Journal of Conflict Management & Sustainable Development

Volume 1 **Issue 1** **2017**

ISBN 978-9966-046-15-4

Journal of Conflict Management and Sustainable Development

Volume 1 Issue 1 **2017**

Journal of Conflict Management and Sustainable Development
is a journal published twice a year

Typesetting by:
New Tech Edge Solutions Ltd,
P.O. Box 60561 – 00200,
Tel: +254 721 262 409/ 737 662 029,
Nairobi, Kenya.

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

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

This Journal should be cited as (2017) 1(1) Journal of cmsd

ISBN 978-9966-046-15-40

Editor's Note

The *Journal of Conflict Management and Sustainable Development* is a peer-reviewed/refereed interdisciplinary online bi-annual publication. It is a forum for academic discourse in conflict management in all fields as countries pursue sustainable development.

The Journal is aimed at a worldwide audience and is meant to spur debate among academics and persons interested in conflict management and sustainable development.

The editor welcomes contributions by way of articles, commentaries, book reviews and reflections covering the themes of conflict management and sustainable development.

This Issue carries articles covering diverse areas such as Environmental Justice; the Resource Curse; Mediation and the Role of women in Peace and Security; African Traditional Justice Systems; Management of Commercial Disputes; Arbitration and its efficacy; and Online Dispute Resolution.

I would recommend this Journal to academics, conflict managers, Environmentalists and the general reader interested in its thematic coverage.

Kariuki Muigua, Ph.D., FCIArb, Chartered Arbitrator

Managing Editor
Nairobi, 2017

Journal of Conflict Management and Sustainable Development

A Journal Published Twice a Year – Volume 1 Issue 1

Towards Environmental Justice in Kenya

By: ***Kariuki Muigua* & Francis Kariuki*****

Abstract

Natural resources are vital for human survival. They are sources of livelihood for most communities in Africa. However, access to, control and use of natural resources in most of Africa has been limited, denied or undermined by laws and policies carried over from the colonial period. Using some examples from the colonial era, the paper argues that current environmental injustices in Kenya have roots in colonial laws and policies. It also explores the provisions of the Constitution of Kenya 2010, and some of the sectoral laws enacted under it on environmental justice. The conceptual parameters of environmental justice adopted in this discussion are to assess whether the laws, policies and regulations under study distribute environmental burdens proportionately; whether they have adequate provisions for all to participate in environmental decision-making and whether they allow all to have access and enjoy a fair share of natural resources.

1.0 Introduction

The paper discusses the concept of environmental justice as a tool for effective management of natural resources in the Kenyan context. Natural resources are vital for human survival. They are sources of livelihood for most communities in Africa. However, access to, control and use of natural resources in most of Africa has been limited, denied or undermined by laws and policies carried over from the colonial period. Using some examples from the colonial era, the paper argues that current environmental injustices in Kenya have roots in colonial laws and policies. It also explores the provisions of the Constitution of Kenya 2010, and some sectoral laws enacted under it on environmental justice.

2.0 Environmental Justice

Broadly defined, environmental justice entails the right to have access to natural resources; not to suffer disproportionately from environmental policies, laws and regulations; and the right to environmental information,

participation and involvement in decision-making.[1] In the United States of America (USA), it is defined as the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.[2] Environmental justice serves two purposes. First, it ensures no groups of persons bear disproportionate environmental burdens and second, that all have an opportunity to participate democratically in decision-making processes.[3] In the United Kingdom (UK), environmental justice refers to fairness in the distribution of environmental 'goods' or 'bads' and fairness in providing information and opportunities necessary for people to participate in decisions about their environment.[4] Environmental justice also means a struggle to rein in and subject corporate and bureaucratic decision-making and relevant market processes to democratic scrutiny and accountability. Environmental justice in this context requires that the exploitation of resources should be done with due regard to environmental and social exigencies. These exigencies act as important constraints in natural resources exploitation.[5]

---

* Ph.D in Law (Nrb), FCIArb (Chartered Arbitrator), LL.B (Hons) Nrb, LL.M (Environmental Law) Nrb; Dip. In Arbitration (UK.); Dip. In Law (KSL); FCPS (K); MKIM; Accredited Mediator; Consultant: Lead expert EIA/EA NEMA; BSI ISO/IEC 27001:2005 ISMS Lead Auditor/ Implementer; Advocate of the High Court of Kenya; Senior Lecturer at University of Nairobi, School of Law [September, 2017].
*LL. B; LL.M; MCIArb; Lecturer, Strathmore Law School.

The discussion begins with an overview of the concept of environmental justice and its importance in natural resources management. It then highlights incidences of environmental injustices that have happened in Kenya and undertakes an analysis of the relevant legal frameworks, and offers proposals on what can be done to achieve environmental justice for the Kenyan people.

[1] R. Ako, 'Resource Exploitation and Environmental Justice: the Nigerian Experience,' in F.N. Botchway (ed), *Natural Resource Investment and Africa's Development*, (Cheltenham, UK: Edward Elgar Publishing, 2011), pp. 74-76.

[2] U.S. Environmental Justice Agency, 'What is Environmental Justice?'Available at *http://www.epa.gov/environmentaljustice/* [Accessed on 08/12/2014].

[3] R. Ako, 'Resource Exploitation and Environmental Justice: the Nigerian Experience,' in F.N. Botchway (ed), *Natural Resource Investment and Africa's Development*, *op. cit.*

[4] *Ibid.*

[5] Obiora, L., 'Symbolic Episodes in the Quest for Environmental Justice'. *Human Rights Quarterly, 21, 2, 1991*. P. 477.

In Africa, environmental justice mostly entails the right to have access to, use and control natural resources by communities.[6] This view is exemplified by the *Endorois case,* [7] where the community was fighting against violations resulting from their displacement from their ancestral lands without proper prior consultations, adequate and effective compensation for the loss of their property, the disruption of the community's pastoral enterprise and violations of the right to practise their religion and culture, as well as the overall process of their development as a people. The African Commission on Human and Peoples' Rights (ACHPR) found Kenya to be in violation of the African Charter, [8] and urged Kenya to, *inter alia,* recognise the rights of ownership of the Endorois; restitute their ancestral land; ensure the Endorois have unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle. The Government of Kenya is however yet to implement the decision of the Commission in the Endorois case. This demonstrates the Government's laxity in actualizing environmental rights in Kenya.[9]

2.1 Components of Environmental Justice

The 1992 Rio Declaration succinctly captures the key components of environmental justice. It provides that environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual should have appropriate access to information concerning the environment held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. Further, it

---

[6] *Ibid.*

[7] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, No.* 276 / 2003; See also generally, *Kemai & Others vs Attorney General & 3 Others* (2006) 1 KLR (E&L) 326, Civil Case 238 of 1999; Ogiek People v. District Commissioner Case No. 238/1999 (2000.03.23) (Indigenous Rights to Tinet Forest).

[8] Arts. 1, 8, 14, 17, 21 and 22. the Kenyan government had violated their right to religious practice (Art. 8), right to property (Art. 14), right to freely take part in the cultural life of his/her community (Art. 17), right of all peoples to freely dispose of their wealth and natural resources (Art. 21), and right to development (Art. 22)

[9] United Nations Human Rights Committee, 'Consideration of reports submitted by States parties under Art. 40 of the Covenant Concluding observations adopted by the Human Rights Committee at its 105th session, 9-27 July 2012. CCPR/C/KEN/CO/3, para. 24.

obligates the States to facilitate and encourage public awareness and participation by making information widely available. In addition, states are to provide effective access to judicial and administrative proceedings, including redress and remedy.[10]

Essentially, the Declaration contains the critical legal mechanisms that are germane in promoting environmental justice. These are access to information, public participation and access to justice in environmental matters. The three components are interdependent and functionally interlinked. Access to environmental information is a prerequisite to public participation in decision-making and to monitoring governmental and private sector activities. Effective access to justice in environmental matters requires an informed public that can bring actions before informed institutions.[11]

2.1.1 Access to Environmental Information

Access to information refers to the availability of environmental information (including that on hazardous materials and activities in communities) and mechanisms by which public authorities provide environmental information.[12] Communities cannot be meaningfully engaged on matters relating to the environment and the exploitation of natural resources without an understanding of what the ideals should be in a society where there is environmental justice. As such, the first step towards achieving environmental justice for the Kenyan people must be to afford them access to the relevant environmental information in forms that they would appreciate. This could be done in different ways including through newspapers, television, posters, release of reports, barazas, amongst other processes provided in law where communities can get the relevant information in forms and language that they can understand and appreciate.

2.1.2 Public Participation

Public Participation means the availability of opportunities for individuals, groups and organizations to provide input in the making of decisions which have, or are likely to have, an impact on the environment including in the

[10] Principle 10, Report of the United Nations Conference on Environment and Development (Rio de Janeiro, 3-14 June 1992), A/CONF.151/26 (Vol. I).
[11] UNEP, *Training Manual on International Environmental Law,* (UNEP, 2006), pp.80-81.
[12] Ibid.

enactment of laws, the enforcement of national laws, policies, and guidelines and environmental impact assessment procedures.[13] Public participation in environmental and natural resources governance should not be cosmetic but should be meaningful in order for the public to feel that their concerns are addressed and consequently for them to have trust and support the decisions of the government relating to the particular natural resources and environmental concerns. However, this cannot be achieved in a situation where the citizenry do not have an understanding of those problems, and where they have any knowledge be it traditional or any other, there must be a harmonization of the same with the scientific knowledge. This can be achieved through educating the public on the available scientific knowledge in a comparative manner so as to make them appreciate the similarities or differences arising therein.

2.1.3 Access to Justice

Access to justice is not an easy concept to define. It has been described as a situation where people in need of help, find effective solutions from justice systems that are accessible, affordable, comprehensible to ordinary people, and which dispense justice fairly, speedily and without discrimination, fear or favour and offer a greater role for alternative dispute resolution.[14] It also refers to those judicial and administrative remedies and procedures available to a person (natural or juristic) who is aggrieved or likely to be aggrieved by an issue. Further, it could refer to a fair and equitable legal framework that protects human rights and ensures delivery of justice.[15]Access to justice also entails the opening up of formal systems and legal structures to the disadvantaged groups in society, removal of legal, financial and social barriers such as language, lack of knowledge of legal rights and intimidation by the law and legal institutions.[16] Access to justice could also include the use of informal conflict management mechanisms such as Alternative

[13] Ibid.
[14] Ladan, M.T., "Access to Justice as a Human Right under the Ecowas Community Law," available at *http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=16&cad=rja&uact=8&ved=0CFcQFjAFOAo&url=http%3A%2F%2Fwww.abu.edu.ng%2Fpublications%2F2009-07-*. (Accessed on 19/04/2014).
[15] *Ibid.*
[16] Global Alliance against Traffic in Women (GAATW), Available at *http://www.gaatw.org/atj/* (Accessed on 09/03/ 2014).

Dispute Resolution mechanisms (ADR) and traditional dispute resolution mechanisms (TDRM), to bring justice closer to the people and make it more affordable.[17]

In *Dry Associates Limited v Capital Markets Authority & anor*[18], access to justice was broadly described as including the enshrinement of rights in the law; awareness of and understanding of the law; access to information; equality in the protection of rights; access to justice systems particularly the formal adjudicatory processes; availability of physical legal infrastructure; affordability of legal services; provision of a conducive environment within the judicial system; expeditious disposal of cases and enforcement of judicial decisions without delay.[19]

Access to justice is a basic and inviolable right guaranteed in international human rights instruments and national constitutions.[20] As a justiciable right, it has two important dimensions: procedural access (fair hearing before an impartial tribunal) and substantive access (fair and just remedy for a violation of one's rights).[21]The two dimensions are important in facilitating access to justice as observed by Krishna Iyer, J in *Municipal Council, Ratlamvs Shri Vardhichand & Others*[22] that '*it is procedural rules which infuse life into substantive rights, which activate them effective* (Emphasis added).' Alternatively, procedural rights without any substantive content are meaningless if entirely cut from material considerations.[23] As such, access to justice is an instrumental right that gives the structural framework necessary for the realisation of all substantive fundamental human rights.[24] However, both conceptions of access to justice must be accorded equal importance in

---

[17] See Muigua, K. and Kariuki F., 'ADR, Access to Justice and Development in Kenya'. Paper Presented at Strathmore Annual Law Conference 2014 held on 3rd& 4th July, 2014 at Strathmore University Law School, Nairobi.

[18] *Dry Associates Limited V Capital Markets Authority & Another Interested Party Crown Berger (K) Ltd [2012] eKLR [Petition No. 328 of 2011].*

[19] *Dry Associates Limited V Capital Markets Authority & Another Interested Party Crown Berger (K) Ltd* [2012] eKLR [Petition No. 328 of 2011] para. 110.

[20] Art. 48 of the Constitution of Kenya 2010, guarantees the right of access to justice for all; See also Art. 159(2) thereof.

[21] *Ibid.*

[22] 1980 AIR 1622, 1981 SCR (1) 97. Available at *http://indiankanoon.org/doc/440471/* [Accessed on 06/12/2014].

[23] Cullet, P., 'Definition of an Environmental Right in a Human Rights Context,'13 *Netherlands Quarterly of Human Rights* (1995), p. 25 at p. 37.

[24] Ibid.

legal frameworks, if communities are to have any meaningful access to justice. The Bill of Rights is thus not enough by itself to guarantee access to justice for all persons. There has to be corresponding legal and non-legal frameworks for the enforcement of rights.

2.1.4 Environmental Justice as either Distributive or Procedural Justice

Just like access to justice, environmental justice is associated with two elements of justice namely: distributive and procedural justice in relation to the environment. Distributive environmental justice recognizes that the human right to a dignified life is fundamental, and everyone has a right to a healthy and safe environment. On the other hand, procedural environmental justice requires that in order to uphold distributive justice, citizens need to be informed about and involved in decision making, and enabled to identify and stop acts that breach environmental laws and cause environmental injustices. Procedural justice is concerned with how and by whom decisions are made, and encompasses participation and legitimacy as common concepts. The institutional framework addressing environmental issues should be easily accessible to all including the marginalized groups.[25]
Demands for the recognition of cultural identity and for full participatory democratic rights are integral demands for justice as well, and they cannot be separated from distributional issues.[26] One of the crucial components of environmental justice is that it seeks to tackle social injustices and environmental problems through an integrated framework of policies. An equitable distribution of the environmental costs and benefits of economic development, both globally and nationally, is required, based on the premise that everyone should have the right and be able to live in a healthy environment with access to enough environmental resources for a healthy

[25] Friends of the Earth Scotland, 'Environmental Justice', available at *http://www.foescotland.org.uk/environmentalrights* [Accessed on 08/12/2014]; See also Agyeman, J., and Evans, B., 'Just sustainability': the emerging discourse of environmental justice in Britain? *The Geographical Journal*, Vol. 170, No. 2, June 2004, pp. 155–164 at p. 156.
[26] Schlosberg, D., 'Reconceiving Environmental Justice: Global Movements and Political Theories,' *Environmental Politics*, Vol.13, No.3, Autumn 2004, pp.517 – 540 at p. 537.

life. It also recognizes that it is predominantly the poorest and least powerful people who are missing the above-stated conditions.[27]

Secondly, environmental justice examines issues of procedural equity and access to the processes of justice. The procedures and processes needed to tackle negative environmental impacts should therefore be accessible on an equal basis to different social groups since many environmental injustices may be caused or exacerbated by procedural injustices in the processes of policy design, land-use planning, science and law. Therefore, the necessary policy, legal and institutional framework in place is crucial in ensuring environmental justice at the global, regional and national levels.[28]

Thirdly, environmental justice is inextricably related to sustainable development and social justice. It has been argued that it is possible to have a situation of perfect equality but which is destructive of the environment, and also a situation of perfect environmental sustainability which is inequitable.[29] Sustainable development has been described as primarily a social justice project focusing on equitable development to meet human needs while still recognizing that the preservation of natural resources is necessary to fulfil these needs.[30]

Notably, the main outcomes of the Rio+20 Conference was the agreement by member States to launch a process to develop a set of Sustainable Development Goals, which will build upon the Millennium Development Goals and converge with the post 2015 development agenda.[31] The developed Sustainable Development Goals (SDGs), also known as *the 2030 Agenda for Sustainable Development*,[32] includes a set of 17 Sustainable

---

[27] Todd, H., & Zografos, C., 'Justice for the Environment: Developing a Set of Indicators of Environmental Justice for Scotland,' *Environmental Values*, Vol.14, No.4 (November 2005), pp. 483-501 at p. 484.

[28] *Ibid*, p. 484.

[29] *Ibid*, p. 484.

[30] Thatcher, A., 'Theoretical definitions and models of sustainable development that apply to human factors and ergonomics,' in Broberg, N. O., et al, (eds), *Human Factors in Organizational Design and Management – Xi, Nordic Ergonomics Society Annual Conference – 46*, 2014, pp. 747-752 at p. 747.

[31] United Nations Department of Economic and Social Affairs, "Sustainable development goals," available at https://sustainabledevelopment.un.org/topics/sustainabledevelopmentgoals [Accessed on 25/08/2017].

[32] United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, Resolution adopted by the General Assembly on 25 September 2015,

Development Goals (SDGs) which focus on inequalities, economic growth, decent jobs, cities and human settlements, industrialization, energy, climate change, sustainable consumption and production, peace, justice and institutions.[33]

The *Sustainable Development Goals, Agenda 2030* (SDGs) define sustainable development broadly to cover issues such as poverty, inequality, gender equality, health, education, governance, climate change and environmental protection.[34] The global debate on sustainable development is mainly based on three core elements of sustainability which include:[35] Economic: An economically sustainable system must be able to produce goods and services on a continuing basis, to maintain manageable levels of government and external debt, and to avoid extreme sectoral imbalances which damage agricultural or industrial production; Environmental: An environmentally sustainable system must maintain a stable resource base, avoiding over-exploitation of renewable resource systems or environmental sink functions, and depleting non-renewable resources only to the extent that investment is made in adequate substitutes. This includes maintenance of biodiversity, atmospheric stability, and other ecosystem functions not ordinarily classed as economic resources; and Social: A socially sustainable system must achieve distributional equity, adequate provision of social services including health and education, gender equity, and political accountability and participation.[36]

As a result, the concept of sustainable development is seen an attempt to combine growing concerns about a range of environmental issues, socio-economic issues to do with poverty and inequality and concerns about a healthy future for humanity. It strongly links environmental and socio-

---

[without reference to a Main Committee (A/70/L.1)], Seventieth session, Agenda items 15 and 116, 21 October 2015.

[33] United Nations General Assembly, "The road to dignity by 2030: ending poverty, transforming all lives and protecting the planet," *Synthesis report of the Secretary-General on the post-2015 Sustainable development agenda*. A/69/700. para.45.

[34] See United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, Resolution adopted by the General Assembly on 25 September 2015.

[35] Harris, J.M., "Basic Principles of Sustainable Development," Global Development and Environment Institute, Working Paper 00-04, June 2000, op cit., pp.5-6.

[36] Ibid, p.6.

economic issues. [37] Environmental justice may be considered as an alternative discourse to sustainable development. This is because environmental justice emphasizes commitment to the struggle of communities who suffer the most environmental damage by giving them a voice to access decision-making, which links with social justice, to ensure sustainable and equitable development.

Environmental justice can therefore address our concerns as to the use of our environmental resources and how to ensure equitable participation in environmental decision-making. This has been framed in academic terms as distributive justice and procedural justice, a distinction which is useful in the environmental justice discourse.[38]

3.0 Background to Environmental Injustice in Kenya

The history of natural resources in Kenya depicts a struggle for environmental justice. A classic example is the Mau Mau revolt in the 1920s-1950s. One of the main reasons for the revolt was to claim back land and land-based resources which had been divested from local communities and vested in Her Majesty. The colonialists were able to use law to exercise control over all the natural resources in the colony. In 1899,using the *Foreign Jurisdiction Act,*[39] the British were able to declare the land in the protectorate as waste and unoccupied since a settled form of government did not exist and the land had not been appropriated by the local sovereign or individual.[40] Several laws were therefore introduced in Kenya whose

[37] Hopwood, B., *et al*, "Sustainable development: mapping different approaches," *Sustainable Development,* Vol. 13, Issue 1, February 2005, pp.38–52, p.39.

[38] Paavola, J. and Adger, W.N., "Justice and Adaptation to Climate Change", *Tyndall Centre Working Paper 23,* 2002.

[39] *Foreign Jurisdiction Act*, 1890. (53 & 54 Vie. c, 37.) s. 2 & 3.

[40] Njonjo Commission Report, p.23. Towett J. Kimaiyo has recorded that on 15th June, 1895, Kenya was declared a British Protectorate and the legal effect of this declaration was to confer on the British crown Political Jurisdiction over the area, whilst it remained a foreign jurisdiction. The declaration of Protectorate did not confer any rights over land in the territory. Any rights over the land would have to be on the basis of conquest, agreement, treaty or sale with the indigenous people. In 1897, the Indian Land Act was extended to the territory, thus enabling the appropriation of lands in the main land beyond Mombasa for public use. This appropriation was however limited to land within one mile of either side of the railway line. To overcome the problem of title to land in the territory, in 1899 the law officers of the crown advised that the Foreign Jurisdiction Act, 1890

effect was to wrest control over natural resources from local communities. For example, under the *Crown Lands Ordinance of 1915,* all public land in the colony was vested in Her Majesty, leaving Africans as tenants at the will of the crown.[41] Under the Ordinance, all land within the protectorate was declared crown land whether or not it was occupied by the natives or reserved for native occupation.

The effect of the law was to appropriate all land and land based resources from Africans and to vest them in the colonial masters.[42] In addition, the law gave the colonial authorities powers to appropriate land held by indigenous people and allocate it to the settlers. This position was affirmed in a 1915 opinion delivered by the then Chief Justice to the effect that whatever rights the indigenous inhabitants may have had to the land had been extinguished by the Ordinance leaving them as mere tenants at the will of the crown.[43] The colonial authorities were therefore able to grant land rights to settlers in the highlands, while Africans were being driven and restricted to the native reserves. In the natives reserves there was overcrowding, soil erosion, and poor sanitation, amongst many other problems.[44]

At the coastal region the *Land Titles Act*[45] was enacted to remove doubts that had arisen in regard to titles to land there and to establish a Land Registration Court. The processes of land adjudication and registration under the Act deprived indigenous Coastal Communities of their land. This led to problems of landlessness among the indigenous Coastal people and

---

empowered the crown to control and dispose waste and unoccupied land in the protectorates with no settled forms of government and where land had been appropriated to the local sovereign individuals. In 1901 the East African (Lands) ordinance-in- council was enacted conferring on the commissioner of the Protectorate (later named Governor) power to dispose of all public lands on such terms and conditions as he might think fit. [Towett J. Kimaiyo, 'Chapter 6: Kenya Land Policy since 1900,' *Ogiek Land Cases and Historical Injustices*, 1902-2004, Vol. 1, 2004.]

[41] HWO Okoth-Ogendo, *Tenants of the Crown: Evolution of Agrarian Law & Institutions in Kenya, (*ACTS Press, Nairobi, 1991), p.54.

[42] *Ibid*.

[43] See generally the case of *Isaka Wainaina and Anor vs. Murito wa Indagara and others* (1922-23) 9(2) KLR, 102.

[44] See HWO Okoth-Ogendo, *Tenants of the Crown: Evolution of Agrarian Law & Institutions in Kenya, (*ACTS Press, Nairobi, 1991).

[45] Cap 282, Laws of Kenya.

absentee landowners.[46] Some of the current land problems at the coast region have been traced back to the now repealed *Land Titles Act*[47].

The capitalist traders in British territory of Kenya agreed to employ their resources, through private Chartered Companies,[48] so long as they were guaranteed a monopoly of trade and allowed to exercise exclusive rights over taxation, minerals and land.[49] To protect these traders and safeguard their future claims, European Governments declared the territories they were occupying protectorates. Since the legality of protectorates was contested, they developed a system of Treaties or Agreements which were accepted as valid titles to the acquisition of African territories and the Africans were alleged to have "voluntarily ceded their sovereign rights." Such treaties were duly attested by a cross which purported to carry the assent of a King or Chief. The so-called assent was obtained by vague promises which were often unrecorded and all they were looking for were grounds to justify the acquisition of African lands.[50]

The two Maasai agreements of 1904 and 1911 illustrate the effect of the treaties and agreements on the rights of the local people to their natural resources. In 1904, the then Commissioner of the Protectorate entered into an agreement with the Chief and certain representatives of the Maasai tribe by which, *inter alia*, it was arranged that certain sections of the tribe should move to a reserve at Laikipia. This removal took place and the tribe was consequently divided in two.[51] In 1911, the then Governor of the

[46] National Land Policy, 2009. p.43.
[47] *Land Titles Act* 1908, LTA (Cap 282).
[48] A good example is the ten-mile coastal strip which was owned by the Sultan of Zanzibar. This land had been leased to the Imperial British East African Company in 1888 by virtue of which all land in the Sultan's territory was ceded to the company except the private lands. Government of Kenya, *Report of the Commission of Inquiry into Land Law Systems in Kenya on Principles of a National Land Policy Framework, Constitutional Position of Land and New Institutional Framework for Land Administration* (Government Printer Nairobi, 2002) p.21.
[49] Kiwanuka, S., 'From Colonialism to Independence: A Reappraisal of Colonial Policies & African Reactions.' 1870-1960. KLB. P. 19.
[50] *Ibid*; See generally, Watkins, O. F., 'The Report of the Kenya Land Commission, September, 1933', *Journal of the Royal African Society*, Vol. 33, No. 132 (Jul., 1934), pp. 207-216.
[51] 'Judgment of the High Court of the East Africa Protectorate in the Case Brought by the Maasai Tribe Against the Attorney-General of the Protectorate and Others'

Protectorate entered into another agreement with the Chief, his regents, and certain representatives of that portion of the tribe living at Laikipia, by which it was arranged that the sections of the tribe which under the former agreement had moved to Laikipia should move south into one reserve with the remainder of the tribe.[52] Using the two Agreements, the British were able to forcibly move certain sections of the Maasai out of their favourite grazing grounds in the central Rift Valley (Naivasha-Nakuru) into two reserves in order to make way for white settlement.[53] Since then, attempts by the community to regain the land have not been successful. The Colonialists chose not to recognise customary property ownership regarding it as an invalid way of claiming any ownership or control over property or environment.[54]

The Maasai representatives have argued that land loss occasioned by the two agreements, is the single most important factor responsible for the ongoing cultural, economic, and social destitution of the Maasai people and has indeed, been responsible for the erosion of their sovereignty as a people. [55] They feel that they have been neglected by successive Governments of Kenya in redressing these historical injustices on land and related natural resources.[56]

The loss of control rights over natural resources also affected other resources including forests and water. For instance, in 1891 a law was enacted to protect the mangrove forests at Vanga in Coast region. Shortly

---

The American Journal of International Law, Vol. 8, No. 2 (Apr., 1914), pp. 380-389 at p. 381.

[52] *Ibid.*

[53] Hughes, L., *Moving the Maasai: A Colonial Misadventure,* (Palgrave Macmillan, 2006), p. 8; Olson, P.A., 'The Struggle for the Land: Indigenous Insight and Industrial Empire in the Semiarid World', U of Nebraska Press, 1990. Available at *https://books.google.co.ke/books?id=OqwF27HZms8C&printsec=frontcover#v=onepage&q&f=false* [Accessed on 26/12/2014]. p. 235.

[54] The provisions of the Land Titles Act demanded that for any local to claim land at the coast, they ought to possess papers showing ownership.

[55]Meitamei, O.D., 'Maasai Autonomy and Sovereignty in Kenya and Tanzania', *Mining Indigenous Lands*, 25.1 (Spring 2001). Available at *http://www.culturalsurvival.org/ourpublications/csq/Art./maasai-autonomy-and-sovereignty-kenya-and-tanzania* [Accessed on 26/12/2014].

[56] See generally, Kantai, P, 'In the Grip of the Vampire State: Maasai Land Struggles in Kenyan Politics,' *Journal of Eastern African Studies*, *Vol. 1, No. 1*, pp.107-122, March 2007.

thereafter in 1897, the *Ukamba Woods and Forests Regulations* established a strip marking two miles each side of Uganda railway and the same was placed under the management and control of the Divisional Forest Officer (DFO) and the railway administration. This changed forest management by communities which was done through customary practices with the accruing benefits extending to all community members in a fair manner. In 1900, the 1891 and 1897 Regulations were extended to cover all the forests in the coastal region and all those along the railway line. To facilitate this state-centric approach to forests management, a post of conservator of forests was established in 1902 as the officer who would oversee the management of all the regulated forests from the national level. Within the same year, the East African Forests Regulations provided for the gazettement or degazettement of forests and control of forests exploitation through a system of licences and fines. The culmination of this was in 1932 when a declaration was issued over the remaining expansive forests in order to bring them under control of the government including the high potential areas.[57]

The main focus of forests management in reserved forests was production and protection and included collection of revenues, supervisory permits and licences, protection against illegal entry and use, reforestation and afforestation, research and extension.[58] Further, outside reserved forests, the focus by the government authorities was regulation and control of forest resources utilisation through legislation without considering the interests of the local communities or the existing traditional management systems.[59]

Thus, the colonial government effectively transferred the management of forests from the local communities to the government through exclusionist and protectionist legal frameworks, a move that was inherited by the

[57]Mogaka, H., 'Economic Aspects of Community Involvement in Sustainable Forest Management in Eastern and Southern Africa.' *Issue 8 of Forest and social perspectives in conservation.* IUCN, 2001. p.74.

[58] Kigenyi, et al. 'Practice Before Policy: An Analysis of Policy and Institutional Changes Enabling Community Involvement in Forest Management in Eastern and Southern Africa.' *Issue 10 of Forest and social perspectives in conservation*. IUCN, 2002. P. 9.

[59] Ibid.

independent governments of Kenya.[60] It was only in the 1990s that there emerged a paradigm shift towards community based forests management although this was done with minimal commitment from the stakeholders.[61] Arguably, this has been with little success due to the bureaucracy involved in requiring communities to apply for complicated licences and permits in order to participate in the same. Similarly, in relation to water resources, legal frameworks were enacted chief among which is the Water Ordinance of 1929, vesting water resources on the authorities. This denied local communities the universal water rights that they had enjoyed in the pre-colonial period. It is noteworthy that the problem of environmental injustice in Kenya has in fact continued into independent Kenya and often with ugly results, as has been documented in various Government reports.[62]

Environmental injustice continues to manifest itself in modern times. The recent conflicts such as those in Lamu County and in some of the pastoral counties are largely attributable to environmental injustices inflicted over the years.[63] In some, there are feelings that land and other land-based

[60] For instance, in 1985 the Government of the day effected a total ban on the shamba system, which was participatory in nature in that it allowed communities to settle in forests and engage in farming as they took care of the forests. Following the ban, the communities were resettled outside the gazette forest areas. This form of eviction has also been witnessed in such recent cases as the Endorois and the Ogiek cases.

[61] Emerton, L., 'Mount Kenya: The Economics of Community Conservation'. *Evaluating Eden Series*, Discussion Paper No.4. p. 6.

[62] See the *Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya*, July 31, 1999 (Akiwumi Report). The report found that some of the main causes of post-independence tribal clashes have been ambitions by some communities of recovering what they think they lost when the Europeans forcibly acquired their ancestral land; See also the *Kriegler and Waki Reports on 2007 Elections*, 2009. Government Printer, Nairobi. The *Kriegler and Waki Reports* stated that the causes of the post-election clashes in the Rift Valley region covered by included conflict over land, cattle rustling, political differences and ecological reasons among others. [p. 59].

[63] See generally, Rohwerder, B., *Conflict Analysis of Kenya*, (Birmingham, UK: GSDRC, University of Birmingham, 2015). Available at http://www.gsdrc.org/wp-content/uploads/2015/12/KenyaConflictAnalysis.pdf [Accessed on 1/09/2017]; See also Nyanjom, O., "Remarginalising Kenyan Pastoralists: The Hidden Curse of National Growth and Development," *African Study Monographs*, Suppl. 50: October 2014, pp. 43–72; National Environment Management Authority, 'Environmental Sensitivity: Atlas of Lamu County,' 2015. Available at

resources were taken away from local communities, creating a feeling of disinheritance. In other areas, there are conflicts over access to resources such as forests among forest communities for livelihood, while in others conflicts emerge due to competition over scarce natural resources and competing land uses.

4.0 Legal Framework for Environmental Justice in Kenya

4.1 Constitution of Kenya 2010

The history of environmental justice is important in the Kenyan context as it shows how laws and policies can impose environmental burdens disproportionately on people; marginalize and exclude communities from natural resources; and hinder communities from enjoying a fair share of their natural resources. The current Constitution seeks to correct this situation by promoting and requiring environmental justice.

The Constitution provides a foundation for environmental justice by emphasizing the need for public participation in matters of governance including the governance of environmental matters and natural resources in Kenya. The Constitution provides for the national values and principles of governance which include, *inter alia,* democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; good governance, integrity, transparency and accountability; and sustainable development.[64]

In The Matter of the National Land Commission [2015] eKLR,[65] the Supreme Court of Kenya extensively addressed itself to the role and place of public participation in the administration and management of land in Kenya. Mutunga, CJ (as he then was) was of the opinion that:

> *"Public participation was a major pillar, and bedrock of democracy and good governance. It was the basis for changing the content of the State, envisioned by the Constitution, so that the citizens had a major voice and impact on the equitable distribution of political power and resources. With devolution being implemented under the Constitution, the*

---

http://www.ku.ac.ke/schools/environmental/images/stories/docs/Lamu_Sensitivity_Atlas.pdf [Accessed on 1/09/2017]

[64] Art. 10(1).

[65] Advisory Opinion Reference No. 2 of 2014, December 2, 2015.

> *participation of the people in governance would make the State, its organs and institutions accountable, thus making the country more progressive and stable. The role of the Courts, whose judicial authority was derived from the people of Kenya, was the indestructible fidelity to the value and principle of public participation. The realization of the pillars of good governance would become weak and subject to the manipulation by the forces of status quo if the participation of the people was excluded" (emphasis added).*[66] *Further, he stated that: "public participation was the community based process, where people organise themselves and their goals at the grassroots level and work together through governmental and non-governmental community organisations to influence decision making processes in policy, legislation, service delivery, oversight and development matters. It was a two way interactive process where the duty bearer communicates information in a transparent and timely manner, engages the public in decision making and is responsive and accountable to their needs. The definition could be applied to the management and administration of land in Kenya. In order to achieve efficient land administration and management, the national and county governments; the arms of government; and the commissions and independent offices, must conduct meaningful consultation, communication, and engagement with the people" (emphasis added).*[67]

The Chief Justice further stated that the principle of the participation of the people did not stand in isolation; it was to be realised in conjunction with other constitutional rights, especially the right of access to information (article 35); equality (article 27); and the principle of democracy (article 10(2)(a)). The right to equality related to matters concerning land, where State agencies were encouraged also to engage with communities, pastoralists, peasants and any other members of the public. Thus, public bodies should engage with specific stakeholders, while also considering the views of other members of the public. Democracy was another national principle that was enhanced by the participation of the people.[68]

---

[66] Advisory Opinion Reference No. 2 of 2014, para. 45.
[67] Ibid, para. 47.
[68] Ibid, para. 49.; See also Muigua, K., et al, *Natural Resources and Environmental Justice in Kenya*, (Glenwood Publishers Limited, August, 2015), pp. 23-29.

In the case of *Friends of Lake Turkana Trust v Attorney General & 2 others*[69] the Court stated, *inter alia,* that the right to life, dignity and economic and social rights are all connected and indivisible, and it cannot be said that —one set of rights is more important than another. All these rights of necessity need to be observed for person to attain a reasonable livelihood.[70] The need for environmental justice was also affirmed in the case of *Joseph Leboo & 2 others v Director Kenya Forest Services & another*[71] the Court stated as follows:

> *"…in my view, any person is free to raise an issue that touches on the conservation and management of the environment, and it is not necessary for such person to demonstrate, that the issues being raised, concern him personally, or indeed, demonstrate that he stands to suffer individually. Any interference with the environment affects every person in his individual capacity, but even if there cannot be demonstration of personal injury, such person is not precluded from raising a matter touching on the management and conservation of the environment….Any person, without the need of demonstrating personal injury, has the freedom and capacity to institute an action aimed at protecting the environment. The plaintiffs have filed this suit as representatives of the local community and also in their own capacity. The community, of course, has an interest in the preservation and sustainable use of forests. Their very livelihoods depend on the proper management of the forests. Even if they had not demonstrated such interest that would not have been important, as any person who alleges a violation of any law touching on the environment is free to commence litigation to ensure the protection of such environment…."*[72] *(emphasis added)*

The one common component that runs through all these principles and values is their anthropocentric nature. They all recognise the important role of all human beings in matters of governance including governance of natural resources. They call for meaningful involvement of all persons in governance matters. Meaningful involvement has been defined to mean that: potentially affected community residents have an appropriate opportunity to participate in decisions about a proposed activity that will affect their environment and/or health; the public contribution can influence the

[69] [2014] eKLR, ELC Suit No. 825 OF 2012.
[70] Advisory Opinion Reference No. 2 of 2014, p.11.
[71] [2013] eKLR, Environment and Land No. 273 of 2013.
[72] Ibid, Paras 25 & 28.

regulatory agency's decision; the concerns of all participants involved will be considered in the decision making process; and the decision makers seek out and facilitate the involvement of those potentially affected.[73]

The Constitution guarantees the right of every person to a clean and healthy environment, which includes the right- to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and to have obligations relating to the environment fulfilled under Article 70.[74] The guarantee does away with the requirement for showing standing in environmental matters.[75]

To realise environmental rights, the constitution guarantees the right to access to information[76] and access to justice.[77] Environmental justice as an offshoot of the right of access to justice also needs to be enhanced to facilitate people's enjoyment of the right to a clean and healthy environment as envisaged in the laws of Kenya. If people and communities in general are to have any meaningful access to justice, then both substantive and procedural rights must be accorded equal importance in the access to justice frameworks. The Bill of Rights is thus not enough to guarantee access to justice for all persons but there must be a corresponding effective legal framework for the enforcement of this Bill of Rights. It is within this framework that the right to environmental justice for all persons in Kenya would be realised.

For example, in land matters the Constitution outlines the principles of landholding and management in Kenya to wit; sustainability, efficiency, equity and productivity. These principles are to be realised by ensuring equitable access to land; security of land rights; transparent and cost effective administration of land; elimination of gender discrimination in law, customs and practices related to land and property in land; and encouragement of

---

[73] The National Environmental Justice Advisory Council, Indigenous Peoples Subcommittee, 'Meaningful Involvement and Fair Treatment by Tribal Environmental Regulatory Programs', November 2004, p. 5. Available at *http://www.epa.gov/environmentaljustice/resources/publications/nejac/ips-final-report.pdf*

[74] Art. 42.

[75] See the case of Prof. Wangari Maathai.

[76] Art. 35

[77] Art. 48.

communities to settle land disputes through recognised local community initiatives consistent with this Constitution.[78]

If well implemented the principles would be a positive step towards realising environmental justice for all in land matters in Kenya.[79] The poor and women would have access to land for housing and farming to feed their families. The Constitution also requires the enactment of other laws on land namely: *Land Act,* [80] *Land Registration Act*[81] and *National Land Commission Act.*[82] These laws adopted the constitutional principles on land as the guiding principles in their implementation including dealing with historical land injustices.

4.2 Environmental Management and Coordination Act 1999

With regard to sustainable development, the Act [83] provides that in exercising the jurisdiction conferred upon it under subsection (3),[84] the High Court shall be guided by the following principles of sustainable development, *inter alia*; the principle of public participation in the development of policies, plans and processes for the management of the environment; and the cultural and social principle traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and are not repugnant to justice and morality or inconsistent with any written law.[85]

It is noteworthy that EMCA, in a bid to facilitate public participation in environmental governance matters, dispenses with the requirement of proving *locus standi* in environmental litigation. The Act also states that a person alleging violation of a right to clean and healthy environment shall have the capacity to bring an action notwithstanding that such a person

[78] Art. 60(1).
[79] See also *Environmental Management and Co-ordination (Amendment) Act*, Act No. 5 of 2015 which was enacted to revise the Environmental Management and Coordination Act, (EMCA) No. 8 of 1999 in line with the current constitutional provisions on environmental management.
[80] No. 6 of 2012.
[81] No. 3 of 2012.
[82] National Land Commission Act, 2012 (No. 5 of 2012).
[83] Environmental Management and Coordination Act, (EMCA) No. 8 of 1999, Laws of Kenya.
[84] Powers to enforce the right of every person in Kenya to a clean and healthy environment the duty to safeguard and enhance the environment.
[85] Environmental Management and Coordination Act 1999, S. 3(5).

cannot show that the defendant's act or omission has caused or is likely to cause him any personal loss or injury provided that such action –is not frivolous or vexations; or is not an abuse of the court process.[86]
The *Environmental Management and Co-ordination (Amendment) Act*, 2015[87] was enacted to streamline EMCA in accordance with the current Constitution of Kenya and especially making provision for the devolved system of governance with respect to the various environmental bodies in the country.

4.3 The Environment and Land Court Act

The Environment and Land Court Act[88] establishes an Environment and Land Court (ELC) to hear matters touching on environment and land. The important role to be played by courts in achieving environmental justice was affirmed in the case of *Peter K. Waweru v Republic,*[89] where the Court, although not the ELC, stated, *inter alia*, that "…environmental crimes under the Water Act, Public Health Act and EMCA cover the entire range of liability including strict liability and absolute liability and ought to be severely punished because the challenge of the restoration of the environment has to be tackled from all sides and by every man and woman….In the name of environmental justice water was given to us by the Creator and in whatever form it should never ever be the privilege of a few – the same applies to the right to a clean environment."[90]
Article 22(2) of the Constitution of Kenya allows Courts to take action to protect the environment without necessarily looking for immediate proof of likely violation of the right to clean and healthy environment. In *Said Tahir &*

[86] S. 3(4), EMCA; Art. 70 (1) of the Constitution also states that if a person alleges that a right to a clean and healthy environment recognised and protected under Art. 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter. Clause (3) thereof is to the effect that for the purposes of this Art., an applicant does not have to demonstrate that any person has incurred loss or suffered injury.
[87] *Environmental Management and Co-ordination (Amendment) Act*, Act No. 5 of 2015, Laws of Kenya.
[88] *Environment and Land Court Act*, No. 19 of 2011, Laws of Kenya. Government printer, Nairobi.
[89] [2006] eKLR.
[90] [2006] eKLR, Misc. Civ. Applic. No. 118 of 2004, p.14.

2 others v County Government of Mombasa & 5 others,[91] the Court observed that although the right to a clean and healthy environment is a right under the Bill of Rights (Chapter 4 of the Constitution), the determination of which is conferred upon the High Court under Article 23(1) of the Constitution, there is a duality of jurisdiction between the High Court and the Environment and Land Court by virtue of Article 162 (2) of the Constitution, and by virtue of the jurisdiction conferred upon the latter court by section 13(7) of the *Environment and Land Act*[92]. However, in *Timothy Otuya Afubwa & another v County Government of Trans-Nzoia & 3 others*, the Court stated that the Constitution designates the High Court as the only court to address questions on violation of the Bill of Rights. The only right under the Bill of Rights which the Environment and Land Court can hear is the right to clean and healthy environment and thus it has jurisdiction to entertain matters relating to violation of this right.[93]

The establishment of the court is part of the recognition of the need to enhance access to justice in environmental matters. Previously, environmental and land court matters used to be heard in the ordinary courts and could take years before justice is realised for the parties.

