Journal of Appropriate Dispute Resolution (ADR) & Sustainability

Volume 1 Issue 2 2024 ISBN: 9789966046345

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Journal of Appropriate Dispute Resolution (ADR) & Sustainability

Volume 1 Issue 2 **2024**

Typesetting by:
Anne W. Kiramba
P.O. Box 60561 – 00200,
Tel: +254 737 662 029,
Nairobi, Kenya.

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

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

This Journal should be cited as ***(2024) 1(2)*** *Journal of Appropriate Dispute Resolution (ADR) & Sustainability*

ISBN 978-9966-046-34-5

Editor's Note

Welcome to Volume 1 Issue 2 of Journal of Appropriate Dispute Resolution (ADR) & Sustainability.

The Journal is focused on disseminating knowledge and creating a platform for scholarly debate on pertinent and emerging areas in the fields of Dispute Resolution and Sustainability.

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

This volume contains papers on various themes including: *Looking Beyond Paris: Reflections on Development and Sustainability; The Judicial Clarification of Access to Electoral Justice by Africa's Continental and Sub-Regional Courts: Emerging Standards and Domestic Effects; Forensic DNA Technology and Criminal Justice Reform in Kenya: The Case for a National DNA Database Legislation; Embracing Sustainable Mining in Africa; Use of Alternative Dispute Resolution in Healthcare; Assessing the Dynamics of Land Corruption in Kenya: Causes, Consequences, and Remedial Strategies; Evolving Mediation In Kenya: Opportunities, Challenges And Future Perspectives; Arbitration Act of 1995: 28 Years Post-Enactment and Change is Long Overdue;* and *Past Way Their Time; Reflecting on the Right to Cultural Practice and Children Rights.*

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

The Journal adopts an open publication policy and does not discriminate against authors on any grounds. We thus encourage submission of papers from all persons including professionals, students, policy makers and the public at large. These submissions

should be channeled to admin@kmco.co.ke to be considered for publication in subsequent issues of the Journal.

I wish to thank all those who have made this publication possible including reviewers, editors and contributors.

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

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Lucky holds certification as a professional mediator, demonstrating her commitment to facilitating peaceful resolutions to conflicts. As a student member of the Chartered Institute of Arbitrators and Women in ADR, she actively engages with and supports the ADR community. Her involvement in the ADR space extends to volunteering for the

31st Willem C. Vis Moot as a Moot Court Coach for the University of Dar es Salaam.

Beyond her academic and extracurricular commitments, Lucky contributes to the legal community through her work. She has previously interned at renowned law firms such as Coulson Harney (Bowmans) and ENS Africa, where she honed her legal research skills. Currently, she serves as a Legal Trainee at CFL Advocates and an Administrative Assistant at Women in ADR, combining practical experience with her passion for ADR.

Lucky's dedication to legal research is evident through her contributions to the East Africa Law Journal and her active participation as an oralist and researcher in the 30th Willem C. Vis International Arbitration Moot. Her research interests extend to Alternative Dispute Resolution, Gender Law, Dispute Resolution, and the rights of women and children.

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George has a remarkable track record as a mooter, reader, and researcher. He has won the KenyaMun International Law Commission Essay Writing Competition twice in a row (2023-23 and 2023-24). He was also part of the University of Embu team that ranked second in the Kenyan rounds of the Stetson International Environmental Law Moot Court Competition, where their memorials were adjudged the best. Additionally, he secured the third position in the second edition of Dr. (now Professor) Kariuki Muigua's Essay Writing Competition, organized by the University of Nairobi Young Arbiters Society (YaS).

George's vision is to contribute to a peaceful and harmonious society through effective dispute resolution and problem-solving. He is currently working as a freelance legal researcher and can be contacted

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Volume 1 Issue 2 - 2024

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Journalofadr&sustainability Vol. 1(2) (2024)

Looking Beyond Paris: Reflections on Development and Sustainability

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

Abstract

The paper critically reflects upon development and sustainability. It argues a case for countries to look beyond the Paris Agreement and embrace Sustainable Development in order to effectively confront climate change. It examines some of the current concerns in development and sustainability. It further suggests approaches towards embracing Sustainable Development as an ideal.

1.0 Introduction

Climate change has been described as an undesirable phenomenon that affects realization of the Sustainable Development agenda across the world by affecting the sustainability of the planet's ecosystems, the stability of the global economy and the future of humankind[1]. The impacts of climate change including intense droughts, water scarcity, severe fires, rising sea levels, flooding, melting polar ice, catastrophic storms and declining biodiversity are being witnessed across the

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[1] Climate Change., 'Meaning, Definition, Causes, Examples and Consequences.' Available at *https://youmatter.world/en/definition/climate-change-meaning-definition-causes-and-consequences/* (Accessed on 06/10/2023)

world[2]. Climate change has therefore been referred to as the most pressing global challenge that affects both developed and developing countries in their efforts towards the realization of the Sustainable Development agenda [3]. The United Nations 2030 agenda for Sustainable Development recognizes that climate change is one of the greatest challenges of our time and its adverse impacts undermine the ability of all countries to achieve Sustainable Development[4]. It urges all countries to take urgent action to combat climate change and its impacts in order to achieve Sustainable Development[5].

The *Paris Agreement*[6] was adopted to strengthen the global response to the threat of climate change, in the context of Sustainable Development and efforts to eradicate poverty[7]. It seeks to achieve this goal through measures such as holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce

[2] United Nations., 'What is Climate Change?' Available at *https://www.un.org/en/climatechange/what-is-climate-change* (Accessed on 06/10/2023)
[3] Muigua. K., 'Achieving Sustainable Development, Peace and Environmental Security.' Glenwood Publishers Limited, 2021
[4] United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development.' Available at *https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf* (Accessed on 06/10/2023)
[5] Ibid, Sustainable Development Goal, 13
[6] United Nations Framework Convention on Climate Change., 'Paris Agreement.' Available at https://unfccc.int/sites/default/files/english_paris_agreement.pdf (Accessed on 06/10/2023)
[7] Ibid, Article 2 (1)

the risks and impacts of climate change[8]; increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production[9]; and making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development[10].

The Paris Agreement has been hailed for strengthening the global response to the threat of climate change[11]. It builds upon the *United Nations Framework Convention on Climate Change (UNFCCC)* and for the first time brings all nations into a common cause to undertake ambitious efforts to combat climate change and adapt to its effects, with enhanced support to assist developing countries to do so[12]. As such, the Paris Agreement charts a new course in the global climate effort. The Paris Agreement has had notable successes including encouraging countries to set carbon neutrality goals, embrace net zero targets and adopt a collaborative approach towards combating climate change[13].

However, it has been argued that most solutions to combating climate change such as those envisaged in the Paris Agreement usually focus

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[8] Ibid

[9] Ibid

[10] Ibid

[11] United Nations Climate Change., 'Key Aspects of the Paris Agreement.' Available at https://unfccc.int/most-requested/key-aspects-of-the-paris-agreement (Accessed on 06/10/2023)

[12] Ibid

[13] Nahm. J., 'Failures and Successes of the Paris Agreement.' Available at *https://ace-usa.org/blog/research/research-foreignpolicy/failures-and-successes-of-the-paris-agreement/#:~:text=The%20Paris%20Agreement%20achieved%20notable,reabsorbed%20without%20significant%20environmental%20impact.* (Accessed on 06/10/2023)

on restricting emissions of greenhouse gases such as carbon dioxide[14]. It has been pointed out that such policies intended to tackle climate change through restrictions on greenhouse gases are almost certainly not sustainable since they bear significant costs and have minimal impact on the climate and will most certainly bring about poverty, making it more difficult for the poor to adapt to climate change[15]. Consequently, it has been argued that confronting climate change through global regulation of greenhouse gas emissions alone will not be sufficient or could be counterproductive [16] . Sustainable Development has therefore been idealized as the best response to climate change.

The paper critically reflects upon development and sustainability. It argues a case for countries to look beyond the Paris Agreement and embrace Sustainable Development in order to effectively confront climate change. It examines some of the current concerns in development and sustainability. It further suggests approaches towards embracing Sustainable Development as an ideal.

2.0 Reflections on Development and Sustainability

Development is perceived as a multidimensional process involving the reorganization and reorientation of entire economic and social systems[17]. It entails various facets including economic development that focuses on improvement in the provision of goods and services in a society and human development which focuses on the

[14] Climate Change and Sustainability, Available at *https://www.open.edu/openlearncreate/mod/oucontent/view.php?id=13823&printable*=1 (Accessed on 06/10/2023)

[15] Ibid

[16] Ibid

[17] Todaro, M. P., & Smith, S. C., 'Classic Theories of Development: A Comparative Analysis.' *Economic Development,*, (2004) 113-148.

improvement of the well-being of individuals and their relationships with the society in areas such as health, education, entitlements, capabilities, empowerment among others[18]. Sustainability on the other hand is a long-term goal for the world to meet the needs of economic growth with the least amount of impact on the environment[19]. It refers to the ability of societies to exist and develop with without depleting natural resources[20]. To pursue sustainability is to create and maintain the conditions under which humans and nature can exist in productive harmony to support present and future generations[21]. The intersection between development and sustainability has led to the emergence of the concept of Sustainable Development.

Sustainable Development is development which considers the long term perspectives of the socio-economic system, to ensure that improvements occurring in the short term will not be detrimental to the future status or development potential of the system[22]. It has been defined as development that meets the needs of the present without compromising the ability of future generations to meet their own needs[23]. It combines elements such as environmental protection,

[18] Ibid
[19] Scoones. I., 'Sustainability.' *Development in Practice* 17.4-5 (2007): 589-596.
[20] Ibid
[21] United States Environmental Protection Agency., 'Sustainability.' Available at https://www.epa.gov/sustainability/learn-about-sustainability (Accessed on 06/10/2023)
[22] Muigua. K., 'Nurturing Our Environment for Sustainable Development.' Glenwood Publishers Limited, 2016
[23] World Commission on Environment and Development., 'Our Common Future.' Oxford, (Oxford University Press, 1987)

economic development and social concerns [24] . Sustainable Development has been embraced as the global blueprint for development as envisaged under the United Nations 2030 Agenda for Sustainable Development and its 17 Sustainable Development Goals (SDGs) which seek to strike a balance between social, economic and environmental sustainability[25].

The SDGs form the framework for improving the lives of populations around the world and mitigating the hazardous effects of climate change [26] . It has been observed that Sustainable Development attempts to reduce the development impact created on the environment and promotes ways in which society can adapt to the challenges that climate change presents[27]. Sustainable Development policies can help to remedy impacts associated with climate change[28]. Countries are increasingly embracing a positive approach towards development and sustainability by embracing Sustainable Development as part of their national development agendas[29]. In Kenya, Sustainable Development has been enshrined as one of the

[24] Fitzmaurice. M., 'The Principle of Sustainable Development in International Development Law.' *International Sustainable Development Law.*, Vol 1
[25] United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development.' Op Cit
[26] United Nations., 'Sustainability.' Available at https://www.un.org/en/academic-impact/sustainability (Accessed on 06/10/2023)
[27] Ibid
[28] Ibid
[29] The Organization for Economic Cooperation and Development., 'Sustainable Development Strategies What are They and How Can Development Co-operation Agencies Support Them?' Available at https://www.oecd.org/dac/environment-development/1899857.pdf (Accessed on 06/10/2023)

national values and principles of governance[30]. This approach has allowed countries to pursue development and sustainability as related agendas contributing to the attainment of Sustainable Development and confronting global challenges including climate change[31]. Development and sustainability is now being increasingly witnessed in several sectors of global economies including agriculture, infrastructure development, transport, tourism, manufacturing and financial services[32].

Sustainable agricultural practices including crop rotation, planting cover crops, reduction or elimination of tillage, integrated pest management, integrating livestock and crops, sustainable water use, irrigation and agroforestry are now forming the backbone of the agricultural sector in many countries [33]. Development in the manufacturing sectors is also embracing sustainability through reusing and recycling strategies, waste management methods, software tools, pollution prevention methods, efficient industry practices, and business development models aimed at yielding products through eco-friendly approaches[34]. The transport sector is also embracing sustainability through the use of low and zero emission, energy efficient, affordable modes of transport, including

[30] Constitution of Kenya, 2010., Article 10 (2) (d)
[31] United Nations., 'Sustainability.' Op Cit
[32] Neumayer. E., 'Human Development and Sustainability.' Available at https://web.archive.org/web/20171206022258id_/https://core.ac.uk/download/pdf/6248638.pdf (Accessed on 06/10/2023)
[33] Union of Concerned Scientists., 'What Is Sustainable Agriculture?.' Available at https://www.ucsusa.org/resources/what-sustainable-agriculture (Accessed on 06/10/2023)
[34] Narayanan. G., & Gunasekera. J., 'Introduction to Sustainable Manufacturing Processes.' Sustainable Manufacturing Processes, 2023

electric and alternative fuel vehicles, as well as domestic fuels[35]. Development in the tourism sector is also embracing sustainability through green tourism and eco-tourism approaches[36]. Further, the financial sector in most countries is adopting sustainability practices through the use of green products such as green bonds[37]. Countries are also enhancing investments in clean and green sources of energy as part of their development agenda which is a vital initiative in enhancing sustainability[38].

Development and sustainability can therefore be pursued together under the Sustainable Development agenda. This approach has the ability to help countries combat climate change. It has been observed that some synergies already exist between climate change policies and the sustainable development agenda in most countries, such as energy efficiency, renewable energy, transport and sustainable land-use policies[39]. As a result, it has been observed that successfully limiting global climate change to 'safe' levels in the long-term is likely

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[35] Office of the Energy Efficiency & Renewable Energy., 'Sustainable Transportation and Fuels.' Available at *https://www.energy.gov/eere/sustainable-transportation-and-fuels#:~:text=Sustainable%20transportation%20refers%20to%20low,as%20well%20as%20domestic%20fuels.* (Accessed on 06/10/2023)

[36] Muigua. K., 'Fostering Sustainable Tourism in Kenya.' Available at *http://kmco.co.ke/wp-content/uploads/2023/08/Fostering-Sustainable-Tourism-in-Kenya.pdf* (Accessed on 06/10/2023)

[37] Lala. O, & Stone. D., 'The Role of Central and Commercial Banks in Promoting Sustainable Finance in Africa.' Available at https://www.mfw4a.org/blog/role-central-and-commercial-banks-promotingsustainable-finance-africa (Accessed on 06/10/2023)

[38] Muigua. K., 'Adopting Green Energy for a Bright Tomorrow.' Available at *http://kmco.co.ke/wp-content/uploads/2023/06/Adopting-Green-Energy-for-a-Bright-Tomorrow.pdf* (Accessed on 06/10/2023)

[39] Beg. N., 'Linkages between Climate Change and Sustainable Development.' *Climate Policy Review*, 2002

to require connecting climate change policies to Sustainable Development strategies in both developing and developed countries[40]. Since the feasibility of stabilising greenhouse gas concentrations as a response to climate change is dependent on general socio-economic development paths, it is imperative to put climate policy responses in the larger context of development and sustainability rather than viewing climate change as an add-on to those broader policies[41]. It is thus evident that climate policies may impact development priorities in both positive and negative ways, depending on the strategies, instruments, and contexts and that development policies such as those on agriculture, energy, forestry, tourism, transportation, manufacturing and population, could be relevant to climate change[42]. For example, small-scale rural renewable energy projects or local forestry projects offer climate change mitigating options with poverty benefits[43].

The Paris Agreement recognizes the relationship between climate change and the concepts of development and sustainability. The Agreement upholds the intrinsic relationship that climate change actions, responses and impacts have with equitable access to Sustainable Development and eradication of poverty[44]. The Agreement further seeks to strengthen the global response to the threat of climate change, in the context of Sustainable Development and efforts to eradicate poverty[45]. The Agreement also envisages

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[40] Ibid
[41] Swart. R., Robinson. J., & Cohen. S., 'Climate Change and Sustainable Development: Expanding the Options.' *Climate Policy* 3S1 (2003) S19–S40
[42] Banuri. T., & Opschoor. H., 'Climate Change and Sustainable Development.' DESA Working Paper No. 56, ST/ESA/2007/DWP/56
[43] Ibid
[44] Paris Agreement., Preamble
[45] Ibid, Article 2 (1)

designing climate change responses within the broader context of development and sustainability and calls upon countries to pursue mitigation and adaptation actions while fostering Sustainable Development and environmental integrity[46]. It also encapsulates the role of Sustainable Development in reducing the risk of loss and damage associated with climate change[47].

Climate change can therefore be confronted within the broader context of development and sustainability. According to the UNFCCC, pursuing climate action and Sustainable Development in an integrated and coherent way offers the strongest approach to enable countries to achieve their objectives efficiently and quickly under the Paris Agreement and the 2030 Agenda for Sustainable Development[48]. Further, the outcome of the Rio+ 20/Earth Summit 2012 envisages the role of development and sustainability in combating climate change[49]. The outcome of the Rio+ 20 urges countries to pursue development and sustainability by ensuring the promotion of an economically, socially and environmentally sustainable future for our planet and for present and future generations[50]. It also envisages combating climate change within the framework of development and sustainability[51]. To this end, it urges countries to pursue development and sustainability through measures such as sustainable agriculture, including crops, livestock, forestry, fisheries and aquaculture, that improves food security,

[46] Ibid, Article 6 (1)
[47] Ibid, Article 8 (1)
[48] United Nations Climate Change., 'Action on Climate and SDGs.' Available at https://unfccc.int/topics/cooperative-activities-and-sdgs/action-on-climate-and-sdgs (Accessed on 06/10/2023)
[49] United Nations., 'United Nations Conference on Sustainable Development (Rio + 20)' A/CONF.216/L.1
[50] Ibid
[51] Ibid

eradicates hunger and is economically viable, while conserving land, water, plant and animal genetic resources, biodiversity and ecosystems and enhancing resilience to climate change and natural disasters[52]. It also envisages development and sustainability through various approaches including enhancing energy efficiency, promoting the blue economy, conservation of forests and good land management practices as part of the global efforts to combat climate change[53].

Development and sustainability can therefore be pursued together under the concept of Sustainable Development. This approach offers the strongest approach to enable countries to achieve their objectives efficiently and quickly under the Paris Agreement and the 2030 Agenda for Sustainable Development compared to pursuing the reduction of greenhouse gas emissions as a sole objective[54]. However, there is need to address the problems hindering the achievement of development and sustainability. These problems include poverty, unemployment, war and instability, governance problems, population increase and poor governance and depletion of natural resources[55]. Solving these problems will enable countries realize development and sustainability while meeting the ambitions put forward under the Paris Agreement and the 2030 Agenda for Sustainable Development[56].

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[52] Ibid
[53] Ibid
[54] United Nations Climate Change., 'Action on Climate and SDGs.' Op Cit
[55] Beg. N., 'Linkages between Climate Change and Sustainable Development.' Op Cit
[56] Ibid

3.0 Conclusion

Development and sustainability are vital components of the Sustainable Development agenda[57]. It is imperative for countries to pursue development and sustainability in order to realize the aspirations of the Paris Agreement and the 2030 Agenda for Sustainable Development[58]. This can be achieved by striking a balance between the various facets of development and sustainability including economic sustainability, resource sustainability, social sustainability, energy sustainability and environmental sustainability[59]. Countries should therefore undertake initiatives to foster development by eliminating poverty, promoting food security, enhancing the quality of education, promoting access to health services, water, energy and decent employment while building resilient industry and infrastructure[60]. This should be done within the confines of sustainability through embracing sustainable practices in various sectors including agriculture, manufacturing, energy, tourism and transport[61]. It is also vital for countries to embrace sound governance and sustainable management of natural resources including land, forests, water and wetlands, wildlife and biodiversity, minerals, fisheries and the blue economy as part of their development agenda[62].

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[57] Fitzmaurice. M., 'The Principle of Sustainable Development in International Development Law.' Op Cit

[58] United Nations Climate Change., 'Action on Climate and SDGs.' Op Cit

[59] Dincer. I., & Ozturk. M., 'Energy, Environment, and Sustainable Development.' *Geothermal Energy Systems,* 2021

[60] United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development.' Op Cit

[61] The Organization for Economic Cooperation and Development., 'Sustainable Development Strategies What are They and How Can Development Co-operation Agencies Support Them?' Op Cit

[62] Muigua. K., Wamukoya. D., & Kariuki. F., 'Natural Resources and Environmental Justice in Kenya.' Glenwood Publishers Limited, 2015

Through the foregoing approaches, development and sustainability will be realized. It has been correctly opined that since the feasibility of stabilising greenhouse gas concentrations as a response to climate change is dependent on general socio-economic development paths, it is imperative to put climate policy responses in the larger context of development and sustainability rather than viewing climate change as an add-on to those broader policies[63]. It is therefore necessary for countries to look beyond the Paris Agreement and pursue development and sustainability.

[63] Swart. R., Robinson. J., & Cohen. S., 'Climate Change and Sustainable Development: Expanding the Options.' Op Cit

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The Judicial Clarification of Access to Electoral Justice by Africa's Continental and Sub-regional Courts: Emerging Standards and Domestic Effects

By: ***Brian Sang YK****

Abstract

National courts in Africa have in recent years adjudicated contested elections in Kenya, Ghana, Uganda, Malawi and Zambia. While the respective judicial processes in these African countries have expanded access to electoral justice in Africa, their outcomes have not been universally satisfactory. The resulting ineffectiveness of national courts in rendering impartial judgments in highly contested electoral disputes has led dissatisfied parties to seek further recourse before the African supranational courts established by continental and sub-regional treaties. This article critically examines the judicial role of Africa's continental and sub-regional courts in resolving election-related disputes that are typically framed as alleged violations of the right to democratic participation. It analyzes selected judgments in which the African Court of Human and Peoples' Rights (ACtHPR) and the East African Court of Justice (EACJ) have evaluated the compatibility of national election-related laws, policies and practices with the continental and sub-regional legal standards on political rights. The analysis in this article demonstrates that the jurisprudence of the ACtHPR and the EACJ has made a twofold contribution to clarifying access to electoral justice in Africa: (i) elaborating the legal content of electoral rights and their implications for national election-related processes; and (ii) expanding the scope and possibility of

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reviewing the national election laws, policies and practices that impact the right to democratic participation.

Key words: Elections; law; electoral justice; Africa; courts; continental; sub-regional

1. Introduction

Democratic governance, with its defining attribute of periodic elections in which the voters select their representatives,[1] is the most prevalent system of governance in Africa.[2] This is in large part due to the constitutional reforms of the 1990s,[3] which saw the authoritarian systems maintained by post-colonial regimes replaced by liberal democratic models.[4] Although multiparty elections have become a regular feature of civic life in many African states, they have not always lived up to the full promise of democracy.[5] Electoral outcomes are often contested with good reason in Africa. Allegations of

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[1] André Bächtiger, John Dryzek, Jane Mansbridge & Mark Warren, 'Deliberative Democracy: An Introduction' in André Bächtiger, John Dryzek, Jane Mansbridge & Mark Warren (eds), *The Oxford Handbook of Deliberative Democracy* (OUP 2018) 1, 2.

[2] International IDEA, *The Global State of Democracy 2019: Addressing the Ills, Reviving the Promise* (2019) 62: 'In 1975, 41 [African] countries were non-democracies while only 3 countries were classified as democracies. By 2018, the share of democracies had increased fivefold to 20 countries, making democracy the most common regime type in the region (41 percent).'

[3] Nic Cheeseman, *Democracy in Africa: Successes, Failures, and the Struggle for Political Reform* (CUP 2015) 90.

[4] Charles Manga Fombad, Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects' (2011) 59 Buffalo Law Review 1007, 1010.

[5] Nic Cheeseman, Gabrielle Lynch and Justin Willis, *The Moral Economy of Elections in Africa: Democracy, Voting and Virtue* (CUP 2020).

widespread vote buying, massive rigging and systemic voter suppression are a recurrent theme in all the recent elections in Africa.[6] Previous decades witnessed outbreaks of election-related conflicts in response to alleged denial of electoral justice, but the tide seems to be turning toward a culture of judicial resolution of election disputes. National courts in Africa have in recent years adjudicated contested presidential elections in Kenya, Ghana, Uganda, Malawi and Zambia. [7] In this way national judicial processes, though not universally satisfactory, have promoted peace and stability.

National courts have also made creditable contributions to expanding access to electoral justice in Africa,[8] but their efficacy is restricted. In some states, there are symbiotic relations between the national election supervision body and the ruling party thus foreclosing any credible elections.[9] In other states, the close relations between judicial officers and the executive make it impossible for opposition candidates to get a fair and impartial determination of electoral

[6] Paul Collier & Pedro Vicente, 'Violence, Bribery, and Fraud: The Political Economy of Elections in Sub-Saharan Africa' (2012) 153 Public Choice 117–147.
[7] For a fuller discussion of the relevant African jurisdictions, see Christopher Mbazira (ed), *Budding Democracy or Judicialisation? Lessons from Africa's Emerging Electoral Jurisprudence* (AJJF 2021).
[8] Richard Stacey & Victoria Miyandazi, 'Constituting and Regulating Democracy: Kenya's Electoral Commission and the Courts in the 2010s' (2021) 16 Asian Journal of Comparative Law 193–210.
[9] Chikodiri Nwangwu & Olihe Adaeze Ononogbu, 'Electoral Laws and Monitoring of Campaign Financing During the 2015 Presidential Election in Nigeria' (2016) 17 Japanese Journal of Political Science 614–634.

disputes against the incumbent.[10] There are also states where judicial officials have ruled against the incumbent in disputed presidential elections and suffered serious backlash. [11] The resulting ineffectiveness of national courts in rendering impartial judgments in electoral disputes has led dissatisfied parties to seek further recourse before African supranational courts established by continental and sub-regional treaties.[12] Two such continental and sub-regional courts, namely the African Court of Human and Peoples' Rights (ACtHPR) and the East African Court of Justice (EACJ), will be the focus of this article's analysis.

This article critically examines the judicial role of Africa's continental and sub-regional courts in resolving election-related disputes that are framed as alleged violations of the right to democratic participation. It argues that the election-related human rights jurisprudence of the ACtHPR and the EACJ has made a twofold contribution to clarifying access to electoral justice in Africa: (i) elaborating the legal content of electoral rights and their implications for national election-related processes; and (ii) expanding the scope and possibility of reviewing domestic election-related laws, policies and practices that impact the right to democratic participation.

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[10] Meshack Simati, *Post-Election Violence in Africa: The Impact of Judicial Independence* (2020); Lydia Apori Nkasah, 'Dispute Resolution and Electoral Justice in Africa: The Way Forward' (2016) 41 Africa Development 97–131.
[11] Nic Cheeseman, 'Can the Courts Protect Democracy in Africa?' The Africa Report (21 May 2021) *https://www.theafricareport.com/90612/can-the-courts-protect-democracy-in-africa/* (accessed 5 February 2023).
[12] Solomon T Ebobrah & Victor Lando, 'Africa's Sub-regional Courts as Back-Up Custodians of Constitutional Justice: Beyond the Compliance Question' in James Thuo Gathii (ed), *The Performance of Africa's International Courts: Using Litigation for Political, Legal and Social Change* (OUP 2020) 178, 179.

To illustrate this, the article analyzes selected judgments in which the ACtHPR and the EACJ have evaluated the compatibility of national election-related laws, policies and practices with the continental and sub-regional legal standards on political rights. After identifying the legal standards on electoral justice developed by the ACtHPR and the EACJ, the article analyzes the ways in which those legal standards have been incorporated into the judicial reasoning and decision-making of some African national courts.

2. Barriers to Accessing Electoral Justice in Africa and the Inadequacies of National Mechanisms for Redress

Holding of periodic and genuine elections that are conducted by a national independent electoral management body is an essential feature of democratic governance. Indeed, the Office of the UN High Commissioner for human rights has affirmed that "elections lie at the heart of democracy and remain the primary means through which individuals exercise the right to participate in public affairs." [13] Despite the critical importance of free, fair and credible elections to democracy, several African states have barriers to participation in elections and accessing justice in the event of electoral injustice.

To highlight the causes and consequences of these barriers to electoral justice, this section begins with a brief overview of the scope and content of electoral justice before turning to a detailed review of the typical barriers to accessing electoral injustice. It also analyzes the contributory factors that impede national mechanisms from effectively redressing electoral injustice in Africa.

[13] A/HRC/39/28 at para 25.

2.1 The Concept and Content of Electoral Justice: A Brief Overview

Before proceeding to discuss the barriers that impede access to electoral justice, it is useful to clarify what the phrase "electoral justice" means. Electoral justice has been defined as:

> the means and mechanisms available in a specific country, local community or on a regional or international level for:
>
> - ensuring that each action, procedure, and decision related to the electoral process complies with the legal framework;
> - protecting or restoring electoral rights; and
> - giving people who believe their electoral rights have been violated the ability to file a challenge, have their case heard and receive a ruling.[14]

In simpler terms, electoral justice refers to the legal mechanisms that function to ensure the prevention, mitigation or resolution of disputes related to elections. The key objective of electoral justice is to preserve, maintain and restore the confidence of citizens in their equal participation in elections and the legitimacy of the electoral process. Electoral justice system is a much broader concept that encompasses "all the institutions and mechanisms available in a country to ensure that every aspect of the electoral process is consistent with the law and citizens' electoral rights are adequately protected."[15]

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[14] Iain Kearton, Sarah Bracking, Stuart Weir & David Beetham (eds), *International IDEA Handbook on Democracy Assessment* (Brill Nijhoff, 2021).

[15] Giammarco Guzzetti, 'Advancing Human Rights and Democracy through Electoral Justice: The Case of Kenya' (2020).

2.1.1 Scope and Content

The concept of electoral justice, which has been elaborated above, creates rights and imposes obligations on a number of state and non-state actors. For governments to preserve democratic values and defend the rights of their people, they must first develop a strong legal system.[16] The protection of individual liberty and the upholding of the rule of law are based on this framework. It includes a variety of organizations and legislative measures that control different facets of public life, such as voting procedures and the defense of basic rights. States have an obligation to create and preserve an open, efficient legal system that promotes a just and equitable society.[17] The acknowledgment and defense of the right to vote and the right to run for public office are essential to a democracy in operation. These rights, which provide people the ability to choose their representatives and influence the course of their government, are fundamental to their involvement in the democratic process.[18] States encourage diversity and representation by enabling their citizens to actively participate in the political decision-making process through the preservation of the right to vote and run for office.[19]

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[16] Electoral justice - idea *https://www.idea.int/sites/default/files/publications/chapters/electoral-justice-handbook/electoral-justice-handbook-overview.pdf* accessed 24 January 2024

[17] New challenges in the promotion and protection of human rights *https://www.ohchr.org/en/statements/2009/10/new-challenges-promotion-and-protection-human-rights* accessed 24 January 2024

[18] Deichmann K [2020] Regional Integration, human rights and democratic participation in Africa

[19] Frey E, 'How to Encourage Better and More Meaningful Political Participation in the US' (Ford Foundation, 16 November 2023) <https://www.fordfoundation.org/news-and-stories/stories/how-to-encourage-better-and-more-meaningful-political-participation-in-the-us/> accessed 24 January 2024

A democratic society is built on the ideals of freedom of association, freedom of communication, and access to the courts in addition to political rights.[20] Together, these rights support the variety and pluralism that are necessary for a vibrant democratic discourse.[21] Freedom of association encourages the creation of civil society organizations and a variety of interest groups by allowing people to achieve shared objectives. Citizens may express their thoughts, participate in public discourse, and hold their leaders responsible when they have freedom of expression.[22]

The rule of law is strengthened when citizens have access to the courts, which guarantees them a way to seek justice and protection of their rights.[23] Judicial independence is essential to maintaining the integrity of the legal system by ensuring that the judiciary may work impartially and unhindered.[24] These elements work together to provide the foundation of a democratic society, highlighting the need of an extensive legal system in defending citizens' rights and freedoms.

