
Journal of Conflict Management & Sustainable Development
Realizing Environmental, Social and Governance Tenets for Sustainable Development
Kariuki Muigua
Assessing the Jurisprudential gains and Challenges in the Prosecution of Terrorism-related Offences in Kenya
Michael Sang
Who Speaks for Nature? Entrenching the Ecocentric Approach in Environmental Management in Kenya
Kariuki Muigua
Waking up to the call of Climate change: Challenges for Africa and Europe
Gichinga Ndirangu
Effective Public Participation in Environmental Impact Assessment Process: Assessing The Law and Practice in Kenya
Aaron Masya Nzembei & Angelah A. Malwa
An Appraisal of Kenya's National Cybersecurity Strategy 2022: A Comparative Perspective
Michael Sang
Safeguarding the Environment through Effective Pollution Control in Kenya
Kariuki Muigua
Resolving Intergovernmental Disputes in Kenya through Alternative Dispute Resolution (ADR) mechanisms
Vianney Sebayiga
Volume 10
Issue 2
2023
ISBN 978-9966-046-15-4

An Appraisal of Kenya's National Cybersecurity Strategy 2022: A Comparative Perspective

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Abstract

The objective of the study is to critically analyse Kenya's National Cyber Security Strategy of 2022, juxtaposing it with Estonia and UK's cyber-security strategies. It begins by outlining the legal framework for cyber security in Kenya and its efficacy. Using a desktop review, it discusses the 2022 strategy by bringing to the fore its necessity, design, development, principles, goals, pillars, merits and shortcomings, It also highlights the implementation of the strategy. The final section addresses implementation of the 2022 strategy while drawing valuable lessons from Estonia and the UK. Estonia and the UK have been selected due to their significant progress in this field and their different approaches to cyber security. The discussion on cyber security strategies is a sine qua non for development of jurisprudence and vital lessons in this emerging field.

Key Words: Kenya, National Cyber security strategy 2022, Estonia, UK, cyber-security, implementation.

1.0 Introduction

Cyber security has become an increasingly critical issue in today's digital age, and many countries are developing national cybersecurity strategies and laws to protect themselves from cyber threats.[1] It has become increasingly necessary for the Government of Kenya to secure her cyberspace. The Government thus, has continued to develop and implement initiatives to combat increasing cybercrimes and strengthen the safety and resilience of our national critical systems. The initiatives include policy formulation and

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[1] Government of Kenya. (2022). Kenya National Cybersecurity Strategy 2022. Retrieved from https://www.president.go.ke/wp-content/uploads/2022/01/Kenya-National-Cyber-Security-Strategy.pdf {accessed 17 February 2023}.

reviews, enactments of laws and regulations, strengthening of governance structures, capacity building, increased awareness programmes and fostering collaboration.[2] One of the initiatives Kenya has developed is the formulation of the National Cyber security Strategy of 2022. Kenya is one such country that has made significant efforts in recent years to develop its national cybersecurity strategies and laws. Cybersecurity is a key enabler for digital economy.[3]

The widespread adoption and rapid advancements in cyberspace, largely driven by emerging technologies, have introduced new risks that pose threats to individuals, businesses, national infrastructure, and governments.[4] These risks come from a broad range of sources, both state and non-state, and can result in disruptive activities. Their consequences can have severe impacts on public safety, national security, and the stability of the globally interconnected economy.[5]

However, Kenya's implementation of its 2022 cyber security strategy and laws is still in its early stages, and it can learn from the experiences of other countries that have made significant progress in this area.[6] Two countries that are often cited as global leaders in cybersecurity are Estonia and the United Kingdom (UK).[7] By comparing Kenya's national cybersecurity strategy and laws with those of Estonia and the UK in terms of

[2] Kenya National Cybersecurity Strategy 2022. Available at https://ict.go.ke/wp-content/uploads/2022/10/KENYA-CYBERSECURITY-STRATEGY-2022.pdf {accessed 14 February 2023}.
[3] Kenya National Cybersecurity Strategy 2022. Available at https://ict.go.ke/wp-content/uploads/2022/10/KENYA-CYBERSECURITY-STRATEGY-2022.pdf {accessed 14 February 2023}.
[4] World Bank. (2022). Kenya National Cybersecurity Strategy 2022. Retrieved from https://projects.worldbank.org/en/projects-operations/document-detail/P176435 {accessed 17 February 2023}.
[5] Ibid
[6] Government of Kenya. (2022). Kenya National Cybersecurity Strategy 2022. Retrieved from https://www.president.go.ke/wp-content/uploads/2022/01/Kenya-National-Cyber-Security-Strategy.pdf {accessed 17 February 2023}.
[7] World Bank. (2022). Kenya National Cybersecurity Strategy 2022. Retrieved from https://projects.worldbank.org/en/projects-operations/document-detail/P176435 {accessed 17 February 2023}.

implementation, we can gain useful insights into how Kenya can enhance its cybersecurity capabilities and better protect itself from cyber threats.

2.0 The National Legal Framework for Cybersecurity in Kenya

Kenya has a legal framework for cybersecurity, which includes a number of laws, regulations, and policies that address various aspects of cybersecurity. This section addresses some of the key legal documents that make up Kenya's legal framework for cyber security while outlining their efficacies and proposals for legislative reform. It also highlights the concept of cyber-terrorism.

2.1 Constitutional Framework

The Constitution of Kenya does not have a specific provision on cybersecurity. However, it provides a framework for the protection of fundamental rights, which includes the right to privacy[8], the right to access information,[9] and the right to freedom of expression.[10] These rights have implications for cybersecurity, as the protection of personal data, the availability of information, and the freedom to use the internet and other communication technologies are important elements of cybersecurity.

Additionally, the Constitution provides for the establishment of various institutions that are involved in cyber security. The National Police Service is responsible for enforcing the law and investigating crimes, including cybercrimes.[11] The National Intelligence Service (NIS) is responsible for collecting and analyzing intelligence, including information related to cyber threats and cybercrime.[12] The Independent Electoral and Boundaries Commission (IEBC) is responsible for conducting elections in Kenya, and as such, it plays a critical role in ensuring the security and integrity of the

[8] Article 31 of the Constitution of Kenya (COK) 2010
[9] Article 35 of COK 2010
[10] Article 33 of COK 2010
[11] Article 244 of the COK 2010
[12] Article 242 of COK 2010; Section 5 of the National Intelligence Service Act, 2012

electoral process, including the protection of electoral data and systems from cyber threats.[13]

While the Constitution does not have a specific provision on cybersecurity, the above institutions, as well as other government bodies, operate within the framework of the Constitution to ensure the protection of fundamental rights and the security of the state.

2.2 Statutory Framework

The Computer Misuse and Cybercrimes Act 2018 is the primary legislation that governs cybersecurity in Kenya. The act criminalizes various cyber activities, such as unauthorized access, interception, and interference with computer systems and data.[14] It established the National Computer and Cybercrimes Coordination Committee to coordinate cybersecurity matters.[15]

The Data Protection Act 2019 establishes a legal framework for the protection of personal data in Kenya. It sets out the rights and obligations of data subjects[16] and data controllers, as well as the procedures for handling data breaches.[17]

Various statutes also establish various institutions involved in cyber security. The Communications Authority of Kenya (CA) is responsible for regulating the communications sector in Kenya, including the telecommunications and information technology industries. The authority also plays a key role in the management of cyber security incidents.[18]

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[13] Articles 88, 248 of COK 2010; Section 4 of the Independence Electoral and Boundaries Commission (IEBC) Act, 2011
[14] Part III of the Act captures the various offences
[15] Part II of the Act; Kenya National Cybersecurity Strategy 2022. Available at https://ict.go.ke/wp-content/uploads/2022/10/KENYA-CYBERSECURITY-STRATEGY-2022.pdf {accessed 14 February 2023}.
[16] Part IV of the Act
[17] Part VIII of the Act
[18] Section 5 of the Kenya Information and Communications Act, 1998

The Kenya Information and Communications (Cybersecurity) Regulations 2019 under the Kenya Information and Communications Act provide a legal framework for the implementation of the National Cybersecurity Strategy 2018. They set out the requirements for the protection of critical information infrastructure and the reporting of cybersecurity incidents.[19]

2.3 Policy Framework

The National Cyber security Strategy 2022 provides a policy framework for Kenya's cybersecurity efforts. The strategy outlines the government's approach to cybersecurity and identifies key initiatives and action plans to be implemented to achieve the strategic objectives.[20] It will be discussed in more detail in the next section.

The Communications Authority of Kenya (CA) has also issued a number of guidelines and regulations on cybersecurity, including the Guidelines for the Management of Cybersecurity and the Kenya Information and Communications (Cybersecurity Incident Management) Regulations 2020, National ICT Policy Guidelines 2020; and National Digital Master Plan 2022. These documents provide further guidance on the management of cybersecurity incidents and the reporting requirements for the incidents.[21]

Kenya has made significant progress in the development of legal frameworks and policies to promote cybersecurity. The Computer Misuse and Cybercrimes Act 2018, for example, provides a comprehensive legal framework for addressing cybercrime and other malicious cyber activities. The Data Protection Act 2019 and the Kenya Information and Communications (Cybersecurity) Regulations 2019 provide a legal

[19] Kenya National Cyber security Strategy 2022. Available at https://ict.go.ke/wp-content/uploads/2022/10/KENYA-CYBERSECURITY-STRATEGY-2022.pdf {accessed 14 February 2023}.
[20] Ibid
[21] Ibid

framework for the protection of personal data and the management of cybersecurity incidents.[22]

The government has also taken steps to implement the National Cyber security Strategy 2022 and upgrade institutions such as the Kenya Computer Incident Response Team (KE-CIRT) and establish the National Cyber security Centre of Excellence (NCCoE) to enhance its cyber security capacity.[23]

However, despite these efforts, there are still some challenges that could limit the effectiveness of these legal frameworks in promoting cybersecurity. For example, the capacity of law enforcement agencies to investigate and prosecute cybercrime may be limited, and there may be gaps in the implementation of some of the regulations and policies.[24]

In addition, there are emerging threats such as social engineering, phishing attacks, and ransomware that may require a more proactive and adaptive approach to cybersecurity. It's important to continuously assess and update the legal frameworks and policies to keep up with the evolving cyber threat landscape.[25]

Overall, the legal frameworks in Kenya provide a good foundation for promoting cybersecurity, but their effectiveness will depend on how they are implemented and enforced. It is also important to note that promoting cybersecurity is a collaborative effort involving various stakeholders, including the government, the private sector, and individuals.

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[22]Kipkemoi R. arap Kirui and Hannes F. Zacher, "Cyber security and Cybercrime Legislation in Kenya: Gaps and Prospects for Reform", T*he Journal of African Law* (2021).
[23] Kenya National Cybersecurity Strategy 2022. Available at https://ict.go.ke/wp-content/uploads/2022/10/KENYA-CYBERSECURITY-STRATEGY-2022.pdf {accessed 14 February 2023}.
[24]James N. Kinyanjui and Stephen K. Mwaniki, "Critical Evaluation of Cybercrime and Cybersecurity Laws in Kenya", *the Journal of Computer Science and Information Security* (2019).
[25] Ibid

2.4 Cyber-terrorism

Cyber-terrorism refers to the use of computer networks to perpetrate terrorist activities such as spreading propaganda, committing financial crimes, disrupting critical infrastructure, or causing physical harm.[26] In Kenya, cyber-terrorism is a growing concern as the country becomes more digitally connected.[27]

One notable instance of cyber-terrorism in Kenya was the 2013 Westgate mall attack in Nairobi, in which Al-Shabaab militants used social media to claim responsibility and to spread propaganda. The group also hacked into the Kenyan Defense Forces' Twitter account and used it to disseminate false information.[28]

In recent years, there have been reports of other cyber-related terrorist activities in Kenya, including attempts to hack into government systems and financial institutions. In response, the Kenyan government has increased its focus on cybersecurity, including the development of the National Cybersecurity Strategy 2022, to enhance its capacity to prevent and respond to cyber-terrorism threats. The government has also collaborated with international partners to share information and build cybersecurity capabilities.[29]

Section 33 of the Kenyan Computer Misuse and Cybercrimes Act 2018 stipulates:

> *A person who accesses or causes to be accessed a computer or computer system or network for purposes of carrying out a terrorist act, commits an offence and shall on conviction, be liable to a fine*

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[26]Charles Ombongi, "Cyber terrorism in Kenya: A Preliminary Analysis", *Journal of Global Security Studies*, Volume 5, Issue 2, Spring 2020, Pages 247–257.
[27] Ibid
[28] Daisy Cherotich and Richard Kipkoech Langat, "Emerging Trends of Cyber Terrorism in Kenya", *International Journal of Scientific and Research Publications*, Volume 9, Issue 8, August 2019, Pages 309–315.
[29] Ibid

> *not exceeding five million shillings or to imprisonment for a term not exceeding ten years, or to both. For the purpose of this section, "terrorist act" shall have the same meaning as assigned under the Prevention of Terrorism Act, 2012 (No. 30 of 2012).*[30]

This section makes it an offense to access a computer or computer system or network for the purpose of carrying out a terrorist act. The purpose of this section is to deter individuals from using technology to carry out terrorist activities in Kenya. However, some reports, such as the Kenya National Commission on Human Rights Report (KNCHR Report), have raised concerns that the definition of "terrorist act" is quite broad, and there is a possibility that innocent people may be falsely accused and charged under this section.[31]

Section 2 of the POTA has defined a terrorist act as

> *an act or threat of action—(a) which— (i) involves the use of violence against a person; (ii) endangers the life of a person, other than the person committing the action; (iii) creates a serious risk to the health or safety of the public or a section of the public; (iv) results in serious damage to property; (v) involves the use of firearms or explosives; (vi) involves the release of any dangerous, hazardous, toxic or radioactive substance or microbial or other biological agent or toxin into the environment; (vii) interferes with an electronic system resulting in the disruption of the provision of communication, financial, transport or other essential services; (viii) interferes or disrupts the provision of essential or emergency services; (ix) prejudices national security or public safety; and (b) which is carried out with the aim of— (i) intimidating or causing fear amongst members of the public or a section of the public; or (ii)*

[30] Section 33 of the CMCA 2018
[31] Kenya National Commission on Human Rights, *Report On Securing National Security & Protection Of Human Rights A Comparative Analysis Of The Efficacy Of Counter Terrorism*
Legislation and Policy: Final Report (Kenya: ECPL, 2018) at 12 (*hereinafter KNCHR Report).*

> *intimidating or compelling the Government or international organization to do, or refrain from any act; or (iii) destabilizing the religious, political, Constitutional, economic or social institutions of a country, or an international organization.*[32]

The study concurs with the KNCHR Report that this definition is beyond broad. In fact, there is no particular mention of cyber-terrorism in this section.

Section 33 of the Kenyan Computer Misuse and Cybercrimes Act 2018 and the Kenyan Prevention of Terrorism Act 2012 are similar in that they both criminalize the commission of terrorist acts. However, the Computer Misuse and Cybercrimes Act 2018 focuses specifically on the use of a computer, computer system or network to carry out a terrorist act, while the Prevention of Terrorism Act 2012 provides a broader definition of what constitutes a terrorist act, and criminalizes a wider range of activities related to terrorism, including financing of terrorism and recruitment of terrorists.

Additionally, the study postulates that the penalties for committing a terrorist act under these two acts differ. Section 33 of the Computer Misuse and Cybercrimes Act 2018 provides for a fine not exceeding five million shillings or imprisonment for a term not exceeding ten years, or both. In contrast, the Prevention of Terrorism Act 2012 provides for a maximum penalty of life imprisonment upon conviction for certain offenses related to terrorism, such as commission of a terrorist act, funding terrorism, and recruiting terrorists. Section 6 of the POTA stipulates that a person who possesses any property intending or knowing that it shall be used, whether directly or indirectly or in whole or in part, for the commission of, or facilitating the commission of a terrorist act, commits an offence and is liable, on conviction, to imprisonment for a term not exceeding twenty years. Clearly, these penalties are dissimilar for similar offences. There is therefore need for harmonization of these laws to ensure uniformity in legislation. The POTA also needs to come out clearly on what specifically constitutes terrorism, and it should address cyber-terrorism as it is an emerging area.

[32] Section 2, Prevention of Terrorism Act, 2012

Overall, the effectiveness and fairness of Section 33 of the Kenyan Computer Misuse and Cybercrimes Act 2018 will depend on how it is enforced and whether the definition of "terrorist act" is interpreted appropriately.

3. Kenya's National Cybersecurity Strategy 2022: Its merits and shortcomings

This section critically examines Kenya's National Cyber security Strategy of 2022. It focuses on the necessity, design and development of the strategy. It also pinpoints its principles, goals, pillars, merits and shortcomings. Finally, it discusses the implementation of the strategy.

3.1 Necessity, Design and Development of the cybersecurity strategy

Kenya developed her first Cybersecurity Strategy in 2014, with the vision, key objectives, and commitment to support national priorities by encouraging ICT growth and proactive protection of critical information infrastructures.[33] Through the 2014 Strategy; Kenya established Kenya Computer Incident Response Team and coordination Centre (KE-CIRT/CC) and the National Digital Forensics Laboratory at the National Police Service under Directorate of Criminal Investigations (DCI). In regard to legislation, the Government enacted the Computer Misuse and Cybercrimes Act-2018 which is currently the overarching law for protection of Critical Information Infrastructures and management of cybercrime in Kenya. To achieve its objectives, the Act establishes and mandates the National Computer and Cybercrimes Co-ordination Committee (NC4) and the Secretariat, as the national authority to spearhead and coordinate cybersecurity matters.[34]

The Government of Kenya (GoK) has identified specific sectors and critical systems that are essential to providing vital services and are crucial to the

[33] Kenya National Cybersecurity Strategy 2022. Available at https://ict.go.ke/wp-content/uploads/2022/10/KENYA-CYBERSECURITY-STRATEGY-2022.pdf {accessed 14 February 2023}.
[34] Kenya National Cybersecurity Strategy 2022. Available at https://ict.go.ke/wp-content/uploads/2022/10/KENYA-CYBERSECURITY-STRATEGY-2022.pdf {accessed 14 February 2023}.

nation's security.[35] These have been designated as Critical Information Infrastructures (CIIs) in accordance with the provisions of the Computer Misuse and Cybercrimes Act (CMCA). The Gazette Notice No.1043 of 31 January 2022 provides the details of these sectors and systems. The CIIs are systems whose disruption could result in the interruption of life-sustaining services, adverse effects on the Kenyan economy, massive casualties or fatalities, the failure or disruption of the money market, and significant harm to the Republic of Kenya's security, including its Intelligence and Military services. This demonstrates the Republic of Kenya's commitment to protecting its sovereignty and the welfare of its citizens.[36]

Kenya recognizes that cybersecurity is a major national economic and security challenge.[37] The country faces various cybersecurity issues, including adversaries exploiting the new operating environment to conduct war-like activities that disrupt critical infrastructure operations.[38] In Kenya, efficiency, cost, and convenience have been prioritized during the development and implementation of most ICT infrastructure and users, leading to security being overlooked. Interconnected ICTs have inherent vulnerabilities that can be exploited by adversaries, exposing citizens, businesses, and the government to global threats. Despite various policies and laws being enacted, governance of cyberspace is still uncoordinated and lacks a clear structure. Moreover, the awareness of government employees

[35] Government of Kenya. (2022). Kenya National Cybersecurity Strategy 2022. Retrieved from https://www.president.go.ke/wp-content/uploads/2022/01/Kenya-National-Cyber-Security-Strategy.pdf {accessed 17 February 2023}.
[36] Kenya National Cybersecurity Strategy 2022. Available at https://ict.go.ke/wp-content/uploads/2022/10/KENYA-CYBERSECURITY-STRATEGY-2022.pdf {accessed 14 February 2023}.
[37] World Bank. (2022). Kenya National Cybersecurity Strategy 2022. Retrieved from https://projects.worldbank.org/en/projects-operations/document-detail/P176435 {accessed 17 February 2023}.
[38] Ibid

and the general public about cybersecurity is considered low, increasing their susceptibility to cybersecurity threats.[39]

Kenya also faces cybersecurity threats that leverage the aforementioned challenges.[40] Nation-states and corporate entities engage in cyber espionage to gain access to sensitive data for financial gain, political reasons, or competitive advantage.[41] With the increasing interconnectedness of ICTs, systems can be sabotaged through deliberate and malicious acts that disrupt normal processes and functions or destroy/damage equipment and information. [42] Cyber subversion through propaganda, fake news, and misinformation undermines trust in the government, authority, and competence of leaders, posing a threat to Kenya's stability.[43] Furthermore, terror groups use ICTs, such as virtual private networks, the internet, global applications, social media platforms, and websites, for recruitment, radicalization, incitement, financing, training, planning, and execution of attacks. Additionally, there has been an increase in cyber fraud cases through banking/finance, sim swaps, and online scams, such as digital Ponzi schemes, job scams, fake websites and lotteries, Crypto and Forex Scams, "*Tuma kwa Hii Namba*" syndicates, among others.[44]

These cyber security risks have necessitated the formulation of the 2022 strategy. The National Cyber security Strategy 2022 sets out a roadmap for a coordinated and integrated approach to implementing cybersecurity

[39] Kenya National Cybersecurity Strategy 2022. Available at https://ict.go.ke/wp-content/uploads/2022/10/KENYA-CYBERSECURITY-STRATEGY-2022.pdf {accessed 14 February 2023}.
[40] International Telecommunication Union. (2022). Kenya's National Cybersecurity Strategy 2022: Building resilience to cyber threats. Retrieved from https://www.itu.int/en/myitu/News/2022/01/27/14/20/Kenya's-National-Cybersecurity-Strategy-2022-Building-resilience-to-cyber-threats {accessed 17 February 2023}.
[41] Ibid
[42] Ibid
[43] Ibid
[44] Kenya National Cybersecurity Strategy 2022. Available at https://ict.go.ke/wp-content/uploads/2022/10/KENYA-CYBERSECURITY-STRATEGY-2022.pdf {accessed 14 February 2023}.

activities in Kenya.[45] The Strategy lays down the necessary foundations and key principles for effective cybersecurity in both the public and private sectors, which incorporate good governance and various initiatives and interventions. The Strategy begins by providing an extensive overview of Kenya's cybersecurity landscape, which highlights the current policies, legal and regulatory frameworks in place and outlines the challenges and threats faced by Kenya's cyberspace.[46]

The goal of this strategy is to support the implementation of Kenya's cyber security initiatives and tackle the challenges and threats identified above.[47] This will be achieved by improving the institutional framework for cybersecurity governance and coordination, enhancing the policy, legal, and regulatory frameworks related to cybersecurity, increasing the protection and resilience of critical information infrastructures, strengthening the capability and capacity for cybersecurity, reducing cybersecurity risks and crimes, and promoting cooperation and collaboration both nationally and internationally.[48]

3.2 Principles and goals of the cybersecurity strategy

The guiding Principles of the Kenya Cybersecurity Strategy 2022 are based on the objectives of the Computer Misuse and Cybercrimes Act,2018 and include: Protecting the confidentiality, integrity and availability of computer systems, programmes and data; Preventing the unlawful use of computer systems; Facilitating the prevention, detection, investigation, prosecution and punishment of cybercrimes; Protecting the rights to privacy, freedom of expression and access to information as guaranteed under the constitution of

[45] Kenya National Cybersecurity Strategy 2022. Available at https://ict.go.ke/wp-content/uploads/2022/10/KENYA-CYBERSECURITY-STRATEGY-2022.pdf {accessed 14 February 2023}.
[46] Ibid
[47] Ibid
[48] Kenya National Cybersecurity Strategy 2022. Available at https://ict.go.ke/wp-content/uploads/2022/10/KENYA-CYBERSECURITY-STRATEGY-2022.pdf {accessed 14 February 2023}.