4.4 Water Policy 2012 and Water Act 2016

In the past, the water sector in the country has been bedeviled by many problems, some of which can be traced back to the colonial times. For instance, the colonial masters made policies that favoured the use of all the water resources in the colony by the settlers at the expense of the locals. The local people lost control over water resources in the country as the colonial laws such as the 1929 *Water Ordinance* divested ownership of all water bodies in the colony from local communities. The main use of water from the water bodies was farming by settlers. The settlers' main preoccupation was water exploitation without conservation of catchment areas. This led to such problems as soil erosion, siltation and disease outbreaks amongst the Africans who had been restricted to certain reserve areas. Indeed, the state-centric approach to water management in Kenya has been a problem that was also repeated in the now repealed *Water Act*

[91] [2015] eKLR, Petition No. 6 of 2015.
[92] No 19 of 2011, Laws of Kenya.
[93] *Timothy Otuya Afubwa & another v County Government of Trans-Nzoia & 3 others* [2015] eKLR, para.8.

2002[94] which vested the control of water resources in the state and the Minister responsible for water resources. Although past policies have contemplated participatory approach to water management in the country, the same has not achieved much positive results.

To correct this, the current Constitution provides for principles of natural resources management which include public participation and also devolution, which seek to empower the locals and give them a voice in the management. The water sector does not have a current and clear sector-specific policy and legal framework to operationalize devolution as envisaged by the current Constitution of Kenya.[95] As such, the *Water Policy* 2012 seeks to address this alongside other challenges that were identified as *inter alia:* Climate Change, Disaster Management and Environmental Degradation; Water availability and water service provision; absence of reliable information in the rural Water Supply and Sanitation (WSS) sub-sector; mixed and inconsistent performance of sector institutions mainly due to insufficient governance and autonomy of institutions; lack of good governance practices in some sector institutions; insufficient effluent treatment threatening the country's public health and economic growth; incomplete devolution of functions to the basin level in Water Resources Management (WRM) and conflict of interest in regulation and implementation.[96]

Article 43 of the Constitution of Kenya guarantees the right to an adequate standard of living for all and this encompasses right to adequate food, clothing, shelter, clean and safe water, education, health and social security.

The Water Act 2016 [97] was enacted to provide for the regulation, management and development of water resources, water and sewerage services; and for other connected purposes. The Cabinet Secretary, the Water Resources Authority, the Regulatory Board, county governments and any person administering or applying this Act shall be guided by the

[94] Act No. 8 of 2002.

[95] Heymans, C., et al. *Devolution in Kenya: opportunities and challenges for the water sector - supporting poor-inclusive WSS sector reform*. Water and sanitation program, policy note, World Bank Group, 2013. Available at *http://documents.worldbank.org/curated/en/2013/09/19122948/devolution-kenya-opportunities-challenges-water-sector-supporting-poor-inclusive-wss-sector-reform*

[96] National Water Policy, 2012.

[97] Water Act, No. 43 of 2016, Laws of Kenya, Repealed by the Water Act, No. 43 of 2016.

principles and values set out in Articles 10[98], 43[99], 60[100] and 232[101] of the Constitution.[102] Thus, while every water resource is vested in and held by the national government in trust for the people of Kenya even under this Act[103], its management should be aimed at ensuring that communities enjoy their right to water among other economic and social rights that are related to the provision of water services. Section 63 thereof also provides that every person in Kenya has the right to clean and safe water in adequate quantities and to reasonable standards of sanitation as stipulated in Article 43 of the Constitution.

For effective water resources management, environmental justice concepts such as public participation, information sharing, community based natural resource management, amongst others should feature prominently if the sector is to reflect the spirit of the current Constitution. This can be achieved through the Policy guiding principles which include *inter alia*: Right to water with a pro-poor orientation; Integrated Water Resource Management (IWRM) approach; Sector Wide Approach (SWAp) for enhanced development; devolution of functions to the lowest appropriate level; gender provisions in the management of Water Sector Institutions (WSIs) and safeguarding of water; socially responsive commercialization for service delivery; good governance practices on all levels; participatory approach; public Private Partnership (PPP); and "User pays and polluter pays" principles. If fully implemented through the relevant sectoral regulations, these principles can go a long way in actualizing environmental justice in the water sector.[104]

[98] Constitution of Kenya 2010, National Values and Principles of Governance.
[99] Constitution of Kenya 2010, Economic and Social Rights.
[100] Constitution of Kenya, Principles of Land Policy.
[101] Constitution of Kenya, Values and Principles of Public Service
[102] Water Act, No. 43 of 2016, sec. 4.
[103] Ibid, sec. 5.
[104] *Ibid*, para. 1.5; For further comment on the place of Water Act 2016 in achieving efficiency in water governance in Kenya, see Muigua, K., "Streamlining Water Governance in Kenya for Sustainable Development," available at http://www.kmco.co.ke/attachments/article/184/Streamlining%20Water%20Governance%20in%20Kenya-%2017TH%20FEBRUARY%202017.pdf

4.5 National Land Policy, 2009

The Policy[105] identifies the problems facing the land sector in Kenya as including: severe land pressure and fragmentation of land holdings into uneconomic units; deterioration in land quality due to poor land use practices; unproductive and speculative land hoarding; under-utilization and abandonment of agricultural land; severe tenure insecurity due to overlapping rights; disinheritance of women and vulnerable members of society, and biased decisions by land management and dispute resolution institutions; landlessness and the squatter phenomenon; uncontrolled development, urban squalor and environmental pollution; wanton destruction of forests, catchment areas and areas of unique biodiversity; desertification in the arid and semi-arid lands; and growth of extra-legal land administration processes.[106]

In order to tackle these challenges, it proposed that the process of acquisition, use and disposal of land rights should be guided by: equal recognition and enforcement of land rights arising under all tenure systems; non-discrimination in ownership of, and access to land under all tenure systems; protection and promotion of the multiple values of land; and development of fiscal incentives to encourage the efficient utilization of land. [107] These values and principles have also been reflected in the Constitutional provisions dealing with land and have also been recognised albeit in broader terms in the various land laws enacted in line with the Constitution.

5.0 Gender Discrimination and Environmental Justice

Kenya's quest for environmental justice for all persons cannot be fully realised without tackling the problem of gender discrimination in relation to access to natural resources in Kenya. Gender discrimination in law and policy particularly in access to natural resources and property ownership is an instance of environmental injustice.[108] In the past, women have been

[105] *Sessional Paper No. 3 of 2009 on National Land Policy*, August, 2009.
[106] *Ibid*, Para. 2.3.
[107] *Ibid*, para. 3.3.2.
[108] It is noteworthy that this is not a Kenyan problem only but has also persisted in other jurisdictions around the world. See generally, UN Human Rights Committee (HRC), *Consideration of reports submitted by States parties under Art. 40 of the*

discriminated against especially when it comes to access to land and associated resources. Indeed, it has been observed that much of Kenya's history was in fact marked by growing inequality and division, where women and sexual and gender minorities were oppressed by traditional social and religious attitudes to gender which translated into discriminatory laws and discrimination by both the state and private actors, denied them equal participation in civil, political, economic, social and cultural life.[109] It is documented that only 3% of women have title deeds in Kenya.[110] This has led to instances where women have not only been discriminated against in practice but also in law.

It is against this background that the current Constitution of Kenya has incorporated elaborate provisions to correct the situation. It provides that every person is equal before the law and has the right to equal protection and equal benefit of the law.[111] Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.[112]

The constitution also prohibits the State or any person from discriminating directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.[113] These provisions are important in ensuring that all persons including women have access to, control and use of natural resources. If women are denied opportunities to access, use and manage natural resources they can also exploit the provisions allowing any person whose right to a clean and healthy environment is being or is likely to be, denied, violated, infringed or

---

Covenant: International Covenant on Civil and Political Rights: 4th periodic report: United States of America, 22 May 2012, CCPR/C/USA/4 [accessed 27 December 2014].

[109] The Equal Rights Trust (ERT), "In the Spirit of Harambee: Addressing Discrimination and Inequality in Kenya," *ERT Country Report Series*: 1, London, February 2012. p. 1. Available at *http://www.equalrightstrust.org/ertdocumentbank/In_the_Spirit_of_Harambee.pdf* [Accessed on 20/12/2014].

[110] UNDP-Kenya, *Millennium Development Goals in Kenya-Ten Years of Implementation and Beyond: The Last Stretch Towards 2015*, UNDP-Kenya, Nairobi, 2010, p.33.

[111] Art. 27(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

[112] Art. 27(3).

[113] Art. 27(4) (5).

threatened, to apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.[114]

Among the principles of land policy as envisaged under Article 60(1) are *inter alia*: equitable access to land; security of land rights; and elimination of gender discrimination in law, customs and practices related to land and property in land. These principles envisage the removal of gender discrimination in access, use, management and ownership of property as this is one of the best ways of achieving environmental justice for all including women.

Women bear a disproportionate burden in environmental matters and are affected more by climate change, pollution and depletion of natural resources. Since they are particularly vulnerable to the earth's sustainability, their involvement in environmental problems is crucial.[115] The Constitution of Kenya has provisions that not only encourage but also make it an obligation on the State to ensure that there is meaningful participation by women especially in matters of governance since they form part of the previously marginalised groups in society. It obligates the State to put in place affirmative action programmes designed to ensure that minorities and marginalised groups, [116] *inter alia*—participate and are represented in governance and other spheres of life; are provided special opportunities in educational and economic fields; develop their cultural values, languages and practices; and have reasonable access to water, health services and infrastructure.[117] These provisions can facilitate the creation of a society where women not only participate in decision making in matters touching

[114] Art. 71, Constitution of Kenya.

[115] United Nations Development Programme, 'Women's Empowerment to Environmental Justice'. Available at *http://www.ks.undp.org/content/kosovo/en/home/presscenter/Art.s/2013/05/30/women-s-empowerment-to-environmental-justice-dg-environment-women-empowerment-/* [Accessed on 19/12/2014].

[116] See Art. 260 on interpretation which provides that "affirmative action" includes any measure designed to overcome or ameliorate an inequity or the systemic denial or infringement of a right or fundamental freedom; and "marginalised group" means a group of people who, because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Art. 27(4). Arguably, this definition would include women, based on discrimination on ground of sex.

[117] Art. 56, Constitution of Kenya.

on the environment but are also given an opportunity to own and enjoy the natural resources related to the environment.

6.0 Environmental Justice and Livelihood

Access to justice regarding natural resources is a pre-requisite for improving people's livelihoods. In addition, environmental justice is inextricably linked to people's livelihood thus necessitating greater protection in law and policy. To this extent, environmental justice also dictates that victims of environmental injustice have a right to receive full compensation and reparations for damage as well as quality health care.[118]

The close relationship between environmental justice and livelihood sustenance was demonstrated in the case of *Kemai & Others vs Attorney General & 3 Others,*[119] where members of the Ogiek ethnic community, sought a declaration that their eviction from Tinet Forest by the government contravened their right to life, the protection of the law and the right not to be discriminated against. This was based on the claim that they had been living in Tinet Forest since time immemorial, where they derived their livelihood by gathering food, hunting and farming. Their argument was that they would be left landless if evicted from the forest. They also claimed that their culture was concerned with the preservation of nature so as to sustain their livelihood and that they had never been a threat to the natural environment. The Court, in declining to issue favourable orders, held that the real threat to the right to life and to livelihood is not the government eviction orders in themselves but the negative environmental effect of ecological mismanagement, neglect and the raping of the natural resources. Hence, the importance of the issue of preserving the rain water catchment area. It is noteworthy that the Ogiek community case also moved on to the ACHPR for determination and has

[118]Agyeman, J., and Evans, T., 'Toward Just Sustainability in Urban Communities: Building Equity Rights With Sustainable Solutions' *Annals of the American Academy of Political and Social Science,* Vol. 590, Rethinking Sustainable Development (Nov., 2003), pp. 35-53 at p. 50.

[119] *Kemai & Others vs Attorney General & 3 Others* (2006) 1 KLR (E&L) 326, Civil Case 238 of 1999; Ogiek People v. District Commissioner Case No. 238/1999 (2000.03.23) (Indigenous Rights to Tinet Forest)

since been finalized, with the judgment delivered in favour of the Ogiek community.[120]

While managing resources sustainably, states must have an environmental policy that takes account of those who depend on the resources for their livelihoods. Otherwise, it could have an adverse impact both on poverty and on chances for long-term success in resource and environmental conservation.[121] Legal and policy constraints that deny the poor access to water for livelihood such as growing food crops for their families including small-scale agriculture to grow food crops for their families should be removed.

The Kenyan economy is largely based on agriculture which relies mostly on the exploitation of natural resources.[122] Essentially, environmental justice gives people greater opportunities for protecting their fundamental human rights. Some of the basic rights guaranteed in the Constitution of Kenya 2010 include the economic and social rights of every person. These rights include the right—to the highest attainable standard of health, which includes the right to health care services, including reproductive healthcare; to accessible and adequate housing, and to reasonable standards of sanitation; to be free from hunger, and to have adequate food of acceptable quality; to clean and safe water in adequate quantities; to social security; and

[120] African Commission on Human and People's Rights v Republic of Kenya, Appl. No. 006/2012 (Delivered on Friday 26 May 2017).

[121] United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992, Agenda 21; See also chapter 3, para. 2.

[122] Office of the Prime Minister Ministry of state for Planning, National Development and Vision 2030, *Sessional paper No. 10 of 2012 On Kenya Vision 2030*, Government Printer, Nairobi. P. 44; Government of Kenya, Integrated Water Resources Management and Water Efficiency Plan for Kenya, August, 2009. Government Printer, Nairobi; See also the Fisheries Management and Development Act, (No. 35 of 2016) which was enacted to provide for the conservation, management and development of fisheries and other aquatic resources to enhance the livelihood of communities dependent on fishing and to establish the Kenya Fisheries Services; and for connected purposes. The objective of this Act is to protect, manage, use and develop the aquatic resources in a manner which is consistent with ecologically sustainable development, to uplift the living standards of the fishing communities and to introduce fishing to traditionally non-fishing communities and to enhance food security (Sec. 5(1).

to education.[123] These rights touch on the livelihoods of persons and they cannot therefore be ignored.

7.0 Environmental Justice and Conflict Management

It is worth mentioning that natural resources are perceived as an integral part of society the world all over, as sources of income, industry, and identity. Owing to this central role of natural resources to the general wellbeing of communities, conflicts related to the exploitation of natural resources are inevitable. Natural resource based conflicts have been defined as disagreements or disputes that arise with regard to the use, access and management of natural resources. [124] They have also been defined as situations where the allocation, management, or use of natural resources results in: violence; human rights abuses; or denial of access to natural resources to an extent that significantly diminishes human welfare.[125]

Environmental justice is related to conflict management. This is because in the environmental context procedural rights are the vehicle through which substantive rights are articulated by the courts and the other conflict

[123] Art. 43; ; See also the National Food and Nutrition Security Policy, 2011 whose objective is to increase the quantity and quality of food available and accessible, in order to ensure that all Kenyans have an adequate, diverse and healthy diet. This will be achieved by working towards sustainable production increases for food that is diversified, affordable and helps meet basic nutrition requirements. This policy places an obligation on Government to promote sustainable food production systems with particular attention to increasing soil fertility, agro-biodiversity, organic methods and proper range and livestock management practices; Under the Agriculture and Food Authority (AFA) 2016-2021 Strategic Plan, one of the main goals under the Strategic Plan is to promote increased agricultural production for food and nutrition security; There is also a pending Food Security Bill, 2014 which seeks to give effect to Article 43(1)(c) of the Constitution on the freedom from hunger and the right to adequate food of acceptable quality; Article 53(1)(c) of the Constitution on the right of every child to basic nutrition and Article 21 of the Constitution on the implementation of rights and fundamental freedoms under the Constitution; and for connected purposes.

[124] Food and Agricultural Organisation, 'Conflict and Natural Resource Management', page 1. Available at *http://www.fao.org/forestry/21572-0d9d4b43a56ac49880557f4ebaa3534e3.pdf* [Accessed on 09/12/2014].

[125] United States Agency for International Development (USAID), 'Conflict Over Natural Resources At The Community Level in Nepal Including Its Relation to Armed Conflict', May 2006, page 1. Available at pdf.usaid.gov/pdf_docs/PNADF990.pdf [Accessed on 09/12/2014].

management processes. The procedures and processes needed to tackle negative environmental impacts should therefore be accessible on an equal basis to different social groups since many environmental injustices may be caused or exacerbated by procedural injustices in the processes of policy design, land-use planning, science and law. Therefore, the necessary policy, legal and institutional framework in place is crucial in ensuring environmental justice at the global, regional and national levels.

Access to courts is an important pillar in promoting environmental justice in Kenya. Courts have however been faced by a number of challenges that hinder people particularly local communities from vindicating their environmental rights. Although the Constitution of Kenya guarantees the right of every person to institute proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened with no need to prove locus standi to institute the suit, there still lies other challenges hindering access to courts such as the geographical location, complexity of rules and procedure and the use of legalese.[126]

Environmental justice can be enhanced if the conflict management mechanisms allow parties to enjoy autonomy over the process and outcome; they can be expeditious, cost-effective, flexible and employ non-complex procedures. Compared to courts, ADR processes are affordable, flexible, less complex, foster relationships and give communities greater opportunities to participate in the management of natural resources.[127]ADR and TDRM processes provide additional avenues for people in accessing environmental justice. Alternative Dispute Resolution mechanisms such as negotiation, conciliation and mediation have the potential to enhance environmental justice for the Kenyan people since they allow parties to enjoy autonomy over the process and outcome; they are expeditious, cost-effective, flexible and employ non-complex procedures. To enhance environmental justice there is need to move beyond the law by adopting

[126] *Strengthening Judicial Reform in Kenya: Public Perceptions and Proposals on the Judiciary in the new Constitution*, ICJ Kenya, Vol. III, May, 2002; See also Kariuki Muigua, *Avoiding Litigation through the Employment of Alternative Dispute Resolution*, pp. 6-7, a Paper presented by the author at the In-House Legal Counsel, Marcus Evans Conference at the Tribe Village Market Hotel, Kenya on 8th& 9th March, 2012. Available at *http://www.chuitech.com/kmco/attachments/Art./101/Avoiding.pdf*

[127] See generally Muigua K. "ADR: The Road to Justice in Kenya." Chartered Institute of Arbitrators (Kenya Branch). 2014; Volume 2 Number 1 (2014):28-94.

approaches that give communities greater avenues for protecting their rights and benefiting from the use of natural resources.

8.0 Enhancing Access to Environmental Justice in Kenya

Any steps towards realising environmental justice for the Kenyan people should arguably ensure that the local people's perception of what entails environmental justice is effectively incorporated in any government measures aimed at achieving the same. With this incorporation, it would be possible for the communities to support the government efforts in relation to achieving environmental justice for the Kenyan people. This can be achieved through ensuring that the elements discussed below are effectively incorporated in the laws on environmental governance.

8.1 Environmental Justice and Access to Information

As already pointed out, in order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, there is need to guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters.[128] The Constitution guarantees the right of access to information held by the State, any other person and required for the exercise or protection of any right or fundamental freedom.[129] It also obligates the State to publish and publicise any important information affecting the nation.[130]

Guaranteeing access to the relevant information is imperative in facilitating access to environmental justice and enabling the communities to give prior, informed consent where required in relation to exploitation of natural resources. With regard to informed consent, 'informed' has been defined to mean that all information relating to the activity is provided to indigenous

[128] Article 1 of the *1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*, UN Doc. ECE/CEP/43. Adopted at the 4th UNECE Ministerial Conference, Aarhus, 25 June, 1998. UN Doc. ECE/CEP/43.

[129] Art. 35(1); See also *Access to Information Act, No. 31 of 2016* which deals with disclosure of information including information on dangers of public health, safety and the environment. The Act was enacted to give effect to Article 35 of the Constitution; to confer on the Commission on Administrative Justice the oversight and enforcement functions and powers and for connected purposes.

[130] Art. 35(2).

peoples and that the information is objective, accurate and presented in a manner or form that is understandable to indigenous peoples.[131] Relevant information includes: the nature, size, pace, duration, reversibility and scope of any proposed project; the reason(s) or purpose of the project; the location of areas that will be affected; a preliminary assessment of the possible economic, social, cultural and environmental impacts, including potential risks and benefits; personnel likely to be involved in the implementation of the project; and procedures that the project may entail.[132] This informed consent cannot therefore be given without first ensuring that the concerned communities have access to relevant information. In *Friends of Lake Turkana Trust v Attorney General & 2 others*[133] the court was of the view that access to environmental information was a prerequisite to effective public participation in decision making and monitoring governmental and public sector activities on the environment.

The Court, in *Friends of Lake Turkana Trust* case, also observed that article 69(1) (d) of the Constitution of Kenya 2010 placed an obligation on the state to encourage public participation in the management, protection and conservation of the environment. Public participation would only be possible where the public had access to information and was facilitated in terms of their reception of different views. Such community based forums and Barazas can effectively facilitate this. For example, Rule 5 of the Second Schedule to the *Forest Conservation and Management Act, 2016*[134] states that where rules made under the Act so require, the responsible authority shall cause a public meeting to be held in relation to a proposal before the responsible authority makes its decision on the proposal. Such public meetings should, as a matter of practice, be conducted in a manner that would ensure full and meaningful participation of all the concerned communities. Well conducted, these are viable forums through which access to environmental information can be realized and consequently enhance access to environmental justice.

---

[131] FAO, 'Respecting free, prior and informed consent: 'Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition. *Governance of Tenure Technical Guide* No. 3, Rome 2014. p.5.

[132] Ibid.

[133] ELC Suit No 825 of 2012.

[134] *Forest Conservation and Management Act,* No. 34 of 2016, Laws of Kenya.

8.2 Environmental Justice and Public Participation

Meaningful involvement of people in environmental matters requires effective access to decision makers for all, and the ability in all communities to make informed decisions and take positive actions to produce environmental justice for themselves. [135] The *Vienna Declaration and Programme of Action* [136] states that all peoples have the right of self-determination.[137] By virtue of that right, they freely determine their political status, and freely pursue their economic, social and cultural development. This calls for free prior and informed consent from the affected communities in relation to exploitation of natural resources in their areas.

Free, prior and informed consent is a collective right of indigenous peoples to make decisions through their own freely chosen representatives and customary or other institutions and to give or withhold their consent prior to the approval by government, industry or other outside party of any project that may affect the lands, territories and resources that they customarily own, occupy or otherwise use.[138] It is thus not a stand-alone right but an expression of a wider set of human rights protections that secure indigenous peoples' rights to control their lives, livelihoods, lands and other rights and freedoms and which needs to be respected alongside other rights, including rights relating to self-governance, participation, representation, culture, identity, property and, crucially, lands and territories.[139] The Guidelines call for consultation and participation which entails engaging with and seeking the support of those who, having legitimate tenure rights, could be affected by decisions, prior to decisions being taken, and responding to their contributions; taking into consideration

---

[135] US Office of Legacy Management, 'Environmental Justice' *What Is Environmental Justice?* available at *http://energy.gov/lm/services/environmental-justice/what-environmental-justice*[Accessed on 08/12/2014].

[136] UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23.

[137] Proclamation 1.2.

[138] FAO, 'Respecting free, prior and informed consent: 'Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition, op. cit. p.4.

[139] *Ibid;* See generally, *In The Matter of the National Land Commission [2015] eKLR*, Advisory Opinion Reference No. 2 of 2014, December 2, 2015, paras 45-49; See also Muigua, K., et al, *Natural Resources and Environmental Justice in Kenya*, (Glenwood Publishers Limited, August, 2015), pp. 23-29.

existing power imbalances between different parties and ensuring active, free, effective, meaningful and informed participation of individuals and groups in associated decision-making processes.[140]

The Constitution of Kenya provides that the objects of devolved government are *inter alia*-to promote democratic and accountable exercise of power; to foster national unity by recognising diversity; to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them; to recognise the right of communities to manage their own affairs and to further their development; to protect and promote the interests and rights of minorities and marginalised communities; to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya; to ensure equitable sharing of national and local resources throughout Kenya; and to facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya.[141]

The Constitution provides for the participation of the persons with disabilities, [142] youth [143] minorities and marginalized groups [144], and older members of society [145], in governance and all other spheres of life. The foregoing provisions are important especially in relation to the provisions of the *County Governments Act [146]* which are to the effect that citizen participation in county governments shall be based upon the principles of *inter alia* —Timely access to information, data, documents, and other information relevant or related to policy formulation and implementation; Reasonable access to the process of formulating and implementing policies, laws, and regulations; protection and promotion of the interest and rights of minorities, marginalized groups and communities; legal standing to interested or affected persons, organizations, and where pertinent,

[140] FAO, 'Respecting free, prior and informed consent: 'Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition, op. cit. p.4; See also Community Land Act, No. 27 of 2016 which requires active involvement of affected communities in negotiations involving exploitation of resources lying within such lands.
[141] Art. 174, Constitution of Kenya 2010.
[142] Art. 54.
[143] Art. 55
[144] Art. 56
[145] Art. 57.
[146] No. 17 of 2012, Laws of Kenya.

communities, to appeal from or, review decisions, or redress grievances, with particular emphasis on persons and traditionally marginalized communities, including women, the youth, and disadvantaged communities; reasonable balance in the roles and obligations of county governments and non-state actors in decision-making processes; promotion of public-private partnerships; and recognition and promotion of the reciprocal roles of non-state actors' participation and governmental facilitation and oversight.[147]

These provisions have an implication on natural resources management. It means that the devolved governments must not purport to make unilateral decisions especially with regard to the management of natural resources. They must recognise the centrality of people in whole debate of natural resources management, since these resources have an impact on the economic, social, cultural and even spiritual lives of the diverse communities in Kenya. As such, they must ensure their active participation in coming up with legislative and policy measures to govern their management and utilisation for the benefit of all. They must also be alive to the fact that any negative impact on the environment directly affects these communities.

The Constitution of Kenya requires Parliament to conduct its business in an open manner, and its sittings and those of its committees to be open to the public; and to facilitate public participation and involvement in the legislative and other business of Parliament and its committees.[148] The proposed law, *the Natural Resources (Benefit Sharing) Bill*, 2014, also seeks to have established by each affected local community a Local Benefit Sharing Forum comprising of five persons elected by the residents of the local community.[149] Every affected local community is also to enter into a local community benefit sharing agreement with the respective county benefit sharing committee.[150] Such local community benefit sharing agreement is to include non-monetary benefits that may accrue to the local community and the contribution of the affected organization in realizing the same.[151]

It is therefore imperative that such communities be involved in the whole process to enable them air their views on the same and where such negative effects are inevitable due to the nature of the exploitation of the

[147] *Ibid*, S. 87.
[148] Art. 118(1) (a).
[149] S. 31(1).
[150] S. 32(1).
[151] S. 32(2).

natural resources, their appreciation of such impact is the ultimate key to winning social acceptance of these projects.[152] Indeed, it has been observed that participation will bring the most benefit when the process is seen as fair, and processes are seen as more fair if those who are affected have an opportunity to participate in a meaningful way and their opinions are taken seriously.[153]Indicators of procedural justice have been identified as: presence of local environmental groups, public participation or consultation on local developments and initiatives, Access to information, and responsiveness by public bodies.[154]

Indeed, it has been argued that those affected by environmental problems must be included in the process of remedying those problems; that all citizens have a duty to engage in activism on behalf of Environmental Justice; and that in a democracy it is the people, not the government, that are ultimately responsible for fair use of the environment. [155] Active and meaningful public participation, therefore, through such means as suggested in the indicators of procedural justice are important in enhancing access to environmental justice for all. For instance, it is imperative for the general public to not only abide by but also promote the realisation of the recent ban of use of polythene papers in Kenya, which took effect on 28th August 2017, since the government efforts to effect this ban is meant to promote the right to clean and healthy environment for all.

---

[152] S. 115 of the *County Governments Act* 2012 provides that Public participation in the county planning processes shall be mandatory and be facilitated through—mechanisms provided for in Part VIII of this Act; and provision to the public of clear and unambiguous information on any matter under consideration in the planning process, including—clear strategic environmental assessments; clear environmental impact assessment reports; expected development outcomes; and development options and their cost implications.

[153] Amerasinghe, M., et. al., 2008. 'Enabling Environmental Justice: Assessment of Participatory Tools. Cambridge, MA: Massachusetts Institute of Technology. p.3. Available at *http://web.mit.edu/jcarmin/www/carmin/EnablingEJ.pdf* [Accessed on 08/12/2014].

[154] Todd, H., & Zografos, C., Justice for the Environment: Developing a Set of Indicators of Environmental Justice for Scotland, op. cit. p. 495.

[155] Frechette, K.S., 'Environmental Justice: Creating Equality, Reclaiming Democracy', OUP USA (2005). Available at *http://philpapers.org/rec/SHREJC* [Accessed on 10/12/2014].

8.3 Benefit Sharing Arrangements

Benefit-sharing is a way of integrating the economic, social and environmental considerations in the management of natural resources. [156]In order to protect community and individual interests over land based resources and facilitate benefit sharing, the *National Land Policy*, 2009 recommended that the Government should: establish legal frameworks to recognise community and private rights over renewable and non-renewable land-based natural resources and incorporate procedures for access to and sustainable use of these resources by communities and private entities; devise and implement participatory mechanisms for compensation for- loss of land and damage occasioned by wild animals; put in place legislative and administrative mechanisms for determining and sharing of benefits emanating from land based natural resources by communities and individuals where applicable; make benefit-sharing mandatory where land based resources of communities and individuals are managed by national authorities for posterity; and ensure the management and utilization of land-based natural resources involves all stakeholders.[157]

Perhaps as a response to the proposals by the *National Land Policy*, 2009, there is a proposed law, *Natural Resources (Benefit Sharing) Bill*, 2014, which seeks to establish a system of benefit sharing in resource exploitation between resource exploiters, the national government, county governments and local communities; to establish the Natural Resources Benefits Sharing Authority; and for connected purposes. The Bill, if passed into a law, is to apply with respect to the exploitation of petroleum; natural gas; minerals; forest resources, water resources; wildlife resources; and fishery resources. [158] Notably, this Bill provides for guiding principles of benefit sharing which include: transparency and inclusivity; revenue maximization and adequacy; efficiency and equity; accountability and participation of the people; and rule of law and respect for human rights of the people.[159]

The proposed law also proposes the establishment of the Benefit Sharing Authority,[160] with the mandate to, *inter alia*: coordinate the preparation of

---

[156] Government of Kenya, *Sessional Paper No. 3 of 2009 on National Land Policy*, Government Printer, Nairobi, p. 23.
[157] *Ibid*, p. 23.
[158] S. 3.
[159] S. 4.
[160] S. 5.

benefit sharing agreements between local communities and affected organizations; review, and where appropriate, determine the royalties payable by an affected organization engaged in natural resource exploitation; identify counties that require to enter into a benefit sharing agreement for the commercial exploitation of natural resources within the counties; oversee the administration of funds set aside for community projects identified or determined under any benefit sharing agreement; monitor the implementation of any benefit sharing agreement entered into between a county and an affected organization; conduct research regarding the exploitation and development of natural resource and benefit sharing in Kenya; make recommendations to the national government and county governments on the better exploitation of natural resources in Kenya; determine appeals arising out of conflicts regarding the preparation and implementation of county benefit sharing agreements; and advise the national government on policy and the enactment of legislation relating to benefit sharing in resource exploitation.[161]

The Bill also seeks to establish in each county that has a natural resource, a County Benefit Sharing Committee.[162] Benefit sharing could effectively be used to promote environmental justice among communities and enhance the relationship between the government and communities as well as among communities which in turn enhances peace in the country.

The *Natural Resources (Classes of Transactions Subject to Ratification) Act, 2016*[163] is meant to give effect to Article 71 of the Constitution of Kenya,

[161] S. 6(1).

[162] S. 28. The functions of the said Committees will include inter alia: negotiate with an affected organization on behalf of the County Government prior to entering into a county benefit sharing agreement; monitor the implementation of projects required to be undertaken in the county pursuant to a benefit sharing agreement; determine the amount of money to be allocated to each local community from sums devolved under this Act; convene public forums to facilitate public participation with regard to proposed county benefit sharing agreements prior to execution by the county government; convene public forums for the purpose of facilitating public participation with regard to community projects proposed to be undertaken using monies that accrue to a county government pursuant to this Act; and make recommendations to the county government on projects to be funded using monies which accrue to the county government pursuant to this Act.(s. 29).

[163] Natural Resources (Classes of Transactions Subject to Ratification) Act, No. 41 of 2016, Laws of Kenya.

2010 and for connected purposes.[164] It requires certain transactions to be ratified by Parliament if they involve, inter alia, the grant of a right or concession by or on behalf of any person, including the national government, to another person for the exploitation of any natural resource of Kenya.[165] Some of the relevant considerations in deciding whether or not to ratify an agreement are as follows— the applicable Government policy; recommendations of the relevant regulatory agency; comments received from the county government within whose area of jurisdiction the natural resource that is the subject of the transaction is located; adequacy of stakeholder consultation; the extent to which the agreement has struck a fair balance between the interests of the beneficiary and the benefits to the country arising from the agreement; the benefits which the local community is likely to enjoy from the transaction; and whether, in granting the concession or right the applicable law has been complied with.[166]

The need for equitable benefit sharing has also been captured in the *Community Land Act 2016*[167] which provides that subject to any other law, natural resources found in community land shall be used and managed- sustainably and productively; for the benefit of the whole community including future generations; with transparency and accountability; and on the basis of equitable sharing of accruing benefits.[168] Further, subject to any other relevant written law, an agreement relating to investment in community land should be made after a free, open consultative process and should contain provisions on the following aspects- an environmental, social, cultural and economic impact assessment; stakeholder consultations and involvement of the community; continuous monitoring and evaluation of the impact of the investment to the community; payment of compensation and royalties; requirement to re-habilitate the land upon completion or abandonment of the project; measures to be put in place to mitigate any negative effects of the investment; capacity building of the community and transfer technology to the community; and any other matters necessary for determining how local communities will benefit from investments in their

[164] See also S. 124A, *Environment (Management and Coordination) Act*, No.8 of 1999, Laws of Kenya.
[165] Article 71(1) (a), Constitution of Kenya.
[166] Sec. 9, Natural Resources (Classes of Transactions Subject to Ratification) Act.
[167] No. 27 of 2016, Laws of Kenya.
[168] Sec. 35, Community Land Act 2016.

land.[169] Such an agreement relating to investment in community land should only be made between the investor and the community, and the same must be approved by two thirds of adult members at a community assembly meeting called to consider the offer and at which a quorum of two thirds of the adult members of that community is represented.[170]

8.4 Demonstrations and Lobbying

The Constitution guarantees every person's right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities.[171]These are important tools that local communities can use to agitate for environmental rights. For example, communities can, by staging demonstrations and protests, stop corporations that are causing environmental pollution.

Environmental lobbying is either direct or indirect. Direct lobbying takes place when lobbyists meet with politicians and provide them with information that is relevant to the legislation on the floor of the House. The main goal is influencing the politician to vote in a certain way on legislation that is consistent with the interests of the group. Indirect lobbying arises where grass root lobbyists recruit community members to promote the interests of their group by holding demonstrations or writing or calling politicians with the main objective of rallying the community around a certain issue and to empower them to do something about it.[172]A good example of this is the Maasai land claims initiative whose overall goal is to redress historical injustices and wrongs arising from the appropriation of Maasai ancestral land by the British colonial government following the Maasai Agreements of 1904 and 1911 and the failure by successive Governments of independent Kenya to address the said injustices and wrongs.[173]

In many instances, lobbyists' Non-Governmental Organisations (NGOs) usually facilitate the lobbying and activism and communities can join

[169] Sec. 36(1), Community Land Act 2016.
[170] Sec. 36(2) (3), Community Land Act 2016.
[171] Art. 37.
[172] Rolli, E., 'Environmental Lobbyist',
available at *http://www.sage.wisc.edu/careers/profiles/pdf/Environmental%20Lobbyist.pdf* [Accessed on 22/12/2014]. p. 1.
[173] Koissaba, B.O., 'Maa Civil Society Forum: Issues Arising From Anglo - Maasai Treaties Of 1904 And 1911'. p.4.

in. [174] With strong governmental and community support, the NGOs involved can play a vital role in offering environmental education especially where government bodies cannot reach thus filling in the education lacuna that may exist. Effectively carried out demonstrations and lobbying can be a powerful tool in addressing such concerns as climate change, benefits sharing, participation in decision making, addressing the issue of environmental hazards all of which have a direct impact on communities and their lives.

8.5 Judicial Activism

There is no clear definition of some of the rights guaranteed in the Constitution of Kenya regarding the environment and thus it is up to the courts to give guidance in certain matters. There is therefore, a need for judicial activism so that jurisprudence in this area can be improved. For instance, there is no explanation of what, for example, amounts to a 'clean and healthy environment.' As noted by one author,[175] it took the court's active role to delineate this right in *Uganda Electricity Transmission Co Ltd v De Samaline Incorporation Ltd,* [176]where the court expanded the meaning of a clean and healthy environment as follows;

> *'I must begin by stating that the right to a clean and healthy environment must not only be regarded as a purely medical matter. It should be regarded as a holistic social-cultural phenomenon because it is concerned with physical and mental well-being of human beings… a clean and healthy environment is measured in both ethical and medical context. It is about linkages in human well-being. These may include social injustice, poverty, diminishing self-esteem, and poor access to health services. That right is not restricted to a clinical model…'* (Emphasis added)

---

[174] See generally, Ndahinda, F.M., 'Indigenousness in Africa: A Contested Legal Framework for Empowerment of 'Marginalized' Communities'. Springer Science & Business Media, Apr 27, 2011. Available at *https://books.google.co.ke/books?id=ayiB1Ngvd4C&dq=two+Maasai+agreements+of+1904+and+1911&source=gbs_navlinks_s* [Accessed on 26/12/2014].

[175] Twinomugisha, B.K., 'Some Reflections on Judicial Protection of the Right to a Clean and Healthy Environment in Uganda', *3/3 Law, Environment and Development Journal (2007),* p. 244 at pg. 249.

[176] Misc. Cause No. 181 of 2004 (High Court of Uganda).

Notably, the *Environment and Land Court Act* gives the court *suo moto* jurisdiction.[177] It is arguable that the section allows judges to engage in judicial activism to safeguard environmental rights by ensuring sustainable development using the devices envisaged in Article 159 of the Constitution to ease access to justice. Courts may therefore act without necessarily waiting for filing of any cases on public interest litigation so as to promote environmental justice.

8.6 Role of Academia

The institutions of learning around the country can play an important role in promoting environmental justice. They can be useful channels through which relevant information on environmental matters and natural resources can reach the communities in means that such communities can appreciate. Such information would not only be useful in assisting the communities know how best the resources at their disposal can be utilised for betterment of their livelihoods but would also be useful in enabling the communities to understand the existing legal and institutional frameworks on natural resources management and thus be able to meaningfully engage

[177] S.20; See also *Waweru v Republic*, Nairobi High Court, Miscellaneous Civil Application No. 118 of 2004 KLR (E&L) 677 which called for involvement of everyone, including courts, in protection and restoration of the environment and its resources. This has been the trend around the world. For instance, in the Philippine case of *Minors Oposa v. Secretary of the Department of Environmental and Natural Resources*, 33 ILM 173 (1994), the Supreme Court of the Philippines found the following: The right to a clean environment, to exist from the land, and to provide for future generations are fundamental; There is an intergenerational responsibility to maintain a clean environment, meaning each generation has a responsibility to the next to preserve that environment, and children may sue to enforce that right on behalf of both their generation and future generations; The Philippine Constitution requires that the government "protect and promote the health of the people and instill health consciousness among them." (see Section 15, Article II).
A group of children, including those of renowned environmental activist Antonio Oposa, brought this lawsuit in conjunction with the Philippine Ecological Network, Inc. (a non-profit organisation) to stop the destruction of the fast disappearing rain forests in their country. The plaintiff children based their claims in the 1987 Constitution of the Philippines, which recognises the right of people to a "balanced and healthful ecology" and the right to "self-preservation and self-perpetuation" (see Section 16, Article II). (Child Rights International Network, "Minors Oposa v. Secretary of the Department of Environmental and Natural Resources," available at https://www.crin.org/en/library/legal-database/minors-oposa-v-secretary-department-environmental-and-natural-resources/ [Accessed on 25/08/2017]

the authorities during public participation opportunities. Coming up with study programmes that focus on the specific resources in the country and collaborating with funding organisations would be useful in ensuring that a reasonable number of members of the public in general and specific communities in particular are well versed with the exploitation and management of the various natural resources, thus enabling them help the larger community in appreciating the implications of natural resources management.

8.7 Advocacy

The role of civil society, Non-Governmental Organisations (NGOs) and other faith-based organisations has been prominent in agitating for effective and efficient natural resources management. It has been noted that Environmental justice activists call for policy-making procedures that encourage active community participation, institutionalise public participation, recognise community knowledge, and utilise cross-cultural formats and exchanges to enable the participation of as much diversity as exists in a community.[178]

8.8 Public Interest Litigation

Public interest litigation is one viable way of enhancing environmental justice in Kenya. When people are given opportunities to move to judicial and other non-judicial forums, natural resource managers are most likely to manage resources more productively, efficiently, sustainably and effectively. The Constitution provides for the enforcement of environmental rights and states that if a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.[179] Further constitutional provisions that are useful in the promotion of the right under Article 70 are to be found under Articles 22[180], 23[181] and 48[182] thereof. These are important provisions that

[178] Schlosberg, D., 'Reconceiving Environmental Justice: Global Movements and Political Theories', op. cit. at p. 522.
[179] Art. 70(1).
[180] Art. 22(1) guarantees every person's right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated

are aimed at promoting environmental justice for every person through use of public interest litigation.

For instance, in December 2010 the Africa Network for Animal Welfare (ANAW), a Kenya non-profit organization, filed a case in the East Africa Court of Justice (EACJ)challenging the Tanzanian government's decision to build a commercial highway across the Serengeti National Park. On June 20, 2014, the court ruled that the government of Tanzania could not build a paved (bitumen) road across the northern section of the Serengeti, as it had planned. It issued a permanent injunction restraining the Tanzanian government from operationalising its initial proposal or proposed action of constructing or maintaining a road of bitumen standard across the Serengeti National Park subject to its right to undertake such other programmes or initiate policies in the future which would not have a negative impact on the environment and ecosystem in the Serengeti National Park. [183] Such decisions show the crucial role that courts can play in promoting environmental justice through stopping any government development plans that might negatively affect the environment or the livelihoods of communities.

In the case of *Lereya & 800 others v AG & 2 others,*[184] the plaintiff and others being the affected residents of Marigat Division of Baringo District sued the AG, Minister for Environment and Natural Resources and the National Environment Management Authority seeking the eradication of a weed plant on their land. They averred that the Food Agricultural Organization (FAO) introduced the weed, *Propis Juliflora* in Ng'ambo location in Marigat Division to curb desertification. The weed, which is invasive in nature allegedly, went out of control and caused harm to humans, livestock and the environment. The suit was objected to on grounds, *inter alia*, that the suit which was brought more than 20 years after the introduction of the plant was time

---

or infringed, or is threatened. Such persons need not prove locus standi to institute the suit (Art. 22(2).