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[20] Dryzek JS, 'Networks and Democratic Ideals: Equality, Freedom, and Communication' [2007] Theories of Democratic Network Governance 262

[21] Ibid

[22] Freedom of Expression: A Fundamental Human Right Underpinning All Civil Liberties (UNESCO, 17 April 2015) <https://en.unesco.org/70years/freedom_of_expression> accessed 24 January 2024

[23] Access to Justice (Constitutional Accountability Center, 23 January 2024) <https://www.theusconstitution.org/issues/access-to-justice/> accessed 24 January 2024

[24] Lawyer MS |Stanford and O'Connor JSD, 'The Importance of Judicial Independence' (Stanford Law School) <https://law.stanford.edu/stanford-lawyer/articles/the-importance-of-judicial-independence/> accessed 24 January 2024

These principles were first highlighted in the Universal Declaration of Human Rights[25] and subsequently in Article 25 of the ICCPR which provides:

> Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable distinctions:
>
> (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
> (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
> (c) To have access, on general terms of equality, to public service in his country.

Electoral justice ensures adherence by all actors to legal standards, which in turn promotes consistent application of election-related laws at the national level and maintenance of stability. [26] This

[25] UDHR, art 21 provides:

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right of equal access to public service in his country.
3. The will of the people shall be the basis of the authority of government. This will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

[26] Oliver Joseph & Frank McLoughlin, *Electoral Justice System Assessment Guide* (2019).

subsequently contributes to the sustainability of people-driven governance and progressive consolidation of democracy.

2.1.2 Electoral Justice and the Right to an Effective Remedy

The concept of electoral justice would be incomplete without the guarantee of the right to an effective remedy. Article 2(3) of the ICCPR, which provides a basis for the right to an effective remedy, states as follows:

> Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
> (c) To ensure that the competent authorities shall enforce such remedies when granted.

International treaty provisions that similarly establish the right to an effective remedy are found in the Universal Declaration of Human Rights,[27] the European Convention of Human Rights,[28] the American Convention on Human Rights,[29] and the American Declaration on the

[27] Universal Declaration, art 8.
[28] European Convention, art 13.
[29] American Convention, art 25.

Rights of Man.[30] Although the African Charter does not explicitly provide for the right to an effective remedy, the jurisprudence of the African Commission[31] and more recently the African Court[32] has recognized its centrality. The importance of the right to effective remedy was underscored by the African Commission in *Jawara v The Gambia*.[33] In that case, the African Commission held that fundamental rights 'can only be fully realized if governments provide structures which enable them to seek redress if they are violated.'[34]

The essential nature to the right to effective remedy has also been reinforced by the fact that the African Women's Protocol[35] makes explicit provision for the right to remedy. Article 25(2) of the Protocol requires states to 'provide for appropriate remedies to any woman whose rights or freedoms ... have been violated.'[36] Article 25(2) of the African Women's Protocol echoes the requirement in Article 32 of the African Charter on Democracy and Governance that state parties

[30] American Declaration, art XXIV.
[31] *Mouvement Burkinabé des Droits de l'homme et des Peuples v Burkina Faso* [2001] AHRLR 51 (ACHPR 2001); *Malawi African Association and Others v Mauritania* [2000] AHRLR 149 (ACHPR 2000); *Pagnoulle (on behalf of Mazou) v Cameroon* [2000] AHRLR 55 (ACHPR 1995).
[32] *Law Society of Tanganyika and Rev Christopher Mtikila v Tanzania* Application No. 009/2011 and 011/2011.
[33] Communication No. 147/95 and 149/96 (27 April–11 May 2000) [2000] ACHPR 17.
[34] Ibid para 74.
[35] Protocol to the African Charter on Human and Peoples' Rights on Women's Rights.
[36] Protocol, art 25(a).

must strive to institutionalize good political governance through an independent judiciary.[37]

The right to effective remedy is essential not only for individuals but more importantly for the broader process of democratization. This is because it creates two interrelated obligations. First, an *ex ante* requirement to adopt a preventive stance by anticipating problems that may derail democracy and to address them conclusively. This requirement is consistent with the Preamble of the Inter-American Democratic Charter[38] which has been interpreted as follows:

> the Member States expressed their conviction that the Organization's Mission is not limited to the defense of democracy wherever its fundamental values and principles have collapsed, but also calls for an ongoing and creative work to consolidate democracy as well as a continuing effort to prevent and anticipate the very causes of the problems that affect the democratic system of government.

The second interrelated obligation is an *ex post facto* requirement to ensure that national electoral dispute settlement mechanisms can provide meaningful redress to claims of electoral injustice. This is consistent with Article 17(2) of the African Charter on Democracy, Elections and Governance[39] which states that states parties shall

[37] Nebila Abdulmelik & Tsion Bellay, 'Advancing Women's Political Rights in Africa: The Promise and Potential of ACDEG' (2019) 54 *African Spectrum* 147–161.
[38] Inter-American Democratic Charter 40 ILM 1289 (2001).
[39] AU Assembly/AU/Dec.147 (VIII).

'ensure and strengthen national mechanisms that redress election-related disputes in a timely manner.'[40]

2.2 Barriers to Accessing Electoral Justice in Africa

A prominent feature of the recent history of democracy in Africa, which is also reflected in other continents, is the myriad barriers to the full exercise of democratic rights.[41] Examples of these barriers include the imposition of unjustifiable limits to the right to choose one's leaders, the right to offer oneself as a candidate for election, and the legitimate expectation of a credible election.[42] These barriers to the full exercise of democratic rights produce adverse effects for electoral justice and the do so in both direct and indirect ways. Typical examples of the barriers to accessing electoral justice include: (i) restrictions on voter eligibility; (ii) obstacles to standing for elections; and (iii) impediments to free, fair and verifiable elections. These barriers will be explored below with illustrations drawn from recent elections in respective African jurisdictions.

2.2.1 Restrictions on Voter Eligibility

One of the most common obstacles to electoral justice is restriction on eligibility of individuals from voting. The right of citizens to participate in the management of public affairs through voting is an integral aspect of democracy as it enables citizens to take meaningful part in decision-making. This has been affirmed by the South African

[40] ACDEG, s 17(2).
[41] Jaimie Bleck & Nicholas van de Walle, *Electoral Politics in Africa since 1990: Continuity and Change* (2019).
[42] Nic Cheeseman, 'How Could We Design Democracy to Make it Work in the African Context?' in Charles M Fombad & Nico Steytler (eds), *Democracy, Elections and Constitutionalism in Africa* (2021) 36, 40.

High Court in *August v Electoral Commission* where it held that 'the right to vote of each and every citizen is a badge of dignity and personhood.'[43] Despite the centrality of the right to elect one's political representatives to the core democratic guarantees, it is frequently curtailed by national laws. Several African states have domestic legal provisions that restrict to a greater or lesser extent eligibility to vote on the basis of one or more of the following grounds: nationality or citizenship, residence status, mental health status, and prisoner status.

The effect of restrictions on voter eligibility has been elaborated by the UN Human Rights Committee in its General Comment No. 25[44] as follows:

> The right to vote at elections and referenda must be established by law and may be subjected only to reasonable restrictions, such as setting a minimum age limit for the right to vote. It is unreasonable to restrict the right to vote on the ground of physical disability or to impose literacy, educational or property requirements. Party membership should not be a condition of eligibility to vote, nor a ground for disqualification.[45]

[43] [2018] ZAECMHC 12.
[44] Human Rights Committee, General Comment No. 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Art 25) UN Doc. CCPR/C/21/Rev.1/Add.7 (12 July 1996).
[45] Ibid para 10.

Domestic laws restricting prisoners from voting have been successfully challenged before courts of law in Ghana,[46] Kenya,[47] Uganda,[48] Nigeria,[49] Botswana,[50] South Africa,[51] and Zambia.[52] Yet, despite the judicial recognition of prisoner's voting rights in these countries, it has only been implemented in Malawi. [53] The governments of the other countries have failed to give effect to the voting rights of prisoners because of, inter alia, resource constraints and alleged delays in enactment of the enabling legislation.[54]

An example of this type of restriction is drawn from the Kenyan case of *Centre for Minority Rights Development (CEMIRIDE) and 2 Others v Attorney General and 2 Others; Independent Electoral and Boundaries*

[46] *Ahuma Ocansey v The Electoral Commission; Centre for Human Rights and Civil Liberties v Attorney General and Another* [2010] paras 78–80.
[47] *Priscilla Nyokabi Kanyua v Attorney General and Another* [2010] eKLR.
[48] *Kalali Steven v Attorney General and Electoral Commission* [2020] Misc Cause 35 of 2018.
[49] *Victor Emenuwe and Others v Independent National Electoral Commission (INEC) and Comptroller General of Nigeria Prisons* [2018].
[50] *Thomas Sibanda v Attorney General of Botswana and Secretary of the Independent Electoral Commission* [2009] MAHLB-00347-09.
[51] *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others* [2004] ZACC para 56: "It could hardly be suggested that the government is entitled to disenfranchise voters in order to enhance its image; nor could it reasonably be argued that the government is entitled to deprive convicted prisoners of valuable rights that they retain in order to correct a public misconception as to its true attitude to crime and criminals."
[52] *Malembeka v Attorney General and Electoral Commission of Zambia* (2016/CC/013) [2016].
[53] This was in the general elections held in June 2020.
[54] Lukas Muntigh, The Right of Prisoners to Vote in Africa: An Update (2020) Fact Sheet 17, July 2020.

Commission (Interested Party),[55] which involved the alleged exclusion from political participation of marginalized indigenous communities without access to the internet. Another form of exclusion from eligibility to vote is the denial of an opportunity to vote for citizens who are not resident in their respective countries at the time of elections. It is useful to note, however, that trends across several African countries indicate a growing acceptance of the eligibility of citizens abroad to vote. Indeed, a recent study of sub-Saharan countries shows progressive legal recognition of the voting rights of their respective citizens in the diaspora.[56]

2.2.2 Obstacles to standing for, or fielding candidates in, elections

Another democratic guarantee that is frequently restricted is the right to stand for elections.[57] That right derives from the entitlement of a citizen to take part in the government of his or her country, either directly or through freely chosen representatives.[58] A number of African jurisdictions have domestic laws that create obstacles to the right to vie or to be nominated for public office.[59] In particular, the relevant domestic laws typically restrict the right to stand for elections on one or more of the following grounds: age, citizenship,

[55] [2022] eKLR.
[56] Elizabeth Wellman, 'Emigrant Inclusion in Home Country Elections: Theory and Evidence from sub-Saharan Africa' (2021) 115 American Political Science Review 82–96.
[57] Carolien Van Ham & Staffan I Lindberg, 'Elections: The Power of Elections in Multiparty Africa' in Nic Cheeseman (ed), *Institutions and Democracy in Africa: How the Rules of the Game Shape Political Developments* (2018) 213, 215.
[58] UDHR, art 21; ICCPR, art 25.
[59] Ionel Zamfir, State of Democracy in sub-Saharan Africa: Democratic Progress at Risk (2021) European Parliament Briefing 7.

residence status, educational qualification, financial ability, and disability. Such restrictions often result in discriminatory practices.[60] Arbitrary restriction of the individual right to stand for election and the collective right to field a candidate in elections have been identified a causal factor for violation of several fundamental rights.[61] Indeed, the Human Rights Committee has observed in its General Comment No. 25 that every citizen can take part in the conduct of public affairs, the right to vote and to be elected and the right to have access to public service. Additionally, General Comment No. 25 of the Human Rights Committee[62] states that: 'The right of persons to stand for elections should not be limited unreasonably by requiring candidates to be members of parties or of specific parties.'[63]

2.2.3 Impediments to free, fair and verifiable elections

For the idea of representative democracy to have meaningful and practical effect, it is necessary to have independent institutional support from election management bodies and the judiciary.[64] These two institutions are crucial to ensuring free, fair and verifiable elections. There are few jurisdictions in Africa where democratic stability has been achieved with the support of strong institutions and

[60] UNECA, *Africa Governance Report III: Elections and the Management of Diversity* (2013).
[61] UDHR, art 25
[62] Human Rights Committee, General Comment No 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Art 25) UN Doc. CCPR/C/21/Rev.1/Add.7 (12 July 1996).
[63] Ibid para 21.
[64] Franklin Oduro, The Changing Nature of Elections in Africa: Impact on Peacebuilding?' in Terence McNamee & Monde Muyangwa (eds), *The State of Peacebuilding in Africa: Lessons Learned for Policymakers and Practitioners* (2021) 163.

processes, and this has led to consolidation of good political governance. These include Mauritius, Botswana, Cape Verde, Namibia and Ghana.[65]

By contrast, the majority of African states have serious deficiencies of democratic governance due to the lack of independent courts and election management bodies.[66] There are examples from a number of African countries where the incumbent head of state or government in the exercise of their role as the appointing authority appoint persons loyal to them to key positions.[67] These include the post of head of the independent election management body which will oversee the elections and the judiciary which will adjudicate challenges to the presidential election results.

2.2.4 Curtailment of access to election-related information

A troubling trend that has been witnessed during elections across several African countries is the tendency of the incumbent government to instigate network disruptions and internet shutdowns.[68] These state-sponsored actions are intended to curtail access to election-related information either to manipulate public

[65] Chester A. Crocker, 'African Governance: Challenges and their Implications' in Hoover Institution (ed), *Governance in an Emerging New World* (2019) 119.
[66] Campion S and Jega AM, 'African Election Management Bodies in the Era of Democratic Backsliding' (2023) 30 South African Journal of International Affairs 375
[67] Ibid
[68] Eleanor Marchant & Nicole Stremlau, The Changing Landscape of Internet Shutdowns in Africa: Introduction' (2020) 14 International Journal of Communication 4216–4223.

opinion or to create a context conducive for election fraud.[69] Indeed, there are credible reports that incumbent governments have purchase costly technological systems for jamming telecommunications signals and to shutdown the internet in their respective countries.[70]

2.3 Inadequacies of National Mechanisms for Redressing Electoral Injustice in Africa

The legal and administrative frameworks of most African states provide at least some form of national mechanism that ought to address electoral grievances.[71] Such national mechanisms that should ordinarily respond to claims of electoral injustice include intra-party dispute settlement organs, national political parties disputes tribunals, election courts with restricted jurisdiction, and courts with general unlimited jurisdiction.[72] In some African countries, these national mechanisms have played an important role in providing formal forums to air claims of electoral injustice in a timely manner.[73] Nonetheless, the overall impact of the national mechanisms for redressing electoral injustice across most African countries is curtailed primarily by systemic inefficiencies and impartiality deficits.

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[69] Evelyn Lirri, 'How Weaponization of Network Disruptions During Elections Threatens Democracy' (2021) available at <*https://cipesa.org/2021/11/how-weaponization-of-network-disruptions-during-elections-threatens-democracy/*> (accessed on 5 August 2023).

[70] Deborah Mburu Nyokabi et al, 'The Right to Development and Internet Shutdowns: Assessing the Role of Information and Communications Technology in Democratic Development in Africa' (2019).

[71] Lydiah Nkasah, 'Dispute Resolution and Electoral Justice in Africa' (2016) 41 Africa Development 97, 102.

[72] Sarah Birch & David Muchlinski, 'Electoral Violence Prevention: What Works?' (2018) 25 Democratization 385, 391.

[73] Examples include Malawi, Zambia and Kenya.

The discussion below focuses on four key inadequacies of the generic national mechanisms that are mandated to redress electoral injustice in Africa. These include: (i) constraints on accessing legal aid and assistance; (ii) inefficient intra-party dispute resolution mechanisms; (iii) compromised or partisan electoral management bodies; and (iv) lack of judicial independence and impartiality.

2.3.1 Constraints on accessing legal aid and assistance

It is a truism that having a claim that is legally valid is not a guarantee of justice, particularly if the party on the right side of the law is prevented from accessing justice.[74] The reason for this is that lodging claims based in law requires technical expertise that is both costly to obtain and is a crucial factor in ensuring a successful (quasi-) judicial outcome. Election claims are frequently complex and require the assistance of experienced legal counsel, which is invariably costly. In most national laws provision is rarely made for legal aid or assistance in election matters.[75] This omission often presumes that litigants in election matters are only those who are financially able. Yet this overlooks the fact that even the less financially endowed citizens are affected parties with legitimate interests in bringing election claims.

2.3.2 Inefficient intra-party dispute resolution mechanisms

A growing number of African countries with party-based systems of democratic governance have laws requiring political parties to

[74] Caitlin Gormley & Nick Watson, 'Inaccessible Justice: Exploring the Barriers to Justice and Fairness for Disabled People Accused of a Crime' (2021) 60 Howard Journal of Crime and Justice 493, 494.

[75] Charles Khamala, *Legal Aid for Effective Victim Legal Representation in Kenya's Post-Election Violence: Lessons from the International Criminal Court* (2022).

develop internal dispute resolution mechanisms.[76] An example of this is found in the provisions of Kenya's Political Parties Act,[77] which specifies as one of the prerequisites for political party registration that there must be a clear outline of the modalities of an internal political party dispute resolution mechanism.[78] South Africa has a similar domestic law to that in Kenya in the form of the Electoral Commission Act.[79] The South African law establishes Party Liaison Committees[80] whose function is to hold meetings to facilitate consultation and co-operation between registered political parties and the Independent Electoral Commission to resolve intra-party disputes relating to electoral matters.[81]

When disputes are not settled internally by the structures of the political party, they typically proceed to statutory mechanisms for the resolution of disputes. In the Kenyan context that role is reserved for the Political Parties Dispute Tribunal, which is a quasi-judicial body established by Section 39 of the Political Parties Act. The nature of the disputes that are usually settled by statutory mechanisms for resolving political party disputes include disputes between a member or members of a political party and the party, disputes between political parties, disputes between coalition partners, appeals from

[76] Clive J Napier, 'Political Party Liaison Committees as Conflict Resolution Mechanisms – The South African Experience' (2015) 40 Journal of Contemporary History 156, 157; Nahomi Ichino & Noah L Nathan, 'Primaries on Demand? Intra-party Politics and Nominations in Ghana' (2012) 42 British Journal of Political Science 769–791.
[77] Political Parties Act, s 9.
[78] Second Schedule, s 23.
[79] Act 51 of 1996.
[80] Election Commission Act, s 5(1)(g).
[81] Napier (n 65) 164–165.

decisions of the registrar of political parties, and disputes arising from party primaries.

Similar political party dispute resolution mechanisms to those found in South Africa and Kenya are present in Ghana, Malawi and Uganda. Despite the presence of these fairly elaborate and legally empowered mechanisms, their outcomes are often unsatisfactory and hence the disputes eventually end up in court as litigation matters. The adverse implication of this is that it ends up wasting time, costing a lot of money and in many cases denying justice to affected persons and groups.

2.3.3 Compromised or partisan electoral management bodies

The majority of African countries have legally established independent electoral management bodies. While this is a positive indicator of democratic progress, the abiding threat to the full consolidation of democratic gains in Africa is state capture of electoral management bodies.[82] In some African countries the composition of the electoral management body is skewed in favour of the incumbent, in others they are manipulated through funding cuts or delayed disbursement, and yet in others the 'non-compliant' members of such bodies are targeted, intimidated and coerced into submission.[83]

2.3.4 Lack of judicial independence and impartiality

Almost all African countries have, at least as a matter of law, systems for judicial settlement of election disputes by means of binding

[82] Wachira Maina, State Capture During the 2017 Elections in Kenya, Africog.
[83] Nation Africa, 'How Kenyan Election Official Chris Msando Died' The East Africa (2 August 2017).

decisions.[84] While this may suggest that the majority of electoral disputes can be satisfactorily settled by domestic courts, the actual situation is less encouraging. In fact, institutional reports on judicial independence, rule of law and governance in Africa by international organizations and non-governmental organizations indicate growing risks for democracy caused by judicial capture and subservience to the executive.[85] These findings are supported by the unsatisfactory situation in several African countries.

3. Electoral Justice and the Judicial Mandates of Two of Africa's Continental and Sub-Regional Courts

Dissatisfaction with national mechanisms for redressing alleged violations of electoral rights in Africa has led to the increasing turn by litigants to supranational courts for further recourse.[86] In this context, the courts that were originally established by human rights or regional integration treaties have been re-purposed into forums for the resolution of disputed electoral processes and outcomes.[87] To ensure that the election-related disputes fit in the jurisdiction of the relevant continental and sub-regional courts, litigants have tended to

[84] H Fjelbde, *Electoral Institutions and Electoral Violence in sub-Saharan Africa* (2016).
[85] Malcolm Langford, Rebecca Schiel & Bruce M Wilson, 'The Rise of Electoral Management Bodies: Diffusion and Effects' (2021) 16 Asian Journal of Comparative Law 60, 67.
[86] Andre Mangu, 'The Role of the African Union and Regional Economic Communities in the Implementation of the African Charter on Democracy, Elections and Governance' (2018) 5 African Journal of Democracy and Governance 125–152.
[87] James Gathii & Olabisi Akinkugbe, 'Judicialization of Election Disputes in Africa's International Courts' (2021) 84 Law and Contemporary Problems 181, 189.

frame them variously as violations of the right to democratic participation or as a breach of related community norms.

This section examines the legal and institutional context of electoral justice in Africa, with a special focus on the competence of Africa's continental and sub-regional courts. It begins with a brief discussion of the treaty law framework for democratic governance and electoral justice in Africa, which is followed by an examination in turn of the respective judicial mandates of the African Court and the East African Court of Justice.

3.1 Treaty Law on Democratic Governance and Electoral Justice in Africa

The treaty law relating to democratic governance and electoral justice in Africa is found in many sources. For analytical clarity, it may be useful to classify them into distinct categories. First, there are treaties which are adopted within the auspices of the African Union treaty framework and that of its predecessor (the Organization of African Unity). This will be discussed below as African Union treaties. Secondly, there are continental African human rights treaties, including the African Charter and the African Women's Protocol. Thirdly, there are sub-regional treaties that are adopted under regional economic integration framework laws. These distinct types of treaty law sources will be discussed below.

3.1.1 African Union Treaties

The pursuit of democratic self-government by the peoples of Africa was one of the primary objectives behind the establishment of the Organisation of African Unity (OAU), which later transformed into

the African Union.[88] This concern for democracy and governance is clearly reflected in the treaty law framework of the African Union. An illustrative example is the text of the Preamble to the Constitutive Act of the African Union, [89] which captures the determination 'to consolidate democratic institutions and culture, and to ensure good governance and the rule of law'.[90]

This is reiterated in Article 3(g) of the Constitutive Act which expressly includes the promotion of good governance and democratic principles and institutions as one of the objectives of the African Union.[91] Article 4(m) of the Constitutive Act further states that the African Union shall operate in accordance with the principles of good governance, rule of law and respect for democratic principles.

More detailed provision for rights related to democratic governance and electoral justice is made in the African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development (hereafter 'African Decentralisation Charter').[92] Article 2(b) of the African Decentralisation Charter expressly states that one of the objectives of the Charter is to promote local governance and local democracy as one of the cornerstones of decentralization in Africa. Article 12(2) of the Charter states that local democracy and

[88] Y El-Ayouty (ed), *The Organization of African Unity After Thirty Years* (1994).
[89] OAU Doc. CAB/LEG/23.15 (entered into force 26 May 2001).
[90] Constitutive Act of the African Union, preamble, para 9.
[91] Constitutive Act, art 3(g): 'The objectives of the [African] Union shall be to: … promote democratic principles and institutions, popular participation and good governance'.
[92] African Charter on Decentralisation available at: *https://au.int/en/treaties/african-charter-values-and-principles-decentralisation-local-governance-and-local* <accessed on 5 August 2023>.

governance must take a participatory and representative form, and Article 12(4) of the Charter further imposes an obligation on local governments and authorities to 'promote the development of innovative democratic and peaceful public expression platforms.'

Article 13 of the African Decentralisation Charter requires states parties to enshrine the election of local public officials in national legislation that 'defines the modalities and timelines of such elections.' [93] In addition, Article 13 of the Charter imposes an obligation on central governments to 'enact electoral laws that promote regular, democratic, free, fair and transparent local government elections.' These provisions cumulatively seek to provide a framework that ensures domestic legal frameworks are conducive to the promotion of democracy in local governance of decentralized units and the realization of electoral justice.

3.1.2 Continental African Human Rights Treaties

The legal norms on democratic governance and electoral justice are further strengthened by the principal continental African human rights treaty: the African Charter on Human and Peoples' Rights. The African Charter explicitly recognizes the right to democratic participation in Article 13, which provides:

1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.

[93] African Decentralisation Charter, art 13(1).

2. Every citizen shall have the right of equal access to the public service of his country.
3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

This provision, which is similar to Article 25 of the ICCPR, has been interpreted by the African Commission on Human and Peoples' Rights.[94] The provisions of Article 13 of the African Charter have been expounded in greater detail in the African Charter on Democracy, Elections and Governance. Due to its unique status, the ACDEG is discussed separately in section 3.1.4 below.

3.1.3 Sub-regional Economic Integration Treaties

Besides the African Charter, which is a continental treaty instrument, there are other sub-regional treaty instruments that focus on economic integration but nonetheless incorporate some human rights aspects. These include the Treaty for the Establishment of the East African Community,[95] the Treaty of the Economic Community of West African States [96] and the Treaty of the Southern Africa Development Community.[97] Guided by the scope of the present article, the discussion below will only canvass the jurisprudence of

[94] ICCPR, art 25.
[95] EAC Treaty available at https://www.eala.org/documents/view/the-treaty-for-the-establishment-of-the-east-africa-community-1999-2006 <accessed on 5 August 2023>.
[96] ECOWAS Treaty available at: https://www.refworld.org/docid/492182d92.html <accessed on 5 August 2023>.
[97] SADC Treaty available at: https://www.sadc.int/sadc-treaty <accessed on 5 August 2023>.

the East African Court of Justice and will not discuss the case law of the other sub-regional human rights treaty bodies.

3.1.4 African Charter on Democracy, Elections and Governance

Despite their importance in integrating democratic governance norms, the African Union treaties, the continental African human rights treaties and the sub-regional economic integration treaties only provide piecemeal regulation of electoral democracy. A more comprehensive statement of the treaty law on electoral democracy and governance is found in the African Charter on Democracy, Elections and Governance. The African Charter on Democracy was adopted on 30 January 2007 and entered into force in February 2012 after being ratified by 15 member States of the African Union. As at March 2023, the African Charter on Democracy had been ratified by 38 out of the 55 member states of the African Union. It has also been signed by 46 out of the 55 member states of the African Union. Article 2 of the ACDEG provides that member states must 'promote the holding of regular, free and fair elections to institutionalise legitimate authority of representative government as well as democratic change of government.'

3.2 Mandate of the African Court of Human and Peoples' Rights

The African Court on Human and Peoples' Rights, which is mandated to complement the work of the African Commission, has jurisdiction to determine matters relating to the African Charter and any other human rights instrument ratified by the state against which a complaint is brought.[98] It is useful to note that the African Court can only be seized of cases in which the respondent State has ratified the

[98] African Court Protocol, art 3.

African Court Protocol and deposited the declaration specified in Article 34(6) of the African Court Protocol in cases involving NGOs.[99] The competence of the African Court to apply the African Charter on Democracy as a human rights instrument was confirmed in *Actions pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire*.[100] In that case the Court had to expound on the meaning of a 'human rights treaty' within the terms of Article 3 of the African Court Protocol.[101] In doing so, the African Court confirmed that it had broad material jurisdiction to invoke treaties concluded under the African Union, as well as those adopted by other regional and international organizations.[102]

3.3 Mandate of the East African Court of Justice

Unlike the African Court, the East African Court of Justice does not have an explicit human rights mandate.[103] This is because it was established primarily as the judicial organ of the East African Community, a regional economic integration community, as opposed to a human rights court. Article 9 of the East African Community Treaty establishes the EACJ as the judicial organ of the East African Community. Article 23 of the Treaty further states that the EACJ shall

[99] African Court Protocol, art 34(6).
[100] [2016] 1 AfCLR 668.
[101] African Court Protocol, art 3: The judges of the Court shall be elected by secret ballot by the Assembly from the list referred to in Article 13 (2) of the present Protocol. The Assembly shall ensure that in the Court as a whole there is representation of the main regions of Africa and of their principal legal traditions.
[102] *APDH* (n 89).
[103] *Katabazi v Secretary General of the East African Community* Ref No. 1 of 2007; *Independent Medical Legal Unit v Attorney General of Kenya* Ref No. 3 of 2010; *Omar v Attorney General of Kenya* Ref No. 4 of 2011.

ensure the adherence to law in the interpretation and application of the Treaty and the compliance by Partner States with it.

Despite not having explicit jurisdiction to hear and determine human rights claims, the East African Court of Justice has developed by means of its decisions a basis for its indirect human rights mandate.[104] One instance of the exercise by the EACJ of an indirect human rights mandate is found in *James Katabazi and 21 Others v Secretary General of the East African Community and Another*.[105] The applicant in that case challenged the intervention by Ugandan security agents to prevent the execution of a lawful court order on the ground that it violated Articles 6, 7(2), 8(1) and 29 of the EAC Treaty.[106] The EACJ held that while it does not have explicit jurisdiction over human rights violations, it is competent to be seized of matters that fall under one of the provisions of Article 27(1) of the EAC Treaty.[107]

The jurisdiction of the EACJ extends to both contentious and non-contentious matters that require the judicial interpretation and application of the EAC Treaty.[108] More recently, the EACJ has asserted an emerging quasi-appellate jurisdiction over decisions of national courts. This was affirmed in the case of *East African Civil Society Organisations Forum (EASCOF) v Attorney General of the*

[104] MT Taye, 'The Role of the East African Court of Justice in the Advancement of Human Rights: Reflections on the Creation and Practice of the Court' (2019) 27 African Journal of International and Comparative Law 108, 110.
[105] [2007] EACJ 3 (1 November 2007).
[106] Ibid para 48.
[107] Ibid.
[108] EAC Treaty, art 23.

Republic of Burundi and Others,[109] where the East African Court confirmed that it was competent to adjudicate over challenges to judicial decisions of national courts, including apex courts.[110]

3.4 Remedies in Election-related Cases

An important question to consider is the types of remedies that are available from Africa's continental and sub-regional courts. This is particularly crucial in light of doubts raised regarding the practical domestic effect of supranational litigation in African jurisdictions.[111] Three key remedies that are relevant to election-related cases can be briefly highlighted below. They include (i) directive orders to amend defective laws; (ii) declaratory relief; and (iii) compensation for denial of justice.

The first remedy, directive orders to amend defective laws, applies where a court finds that the concerned state has violated rights and directs it to take certain action to bring it into compliance with its international obligations. An example of this is found in the case of *Rev Christopher Mtikila v United Republic of Tanzania* where the African Court ordered Tanzania to amend its election law, including specific constitutional provisions, to bring it into compliance with African human rights treaties.[112]

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[109] Reference No. 2 of 2015.
[110] Ibid.
[111] Antonia Witt, 'Where Regional Norms Matter: Contestation and the Domestic Impact of the African Charter on Democracy, Elections and Governance' (2019) 54 Africa Spectrum 106–126.
[112] *Law Society of Tanganyika and Rev Christopher Mtikila v Tanzania* Application No. 009/2011 and 011/2011.