Kenya 2010; and Facilitating international cooperation on cybersecurity matters.[49]

In addition, the Strategy is guided by Kenya's public policy formulation process and international best practices.

The following are the goals of the Strategy: To; Enhance Kenya's institutional framework for cybersecurity governance and coordination; Strengthen cybersecurity policy, legal and regulatory frameworks; Enhance the protection and resilience of CIIs; Strengthen cybersecurity capability and capacity; Minimize cybersecurity risks and crimes and; Foster national and international cooperation and collaboration.[50]

3.3 Pillars of the cybersecurity strategy

The Strategy provides a framework to defend and protect the cyberspace of Kenya guided by the following strategic pillars:[51]

1. Cybersecurity governance

Cybersecurity governance is critical in developing a vibrant cybersecurity ecosystem for a digital economy.[52] Enhancing Kenya's cybersecurity governance will lay foundations for protecting Kenya from cyber threats in the long term. The Cybersecurity governance pillar provides strategic guidance on governance structures and resources required to support formulation and implementation of a secure national cyber ecosystem.[53]

2. Cybersecurity policies, laws, regulations and standards

Development of a safe, secure and resilient cyberspace ecosystem requires a robust policy, legal and regulatory framework.[54] To strengthen Kenya's

[49] Ibid
[50] Ibid
[51] Ibid
[52] Ibid
[53] Kenya National Cybersecurity Strategy 2022. Available at https://ict.go.ke/wp-content/uploads/2022/10/KENYA-CYBERSECURITY-STRATEGY-2022.pdf {accessed 14 February 2023}.
[54] Ibid

ability to create and execute a comprehensive cybersecurity strategy, it is necessary to engage important stakeholders from both the public and private sectors in the process of developing and implementing cybersecurity policies, laws, regulations, and standards. Interventions under this pillar include: Reviewing cybersecurity policies, laws, regulations and standards; Amending/updating cybersecurity policies, laws, regulations and standards; Establishing new cybersecurity policies, laws and regulations for: implementation of CMCA-2018; adoption of new and emerging technologies; outsourcing of critical systems; adoption of country code top level domain ".ke" among others.[55]

3. Critical Information Infrastructures Protection (CIIP)

As digitalization grows, CIIs which were once disconnected from the internet in many industries are now becoming more integrated with other digital systems, putting them at risk of cyber threats and jeopardizing national security and public safety.[56] To enhance the cybersecurity position and fortitude of CIIs and other digital systems and infrastructure, the Kenyan government is dedicated to implementing several initiatives. Interventions include; Developing Critical Information Infrastructure Protection framework; Identifying and classifying CIIs.; Implementation of Cryptography and access control to safeguard GoK sensitive information and data; Encouraging establishment of in-country Cloud Computing Data Centers and services, and promoting local hosting and; Establishing Information sharing/reporting and Incident response framework.[57]

4. Cybersecurity capability and capacity building

As technology evolves, the risks and threats in the cyberspace are becoming increasingly complex. To keep up with this rapid pace of technological change and ensure cutting-edge capabilities are available, the Kenyan Government plans to support advanced research, encourage local digital innovation, and cultivate local cybersecurity skills and knowledge.[58] The

[55] Ibid
[56] Ibid
[57] Ibid
[58] Ibid

aim is to make Kenya a leader in cybersecurity on the African continent. In particular, the demand for qualified cybersecurity professionals is growing, representing an immediate and promising opportunity in the cybersecurity sector. To address this, the Government intends to collaborate with academia, research institutions, and the private sector to create new opportunities, stimulate investment, and encourage research and development in cybersecurity.[59]

5. Cyber-Risks & Cyber-Crimes Management

As the number of cyber threats and malicious attacks increases in complexity, it is necessary to establish measures for prompt detection and resolution of such threats.[60] To improve its ability to defend against and respond to malicious cyber activities, Kenya aims to strengthen its management of cyber risks and cybercrime. The government is dedicated to safeguarding Kenyan citizens from cybercrime, responding to evolving threats, protecting critical systems, and managing cyber-physical risks effectively. The interventions under this pillar include: Developing and implementing a national cybersecurity risks management framework; Performing national cybersecurity risk assessment/audits; Developing and implementing a national framework for cybercrime management and; Establishing a National Cybercrimes Alert and Warning system.[61]

6. Co-operation and collaboration

Cybersecurity threats are not limited by national borders, and thus addressing them requires cooperation and coordination across nations.[62] Enhancing collaboration and engagement among all stakeholders, including academia, research institutions, private sector and international partners, is important to develop effective policies, mechanisms and initiatives to promote a secure and resilient cyberspace.[63] The Kenyan Government is dedicated to working with these stakeholders to improve Kenya's cybersecurity position at both national and international levels. Already, we have the Inter-Agency

[59] Ibid
[60] Ibid
[61] Ibid
[62] Ibid
[63] Ibid

Guidelines on Cooperation and Collaboration in the investigation and Prosecution of Terrorism and Terrorism Financing.[64] These guidelines are issued under Section 50(3) of the Office of the Director of Public Prosecutions Act No. 2 of 2013 which empowers the ODPP to work with law enforcement agencies to come up with guidelines for investigating crimes. These guidelines are not only aimed at ensuring that there is effective coordination, collaboration and cooperation in the investigation and prosecution of Terrorism and Terrorism Financing, but are also meant to enhance Organizational Partnership between investigative agencies and the ODPP.[65]

These guidelines include; Information Sharing; Confidentiality and Security of Information; Protection of Data; investigations; enforcement; Prosecution; disengagement; community engagement; detention of remandees and convicts; respect for human rights; witness and victim protection; capacity building and; international cooperation.[66] For instance, under investigations, lead agencies undertake to take cognizance of emerging/evolving threats from the cyberspace and more specifically dangers posed by unregulated cryptocurrencies in order to mitigate risks posed by terrorism, terrorism financing, and proliferation financing. They shall closely pursue any incidents involving the unlawful trade and dealing with Unmanned Aircraft Systems commonly referred to as 'Drones' to prevent any imminent aviation attack or any foreseeable National Security risk on land, at Sea and specifically to civil aviation safety and security.[67]

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[64]Inter-Agency Guidelines on Cooperation and Collaboration in the investigation and Prosecution of Terrorism and Terrorism Financing. Available at https://www.odpp.go.ke/wp-content/uploads/2022/04/INTER-AGENCY-GUIDELINES-08.04.2022.pdf {accessed 17 February 2023}.
[65] Ibid
[66] Inter-Agency Guidelines on Cooperation and Collaboration in the investigation and Prosecution of Terrorism and Terrorism Financing. Available at *https://www.odpp.go.ke/wp-content/uploads/2022/04/INTER-AGENCY-GUIDELINES-08.04.2022.pdf* {accessed 17 February 2023}.
[67] Ibid at 13

3.4 Implementation

The Strategy also has an implementation matrix which outlines the strategic interventions related to the Strategic Pillars.[68] The matrix assigns roles and responsibilities to various cybersecurity actors to be performed within specified timelines as well as estimated costing of the initiatives.[69] The implementation phase entails involving multi-stakeholders to support the execution of the identified initiatives in this strategy. Implementation of the Kenya Cybersecurity Strategy 2022 will adopt a multi-stakeholder approach. All the stakeholders in Kenya shall have responsibility of establishing respective governance structures with allocation of resources including; budget, human resource and infrastructure to support the overall mission of the Strategy.[70]

The monitoring and evaluation of the strategy are connected to the National Integrated Monitoring and Evaluation System (NIMES) to ensure that there is a clear connection between this strategy and the Vision 2030. A review of the strategy will be conducted after three years, and a final review after five years. Additionally, the National Computer Cybercrimes and Coordination Committee (NC4) Secretariat will perform an annual monitoring and evaluation exercise and report on the implementation of the strategy.[71]

3.5 Merits and shortcomings of the strategy

From the critical examination of the strategy, the study posits the following merits: One is the Comprehensive approach. The strategy covers a wide range of areas related to cybersecurity, including institutional framework, legal and regulatory frameworks, protection and resilience of critical infrastructure, capability and capacity building, risk and crime minimization, and national and international cooperation. Second is the aspect of

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[68] Kenya National Cybersecurity Strategy 2022. Available at *https://ict.go.ke/wp-content/uploads/2022/10/KENYA-CYBERSECURITY-STRATEGY-2022.pdf {accessed 14 February 2023}*.
[69] Ibid
[70] Kenya National Cybersecurity Strategy 2022. Available *at https://ict.go.ke/wp-content/uploads/2022/10/KENYA-CYBERSECURITY-STRATEGY-2022.pdf* {accessed 14 February 2023}.
[71] Ibid

Collaboration. The strategy emphasizes the need for collaboration among various stakeholders, including government agencies, private sector, academia, and international partners, to improve Kenya's cyber security posture and resilience. Finally, is the Monitoring and evaluation aspect. The strategy integrates with the National Integrated Monitoring and Evaluation System (NIMES), and includes mid-term and final reviews as well as annual monitoring and evaluation exercises to ensure the implementation of the strategy is on track.

The study identifies the following shortcomings: One is the lack of specifics. The strategy does not provide specific details on how each of its objectives will be achieved, which could make it difficult to measure progress and hold stakeholders accountable. Resource constraints is another issue. The strategy acknowledges that resource constraints may limit its implementation, particularly in terms of funding, capacity building, and infrastructure. Implementation challenges will also be a problem. The strategy's success will depend on its implementation, which may face challenges such as bureaucracy, lack of expertise and capacity, and resistance to change.

4. Implementing Kenya's National Cybersecurity Strategy 2022: Comparative Lessons from Estonia and the UK

4.1 Rationale for selecting Estonia and the UK

Estonia and the UK are often discussed when it comes to the implementation of cybersecurity strategies due to their significant progress in this field and their different approaches to cybersecurity.

Estonia has been recognized as a global leader in cybersecurity, primarily because of its experience in dealing with cyber threats.[72] In 2007, Estonia suffered a large-scale cyber-attack that targeted its government, media, and financial institutions. This attack led Estonia to prioritize cybersecurity and develop innovative and comprehensive approaches to cybersecurity.

[72] The Estonian Ministry of Defence, "Estonian Cyber Security Strategy", available at *https://www.kaitseministeerium.ee/sites/default/files/Estonian%20Cyber%20Security%20Strategy%202019-2022.pdf* {accessed 17 February 2023}.

Estonia's cybersecurity strategy emphasizes the importance of a secure digital infrastructure, promoting e-governance, and ensuring that every citizen has access to digital services.[73] Estonia's efforts have paid off, as it has one of the lowest rates of cybersecurity incidents in the world.[74]

The UK, on the other hand, has developed a comprehensive approach to cybersecurity that emphasizes collaboration between the government, industry, and academia.[75] The UK's cybersecurity strategy focuses on improving cybersecurity across all sectors and building a resilient digital economy. The UK has established various institutions, such as the National Cyber Security Centre (NCSC), to lead the implementation of its cybersecurity strategy. The UK has also taken a proactive approach to addressing cybersecurity challenges, such as the use of artificial intelligence to detect and respond to cyber threats.[76]

In summary, Estonia and the UK have different experiences and approaches to cybersecurity, which makes them interesting cases to study and compare when it comes to the implementation of cybersecurity strategies. Estonia's focus on a secure digital infrastructure and e-governance, and the UK's emphasis on collaboration and a resilient digital economy, can provide useful insights for Kenya developing its own cyber security strategies.

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[73]Tim Stevens, "Estonia's Cyber Security Strategy: Lessons for the EU", available at *https://www.carnegieeurope.eu/2017/03/29/estonia-s-cyber-security-strategy-lessons-for-eu-pub-68433* {accessed 17 February 2023}.
[74] Ibid
[75] HM Government. (2021). UK Cyber Security Strategy 2021-2026. *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1015105/UK_Cyber_Security_Strategy_2021-2026.pdf* {accessed 17 February 2023}.
[76] Ibid

4.2 Distinct features of Estonia's Cybersecurity strategy

Estonia is known for being a pioneer in the field of cybersecurity, and its cybersecurity strategy has several distinct features. Here are some of the key features of Estonia's cybersecurity strategy[77]:

1. **Strong Emphasis on National Cybersecurity**: Estonia places a high priority on national cybersecurity and has invested heavily in developing its cybersecurity capabilities. The country recognizes that cyber threats can have significant implications for national security and the economy and has made efforts to build a robust and resilient cybersecurity infrastructure.[78]

2. **Integration of Cybersecurity with e-Government**: Estonia is also known for its advanced e-government infrastructure, which provides a range of digital services to its citizens. The country has integrated cybersecurity into its e-government services to ensure the protection of sensitive information and systems. This integration has enabled Estonia to offer secure digital services that are accessible to its citizens and businesses.[79]

3. **Public-Private Partnership**: Estonia has established a strong public-private partnership to address cybersecurity. The country recognizes that cybersecurity is a shared responsibility and has collaborated with the private sector to develop cybersecurity policies and practices. This partnership has helped to build a strong cybersecurity ecosystem that leverages the expertise of both the public and private sectors.[80]

4. **Proactive Approach to Cybersecurity**: Estonia takes a proactive approach to cybersecurity and recognizes the importance of threat intelligence and situational awareness. The country has established

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[77] Maria Yen and Markus Vihma "Estonia's Cyber security Strategy: A Recipe for Success", available at *https://www.belfercenter.org/publication/estonias-cybersecurity-strategy-recipe-success* {accessed 17 February 2023}.
[78] Ibid
[79] Ibid
[80] Ibid

the Cyber Security Council, which is responsible for coordinating national cybersecurity efforts and developing a cybersecurity strategy that is agile and adaptable to changing threats.[81]

5. **Focus on Education and Training**: Estonia places a strong emphasis on education and training to build a cybersecurity workforce that can respond to evolving threats. The country has established the Estonian Academy of Security Sciences, which provides cybersecurity training to government officials, law enforcement agencies, and other stakeholders.[82]

Overall, Estonia's cybersecurity strategy is known for its comprehensive and proactive approach to cybersecurity, its integration with e-government services, and its strong public-private partnerships. These features have helped Estonia to become a leader in the field of cybersecurity and a model for other countries to follow.

4.3 Distinct features of the United Kingdom's Cybersecurity strategy

The United Kingdom's cybersecurity strategy has several distinct features, including[83]:

1. **A Comprehensive and Integrated Approach**: The UK's cybersecurity strategy takes a comprehensive and integrated approach to addressing cyber threats, focusing on prevention, detection, and response. The strategy is guided by the National Cyber Security Strategy, which outlines the government's objectives for protecting the UK from cyber threats.[84]

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[81] Kaska, Kadri. "Estonian Cyber Security Strategy: Managing Risks from Cyberspace." *Journal of Strategic Security* 5, no. 1 (2012): 21-39. https://scholarcommons.usf.edu/cgi/viewcontent.cgi?article=1185&context=jss {accessed 17 February 2023}.
[82] Ibid
[83] National Cyber Security Centre. (2021). Annual Review 2021. *https://www.ncsc.gov.uk/report/annual-review-2021* {accessed 16 February 2023}.
[84] Ibid

2. **Partnership with Industry and International Allies**: The UK recognizes that cybersecurity is a shared responsibility and has established strong partnerships with industry and international allies. The government works closely with the private sector to share threat intelligence and develop best practices, and it also collaborates with international partners to promote cybersecurity and combat cyber threats.[85]

3. **A Focus on Innovation**: The UK is known for its innovative approach to cybersecurity, and the government has invested in research and development to create new technologies and approaches to cybersecurity. The strategy focuses on promoting innovation and supporting the development of new technologies that can improve cybersecurity.[86]

4. **Awareness and Education**: The UK places a strong emphasis on cybersecurity awareness and education. The government works to raise awareness of cyber threats and provides resources to help individuals and businesses protect themselves from cyber-attacks. The government also supports education and training programs to build a skilled and knowledgeable cybersecurity workforce.[87]

5. **Cybersecurity Standards and Certification**: The UK has established cybersecurity standards and certification programs to ensure that organizations are taking appropriate measures to protect their systems and data. The Cyber Essentials program, for example, provides a baseline standard for cybersecurity that all organizations can follow, while the Cyber Security Information Sharing Partnership (CiSP) enables organizations to share threat intelligence and best practices.[88]

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[85] Ibid
[86] National Cyber Security Centre. (2020). Cyber Security Skills in the UK Labour Market 2020. *https://www.ncsc.gov.uk/report/cyber-security-skills-in-the-uk-labour-market-2020* {accessed 16 February 2023}.
[87] Ibid
[88] Ibid

Overall, the UK's cybersecurity strategy is characterized by a comprehensive and integrated approach, strong partnerships with industry and international allies, a focus on innovation, awareness and education, and cybersecurity standards and certification. These features have helped the UK to develop a strong cybersecurity infrastructure and respond effectively to cyber threats.

4.4 Lessons for Kenya from Estonia and the United Kingdom

Kenya can learn several lessons from Estonia and the United Kingdom in implementing its cybersecurity strategy. Firstly, Kenya should take a Comprehensive and Integrated Approach. Both Estonia and the UK have taken a comprehensive and integrated approach to cybersecurity. Kenya should also adopt a similar approach, focusing on prevention, detection, and response, and ensuring that all stakeholders are involved in the effort. Secondly, Kenya should emphasize Public-Private Partnerships. Estonia and the UK have both established strong public-private partnerships to address cybersecurity. Kenya should prioritize collaboration between government and the private sector, working together to develop policies, share threat intelligence, and build a strong cyber security ecosystem. Thirdly, Kenya should prioritize Awareness and Education. Both Estonia and the UK prioritize cybersecurity awareness and education. Kenya should follow their lead and invest in public education campaigns and cybersecurity training programs to raise awareness of cyber threats and help individuals and organizations protect themselves. In addition, Kenya should focus on Innovation. Estonia and the UK have a strong focus on innovation and investing in research and development to create new technologies and approaches to cybersecurity. Kenya should prioritize innovation and support the development of new technologies that can improve cyber-security. Finally, Kenya should establish Cyber-security Standards and Certification: Both Estonia and the UK have established cybersecurity standards and certification programs. Kenya should consider following their lead and develop similar programs to ensure that organizations are taking appropriate measures to protect their systems and data.

By following these lessons, Kenya can strengthen its cybersecurity infrastructure and respond effectively to cyber threats. However, each country's cybersecurity strategy is unique and must be tailored to its specific needs and circumstances.

Conclusion

Kenya has made significant strides in recent years in developing its national cybersecurity strategies and laws. In 2014, Kenya established the National Cybersecurity Coordination Committee (NCCC) to coordinate and oversee the country's cybersecurity efforts. In 2018, Kenya enacted the Computer Misuse and Cybercrimes Act, which criminalizes various cybercrimes and provides a legal framework for investigating and prosecuting cybercrime offenses. Kenya has also been active in promoting cybersecurity awareness and capacity building through various initiatives, such as the National Cyber security Awareness Month. The study has focused on the 2022 Cyber-security strategy by addressing its necessity, initiatives, principles, goals, pillars, implementation, merits and shortcomings.

Compared to Estonia and the UK, Kenya is still in the early stages of implementing its 2022 cyber security strategy and laws. However, Kenya's efforts are commendable, and it is taking steps to address its cyber security challenges. To improve the implementation of its 2022 cyber security strategy and laws, Kenya can learn from the experiences of Estonia and the UK. For example, Kenya could prioritize the development of a secure digital infrastructure, as Estonia has done. Kenya could also focus on promoting collaboration between the government, industry, and academia, as the UK has done. Additionally, Kenya could explore the use of innovative technologies, such as artificial intelligence, to enhance its cybersecurity capabilities.

In conclusion, while Kenya has made progress in developing its 2022 national cyber security strategy and laws, there is still room for improvement in their implementation. By learning from the experiences of Estonia and the

UK, Kenya can enhance its cybersecurity capabilities and better protect its citizens, businesses, and government institutions from cyber threats. Individuals must take measures to safeguard themselves and their important assets in the online or digital space, just as they would in the physical or terrestrial world. This requires taking appropriate steps to secure not only the physical devices such as phones, computers and other gadgets, but also the information, software, hardware and infrastructure that allows them to enjoy the benefits of flexibility, convenience and independence in their personal and professional lives.

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Kenya National Cyber security Strategy 2022. Available at https://ict.go.ke/wp-content/uploads/2022/10/KENYA-CYBERSECURITY-STRATEGY-2022.pdf

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Maria Yen and Markus Vihma "Estonia's Cyber security Strategy: A Recipe for Success", available at https://www.belfercenter.org/publication/estonias-cybersecurity-strategy-recipe-success

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The Independence Electoral and Boundaries Commission (IEBC) Act, 2011

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Tim Stevens, "Estonia's Cyber Security Strategy: Lessons for the EU", available at *https://www.carnegieeurope.eu/2017/03/29/estonia-s-cyber-security-strategy-lessons-for-eu-pub-68433*

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Safeguarding the Environment through Effective Pollution Control in Kenya

By: ***Kariuki Muigua*** [*]

Abstract

Environmental pollution has become a major challenge, not only in Kenya but also across the globe, especially in the era of seeking faster economic development to take care of the ballooning human population in different countries. The Sustainable development agenda was formulated to help achieve the balance between development and environmental protection. Despite the development of the comprehensive sustainable development principles, there seems to have been slow progress in their implementation especially in curbing environmental pollution. Kenya has only seen increase in environmental pollution across the country and this threatens not only the environment but also human beings livelihoods that rely on a healthy environment. In the context of the constitutionally guaranteed right to a clean and healthy environment, this paper discusses how the problem of pollution can be dealt with in Kenya as a key step towards achieving sustainable development.

1. Introduction

Recently, the Kenyan media has been awash with reports of increased and unregulated cases of pollution. This has ranged from water, air and soil pollution, among others.[1] However, this does not imply that pollution is a Kenyan problem only. On the contrary, there have been increased cases of

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[1] Odinga, T., "Focus on miners, farmers as soil pollution rises," *Business daily*, Tuesday, December 4, 2018. Available at https://www.businessdailyafrica.com/datahub/3815418-4881226-11dxf1kz/index.html ; Omanga, E., Ulmer, L., Berhane, Z., & Gatari, M., "Industrial air pollution in rural Kenya: community awareness, risk perception and associations between risk variables," *BMC public health* 14, no. 1 (2014): 377.

various forms of pollution the world over.[2] This is despite the presence of some legal and institutional frameworks meant to control the problem. At the international level and national environmental laws, environmental law has evolved to recognize substantive rights with relation to the environment, such as the rights implied in the common heritage of mankind and the right to be free from toxic pollution, among others.[3]

The Constitution of Kenya guarantees the right of every person to a clean and healthy environment including 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.[4] One of the obligations of the State under Article 69 is to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and to ensure the equitable sharing of the accruing benefits.[5]

According to the Kenya's National Land Policy 2009[6], Kenya faces a number of environmental problems including the degradation of natural resources such as forests, wildlife, water, marine and coastal resources as well as soil erosion and the pollution of air, water and land. No doubt mining will escalate the situation unless environmental management is integrated into mining activities.