[181] Art. 23 confers the High Court with jurisdiction, in accordance with Art. 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

[182] Art. 48 obligates the State to ensure access to justice for all persons and, if any fee is required, it be reasonable and not impede access to justice.

[183] *African Network for Animal Welfare (ANAW) v The Attorney General of the United Republic of Tanzania*, Reference No. 9 of 2010.

[184] Nairobi HCCC No.115 of 2006 KLR(E&L) P. 761

barred and secondly that the plaintiffs had no specific interest in the subject matter and therefore lacked locus standi in the matter. The Court held that the preliminary objection on the ground of time limitation was not tenable because the weed was invasive in nature and its effects in the environment were long-term or continuing. Secondly, on the basis of section 3(3) and (4) of EMCA the preliminary objection on the ground of lack of locus standi had no merit.[185]However, this case was dismissed because the government had not been notified of the proceedings as required under the law.

The foregoing case is a good example of a scenario where the concerted efforts by the affected community to petition the court to enforce the right to clean and healthy environment were thwarted by procedural technicalities. Such technicalities should be addressed so as to ensure that the locals are able to access justice. As already indicated, procedural justice is not limited to environmental justice, but cuts across the whole spectrum of justice.[186] The basis of redress is the obligation on the State to ensure access to justice for all persons at reasonable fees so as not impede access to justice.[187] Further, the Constitution states that in exercising judicial authority, the courts and tribunals are to ensure *inter alia*, that justice is done to all irrespective of status; justice is not delayed; and that justice is administered without undue regard to procedural technicalities.[188]

In the past, public interest litigation has successfully been used to safeguard environmental rights. For instance, in *Hassan & 4 others v KWS,*[189] the applicants sought orders to restrain the respondent from removing and or dislocating a rare and endangered animal called Hirola from its natural habitat in Arawale to the Tsavo National Park on the grounds that it was a gift to the people of the area and should be left there. The respondent contended that the application was seeking to curtail the respondent from carrying out its express statutory mandate.

---

[185] Previously, such rights as to petition court were unheard of and environmental rights cases were thrown out of the courts on technical grounds. Such infamous cases include, inter alia, *Wangari Maathai –v- Kenya Times Media Trust* (1989) 1KLR (E&L) which was dismissed for lack of standing.

[186] Todd, H., & Zografos, C., Justice for the Environment: Developing a Set of Indicators of Environmental Justice for Scotland, op. cit. p. 497.

[187] Art. 48.

[188] Art. 159 (2).

[189] Nairobi HCCC No2959 of 1996 KLR (E&L) p. 214,

The court in granting the temporary injunction held, *inter alia,* that although Section 3A (d), (e) and (f) of the *Wildlife (Conservation & Management) Act* empowered the Respondent to conserve wild animals in their habitat, the respondent would be acting outside its powers if it were to move the animals away from their natural habitat without the express consent of those entitled to the fruits of the land which includes flora and fauna.

9.0 Conclusion

Environmental rights can best be realised through the advocacy of rights to access to information, to consultation in the decision-making process and to access to courts, revamped in an environmental setting. Environmental justice in Kenya is an ideal that can be achieved. Already there are laws, policies and institutions that can be used as platforms for enhancing access to justice. However, due to the many and divergent interests (including local communities, investors and national and county governments) and high stakes involved in natural resources governance, the road to environmental justice may not be easy. It will require the concerted efforts of all parties concerned to make environmental justice in Kenya a reality.

References

1. *Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*, UN Doc. ECE/CEP/43. Adopted at the 4th UNECE Ministerial Conference, Aarhus, 25 June, 1998. UN Doc. ECE/CEP/43
2. Agyeman, J., and Evans, B., _Just sustainability ': the emerging discourse of environmental justice in Britain? *The Geographical Journal*, Vol. 170, No. 2, June 2004, pp. 155–164.
3. Agyeman, J., and Evans, T., _Toward Just Sustainability in Urban Communities: Building Equity Rights With Sustainable Solutions'Annals *of the American Academy of Political and Social Science,* Vol. 590, Rethinking Sustainable Development (Nov., 2003), pp. 35-53.
4. Ako, R., _Resource Exploitation and Environmental Justice: the Nigerian Experience,' in F.N. Botchway (ed), Natural Resource Investment and Africa's Development, (Cheltenham, UK: Edward Elgar Publishing, 2011), pp. 74-76.
5. Amerasinghe, M., et. al., 2008. _Enabling Environmental Justice: Assessment of Participatory Tools. Cambridge, MA: Massachusetts Institute of Technology. Available at http://web.mit.edu/jcarmin/www/carmin/EnablingEJ.pdf [Accessed on 08/12/2014].
6. Braun, A., "Governance Challenges in Promoting Environmental Justice." *Beyond Intractability*. Eds. Guy Burgess and Heidi Burgess. Conflict Information Consortium, University of Colorado, Boulder. Posted: May 1, 2011, available at http://www.beyondintractability.org/essay/environmental-justice-challenges. [Accessed on 08/12/2014].
7. Commonwealth of Massachusetts, 2002, _Environmental Justice Policy of the Executive Office of Environmental Affairs', page 2, available at http://www.mass.gov/eea/docs/eea/ej/ej-policy-english.pdf (Accessed on 06/12/2014).
8. Cullet, P., _Definition of an Environmental Right in a Human Rights Context'. 13 *Netherlands Quarterly of Human Rights* (1995), p. 25. Available at http://www.ielrc.org/content/a9502.pdf [Accessed on 08/12/2014].
9. Eckersley, R., _The State and Access to Environmental Justice: From Liberal Democracy to Ecological Democracy'. Keynote Speaker, Access to Environmental Justice EDO WA Conference, 20 February 2004. Available at http://www.edowa.org.au/files/presentations/EDO_AEJ_RobynEckersley.pdf [Accessed on 08/12/2014].
10. Emerton, L., _Mount Kenya: The Economics of Community Conservation'. Evaluating Eden Series, Discussion Paper No.4.
11. *Environmental (Management and Coordination) Act*, No. 8 of 1999, Laws of Kenya.
12. *Environmental Management and Co-ordination (Amendment) Act*, Act No. 5 of 2015, Laws of Kenya.
13. Food and Agricultural Organisation, _Conflict and Natural Resource Management '. Available at http://www.fao.org/forestry/21572-0d9d4b43a56ac49880557f4ebaa3534e3.pdf [Accessed on 09/12/2014].
14. ……., _Respecting free, prior and informed consent: _Practical guidance for governments, companies, NGOs, indigenous peoples and local

communities in relation to land acquisition. *Governance of Tenure Technical Guide* No. 3, Rome 2014.
15. Friends of the Earth Scotland, ‗Environmental Justice ', available at http://www.foescotland.org.uk/environmentalrights [Accessed on 08/12/2014]
16. Frechette, K.S., ‗Environmental Justice: Creating Equality, Reclaiming Democracy', OUP USA (2005). Available at http://philpapers.org/rec/SHREJC [Accessed on 10/12/2014].
17. Global Alliance against Traffic in Women (GAATW), Available at http://www.gaatw.org/atj/ (accessed on 09/03/ 2014).
18. Heymans, C., et al. ‗Devolution in Kenya: opportunities and challenges for the water sector - supporting poor-inclusive WSS sector reform.' *Water and sanitation program, policy note, World Bank Group*, 2013. Available at http://documents.worldbank.org/curated/en/2013/09/19122948/devolution-kenya-opportunities-challenges-water-sector-supporting-poor-inclusive-wss-sector-reform
19. Hughes, Lotte, Moving the Maasai: A Colonial Misadventure (Palgrave Macmillan, 2006).
20. International Commission of Jurists, Kenya, ‗Strengthening Judicial Reform in Kenya: Public Perceptions and Proposals on the Judiciary in the new Constitution', *ICJ Kenya*, Vol. III, May, 2002.
21. Kantai, P, ‗In the Grip of the Vampire State: Maasai Land Struggles in Kenyan Politics, 'Journal *of Eastern African Studies*, Vol. 1, No. 1, pp.107-122, March 2007.
22. Kigenyi, et al. ‗Practice Before Policy: An Analysis of Policy and Institutional Changes Enabling Community Involvement in Forest Management in Eastern and Southern Africa. 'Issue 10 of Forest and social perspectives in conservation. IUCN, 2002.
23. Kiwanuka, S., ‗From Colonialism to Independence: A Reappraisal of Colonial Policies & African Reactions. '1870-1960. KLB. P. 19.
24. Koissaba, B.O., ‗Maa Civil Society Forum: Issues Arising from Anglo - Maasai Treaties of 1904 And 1911'. Available at http://equalinrights.pbworks.com/f/Write+up+on+Anglo+Maasai+Treaties.pdf
25. Meitamei, O.D., ‗Maasai Autonomy and Sovereignty in Kenya and Tanzania', Mining Indigenous Lands, 25.1 (Spring 2001). Available at http://www.culturalsurvival.org/ourpublications/csq/Art./maasai-autonomy-and-sovereignty-kenya-and-tanzania [Accessed on 26/12/2014].
26. Mogaka, H., ‗Economic Aspects of Community Involvement in Sustainable Forest Management in Eastern and Southern Africa, 'Issue 8 of Forest and social perspectives in conservation, IUCN, 2001. p.74.
27. M.T. Ladan, —Access to Justice as a Human Right under the Ecowas Community Law,‖available athttp://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=16&cad=rja&uact=8&ved=0CFcQFjAFOAo&url=http%3A%2F%2Fwww.abu.edu.ng%2Fpublications%2F2009-07-, (accessed on 19/04/2014).

28. Muigua, K. and Kariuki F., ‗ADR, Access to Justice and Development in Kenya'. Paper Presented at Strathmore Annual Law Conference 2014 held on 3rd & 4th July, 2014 at Strathmore University Law School, Nairobi.
29. Muigua, K., *Avoiding Litigation through the Employment of Alternative Dispute Resolution*, pp. 6-7, a Paper presented by the author at the In-House Legal Counsel, Marcus Evans Conference at the Tribe Village Market Hotel, Kenya on 8th& 9th March, 2012. Available at http://www.chuitech.com/kmco/attachments/article/101/Avoiding.pdf
30. ……., "ADR: The Road to Justice in Kenya." *Chartered Institute of Arbitrators (Kenya Branch)*. 2014; Volume 2 Number 1 (2014):28-94.
31. Ndahinda, F.M., ‗Indigenousness in Africa: A Contested Legal Framework for Empowerment of 'Marginalized' Communities'. *Springer Science & Business Media*, Apr 27, 2011.
32. Obiora, L., ‗Symbolic Episodes in the Quest for Environmental Justice'. Human Rights Quarterly, 21, 2, 1991.
33. Okoth-Ogendo, HWO, Tenants of the Crown: Evolution of Agrarian Law & Institutions in Kenya, (ACTS Press, Nairobi, 1991).
34. Olson, P.A., *The Struggle for the Land: Indigenous Insight and Industrial Empire in the Semiarid World*, U of Nebraska Press 1990. Available at https://books.google.co.ke/books?id=OqwF27HZms8C&printsec=frontcover#v=onepage&q&f=false [Accessed on 26/12/2014].
35. Paavola, J. and Adger, W.N., ―Justice and Adaptation to Climate Change‖, *Tyndall Centre Working Paper 23,* 2002.
36. Principles of Environmental Justice adopted at the People of Color Environmental Leadership Summit on October 27, 1991, in Washington, D.C.
37. Rolli, E., ‗Environmental Lobbyist', available at http://www.sage.wisc.edu/careers/profiles/pdf/Environmental%20Lobbyist.pdf [Accessed on 22/12/2014].
38. Schlosberg, D., ‗Reconceiving Environmental Justice: Global Movements and Political Theories', *Environmental Politics*, Vol.13, No.3, Autumn 2004, pp.517 – 540.
39. Todd, H., & Zografos, C., Justice for the Environment: Developing a Set of Indicators of Environmental Justice for Scotland, *Environmental Values*, Vol.14, No.4 (November 2005), pp. 483-501.
40. The Equal Rights Trust (ERT), ―In the Spirit of Harambee: Addressing Discrimination and Inequality in Kenya, ‖ ERT Country Report Series: 1, London, February 2012. p. 1. Available at http://www.equalrightstrust.org/ertdocumentbank/In_the_Spirit_of_Harambee.pdf [Accessed on 20/12/2014].
41. The National Environmental Justice Advisory Council, Indigenous Peoples Subcommittee, ‗Meaningful Involvement and Fair Treatment by Tribal Environmental Regulatory Programs', November 2004. Available at http://www.epa.gov/environmentaljustice/resources/publications/nejac/ips-final-report.pdf
42. Towett J. Kimaiyo, ‗Chapter 6: Kenya Land Policy since 1900, ' Ogiek Land Cases and Historical Injustices, 1902-2004. Vol. 1, 2004.

43. Twinomugisha, B.K., 'Some Reflections on Judicial Protection of the Right to a Clean and Healthy Environment in Uganda', *3/3 Law, Environment and Development Journal (2007),* p. 244.
44. UNDP-Kenya, Millennium Development Goals in Kenya-Ten Years of Implementation and Beyond: The Last Stretch towards 2015, UNDP-Kenya, Nairobi, 2010.
45. United Nations, the International Forum for Social Development, _Social Justice in an Open World: The Role of the United Nations'. Available at http://www.un.org/esa/socdev/documents/ifsd/SocialJustice.pdf [Accessed on 11/12/2014].
46. United Nations Development Programme, _Women 's Empowerment to Environmental Justice'. Available at http://www.ks.undp.org/content/kosovo/en/home/presscenter/Art.s/2013/05/30/women-s-empowerment-to-environmental-justice-dg-environment-women-empowerment-/ [Accessed on 19/12/2014].
47. United States Agency for International Development (USAID), _Conflict Over Natural Resources at The Community Level in Nepal Including Its Relation to Armed Conflict', May 2006. Available at *pdf.usaid.gov/pdf_docs/PNADF990.pdf* [Accessed on 09/12/2014].
48. U.S. Environmental Justice Agency, _What is Environmental Justice? 'Available at http://www.epa.gov/environmentaljustice/ [Accessed on 08/12/2014].
49. US Office of Legacy Management, _Environmental Justice 'What *Is Environmental Justice?* available at http://energy.gov/lm/services/environmental-justice/what-environmental-justice [Accessed on 08/12/2014].
50. Watkins, O. F., _The Report of the Kenya Land Commission, September, 1933', *Journal of the Royal African Society*, Vol. 33, No. 132 (Jul., 1934), pp. 207-216.

Case law

51. African Network for Animal Welfare (ANAW) v The Attorney General of the United Republic of Tanzania, Reference No. 9 of 2010.
52. *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, 276 / 2003, African Commission on Human and Peoples' Rights, 4 February 2010
53. *Dry Associates Limited V Capital Markets Authority & Another Interested Party Crown Berger (K) Ltd [2012] eKLR [Petition No. 328 of 2011]*
54. *Friends of Lake Turkana Trust v Attorney General & 2 others*, ELC Suit No 825 of 2012.
55. *Hassan & 4 others v KWS*, Nairobi HCCC No2959 of 1996 KLR (E&L) p. 214,
56. *Isaka Wainaina and Anor vs. Murito wa Indagara and others* (1922-23) 9(2) KLR, 102.
57. _Judgment of the High Court of the East Africa Protectorate in the Case Brought by the Maasai Tribe Against the Attorney-General of the Protectorate and Others'The *American Journal of International Law*, Vol. 8, No. 2 (Apr., 1914), pp. 380-389.

58. *Kemai & Others vs Attorney General & 3 Others*, (2006) 1 KLR (E&L) 326, Civil Case 238 of 1999
59. *Lereya & 800 others v AG & 2 others*, Nairobi HCCC No.115 of 2006 KLR(E&L) P. 761
60. *Municipal Council, Ratlam vs Shri Vardhichand & Ors* 1980 AIR 1622, 1981 SCR (1) 97.
61. *Ogiek People v. District Commissioner Case No. 238/1999* (2000.03.23) (Indigenous Rights to Tinet Forest)
62. *Uganda Electricity Transmission Co Ltd v De Samaline Incorporation Ltd*, Misc. Cause No. 181 of 2004 (High Court of Uganda).
63. *Wangari Maathai –v- Kenya Times Media Trust* (1989) 1KLR (E&L)
64. *Waweru v Republic*, Nairobi High Court, Miscellaneous Civil Application No. 118 of 2004 KLR (E&L) 677.

Statutes/ Official Documents

65. Constitution of Kenya, 2010. Government Printer, Nairobi.
66. County Governments Act, 2012. Government Printer, Nairobi.
67. Environment and Land Court Act, No. 19 of 2011, Laws of Kenya. Government printer, Nairobi.
68. Foreign Jurisdiction Act, 1890. (53 & 54 Vie. c, 37.)
69. *Forest Conservation and Management Act,* No. 34 of 2016, Laws of Kenya.
70. Government of Kenya, Integrated Water Resources Management and Water Efficiency Plan for Kenya, August, 2009. Government Printer, Nairobi.
71. ……., Sessional Paper No. 3 of 2009 on National Land Policy, Government Printer, Nairobi.
72. Kriegler and Waki Reports on 2007 Elections, 2009. Government Printer, Nairobi.
73. Land Titles Act, Cap 282, Laws of Kenya. (Repealed).
74. National Water Policy, 2012. Government Printer, Nairobi.
75. Office of the Prime Minister Ministry of state for Planning, National Development and Vision 2030, Sessional paper No. 10 of 2012 On Kenya Vision 2030, Government Printer, Nairobi.
76. Report of the United Nations Conference on Environment and Development (Rio de Janeiro, 3-14 June 1992), A/CONF.151/26 (Vol. I).
77. Report of the Commission of Inquiry into Land Law Systems in Kenya on Principles of a National Land Policy Framework, Constitutional Position of Land and New Institutional Framework for Land Administration (Government Printer Nairobi, 2002)
78. Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya, (Government Printer Nairobi, July 31, 1999).
79. Sessional Paper No. 3 of 2009 on National Land Policy, August, 2009.
80. United Nations Human Rights Committee, Consideration of reports submitted by States parties under Art. 40 of the Covenant Concluding observations adopted by the Human Rights Committee at its 105th session, 9-27 July 2012. CCPR/C/KEN/CO/3.

81. UN General Assembly, Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23.
82. United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992, Agenda 21. (A/CONF.151/26, vol. II).
83. UNEP, Training Manual on International Environmental Law, (UNEP, 2006).
84. Water Act, No. 8 of 2002, Laws of Kenya. Government printer, Nairobi (Repealed).
85. Water Act, No. 43 of 2016, Laws of Kenya. Government printer, Nairobi.

The Paradox of Plenty: Is Turkana County in Kenya Susceptible to Falling Prey to the Resource Curse?

By: ***Florence Karimi Shako****

Abstract

Kenya is a country rich in natural resources which make a substantial contribution to the national income and to the livelihood of its citizens. As Kenya seeks to develop its natural resources, there are greater efforts employed specifically to the growth of the oil and gas sector. Although natural resources can greatly contribute to the national income, their mismanagement can also lead to a devastated economy and can provoke and sustain internal conflicts and result in political instability. The resource curse therefore refers to the paradox of countries rich in oil, gas and minerals remaining poor. Despite their resource abundance, political and economic problems undermine the progress and development of such countries. Consequently, this inhibits good governance and democracy. This article analyzes the meaning of the resource curse concept as posited by various scholars. It also analyzes different theories posited for its existence. The author examines the economic and political explanations that have been put forward for the subsistence of the resource curse and the main criticisms lodged against the same. The author further explores the issues that have arisen in Turkana county in Kenya following oil discovery in this marginalized area that demonstrate the country's vulnerability to falling prey to the resource curse. While the locals have greeted the news of an oil discovery with enthusiasm, the author argues that this oil find may lead to greater economic and political problems instead of the anticipated development for the region. The article argues that while the resource curse exists, it is not inevitable. The author concludes that oil and gas resources can contribute positively to Kenya both economically and politically through good governance, eradication of corruption and transparency in resource management. The author posits that these are the necessary tools to translate the natural resource riches in the country, particularly the recent oil discoveries in Turkana County, into sustainable and inclusive growth.

Key words: Natural resources, Resource curse, Turkana, Oil and gas

1.0 Introduction

Kenya is endowed with a wealth of natural resources including limestone, soda ash, salt, gemstones, fluorspar, zinc, diatomite, hydropower, wildlife, *inter alia*. The country relies heavily on its natural resources not only to support the livelihoods of its citizens but also to contribute to the national income. The State is obligated to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits.[1] The State is also mandated to utilise the environment and natural resources for the benefit of the people of Kenya.[2]

Until recently, Eastern Africa was zoned as an agricultural region and as such, not much oil and gas exploration went on in the region.[3] However, the landscape has now shifted and Kenya has four prospective sedimentary basins: Anza, Lamu, Mandera and the Tertiary Rift.[4] BP and Royal Dutch Shell companies carried out exploration work in the 1950s with the first exploration well being drilled in 1960.[5] Over the past fifty years, many other oil and gas companies have tried their luck onshore and offshore, including Exxon, Total, Chevron, Woodside and China National Offshore Oil Corporation.[6] Of thirty three wells drilled in the country prior to 2012, sixteen showed signs of hydrocarbons, but none were considered

---

* Full time Lecturer, Riara University; LLB (University of Nairobi); LLM (London School of Economics and Political Science); Member (Chartered Institute of Arbitrators);http://www.riarauniversity.ac.ke/law/index.php/faculty/#1467714115415-c219c877-1957

[1] Constitution of Kenya, 2010, Article 69 (1)(a).
[2] Constitution of Kenya, 2010, Article 69 (1)(h).
[3] Rift Energy, 'Upstream Oil and Gas Industry in Kenya' http://www.riftenergycorp.com/database/files/library/Overview_of_upstream_oil_and_gas_industry_in_Kenya.pdf (accessed 10 August 2017).
[4] Bill Page, 'The Deloitte Guide to Oil and Gas in East Africa' Deloitte Consulting Limited (2014) https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Energy-and-Resources/gx-er-Deloitte-guide-to-oilandgas-in-eastafrica-April%202014.pdf (accessed 10 August 2017).
[5] Ibid.
[6] Ibid.

commercial.[7] On 26 March, 2012, Tullow announced an oil discovery with a further discovery announced in November, 2012.[8]

Between 2012 and 2016, global prices of crude oil significantly reduced leading to a decline in exploration activities.[9] However, in March, 2016, Tullow announced that it had discovered an active petroleum system with significant oil generation south of the South Lokichar oil basin in Turkana county.[10] Thereafter, in July 2016, Tullow announced that it had reached an agreement with the Government of Kenya to extend the exploration period in South Lokichar to the year 2020.[11] The exploration and appraisal campaign in Kenya has progressed to schedule in 2017 with two discoveries made.[12] The first discovery was made in January 2017 at Erut-1 and the second in May 2017 at Emukuya-1, which proved that oil has migrated to the northern limit of the South Lokichar basin.[13] Explorations activities are therefore still underway to date.

The news of Kenya becoming a potential supplier and hub of oil and gas has been greeted with enthusiasm and has been deemed to be a clear indicator of progress.[14] However, after years of extensive research and examination by economists and political scientists, there is general agreement that states with abundant resource wealth generally perform worse than states which have less resources.[15] This greatly paradoxical principle, which has traditionally focused on extractive industries such as oil, gas, and mining, reveals that there are trade-offs between resources on one hand and

[7] Ibid.
[8] Ibid.
[9] Lily Kuo, 'A New Oil Discovery in Kenya is very Encouraging for its Export Ambitions' Quartz Africa (2016)http://qz.com/640595/a-new-oil-discovery-in-kenya-is-very-encouraging-indeed-for-its-export-ambitions/ (accessed 10 August 2017).
[10] Ibid.
[11] Oil News Kenya, 'Tullow Oil Receives 3 year Licence Extension in Kenya's Blocks 10BB,13T' (2016).
http://www.oilnewskenya.com/tullow-oil-receives-3-year-license-extension-in-kenyas-blocks-10bb-13t/ (accessed 10 August 2017).
[12] Keith C. Hill, 'Africa Oil Kenya Operations Update'
http://africaoilcorp.mwnewsroom.com/press-releases/africa-oil-kenya-operations-update-tsx-aoi-201707261099792001 (accessed 10 August 2017).
[13] Ibid.
[14] Scott W. Lyons, 'Preventing a Renewable Resource Curse' (2015) 15 Sustainable Development Law and Policy, 4.
[15] Ibid.

economic development and poverty reduction on the other.[16] This paradox is referred to as the resource curse. While this curse is not an absolute law of economics and development, there is a strong tendency of negative results.[17]

The resource curse is not just a result of economic factors. The paradox of plenty has political repercussions which may hinder the progress of the country. The extractive industries of a country might be plagued with what is known as natural resource conflicts. Natural resource conflicts have been defined as situations where the allocation, management, or use of natural resources results in violence, human rights abuses, or denial of access to natural resources to an extent that significantly diminishes human welfare.[18] It has been found that oil-based activities have brought with them the politics of oil and that this has ignited and exacerbated oil based conflicts in the oil-bearing areas.[19] These conflicts are multi-dimensional, with the communal conflicts taking the form of conflict within a community, conflict between communities, and conflict between host communities and the oil companies.[20]

As Tullow continues its exploration activities in the hope of making Kenya an oil and gas hub in Eastern Africa, it is imperative that the vulnerability of the region falling prey to the resource curse be taken into account. The State in fulfilling its constitutional mandate to ensure sustainable exploitation and proper management of natural resources ought to be cognizant of the negative implications of resource abundance to avoid making the resource curse a reality in our country. This article focuses on the effects of oil discovery in Turkana County in Kenya as a case study illustrating the susceptibility of the region suffering from this paradox of plenty.

The first part of this article analyzes the meaning and concept of the resource curse phenomenon as articulated by various scholars. In the

[16] Ibid.
[17] Ibid.
[18] Kariuki Muigua, 'Natural Resources and Conflict Management in East Africa' (2014) https://profiles.uonbi.ac.ke/kariuki_muigua/files/natural_resources_and_conflict_management_in_east_africa-1st_east_african_adr_summit_final.pdf (accessed 10 August 2017).
[19] Ibid.
[20] Ibid.

second part, the author evaluates the theories which have been posited for its existence. The author examines both economic and political mainstream explanations for the existence of the resource curse and the main criticisms of these theories. The last part of the article explores the economic and political issues that have arisen in Turkana County following oil discoveries in this marginalized area in Kenya, that are indicative of susceptibility of the region to the resource curse phenomenon. Turkana County in Kenya is chosen as a case study due to the recent discoveries of oil in the area and the exploration activities which continue to take place in the region. As the locals anticipate the benefits that would accrue from the oil discovery, there is danger lurking of falling prey to this curse. The author explores lessons that Kenya can draw from countries such as Nigeria and Botswana to avoid the resource curse. The paper concludes with reflections on the role of good governance, adequate laws and policies and eradication of corruption in avoiding the resource curse in the oil and gas sector in Kenya. The author posits that these are the necessary tools to translate the natural resource riches in the country, particularly the recent oil discoveries in Turkana County, into sustainable and inclusive growth.

2.0 The Resource Curse Concept

The idea that large resource endowments are 'bad' for the countries that exploit them is long established.[21] The sixteenth-century philosopher and political theorist Jean Bodin stated that, "Men of a fat and fertile soil are most commonly effeminate and cowards whereas … a barren country makes men … careful, vigilant and industrious."[22] This statement reflects the concept of the resource curse; the paradox that countries rich in resources tend to remain poor.

The term 'resource curse' was first proposed by Richard Auty in 1993 to describe how resource-rich countries generally develop more slowly than non-endowed countries.[23] However, it was Sachs and Warner who

[21] Paul Stevens, Glada Lahn and Jaakko Kooroshy, 'The Resource Curse Revisited' (2015) The Royal Institute of International Affairs, 8.
[22] Ibid.
[23] David A. Fleming and Thomas G. Measham, 'Disentangling the Resource Curse: National and

popularized the term to label their finding that resource-poor countries vastly outperform resource-rich economies in economic growth.[24] This negative link between natural resource windfalls and economic growth has since then been demonstrated by several empirical studies analyzing cross-country samples and within country analysis.[25] The resource curse therefore means that despite these windfalls, countries rich in resources can experience hampered economic and political development. On average, resource rich economies have lower growth, worse institutions, and more conflict than resource poor economies.[26] Thus empirically, being rich in natural resources is associated with being poor in material wealth – the 'paradox of plenty'.[27]

The oddity of resource-poor economies outperforming resource-rich economies has been a recurring motif of economic history.[28] In the seventeenth century, resource-poor Netherlands eclipsed Spain, despite the overflow of gold and silver from the Spanish colonies in the New World.[29] In the nineteenth and twentieth centuries, resource-poor countries such as Switzerland and Japan surged ahead of resource abundant economies such as Russia.[30]

This important finding that natural resource abundant economies tend to grow slower than economies without substantial resources continues to exist.[31] For instance, growth losers, such as Nigeria, Zambia, Sierra Leone, Angola, Saudi Arabia and Venezuela, are all resource-rich, while the Asian

---

Regional Socioeconomic Impacts of Resource Windfalls' (2013) CSIRO Social and Economic Sciences Research Program, 3.

[24] Ibid.

[25] Ibid.

[26] Halvor Mehlum, Karl Moene and Ragnar Torvik, 'Cursed by Resources or Institutions?, Norwegian University of Science and Technology' (2005) Working paper Series Number 10, 1.

[27] Ibid.

[28] Jeffrey D. Sachs and Andrew M. Warner, 'Natural Resource Abundance and Economic Growth' (1995) NBER Working Paper No. w5398, 2.

[29] Ibid.

[30] Ibid.

[31] Halvor Mehlum, Karl Moene and Ragnar Torvik, 'Institutions and the Resource Curse' (2006) The Economic Journal, Royal Economic Society, Blackwell Publishing, 1.

tigers: Korea, Taiwan, Hong Kong and Singapore, are all resource-poor.[32] On average, resource abundant countries lag behind countries with fewer resources. However, some countries rich in natural resources do experience economic growth. Many growth winners such as Botswana, Canada, Australia, and Norway are rich in resources.[33]

Some scholars have argued that the resource curse either does not exist or is not always inevitable. Van der Ploeg argues that the resource curse is not inevitable when he states that resource rich countries with good institutions, trade openness and high investments in exploration technology seem to enjoy the fruits of their natural resource wealth.[34] There is no general consensus on the existence of the resource curse. Its ubiquity should therefore not be exaggerated as some countries which are resource rich do have significant economic success. This article argues that the resource curse does indeed exist but it is not always inevitable. This means that the sunny optimism of oil discovery in the Turkana County in Kenya ought to be maintained but the susceptibility to falling prey to the resource curse should be taken into account to ensure the region does indeed benefit from the oil discoveries and has sustainable growth.

Natural resources are the subject of the resource curse phenomenon. The phrase 'natural resources' in this article is restricted to the analysis of oil and gas resources. Early studies by Sachs and Warner and Collier and Hoeffler looked at broad measures of resources that included petroleum, other minerals, and agricultural commodities.[35] Today, agricultural products are rarely seen as part of the resource curse - both because they are produced, not extracted, and hence fail to meet standard definitions of natural resources; and because they are seldom correlated with unfavorable outcomes.[36] Only one type of resource has been consistently correlated with less democracy and worse institutions: petroleum, which is the key

[32] Ibid.
[33] Ibid.
[34] Ramez Badeeb, Hooi Hooi Lean and Jeremy Clark, 'The Evolution of the Resource Curse Thesis: A Critical Literature Survey' (2016) University of Canterbury, Working Paper 5, 2.
[35] Michael L. Ross, 'What Have we Learned about the Resource Curse?' (2015) Annual Review of Political Science, 4.
[36] Ibid.

variable in the vast majority of the studies that identify some type of curse.[37] The article therefore uses the term 'natural resources' to refer to oil and gas resources discovered in the Turkana County of Kenya.

At first glance, one might assume that a generous endowment of petroleum or mineral reserves would be an unambiguous blessing for a developing country. [38] The sale of such reserves would seem to offer attractive opportunities for a poor country to generate national income, raise living standards, and improve the plight of its poorest residents.[39] In practice, however, it has proven to be extremely difficult to convert natural resource wealth into broad-based improvements in economic performance and human development.[40] In fact, heavy dependence on the export of natural resources has been shown to negatively affect a country's economic, social and political development.[41]

There has also been research linking the extraction of natural resources to corruption, authoritarianism, economic decline and civil war because natural resources are said to provide both finance and motive for armed conflict and to create indirect economic and institutional causes of violence.[42] This means that resource rich countries can be afflicted with political instability and oil-based violence if these resources are not properly managed.

This article argues that the resource curse does indeed exist even though it is not always inevitable. There are economic and political explanations that have been posited in existing literature for the existence of the resource curse. This article examines the evolution of the resource curse thesis, analyzing economic and political theories proferred for its existence and the main criticisms against each of these theories.

---

[37] Ibid.

[38] Scott Pegg, 'Poverty Reduction or Poverty Exacerbation, World Bank Group Support for Extractive Industries in Africa' (2003) 8.

[39] Ibid.

[40] Ibid.

[41] Ibid.

[42] Matthias Basedau and Jann Lay, 'Resource Curse or Rentier Peace? The Ambiguous Effects of Oil Wealth and Oil Dependence on Violent Conflict' (2009) Journal of Peace Research 46, 757

3.0 Theories of the Resource Curse

3.1 Economic Explanations

From an economical perspective, there are three mainstream explanations for the resource curse that is, the Dutch disease, volatility theory and the rent-seeking theory.

3.1.1 Dutch Disease theory

The most widely accepted economic explanation for the resource curse is known as the Dutch Disease theory.[43] In this account, resource exports provide a capital infusion to the economy, but have the side effect of inflating the national currency.[44] This damages the global competitiveness of other export sectors in the economy.[45]

The Dutch Disease, which owes its origin to the experience of the Netherlands with the discovery of North Sea natural gas in the 1960s, has two elements in its technical form.[46] According to economists, the first element is the spending effect which means that resource booms tend to lead to appreciation in the real foreign exchange rate, driving spending to the non-tradeable sector (for example construction), which results in inflation.[47]

The second element is the migration of labor and capital to the booming non-tradeable sectors.[48] The effect of these elements is that sectors such as manufacturing and agriculture regress in favour of the oil industry. This can adversely affects country's economic development in periods of resource bursts.

Oil has become a curse rather than a blessing for Nigeria for example, because instead of yielding foreign exchange for the development of the

---

[43] Matthew L. Norman, 'The Challenges of State Building in Resource Rich Nation' (2011-2012) NorthWestern Journal of International Human Rights, Volume 10, Number 3, 184, 185.
[44] Ibid.
[45] Ibid.
[46] Emeka Duruigbo, 'The World Bank, Multinational Oil Corporations, and the Resource Curse in Africa' (2005) Journal of International Law, University of Pennsylvania, Volume 26, Number 1, 2.
[47] Ibid.
[48] Ibid.

country, its proceeds have led to greater impoverishment of the masses.[49] The exploitation and production of oil in this country has led to hindered economic growth and political problems. It has also contributed to unprecedented crisis flash points in the Niger Delta.[50] Nigerian scholar Pat Utomi links the problems of the Nigerian economy to the Dutch Disease.[51] Utomi bases his position principally on data that indicates that in the years that Nigerian oil revenue dwindled (1987-1990), manufacturing boomed.[52] The oil windfalls of 1991 put an end to this progress and, with consistent growth in oil revenues since 1999, Nigeria's economy has been in the doldrums.[53]

The problem with the Dutch Disease model is that it suggests unconditional negative correlation between natural resources abundancy and economic performance.[54] Thus, this model fails to explain cases such as Norway, Botswana, Australia and others, which have managed to escape from the resource curse.[55] This suggests that there are some important pre-conditions, which are not included into the Dutch Disease model which might include either the quality of institutions, the structure of the economy or some alternative explanation.[56]

3.1.2 Volatility theory

A second explanation blames the volatility of primary commodity markets for the resource curse. During resource booms, exporting nations are flush with capital and undertake large, often ill-advised, investments with the

[49] Robert O. Dode, 'The Political Economy of Resource Curse and the Niger Delta Crisis in Nigeria: Matters Arising' (2011) Afro Asian Journal of Social Sciences, Volume 2, Number 1, 3.
[50] Ibid.
[51] Emeka Duruigbo, 'The World Bank, Multinational Oil Corporations, and the Resource Curse in Africa' (2005) Journal of International Law, University of Pennsylvania, Volume 26, Number 1, 2
[52] Ibid.
[53] Ibid
[54] Dina Akylbekova, 'Analyzing the Resource Curse Theory' Lund University, http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=7760298&fileOId=7760302 (accessed 2 August 2017).
[55] Ibid.
[56] Ibid.

mistaken assumption that the windfall profits will continue.[57] It is common for resource exporters to finance large projects using debt with future resource revenues as collateral but when the inevitable bust comes, the exporting nation faces a debt crisis.[58]

Both Auty and Mikesell offer revenue volatility as a possible explanation for the resource curse.[59] The basic argument is that oil, gas and mineral revenues are very volatile, especially driven by violent fluctuations in prices over relatively short periods of time.[60] Potentially, this volatility could cause a variety of problems.[61] Fluctuating revenue profiles make it very difficult to pursue a prudent fiscal policy and there is also concern that windfall revenues from fluctuating export prices would be consumed rather than invested.[62]

However, this theory has also been criticized. Sachs and Warner found no correlation between commodity price volatility and the slower economic growth.[63] Scholars have also indicated that the fiscal positions of countries react strongly to shocks to commodity prices, yet there are marked differences across countries.[64] This distinct behaviour across countries may relate to institutional arrangements, which in some cases include the efficient application of fiscal rules amid political commitment and high standards of transparency.[65] Additionally, it is argued that governments can mitigate these revenue fluctuations by establishing stabilization funds.[66]

---

[57] Matthew L. Norman, 'The Challenges of State Building in Resource Rich Nations' (2011-2012) NorthWestern Journal of International Human Rights, Volume 10, Number 3, 184, 185

[58] Ibid.

[59] Paul Stevens, 'Resource Impact – Curse or Blessing?: A Literature Survey' (2003) Centre for Energy, Petroleum and Mineral Law and Policy, 10,11

[60] Ibid.

[61] Ibid.

[62]Ibid.

[63] Andreas Heinrich, 'Challenges of a Resource Boom: Review of the Literature' (2011) Working Papers of the Research Centre for East European Studies, University of Bremen, No. 114, 13

[64] Ibid.

[65] Ibid.

[66]Ibid.

3.1.3 Rent-seeking theory

An alternative story is that resource wealth such as oil somehow makes societies less entrepreneurial.[67] There is so much wealth floating around the government that entrepreneurial persons find it much more profitable to engage in unproductive rent-seeking activities to appropriate that wealth rather than in creating more wealth.[68] The presence of common-pool problems or uncertainty over property rights over the resource income may generate low growth by inefficiently focusing economies in fighting over existing resources.[69] There is general agreement that rent-seeking behaviour produces undesirable results for the economy.[70] It has been argued that rent-seeking behaviour imposes significant losses on many economies.[71] Auty argues such behaviour distracts attention from goals of long-term development towards maximizing rent creation and capture.[72]

The main criticism of this model is that contrary to long-entrenched intuition, non-renewables can be progressively extended through exploration, technological progress, and investments in appropriate knowledge.[73] The resource-curse hypothesis has been deemed to be anomalous to development economics, since on the surface it arguably has no clear policy implication but stands as a wistful prophecy: Countries afflicted with the 'original sin' of resource endowments have poor growth prospects.[74]

It has been stated by critics that policy makers are to blame for problems created by rent seeking behaviour and not merely the presence of minerals in a country. The rent-seeking model assumes that institutions may decrease or even prevent rent-seeking, harming the economy, but the

---

[67] Ricardo Hausmann and Robert Rigobon, 'An Alternative Interpretation of the Resource Curse: Theory and Policy Implications' (2002) NBER Working Paper No. 9424, 7.
[68] Ibid
[69] Ibid
[70] Paul Stevens, 'Resource Impact – Curse or Blessing?: A Literature Survey' (2003) Centre for Energy, Petroleum and Mineral Law and Policy, 15.
[71] Ibid
[72] Ibid
[73] Gavin Wright and Jesse Czelusta, 'Why Economies Slow: The Myth of the Resource Curse' (2004) Challenge, 36
[74] Ibid

model fails to incorporate institutions into the analysis.[75] This means that while the rent-seeking theory recognizes the need to focus on long term development of a country and not just the short term gains, it omits from its analysis the role that policy makers and institutions play in effective management of these resources that will lead to wealth creation.

3.2 Political Explanations

Even though economic factors have dominated the resource curse literature, in recent years, scholars have identified political factors to be equally important in studying the economic progress of resource-rich countries and that governments play a key role in devising favorable policies for economic development.[76] Therefore, two main political explanations have been posited for the existence of the resource curse that is, the institutional theory and the rentier-state theory.

3.2.1 Institutional theory

When governments depend on mineral revenues instead of taxes, for example, they lack incentives to strengthen institutions required to establish the mechanism to provide efficient public goods and avoid conflict.[77] In countries with robust and well-functioning institutions, there is ample evidence that it is possible to turn the revenue flowing from the exploitation of natural resources into lasting economic and social development.[78] The reverse is true for countries with poorly functioning institutions which do not effectively exploit and manage their natural resources. The argument is that the dangerous mix of weak institutions and resource abundance causes the resource curse.[79]

---

[75] Dina Akylbekova, Analyzing the Resource Curse Theory, Lund University, http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=7760298&fileOId=7760302(accessed 2 August 2017).
[76] Meaza Zerihun Demissie, 'The Natural Resource Curse in Sub-Saharan Africa: Transparency and International Initiatives' (2014) Dissertations, Paper 6, 19,20.
[77] Ibid.
[78] Patrick Keenan, 'International Institutions and the Resource Curse' (2014) Penn State Journal of Law and International Affairs, Volume 3, Number 1, 219.
[79] Halvor Mehlum, Karl Moene and Ragnar Torvik, 'Institutions and The Resource Curse' (2006) The Economic Journal, Blackwell Publishing, 12,16.

Weak or dysfunctional institutions permit leaders to engage in all manner of mischief with the wealth they receive from the sale of natural resources that is, personal enrichment at public expense and distributing legitimately obtained revenue in ways that are damaging to the political or economic life of the country.[80] The leadership tend to misappropriate resource wealth for their personal gain and fail to instal mechanisms to ensure there is benefit sharing in the regions where oil is discovered and later exploited and produced. The resource wealth is shared between the governments and multinational companies leaving the locals out in the cold. This can escalate to violence and political instability in countries with weak institutions as locals fight to obtain what they perceive to be a legitimate share of oil revenues.