The second remedy that may be granted by continental and sub-regional courts to applicants in electoral justice case is declaratory relief. It consists in a judicial finding and determination that the challenged law, practice or conduct is (i) a violation of a particular right and (ii) contrary to the concerned state's treaty obligations. The declaratory remedy was issued by the EACJ in the case of *Media Council of Tanzania and Others v Attorney General of the United Republic of Tanzania*.[113] That case concerned a challenge against several provisions of Tanzania's Media Services Act,[114] which the applicant alleged infringed on freedom of expression and freedom of media.[115] In its judgment the Court declared that certain provisions of the challenged law violated Article 6(d) and 7(d) of the EAC Treaty by unjustifiably curtailing the right to freedom of expression.[116]

Another remedy that Africa's continental and sub-regional courts grants to applicants in electoral justice cases is compensation for denial of justice.[117] The remedy of compensation typically 'takes the form of monetary awards for any economically assessable harm, including for material damage or loss of earnings, lost opportunities (employment, education), physical or mental harm, moral damage, and costs for expert or medical assistance.'[118] In the context of electoral justice cases, compensation entails a monetary award of a

[113] Ref No. 2 of 2017.
[114] Act No. 120 of 2016.
[115] *Media Council of Tanzania* (n 102) para 5.
[116] Ibid para 118.
[117] *Lohé Issa Konaté v Burkina Faso* Application No. 004/2013 para 60; *Zongo v Burkina Faso* Application No. 013/2011 para 11; *Tribert Ayabatwa Rujugiro v Rwanda* Ref No. 53 of 2021.
[118] African Court of Human and Peoples' Rights, *Comparative Study on the Law and Practice of Reparations for Human Rights Violations* (2019) ix.

fixed sum to redress the harm suffered by the victims as a result of violation of electoral rights. The legal basis for compensation orders by the African Court is premised on Article 27 of the African Court Protocol which empowers it, where it has found a violation, "to make appropriate orders to remedy the violation, including the payment of fair compensation or reparation."

A more explicit basis for compensation as a remedy is found in Article 63(1) of the American Convention on Human Rights, which provides:

> If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or right or freedom be remedied and that fair compensation be paid to the injured party.

The EACJ has in its recent jurisprudence on electoral disputes given orders of compensation as relief in cases where rights were found to have been violated by the respondent state. A case in point is *Martha Wangari Karua v Attorney General of Kenya* where the applicant alleged that her fundamental rights had been violated. In its decision the Court found that the applicant's rights had been violated and ordered the Government of Kenya to pay her compensation of USD 10,000.[119] The section below discusses this trend and other emerging standards in the judicial clarification of access to electoral justice by the EACJ and the African Court.

[119] Reference No. 20 of 2019.

4. Judicial Clarification Of Access To Electoral Justice By The African Court And The East African Court Of Justice: Emerging Standards

Africa's supranational courts have had occasion to adjudicate cases concerning alleged violations of human rights or community norms in the context of elections and other related democratic processes.[120] These include cases in which the applicants claim that election-related violations of human rights occurred before, during and after the electioneering period. In line with the scope of the present article, this section critically examines the relevant practice of the African Court and the East African Court of Justice to demonstrate the ways in which these supranational courts have elaborated on access to electoral justice.

The objective of the analysis in this section is to identify the emerging normative standards on electoral justice which have been developed by these two courts. To achieve that objective, this section focuses on seven thematic aspects: (i) the right to vote and participate in democratic processes; (ii) the right to stand for an elective position; (iii) freedom of association and expression; (iv) composition and conduct of election supervision bodies; (v) right to equality and gender representation quotas; (vi) the right to appellate review of disputed election results; and (vii) terms limits for presidential and legislative candidates. The discussion of these thematic aspects is followed by a brief synthesis of the emerging standards on electoral justice.

[120] Ebobrah & Lando (n 12).

4.1 Right to Vote and Participate in Democratic Processes

The ability to vote freely for one's political representatives lies at the heart of the democratic enterprise. Indeed, the right to vote and participate in democratic processes is a key guarantee that states must deliver to their citizens. The UN Human Rights Committee has emphasized that: "States must take effective measures to ensure that all persons entitled to vote are able to exercise that right."[121] This means that states are obligated to ensure that legislative provisions and administrative directives do not curtail the enjoyment of the voting rights of all persons who are legally entitled to vote.

A good illustration of this is the decision of the African Court in *Houngue Éric Noudehouenou v Republic of Benin*.[122] The applicant in that case challenged a national law that required political parties to pay 249 million CFA francs to be registered to field candidates in the elections. That law also excluded persons not belonging to registered political parties from participating in the elections. The African Court held that this practice violates the right to political association and participation as guaranteed by Article 12 of the African Charter.[123] The Court further declared that the process of constitutional amendment to be invalid for breaching the principle of national consensus, which is paramount importance and deserving of respect.[124]

The right to vote and participate in democratic processes was also considered in the case of *Ibrahim Ben Mohamed Ben Ibrahim Belguith v*

[121] General Comment No. 25 (n 35) para 11.
[122] [2021].
[123] Ibid para 79.
[124] Ibid para 119.

Republic of Tunisia.[125] The applicants in that case challenged unilateral presidential decrees which, inter alia, suspended the powers of Parliament and disrupted the functions of elected officials. The Court held that it constituted a violation of the right of citizens to participate in the conduct of public affairs under the Article 13(1) of the African Charter.[126] It also held that failure by the State to operationalize its Constitutional Court thus enabling citizens to challenge the constitutionality of unilateral presidential decrees violated their right to participate in the political affairs of their country directly or through freely chosen representatives.[127]

The African Court has held that the conduct of the state agents which is designed to interfere with the right to vote and participate in democratic processes constitutes violations of the core political rights. An example of such state-sponsored conduct can be seen in the case of *Kouassi Kouamé Patrice and Baba Sylla v Republic of Côte d'Ivoire*.[128] The applicant alleged that state agents had confiscated the duplicates of vote collation sheets and expelled some candidates' representatives from the vote tallying station. The Court found that the confiscation of duplicates of vote collation sheets and the expulsion of representatives of candidates constituted a violation of (i) the right to vote under Article 13(1) of the African Charter and (ii) the right to effective participation of the applicants' representatives in the democratic process under Articles 3 and 4 of the ACDEG.[129]

[125] [2022].
[126] Ibid para 122.
[127] Ibid.
[128] [2022].
[129] Ibid.

4.2 Right to Stand for an Elective Position and the Opportunity to be Nominated

A recurrent issue that Africa's regional and sub-regional courts have tackled involves restrictions on the right to stand for an elective position and the opportunity to be nominated. That issue was considered by the EACJ in *Tanganyika Law Society and Another; and Christopher Mtikila and Others v Tanzania*.[130] In that case the EACJ addressed the issue of whether a domestic law that prohibited independent candidates from standing for election at all levels constituted a violation of the right to political participation in the national electoral process.

Domestic legal restrictions on the right to stand for an elective position featured again before the African Court in the case of *Noudehouenou v Republic of Benin*.[131] The applicants in that case challenged the validity of a constitutional amendment process on the ground that it did not meet the requirement of national consensus.[132] Closely related to the right to stand for an elective position is access to the opportunity to be nominated by a political party to serve in a representative capacity. As well as those who are directly elected, provision is usually made for political parties to nominate individuals to represent particular interest groups. The challenge then arises when political parties for reasons of expedience rather than merit exclude certain deserving individuals from the nominations list. So far there have been no cases before the EACJ or the African Court on this issue, but it is to be expected that such matters will be brought before these courts in the near future.

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[130] *Law Society of Tanganyika and Rev Christopher Mtikila* (n 23).
[131] Application No. 028/2020.
[132] Ibid para 7.

4.3 Freedom of Association and Expression in Electioneering

Africa's regional and sub-regional courts have also responded to allegations of curtailment by states of freedom of association and expression during the electioneering period. One such instance can be drawn from the decision of the East African Court of Justice in *Burundian Journalists Union v Attorney General of the Republic of Burundi*.[133] In that case, the applicant challenged Burundi Press Law No. 1/11 which introduced a mandatory accreditation scheme for journalists to obtain a press card as a prerequisite to practising their profession. The EACJ held that the impugned law violated freedom of expression.[134] The Court's reasoning was based on the fact that press freedom and freedom of expression are 'essential components of democracy.'[135] On that basis the Court found that 'under Articles 6(d) and 7(2) [of the EAC Treaty], democracy must of necessity include adherence to press freedom [and] free press goes hand in hand with the principles of accountability and transparency which are also entrenched in Articles 6(d) and 7(2).'[136]

Another example of judicial elaboration of the normative standards of freedom of association and expression in the context of elections is found in the African Court's decision in *Ajavon v Benin*.[137] The African Court on Human and Peoples' Rights ruled that the Beninese government violated various rights under the African Charter on Human and Peoples' Rights and the International Covenant on Civil and Political Rights. The case was brought by Sébastien Germain

[133] Reference No. 7 of 2013.
[134] Ibid para 123.
[135] Ibid para 58.
[136] Ibid para 83.
[137] Application No. 062/2019 and 027/2020.

Marie Aïkoué Ajavon, a Beninese businessman living in France, challenging laws in Benin that restricted political alliances, independent candidature, and imposed residency requirements. The Court found violations of the rights to freedom of association, free participation in government, and non-discrimination. It ordered Benin to repeal certain laws but upheld restrictions on digital expression to prevent racial and xenophobic insults. The decision clarified that limitations on the right to strike were a breach of the principle of non-regression, and while some restrictions on freedom of assembly were justified, others on political associations were not.[138] The emerging jurisprudence of the EACJ and African Court is consistent with comparable international jurisprudence. In its General Comment No. 25 the Human Rights Committee stated that: 'in order to ensure the full enjoyment of rights protected by article 25, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.'[139]

4.4 Composition and Conduct of Election Supervision Bodies

Due to their role as umpires and facilitators of free, fair and verifiable elections, the composition and conduct of election supervision bodies inevitably become deeply contested issues. And these issues have been raised on a number of occasions for resolution by Africa's continental and sub-regional courts. The first merits decision by the African Court on this issue is *Actions pour la Protection des Droits de l'Homme (APDH) v Cote d'Ivoire* which involved a challenge against a

[138] Ibid.
[139] General Comment No. 25 (n 35) para 25.

new legislation on the constitution of the Electoral Commission of Côte d'Ivoire.[140]

The applicant in the *APDH* case sought the review of Law No 2014–335, which allowed personal representatives of the presidents and the leader of the National Assembly to be members of the national electoral body. The applicant argued that the challenged law violated (i) the legal obligation to establish an independent and impartial electoral body,[141] and (ii) the obligation to protect the right to equality before the law and equal protection by the law.[142] The ACtHPR found that the challenged legislation was inconsistent with the African Charter, the African Democracy Charter and the ECOWAS Protocol of Democracy. It accordingly ordered Côte d'Ivoire to amend its domestic laws to make it compliant with specific provisions of these treaty laws.

This was illustrated in the case of *Suy Bi Gohore Emile and Others v Côte'd Ivoire*.[143] In *Suy Bi Gohore* the applicants contended that, while the state had modified the law governing the national electoral body in line with the African Court's order in the *APDH* case,[144] it failed to comply fully with the obligation to establish an independent and impartial electoral management body in terms of Article 17 of the African Democracy Charter.[145] The African Court found that the lack of independence and impartiality of the electoral management body

[140] Application No. 001/2014.
[141] ACDEG, art 17.
[142] ACDEG, art 10(3); African Charter, art 3.
[143] Application No. 044/2019.
[144] Ibid.
[145] ACDEG, art 17.

and the ministerial control over the electoral process violated the applicant's right to be elected in transparent elections.

A more recent judicial examination of electoral supervision bodies by the African Court is found in its decision in *Oumar Mariko v Republic of Mali*.[146] The applicant in that case, who had been a presidential candidate in the 2018 election, argued that the composition of the election body violated the state's obligation to establish an independent and impartial electoral body.[147] The applicant further alleged that the devolution of the election management function to two other sub-national bodies constituted a breach of the State's obligation to provide voter lists in a transparent manner.[148] In particular, the applicant argued that the impugned national elections law, which devolved the election management to two other bodies, established disparate electoral management bodies with overlapping jurisdictions.[149]

The African Court held that the 'overlapping jurisdictions of the various bodies provided for in the Election Law, and the lack of transparency in their relations, have a negative impact on the independence and impartiality of the INEC, which as an electoral body already has sufficiently clear attributions.'[150] Hence, the Court found that Mali had violated its obligation to establish and strengthen

[146] Application No. 029/2018, Judgment of 24 March 2022.
[147] Ibid para 4.
[148] Ibid para 5.
[149] Ibid para 5.
[150] Ibid para 124.

electoral boundaries under Article 17(1) of the African Democracy Charter and Article 3 of the ECOWAS Protocol of Democracy.[151]

4.5 Right to Equality and Gender Representation Quotas

The right to equality and the related issue of gender representation quotas in elections have also been canvassed by Africa's continental and sub-regional courts. It is worth recalling that the basis of claims of violations of equal gender representation in elections is the African Women's Protocol, which guarantees women's equal right to participation in the political and decision-making processes. Article 9 of the African Women's Protocol provides:

1. States Parties shall take specific positive action to promote participative governance and the equal participation of women in the political life of their countries through affirmative action, enabling national legislation and other measures to ensure that:
   a) Women participate without any discrimination in all electoral processes;
   b) Women are represented equally in at all levels with men in all electoral processes;
   c) Women are equal partners with men at all levels of development and implementation of State policies and development programmes.
2. States Parties shall ensure increased and effective representation and participation of women at all levels of decision-making.

[151] Ibid para 126.

The only relevant judicial decision on equality and gender representation quotas thus far from the selected supranational courts in the present study is *Among A Anita v Attorney General of Uganda and Secretary General of the East African Community*.[152] In that case the applicant challenged the legality of Rule 13(1) of the Rules of Procedure for the Election of Members of the East African Legislative Assembly, 2012. She argued that the impugned rules neither catered for nor guaranteed representation in the EALA for the groups identified in Article 50(1) of the EAC Treaty.[153] These groups include women, persons with disabilities and youth. The Court found that 'the Rules of Procedure save for Rule 13(1) and (2) of Appendix B are, in substance, consistent with the Treaty provisions.'[154]

4.6 Right to Credible Elections, Appellate Review of Disputed Election Results, and Judicial Independence

Whenever electoral outcomes are disputed before a judicial forum, three interrelated claims are frequently raised by the complainant. The first is the violation of the right to credible elections, the need for review of disputed election results and alleged shortfalls of judicial independence. In *Kouassi Kouamé Patrice and Baba Sylla v Republic of Côte d'Ivoire* the applicants, who had been candidates in the 2021 parliamentary election, challenged the independence and impartiality of the Constitutional Council.[155] They alleged that the composition and procedure of appointing members of the Constitutional Council violated Article 7(1)(d) and Article 26 of the

[152] Reference No. 6 of 2012.
[153] Ibid pg 4.
[154] Ibid pg 31.
[155] Application No. 015/2021.

African Charter, as well as Article 17 of ACDEG[156] and Article 3 of the ECOWAS Democracy Protocol.[157] The Court found no evidence that there was direct or indirect inappropriate interference with the Constitutional Council by the executive or the ruling party.[158] Hence, the Court found no violation of the rights claimed.[159]

A second claim that is often raised by parties disputing election outcomes is breach of the right of appellate review of decisions of electoral management bodies and judicial bodies. A case that captures this claim is *Jebra Kambole v United Republic of Tanzania*.[160] The applicant in that case challenged the provisions of Article 41(7) of the Constitution of Tanzania, which precluded courts from adjudicating disputed presidential election results after the electoral body had declared a winner, on the grounds that it violated the rights to be heard, to equality and access to justice.

The African Court's decision in the *Jebra Kambole* case emphasized the critical importance to a democratic society of mechanisms through which citizens can directly challenge contested presidential election results in court. More specifically, the Court observed that 'the right to have one's case heard and does not cease to exist after the completion of appellate proceedings. In circumstances where there are cogent reasons to believe that the findings of the trial or appellate

[156] ACDEG, s 17.
[157] ECOWAS Democracy Protocol, art 3.
[158] *Kouassi Kouamé Patrice* (n 117).
[159] Ibid.
[160] Application No. 018/2018, Judgment of 15 July 2020 (2020) 4 AfCLR 460.

courts are no longer valid the right to be heard requires that a mechanism to review such findings should be put in place.'[161]

The East African Court of Justice has similarly stressed the importance of the availability of appellate review of disputed electoral outcomes. One of its more prominent decisions in this regard is *Martha Wangari Karua v Attorney General of Kenya* where the applicant challenged the Supreme Court of Kenya's decision that it could not entertain an election petition after the lapse of the six months period provided by the Elections Act for hearing such matters.[162] The EACJ held that the decision of the Supreme Court of Kenya was contrary to the right of access to justice and fair trial guarantees. It asserted, "This Court is well within the purview of its mandate to interrogate the decision of the Supreme Court of Kenya that has been impugned in this Reference, with a view to determining its compliance with the Treaty".[163]

Another decision of the EACJ on the issue of access to appellate review of disputed election results is *Sitenda Sebalu v Attorney General of Uganda* where the applicant argued that he had the right of appeal before the EACJ.[164] The applicant in *Sebalu*, who had filed an unsuccessful election petition before the Supreme Court of Uganda, sought to invoke the appellate review jurisdiction of the EACJ on the basis of Article 27(1).[165] While the EACJ disallowed the argument that

[161] Ibid para 96.
[162] *Martha Wangari Karua* (n 108).
[163] Ibid para 27.
[164] Reference No. 1 of 2010.
[165] EAC Treaty, art 27(1): 'The Court shall initially have jurisdiction over the interpretation and application of this Treaty: Provided that the Court's jurisdiction to interpret under this paragraph shall not include the

it could entertain appeals against apex domestic courts of Partner States, it held that the delay in implementing the appellate jurisdiction violated the principle of good governance under Article 6 of the EAC Treaty.[166]

4.7 Term Limits for Presidential and Legislative Candidates

The question of term limits for presidential candidates presents controversial issues for electoral governance in Africa. That issue has not yet been adjudicated by the African Court. The East African Court of Justice, in contrast to the African Court, has dealt with this issue in extensive detail. One of its earlier decisions on this issue is *Legal Brains Trust v Attorney General of Uganda* which concerned the term limits and eligibility for re-election of members of EALA.[167] The relevant issue was whether Article 51(1) of the EAC Treaty means that a member of EALA can only hold office for a maximum of two terms. In its judgment, the EACJ reasoned that Article 51(1) "means that upon election to office, a member serves five years and he or she is then eligible for re-election for a further term of five years. It means that he or she can even serve only one term of five years if he or she is not re-elected. The total period is ten years."[168]

More recently, the East African Court of Justice has expounded further on the legal standards relating to the term limits of sitting presidents in the context of a constitutional review to extend those limits in *East African Civil Society Organisations Forum v The Attorney*

application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States.'

[166] *Sebalu* (n 144)

[167] Appeal No. 4 of 2012.

[168] Ibid pg 23.

General of the Republic of Burundi.[169] There, the court was asked to determine the consistency with the EAC Treaty of a decision of the Constitutional Court of Burundi which held that the incumbent president was eligible to run for a third term.[170] Although the Court did not rule on the issue of term limits, it confirmed that it has a duty to evaluate whether election-related decisions of domestic courts in Partner States comply with the rule of law and good governance as enshrined in the EAC Treaty.

4.8 Synthesis of Emerging Standards on Electoral Justice

4.8.1 Inclusivity and accessibility

The emerging standards on electoral justice underscore the importance of ensuring inclusivity and accessibility in electoral processes. This involves implementing measures that enable all eligible citizens, including marginalized and vulnerable groups, to participate freely in the electoral system. Electoral justice standards advocate for removing barriers to entry, promoting equal representation, and addressing any systemic discrimination that could hinder individuals from exercising their voting rights.[171]

4.8.2 Transparency and fairness

The standards also emphasize the critical role of transparency and fairness in electoral practices. To uphold electoral justice, there is a

[169] Reference No. 2 of 2015.
[170] Ibid para 4.
[171] Aclu, 'Why Access to Voting Is Key to Systemic Equality: ACLU' (American Civil Liberties Union, 6 October 2023) https://www.aclu.org/news/voting-rights/why-access-to-voting-is-key-to-systemic-equality accessed 24 January 2024

need for transparent electoral laws and procedures, fair delineation of electoral boundaries, and impartial oversight mechanisms. This ensures that the electoral process is conducted openly, allowing citizens to have confidence in the fairness of the outcomes and reducing the potential for disputes or challenges.

4.8.3 Legal framework and rule of law

The standards on electoral justice also highlight the significance of a strong legal framework to underpin electoral justice. This involves enacting and enforcing laws that safeguard electoral processes, protect the rights of voters and candidates, and establish clear mechanisms for dispute resolution. Upholding the rule of law in electoral matters is crucial for fostering trust in the democratic process and maintaining the integrity of elections.[172]

4.8.4 Accountability and remedies

An essential aspect of the emerging standards on electoral justice revolves around establishing accountability mechanisms and effective remedies for electoral disputes. This includes holding individuals or entities accountable for electoral malpractices, ensuring that electoral institutions operate transparently, and providing accessible avenues for addressing grievances. Robust accountability measures contribute to the overall credibility of the electoral system.

4.8.5 International standards and cooperation

The emerging standards on electoral justice recognize the importance of aligning electoral practices with international standards and

[172] Lenaerts K, 'Upholding the Rule of Law through Judicial Dialogue' [2019] Yearbook of European Law

fostering cooperation among nations. By adhering to established global norms and collaborating on best practices, countries can enhance the credibility of their electoral processes. International cooperation also provides a platform for sharing experiences, resources, and expertise, contributing to the continuous improvement of electoral systems worldwide.

5. Domestic Effects of the Electoral Jurisprudence of Africa's Continental and Sub-Regional Courts

Having identified the emerging normative standards on access to electoral justice developed by the African Court and the East African Court of Justice, the next logical question concerns what the domestic effects of these jurisprudential contributions have been.[173] This section explores the responses by African governments to decisions of African continental and sub-regional courts. In particular, the following responses to these courts are discussed: (i) reliance by national courts on their case law; (ii) compliance by states with judicial orders; (iii) resistance by states to judicial orders; and (iv) pre-emptive avoidance action by national legislatures.

This section considers the ways in which the jurisprudence of Africa's regional and sub-regional courts have had varying effects on the right to political participation and electoral justice at the domestic level. In particular, it analyzes the domestic reception of election-related judgments issued by Africa's supranational courts along four themes: reliance; compliance; resistance; and avoidance.

[173] Witt (n 100).

5.1 Reliance by National Courts on the Case Law of Africa's Continental and Sub-regional Courts

Courts of law at the national level have long had a crucial role in giving effect to electoral rights and developing legal norms on access to electoral justice.[174] A more recent trend is the tendency by national courts to be influenced by the jurisprudence of Africa's continental and sub-regional courts.[175] The courts in Uganda have relied on more than one occasion on the case law of the East African Court of Justice. One example is the decision of the Uganda Constitutional Court in *Jacob Oulanyah v Attorney General*.[176] In that case the petitioner challenged Rule 11(1) of the Rules of Procedure of the Parliament of Uganda which prevented independent candidates from standing for election to the East African Legislative Assembly. Specifically, the petitioner argued that those rules violated the right to participate in elections and freedom of association.[177]

Another instance of reliance by Ugandan courts on the case law of the EACJ is *Akidi Margaret v Adong Lilly and the Electoral Commission*[178] where the petitioner challenged election results on the ground that it was substantially tainted by the commission of electoral offences and non-compliance with election laws. The Ugandan High Court relied

[174] Obrien Kaaba, 'The Challenges of Adjudicating Presidential Election Petitions in Domestic Courts in Africa' (2015) 5 African Human Rights Law Journal 3.
[175] Bonolo Ramadi Dinokopila, 'The Impact of Regional and Sub-regional Courts and Tribunals on Constitutional Adjudication in Africa' in Charles M Fombad (ed), *Constitutional Adjudication in Africa* (OUP 2017).
[176] [2008] Constitutional Petition No. 28 of 2006.
[177] Ibid.
[178] [2011] UGHC 94.

on the case law of the EACJ, namely the judgments in *Sitenda Sebalu*[179] and *Anyang' Nyong'o*[180] during in its final decision.

Similar judicial reliance on the case law of the EACJ is evident in *Toolit Simon Akecha v Oulanyah Jacob L'Okori and Electoral Commission*.[181] The appellant in that case challenged the outcome of elections on the grounds that non-compliance with election laws and widespread commission of electoral offences affected the election results in a substantial manner.[182] In its decision the High Court of Uganda cited the *Sitenda Sebalu* and *Anyang' Nyong'o* judgments of the EACJ to support the applicability of Article 123 of the EAC Treaty.

The judicial decisions of the ACtHPR have also found acceptance in the practice of South African domestic courts. One notable instance is apparent in both the analysis and decision of the Constitutional Court of South Africa in *New Nation Movement NPC and Others v President of the Republic of South Africa and Others*.[183] *New Nation Movement NPC* involved a challenge against provisions of national law that excluded South African citizens from standing for election as Members of the National Assembly and provincial legislators without being members of a political party. In its decision, the Constitutional Court relied on the reasoning of the African Court in *Law Society of Tanganyika*.[184]

[179] *Sitenda Sebalu* (n 153).
[180] *Akidi Margaret* (n 165).
[181] [2011] UGHC 97.
[182] Ibid para.
[183] [2020] ZACC 11.
[184] *Law Society of Tanganyika and Rev Christopher Mtikila* (n 23).

5.2 Compliance by States with Judicial Orders of Africa's Continental and Sub-regional Courts

The reliance by national courts on the election-related case law of Africa's continental and sub-regional courts is complemented by the positive action of other organs of government to comply with judicial orders of these supranational courts.[185] In particular, there have been instances where the executive and the legislature have taken positive steps calculated to comply with judicial orders.[186] Three examples can be given to demonstrate the compliance by states with the election-related judicial orders of Africa's continental and sub-regional courts. The first example is drawn from the response of Burundi to the decision of the East African Court of Justice in *Burundian Journalists Union v Attorney General of Burundi*.[187] The initial effect of that decision was that it caused Burundi's Parliament to propose amendments to the Press Law to expunge the impugned provisions in compliance with the decision of the EACJ. After being approved by Burundi's Senate a new legislation, which complied fully with the EAC Treaty, was promulgated. Yet, as discussed in more detail below,[188] that record of compliance was nullified by the subsequent bad faith conduct of Burundian state actors.

Another example of compliance by states with the judicial orders of Africa's supranational courts in election-related cases is the response

[185] Christof Heyns et al, 'The Right to Political Participation in sub-Saharan Africa' (2019) 8 *Global Journal of Comparative Law* 128, 143–146.
[186] Trésor Makunya, 'Overcoming Challenges to the Adjudication of Election-Related Disputes at the African Commission on Human and Peoples' Rights: Perspectives from the Ngandu Case' (2022) 22 African Human Rights Law Journal 379, 400.
[187] *Burundian Journalists Union* (n 122).
[188] See section 5.3 below.

of Côte d'Ivoire to one of the orders issued by the African Court in *APDH*. [189] On 28 August 2019, Côte d'Ivoire submitted a communication to the Court confirming that it had adopted new legislation to rectify the impugned composition of the Electoral Commission as specified in the *APDH* judgment.[190]

A third and related example of compliance by states with election-related judicial orders of Africa's supranational courts is found in the response of Côte d'Ivoire to the African Court's order in *Suy Bi Gohore Emile*.[191] The state of Cote d'Ivoire took specific measures to give effect to the order of the African Court. In particular, the State amended and reconstituted composition of the IEC which led to escalation to the courts. The court held that the respondent State had not violated its obligation to execute the judgment of the Court provided under Article 30 of the Protocol.

A further example of compliance can be drawn from the action of the Government of Tanzania, which adopted a Draft Constitution in 2016 in order to comply with the order of the African Court in the *Rev Christopher Mtikila* case.[192] In that case the African Court had directed the relevant authorities in Tanzania to re-examine its election laws since, the current Tanzanian election laws prohibiting independent candidates from running for public office are in breach of various articles of the African Charter on Human and Peoples' Rights, the International Convention of Civil and Political Rights, the Universal Declaration on Human Rights and the rule of law**.** The case sought to

[189] *APDH* (n 89).
[190] Ibid.
[191] *Suy Bi Gohore Emile* (n 132).
[192] *Law Society of Tanganyika and Rev Christopher Mtikila* (n 23).

establish generally if the rights and fundamental freedoms guaranteed in Part III, Chapter One of the Constitution of the United Republic, 1977 were immutable based on factual issues that arose. The inquiry was prompted by a set of amendments to the Constitution vide the Eight Constitutional Amendment Act, 1992 (No. 4).

5.3 Resistance by States to Judicial Orders of Africa's Continental and Sub-regional Courts

As well as positive compliance action by states, there have been some instances of determined resistance by states to the implementation of the election-related judicial orders of Africa's supranational courts.[193] In the recent past there has been a trend of threatened or actual disengagement by states from the ACtHPR.[194] States may consider disengaging for a variety of reasons, including as perceived loss of sovereignty, political disputes, uncertainty about the court's efficacy, resource limitations, perceived bias, or shifts in the goals of foreign policy and leadership.

An instructive example of this is reaction of the Kenyan government in the aftermath of the decision in *Anyang' Nyong'o v Attorney General of Kenya* where the Court held that the National Assembly of Kenya did not undertake an election within the meaning of Article 50 of the

[193] For a detailed review, see Karen J Alter, James T Gathii & Laurence R Helfer, 'Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences' (2016) 27 European Journal of International Law 293–328.
[194] SH Adjolohoun, 'A Crisis of Design and Judicial Practice? Curbing State Disengagement from the African Court on Human and Peoples' Rights' (2020) 20 African Human Rights Law Journal 7.

Treaty, and that the election rules in issue infringe the same Article. The Court ordered that the claimants have costs of the reference.[195]
Another trend that reflects resistance to judicial decisions of sub-regional courts is the cynical show of cooperation by states immediately after the judgment only to later make an about face and act in bad faith. A good example of this tendency is conduct of the Tanzanian government in the wake of the EACJ judgment in *Media Council of Tanzania*.[196] The Tanzanian government initially made a commitment to engage stakeholders in law reform efforts to support independent journalism. Despite that, the government subsequently conducted a crackdown against journalists and media professionals.[197] Shortly thereafter the government sponsored a bill in the Tanzanian Parliament which sought, inter alia, to introduce criminal sanctions for individuals who failed to comply with an onerous administrative process before publishing 'non-official' statistics that challenge government data.[198]

5.4 Pre-emptive Avoidance Action by National Legislatures

Closely related to resistance by states to election-related judicial orders of Africa's continental and sub-regional courts is the more subtle response of pre-emptive avoidance. Unlike resistance where state actors conduct themselves in ways that undermine the respective judicial orders, the pre-emptive avoidance response

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[195] *Anyong Nyong'o*.
[196] *Media Council of Tanzania* (n 109).
[197] Wisdom J Tettey, 'The Media and Democratization in Africa: Contributions, Constraints and Concerns of the Private Press' (2001) 23 *Media, Culture & Society* 5–31.
[198] Oryem Nyeko, 'Tanzania Drops Threat of Prison over Publishing Independent Statistics: Amendment to Statistics Act a Step in Right Direction for Free Expression' (2019) *Human Rights Watch* 3.

circumvents the process to avoid submitting to the jurisdiction of the relevant court. Two cases will be used to illustrate pre-emptive avoidance action by national legislatures. The first one is the decision in *Democratic Party and Another v Secretary General of the East African Community and Another*.[199] Immediately after that reference was filed the Ugandan Parliament was quickly mobilized to pass legislation whose effect was calculated to circumvent the jurisdiction of the EACJ.