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[2] World Health organization, "9 out of 10 people worldwide breathe polluted air, but more countries are taking action," 2 May 2018. Available at https://www.who.int/news-room/detail/02-05-2018-9-out-of-10-people-worldwide-breathe-polluted-air-but-more-countries-are-taking-action

[3] United Nations, *UNEP Compendium on Human Rights and the Environment: Selected international legal materials and cases*, United Nations Environment Programme ; Center for International Environmental Law (2014). Available at http://wedocs.unep.org/handle/20.500.11822/9943

[4] Art. 42; Art. 70(1) of the Constitution 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.

[5] Art. 69(1) (a), Constitution of Kenya, 2010.

[6] Republic of Kenya, National Land Policy (Government Printer, Nairobi, 2009).

There have been nationwide reports indicating that raw water in Kenya is too polluted with chemicals and heavy metals to be fit for irrigation or human and livestock consumption.[7] This paper seeks to add to the existing literature on how the problem of pollution in Kenya can be dealt with effectively. While this paper discusses environmental pollution in Kenya, it will specifically focus on air, water, land and noise pollution since these are the most common forms of pollution in Kenya.[8]

2. Environmental Pollution: Meaning and Forms

Environmental pollution has been defined as 'the contamination of the physical and biological components of the earth/atmosphere system to such an extent that normal environmental processes are adversely affected'.[9]

Environmental Pollution has also been defined as 'any discharge of material or energy into water, land, or air that causes or may cause acute (short-term) or chronic (long-term) detriment to the Earth's ecological balance or that lowers the quality of life'.[10]

Pollutants strain ecosystems and may reduce or eliminate populations of sensitive species. Contamination may reverberate along the food chain

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[7] Nasike, C., "Enforce measures to curb water pollution," *Business Daily*, Thursday, August 22, 2019. Available at *https://www.businessdailyafrica.com/analysis/letters/Enforce-measures-to-curb-water-pollution/4307714-5245596-tdpn9y/index.html* [Accessed on 9/9/2019].

[8] This list is not exhaustive as such Acts as the *Radiation Protection Act*, Cap 243, Laws of Kenya Revised Edition 2012 [1985], seeks to provide for the protection of the public and radiation workers from the dangers arising from the use of devices or material capable of producing ionizing radiation and for connected purposes. Sec. 8 (1) thereof prohibits any person, subject to such exemptions as may be prescribed under regulations made under this Act, to—(a) manufacture or otherwise produce; (b) possess or use; (c) sell, dispose of or lease, loan or deal with;
(d) import or cause to be imported; or (e) export or cause to be exported, any irradiating device or radioactive material except under and in accordance with a licence issued under this Act.

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

[10] Coker, A.O,. "Environmental Pollution: Types, Causes, Impacts and Management for the Health and Socio-Economic Well-Being of Nigeria," p.1. Available at https://pdfs.semanticscholar.org/8e7b/a9595bab30d7ea87715533353c53f7452811.pdf [Accessed on 9/9/2019].

causing mass destruction.[11] An example is the use of herbicides and pesticides in agricultural land. Some of these chemicals seep into rivers that flow through protected areas, causing poisoning of wildlife which drinks from the river. Another problem is the dumping of solid waste into rivers that flow through protected areas. Solid waste management which is constitutionally delegated to county governments has been a big problem across the country.[12]

Pollution has been attributed to many factors which include but not limited to waste by-products emanating from industrialization of our society, the introduction of motorized vehicles, and the explosion of the human population, leading to an exponential growth in the production of goods and services.[13] This is mainly because of the indiscriminate discharge of untreated industrial and domestic wastes into waterways, the spewing of thousands of tons of particulates and airborne gases into the atmosphere, the "throwaway" attitude toward solid wastes, and the use of newly developed chemicals without considering potential consequences has resulted in a lot of environmental disasters throughout the world.[14]

A major cause of pollution in coastal ecosystems is construction of hotels and other facilities in areas that are not on the sewerage lines.[15] Beach resorts and some households in Mombasa have constructed onsite sewage management systems such as septic tanks and soakage pits.[16] However, these often cause groundwater contamination which in turn causes considerable

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[11] FIAN International, 'Study 3: Ecodestruction and the Right to Food: The Cases of Water and Biodiversity,' *Starving the Future*, June 2002, available at http://www.fian.at/assets/Ecodestruction02.pdf [Accessed 20/9/2019].

[12] Schedule 4, Constitution of Kenya 2010.

[13] Coker, A.O,. "Environmental Pollution: Types, Causes, Impacts and Management for the Health and Socio-Economic Well-Being of Nigeria," p.1. Available at https://pdfs.semanticscholar.org/8e7b/a9595bab30d7ea87715533353c53f7452811.pdf [Accessed on 9/9/2019].

[14] Coker, A.O,. "Environmental Pollution: Types, Causes, Impacts and Management for the Health and Socio-Economic Well-Being of Nigeria," p.1. Available at https://pdfs.semanticscholar.org/8e7b/a9595bab30d7ea87715533353c53f7452811.pdf [Accessed on 9/9/2019].

[15] Businge, M.S., *et al*., 'Environment and Economic Development' in *Kenya State of the Environment and Outlook 2010* (NEMA, 2011) 2, p.14.

[16] *Ibid*.

coral reef dieback and threatens the proliferation of marine life.[17] The Wildlife Conservation and Management Act, 2013[18] deals with pollution by making it an offence to pollute wildlife habitats.[19] The Act applies the polluter pays principle and environmental restoration alongside payment of hefty fines for persons convicted of polluting wildlife habitats.[20] EMCA has very substantive provisions on pollution of the environment and gives deterrent penalties for violation of those provisions. The courts have further upheld the provisions of EMCA relating to pollution of wildlife resources and one such incidence was in the case of *Kwanza Estates LTD v Kenya Wildlife Service,*[21] where the court issued an injunction stopping the construction of a public toilet on the beachfront without approval from NEMA holding that the actions had potentially negative effects on the environment.

Environmental pollution is a threat to not only the sustainable development agenda but also to the very existence of the humankind. Environmental law thus seeks to control the use of one's property and human behaviour so as to permit a habitable environment and to minimize adverse ecological effects.[22]

3. Types of Pollution in Kenya

The most common types of pollution perceived in our environment include: water pollution; land pollution; noise pollution; and air pollution.[23]

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[17] *Ibid*.
[18] No. 47 of 2013, laws of Kenya.
[19] S. 89.
[20] S. 89(2).
[21] Civil Case 133 of 2012 [eKLR].
[22] Kutner, Luis. "The Control and Prevention of Transnational Pollution: A Case for World Habeas Ecologicus," *University of Miami Inter-American Law Review* 9, no. 2 (1977): 257.
[23] Coker, A.O., "Environmental Pollution: Types, Causes, Impacts and Management for the Health and Socio-Economic Well-Being of Nigeria." Available at https://pdfs.semanticscholar.org/8e7b/a9595bab30d7ea87715533353c53f7452811.pdf; Ndungu, N.J., "Pollution in Thika Municipality: Assessment Of Community-Based Awareness and Perception." (2003), available at *http://erepository.uonbi.ac.ke/bitstream/handle/11295/19013/Ndungu%20John%20Ndiraku_Pollution%20in%20Thika%20Municipality-%20Assessment%20of%20Communty-*

3.1 Land and Water pollution

It is estimated that about 30 to 50 per cent of nitrogen applied to soils leaches into rivers and the air, suffocating aquatic life, worsening climate change and shortening lives through contamination.[24] Nutrient pollution, or an excess of nutrients such as nitrogen and phosphorus in the water which enter the rivers as runoff from farmlands and residential areas, can lead to a host of health and environmental problems.[25] Nutrient pollution is attributed to fertilizer, animal manure, sewage treatment plant discharge, detergents, storm water runoff, cars and power plants, failing septic tanks and pet waste.[26]

Nutrient pollution of rivers is considered to be one of the most widespread human impacts on water resources.[27] This is especially more serious in agriculture based economies such as Kenya where most people in rural areas engage in farming using modern chemicals that end up in water bodies. This not only pollutes the water but have a residue effect on the soil thus polluting the soil. Apart from farming chemicals, Sewerage water, industrial wastes and disposals are also sources of water pollution.[28]

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based%20Awareness%20and%20Perception.pdf?sequence=3&isAllowed=y;
Ullah, S., "A sociological study of environmental pollution and its effects on the public health Faisalabad city," *International Journal of Education and Research*, Vol. 1 No. 6 June 2013.

[24] Onyango, L., "Nema shuts down four firms for polluting Nairobi River," *Daily Nation*, Monday August 26 2019. Available at https://www.nation.co.ke/news/Nema-shuts-down-four-firms-for-polluting-Nairobi-River/1056-5250274-dlwt1iz/index.html

[25]Thompson, E., "How Land Use Affects Nutrient Pollution in a Changing Climate," *Earth & Space Science News* (sourced from *Journal of Geophysical Research: Biogeosciences*), 4 September, 2019. Available at https://eos.org/research-spotlights/how-land-use-affects-nutrient-pollution-in-a-changing-climate

[26] United Nations Environmental Protection Agency, "The Facts about Nutrient Pollution," available at https://www.epa.gov/sites/production/files/2015-03/documents/facts_about_nutrient_pollution_what_is_hypoxia.pdf

[27] Stevenson, R., "Nutrient Pollution: A Problem with Solutions," In book: River Conservation: Challenges and Opportunities, Chapter: 4, Publisher: Fundacion BBVA, Editors: Sergi Sabater, Arturo Elosegi, pp.77-104, at p.77.

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

Target 6.3 of the Sustainable Development Goals (SDGs) requires that states should ensure that "by 2030, they improve water quality by reducing pollution, eliminating dumping and minimizing release of hazardous chemicals and materials, halving the proportion of untreated wastewater and substantially increasing recycling and safe reuse globally.

3.2 Noise and Air pollution Control in Kenya

Some scholars have defined the term noise to describe sounds that are disagreeable or unpleasant produced by acoustic waves of random intensities and frequencies.[29] Noise from industry, traffic, homes and recreation can cause annoyance, disturb sleep and effects health. Thus, sound is considered to be a potential serious pollutant and threat to the environmental health.[30]
Air pollution can be defined as "the introduction of chemicals, particulate matter, or biological materials that cause harm or discomfort to humans or other living organisms, or cause damage to the natural environment or built environment, into the atmosphere".[31]

Air pollution is now considered to be a significant public health problem, responsible for a growing range of health effects in many regions of the world.[32] Indeed, it has been documented that air pollution has overtaken poor sanitation and a lack of drinking water to become the main environmental

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[29] Ibid.
[30] Ibid; Mead, M.N.,"Noise Pollution: The Sound behind Heart Effects," *Environmental Health Perspectives* 115, no. 11 (2007): A536; Owen, D., "Is Noise Pollution the Next Big Public-Health Crisis?" *The New Yorker, May 13, 2019 Issue.* Available at https://www.newyorker.com/magazine/2019/05/13/is-noise-pollution-the-next-big-public-health-crisis
[31] Sharma, S. B., Jain, S., Khirwadkar, P., & Kulkarni, S., "The effects of air pollution on the environment and human health," *Indian Journal of Research in Pharmacy and Biotechnology* 1, no. 3 (2013): 391-396; Ghorani-Azam, A., Riahi-Zanjani, B., & Balali-Mood, M., "Effects of air pollution on human health and practical measures for prevention in Iran," *Journal of research in medical sciences: the official journal of Isfahan University of Medical Sciences* 21 (2016); Rani, B., Singh, U., & Maheshwari, R., "Menace of air pollution worldwide," *Advances in Biological Research* 2, no. 1 (2011): 1-22.
[32] Kelly, F. J., & Fussell, J. C., "Air pollution and public health: emerging hazards and improved understanding of risk," *Environmental geochemistry and health* 37, no. 4 (2015): 631-649.

cause of premature death.[33] Nitrogen oxides, Sulphur dioxide, Carbon Monoxide, Ammonia and Ozone are considered to be the major air pollutants.[34]

The United Nations observes that most recorded air pollution-linked deaths occur in developing countries, where laws are weak or not applied, vehicle emission standards are less stringent and coal power stations more prevalent.[35]

Kenya's air condition in most major cities and towns has been rated as some of the most polluted in the world.[36] This is mainly attributed to the unsustainable policies in sectors such as transport, energy, waste management and industry.[37]

It has been argued that while other parts of the world, particularly the developed nations, also have the problem of air pollution mainly caused by burning of hydrocarbons for transport that can be addressed by tackling fuel usage through electric vehicles, and car-free zones, African cities have entirely different problems; pollution is mainly due to the burning of rubbish, cooking with inefficient solid fuel stoves, millions of small diesel electricity generators, cars which have had their catalytic converters removed and petrochemical plants, all pushing pollutants into the air over the cities.[38]

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[33] Ibid.
[34] Ullah, S., "A sociological study of environmental pollution and its effects on the public health Faisalabad city," *International Journal of Education and Research*, Vol. 1, No. 6, June 2013.
[35] United Nations Environment Programme, "Air pollution hurts the poorest most," 9 May, 2019. Available at https://www.unenvironment.org/news-and-stories/story/air-pollution-hurts-poorest-most
[36] Chasant, M., "Air Pollution In Kenya: Causes, Effects And Solutions," 4 July, 2019. Available at https://www.atcmask.com/blogs/blog/air-pollution-in-kenya
[37] Ibid.
[38] Vidal, J., "'There is no escape': Nairobi's air pollution sparks Africa health warning," *The Guardian*, 10 July, 2016. Available at https://www.theguardian.com/cities/2016/jul/10/no-escape-nairobi-air-pollution-sparks-africa-health-warning

According to the World Health Organization, approximately 19,000 people die prematurely in Kenya annually because of air pollution.[39] This is mainly attributed to PM 2.5 annual exposure, which, according to the United Nations, are 70 per cent over the safe level in Nairobi.[40] Kenya has had its own share of air and noise pollution despite the existence of laws meant to curb the same.[41]

4. International and Regional Law and Pollution Control

The *International Covenant on Economic, Social and Cultural Rights*[42], recognises the right to be free from pollution and states that 'the States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: the improvement of all aspects of environmental and industrial hygiene.[43]

The United Nations *Montreal Protocol on Substances that Deplete the Ozone Layer*[44] aims to reduce and eventually eliminate the emissions of man-made

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[39] United Nations Environment Programme, "Nairobi matatus' odd engine idling culture pollutes, harms health," 19 December, 2019. Available at https://www.unenvironment.org/news-and-stories/story/nairobi-matatus-odd-engine-idling-culture-pollutes-harms-health

[40] Ibid.

[41] Sfrican City Planner, "Nairobi, Kenya, faces a Growing Challenge of Noise Pollution," October 17, 2016. Available at http://africancityplanner.com/nairobi-kenya-faces-growing-challenge-noise-pollution/; Barczewski, B., "How well do environmental regulations work in Kenya?: a case study of the Thika highway improvement project." *Center for Sustainable Urban Development* (2013); Jammah, A., "Kenya needs to address the crisis of air pollution," Standard Digital, 18th March, 2016. Available at https://www.standardmedia.co.ke/article/2000195290/kenya-needs-to-address-the-crisis-of-air-pollution.

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

[43] *International Covenant on Economic, Social and Cultural Rights*, Article 12 (1)(2)(b).

[44] UN General Assembly, *Protection of global climate for present and future generations of mankind: resolution / adopted by the General Assembly*, 6 December 1988, A/RES/43/53.

ozone depleting substances. The *1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*[45] requires the parties to reduce to a minimum the transboundary movements of hazardous wastes; to ensure that such wastes are managed and disposed of in an environmentally sound manner, as close as possible to their source of generation; and to reduce to a minimum the generation of hazardous wastes at the source.

The *1992 Framework Convention on Climate Change*[46] requires parties to achieve "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.

The other *Protocol to the Nairobi Convention is the Protocol Concerning Co-operation in Combating Marine Pollution in Cases of Emergency in the Eastern African Region*[47] which was adopted in 1985. Article 2 of the Protocol provides that it applies to "marine pollution incidents which have resulted in or which pose a significant threat of, pollution to the marine and coastal environment of the Eastern African region or which adversely affect the interests of one or more of the Contracting Parties." The other Protocol relating to the East Africa region, is the Protocol for the Protection of the West Indian Ocean Marine Environment from Land-Based Sources and Activities (LBSA Protocol)[48], enacted in 2010.

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[45] UN General Assembly, Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Basel, 22 March 1989, United Nations, *Treaty Series* , vol. 1673, p. 57.

[46] UN General Assembly, *United Nations Framework Convention on Climate Change: resolution / adopted by the General Assembly*, 20 January 1994, A/RES/48/189.

[47] United Nations, *Protocol Concerning Co-operation in Combating Marine Pollution in Cases of Emergency in the Eastern African Region*, Jun 21, 1985, Nairobi. Entry into force: May 30, 1996

[48] Protocol for the Protection of the Marine and Coastal Environment of the Western Indian Ocean from Land-Based Sources and Activities. Adopted in Nairobi, Kenya on 31 March 2010

The *Nairobi Convention*[49] together with its three protocols constitutes the current regional legal framework for the protection and conservation of the marine and coastal environment of the Western Indian Ocean region. The Convention is meant to ensure there is a joint regional legal framework that coordinates the efforts of the member states to build their capacity to protect, manage and develop their coastal and marine environment.[50] This would include capacity to keep these areas pollution free. This is because transnational pollution would require cooperation among states sharing major water bodies like Indian Ocean.[51]

These legal instruments are to offer guidelines to states on how to conserve the various aspects of the environment and also curb pollution.

5. Legal and Institutional Framework on Pollution Control in Kenya: Challenges and Prospects

5.1 Constitution of Kenya 2010

Under the Constitution of Kenya 2010[52] Although the national government, has the role of protecting the environment and natural resources,[53] county governments have a role in pollution control[54] and implementation of specific national government policies on natural resources and environmental conservation including soil and water conservation and forestry.[55] The Counties should however work closely with the national government and other stakeholders in discharging some of these duties

[49] https://www.unenvironment.org/nairobiconvention/
[50] Ibid.
[51] See generally, Mendis, C., "Sovereignty vs. trans-boundary environmental harm: The evolving International law obligations and the Sethusamuduram Ship Channel Project," *Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, New York, NY(USA). 67* (2006): 2006, see also Caron, D.D., "Liability for Transnational Pollution Arising from Offshore Oil Development: A Methodological Approach," *Ecology Law Quarterly* (1983): 641-683; Kutner, L., "The Control and Prevention of Transnational Pollution: A Case for World Habeas Ecologicus," *University of Miami Inter-American Law Review* 9, no. 2 (1977): 257.
[52] Constitution of Kenya 2010 (Government Printer, Nairobi, 2010).
[53] Ibid, Fourth Schedule, S. 22.
[54] *Ibid*, S. 3 of Part II.
[55] *Ibid*, S. 10.

considering that they may traverse various counties and may require some major steps from both national and county levels of government.

5.2 Environmental Management and Coordination Act (EMCA), 1999

The Environmental Management and Coordination Act (EMCA), 1999[56], is the framework law on environmental management and conservation. EMCA establishes among others institutions; National Environment Management Authority, National Environment Complaints Committee [57], National Environment Tribunal and County Environment Committees.

EMCA provides the general guidelines and standards to be observed in management and conservation of various aspects of the environment. It is therefore supposed to be implemented through enactment of sectoral laws that should focus on the various aspects of the environment. In order to align the Act with the Constitution, EMCA was amended in 2015 by the *Environmental Management and Co-ordination (Amendment) Act* (No 5 of 2015). While EMCA contains provisions on almost all the aspects of the environment, it is worth pointing out that the procedural aspects of the regulation of these aspects heavily depends on regulations and other laws that expound on the EMCA provisions.

5.3 National Environment Management Authority (NEMA)

The National Environment Management Authority (NEMA) was established as the principal instrument of government charged with the implementation of all policies relating to the environment, and to exercise general supervision and coordination over all matters relating to the environment. In consultation with the lead agencies, NEMA is empowered to develop regulations, prescribe measures and standards and, issue guidelines for the management and conservation of natural resources and the environment. The Act provides for environmental protection through; Environmental impact assessment; Environmental audit and monitoring; and Environmental restoration orders, conservation orders, and easements.

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[56] No. 8 of 1999, Laws of Kenya.
[57] See Environmental Management and Co-ordination (Amendment) *Act* (*No 5 of 2015*), Laws of Kenya.

Notably, NEMA can delegate its functions under EMCA to any lead agency, being the oversight authority, and where it carries out a delegated duty, it can recover costs from the relevant body for any of such functions.[58]

5.4 Health Act, 2017

The Health Act, 2017[59] was enacted to establish a unified health system, to coordinate the inter-relationship between the national government and county government health systems, to provide for regulation of health care service and health care service providers, health products and health technologies and for connected purposes.[60] In seeking to promote and advance public and environmental health, the Act obligates the national health system to ensure that measures for managing environmental risk factors to curtail occurrence and distribution of diseases are put in place and implemented. In particular such measures should target, inter alia—the reduction of disease burden arising from poor environmental hygiene, sanitation, occupational exposure and environmental pollution.[61]

5.5 Public Health Act

The *Public Health Act*[62] was enacted to make provision for securing and maintaining health.[63] The Act empowers the Cabinet Minister in charge to make rules concerning port health matters. Specifically, the Cabinet Secretary may make rules, inter alia: or the destruction of rats, mice or insects in, vessels, the disposal of bilge or other water on board, the cleansing of vessels, the provision of a supply of pure water on board, and for preventing the pollution of the water of the port with excreta and manure or any infective or offensive matter.[64]

It also places a duty on local authority to protection of water supplies. Specifically, It provides that it shall be the duty of every local authority to take all lawful, necessary and reasonably practicable measures—for

[58] Sec. 12, EMCA.
[59] Act No. 21 of 2017, Laws of Kenya.
[60] Ibid, Preamble.
[61] Health Act, 2017, Sec. 68 (2)(a).
[62] Public Health Act, Cap. 242, Laws of Kenya Revised Edition 2012 [1986].
[63] Ibid, preamble.
[64] Ibid, sec. 73 (d).

preventing any pollution dangerous to health of any supply of water which the public within its district has a right to use and does use for drinking or domestic purposes (whether such supply is derived from sources within or beyond its district); and for purifying any such supply which has become so polluted, and to take measures (including, if necessary, proceedings at law) against any person so polluting any such supply or polluting any stream so as to be a nuisance or danger to health.[65] The Act also empowers the Cabinet Secretary on the advice of the Central Board of Health, to make, and impose on local authorities and others the duty of enforcing, rules in respect of defined areas—prohibiting bathing in, and prohibiting or regulating the washing of clothes or other articles or of animals in, or in any place draining into, any such water supply as is mentioned in section 129; and prohibiting or regulating the erection of dwellings, sanitary conveniences, stables, cattle-kraals, pig-styes, ostrich-pens, dipping tanks, factories or other works likely to entail risk of harmful pollution of any such water supply, or prohibiting or regulating the deposit in the vicinity of, or in any place draining into, any such supply of any manure, filth or noxious or offensive matter or thing, and generally, for preventing the pollution dangerous to health of any supply of water which the public within its district has a right to use and does use for drinking or domestic purposes and for purifying any such supply which has become so polluted, and for preventing the pollution of streams so as to be a nuisance or a danger to health.[66]

Regarding disposal of sewage, the Act provides that no person should dispose of solid or liquid sewage or sewage effluent in such a manner or in such a position as to cause or be likely to cause dampness in any building or part thereof, or to endanger the purity of any water supply, or to create any nuisance, with exception of disposal of waste water from baths, lavatory basins or kitchen sinks by a satisfactory method of surface irrigation or sub-irrigation in such a manner that neither dampness of buildings, the breeding of mosquitoes, the pollution of water supplies nor other form of nuisance is caused thereby.[67]

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[65] Ibid, sec. 129.
[66] Sec. 130.
[67] Sec. 63; See also EMCA's Water quality Regulations, 2006 (Legal notice No. 121); Water Act, 2016.