The case of Angola illustrates the problem of direct personal enrichment from the sale of state assets.[81] Sonangol is the company responsible for the exploitation of all of Angola's substantial oil and gas reserves.[82] In early 2012, Manuel Vincente, the former head of Sonangol, which is solely responsible for the awarding of concession rights, disclosed that he had for years held an ownership interest in a private company which had been involved in a lucrative oil exploitation contract with the state.[83] He also disclosed that the head of the president's military police agency and the minister for state economic cooperation also held stakes in the same company.[84]

However, the main criticism of the institutional theory is that many resource-abundant countries have centralized power and weak institutions, and still there is a big variation of how natural resources wealth is managed even among the countries with grabber friendly institutions.[85] Consequently,

[80] Patrick Keenan, International Institutions and the Resource Curse, (2014) Penn State Journal of Law and International Affairs, Volume 3, Number 1, 231
[81] Ibid.
[82] Ibid.
[83] Ibid.
[84] Ibid.
[85] Dina Akylbekova, Analyzing the Resource Curse Theory, Lund University, http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=7760298&fileOId=7760302 (accessed 2 August 2017).

the lack of institutions only does not explain the variance in economic performance and growth in resource abundant countries.[86]

3.2.2 Rentier-state theory

Theories of the rentier state contend that when governments gain most of their revenues from external sources, such as resource rents or foreign assistance, they are freed from the need to levy domestic taxes and become less accountable to the societies they govern.[87] Mahdavy, who first posed this theory, argues that resource rents make state officials both myopic and risk-averse: upon receiving windfalls, governments grow irrationally optimistic about future revenues and devote the greater part of their resources to jealously guard the status quo instead of promoting development.[88]

Yates argues that rentier states suffer from poor governance because state officials can use resource rents more easily to meet unpopular or illegal objectives.[89] For Karl, fiscal reliance on petrodollars weakens the state and creates political instability.[90] Finally, Wantchekon investigates how economic growth, the distribution of income, and the allocation of political power simultaneously evolve when resources are discovered.[91] They find that resource abundance is likely to increase income inequality and the consolidation of dictatorial regimes.[92] It has also been argued that natural resource dependent economies are more likely to be authoritarian; exhibit higher levels of government spending which are associated with worse governance and are more likely to lead to breakdown in democracy.[93]

Natural resources have also contributed to increased political instability in some resource rich countries. Expanding on Sachs and Warner's initial

---

[86] Ibid.
[87] Michael L. Ross, 'The Political Economy of the Resource Curse' (1999) World Politics, The John Hopkins University Press, 8.
[88] Ibid.
[89] Nathan Jensen and Leonard Wantchekon, 'Resource Wealth and Political Regimes in Africa' (2004) Comparative Political Studies, 816-841.
[90] Ibid.
[91] Ibid.
[92] Ibid.
[93] Nathan Jensen and Leonard Wantchekon, 'Resource Wealth and Political Regimes in Africa' (2004) Comparative Political Studies, 816-841.

study that supported the natural resource curse theory, Collier and Hoeffler found a strong negative correlation between resource abundance and political stability.[94] Richly detailed case studies of Nigeria, Venezuela, and Iran show that oil can undermine political stability over time, especially in authoritarian regimes. [95] Virtually all oil-rich states tend to face significantly higher levels of social protest when oil revenues fall, and some of these regimes collapse.[96]

Where regimes have developed mechanisms of social control, permit rotation in power, or have sources of legitimacy that are not based on oil rents, they are more likely to endure through boom-bust cycles. But where initial oil exploitation coincides with regime and state building, non-oil-based interests do not form and patronage rents may be the main glue of the polity. Under these circumstances, these regimes are especially fragile and vulnerable during oil busts.[97]

Corruption contributes to the existence of the resource curse and the resulting political instability and poor ecomomic development of some resource rich countries. The instances in sub-Saharan Africa where the association between patrimonial structures, corruption and mineral abundance is strongest include Angola, Republic of Congo, Democratic Republic of Congo, Equatorial Guinea, Gabon and Nigeria.[98] On the other hand, some resource-rich countries have a record of good economic performance and high public integrity.[99] In Botswana, as noted, the export of diamonds has financed rapid development in a context of political legitimacy and comparatively sound economic management.[100]

---

[94] Ibid.
[95] Terry Lynn Karl, 'Oil-Led Development: Social, Political and Economic Consequences' (2004) Encyclopedia of Energy, Volume 4, 669.
[96] Ibid.
[97] Ibid.
[98] Hazel M. McFerson, 'Governance and Hyper-Corruption in Resource-rich African Countries' (2009) Third World Quarterly, Volume 30, Number 8, 1529, 1545.
[99] Ibid.
[100] Ibid.

4.0 Crude Politics in Turkana County

4.1 Background

For the last 56 years, Asekon Ekai, a local, has walked the dust bowls of Lokichar, Turkana County, where temperatures can soar up to 40 degrees celsius.[101] She has fought and won many contests with famine, ill health and the never ending feuds with neighbouring communities.[102] The Lokichar area is one marred with many difficulties but like other residents, the news of the discovery of oil gave Ekai a measure of hope for the economic and political development of the region. Ekai's opinion of the discovery is "Mwambie Uhuru ama Raila, mafuta ni yetu, ni ya Turkana na itakaa Turkana kama hakuna pesa (The translation is: Tell President Uhuru or Raila that the oil is ours and will not leave Turkana if there is no money for us). No money, no oil."[103] The residents of Lokichar remain emotive about the need to benefit from the profits made in oil exploration and production such as the need to tap into employment opportunities generated and rceiving shares of oil proceeds.

With an estimated land size of almost 77,000km^2, Turkana County is the largest county in Kenya.[104]It is located in the north-western part of Kenya, bordering the counties of West Pokot and Baringo to the south, Samburu to the south-east, and Marsabit to the east.[105] In addition, it shares international borders with South Sudan to the north, Uganda to the west and Ethiopia to the north-east (see Figure 1 below).[106]

Turkana is the poorest county in Kenya, with 94.3% of the population living below the poverty line.[107] It is located far from the capital Nairobi, with

[101] Peter Muiruri, 'Lokichar Oil: A Blessing or Curse For Turkana?' *Standard Media* https://www.standardmedia.co.ke/business/article/2001234391/lokichar-oil-a-blessing-or-curse-for-turkana (accessed 1 August 2017).
[102] Ibid
[103] Ibid
[104] Michael Bliss, 'Oil Exploration in Kenya: Success Requires Consultation. Assessment of Community Perceptions of Oil Exploration in Turkana County Kenya' (2015) Cordaid, 16.
[105] Ibid
[106] Ibid.
[107] Ibid.

limited access to basic services and very poor road infrastructure.[108] The difference in wealth and level of development between Turkana and the rest of the country, in particular Nairobi, is so big that the Turkana people talk of "those in Kenya" or making a distinction between "Kenya A and Kenya B", as if Turkana were in another country.[109]

It has an arid and semi-arid climate and fragile ecosystem best suited to pastoralism.[110] Most of the population are pastoralists who are widely dispersed and mobile according to the seasonal availability of grazing grounds and water sources.[111]

[108] Ibid.
[109] Ibid.
[110] Kennedy Mkutu Agade, "'Ungoverned Space" and the Oil Find in Turkana, Kenya,' (2014) The Round Table, Volume 103, Number 5, 497.
[111] Ibid.

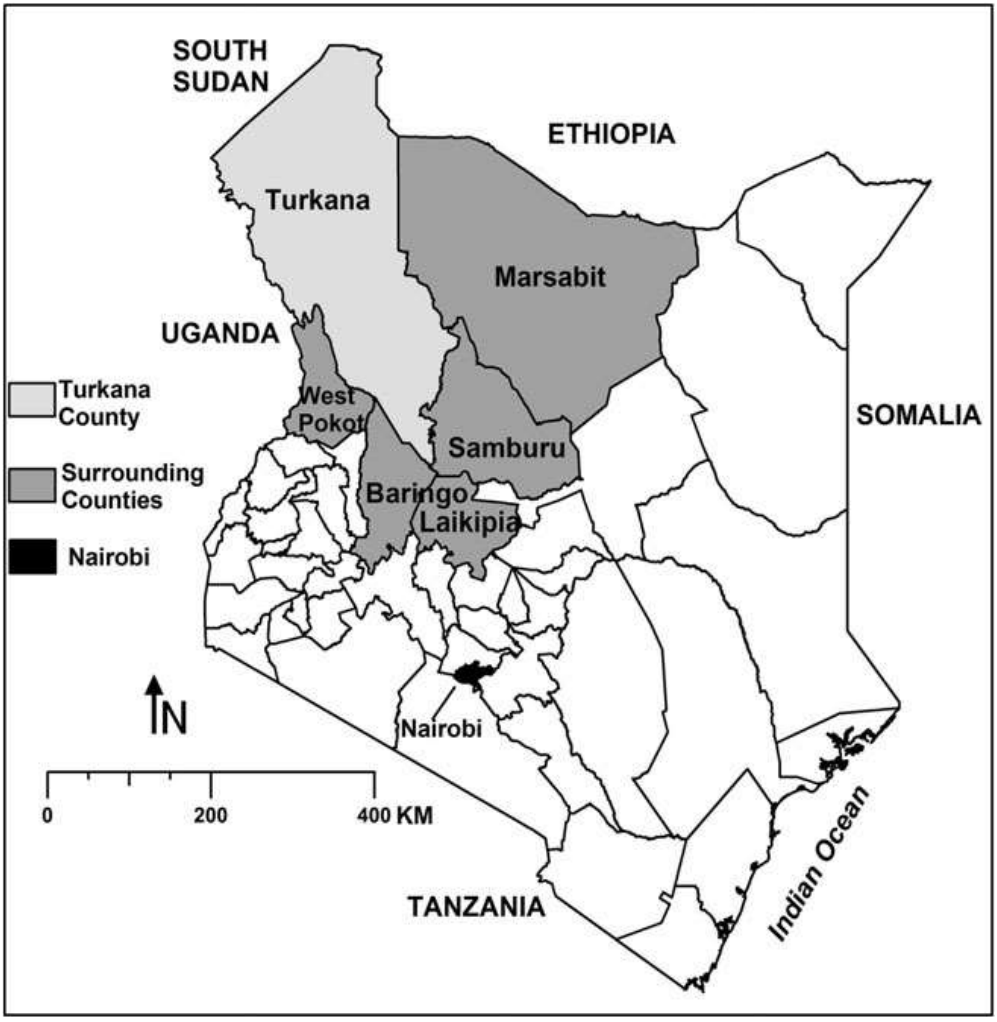

Figure 1: Location of Turkana County and surrounding counties in Kenya[112]

Turkana County and the surrounding counties of Baringo, Laikipia, Marsabit, Samburu, and West Pokot historically suffer from violent conflicts, including

[112] Eliza M. Johannes, Leo C. Zulu & Ezekiel Kalipeni, 'Oil Discovery in Turkana County, Kenya: A Source of Conflict or Development?' (2015) African Geographical Review, 34:2, 143.

cattle raids.[113] For Turkana County, these conflicts include clan or ethnic-based conflicts, international cross border conflicts, and intracommunal conflicts such as those between two Turkana communities.[114]

The main contributing sources of conflict in this region are environmental stressors including climate change, the Ilemi Triangle boundary dispute, dams and their ecological impacts on the waters of Lake Turkana and the recently launched transportation development project called Lamu Port and New Transport Corridor Development to Sudan and Ethiopia (LAPSSET).[115] The gun is inextricably linked with survival and even livelihood and is held by an estimated 1 in 3 Turkana men.[116] There is a thriving arms trade with sources in Ethiopia, Somalia, Uganda, Southern Sudan and Kenya itself, civil wars and unrest have contributed to their proliferation.[117] The government has attempted to disarm these communities but these attempts have been strongly resisted and the arms trade continues to thrive. Violent intercommunal conflict over water, pasture and livestock resources affects Turkana's international and internal borders.[118] There is underdeveloped infrastructure in Turkana and the poor state of the roads leads to vehicles being ambushed which further contributes to the violence in the region.

Given the challenges faced in the Turkana region, the news of an oil find was greeted with a lot of optimism by the locals, like Ekai, for the future development of the region. In March 2012, oil was discovered in the Lokichar Basin in Turkana County. In January 2014, Tullow stated that Kenya's Northern Basin could have an excess of 1 billion barrels of oil and exploration activities have continued with two further discoveries made in the year 2017. Kenya's petroleum potential is best depicted by the four

[113] Eliza M. Johannes, Leo C. Zulu and Ezekiel Kalipeni, 'Oil Discovery in Turkana, County Kenya: A Source of Conflict or Development?' (2015) African Geographical Review, Volume 34, Number 2, 148,149.
[114] Ibid.
[115] Ibid.
[116] Kennedy Mkutu and Gerard Wandera, 'Conflict, Security and Extractive Industries in Turkana, Kenya: Emerging Issues' (2012-2015) The Open Society Initiative for Eastern Africa, 1.
[117] Ibid.
[118] Ibid.

large sedimentary basins that straddle the country which include Lamu, Anza, Mandera and Tertiary Rift basins.[119]

The oil blocks are as shown below with Turkana being a major region where exploration activities continue to take place to date:

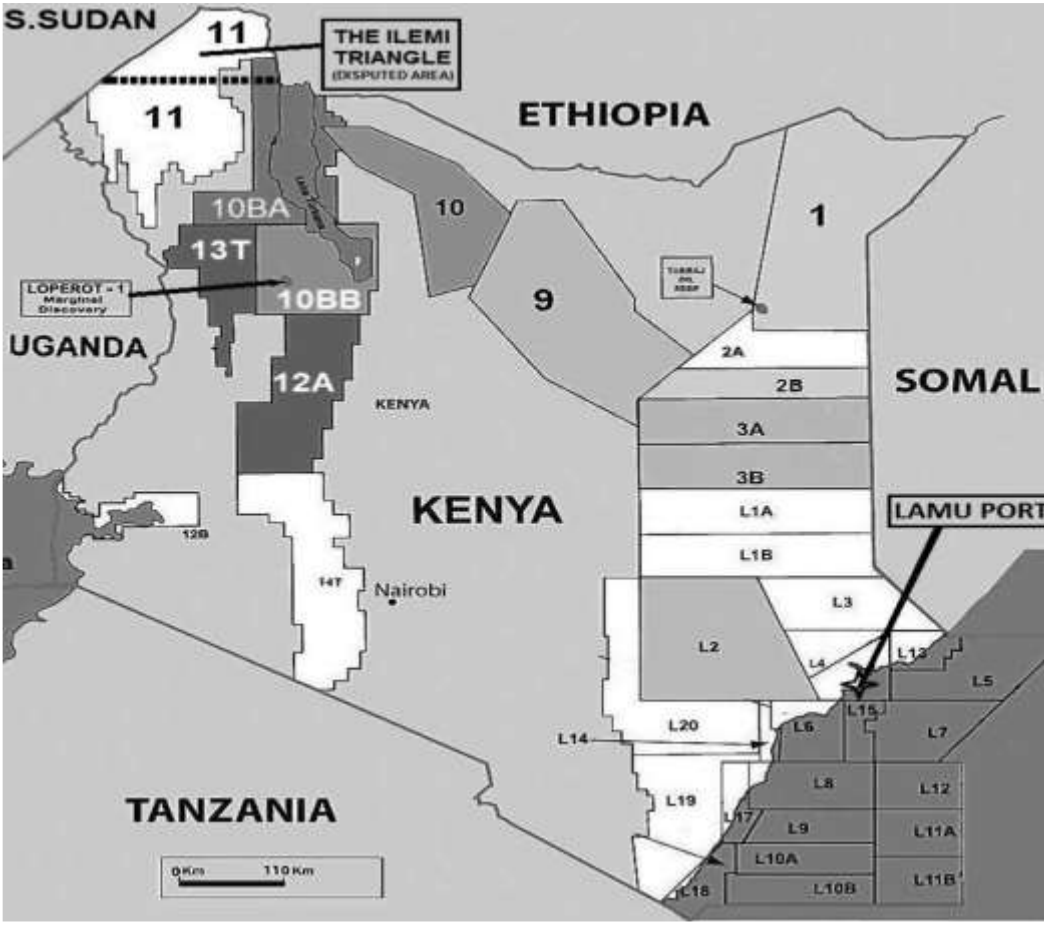

Figure 2: Kenya Oil blocks[120]

[119] Isaiah L. Okuthe, 'Environmental and Social Challenges of Oil and Gas Exploration in Kenya' (2015) International Journal of Innovation and Scientific Research, Volume 17, Number 1, 164.

[120] David M. Anderson & Adrian J. Browne, The Politics of Oil in Eastern Africa, Journal of Eastern African Studies, 5:2, (2011) 385

4.2 Resource Blessing or Resource Curse?

Porous borders and unsettled trans-boundary disputes have created tensions surrounding the exploration for Kenya's oil and gas.[121] Historically unclear delimitation of Kenya's borders with neighboring South Sudan have threatened to become serious following the discovery of oil in Turkana.[122] The oil discovery has also exacerbated the conflicts between Turkana and its neighbours in Kenya; among the disputed areas are Kainuk and Kaputir along the border of West Pokot and Turkana South.[123] It has been claimed that some members of the Pokot community want the boundary shifted so that areas with oil reservoirs are under their jurisdiction.[124] The oil discovery has escalated these border conflicts both local and international as communities and countries fight for control over the resources.

According to local communities in Turkana South, the displacement of local communities to make way for oil exploration has contributed to this escalation of conflict between the Turkana and the Pokot, as the Turkana had little choice but to move into insecure areas closer to the border with West Pokot.[125] As part of existing efforts to reduce inter-communal conflict, local government officials from both sides of the Turkana–West Pokot border occasionally meet to collaborate on improving conflict management.[126] However, these interactions tend to be not as effective as they could be and are often unable to prevent or adequately address violent clashes and raids.[127] Underlying factors causing this include weak relations and lack of confidence between local government and communities, deep-rooted mistrust between the different communities in the region, lack of

[121] Patricia I. Vasquez, 'Kenya at a Crossroads: Hopes and Fears Concerning the Development of Oil and Gas Reserves' International Development Policy (2013) Volume 4, Number 3, 18.
[122] Ibid.
[123] Nation Team, 'Dreams of Oil Billions Fuel Strife in the North'. http://www.nation.co.ke/news/Dreams-of-oil-billions-fuel-strife-in-the-north/-/1056/2734032/-/rh75b8z/-/index.html *Daily Nation* (Nairobi, 29 May 2015).
[124] Ibid.
[125] Michael Bliss, Oil Exploration in Kenya: Success Requires Consultation. Assessment of Community Perceptions of Oil Exploration in Turkana County, Kenya, (2015) Cordaid, 19.
[126] Ibid.
[127] Ibid.

confidence in the possibility of sustainable peace, and vested economic and political interests in keeping the region insecure.[128]

Ensuring sufficient security to avoid interruption of oil production is moving up on the list of national security priorities, leading to the deployment of a security unit to protect oil exploration sites and companies, and transport networks serving these.[129] The border areas of Turkana neighbouring Somalia and Ethiopia have been hit by frequent grenade and gun attacks since Kenya sent its army into southern Somalia in October 2011 in pursuit of Al-Shabaab, who had orchestrated the kidnapping of aid workers and tourists and a number of bomb attacks.[130] The protection of oil as a strategic investment could lead to new confrontations between investors, state and community, and escalating violence between formal security providers and local armed groups.[131]

In an agreement made with the former provincial administration, administrative police, regular police and National Police Reservists (NPRs) have been deployed to exploration sites, bases and as escorts for survey teams for which they are paid an added allowance.[132] Communities have voiced high levels of fear relating to the re-deployment of NPR and their subsequent vulnerability to raiders in the absence of this protection.[133] In addition to re-deployment to service the oil industry, there is now a metamorphosis from their previous role in provision of remote livestock security to paid work as road escorts and private security guards, which is developing in line with the oil sector.[134] NPRs are also vulnerable to recruitment by politicians for their personal protection, and fears have been raised that in the event of instability or natural resources conflict they are a ready 'private army' who could be galvanized in various directions.[135]

---

[128] Ibid.
[129] Kennedy Mkutu Agade, "'Ungoverned Space" and the Oil Find in Turkana, Kenya,' (2014) The Round Table, Volume 103, Number 5, 504.
[130] Ibid.
[131] Ibid.
[132] Kennedy Mkutu and Gerard Wandera, 'Conflict, Security and Extractive Industries in Turkana, Kenya: Emerging Issues' (2012-2015) The Open Society Initiative for Eastern Africa, 27, 28.
[133] Ibid.
[134] Ibid.
[135] Ibid.

The oil find has therefore exacerbated conflict in Turkana county and contributed to increased instability and insecurity in the region. There is a need for good governance and strong institutions to ensure proper management of these resources and transparency in benefits sharing in order to avoid the resource curse. Heightened conflict can lead to greater political instability in the region.

In Nigeria, corruption plays a large role in the subsistence of the resource curse since governments respond to the windfall of oil wealth by being inundated with easy money to use in government programs.[136] This corruption highlights the importance of good institutions as lobbying and bribing are a part of the strategic model of a corrupt government.[137] The tragedy in Nigeria today is that with a near total absence of government presence in the lives of citizens, corruption is the only system that seems to work.[138]

Nigeria is an example of government trying to end rent-seeking in the form of the gas subsidy but has much more pressing issues of violence and corruption.[139] Without good institutions, Nigeria has fallen prey to the resource curse and fails to realize its full potential for development. The oil and gas resources have not been converted to sustainable economic growth. Kenya can learn from this and put in mechanisms to curb corruption in its institutions which could contribute to the ineffective management of the oil exploration and production activities.

On the other hand, Botswana has strong democratic institutions which helped to prevent corruption and encourage transparency.[140] These attributes have enabled these leaders to withstand a culture of rampant greed that has done so much to undermine the development process in the rest of the continent.[141] It is because of Botswana's wise management of its resource revenues with a focus on the long term future and the

[136] Jakob Peterson, 'The Resource Curse in Nigeria: A Story of Oil and Corruption' (2012) Metropolitan State College of Denver, Economics 3903 - The Geopolitics and Economics of Oil, 10, 11.
[137] Ibid.
[138] Ibid.
[139] Ibid.
[140] Mingcong Li, 'Corruption, Transparency and the Resource Curse' (2013) International Journal of Social Science and Humanity, Volume 3, Number 6, 574.
[141] Ibid.

establishment of several democratic institutions that made it one of the most successful resource-rich countries in Africa.[142] This is a model that ought to be emulated by countries rich in oil, gas and other minerals. The need for accountable leadership and strong institutions cannot be overstated in the pursuit of sustainable economic growth in the extractive industries of a country. Corruption only undermines progress and development.

This comparative analysis of Nigeria and Botswana depicts the postulations of theorists that good institutions that ensure property rights protection can discourage rent-seeking behaviour in mineral-rich contexts and, hence, prevent the resource curse phenomena and stimulate economic development.[143] Good institutions, in the form of secure property rights, efficient bureaucracies and low corruption, improve resource windfall management and can turn the curse into a blessing.[144]

As Kenya continues its exploration activities, it is important to ensure that the management of these resources is in the hands of good institutions which are accountable and transparent. Good governance will translate this oil find into the benefits that are hoped for. Corruption has no place in the success story of resource abundant countries and only accountable and transparent policies can lead to the economic development that is hoped for. Striking oil does not automatically make a country successful. This is only attainable through proper governance, transparency and accountability of the leadership in carrying out its mandate of resource governance and benefits sharing.

Oil in Turkana could break the county's cycle of insecurity and underdevelopment if the proceeds are shared fairly with the people of Turkana to address their local needs; Joseph Kapilak, a teacher at Lokichar, offered these words of wisdom:

> *'The Turkana should be offered compensation for their oil and also be offered education in disciplines that are relevant to the oil industry, such as mineral engineering and mechanical engineering, as well as*

[142] Ibid.
[143] Elissaios Papyrakis, 'The Resource Curse – What Have We Learned From Two Decades of Intensive Research: Introduction to the Special Issue' (2017) The Journal of Development Studies, Volume 53, Number 2, 178.
[144] Ibid.

> *environmental sciences. The Turkana people should be a part of the oversight process as contracts and sale deals are developed. Only then will violent conflict be avoided … and real development come to Turkana.' (Interview response, Lokichar, 25 May 2013)*[145]

In most developing countries, oil and other natural resources are treated as state assets; they belong to the state and can be sold only by the government.[146] Because states are not in the business of developing oil wells, they typically sell the rights to exploit natural resources to private companies.[147] The actual exploitation of the resource is conducted by a complex web of companies, usually involving one or more private companies, a state-owned company, and multiple subcontractors.[148] In Turkana, Africa Oil Corporation, Tullow Oil and Maersk Oil and Gas companies, multi-national owned by prominent individuals and the state are all involved in the exploration process.

This complex structure results in opportunities for state officials to insert themselves or their families into the private ownership structure so as to enrich themselves from the sale of state assets.[149] Public officials help themselves politically by doing business with companies headed by potential political supporters and they can directly benefit themselves or their families by ensuring that some or much of the revenue flows to them.[150] The result of this complex structure is that the political elite and the transnational companies enrich themselves at the expense of the members of the community. This also makes the Turkana region susceptible to violence and political instability if such structures are not subjected to checks and balances and personal enrichment by public officials is not prevented or stopped. This is because the locals will remain aggrieved by the benefits sharing formula and will fight to obtain their rightful share.

---

[145] Eliza M. Johannes, Leo C. Zulu & Ezekiel Kalipeni, 'Oil Discovery in Turkana County, Kenya: A Source of Conflict or Development?' (2015) African Geographical Review, 34:2, 152, 153.
[146] Patrick Keenan, 'International Institutions and the Resource Curse' (2014) Penn State Journal of Law and International Affairs, Volume 3, Number 1, 234.
[147] Ibid.
[148] Ibid.
[149] Ibid.
[150] Ibid

The Niger Delta is an example where despite the presence of resource wealth, the region remains underdeveloped. The explanation for the failure of state governments to transmute resource curse to blessing is massive corruption and stealing of state funds.[151] The evidence that a large proportion of the huge resources that have flowed to Niger Delta states has been diverted to personal use includes the large number of governors and other officials of state governments that have gone on trial and been convicted for money laundering, embezzlement of public funds and corruption.[152]

The benefits sharing question also has to be addressed to avoid the resource curse. Distributing oil revenues directly, and equally, to all citizens in a producer country, then taxing them directly on their income could have enormous benefits.[153] Recent studies have indicated that direct cash transfers can have significant benefits on long-term wealth and income and can provide encouragement for a direct distribution scheme.[154] This would then mean that the revenues obtained from oil production would be shared between the government and the locals in Turkana giving the people a sense of inclusivity in the benefits obtained.

The other benefit of distributing oil revenues, instead of leaving it in the hands of a few, is that this would transform the nature of politics.[155] Direct distribution would also deliver a better sense of shared citizenship, replacing fragmentation and factional politics. For one thing, this would transform the dynamics of conflict.[156] It would also make the government more accountable to the people because despite the resource wealth, there would still be reliance on taxation of that which is directed to the citizenry.

In Nigeria, because the government raises public finance majorly through oil rents, state-citizen engagements and bargain are largely absent or in most

[151] Eghosa E. Osaghae, 'Resource Curse or Resource Blessing: The Case of the Niger Delta 'Oil Republic' in Nigeria' (2015) Commonwealth and Comparative Politics, Volume 53, Number 2, 124.
[152] Ibid.
[153] Nicholas Shaxson, 'Oil, Corruption and the Resource Curse' (2007) International Affairs Volume 83, Number 6, 1135, 1136.
[154] Ibid.
[155] Ibid.
[156] Ibid.

cases weak.[157] There is a participation deficit; a lack of connection between citizens and the state, which breaks any sense of ownership of public resources or consequent citizens engagement as one of the biggest challenges of oil-rich economies.[158] Since governments in oil-rich countries do not rely as much on revenue raised by taxing their citizens, they are not held as accountable as their counterparts in resource poor countries.[159] State building is shaped by state-society engagement, and taxation is a strategic nexus between the state and society.[160] There is a need to ensure that the state in Kenya engages the community in the oil exploration and production process to give a sense of ownership of the public resources. Kenya can learn from Nigeria in so far as the need to maintain a link between the government and the citizens through taxation leading to greater accountability and transparency in the management and dissemination of oil revenues.

So far, the economic benefits from the oil exploration process relate to jobs, tenders and provision of equipment and services to the investors while some casual labour and manual jobs have gone to community members.[161] However, the oil industry is highly mechanised and does not promise many jobs for the locals.[162] This has left the people of Turkana feeling like outsiders in a process taking place in their own land and frustrated as they had envisioned economic benefits in terms of employment.

In October 2013, the residents of the Lokichar area protested the lack of employment opportunities for the locals leading to Tullow Oil Kenya suspending its exploration activities. The locals demanded that they should be employed at company sites and where they lacked the skills, they should be provided with training. Hundreds of residents marched on the oil sites, demanding an explanation from the Tullow president on the criteria the firm used to hire workers and to know who was responsible for

[157] Ijere Thomas Chukwuma, 'The Resource Curse in Nigeria: Lessons and Policy Option' (2015) International Journal of Research in Humanities and Social Studies, Volume 2, Number 18, 41.
[158] Ibid.
[159] Ibid.
[160] Ibid.
[161] Kennedy Mkutu Agade '*Ungoverned Space' and the Oil Find in Turkana, Kenya*, The Round Table, Volume 103, Number 5, (2014) 504.
[162] Ibid.

tendering.[163] Demonstrators blocked all roads leading to drilling sites and vowed not to back down until their demands were met.[164]

There is a need to engage the community and create employment opportunities for the locals. Where the skills needed are technical, there should be access to education in these competencies and relevant trainings. Utilising outsiders and foreign companies will only bring further conflict to the area and undermine its progress. The employment opportunities created should not be limited to unskilled labour but should be extended to semi-skilled and skilled labour. The economic development of the region as a result of the oil discovery ought to include empowering the community through job creation.

To avoid the resource curse, a country should also deepen the process of economic diversification by investing oil revenues to develop infrastructures and human capital that would support the economy. [165] The goal of diversifying the economy is important because while the oil economy is an enclave that provides just a few jobs, it has the potential to crowd areas of the economy that are key to job creation such as manufacturing and agriculture.[166] This was the case with Nigeria where with the discovery of oil, government simply ignored the wealth-creating and employment-generating aspects of the economy; the Nigerian oil and gas sector has dominated exports, eclipsing these sectors of the economy.[167]

Further, oil wealth in Nigeria has not been used to benefit other sectors of the economy that would help the country diversify its economy and avoid the Dutch Disease or problems of volatility of oil prices. [168] With the ascendancy of oil as the sole revenue earner for the country, the agriculture and manufacturing sectors that employ more people were jettisoned for the

[163] Sammy Luta, *Oil Drilling Halted After Row*, http://www.nation.co.ke/news/Tullow-halts-drilling-over-job-protests-/1056-2049540-cfwtd3/index.html (visited 30 July, 2016).
[164] Ibid.
[165] Ibid.
[166] Ibid.
[167] Ibid.
[168] Eyene Okpanachi and Nathan Andrews, 'Preventing the Oil "Resource Curse" in Ghana: Lessons From Nigeria' (2012) World Futures, Volume 68, Number 6, 442.

oil enclave economy that employs just about 1% of the country's workforce.[169]

To avoid these economic problems, the leadership in Kenya should ensure the diversification of the economy despite the discovery of oil and gas in areas such as the Lokichar basin. Overreliance on oil revenues would cause severe problems during boom bust cycles and the inevitable violent fluctuations in the prices of oil. This means that sectors such as agriculture should continue to be strengthened despite the discovery of oil as they would ensure sustainable growth in periods where oil revenues are low. The oil revenues should also be utilised to develop infrastructure and increase job creation.

The discovery of oil and gas could lead to greater development of the marginalized county of Turkana, but its susceptibility to the resource curse should not be ignored. The paradox of plenty can hinder both economic and political development in the region. These tell tale signs at this initial exploration stage are indicative of greater problems in the future. There is a need to curb the escalating tensions both locally and internationally, there should be checks and balances to eradicate corruption, institutions should be strengthened, the benefits question must be addressed and the diversification of the economy is necessary. These may not be the remedies to exorcise the resource curse in a country, but they are positive steps in the direction of sustainable economic growth and political development. The management of these resources both economically and politically will decide Kenya's fate-success or otherwise - in its journey to become a major hub of oil and gas.

5.0 Conclusion

There is a general consensus that countries rich is oil tend to remain poor, a phenomenon commonly referred to as the paradox of plenty or the resource curse. This affects the extractive industries of countries rich in oil, gas and mining leading to poor economic development and political instability in some of these regions. Contrary to expectation, the wealth found in these countries leads to adverse effects instead of sustainable and inclusive growth. This means that the presence of resource wealth in a

[169] Ibid.

country of itself is not enough to lead to development. Therefore, while the discovery of oil in Turkana can lead to economic benefits and general improvement of this county, the region remains susceptible to falling prey to the resource curse. The oil find can lead to devastating economic and political effects instead of the sustainable and inclusive growth that is hoped for.

One of the key roles of the state is to ensure good governance and eradicate corruption. Countries with good governance have a better chance of practicing transparency and experiencing low corruption.[170] An Open Society Institute of Southern Africa study on resource-rich Sub-Saharan Africa countries such as the Democratic Republic of Congo, Malawi, Tanzania, and Zambia found that mineral-rich countries in Africa are not benefiting enough from the minerals due to poor governance. [171] Additionally, good governance in resource-rich countries is essential to avoid the resource curse.[172]

Here, the institutional and rentier state theories ring true in that whenever the State has well functioning institutions and good governance, then the exploitation of resources can result in sustainable growth. This also leads to the eradication of corruption in the exploitation and the utilisation of the resources. However, where there is poor governance and weak institutions, the resource curse prevails in boom-bust cycles and the country can fall into political instability.

Transparency also means that a concerted effort is needed from all key stakeholders to manage the unrealistically high expectations of local communities with regard to employment and business opportunities as well as compensation related to oil activities and impacts.[173] It should be made clear that the oil sector is a capital-intensive industry, with limited low-skilled job opportunities, except during the short construction phase.[174] Government has an important role to play in managing community

[170] Meaza Zerihun Demissie, 'The Natural Resource Curse in Sub-Saharan Africa: Transparency and International Initiatives' (2014) Dissertations, Paper 6, 21.
[171] Ibid.
[172] Ibid.
[173] Michael Bliss, Oil Exploration in Kenya: Success Requires Consultation. Assessment of Community Perceptions of Oil Exploration in Turkana County, Kenya, (2015) Cordaid, 40.
[174] Ibid.

expectations and creating a conducive business environment that allows the private sector to train and hire local staff and invest in local businesses.[175] Moreover, it is the government's responsibility to invest in basic social services - including not only health, education, and water and sanitation, but also road infrastructure and electricity - that allow local communities to lead a healthy, productive life and contribute to a thriving local economy.[176]
There is also a need for the State to have proper regulatory and legal frameworks in place to govern the oil and gas sector in order to ensure that there is proper management and utilisation of the resources, good mechanisms for benefits sharing and overall increased economic growth. If the objectives of devolution in the new Constitution are fulfilled and political power and economic resources shift from the centre to county level, particularly in restless peripheral regions such as Turkana, then conflicts over scarce resources can be mitigated.[177]
The regulatory environment for the oil industry in Kenya is in flux.[178] New laws will encourage investment where there is a lack of regulation, but on the other hand such laws can increase the costs of doing business.[179] Since the political and regulatory environment in Kenya is intertwined, the government ought to exploit new rules and regulations to advance political and economic goals.[180] Once production does begin, and petrodollars flow into government coffers, oil revenue sharing will become a fixture of Kenya's often-divisive politics.[181] There is a need for sound economic and legal policies to be advanced to ensure sustainable and inclusive growth.
The continent of Africa is one of economic paradox: Abundant natural resources lie within many of the states, yet despite their mineral wealth, these same states exhibit low levels of development and a poor standard of

[175] Ibid.
[176] Ibid.
[177] Ibid.
[178] Luke Patey, 'Kenya: An African Oil Upstart in Transition,' Danish Institute for International Studies and Research Associate (2014), 4.
[179] Ibid.
[180] Ibid.
[181] Ibid.

living.[182] Resources that seemingly should benefit African states have instead been the impetus for their stagnant development.[183] There is little doubt that Africa's oil and gas producers epitomize the resource curse phenomenon-a counter-intuitive, inverse association between economic growth and endowment with natural resources.[184] Resource-rich countries, almost without exception, are riddled with multifarious and nefarious social, economic, and political problems. [185] Stories of extreme poverty, environmental degradation, human rights abuses, authoritarianism, civil conflicts, and wars are rife.[186]

As Kenya continues its quest to become an oil and gas hub in the Eastern Africa region, the leadership should carry out its constitutional mandate to effectively utilise and manage these resources. The leadership ought to play its role in ensuring that Kenya avoids the resource curse and that the oil and gas discoveries lead to sustainable growth. This could be done through good governance, enacting adequate laws and policies for the oil and gas sector, employing efforts to counter corruption and ethnic divisions and policies of transparency in the exploitation and utilisation process as well as benefits sharing. Once the vulnerability to falling prey to the resource curse is acknowledged, proper measures can be put in place to ensure that the oil discovery leads to the economic benefits and improved political climate that is hoped for by the locals in Turkana County.

[182] Ehiedu E.G. Iwereibor, 'Revse the Curse: Creating a Framework to Mitigate the Resource Curse and Promote Human Rights in Mineral Extraction Industries in Africa' (2014) Emory International Law Review, Volume 28, 425.
[183] Ibid.
[184] Ibid.
[185] Ibid.
[186] Emeka Duruigbo, 'The World Bank, Multinational Oil Corporations, and the Resource Curse in Africa' (2005) University of Pennsylvania Journal of International Law, Volume 26, Number 1, 2.

Effective Management of Commercial Disputes: Opportunities for the Nairobi Centre for International Arbitration

By: ***Kariuki Muigua* & Ngararu Maina****

Abstract

Arbitral institutions play an important role in the growth and development of international arbitration the world over. They are tasked with promoting and safeguarding the discipline, both through ensuring development of sound legal framework and facilitating the practice of arbitration and other Alternative Dispute Resolution mechanisms. While international arbitration is 'international' in nature, various regional blocks have developed arbitral institutions that target particular economic areas and take care of commercial disputes in that area. While these institutions have been established under various legal regimes, they strive to maintain professional standards that correspond to the international best practices in arbitration. The authors, in this paper, critically discuss the potential of the Nairobi Centre for International Arbitration in promoting effective management of commercial disputes in Kenya and the African region as a whole. The paper offers recommendations on how to tackle the potential challenges that the Centre is likely to encounter in discharging its statutory mandate of facilitating and encouraging the conduct of international commercial arbitration in accordance with the Act, and administering domestic and international arbitrations as well as alternative dispute resolution techniques under its auspices.

1.0 Introduction

One of the key features of international and regional trade is the need for effective framework for the management of commercial disputes. This is because disputes are considered to be inevitable in the international business world.[1] Considering the transnational nature of international trade,

* Ph.D in Law, LL.B, LL.M (Env. Law, Nairobi), FCIArb (Chartered Arbitrator), Accredited Mediator, FCPSK, MKIM, Dip in Arb (UK), Advocate, Lecturer, Centre for Advanced Studies in Environmental Law and Policy (CASELAP), University of Nairobi; Chairperson, Chartered Institute of Arbitrators (Kenya Branch) 2013-2015.

national courts and legal systems in general do not appeal to the international commercial community due to the uncertainties that may come with resorting to them for commercial disputes management.[2] One of the main contentions against the use of national legal systems in international commercial disputes is that they may not be sensitive to the expectations of disputants from different national and legal backgrounds. The general international law as well may not be adequate to deal with cross-border commercial transactions.[3] While there are those who argue for a third legal order to be *lex mercatoria*,[4] international arbitration has gained popularity as the primary way through which international companies resolve their transnational problems. It is associated with advantages which include: flexibility and adaptability of procedure; the ability to customize the process; party participation; predictability; expertise of arbitrators; procedural and evidentiary advantages; finality of decisions and awards;

** LLB (Hons, Moi), PG. Dip. (KSL), LL.M Cand. (Intl. Trade & Inv. Law, UoN), Advocate, Legal Researcher. Areas of interest include International Trade and Investments Law, ADR and Conflict Management, Environmental Law and Natural Resources Law, Family Law, Human Rights and Constitutionalism.

[1] Fischer, R.D. & Haydock, R.S., 'International Commercial Disputes Drafting an Enforceable Arbitration Agreement,' *William Mitchell Law Review*, Vol. 21, Iss. 3, Art. 23, 1996, pp. 942-987 at p. 942.

[2] Manriruzzaman, A.F.M., "The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration?" *American University International Law Review*, Vol. 14, no. 3 (1999), 657-734.

[3] Fischer, R.D. & Haydock, R.S., 'International Commercial Disputes Drafting an Enforceable Arbitration Agreement,' op cit, p. 658.

[4] See Manriruzzaman, A.F.M., "The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration?" op cit. It is important to point out that this is a highly contentious issue especially with regard to its relationship with international commercial arbitration. *Lex mercatoria* is defined as an international law system applied by international merchants based on commercial rules and principles. It is noteworthy that this legal system (*Lex mercatoria*) is not enforced by any national law and is not contained in an international agreement. See Güçer, S., 'Lex Mercatoria in International Arbitration,' *Ankara bar Review*, Vol. 1, 2009, pp.30-39 at p. 34; See also Sweet, A.S., 'The new Lex Mercatoria and Transnational Governance,' *Journal of European Public Policy*, Vol. 13, No.5, August 2006, pp. 627–646.

enforceability of awards; speed and efficiency of arbitration; cost savings; privacy; and fairness and accountability.[5]

It has been observed that international commercial arbitration has been successful in recent decades among international traders as an alternative to national courts for the settlement of disputes.[6] The growth in international commercial arbitration is mainly attributed to globalization and the impracticability of traditional justice systems. However, the tremendous expansion of international commerce and the recognition of [our] global economy has also played a significant role.[7] Also important is the fact that the growth in international arbitration has seen a corresponding growth in the availability of institutions experienced in handling arbitration and other forms of ADR, providing a practical alternative to litigation.[8]

It is against this background that this paper focuses on the Nairobi Centre for International Arbitration (NCIA) and how the institution can effectively contribute to management of commercial disputes in the East African region and Africa as a whole, for increased efficiency in regional and international trade. This is because arbitral institutions are an important part of the contributing factors in growth of efficacious international arbitration which in turn facilitates deepening of international trade.

2.0 The Nairobi Centre for International Arbitration

One of the most recent international arbitral institutions in the African region is the Nairobi Centre for International Arbitration (NCIA), based in

---

[5] Fischer, R.D. & Haydock, R.S., 'International Commercial Disputes Drafting an Enforceable Arbitration Agreement,' op cit, p. 948; cf. Burton, S.J., "Combining Conciliation Arbitration of International Commercial Disputes", *Hastings International and Comparative Law Review*, 18, (July, 1995), 637.

[6] Croff, C., 'The Applicable Law in an International Commercial Arbitration: Is It Still a Conflict of Laws Problem?' *The International Lawyer*, Vol. 16, No. 4 (Fall 1982), pp. 613-645, p. 613.

[7] Fischer, R.D. & Haydock, R.S., 'International Commercial Disputes Drafting an Enforceable Arbitration Agreement,' op cit, p. 945; 947; See also Perlman, L. & Nelson, S.C., 'New Approaches to the Resolution of International Commercial Disputes,' *The International Lawyer*, Vol. 17, No. 2 (Spring 1983), pp. 215-255; See also Burstein, H., 'Arbitration of International Commercial Disputes,' *Boston College Law Review*, Vol. 6, Iss. 3, Art. 13, 1965, pp. 569-577.

[8] Fischer, R.D. & Haydock, R.S., 'International Commercial Disputes Drafting an Enforceable Arbitration Agreement,' op cit, p.947.