The second example is the decision in *Plaxeda Rugumba v Attorney General of Rwanda*.[200] The applicant argued that the arbitrary arrest and detention without trial of her brother violated Articles 6(d) and 7(2) of the EAC Treaty. Shortly after the filing of that reference the state produced the applicant's brother for trial before the Military High Court, which declared that the circumstances of his detention were unlawful.[201] The Military High Court thereafter issued a valid detention order in compliance with Rwandan criminal law.

6. Conclusion

This article has considered the jurisprudence of Africa's continental and sub-regional courts that have adjudicated rights claims arising from election-related processes. The aim of the article was to analyze in what ways and to what effect Africa's continental and sub-regional courts have clarified the standards of access to electoral justice. Its core argument has been that litigants have found Africa's continental and sub-regional courts to be useful avenue for pursuing electoral justice, particularly when prospects for securing justice at the national

[199] Appeal No. 1 of 2014.
[200] Appeal No. 1 of 2012.
[201] Appellate Judgment para 33.

level are doubtful. This is supported by the number of appreciable number of election-related cases that have been decided, as well as those that are pending determination. A secondary argument, which is borne out by the case law analyzed, is that there is growing reliance by litigants on African treaty instruments and increased receptivity by domestic courts in Africa to the electoral jurisprudence emanating from Africa's continental and sub-regional courts.

The main finding of this article is that Africa's continental and regional courts have contributed significantly to the protection of electoral justice in at least four ways. First, they have availed an avenue for accessing justice in controversial cases where domestic judicial forums are unsuited or compromised. Secondly, they have developed authoritative interpretations of key election-related rights and concepts which will continue to guide courts in Africa. Thirdly, Africa's continental and sub-regional courts have elaborated the legal content of electoral rights and their respective implications in judicial decisions. These salient contributions have been demonstrated with reference to specific case law.

Despite the creditable contribution of Africa's continental and sub-regional courts to electoral justice in particular, the response by national governments has not always been positive. Another concern is the lack of uniformity in some similar-fact cases which may result in confusion. Although, on one view, this difference in opinions/decisions/reasoning is problematic, another view suggests that these are teething problems given the relative novelty of the electoral rights claims involved. Proponents of the latter view contend that differing opinions at the initial stage are useful in

developing greater consistency and complementarity in future decisions.

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Forensic DNA Technology and Criminal Justice Reform in Kenya: The Case for a National DNA Database Legislation

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Abstract

This paper engages in a comprehensive exploration of the intricate interplay between Forensic DNA Technology, criminal justice reform, and the imperative for a National DNA Database Legislation in Kenya. Beginning with an analysis of the symbiotic relationship between law and science, the transformative potential of DNA evidence in modern investigations is unveiled. The discourse delves into the pressing necessity for a national DNA database, underscored by the surge in sexual and gender-based crimes that demand advanced methods for deterrence and resolution. Challenges stemming from insufficient forensic equipment, wrongful convictions, and gaps within the legal framework are illuminated, emphasizing the urgency of reform.

Drawing lessons from international exemplars like South Africa and the United Kingdom, the paper underscores the themes of privacy, human rights, proportionality, and accreditation as pivotal guides in crafting a balanced legislative framework. The discussion culminates in a call for a robust National DNA Database Legislation in Kenya that harmonizes law, science, ethics, and human rights. The way forward necessitates resource allocation, collaborative efforts, and international partnerships to establish a functional DNA database while upholding the principles of justice, accountability, and individual dignity. In sum, this paper seeks to equip Kenya with insights to navigate the intricate path of DNA technology

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integration within the criminal justice system, ultimately achieving a harmonious equilibrium between law enforcement and individual rights.
Key Words*: Forensic-DNA-Technology, Criminal-Justice, Reform, Kenya, National-DNA-Database- Legislation.*

1. Introduction

In the dynamic landscape of criminal justice reform and technological advancements, the integration of forensic DNA technology has emerged as a pivotal force in reshaping investigative approaches, evidence presentation, and justice administration.[1] This discourse delves into the intricate interplay between Forensic DNA Technology and the imperative for criminal justice reform, with a specific focus on the case of Kenya. As the nation contemplates the establishment of a National DNA Database Legislation, a comprehensive exploration of its legal, scientific, ethical, and practical dimensions is essential to forge a path that balances the imperatives of law enforcement with the preservation of individual rights, privacy, and societal trust.

This discussion commences by illuminating the nexus between law and science within the context of evidence presentation in criminal justice. It highlights the transformative role that Forensic DNA Technology has assumed, becoming a cornerstone in the quest for accurate and efficient criminal investigations. Subsequently, the discourse pivots toward an analysis of the pressing necessity for a national DNA database in Kenya. This examination is framed by the persistent rise in sexual and gender-based crimes, reflecting the

[1]Lum, C., & Isaac, W. (2016) "DNA Databases in Criminal Justice: Mitigating Impacts on Racial and Ethnic Minority Communities" Annual *Review of Criminology*.

urgency of adopting advanced methods to apprehend and prevent such offenses.

The inefficiencies stemming from insufficient forensic equipment and personnel further underscore the exigency of enacting comprehensive DNA legislation. The existence of physical infrastructure without modern equipment and well-trained staff poses a significant hurdle in realizing the full potential of DNA analysis for law enforcement purposes. In this realm, the discussion uncovers the barriers that hinder Kenya's progress, elucidating the need to bridge the gap between archaic methodologies and cutting-edge technologies.

Furthermore, the discourse delves into the poignant concern of wrongful convictions that can arise due to the absence of an efficient DNA database. The exploration of real-life instances where innocents have faced undeserved sentences magnifies the pressing need for a mechanism that can exonerate the innocent and confirm the guilt of the perpetrators.

The narrative then steers into the gaps within the current Kenyan legal framework, revealing shortcomings that hinder the effective utilization of DNA evidence. Outdated laws of evidence, inadequate human rights safeguards, inconsistency in judicial decisions, and vague provisions on cross-border DNA evidence sharing are pivotal aspects that require remediation.

Drawing from international experiences, the discourse turns toward the lessons Kenya can glean from the DNA legislation of countries such as South Africa and the United Kingdom. These exemplars offer invaluable insights into designing a robust legislative framework that

synergizes law, science, and ethics while safeguarding individual rights and privacy.

Amidst these discussions, the significance of privacy, human rights, proportionality, and accreditation emerges as recurring themes. These elements underscore the intricacies of crafting an equitable and efficient DNA database system that can be harnessed as a potent tool for law enforcement without infringing upon the fundamental rights of citizens.

In its entirety, this discourse serves as a comprehensive exploration of the complex tapestry woven between Forensic DNA Technology, criminal justice reform, and the establishment of a National DNA Database Legislation in Kenya. By shedding light on legal lacunae, scientific potential, ethical considerations, and international precedents, this analysis aspires to foster a nuanced understanding that underpins informed decision-making, aligning the nation's pursuit of justice with the preservation of human dignity and societal trust.

2. Law, Science and the Centrality of Forensic DNA Technology in Criminal Justice

2.1 The Nexus of Law and Science in Evidence

Forensic DNA technology plays a crucial role in modern criminal justice systems around the world, including Kenya. The nexus of law and science in evidence is an essential aspect of the criminal justice process, ensuring fair and accurate investigations and adjudications.[2]

[2]Frazier, K. A. (2019) "The Intersection of Science and Law in the Search for Truth: Lessons for Forensic Scientists and Lawyers" Forensic *Science International: Synergy*.

In criminal cases, the ultimate goal is to determine the truth and hold perpetrators accountable while protecting the rights of the accused. To achieve this, the justice system relies on evidence to establish guilt or innocence. However, not all evidence is created equal. Scientific evidence, particularly DNA analysis, holds a unique position due to its accuracy, reliability, and objectivity.[3]

Forensic DNA technology involves the analysis of DNA samples collected from crime scenes, victims, and suspects. DNA, being unique to each individual (except identical twins), serves as a powerful identifier. It can link a suspect to a crime scene or exonerate an innocent person. Its use in criminal investigations has significantly advanced the pursuit of justice.[4]

DNA evidence can conclusively identify individuals who were present at a crime scene, either as suspects or victims. DNA technology has exonerated numerous individuals who were wrongfully convicted, sometimes spending years in prison for crimes they did not commit. DNA profiles stored in databases can help identify suspects based on matches to evidence found at crime scenes or on other victims. In addition, DNA databases can facilitate the connection of crimes committed by the same perpetrator, helping investigators solve cases that may have otherwise remained unsolved.[5]

The integration of forensic DNA technology into the legal system has raised important legal and ethical considerations. It requires a clear understanding of the scientific principles involved and proper

[3] Ibid
[4] Ibid
[5] Ibid

procedures for collecting, handling, analyzing, and preserving DNA evidence. Legal professionals, including judges, prosecutors, and defense attorneys, must be well-versed in the scientific underpinnings of DNA technology to effectively present and evaluate DNA evidence in court.[6]

The admissibility of DNA evidence is often subject to scrutiny during legal proceedings. Courts need to assess whether the scientific methods used to analyze DNA samples are reliable, whether the laboratory conducting the analysis follows appropriate protocols, and whether the evidence was handled and stored correctly to prevent contamination or tampering.[7]

Consequently, forensic DNA technology represents a significant development in criminal justice systems, enhancing the accuracy and fairness of investigations and trials. The intersection of law and science in the form of DNA evidence highlights the need for well-informed legal practitioners and robust legislation to ensure that DNA analysis is conducted properly and that the results are used responsibly and ethically.

2.2 The Pivotal Role of Forensic DNA technology in Criminal Justice

The pivotal role of forensic DNA technology in criminal justice cannot be overstated. It has transformed the way investigations are conducted, trials are adjudicated, and justice is served.[8] Forensic DNA technology is unmatched in its ability to identify individuals

[6] Ibid
[7] Ibid
[8] James, N. (2015) "DNA Testing in Criminal Justice: Background, Current Law, Grants, and Issues" *Congressional Research Service*.

with an extremely high degree of accuracy. By analyzing DNA samples from crime scenes and comparing them to DNA profiles of known individuals, law enforcement can accurately identify perpetrators. [9] Equally important is its role in exonerating the innocent. DNA evidence has led to the release of numerous individuals who were wrongfully convicted, sometimes after spending years behind bars.[10]

DNA databases, both at the national and international levels, enable law enforcement to link crimes committed by the same individual. This is especially valuable in solving cold cases, which are old cases that have remained unsolved for an extended period. By connecting crimes across jurisdictions, DNA databases facilitate the identification and capture of serial offenders who might otherwise have gone undetected.[11]

Furthermore, DNA evidence can serve as a crucial lead in investigations, even when there are no suspects. By analyzing DNA samples found at crime scenes or on victims, law enforcement can create a genetic profile of the suspect and search databases for potential matches. This can narrow down the pool of suspects and help focus investigative efforts.[12] The existence of a National DNA Database can act as a deterrent to potential offenders. The knowledge that their DNA profile will be on record and could potentially link them to future crimes may dissuade individuals from engaging in criminal activities.[13]

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[9] Ibid
[10] Ibid
[11] Ibid
[12] Ibid
[13] Ibid

Forensic DNA analysis is based on scientific principles and is objective and impartial. It does not rely on witness testimony or other potentially biased evidence. This makes DNA technology a critical tool in cases where witness reliability might be questionable.[14]The use of advanced forensic DNA technology provides the public with greater confidence in the criminal justice system. When people see that law enforcement is utilizing accurate and reliable scientific methods to solve crimes and ensure justice, it increases trust in the system.[15]

However, while the benefits of forensic DNA technology are substantial, it is crucial to address privacy concerns and ensure that DNA databases are managed responsibly. Adequate safeguards should be in place to protect the privacy of individuals, prevent misuse of DNA data, and avoid potential discrimination or stigmatization based on genetic information.[16]

In Kenya, enacting a National DNA Database Legislation would formalize the use of forensic DNA technology, establish guidelines for the collection, storage, and use of DNA samples, and provide a legal framework for its responsible application in criminal investigations. Such legislation could further enhance the criminal justice system's capacity to solve crimes, protect the innocent, and ensure a fair and equitable administration of justice.

[14] Ibid
[15] Ibid
[16] Ibid

3. The Necessity of a National DNA Database in Kenya and Gaps in the Law

3.1 Why does Kenya need a National DNA Database?

3.1.1 Rise in Sexual and Gender-Based Crimes

Kenya needs a national DNA database to address the rise in sexual and gender-based crimes, which has become a significant concern in recent years. These crimes, including rape, sexual assault, and domestic violence, have devastating effects on victims and their communities.[17] A well-regulated national DNA database can play a crucial role in combating these crimes and bringing perpetrators to justice.

Sexual and gender-based crimes often involve perpetrators who are known to the victims, making it challenging to identify them through traditional investigative methods.[18] With a national DNA database, DNA samples collected from crime scenes can be compared to a vast pool of profiles, helping law enforcement identify repeat offenders who might have committed similar crimes in the past.[19]

The existence of a national DNA database can act as a strong deterrent to potential offenders. Knowing that their DNA profiles will be stored and used for future comparisons may discourage individuals from

[17] Hattery A and Smith E, Gender, Power, and Violence: Responding to Sexual and Intimate Partner Violence in Society Today (Rowman & Littlefield 2019)

[18] 'Perpetrators of Sexual Violence: Statistics' (RAINN) https://www.rainn.org/statistics/perpetrators-sexual-violence accessed 24 January 2024

[19] Peterson, J. L. (2018) "The Necessity of a DNA Database in Criminal Justice" *Michigan Law Review*.

committing such heinous crimes.[20] DNA evidence is highly reliable and can significantly strengthen the investigation and prosecution of sexual and gender-based crimes. It provides an objective link between the suspect and the crime scene, reducing the reliance on potentially biased witness statements.[21]

Furthermore, in cases of false accusations or mistaken identity, a national DNA database can quickly clear innocent individuals who might be wrongly accused of sexual offenses. By comparing DNA profiles, law enforcement can exclude innocent individuals from the list of suspects.[22] Many sexual offenders are serial perpetrators, committing multiple crimes over time. A national DNA database can help connect seemingly unrelated crimes, potentially leading to the identification and apprehension of serial offenders.[23]

A well-maintained DNA database can enhance the country's forensic capabilities, promoting professionalism and standardization in DNA collection, analysis, and storage.[24]

3.1.2 Insufficient Forensic Equipment and Personnel

One of the significant hurdles Kenya faces in establishing a functional national DNA database is the lack of sufficient forensic equipment and trained personnel. While there might be a forensic laboratory building in place, without proper equipment and an adequately skilled workforce, the potential benefits of such a facility remain

[20] Ibid
[21] Ibid
[22] Ibid
[23] Ibid
[24] Ibid

unrealized.[25] A forensic laboratory relies on specialized equipment for DNA extraction, amplification, sequencing, and analysis. These tools are essential to process and interpret DNA samples accurately. Insufficient or outdated equipment can lead to delays in processing samples, inaccurate results, and compromised forensic analysis.[26]

Forensic DNA analysis requires highly trained scientists who are knowledgeable about the intricacies of DNA technology and analysis. They need to follow strict protocols to ensure the integrity of the samples and prevent contamination. Without a skilled workforce, even the most advanced equipment becomes ineffective. [27] Consequently, the absence of sufficient forensic equipment and personnel has several implications for criminal investigations.

In contrast, modern forensic laboratories with advanced scientific technologies can provide "fraction of a time" results, expediting the analysis process while maintaining accuracy. These state-of-the-art machines employ cutting-edge techniques that drastically reduce analysis time, allowing law enforcement to make timely and informed decisions. Furthermore, such equipment often requires less maintenance, leading to lower operational costs compared to outdated alternatives.[28]

To bridge this gap, Kenya's efforts should be focused on acquiring modern equipment and investing in the training of skilled personnel.

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[25] Zakariyya Sarki, Geshina Ayu (2018). Preparedness and challenges of police in using forensic science: Review of some related literature. *Journal of Social Sciences and Humanities*. 2(14-24)
[26] Ibid
[27] Ibid
[28] Ibid

Adequate financial resources are essential to facilitate the acquisition of advanced technology, the continuous professional development of forensic experts, and the seamless operation of the laboratory.[29] By adopting modern equipment and fostering a well-trained workforce, Kenya can significantly enhance its forensic capabilities, expedite criminal investigations, and lay the groundwork for efficient DNA analysis that aligns with international best practices.[30]

Insufficient forensic equipment and personnel in Kenya's endeavors to establish a National DNA Database also intersects with the critical aspect of accreditation and ISO certification for key institutions like the National Forensics Laboratory and the Government Chemist. These certifications are vital markers of quality assurance and adherence to international standards in forensic analysis.[31]

While the physical infrastructure is in place, a notable challenge lies in achieving accreditation and ISO certification for these key institutions. The absence of modern equipment and adequately trained personnel hampers the ability to meet stringent international requirements for accreditation. Accreditation signifies that an institution's processes, procedures, and results have been independently assessed and meet recognized standards of excellence.[32]

Acknowledging this challenge, it's notable that the US government has been collaborating with the National Police Service and the Directorate of Criminal Investigations (DCI) to adequately prepare

[29] Ibid
[30] Ibid
[31] Ibid
[32] Ibid

for the international accreditation process. The US government's involvement underscores the importance of elevating Kenya's forensic capabilities to global benchmarks.[33]

Achieving accreditation and ISO certification requires the alignment of laboratory practices with international best practices. This includes ensuring that equipment and methodologies meet rigorous scientific and technical standards, enabling accurate and reliable results.

By partnering with international agencies and embracing the assistance provided, Kenya's forensic institutions are taking crucial steps toward enhancing their capabilities. The US government's support in this regard reflects a commitment to equipping Kenyan forensic agencies with the tools and expertise necessary for effective crime investigation and justice administration. The journey towards accreditation and certification is a significant stride in closing the gaps in forensic infrastructure, thereby bolstering the foundation for a functional and reliable National DNA Database.

3.1.3 Wrongful Convictions

DNA technology has proven to be a powerful tool in overturning wrongful convictions and revealing the truth. Inaccurate or unreliable evidence, mistaken eyewitness identifications, false confessions, and inadequate legal representation are some of the factors that can lead to wrongful convictions. A national DNA database can play a vital role in preventing and rectifying such injustices.[34]

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[33] Ibid

[34] Baechler, S., & Margot, P. (2016). Understanding crime and fostering security using forensic science: The example of turning false identity documents into forensic intelligence. *Security Journal*, 29(4), 618-639.

DNA evidence is often referred to as the "gold standard" of forensic evidence due to its high accuracy and reliability.[35] When properly collected, analyzed, and interpreted, DNA evidence can definitively establish the presence or absence of an individual at a crime scene. This scientific certainty has the potential to identify the real perpetrators and exonerate the wrongfully accused.[36]

DNA evidence can conclusively prove the innocence of individuals who have been wrongfully convicted. By comparing DNA profiles from crime scenes to profiles in the database, authorities can identify matches that were not previously possible due to limitations in traditional investigative methods.[37] Furthermore, a national DNA database can facilitate the review of past convictions. If new technology or information comes to light, authorities can reevaluate cases and potentially identify instances of wrongful conviction that went unnoticed.[38] In cases where DNA evidence was not properly considered during the original trial, a national DNA database can prompt the reevaluation of evidence. This helps ensure that only reliable and accurate evidence is used in court.[39]

Furthermore, in some cases, wrongful convictions can be attributed to systemic issues or patterns of misconduct within the criminal justice system. A national DNA database can aid in identifying such patterns and addressing them to prevent future injustices[40]. As law enforcement becomes more aware of the potential for DNA evidence

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35 Ibid
36 Ibid
37 Ibid
38 Ibid
39 Ibid
40 Ibid

to prevent wrongful convictions, investigation practices can evolve to prioritize DNA collection and analysis, thereby reducing the likelihood of inaccurate convictions.

3.2 What Gaps Exist in the Current Kenyan Law?

3.2.1 Outdated Law of Evidence

One significant gap in the current Kenyan law that affects the effective use of forensic DNA technology is the outdated law of evidence. The law of evidence dictates how different types of evidence, including DNA evidence, can be presented, admitted, and evaluated in court. In the context of forensic DNA technology, outdated evidence laws can hinder the proper utilization and presentation of DNA evidence, potentially leading to miscarriages of justice or missed opportunities for accurate convictions and exonerations.[41]

The Law of Evidence Act for instance has no mention of DNA technology or forensic analysis.[42] DNA evidence is complex and requires specialized knowledge to understand its significance. The Kenyan Evidence Act does not adequately address issues related to the admissibility, weight, and reliability of DNA evidence.[43]

Furthermore, DNA evidence requires expert interpretation to explain its significance to the court. Kenyan law does not provide clear guidelines for the admissibility and qualification of expert witnesses

[41] Mbaya, B. (2016). The state of forensic investigations in Kenya. Master's thesis submitted at the University of Nairobi.
[42] Cap 80 Laws of Kenya
[43] Ibid

in DNA analysis.[44]The right to cross-examine witnesses and confront accusers is a cornerstone of the adversarial legal system. Outdated evidence laws such as Kenyan Evidence Act might not account for the challenges of cross-examining DNA experts or addressing the technicalities of DNA analysis.[45]

Addressing the gap created by outdated evidence laws is crucial to fully harnessing the potential of forensic DNA technology in the Kenyan criminal justice system. Legislative reforms that consider the unique challenges and benefits of DNA evidence can enhance the accuracy, fairness, and effectiveness of criminal investigations and trials.

The Penal Code, Section 122 A-122 D comes closest to addressing DNA evidence.

It stipulates the following:

(1)A police officer of or above the rank of inspector may by order in writing require a person suspected of having committed a serious offence to undergo a DNA sampling procedure if there are reasonable grounds to believe that the procedure might produce evidence tending to confirm or disprove that the suspect committed the alleged offence.[46]

[44] Mbaya, B. (2016). The state of forensic investigations in Kenya. Master's thesis submitted at the University of Nairobi.

[45] Ibid

[46] Penal Code, Section 122 A

(2) In this section—

"DNA sampling procedure" means a procedure, carried out by a medical practitioner, consisting of—(a) the taking of a sample of saliva or a sample by buccal swab;(b)the taking of a sample of blood; (c) the taking of a sample of hair from the head or underarm; or (d)the taking of a sample from a fingernail or toenail or from under the nail, for the purpose of performing a test or analysis upon the sample in order to confirm or disprove a supposition concerning the identity of the person who committed a particular crime;[47]

"Serious offence" means an offence punishable by imprisonment for a term of twelve months or more.

Where a suspect in respect of whom an order has been made under section 122A resists compliance with the order, members of the police force, under supervision of an officer of or above the rank of inspector, shall be entitled to use reasonable force in restraining the suspect for the purpose of effecting the procedure.[48]

Nothing in section 122A shall be construed as preventing a suspect from undergoing a procedure by consent, without any order having been made: Provided that every such consent shall be recorded in writing signed by the person giving the consent.[49]Such consent may, where the suspect is a child or an incapable person, be given by the suspect's parent or guardian.[50]

The results of any test or analysis carried out on a sample obtained from a DNA sampling procedure within the

[47] Ibid

[48] Ibid, section 122 B

[49] Ibid, section 122 C

[50] Ibid

> meaning of section 122A shall not be admissible in evidence at the request of the prosecution in any proceedings against the suspect unless an order under section 122A or a consent under 122C is first proven to have been made or given.[51]

The Penal Code sections 122A to 122D of Kenya establish the legal framework for DNA sampling procedures conducted by senior police officers on suspects of serious offenses. While these provisions outline the procedure for obtaining DNA samples and the circumstances under which they can be collected, they are indeed silent on the storage of DNA profiles obtained from these procedures. The absence of specific provisions on DNA profile storage raises several important considerations.

First, The Penal Code provisions address the collection of DNA samples for testing and analysis to confirm or disprove a suspect's involvement in a particular crime. However, there is no explicit mention of how long the DNA profiles obtained through these procedures should be retained, stored, or for what purposes they can be used beyond the immediate investigation.

Secondly, the lack of guidance on DNA profile storage raises concerns about the potential misuse or unauthorized access to individuals' genetic information. Proper safeguards and regulations should be in place to ensure the privacy and data protection of individuals whose DNA profiles have been collected.

Thirdly, internationally recognized best practices for DNA evidence collection and storage recommend clear protocols for handling DNA

[51] Ibid, section 122 D

samples and profiles. These protocols often emphasize the importance of adherence to accreditation standards, quality control, and data security. The storage of DNA profiles raises legal and ethical considerations, particularly regarding the potential impact on an individual's privacy, rights, and personal information. Any future legislation or guidelines should carefully balance law enforcement needs with individual rights.

Finally, if DNA profiles are stored, mechanisms for data sharing, especially across borders, should be clearly defined. International cooperation requires careful attention to legal and ethical considerations.

Given the absence of explicit provisions on DNA profile storage in the current legislation, it becomes important for Kenya to consider addressing this gap through future legal and regulatory measures. A comprehensive and transparent framework should be established to regulate the storage, retention, access, and sharing of DNA profiles. This framework should consider principles such as data security, consent, data protection, oversight, and the balance between law enforcement objectives and individual rights.

By establishing clear guidelines and regulations for the storage of DNA profiles, Kenya can ensure responsible and accountable use of DNA evidence in criminal investigations while safeguarding the privacy and rights of its citizens. Such regulations could draw from international best practices and ensure that any future DNA database operates within legal and ethical boundaries.

3.2.2 Inadequate Human Rights Safeguards

Another significant gap in the current Kenyan law concerning the utilization of forensic DNA technology is the inadequate human rights safeguards. Implementing a national DNA database and using DNA evidence in criminal investigations and trials must be accompanied by robust safeguards to protect individuals' rights and privacy.[52] Without proper safeguards, there's a risk of misuse of DNA data, potential violations of personal privacy, and even discrimination based on genetic information.[53]

DNA information is uniquely personal and carries sensitive genetic data that can reveal details about an individual's health, ancestry, and other personal traits. Inadequate safeguards might lead to unauthorized access, sharing, or misuse of this information, potentially violating individuals' privacy rights.[54]

Inadequate security measures can lead to breaches of the DNA database, resulting in unauthorized access to sensitive genetic information. This could expose individuals to identity theft, discrimination, or other forms of harm.[55] If DNA data falls into the wrong hands, there's a risk of genetic discrimination, where individuals might face discrimination in areas such as employment, insurance, or education based on their genetic predispositions.[56]

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[52] Osse, A. (2016). Police reform in Kenya: a process of 'muddling through'. *Policing and Society*, 26(8), 907-924.

[53] Ibid

[54] Ibid

[55] Ibid

[56] Ibid

Furthermore, improper handling of DNA data or evidence could lead to stigmatization of individuals, particularly if they are wrongly associated with criminal activities due to incomplete or inaccurate analysis. [57] Adequate safeguards should ensure that individuals provide informed consent before their DNA is collected and included in a national database. Without clear consent procedures, there's a risk of involuntary inclusion.[58]

3.2.3 Inconsistency of Judicial Decisions

Another significant gap in the current Kenyan law regarding the use of forensic DNA technology is the inconsistency of judicial decisions related to DNA evidence. Inconsistencies in how different courts interpret and apply DNA evidence can lead to unequal treatment of cases and erode public trust in the criminal justice system.[59]

Inconsistent decisions set uncertain legal precedents. When different courts reach contradictory conclusions about the admissibility or weight of DNA evidence, it creates confusion for legal practitioners and undermines the predictability of outcomes. [60] Inconsistent decisions can lead to unequal treatment of similar cases, resulting in situations where individuals facing similar charges receive vastly different outcomes based on the court's they appear in. This erodes the public's perception of fairness and impartiality.[61]

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[57] Ibid

[58] Ibid

[59] Mbaya, B. (2016). The state of forensic investigations in Kenya. Master's thesis submitted at the University of Nairobi.

[60] Ibid

[61] Ibid

3.2.4 Vague Provisions on Cross-Border Sharing of DNA Evidence

Another significant gap in the current Kenyan law concerning the use of forensic DNA technology is the vague provisions on cross-border sharing of DNA evidence. In an interconnected world where crime often transcends national boundaries, it's crucial to have clear and effective regulations regarding the sharing of DNA evidence with other countries. Vague provisions can lead to challenges in international cooperation, evidence admissibility, and protection of individual rights.[62]

Vague provisions can lead to uncertainty about the legal procedures, requirements, and limitations when sharing DNA evidence across borders. This uncertainty can hinder effective collaboration between countries.[63]

Inconsistent or unclear regulations might result in disputes over the admissibility of DNA evidence obtained from foreign sources. Courts may question the authenticity and reliability of evidence when the legal framework is ambiguous.[64]

In addition, cross-border sharing of DNA data raises privacy concerns, as different countries may have varying standards of data protection. Vague provisions can expose individuals to potential privacy breaches and misuse of their genetic information.[65] Vague provisions can lead to jurisdictional conflicts and challenges in

[62] Ibid
[63] Ibid
[64] Ibid
[65] Ibid

determining which country's laws apply when sharing DNA evidence or pursuing joint investigations.[66]

4. Designing a National DNA Database Legislation for Kenya: Lessons from South Africa and the United Kingdom

4.1 Commonalities between Kenya, South Africa and the United Kingdom

While these countries may have distinct legal systems and social contexts, there are certain common aspects that can serve as valuable lessons for Kenya as it considers enacting DNA database legislation. All three countries recognize the value of forensic DNA technology in solving crimes, exonerating the innocent, and enhancing the criminal justice system's effectiveness. This shared recognition highlights the global importance of DNA evidence in modern criminal investigations.[67] South Africa, the United Kingdom, and Kenya all have legal systems that accommodate DNA evidence. They understand the need for a solid legal foundation that allows DNA evidence to be collected, stored, analyzed, and presented in court.[68]

Each country is mindful of the ethical implications of DNA technology, including privacy concerns, potential misuse of data, and safeguarding individual rights. This emphasis on ethical considerations is crucial for maintaining public trust and confidence in the justice system.[69]

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[66] Ibid
[67] Mbaya, B. (2016). The state of forensic investigations in Kenya. Master's thesis submitted at the University of Nairobi.
[68] Ibid
[69] Ibid

All three countries recognize the necessity of robust data security measures to protect sensitive genetic information from unauthorized access or breaches. Ensuring data security is paramount to preventing identity theft, discrimination, and other forms of harm.[70]

In addition, South Africa, the United Kingdom, and Kenya understand the significance of international cooperation in cross-border criminal investigations. They all engage in mutual legal assistance treaties and agreements to facilitate the sharing of DNA evidence and information.[71]

Each country grapples with issues related to data retention and deletion. Striking a balance between retaining DNA profiles for investigative purposes and respecting individuals' rights to privacy is a common challenge.[72]All three countries acknowledge the need for oversight bodies to monitor the implementation of DNA database legislation, ensuring compliance with ethical and legal standards.

4.2 The National DNA Database Law in South Africa-Criminal Law (Forensic Procedures) Amendment Act

The National DNA Database law in South Africa is governed by the Criminal Law (Forensic Procedures) Amendment Act, commonly referred to as the DNA Act. Enacted in 2013 and amended in 2022, this legislation establishes the legal framework for the collection, retention, analysis, and utilization of DNA profiles for law enforcement and criminal justice purposes.[73] The DNA Act reflects

[70] Ibid
[71] Ibid
[72] Ibid
[73] The 2013 version is available at

South Africa's commitment to utilizing modern forensic techniques to enhance criminal investigations while also addressing ethical and human rights considerations.