While this Act seems comprehensive in its provisions, its implementation and enforcement seems minimal or non-existent considering that all that it seeks to prohibit is what has been happening across the country and especially in major towns and cities such as Nairobi and Mombasa. Nairobi River is enough evidence of lack of implementation of the Public Health Act owing to its current pathetic state and absolute pollution as has been highlighted severally in the media. The ripple effect has been the pollution of other watercourse downstream such as the River Athi.[68] This affects not only human beings and animals but also adversely affects agricultural production and also causes the double tragedy of people consuming polluted and contaminated foodstuffs produced with the polluted water. There is thus a heightened need for protection of the public health from industrial pollution in Kenya which may range from water, air and land pollution.

5.6 Suppression of Noxious Weeds Act

Considering that land degradation and pollution can be caused by various factors including noxious weeds, the *Suppression of Noxious weeds Act*[69] was enacted to provide for the suppression of noxious weeds.[70] The Cabinet Secretary may by notice in the Gazette declare a plant to be a noxious weed in any area, which shall be specified in the notice, and which may consist either of the whole of Kenya or of one or more districts or portions thereof.[71] Where a weed is declared as noxious, any person in charge of such land should clear the noxious weed, or cause it to be cleared, from that land.[72] Such weeds may be injurious to agricultural or horticultural crops, natural

[68] Kienja, K., "Pollution of urban waterways in Nairobi: a case study of Mathare 4B village, Nairobi, Kenya." Master Thesis, University of Canterbury (2017). Available at https://pdfs.semanticscholar.org/06b6/abcabbe413610fe725ee8bb27ac61971868a.pdf

[69] *Suppression of Noxious weeds Act, Cap 325,* Laws of Kenya, Revised Edition 2012 [1983].

[70] Ibid, Preamble.

[71] Ibid, sec. 3.

[72] Ibid, sec. 4.

habitats or ecosystems, or humans or livestock, hence the need to control them.[73]

a) Water pollution Control

National Environment Management Authority (NEMA) has made considerable attempts at controlling water pollution in the country.[74] However, this may be considered to be a reactive measure which was only taken after media houses' expose on the extent of pollution that is taking place in the country, especially perpetrated by the corporate bodies. This begs the question where NEMA was and whether the perquisite measures during the licensing of these companies were taken. Environmental Impact Assessment (EIA)[75] and Strategic Environment and Social Assessment (SESA)[76] assessments as required by the law were supposed to address this problem; follow up measures by NEMA to ensure that there is compliance were evidently missing. This has resulted in various companies dropping their guard and engaging in wanton destruction of water bodies through uncontrolled and untreated discharge of pollutants into the water bodies. NEMA Director General has been on record stating that some of the closed down companies do not have efficient waste water treatment plants.[77] This is worrying as it may mean that there are many more out there doing the same and its only that they have not been discovered.

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[73] Gbèhounou, G., *Guidance on Weed Issues and Assessment of Noxious Weeds in a Context of Harmonized Legislation for Production of Certified Seeds*, Plant Production and Protection Division, Food and Agriculture Organization of the United Nations, 2013. Available at http://www.fao.org/3/a-i3493e.pdf

[74] Onyango, L., "NEMA shuts down four firms for polluting Nairobi River," Daily *Nation,* Monday August 26 2019. Available at https://www.nation.co.ke/news/Nema-shuts-down-four-firms-for-polluting-Nairobi-River/1056-5250274-dlwt1iz/index.html

[75] Sec. 68, EMCA.

[76] Sec. 57A, EMCA.

[77] Onyango, L., "Nema shuts down four firms for polluting Nairobi River," *Daily Nation,*Monday August 26 2019. Available at https://www.nation.co.ke/news/Nema-shuts-down-four-firms-for-polluting-Nairobi-River/1056-5250274-dlwt1iz/index.html

The *Water Quality Regulations 2006*[78] apply to drinking water, water used for industrial purposes, water used for agricultural purposes, water used for recreational purposes, water used for fisheries and wildlife, and water used for any other purposes.[79] The Regulations not only obligate every person to refrain from any act which directly or indirectly causes, or may cause immediate or subsequent water pollution, but also seek to regulate through licensing the various uses and interaction with water. They also set standards by which every user of water and water bodies must observe.

The Water Act 2016[80] also carries provisions that seek to curb contamination and pollution of water sources and establishes institutions that should enforce the Act. Despite the enactment of this Act, there are still many cases of pollution of water bodies due to lack of enforcement of the prescribed standards and little has changed if at all, in the quality of water across the country as far as water hygiene is concerned.

b) Land pollution Control

Land pollution and degradation is closely related to water pollution as this can also result in water pollution, hence the need to tackle the problem. Land degradation in Kenya is often attributed to both natural and human factors which include biophysical (natural) factors related to climatic conditions and extreme weather events such as droughts and floods, and catchment factors such as steep slopes and highly erodible soils.[81] However, human activities carry the greatest share of blame, and these include unsustainable land management practices (anthropogenic) factors such as destruction of natural vegetation, over-cultivation, overgrazing, poor land husbandry and excessive forest conversion.[82]

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[78] Water quality Regulations, 2006 (Legal notice No. 121).
[79] Regulation 2.
[80] No. 43 of 2016, Laws of Kenya.
[81] Republic of Kenya, Report Of the Land Degradation Assessment (LADA) In Kenya: Based On A Study Of Land Degradation Assessment (Lada) With Remote Sensing And GIS, For Sustainable Land Management (SLM) In Kenya, March 2016. Available at http://www.environment.go.ke/wp-content/uploads/2018/08/LADA-Land-Degradation-Assessment-in-Kenya-March-2016.pdf
[82] Ibid.

Land degradation may include: biological/Vegetation degradation (loss of biodiversity/vegetation); Soil erosion by water; Wind erosion; Water resources degradation; Chemical degradation; and physical degradation.[83]
Considering that the above factors fall under different sectors, land pollution is governed by various policies and laws that range from agricultural laws, forestry laws, climate change laws and water laws among others.[84]
Article 60 of the Constitution requires that in Kenya should be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the principles of sustainable and productive management of land resources; and sound conservation and protection of ecologically sensitive areas, among others.

The Constitution also obligates the State to: ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya; encourage public participation in the management, protection and conservation of the environment; protect genetic resources and biological diversity; establish systems of environmental impact assessment,

[83] Ibid.
[84] See Agricultural Sector Development Strategy 2010–2020, the Kenya Vision 2030, the National Environment Policy, 2013, the Environment Management and Coordination Act 1999, the National Livestock Policy, 2013, the National Ocean and Fisheries Policy, 2008, the National Food and Nutrition Security Policy, 2011, the National Horticulture Policy, 2012, the Forest Policy, 2014, the Sessional Paper No. 3 of 2009 On National Land Policy, the Draft National Land Use Policy, 2016, the National Spatial Plan (NSP) 2015-2045, the Natural Resources Benefit Sharing Bill, the Forest Conservation and Management Act, No. 34 of 2016, the Community Land Act No. 27 of 2016, the Agriculture, Fisheries and Food Authority Act (No 13 of 2013) Crops Act 2013 No 16 of 2013, The Kenya Agricultural and Livestock Research Act, 2013 (No. 17 of 2013), the Fisheries Management and Development Act, 2016, Biosafety Act, No. 2 of 2009, the Kenya Plant Health Inspectorate Service Act, No. 54 of 2012, the Seeds and Plant Varieties Act, Cap 326, the Wildlife Conservation and Management Act, 2013 (No. 47 of 2013), the County Governments Act, 2012 (No.17 of 2012), the Urban Areas and Cities Act, 2011 (No. 13 of 2011), the Land Adjudication Act (Cap. 284), Agriculture and Food Authority (AFA) 2016-2021 Strategic Plan, the Livestock and Livestock Products Development and Marketing Bill, 2016, the Food Security Bill, 2017, and the National Drought Management Authority Act, No. 4 of 2016.

environmental audit and monitoring of the environment; and eliminate processes and activities that are likely to endanger the environment.[85] It also requires every person to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.[86]
The *Kenya Vision 2030* also commits the country to mitigate unintended adverse land degradation.

The various policies and laws thus seek to curb or mitigate the above forms of land pollution/degradation. However, the situation on the ground paints a grim picture and serves as an indication that little has been achieved despite the existence of these legal instruments.

c) Noise pollution Control

The *Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulation, 2009*[87] defines "noise" to mean any undesirable sound that is intrinsically objectionable or that may cause adverse effects on human health or the environment. These Regulations prohibit any person from making or causing to be made any loud, unreasonable, unnecessary or unusual noise which annoys, disturbs, injures or endangers the comfort, repose, health or safety of others and the environment.[88] However, there are some exemptions to these prohibitions.[89]

In the case of **Pastor James Jessie Gitahi and 202 others vs Attorney General**[90], the court recognized one of the components of a clean and healthy environment to be the prevention of noise and vibration pollution. The National Environmental Management Authority (Nema) inspectors have made attempts at noise pollution control in the country.[91]

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[85] Article 69 (1).
[86] Article 69 (2).
[87] Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations, 2009, Legal Notice No. 61 of 2009.
[88] Ibid, Regulation 3 (1).
[89] Regulation 7.
[90] [2013] eKLR,petition No. 683 of 2009.
[91] Omullo, C., "Nema shuts four Nairobi clubs over noise pollution," *Business Daily*, Thursday, January 11, 2018. Available at

Despite the Regulations, noise pollution is however still a major problem in the country because of lack of enforcement of the Regulations and possibly the public's ignorance on the levels of noise that may be considered as air pollution.

d) Air pollution Control

The *Air Quality Regulations 2014* seek to provide for prevention, control and abatement of air pollution to ensure clean and healthy ambient air. They also seek to ensure that there is establishment of emission standards for various sources such as mobile sources (e.g. motor vehicles) and stationary sources (e.g. industries) as outlined in the Environmental Management and Coordination Act, 1999.[92] As already pointed, despite the existence of these Regulations, there has been massive pollution of air especially around major towns due to industrial development and unsustainable mode of transport, mainly public service vehicles (matatus) and other unroadworthy vehicles. Some authors have rightly pointed out that developing countries such as Kenya have limited air quality management systems due to inadequate legislation and lack of political will, among other challenges. In addition, maintaining a balance between economic development and sustainable environment is usually a challenge; there are no investments in pollution prevention technologies.[93] More attention goes to the short-term benefits from increased production and job creation where the lack of air quality management capability translates into lack of air pollution data, hence the false belief that there is no problem.[94]

https://www.businessdailyafrica.com/news/Nema-shuts-four-Nairobi-clubs-over-noise-pollution/539546-4260126-1u5arqz/index.html

[92] The Environment Management And Co-Ordination (Air Quality) Regulations, available at http://www.nema.go.ke/index.php?option=com_content&view=article&id=31&Itemid=171

[93] Omanga, E., Ulmer, L., Berhane, Z., & Gatari, M., "Industrial air pollution in rural Kenya: community awareness, risk perception and associations between risk variables," *BMC public health* 14, no. 1 (2014): 377.

[94] Ibid.

Under EMCA, projects and activities that are likely to cause air pollution are also to be subjected to Environmental Impact Assessment[95].

6. Towards an Effective framework on Pollution Control in Kenya

6.1 Effective Waste Management

Effective disposal and management of waste is considered as one of the ways of pollution control.[96] Achievement of sustainable waste management mechanisms in Kenya has been attributed to such factors as lack of adequate consumer awareness, poor policy frameworks and lack of structured Extended Producer Responsibility Schemes, among others.[97]

6.2 Real Time Air Pollution Monitoring

Under the Kenya Bureau of Standards legal provisions of 2014, the Kenya Bureau of standards offers pre-export inspection of used vehicles to determine whether they conform to the code regulations in a bid to control pollution.[98] Investing in technology that will enable the government agencies to achieve real time air pollution monitoring can go a long way in ensuing that pollutants are kept within acceptable levels as defined by the World Health Organisation standards. As already pointed out, air pollution is worst in the major cities and towns and these efforts should be concentrated more on these areas due to their high susceptibility and the high population living

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[95] Sec. 68, EMCA.

[96] Spiegel, J., & Maystre, L. Y., "Environmental pollution control and prevention." *Encyclopedia of Occupational Health and Safety. 4th ed. Geneva: International Labour Office* 2 (1998).

[97] Wakiaga, P., "Incentivising waste management is way to go," *Business Daily*, Sunday, August 25, 2019. Available at *https://www.businessdailyafrica.com/analysis/letters/Incentivising-waste-management-is-way-to-go/4307714-5248640-ym86ov/index.html* [Accessed on 17/9/2019].

[98] Uttamang, P., Aneja, V. P., & Hanna, A. F., Assessment of gaseous criteria pollutants in the Bangkok Metropolitan Region, Thailand, *Atmospheric Chemistry and Physics*, *18*(16), 12581-12593.

in these areas. Kenya can develop and invest in the relevant sensors through tapping into the local experts skills.[99]

There is a need to invest in pollution prevention technologies like emission controls especially for factories and heavy industries with strict enforcement to ensure that people living in such areas do not pay the heavy cost of air pollution. The risk of such pollution is not just restricted to the urban areas. Research has concluded that 'pollution from industries negatively impacts the health of employees and neighbouring communities and the potential for adverse health outcomes is heightened when the industries are located in rural areas where the bulk of the population is vulnerable because of limited information about their rights and limited capacity to defend themselves or influence policy decisions'.[100]

There is need to fully operationalize the *Air Quality Regulations 2014* which ensure clean and healthy ambient air. There is need for strict enforcement of compliance with the emission standards for various sources such as mobile sources (e.g. motor vehicles) and stationary sources (e.g. industries) as outlined in the *Air Quality Regulations 2014 and* Environmental Management and Coordination Act, 1999.[101]

6.3 Incentive-Based Regulatory Approaches for Pollution Control

There are other regulatory approaches that can be used to promote and attain environmental protection and public health that are not rights-based. These include economic incentives and disincentives, criminal law, and private liability regimes which are all now considered as part of the framework of

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[99] Mugendi, E., "Measuring Nairobi's air quality using locally assembled low-cost sensors: How low cost sensors are tracking air quality in East Africa's largest city," May 9, 2018. Available at *https://medium.com/code-for-africa/measuring-nairobis-air-quality-using-locally-assembled-low-cost-sensors-94a356885120*

[100] Omanga, E., Ulmer, L., Berhane, Z., & Gatari, M., "Industrial air pollution in rural Kenya: community awareness, risk perception and associations between risk variables," *BMC public health* 14, no. 1 (2014): 377.

[101] The Environment Management And Co-Ordination (Air Quality) Regulations, available at *http://www.nema.go.ke/index.php?option=com_content&view=article&id=31&Itemid=171*

international and national environmental law and health law.[102] Scholars have argued that market-based instruments "harness market forces" so that they use market signals to affect behaviour (of both consumers and firms) towards pollution control. They are also called Economic Incentives for pollution control (EI) and include pollution charges or levies, taxes and tradable permits.[103]

Some authors have argued that incentive-based policy instruments are more efficient means of achieving environmental goals such as reductions in polluting emissions and fostering the delivery of ecosystem services.[104] Both a charge system and a tax system use financial instruments to persuade polluters to reduce pollution, by making pollution more costly to the polluter, thus forcing firms to reduce emissions.[105]

Kenya has been making progress in adopting these approaches, with the latest being the Green Bond Programme - Kenya, which aims to promote financial sector innovation by developing a domestic green bond market.[106] Such measures are commendable for promoting sustainability and reducing

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[102] Shelton, D., 'Human Rights, Health and Environmental Protection: Linkages in Law and Practice: A Background Paper for the WHO,' p. 3. Available at *http://www.who.int/hhr/information/Human_Rights_Health_and_Environmental_Protection.pdf* [Accessed on 28/09/2019].

[103] Di Falco, S., "Economic incentives for pollution control in developing countries: what can we learn from the empirical literature?." *Politique Agricola Internazionale (PAGRI)* 2, no. 2 (2012): 7-24, at p.7.

[104] de Vries, F. P., & Hanley, N., "Incentive-based policy design for pollution control and biodiversity conservation: a review." *Environmental and Resource Economics* 63, no. 4 (2016): 687-702.

[105] Di Falco, S., "Economic incentives for pollution control in developing countries: what can we learn from the empirical literature?" *Politique Agricola Internazionale (PAGRI)* 2, no. 2 (2012): 7-24, at p.9.

[106] "The Green Bonds Programme – Kenya," available at https://www.greenbondskenya.co.ke/

climate change[107], which is one of the results of pollution, through funding renewable energy and afforestation projects.[108]
Banning of non-reusable plastic bags in August 2017 was also a major step in curbing pollution in the country and this has received accolades across the globe.[109] This has not only been embraced by companies but also the general public.

Using such incentives and investing in technology, the Government of Kenya can succeed in achieving sustainable solid waste management in the country which is still a big menace. Notably, the poorly disposed solid waste causes water, air and soil/land pollution.

The Government should also invest more in modern modes of transport that emit fewer polluting gases through offering relevant tax breaks/exemptions to encourage investment in the sector.

It is hoped that in the long run, this will see Kenya achieve a cleaner environment for all, thus moving closer to achieving the right to a clean and healthy environment.

6.4 Pollution Control in the Context of Sustainable Development

[107] Kenya Bankers Association, *Kenya Green Bond Guidelines Background Document (Draft 02)*. Available at https://www.nse.co.ke › products-services › debt-securities › the-green-bond

[108] Ngugi, B., "Kenya sets stage for first ever green bond after approving rules," *Business Daily*, Wednesday, February 20, 2019. Available at https://www.businessdailyafrica.com/markets/capital/Kenya-sets-stage-for-first-ever-green-bond/4259442-4990946-y3k2y4z/index.html

[109] National Environment Management Authority, "Government BANS Plastic Carrier Bags," *NEMA News: NEMA Quarterly magazine*, January-March, 2017. Available at *http://www.nema.go.ke/images/Docs/Awarness%20Materials/NEAPS/NEMA%20Quarterly%20Magazine-Jan-March%202017.pdf*

Sustainable Development Goals (SDGs) 3.9 requires that by 2030, countries should substantially reduce the number of deaths and illnesses from hazardous chemicals and air, water and soil pollution and contamination.[110]

In addition to the 2030 SDGs, *Agenda 21*[111] was adopted in 1992 with the aim of combating the problems of poverty, hunger, ill health and illiteracy, and the continuing deterioration of the ecosystems on which the human race depend for their well-being. Further, it sought to deal with the integration of environment and development concerns and greater attention to them which would lead to the fulfillment of basic needs, improved living standards for all, better protected and managed ecosystems and a safer, more prosperous future. [112] The aim was to achieve a global consensus and political commitment at the highest level on development and environment cooperation.

Chapter 3 of the *Agenda 21* deals with combating poverty. Clause 3.2 thereof provides that while managing resources sustainably, an environmental policy that focuses mainly on the conservation and protection of resources must take due account of those who depend on the resources for their livelihoods. Clause 4.5 thereof notes that special attention should be paid to the demand for natural resources generated by unsustainable consumption and to the efficient use of those resources, consistent with the goal of minimizing depletion and reducing pollution.[113] *Agenda 21* basically seeks to enable all people to achieve sustainable livelihoods through integrating factors that allow policies to address issues of development, sustainable resource management and poverty eradication simultaneously.[114]

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[110] SDG 3 requires countries to ensure healthy lives and promote wellbeing for all at all ages.
[111] (A/CONF.151/26, vol.II), United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992, Agenda 21.
[112] Ibid, Preamble.
[113] Ibid, Clause 4.5.
[114] Ibid, Clause 3.4.

The *Forest Principles*[115] state in the preamble that the subject of forests is related to the entire range of environmental and development issues and opportunities, including the right to socio-economic development on a sustainable basis. The guiding objective of these principles is to contribute to the management, conservation and sustainable development of forests and to provide for their multiple and complementary functions and uses.[116]

The Principles require countries to ensure that forest resources and forest lands are sustainably managed to meet the social, economic, ecological, cultural and spiritual needs of present and future generations. These needs are for forest products and services, such as wood and wood products, water, food, fodder, medicine, fuel, shelter, employment, recreation, habitats for wildlife, landscape diversity, carbon sinks and reservoirs, and for other forest products. As a result, appropriate measures should be taken to protect forests against harmful effects of pollution, including air-borne pollution, fires, pests and diseases, in order to maintain their full multiple value.[117]

Notably, the *Principles* state that the vital role of all types of forests in maintaining the ecological processes and balance at the local, national, regional and global levels through, inter alia, their role in protecting fragile ecosystems, watersheds and freshwater resources and as rich storehouses of biodiversity and biological resources and sources of genetic material for biotechnology products, as well as photosynthesis, should be recognised.[118]

6.5 Public Empowerment and Participation

The Constitution provides that every person has a duty to cooperate with the State in discharging of its obligations towards the environment. Noting that the general public is as much a partaker in generation of pollution as it is a victim of its effects, there is need to involve them in combating pollution in the country. Creating awareness on the harmful effects of the various forms of pollution as well as creating incentives for the public to desist from

[115] United Nations, The Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests (Forest Principles) A/CONF.151/26 (Vol. III).
[116] Ibid, Preamble.
[117] Principle 2 (b).
[118] Principle 4.

activities that cause pollution is necessary. This must however be accompanied by providing alternative means of production that are sustainable. Environmental education and ethics should be promoted in the country. They should also be involved through other participatory tools such as the Environmental Impact Assessment (EIA) [119] and Strategic Environmental Assessment (SEA) [120] in order to make environmentally sound decisions which also consider their views.