Nairobi, Kenya. NCIA is a regional centre for international commercial arbitration set up pursuant to the Nairobi Centre for International Arbitration Act (the Act), [9] alongside an Arbitral Court, with its headquarters in Nairobi, Kenya. The Act provides for the functions of the Centre, the Centre's administrative Board of Directors and their functions, establishment, composition and jurisdiction of the Arbitral Court, amongst others. The Centre is supposed to, inter alia: promote, facilitate and encourage the conduct of international commercial arbitration in accordance with the Act; administer domestic and international arbitrations as well as alternative dispute resolution techniques under its auspices; develop rules encompassing conciliation and mediation processes; organize international conferences, seminars and training programs for arbitrators and scholars; maintain proactive co-operation with other regional and international institutions in areas relevant to achieving the Centre's objectives; provide *ad hoc* arbitration by facilitating the parties with necessary technical and administrative assistance at the behest of the parties; provide advice and assistance for the enforcement and translation of arbitral awards; provide training and accreditation for mediators and arbitrators; educate the public on arbitration as well as other alternative dispute resolution mechanisms; enter into strategic agreements with other regional and international bodies for purposes of securing technical assistance to enable the Centre achieve its objectives; and provide facilities for hearing, transcription and other technological services.[10]

The Centre has since discharged some of these functions, such as developing rules encompassing conciliation and mediation processes. [11] However, there still lies an uphill task ahead and for the Centre to effectively discharge most of its statutory functions. There are potential challenges that it will arguably have to overcome for it to secure a place among the World's most successful arbitration centres. This paper critically

[9] No. 26 of 2013, Laws of Kenya, Preamble. This Act is also binding on the Government (s. 26).

[10] S. 5, No. 26 of 2013.

[11] See Nairobi Centre for International Arbitration (Arbitration) Rules, 2015, Legal Notice No. 255, *Kenya Gazette Supplement No. 210,* 24th December, 2015; Nairobi Centre for International Arbitration (Mediation) Rules, 2015, Legal Notice No. 253, *Kenya Gazette Supplement No. 205,* 18th December, 2015.

analyses the challenges that are likely to characterize this journey to establishing Kenya as an international arbitration destination. Through highlighting the international best practices in international arbitration, the authors proffer solutions on how the Centre can help make Kenya and the East African region as a whole, the preferred destination for arbitration by the business community around the world.

3.0 Hitting the Ground Running: Key Issues in International Arbitral Institution

The Nairobi Centre for International Arbitration (NCIA) was established in the wake of increased regional arbitral institutions across the African continent and beyond, some of which have been around long enough to win the confidence of the international business community. For instance, it is recorded that the International Chamber of Commerce ("ICC") Court of Arbitration was created shortly after World War I by business people who wrestled with the practical difficulties of resolving disputes with merchants of different national backgrounds.'[12] NCIA became the second regional arbitral institution to be set up in the Eastern African region, after Kigali Centre for International Arbitration in Kigali, Rwanda. However, the competition for business extends beyond the region and indeed Africa, to such areas as the Middle East and the United Kingdom where there are a number of globally competitive arbitral institutions which have been getting much of the arbitration business from this region.[13] The established institutions include, inter alia: American Arbitration Association (AAA); International Chamber of Commerce (ICC); London Court of International Arbitration (LCIA); Cairo Regional Centre for International Commercial Arbitration (CRCICA); Kuala Lumpur Regional Centre for Arbitration (the KLRCA); Lagos Regional Centre (the RCICAL); and Permanent Court of Arbitration (PCA).[14] While it may be expected that NCIA may face challenges in the initial stages, there are key issues that ought to be

[12] Fischer, R.D. & Haydock, R.S., 'International Commercial Disputes Drafting an Enforceable Arbitration Agreement,' op cit, p. 944.

[13] Lew, J.D.M., 'Comparative International Commercial Arbitration,' p.237, [London: Kluwer Law International, 2003].

[14] See Blackaby, N., et al, *An Overview of International Arbitration*, in *Redfern & Hunter on International Arbitration*, (Oxford University Press, 2009), pp. 1-83 at pp. 59-69.

addressed to catapult the Centre to internationally accepted standards to make sure that all that remains is marketing the institution and the country as a whole. The next section, evaluates key elements from the NCIA Act as well as the NCIA institutional arbitration rules with a view to highlight the potential opportunities and pitfalls that may hinder the blossoming of the Centre.

3.1 Seat of Arbitration and Place of Hearings.

Rule 18(1) states that the parties may agree in writing on the seat of arbitration. However, unless otherwise agreed under paragraph (1), the seat of arbitration shall be Nairobi, Kenya.[15] The Arbitral Tribunal may also, on considering all the circumstances, and on giving the parties an opportunity to make written comments, determine a more appropriate seat.[16] The Rules are flexible on physical location as they give the Arbitral Tribunal the power to, with the consent of all the parties to the arbitration, meet at any geographical location it considers appropriate to hold meetings or hearings.[17] Where the Arbitral Tribunal holds a meeting or hearing in a place other than the seat of arbitration, the arbitration is to be treated as arbitration conducted at the seat of the arbitration and any award as an award made at the seat of the arbitration for all purposes.[18] Thus, the change in geographical location may only offer physical comfort and satisfy parties' aesthetic preferences rather than have any legal implications on the *lex arbitri*, that is, law of the seat of arbitration.[19]

Rule 19 of NCIA Arbitration Rules states that the law applicable to the arbitration shall be the arbitration law of the seat of arbitration, unless and to the extent that the parties have expressly agreed in writing on the application of another arbitration law and such agreement is not prohibited by the law of the arbitral seat. It has been observed that since it is the law of the seat that governs how the arbitral proceedings are to be conducted,

[15] Rule 18(2).
[16] Rule 18(3).
[17] Rule 18(4).
[18] Rule 18(5).
[19] See generally, Henderson, A., 'Lex Arbitri, Procedural Law and the Seat of Arbitration: Unravelling the Laws of the Arbitration Process,' *Singapore Academy of Law Journal*, 26, 2014, pp. 886-910.

the choice of seat can affect: whether the national courts will intervene in the arbitration; whether the subject matter of the dispute is capable of being resolved by arbitration; the ease by which an arbitral award can be challenged or appealed; and the enforceability of an arbitral award in other jurisdictions.[20]

It is, therefore, important for the NCIA to actively coordinate and facilitate, in collaboration with other lead agencies and non-State actors, the formulation of national policies, laws and plans of action on alternative dispute resolution and facilitate their implementation, enforcement, continuous review, monitoring and evaluation. This is one of its main functions as provided for by the establishing Act and it is one of the most important roles since it will help in enhancing the competitiveness of the Centre in the region. If there is a negative perception about Kenyan courts' willingness to enforce and uphold arbitral awards, then the effectiveness of NCIA would be affected. The Centre must ensure that the country remains globally attractive by way of having in place laws, policies and institutions that support ADR and arbitration in particular. In the Kenyan case of *Nyutu Agrovet Limited v Airtel Networks Limited*,[21] the Court, in supporting limited role of national courts, stated as an *Obiter:* "*Our courts must therefore endeavor to remain steadfast with the rest of the international community we trade with that have embraced the international trade practices espoused in the UNICITRAL Model. If we fail to do so, we may become what Nyamu J. (as he then was) in Prof. Lawrence Gumbe & Anor –v - Hon. Mwai Kibaki & Others, High Court Misc. Application No. 1025/2004 referred to as; "A Pariah state and could be isolated internationally* (emphasis added)."

It is believed that the success of an arbitration institution is dependent on a number of factors that range from its pricing strategy to the overall quality of the legal system of the host state.[22] NCIA must therefore take up the

[20] Ashurst, 'Anatomy of an arbitration Part II: Key elements of an arbitration clause,' *International arbitration briefing*, Ashurst London, July 2013, p.2. Available at *https://www.ashurst.com/doc.aspx?id_Content=9363 [Accessed on 4/03/2016].*

[21] Nyutu Agrovet Limited V Airtel Networks Limited [2015] eKLR, Civil Appeal (Application) No 61of 2012.

[22] Gadelshina, E.R., 'What plays the key role in the success of an arbitration institution?' *Financier Worldwide Magazine*, February 2013. Available at

challenge and aggressively play its expected role of selling Kenya as the preferred destination for international arbitration. It must work with the other stakeholders to ensure that the national legal system offers support rather than a sabotaging international arbitration.

3.2 The enforcement of the award

The fact that Kenya is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention),[23] will make it easy for arbitral awards to be enforced in states that have reciprocity agreements with Kenya. This may, therefore, help in achieving certainty and predictability that is vital in international arbitration. Also noteworthy is the express provision in the East African Court of Justice Arbitration Rules, 2012 that enforcement of arbitral awards shall be in accordance with the enforcement procedures of the country in which enforcement is sought.[24]

It has been argued that "overly technical judicial review of arbitration awards would frustrate the basic purposes of arbitration: to resolve disputes speedily and to avoid the expense and delay of extended court proceedings." [25] The Kenyan Courts have demonstrated goodwill in recognizing and enforcing international arbitral awards especially under the

---

http://www.financierworldwide.com/what-plays-the-key-role-in-the-success-of-an-arbitration-institution/#.Vt_n_dA4Q7o [Accessed on 02/03/2016].

[23] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), New York, June 10, 1958 330 U.N.T.S. 38. The Convention's principal aim is that foreign and non-domestic arbitral awards will not be discriminated against and it obliges Parties to ensure such awards are recognized and generally capable of enforcement in their jurisdiction in the same way as domestic awards. An ancillary aim of the Convention is to require courts of Parties to give full effect to arbitration agreements by requiring courts to deny the parties access to court in contravention of their agreement to refer the matter to an arbitral tribunal. (United Nations Commission on International Trade Law, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention"), available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html [Accessed on 03/03/2016].

[24] Rule 36(3).

[25] Sweeney, J.C., 'Judicial Review of Arbitral Proceedings,' *Fordham International Law Journal*, Vol. 5, Issue 2, Art. 3, 1981, pp. 253-276 at 276.

New York Convention. In the Kenyan case of *Nyutu Agrovet Limited V Airtel Networks Limited*,[26] the Court affirmed its intention to support arbitration by holding, inter alia, '*no court should interfere in any arbitral process except as in the manner specifically agreed upon by the parties or in particular instances stipulated by the Arbitration Act. The principle of finality of arbitral awards as enshrined in the UNCITRAL Model law that had been adopted by many nations had to be respected. The parties herein had agreed that the Arbitrators decision shall be final and binding upon each of them. Since they did not agree that any appeal would lie, the appeal by the appellant was an unjustifiable attempt to wriggle out of an agreement freely entered into and had to be rejected* (emphasis added).' This denotes a positive step and a bright future for parties that choose to enforce arbitral awards in Kenya.

3.3 Language

Language is an important aspect of the process and it can potentially affect the proceedings in many circumstances, leading in most cases to an inefficient arbitration.[27] As such, it has been observed that parties should not only choose the language, but also they should do it with due consideration. This is because choice of the "wrong" language may imply the need to resort to translation and interpretation for most of the conduct of the proceedings and this may, on one hand affect the costs and the duration of the proceedings and, on the other, may not be very accurate.[28]

Rule 20(1) of the NCIA Arbitration Rules states that the initial language of the arbitration shall be the language of the arbitration agreement, unless the parties have agreed in writing otherwise. The Rules also provide that in the event that the arbitration agreement is written in more than one language, the Centre may, unless the arbitration agreement provides that the arbitration proceedings shall be conducted in more than one language, decide which of those languages shall be the initial language of the

[26] [2015] eKLR, Civil Appeal (Application) 61 of 2012.
[27] Faienza, V., 'The Choice of the Language of the Proceedings: An Underestimated Aspect of the Arbitration?' *Kluwer Arbitration Blog*, available at http://kluwerarbitrationblog.com/2014/05/06/the-choice-of-the-language-of-the-proceedings-an-underestimated-aspect-of-the-arbitration/ *[Accessed on 4/03/2016].*
[28] Ibid.

arbitration.[29] The Rules further provide that upon the formation of the Arbitral Tribunal and unless the parties have agreed upon the language of the arbitration, the Arbitral Tribunal shall decide upon the language of the arbitration, after giving the parties an opportunity to make written comments and after taking into account— the initial language of the arbitration; and any other matter it may consider appropriate in all the circumstances of the case.[30]

Rule 20 (5) provides that if a document is expressed in a language other than the language of the arbitration and no translation of such document is submitted by the party relying upon the document, the Arbitral Tribunal or, if the Arbitral Tribunal has not been formed, the Centre may direct that party to submit a translation in a form to be determined by the Arbitral Tribunal or the Centre, as the case may be.

Art. 17 (1) UNCITRAL Arbitration Rules provides that the arbitral tribunal shall determine the language of the arbitration 'promptly after its appointment'. The *Arbitration Rules of the Singapore International Arbitration Centre*[31] also provide that where unless the parties have agreed otherwise, the Tribunal is to determine the language to be used in the proceedings. There are those who argue that in view of the extreme significance of the language issue in international commercial arbitration, where the parties usually come from different countries and speak different languages, this rule should generally be followed in international arbitration, even if the proceedings are not conducted under the UNCITRAL Arbitration Rules.[32] It has rightly been observed that party autonomy is particularly important here since the choice of the language affects the parties' position in the proceedings and the expediency and costs of the arbitration.[33] If the parties have reached an agreement on the language to be used in the arbitration, due to the principle of the priority of party autonomy, the tribunal has to accept the

[29] Rule 20(3), *Nairobi Centre for International Arbitration (Arbitration) Rules*, 2015.
[30] Rule 20(4).
[31] Arbitration Rules of the Singapore International Arbitration Centre, SIAC Rules (5th Edition, 1 April 2013), Rule 19.
[32] Ibid.
[33] Principle No. XIII.3.4 - Language of the arbitration: "Commentary to Trans-Lex Principle, available at http://www.trans-lex.org/969050" [Accessed on 26/02/2016].

determination by the parties.[34] NCIA may, therefore, need to have in its list, arbitrators who are knowledgeable in a number of major languages. It is to be appreciated that translations may not always capture the original intent of the parties. Arbitration proceedings may also have on board parties, as witnesses, who were not parties to the original contract. Understanding more languages may help the arbitrator gather important information directly from the witness during proceedings as opposed to translated proceedings.

3.4 Choice of Rules of Procedure

Rule 3(1) of NCIA Arbitration Rules provides that the Rules shall apply to arbitrations where any agreement, submission or reference, whether entered into before or after a dispute has arisen, provides in writing for arbitration under the Nairobi Centre for International Arbitration Rules or such amended Rules as the Centre may have adopted to take effect before the commencement of the arbitration. It has been noted that if institutional arbitration is chosen, it is usual for the selected institution's rules to govern the conduct of the arbitration.[35] If ad hoc arbitration is chosen, the parties may choose to draft their own rules or, as is more common, to use other rules, such as the UNCITRAL Rules.[36]

In recognition of this, the NCIA Act provides that subject to any other rules of procedure by the Court, the Arbitration Rules of the United Nations Commission on International Trade Law, with necessary modifications, shall apply.[37] Further, Rule 3(3) states that nothing in the Rules shall prevent parties to a dispute or arbitration agreement from naming the Centre as the appointing authority without submitting the arbitration to the provisions of these Rules. This, therefore, ensures that flexibility and autonomy of parties is retained especially where the Centre is expected to provide *ad hoc* arbitration by facilitating the parties with necessary technical and administrative assistance at the behest of the parties, as provided in its mandate. It has been observed that the adaptability and flexibility parties

[34] Ibid.
[35] Ashurst, 'Anatomy of an arbitration Part II: Key elements of an arbitration clause,' *International arbitration briefing*, Ashurst London, July 2013, p. 1.
[36] Ibid.
[37] S. 23, No. 26 of 2013, Laws of Kenya.

have in choosing or shaping their own arbitral process is one of arbitration's strengths.[38] It is important to guarantee both national and international parties that their autonomy and flexibility in the process, being one of the key advantages of international arbitration, would not be lost should they settle on NCIA as their preferred choice for institutional arbitration or even appointing authority.

3.5 Confidentiality

Rule 34(1) of the NCIA Arbitration Rules states that unless the parties expressly agree in writing to the contrary, the parties must undertake to keep confidential all awards in their arbitration, as well as all materials in the proceedings created for the purpose of the arbitration and all other documents produced by another party in the proceedings not in the public domain, except where disclosure may be required of a party by legal duty, to protect or pursue a legal right or to enforce or challenge an award in legal proceedings before a judicial authority. Further, the deliberations of the Arbitral Tribunal are confidential to its members, except where disclosure of an arbitrator's refusal to participate in the arbitration is required of the other members of the Arbitral Tribunal under rules 12, 14 and 30.[39] The Centre also commits also not to publish an award or any part of an award without the prior written consent of all parties and the Arbitral Tribunal.[40]

Safeguarding the confidentiality of the arbitration process and outcome is important for the international arbitration parties who may wish to maintain business interests and secrets. It is however noteworthy that confidentiality may be lost in case of appeal to national courts.

3.6 The Role of National Courts during the Arbitration Proceedings

The NCIA Act provides for the establishment of a Court to be known as the Arbitral Court, to be presided over by a President; two deputy presidents; fifteen other members all of whom shall be leading international

[38] Fischer, R.D. & Haydock, R.S, "International Commercial Disputes Drafting an Enforceable Arbitration Agreement," *William Mitchell Law Review*, op cit. at p. 948.
[39] Rule 34(2).
[40] Rule 34(3).

arbitrators; and the Registrar.[41] The Court is to have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with the Act or any other written law.[42] Further, a decision of the Court in respect of a matter referred to it is to be final.[43] Rule 33 of the NCIA Arbitration Rules provides that the decisions of the Centre with respect to all matters relating to the arbitration shall be conclusive and binding upon the parties and the Arbitral Tribunal.

The NCIA Act is not clear on the role of the Arbitral Court and its relationship with national courts as far as jurisdiction in arbitration matters is concerned. While this may be attractive as far as arbitral independence is concerned, it is also likely to cause confusion especially when considered in light of Kenya's Arbitration Act, 1995[44] which provides for the role of the national courts in arbitration proceedings. The Arbitration Act provides for limited role of the court in arbitration as stated as follows: '*Except as provided in this Act, no court shall intervene in matters governed by this Act* (emphasis added).'[45]

The role of the national courts as provided in the Arbitration Act, 1995 is limited to: appointment of a tribunal as provided for under section 12 of the Arbitration Act, 1995; Stay of legal proceedings as provided for under section 6 of the Act; power of the High Court to grant interim orders for the maintaining of the status quo of the subject matter of the arbitration pending the determination of the dispute through arbitration (s.7); application by a party to challenge arbitrator or arbitral tribunal (s.14); assistance in taking evidence for use in arbitration (s.28); and setting aside of an arbitral award (s.35). The legal provisions on intervention by the two courts (national courts and arbitral court) are mainly found in the Arbitration Act, 1995 and the NCIA Arbitration Rules. The role of national court as provided for in the Arbitration Act, however, is divided between the Arbitral tribunal and the arbitral court in the NCIA Act.

---

[41] S. 21.
[42] S. 22(1).
[43] S. 22(2).
[44] Act No. 4 of 1995, Laws of Kenya.
[45] S. 10, Act No. 4 of 1995, Laws of Kenya.

Most of the foregoing instances where national courts can intervene fall within the jurisdiction of the arbitral tribunal in NCIA Act.[46] While the NCIA Act is silent on the specific role of the Arbitral Court, the NCIA Arbitration Rules provides for a number of instances where the jurisdiction of the court may be invoked. Rule 11(3) provides that a party who intends to remove an arbitrator shall, within fifteen days of the formation of the Arbitral Tribunal or on becoming aware of any circumstances referred to in paragraph (1) and (2)[47], send a written statement of the reasons for requiring the removal, to the Arbitral Court, the Centre, the Arbitral Tribunal and all other parties. The Arbitral Court is to make its decision on the removal of an arbitrator within fifteen days of receipt of the written statement, unless—the arbitrator resigns from office; or all other parties agree to the removal of the arbitrator.[48]

While the creation of an independent arbitral court and an arbitral tribunal with expanded mandate is laudable as a positive step towards encouraging international arbitration in Kenya, there is the potential of dissatisfied parties, especially of Kenyan nationality, challenging the same on grounds of ousted jurisdiction of national courts. While international commercial arbitration mostly takes place in a country that is neutral, it may not be uncommon to have nationals taking part. The most likely challenge would be where an arbitration is international by virtue of the subject matter being in a foreign country, while both parties may be locals. In the Tanzanian case of *Dowans Holdings SA (Costa Rica) and Dowans Tanzania Limited v. Tanzania Electric Supply Company Limited (Tanzania)*,[49] it was held that the intervention by the national courts is automatic, regardless of any clause in the arbitration agreement, which purports to oust or waive the jurisdiction of courts. Such a position by Kenyan courts is likely to interfere with the

[46] See Rule 27 of NCIA Arbitration Rules on Interim and conservatory measures.

[47] Rule 11. (1) A party may require the removal of an arbitrator if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence. (2) A party may remove an arbitrator it has nominated, or in whose appointment it has participated, only for reasons of which the party becomes aware after the appointment has been made.

[48] Rule 11(6).

[49] Dowans Holding SA & Anor v Tanzania Electric Supply Co Ltd [2011] EWHC 1957
(Comm), Case No: 2010 Folio 1539.

functions of NCIA. From the NCIA Act, it appears that the national courts shall only come in during recognition and enforcement of the arbitral award, although this is likely to create confusion especially in case of dissatisfied party (ies).

It is, therefore, important for the NCIA to trend this ground carefully so as to safeguard its independence from domestic interference. This is especially important if the Centre is to compete with other regional independent institutions. For instance, the East African Court of Justice Arbitration Rules, 2012 provide under Rule 36 for finality and enforceability of Award. It states that subject to Rules 33[50], 34[51] and 35[52], the arbitral award shall be final. It also states that by submitting the dispute to arbitration under Article 32 of the Treaty, the parties shall be deemed to have undertaken to implement the resulting award without delay. It is noteworthy that the East African Court of Justice is independent of any national laws as far as its activities are concerned, and the only instance where national courts may come in would be during recognition and enforcement of its awards, as foreign or international arbitral awards. There are those who believe that the tribunal can handle contested issues of arbitral procedure and the courts of the seat be available for supportive and supervisory action if the parties require, in accordance with the lex arbitri.[53] Others argue that the typical statute governing arbitration provides for cooperation between the judicial and arbitral processes, limits judicial supervision of awards, and perhaps most importantly divests courts of the jurisdiction to hear matters submitted to arbitration in recognition of the legitimate exercise of contractual rights between parties.'[54]

NCIA must scrupulously maintain a reputation of independence and non-ambiguity in the guiding laws and regulations. The possible confusion in the

[50] Rule 33: Interpretation of the Award.
[51] Rule 34: Correction of the Award.
[52] Rule 35: Additional Award and Review of the Award.
[53] Henderson, A., 'Lex Arbitri, Procedural Law and the Seat of Arbitration: Unravelling the Laws of the Arbitration Process,' op cit, p. 910; See also Lew, J.D., Does National Court Involvement Undermine the International Arbitration Process? *AM. U. INT'L L. REV.,* Vol. 24, 2009, pp. 489-537.
[54] Fischer, R.D. & Haydock, R.S., 'International Commercial Disputes Drafting an Enforceable Arbitration Agreement,' op cit, p.947.

role of court may therefore need to be clarified so that it will be clear to the parties, from the onset, what they are submitting to.

3.7 NCIA and ADR Mechanisms

The NCIA Act provides that nothing in the Act may be construed as precluding the Court from adopting and implementing, on its own motion or at the request of the parties, any other appropriate means of dispute resolution, including internal methods, conciliation, mediation and traditional dispute resolution mechanisms. [55] NCIA may benefit from teaming up with other local and regional institutions that specialize in ADR mechanisms, for cooperation in training and building capacity in the region. This is important if the Centre is to achieve some of its main functions: to provide training and accreditation for mediators and arbitrators; to educate the public on arbitration as well as other alternative dispute resolution mechanisms; and to enter into strategic agreements with other regional and international bodies for purposes of securing technical assistance to enable the Centre achieve its objectives.[56]

Building capacity in all the major ADR mechanisms is important to ensure that those who approach the Centre in need of other services other arbitration have confidence in the institutional capacity. There are those who believe that parties to international contracts often fail to face squarely the issue of whether they really want arbitration rather than either court litigation or nonbinding procedures such as conciliation and mediation.[57] This may be attributed to an ambiguous arbitration agreement or clause or the nature of the subject matter, especially in light of arbitrability.[58] It is also possible to combine conciliation and international arbitration where circumstances so demand. [59] Indeed, the International Chamber of

[55] S. 24.

[56] S. 5, No. 26 of 2013.

[57] Park, W.W., 'Arbitration of International Contract Disputes,' *The Business Lawyer*, Vol. 39, No. 4 (August 1984), pp. 1783-1799 at p. 1783.

[58] See Curtin, K.M., 'Redefining Public Policy in International Arbitration of Mandatory National Laws,' *Defense Counsel Journal*, April, 1997, pp. 271-284 at p. 271.

[59] See van den Berg, A.J. (ed), *New Horizons in International Commercial Arbitration and Beyond*, (Kluwer Law International, 2005), pp. 480-481; Schneider, M.E., 'Combining Arbitration with Conciliation,' available at

Commerce Court of Arbitration provides for optional conciliation in its rules.[60] Even if the NCIA Arbitration Rules do not have such express provisions on conciliation, it can still exploit the provisions of NCIA Act which require the Centre and Court to adopt and implement ADR mechanisms.[61]

It is also commendable that the institution already has in place the Nairobi Centre for International Arbitration (Mediation) Rules, 2015.[62] The Mediation Rules are to apply to both domestic and international mediation proceedings.[63] Thus, parties to a domestic or international commercial contract may choose to engage in mediation to resolve their dispute under NCIA. It is also possible to employ both mediation and arbitration in a contract as conflict management mechanisms, since the rules do not restrict parties from doing so. Under the doctrine of party autonomy, it is possible to exploit the advantages of both mechanisms where necessary. NCIA should take advantage of this possibility to afford parties the best option to their dispute. It may therefore be important to ensure that NCIA is well equipped in offering services in the various ADR mechanisms.

4.0 Opportunities for Nairobi Centre for International Arbitration

It has convincingly been argued that arbitration involving parties from developing countries will only work effectively if it is tailored to satisfy the needs and legitimate expectations of all parties.[64] The belief comes from the perception that many developing countries view existing forms of international arbitration as mechanisms which primarily serve the interests of Western entities. Thus, unless the developing countries are reasonably persuaded that arbitration will fairly protect their interests, its potential will remain unrealized in the developing world. NCIA, in collaboration with other regional institutions can take up the challenge and offer tailor made

---

http://www.nigerianlawguru.com/articles/arbitration/COMBINING%20ARBITRATION%20WITH%20CONCILIATION.pdf [Accessed on 10/03/2016].

[60] 'Rules for the ICC Court of Arbitration,' *Berkeley Journal of International Law*, Vol. 4, Issue 2, Article 17, pp. 422-432 at pp. 422-424.

[61] S. 24, S. 26 of 2013.

[62] Legal Notice No. 253, *Kenya Gazette Supplement No. 205,* 18th December, 2015.

[63] Ibid, Rules 4 & 5.

[64] Mclaughlin, J.T., 'Arbitration and Developing Countries,' *The International Lawyer*, Vol. 13, No. 2 (Spring 1979), pp. 211-232 at p. 231.

services for the regional and international clientele. It is arguable that they are in a better position to understand and address the interests and expectations of the locals, without necessarily appearing like they are favouring them in the process.

The familiarity with the cultural setting may boost the chances of acceptance or recognition of award by parties thus saving on time. It may also inform parties' choice of ADR mechanism to be employed, and NCIA Act contemplates such a situation. It has been argued that culture can profoundly affect a dispute resolution process. This is because far from being merely a function of practical and procedural efficiency contemplated by disputing parties, the choice of a dispute resolution mechanism -- whether mediation, arbitration or litigation -- within the forum of a certain society is strongly influenced by the peculiarities of tradition, culture, and legal evolution of that society.[65] Thus, it is possible to argue that NCIA is likely to get most of the clients in need of other ADR services, apart from international arbitration, from the local business community. They may take advantage of the proximity (thus saving on costs), and the feeling that the experts in NCIA are more likely to appreciate the nature of their dispute in local context, either out of having lived around the same area or having interacted with the local circumstances.[66]

Maintaining international standards is key if NCIA is to rise above the perceptions that typify the legal institutions in this region and country,

---

[65] De Vera, C., 'Arbitrating Harmony: 'Med-Arb' and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China,' *Columbia Journal of Asian Law*, 18, 2004, p. 149. Cf. Barkett , J.M. & Paulsson, J., *The Myth of Culture Clash in International Commercial Arbitration*, *FIU Law Review*, Vol. 5, No.1 (2009).

[66] See Kohler, G.K. & Kun, F., 'Integrating Mediation into Arbitration: Why It Works in China,' *Journal of International Arbitration*, Vol. 25, No. 4, 2008, 479–492; See also Goldsmith, J.C., et al, *ADR in Business: Practice and Issues Across Countries and Cultures, Volume 2*, (Kluwer Law International, 2011); See also LeBaron, M., "Culture and Conflict." *Beyond Intractability*. Eds. Guy Burgess and Heidi Burgess. Conflict Information Consortium, University of Colorado, Boulder. Posted: July 2003 <http://www.beyondintractability.org/essay/culture-conflict>. [Accessed on *[Accessed on 10/03/2016]; 'International Construction Arbitration: When Cultures Collide,' Trust the Leaders, Issue 1, Fall 2002. Available at http://www.sgrlaw.com/resources/trust_the_leaders/leaders_issues/ttl1/594/* [Accessed on [Accessed on 10/03/2016].

namely, inter alia: unprofessionalism, corruption, institutional incapacity and lack of goodwill. While it is expected that the Centre will receive financial and technical support from the State and its machinery, this should not interfere with its functioning or discharge of its statutory duties. It should retain its independence as far as neutrality, predictability, professionalism and competitiveness are concerned. Foreigners as well as locals should be able to approach the institution for arbitration services without any reservations.[67]

One of the ways that NCIA can establish and maintain international standards is through forging strategic partnerships with other players in the sector-national, regional and international. Locally, it can liaise with such institutions as the Chartered institute of Arbitrators (Kenya branch) (CIArb-K), Centre for Alternative Dispute Resolution (CADRE), Kenya National Chamber of Commerce and Industry, Strathmore Dispute Resolution Centre (SDRC); and the Universities. While institutions such as CIArb-K, CADRE, SDRC and Universities may not be institutional arbitrations in the strict sense of the word, they can play a major role, through collaborative activities, in facilitating training, accreditation and making available a pool of competent practitioners. They can also be useful in creating public awareness on ADR mechanisms and international arbitration. This is besides collaboration with other regional and international arbitral institutions such as the Kigali International Arbitration Centre, Mauritius International Arbitration Centre (MIAC-LCIA), Cairo Regional Centre for International Commercial Arbitration (CRCICA); Kuala Lumpur Regional Centre for Arbitration (the KLRCA); and Lagos Regional Centre (the RCICAL) amongst others. Such collaborations and cooperation can go a long way in boosting NCIA's profile as well as the other institutions'.

The relationship between the national courts and the arbitral Court established under NCIA Act, also ought to be clearly defined so as to promote predictability and confidence in the Centre. The international

[67] See Kirby, M., 'International Commercial Arbitration and Domestic Legal Culture,' Australian Centre for International Commercial Arbitration Conference, Melbourne, 4 December 2009, p. 2. Available at http://www.michaelkirby.com.au/images/stories/speeches/2000s/2009+/2419.Speech_Acica_Conf.Melbourne_December_2009.pdf [Accessed on 10/03/2016].

business community may only trust the institution where they are assured that national courts will not unnecessarily interfere with the process. The Centre's administrative Board ought to ensure that the Centre will not be associated with the perceived court inefficiencies as this may adversely affect its development and growth. The Centre should seek to paint a better image, one associated with efficiency, neutrality and general professionalism.

5.0 Conclusion

Kenya is hoping to become a middle-level income economy by the year 2030 and one of the ways through which it can achieve this is increased regional and international trade.[68] As already pointed out, this often comes with commercial disputes which must be dealt with if trade is to thrive. As such, it is important for the country to have in place effective conflict management mechanisms. This presents NCIA a good opportunity to establish itself and the country as the preferred destination for international arbitration. With support from the relevant stakeholders such as the Government, Judiciary, practitioners, amongst others, NCIA has the potential to achieve all its statutory obligations and even surpass the expectations to join the world's most respected international arbitral institutions. NCIA has the potential to become the one stop shop for the effective management of commercial disputes.

[68] Vision 2030, Republic of Kenya, (Government Printer, Nairobi, 2007). *Vision 2030* is based on three main pillars: economic, social, and political.

References

1. Arbitration Act, Act No. 4 of 1995, Laws of Kenya.
2. Ashurst, 'Anatomy of an arbitration Part II: Key elements of an arbitration clause,' *International arbitration briefing*, Ashurst London, July 2013.
3. Available at *https://www.ashurst.com/doc.aspx?id_Content=9363 [Accessed on 4/03/2016].*
4. Barkett, J.M. & Paulsson, J., *The Myth of Culture Clash in International Commercial Arbitration*, *FIU Law Review*, Vol. 5, No.1 (2009).
5. Blackaby, N., et al, *An Overview of International Arbitration*, in *Redfern & Hunter on International Arbitration*, (Oxford University Press, 2009), pp. 1-83.
6. Burstein, H., 'Arbitration of International Commercial Disputes,' *Boston College Law Review*, Vol. 6, Iss. 3, Art. 13, 1965, pp. 569-577.
7. Burton, S.J., "Combining Conciliation Arbitration of International Commercial Disputes", *Hastings International and Comparative Law Review*, 18, (July, 1995), 637.
8. Croff, C., 'The Applicable Law in an International Commercial Arbitration: Is It Still a Conflict of Laws Problem?' *The International Lawyer*, Vol. 16, No. 4 (Fall 1982), pp. 613-645.
9. Curtin, K.M., 'Redefining Public Policy in International Arbitration of Mandatory National Laws,' *Defense Counsel Journal*, April, 1997, pp. 271-284.
10. De Vera, C., 'Arbitrating Harmony: 'Med-Arb' and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China,' *Columbia Journal of Asian Law*, 18, 2004, p. 149.
11. Dowans Holding SA & Anor v Tanzania Electric Supply Co Ltd [2011] EWHC 1957 (Comm), Case No: 2010 Folio 1539.
12. Faienza, V., 'The Choice of the Language of the Proceedings: An Underestimated Aspect of the Arbitration?' Kluwer Arbitration Blog.
13. Available at http://kluwerarbitrationblog.com/2014/05/06/the-choice-of-the-
14. language-of-the-proceedings-an-underestimated-aspect-of-the-arbitration/[Accessed on 4/03/2016].
15. Fischer, R.D. & Haydock, R.S., 'International Commercial Disputes Drafting an Enforceable Arbitration Agreement,' *William Mitchell Law Review*, Vol. 21, Iss. 3, Art. 23, 1996, pp. 942-987.
16. Gadelshina, E.R., 'What plays the key role in the success of an arbitration institution?' *Financier Worldwide Magazine*, February 2013. Available at http://www.financierworldwide.com/what-plays-the-key-role-in-the-success-of-an-arbitration-institution/#.Vt_n_dA4Q7o [Accessed on 02/03/2016].
17. Goldsmith, J.C., et al, *ADR in Business: Practice and Issues across Countries and Cultures, Volume 2*, (Kluwer Law International, 2011).
18. Güçer, S., 'Lex Mercatoria in International Arbitration,' *Ankara bar Review*, Vol. 1, 2009, pp.30-39.
19. Henderson, A., 'Lex Arbitri, Procedural Law and the Seat of Arbitration: Unravelling the Laws of the Arbitration Process,' *Singapore Academy of Law Journal*, 26, 2014, pp. 886-910.

20. 'International Construction Arbitration: When Cultures Collide,' *Trust the Leaders*, Issue 1, Fall 2002. Available at http://www.sgrlaw.com/resources/trust_the_leaders/leaders_issues/ttl1/594/ [Accessed on [Accessed on 10/03/2016].
21. Kohler, G.K. & Kun, F., 'Integrating Mediation into Arbitration: Why It Works in China,' *Journal of International Arbitration*, Vol. 25, No. 4, 2008, 479–492.
22. *[Accessed on 4/03/2016].*
23. LeBaron, M., "Culture and Conflict." *Beyond Intractability*. Eds. Guy Burgess and Heidi Burgess. Conflict Information Consortium, University of Colorado, Boulder. Posted: July 2003 <http://www.beyondintractability.org/essay/culture-conflict>. [Accessed on [Accessed on 10/03/2016].
24. Lew, J.D.M., 'Comparative International Commercial Arbitration,' p.237, [London: Kluwer Law International, 2003].
25. Lew, J.D., Does National Court Involvement Undermine the International Arbitration Process? *AM. U. INT'L L. REV.,* Vol. 24, 2009, pp. 489-537.
26. Manriruzzaman, A.F.M., "The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration?" *American University International Law Review*, Vol. 14, no. 3 (1999), 657-734.
27. Mclaughlin, J.T., 'Arbitration and Developing Countries,' *The International Lawyer*, Vol. 13, No. 2 (Spring 1979), pp. 211-232.
28. Nairobi Centre for International Arbitration, No. 26 of 2013, Laws of Kenya.
29. Nairobi Centre for International Arbitration (Arbitration) Rules, 2015, Legal Notice No. 255, *Kenya Gazette Supplement No. 210,* 24th December, 2015.
30. Nairobi Centre for International Arbitration (Mediation) Rules, 2015, Legal Notice No. 253, *Kenya Gazette Supplement No. 205,* 18th December, 2015.
31. Nyutu Agrovet Limited V Airtel Networks Limited [2015] eKLR, Civil Appeal (Application) No 61of 2012.
32. Park, W.W., 'Arbitration of International Contract Disputes,' *The Business Lawyer*, Vol. 39, No. 4 (August 1984), pp. 1783-1799.
33. Perlman, L. & Nelson, S.C., 'New Approaches to the Resolution of International Commercial Disputes,' *The International Lawyer*, Vol. 17, No. 2 (Spring 1983), pp. 215-255.
34. Principle No. XIII.3.4 - Language of the arbitration: "Commentary to Trans-Lex Principle, available at http://www.trans-lex.org/969050" [Accessed on 26/02/2016].
35. 'Rules for the ICC Court of Arbitration,' *Berkeley Journal of International Law*, Vol. 4, Issue 2, Article 17, pp. 422-432.
36. Schneider, M.E., 'Combining Arbitration with Conciliation,' available at http://www.nigerianlawguru.com/articles/arbitration/COMBINING%20ARBITRATION%20WITH%20CONCILIATION.pdf [Accessed on 10/03/2016].
37. Sweeney, J.C., 'Judicial Review of Arbitral Proceedings,' *Fordham International Law Journal*, Vol. 5, Issue 2, Art. 3, 1981, pp. 253-276.

38. Sweet, A.S., 'The new Lex Mercatoria and Transnational Governance,' *Journal of European Public Policy*, Vol. 13, No.5, August 2006, pp. 627–646.
39. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), New York, June 10, 1958 330 U.N.T.S. 38.
40. United Nations Commission on International Trade Law, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention"), available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html ,.[Accessed on 03/03/2016].
41. Van den Berg, A.J. (ed, *New Horizons in International Commercial Arbitration and Beyond*, (Kluwer Law International, 2005), pp. 480-481.
42. Vision 2030, Republic of Kenya, (Government Printer, Nairobi, 2007).

Do We Need to Regulate Online Dispute Resolution in Kenya?

By: ***Alvin Gachie***[1]

Abstract

This paper has discussed responses to the question of whether there is a need to regulate Online Dispute Resolution in Kenya. The first section introduces the concept of Online Dispute Resolution (ODR). The second section gives a background to the study on which this paper is based, giving the reader an understanding of the research on which this paper is grounded. The third section discusses the regulation-led approach in the United Kingdom, where the European Parliament has taken the lead in regulating dispute resolution mechanisms. It also explains the opposite approach, referred to in this paper as the market-led approach, characterised in the approach in the USA, where there is little state involvement in this private dispute resolution mechanism. This paper finds that law may be beneficial to regulating technology due to consumer protection concerns. For Kenya, the regulation-led approach is preferred to the market-led approach. This leads to a suggestion that Kenya should prioritise provision for Online Dispute Resolution in the legal framework.

1.0 Introduction

This paper discusses whether there is a need for a new legal framework for Online Dispute Resolution (ODR) in Kenya. There is little focus in existing literature on whether a developing country such as Kenya should prioritise provision for ODR in the legal framework, or whether ODR ought to develop first and legal provision to follow. Some authors argue that there is a need to put in place a dedicated legal framework for ODR, to take into account the peculiarities of the dispute resolution mechanism. This approach would be similar to the European Union (EU) experience, which

[1] Advocate of the High Court of Kenya, LL.M (University of Nairobi), LL.B (Hons, University of Nairobi), Dip. in Law (Kenya School of Law). This paper is based on an LL.M Thesis by Alvin Gachie, 'An Evaluation of the Need for Regulation of Online Dispute Resolution (ODR) in Kenya' (LL.M Thesis, 2016) <http://erepository.uonbi.ac.ke/bitstream/handle/11295/98426/Gachie_An%20Evaluation%20Of%20The%20Need%20For%20Regulation%20Of%20Online%20Dispute%20Resolution%20(ODR)%20InKenya.pdf?sequence=1&isAllowed=y> accessed on 4 January 2017.

factors in consumer protection issues to support the call for enactment of an ODR law. On the other side of the debate are authors who argue that there is no need for a dedicated legal framework for ODR. This side favours a scenario where the private dispute resolution field is market-driven, with little state involvement, as in the United States of America (USA).

This paper introduces the concept of ODR, briefly presents the two opposing arguments, and concludes that there is no need for a legal framework for ODR in Kenya. The paper finds that while parallels may be drawn from the experiences in the UK and USA, there is a need to allow ODR to develop before incorporating it into the legal framework. At a time when there is little market interest in ODR, the state may, however, explore other ways of promoting uptake of the dispute resolution mechanism, but not through enacting statute. ODR may rely on the legal framework for Alternative Dispute Resolution (ADR) in Kenya.

Imagine you have bought an electronic item on an online shop, and the supplier delivers it to your office. The item works well for two weeks, then it malfunctions. You had not checked on the supplier's website where the brick-and-mortar shop is located. What a better time to find out! You go onto the supplier's website and learn that the warehouse is in Arusha, Tanzania. You live in Kericho, Kenya. The total cost of returning the item to the supplier, including the mobile phone airtime you would use to communicate with the supplier, are far much more than the Kshs 4,000/- you spent to buy the item and have it delivered.

You have a Business to Consumer (B2C) dispute with the supplier. You might consider not pursuing the dispute because the cost and speed may outweigh the benefit, but it does not mean that ignoring the dispute will make it go away. Online Dispute Resolution may have a solution to your problem. It may be used to resolve the dispute between you as the consumer in Kenya, and the supplier in Tanzania. The possibility that you may never meet the supplier, the distance between the parties, and the uncertainty of whether the process will be fair, are considerations that make it necessary to examine whether ODR should be regulated. This paper argues that the legal framework for ADR may support the emergence of ODR, and that there is no need for a dedicated legal framework for ODR in Kenya.