4.2.1 Specified Collection of Samples from Convicted Schedule 8 offenders

Schedule 8 of the Act includes a list of serious offenses for which individuals are required to provide DNA samples upon conviction.[74] This provision aims to enhance law enforcement's ability to solve crimes and prevent recidivism while carefully considering individual rights and privacy.

Schedule 8 of the DNA Act outlines a range of offenses that fall under the category of serious crimes. These offenses include various forms of violent crimes, sexual offenses, and crimes involving the possession or use of firearms such as treason, murder, kidnapping, robbery among others.[75]

Upon conviction for a schedule 8 offense, individuals are required to provide a DNA sample, typically in the form of a buccal swab (a swab taken from the inside of the cheek). This sample is used to generate a DNA profile that can be stored in the National DNA Database.[76] The

https://www.gov.za/sites/default/files/gcis_document/201409/37268act37of2013crimlawamend27jan2014.pdf accessed 17 August 2023. The 2022 version is available at https://www.gov.za/sites/default/files/gcis_document/202212/47735criminallawforensicproceduresamendmentact8of2022_0.pdf accessed 17 August 2023

[74] Criminal Law (Forensic Procedures) Amendment Act, Act No. 37 of 2013, section 5

[75] Ibid

[76] Ibid, section 2

collection of DNA samples from convicted individuals enables law enforcement to establish a link between these individuals and unsolved crimes. DNA evidence can be compared to samples collected from crime scenes, potentially leading to the identification and prosecution of repeat offenders.

The study argues that the inclusion of schedule 8 offenses in the DNA Act serves as a deterrent to individuals who might consider committing serious crimes. The knowledge that their DNA profile will be on record and potentially linked to future crimes can discourage individuals from engaging in criminal activities.

While the provision allows for the collection of DNA samples, the Act also emphasizes the importance of informed consent. Individuals must be informed about the purpose and implications of DNA collection.[77] Moreover, the Act provides for the rights of individuals to object to the collection, ensuring a degree of autonomy.[78]

The Act also includes provisions for individuals to request the removal of their DNA profiles from the database in cases where their convictions are overturned or expunged.[79] The National Forensic Oversight and Ethics Board monitors the implementation of the DNA Act, including the collection and use of DNA samples from convicted schedule 8 offenders.[80]

[77] Ibid, section 1 & 6
[78] Ibid, section 2
[79] Ibid, section 6
[80] Ibid

4.2.2 Regulated Administration of the DNA Database

In South Africa, the administration of the National DNA Database is subject to comprehensive regulations and oversight to ensure its effective and ethical use. The DNA Act places a strong emphasis on data security and confidentiality. Strict measures are in place to safeguard DNA profiles and prevent unauthorized access or breaches.[81]

Access to the DNA database is tightly controlled, limited to authorized personnel who are directly involved in criminal investigations and legal proceedings. This ensures that DNA data is used for legitimate law enforcement purposes.[82]

The DNA Act defines the permissible uses of DNA data, such as identifying suspects, linking crime scenes, and solving cases. This prevents the misuse of DNA profiles for purposes beyond the scope of law enforcement.[83]

The Act establishes the National Forensic Oversight and Ethics Board, an independent body responsible for monitoring the administration of the DNA database, ensuring compliance with ethical and legal standards, and addressing any breaches or violations.[84]

In addition, The DNA Act specifies the retention periods for DNA profiles, ensuring that data is retained for a reasonable period while also allowing for the expungement and deletion of profiles in certain

[81] Ibid, section 6
[82] Ibid
[83] Ibid
[84] Ibid

circumstances. [85] Regular audits are conducted to assess the adherence to regulations and ethical standards in managing the DNA database. Accountability mechanisms are in place to address non-compliance or misconduct.[86]

4.2.3 Lessons for Kenya

The study posits that Kenya can draw several valuable lessons from South Africa's regulated administration of the DNA database. First, Kenya should establish comprehensive regulations that govern the administration, use, and security of the DNA database. Clear guidelines will ensure that DNA data is handled responsibly and ethically. Kenya should prioritize data security to prevent unauthorized access and breaches. Robust encryption, access controls, and regular audits are essential components of data protection.

In addition, Kenya should define the authorized purposes for which DNA data can be used, preventing its misuse for unrelated purposes. This ensures that DNA evidence is used for legitimate law enforcement purposes only. Kenya should establish an independent oversight body responsible for monitoring the administration of the DNA database, ensuring compliance with ethical and legal standards, and addressing any breaches or violations.

Furthermore, Kenya should define clear data retention periods, allowing for the retention of DNA profiles for investigative purposes while also providing mechanisms for expungement and deletion in appropriate cases. Kenya should conduct regular audits to assess

[85] Ibid
[86] Ibid

compliance with regulations and ethical standards. Transparent reporting mechanisms ensure accountability and build public trust. Moreover, Kenya should provide training to law enforcement, legal professionals, and database administrators about the responsible administration of the DNA database and adherence to ethical guidelines. Kenya should develop protocols for sharing DNA data with other countries while ensuring that international agreements adhere to ethical and legal standards.

4.3 The National DNA Database Law in the United Kingdom

Protection of Freedoms Act

The National DNA Database (NDNAD) Law in the United Kingdom is governed by the Protection of Freedoms Act 2012, which introduced significant changes to the regulation and management of the DNA database.[87]The Act introduced changes to the retention periods for DNA profiles and samples. It established a framework for different retention periods based on whether an individual is convicted (e.g. of a minor offence, recordable offence, etc.), cautioned, or acquitted.[88]

The Act provides that fingerprints and DNA profiles must be destroyed if it appears to the responsible chief officer of police that a)the taking of the fingerprint or, in the case of a DNA profile, the taking of the sample from which the DNA profile was derived, was unlawful, or(b)the fingerprint was taken, or, in the case of a DNA profile, was derived from a sample taken, from a person in connection with that person's arrest and the arrest was unlawful or based on

[87] Protection of Freedoms Act 2012 available at https://www.legislation.gov.uk/ukpga/2012/9/contents/enacted accessed 18 August 2023

[88] Ibid, Part 1, chapter 1

mistaken identity.[89]This automatic deletion ensures that DNA data is not retained when there is no longer a legitimate reason for its retention. The Act strengthened protections for innocent individuals by ensuring that their DNA data is not indefinitely retained if they are not convicted of a serious offense.

The Act established the role of The Commissioner for the Retention and Use of Biometric Material, an independent oversight body responsible for overseeing the use of biometric data, including DNA, by law enforcement agencies.[90]

In addition, The Act introduced provisions regulating the storage, use, and destruction of DNA samples collected from individuals during the investigative process. [91] The Act also emphasizes the importance of obtaining informed consent from individuals for the collection and retention of their biometric data, including DNA samples.[92]

4.3.1 From Universal and Indefinite Retention to Selective Collection and Use

The shift from universal and indefinite retention of DNA profiles to selective collection and use, as highlighted by the Protection of Freedoms Act in the United Kingdom, is a significant aspect of the evolution of the National DNA Database (NDNAD) law. This shift reflects a more balanced and rights-based approach to DNA data

[89] Ibid, section 1 (2)
[90] Ibid, section 20-21
[91] Ibid, Part 1, chapter 1
[92] Ibid, section 11, 26,27

management, acknowledging the importance of both effective law enforcement and individual rights and privacy.[93]

Before the enactment of the Protection of Freedoms Act in the UK, the NDNAD law allowed for the universal and indefinite retention of DNA profiles, even for individuals who had not been convicted of a crime. This approach raised concerns about the potential for overreach, privacy violations, and the stigmatization of innocent individuals.[94]

The Protection of Freedoms Act introduced several key changes that shifted the focus from universal and indefinite retention to a more selective and rights-conscious approach. First, The Act establishes different retention periods based on the severity of the offense and the individual's legal status. DNA profiles from those arrested but not convicted are retained for a limited period, while profiles from convicted individuals may be retained indefinitely for serious offenses.[95]

The Act also introduces provisions for the automatic deletion of DNA profiles and samples in cases of acquittals, overturned convictions, unlawful arrests or mistaken identity. This ensures that innocent individuals are not unfairly impacted by DNA data retention.[96]The Act emphasizes the importance of protecting the rights of innocent individuals by introducing mechanisms that prevent the indefinite

[93] B. R. Sheldon (2013). "The UK's Protection of Freedoms Act 2012: A Model for Comprehensive Reform of Forensic DNA Databases?" *Berkeley Journal of Criminal Law*

[94] Ibid

[95] Ibid

[96] Ibid

retention of their DNA profiles.[97] The Act also underscores the importance of obtaining informed consent for DNA sample collection and retention, promoting transparency and individual autonomy.[98] By adopting a selective and rights-based approach to DNA data management, Kenya can build a responsible and effective national DNA database that aligns with international human rights standards while supporting law enforcement efforts. The UK's Protection of Freedoms Act provides a valuable model for achieving this balance.

4.3.2 Emphasis on Privacy and Human Rights

The Protection of Freedoms Act in the United Kingdom, specifically in the context of the National DNA Database (NDNAD), places a significant emphasis on privacy and human rights. This emphasis reflects a broader understanding that while DNA evidence can be a powerful tool for law enforcement, it must be used responsibly, ethically, and with a deep respect for individual rights and privacy.

The Act recognizes the importance of balancing law enforcement needs with the rights and privacy of individuals. It seeks to strike a balance that allows for effective criminal investigations while minimizing the potential for undue intrusion into individuals' lives.[99] The Act introduces a shift from universal and indefinite retention of DNA profiles to more selective retention based on the severity of the offense and the individual's legal status. This approach respects the privacy of individuals who are not convicted of serious crimes.[100]

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[97] Ibid
[98] Ibid
[99] B. R. Sheldon (2012). "Protecting Freedoms, Protecting Rights: The UK's Forensic Science Regulator and the Protection of Freedoms Act" *Forensic Magazine*
[100] Ibid

The Act also introduces provisions for the automatic deletion of DNA profiles and samples when individuals are acquitted or have their convictions overturned. This protects innocent individuals from having their DNA data retained indefinitely.[101]

The Act also highlights the necessity of obtaining informed consent for the collection and retention of DNA samples. This empowers individuals to make informed decisions about their genetic data.[102] The Act promotes transparency in DNA data management practices, ensuring that individuals are informed about how their DNA data will be used, retained, and protected.[103]

The establishment of the Biometric Commissioner as an independent oversight body underscores the commitment to accountability in the administration of DNA data.[104]

4.3.3 Focus on Proportionality

The focus on proportionality is a central aspect of the National DNA Database (NDNAD) law in the United Kingdom, as highlighted by the Protection of Freedoms Act. Proportionality refers to the principle that the use of DNA evidence and data collection should be commensurate with the goals of law enforcement, ensuring that the benefits derived from such practices are balanced against potential intrusions into individuals' privacy and rights.[105]

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[101] Ibid
[102] Ibid
[103] Ibid
[104] Ibid
[105] Ibid

The Act introduces retention periods that vary based on factors such as the seriousness of the offense and the individual's legal status. This approach ensures that DNA data is retained only for as long as necessary and is proportionate to the individual's involvement in criminal activities.[106]

The Act differentiates retention periods for DNA profiles based on the severity of the offense. More serious offenses may justify longer retention periods, while less serious offenses involve shorter periods.[107]

The Act also takes into account the potential risks and benefits of DNA data retention. It aims to strike a balance that maximizes the benefits of law enforcement while minimizing the potential for misuse or unjustified intrusion into individuals' lives.[108]

Furthermore, The Act includes provisions for the automatic deletion of DNA profiles when individuals are acquitted, unlawfully arrested or have their convictions overturned. This principle ensures that DNA data retention is proportionate to the individual's legal status.[109] The focus on proportionality underscores the importance of protecting the rights and privacy of individuals, particularly those who have not been convicted of serious offenses.

4.3.4 Lessons for Kenya

The Protection of Freedoms Act offers several important lessons for Kenya, considering the establishment of a national DNA database.

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[106] Ibid
[107] Ibid
[108] Ibid
[109] Ibid

The Act demonstrates the importance of striking a balance between utilizing DNA evidence for law enforcement purposes and safeguarding individual rights, particularly the right to privacy. Learning from the Act, Kenya can define clear retention periods for DNA profiles based on the seriousness of the offense and the individual's legal status (conviction, acquittal, etc.).

Implementing mechanisms for the automatic deletion or expungement of DNA profiles for individuals who are acquitted or have their convictions overturned is crucial for protecting the innocent. In addition, establishing an independent oversight body, similar to the Biometric Commissioner in the UK, can ensure accountability, transparency, and adherence to ethical and legal standards.

We should also emphasize the importance of informed consent and transparent communication with individuals whose DNA data is collected and retained. Further, we should establish mechanisms for periodic reviews of DNA retention policies to ensure they remain aligned with changing legal, ethical, and technological contexts.

5. Conclusion and the Way Forward

In the complex tapestry of criminal justice reform, the integration of Forensic DNA Technology emerges as a pivotal thread that weaves together law, science, ethics, and human rights. Through this comprehensive exploration, the symbiotic relationship between these domains becomes apparent, underscoring the need for a balanced and thoughtfully crafted National DNA Database Legislation in Kenya.

From the inception of DNA evidence as a transformative tool in the realm of law enforcement to its potential to rectify wrongful convictions and enhance the pursuit of justice, the journey has illuminated the power and responsibilities that come with harnessing this technology. The rise in sexual and gender-based crimes accentuates the urgency for Kenya to embrace modern methods that provide swift and accurate resolutions for victims and their families. Yet, as the path toward a National DNA Database unfolds, challenges loom on the horizon. The scarcity of modern forensic equipment and skilled personnel presents a daunting hurdle that demands immediate attention. The pitfalls of wrongful convictions emphasize the imperative to establish a mechanism that safeguards innocence and enables the apprehension of the guilty.

The gaps within Kenya's current legal framework, whether it be outdated laws of evidence, inadequate human rights safeguards, or the lack of clear cross-border DNA evidence sharing provisions, underscore the need for holistic reform that ensures alignment with contemporary ethical and international standards.

As Kenya envisions the way forward, it can draw inspiration from international examples like South Africa and the United Kingdom. The lessons learned from their experiences emphasize the significance of privacy, human rights, proportionality, and accreditation in the establishment of a functional and ethical DNA database system.

The way forward is a multi-faceted endeavor that requires a concerted effort from legislative bodies, law enforcement agencies, forensic experts, and civil society. It entails the formulation of a comprehensive National DNA Database Legislation that addresses

the gaps identified, respects human rights, and upholds ethical principles.

Additionally, Kenya must prioritize the allocation of resources to acquire state-of-the-art forensic equipment and facilitate comprehensive training programs for personnel. Collaborations with international partners and organizations, like the support provided by the US government, can play a pivotal role in ensuring Kenya's readiness for the international accreditation process.

In forging this path, Kenya has the opportunity to establish a National DNA Database Legislation that resonates with the principles of justice, accountability, and human dignity. By upholding these ideals, Kenya can pave the way for a more equitable criminal justice system-one that harnesses the transformative potential of Forensic DNA Technology while safeguarding individual rights and societal trust. Through this integration of law, science, ethics, and human rights, Kenya can lay the foundation for a future where justice truly prevails.

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B. R. Sheldon (2013). "The UK's Protection of Freedoms Act 2012: A Model for Comprehensive Reform of Forensic DNA Databases?" Berkeley Journal of Criminal Law

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Penal Code, Section 122 A

Peterson, J. L. (2018) "The Necessity of a DNA Database in Criminal Justice" Michigan Law Review.

Protection of Freedoms Act 2012 available at https://www.legislation.gov.uk/ukpga/2012/9/contents/enacted accessed 18 August 2023

The 2013 version is available at https://www.gov.za/sites/default/files/gcis_document/201409/37268act37of2013crimlawamend27jan2014.pdf accessed 17 August 2023. The 2022 version is available at *https://www.gov.za/sites/default/files/gcis_document/202212/47735criminallawforensicproceduresamendmentact8of2022_0.pdf* accessed 17 August 2023

Zakariyya Sarki, Geshina Ayu (2018). Preparedness and challenges of police in using forensic science: Review of some related literature. Journal of Social Sciences and Humanities. 2(14-24)

Embracing Sustainable Mining in Africa

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

Abstract

The paper critically explores the idea of sustainable mining in Africa. It argues a case for embracing sustainable mining in order to achieve Sustainable Development in Africa given the abundance of mineral resources in the continent. The paper discusses the concept of sustainable mining and the progress made towards its realization in Africa. The paper further examines some of the challenges hindering sustainability in the mining sector in Africa. It then suggests recommendations towards embracing sustainable mining in Africa.

1.0 Introduction

Mining refers to the act, process or industry of extracting minerals from the earth[1]. It has also been defined as an economic activity that consists of extraction of potentially useable and non-renewable mineral resources (excluding petroleum, natural gas and water) from land and sea without involving agriculture, forestry and fisheries[2]. The *Mining Act*[3] of Kenya defines minerals as geological substances whether in solid, liquid or gaseous form occurring naturally in or on

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[1] United Nations Environment Programme., 'Mining.' Available at *https://leap.unep.org/knowledge/glossary/mining* (Accessed on 28/09/2023)

[2] Muigua. K., Wamukoya. D., & Kariuki. F., 'Natural Resources and Environmental Justice in Kenya.' Glenwood Publishers Limited, 2015

[3] Mining Act, No. 12 of 2016, Laws of Kenya, S 4

the earth, in or under water, in mine waste or tailing but does not include petroleum, hydrocarbon gases or groundwater.

Mining is an important industry that contributes significantly to the global economy. Minerals are critical to the social, political and economic activity of any country[4]. They are core raw materials for the manufacturing sector, high technology industries, resource industries and the construction industry[5]. It has been observed that minerals and mineral products are the backbone of most industries in the world and some form of mining or quarrying is carried out in nearly every country [6] . Mining therefore has important economic, environmental, labour and social effects[7]. It ensures availability of minerals that are needed to construct roads and hospitals, to build automobiles and houses, to make computers and satellites, to generate electricity, and to provide the many other goods and services that consumers enjoy [8] . It is also a major source of employment in many countries[9].

However, despite its importance as an economic activity, mining and subsequent processing of strategic elements can be harmful to the environment[10]. Further, it has been observed that the rates of death,

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[4] Muigua. K., Wamukoya. D., & Kariuki. F., 'Natural Resources and Environmental Justice in Kenya.' Op Cit

[5] Ibid

[6] International Labour Organization.,' Mining (Coal; other Mining) Sector.' Available at *https://www.ilo.org/global/industries-and-sectors/mining/lang--en/index.htm* (Accessed on 28/09/2023)

[7] Ibid

[8] National Academies Press., 'Evolutionary and Revolutionary Technologies for Mining.' Available at *https://nap.nationalacademies.org/read/10318/chapter/4* (Accessed on 28/09/2023)

[9] Ibid

[10] Massachusetts Institute of Technology., 'The Future of Strategic Natural Resources.' Available at

injury and disease among the world's mineworkers remain high, and mining remains the most hazardous occupation when the number of people exposed to risk is taken into account[11]. These challenges have led to the emergence of the concept of sustainable mining.

The paper critically explores the idea of sustainable mining in Africa. It argues a case for embracing sustainable mining in order to achieve Sustainable Development in Africa given the abundance of mineral resources in the continent. The paper discusses the concept of sustainable mining and the progress made towards its realization in Africa. The paper further examines some of the challenges hindering sustainability in the mining sector in Africa. It then suggests recommendations towards embracing sustainable mining in Africa.

2.0 Conceptualizing Sustainable Mining

Mining ensures the availability of vital raw materials and resources that drive societies forward and ignite economic growth and technological advancement[12]. However, the critical need to mine must be balanced with a holistic environmental and social responsibility [13] . Sustainable mining entails optimizing environmental performance and social impact of mining activities[14]. Sustainable mining also entails ensuring sound labour practices

https://web.mit.edu/12.000/www/m2016/finalwebsite/solutions/mining.html (Accessed on 28/09/2023)

[11] International Labour Organization.,' Mining (Coal; other Mining) Sector.' Op Cit

[12] Pan African Resources., 'Sustainable Mining.' Available at *https://www.panafricanresources.com/sustainable-mining/#:~:text=Sustainable%20mining%20refers%20to%20the,generations%20can%20also%20be%20met* (Accessed on 02/10/2023)

[13] Ibid

[14] Ibid

including good safety standards and paying workers a fair wage[15]. It also focuses on investing in the tools, equipment and training needed to safeguard workers as much as possible[16].

It has been pointed out that community engagement is at the heart of mining sustainability [17] . The employment opportunities and economic activities generated by mining processes are beneficial to social sustainability and community well-being[18]. Sustainable mining operations therefore consider social investment, focus on the economic and social returns in the community and on building community resilience. [19] Further, in order to foster community engagement, sustainable mining entails obtaining the consent of local communities at all stages in the lifecycle of a mine from mineral right application to the closure and rehabilitation of the mining sites[20]. The concept of Free, Prior, and Informed Consent (FPIC) is therefore vital in the sustainable mining agenda[21]. The global call for application of

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[15] Sammour. J., 'What Exactly is Ethical Mining?.' Available at *https://www.daintylondon.com/blogs/news/what-is-ethical-mining#:~:text=Whether%20mining%20metals%2C%20diamonds%20or,its%20workers%20a%20fair%20wage* (Accessed on 02/10/2023)

[16] Ibid

[17] Well Planning Group., 'At The Heart of Mining Sustainability is Community Engagement.' Available at *https://www.wallplanning.com.au/at-the-heart-of-mining-sustainability-is-community-engagement/#:~:text=You'll%20likely%20have%20heard,%3A%20Social%2C%20Environmental%2C%20Economic* (Accessed on 02/10/2023)

[18] Ibid

[19] Ibid

[20] Mathiba. G., 'The Incorporation of the FPIC Principle in South African Policy on Mining-Induced Displacements.' *International Journal on Minority and Group Rights*., 2023 (1-23)

[21] Muigua. K., 'Maximising the Right to Free, Prior, and Informed Consent for Enhanced Environmental Justice in Kenya.' Available at http://kmco.co.ke/wp-content/uploads/2019/03/Maximising-the-Right-to-FPIC-in-Kenya-Kariuki-Muigua-29th-March-2019.pdf (Accessed on 02/10/2023)

Free, Prior, and Informed Consent (FPIC) in mining is generally meant to address the abuse of the rights of indigenous peoples worldwide including: indigenous land rights, recognition of and respect for culture, the right to economic participation, to a livelihood and to a clean environment, among others[22].

Various strategies have been embraced to foster sustainable mining. It has been pointed out that Corporate Social Responsibility (CSR) is an integral component of sustainable mining due to the nature of activities undertaken by mining companies[23]. CSR in relation to mining entails a set of voluntary actions to mitigate the negative environmental and social impact of mining or to improve the social and economic well-being of populations living close to where mining companies operate[24]. It ensures the inclusion of social interests, environmental protection and a relationship with local community groups in the company strategies adopted by mining corporations[25].

Mining companies can therefore foster sustainable mining by embracing CSR practices including investments in public services and infrastructure, contributions to local agriculture and other economic activities, as well as payments to support the cultural or political activities of communities in mining areas[26]. Sustainable mining can also be realized through several approaches including reducing, reusing and rethinking mining waste, promoting water conservation, lowering carbon emissions by transitioning to

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[22] Ibid
[23] Majer. M., 'The Practice of Mining Companies in Building Relationships with Local Communities in the Context of CSR Formula.' *Journal of Sustainable Mining*, 12 (3): 38-47
[24] Bezzola. S et al., 'CSR and Local Conflicts in African Mining Communities.' *World Development*, Volume 158, 2022
[25] Ibid
[26] Ibid

renewable energy, ensuring the long term well-being of local communities, restoring land to its natural state and combatting illegal mining and its impact and communities and the environment[27].

It has been argued that sustainable mining can foster the attainment of the Sustainable Development Goals (SDGs) envisioned by the United Nations[28]. Sustainable mining can enhance realization of most of the SDGs including ending extreme poverty; ensuring healthy lives and promoting well-being for all people; ensuring inclusive and equitable quality education and promoting lifelong learning opportunities; promoting sustained, inclusive and sustainable economic growth; fostering inclusive and sustainable industrialization and enhancing innovation; and promoting sustainable consumption and production patterns[29]. The *United Nations Global Compact Strategy 2021-23* aims to accelerate and scale the global collective impact of business and deliver the SDGs through accountable companies and ecosystems that enable change[30]. It encapsulates principles that are integral in achieving this aim which focus on human rights, labour, environment and anti-corruption[31]. Mining companies can embrace this strategy in order to promote sustainable mining.

[27] Pan African Resources., 'Sustainable Mining.' Op Cit
[28] Ibid
[29] Ibid
[30] United Nations Global Compact., 'UN Global Compact Strategy 2021-2023.' Available at https://ungc-communications-assets.s3.amazonaws.com/docs/about_the_gc/UN-GLOBAL-COMPACT-STRATEGY-2021-2023.pdf (Accessed on 02/10/2023)
[31] Ibid

3.0 Sustainable Mining in Africa

Africa is a continent that is richly endowed with a variety of mineral resources, with potential for economic growth and development[32]. The continent is home to approximately 30% of the world's mineral reserves[33]. The Democratic Republic of the Congo (DRC), for example, produces over 70% of the world's cobalt[34]. DRC and Zambia together supply nearly 10% of global copper[35]. Botswana and South Africa produce a significant amount of diamond while Ghana and South Africa are significantly endowed with gold deposits[36]. Africa is therefore classified as a major producer of many key mineral commodities in the world, with bountiful reserves of vital metals and minerals including gold, diamond, cobalt, bauxite, iron ore, coal, and copper available across the continent[37]. Some of the major mining countries in Africa are DRC, South Africa, Namibia, and Zimbabwe[38].

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[32] United Nations Economic Commission for Africa., 'Africa Mining Vision Guidelines.' Available at *https://www.uneca.org/african-mining-vision-guidelines#:~:text=The%20overall%20goal%20of%20the,and%20socio%2Deconomic%20development%E2%80%9D* (Accessed on 03/10/2023)

[33] White & Case., 'Don't Let a Crisis Go to Waste: Financing Mining & Metals Projects in Africa in 2023.' Available at *https://www.whitecase.com/insight-our-thinking/africa-focus-summer-2023-financing-mining-metals-projects#:~:text=Africa%20holds%20a%20remarkable%2030,sector's%20global%20revenue%20in%202022.* (Accessed on 03/10/2023)

[34] United Nations., 'African Countries Urged to Prioritize Green Value Chains for Minerals.' Available at *https://www.un.org/africarenewal/magazine/february-2023/african-countries-urged-prioritize-green-value-chains-minerals#:~:text=Africa%20is%20home%20to%20many,platinum%20metals%2C%20lithium%20and%20more* (Accessed on 03/10/2023)

[35] Ibid

[36] Statistica., 'Mining Industry in Africa - Statistics & Facts.' Available at https://www.statista.com/topics/7205/mining-industry-in-africa/ (Accessed on 03/10/2023)

[37] Ibid

[38] Ibid

Kenya is also richly endowed with industrial minerals including soda ash, fluorspar, diatomite and gemstones[39]. Further, it has been argued that Africa has an opportunity to emerge as a production hub for 'rare earths' with significant deposits being available in the continent especially in eastern and southern countries including South Africa, Madagascar, Malawi, Kenya, Namibia, Mozambique, Tanzania, Zambia and Burundi[40]. Rare earths have been described as the catalysts of industrial societies in the 21st century since they are vital to key products from hi-tech items including smartphones and monitors to energy conversion systems such as wind turbines, photovoltaic panels and electrical machinery and even military equipment including lasers and radar[41]. Sustainable mining is therefore a pertinent concern in Africa in order to ensure that the abundant mineral resources in the continent are able to trigger social and economic development[42].

The *Africa Mining Vision*[43] seeks to achieve transparent, equitable and optimal exploitation of mineral resources in Africa in order to underpin broad-based sustainable growth and socio-economic development. It recognizes the need for a sustainable and well-governed mining sector in Africa that effectively garners and deploys resource rents and that is safe, healthy, gender and ethnically

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[39] Muigua. K., Wamukoya. D., & Kariuki. F., 'Natural Resources and Environmental Justice in Kenya.' Op Cit

[40] Italian Institute for International Political Studies., 'The Scramble for Africa's Rare Earths: China is not Alone.' Available at *https://www.ispionline.it/en/publication/scramble-africas-rare-earths-china-not-alone-30725* (Accessed on 03/10/2023)

[41] Ibid

[42] Muigua. K., Wamukoya. D., & Kariuki. F., 'Natural Resources and Environmental Justice in Kenya.' Op Cit

[43] Africa Union., 'Africa Mining Vision.' Available at *https://au.int/sites/default/files/documents/30995-doc-africa_mining_vision_english_1.pdf* (Accessed on 03/10/2023)

inclusive, environmentally friendly, socially responsible and appreciated by surrounding communities[44]. The Vision identifies the challenges that riddle the mining industry in Africa including environmental, social and cultural concerns and proposes several solutions to address these challenges[45]. The Vision not only seeks to guide the mining industry in Africa, but it also aims at ensuring sustainable utilization of natural resources in Africa in order to ensure that the continent's natural resources are used to transform the social and economic development path of the continent[46]. Further, the Vision seeks to ensure the adoption of an integrated approach in the governance of Africa's mineral resources and the involvement of all stakeholders in the governance process[47].

The Africa Mining Vision explores how development can be achieved through the creation of local value, driven by the strategic use of mineral resources in Africa[48]. It charts a path for generating and realizing various types of linkages arising from the mining sector through measures such as industrial development and technical upgrading[49]. Further, the Africa Mining Vision recognizes the contribution of Artisanal and Small-Scale mining (ASM) to local economic development, and fosters women's rights and gender justice[50]. The Vision also establishes a progressive fiscal regime that can curb the financial misuse of the continent's resources through tax evasion and avoidance and illicit financial flows from the mineral sector[51]. The Africa Mining Vision also upholds the principle of Free,

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44 Ibid
45 Ibid
46 Ibid
47 Ibid
48 Ibid
49 Ibid
50 Ibid
51 Ibid

Prior and Informed Consent (FPIC) for mining-affected communities, and stipulates measures to address the social and environmental impacts of mining[52]. The Africa Mining Vision identifies opportunities that can accelerate benefits from the mining industry in Africa including the use of resource rents, upscaling physical infrastructure, downstream value addition, upstream value addition and technology and product development[53].

The Africa Mining Vision is very integral in enhancing sustainable mining in Africa. It acknowledges that effective management of the mineral resources in the continent is critical to transform the sector in a sustainable manner[54]. Realizing the ideal of the Africa Mining Vision is essential in promoting sustainable mining in Africa.

Agenda 2063[55] also embraces the concept of sustainable mining and calls for the implementation of the Africa Mining Vision in order to realize this ideal in Africa. Agenda 2063 represents a shared strategic framework for inclusive growth and sustainable development and a global strategy to optimize the use of Africa's resources for the benefit of all Africans[56]. It stipulates the importance of African and international initiatives for better governance in the mining sector and the extractive industry[57]. According to Agenda 2063, Africa's natural resources need to be governed effectively to foster transparency and counter illicit resource outflows and unacceptable

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[52] Ibid
[53] Africa Union., 'Africa Mining Vision.' Op Cit
[54] United Nations Economic Commission for Africa., 'Africa Mining Vision Guidelines.' Op Cit
[55] Africa Union., 'Agenda 2063: The Africa we Want.' Available at https://au.int/sites/default/files/documents/33126-doc-framework_document_book.pdf (Accessed on 03/10/2023)
[56] Ibid
[57] Ibid

exploitation of Africa's natural resources[58]. In this regard, Agenda 2063 calls upon the African Union (AU) member states to fully implement the Africa Mining Vision[59]. Actualizing Agenda 2063 can therefore fast track the implementation of the Africa Mining Vision and realization of sustainable mining in Africa.