There is also a need to put in place a working public/citizen complaint mechanism that provides the opportunity for citizens to lodge complaints and grievances about the violation/infringement of their right to a clean and healthy environment by companies polluting the environment. The acceptance speech by Nobel Laureate, the late Prof. Wangari Maathai, summarises the importance of public participation and empowerment in environmental protection and conservation as follows: "…….*So, together, we have planted over 30 million trees that provide fuel, food, shelter, and income to support their children's education and household needs. The activity also creates employment and improves soils and watersheds. Through their involvement, women gain some degree of power over their lives, especially their social and economic position and relevance in the family….Initially, the work was difficult because historically our people have been persuaded to believe that because they are poor, they lack not only capital, but also knowledge and skills to address their challenges. Instead they are conditioned to believe that solutions to their problems must come from 'outside'. Further, women did not realize that meeting their needs depended on their environment being healthy and well managed. They were also unaware that a degraded environment leads to a scramble for scarce resources and may culminate in poverty and even conflict….In order to assist communities to understand these linkages, we developed a citizen education program, during which people identify their problems, the causes and possible solutions. They then make connections between their own personal*

[119] See Article 69 (1), Constitution; Sec. 68, EMCA.
[120] See 57A, Environmental Management and Co-ordination (Amendment) Act, *2015* (*No. 5 of 2015*).

actions and the problems they witness in the environment and in society…. (Emphasis added)."[121]

6.6 Proper and Effective Spatial Planning

There have been various reports of demolition of buildings deemed to have been built in riparian land and other ecologically sensitive areas. There is a need to put in place effective spatial planning management systems as well as a working system for monitoring development activities. This will avoid situations where people not only suffer losses but also eliminate all chances of corruption by government officers who may be in the habit of illegally issuing clearances. The means of achieving some of these are well set out in the *National Spatial Plan 2015-2045*[122] whose specific objectives are:-To create a spatial planning context that enhances economic efficiency and strengthens Kenya's global competitiveness; To promote balanced regional development for national integration and cohesion; To optimize utilization of land and natural resources for sustainable development; To create livable and functional Human Settlements in both urban and rural areas; To secure the natural environment for high quality of life; and to establish an integrated national transportation network and infrastructure system. Full implementation of this Plan can go a long way in not only controlling pollution but also eliminating any factors that may lead to pollution in future.

6.7 Role of Courts in Environmental Conservation

The Constitution of Kenya places an obligation on national Courts and tribunals to protect and enforce environmental rights and especially the right to a clean and healthy environment. [123] The Court, especially the Environment and Land Court has made impressive efforts to discharge this duty. These efforts date to the pre-2010 Constitution era as evidenced by such cases as *Peter K. Waweru v Republic*,[124] where the Court stated that '…environmental crimes under the Water Act, Public Health Act and EMCA

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[121] The Norwegian Nobel Institute, 'Wangari Maathai: The Nobel Lecture (Oslo, December 10, 2004),' available at *http://nobelpeaceprize.org/en_GB/laureates/laureates-2004/maathai-lecture/* [Accessed on 20/9/2019].
[122] National Spatial Plan, 2015-2045 (Government Printer, Nairobi, 2015).
[123] Articles 21, 22, 42, 70, Constitution of Kenya.
[124] [2006] eKLR, Misc. Civ. Applic. No. 118 of 2004.

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….' It went further to state, ―…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.[125] The Court, while borrowing from such jurisdictions as India[126], also affirmed the broad scope of the right to a clean and healthy environment by stating, *inter alia*, that 'the right of life is not just a matter of keeping body and soul together because in this modern age that right could be threatened by many things, including the environment. The right to a clean environment is primary to all creatures including man; it is inherent from the act of creation, the recent restatement in the Statutes and the Constitutions of the world notwithstanding.'[127]

The recognition of the right to a clean and healthy environment as now guaranteed under Article 42 of the Constitution of Kenya has been reaffirmed by the Environment and Land Court in several more recent decisions[128].

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[125] p.14.

[126] The Supreme Court of India held in *Subhash Kumar v. State of Bihar,* that the "right to life guaranteed by Art. 21 of the Constitution includes the right of enjoyment of pollution-free water and air for full enjoyment of life." Further, in the case of *Dr. Mohiuddin Farooque v. Bangladesh, represented by the Secretary, Ministry of Irrigation, Water Resources and Flood Control and Others,* the Supreme Court interpreted the right to life to include the protection and preservation of the environment and ecological balance free from pollution of air and water. In another Indian case of *K. Ramakrishnan and Others v State of Kerala and Others* (smoking case), the Court stated that "*The word 'life' in the Constitution has not been used in a limited manner. A wide meaning should be given to the expression 'life' to enable a man not only to sustain life but also to enjoy it in a full measure. The sweep of right to life conferred by Art. 21 of the Constitution is wide and far-reaching so as to bring within its scope the right to pollution free air and the "right to decent environment."*

[127] [2006] eKLR, Misc. Civ. Applic. No. 118 of 2004, p.8.

[128] Friends of Lake Turkana Trust v Attorney General & 2 others, [2014] eKLR, ELC Suit No. 825 of 2012; In The Matter of the National Land Commission [2015] eKLR; Joseph Leboo & 2 others v Director Kenya Forest Services & another [2013] eKLR, Environment and Land No. 273 of 2013; Joseph Letuya & 21 others v Attorney General & 5 others [2014] eKLR, ELC Civil Suit No. 821 of 2012 (OS);

It is a commendable step towards realising the right to a clean and healthy environment free from pollution for the courts to protect the rights of all especially those that seem to have been ignored in decision making processes during the setting up of industries that affect their environment adversely.

7. Conclusion

The 2030 SGDs acknowledge that social and economic development depends on the sustainable management of our planet's natural resources. The goal is therefore to conserve and sustainably use oceans and seas, freshwater resources, as well as forests, mountains and drylands and to protect biodiversity, ecosystems and wildlife. They also seek to ensure that countries promote sustainable tourism, tackle water scarcity and water pollution, to strengthen cooperation on desertification, dust storms, land degradation and drought and to promote resilience and disaster risk reduction.[129] Combating pollution in all its forms is thus critical if the sustainable development agenda is to be achieved. This calls for concerted efforts from all stakeholders including state organs, private sector and individuals. Kenya still has a lot to do in its fight against pollution and all its ills. If the Vision 2030, which seeks to ensure that Kenya achieves a newly industrialised state by 2030 through sustainable means of production and manufacturing is to be achieved, environmental pollution must receive more attention than it is receiving currently. So far the various phases of the Vision 2030 have not performed satisfactorily in curbing pollution. Pollution threatens national development as well as achievement of sustainable livelihoods for the Kenyan people.

Safeguarding the environment through effective pollution control in Kenya is essential. It is worth the effort for the sake of the current and future generations.

Joseph Owino Muchesia & another v Joseph Owino Muchesia & another [2014] eKLR; John Mining Temoi & Another v Governor Of County Of Bungoma & 17 Others [2014] EKLR; Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others [2017] eKLR; *Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR.*

[129] Target 33.

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Resolving Intergovernmental Disputes in Kenya through Alternative Dispute Resolution (ADR) mechanisms

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Abstract

Devolution is one of the transformative changes introduced by the Constitution of Kenya (hereinafter referred to as "Constitution"). Unlike pre-2010 where power was centralised, authority and power have been decentralised through two levels of government: namely, national government and county government. The universal support for devolution was anchored in its promise of bringing services closer to the 'wananchi'. Under Articles 6 and 189 of the Constitution, the two levels of government are required to work together through consultation and co-operation in performing their functions. Cognizant of potential intergovernmental disputes, the Constitution directs that such disputes be resolved through Alternative Dispute Resolution (ADR) mechanisms. Following this constitutional directive, the Intergovernmental Relations Act 2012 (IGRA hereinafter) was enacted to provide for procedures in resolving intergovernmental disputes. Pursuant to the IGRA, the Intergovernmental Relations (ADR) Regulations 2021 were gazetted to provide a detailed framework. This paper analyses the nature and causes of intergovernmental disputes by highlighting examples witnessed in the last thirteen years of devolution. It observes that contrary to the constitutional directive that intergovernmental disputes should be resolved through ADR mechanisms, majority of the disputes have been resolved through litigation. This has not only worsened relations between and within the two levels of government, but has also delayed projects as well as wastage of resources though high litigation fees. Consequently, this has negatively affected the provision of services to the people. Further, the paper critically examines the strengths and gaps in the ADR Regulations. Lastly, the paper offers recommendations on better resolution of intergovernmental disputes through ADR.

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1.0 Introduction

On 27th August 2010, Kenyans promulgated a new Constitution which significantly transformed the system of governance in the country.[1] For a long time, political and economic power was centralised around 'an imperial' presidency causing many governance and economic problems such as bad governance, marginalisation, unequal distribution of power and resources.[2] The centralised system crippled democratic participation of the people and communities in their governance, development, and management of their own affairs.[3] In response to these problems, the people of Kenya overwhelmingly voted for devolution as a new system of governance. This was aimed at decentralising power, resources, and national prosperity from the centre to the people.[4] Under the devolved system of government, citizens participate in their governance by exercising their sovereignty either directly or indirectly through elected and appointed representatives.[5] Little wonder, the Constitution of Kenya Review Commission noted that there was no single person that opposed the principle of devolving and sharing power.[6]

Devolution is arguably the most transformative aspect of the Constitution as it promises a new Kenya.[7] It came with the hope that it would deliver massive gains and improve the lives of people if implemented properly.[8] While the Constitution brought other major changes like the recognition of the supremacy of the Constitution, separation of powers, robust bill of rights,

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[1] Mutakha Kangu, *Constitutional Law of Kenya on Devolution* (Strathmore University Press 2015)1.
[2] Council of Governors, *Annual Report*, 2014 /2015, vii.
[3] Kangu (n 1)2.
[4] Council of Governors, 3rd Annual Devolution Conference Report held at Meru National Polytechnic, Meru County from 19th to 23rd April 2016. Under Article 10 of the Constitution, sharing and devolution of power is one of the core principles in Article 10 of the Constitution.
[5] Ministry of Devolution and Planning, *Policy on Devolved System of Government*, 2016,2.
[6] Council of Governors, *Annual Report, 2014/2015*, 4.
[7] Patrick Onyango, *Devolution Made Simple: A Popular Version of County Governance System* (Friedrich-Ebert-Stiftung 2013) 4.
[8] Mutakha Kangu 'Kenya's Model of Devolution' in Intergovernmental Relations Technical Committee (IGRTC) (ed) *Deepening Devolution and Constitutionalism in Kenya: A Policy Dialogue*,2021)3.

and independence of the judiciary, these were also present in the repealed constitution, at least in theory.[9] However, devolution did not exist and this major change has changed the purpose and structure of the state from centralisation of power to effective participation of people as well as service delivery.[10] This is evident from the objectives of devolution outlined in the Constitution.[11]

The Constitution creates two distinct and interdependent levels of government, namely the national and county governments.[12] At the national level, there exists three arms of government which are the Parliament, Executive, and Judiciary. Parliament is empowered to make, amend, and repeal laws.[13] It is bicameral in nature comprising the National Assembly and the Senate.[14] The executive is tasked with enforcing laws and implementing policies while the judiciary interprets the law.[15] At the county level, county governments are divided into county assemblies and county executives.[16] Besides creating the two levels of government, the Constitution also creates geographic constituent units and fixes them in it.[17] For this reason, there are forty-seven counties entrenched and constitutionally

[9] Ibid 40.
[10] Intergovernmental Relations Technical Committee, *Strategic Plan 2021/2015*,1.
[11] Constitution of Kenya, Article 174. The objectives are: a) To promote democratic and accountable exercise of power; b) To foster national unity by recognising diversity; c) 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; d) To recognise the right of communities to manage their own affairs and to further their development; e) To protect and promote interests and rights of minorities and marginalised communities; f) To promote social and economic development and the provision of proximate, easily accessible services throughout Kenya; g) To ensure equitable sharing of national and local resources throughout Kenya; h) To facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya; and, i) To enhance checks and balances and the separation of powers.
[12] See Article 1 of the Constitution which provides that the sovereign power of people is exercised at the national and county level.
[13] Constitution of Kenya, Article 94 (5).
[14] Ibid Article 93(1) and 93(2).
[15] Ibid Articles 129 and 159.
[16] Ibid 176.
[17] Ibid Article 6(1) and the First Schedule.

protected under the Constitution. Their names can only be changed through a constitutional amendment.[18] Further, the Constitution stipulates that the relations among the two levels of government are distinct and interdependent. In addition, the two levels must conduct their mutual relations based on consultation and co-operation.[19] The co-operation envisaged by the Constitution is one which respects the functional and institutional integrity of each level of government.[20] To foster co-operation and consultation, the two levels of government may set up joint committees and authorities.[21]

The principle of cooperation and consultation stems from a phenomenon of intergovernmental dialogue where both levels of government share and exchange information with each other.[22] This is aimed at avoiding conflict of interests in performing their assigned duties which to some extent requires a compromise between them for the better good.[23] It discourages an adversarial approach to resolving disputes or conflicts between them and instead fosters a harmonious intergovernmental relationship.[24] The principle of consultation requires the making of conscious and deliberate efforts to seek out views of the other party and to consider them before arriving at a decision. This enhances the decision making of all the parties concerned.[25] Consultation requires that one level of government invites the other to present its views on the matter. The consulted government is then afforded an adequate opportunity and a reasonable opportunity to share its considered

[18] Kangu (n 1)126.
[19] Constitution of Kenya, Article 6(2) and 189.
[20] Ibid Article 189(1).
[21] Ibid Article 189(2).
[22] Gabriel Gathumbi, 'Alternative Dispute Resolution Mechanisms as a tool for Dispute Settlement in the Devolved Governance System in Kenya' (Unpublished LLM Thesis, University of Nairobi 2018) 40.
[23] Report of the Intergovernmental Relations Workshop held at Royal Swiss Hotel Kisumu from 3rd to 5thDecember 2018,64. (Kisumu Workshop).
[24] Gathumbi (n 22).
[25] *Commission for the Implementation of the Constitution* ***v*** *Attorney General and another* (2013) eKLR.

views.[26] Following this, the consulting government must consider the views of the consulted government in good faith before making a decision.[27] Notably, the other government should not be consulted as a mere formality, but with the commitment to consider the views shared where they add value to the decision being made.[28] Be that as it may, where the views are not accepted or considered, the consulting government should give reasons justifying non-acceptance.[29]

The principle of interdependence recognises that whereas the various levels of government are autonomous, they cannot operate in isolation.[30] Interdependence is necessary because both levels of government have a responsibility to serve the people of Kenya.[31] In addition, the national government is allocated certain functions by virtue of its role in national policy formulation and standard setting while the county government is assigned theimplementation of functions.[32] Therefore, interdependence demands that the two levels of government not only cooperate and consult each other but also share information and build capacity.[33] This is because the performance of any function cannot be complete if one level of government fails to do its part.[34] While referring to the relationship between the two levels of government, the Supreme Court of Kenya in *the Matter of the Interim Independent Election Commission* recognised that there is a close connectivity between the functioning of national and county governments*".*[35]

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[26] Peter Wanyande & Gichira Kibara, 'Kenya's Devolution Journey: an Overview' in Intergovernmental Relations Technical Committee (IGRTC) (ed) *Deepening Devolution and Constitutionalism in Kenya: A Policy Dialogue* (IGRTC 2021) 68.
[27] Ibid
[28] Gathumbi (n 22) 41.
[29] Ibid.
[30] Faith Simiyu, 'Recasting Kenya's devolved Framework for Intergovernmental Relations: Lessons from South Africa' (2015) < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2692607> accessed on 15 February 2023 10.
[31] Kisumu Workshop (n 23)18.
[32] Gathumbi (n 22) 41.
[33] Kisumu Workshop (n 23) 42.
[34] Ibid 63.
[35] (2011) eKLR

The principle of distinctiveness requires that each level of government be autonomous from the other.[36] As a result, the two levels of government created are equal and neither is subordinate to the other.[37] Autonomy encompasses certain distinct features such as political economy, functional economy, financial autonomy, and administrative autonomy.[38] In addition, the principle of distinctiveness connotes a measure of flexibility on each level of government to make their own decisions pursuant to their constitutionally defined roles.[39] *In the case of Institute of Social Accountability v National Assembly and Others,* the High Court noted that the principle of distinctness means that each level of government must be free from interference in the performance of its function.[40]

From the foregoing, the seamless interdependence of the two levels of government is dependent on intergovernmental relations.[41] This paper critically examines the alternative dispute resolution of intergovernmental disputes. The overall structure takes the form of six parts. Part One is this brief introduction that sets the context of the study. Part Two discusses the legal framework governing intergovernmental relations. In Part Three, the paper discusses the nature, parties, and causes of intergovernmental disputes. It analyses the rationale and benefits of using ADR mechanisms in resolving intergovernmental disputes. This is achieved by highlighting the challenges associated with using litigation to resolve intergovernmental disputes. Part Four critically analyses the Intergovernmental Relations (ADR) Regulations 2021 passed to provide a framework to guide the resolution of intergovernmental disputes. Part Five makes recommendations while Part Six concludes the paper.

2.0 Legal Framework Governing Intergovernmental Relations in Kenya

[36] Kisumu Workshop (n 23),42.
[37] Simiyu (n 30).
[38] Kangu, (n 8) 64.
[39] Simiyu (n 30)10.
[40] (2015) eKLR.
[41] Kisumu Workshop (n 23) 7.

The concept of intergovernmental relations refers to the processes of interactions between different governments, and between organs of state from different governments in the course of the discharge of their functions.[42] Such relations facilitate the attainment of common goals through cooperation.[43] Intergovernmental relations and interactions occur through law making, policy alignment, fiscal grants and transfers, planning and budgeting. [44] Co-operation and co-ordination are the pillars of intergovernmental relations. This is because no single level of government can deliver its mandate and vision of a nation on its own.[45] In this section, the paper extensively explores the various laws establishing the intergovernmental relations. The primary law is the Constitution and the Intergovernmental Relations Act. Nonetheless, other legislations with provisions on intergovernmental relations are briefly highlighted.

2.1 The Constitution of Kenya

As stated in the previous section, the Constitution provides that governments at national and county levels are distinct and interdependent. They are obliged to conduct their mutual relations based on cooperation and consultation.[46] This may be achieved through forming joint committees and joint authorities for co-operation in the performance of functions. [47] In addition, the Constitution outlines the national values such as sharing and devolution of power, good governance, and sustainable development. These national values are binding on all persons and offices in interpreting the Constitution, interpreting the law, and implementing public policy

[42] IGRTC, *Strategic Plan 2021 – 2025*, 2. See also South African Intergovernmental Relations Framework Act 2005 which defines intergovernmental relations as the relationship that arise between different governments or between organs of state from different governments in the conduct of their affairs.
[43] Karega Mutahi, 'Intergovernmental Relations' A presentation during the induction of Governors, 14th December 2017,2.
[44] Winnie Mitullah, 'Intergovernmental Relations Act 2012: Reflection and Proposals on Principles, Opportunities and Gaps' FES Kenya Occasional Paper, No. 6, 2012,1.
[45] Ibid 2.
[46] Constitution of Kenya, Article 6(2).
[47] Ibid Article 189(2).

decisions.[48] Further, the Constitution provides for the transfer of functions and powers between levels of government where; a) the functions would be more effectively performed by the receiving government, and b) the transfer of functions or powers is not prohibited by the legislation under which it is to be performed.[49] This is aimed at fostering service delivery.

In addition, the Constitution addresses the anticipated disputes between the two levels of government.[50] It stipulates that in any dispute between governments, the governments shall make every reasonable effort to settle the dispute, including by means of procedures provided under national legislation. Besides, it provides that in exercising judicial authority, the courts and tribunals shall be guided by the principle of promoting alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms provided they do not contravene the Bill of Rights.[51] Furthermore, the Constitution requires that the national legislation shall provide for procedures for settling intergovernmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration.[52] Pursuant to the constitutional imperative, the Intergovernmental Relations Act was enacted in 2012. It is the main statute that extensively deals with intergovernmental relations.

2.2 Intergovernmental Relations Act (IGRA) Act Number 2 of 2012

The IGRA provides structures for interaction between the national and county governments and also among county governments.[53] It establishes three institutions to facilitate intergovernmental consultations; namely, the National and County Government Co-ordinating Summit (Summit), which is designated as the apex body for intergovernmental relations, the Intergovernmental Relations Technical Committee (IGRTC) responsible for

[48] Ibid Article 10.
[49] Ibid Article 187(a)(b).
[50] Ibid Article 189(3).
[51] Ibid Article 159(2)(c).
[52] Ibid, Article 189(4).
[53] IGRTC, *Status of Sectoral and Intergovernmental Forums in Kenya*, 2018,2.

coordinating the activities of the Summit, and the Council of Governors. These institutions are discussed in detail below.

2.2.1 The Summit

The summit is the apex body of intergovernmental relations.[54] It comprises: the president or in the absence of the president, the deputy president, who shall be the Chairperson; and the governors of the forty-seven counties.[55] The chairperson of the Council of County Governors (CoG) is the Vice-Chairperson.[56] Given the composition of the summit, it facilitate vertical relations between national and county governments.[57] The Summit is empowered to evaluate the performance of both levels of government, coordinate and harmonise the development of national and county policies, facilitate and coordinate the transfer of functions, powers and competencies to either level of government, and to resolve disputes.[58]

2.2.2 The IGRTC

The IGRTC is the primary facilitator of intergovernmental relations.[59] It envisions harmonious and effective intergovernmental relations. IGRTC's mission is to support successful devolution through cooperative, consultative, and coordinated intergovernmental relations.[60] It comprises of a chairperson, a maximum of eight members competitively recruited, and the Principal Secretary of the State department responsible for devolution. The IGRTC is responsible for the day-to-day administration of the Summit and the Council of Governors.[61] This is through facilitating the activities and implementing the decisions of the summit and CoG.[62] As a result, the IGRTC

[54] IGRA, Section 7(1).
[55] IGRA, Section 7(2).
[56] IGRA, Section 7(3).
[57] IGRTC (n 53) 2.
[58] IGRA, Section 8 and 34.
[59] IGRTC (n 53)2.
[60]IGRTC, *Strategic Plan 2021-2025*,28.
[61] IGRA, Section 12(a).
[62] Ibid.

serves as the secretariat between the summit and the CoG.[63] The Secretariat of the IGRTC is responsible for implementation and monitoring of the decisions of the Summit, CoG, and IGRTC.[64]

Second, the IGRTC is also responsible for the finalisation of the residual functions of the defunct Transition Authority (TA).[65] Prior to the formation of IGRTC, the TA was the institution mandated to oversee the functional changeover to the devolved governance system from the previous centralized authority.[66] Upon expiry of the TA's term on March 4, 2016, there were still a number of issues that had not been concluded.[67] Therefore, those residual functions are undertaken by the IGRTC.[68]

Third, the IGRTC is mandated to convene a meeting of the forty-seven County Secretaries within thirty days preceding every Summit meeting.[69] In addition, the IGRTC can perform any other function conferred on it by the Summit, CoG, or any other legislation.[70] The IGRA empowers the IGRTC to establish sectorial working groups or committees for better execution of its functions.[71] Further, the IGRTC handles intergovernmental disputes reported to it by any of the parties through ADR mechanisms.[72] Furthermore, the IGRTC handles emerging issues on intergovernmental relations that are referred to it by the Summit and the CoG.[73] The IGRTC may establish sectoral working groups for the better carrying out of its functions.[74] However, the Cabinet Secretary is not precluded from convening a

[63] Ibid Section 15 which establishes the Intergovernmental Relations Secretariat headed by the Secretariat of the IGRTC and consists of a secretary appointed by the IGRTC. The secretary is mainly responsible for the implementation of the decisions of the Summit, the Council and IGRTC and any other duties assigned by the said structures.
[64] Ibid.
[65] Ibid Section12(b).
[66] Transition to Devolved Government Act 2012, Section 4.
[67] Kisumu Workshop (n 23) 81.
[68] IGRA, Section 12(b).
[69] Ibid Section 12(c).
[70] Ibid Section12(d).
[71] Ibid Section 13(1).
[72] Ibid Section 33(2).
[73]IGRTC, *Strategic Plan 2021-2025*,2.
[74] IGRA Section 13(1).

consultative for on sectoral issues of common interest to the national and county government.[75] Lastly, the IGTRC is accountable to and must submit quarterly reports to the Summit and CoG.[76]

2.2.3 The CoG

The CoG exists as the main avenue through which consultation and cooperation can be pursued among the forty-seven County Governments.[77] It provides a forum for consultation with the national government and other institutions that interact with the county governments.[78] The IGRA requires the governors to elect their own chairperson and vice-chairperson for a term of one year which may be renewed for another year.[79] The CoG facilitates horizontal relations by bringing together all county governors for consultations among county governments.[80]

The CoG is vested with the following responsibilities: sharing information on the performance of the counties in the execution of their functions with the objective of learning and promotion of best practice and where necessary, initiating preventive action; considering matters of common interest to County Governments; dispute resolution between counties within the framework provided under the IGRA; facilitating capacity building for Governors; receiving reports and monitoring implementation of inter-county agreements on inter-county projects; consideration of matters referred to the council by a member of the public; consideration of reports from other intergovernmental forums on matters affecting national and County interests or relating to the performance of counties; and performing any other function as may be conferred on it by the IGRA or any other legislation or that it may consider necessary or appropriate.[81]

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[75] Ibid Section 13(2).
[76] Ibid Section 14.
[77] Council of Governors, *Annual Report 2014/2015*,1.
[78] IGRA, Section 20(1).
[79] IGRA, Section 19(1) and 19(2).
[80]IGRTC, Status of Sectoral and Intergovernmental Forums in Kenya, 2018,2.
[81] IGRA, Section 20(1).