2.0 What is Online Dispute Resolution?

ODR is defined as 'a form of appropriate dispute resolution that utilizes telecommunication (usually internet-based, but to a lesser extent, telephones and cellular phones) to facilitate speedy and efficient resolution, mainly by compressing or reducing the time, costs and geographic space that is shared between disputing parties'. The following definition of ODR presents it as the nexus beetween dispute resolution and technology, where technology supports the existing dispute resolution mechanisms:

> *"ODR is … technology supported dispute resolution. In that sense it can be any form of dispute resolution: technology supported mediation, technology supported arbitration, technology supported anything really."*[2]

ODR may be used to resolve disputes that arise from both online and offline interactions. ODR involves the resolution of disputes that arise from online and mobile electronic commerce (e-commerce), but also extends to family law, e-consumer protection and disputes arising from off-line commerce. ODR is a suitable cost-effective dispute resolution mechanism for high-volume, low-value claims between parties in distant geographical locations, where straightforward repetitive issues may arise between different consumers on a regular basis.

There are different forms of e-commerce transactions including B2C e-commerce transactions, Business to Business (B2B) e-commerce transactions, Government to Citizen (G2C) e-commerce transactions, and Consumer to Consumer (C2C) e-commerce transactions. The inherent nature of B2C online disputes makes them amenable to ODR. Therefore, disputes arising from online and mobile B2C e-commerce transactions are the best suited type of disputes for ODR. A person already using the internet and mobile phone to effect transactions would, according to this position, be more responsive to an attempt to resolve any dispute that may arise, using the same system.

[2] Alvin Gachie, 'An Evaluation of the Need for Regulation of Online Dispute Resolution (ODR) in Kenya' (LLM Thesis, University of Nairobi 2016) 64 <http://erepository.uonbi.ac.ke/bitstream/handle/11295/98426/Gachie_An%20Evaluation%20Of%20The%20Need%20For%20Regulation%20Of%20Online%20Dispute%20Resolution%20(ODR)%20InKenya.pdf?sequence=1&isAllowed=y> accessed 4 January 2017.

2.1 Background

This paper is based on a study on whether there is a need for regulation of ODR in Kenya.[3] The study evaluated the differing positions of regulation of ODR in the UK and the USA to determine whether either of the two approaches is favourable for Kenya. The study involved a desk-based review of literature, and interviews of ten respondents. This was not intended to be a representative sample. Rather, the study sought to draw opinions on whether there is a need to develop ODR law in Kenya. The study involved lawyers, academics, ODR experts and a judge.

In an effort to minimise the likelihood that the data provided by the respondents is traced back to them, the respondents have been anonymised. Many ethical guidelines for social science research suggest that it is important to anonymise research participants through assigning pseudonyms. While the author attempts to remove personal identifiers, it is acknowledged that it is impossible to completely hide the identity of respondents, as contextual identifiers in the responses may still be present. Further, their views have not been documented in any particular order: neither in the text nor in the footnotes.

2.2 Crossroads: Whether Kenya should Adopt a Regulation-led or Market-led Approach

2.2.1 A regulation-led approach in the United Kingdom versus a market-led approach in United States of America

Developed countries such as the UK and the USA have better infrastructure to sustain internet connectivity than developing countries such as Kenya, where weak infrastructure limits internet penetration.[4] In the UK and USA respectively, the level of internet use was estimated at 92.6% and 88.5% in the year 2016, contrasted against Kenya's 45%.[5] Kenya

[3] Alvin Gachie (n 2).

[4] Chandra Gnanasambandam and others, 'Online and Upcoming: The Internet's Impact on India' (McKinsey & Company Inc 2012) 25 – 28; Angela Kaguara and Maureen Wanjiru, 'Digital Divide: The Glaring Reality' (University of Nairobi 2009) 7,8 <https://www.uonbi.ac.ke/wakaguara/files/digital_divide_conference_paper.pdf> accessed 24 November 2015.

[5] Internet Live Stats, 'Internet Users by Country' (*Internet Live Stats*, 2016) <http://www.internetlivestats.com/internet-users-by-country/> accessed 14 September 2016.

had approximately 21 million internet subscriptions, following a 3.7% increase in uptake from the year 2015.[6] On a global comparative scale, developing countries such as Kenya have low access to broadband networks, and the use of both fixed and mobile telephone surpasses internet use.[7]

In Kenya, the increasing penetration of mobile phones, established mobile-communication infrastructure and low levels of internet connectivity all indicate that ODR may be facilitated by wireless mobile devices, and not computers.[8] Low use of the internet in developing countries is associated with low disposable income. [9] With such low disposable income, a household would prioritise shopping for subsistence in physical markets, limiting engagement in e-commerce transactions such as online shopping.[10] This suggests that e-commerce has not reached its full potential in Kenya. As e-commerce increases, the disputes that may arise from these business interactions may present a budding ground for ODR.[11]

On the one hand, it is argued that developing legal standards to support ODR systems is important to ensure the development of the sector. According to this position, 'a solid legal framework is needed to allow for the proper growth of online dispute resolution with its norms, market and

---

[6] Ibid.

[7] Christine Zhen-Wei Qiang, 'Broadband Infrastructure Investment in Stimulus Packages: Relevance for Developing Countries' 7 <http://siteresources.worldbank.org/EXTINFORMATIONANDCOMMUNICATIONANDTECHNOLOGIES/Resources/282822120827325276 9/Broadband_Investment_in_Stimulus_Packages.pdf> accessed 24 November 2015.

[8] Doug Leigh and Frank Fowlie, 'Online Dispute Resolution (ODR) within Developing Nations: A Qualitative Evaluation of Transfer and Impact' (2014) 3 Laws 106.

[9] Luis Enriquez and others, 'Creating the Next Wave of Economic Growth with Inclusive Internet' (World Economic Forum 2015).

[10] GSV Radha Krishna Rao and G Radhamani, *WiMAX: A Wireless Technology Revolution* (Auerbach Publications 2007) 323; Paul Guinness, *Geography for the IB Diploma Global Interactions* (Cambridge University Press 2011) 47.

[11] Rafal Morek, 'Regulation of Online Dispute Resolution: Between Law and Technology' <http://www.odr.info/cyberweek/Regulation%20of%20ODR_Rafal%20Morek.doc> accessed 17 November 2015.

technology.'[12] Supporters of this view argue that developing legal standards for ODR may assist to stimulate growth in the area.[13] The UK position draws from the view that regulation of ODR is essential for development of the area.[14]

The UK consists of three distinct legal systems: England and Wales; Scotland; and Northern Ireland.[15] While there are differences with regard to property rights and the court system, the three systems are similar.[16] Many laws of the UK Parliament in London not only apply to England and Wales, but also to Scotland and Northern Ireland.[17] In this paper, reference to the 'legal framework in the UK' connotes laws that apply throughout the UK, especially with regard to the UK involvement in the EU.

The UK is a member of the EU.[18] By virtue of this relationship, EU laws affect the legal framework on ODR throughout the UK.[19] A referendum on

---

[12] Ibid; Pablo Cortés, 'Online Dispute Resolution for Consumers' in Mohamed S Abdel Wahab, Ethan Katsh and Daniel Rainey (eds), *Online Dispute Resolution: Theory and Practice* (Eleven International Publishing 2010) <http://www.mediate.com/pdf/cortes.pdf> accessed 17 November 2015.

[13] Louis Del Duca, Colin Rule and Zbynek Loebl, 'Facilitating Expansion of Cross-Border E-Commerce - Developing a Global Online Dispute Resolution System (Lessons Derived from Existing ODR Systems - Work of the United Nations Commission on International Trade Law' (2012) 1 Penn State Journal of Law & International Affairs 81 – 82.

[14] Karolina Mania, 'Online Dispute Resolution: The Future of Justice' (2015) 1 International Comparative Jurisprudence 76, 85.

[15] European Union, 'United Kingdom' (*European Union*, 5 July 2016) <http://europa.eu/european-union/about-eu/countries/member-countries/unitedkingdom_en> accessed 14 September 2016; Sarah Carter, 'A Guide to the UK Legal System' (*Globalex - Hauser Global Law School Program, New York University School of Law*, 2015) <http://www.nyulawglobal.org/globalex/United_Kingdom1.html> accessed 19 May 2016; Tom Bolam, 'Common Mistakes in Choice of Law and Jurisdiction Clauses' (*Lexology*, 22 September 2015) <http://www.lexology.com/library/detail.aspx?g=8f9476e8-b712-4726-b675 21463a3355e9> accessed 19 May 2016.

[16] Tom Bolam (n 15).

[17] Ibid.

[18] UK Crown, 'Countries in the EU and EEA' (*UK Crown*, 2016) <https://www.gov.uk/eu-eea> accessed 14 September 2016; European Union (n 15); Vaughne Miller and others, 'Research Briefings - Brexit: What Happens Next?' (UK House of Commons 2016) Briefing Paper 07632 <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7632#fullreport> accessed 14 September 2016.

23rd June, 2016 displayed support for 'Brexit', the process of withdrawal of the UK from the EU. The legal result of Brexit is that the EU laws cease to apply to the withdrawing state.[20] However, the effect of withdrawal on the legal framework is not immediate.[21] The trigger process is the approval by the UK Parliament to invoke Article 50 of the Treaty of the European Union.[22] This is likely to commence in 2017, leading to a conclusion of the official legal Brexit in 2019.[23] The UK remains a member of the EU until the official legal Brexit.[24] EU law influences the UK legal system until the UK Parliament either repeals certain pieces of EU legislation or enacts local legislation in particular areas.[25] For this reason, this paper discusses EU law on ODR as part of the legal framework of the UK.

The EU has designated laws dealing with ODR, including Regulation (EU) No. 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on Consumer ODR), as well as Regulation (EU) No. 2015/1051 of 1 July 2015 on the modalities for the exercise of the functions of the online dispute resolution platform, on the modalities of the electronic complaint form and on the modalities of the cooperation between contact points provided for in Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes. The UK

---

[19] Vaughne Miller and others (n 18) 10, 11.

[20] Consolidated Texts of the European Union Treaties as amended by the Treaty of Lisbon 2007, art 50(3); Eva-Maria Poptcheva, 'Article 50 TEU: Withdrawal of a Member State from the EU' (European Parliament 2016) Briefing <http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577971/EPRS_BRI(2016)577971_EN.pdf> accessed 15 August 2016.

[21] TEU (n 20), art 50(3); Eva-Maria Poptcheva (n 20).

[22] TEU (n 20), art 50; David Davis, 'Exiting the European Union: Ministerial Statement' (UK House of Commons, 5 September 2016) <https://www.gov.uk/government/speeches/exiting-the-european-union-ministerial-statement-5-september-2016> accessed 14 September 2016.

[23] Ashley Cowburn, 'Brexit "could Be Delayed until Late 2019" with Whitehall Departments Not yet Ready to Trigger Article 50' *The Independent* (14 August 2016) <http://www.independent.co.uk/news/uk/politics/brexit-date-article-50-eu-referendum-result-europe-theresa-may-a7189851.html>.

[24] Vaughne Miller and others (n 18) 8.

[25] Sarah Gordon, 'Untangling Britain from Europe Would Cause Constitutional "havoc"' *Financial Times* (20 June 2016)<http://www.ft.com/cms/s/2/d7ae7b70-361a-11e6-9a05-82a9b15a8ee7.html#axzz4HQhVRMft> accessed 16 August 2016.

adopted Regulation (EU) No. 2015/1051 through the Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015, made by the Secretary of State designated for the purposes of section 2(2) of the European Communities Act 1972(a), in relation to matters relating to consumer protection. ODR is therefore well seated in the law in the UK. The aim of the provision for ODR in the law in the UK is to improve consumer confidence for both online and offline transactions.[26]

In contrast to the position in the UK, the USA Federal Arbitration Act of 1970 mandates strict use of arbitration for B2C disputes.[27] However, the USA law does not proactively support ODR systems through regulation.[28] As a result, the ODR systems in the USA operate in the private realm.[29] The USA position is that regulation of ODR is not needed because the system developed without specific provision in the law and therefore should continue in the hands of private players.[30] This argument is supported by the example of the development of the mobile money services in Kenya, which developed in the hands of private players without a precedent in other countries for regulators to follow in providing regulation.[31]

2.2.2 Is there a need for introduction of a legal framework to govern the area of ODR in Kenya and to facilitate resolution of disputes arising from B2C e-commerce transactions?

B2C e-commerce disputes may be resolved through the court process, administrative process or ADR.[32] In Kenya, litigation through the courts is

[26] UK Department for Business, Innovation and Skills, 'Explanatory Memorandum to the Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015' (2015).

[27] Amy Schmitz, 'Consumer Redress in the United States', *The Transformation of Consumer Dispute Resolution in the European Union: A Renewed Approach to Consumer Protection* (Oxford University Press 2016) 3.

[28] Ibid.

[29] Ibid.

[30] Esther van den Heuvel, 'Online Dispute Resolution as a Solution to Cross-Border E-Disputes' 21, 22 <http://www.oecd.org/internet/consumer/1878940.pdf> accessed 4 October 2016.

[31] Alvin Gachie (n 2) 64.

[32] Feliksas Petrauskas and Eglė Kybartienė, 'Online Dispute Resolution in Consumer Disputes' (2011) 18 Jurisprudence 921; Pablo Cortés (n 12) 172, 173; Llewellyn Joseph Gibbon, 'Creating a Market for Justice; a Market Incentive Solution to Regulating the Playing Field: Judicial Deference, Judicial Review, Due Process, and

provided for under the Civil Procedure Act (Cap 21) and the Civil Procedure Rules of 2010. The Kenya Information and Communications (Dispute Resolution) Regulations made pursuant to the Kenya Information and Communications Act of 1998 provide for a consumer in a B2C e-commerce dispute with a telecommunications service provider to file a complaint with the Communications Authority of Kenya. A consumer may also resort to ADR as envisioned under Article 159 of the Constitution of Kenya of 2010, which provides that the courts and tribunals shall support the use of ADR.

2.2.3 Would a legal framework for ODR be of any use in Kenya?

Should Kenya prioritise development of legal standards for ODR in the country drawing from the UK experience, or alternatively should ODR develop independent of the law drawing from the USA experience?

The dominant view of respondents to the paper on which this paper is based, on whether Kenya should adopt a regulation-led approach towards ODR, or whether the technology should develop first, leaned in favour of the regulation-led approach. While the frequency of references to a regulation-led approach stood at 55%, the frequency of references to a market-led approach was 30%. There was a third approach that emerged from the responses: a hybrid approach which carved a frequency of 15%. These respondents were of the view that the two dominant approaches may be merged, with the best of the UK regulation-led direction fused with the USA market-led direction.

Figure 1 shows the frequency of responses concerning the question on the need for regulation of ODR in Kenya. The figure shows a 30% frequency

---

Fair Play in Online Consumer Arbitration' (2002) 23 Northwestern Journal of International Law & Business 4, 5, 11 – 15<http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1555&context=njilb> accessed 14 September 2016; Colin Rule, Vikki Rogers and Louis Del Duca, 'Designing a Global Consumer Online Dispute Resolution (ODR) System for Cross-Border Small Value-High Volume Claims—OAS Developments' (2010) 42 Uniform Commercial Code Law Journal 225 – 228 <http://colinrule.com/writing/ucclj.pdf> accessed 14 September 2016; Urša Jeretina, 'Administrative Aspects of Alternative Consumer Dispute Resolution in the European Union (EU), Slovenia and Croatia' (2016) 9 NISPAcee Journal of Public Administration and Policy 191 – 192 <https://www.degruyter.com/downloadpdf/j/nispa.2016.9.issue-1/nispa-2016-0009/nispa-2016-0009.xml> accessed 14 September 2016.

favouring the market-led approach, a 55% frequency tending towards the regulation-led approach, and a 15% frequency in support of a hybrid approach.

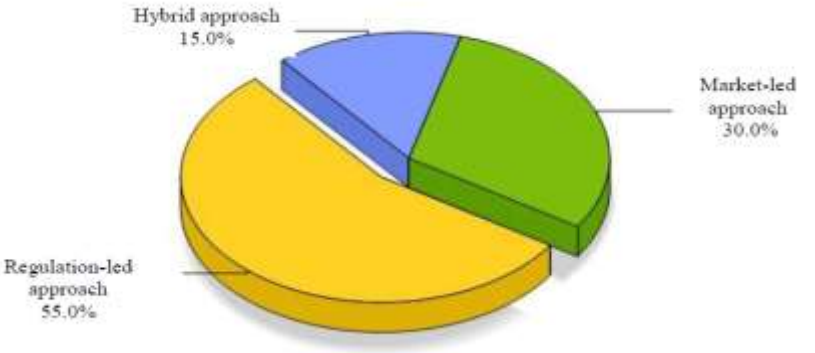

Figure 1: The need for regulation of ODR in Kenya, Source: Author

Respondent Q was emphatic about providing for ODR in the law. The provisions on ODR should however not be transplanted from another country without concern for the local realities in Kenya, but instead, should take into account the society the law seeks to regulate.[33] Highlighting the development of M-PESA before regulation was put in place for it, Respondent Q remarks:

> *"…it is time to codify (technology into law) getting the practices of … corporates, getting the practices of our advanced nations and then customizing our own local instance of the law…It is high time we had the law because the technology has been ahead of it anyway as we speak today."*

According to Respondent H:

> *"I know there are those who say that the industry should regulate itself. That it shouldn't (have) the law. You have to have the law because there is the question of cyber security. You need the law to regulate the technology. The kind of law(s) you need (are) the so-*

[33] Jacob K Gakeri, 'Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR' (2011) 1 International Journal of Humanities and Social Science 240 <http://www.ijhssnet.com/journals/Vol._1_No._6;_June_2011/25.pdf> accessed 28 September 2016.

> *called…technologically neutral laws... Or the laws with technologically neutral provisions because the technology is always changing. They're always changing. If you have…laws that are static and … not dynamic, it means … the law (will also need to) chang(e)."*

Similarly, Respondent N noted that if the development of the law is proactive, responding to potential issues that may be presented by technology before they arise, then the result would be fewer disputes. On the contrary, if the development of the law is reactive, addressing the problems presented by technology when they arise, then the instances of disputes may be high:

> *"(T)echnology has become a very key facet of how business is conducted across the world, including in (Kenya). You need to have the law saying something about how those relationships are entered. How, for example, in terms of contracting what's the effect of the postal rule in an online situation? Effectively the law has to say something about technology so there has to be a more direct than in indirect relationship. If it's indirect which means as and when disputes come up then the law would address those then it takes a very reactive role as opposed to a proactive role, which then can take care of a lot of loopholes and solve a lot of disputes before they actually come up."*

The regulation-led approach draws from the UK experience. This approach has provision in the law for issues including consumer protection, as safeguarded in the EU ODR and ADR laws. According to Respondent B:

> *"… the EU is a model that could work in other places as well…if the EU system works well it will be a lot more comprehensive than ODR in the US. ODR in the US is mainly used by some very large companies, consumer oriented companies: EBay, Facebook, Twitter and so forth. They generate huge numbers of disputes and they need systems for dealing with that. The EU regulation applies to everybody."*

While an ODR system is online, there is still a need to have the same consumer protection safeguards as offline dispute resolution systems. While courts carry out dispute resolution, due to the nature of ODR, public-private partnerships may be useful. According to Respondent Z:

> *"a lot of it will come down in the end if the courts are going to be adopting more and more technology and more and more technology based solutions within courts, that you have to depend first of all on, whether or not the courts want to do that in-house or whether they want to do that externally…businesses have much greater freedom and motivation to improve services, to make them faster, better, more efficient and better for the client, which is obviously much better than courts can do. As a result, you need to regulate the businesses that are providing these sorts of services to make sure that they are meeting the standards of current legal procedure. I think you have to legislate quite strongly. Just because something's online does not mean that it should be any less legally binding nor held to any lower standards. It should absolutely be of the same standards and you should legislate to that effect."*

The views of Respondent Z are backed up by those of Respondent J who, noting that using the law to positively impact the development of ODR would need support from the government, states:

> *"… Kenya…has two options… The government could develop their own platform and form a public body dealing with these matters. Or … like in the UK, (the government could invite) …a public tender … where they say, "We need somebody to do this. Who is willing to do it and for which price?" Then the government chooses the best of those who apply to do the job…"*

Respondent D, while expressing a need for regulation, expressed a reservation whether it would be high in priority noting as follows:

> *"We still haven't gotten to the volumes that rationalize us spending money to get legislation on it, but it's something that we'll have to deal with I think sooner than later."*

The existing laws on ADR may be amended to provide for ODR. This approach favours amending existing law instead of putting in place a dedicated legal instrument. This is the view taken by Respondent X displayed in the following excerpt:

> *"For B2B and B2C disputes, already an elaborate system has been established for ADR which can be evolved into the online space… The Arbitration Act has been put in place to give some legal force and recognition of this mechanisms… Kenya should not actively seek to regulate ODR but rather, to work with arbitrators and arbitration bodies*

> *to continually improve ADR and ODR, especially by clarifying that the existing mechanisms/regulations for ADR can be extended to ODR with the necessary modifications."*

This view supports reference to ODR in the existing ADR law. In doing so, it still lends support for regulation of ODR. Respondent X supports the approach of building on the legal framework already in place relating to dispute resolution, noting that amendment may be required for ODR to operate efficiently:

> *"Since the law recognises freedom of contract, contracting parties are free to opt into the form of ADR they would like to govern any dispute in their contractual relationship. This would include ODR – the existing rules for ADR can possibly be applied – with the necessary modification… - to ODR, without the need for new regulations for ODR; or possibly with a slight amendment of the ADR rules to clarify that they can also be applied online. The above applies to B2C and B2B disputes. When it comes to disputes that have to go to court, if we are saying that courts can adopt the use of technology in resolving cases for example conducting hearings through video conferencing, this might call for the passing of a few regulations/amendments on the laws governing court procedures."*

The regulation-led approach recognises consumer protection as a key confidence-builder in e-commerce and ODR. [34] Consumers must be comfortable that the law guarantees their protection from unscrupulous traders.[35] They must be sure that if they share information over the ODR

[34] Interview with Stephen Kiptiness, Lead Partner at Kiptiness & Odhiambo Associates, Lecturer at the University of Nairobi School of Law, 'Legal Framework for Online Dispute Resolution in Kenya: LLM Thesis' (29 June 2016); Interview with Professor Ethan Katsh, Director, National Center for Technology and Dispute Resolution, Professor Emeritus of Legal Studies at University of Massachusetts Amherst, 2014-2015 Affiliate Researcher at Harvard University Berkman Center for Internet and Society, 'Legal Framework for Online Dispute Resolution in Kenya: LLM Thesis' (15 June 2016); Interview with Dr Pablo Cortés, Senior Lecturer, Leicester School of Law, University of Leicester, UK, 'Legal Framework for Online Dispute Resolution in Kenya: LLM Thesis' (17 June 2016); Interview with John Walubengo, Lecturer at the Multimedia University of Kenya, Faculty of Computing and IT, Blogger at Daily Nation (www.nation.co.ke/jwalu), 'Legal Framework for Online Dispute Resolution in Kenya: LLM Thesis' (23 June 2016).

[35] Interview with Professor Ethan Katsh, Director, National Center for Technology and Dispute Resolution, Professor Emeritus of Legal Studies at University of Massachusetts Amherst, 2014-2015 Affiliate Researcher at Harvard University

system, their information is protected through a robust data protection framework. [36] Consumers must have confidence in the viability of e-commerce, the stability of the public infrastructure providing these services, and the integrity of the system from cybercrime.[37]

2.2.4 Perspectives on regulation of technology have been considered to be those of developed countries. What is your comment on this view? What considerations may be taken by a developing country in evaluating the need for regulation of ODR?

A number of issues arise that must be taken into consideration if Kenya is to develop the regulation on ODR. The form of the regulation to be put in place must be decided. It may either be through independent legislation,[38] reference to ODR in existing ADR law,[39] or through issuance of guidelines

---

Berkman Center for Internet and Society (n 34); Interview with Mark Lavi, Senior In-house Counsel, Safaricom, 'Legal Framework for Online Dispute Resolution in Kenya: LLM Thesis' (10 June 2016); Interview with Dr Pablo Cortés, Senior Lecturer, Leicester School of Law, University of Leicester, UK (n 34); Interview with Grace Mutung'u, ICT Lawyer, Kenya ICT Action Network (KICTANet), 'Legal Framework for Online Dispute Resolution in Kenya: LLM Thesis' (29 June 2016).

[36] Interview with John Walubengo, Lecturer at the Multimedia University of Kenya, Faculty of Computing and IT, Blogger at Daily Nation (www.nation.co.ke/jwalu) (n 34).

[37] Interview with Stephen Kiptiness, Lead Partner at Kiptiness & Odhiambo Associates, Lecturer at the University of Nairobi School of Law (n 34); Interview with John Walubengo, Lecturer at the Multimedia University of Kenya, Faculty of Computing and IT, Blogger at Daily Nation (www.nation.co.ke/jwalu) (n 34); Interview with Justice Adam Mambi, Judge of the High Court of Tanzania, Expert on ICT/Cyber Law & Intellectual property law, Author of 'ICT Law Book: A Source Book for Information and Communication Technologies & Cyber Law in Tanzania & East African Community (2010)', 'Legal Framework for Online Dispute Resolution in Kenya: LLM Thesis' (9 July 2016).

[38] Interview with Stephen Kiptiness, Lead Partner at Kiptiness & Odhiambo Associates, Lecturer at the University of Nairobi School of Law (n 34); Interview with Dr Pablo Cortés, Senior Lecturer, Leicester School of Law, University of Leicester, UK (n 34); Interview with Justice Adam Mambi, Judge of the High Court of Tanzania, Expert on ICT/Cyber Law & Intellectual property law, Author of 'ICT Law Book: A Source Book for Information and Communication Technologies & Cyber Law in Tanzania & East African Community (2010)' (n 37); Interview with Frances Singleton-Clift, Justice Technology Advisor, The Hague Institute for Innovation of Law(HiiL), The Hague, The Netherlands, 'Legal Framework for Online Dispute Resolution in Kenya: LLM Thesis' (15 July 2016).

[39] Interview with Mark Lavi, Senior In-house Counsel, Safaricom (n 35).

that encourage certain legal standards to be upheld.[40] The starting point is the view that the legal framework for ADR as at 2016 is inadequate to meet the peculiar challenges presented by ODR. According to Respondent Z:

> *"…the most sensible thing is to set up first of all a framework. Then once you have a framework that you are happy with things operating within that you then use that to promote actively bringing ODR into a country. You know exactly where you can operate within, how it's going to work. Then you give companies a real opportunity to open up an entirely new market waiting for them. It's huge not only in terms of revenue itself but the promise of access to justice is huge."*

The UK has put in place the Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015 recognising the use of the EU ODR platform established under Article 5 of Regulation (EU) No. 524/2013.[41] This serves as a reference to ODR in existing ADR law, through an amendment of the ADR statute or regulation. Another benchmark law in the UK is the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015, which provides for approval of ADR entities that are competent to resolve disputes, including ODR-related disputes.[42] Further, the EU ODR Regulation, effective January, 2016 is also instructive in considering developing a legal framework for ODR in Kenya.[43]

All EU laws applicable in the UK before Brexit will still be in force until the exit is legally complete (possibly in 2019) or further into the future, if the UK enacts a separate Act or passes regulations to adopt the EU law.[44]

---

[40] Interview with Edward Muriithi Rinkanya, Principal Legal Officer for Dispute Resolution and Commercial Services, Communications Authority of Kenya, 'Legal Framework for Online Dispute Resolution in Kenya: LLM Thesis' (7 August 2016).

[41] Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015, Art 2.

[42] Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015, Schedule 3.

[43] Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC 2013.

[44] Ashley Cowburn (n 23); Swati Dhingra and others, 'The UK Treasury Analysis of "The Long-Term Economic Impact of EU Membership and the Alternatives": CEP Commentary', *Brexit 2016 Policy analysis from the Centre for Economic Performance* (London School of Economics and Political Science 2016)

There is no need to re-invent the wheel, but there is a need to adapt the legal framework in other jurisdictions to conform to local realities.[45] Kenya may draw lessons from the UK experience, therefore, in considering preparing a legal framework for ODR. According to Respondent N:

> *"…there's no shame in not wanting to reinvent the wheel. There's absolutely no shame in copying... Why would I need to reinvent the wheel and come up with a triangular wheel instead of something circular? Or I come up with something which is a lot more native?"*

A potential challenge for consideration that may limit development of ODR even if provision is made in the law, is the weak legal provision for e-commerce in Kenya. [46] Respondent N outlines the development of Information and Communication Technology (ICT) law in Kenya, highlighting the provision for e-commerce:

"… the national ICT policy … promulgated in 2006 … addressed issues of electronic commerce and sought to … recognize electronic transactions…That led to the Kenya Communications (Amendment) Act 2009, which is now known as the Kenya Information and Communications Act … (of) 2013. That was an attempt by government, both Parliament and the … recognize e-transactions.

Respondent N deplores the inadequate provision for e-commerce in the law:

> "I *think that (the law on e-commerce) is insufficient as it currently is drafted and that's why we still need to have an Electronic Transactions… Act. Digital signatures…(have) been working … for over a decade in*

<http://cep.lse.ac.uk/pubs/download/brexit08_book.pdf> accessed 15 August 2016; Jiries Saadeh, 'The European Union, Investment Treaties and Investment Arbitration Post-Brexit| Arbitration Blog'<http://arbitrationblog.practicallaw.com/the-european-union-investment-treaties-and-investment-arbitration-post-brexit/>accessed16 August 2016.

[45] Interview with Stephen Kiptiness, Lead Partner at Kiptiness & Odhiambo Associates, Lecturer at the University of Nairobi School of Law (n 34); Interview with Professor Ethan Katsh, Director, National Center for Technology and Dispute Resolution, Professor Emeritus of Legal Studies at University of Massachusetts Amherst, 2014-2015 Affiliate Researcher at Harvard University Berkman Center for Internet and Society (n 34); Interview with Dr Pablo Cortés, Senior Lecturer, Leicester School of Law, University of Leicester, UK (n 34).

[46] Interview with Stephen Kiptiness, Lead Partner at Kiptiness & Odhiambo Associates, Lecturer at the University of Nairobi School of Law (n 34); Interview with John Walubengo, Lecturer at the Multimedia University of Kenya, Faculty of Computing and IT, Blogger at Daily Nation (www.nation.co.ke/jwalu) (n 34).

> *many Western countries. Since the law recognized that digital signatures can be used on documents in 2009, which was technologically speaking still fairly late, the (Communications Authority) has only started putting in place regulations on licensing of the entities that would supply these digital signatures … From 2009 will be a decade in the next three years. Nothing has happened."*

According to Respondent N, while the law recognises the digital signatures may be used, without regulations from the Communications Authority of Kenya on how they apply, the law is not implemented. Further, in relation to B2C transactions, there is a challenge with low levels of appreciation of how e-commerce works, including how digital signatures are used. This removes the utility of having laws in place, if they are not beneficial in practice:

> *"(T)he law says, "We recognize that you can use digital signatures for purposes of attesting to certain documents that you've entered into with the purpose of contracting." I have been in a situation where my bank cannot allow me to electronically sign a document. They need me to go to the bank and physically do that. The (Communications Authority) has not licensed … entities that will offer (digital signatures). It does not mean they're not offered. There are people who offer (digital signatures) abroad…There's a high level of ignorance in the commercial sector as to the utility of (digital signatures). There are companies who in terms of e-bills internally allow people to append electronic signatures. Depending on who their client (or) suppliers are… It's good to have it in the law but we're not practical."*

Another stumbling block would be to encourage wilful adoption of ODR by parties, as stated by Respondent B:

> *"I think the challenge for online dispute resolution, which is the same challenge for mediation, is to get both parties to agree to it. If only one party wants to have mediation or ODR and the other party doesn't, then you can't force anything."*

It is believed that stronger e-commerce laws than those present in Kenya would promote development in the area of ODR.[47] The issue of unreliable

[47] Interview with Stephen Kiptiness, Lead Partner at Kiptiness & Odhiambo Associates, Lecturer at the University of Nairobi School of Law (n 34); Interview with John Walubengo, Lecturer at the Multimedia University of Kenya, Faculty of Computing and IT, Blogger at Daily Nation (www.nation.co.ke/jwalu) (n 34).

electricity connection came to light.[48] The development of e-commerce and ODR alike, would require better public infrastructure than what is currently available.[49] This would also require greater effort in increasing internet penetration in the country in light of the comparative lower levels than in the UK or the USA.[50] In 2016, only 16% of Kenyan adults had a smart phone, and only 18% accessed the internet at least once a month.[51]

Beyond this, Kenya does not have an effective addressing system.[52] The UK and the USA have well laid out addresses not only in the urban areas but also in the far-flung areas, facilitating efficient delivery of goods and services. Kenya lags behind with unmarked addresses making it difficult for e-commerce to progress, therefore creating an unfavourable environment for development of ODR.[53] It is therefore noted that aligning the laws with the emergent technology is not the solution to all problems. It is not a guarantee that once the laws are put in place, then ODR would thrive in Kenya. According to Respondent J:

> *"…it would be beneficial if there is some governmental support. I don't think legislation is a panacea. I think what you need more is resources and maybe legislation in terms of muscle to require traders or businesses*

[48] Interview with Stephen Kiptiness, Lead Partner at Kiptiness & Odhiambo Associates, Lecturer at the University of Nairobi School of Law (n 34).

[49] Interview with Justice Adam Mambi, Judge of the High Court of Tanzania, Expert on ICT/Cyber Law & Intellectual property law, Author of 'ICT Law Book: A Source Book for Information and Communication Technologies & Cyber Law in Tanzania & East African Community (2010)' (n 37); Interview with Stephen Kiptiness, Lead Partner at Kiptiness & Odhiambo Associates, Lecturer at the University of Nairobi School of Law (n 34); Interview with John Walubengo, Lecturer at the Multimedia University of Kenya, Faculty of Computing and IT, Blogger at Daily Nation (www.nation.co.ke/jwalu) (n 34).

[50] Interview with Stephen Kiptiness, Lead Partner at Kiptiness & Odhiambo Associates, Lecturer at the University of Nairobi School of Law (n 34); Interview with Professor Ethan Katsh, Director, National Center for Technology and Dispute Resolution, Professor Emeritus of Legal Studies at University of Massachusetts Amherst, 2014-2015 Affiliate Researcher at Harvard University Berkman Center for Internet and Society (n 34).

[51] Central Bank of Kenya, Kenya National Bureau of Statistics and Financial Sector Deepening (FSD) Kenya, 'The 2016 FinAccess Household Survey' (Financial Sector Deepening (FSD) Kenya 2016) 19 <http://fsdkenya.org/publication/finaccess2016/> accessed 16 September 2016.

[52] Interview with Grace Mutung'u, ICT Lawyer, Kenya ICT Action Network (KICTANet) (n 35).

[53] Ibid.

to have the legal obligation to form or even to participate in ODR. For instance, if you have complaints against utilities or financial bodies it should be somehow monitored. It should also enable an ODR route for customers and consumers to complain when they have a reason to do so, and not just to force them to go to the court to elevate a complaint against a business. In that sense, I think the European approach would be better to enable the use of ODR."

3.0 What is the way forward for regulation of ODR in Kenya?

Kenya should adopt a regulation-led approach to promote the development of ODR. The legal framework for ODR in Kenya may be developed either through enacting a law dedicated to the area, or through recognising ODR in the existing ADR law. Alternatively, ODR may be included in the legal system through preparation of ODR regulations under the ADR law, or through the Kenya Information (Dispute Resolution) Regulations of 2010. According to Respondent G:

"The best way under the law is (to) give the Minister the power to make regulations from time to time."

Once ODR is provided for in the law, Kenya may consider development of a pilot ODR system. The cost implications of establishing ODR systems must be taken into account. A pilot ODR system may be developed by the Communications Authority of Kenya to address the question of viability of ODR. Development of ODR systems may be taken up as a government-led initiative, where an internal department initiates a pilot project.[54] The Communications Authority of Kenya, for example, already has the Kenya Information and Communications (Dispute Resolution) Regulations, 2010 which may be used as a launch-pad for ODR regulation.[55] This should be accompanied by public awareness campaigns on the benefits of ADR in

[54] Interview with Dr Pablo Cortés, Senior Lecturer, Leicester School of Law, University of Leicester, UK (n 34); Interview with Frances Singleton-Clift, Justice Technology Advisor, The Hague Institute for Innovation of Law(HiiL), The Hague, The Netherlands (n 38).

[55] Interview with Edward Muriithi Rinkanya, Principal Legal Officer for Dispute Resolution and Commercial Services, Communications Authority of Kenya (n 40); Interview with Mark Lavi, Senior In-house Counsel, Safaricom (n 35); Interview with John Walubengo, Lecturer at the Multimedia University of Kenya, Faculty of Computing and IT, Blogger at Daily Nation (www.nation.co.ke/jwalu) (n 34).

general, and ODR in specific, to further give life to the constitutional provision hailing the importance of out-of-court solutions to disputes.
Cybersecurity issues must also be addressed, for e-commerce to flourish and ODR to bud.[56] Further, levels of awareness among consumers, businesses, the judiciary and Advocates must be checked to create room for adoption of ODR.[57] Government bodies for example the Communications Authority of Kenya would be key information points to disperse knowledge not only on ODR but also on the existing ADR mechanisms, making the different stakeholders amenable to the dispute resolution mechanisms.[58] According to Respondent N:

> *"ODR … draws heavily from the principles used in ADR. People need to be sensitized that you need not have necessarily contracted through online means. You might have contracted in the brick-and-mortar world but you can use that dispute to take it onto an ODR platform and use it to settle…People need to be (made aware by) …the relevant regulatory institutes,… (the Communications Authority) being one of them… (It is) a government mandate to publicize and let people know."*

4.0 Conclusion

This paper has discussed responses to the question whether there is a need for regulation of ODR in Kenya. The first section introduces the concept of ODR. The second section gives a background to the study on which this

[56] Interview with Justice Adam Mambi, Judge of the High Court of Tanzania, Expert on ICT/Cyber Law & Intellectual property law, Author of 'ICT Law Book: A Source Book for Information and Communication Technologies & Cyber Law in Tanzania & East African Community (2010)' (n 37); Interview with John Walubengo, Lecturer at the Multimedia University of Kenya, Faculty of Computing and IT, Blogger at Daily Nation (www.nation.co.ke/jwalu) (n 34); Interview with Grace Mutung'u, ICT Lawyer, Kenya ICT Action Network (KICTANet) (n 35).

[57] Interview with Justice Adam Mambi, Judge of the High Court of Tanzania, Expert on ICT/Cyber Law & Intellectual property law, Author of 'ICT Law Book: A Source Book for Information and Communication Technologies & Cyber Law in Tanzania & East African Community (2010)' (n 37); Interview with Stephen Kiptiness, Lead Partner at Kiptiness & Odhiambo Associates, Lecturer at the University of Nairobi School of Law (n 34); Interview with Grace Mutung'u, ICT Lawyer, Kenya ICT Action Network (KICTANet) (n 35); Interview with John Walubengo, Lecturer at the Multimedia University of Kenya, Faculty of Computing and IT, Blogger at Daily Nation (www.nation.co.ke/jwalu) (n 34).

[58] Interview with Stephen Kiptiness, Lead Partner at Kiptiness & Odhiambo Associates, Lecturer at the University of Nairobi School of Law (n 34).

paper is based, giving the reader an understanding of the research on which this paper is grounded. The third section discusses the regulation-led approach in the UK, where the European Parliament has taken the lead in regulating the dispute resolution mechanisms. It also explains the opposite approach, referred to in this paper as the market-led approach, characterised in the approach in the USA where there is little state involvement in this private dispute resolution mechanism. The study on the legal framework for ODR in the UK and the USA revealed that law may be beneficial to regulating technology due to consumer protection concerns.

For Kenya, the regulation-led approach emerged as the preferred one. This leads to a suggestion that Kenya should prioritise provision for ODR in the legal framework. While the market-led approach in the USA has still seen development of ODR for B2C e-commerce disputes, there is concern that consumers may not adequately be protected under these private-led systems. The frequency of references to a regulation-led approach was 55%, the market-led approach drew a frequency of 30% in the responses. A hybrid approach was also suggested, adopting parts of the regulation-led approach to certain aspects of ODR, and parts of the market-led approach to other aspects of ODR. References to a hybrid approach had a frequency of 15%. A regulation-led approach is anticipated to support development of ODR in Kenya, ensuring consumers are well taken care of in the legal framework.

Building Kenya's Future as A Global Hub for International Commercial Arbitration

By: ***Dorothy S. Aswani****

1.0 Introduction

Arbitration is an adjudicative process in which the parties present evidence and arguments to an impartial and independent third party, who has the authority to hand down a binding decision based on objective standards. There is no universal definition of an 'international' arbitration. Accordingly, recourse must be had to the relevant national laws when seeking to enforce an award.[1] Arbitration, as one of the Alternative Dispute Resolution Mechanisms (ADR), is not a new concept to the Kenyan people and Kenyan legal regime in general. Kenya has a well-established legal infrastructure, based on common law principles, with established provision for dispute resolution in support of a local economy built on agriculture and the service sector. Outside the High Court, the use of arbitration is on the verge of a major leap with the introduction of the Constitution of Kenya, 2010, which inserted a requirement for arbitration prior to the pre-trial process.[2] Arbitration of international commercial disputes has become a popular practice amongst business persons and corporations. This has tremendously grown with the development of the commercial industry internationally and the concept of globalization.[3] Arbitration of business disputes in Africa continues to grow progressively. This upward trajectory in disputes is largely as a consequence of vigorous economic growth in many African jurisdictions. A recent World Bank Report[4] projected Sub-Saharan Africa's growth at an average of 3.7 percent in 2015, partly thanks to "continuing infrastructure investment". The International Monetary Fund (IMF)

* LLB, (Hons) Moi University; Diploma in Law (KSL); LLM Candidate (UON); Advocate of the High Court of Kenya.

[1] Attiya Waris, "International Commercial Arbitration in Kenya" in Muigai, G. (ed), *Arbitration Law and Practice in Kenya,* (Law Africa, 2011)."

[2] The Constitution of Kenya, Article 159 (Government Printer, Nairobi, 2010).

[3] P. Cresswell, "International Arbitration: Enhancing Standards," *The Resolver, Chartered Institute of Arbitrators,* United Kingdom, February 2014, pp.10-13.

[4] General Overview of the World Bank from 22 October 2015 available at *http:/www.worldbank.org/en/region/afr/overview.*

continues to forecast sub-Saharan Africa's growth at an average of 4 per cent in 2016.[5] This is despite the global economic situation and marked reductions in commodities prices, particularly in the natural resources sector, which to date has contributed significantly to much of Africa's growth. It has indeed been rightly observed, that the increasing importance of arbitration and dispute resolution in the African context is a reflection of the global growth in international business, and the preferred methods of resolving international disputes, a trend that is likely to continue into the 22nd Century.[6] Investment in Africa, in general and Kenya specifically, continues to attract investors not only in new sectors, but also from different jurisdictions, with China being a good example. The country has developed a strong foothold in Kenya, and Africa in general, providing the impetus for the creation of an arbitration partnership between China and South Africa for instance. The establishment of Kenya as a regional hub is very much an ambition of the government. This paper seeks to address the challenges that are now a hindrance to the realization of this 'dream'.