The *Mining Act*[60] of Kenya also embraces the aspect of sustainable mining. The Act enshrines sustainable development as one of the guiding principles in developing the mining sector in Kenya[61]. It also advocates for the development of the mining sector in Kenya in a manner which promotes compliance with international conventions and national policies relating to the sustainable development of the mineral resources and ensures that mining operations take into account local and community values[62]. It further calls upon mining entities to promote sustainable use of land through restoration of abandoned mines and quarries[63]. The Mining Act therefore embraces the concept of sustainable mining by enshrining measures to ensure the protection of the environment, community development, safety of prospecting and mining operations and health and safety of persons undertaking those operations among others[64].

Sustainable mining is thus vital in Africa. There has been increased demand on the mining industry to adopt more environmentally and socially responsible practices in Africa[65]. It has been pointed out that

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[58] Ibid
[59] Ibid
[60] Mining Act, No. 12 of 2016, Laws of Kenya, S 20 (1) (o)
[61] Ibid, S 5
[62] Ibid
[63] Ibid, S 179 (a)
[64] Ibid, S 42
[65] Ford. N., 'Can African Mining ever be Sustainable?' Available at https://african.business/2022/04/energy-resources/can-african-mining-ever-be-sustainable (Accessed on 03/10/2023)

with shareholders and lenders demanding greenhouse gas emissions and pollution reduction, plus improvements in worker and community welfare, there is a growing belief that it is in the mining industry's best interests to adopt more responsible practices to increase productivity and avoid adverse publicity[66]. As a result of these concerns, private and public sector led mining activities across Africa have begun to prioritize sustainable techniques to promote environmental sustainability, social responsibility, and good business practices[67]. In turn, the sustainable mining industry has become an increasingly attractive investment opportunity for global players seeking to enhance their returns on investment while spearheading climate protection and resilience[68]. Sustainable mining can unlock economic and social development in Africa while fostering environmental conservation and confronting the threat of climate change[69].

However, several problems hinder the realization of the ideal of sustainable mining in Africa. It has been pointed out that growth in Africa's mineral-rich countries is slipping, and inequality and economic fragility are on the rise[70]. Further, many African countries are under pressure to enter into unfair mining deals and contracts with foreign companies, and to hand out tax incentives to such

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[66] Ibid
[67] Africa Business., 'African Sustainable Mining Piques Interest of Global Players.' Available at *https://african.business/2023/09/apo-newsfeed/african-sustainable-mining-piques-interest-of-global-players#:~:text=While%20clean%2Denergy%20mines%20are,large%2Dscale%20projects%20in%20South* (Accessed on 03/10/2023)
[68] Ibid
[69] Ibid
[70] Oxfam., 'From Aspiration to Reality: Unpacking the Africa Mining Vision.' Available at https://www-cdn.oxfam.org/s3fs-public/bp-africa-mining-vision-090317-en.pdf (Accessed on 03/10/2023)

companies a situation that ends up hurting them in the long term[71]. Despite boasting vast mineral wealth, the mining industry in Africa has spawned gloomy tales of the natural resource curse phenomenon[72]. In Africa, mineral resources are extracted mainly for processing and use outside the continent, and mineral sectors have remained an enclave and disconnected from broader economies[73]. It has been shown that public debt and fiscal stress is rising in several mineral-rich African countries such as Nigeria, Zambia, Angola and Mozambique[74]. Further, Angola, Democratic Republic of the Congo (DRC) and Nigeria are good examples of African countries well-endowed in natural resources that suffer widespread poverty[75]. There has also been prevalence of conflicts linked to natural resources in countries such as DRC[76].

From the foregoing, it is evident that Africa is yet to harness the full potential of its mineral endowments for sustainable and inclusive development. The continent is richly endowed with a variety of mineral resources, with potential for economic growth and development but performance so far has not been consistent with expectations[77]. There is need to embrace sustainable mining in Africa in order to unlock growth and prosperity in Africa.

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71 Ibid
72 Ibid
73 Ibid
74 Henri. A., 'Natural Resources Curse: A Reality in Africa.' *Resources Policy* , Volume 63, 2019
75 Ibid
76 Ibid
77 United Nations Economic Commission for Africa., 'Africa Mining Vision Guidelines.' Op Cit

4.0 Way Forward

Several measures are required in order to embrace sustainable mining in Africa.

There is need to actualize the Africa Mining Vision. The Vision is integral in transforming the mining sector in Africa and promoting sustainable mining[78]. African countries should therefore accelerate the implementation of the African Mining Vision in order to realize sustainable mining in Africa[79]. Some of the measures that are required in order to implement the Vision include aligning mineral sector laws, policies and institutions with the African Mining Vision, raising awareness about the Vision among stakeholders in the mining sector and ensuring that companies operating in Africa's mineral sector institute policies that comply with the provisions of the Vision on aspects such as human rights, corporate accountability, gender justice, social and environmental impacts[80].

In addition, there is need to adopt sound labour practices in the mining sector in order to realize sustainable mining[81]. Challenges such as death, injury and disease among the world's mineworkers remain high, and mining remains the most hazardous occupation when the number of people exposed to risk is taken into account[82]. These challenges hinder the realization of sustainable mining.

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[78] World Bank., 'Africa Mining Vision and Country Mining Visions.' Available at https://www.worldbank.org/content/dam/Worldbank/Event/Africa/Ethiopia%20Extractive%20Industries%20Forum%202014/9_AMV.pdf (Accessed on 04/10/2023)

[79] Ibid

[80] Oxfam., 'From Aspiration to Reality: Unpacking the Africa Mining Vision.' Op Cit

[81] International Labour Organization.,' Mining (Coal; other Mining) Sector.' Op Cit

[82] Ibid

Therefore in order to achieve sustainable mining, there is need to foster sound labour practices including good safety standards and paying workers a fair wage[83]. Further, there is need to invest in the tools, equipment and training needed to safeguard workers in the mining sector as much as possible[84].

It is also imperative for mining companies to embrace community participation and engagement while undertaking mining activities[85]. Public participation is one of the fundamental principles of governance that is recognized worldwide and has been enshrined under the Constitution of Kenya[86]. Public participation is believed to be important in bridging the gap between the government, civil society, private sector and the general public, building a common understanding about the local situation, priorities and programmes as it encourages openness, accountability and transparency, and is thus at the heart of inclusive decision-making[87]. Further, public participation can improve the quality of decision-making in the mining sector by providing decision-makers with additional, unique information on local conditions[88]. Public participation and community engagement can be realized in the mining sector through

[83] Sammour. J., 'What Exactly is Ethical Mining?.' Op Cit
[84] Ibid
[85] Muigua. K., 'Maximising the Right to Free, Prior, and Informed Consent for Enhanced Environmental Justice in Kenya.' Op Cit
[86] Constitution of Kenya, 2010., Article 10 (2) (a), Government Printer, Nairobi
[87] Muigua. K., 'Towards Meaningful Public Participation in Natural Resource Management in Kenya.' Available at *http://kmco.co.ke/wp-content/uploads/2018/08/towardsmeaningful-publicparticipation-in-natural-resourcemanagement-in-kenya.pdf* (Accessed on 04/10/2023)
[88] Cerezo. L, & Garcia. G., 'Lay Knowledge and Public Participation in Technological and Environmental Policy.' Available at https://scholar.lib.vt.edu/ejournals/SPT/v2n1/pdf/CEREZO.PDF (Accessed on 04/10/2023)

FPIC[89]. The global call for application of FPIC in mining is generally meant to address the abuse of the rights of indigenous peoples worldwide including: indigenous land rights, recognition of and respect for culture, the right to economic participation, to a livelihood and to a clean environment, among others[90]. It is therefore vital to foster community engagement by obtaining the consent of local communities at all stages in the lifecycle of a mine from mineral right application to the closure and rehabilitation of the mining sites[91].

Sustainable mining can also be realized in Africa through the adoption of CSR by mining companies[92]. The mining sector has been described as one of the most controversial industries in the sense that, at the same time that it is beneficial to society, it can also be a threat to it[93]. It is therefore vital for mining companies to establish and maintain a good relationship with indigenous, local, and societal groups in order to avoid losing their Social License to Operate (SLO)[94]. Mining companies should therefore embrace CSR through the inclusion of social interests, environmental protection and a relationship with local community groups in the company strategies[95]. Mining companies can therefore foster sustainable mining by embracing CSR practices including investments in public

[89] Muigua. K., 'Maximising the Right to Free, Prior, and Informed Consent for Enhanced Environmental Justice in Kenya.' Op Cit
[90] Ibid
[91] Mathiba. G., 'The Incorporation of the FPIC Principle in South African Policy on Mining-Induced Displacements.' Op Cit
[92] Majer. M., 'The Practice of Mining Companies in Building Relationships with Local Communities in the Context of CSR Formula.' Op Cit
[93] Yousefian. M et al., 'Corporate Social Responsibility and Economic Growth in the Mining Industry.' *The Extractive Industry and Society*, Volume 13, 2023
[94] Ibid
[95] Majer. M., 'The Practice of Mining Companies in Building Relationships with Local Communities in the Context of CSR Formula.' Op Cit

services and infrastructure, contributions to local agriculture and other economic activities, as well as payments to support the cultural or political activities of communities in mining areas[96].

Finally, it is very important to for mining companies to embrace the ideal of Sustainable Development. Sustainable Development has been defined as development that meets the needs of the present without compromising the ability of future generations to meet their own needs[97]. It combines elements such as environmental protection, economic development and social concerns[98]. It has been pointed out that since the mining industry's operations have the potential to impact a wide range of environmental and socioeconomic entities, it is imperative for them to embrace Sustainable Development by ensuring improved environmental performance and addressing the needs of stakeholders and community groups from the onset throughout the lifetime of the mining process[99]. Sustainable Development can be realized in the mining sector through several approaches including reducing, reusing and rethinking mining waste, promoting water conservation, lowering carbon emissions by transitioning to renewable energy, ensuring the long term well-being of local communities, restoring land to its natural state and combatting illegal mining and its impact and communities and the environment[100].

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[96] Ibid
[97] World Commission on Environment and Development., 'Our Common Future.' Oxford, (Oxford University Press, 1987)
[98] Fitzmaurice. M., 'The Principle of Sustainable Development in International Development Law.' *International Sustainable Development Law*., Vol 1
[99] Hilson, G., & Murck. B., 'Sustainable Development in the Mining Industry: Clarifying the Corporate Perspective.' *Resources Policy*, Volume 26, Issue 4
[100] Pan African Resources., 'Sustainable Mining.' Op Cit

The foregoing measures are integral in embracing sustainable mining in Africa.

5.0 Conclusion

Mining is an important industry that contributes significantly to the global economy. However, despite its importance as an economic activity, mining and subsequent processing of strategic elements can result in environmental, social and economic concerns[101]. Sustainable mining has therefore emerged as an ideal that seeks to optimize environmental performance and social impact of mining activities[102]. The *Africa Mining Vision*[103] seeks to achieve the ideal of sustainable mining in Africa. However, problems in the mining sector in Africa and slow implementation of the African Mining Vision have hindered realization of sustainable mining in Africa[104]. Sustainable mining can be embraced in Africa by actualizing the Africa Mining Vision, adopting sound labour practices, embracing community participation and engagement, adoption of CSR activities and fostering Sustainable Development[105]. Embracing sustainable mining in Africa is an ideal worth pursuing.

[101] Massachusetts Institute of Technology., 'The Future of Strategic Natural Resources.' Op Cit
[102] Pan African Resources., 'Sustainable Mining.' Op Cit
[103] Africa Union., 'Africa Mining Vision.' Op Cit
[104] Oxfam., 'From Aspiration to Reality: Unpacking the Africa Mining Vision.' Op Cit
[105] Ibid

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Muigua. K., 'Maximising the Right to Free, Prior, and Informed Consent for Enhanced Environmental Justice in Kenya.' Available at http://kmco.co.ke/wp-content/uploads/2019/03/Maximising-the-Right-to-FPIC-in-Kenya-Kariuki-Muigua-29th-March-2019.pdf

Muigua. K., 'Towards Meaningful Public Participation in Natural Resource Management in Kenya.' Available at *http://kmco.co.ke/wp-content/uploads/2018/08/towardsmeaningful-publicparticipation-in-natural-resourcemanagement-in-kenya.pdf*

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guidelines#:~:text=The%20overall%20goal%20of%20the,and%20socio%2Deconomic%20development%E2%80%9D

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United Nations., 'African Countries Urged to Prioritize Green Value Chains for Minerals.' Available at https://www.un.org/africarenewal/magazine/february-2023/african-countries-urged-prioritize-green-value-chains-minerals#:~:text=Africa%20is%20home%20to%20many,platinum%20metals%2C%20lithium%20and%20more

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White & Case., 'Don't Let a Crisis Go to Waste: Financing Mining & Metals Projects in Africa in 2023.' Available at https://www.whitecase.com/insight-our-thinking/africa-focus-summer-2023-financing-mining-metals-projects#:~:text=Africa%20holds%20a%20remarkable%2030,sector's%20global%20revenue%20in%202022.

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Use of Alternative Dispute Resolution in Healthcare

By: ***Dr Majid Twahir****

Abstract

Litigation is an adversarial system of solving disputes that does not lend itself very well whenever there is a healthcare dispute between patients and healthcare provides. Litigation does not deter physician negligence, remedy an injured patient, serve useful public health function or aid institutional improvement. Article 159(2)(c) of the Constitution of Kenya, 2010 encourages the use of ADR. However, the use of ADR in healthcare remains very low. This may be because of lack of enabling statues or guidelines on operationalizing Article 159(2)(c) in healthcare. This paper, using a qualitative, doctrinal approach, reviews underlying foundational principles of healthcare conflicts and then the implementation of Alternative Dispute Resolution in various jurisdictions. The paper then explores mechanism of implementation of ADR in Kenya whenever there is unexpected adverse healthcare clinical outcome.

1.0 Introduction

Conflict in the provision of healthcare service is an increasing problem in Kenya[1]. Common among such conflicts is that between healthcare providers (hospitals), hereinafter referred to as providers, and healthcare consumer (patient and or family), hereinafter referred to as consumers. This conflict usually involves one of the clinical staff of the provider, commonly a doctor or nurse, and a consumer[2]. This conflict occurs when there is unexpected adverse clinical outcome[3].

[1] Gerry McGivern and others, 'Strengthening Health Professional Regulation in Kenya and Uganda: Research Findings Policy Brief'.

[2] Ibid.

[3] Christopher B-Lynch, Adeyemi Coker and John A Dua, 'A Clinical Analysis of 500 Medico-legal Claims Evaluating the Causes and Assessing the Potential Benefit of Alternative Dispute Resolution' (1996) 103 BJOG: An International Journal of Obstetrics & Gynaecology 1236.

Further, commercial conflicts that occur in any other industry also do occur in the healthcare institution. These include those with suppliers, non-clinical contractors among other stakeholders[4]. This paper focuses on the conflict between clinicians and patients whenever there is an adverse or unexpected outcome.

1.1 General Basis of Interpesonal Conflict

A conflict represents, primarily, an interactional crisis – at some level, a crisis between the relationship of human beings[5]. This crisis disrupts the perception of self and of the other party making either party feel more vulnerable and self-centred, even more than before the conflict[6]. Specifically, the occurrence of conflict tends to destabilize the parties' experience of both self and other, so that the parties interact in ways that are both more vulnerable and more self-absorbed than they did before the conflict[7]. The negative emotions feed into each other in a vicious circle, on both sides, as the parties interact[8]. This vicious cycle leads to ever increasing sense of weakness and self-absorption of each party[9]. The ultimate outcome is mutual destruction[10]. This transformative model of conflict takes a social-communicative view, where conflict is seen in terms of loss of power,

[4] Orna Rabinovich-Einy, *See You Out of Court?: The Role of ADR in Healthcare* (Duke University School of Law 2011).

[5] Robert A Baruch Bush and Joseph P Folger, 'Chapter 2: A Transformative View of Conflcit and Mediation', *The Promise of Mediation: The Transformative Approach to Conflict* (John Wiley & Sons 2005).

[6] Joseph Folger and Robert A Baruch Bush, 'Transformative Mediation' (2014) 2 International Journal of Conflict Engagement and Resolution 20 <https://www.jstor.org/stable/26928945> accessed 21 January 2024.

[7] Dorothy J Della Noce, Robert A Baruch Bush and Joseph P Folger, 'Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy' (2002) 3 Pepp. Disp. Resol. LJ 39.

[8] Ibid.

[9] Ibid.

[10] Ibid.

rights or needs[11]. Solutions sort depends on the protagonists' point of view of the greatest loss[12]. Decisions made based on this, aim at gaining what is lost – power, rights or needs – rather than in solving the problem in a mutually acceptable manner.

Decision making is a balance between desirability and feasibility, thus, contextual, and individual variations. Whereas, desirability is culturally influenced, feasibility is knowledge influenced[13]. Many decisions are made in the presence of incomplete information[14]. Culture plays an important modifying role in decision making[15]. Decision theory is associated with goal directed behaviour in the presence of options[16]. A normative decision theory is a theory about how decisions should be made, and a descriptive theory is a theory about how decisions are made[17]. Normative decision theory includes the pre-requisite of rationale decision making[18]. It involves decision making in the presence of uncertainty and incomplete information as

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[11] Ibid.

[12] Robert A Baruch Bush and Joseph P Folger, 'Chapter 2: A Transformative View of Conflict and Mediation', *The Promise of Mediation: The Transformative Approach to Conflict* (John Wiley & Sons 2005).

[13] Carol B Liebman and Chris Stern Hyman, 'A Mediation Skills Model to Manage Disclosure of Errors and Adverse Events to Patients' (2004) 23 Health Affairs 22.

[14] Bellal Ahmed Bhuiyan, 'An Overview of Game Theory and Some Applications', *Philosophy and Progress*, vol LIX–LX (2016) <http://dx.doi.org/10.3329/pp.v59i1-2.36683>.

[15] Arnaldo Oliveira, 'A Discussion of Rational and Psychological Decision-Making Theories and Models: The Search for a Cultural-Ethical Decision-Making Model' [2007] Electronic Journal of Business Ethics and Organization Studies 12.

[16] Sven Ove Hansson, 'Chapter 1: What Is Decision Theory?', *Decision Theory: A Brief Introduction* (Department of Philosophy and the History of Technology, Royal Institute of Technology, Stockholm 1994).

[17] Edwards Ward, 'The Theory Of Decision Making' [1954] Psychological bulletin 380.

[18] Ibid.

well as issues about how an individual can coordinate his/her decisions over time and of how several individuals can coordinate their decisions in social decision procedures[19].

The "Game theory" as expounded by Von Neumann and Morgenstern in 1944 is premised on either party intention to maximize their own benefits while in the environment of information asymmetry[20]. The unavailability of equal information to all parties breeds an environment of mistrust and non-cooperation. Information sharing and collaboration achieves mutually satisfying outcomes[21].

Conflict in Healthcare When there is an Unexpected Adverse Clinical Outcomes

There are two principal courses of conflict involving clinical outcomes whenever there are unexpected adverse clinical outcomes – actual negligence and perceived negligence[22]. Actual clinical negligence as a source of conflict in the hospital, is only the tip of the iceberg. Judiciable related conflict involving patient care in hospitals has multiple deeper underlying reasons[23]. These includes administrative, human resources (numbers, hours of work, staff skills mix and so on), work-related culture and environment and many other operational reasons[24]. Perceived clinical negligence is the other

[19] Oliveira (n 16).

[20] Bellal Ahmed Bhuiyan, 'An Overview of Game Theory and Some Applications', *Philosophy and Progress*, vol LIX–LX (2016) <http://dx.doi.org/10.3329/pp.v59i1-2.36683>.

[21] Ibid.

[22] Philip J Moore, Nancy E Adler and Patricia A Robertson, 'Medical Malpractice: The Effect of Doctor-Patient Relations on Medical Patient Perceptions and Malpractice Intentions' (2000) 173 Western Journal of Medicine 244.

[23] B-Lynch, Coker and Dua (n 4).

[24] James A Wall and Timothy C Dunne, 'Mediation Research: A Current Review' (2012) 28 Negotiation Journal 217.

source of conflict in the hospital[25]. This is when a patient and family attribute unexpected adverse clinical outcome to negligence when there has been no actual negligence. Whatever the underlying cause of clinical negligence (perceived or actual), there is increased litigation as a result[26]. One of the common reasons for increased litigation in healthcare is poor, restricted, and incomplete communication by the clinician to the patient[27]. Many patients and their relatives go to court because they seek an explanation to an unexpected outcome, and if fault is proven, an apology as well as an assurance that this will not happen again to the patient and to others [28] . Paradoxically, clinicians justify deliberate poor communication to increasing litigation. Clinicians believe that disclosure will be used against them in litigation[29]. Thus, a vicious cycle is created where litigation results in reduced communication and in turn, reduced communication results in more litigation. Litigation begets more litigation.

Attempts at resolving conflicts in healthcare because of unexpected adverse clinical outcomes are seen as a zero-sum competition between the clinician and the patient/relatives involved – one must lose for the other to win[30]. Efforts are geared towards vindicating the

[25] Moore, Adler and Robertson (n 23).
[26] Letitia Pienaar, 'Investigating the Reasons behind the Increase in Medical Negligence Claims' (2016) 19 Potchefstroom Electronic Law Journal 1 <http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812016000100005&nrm=iso>.
[27] Marie M Bismark and others, 'Remedies Sought and Obtained in Healthcare Complaints' (2011) 20 BMJ Quality & Safety 806 <http://qualitysafety.bmj.com/content/20/9/806.abstract>.
[28] Liebman and Hyman (n 14).
[29] Ibid.
[30] Francesco Traina, 'Medical Malpractice: The Experience in Italy' (2009) 467 Clinical orthopaedics and related research 434.

clinician on the one hand or blaming him/her on the other[31]. These leads to a non-collaborative approach to the conflict resolution process and the insistent of litigation as an enforceable process of this competitive, zero-sum process to maximize each protagonists' outcome. In the process, both parties end in a worse position than before the conflict. This is classically depicted in the Nash's prisoners' dilemma. The clinician and the patients representing the prisoners.

The flip side of the earlier described transformative model of conflict is that people have the capacity to change the quality of their interactions to reflect relative personal strength or self-confidence (the empowerment shift) and relative openness or responsiveness to the other (the recognition shift)[32]. Mediation helps parties to identify opportunities for empowerment and recognition shifts as they arise in the parties' conversation and to choose whether and how to act upon these opportunities, and thus to change their interaction from destructive to constructive[33].

Positivist approach to law is about a set of normative rules that are set out by a recognised authority and must be obeyed[34]. The rules create an obligation that if not adhered to will result in sanctions. The authority to adjudicate matters is granted to the control as a reflection of the sovereign will of the people[35]. In accordance with Hart's view

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[31] Lionel L Wilson and Max Fulton, 'Risk Management: How Doctors, Hospitals and MDOs Can Limit the Costs of Malpractice Litigation' (2000) 172 Medical journal of Australia 77.

[32] Bush and Folger (n 6).

[33] Raechel Johns and Janet Davey, 'Introducing the Transformative Service Mediator: Value Creation with Vulnerable Consumers' (2019) 33 Journal of Services Marketing 5.

[34] James Penner and Emmanuel Melissaris, 'Chapter 5: Hart's Theory of Law', *McCoubrey & White's Textbook on Jurisprudence* (Kindle Edition, OUP Oxford).

[35] Constitution of Kenya, 2010, Article 159 (1).

of positivists law, the rules are modified by primary and subsidiary characteristics which pressurises compliance even when in conflict with ones wishes[36]. In the Kenya constitution, Article 159(2) modifies the direct application of law to allow for alternative dispute resolution. This allowance for alternative dispute resolution itself is law which is couched in mandatory language - "**shall** be promoted". This being the case, then ADR would have been in common use in health disputes. To under why some laws are implemented and others not, one has to delve deeper into Hart's philosophy of law, specifically on what distinguishes from the other positivist thinkers such as Bentham, Austin, and Kelsen, to understand why some laws are implemented/followed and others are not[37]. Hart affirmed that the attitude of the participants of the law was important in understanding the application of the law[38]. In health law dispute, the attitude of the parties involved would play a big role in adoption and implementation of the law – in promoting alternative dispute resolution[39]. Lastly, Hart affirmed the role of secondary rules in the operationalization and implementation of law[40].

1.2 Methodology

This qualitative paper takes a doctrinal approach grounded on H. L. A Hart positivist jurisprudence, analysis of statutes, and court decisions, looking at clarity, internal logic and consistence[41]. The issue the paper explores is that although article 159(2)(c) of the Constitution of Kenya, 2010 encourages the use of ADR, there is still

[36] Penner and Melissaris (n 35).
[37] Ibid.
[38] Ibid.
[39] Bismark and others (n 28).
[40] Penner and Melissaris (n 35).
[41] Khadijah Mohamed , 2016. Combining Methods in Legal Research. The Social Sciences, 11: 5191-5198. DOI: 10.36478/sscience.2016.5191.5198 URL: https://medwelljournals.com/abstract/?doi=sscience.2016.5191.5198

low use of ADR in Healthcare in Kenya. There has been no systematic study on why the use of alternative dispute resolution remains low despite article 159(2)(c) of the Constitution of Kenya, 2010 which encourages the use alternative dispute resolution.

2.0 Using Alternative Dispute Resolution in Healthcare

In circumstances of disputes, successful litigation promotes compensatory and distributive justice rather than restorative justice[42]. Litigation worsens the information asymmetry and non-collaboration. This leads to downward spiral of an already adversarial relationship and does not address underlying issues of the problem. The protagonists position themselves to get the best outcome for themselves. Litigation does not deter physician negligence, remedy injured patient, serve useful public health function or aid institutional improvement[43]. The protagonists, in this case the clinical team with the hospital on the one hand, and the patients on the other, need to have an ongoing relationship after the litigation. ADR allows a more measured interaction and an opportunity to explore more complex causes of unexpected adverse clinical outcomes[44]. Mediation allows collaborative evaluation of issues and decision making that address the root course of the issues[45, 46]. In the first step towards inculcating ADR in healthcare disputes, education of both the patients and clinicians is important. Physicians have modest knowledge of mediation and thus contributes to poor uptake of alternative dispute resolution as a

[42] Bismark and others (n 28).
[43] Sheea Sybblis, *Mediation in the Health Care System: Creative Problem Solving,* Pepperdine Dispute Resolution Law Journal. Issue. 3 (2006). Available at: https://digitalcommons.pepperdine.edu/drlj/vol6/iss3/6
[44] Bush and Folger (n 6).
[45] Mengxiao Wang and others, 'The Role of Mediation in Solving Medical Disputes in China' (2020) 20 BMC Health Services Research 225 <https://doi.org/10.1186/s12913-020-5044-7>.
[46] Bismark and others (n 28).

means of resolving healthcare disputes between patients and physicians[47]. A study in Singapore tertiary hospital found only moderate knowledge of ADR among doctors[48]. Increased education level of the clinician in healthcare and in medical malpractice are independent factors that make ADR more acceptable to the clinician[49].

A collaborative, non-zero sum gained approach to healthcare conflict ensures the best outcome. But this is premised on information sharing and collaboration. This is not the process in litigation. Mediation aims at "pushing" the protagonists to this viewpoint. At a societal level, information, knowledge and thus attitude will encourage the use of mediation to resolve healthcare conflict rather than the zero-sum approach in litigation. Such a process would go in to restoring relationship and confidence between the consumer and the provider. Alternative dispute resolution is a viable and desirable option to litigation in healthcare related conflicts because of unexpected adverse clinical outcomes[50].

Lord Justice Brooke (and with agreement of Lord Justice Robert Walker and Lord Justice Sedley), in **Dunnett v Railtrack Plc**, stated that

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[47] Lin W, Ling ZJ, Liu S, Lee JTB, Lim M, Goh A, et al. (2018) A knowledge, attitude, and practice survey on mediation among clinicians in a tertiary-care hospital in Singapore. PLoS ONE 13 (7): e0199885. https://doi.org/10.1371/journal. pone.0199885

[48] Wenrong Lin and others, 'A Knowledge, Attitude, and Practice Survey on Mediation among Clinicians in a Tertiary-Care Hospital in Singapore' (2018) 13 PLoS ONE.

[49] Lauris C Kaldjian and others, 'Disclosing Medical Errors to Patients: Attitudes and Practices of Physicians and Trainees' (2007) 22 Journal of general internal medicine 988.

[50] Bismark and others (n 28).

"*This court has knowledge of cases where intense feelings have arisen, for instance in relation to clinical negligence claims. But when the parties are brought together on neutral soil with a skilled mediator to help them resolve their differences, it may very well be that the mediator is able to achieve a result by which the parties shake hands at the end and feel that they have gone away having settled the dispute on terms with which they are happy to live. A mediator may be able to provide solutions which are beyond the powers of the court to provide*"[51]

A review study by David H. Sohn and B. Sonny Bal, confirmed that in the United States, ADR, in this case negotiation, as a process leading to early apology and disclosure program as well as mediation, significantly reduces both litigation as well as the award amount. More importantly, they also improved satisfaction of both plaintiff and defendants[52]. Some states in the United States of America have legislated the use of Alternative Dispute Resolution as the first line of conflict resolution whenever there is an unexpected adverse clinical outcome[53].

Whenever unexpected clinical outcomes are related to perception rather than reality, the institution would be protected from frivolous lawsuits while the consumer is patiently educated in a non-acrimonious and confidence building atmosphere[54]. This would imply a system where consumers do not continue to incur costs of

[51] *Dunnett v Railtrack Plc (Costs) [2002] EWCA Civ 303*.
[52] Sohn DH, Bal BS. Medical malpractice reform: the role of alternative dispute resolution. Clin Orthop Relat Res. 2012 May;470(5):1370-8. doi: 10.1007/s11999-011-2206-2. PMID: 22161080; PMCID: PMC3314770.
[53] Gary A Balcerzak and Kathryn K Leonhardt, 'Alternative Dispute Resolution in Healthcare: A Prescription for Increasing Disclosure and Improving Patient Safety' [2008] *Patient Safety & Quality Healthcare* <https://www.psqh.com/julaug08/resolution.html> accessed 1 January 2023.
[54] Wang and others (n 46).

unexpected outcomes and hospital would not be exposed to unfair reputational damage.

There are various options of Alternative Dispute Resolutions that may be available in healthcare. Evaluative mediation or conciliation takes advantage of the expert knowledge of the mediator/conciliator[55]. A trained mediator with knowledge of the clinical subject matter may assuage the need for litigation. An alternative approach would be the "Rush model" co-mediation approach which aims to encourage participation by the patients. This is where each of the two parties in conflict appoint one co-mediator. The appointment of a mediator by the patient encourages their participation and perception that the proceedings will be fair. The appointment of the mediators by each party is not intended to compromise their impartiality and fair mediation[56].

China faced a unique situation where perceived or actual negligence was met with organized violence against the hospital and clinicians to intimidate and coerce favourable settlement for the affected patients and family[57]. Facing scarcity of both medical and legal resources, alternative dispute resolution (arbitration and mediation) substantially reduced the need for litigation in China as well as reduction of the organised crime leading to improved safety of hospitals and of clinical staff[58].