In fulfilling its responsibilities, the CoG has powers to establish other intergovernmental forums, sectoral working groups, and committees including inter-city and municipality forums.[82] To this end, the CoG has established about 18 committees that focus on several issues and sectors.[83] The CoG is the highest decision-making organ and provides overall direction, leadership, and guidance to the committees.[84] In addition, it established a secretariat to implement and coordinate its activities. The secretariat is responsible for administrative and technical support to the activities of the CoG.[85] It also implements secretariat activities under the guidance and direction of the CoG and the respective committees. The Secretariat staff is composed of the Chief Executive Officer who reports to the CoG, and directorates as well as departments in charge of programmes, administration and finance, corporate communications, sectoral issues, resource mobilisation, and legal affairs.[86]

2.2.4 Dispute Resolution Provisions Under the IGRA

Besides establishing intergovernmental institutions, the IGRA makes provision for dispute resolution. It provides that parties shall take all reasonable measures to resolve disputes amicably and apply and exhaust ADR mechanisms provided thereunder or other legislation before resorting

[82] IGRA, Section 20(2) and 20(3).
[83] The Council of Governors Statutory, *Annual Report, 2015 – 2016*, page 17. The committees are: Health Committee; Agriculture Committee; Infrastructure and Energy Committee; Urban Development, Planning and Lands Committee; Tourism and Wildlife Committee ; Water, Forestry and Mining Committee ;Cooperatives and Enterprise Development Committee; Trade, Industry and Investment Committee; Education, Youth, Sports, Culture and Social Services Committee; Finance, Planning and Economic Affairs Committee; Human Resources, Labour and Social Welfare Committee; Legal and Human Rights Committee; Intergovernmental Relations Committee (which resolves disputes between counties); Security and Foreign Affairs Committee; Resource Mobilization Committee; Information, Technology and Communications (ICT) Committee; Rules and Business Committee (oversees the operations of the Secretariat), and Arid and Semi-Arid Land (ASAL) Committee.
[84] The Council of Governors, *Annual Report 2015/2016*,17.
[85] Ibid.
[86] Ibid.

to judicial proceedings under Article 189(3) and (4) of the Constitution.[87] It provides for the transfer and delegation of powers, functions, and competencies from either level of government to the other by agreement as provided by Article 186 and 187 of the Constitution.[88] The IGRA also provides that all agreements between the national and county governments and among county government shall have a dispute resolution mechanism, appropriate for the nature of the agreement, for disputes that may arise in implementation.[89]

Dispute resolution mechanisms are provided in Sections 30-36 of the IGRA. These provisions apply to disputes between the national and county governments and disputes among county governments.[90] Disputes should as far as possible be resolved through ADR.[91] After efforts to negotiate either directly or through an intermediary have failed, then a party may declare a dispute by referring the matter to the Summit, Council of Governor (CoG) or any other intergovernmental structure established under the IGRA.[92] Once the dispute is declared, the organ responsible is required to convene a meeting of the parties or their representatives within 21 days.[93] The aim of the meeting is to determine the nature of the dispute and the material issues which are not in dispute and identify the mechanisms and procedures for settling the dispute.[94] Such a mechanism may be provided in the IGRA, another legislation or an agreement.[95] Where efforts to resolve the disputes under the Act fail the matter may be taken to court.[96] The minister of devolution and planning is empowered to make regulations to provide a framework for dispute resolution under the IGRA.[97] Pursuant to this

[87] IGRA, Section 31.
[88] Ibid Section 24-28.
[89] Ibid Section 32.
[90] Ibid Section 30.
[91] Ibid Section 31.
[92] Ibid Section 33(1)
[93] Ibid Section 34(1).
[94] Ibid Section 34(1)(a).
[95] Ibid Section 34(2).
[96] Ibid Section 35.
[97] Ibid Section 38(2)(c).

authority, the Intergovernmental Relations (ADR) Regulations were gazetted in 2021. These regulations are analysed in part three of this paper.

2.3 National Government and Co-ordination Act, Act No. 1 of 2013

This Act seeks establish an administrative and institutional framework for co-ordination of national government functions at the national and county levels of governance.[98] It also provides for an extensive mediation procedure of resolving disputes that arise between powers of officers of the county government and the national government.[99] The mediation team shall consist of two eminent persons appointed by the governor and two eminent persons appointed by the Cabinet Secretary for the time being responsible for national government co-ordination.[100] In addition, the mediation team shall be guided by the constitutional principles and the respective constitutional mandates of each respective government.[101] The mediation must be finalized within a period of fourteen days.[102] Where the mediation team fails to resolve the dispute within the stipulated time, the matter may be referred to the Summit under the IGRA for resolution.[103]

2.4 County Governments Act, Act No. 17 of 2012

The County Government Act creates citizen forums to facilitate citizen participation in their governance at the county level.[104] The avenues for the participation of people's representatives including but not limited to members of the National Assembly and Senate.[105] In addition, the County Government Act establishes a county intergovernmental forum in each county. It is chaired by the governor or in his absence, the deputy governor, or county executive committee (where both the governor and deputy governor are absent).[106] The forum comprises: the heads of all departments

[98] *National Government and Co-ordination Act*, Preamble.
[99] Ibid Section 19.
[100] Ibid 19(2).
[101] Ibid 19(3).
[102] Ibid 19(4).
[103] Ibid 19(5).
[104] *County Governments Act*, Section 91.
[105] Ibid Section 91(f).
[106] Ibid Section 54(2).

of the national government rendering services in the county; and county executive committee members. [107] The intergovernmental forum is responsible for among other things coordination of intergovernmental functions and harmonisation of services rendered in the county. [108]

2.5 Public Finance Management Act, Act Number 18 of 2012

The Public Finance Management Act creates the Intergovernmental Budget and Economic Council (IBEC) which brings together the national and county government leaders to discuss matters of budgeting, borrowing, disbursements from consolidated fund and equitable distribution of revenue between the two levels of government. [109] The IBEC is composed of the deputy president, cabinet secretary in charge of intergovernmental relations, every county executive committee member of finance, chairperson of the CoG, a representative of the Public Service Commission, a representative of the Judicial Service Commission, and the Cabinet Secretary in charge of finance. [110] The National Treasury provides secretariat services to the IBEC. The IBEC meets at least twice a year, and the agenda as well as time are set by the deputy president in consultation with other council members. [111] In addition, the National Treasury is obligated to enter into an agreement with the respective county government for the transfer of the respective conditional allocations made to the county government. [112] The agreement sets out the conditions that may attached to conditional allocation. [113]

2.6 Urban Areas and Cities, Act Number 13 of 2011

Under the Urban Areas and Cities Act, the two levels of government are required to enter into an agreement regarding the performance of functions and delivery of services by Nairobi, the capital city. [114] The agreement may provide for administrative structure of the capital city, funding operations,

[107] Ibid Section 54(3).
[108] Ibid Section 54(4).
[109] *Public Finance Management Act*, Section 187
[110] Ibid.
[111] Ibid Section 187(3) and (5).
[112] Ibid Section 191.
[113] Ibid.
[114] Section 6(5).

and activities, joint projects to be undertaken by both governments in the capital city, and dispute resolution mechanisms.[115]

2.7 Health Act, Act Number 21 of 2017

Under the Health Act, both levels of government are obligated to cooperate to ensure the provision of free and compulsory vaccination of children under 5 years and maternity care.[116] To actualise this, the national government is required to consult with respective county governments and provide funds.[117]

2.8 Agriculture, Fisheries, and Food Authority Act Number 13 of 2013

Under the Agriculture and Food Authority Act, the national government is responsible for agricultural matters. On the other hand, county governments are responsible for agricultural matters.[118] These matters are outlined in Part 2 of the Fourth Schedule of the Constitution.[119]

2.9 National Cohesion and Integration Act, Act Number 12 of 2008

This statue establishes the National Cohesion and Integration Commission which is tasked among other functions to promote arbitration, conciliation, and mediation to secure and enhance racial harmony and peace.[120]

2.10 National Police Service Act (NPSA), Act Number 11A of 2021

The NPSA establishes the County Policing Authority in each county. It comprises the governor (the chairperson), county representatives appointed by the Inspector General, two elected members nominated by the County Assembly, the chairperson of the County Security Committee, and at least six members appointed by the governors.[121] The County Policing Authority provides a platform through which the public participates on all aspects to

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[115] *Urban Areas and Cities Act,* Section 6(6).
[116] *Health Act,* Section 5(4).
[117] Ibid.
[118] *Agriculture and Food Authority Act*, Section 29(2).
[119] Crop and animal husbandry, livestock sale yards, county abattoirs, plant and animal disease control, and fisheries.
[120] *National Cohesion and Integration Act*, Sections 15 and 25.
[121] *National Police Service Act*, Section 41. These people may come from the business sector, religious organisations, youth, community-based organisations, and persons with special needs.

do with county policy and the National Police Service at the county level.[122]

3.0 Intergovernmental Disputes and ADR mechanisms

3.1 Definition and Parties to Intergovernmental disputes

Conflicts arise when people pursue irreconcilable goals and end up compromising or opposing the interests of another.[123] Disputes are a product of unresolved conflicts, they arise when conflicts are not adequately managed.[124] The conduct of mutual relations between the two levels of government has been characterised by recurrent conflicts which often escalate into disputes.[125] For a dispute to qualify as an intergovernmental dispute under the IGRA, it must meet the certain criteria. First, the dispute must involve a specific disagreement concerning a matter of fact, law, or denial of another.[126] Second, it must be of a legal nature which means that the dispute is capable of being the subject of judicial proceedings.[127] Third and most importantly, the dispute must be an intergovernmental one.[128] This essentially means that such a dispute must involve various organs of state and arises from the exercise of powers of function assigned by the Constitution, a statute or an agreement or instrument entered into pursuant to the Constitution or a statute.[129] The inclusion of an agreement implies that even a commercial agreement between the national and county government

[122] Ibid Section 41(9)(g).
[123] Kariuki Muigua, 'Dealing with Conflicts in Project Management' [2018] *Alternative Dispute Resolution*,4.
[124] Kariuki Muigua, Accessing Justice through ADR (Glenwood Publishers Limited, Nairobi 2022) 76.
[125] Kibaya Imaana Laibuta, 'Facilitation of a Consultative Forum on the Development of the Proposed Intergovernmental Dispute Resolution Mechanisms' available at < https://ciarbkenya.org/wp-content/uploads/2021/03/the-place-of-adr-in-intergovernmental-disputes.pdf> 3 accessed on 25 February 2023.
[126] *County Government of Nyeri v Cabinet Secretary, Ministry of Education Science & Technology & another (2014) eKLR, para 10.*
[127] Ibid.
[128] Ibid.
[129] Ibid. See Section 32 of the IGRA.

qualifies as an intergovernmental dispute.[130] Therefore, intergovernmental disputes are not limited to the exercise of powers of the two governments as specified in the Constitution.[131] Fourth, the dispute may not be subject to any of the previously enumerated exceptions.[132] In *Kenya Ports Authority v William Odhiambo Ramogi & Others,* the COA considered that the test of determining the matter as an intergovernmental dispute was simply not to look at the parties to the dispute but the nature of the claim in question.[133]

In view of the above, intergovernmental disputes can only arise between the national government and a county government, or amongst county governments.[134] Therefore, a dispute between a person or state officer in his individual capacity seeking to achieve his own interest or rights would not equate an intergovernmental dispute.[135] However, where a state officer seeks through any means to advance the interest of a government, whether county or national, against another government whether county or national.[136] Then such a dispute would rank as an intergovernmental dispute.[137] Interestingly, in another court decision, the Environment and Land Court held that there can be no intergovernmental dispute between an individual and the county government or vice versa.[138] Intergovernmental disputes can also arise

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[130] Ibid,
[131] *Isiolo County Assembly Service Board & another vs Principal Secretary (Devolution) Ministry of Devolution and Planning & another (2016) eKLR.*
[132] *County Government of Nyeri v Cabinet Secretary, Ministry of Education Science & Technology & another* (2014) eKLR, *para 10.*
[133] [2019] eKLR.
[134] Section 30(2)(b) of the IGRA.
[135] *Isiolo County Assembly Service Board & another vs Principal Secretary (Devolution) Ministry of Devolution and Planning & another (2016) eKLR.*
[136] Ibid.
[137] Ibid.
[138] *Okoiti v Parliament of Kenya & 2 Others; County Government of Taita Taveta & 3 Others* (Interested Parties) (Petition 33 of 2021)[2022] KEELC 33 (KLR)(23 March 2022)(Ruling). In this case, the petitioner and 178 other residents petitioned Parliament to set up an independent commission to resolve the boundary dispute between the counties of Taita Taveta and Kwale and between the counties of Taita-Taveta and Makeuni to survey and erect beacons to clearly demarcate the boundaries. See also *Daniel Muthama v Ministry of Health: Shenzhen Mindray Bio-Medical Electronics Co. Ltd* [2015] eKLR.

between county governments and state agencies established by the national government, and between state agencies.[139]

3.2. Nature and Examples of Intergovernmental Disputes

According to the IGTRC, intergovernmental disputes can be categorised as administrative, financial, functional, legislative, and jurisdictional relations.[140] The administrative category relates to intergovernmental relations.[141] Financial is concerned with intergovernmental fiscal relations and fiscal resource allocation.[142] Functional relates to the encroachment by the national government and state agencies on the functions of county governments, joint undertakings between the national and county governments, and intergovernmental service delivery in the contest of shared functions.[143] The implementation of the devolved governance system commenced in March 2013. Since then, disputes have emerged between the two levels of government and various organs of state which threaten the implementation of the devolved governance system if not checked and addressed.[144] There are many areas and issues around which tensions between the two levels of government and between county governments are likely to arise. Tensions are also likely to arise within institutions and structures of the same level of government. While most of these conflicts are likely to revolve around functional areas, others are of a purely political or ideological nature. It must also be noted that some disputes may have their origins in history and therefore not necessarily caused by the adoption of a devolved system of governance. Some of these conflicts that have their origins in history may have been exacerbated by the adoption of devolution.[145] Below are some of the intergovernmental disputes witnessed in the last ten years of devolution.

a) Supremacy wars between the Senate and National Assembly

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[139] IGRTC, Cost of Litigation in Inter/Intragovernmental Litigation in Kenya, May 2017, 47.
[140] Ibid 12.
[141] Ibid.
[142] Ibid.
[143] Laibuta (n 125) 3.
[144] Gathumbi (n 22) 47.
[145] Kisumu Workshop (n 23).

Prior to the establishment of a devolved governance system, Kenya had a unicameral Parliament. However, the Constitution provides for a bicameral Parliament comprising two Houses, the Senate, and National Assembly.[146] The two Houses have had bitter disagreements which at times spill over in the public arena. This has played out in conflicts arising in the operations of the two Houses of Parliament. Soon after the establishment of the two Houses, supremacy battles emerged as to which of the Houses was superior to the other. The Constitution of Kenya is silent on this matter.[147] The most contentious one arose on the exclusion of the Senate in the consideration of the Division of Revenue Bill deemed to be affecting the county governments.[148] The Senate objected to the exclusion by way of preference to the Supreme Court seeking for an Advisory Opinion on the matter. In its Advisory, the Supreme Court held that the consideration of Bills to be passed was not a unilateral exercise exclusive to either of the two Houses; rather, the Speaker of both houses had to engage and consult.[149] The Supreme Court observed that the two Houses had an obligation to work together in the spirit of consultation and cooperation in the discharge of their constitutional mandate. [150]The Court further observed that this was a case where the two Speakers of the Senate and National Assembly had an obligation, in case of disagreement between themselves to engage the ADR mechanism of mediation.[151]

A similar dispute on the division of revenue arose in the financial year 2019/2020. The Commissioner on Revenue Allocation (CRA) had recommended the equitable shareable revenue for the counties for KES.

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[146] Constitution of Kenya, Article 93(1).
[147] Oseko Louis, Denzel Obure and Kihiko Rosemary Wambui, 'Intergovernmental Dispute Resolution: Analysing the Application and Future of ADR' [2021] *Journal of Conflict Management and Sustainable Development*,148.
[148] *In the Matter of the Speaker of the Senate & Another v Attorney General & 4 Others* (2013) eKLR.
[149] Ibid para 197.
[150] Ibid para 125.
[151] Ibid, Para 143. See Also the Court of Appeal decision in *Speaker of the National Assembly & another v Senate & 12 others* (Civil Appeal E084 of 2021) [2021] KECA 282 (KLR) (19 November 2021) (Judgment**)** and Council *of Governors & 4 Others v Attorney General & 3 Others* (2020) eKLR.

335.7 billion.[152] However, the Cabinet Secretary in charge of National Treasury on his part published the Budgetary Policy Statement in which he set the equitable sharing revenue for counties at KES. 310 billion.[153] The statement was tabled in the National Assembly. The CoG rejected the proposal and urged the two houses to go with the CRA's recommendation.[154] The senate fully agreed with the CoG's position, but the National Assembly and Treasury disagreed.[155] There were failed negotiation attempts prompting a request to the Supreme Court to render an advisory opinion on the matter.[156]

b) Disputes over Allocation of Resources

Despite their effort to live within the letter and spirit of the Constitution, the two levels of government have not always agreed with each other. There have been disputes caused by perceived or real interference in the county government mandates by the national government including competition for power, resources and relevance. The issues have involved a number of devolved functions such as health, agriculture, roads, water, gaming, gambling and betting, among others. National government is accused of holding the bigger portion of resources allocated to these functions thus going against the principle of resources follow functions.[157] There have been disputes conflicts as to the erroneous allocation of funds. In *Council of Governors v Attorney General & 4 Others*, the High Court declared , inter alia, that the National government cannot allocate itself funds for and undertake devolved functions without first executing inter-government agreements as required under Article 187 of the Constitution.[158]

c) Disputes Resulting from Transfer of Functions and powers

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[152] *Council of Governors & 47 Others v Attorney General & 3 Others* (interested parties); *Katiba Institute & 2 Others* (2020) eKLR.
[153] Ibid.
[154] Ibid.
[155] Ibid.
[156] Ibid.
[157] IGRTC, *Strategic Plan 2021 – 2025*,10.
[158] (2020) eKLR. The national government had been allocated KES. 4121 billion for maternity health care, KES. 45 billion for leasing medical equipment, and KES 4.5 billion for level 5 hospitals in the Division of Revenue Act 2016. Yet, the above are devolved functions.

The Constitution recognizes that the functions and powers assigned to the national and county governments fall into the two categories of exclusive and concurrent functions and powers.[159] It, however, creates a lot of uncertainty since it does not specify which of the assigned functions and powers are exclusive and which are concurrent.[160] This results into duplication of efforts, roles and expenditure by the levels of government; wasteful use of financial resources as both levels of government may invest money in the same activity.[161] In view of the uncertainties, disputes have arisen as to which level of government is responsible for what task. For instance**,** the dispute between the county government and national government over sugar milling and privatisation of South Nyanza Sugar Company.[162] The contention was that sugar milling was a devolved function, therefore, the national government could not privatise sugar milling as it was not within its powers.[163] In response, the national government maintained that sugar milling companies were public investments thus were to be dealt with by the national government.[164]

Another source of contention is that many functions that belong to county governments have been retained by the national government through state corporations.[165] An example is in the agricultural sector where the national government retains the functions on the basis that it oversees international trade.[166] Therefore, since most of the agricultural products are intended for export, such matters are within hence within its mandate. This position has

[159] *Constitution of Kenya,* Article 186(2).
[160] Kisumu Workshop (n 23) 42.
[161] Ibid.
[162] *County Government of Migori & 4 Others v Privatisation Commission of Kenya* (2017) eKLR.
[163] Ibid.
[164] Ibid.
[165] *Council of County Governors v Attorney General & 4 Others* (2015) eKLR and *Council of Governors v Attorney General & 12 Others* (2018) eKLR. Some of these parastatals include Kenya Leather Development Council, Directorate of Fisheries, Nyayo Tea Zones Development Authority, Agricultural Finance, National Irrigation Board, National Cereals and Produce Board, Kenya Dairy Board, and Agricultural Development Corporation.
[166] Part One, Fourth Schedule to the Constitution.

resulted from the failure to delineate the roles and boundaries by the national government in respect to the international trade function.[167] Furthermore, the Supreme Court has held that a county government cannot levy a charge for a road service that is vested in the National Government.[168]

In the health sector, disputes have also arisen because of the failure by the national government to consult the county governments. In *International Legal Consultancy Group & another v Ministry of Health & 9 others*, the national government leased modern medical equipment and instructed county governments to accept them and install them in hospitals managed by county governments.[169] This agitated the county governments because the health function has been devolved to county governments and therefore the national government did not have jurisdiction over the function and consequently could lease the medical equipment for counties. Although counties eventually accepted the equipment, tensions remain over the procurement.[170] The CoG has formally raised concerns on the use of the newly introduced e-procurement system.[171] The system has not only made the procurement system overly bureaucratic but has also excluded sections of the society that are unable to access Internet services.[172] Counties in regions with low Internet activity have also been affected, as they are unable to access the system to enable the respective Counties to carry out procurement processes.[173]

d) Disputes between County Assemblies and Controller of Budget

[167] Page 92. See *Lake Naivasha Grower Group & another v County Government of Nakuru* (2019) eKLR where the high court held that the county government cannot levy, import, and export tax on horticultural products as the said mandate is a preserve of the national government.
[168] *Base Titanium Limited v County Government of Mombasa & another* (Petition 22 of 2018) [2021] KESC 33 (KLR) (16 July 2021) (Judgment).
[169] (2016) eKLR.
[170] Wanyande and Kibara (n 26) 11.
[171] Ibid.
[172] Ibid.
[173] The Council of Governors, *Annual Report 2014 /2015*, 22.

