ac.ke/bitstream/handle/11732/3574/BRENDA%20KWAMBOKA%20NYABUTO%20MAIR%202017.pdf?isAllowed=y&sequence=1 <accessed on 5 May 2025>

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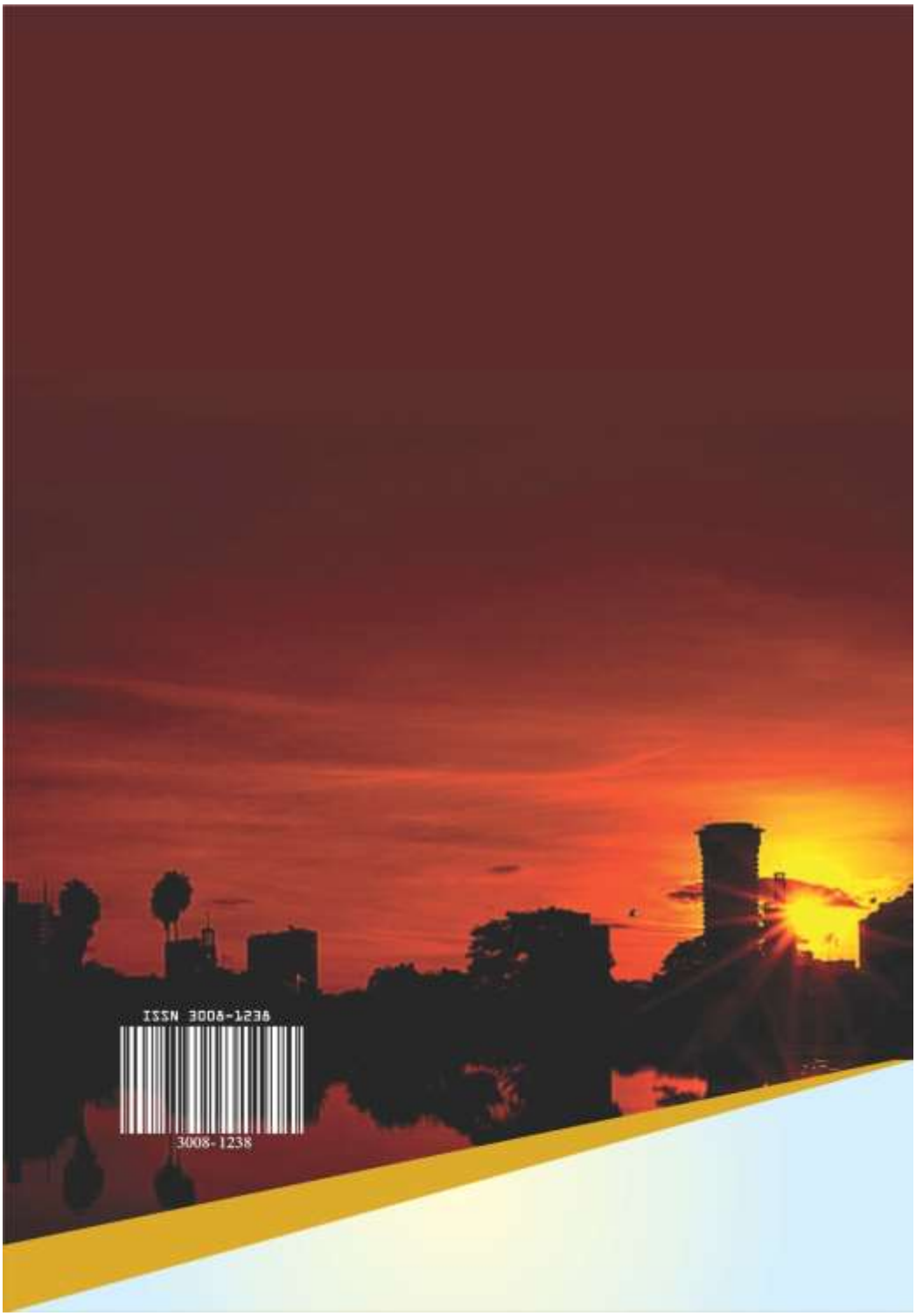
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