In some communities, medical malpractice claims are very low. This is due to cultural reverence of the doctor and the reluctance to subject the doctor to formal litigation process[59]. In the event that a case is

[55] Balcerzak and Leonhardt (n 54).
[56] Ibid.
[57] Wang and others (n 46).
[58] Ibid.
[59] Ibid.

brought before the courts, successful claims are also very low due to difficulty of plaintiff to secure evidence[60]. Alternative dispute resolution may be used as a mechanism of improving consumer protection and encouraging a culture of accountability. This requires appropriate legislation and structures to implement this[61].

Conflict between healthcare providers and consumers deals with confidential patient care information. Additionally, the healthcare industry, is covered vigorously by the media. Even though availing sensitive clinical information for legal process is permitted under the Data protection act, 2019[62], it was never envisaged for consumption of the public. Since arbitration proceedings are not open to the public. This privacy is advantageous to the parties, as it protects both the healthcare consumer (patients) from leakage of sensitive personal and confidential clinical information as well as the healthcare providers from bad publicity that could affect consumer confidence and market position[63].

3.0 Implementing Alternative Dispute Resolution in Healthcare in Kenya

Whereas it is generally held that article 159(2)(c) of the Constitution of Kenya, 2010 encourages the use of alternative dispute resolution (ADR), there are no mechanisms as to how ADR will be specifically operationalised in healthcare whenever there is an unexpected adverse outcome. In the operationalization of the Article 159(2) of the Constitution of Kenya 2010, it would be important to create

[60] Katherine Benesch, 'Why ADR and Not Litigation for Healthcare Disputes?' (2011) 66 Dispute Resolution Journal 52.
[61] V Durmus and M Uydaci, 'Mediation in Turkish Health Law for Healthcare Disputes' (2016) 10 International Journal of Health and Medical Engineering 2712.
[62] Data Protection Act, 2019, Laws of Kenya, Section 45(c)(i).
[63] Benesch (n 61).

secondary rules in accordance to work in other jurisdictions as described earlier and in keeping with HLA Hart positivist approach to law.

The Constitution of Kenya, 2010 has in multiple times directed parliament to legislate law to bring to life the constitution. Such examples include article 18 authorizing legislation on citizenship, article 68 authorizing legislation on land, article 72 authorizing legislation on environment and article 80 authorizing legislation of leadership among many other such articles of the constitution. Indeed, in relations to alternative dispute resolution, article 189(4) of the Constitution of Kenya, 2010 expressly states that "*National legislation shall provide procedures for settling intergovernmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration*" thus mandating delineation of procedure to operationalize alternative dispute resolution. Such direction is missing on how to operationalize article 159(2)(c) and especially as it applies to the healthcare industry. Such specific legal or statutory direction has been given in various jurisdictions. Netherlands has legislated dispute resolutions committees[64], Australia has legislated process to complement litigation[65] and New Zealand has legislated processes that almost replaces litigation[66]. The City of Baltimore and in Georgia, arbitration is mandatory in dispute resolution[67].

[64] Rachel I Dijkstra and others, 'Medical Dispute Committees in the Netherlands: A Qualitative Study of Patient Expectations and Experiences' (2022) 22 BMC Health Services Research 650 <https://doi.org/10.1186/s12913-022-08021-2>.

[65] Bismark and others (n 28).

[66] David de Kam, 'Through the Regulator's Eyes: On the Effects of Making Quality and Safety of Care Inspectable'.

[67] 'Https://www.Healio.Com/News/Orthopedics/20120325/Mediation-Successfully-Used-for-Malpractice-Claims Accessed on 27th October 20022'.

Many institutions have internal root cause analysis and patient resolution processes[68]. These are viewed with suspicion by patients with perception of bias[69]. Neutral mediation committee are more favourably perceived and acceptable to patients impacted by unexpected adverse clinical outcomes[70]. Some jurisdictions have adopted the "Rush model" co-mediation which aims to encourage participation by the patients. In this model, one mediator is appointed by the institution/clinician and the other by the patient. This approach fosters trust, and collaboration of all parties involved[71].

Certain unexpected adverse clinical outcomes are more amenable to alternative dispute resolution. Patient and relatives with unexpected non-fatal outcomes find ADR more acceptable as an alternative to litigation[72]. Phased implementation of ADR will build a culture of acceptability. Tertiary hospitals and departments like surgery, obstetrics and gynaecology, and internal medicine handle more complex medical conditions and are more likely to face medical disputes. Unexpected adverse clinical outcomes in secondary hospitals level hospital are more likely to be solved through mediation and end up with less compensation compared to those in tertiary hospitals[73].

In order to set-up alternative dispute resolution in the healthcare, the first step is to build knowledge and understanding and thereby to

[68] Davide Nicolini, Justin Waring and Jeanne Mengis, 'Policy and Practice in the Use of Root Cause Analysis to Investigate Clinical Adverse Events: Mind the Gap' (2011) 73 Social science & medicine 217.
[69] Thaddeus Mason Pope, 'Multi-Institutional Healthcare Ethics Committees: The Procedurally Fair Internal Dispute Resolution Mechanism' (2008) 31 Campbell L. Rev. 257.
[70] Wang and others (n 46).
[71] Balcerzak and Leonhardt (n 54).
[72] Wang and others (n 46).
[73] Ibid.

change the attitude of all involved, both the patient and the clinicians to ADR. Knowledge of ADR is still very low among the clinician and patients[74]. Creating a framework and for this, including signing general consent/ contract to allow for ADR when a patient attends a hospital or part of employment contract when a doctor joins the employment of a healthcare institution. However, this should not preclude the right of either to seek their day in court to litigate their case should either of them wish[75]. There has been trepidation that, in a professional engagement between patient and healthcare providers, contracting very early to commit to ADR prior to litigation (or legislating to mandate ADR) may violate the rights of individuals to fair trial[76].

4.0 Conclusion

Litigation in an open court in matters that involve sensitive patient information is not ideal in resolving conflicts whenever there are healthcare conflicts[77]. Alternative Dispute Resolution as encouraged in the Constitution of Kenya, 2010, Article 159(2)(c) is still not significantly utilized whenever there is a conflicting concerning an unexpected adverse healthcare outcome. It is important to operationalise this article through secondary statutes and /or rules and guidelines. It further requires appropriate institution or existing institution to take-up additional mandate and create infrastructure to support this. In-house dispute resolution mechanism is viewed with suspicion by patients[78]. Setting up of neutral ADR mechanisms and process would be more acceptable to all parties[79]. An example of such a system is that of appointing co-mediators, one each appointed by

[74] Lin and others (n 49).
[75] Benesch (n 61).
[76] Ibid.
[77] Ibid.
[78] Pope (n 70).
[79] Ibid.

the healthcare consumer and providers in conflict. Improving acceptance of ADR requires education of potential users (healthcare consumers and healthcare providers) on ADR to create acceptable attitude.

Phased implementation of ADR based on healthcare facilities and healthcare conflicts where an adverse outcome is not death will go a long way in starting up ADR mechanism and building confidence in the system.

Lastly, clinician and patient education of ADR significantly improves acceptability of ADR as an alternative to litigation[80].

[80] Lin and others (n 49).

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Dunnett v Railtrack Plc (Costs) [2002] EWCA Civ 303
Constitution of Kenya, 2010, Article 159 (1)

Data Protection Act, 2019, Laws of Kenya, Section 45(c)(i)

Assessing the Dynamics of Land Corruption in Kenya: Causes, Consequences, and Remedial Strategies

By: ***Lucky Philomena Mbaye****

Abstract

This paper undertakes a comprehensive analysis of the intricate issue of land corruption in Kenya, with a focused exploration of its root causes, expansive consequences on societal development, and the proposition of effective remedial strategies. Through an in-depth examination of specific case studies, institutional frameworks, and the socio-economic implications entwined with land corruption, this paper aims to illuminate the multifaceted nature of the problem. By delving into the complexities of land corruption, the paper contributes critical insights to the ongoing discourse on anti-corruption efforts and the advancement of sustainable land governance in Kenya. The findings of this paper are anticipated to provide an understanding of the issue, thereby informing evidence-based policies and fostering a more resilient and transparent land administration system in the country.

Introduction

Land corruption, a pervasive issue in many developing nations, stands as a formidable barrier to equitable and sustainable societal development. [1] In the Kenyan context, this phenomenon has manifested in various forms, posing significant challenges to the nation's land governance systems and impeding the realization of

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[1] U Myint, 'Corruption: Causes, Consequences and Cures', *Asia-Pacific Development Journal* Vol. 7, No. 2, December 2000.

socio-economic progress.[2] The term "***land corruption***" refers to the abuse of power or position, often within the realms of government and public institutions, for personal gain or the detriment of the public interest in matters related to land administration and allocation.[3] Kenya, endowed with diverse landscapes and rich natural resources, has witnessed instances of land corruption that span historical, political, and socio-economic dimensions.[4] From irregular land allocations to fraudulent transactions, these instances have not only jeopardized the integrity of the land governance system but have also perpetuated social inequalities and hindered inclusive development initiatives.[5] Notable cases include illicit land acquisitions, bribery in land transactions, and the misuse of public office for personal gain, all of which have eroded public trust in the country's land administration institutions.[6]

As the complexities of land corruption in Kenya persist, this paper embarks on a comprehensive exploration of its root causes, examining the socio-economic implications and proposing effective remedial strategies. By shedding light on specific cases and institutional frameworks, this paper seeks to contribute insights to the ongoing discourse on combating corruption and fostering

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[2] Toke S. Aidt, 'Corruption and Sustainable Development' in International Handbook on the Economics of Corruption (2011).

[3] Transparency International, 'Land Corruption' < *https://www.transparency.org/en/our-priorities/land-corruption#:~:text=Corrupt%20practices%20within%20land%20administration%20and%20management%20is%20known%20as%20land%20corruption.*> accessed 4 January 2024.

[4] Ibid 4.

[5] Transparency International, 'Understanding Land Corruption'< *https://images.transparencycdn.org/images/2019_Report_UnderstandingLandCorruption_English.pdf* > accessed 15th January 2024.

[6] Ibid 4.

sustainable land governance in Kenya. In doing so, the paper aims to provide a foundation for evidence-based policies and interventions, addressing the challenges posed by land corruption and cultivating a more transparent, accountable, and equitable land administration system in the country.

Definition of Land Corruption

Land corruption in Kenya is a multifaceted challenge rooted in the abuse of power and authority within land administration and governance.[7] At its core, land corruption encompasses a range of unethical and illegal practices that undermine the integrity of land-related processes, often at the expense of public welfare and equitable resource distribution.[8] It represents a breach of trust and the distortion of public institutions for personal gain, casting a shadow over the nation's efforts toward sustainable development.[9] In the Kenyan context, instances of land corruption manifest in various forms, each contributing to the erosion of the principles that should underpin a fair and just land administration system.[10] Illicit land acquisitions, bribery, fraud in land transactions, and the misuse of

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[7] Transparency International, 'Land Corruption' < *https://www.transparency.org/en/our-priorities/land-corruption#:~:text=Corrupt%20practices%20within%20land%20administration%20and%20management%20is%20known%20as%20land%20corruption.*> accessed 4 January 2024.

[8] Ibid 1

[9] Brankov Tatjana & Tanjevic Natasa, 'CORRUPTION IN THE LAND SECTOR' (2013) *Economics of Agriculture*, 60. < *https://www.researchgate.net/publication/283672232_CORRUPTION_IN_THE_LAND_SECTOR_1* > accessed 4 January 2024.

[10] Cherotwei Geoffrey Simotwo, 'Corruption in the Land Question and Protracted Conflict in Bungoma County Kenya 1992 -2019' (2021) < *https://ir-library.ku.ac.ke/bitstream/handle/123456789/23608/Corruption%20in%20the%20Land%20.....pdf?sequence=1&isAllowed=y* > *accessed 4 January* 2024.

public office for personal enrichment are prevalent examples of land corruption that have persisted over time.[11] These instances not only compromise the integrity of land-related decisions but also perpetuate social inequalities, exacerbating the challenges faced by marginalized communities and hindering overall economic development. [12] The complexity of land corruption in Kenya is heightened by historical legacies, political influences, and socio-economic disparities. [13] Furthermore, the intersectionality of land corruption with political and economic interests creates a web of challenges that demand a nuanced understanding to effectively address the root causes.[14] In this paper, the term "***land corruption***" is approached as a broad concept encompassing both overt and covert acts that compromise the fairness, transparency, and equity within Kenya's land governance structures. [15] By defining and understanding land corruption within this contextual framework, the paper seeks to lay the groundwork for a detailed examination of its causes, consequences, and potential remedial strategies. The elucidation of this definition serves as a critical step in unpacking the dynamics of land corruption and devising targeted interventions to foster a more transparent and accountable land administration system in Kenya.

How Land Corruption Manifests itself in Kenya

Corruption manifests itself in several ways including:

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[11] Ibid 7.

[12] Ibid 2.

[13] Alice Wadström and Jean Brice Tetka, 'What Factors Enable Land Corruption?' Transparency International (2019) < *https://www.jstor.org/stable/pdf/resrep20593.8.pdf* > accessed 15 January 2024.

[14] Transparency International, 'Land Corruption Topic Guide' < *https://knowledgehub.transparency.org/assets/uploads/kproducts/Land-Corruption-Topic-Guide-2018-with-picture.pdf* > accessed 4 January 2024.

[15] Ibid 4.

Land Corruption through Policy Making and Legislation

Corruption becomes evident in the establishment and enforcement of land and property laws, influencing critical aspects such as procurement, purchase, inheritance, compensation for damages, and succession procedures.[16] In this context legislators may be swayed by bribes in formulating laws that perpetrate corruption, judges may be swayed by bribes to introduce law precedent that perpetrate corruption, and individuals might also attempt to manipulate law enforcement to suppress complaints related to corrupt land governance.[17]

A recent example is the Land Laws (Amendment) Bill (National Assembly Bill No. 65 of 2023),[18] proposing amendments to critical sections of key land-related acts, including the Land Registration Act No. 3 of 2012, the National Land Commission Act No. 5 of 2012, and the Land Act No. 6 of 2012. Notably, the proposed changes aim to grant the Lands Cabinet Secretary the authority to approve or reject land acquisition for state projects, a responsibility currently entrusted to the National Land Commission as stipulated in Article 67 of the Constitution.[19] If this bill is enacted, it would shift the power to acquire land for state projects from an independent commission to the Lands Cabinet Secretary. This alteration raises concerns about the

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[16] Ibid 14.

[17] Akech, Migai, "Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability?" *Indiana Journal of Global Legal Studies*, vol. 18, no. 1, 2011, pp. 341–94. JSTOR, https://doi.org/10.2979/indjglolegstu.18.1.341. Accessed 22 Jan. 2024.

[18] Parliament of Kenya, 'Land Laws (Amendment) Bill (National Assembly Bill No. 65 of 2023)' < *http://www.parliament.go.ke/sites/default/files/2023-11/THE%20LAND%20LAWS%20%28AMENDMENT%29%20BILL%2C%202023%20%282%29-1.pdf* > accessed 15 January 2024.

[19] Article 67, Constitution of Kenya 2010.

potential for corruption in land dealings this is because; Currently, the National Land Commission serves as an independent body tasked with overseeing land matters, ensuring transparency and fairness.[20] Shifting the authority to the Lands Cabinet Secretary could eliminate this independent oversight, creating an environment susceptible to corruption; Granting the Lands Cabinet Secretary sole authority to approve or reject land acquisition provides room for discretionary decision-making.[21] This discretion could be exploited for personal gain, with the potential for favoritism, nepotism, or other corrupt practices in the land acquisition process; The involvement of an independent commission helps ensure accountability in the land acquisition process. With the Lands Cabinet Secretary solely responsible, the checks and balances inherent in an independent body may be diminished, making it easier for corrupt practices to go unchecked; and Centralizing the power to the Lands Cabinet Secretary may lead to less transparent decision-making processes in land acquisition for state projects. This lack of transparency creates opportunities for corruption to thrive, as decisions may be made behind closed doors without adequate scrutiny.[22]

As lawmakers consider such amendments, it becomes imperative to prioritize mechanisms that uphold transparency, accountability, and independent oversight in the formulation and execution. Failure to do so not only jeopardizes the integrity of the land governance system but also undermines public trust in the fairness and legality of land-

[20] Ibid 19.

[21] Report on the Land (Amendment)National Assembly Bill No. 40 of 2022 (1)(1).pdf < *http://www.parliament.go.ke/sites/default/files/2023-10/Report%20on%20the%20Land%20%28Amendment%29National%20Assembly%20Bill%20No.%2040%20of%202022%20%281%29%281%29.pdf* >

[22] Ibid 14.

related transactions. Vigilance and adherence to principles of good governance are paramount in safeguarding against the insidious influence of corruption within the realm of land legislation and policy-making.[23]

Land Corruption through Gaps in the Legal Systems

In societies characterized by the coexistence of formal and customary legal systems, corruption often finds fertile ground within the gaps that exist between these two frameworks.[24] A significant challenge arises from the judiciary's failure to fully acknowledge and incorporate customary laws into the legal landscape, particularly those designed to safeguard indigenous rights concerning community land. [25] This oversight creates vulnerabilities that unscrupulous individuals may exploit, leading to instances of abuse and corruption. [26] The discrepancy in legal definitions further exacerbates the issue. In some cases, bribery is narrowly defined as a criminal offense only when involving public officials, overlooking the role of community chiefs or traditional authorities.[27] These figures, while not accorded the same legal status as public officials, hold substantial influence over ownership decisions concerning communal land. [28] The resulting legal vacuum not only provides opportunities for corruption but also undermines the protection of

[23] W. Zimmermann, 'Good governance in public land management' (2007) < https://www.fao.org/3/a1423t/a1423t01.pdf > accessed 22 January 2024.
[24] Transparency International, 'Land Corruption Topic Guide' (2018) < *https://knowledgehub.transparency.org/assets/uploads/kproducts/Land-Corruption-Topic-Guide-2018-with-picture.pdf* > accessed 22 January 2024.
[25] Ibid 8.
[26] Ibid 24.
[27] Ibid 24.
[28] Ibid 24.

indigenous rights.*[29] This situation contributes to a complex interplay between corruption and the legal systems, where the failure to recognize and harmonize customary laws with formal legal structures creates loopholes that can be exploited. As a consequence, communities relying on customary laws for the preservation of their land rights may find themselves marginalized and susceptible to abuse.

Land Corruption through poor Land Administration and Governance

Land corruption in Kenya is intricately woven into the fabric of poor land administration and governance, fostering a range of issues that collectively undermine the integrity of the land sector. [30] The inefficiencies within land registration and titling processes not only breed delays and bureaucratic red tape but also create fertile ground for fraudulent transactions and manipulative practices. [31] These issues, when left unaddressed, often escalate into instances of land grabbing and irregular allocations, where influential individuals or entities exploit administrative weaknesses to acquire land illegally, resulting in the unfortunate displacement of communities.[32] The lack of transparency in land transactions is a direct byproduct of these inadequate governance practices.[33] Outdated and inaccessible land

[29] Ibid 24.

[30] Ibid 6.

[31] Ronald Matende, 'Land Registration: A review of Rationale, Mechanics and Typologies' (2019).

[32] MMAN Advocates, 'Ardhi Sasa: Is this the light at the end of the tunnel?' (2021) < *https://mman.co.ke/content/ardhisasa-%E2%80%93-light-end-tunnel* >.

[33] Prince Donkor Ameyaw & Walter Timo de Vries, 'Transparency of Land Administration and the Role of Blockchain Technology, a Four-Dimensional Framework Analysis from the Ghanaian Land Perspective' (2020), 9(12), 491; https://doi.org/10.3390/land9120491

records serve as the breeding ground for illicit deals, shielded from public scrutiny.[34] As the complexities of land use planning remain inadequately addressed, corruption finds a foothold.[35] Inconsistent zoning regulations and unauthorized changes in land use allow individuals to manipulate planning processes for their personal gain, contributing to a culture of corruption within land governance.[36]

For numerous decades, the Kenyan land sector has grappled with persistent issues of corruption, fraud, and illicit transactions, primarily stemming from challenges within the registration and titling processes in land registries.[37] The prolonged reliance on manual land registration systems has resulted in inherent inefficiencies, including the loss, destruction, theft, misfiling, and overall manipulation of land records and entries.[38] In response to these challenges, the Ministry of Lands and Physical Planning introduced the Land Information Management System (LIMS), also known as **'Ardhi Sasa**,' hosted on the e-Citizen portal.[39] Ardhi Sasa has emerged as a noteworthy initiative aimed at addressing historical problems faced by Kenyans when dealing with transactions involving the lands registry.[40] This system has proven to be highly

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[34] Ibid 31.
[35] Ibid 24.
[36] Ibid 24.
[37] Ibid 32.
[38] Ibid 32.
[39] Ardhi Sasa, 'Digital land transaction platform to curb fraud, says President Kenyatta' (2021) < *https://lands.go.ke/digital-land-transaction-platform-to-curb-fraud-says-president-kenyatta/*>
[40] Pamela Ager & James Kituku, 'Better Understanding: Analysis of the National Land Information Management System (Ardhi Sasa)' (2023) Oraro & Company Advocates. < *https://www.oraro.co.ke/better-understanding-analysis-of-the-national-land-information-management-system-ardhi-*

effective in mitigating inefficiencies by streamlining access and offering a robust, stable, and secure online platform. Transactions that were once cumbersome are now facilitated with the click of a button, significantly enhancing the overall experience for individuals engaging with the lands registry.[41] However, it's crucial to note that the current implementation of the system exclusively covers the Nairobi Registry.[42] Despite the marked improvements in the capital city, challenges related to land corruption persist in other counties and regions. To comprehensively address these issues and extend the benefits of efficient land management, there is a pressing need for the broader adoption and adaptation of similar technological solutions across the entire country. Such expansion would contribute significantly to curbing corruption, ensuring transparency, and fostering a more reliable land governance system nationwide.

Causes of Land Corruption of Kenya

Some key factors contributing to land corruption in Kenya include;

Historical Injustices

Historical injustices, deeply rooted in the colonial-era land dispossession, form a foundational layer that significantly contributes to the prevalence of land corruption in contemporary Kenya.* The colonial legacy was marked by forced land acquisitions, displacements of indigenous communities and the establishment of skewed land tenure systems, which eventually laid the groundwork

sasa/#:~:text=The%20objective%20of%20Ardhi%20Sasa,titles%2C%20rectification%20of%20land%20records.> accessed 15 January 2024.

[41] Ardhi Sasa, < https://ardhisasa.lands.go.ke/home/faqs >

[42] Ibid 14.

for corrupt practices within the land governance system.[43] [44] The disconnection of communities from their ancestral lands sowed the seeds for conflicts over land, creating an atmosphere conducive to corrupt activities during subsequent land allocation and redistribution initiatives.[45] The arbitrary drawing of borders and the imposition of foreign land ownership structures left indigenous communities disenfranchised, laying the groundwork for corruption to flourish.[46] The lingering effects of colonial legacies continue to fuel land corruption, as powerful elites exploit legal ambiguities and bureaucratic loopholes to consolidate control over coveted territories.[47]

As we navigate the 21st century, the consequences of historical injustices persist, take for instance the Masaai Community who were displaced during the colonial period when Nairobi was transformed into an administrative town.[48]The historical injustices faced by the Maasai community in Kenya are deeply rooted in a series of events that unfolded during the colonial era and persisted into the post-

[43] Philip Onguny & Taylor Gillies, 'Land Conflict in Kenya: A Comprehensive Overview of Literature' (2019) < https://doi.org/10.4000/eastafrica.879 > accessed 4 January 2023.

[44] Jackson N. Wanjohi & John M. Kiboi, 'Historical Land Injustices in Kenya' (2022) *Jumuga Journal of Educational Oral Studies and Human Sciences (JJEOSHS)* 5(1): 1-11. *https://www.researchgate.net/publication/363916350_Historical_Land_Injustices_in_Kenya*

[45] Ibid 9

[46] Ibid 44.

[47] Ibid 44.

[48] Kenya Land Alliance, 'Historic Land Injustice in Laikipia County, Kenya' < *https://kenyalandalliance.or.ke/index.php/welcome/blogpost/28#:~:text=In%20effect%2C%20this%20ordinance%20allowed,driest%20parts%20of%20the%20region.*>

independence period. [49] One significant aspect involves the displacement and loss of grazing lands, impacting the Maasai's traditional territories.[50] During the colonial period, British authorities implemented policies that allocated vast expanses of Maasai land for European settler farms and wildlife conservation. [51] This process resulted in the displacement of the Maasai from their ancestral lands and a substantial reduction in the available grazing areas. The Maasai were confined to reserves, disrupting their nomadic pastoralist way of life and restricting their access to vital resources. [52] Post-independence, efforts were made to address historical injustices through land reforms and policies aimed at redressing past wrongs. However, challenges persisted, and issues such as unclear land tenure, inadequate implementation of land reforms, and competing land-use interests have continued to affect the Maasai community.[53]

The prevalence of land corruption in contemporary Kenya is intricately tied to the historical injustices of the colonial era. Forced land acquisitions, displacement of indigenous communities, and the establishment of skewed land tenure systems set the stage for corrupt practices within the land governance system. [54] Addressing land

[49]Muritu, Esther Gathigia, 'Environmental justice for the Maasai community; reclaiming Land and natural resources' (2016) < https://su-plus.strathmore.edu/items/bfa1c45a-936a-405f-96d0-45e9587f323d> accessed 22nd January 2024.

[50] Dennis M Ndambo, 'Justifying Maasai Land Claims in Kenya through Statutory Law, Common Law and International Law' (2017) *Africa Nazarene University Law Journal,* 2017, Issue 1, p. 84 – 115.

[51] Ibid 50.

[52] Lotte Hughes. "Malice in Maasailand: The Historical Roots of Current Political Struggles." *African Affairs*, vol. 104, no. 415, 2005, pp. 207–24. JSTOR, http://www.jstor.org/stable/3518442. Accessed 15 Jan. 2024.

[53] Ibid 49.

[54] Ibid 44.

corruption requires not only a focus on present-day challenges but also a commitment to rectifying historical injustices, fostering transparent land governance, and promoting equitable access to resources for all communities.[55]

Post-Colonial Irregular Land Allocations

In the post-colonial period, efforts were made to correct historical injustices through land reforms. Unfortunately, these well-intentioned reforms ended up providing opportunities for corruption. The distribution of land became skewed due to irregular allocations driven by political favoritism or personal gain, echoing the historical injustices they aimed to rectify. A concerning outcome was the increase in irregular land allocations, where influential individuals manipulated the reform processes, resulting in a concentration of land among a privileged few.[56] The connection between irregular land allocations and corruption became more pronounced with the rise of political patronage.[57] Land, a valuable resource, turned into a tool for political gain, as influential figures used their positions to secure land for loyal supporters.[58] Additionally, individuals in positions of power exploited land reform processes for personal benefit, contributing to a culture of corruption

[55] Patrick Meager, 'Combatting Corruption in Africa: Institutional Challenges and Responses' (1997) < *https://pdf.usaid.gov/pdf_docs/Pnaca964.pdf* > accessed 15 January 2024.

[56] Joseph Kieyah & Casty G. Mbae- Njoroge, ' Ndung'u Report on Land Grabbing in Kenya: Legal and Economic Analysis' KIPPRA Discussion Paper No. 119 (2010) *https://repository.kippra.or.ke/bitstream/handle/123456789/2684/DP119.pdf?sequence=1&isAllowed=y*

[57] Roger Southall, 'The Ndungu Report: Land & Graft in Kenya' *Review of African Political Economy*, 103, March 2005, pp.142-51.

[58] Ibid 57.

within the broader context of land governance.[59] The reverberations of historical injustices continue in present-day irregular land allocations, presenting an ongoing challenge to fair land distribution.[60] The unintended consequences of post-colonial land reforms have created an environment where corruption flourishes, undermining the very principles these reforms sought to establish.[61] The Ndung'u report unequivocally exposes extensive land corruption during the post-colonial era in Kenya. According to the findings, both former Presidents and successive Commissioners of Lands, along with their deputies, grossly abused the powers vested in the President. The report highlights a pattern of 'unbridled plunder' of public land by local councillors and officials spanning multiple regimes.[62] It underscores that the illicit transactions were significantly facilitated by the active complicity of various professionals, including lawyers, surveyors, valuers, physical planners, engineers, architects, land registrars, estate agents, and bankers in the land and property market. A striking revelation from the Ndung'u Commission is the observation that numerous high-profile allocations of public land were directed towards companies specifically incorporated for such

[59] Erin O'Brien, 'Irregular and Illegal Land Acquisition by Kenya's elites: Trends, processes and impacts of Kenya's land-grabbing phenomenon' (2011) < *https://land.igad.int/index.php/documents-1/countries/kenya/investment-3/642-irregular-and-illegal-land-acquisition-by-kenya-s-elites-trends-processes-and-impacts-of-kenya-s-land-grabbing-phenomenon/file* >

[60] Ibid 59.

[61] Ibid 59.

[62] Joseph Kieyah & Casty G. Mbae, 'Discussion Paper No. 119 of 2010 on Ndung'u Report on Land Grabbing in Kenya: Legal and Economic Analysis' (2010) *KIPPRA Publications* < https://repository.kippra.or.ke/handle/123456789/2684> accessed 15 January 2023.

purposes.[63] This strategic move aimed to shield the directors and shareholders of these entities from easy public scrutiny. The report underscores that a substantial number of these illicit allocations occurred either before or immediately after the multiparty general elections of 1992, 1997, and 2002. This timeframe strongly supports the commission's view that public land was frequently allocated as a form of political reward or patronage. In essence, the Ndung'u Commission serves as compelling evidence that political figures took advantage of land allocations, manipulating the system for personal gain. The report sheds light on a deeply rooted issue of corruption within the land allocation processes and underscores the need for systemic reforms to rectify historical wrongs and ensure a fair and transparent land governance system in Kenya. Addressing these issues requires comprehensive reforms that prioritize transparency, accountability, and the fair distribution of land resources, aiming for a more just and inclusive society.

Inefficient Land Registration Systems

In the specific context of Kenya, the issue of inadequate land governance and administration emerges as a pivotal and multifaceted factor contributing significantly to the pervasive presence of corruption within land-related activities.[64] This landscape of challenges is characterized by several critical aspects that underscore how weaknesses in land governance create fertile ground for corrupt practices. First and foremost, the inefficiencies ingrained in Kenya's land registration systems represent a noteworthy hurdle. Delays in the transition from manual to digital platforms have given rise to

[63] Southall, Roger. "The Ndungu Report: Land & Graft in Kenya." Review of African Political Economy, vol. 32, no. 103, 2005, pp. 142–51. JSTOR, http://www.jstor.org/stable/4006915. Accessed 15 Jan. 2024.

[64] Ibid 31.

inaccuracies and a notable absence of comprehensive records. This inherent inefficiency not only impedes the seamless transfer of land but also establishes an environment conducive to the flourishing of manipulation and fraudulent activities.[65]

Furthermore, the lack of transparency in various facets of land transactions, encompassing sales, transfers, and subdivisions, emerges as a significant contributor to corruption.[66] The opacity shrouding these dealings provides a conducive setting for individuals engaging in corrupt practices to exploit loopholes without the fear of detection. The resulting lack of openness and accountability creates an environment where unscrupulous actors can operate with relative impunity.[67] Internally, corruption challenges manifest within land administration offices, where bureaucratic inefficiencies, instances of bribery, and extortion become part of the transactional landscape.[68] These internal hurdles further contribute to an environment where corrupt practices are not only facilitated but, in some instances, normalized.[69] Additionally, discrepancies in land surveys and mapping processes further complicate the land governance landscape. Inaccurate surveys and outdated mapping hinder effective planning and land use

[65] David Palmer, 'Making Land Registration More Effective' Food and Agriculture Organization <https://www.fao.org/3/x3720T/x3720t04.htm>

[66] Ibid 31.