These disputes stem from the delayed release of the Exchequer to the counties and conflicts over revenue sharing.[174] For example, in the financial year 2019/2020, there was disagreement on the division of revenue where the counties had stuck with the estimates by the Commission on Revenue Allocation of KES. 335 billion, as opposed to KES. 314 billion allocated by the National Assembly. The stalemate grounded service delivery in some counties thus affecting service delivery to the public.[175] In another dispute, the Controller of Budget set mandatory ceilings for financial allocations to County Assemblies forcing the latter to object through a petition before the High Court.[176] Apart from County Assemblies, the CoG has raised concerns on the manner the lack of consultation and involvement by the National Treasury in the negotiation and management of loans and donor grants for functions that belong to Counties.[177] This is also coupled with the perennial delay of disbursements of the equitable share to County Governments.[178] Recently, the Controller of Budget declined to grant KES. 3.2 billion sought by counties. The counties had sought KES. 187 billion but the office approved KES.179.5 billion.[179] In justifying its declination, the Controller of Budget stated that the counties had breached fiscal laws including imprudent use of funds and exceeding the threshold of administrative costs.[180] Narok had the largest sum of declined approvals. The rest of the counties included Kiisi County, Nakuru County, and Nairobi County.[181]

e) Disputes between County Assemblies and Governors

Tensions were also bound to arise between the county-level institutions, namely the governors and the county assembly. This, however, does not

[174] IGRTC, *Strategic Plan 2021 – 2025*, 11.
[175] Ibid.
[176] *Speaker, Nakuru County Assembly & 46 others v Commission on Revenue Allocation & 3 others* [2015] eKLR. Article 216(2), Constitution of Kenya.
[177] The Council of Governors, *Annual Report, 2014 /2015*, 22.
[178] Ibid.
[179] Serfine Achieng, 'Controller of Budget Declines Kshs. 3.2 billion sought by counties' Citizen digital on 21 February 2023 < *https://www.citizen.digital/news/controller-of-budget-declines-ksh32-billion-sought-by-counties-n314847*> accessed on 25 February 2023.
[180] Ibid.
[181] Ibid.

appear to have been contemplated by the framers of the Constitution as it was thought that threats to county governments would emerge from the national government.[182] These conflicts undermined the functioning of the county governments and therefore the smooth and effective implementation of the Constitution.[183]Some of these as was the case of Makueni County threaten the viability of these counties and therefore service delivery.[184]

The last thirteen years of the devolved system of government have seen some of the governors impeached.[185] For example, the governors of Embu, Kericho, Nairobi, Kirinyaga, Makueni, Murang'a, and most recently Meru were affected.[186] In the case of Makueni County, the conflict was so serious that a Commission, in accordance with the constitution, was set up to advice the president on whether or not the county government should be dissolved.[187] The commission led by Honourable Mohamed Nyaoga recommended for the resolution of the county government.[188] Notably, all the impeachment proceedings were thrown out by the Senate except: Nairobi City County, Mike Sonko; Kiambu County, Ferdinard Waitutu; Wajir County, Mohamed Abdi Mohamoud; and the one concerning the Embu County Governor, Martin Nyaga Wambora, which the Senate confirmed.[189] However, the High Court overturned the impeachment of Martin Wambora by the Senate and reinstated the Governor who went ahead to complete his

[182] IGRTC, *Strategic Plan 2021 – 2025*,10,
[183] Wanyande and Gichira Kibara (n 26)11.
[184] Kisumu Workshop (n 23) 66. The tensions between former Makueni Governor Kivutha Kibwana and the MCAs,
[185] *Martin Nyaga Wambora and County Government of Embu v The Speaker of the County Assembly ofEmbu and 4 Others* (2015) eKLR.
[186] Paul Chepkwony-Kericho County, Ferdinard Waititu – Kiambu County,
[187] Francis Gachuri, 'Commission Report shows Makueni County headed for dissolution' published on 3 September 2015, Citizenship http://www.citizen.digital/news/commision-report-shows-makueni-county-headed-for-a-dissolution-99778 accessed on 5 January 2023.
[188] Ibid.
[189] Governor Martin Nyaga Wambora was impeached by the County Assembly of Embu and confirmed by theSenate. The impeachment was reversed by the Court after a successful appeal. See *Martin Nyaga Wambora and County Government of Embu v The Speaker of the County Assembly ofEmbu and 4 Others, Petition No. 7 and 8 of 2014 (consolidated*) (2015) eKLR.

five-year term in August 2017. He was re-elected Governor of Embu in the general elections held on 8th August 2017.[190] In 2022, the Supreme Court confirmed the impeachment of Mike Sonko by the Nairobi County Assembly on grounds of gross violation of the Constitution, abuse of office, violation of national laws, and a lack of mental capacity to run the county government. The Supreme Court found that the impeachment had been properly conducted in accordance with the Constitution.[191]

f) Disputes between Governors and Senators over accountability of public funds

The tension in this regard has been over whether the Senate has authority to summon governors to appear before a Senate committee. On 8 Febuary 2014, the Senate Committee on County Public Accounts and Investment summoned 15 county governors to appear before it and answer questions on county finance management. Several governors appeared save for four, namely, Bomet, Kiambu, Kisumu, and Murang'a even after they were personally summoned. In protest, the four governors filed a petition in the High Court challenging the summons. The governors took the position that it is the county assemblies that can oversight the county executive. In addition, they asserted that being subjected to oversight by the amounts to double oversight.[192] They were unsuccessful at the High Court as it found that that the Senate were within their constitutional mandate. Their appeal at the Court of Appeal was unsuccessful for lack of merit prompting a further appeal to the Supreme Court.[193] In affirming the decisions of the High Court and Court of Appeal, the Supreme Court held that without the powers to summon governors, the Senate would not be able to exercise oversight over the national revenue allocated to counties.[194] As a result, the Senate was within its constitutional mandate of ensuring that county governments operated at optimal and within accountability standards.[195]

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[190] Ibid.
[191] *Sonko v Clerk, County Assembly of Nairobi City & 11 others* (Petition 11 (E008) of 2022) [2022] KESC 26 (KLR) (15 July 2022) (Judgment).
[192] IGRTC, *Strategic Plan 2021 – 2025*, 15.
[193] *International Legal Consultancy Group v Senate & another* (2014) eKLR
[194] *Senate v Council of Governors & 6 Others* [2022] KESC 57(KLR), para 64.
[195] Ibid. See also Constitution, Articles 96,110, and 112.

h) Boundary Disputes

The introduction of a devolved system of government in Kenya's political arena has brought to the fore simmering boundary disputes. The affected counties have disagreed over the location of boundaries, and this has sparked conflicts. Some of the counties with boundary disputes are Nandi and Kisumu, Meru and Isiolo, Makueni and Taita Taveta, Baringo and Turkana. To illustrate, in *County Government of Tana River v County Government of Kitui & 2 others*, the High Court was faced with a boundary dispute between Tana River County and Kitui County over Kalalani and Ddiddale areas. In dismissing the petition, the court found that the dispute was an intergovernmental dispute and referred the parties to the ADR frameworks under the IGRA.[196] Second, there have been boundary disputes between the counties of Taita Taveta and Kwale and between the counties of Taita-Taveta and Makeuni over Mackinnon town and Mtito Andei town. [197] The Environment and Land Court directed the National Land Commission to investigate the historical boundaries and the county boundary dispute involving the three counties, and prepare a detailed report with practical recommendations on the appropriate redress to resolve the county boundary dispute.[198] There have also been boundary disputes between Meru and Isiolo , Nairobi city and Machakos, Kisumu and Vihiga, and Kisii and Nyamira counties. [199] Closely related to boundary disputes, intergovernmental disputes are also likely to arise from natural resource management. Such disputes concern the access and use of natural resources such as pasture, agriculture, forests, sharing agreements with national government, and cattle rustling.[200]

3.3 Impact of Litigation on Intergovernmental relations

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[196] *County Government of Tana River v County Government of Kitui* (2022) eKLR.
[197] *Okoiti v Parliament of Kenya & 2 Others; County Government of Taita Taveta & 3 Others* (Interested Parties) (Petition 33 of 2021) [2022] KEELC 33 (KLR) (23 March 2022) (Ruling).
[198] Ibid, para 102.
[199] Senate standing committee on Justice, Legal Affairs, Human Affairs, and Human Rights, *Report on the County Boundaries Bill* (Senate No 11 of 2021).
[200] Kisumu Workshop (n 23)66.

During the first ten years of devolution, intergovernmental disputes have been largely resolved through litigation in courts.[201] A 2017 study by the IGRTC found that the litigation was mainly between national government and county government, among county governments, county governments and state agencies, county organ and another organ within the same county, National Assembly and Senate, and between state agencies.[202] The disputes were mainly resulting from the interpretation and implementation of powers transferred and implementation of functions as provided in the Fourth Schedule to the Constitution; transfer of functions and policies, impeachments, county boundaries, and employment relations.[203]

The study further revealed that the recurrent inter- and intra-governmental disputes being filed in courts for judicial resolution had had a great impact on the budgetary allocation, in terms of legal fees, to both levels of government. Furthermore, the study found out that the costs of litigation were high and a major constraint to development particularly in the county governments. These costs included both direct financial expenditure and opportunity costs due to delayed, frustrated or abandoned projects as a result of court cases.[204] Consequently, this has a negative impact on the resources allocated for development and service delivery.[205] Moreover, it was found that the major challenge for the counties was the reliance on external counsel as they did not have established legal departments unlike in the national government where cases are handled through the Office of the Attorney General/State Law Office.[206] This exposed the counties to the risk of

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[201] Ibid 10.
[202] IGRTC, *Cost of Litigation in Inter/Intragovernmental Litigation in Kenya*, May 2017, 47.
[203] IGRTC Members, *End Term Report 2015* – 2020, 111.
[204] Ibid.
[205] Kisumu Workshop (n 23)16.
[206] IGRTC, *Cost of Litigation in Inter/Intragovernmental Litigation in Kenya*, May 2017, IGRTC, 48. This is no longer the case as there is now the County Attorney Act 2020 (Act Number 14 of 2020). The County Attorney is the principal legal adviser to the county government. The Act establishes the office of the county attorney in all the 47 county governments. The office consist of the county attorney, county solicitor and such other number of county legal counsel as the county attorney may, in consultation with the county public service bard, consider necessary. The County Attorney is the principal legal adviser to the county government.

collusion between county officers and advocates in fixing exorbitant fees.[207] To illustrate the high legal fees incurred in some of the intergovernmental disputes, the first case is one involving the National government and County government over land rates. The advocates who represented the Nairobi County government demanded for Kshs 2 billion as legal fees. Subsequently, they were paid Kshs. 724 million.[208] In another case involving the National Assembly and the CoG on the constitutional validity of the provisions of the National Government Constituencies Development Fund Act (NGCDF) in the High Court.[209] The average legal fees amounted to Kshs 20 to 30 million.[210] Third, in a case contesting the summoning of four governors to answer questions on county financial management.[211] The litigation of cost was about 3.32 million in the High Court and Kshs. 2.16 million in the Court of Appeal.[212] Most recently, in *KTK Advocates v Nairobi City County Government*, the Applicant's bill of costs was taxed by the Deputy Registrar of the Environment and Land Court as against the Respondent in the sum of about Kshs.1.3 billion, and a certificate of costs issued in June 2022.[213] The case involved the dispute between the Kenya Defence Forces and the Nairobi County government over the 3000-acre land where Embakasi Barracks sits.[214] Furthermore, according to the Council of Governor's Audited reports, the Council spent a total of Kshs. 49,134,138 and Kshs. 87,153,900 on legal fees for the financial years 2013/14 and 2014/15 respectively.[215]

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[207]Ibid 21.
[208] Judicial Review Application No. 109 of 2014.
[209] *Wanjiru Gikonyo v National Assembly & 8 Others* (2016) eKLR.
[210] IGRTC, *Cost of Litigation in Inter/Intragovernmental Litigation in Kenya*, May 2017,47.
[211] *Council of Governors & 6 Others v Senate* (2015) eKLR.
[212] IGRTC, *Cost of Litigation in Inter/Intragovernmental Litigation in Kenya*, May 2017,47.
[213] Miscellaneous Application No. 56 of 2020. See also *KTK Advocates v Baringo County Government* (2017) eKLR wherein Donald Kipkorir sued Baringo county over KSh. 17.570,907 million owed for services offered. The judgement was entered by the High Court in favour of KTK Advocates.
[214] IGRTC Members, *End Term Report 2015* – 2020,114.
[215] Report of the Auditor General on the Financial Statements of COG Secretariat for the year ended 30 June 2014 and year ended 30 June 2015.

Besides high legal fees, litigation has led to other costs that have negatively impacted service delivery and intergovernmental relations. To begin, it has delayed implementation of projects, opportunity costs when projects are delayed, and stalled projects. For example, in Nyeri County, a dispute between the Public Service Board and the county assembly delayed approval of the county budget for 6 months thus affecting service delivery and the recruitment of chief officers in the county.[216] It has also strained intergovernmental relations. This was seen in the dispute between the County Government of Nairobi and Kenya Power over debt incurred for power consumption by the previous local authority. This resulted to Kenya power shutting down power for the county government offices and in return Nairobi County clamped down entrances of Kenya Power premises.[217]

3.4 A Case for ADR in Resolving Intergovernmental Disputes

Given the high legal costs associated with litigation as discussed above, ADR mechanisms such as negotiation, conciliation, mediation, and arbitration should be used in resolving intergovernmental disputes.[218] With the exception of arbitration that culminates in an arbitral award, the other ADR mechanisms result in mutually generated outcomes.[219] ADR seeks to find non-confrontational ways of resolving disputes and promoting harmony, tolerance and peaceful coexistence between concerned parties thus fostering parties' satisfaction.[220] By promoting dialogue, ADR mechanisms avoid the winner-loser scenario that characterize conventional court processes by promoting a win-win, give-and-take approach to resolving dispute. The adversarial nature of litigation pits parties against each other which injures

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[216] IGRTC, *Cost of Litigation in Inter/Intragovernmental Litigation in Kenya*, May 2017,24.
[217] Ibid.
[218] 2nd Annual Devolution Conference Held at Tom Mboya Labour College Kisumu County, 2015 21st April To 23rd April, 14.
[219] Laibuta (n 125) 4.
[220] Council of Governors, 2*nd Annual Devolution Conference held at Tom Mboya Labour College Kisumu County*, from 21st April to 23rd April 2015, 14. See also NCIA, *Research Report on Awareness, Perception and Uptake of Alternative Dispute Resolution in Kenya*, 2021, 9.

the relationship between parties.[221] As a result, it would worsen the relationship between the levels of government which are expected to work together through consultation and corporation as provided for by the Constitution.[222] Closely related to this, ADR mechanisms would enhance confidentiality in intergovernmental disputes and reduce embarrassment occasioned by exposure of such disputes in public through litigation.[223]
Also, ADR mechanisms except for arbitration are less formal than litigation. In most cases, the rules of procedure are flexible, without formal pleadings, extensive written documentation, or strict rules of evidence.[224] This leads to expeditious and cost-effective resolution of intergovernmental disputes. As a result, this ensures that there are no delays in implementation of policies and service delivery.[225] A critical examination of Articles 159 and 189(4) of the Constitution read together with Section 81(b) of the IGRA reveals that ADR mechanisms are complementary, and not alternative to judicial processes.[226] In fact, those provisions dictate that ADR mechanisms are appropriate as the first option for resolving intergovernmental disputes.

3.5 Intergovernmental Disputes Resolved through ADR Mechanisms

Between 2015-2020, the IGRTC received a total of twenty-one (21) cases for resolution through ADR mechanisms. Eight (8) of the cases were successfully resolved; one (1) case was referred to the courts for determination; and twelve (12) were still undergoing dispute resolution processes as at the time of preparing this report.[227] The IGTRC also successfully mediated and oversaw the execution of MOUs by the disputants in the disputes involving the County Government of West Pokot and theMinistry of Interior and National Coordination; County Government

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[221] David Ngwira, '(Re) Configuring 'ADR' as Appropriate Dispute Resolution? Some Wayside Reflections'
[2018] *Alternative Dispute Resolution*, 194.
[222] Oseko, Obure, and Wambui (n 147),155.
[223] Muigua (n 124) 601. Kisumu Workshop (n 23) 80.
[224] Scott Brown, Christine Cervenak, and David Fairman, Alternative Dispute Resolution Practitioners Guide (Conflict Management Group 1998) 6.
[225] Muigua (n 124) 602.
[226] Henry Murigi, 'Institutionalization of Alternative Dispute Resolution' [2020] Journal of Conflict Management and Sustainable Development,246.
[227] IGRTC Members, *End Term Report 2015* – 2020,109.

of Siaya (Agricultural Training Centre) and the Ministry of Interior and National Coordination; Ministry of Agriculture, Livestock and Fisheries (Food and Fisheries Authority) and County Governments ; County Government of Baringo and the Ministry of Agriculture, Livestock and Fisheries; County Government of West Pokot and the Ministry of Agriculture, Livestock and Fisheries; County Government of Garissa and the Ministry of Devolution and Arid & Semi-Arid Lands on construction of masonry perimeter fence, double steel gate and a pedestrian gate at the Garissa Referral Hospital.[228] Furthermore, the IGRTC also facilitated consultative negotiations between West Pokot County Government and County Commissioner over office blocks. The offices occupied by the county government belonged to the national government but were allocated to them by the Transition Authority in January 2013 to facilitate effective settling of the county government following the general elections in 2013. The offices were under construction and were nearing completion in readiness to accommodate the county commissioner whose offices were old and condemned as unfit for human habitation. The county commissioner and the governor were unable to agree on an amicable solution, so the commissioner declared a dispute. The negotiations led to the signing of an MoU and the chairperson of the IGRTC witnessed the agreement.

The dispute over land ownership between the County Government of Tharaka Nithi and the Prisons Department was another dispute resolved by the IGRTC. Initially, the matter was in court but was later withdrawn and referred to IGRTC which successfully facilitated negotiations to have the matter resolved amicably.[229] Lastly, the IGRTC resolved the dispute between Nairobi City County and the Ministry of Agriculture, Livestock and Fisheries regarding the entity mandated to conduct meat inspection in slaughterhouses that export meat products.[230] The dispute was reported to the IGRTC by Nairobi City County. It contended that county abattoirs/slaughterhouses services are a devolved function and hence a

[228] IGRTC, Unreported Status Report as at February 2020,28.
[229] IGRTC, *Cost of Litigation in Inter/Intragovernmental Litigation in Kenya*, May 2017,16.
[230] Ibid 17.

mandate of the county while the Veterinary Department's position was that export house should fall under the national government. After intensive consultation, IGRTC advised that both the national and county governments deploy officers to fulfil their constitutional mandates until a policy and regulations are developed and approved. The Parties agreed and they are complying.

The above cases indicated that it was possible to resolve intergovernmental disputes quickly and in a less costly way through ADR. They also demonstrated that IGRTC can effectively facilitate the resolution of disputes. [231] The CoG also provides a forum for dispute resolution mechanisms between counties within the framework of the IGRA.[232] Such disputes are referred to the COG Committee in charge of Intergovernmental Relations.[233] The Committee is mandated to hear the parties and make a preliminary assessment of the matter before a referral to the full Council.[234]

4.0 The Intergovernmental Relations (ADR) Regulations 2021

For a long time, there was no detailed framework on the resolution of intergovernmental disputes. Intergovernmental relations bodies such as the CoG and the IGRTC had to use their internal procedures in resolving such disputes. This led to uncertainty and inconsistencies in how intergovernmental disputes were resolved. With the gazettement of the Intergovernmental Relations (ADR) Regulations 2021, there is predictability, certainty, and clarity in the resolution of intergovernmental disputes through ADR in conformity with the IGRA and the Constitution. This next section assesses the strengths and gaps in the regulations.

4.1 Strengths of the ADR Regulations

Firstly, the regulations provide for a range of ADR mechanisms that can be chosen by the parties. These include dispute avoidance strategies such as providing for negotiation and consultations between the parties and other

[231] Ibid.
[232] IGRA, Section 20(d).
[233] Council of Governors, *Annual Report 2019/2020*,5.
[234] Ibid 11.

constitutional commissions and offices, line ministries, and intergovernmental forums.[235] The inclusion of such strategies will ensure that conflicts are resolved before they escalate to disputes. Away from dispute avoidance strategies, the regulations provide for detailed provisions of resolving intergovernmental disputes through conciliation, mediation, traditional dispute resolution mechanisms (TDRMs), and arbitration.[236] Notably, the inclusion of TDRMs is commendable and reflect an inclusive and broad appreciation of the role played by elders in impacting country politics and resolution of disputes. TDRM principles such as social cohesion, harmony, peaceful co-existence, respect, and tolerance are in tandem with the constitutional principles of consultation and co-operation.[237] TDRMs will be very instrumental in the resolution of natural resource intergovernmental disputes where communities are involved, for instance, oil and pasture disputes as well as those on the access and use of natural resources.[238]

Secondly, the objects and purpose of the regulations align with the dictates of Articles 6(2), 189, 159(2)(c) of the Constitution. To begin, the regulations reinforce the constitutional principles of consultation and co-operation. This is evident in various consultation procedures. For instance, parties are obligated to take all necessary measures to amicably resolve disputes through negotiations, conciliation, and consultations before declaring a dispute.[239] Should the parties fail, either party must issue a notice to the other party showing intention to declare an intergovernmental dispute.[240] After seven days of the expiry of the notice, a party may then formally declare a dispute by filling form in the Schedule and serving the other party, line ministry, and Cabinet Secretary.[241] Even when a dispute is formally declared, parties are required to consult with each other in an initial meeting and agree on the

[235] *The Intergovernmental Relations (ADR) Regulations 2021*, Regulation 6(2)(a).
[236] Ibid Regulations 10-12.
[237] Francis Kariuki, 'African Traditional Justice Systems' [2017] *Journal for Conflict Management and Sustainable Development*, 165.
[238] Kisumu Workshop (n 23), page 66.
[239] ADR Regulations (n 235) Regulations 3(b), (c), (d), and Regulation 6(2).
[240] Ibid Regulation 6(7)
[241] Ibid Regulation 7(1).

nature of the dispute, and the most appropriate ADR forum for resolution.[242] Furthermore, where the dispute remains unresolved within the ADR mechanisms in the regulations, the parties are required to notify the Summit which then convenes another consultative meeting in an effort to resolve the dispute.[243] The Regulations are alive to the constitutional dictate that courts be the last resort in the resolution of intergovernmental disputes.[244]

Still on the objects and purpose, the regulations seek to promote and ensure the effective, efficient, expeditious, and amicable resolution of intergovernmental disputes. This is achieved by stipulating timelines within which disputes must be resolved through the various ADR mechanisms. For instance, where the parties choose mediation, the dispute must be resolved within 14 days from the date of the commencement of the mediation proceedings.[245] Regarding TDRMS, the dispute must be determined within 21 days from the date of commencement of the proceedings. [246] For arbitration, the dispute must be determined within 30 days from the date of commencement of the arbitration proceedings. [247] These timelines are welcome and workable. They must have been motivated by the long durations previously experienced in attempts to resolve intergovernmental disputes through litigation.