2.0 The Place of International Law

Kenya has had laws on Arbitration from as early as 1914.[7] Being a key player in international trade and choice in international investments, Kenya put in place a legal framework for the recognition and promotion of international commercial arbitration. The adoption of UNCITRAL Model Arbitration law led to legal reforms repealing the 1968 Arbitration Act and replacing it with the Arbitration Act (1995) and the Arbitration Rules therein.[8] The model of the United Nations Commission on International Trade Law (UNCITRAL) was adopted in 1985 with a view to encouraging arbitration and processes that would have global recognition. Later, Kenya's Arbitration Act, 1995 was amended vide the Arbitration (Amendment) Act, 2009.

[5] World Economic Outlook Report published on 19 January 2016 available at *https:/www.imf.org/external/pubs.*

[6] Kariuki Muigua, *Making East Africa a Hub for International Commercial Arbitration: A Critical Examination of the State of the Legal and Institutional Framework Governing Arbitration in Kenya, 2013.*

[7] Arbitration Ordinance, 1914.

[8] Kariuki Muigua, *Nurturing International Commercial Arbitration in Kenya,* July 2014.

However, it is worth mentioning that although the words 'international commercial arbitration' are not expressly provided for under the domestic laws on arbitration in Kenya, its inclusion can be inferred from the Arbitration Act, 1995.[9] Section 3(2) of the 1995 Kenyan Arbitration Act states that-

An arbitration is domestic, if the arbitration agreement provides expressly or by implication for arbitration in Kenya and at the time when proceedings are commenced, or the arbitration is entered into-

a. where the arbitration is between individuals, the parties are nationals of Kenya or are habitually resident in Kenya;
b. where the arbitration is between bodies corporate, the parties are incorporated in Kenya or their central management and control are exercised in Kenya;
c. where the arbitration is between an individual and a body corporate –
   (i) the party who is an individual is a national of Kenya or is habitually resident in Kenya; and
   (ii) the party that is a body corporate is incorporated in Kenya or its central management and control are exercised in Kenya; or
   (iii) the place where a substantial part of the obligations of the commercial relationship is to be performed, or the place with which the subject-matter of the dispute is most closely connected, is Kenya.

An international arbitration is defined in section 3(3) as one where any of the following applies:

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states;
(b) one of the following places is situated outside the state in which the parties have their places of business –
   (i) the juridical seat of arbitration is determined by or pursuant to the arbitration agreement; or
   (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

[9] Act No. 4 of 1995(Amended in 2009) Revised Ed. 2012

(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one state.

If a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement and if a party does not have a place of business, reference is to be made to his habitual residence[10].

The 1995 Arbitration Act adopted Article 1(3) of the UNCITRAL Model Law, which defines arbitration as international, if:

a) the agreement is concluded when the parties have their places of business in different countries;
b) one of the following places is situated outside the country in which the parties conduct business:
   (i) the place of arbitration, if determined in, or pursuant to, the arbitration agreement; or,
   (ii) any place where a substantial part of the commercial relationship's obligations are to be conducted or the place with which the subject matter of the dispute is most closely connected; or
c) the parties have expressly agreed that the subject matter of the agreement relates to more than one country.

The UNCITRAL Model Law recommends that the term 'commercial' be interpreted broadly so as to cover all commercial relationships, whether contractual or not. Without providing an exhaustive list, it suggests that the following relationships are regarded as being of a commercial nature, viz any trade transaction for the supply or exchange of goods or services; a distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation and carriage of goods or passengers by air, sea, rail or road.[11] The Model Law encapsulates the policy of autonomy of parties and restricts the involvement of courts of law in the arbitral process, except in the circumstances provided by the law.

[10] Section 3(4), Arbitration Act.
[11] Ibid, Note 1.

The inclusion of the phrase 'commercial relationship' in the definition of international arbitration can therefore be construed to mean that the Arbitration Act contemplates international commercial arbitration.

In addition to this, Kenya has acceded to the 1958 *New York Convention on the Recognition and Enforcement of Arbitral Awards* (NYC) [12] and to *International Convention on the Settlement of Investment Disputes* (ICSID) both of which deal with international commercial arbitration.

The 1958 New York Convention is irrefutably one of the most important multilateral Conventions in the recognition and enforcement of foreign arbitral awards. This is an important factor in giving legitimacy to such arbitral awards regardless of state boundaries. This is usually achieved through providing common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards. The Convention, however, confers sweeping powers on domestic competent authorities to refuse to recognize and enforce foreign awards. [13] Article V, which enumerates the various grounds on which recognition and enforcement of an arbitral award may be refused, gives the authorities power to question the substantive law of other jurisdictions and this is likely to stifle international commercial arbitration.[14]

Section 36(2) of the Kenyan Arbitration Act provides that an international arbitration award shall be recognized as binding and enforced in accordance to the provisions of the *New York Convention*[15]or any other convention to which Kenya is signatory and relating to arbitral awards. The Act provides an exhaustive list of the only grounds upon which the Kenyan courts may refuse recognition of an international arbitration award.

Arbitration has gained popularity over time as the choice approach to conflict management, especially by the business community, due to its obvious advantages over litigation. The most outstanding of its advantages is

---

[12] The *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* adopted by the United Nations General Assembly in New York on the 10th June, 1958, and acceded to by Kenya on the 10th February, 1989, with a reciprocity reservation.

[13] Gakeri, K. Jacob, "Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR" (2011*) International Journal of Humanities and Social Science*, vol. 1 No. 6 p. 225.

[14] Ibid.

[15] Ibid, Note 8.

its transnational applicability in international disputes with minimal or no interference by the national courts, thus boosting the parties confidence of realizing justice in the best way achievable.[16] Countries and various regions around the world have thus embarked on promoting international arbitration as the best dispute settlement approach in international disputes. However, Africa as a continent has not been quite at par with the rest of the world as far as international commercial arbitration is concerned. Due to the importance of international arbitration and its ever growing popularity across the world, it is important that the African Continent, being a key global economic partner is not left behind in entrenching the practice of arbitration in settling international commercial disputes.[17] It follows, therefore, that the constituent states, Kenya included, should take the necessary steps towards becoming a focal point for international commercial arbitration, in the recognition of international arbitration as one of the most viable approaches to international disputes management.

3.0 Opportunities and Challenges

Arbitration is now firmly entrenched as a viable alternative to the courts in many jurisdictions across Africa, and as seen above is gaining prominence in Kenya. Although the developments seen in recent years have helped establish more reliable and consistent arbitration practices and procedures, there is still more work to be done. There are still relatively few international arbitration cases heard on African soil (in 2014 only eight ICC arbitration cases were heard in African countries),[18] and the number of African arbitrators appointed on international cases remains woefully small. To set out or give recommendations on the ways to make Kenya a hub for international commercial arbitration, it is critical to first identify the challenges facing the practice in Kenya.

---

[16] Kariuki Muigua, *Promoting International Commercial Arbitration in Africa,* paper presented at the East Africa International Arbitration Conference, held on 28-29 July 2014, at Fairmont the Norfolk, Nairobi.

[17] Kariuki Muigua, *Reawakening Arbitral Institutions for Development of Arbitration in Africa; May, 2005,* available *at https://profiles.uonbi.ac.ke//* (Accessed on 10th March, 2016).

[18] 2014 ICC Disputes Resolution Statistics, ICC Dispute Resolution Bulletin, 2015, No. 1.

3.1 Attitude on Enforcement and National Courts Interference

Courts exercise authority over arbitration matters either as a matter of statutory or inherent powers. Although the Arbitration Act[19] provides for minimal intervention or interference by courts, the situation on the ground has been a mixed one, where on the one hand, courts seem to recognise and acknowledge that arbitration should bear minimum court interference, and on the other hand, they appear to violate this important objective of the Act of minimal court interference. Section 10 of the Kenyan Arbitration Act provides that: "*except as provided in the Act, no court shall intervene in matters governed by this Act.*"

The provision permits two possibilities where the court can intervene in arbitration, and that is, where the Act expressly permits it or where it is in the public interest for the court to intervene. This provision echoes Article 5 of the UNCITRAL Model Law on international commercial arbitration. In effect, the article limits the scope of the role of the court in arbitration only to situations that are contemplated under the Model Law.

Court interference intimidates investors since they are never sure what reasoning the court might adopt, should it be called upon to deliberate on such disputes.

The court has no legal right to intervene in the arbitral process or in the award, except in the situations specifically set out in the Arbitration Act, or as previously agreed in advance by the parties and similarly, there is no right of appeal to the High Court or the Court of Appeal against an award except in the circumstances set out in Section 39 of the Arbitration Act. This was observed and upheld in the Kenyan case of *Anne Mumbi Hinga -VS- Victoria Njoki Gathara*.[20] The Court of Appeal observed that most of the applications going to court to have the award set aside will be on grounds of public policy. It, however, stated that one of the underlying principles in the Arbitration Act is the recognition of an important public policy in enforcement of arbitral awards and the principle of finality of arbitral awards. Secondly, public policy can never be defined exhaustively and should be approached with extreme caution. Failure of recognition on the ground of public policy would involve some element of illegality, would be injurious to the public good or would be wholly offensive to the ordinary, reasonable

[19] Cap 49, Laws of Kenya, Arbitration Act 1995.
[20] Court of Appeal at Nairobi, Civil Appeal 8 of 2009 [2009] eKLR.

and fully informed members of the public, on whose behalf the State's powers are exercised.[21]

The Court also stated that "*it follows, therefore, all the provisions invoked except Section 35 and 37 do not apply or give jurisdiction to the superior court to intervene and all the applications filed against the award in the superior court should have been struck out by the court suo moto because jurisdiction is everything as so eloquently put in the case of Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd 1989 KLR 1.'*

Ringera J (as he then was), in *Christ For All Nations vs. Apollo Insurance Co. Ltd*[22] defined public policy in the following words:

"Although public policy is a most broad concept incapable of precise definition…an award could be set aside under section 35 (2) (b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it was shown that either it was:

a) Inconsistent with the constitution or other laws of Kenya, whether written or unwritten; or

b) Inimical to the national interest of Kenya; or

c) Contrary to justice and morality."

The challenge here is the lack of a clear meaning of public policy which gives courts more opportunities to interfere with arbitration proceedings. This has the potential to intimidate local and foreign investors, who carry on business in Kenya, from settling their commercial disputes in Kenya, to instead opt for foreign jurisdictions.

Although there are instances when the Arbitration Act gives the national courts the powers to intervene in arbitration proceedings, these powers, sometimes are exercised far beyond what the Act provides.[23] This often happens where the courts decide that there existed illegality, fraud, incapacity or that the award is against public policy. Though public policy has been defined in the Kenyan context,[24] the lack of clear cut definition of the same can sometimes be applied with disastrous results. This is not only Kenya's problem but of the world all over. For instance, in the Indian case of *Phulchand Exports Ltd v OOO Patriot,*[25] the Supreme Court decided that a

[21] Ibid.
[22] [2002] 2 EA 366.
[23] Ibid.
[24] Christ for all Nations v Apollo Insurance Company ltd.
[25] Civil Appeal 3343/2005 - 12 October 2011.

foreign award can be set aside under section 48(2) of the Act, if it is considered to be patently illegal. They gave the meaning of public policy a wider meaning to include morality and justice as a test, which further complicates the understanding of what is to be regarded as being against public policy. As mentioned above, court interference intimidates investors.

The New York District Court in the case of *Parsons & Whittemore Overseas Co. Inc. vs Societe Generale de l'Industrie du Papier (RAKTA)* was confronted by an argument that recognition and enforcement of an award should be refused on the grounds that diplomatic relations between Egypt (the defendant's state) and the United States had been severed. The court rejected this argument and referred to the 'general pro-enforcement bias' of the New York Convention. It held that the Convention's "public policy" defence should be construed narrowly, and that enforcement of foreign arbitral awards should only be denied on this basis "where enforcement would violate the forum state's most *basic notions* (emphasis added) of morality and justice."

As a way forward, therefore, for any jurisdiction to be considered to be a hub of international commercial arbitration, court interference in Arbitration has to be minimized. As Justice Visram in the case of Alfred Wekesa Sambu & Ors v. Mohammed Hatimy & Ors[26] observed:

> *Where members of an organization have chosen, by virtue of their very membership, to settle their disputes through arbitration, I see absolutely no reason why the courts should interfere in that process. It is not in the public interest…The courts should encourage as far as possible settlement of disputes outside of the court process. Arbitration is one of several methods of alternate dispute resolution and is certainly less expensive, expeditious, informal and less intimidating than the formal court system. This court will certainly encourage the use of alternate dispute resolution where it is appropriate to do so.*

The Arbitration Act, however, seems to have vested vast powers in the High Court. In an effort to encourage arbitration as a dispute resolution method, where parties so agreed, Section 6 of the Act confers powers to the High Court to stay legal proceedings and refer the matter to arbitration where there is pre-existing agreement to do so. However, under Section 11, the High Court may determine the number of arbitrators if parties fail

[26] Alfred Wekesa Sambu & Ors v. Mohammed Hatimy & Ors (2007) eKLR

to agree. It can also appoint arbitrators where parties fail to agree on the procedure of appointing the Arbitrator(s) [27] or even decide on the termination of the mandate of an arbitrator who fails to act where parties are unable to do so.[28] The High Court has powers to set aside an arbitral award as per the provisions of Section 35, and it may also decide on an application by a party in arbitration proceedings challenging an arbitrator. There seems, therefore, to be unlimited opportunities for the courts to interfere with or be involved in arbitration, and parties may also abuse their autonomy through involving the courts.

3.2 Arbitral Tribunal

The secrecy of the Tribunal's deliberations is fundamental to the arbitral process and this requirement is explicitly set out in some national laws and in the International Bar Association's (IBA) Ethics for International Arbitrators.[29] The Arbitration Act, however, imposes no general duty on the arbitral tribunal to act fairly or avoid conflict of interest or unnecessary delay or expense.[30] The only provision that comes close to this is Section 19 which provides for equality in treatment of parties, with each being given full opportunity to present his case. Otherwise, the Act imposes no positive duty to use reasonable dispatch in conducting the proceedings or making the award and the tribunal is duty bound to adhere to the time limits imposed on them by parties. In the absence of an agreement, there is also no specific time frame imposed by the Act within which the award may be made. The Act does not also impose a duty on the tribunal to act judicially, make an award or ensure the award is unambiguous or uncertain. If these were imposed as minimum duties on arbitral tribunals, arbitration would have been more entrenched in the dispute resolution matrix in the country.[31]

3.3 Arbitration as a Profession

The Arbitration Act does not recognize arbitration as a profession, although it is increasingly becoming common for some individuals to practice

[27] Section 12, Arbitration Act.
[28] Ibid, Section 15(2)
[29] Section 6
[30] Ibid, Note 9
[31] Ibid

exclusively as arbitrators, non-lawyers included. Arbitration, without a doubt, involves attributes generally peculiar to professionals such as professional training, discipline, integrity, expertise and commitment to certain appropriate values. Therefore, recognizing arbitration as a profession would not only enhance the profile of arbitration as a dispute resolution mechanism, but would lead to greater accountability and utilization of the process, as well as popularize arbitration.

3.4 Perception of Corruption/ Government Interference

Corruption in international business is rife, and growing. A report on the state of corruption indicated that:

> *The scale and scope of bribery in business is staggering. Nearly two in five polled business executives have been asked to pay a bribe when dealing with public institutions. Half estimated that corruption raised project costs by at least 10 per cent. One in five claimed to have lost business because of bribes by a competitor. More than a third felt that corruption is getting worse. The consequences are dramatic. In developing and transition countries alone, corrupt politicians and government officials receive bribes believed to total between USD 20 and 40 billion annually…When corruption allows reckless companies to disregard the law, the consequences range from water shortages in Spain, exploitative work conditions in China or illegal logging in Indonesia to unsafe medicines in Nigeria and poorly constructed buildings in Turkey that collapse with deadly consequences.*[32]

At times, governments are perceived to be interfering with private commercial arbitration matters. For instance, the government may try to influence the outcome of the process especially where its interests are at stake, and put forward the argument of grounds of public policy. Kenya has had cases where instances of corruption had been inferred at the international arena.

The ICSID case of *World Duty Free v Republic of Kenya*[33] is a relevant example. This was a case of a claim of enforcement of a contract by World Duty Free, who claimed to have bribed the former President of the Republic of Kenya, Daniel Arap Moi. The claimant investor argued that the

[32] Transparency International, The 2009 Global Corruption Barometer. Available at *http://www.transparency.org/research/gcb/gcb_2009*

[33] ICSID Case No ARB/00/7 (4 October 2006).

alleged US$2m bribe to the former Kenyan president was made under the "Harambee" system of "mobilizing resources through private donations for public purposes" and was therefore legally justified. ICSID was of the opinion that in light of domestic laws and international conventions relating to corruption, the tribunal was convinced that corruption is contrary to public policy in most jurisdictions. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by the arbitral tribunal.

Arbitrations involving allegations of corruption throw up difficult factual and legal issues at practically every stage of the arbitral process.

Kenya's competitiveness, according to a Transparency International Survey, is held back by corruption that penetrates every level of society. Frequent demands for bribes by public officials lead to increased business costs for foreign investors.[34] This being the case, it is of utmost importance that international commercial arbitration practitioners have a firm grasp of how to approach these issues, especially since sectors of major importance for international arbitration such as the construction, oil and mining industries suffer from endemic corruption.[35] However, the responsibility for just and effective adjudication of issues of corruption, within the context of the global fight against the scourge of corruption, cannot rest entirely with the tribunal. Parties have as important a role to play in ensuring that the tribunal is properly briefed on these issues, and must make the correct tactical decisions in the prosecution of their case, with sensitivity for the way courts handle public policy challenges.[36]

3.5 Legal and Institutional Reforms

The growth of arbitration in Africa is by no means restricted to an off-shore jurisdiction. Relatively mature arbitral centres already exist in a number of African cities including Kigali, Nairobi and Accra. In 2014, Morocco launched an annual arbitration conference-Casablanca Arbitration Days, which initiative seeks to establish Casablanca as a hub for international

[34] GAN Integrity Solutions, "Business Corruption in Kenya", Business Anti-Corruption Portal (2016).

[35] According to Transparency International's 2011, Bribe Payers Index.

[36] Hwang M.S.C et al, "Corruption in Arbitration-Law and Reality" available at *http://www.arbitration-icca.org.*

arbitration.[37] Governments are getting wise to the fact that arbitration can be a source of economic activity, with conference centres, hotels and professionals engaged in the processes set to benefit. The inadequate legal regimes and infrastructure for the efficient and effective organization and conduct of international commercial arbitration in Kenya[38] has, however, denied the local international arbitrators the fora to display their skills and expertise in international commercial arbitration. Tremendous progress has nevertheless been gradually made to change this situation and hopefully, the results will soon follow.

3.6 Endless Court Proceedings

Parties to arbitration agreements have used court intervention to delay and frustrate arbitral proceedings, whether yet to start or pending.[39] Sometimes matters will be appealed all the way to the highest court of the land in search of setting aside of awards. This delays finalization of the matter, as well as watering down the perceived advantages of arbitration and ADR in general. This can only be corrected through setting up tribunals or courts with finality in their decisions and operating free of national courts interference. The Arbitral Court established under the *Nairobi International Centre for Arbitration Act*[40] will hopefully cut down such cases. It is to provide for the establishment of a regional Centre for international commercial arbitration and the Arbitral Court and to provide for mechanisms for alternative dispute resolution and for connected purposes. This legislation may have been borne out of the recognition that Nairobi is yet to become an attractive destination for foreign investors, seeking the services of international institutional arbitrators. Lack of an elaborate legal and institutional framework on arbitration and excessive court interference in arbitration matters may be cited as some of the contributory factors to this phenomenon.[41] The functions of the Centre include, to *inter alia*, promote, facilitate and encourage the conduct of international commercial arbitration

[37]Ostrove, M. et al, "Developments in African Arbitration" *The Middle Eastern and African Arbitration Review (2016).*

[38] Kariuki Muigua, 'Promoting International Commercial Arbitration in Africa', page 14, available at *http://www.kmco.co.ke.*

[39] Kariuki Muigua, *Role of the Court under Arbitration Act 1995: Court Intervention Before, Pending And Arbitration in Kenya*, Kenya Law Review (2010).

[40] Laws of Kenya, Nairobi International Centre for Arbitration Act, No. 26 of 2013.

[41] Ibid.

in accordance with this Act; administer domestic and international arbitrations, as well as alternative dispute resolution techniques under its auspices; and ensure that arbitration is reserved as the dispute's resolution process of choice.[42] There is already in place a board of directors and an acting registrar, and the physical premises are located in Cooperative House, along Haile Selassie Avenue, Nairobi.

The Act also establishes a Court to be known as the Arbitral Court[43] which is to determine all disputes referred to it in accordance with this Act or any other written law, and its decisions are to be final.[44] These provisions are useful in guaranteeing confidentiality and non-interference by ordinary national courts. Section 22(1) of the Act provides that the Court should have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with this Act or any other written law. Section 22(2) further provides that a decision of the Court in respect of a matter referred to it should be final.[45] Under Section 23, subject to any other rules of procedure by the Court, the Arbitration Rules of the UNCITRAL, with necessary modifications, should apply. The Act also establishes an independent tribunal whose decisions on matters of arbitration under the Act should be final and binding. This will go a long way in ensuring its independence. For any country, a recognized arbitral Centre is also a great show of "soft power", helping to underline broader messages about political and legal stability, and give comfort to foreign investors.

The foregoing provisions, in recognizing international legal instruments on arbitration, therefore, place Kenya in a competitive position to engage with the other regional players in its promotion as a hub for International Commercial Arbitration.[46] In order to offer true competition to the established arbitral centres around the world, this Centre will need to demonstrate that it can offer a reliable and efficient alternative for the users of arbitration-including by giving comfort that the local judiciary will actively support, or at least not interfere with, the arbitral process.

[42] Ibid, Section 5.
[43] Ibid, Section 21.
[44] Ibid, Section 22.
[45] Attiya Waris, "International Commercial Arbitration in Kenya" op cit.
[46] Ibid.

3.7 Inadequate Marketing and Bias in Appointment of Arbitrators

Kenya, and the African continent in general, have been portrayed as 'less developed' in terms of handling international commercial arbitration, and nothing much has been achieved in marketing of Kenya as a Centre for international commercial arbitration.[47] Many people outside Africa still carry with them the perception that Africa does not have adequate/ any qualified international commercial arbitrators. They have, therefore, not sought to know whether this is the position as there has also not been much effort from Africans themselves to refute this assumption. With racism still existing in society, Africa has borne the brunt of it, with this bias rendering Africa's image as a corrupt and uncivilized continent. It has been observed that parties to disputes rarely select African cities as venues for international arbitration, and this is so even for some international arbitral institutions or arbitrators, when asked to make the choice.[48] Despite there being individuals with the relevant knowledge, skill and experience in international dispute resolution, and competent institutions which specialize in, or are devoted to, facilitating alternative dispute resolution (ADR), there has been a general tendency by parties to a dispute doing business in Africa to go back to their home turf to appoint arbitrators.[49] Most disputants prefer to appoint non-nationals as arbitrators in international disputes, thus, resulting in instances where even some Africans go for non-Africans to be arbitrators. Indeed, it has been observed that the near absence of African arbitrators in ICSID arbitration proceedings can, in part, be explained by the fact that African states predominantly appoint international lawyers to represent their interests.[50]This portrays Africa to the outside world as a

[47]Kariuki Muigua, 'Promoting International Commercial Arbitration in Africa' (2014), p. 15.

[48] Amazu A. Asouzu, International Commercial Arbitration and African States: Practice, Participation and Institutional Development, University Press, Cambridge, 2001, p. 5-6.

[49] Amazu A. Asouzu, 'Some Fundamental Concerns and Issues about International Arbitration in Africa', *African Development Bank, Law for Development Review.* Available at https://www.mcgill.ca/files/isid/LDR.2.pdf [Accessed on 10/03/2016].

[50] Karel Daele, Mishcon de Reya, 'Africa's track record in ICSID proceedings' *Kluwer Arbitration Blog*, 30 May 2012.

place where there are no qualified arbitrators to be appointed as international commercial arbitrators.[51]

According to statistics from two of the leading global arbitral institutions, the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA), the number of arbitration cases involving African parties, and in particular parties from sub- Saharan Africa, is on the rise. In its 2014 Statistical Report, the ICC noted that a record 113 parties from sub-Saharan Africa were involved in ICC arbitration in 2014.[52] In its 2013 Statistics, the LCIA registered almost twice as many arbitrations involving African parties as it did in 2012.[53] Despite this strong growth in caseload, however, it is notable that few of the arbitrators nominated to hear these disputes were African themselves. The need for arbitral tribunals to be more diverse and to reflect the community of users is nowhere more stark geographically than in Africa.[54]

3.8 Uncertainty of Costs and Institutional Capacity

There have not been very clear guidelines on the remuneration of arbitrators, and foreigners are not always very sure on what they would have to pay, if and when they engage African international arbitrators to arbitrate their commercial disputes. This is because the issue is often left to the particular institutional guidelines. For instance, the Kenyan branch of Chartered Institute of Arbitrators has its own rules and guidelines on the remuneration of its arbitrators. However, these are only applicable to those who practice arbitration under the Institute and thus have limited applicability.[55] It has also been observed that there exists a challenge on the capacity of existing institutions to meet the demands for international commercial arbitration matters. Much needs to be done to enhance their

[51] Kariuki Muigua, 'Nurturing International Commercial Arbitration in Kenya', pages 9-12.

[52] 2014 ICC Disputes Resolution Statistics, ICC Dispute Resolution Bulletin, 2015, No. 1.

[53] Registrar's Report, Casework 2013, available at *http://www.lcia.org/LCIA/reports.aspx*.

[54] Ostrove, M., et al, 'Developments in African Arbitration,' *The Middle Eastern and African Arbitration Review 2016*. Available at *http://globalarbitrationreview.com/reviews/79/sections/306/chapters/3183/*

[55] CIArb Kenya Website Available at *www.ciarbkenya.org*.

capacity in terms of their number, adequate staff and finances to ensure that they are up to task in facilitation of ADR.[56]

3.9 Key Evolutions

In order to cement the progress made to date, other key evolutions are also needed. Kenya has gone a long way in modernizing its domestic arbitration laws through the amendments discussed earlier and through entrenchment of the provision in the Constitution which inserted a requirement for arbitration prior to the pre-trial process. There is, however, need for the local judges and lawyers and other professionals, who in one way or another engage in arbitration to acquire deeper knowledge of arbitration. An awareness of the upside -as well as downside- of arbitration as an effective means of dispute resolution is also crucial towards fostering the growth of arbitration in Kenya and eventual growth of the country as a regional and global hub.

Capacity building is now being implemented through non- profit organizations such as African Legal Support Facility (ALSF) as well as through international cooperation agreements, such as the one concluded between the Permanent Court of Arbitration (PCA) and the African Union.[57] These agreements aim to assist with the development of arbitral infrastructure and the engagement of the regional arbitration community in participating in educational outreach and training programmes throughout the continent.[58] Kenya should take advantage of such programs.

3.10 Modernization of Arbitral Institutions

Communication remains a challenge to arbitrations being heard in the continent, and a quick fix would be to ensure that institutions created, and already in existence, maintain user-friendly websites where the latest arbitral rules and details of arbitrator panels can be found. According to a recent survey, the most commonly cited challenge by parties when

[56] Kariuki Muigua, 'Making East Africa a Hub for International Commercial Arbitration: A Critical Examination of the State of the Legal and Institutional Framework Governing Arbitration in Kenya', page 14. Available at *http://www.kmco.co.ke/attachments.*

[57] Ostrove, M., et al, 'Developments in African Arbitration,' *The Middle Eastern and African Arbitration Review 2016*, op cit.

[58] Transparency International, The 2009 Global Corruption Barometer, op cit..

conducting arbitration in Africa is the availability and experience of arbitrators.[59] According to Judge Abdulqawi Ahmed Yusuf, the Somali vice-president of the ICJ Court, African states have failed to appoint an African arbitrator or conciliator in 69 out of 85 existing ICSID disputes involving the continent.[60] He further states that the "legitimacy of investor-state arbitration in Africa depends on African arbitrators serving on tribunals and African states having more of a role in the formulation of bilateral investment treaties".[61]

4.0 Conclusion

It has been argued that arbitration is the backbone for protecting international commercial arrangements. In case of a commercial dispute, parties can resolve their differences without having to resort to the courts in the other party's country of residence or incorporation.[62] Further, international arbitration has been regarded as being very effective in the international business arena, since arbitral awards are readily enforceable under the New York Convention in most of the world's key economic nations, and the awards can only be challenged on very limited grounds.[63] Africa's seventh largest economy, Kenya, is home to a well-developed legal disputes sector, with a healthy future, and since the introduction of the country's new constitution, arbitration has been gaining ground. Although the full effect has not been felt, growth in the market is imminent.[64]

Effective and reliable application of international commercial arbitration has the capacity to encourage investors to carry on business with confidence, knowing their disputes will be settled expeditiously and this can enhance economic development for Kenya and the region. Arbitration is already established in certain sectors because it allows cases to be heard by specialists in a relatively short period of time. There is arbitration where parties feel that judges do not have enough expertise to handle the matter,

---

[59] *http://www.simmons-simmons.com/~/media/Files/Corporate/External%20publications.*

[60] Lacey Yong et al, 'Africa must have more representation on tribunals, says Somali judge', GAR, vol. 10, iss 6, 15 October 2015.

[61] Ibid.

[62] Leah Ratcliff, Investors beware - Indian Supreme Court asserts jurisdiction to set aside foreign arbitral awards, *International Arbitration Insights*, 18 June 2008.

[63] See Attiya Waris, "International Commercial Arbitration in Kenya".

[64] Andrew Mizner, 'Arbitration rising,' (African Law & Business, February, 2016). Available at *https://www.africanlawbusiness.com/news/6143-arbitration-rising*

or where they want the dispute at hand to be resolved within a particular period of time because the courts tend to be somehow unpredictable.[65] The surge in construction, in the Nairobi area as well as the East Africa region in general, is potential fuel for arbitration work. Government related disputes in Kenya's and the region's mining sector, energy, insurance and commercial corporations that 'want to resolve their problems and get on with business' also figure strongly in the use of arbitration.[66]

The current Arbitration Act is compatible with the prospect of Kenya being an attractive venue for international commercial arbitration, both for *ad hoc* and institutional arbitrations.[67]

If the foregoing challenges are fully addressed, then Nairobi (Kenya) can secure for itself a place on the global arbitration map.

[65] Ibid.

[66] Ibid.

[67] In institutional arbitration, the specialist institution generally administers the arbitration
under its own rules, unless it agrees to do so under another set selected by the parties. The institution appoints the tribunal and, in most cases, acts as the intermediary between the parties and the tribunal until the, undertaking all necessary administrative arrangements. In ad hoc arbitration, the parties agree to execute the process themselves by appointing the arbitrator and attending to the necessary administrative requirements before and during the hearing. (see Attiya Dr. Waris. "International Commercial Arbitration in Kenya - Book Chapter in Arbitration Law and Practice in Kenya Ed Prof G Muigai (LawAfrica: 2011)."

African Traditional Justice Systems

By: ***Francis Kariuki****

1.0 Introduction

African traditional justice systems (hereinafter 'TJS') refer to all those mechanisms that African peoples or communities have applied in managing disputes/conflicts since time immemorial and which have been passed on from one generation to the other. TJS have also been described using other tags such as community, traditional, non-formal, informal, customary, indigenous and non-state justice systems. All these tags have often been used interchangeably in existing literature to describe localized and culture-specific dispute resolution mechanisms amongst peoples. Although, they have a huge potential for enhancing access to justice (particularly amongst groups that have been excluded from the formal justice system) in Africa, strengthen the rule of law and bring about development among communities,[1] numerous challenges arise in operationalizing them. In recent times, however, they have been recognized in law subject to some limitations making it difficult to describe them using some of the stated tags. Such recognition is borne out of the increasing acceptance of their validity and legitimacy,[2] as they are home-grown, culturally-appropriate, operate on minimal resources and are easily acceptable by the communities they serve.[3] Formal justice systems such as litigation and arbitration employ legal technicalities and complex procedures, are expensive, not expeditious and are located in major towns, and are therefore not easily accessible by a majority of the people particularly the poor.

---

* Francis Kariuki holds an LLB, LLM (University of Nairobi), Postgraduate Diploma in Law (Kenya School of Law), and MCIArb. He is an Arbitrator, an Accredited Mediator and a Lecturer at Strathmore University Law School.

[1] E. Hunter, 'Access to justice: to dream the impossible dream? *'The Comparative and International Law Journal of Southern Africa*, Vol. 44, No. 3 (November, 2011), pp. 408-427.

[2] M. Forsyth, 'A Typology of Relationships between State and Non-State Justice Systems,' *J. Legal Pluralism & Unofficial L.*, (2007), p.69.

[3] D. Pimentel, 'Can Indigenous Justice Survive? Legal Pluralism and the Rule of Law,' *Harvard International Review, Vol. 32, No. 2* (Summer 2010), pp.32-36.

This paper discusses African TJS, their nature, current manifestations and challenges in Africa using Kenya as a case study. The paper contains seven (7) parts. Part 1 is this introduction which offers a definition of TJS and a general overview of the paper. Part 2 discusses the nature of African TJS and is followed by examples of institutions that entrench TJS in Africa in Part 3. The principles that undergird dispute resolution in Africa are explained in Part 4 of this discourse while Part 5 discusses the Kenyan legal landscape and how it seeks to regulate TJS. Part 6 assesses some of the teething problems in dealing with TJS while Part 7 provides a conclusion and offers some recommendations on the way forward.

2.0 Nature of African TJS

Most TJS are embedded in African customary laws[4] and hence reflect traditional African norms and values.[5] They are part of the social fabric in Africa explaining their resilience to date. TJS are justice processes based on cooperation, communitarism, strong group coherence, social obligations, consensus-based decision-making, social conformity, and strong social sanctions.[6] They involve the use of shared patterns of dispute resolution, conciliatory dialogue, the admission of guilt or wrongdoing, and 'compensatory concessions and a ritual commensality where food

[4] Access to Justice in Sub-Saharan Africa, Penal Reform International 2000, p.11, available at http://www.gsdrc.org/docs/open/SSAJ4.pdf, accessed on 01/04/2014.

[5] However, it is worth noting that African customary law is not static but dynamic. Consequently, it is possible to find TJS that are not strictly speaking informed by old customs or traditions but modern or new customs and practices. For a detailed discussion on this see, Francis Kariuki, 'Community, Customary and Traditional Justice Systems in Kenya: Reflecting on and Exploring the Appropriate Terminology' *Alternative Dispute Resolution*, Vol. 3, No. 1 (2015), pp.163-183.

[6] Erin Sherry & Heather Myers, 'Traditional Environmental Knowledge in Practice' *Society & Natural Resources*, Vol. 15 No. 4 (2002), pp. 345-358, at p. 351. See Marguerite Johnston 'Giriama Reconciliation' Vol. 16 *African Legal Studies* (1978) at pp. 92-131(Johnson notes that the possibility of reconciliation is dependent on the disputants' broader social relationship, of which the dispute is but a partial reflection). See also Katherine K. Stich 'Customary Justice Systems and Rule of Law' *Military Law Review*, Vol. 221, (2014) pp. 215-256.

exchanges symbolise the end of animosities and the harmonious re-engagement of the flow of social life.'[7]

They can promote access to justice because they are: accessible by the rural poor and the illiterate people, flexible, voluntary, they foster relationships, proffer restorative justice and give some level of autonomy to the parties in the process.[8] Most TJS are concerned with the restoration of relationships (as opposed to punishment), peace-building and parties' interests and not the allocation of rights between disputants.[9] In most of them, decisions are community-oriented with the victims, offenders (wrongdoer) and the entire community being involved and participating in the definition of harm (wrong doing) and in the search for a solution acceptable to all stakeholders.[10] For example, among the Gumuz, the Oromo and the Amhara living in the Metekkel region of Western Ethiopia have adopted a mechanism of *Michu* or friendship to resolve land disputes due to many immigrants in the area.[11] The aim of traditional dispute resolution by elders in Western Ethiopia, a tribal milieu, is not to punish the wrongdoers but to restore social harmony seeing that different tribes live side by side. The types of conflicts in the area include land boundary disputes, disputes over grazing area and cultural disputes especially due to intermarriages.[12]

They are legitimate and effective as they involve interactions, procedures and decisions that reflect people's culture.[13] As Ayinla documents, African

[7] Andrew McWilliam 'Meto Disputes and Peacemaking: Cultural Notes on Conflict and its Resolution in West Timor' *The Asia Pacific Journal of Anthropology,* Vol. 8 (2007), pp. 75-91 at p. 88.

[8] Francis Kariuki 'Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of *Republic v Mohamed Abdow Mohamed* [2013] eKLR, *Alternative Dispute Resolution*, Vol. 2, No. 1 (2014), pp.202-228.

[9] Ibid, p. 204. See also ICJ-Kenya Report, 'Interface between Formal and Informal Justice Systems in Kenya,' (ICJ, 2011), p. 32; A.N. Allott, 'African Law,' in Derrett, J.D *An Introduction to Legal Systems*, (Sweet & Maxwell, 1968), pp. 131-156.

[10] O.Oko Elechi, 'Human Rights and the African Indigenous Justice System,' A Paper for Presentation at the 18th International Conference of the International Society for the Reform of Criminal Law, August 8 – 12, 2004, Montreal, Quebec, Canada. See also H. Zehr, *The Little Book of Restorative Justice*, (PA, Good Books, 2002).

[11] Linda James Myers & David H Shinn, 'Appreciating Traditional Forms of Healing Conflict and in Africa and the World,' *Black Diaspora Review* Vol. 2 No. 1, Fall 2010, p.7.

[12] Ibid.

[13] Gail Whiteman 'All My Relations: Understanding Perceptions of Justice and Conflict Between Companies and Indigenous Peoples' *Organization Studies* Vol. 30,

traditions, beliefs, customs, practices, religions and values, regulate human affairs and are the basis of the system of administration of justice.[14] Because of social and religious sanctions, the compliance rate with decisions of TJS is higher than with formal justice systems.[15]

In addition, TJS are an aspect of the traditional 'commons' which refers to shared resources by a group of people[16] and an institutional framework regulating the right to access, use and control of resources.[17] As one of the design principles for effective common resource management,[18] TJS can be appropriate in ensuring and facilitating the rights of access, use and control of resources in Africa today especially community resources. TJS are thus aptly suited in mediating issues of ownership and access to resources in Africa which are held communally and intergenerationally and some of it is sacred. Because they enjoy local legitimacy, they are appropriate fora that indigenous and local communities use in determining whether to grant or deny access to their resources.

3.0 Institutions used in Conflict Resolution

Whenever conflicts arise amongst African communities, parties often resort to negotiations and, in other instances, to the institution of council of elders or elderly men and women who act as third parties in the resolution of conflicts.[19] For instance, in relation to the *gacaca* system in Rwanda, it is

---

(2009) at pp. 101-120; Bertha Kadenyi Amisi 'Indigenous Ideas of the Social and Conceptualising Peace in Africa' *Africa Peace and Conflict Journal* (2008) at pp.1-18; Peter Fitzpatrick 'Traditionalism and Traditional Law' *Journal of African Law*, Vol. 28, (1984) pp. 20-27, at p. 21; Carey N. Vicenti 'The re-emergence of tribal society and traditional justice systems' *Judicature*, Vol. 79 (3), (1995) pp. 134-141.

[14] L.A. Ayinla 'African Philosophy of Law: A Critique' 151, available at *http://unilorin.edu.ng/publications/African%20Philosophy%20of%20Law.pdf* accessed on 29 May 2016.

[15] Ibid.

[16] HWO Okoth-Ogendo 'The tragic African commons: A century of expropriation, suppression and subversion' *University of Nairobi Law Journal* at (2003) 107-117.

[17] Yochai Benkler *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (2006) at 116-118 available at *https://www.jus.uio.no/sisu/the_wealth_of_networks.yochai_benkler/portrait.a4.pdf* accessed on 29 May 2016.

[18] Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Actions* (1990), at 90-102.

[19] Francis Kariuki *et al*, *Property Law*, Strathmore University Press, 2016, at 65.

reported that the initial conflict and problem resolvers were the headmen of the lineages or the eldest male or patriarchs of families who resolved conflicts by sitting on the grass together to settle disputes through restoration of social harmony, seeking truth, punishing perpetrators and compensating victims through gifts.[20] The main aim of the *Gacaca* process was to ensure social harmony between lineages and social order throughout the Rwandan ethnicities. After the Rwanda Genocide, the Rwandan Government institutionalized *Gacaca* courts as a means to obtain justice and deal with a majority of the genocide cases that the formal Courts and International Criminal Tribunal for Rwanda (ICTR) could not handle. Institutionalization of the Gacaca Courts aimed at establishing the truth about the Rwandan Genocide, expedite proceedings against suspects of genocide, remove impunity, reconcile Rwandans and use Rwandan Customs to resolve their disputes.[21]

Similarly amongst the Tswana of Botswana it is documented that dispute resolution starts at the household *(lolwapa*) level.[22] If a dispute cannot be resolved at the household level, it is taken to the *Kgotlana* (extended family level) where elders from the extended family sit and listen to the matter. The elders emphasize mediation of disputes. If the *kgotlana* does not resolve the dispute, the disputants take the matter to *kgotla*, which is a customary court with formal court like procedures. It consists of the chief at the village level and the paramount chief at the regional levels. The chiefs are public officials and handle both civil and criminal matters. However, the customary court does not deal with land disputes as its role is merely advisory. The decision of the paramount chief is appealable to the customary court of appeal, which is the final court on customary matters and has the same status as the high Court.[23]

Amongst the Giriama people of Kenya there were two main dispute resolution institutions: the council of elders and the oracles. Two sets of council of elders existed. The first set was the senior age set known as the

[20] Bert Ingelaere, 'The Gacaca Courts in Rwanda' *Traditional Justice and Conflict Resolution After Violent Conflict: Learning From African Experiences*, Luc Huyse and Mark Salter (Eds) (IDEA, Stockholm, 2008), 33.
[21] Ibid, p. 38.
[22] Kwaku Osei-Hwedie and Morena J. Rankopo, *Indigenous Conflict Resolution in Africa: The case of Ghana and Botswana*, p. 43.
[23] Ibid.

kambi that listened to normal and day-to-day complaints and resolved them.[24] The most revered set of council of elders was known as the *vaya*, which consisted of a few select elders who operated as a secret society. The *vaya* governed the whole of the Giriama community by determining planting and harvesting seasons, praying for rain, initiating of youth into age-sets.[25] The *vaya* also presided over trial by ordeals as oracles. Supernatural and superstitions played a great role in dispute resolution, especially in seeking and finding the truth. The Giriama used ordeals to determine the guilt or innocence of parties to a dispute through their reaction to the ordeals.[26] Two ordeals were common among the Giriama: ordeal by fire and ordeal by poison. The ordeal by poison made the guilty person sick while the ordeal by fire caused the guilty person to blister. The accused and the accuser often went to the ordeal together but sometimes the accused went alone to prove his innocence. The jurisdiction of elders among the Giriama was not physical but psychological.[27] Elders did not force anyone to appear before them, but such non-attendance was viewed as an admission of guilt. Parties were only subjected to trial by ordeal by their consent. The council of elders and trial by ordeals often operated as one process where ordeals and oracles determined who to blame and then the council of elders imposed duties and enforced rights.[28]

Amongst the Ameru people of Kenya there is a council of elders called *Njuri Njeke* which plays a key role in dispute resolution.[29] It is reported that the phrase *Njuri Ncheke* connotes a 'selected council of adjudicators with a definite social role' and the members of the council are 'carefully selected and comprised mature, composed, respected and incorruptible elders of the community' because their work calls for greater wisdom, personal discipline, and knowledge of the traditions.[30] The *Njuri Njeke* council of

[24] Marguerite Johnson, 'Giriama Reconciliation,' *African Legal Studies,* Vol.16, (1978), p. 95. Retrieved from http://heinOnline.org on 16.03.2015
[25] Ibid.
[26] Ibid, 96.
[27] Ibid.
[28] Ibid.
[29] Alex N. Kamwaria *et al*, 'Recognizing and Strengthening the Role of the Njuri Ncheke in Devolved Governance in Meru County, Kenya' *Journal of Educational Policy and Entrepreneurial Research (JEPER)* Vol.2 No.12, (2015) pp. 42-47, at pp.43-44.
[30] Ibid, p. 43.

elders receives complaints and summons parties who are free to submit to their jurisdiction or not.[31] Once a party refuses to submit to the *Njuri Ncheke* council of elders the council is supposed to refer the complainant to a court of law. In cases where there is deadlock, the *Njuri Ncheke* has mechanisms for breaking the deadlock such as performance of *Kithiri* curse or *Nthenge* oath.