Closely related to the objects and purpose, the regulations are guided by critical principles. The first significant principle is the prudent use of public funds in the resolution of intergovernmental disputes.[248] This is a welcome acknowledgement of the high litigation costs incurred in the resolution of such disputes through the courts. In part three of this paper, it was demonstrated that legal fees were high and caused strains on budgets of the two levels of government thus affecting service delivery. Another significant

[242] Ibid Regulation 8.
[243] Ibid Regulation 14(2).
[244] Ibid Regulation 15.
[245] Ibid Regulation 10(4). However, the parties may extend the mediation for a period not exceeding 7 days.
[246] Ibid Regulation 11(4). The parties can extend the proceedings for a period not exceeding 7 days.
[247] Ibid Regulation 12(4). Parties may extend for a period not exceeding 15 days.
[248] Ibid Regulation 4(b).

principle is the compliance with the procedures, decisions, and outcomes made through ADR mechanisms in the regulations.[249] This is important because without compliance with the outcomes of the ADR fora, this would frustrate the successful resolution of intergovernmental disputes.

Fourthly, the regulations provide clear provisions on the parties to intergovernmental disputes. The regulations enshrine that they apply to disputes between the national government and county government, and amongst county governments. They also apply to state organs and public offices in the two levels of government; namely, ministries, departments, agencies within the national government, and county departments as well as agencies. In doing so, the regulations provide clarity on parties to intergovernmental disputes. This aligns with case law where there have been prevalent disputes among organs within the same government. They also cater for disputes between county governments and agencies of the national government. Further, the regulations reflect the position enunciated by recent case law on determining the party to an intergovernmental dispute.[250] Courts have determined that one has to look beyond the parties and examine the subject matter.[251] Therefore, an intergovernmental dispute can actually arise between a public officer seeking to enforce an interest of either level of government, and an organ of the other government.[252]

Furthermore, the Regulations outlines an extensive list of intergovernmental disputes. These reflect the tensions and controversies witnessed in the last couple of devolution years. Intergovernmental disputes may relate to the assignment or implementation of functions, a financial matter, written agreement between the parties, boundary disputes, natural resource management, and any other intergovernmental dispute.[253] Regarding boundary disputes, the regulations require parties to consult with the relevant statutory and constitutional bodies in accordance with the existing laws. This

[249] Ibid Regulation 4(d).
[250] *See County Government of Nyeri v Cabinet Secretary of Education, Science, and Technology* [2014] eKLR, *Board of Management, Frere Town Primary School v County Government of Mombasa* [2022] eKLR.
[251] See Part two.
[252] Ibid.
[253] Regulations 6(5)(b), 8(c).

obligation implicitly appreciates that there is the County Boundaries Bill 2021 which seeks to provide for the resolution of county boundary disputes through establishing *ad hoc* county boundary mediation committees.[254] The Bill also creates the independent county boundaries commission tasked with making recommendations to the alteration of county boundaries as dictated by the Article 188 of the Constitution.[255] Relevant to this, the Environment and Land Court has held that the National Land commission has powers to investigate disputes arising from intercounty boundaries.[256] The court noted that county boundary disputes are examples of historical injustices.[257]

Regarding TDRMs, the regulations recognise that decisions from TDRMs may not be in writing. They instead require that where the dispute is resolved, the traditional body submits an outcome of the dispute, and any document that may be necessary.[258] For other ADR mechanisms, reports, and an arbitral award must be submitted.[259]

Lastly, the regulations enhance party autonomy and flexibility which are central to ADR mechanisms. Parties have the right to choose and agree on the ADR forum and practitioner to resolve their dispute.[260] However, where they fail to agree on the ADR practitioner, the Summit, CoG, or an intergovernmental structure can appoint or request a recognised ADR institution to make the appointment.[261] In addition, the parties and the ADR practitioner determine the procedure of the proceedings. Moreover, the parties can extend the period of the proceedings.

4.2 Gaps in the ADR Regulations

[254] Preamble, the *County Boundaries Bill* (Senate Bills Number 20 of 2021).
[255] Ibid Clauses 23, 24, and 26 (Senate Bills Number 20 of 2021).
[256] *Okoiti v Parliament of Kenya & 2 Others; County Government of Taita Taveta & 3 Others* (Interested Parties) (Petition 33 of 2021) [2022] KEELC 33 (KLR)(23 March 2022)(Ruling).
[257] Ibid.
[258] ADR Regulations (n 235) Regulation 11(8).
[259] Ibid Regulations 10(8) and 12(7)
[260] Ibid Regulations 10, 11,12.
[261] Ibid Regulations 10(2),11(2), and 12(2).

a) Incomplete definition of an ADR practitioner. The Regulations defines an ADR practitioner as an individual appointed to assist, guide, or determine an intergovernmental dispute. This definition seems incomplete as it omits individuals or groups of people such as elders who play a role in resolving intergovernmental disputes in the regulations. The omission can be resolved by revising the definition to include individuals or groups. Similarly, the definition of a traditional body is wanting. A traditional body is defined as an institution recognized by the parties or registered within Kenya as an authority with respect to traditional knowledge and cultural practices. 'Recognition by the parties' assumes that traditional institutions lose their authority and validity when they are not recognised by the parties. Also, what traditional institution is being referred to by the regulations? Is it council of elders? If that is the case, it should be expressly clear 'Registered within Kenya' presupposes that all traditional institutions or elders are registered by the Registrar of Societies. This is not the case on the ground because elders get their legitimacy from being custodians of customary law in their communities, it does not depend on registration.

b) Absence of the definition of an intergovernmental dispute. The Regulations do not provide a clear definition of an intergovernmental dispute. It only stipulates that an intergovernmental dispute is one defined under Section 30 of the IGRA. However, looking at the IGRA, there is no definition of an intergovernmental dispute. The regulations could be amended to reflect the definition that has been developed by courts.[262]

c) Limited scope of ADR mechanisms. The regulations define and provide procedures for negotiation, mediation, TRDRMs, and arbitration. Conciliation is mentioned as one of the ADR mechanisms but there are inadequate procedures on how the process will be conducted. The regulations only stipulate that before a dispute is formally declared, the parties may resolve the issues in controversy through an intermediary agreed upon by the parties. The question that arises is that who is an intermediary in this context? This is because an intermediary generally means a mediator.

[262] See discussion in part 3.1 on the definition of an intergovernmental dispute.

The regulations should have just indicated 'conciliator'. In addition, the regulations do not cover other ADR mechanisms such as adjudication, dispute review boards, dispute adjudication boards, and Early Neutral Evaluation. Perhaps, it was assumed that the CoG, Summit, and IGRTC can work as the boards. In the recent past and current regime, religious leaders play a significant role in resolution of intergovernmental disputes. The Cabinet Secretary may consider their inclusion in the regulations during the revision of the current ones.

d) Lack of clarity as to whether parties can appear with their advocates. The regulations are silent on the question as to whether parties must appear in person or can be represented by their lawyers. There is no doubt that parties appearing in person would safeguard the ADR processes from legalities and litigation technicalities. However, one wonders about the place of county attorneys in these ADR mechanisms. County Attorneys are the principal legal advisor of the County Executive in legal proceedings.[263] They have a right of audience in all proceedings in matters to be of public interest and those that involve public property within the county.[264] There is a need to harmonise the provisions of the County Attorney's Act and the regulations. The County Attorney and Attorney General may come in after the ADR mechanisms have failed and parties have resorted to judicial proceedings. However, lawyers are likely to be needed in arbitration under the regulations.

e) Lack of provisions on the revocation of appointment of ADR practitioners. The regulations are silent on the removal of ADR practitioners. There is a danger of the processes where either of the parties feels that there are elements of bias and partiality of the ADR practitioner to any of the parties. In intergovernmental disputes, there is a lot of tension and political interests at play. Where an ADR practitioner is not ethical, they can end being influenced through corruption and bribery. Save for arbitration where the provisions of the Arbitration Act 1995 on removal of an arbitrator may apply, the regulations do not provide for procedures of challenging the

[263] County Attorney Act (Act Number 14 of 2020), Section 7.
[264] Ibid Section 9.

appointment of mediator, conciliator, or Traditional body. This could be remedied by providing such procedures for removal and substitution of an ADR practitioner in cases of gross misconduct, bribery, and bias.

f) Lack of provisions on immunity of ADR practitioners. Save for arbitration where an arbitrator is not liable for anything done or omitted to be done in good faith in discharging their function, the regulations do not provide for immunity of other ADR practitioners.[265] Given the high tensions involved in intergovernmental disputes, some of the ADR practitioners may be intimidated with civil suits and threats. It is important to have them insulated from any act or omission in the performance of their roles unless it can be proved that they acted in bad faith, negligently, or fraudulently.

f) Vague and restrictive provisions on the use of TDRMs. While the inclusion of TDRMs in the regulation is welcome, there are provisions that restrict the application of TDRMs. To begin, the definition of TDRMs as the resolution of an intergovernmental dispute by a traditional body, is vague. As earlier discussed, the definition of a traditional body is inadequate. The regulations could be revised to consider the following amendments on TDRMs. First, 'traditional dispute resolver' should be used instead of the 'traditional body'. This is because the implication of 'body' presupposes that there are no individuals who possess extensive knowledge in customary law and skills. Borrowing from the ADR Bill 2021, a traditional dispute resolver can be defined as a person or group of persons who are by the traditional custom of their community recognised and accepted as possessing skills and traditional knowledge required to resolve the dispute. Second, the definition of TDRM can be revised to read as follows: 'traditional dispute resolution mechanism means a process in which parties attempt to reach a mutually acceptable settlement outcome or agreement to resolve their dispute through the application of customary law of the community concerned with the assistance of a third party called a traditional dispute resolver'.

[265] See Section 16B of the Arbitration Act 1995 and Regulation 12(6).

The Regulations reinforce the repugnancy clause on TDRMs from the Constitution.[266] This trend continues to subjugate and undermine TDRMs against other form of ADR mechanisms. In TDRMs, there is high regard for truth and belief in ancestral powers, superstitions, and sorcery which are a great part of the dispute resolution.[267] However, in *Dancan Ouma Ojenge v P.N*, the Employment and Labour Relations court found that the use of superstitions and witchcraft was repugnant to justice and morality, therefore, inconsistent with the Constitution. [268] While the limitations in the Constitution are clear, the Constitution does not define the standards of morality and justice in the context used, leaving it open for courts to decide.[269] This presents inconsistencies and cripples the role of TDRMs in dispute resolution as religious leaders and elders in Kenya often use oaths and ritual ceremonies in resolving political disputes.

5.0 Recommendations

In addition to the above recommendations concerning the ADR Regulations, this paper makes more recommendations to entrench the resolution of intergovernmental disputes through ADR, and generally on intergovernmental relations.

First, there is a need for comprehensive training to the two levels of government and their respective organs on ADR mechanisms. This will create awareness about the benefits of such mechanisms in resolving intergovernmental disputes over litigation. The awareness will equip state officers with knowledge about ADR mechanisms and ensure that they do not file cases in courts in the first instance. While it is clear from the jurisprudence that courts will refer them back to ADR, resolving intergovernmental disputes in the first instance will save them costs and long delays. In addition, there is need for capacity building by the intergovernmental organs and ADR institutions to strengthen their effective

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[266] Regulation 11(5). See also Art 159(3) of the Constitution.
[267] Francis Kariuki, 'Conflict Resolution by elders in Africa: Successes, Challenges and Opportunities' [2015] *Alternative Dispute Resolution*, 162-165.
[268] [2017] eKLR.
[269] Joseph Segona and Omandi Scholastica, 'An Analysis of the Weaknesses of TDRMs as an avenue of dispute resolution in Kenya' [2019] *Journal of Humanities and Social Science*, 5.

conflict management and ADR.[270]

Second, given that there are still legal certainties about the functions and powers of the two levels of government. This may be resolved through a legislation clarifying the functions and powers. The legislation could be entitled "The Functions and Powers of the National Government and County Government Act".[271] The Act can provide for the (i) clarification of powers and functions, specify the exclusive functions and powers of both levels of government, and outline the concurrent functions and powers. In addition, the Act can provide for guidelines that can guide the national government in the assignment of additional functions and powers to the county governments in accordance with Articles 18693) and 183(1)(b) of the Constitution.[272] The legislation should also address legal inconsistencies and gaps on functions of the two governments. In doing so, the legislation will reduce duplication of efforts, role, and expenditure as well as wastage of resources. It will minimise the likelihood of a total failure in the delivery of services to the public where each level of government may take no action in the functional area hoping that the other will provide the services.[273]

Third, the judiciary is encouraged to continue promoting ADR mechanisms in accordance with the dictates of Article 159(2)(c). Courts have been supportive of ADR mechanisms by staying intergovernmental dispute proceedings and referring parties to ADR.[274] The doctrines of exhaustion and constitutional avoidance have been endorsed by the Supreme Court and the

[270] IGRTC, *End Term Report 2015-2020*,117.
[271] Kisumu Workshop (n 23)10.
[272] Ibid 63.
[273] Ibid 43.
[274] See *County Government of Migori & 4 Others v Privatisation Commission of Kenya* [2017] eKLR, *International Legal Consultancy Group & another v Ministry of Health* [2016] eKLR, *Daniel Muthama v Ministry of Health; Shenzhen Mindray Bio-Medical Electronics Co. Ltd* [2015] eKLR; *Council of Governors v Lake Basin Development Authority & 6 Others* [2017] ekKLR*; Silas v County Government of Baringo* [2014] eKLR; *Turkana County Government v Attorney General* [2015] eKLR.

superior courts.[275] This pro-ADR stance should continue, and members of the bench should not view ADR as a threat to the court system. The outcomes of the ADR mechanisms resulting from the resolution of intergovernmental disputes in the ADR regulations should be enforced. Nonetheless, courts can play a limited role in interpreting the Constitution and providing clarity on novel areas affecting the functions of the two levels of government through advisory opinions to the Supreme Court.[276] The ADR regulations also allow parties to seek interim measures from courts.[277]

There may also be a need to review the renumeration of advocates for cases involving the public sector.[278] As discussed in the paper, many counties have incurred huge budgetary costs in terms of legal fees. While advocates are entitled to legal fees for legal services offered, the huge legal fees have an impact on service delivery to people. This is because a lot of public funds have been diverted to legal representation by agencies within the national government and county government.[279] The Law Society of Kenya and the Attorney General may work together to come up with a special renumeration order applicable for public sector litigation. In same spirit, there may be a need to come up with standard rates of renumeration or guidelines for resolution of intergovernmental disputes through ADR mechanisms especially arbitration. There have been valid concerns about the rising costs of arbitration fees in the country. Nonetheless, the average cost of resolving an intergovernmental dispute through ADR will depend on the complexity of the case and hours taken to resolve the dispute.[280]

There is a need to protect the neutrality and autonomy of the IGRTC. Under the IGRA, the principal secretary of the ministry of devolution affairs is a

[275] *Speaker of the Senate and another v Attorney General* [2015] eKLR. See also *Communication Commission of Kenya v Royal Media Services* [2014] eKLR.
[276] In para 18 of the In *re Matter of the Principle of Gender Representation in the National Assembly* [2011] eKLR, the Supreme Court observed that advisory opinions are an important avenue for resolving matters of great public importance which may not be suitable for conventional mechanisms of justiciability. This arises in novel situation especially those affecting county government.
[277] Regulation 9.
[278] IGRTC, *End Term Report 2015-2020*,118.
[279] IGRTC, *Cost of Litigation in Inter/Intragovernmental Litigation in Kenya*, 2017,33.
[280] Ibid 26.

member of the IGRTC. However, other intergovernmental organs like the CoG does not have a representative. There have been tensions and perceptions about neutrality of the IGRTC. For example, in a meeting with the Senate, the principal secretary declared that the IGRTC was part of the ministry.[281] In another meeting, the principal secretary told the committee that it was disrespectful when it attended a meeting convened by the National Assembly Committee on the implementation of the Constitution without his approval.[282] In addition, the IGRTC's budget is part of the ministry's budget.[283] This undermines the neutrality of the IGRTC and the interference in its affairs could undermine the compliance and enforcement of ADR processes, outcomes, and agreements in the ADR Regulations. The funding model of the defunct Commission for the Implementation of the Constitution may be adopted, its funding was not directly anchored on a ministry or state agency thus enhancing its full neutrality.[284] The IGRA may be amended to remove the ministry of devolution from its membership or include representatives from the CoG and other intergovernmental organs so that it remains truly neutral.[285]

Lastly, the regulations stipulate that the Cabinet Secretary in charge of devolution may in consultation with the IGRTC and CoG issue guidelines for better carrying out of the provisions of the regulations.[286] The CS is called upon to address some of the issues raised in this paper to address the gaps in the regulations. The guidelines should also consider the possibility of waiving confidentiality in some of the matters that may need to be open to the public because of public interest and right to access to information.[287]

6.0 Conclusion

We are all interdependent and must co-exist with each other. This does not mean that it will always be peaceful. On the contrary, conflicts and differences will always be there. However, peace and harmonious co-existence requires that we work together to resolve such differences through

[281] IGRTC, *End Term Report 2015-2020,*132.
[282] Ibid
[283] Kisumu Workshop (n 23) 80.
[284] IGRTC, *End Term Report 2015-2020,*132
[285] Kisumu Workshop (n 23) 92.
[286] Regulation 21.
[287] Regulation 18(1).

dialogue, mutual respect, and tolerance – all principles inherent in ADR mechanisms. Similarly, this is required for the two levels of government. Being co-operative and consultative does not ignore differences of approach and viewpoints but encourages healthy debate to address the needs of people and resolve disputes that arise amicably.[288] Strictly speaking, there are no intergovernmental relations, there are only relations among officials in different levels of government. Individual interactions among state and public officers are at the core of intergovernmental relations.[289] In order for those officers to satisfactorily serve the people of Kenya, they need to co-operate and work together because if one level does not function well, the whole government will not function optimally. This extends to the resolution of their disputes through ADR mechanisms. To paraphrase the words of *Dalai Lama*, a Nobel Prize winner, the two levels of government should not let litigation injure the great relationship they ought to have for the betterment of the lives of Kenyans. There is willingness in the current regime to resolve intergovernmental disputes through ADR. In the Official communique from the 9th ordinary session of the Summit organised by the IGRTC 2023, the government has committed to achieve the following. First, all existing intergovernmental legal cases by one level of government against the other level of government shall be subjected to ADR as provided under the IGRA. Second, through the IGRTC, Kenya Revenue Authority shall withdrawal all matters against county governments from courts and seek ADR. Third, Summit has committed to empowering the IGRTC to enable it adjudicate intergovernmental disputes. All in all, this paper has extensively discussed the resolution of intergovernmental disputes through ADR mechanisms. In view of the recommendations given in part three and four and commitments by the summit, the paper hopes that intergovernmental relations will be improved and promote the gains of devolution.

[288] Kisumu Workshop (n 23) 39.
[289] Ibid 33.

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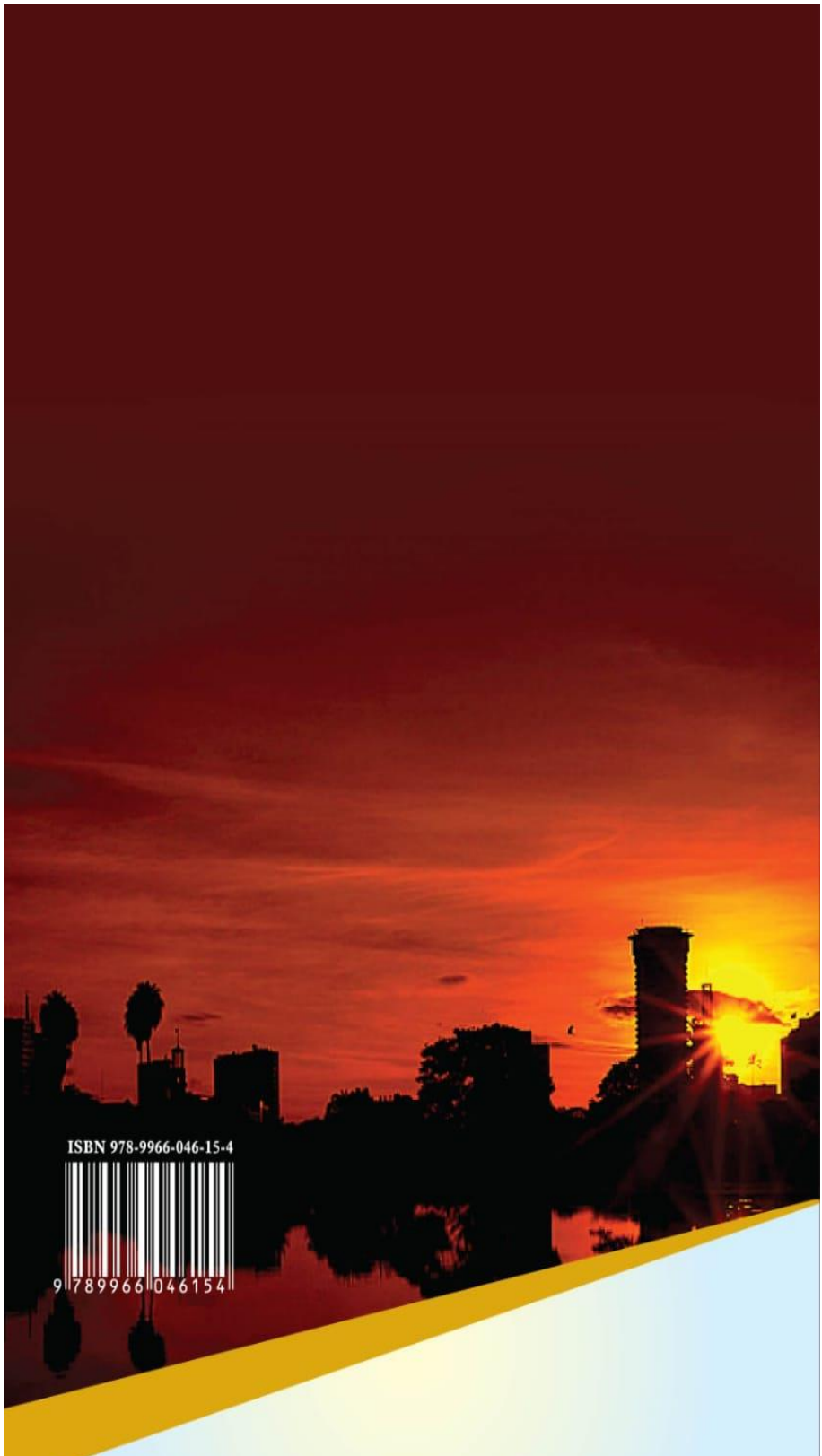
ISBN 978-9966-046-15-4