4.0 Principles that undergird African TJS

Although TJS may vary from community to community, there are certain principles that run through most of them in Africa. First, conflict resolution is based on social or cultural values, norms, beliefs and processes that are understood and accepted by the community. This engenders legitimacy and high compliance rate with the decisions made. Second, there is high regard for truth and belief in ancestral powers, superstitions, charms, sorcery and witchcraft form a great part of dispute resolution and prevention mechanisms in traditional African societies.[32] For instance, among the Samburu, Turkana and Pokot communities there are indigenous warning systems about conflicts by looking at goat intestines and studying stars in the sky.[33] Moreover, traditional healers, diviners, herbalists, spiritual seers and healers played an important role in conflict resolution. Due to the respect, fear and reverence that these experts have in society, they play a crucial role in truth seeking. They also mediate between the living, ancestors and God. Conflicts arising from witchcraft are not resolved by the customary courts. They are regarded as private matters and hence privately resolved by traditional healers and affected parties. Consequently, the role of the spiritualists, especially in helping to identify suspected ritual murderers is prohibited by law.[34]

---

[31] Per Makau J in *Erastus Gitonga Mutuma v Mutia Kanuno & 3 Others* [2012].
[32] Adeyinka A and Lateef B, 'Methods of conflict resolution in African traditional society' 8 *African Research Review: An International Multidisciplinary Journal*, Vol.8 No. 2 (2014).
[33] Ruto Pkalya, Mohamud Adan & Isabella Masinde, *Indigenous Democracy: Traditional Conflict Reconciliation Mechanisms Among the Pokot, Turkana, Samburu and the Marakwet* (ed. Betty Rabar & Martin Kirimi, Intermediate Technology Development Group-Eastern Africa, 2004), p. 84.
[34] Kwaku Osei-Hwedie and Morena J. Rankopo, *Indigenous Conflict Resolution in Africa: The case of Ghana and Botswana*, p. 45.

Third, respect for elders, ancestors, parents, fellow people and the environment is cherished and firmly embedded in the mores, customs, taboos and traditions amongst Africans. Commenting on the mediating role of elders, Jomo Kenyatta notes that:

> '*The function of an elder, both in his own family group and in the community, is one of harmonising the activities of various groups, living and departed. In his capacity of mediator his family group and community in general respect him for his seniority and wisdom, and he, in turn, respects the seniority of the ancestral spirits.'*[35]

According to Bujo the admonitions, commandments and prohibitions of ancestors and community elders are highly esteemed, they reflect experiences which have made communal life possible up to the present.[36] Due to the respect accorded to elders, people avoid being in conflicting situations. Jomo Kenyatta documents how a man could not dare interfere with a boundary mark amongst the Gikuyu people, for fear of his neighbour's curses and out of respect. Boundary trees, lilies and demarcation marks were ceremoniously planted and highly respected by the people. If the boundary trees or lilies dried out, fell down or was rooted up by wild animals, the two neighbours would replace it. But if they could not agree as to the actual place where the mark was, they could call one or two elders who after conducting a ceremony would replant the tree or lily.[37]

Fourth, the communal spirit of sharing and reciprocity, ensures mutual exchange of privileges, goods, favours, obligations, amongst most African communities also fosters peaceful coexistence. [38] This eliminates the likelihood of disputes and conflicts, fosters relationships and a sense of togetherness. Conflicts and disputes have the potential to disrupt the social fabric holding society together and are thus avoided. There exist social

[35] J. Kenyatta, *Facing Mount Kenya: The Tribal Life of the Gikuyu*, (Vintage Books, New York, 1965), p. 255.
[36] B. Bujo, *The Ethical Dimension of Community-The African Model and the Dialogue between North and South*, (Paulines Publications Africa, 1998), pp. 198-202.
[37] J. Kenyatta, *Facing Mount Kenya: The Tribal Life of the Gikuyu*, (Vintage Books, New York, 1965), 38-41.
[38] Ibid, pp. 38-41.

values, norms and beliefs in place aimed at avoiding conflicts, and ensuring that if they arise they are resolved amicably.[39]

Other principles that aid elders in conflict resolution are social cohesion, harmony, openness/transparency, participation, peaceful co-existence, respect, tolerance and humility. Virtually all African communities depict adherence to these values explaining why TJS foster reconciliation and social justice. This sharply differs with the western models of dispute resolution such as litigation and arbitration, which are individualistic and adversarial in nature.

5.0 Legal Recognition of TJS in Kenya

Although TJS have severely been weakened, undermined and disregarded and their resilience across African States, and recognition in international and municipal instruments, illustrates that they still occupy a central place in the world of dispute resolution in Africa.[40] At the international level, the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) recognises the rights of indigenous peoples and requires these rights to be determined in accordance with their own indigenous decision-making institutions and customary laws. [41] Likewise, the Brundtland Report notes that the recognition of traditional rights must go hand in hand with the protection of local institutions that enforce responsibility in resource use.[42] Moreover, the Rio Declaration[43] and the International Labour Organization Convention 169 on Indigenous and Tribal Peoples in Independent Countries,[44] require States to recognise and respect indigenous people's customary laws and traditional decision making institutions.

---

[39] See generally, Francis Kariuki, 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities,' *Alternative Dispute Resolution*,' Vol. 3, No. 2 (2015), pp.30-53 at pp. 46-47.

[40] Ibid, p. 30. See also Francis Kariuki, 'Customary law jurisprudence from Kenyan courts: Implications for Traditional Justice Systems,' Vol. 8, No.1 (2015), pp. 58-72.

[41] See Article 26(3) of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), G.A. Res 61/295, UN. Doc. A/61/295(2007). See also Articles 8 and 9, Convention on Biological Diversity, 31 *ILM*, 1992; Article 12 of the Nagoya Protocol.

[42] World Commission on Environment and Development *Brundtland Report* 1987 at 115-116.

[43] Principle 22 of the Rio Declaration on Environment and Development.

[44] Articles 8 & 9 International Labour Organization Convention 169 on Indigenous and Tribal Peoples in Independent Countries

Nationally, the role of TJS in promoting access to justice and better governance is increasingly being recognized in Kenya. Apart from being anchored on customary law, which is one of the sources of law in Kenya, traditional justice systems are explicitly recognized within formal laws.[45] Article 159 (2) (c) of the Constitution entreats the courts and tribunals in exercising judicial authority to be guided by *inter alia*, the principle that:

> *'…alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted subject to clause (3) ;'(own emphasis).*

However, TJS are not to be applied in a way that contravenes the Bill of Rights; is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or is inconsistent with the Constitution or any written law.[46] But the Constitution does not limit the application of TJS to any area of the law. The 2010 Constitution allows for the use of TJS in the resolution of land and environmental disputes.[47] And due to the sensitivity of the land question in Kenya, TJS seem to be very appropriate as they would foster relationships and coexistence even after the dispute settlement. Courts have also recognised TJS. For example, in the case of *Lubaru M'imanyara v Daniel Murungi,*[48] parties filed a consent seeking to have the dispute referred to the ***Njuri Ncheke* Council of Laare** Division, Meru County and the court citing Articles 60(1) (g) and 159(2) (c) of the Constitution referred the dispute to the *Njuri Ncheke* noting that it was consistent with the Constitution. The consent reached by the parties was adopted as an order of the court.[49] In relation to customary marriage disputes, the Marriage Act 2014 provides for the application of TJS over such disputes. According to Section 68(1) thereof;

---

[45] See generally the Constitution of Kenya 2010, Penal Code Cap. 63, Criminal Procedure Code Cap. 75, National Cohesion and Integration Act No. 12 of 2008 et cetera.
[46] Article 159(3), Constitution of Kenya 2010.
[47] Article 159(2) (c), 60(f), 67(2)(f), Constitution of Kenya 2010. See also ss 18 and 20(1) of the Environment and Land Court Act No. 19 of 2011 allowing the Environment and Land Court to adopt and implement Article 159 of the Constitution.
[48] Miscellaneous Application No. 77 of 2012. [2013] eKLR.
[49] Similarly, in *Seth Michael Kaseme v Selina K. Ade,* Civil Appeal 25 of 2012; [2013] eKLR, the High Court recognised the role of the *Gasa* Council of Elders of Northern Kenya in dealing with land disputes.

> *'The parties to marriage celebrated under Part V may undergo a process of conciliation or customary dispute resolution before the court may determine a petition for the dissolution of marriage.'*

However, customary dispute resolution must conform to the principles of the Constitution.[50] Further, the person who takes parties through the process of conciliation or traditional dispute resolution must prepare a report of the process for the court.[51] Here, it seems that courts will play a supervisory role over customary dispute resolution processes to ensure compliance with the Constitution. But, who will be the dispute resolver in such an instance? Is it a traditional leader, a counsellor, family member, village elder or chief? Application of TDRM in customary marriages may contribute to enhanced access to justice by parties in customary marriages since most disputes touching on marriages have had to be handled by courts. Courts have not given customary law the similar treatment as statutory law, and thus parties to customary unions could not have justice there.

In the African traditional set-up, disputes are not classed as either criminal or civil. Therefore, most communities have procedures for dealing with all matters that may disrupt social stability including criminal offences such as murder. As the Constitution does not prohibit the use of TJS in criminal matters, an important issue for consideration is to determine when, how and under what circumstances they can apply in criminal cases.[52] Courts in Kenya have taken different views in the use of TJS to resolve criminal matters. For instance in *Republic v Mohamed Abdow Mohamed*[53] the High Court in Kenya discharged an accused person who had been charged with murder after the families of the accused and the deceased person *had sat and some form of compensation paid 'wherein camels, goats and other traditional ornaments were paid to the aggrieved family' including a ritual that was performed to pay for the blood of the deceased to his family as provided for under the Islamic Law and customs.*[54]

---

[50] Section 68(2), *Marriage Act*, 2014.
[51] Ibid, section 68(3).
[52] Francis Kariuki 'Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of *Republic v Mohamed Abdow Mohamed* [2013] eKLR, *Alternative Dispute Resolution*, Vol. 2, No. 1 (2014), p.223.
[53] Per Lagat-Korir J in Criminal Case No. 86 of 2011 [2013] eKLR.
[54] Ibid.

However, in *Republic v Abdulahi Noor Mohamed (alias Arab)*[55] the accused was charged with murder but the court urged that the charge against the accused was a felony and 'as such reconciliation as a form of settling the proceedings is prohibited.' This was after the accused's advocate submission that the two families had signed an agreement out of court in accordance with the Somali culture, law and religion and reconciled their minds and felt that the agreement ensured justice for them and the community.

In the Kenyan context, one can argue that if traditional justice systems are in compliance with Article 159(3) of the Constitution, there should be no bar to their applicability in criminal matters where the parties have so consented to their use because judicial authority emanates from the people. This position had received judicial imprimatur earlier in *Ndeto Kimomo v Kavoi Musumba*[56] Law V.P stated as follows:-

> *'In my view, when the parties agreed to have their case decided by taking of an oath, they were in effect withdrawing the appeal from the High Court's jurisdiction and invoking another jurisdiction, involving procedures such as slaughtering a goat, beyond the control of the High Court. The parties were of course entitled to have their case decided in any lawful way they wished, by consent.'*

However, in *Dancan Ouma Ojenge v P.N. Mashru Limited* the Employment and Labour Relations Court in Mombasa noted that although superstition played a great role in dispute resolution especially in seeking and finding the truth, the use of traditional dispute resolution mechanisms in that case was repugnant to justice and morality, inconsistent with the Constitution and the Law. In this case, the Respondent Company alleged the Claimant had stolen a computer box and resorted to terminate his contract unfairly and unlawfully upon receiving the opinion of a witchdoctor about the employee's guilt. The Respondent conducted investigation and disciplinary proceedings by ordeal which was conducted as follows:

> *'…The witchdoctor carried some sticks. He held the sticks on one end, while the General Manager held the other end. The Employees were asked in turns, to place their hands between the sticks. If the witchdoctor declared the grip on the particular hand of an Employee, in between the sticks was strong, it was concluded the individual was guilty of stealing*

[55] Per Lesiit J in **Criminal Case No. 90 of 2013** [2016] eKLR.
[56] *[1977] KLR 170.*

> *Respondent's computer box. The grip of the witchdoctor's sticks, on the hands of the Claimant, and on the hands of 3 other Employees, was declared to be strong. Consequently, the Respondent found them guilty of an employment offence.'*[57]

My view is that the outcome in this case could have been different if the employee had consented to the investigation and disciplinary proceedings being done by way of ordeal.

6.0 Challenges facing TJS in Africa

The first key challenge of dispute resolution by elders or any form of traditional justice system is the negative attitude they receive from 'modernized' Africans. Traditional practices such as rituals, cleansing, and trial by ordeals which are central in resolving disputes have been declared illegal under most legal systems. Similarly, in most countries in Africa including Kenya, South Africa and Ethiopia, there are laws proscribing witchcraft and traditional African practices despite their complementary role in dispute resolution.[58]

Secondly, African justice systems are regarded as inferior in comparison to formal justice systems. The inferiority is as a result of the subjugation of African customary law, which is the undergirding normative framework providing the norms, values, and beliefs that underlie traditional dispute resolution.[59] The repugnancy clauses which aimed at limiting the application of African customary law remain in the statute books of most African countries even in the post-independence era. In Kenya, for instance, Article 159(3) of the Constitution limits the use of traditional dispute resolution mechanisms using a repugnancy clause.[60]

Thirdly, modernity has had its fair share of negative impacts on African justice systems. In pre-colonial period, elders were the rich and wealthiest people as they held land and livestock. Their wealth and respect enabled them to be independent during dispute resolution processes. However, in modern societies, younger people have accumulated wealth and in most cases, older people rely on the younger people. This has enabled dispute

[57] Per James Rika J in Cause No. 167 of 2015 [2017] eKLR.
[58] Francis Kariuki, 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities,' *Alternative Dispute Resolution*,' Vol. 3, No. 2 (2015), pp.30-53 at p. 50.
[59] Ibid, pp. 50-51.
[60] Ibid, p. 51.

resolution by elders to be affected by bribery, corruption and favoritism. For instance, there are reports that the *Abba Gada* elders of the Borana-Oromo and the *Sefer* chiefs of the Nuer community have been corrupted by bribes therefore limiting people's faith in them.[61]

TJS systems are threatened by modernization brought about by urbanization, a cash economy, and socio-economic, political and cultural changes[62] which are breaking down the close social ties and social capital between families and kinsmen. In addition, the superiority of the Westernized judicial and legal system has further reduced the influence elders have in resolution of disputes.

In addition, inadequate or unclear legal and policy framework on traditional dispute resolution mechanisms poses a major challenge to their application in contemporary African societies. Most African countries lack clear policies and laws on traditional dispute resolution mainly due to plurality of their legal systems. Even in countries such as South Africa where there is a legal framework for the application of traditional dispute resolution, there are still challenges and limitations in their usage.[63]

Another criticism levelled against TJS is that they are incapable of respecting and protecting the fundamental rights and freedoms of suspects (in criminal cases) and parties before such forums (especially women). But some have argued that this thinking is premised on a wrong assumption that pre-colonial Kenya did not have a concept of human rights.[64] In addition, Elechi asserts that there are greater opportunities for the achievement of justice within TJS than with the African state criminal justice systems because the former aims at the restoration of rights, dignity, interests and wellbeing of victims, offenders, and the entire community.[65]

---

[61] Gebreyesus Tekla Bahtu, *Popular Dispute Resolution Mechanisms in Ethiopia: Trends, Opportunities, Challenges and Prospects,* p.115-116.

[62] Republic of Kenya, *The National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions,* (Government of Kenya, 2009), para 4.3.4.

[63] Christina Rautenbach, 'Traditional Courts as Alternative Dispute Resolution (ADR)-Mechanisms in South Africa' *SSRN*, 312-315.

[64] Francis Kariuki 'Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of *Republic v Mohamed Abdow Mohamed* [2013] eKLR, *Alternative Dispute Resolution*, Vol. 2, No. 1 (2014), p.217.

[65] O.Oko Elechi, 'Human Rights and the African Indigenous Justice System,' A Paper for Presentation at the 18th International Conference of the International Society for the Reform of Criminal Law, August 8 – 12, 2004, Montreal, Quebec, Canada.

Because of the evolving nature of customary law, traditional justice systems should not be legislated. TJS vary from community to community, and thus they would be challenges in coming up with a legislation harmonizing or consolidating different mechanisms. This may impede the growth of customary law and TJS. If there is need for regulation of TJS, it should be a framework law outlining the principles that such processes must comply with, e.g. fairness, non-discrimination and adherence to human rights standards. However, the regulatory framework on traditional justice systems must allow for their development.[66]

7.0 Conclusion and way forward

In conclusion, it is worth noting that access to justice in Kenya remains a mirage for most people. As such, TJS as discussed above seem to hold a great potential and promise for enhancing access to justice amongst many people and may also help reduce the huge backlog of cases in courts since most disputes can be resolved locally. TJS are the most appropriate processes in rural areas and within informal settlements where people lack the financial wherewithal to access justice in formal justice systems. Within informal areas, communities could benefit a lot from locally-developed justice mechanisms that are sensitive to their plight, easily accessible and that dispense justice expeditiously. They can come up with frameworks for peace building, problem-solving, dispute resolution, improving community's way of life, community crime prevention, community policing and community defense.[67] Such justice mechanisms need not necessarily be informed by African customary law but by the current practices and customs of the people living in the informal settlement who may be from different ethnicities. It is reported that communities living in the informal settlements of Kibera and Mukuru slums have formed their own dispute resolution mechanisms that are independent of the state's formal dispute resolution mechanisms.[68] TJS have also been very effective in peace efforts

[66] Francis Kariuki 'Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of *Republic v Mohamed Abdow Mohamed* [2013] eKLR, *Alternative Dispute Resolution*, Vol. 2, No. 1 (2014), p. 226.
[67] D.K. Tharp & T.R. Clear, *Community Justice: A Conceptual Framework*, *Op. cit*, pp. 323-329.
[68] FIDA Kenya, *Traditional Justice Systems in Kenya: A Study of Communities in Coast province of Kenya* (FIDA Kenya, 2008), p. 4.

in different parts of the country and are good forums for dialogue on matters affecting communities. However, for TJS to work for the African people, and Kenya in particular, a number of things ought to be taken into account, including:

(a) The need to develop a clear legal and policy framework for the application of TJS that ensures respect for human rights of parties, victims, offenders, communities but at the same time respects African customary practices and institutions.

(b) Placing emphasis on TJS, as the first port of call where applicable and relevant, in resolving disputes. Parties in certain personal relations such as marriage, divorce, child custody, maintenance, succession and related matters should first opt for TJS before approaching the formal justice systems.

(c) The need to give elders engaged in the process adequate remuneration to prevent chances and opportunity for corruption.[69] There are reports that corruption of elders in some communities influences the dispute resolution process.

(d) The need for a framework for appealing the decision of elders in the TJS. For instance, among the Tswana, the hierarchy of traditional dispute resolution mechanism begins at the household level, then goes to the extended family level, the a formal customary court, and lastly to the customary court of appeal, which has the same status as the High court.

(e) Caution in not incorporating TJS within the formal justice systems. TJS should be entirely voluntary, consensual and their decisions non-binding. In some jurisdictions, traditional customary courts have been established that allow for the application of customary law by experts in customs and traditions from different communities.[70]

(f) The need to develop an enforcement mechanism for TJS decisions. For instance, in South Africa, if a person fails to obey the decision of a traditional elder, the person is reported to a magistrate who gives

[69] This has to be done cautiously since it is clear that traditionally elders were not paid at all for their work.

[70] Francis Kariuki 'Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of *Republic v Mohamed Abdow Mohamed* [2013] eKLR, *Alternative Dispute Resolution*, Vol. 2, No. 1 (2014), p.227.

the person 48 hours to show cause and if he fails to, he is punished.[71]

(g) African traditions and customs should be co-opted into formal education system to enhance the respect for our cultures, especially after centuries of subjugation. Most African customs and practices are neither written nor codified since they are passed from generations to generations through word of mouth. They are at great risk of dying away and should therefore be taught not only for use in dispute resolution but also for posterity and appreciation by present and future generations.

(h) Need for research and codification of key concepts, practices and norms of different TJS to protect them and to ascertain where, when, how and under what conditions they operate[72] and to determine whether they comply with the thresholds set in the Constitution.

(i) Further, such codification increases uniformity and consistency of application of traditional dispute resolution mechanisms by elders.

(j) In addition, legal representation in traditional dispute resolution fora should be barred completely. A party should appear in person or be represented by a spouse, family member, neighbor or member of the community. Barring legal representation would safeguard these processes from legalities and technicalities applied in litigation. Further, the rationale for excluding legalities is that certain legal procedures such as cross-examination may be inconsistent with traditions, especially where the person being cross-examined is a senior male in the family or community.[73]

---

[71] Francis Kariuki, 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities,' *Alternative Dispute Resolution*,' Vol. 3, No. 2 (2015), pp.30-53 at p.53.

[72] Available at http://www.gsdrc.org/go/display/document/legacyid/98, (accessed on 13/08/14).

[73] Francis Kariuki 'Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of *Republic v Mohamed Abdow Mohamed* [2013] eKLR, *Alternative Dispute Resolution*, Vol. 2, No. 1 (2014), pp.226-227.

Mediation and the Role of Women in Peace and Security

By: ***Mbiriri Nderitu****

Abstract

This paper critically examines the role of women in conflict resolution and peace building. This discussion is based on the fact that the female gender is the most adversely affected by conflict and its aftermath in any society, hence the need to seek their participation in resolving that conflict and also in peace-building.

The author discusses mediation as a conflict management mechanism and observes that the current approaches to mediation (indigenous and official mediation) share one thing in common, namely the limited role that women play in the mediation process. As such, there is a case to be made for the mainstreaming of gender equality at all levels of mediation, considering that while indigenous processes contain a range of progressive values, some of their practices are patriarchal and therefore not gender sensitive.

The author concludes by stating that the place of women in our society puts them in the most proximate contact with the environment and natural resources and therefore for mediation to be effective as a conflict management mechanism it must involve all concerned groups of people, including women and children and their views should be respected and taken into account. The process should ensure there is participation by both gender and neutral implementation of the decisions reached in mediation.

1.0 Introduction

Moore[1] says that Mediation is the intervention into a dispute or negotiation by an acceptable, impartial and neutral third party who has no authoritative decision-making power, to assist disputing parties in voluntarily reaching their own mutually acceptable settlement of the issues in dispute.

Article 33 of the Charter of the United Nations provides that the parties to any dispute shall, first of all seek a solution by negotiation, enquiry,

---

* LLB (MUK), MCIArb, Advocate; A paper presented at CIArb's FIDA Training in Mediation Course, Maanzoni Lodge, Machakos County, 11th December 2012 (**Revised on 25th February 2015**).

[1] C. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict*, (Jossey-Bass Publishers, San Francisco, 1996), p. 14

mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.[2] The United Nations Security Council on 31 October 2000, adopted resolution 1325 (2000) on women, peace and security. In the said resolution, the Security Council highlights the importance of bringing gender perspectives to the centre of all United Nations conflict prevention and resolution, peace -building, peacekeeping, rehabilitation and reconstruction efforts.

Top on its agenda in the above resolution, the Security Council urged and encouraged;

i. Member States to ensure increased representation of women at all decision-making levels in national, regional and international institutions and mechanisms for the prevention, management, and resolution of conflict;
ii. The Secretary-General to implement his strategic plan of action (A/49/587) calling for an increase in the participation of women at decision-making levels in conflict resolution and peace processes;
iii. The Secretary-General to appoint more women as special representatives and envoys to pursue good offices on his behalf, and in this regard calls on Member States to provide candidates to the Secretary-General, for inclusion in a regularly updated centralized roster;

The passing of the above resolution was informed by the fact that women and girls were the most adversely affected by conflict and its aftermath in any society, hence the need to seek their participation in resolving that conflict and also in peace-building. From the onset, it is clear that the role of women in conflict resolution and peace building has been recognized by the premier organization charged with ensuring international peace and security of all nations.

2.0 Mediation and the Role of Women in Peace and Security

A key aspect of any mediation process is the inclusion of primary and secondary actors. An effective mediation should adopt processes that

[2] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

create greater thresholds of inclusion while maintaining efficiencies.[3] Current approaches to mediation (indigenous and official mediation) share one thing in common, namely the limited role that women play in the mediation process. Given the incidence of gender – based violence, rape and the exploitation of children in armed conflict, there is a case to be made for the mainstreaming of gender equality at all levels of mediation.[4] In addition, indigenous approaches rely on traditional norms that have been developed over centuries. While indigenous processed contain a range of progressive values, some of their practices are patriarchal and therefore not gender sensitive. This has the effect of undermining the role of women in mediation and the peace process.[5]

Where it has been tried, the involvement of women in mediation and peace building has had a great impact on the affected communities and even lead to resolution of the conflict. A classic example here in Kenya is the Wajir Peace Initiative. The increasing frequency, severity and cumulative consequences of conflicts in Arid and Semi-arid Land (ASAL) areas in Kenya, particularly in the late 1980s and a better part of the 1990's due to scarcity of resources, caused by environmental hardships, surrogated a number of community based concerted initiatives to ameliorate the impacts of the then raging conflicts.[6]

The most noticeable of these emerging local level attempts to manage pastoralists' conflicts was in Wajir district, in the so called Wajir peace process, where local people peace dialogues and reconciliation meetings often resulted to prolonged period of ceasefire.[7] The Wajir initiative was necessitated by the withdrawal of several NGOs from the district. However, their running away became a blessing in disguise as their absence gave the communities the opportunity to take charge and begin their own Peace Initiatives in their own way.[8]

---

[3] T. Murithi & P. M. Ives, Under the Acacia: Mediation and the dilemma of inclusion, Centre for Humanitarian Dialogue, April 2007, p. 77.

[4] *Ibid.*

[5] *Ibid.*, p. 85.

[6] M. Adan and R. Pkalya, "The Concept Peace Committee;A Snapshot Analysis of the Concept Peace Committee in Relation to Peacebuilding Initiatives in Kenya", Practical Action, Nairobi, (2006), p. 6.

[7] *Ibid.*, p. 6 -7.

[8] M.K Juma, "Unveiling women as pillars of peace: Peacebuilding in communities fractured by conflict in Kenya", New York: UNDP (2000).

The Wajir clan conflict had degenerated to include fighting between women in market places in the district. Sensing danger posed by the continued clan fighting, a group of women (initially two in number) initiated peace meetings with women in Wajir town market with the express purpose of addressing the root causes of the confrontations. As a result, Wajir Women for Peace Group was formed. The initial fruits of the women led peace initiative in Wajir saw a group of educated professionals drawn from all clans in the district form Wajir Peace Group. The peace group teamed up with women for peace in facilitating peace dialogues in the district. Other groups also began to coalesce into peace groups in the district (elders for peace, youth for peace etc) culminating to the formation of Wajir Peace and Development Committee (WPDC) in 1995.

Another example of a conflict situation which has been resolved as a result of inclusivity is in Sri Lanka. While none of the previous attempts at formal peacemaking in Sri Lanka allowed women to play any role in the negotiating process, the peace talks which commenced in 2002 established a formal space for their engagement by creating a Sub Committee for Gender Issues (SGI) to report directly to the plenary of the peace talks.[9] The SGI was mandated to explore the effective inclusion of gender concerns in the peace process. It was of the view that women are an indivisible part of society and are the main force behind social reconstruction and therefore their focus would be on women. However, SGI sought to bring a gender perspective to their work so as to make it holistic and to this end, they also worked with men.[10]

The inclusion of women combatants in the context of peacemaking opened space for discussions on gender sensitive strategizing as much as it enabled delegations to share their different and specific experiences of conflict, conflict resolution and peacebuilding.[11] In recognising women militants as active political agents, there was a possibility of engaged feminist discussion and a sharing of feminist resources with militant women. This in turn could enable women combatants to engage with and shape peace processes beyond the narrow conceptions of territory and power sharing. Peace

[9] S. Kumudini, The importance of Autonomy: Women and the Sri Lankan Peace Negotiations, Centre for Humanitarian Dialogue, November 2010, p. 2.
[10] Ibid., p. 4.
[11] Ibid., p. 9.

processes particularly those that deal with ethno political conflict can offer potential to open up more spaces to critically challenge dominant patriarchal and masculine nationalistic discourse from within.[12]

On its part, The North Atlantic Treaty Organization (NATO) responded to UNSCR 1325 by adopting an Overarching Policy, developed with its partners in the Euro-Atlantic Partnership Council (EAPC) in 2007. The Policy was revised in 2011. In addition, UNSCR 1325 is fully implemented in NATO-led operations and missions, and the Alliance has nominated Gender Advisers at Strategic Commands, in Afghanistan and in Kosovo. In August 2012, following an offer by Norway, a Special Representative for Women, Peace and Security was appointed at NATO Headquarters in Brussels.[13]

Kumudini says that the comparative political "invisibility" of women allows them the space to move across ethnic divides and work together to promote common agendas. [14] These can range from raising gender imperatives to dealing with a range of moral and political issues including that of respect for human rights, transparency, accountability and inclusion. This engagement could also lead to redefining the manner of engagement as well as reframing issues at the heart of the peace process.[15]

The experience of the Northern Ireland Women's coalition, an independent women's political party established just before the all-party peace talks, suggests that there is value in having women present at the talks as a distinct political grouping in their own right. They keep track of gender concerns across the board and do not allow themselves to be marginalised into or limiting their focus to women's issues.[16] They also offer women the space to engage where/when party structures may limit or ignore such needs. An independent women's presence also offers women the neutral space to raise concerns that may be perceived as controversial or too politically charged for partisan politicians to engage with.[17]

As with representation for marginalised groups, the mere presence of a few individual women at the peace table does not by itself ensure that women's

---

[12] Ibid.

[13] Sourcedfrom *www.nato.int/cps/en/SID-473424B6A3D021FD/natolive/topics_91091.htm*, Accessed on 7th December 2012.

[14] *Ibid., p. 10.*

[15] *Ibid.*

[16] *Ibid.*

[17] *Ibid.,* p. 11.

concerns and gender interests are met. A separate mechanism that allows for inclusive representation and a safe place to discuss and build concerns on specific issues would be a useful platform from which to engage formal peace negotiations.[18] Kumudini concludes that the involvement of women must continue beyond the signing of an agreement after a successful mediation. Work must continue well into the period of transition and implementation phase. The interests of women can be realised only through the success of the involvement of the women in peace making.[19]

In her paper[20], Baechler reflects, among other things, on what mediators and other third parties can do to include more women in peace talks. She notes that the peace talks in Nepal, like so many elsewhere, were notably absent of women. Yet women provided a wide range of contributions to the overall peace process. She argues that women roles in Nepali Society and the core issues of the Nepali peace are an expression of the active political role Nepali women started to play. Women activists were not satisfied with being politically marginalized and instead requested a seat at the peace table to defend their own rights, to get first-hand information about the conditions to end the war, to shed light on problems, to open up the close circle of men who reflected the conflict parties, to articulate their own perspectives and to define their own future, in particular with regard to the constitution making in a new Nepali society.

It is important to involve the women in the peace processes because to them, the process might mean more that what is presented on face value. Baechler says that[21];

> "*for Nepali women, peace was never understood in the narrow or negative sense of the term, i.e. the absence of armed violence…It was only the first step towards a more comprehensive peace which emerged out of experiencing a long history of political oppression through a feudal monarchy; near total impunity; widespread insecurity in the rural areas; domestic and public violence as well as double and triple marginalization of women in the exclusionary caste system…*"

[18] *Ibid.*
[19] *Ibid.*, p. 12.
[20] G. Baechler, A Mediator's Perspective: Women and the Nepali peace process, Centre for Humanitarian Dialogue, August 2010, p. 2.
[21] *Ibid.* p. 3.

Baechler says that peace for the women meant a political strategy to implement down-to-earth human security, implying a combination economic security, food security, health security, environmental security, personal security, right to human dignity and freedom of a person, community and political security.[22] She argues that the direct participation of women in peace negotiations would make a significant difference both in terms of process and content. Women, she says, are agents of change who can make a significant and viable impact to a peace process. Inclusion of women democratizes the mediation process by making their voice heard at the negotiation table. They belong to a group that would previously be excluded from negotiations.

The inclusion of women enhances the systematic process of consultation and participation in the mediation process.[23] Owing to their focus on human security in the Nepali case, women were perceived as stakeholders who could play a facilitative role across party lines and sectors in the complex Nepali society.[24] Mediators have many ways to engage (more) women in the mediation process. Such strategies depend on the formal role and the acceptance of the mediator. Strategies also depend on the political and cultural context; is there space for active mediation?[25] Negotiation and mediation training sessions could be conducted with the aim of bringing women to the table.

The long-term goal must be that women are not dependent on the interests of the conflict parties but become interest groups for peace by, and for themselves. Women are a major part of the workforce without whom the development of a stable economy will not be possible. Women (and in particular organised women) contribute significantly to human security, social stability, and to a sound social fabric in times of widespread poverty, ethnic tensions and suffering as a consequence of civil war and ongoing political struggle. Women should be further supported to consolidate this contribution.[26]

The peace making community ought to be able to draw distinctions between 'thin peace agreements' which only involve armed actors and have

[22] Ibid.
[23] Ibid. p. 4.
[24] Ibid., p. 5.
[25] Ibid., p. 6.
[26] Ibid., p. 8.

a high probability of lapsing back into armed violence and 'thick agreements' with broad based involvement of a given society-including women-and a higher degree of success in the long run. Women's participation in mediation should be elevated. They should not only take their place at the mediation table, but should be able to put forward their vision of substantial peace for societies as a whole.[27]

3.0 Conclusion

Most, if not all, conflicts are about resource scarcity or abundance, resource allocation and utilization. The place of women in our society puts them in the most proximate contact with the environment and natural resources. Their everyday lives are affected and ordered according to the prevailing environmental issues and it is only prudent that they are involved in management of the environmental resources and resolution of conflicts arising there from. Women in our society are closest to land utility and therefore they ought to have a voice on any issues concerning access to and use of land, among other issues that are the source of conflicts.[28]

For mediation to be effective it must involve all concerned and or affected groups of people and their views should be respected and taken into account. Men and women must be represented and included in the decision making processes. The gender dimension of the mediation process is crucial and should not be ignored. The process should ensure there is participation by both gender and neutral implementation of the decisions reached in mediation.

Conflict mediation systems should require specifically that gender issues are given adequate weight and should include some requirement for female mediators. The absence of women's voices and interpretations of law from the mediation process tends to encourage decision making that overlooks the rights of women and this should be discouraged.

It is also noted here that women have been of disservice to themselves by failing to take advantage of the opportunities afforded by such instruments as the UNSCR 1325 (2000) to propose to their governments some among themselves to mediate on conflicts that arise from time to time. This has led

[27] *Ibid*., p. 9.

[28] K. Muigua, Resolving Environmental Conflicts in Kenya Through Mediation, (unpublished PhD Thesis), Nairobi, 2011.

to disproportionate inclusion of women in peace processes, thus denying such processes the voice of women. Very few, if any, women have been involved in noticeable peace building initiative and the most recollectable locally is the involvement of madam Graca Machel in the Kenyan post-election violence mediation initiative chaired by Dr. Kofi Annan.

Training of women as mediators is also a vital component of their involvement in resolutions of conflicts that arise. The Chartered Institute of Arbitrators (K) Branch, among other bodies[29], is mandated to conduct such trainings and has international recognition. It is noteworthy that out of a total membership of 682 at the institute today, only 201 are women and majority are at associate level. How then are women able to push for recognition and inclusion without forming a critical mass in such institutions as the ClArb?

Mediation has previously been perceived as *hors d'oeuvres* for dispute resolvers to imbibe at cocktail events; not any more. On 24th February 2015, the Honourable the Chief Justice Dr. Willy Mutunga appointed 12 persons serve in the Mediation Accreditation Committee. Kenyan women should rise to the occasion, get trained and obtain relevant accreditation, especially in light of the constitutional dispensation under Article 159 (2) (c), so that they are in a better position to agitate for their inclusion as mediators in resolution of conflicts.

[29] Other institutions include Centre for Alternative *Dispute Resolution* Limited (CADR), Mediation Training Institute (MTI), The Strathmore University's Dispute Resolution Centre, the Dispute Resolution Centre (K), CADER and the recently formed Nairobi Centre for International Arbitration.

Book Review-Natural Resources and Environmental Justice in Kenya

By: ***James Ndungu Njuguna*** *

Book Title : Natural Resources and Environmental Justice in Kenya
Authors : Kariuki Muigua, Ph.D., Didi Wamukoya & Francis Kariuki
Publisher : Glenwood Publishers Limited
Date : 2015

This is a book that is recommended for all Alternative Dispute Resolution (ADR) practitioners. It contains an in-depth discussion on Natural Resources and Conflict Management (Chapter 16). Mechanisms such as negotiation, mediation, problem solving and facilitation are analysed in relation to their role in natural resources conflict management.

There is also a vivid discussion on the merits and demerits of using Alternative Dispute Resolution in natural resources conflict management. The chapter covers water-based conflicts, biodiversity conflicts, land-based conflicts and minerals, oil and gas conflicts, amongst others. An accomplished Mediator and Counsellor who offers volunteer services to the public through various organizations including "Worldwide Gospel Church of Kenya", a church organization.

The need for such management is explained therein. The various mechanisms available for natural resources management such as judicial mechanisms, ADR and traditional justice systems are also critically analysed.

The authors have ably illustrated how ADR can empower the Kenyan people so that they can meaningfully participate in natural resources management. The authors argue that environmental justice for all is achievable through inclusivity, the use of effective, participatory environmental governance mechanisms and the application of ADR in tandem with other mechanisms.

---

* *LLB (Hons), LLM (UON), PG Dip. (KSL), Dip. Management (KIM), Dip. Law (CILEX), ACIArb.* Chartered Institute of Arbitrators (Kenya Branch). His areas of interest include but are not limited to; Environmental and Natural Resources Law, ADR and Access to Justice.

For those interested in natural resources management, the book contains other materials covering Principles of Natural Resources Management in Kenya, Environmental Justice, Devolution, and Management of various resources such as land, forests, water, wildlife and biodiversity resources, Coastal and Marine Resources and Transboundary Resources.

One running theme in the book is that, for there to be effective management of natural resources, there must be inclusivity. The people affected by decision-making or those who depend on the resources should have access to information and should have a say in how resources are governed. ADR gives them a voice. Specifically, negotiation empowers them to engage with Governments, corporations, Non-Governmental Organisations (NGOs) and Developers and participate in meaningful decision-making.

The book was recently cited by the Supreme Court of Kenya in *The Matter of the National Land Commission [2015] eKLR*, [†] where the Court was deliberating on the importance of the role and place of public participation in the administration and management of land in Kenya. ADR is not just academic. The book offers an insight into how ADR can be used to manage natural resource-based conflicts and thus ensure the attainment of sustainable development.

[†] Advisory Opinion Reference No. 2 of 2014, December 2, 2015.

Book Review: Settling Disputes through Arbitration in Kenya, 3rd Edition

By: ***Faith Nguti***[1]

Author : Dr. Kariuki Muigua, FCIArb (Chartered Arbitrator)
Publisher : Glenwood Publishers Limited
ISBN : 978-9966-046-12-3

Since the promulgation of the Constitution of Kenya 2010, the academic world has come alive and has enthusiastically built up the body of writing on Arbitration in Kenya. This clamour is undeniably attributed to Article 159 (2) (c) of the Constitution of Kenya 2010, which brought to the fore the various alternative dispute resolution mechanisms, including arbitration. The Constitution also required various national laws to incorporate alternative dispute resolution mechanisms.

Dr. Kariuki's various contributions to the Arbitration discourse is crowned by this book, which was first published in 2012. A pioneer authorship in this area of academia, this book has become a trusted manual for the arbitrator, the aspiring arbitrator, as well as the any person who is likely to appear before an arbitrator.

The author, Dr. Kariuki Muigua, pours more than 20 years of experience into the pages of this text and comprehensively takes the reader through the legal and practical ins and outs of conducting arbitration in Kenya. The book is thus meant to take the readers through the process of arbitration in a simplified, yet comprehensive manner, with the latest key amendments and case law on arbitration in Kenya.

The third edition of this book sees its further enrichment by taking into consideration the numerous changes in the legal landscape following the 2010 Constitution. This update is intended to capture the current state of Arbitration to date and to better equip the practitioner and the legal mind for this fast evolving field.

Over the last 7 years, parties have sought the court's decision on various matters involving arbitration, and what has developed is a vast volume of

[1] Legal Researcher, LLB (University of Nairobi), CPM (Mediation Training Institute, East Africa), (PG. Dip. Law KSL, December 2017).

precedent that has shaped the practice of arbitration. The author incorporates this body of law into the earlier text.

This book also evaluates how the courts have addressed some of the issues arising from the practice of arbitration in Kenya. This includes an analysis of the highly contentious decision of the Court in *Republic v. Mohamed Abdow Mohamed,* which tackled the question on the application of alternative dispute resolution in a murder suit. It also discusses some of the concerns that may arise in future, especially in the relationship between arbitration practice and the constitutional bill of rights.

The author has additionally highlighted on legislative updates such as the establishment of the Nairobi Centre for International Arbitration (NCIA), a creation of the Nairobi Centre for International Arbitration Act, No. 26 of 2013. The Centre will play a crucial role in prioritizing International Commercial Arbitration in Kenya, and will also foster Kenya as a preferred destination as a seat of arbitration.

Another legislative update is the incorporation of alternative dispute resolution mechanisms in land dispute handling and management. This move is evidenced in Section 4(2) (k) of the Land Act of 2012, Section 20 of the Environment and Land Court Act and Section 41 of the Community Land Act No. 27 of 2016, which incorporates the use of arbitration in community land disputes.

This book has earned a spot in every arbitrator's bookshelf as an all-in-one guide to Arbitration in Kenya, as the way of the future, for access to justice and for economic growth to be realised in Kenya.

ISBN 978-9966-046-15-4