[67] Ibid 31.

[68] Ibid 31.

[69] Patrick Somba Nzomo, 'An investigation into land registration process and its effects on urban land development' (2008).

management, contributing to an environment where uncertainties and ambiguities become breeding grounds for corrupt activities.[70]

Land Grabbing and Encroachment

The challenge of land grabbing and encroachment in Kenya is deeply entwined with the deficiencies present in the governance and administration of land.[71] In a milieu where structures designed to safeguard land rights and prevent illicit acquisitions demonstrate weaknesses, a conducive environment is created for powerful individuals and entities to exploit vulnerabilities for their own advantage.[72] The gateway to land grabbing swings open when corrupt collaborations unfold between influential actors and officials responsible for land administration.[73] These vulnerabilities originate from systemic shortcomings that encompass gaps in land registration systems, non-transparent land transactions, and inadequate enforcement of land laws.[74] Significantly, officials, in certain instances, either turn a blind eye to such activities or actively engage in facilitating them. This collaboration, often fueled by self-interest, severely undermines the fundamental principles of fairness, justice, and equal access to land. Individuals with considerable influence exploit their positions to unlawfully acquire land, perpetuating a

[70] Mburu Peter Ng'ang'a, 'Strategies to modernize the land registration system in Kenya' *University of Gronigen* (2017).

[71] Jacqueline M. Klopp, 'Pilfering the Public: The Problem of Land Grabbing in Contemporary Kenya' Africa Today Vol. 47, No. 1 (Winter, 2000), pp. 7-26

[72] Ibid 71.

[73] Kenya National Commission on Human Rights, 'Unjust Enrichment: The making of land grabbing millionaires' The Plunder of Kenya's State Corporations and Protected Lands, Vol. 2 < https://www.knchr.org/Portals/0/EcosocReports/Unjust%20Enrichment%20Volume%201.pdf >

[74] Ibid 71.

cycle of dispossession and inequality.[75] The ramifications are profound, disproportionately impacting communities who find themselves dispossessed and marginalized in the face of powerful interests.

Discrepancies in Land Surveys and Mapping

The presence of discrepancies in land surveys and mapping constitutes a critical dimension of the broader challenges within land governance, particularly in the Kenyan context. Inaccuracies within land surveys not only give rise to immediate boundary disputes but also cast a long shadow on the overall effectiveness of land administration.[76] The lack of precision in delineating land boundaries can engender conflicts among landowners, communities, and even governmental bodies, leading to protracted legal battles and social unrest. This situation is exacerbated by outdated mapping systems, which impede effective planning and the sustainable management of land use. The ramifications of these inaccuracies extend beyond mere administrative inefficiencies; they create an environment ripe for corrupt practices to flourish. In the pursuit of resolving disputes arising from inconsistent survey data or outdated maps, corrupt actors may exploit the inherent vulnerabilities. This could involve the manipulation of land records, bribery, or other illicit activities to achieve favorable outcomes.[77] The resulting corruption not only

[75] Jacqueline M. Klopp, 'Pilfering the Public: The Problem of Land Grabbing in Contemporary Kenya' *Africa Today* Vol. 47, No. 1 (Winter, 2000), pp. 7-26.
[76] Ibrahim Mwathane, 'Incompetent use of registry maps causing avoidable disputes' in Land Reforms in Kenya and Around Africa (2000) < http://ibrahimmwathane.com/index.php/frontpage/entry/incompetent-use-of-registry-maps-causing-avoidable-disputes >accessed 5 January 2024.
[77] Ibrahim Mwathane, 'How wrong use of registry maps disturbs the peace' (2021) < https://nation.africa/kenya/blogs-opinion/blogs/how-wrong-use-of-registry-maps-disturbs-the-peace-3462196 >

compromises the integrity of land governance but also perpetuates a cycle of mistrust and inequity within communities.[78]

Impact of Land Corruption

The consequences of corrupt land practices extend beyond the transactional realm, delving into the very fabric of historical injustices and exacerbating the vulnerabilities of marginalized communities. Some of the impacts of land corruption include;

Social Injustice and Marginalization

Within the complex narrative of Kenya's land governance, corrupt land allocations and transactions emerge as contemporary manifestations of historical injustices, perpetuating an unyielding cycle of dispossession. Vulnerable communities, already marginalized by the legacies of colonialism, find themselves further dispossessed and disenfranchised. [79] The disconnection from ancestral lands, initiated during the colonial era, becomes a recurring and agonizing theme as corrupt maneuvers strip these communities of their rights, intensifying existing social inequalities.* The roots of dispossession trace back to the colonial era, a dark period marked by forced land acquisitions, displacement, and the imposition of skewed land tenure systems. The consequences of these historical injustices continue to cast shadows over vulnerable communities, who,

[78] Ibid 76.

[79] Basem Elmukhtar Ertimi & Mohamed Ali Saeh, 'The Impact of Corruption on Some Aspects of the Economy' *International Journal of Economics and Finance*, Vol. 5, No. 8; (2013) http://dx.doi.org/10.5539/ijef.v5n8p1 accessed 15 January 2024.

marginalized by the enduring legacies of colonialism, now face a contemporary struggle against the persistent forces of corruption.[80] The land, once a source of identity, sustenance, and cultural heritage, becomes a commodity manipulated by corruption, amplifying the social inequalities that these communities have grappled with for generations. [81] The consequences are not merely economic or geographical but cut to the core of societal fabric.[82] The dispossession perpetuated by corrupt land practices exacerbates existing social inequalities, creating a widening chasm between those who wield power and those who suffer its consequences.[83] The dispossessed communities face increased marginalization, further alienation, and a deepening sense of injustice that reverberates through generations.[84] The disconnection from ancestral lands, initiated by historical injustices, becomes a recurring motif in the narrative of dispossession.[85] As corrupt practices amplify this disconnection, the ties that bind communities to their heritage are strained to the breaking point.[86] This recurrent theme underscores the insidious nature of corruption, which not only perpetuates historical wrongs but actively contributes to the erasure of cultural and communal identities. In confronting the persistence of dispossession, it becomes imperative for Kenya to not only address the symptoms but to

[80] Kempe Ronald Hope Sr. (2014) Kenya's corruption problem: causes and consequences, Commonwealth & Comparative Politics, 52:4, 493-512, DOI: 10.1080/14662043.2014.955981, accessed 15 January 2024.

[81] Ibid 80.

[82] Ibid 80.

[83] Maryam Omar, 'The Implications of Corruption on Kenya's Sustainable Development and Economic Growth' *University of Nairobi, Institute of Diplomacy and International Studies* (2020).

[84] Ibid 83.

[85] Ibid 83.

[86] Ibid 83

dismantle the systemic roots that sustain this cycle. A commitment to transparency, accountability, and justice within the land governance system is crucial, offering not just restitution for the present but a path towards healing the enduring wounds of historical injustices. *[87] Only through such transformative efforts can Kenya hope to break free from the chains of dispossession and forge a future where land rights are secure, equitable, and reflective of a society committed to rectifying the injustices of the past.

Economic Inequities

Land corruption not only serves as a symptom of systemic inequality but actively perpetuates economic disparities by consolidating land ownership among a privileged minority.[88] This unequal distribution of land resources serves as a formidable barrier to comprehensive economic development, particularly for marginalized communities.[89] The concentration of land in the hands of a select few not only limits the accessibility of fertile and resource-rich lands for those historically disenfranchised but also stifles their agricultural productivity and overall economic opportunities.[90] In this intricate web of corruption, the marginalized find themselves contending not only with the historical legacies of colonialism but also with the contemporary consequences of a system that favors the elite.[91] The implications are

[87] Ibid 83

[88] Kempe Ronald Hope Snr., 'Corruption in Kenya. In: Corruption and Governance in Africa. Palgrave Macmillan, Cham'(2017). https://doi.org/10.1007/978-3-319-50191-8_3 accessed 15 January 2023.

[89] Ibid 88

[90] Shera, Adela, PhD; Dosti, Bernard, PhD; Grabova, Perseta, 'Corruption impact on Economic Growth: An empirical analysis'Journal of Economic Development, Management, I T, Finance, and Marketing Preview publication details; Beverly Hills Vol. 6, Iss. 2, (Sep 2014): 57-77.

[91] Ibid 91.

profound, as the unequal access to land undermines the foundation of economic empowerment and perpetuates a cycle where economic disparities persist, hindering the realization of a truly inclusive and equitable society. [92] This dynamic not only underscores the multifaceted impact of land corruption but emphasizes the urgency for comprehensive reforms that address the root causes of economic inequities within the land governance system.

Impaired Sustainable Development

In Kenya, the nexus between inefficient land registration systems, corrupt land practices, and the impediment of sustainable development initiatives is evident in the intricate challenges faced by the country. [93] The inefficiencies ingrained in Kenya's land registration systems pose a substantial hurdle to sustainable development.[94] The transition from manual to digital platforms has been marred by delays, resulting in inaccurate land records and a notable absence of comprehensive databases. [95] This deficiency obstructs transparent transactions and effective land use planning.[96] Without reliable records, decision-makers struggle to implement sustainable development initiatives, as the very foundation of these efforts rests on accurate data and transparent processes.[97] Corrupt land practices further exacerbate the hurdles to sustainable development in Kenya. The opacity shrouding various facets of land

[92] Benson Kairichi Marimba, 'Mass Media Coverage of Corruption in the Land Sector: Implications for Policy and Reforms in Kenya' *European Journal of Social Sciences Studies*, Vol 2, No 6 (2017).

[93] Toke S. Aidt, 'Corruption and Sustainable Development', in International Handbook on the Economics of Corruption (2011).

[94] Ibid 93.

[95] Ibid 93.

[96] Ibid 93.

[97] Ibid 20.

transactions, encompassing sales, transfers, and subdivisions, creates an environment conducive to corruption. Individuals engaging in corrupt practices exploit these loopholes without fear of detection. [98] The inadequate enforcement of existing land laws compounds the issue, cultivating a culture of impunity within the land governance framework. This lax enforcement allows for illegal land acquisitions, fraudulent transactions, and the manipulation of land use regulations, perpetuating a cycle of corruption that undermines the intended principles of fairness and justice within the land sector.[99]

Internally, corruption challenges manifest within land administration offices in Kenya, where bureaucratic inefficiencies, instances of bribery, and extortion become part of the transactional landscape. [100] These internal hurdles further contribute to an environment where corrupt practices are not only facilitated but, in some instances, normalized.[101] Additionally, discrepancies in land surveys and mapping processes further complicate the land governance landscape. Inaccurate surveys and outdated mapping hinder effective planning and land use management, contributing to an environment where uncertainties and ambiguities become breeding grounds for corrupt activities.[102] The concentration of land ownership, a consequence of corrupt practices like fraudulent transactions and illegal acquisitions, lays bare stark inequities that disproportionately limit access to land for marginalized

[98] Bertrand Venard, 'Institutions, Corruption and Sustainable Development' (2013) Economics Bulletin, Vol. 33 No. 4, pp. 2545-2562.
[99] Toke S. Aidt, 'Corruption and Sustainable Development', in International Handbook on the Economics of Corruption (2011).
[100] Ibid 99.
[101] Ibid 99.
[102] Ibid 99.

communities. [103] This not only obstructs their engagement in sustainable agricultural practices but also forms a major roadblock to broader economic development initiatives. [104] The uncertainties surrounding land ownership, fueled by corrupt practices, act as formidable deterrents for investors and developers alike, stalling essential infrastructure projects and hampering overall economic growth.[105]

Inefficient land use planning, exacerbated by corrupt activities, contributes to environmental degradation, imperiling biodiversity, water resources, and the overall health of ecosystems.[106] Sustainable agricultural productivity takes a severe hit as marginalized communities find themselves denied access to fertile lands, perpetuating a cycle of impoverishment.[107] Furthermore, corrupt land transactions serve as catalysts for social disparities, fueling conflicts over land ownership and diverting resources away from grassroots-driven sustainable development projects.[108] Even in urban areas, corrupt land practices foster unplanned urbanization,

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[103] Ibid 99.

[104] Muntasir Murshed & Farzana Mredula, 'Impacts of Corruption on Sustainable Development: A Simultaneous Equations Model Estimation Approach' *Journal of Accounting, Finance and Economics*, Vol. 8, Issue 1, pp. 109-133, March 2018.

[105] Samuel Chukwudi Angunyai & Lere Amusan, 'Implications of Land Grabbing and Resource Curse for Sustainable Development Goal 2 in Africa: Can Globalization be blamed?' *Department of Political Studies and International Relations, Mafikeng Campus, North West University, Mmbatho 2790, South Africa, Sustainability* (2023), 15(14), 10845; **https://doi.org/10.3390/su151410845**.

[106] Lennart Olsson & Humberto Barbosa, " Land degradation" (2010)

[107] Ibid 105.

[108] Ibid 105.

undermining concerted efforts to create sustainable, resilient cities.[109] The forced dispossession of indigenous communities from their ancestral lands is not merely an economic tragedy but also signals the loss of cultural heritage and traditional knowledge tied to sustainable land use practices.[110]

In light of these multifaceted challenges, there is a compelling need for comprehensive reforms within the Kenyan land governance and administration sector. [111] Strengthening institutions, investing in technological solutions to streamline registration processes, enhancing transparency, and promoting accountability are imperative steps toward mitigating the root causes of corruption and fostering a more equitable and just land governance system in Kenya. [112] This holistic approach is essential for creating an environment conducive to sustainable development, where accurate land records, transparent transactions, and effective land use planning lay the groundwork for a prosperous and equitable future.[113]

Loss of Cultural Heritage

In Kenya, the impact of land corruption extends beyond legal and economic realms, reaching into the very heart of the nation's cultural

[109] Ibid 104.

[110] Răzvan Hoinaru, Daniel Buda, Sorin Nicolae Borlea,Viorela Ligia Văidean and Monica Violeta Achim, 'The Impact of Corruption and Shadow Economy on the Economic and Sustainable Development. Do They "Sand the Wheels" or "Grease the Wheels"?' Sustainability 2020, 12(2), 481; https://doi.org/10.3390/su12020481

[111] Ibid 110.

[112] Ibid 110.

[113] Ibid 110.

identity.[114] Indigenous communities, deeply rooted in their ancestral lands, face the harsh reality of forced dispossession, a consequence of corrupt land transactions.[115] Unscrupulous actors, capitalizing on legal ambiguities and bureaucratic loopholes, exploit vulnerabilities within the land governance system, leading to the loss of sacred sites and areas of cultural significance.[116] The degradation or destruction of these sites not only robs communities of their spiritual anchors but also erodes the cultural fabric woven into the land.[117]

Traditional livelihoods, intricately tied to the land, suffer disruptions, causing a profound loss of cultural identity. The displacement catalyzed by land corruption fragments communities, dispersing cultural practices that were once shared collectively. The intricate knowledge held by indigenous communities about sustainable land use practices, traditional farming methods, and biodiversity conservation is at risk of fading away as these communities face displacement and marginalization.[118] Moreover, land corruption

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[114] Gideon Onyango, 'Bureaucratic Corruption and Maladministration in Kenya: A Bureaucratic Analysis' International Journal of African Renaissance Studies - Multi-, Inter- and Transdisciplinary, Volume 17, 2022 - Issue 1.

[115] Kempe Ronald Hope Sr, 'Kenya's Corruption Problem: Causes and Consequences' Commonwealth & Comparative Politics (2014), 52:4, pp. 493 – 512, DOI: 10.1080/14662043.2014.955981

[116] Ibid 114.

[117] Terngu Sylvanus Nomishan, Paul-Kolade Tubi, and Dimas Solomon Gubam, 'Cultural heritage management and the effect of corruption in Nigeria: hampering sustainable development via cultural heritage destruction' Journal of Cultural Heritage Management and Sustainable Development, ISSN: 2044-1266

[118] Dimas S. Gubam, Paul-Kolade Tubi & Terngu Sylvanus Nomishan, 'Cultural Heritage Management and the Effect of Corruption in Nigeria: Hampering Sustainable Development via Cultural Heritage

threatens the continuation of unique rituals, ceremonies, and cultural practices intimately connected to the land.[119] The very essence of indigenous cultures, manifested in these rituals, becomes vulnerable to disruption, further contributing to the erosion of cultural heritage.[120] This disruption also extends to the broader impact on intergenerational knowledge transfer.[121] As younger generations are separated from their ancestral lands and cultural practices, the oral traditions, stories, and wisdom passed down from elders face the risk of fading into obscurity.[122]

Preserving cultural heritage must be integral to strategies combating land corruption, emphasizing the need for equitable and transparent land governance that respects and protects the cultural significance of the land to indigenous communities. [123] Only through a comprehensive approach can Kenya hope to safeguard not only its legal and economic integrity but also the rich tapestry of cultural heritage woven into its landscapes.

Barrier to Infrastructural Development

Land corruption in Kenya emerges as a formidable barrier to infrastructural development, casting shadows over the nation's progress in numerous ways.[124] The uncertainties surrounding land

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Destruction'(2013) *Journal of Cultural Heritage Management and Sustainable Development* 13(4):662-684, DOI:10.1108/JCHMSD-12-2020-017

[119] Ibid 118.

[120] Ibid 119.

[121] Ibid 115.

[122] Ibid 118.

[123] Ibid 120.

[124] Robert Gillanders, 'Corruption and Infrastructure at the Country and Regional Level' (2014) *The Journal of Development Studies*, 50:6, 803-819, DOI: 10.1080/00220388.2013.858126

ownership, a direct consequence of corrupt practices, instill hesitation among potential investors—both domestic and foreign. This reluctance stems from the risks associated with legal ambiguities, fraudulent transactions, and irregular land allocations.[125] The legal disputes and challenges related to land ownership create prolonged battles that lead to delays in obtaining project approvals and subsequently hinder the timely implementation of infrastructural projects.[126] These delays, compounded by bureaucratic hurdles, not only extend project timelines but also contribute to increased costs, making projects less economically viable and deterring investors.[127]

Furthermore, land corruption contributes to unplanned urbanization, disrupting well-planned urban development. [128] Unauthorized constructions and illegal subdivisions encroach upon designated infrastructure corridors, such as roads and utilities, posing additional challenges to the execution of projects according to predefined plans.[129] Inefficient land use planning, a common consequence of corrupt practices, results in projects being implemented in areas unsuitable for development, contributing to environmental degradation and undermining sustainable development efforts.[130]

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[125] Ibid 124

[126] Ibid 124

[127] Emmanuel Kingsford Owusu, Albert P.C. Chan, & M. Reza Hosseini, 'Impacts of anti-corruption barriers on the efficacy of anti-corruption measures in infrastructure projects: Implications for sustainable *development' Journal of Cleaner Production*, Volume 246, 10 February 2020, 119078,< https://doi.org/10.1016/j.jclepro.2019.119078>, accessed 15 January 2024.

[128] Ibid 127.

[129] Ibid 127.

[130] Innocent Musonda, Chioma Sylvia Okoro and Erastus Mishengu Mwanaumo, 'Infrastructure development in Africa : eradicating stumbling blocks to maximizing investment potentials' (2017) < https://hdl.handle.net/10210/241663> accessed 15 January 2024.

Compromises in the quality of infrastructure due to corruption within the procurement process further exacerbate the issue. [131] Substandard construction materials or execution can result in infrastructural projects that require frequent repairs and maintenance, diverting resources and hindering long-term development goals. [132] Land corruption, therefore, not only introduces uncertainties and delays but also compromises the integrity and quality of vital infrastructural developments in Kenya.[133] Addressing this pervasive issue demands comprehensive reforms, including the establishment of transparent and accountable land governance systems, the strengthening of legal frameworks, and a concerted effort to combat corrupt practices at every level. Only through such measures can Kenya pave the way for sustainable infrastructural growth and ensure a future where the benefits of development reach all corners of the nation.

Remedial Strategies and Recommendations to Prevent Land Corruption in Kenya

Addressing the pervasive issue of land corruption in Kenya requires a multifaceted and comprehensive approach. The following section outlines key remedial strategies and recommendations aimed at mitigating the root causes and facilitating positive transformation within the land governance system.

Comprehensive Legal Reforms

The recommendation to undertake comprehensive legal reforms within the land governance legal framework in Kenya is crucial for addressing existing loopholes and ambiguities that contribute to land

[131] Ibid 130.
[132] Ibid 130.
[133] Ibid 130.

corruption. This approach involves several key components to strengthen the legal foundation, enhance accountability, and create a more transparent and just land governance system. [134] To deter corrupt practices within the land governance system, legal reforms should include the enhancement of penalties for corruption offenses. Stricter and more severe penalties act as a deterrent, sending a clear message that engaging in corrupt activities will result in severe consequences. This can include not only financial penalties but also imprisonment for individuals found guilty of corruption in land transactions. The severity of penalties should be commensurate with the impact of the corruption on the public interest and the integrity of the land governance system.[135]

In tandem with penalties, transparency emerges as a cornerstone in the ongoing battle against corruption within land transactions. [136] Legal reforms should incorporate measures to enhance transparency at every stage of the land transaction process. This involves the development and implementation of digital platforms for land registration and transactions. Ensuring the accessibility of information to the public is vital, and systems that track and trace land transactions should be established. Transparency measures play

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[134]Jacqueline M. Klopp & Odenda Lumumba, 'Reform and Counter-reform in Kenya's Land Governance, Review of African Political Economy, 44: 154, 577 – 594, DOI: https://www.tandfonline.com/doi/abs/10.1080/03056244.2017.1367919

[135] Patrick Meager, 'Combatting Corruption in Africa: Institutional Challenges and Responses' (1997) < https://pdf.usaid.gov/pdf_docs/Pnaca964.pdf > accessed 15 January 2024.

[136] Transparency International, 'Corruption and Land Governance in Kenya' in Adili issue 152 (2015). < https://land.igad.int/index.php/documents-1/countries/kenya/conflict-3/543-corruption-and-land-governance-in-kenya/file >

a pivotal role in reducing opportunities for bribery, fraud, and other corrupt practices by making the entire process more visible and accountable.[137] By intertwining stringent penalties for corruption offenses with robust transparency measures, legal reforms can significantly contribute to the eradication of corrupt practices within the land governance system.[138] This comprehensive approach not only addresses the consequences of corruption but also focuses on preventing and deterring such activities, thereby fostering a more just and trustworthy land governance environment in Kenya.

Historical Injustice Redress

The recommendation to address historical injustices stemming from colonial-era land dispossession in Kenya is a crucial step towards rectifying longstanding grievances and fostering a more equitable and just land governance system.[139] The colonial legacy, marked by forced land acquisitions, displacement of indigenous communities, and the establishment of skewed land tenure systems, has left an indelible mark on the relationship between the Kenyan populace and their land.[140] To embark on a path of redress, the implementation of policies is imperative.[141] These policies should be designed to conduct transparent and inclusive processes that acknowledge the historical

[137] Ibid 136.

[138] Ibid 137.

[139] Jackson N. Wanjohi & John M. Kiboi, PhD, 'Historical Land Injustices in Kenya: A Review in the Context of Guest Christology & the 'Year of Jubilee' Lessons' Jumuga Journal of Education, Oral Studies, and Human Sciences (JJEOSHS) Volume 5, No. 1, 2022.

[140] Ibid 139.

[141] Kenya Human Rights Commission, 'Redress for Historical Lad Injustices in Kenya: A Brief on Proposed Legislation for Historical Land Injustices' (2013)

wrongs perpetrated during the colonial period.[142] Transparent processes entail openness, honesty, and accessibility of information throughout the redress initiatives. This transparency helps build trust among stakeholders, particularly the communities that have been historically marginalized.[143] Inclusivity is equally paramount, involving the active participation of affected communities, civil society, and experts in the formulation and implementation of redress policies.[144] This ensures that the perspectives and needs of those who suffered from historical injustices are heard and integrated into the decision-making process. Rectifying past wrongs involves mechanisms for the restitution of land to dispossessed communities. This may include the return of seized lands or, where restitution is not feasible, providing alternative land of equal value. Additionally, policies should address the socioeconomic impact of dispossession, offering reparations and support for affected communities to rebuild their lives.[145] Redistribution of land more equitably is a central goal of historical injustices redress. This may involve comprehensive land reforms aimed at breaking up large landholdings, ensuring a fair distribution of resources, and dismantling the concentration of land in the hands of a privileged few. These reforms should prioritize the needs of marginalized communities, promoting a more inclusive and just distribution of land resources.

Acknowledging the rights of marginalized communities goes beyond the physical restitution of land. It involves recognizing the cultural,

[142] Collste, G. (2021). Ethics and Historical Justice. In: Keynes, M., Åström Elmersjö, H., Lindmark, D., Norlin, B. (eds) Historical Justice and History Education. Palgrave Macmillan, Cham. https://doi.org/10.1007/978-3-030-70412-4_10

[143] Ibid 141.

[144] Ibid 141.

[145] Ibid 49.

social, and economic rights of these communities, empowering them to actively participate in decision-making processes related to land governance. This recognition can be enshrined in legal frameworks that protect and promote the rights of indigenous and marginalized groups.[146] The redress of historical injustices is not merely a legal or policy matter; it is a moral imperative that seeks to heal the wounds inflicted by colonial oppression.[147] By implementing policies that transparently and inclusively address these historical wrongs, Kenya can pave the way for a more just and equitable future.[148] Such initiatives can contribute to national reconciliation, social cohesion, and the establishment of a land governance system that respects the rights and dignity of all its citizens, irrespective of their historical background.[149] In essence, the redress of historical injustices becomes a cornerstone for building a society founded on principles of justice, fairness, and inclusivity.

Strengthening Oversight Mechanisms

The recommendation to strengthen oversight mechanisms within Kenya's land governance system is pivotal in fostering transparency, accountability, and integrity. Enhancing the capacity and independence of institutions responsible for overseeing land-related activities is a multifaceted approach that requires targeted

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[146] Ibid 49.

[147] Ibid 146.

[148] Ibid 147.

[149] Starzyk, Katherine B., Craig W. Blatz, and Mike Ross, 'CHAPTER 19 Acknowledging and Redressing Historical Injustices', in John T. Jost, Aaron C. Kay, and Hulda Thorisdottir (eds), Social and Psychological Bases of Ideology and System Justification (New York, 2009; online edn, Oxford Academic, 1 May 2009), https://doi.org/10.1093/acprof:oso/9780195320916.003.019, accessed 16 Jan. 2024.

investments and strategic initiatives.[150] Central to this recommendation is the imperative to invest in comprehensive training programs for personnel involved in land governance oversight. By providing specialized training, regulatory officials can develop the skills and knowledge needed to navigate the complexities of land transactions, identify potential irregularities, and effectively enforce existing regulations. Training programs should encompass legal frameworks, investigative techniques, and ethical considerations, empowering oversight personnel to carry out their roles with competence and confidence. Moreover, increasing staffing levels within oversight institutions is essential for bolstering their operational capabilities. Adequate manpower ensures that oversight bodies have the capacity to handle the volume of land transactions, conduct thorough investigations, and respond promptly to emerging issues. Insufficient staffing often leads to backlogs, delays, and a compromised ability to effectively monitor and enforce regulations.[151] Therefore, a strategic investment in human resources is crucial for creating a robust oversight infrastructure.

Independence is a cornerstone of effective oversight,[152] and efforts should be directed towards safeguarding the autonomy of regulatory bodies responsible for land governance. Insulating these institutions from external pressures, political interference, or undue influence ensures that their decisions and actions are guided by the principles of transparency and fairness. This may involve legal reforms to establish clear lines of authority, insulating oversight personnel from external pressures, and reinforcing the independence of regulatory bodies to operate without fear or favor. Collaboration between

[150]Noor, Mohamed Mohamud, 'Corruption in Kenya' (2019).
[151] Ibid 150.
[152] Ibid 150.

regulatory bodies is equally imperative to strengthen oversight mechanisms. Establishing cohesive and streamlined communication channels between institutions such as the Ministry of Lands, the National Land Commission, and county-level bodies enhances the collective ability to monitor, investigate, and enforce land-related regulations. Information-sharing, joint training programs, and collaborative initiatives can synergize the efforts of different oversight entities, creating a more comprehensive and effective oversight ecosystem.

In conclusion, strengthening oversight mechanisms in Kenya's land governance requires a holistic approach that addresses capacity building, independence, and collaboration. By investing in training, increasing staffing levels, safeguarding independence, and fostering collaboration, Kenya can fortify its oversight infrastructure. This, in turn, will contribute to a more transparent, accountable, and resilient land governance system, ensuring that land-related activities align with legal frameworks and serve the public interest.

Promoting Citizen Engagement and Awareness

Fostering citizen engagement and awareness in Kenya's land governance system is a pivotal strategy in promoting transparency, accountability, and citizen-driven efforts against corruption. Empowering citizens with knowledge about their land rights, legal procedures, and the detrimental consequences of corrupt practices is a transformative approach to creating a vigilant and informed public.[153] To achieve this, there is a crucial need for comprehensive

[153] Chen Hao, Maurice Simiyu Nyaranga and Duncan O. Hongo, 'Enhancing Public Participation in Governance for Sustainable Development: Evidence From Bungoma County, Kenya' (2022) *SAGE Open, 12(1)* < https://doi.org/10.1177/21582440221088855 > accessed 16 January 2024.

education programs that reach across diverse communities. Education programs should be designed to demystify complex land laws and procedures, making them accessible to the general public. Workshops, community forums, and informational materials can be utilized to convey essential information about land rights, tenure systems, and legal avenues available to citizens. By breaking down these complex concepts into understandable components, citizens are better equipped to navigate the intricacies of land transactions and recognize potential irregularities or corrupt practices.

Crucially, citizen engagement initiatives should emphasize the importance of active participation in local land governance processes.[154] Communities play a vital role in holding authorities accountable for fair and transparent land administration.[155] By encouraging citizens to actively participate in decision-making forums, such as public hearings or consultations, the public becomes a key stakeholder in the governance of their land.[156] This active engagement not only fosters a sense of ownership but also acts as a deterrent to corruption, as officials are held accountable to an informed and involved citizenry.[157] Furthermore, these education programs should underscore the severe consequences of engaging in corrupt practices within the land sector. By highlighting real-world examples of the social, economic, and legal repercussions of corruption, citizens are better equipped to identify, report, and resist corrupt activities. Understanding the broader impact of corruption on

[154] Ibid 53.
[155] Ibid 153.
[156] Renée A. Irvin and John Stansbury, 'Citizen Participation in Decision Making: Is It Worth the Effort?' *Public Administration Review,* Vol. 64, No. 1 (Jan. - Feb., 2004), pp. 55-65 (11 pages)
[157] Ibid 156.

community development, resource allocation, and social justice empowers citizens to actively reject and condemn such practices. To ensure the effectiveness of these programs, leveraging various communication channels is essential. Utilizing radio, television, social media, and community gatherings can help disseminate information widely, reaching diverse demographics. Additionally, partnerships with local community leaders, civil society organizations, and educational institutions can enhance the reach and impact of these awareness campaigns.[158]

In conclusion, fostering citizen engagement and awareness is a proactive and empowering strategy in the fight against land corruption in Kenya. When citizens are equipped with knowledge about their land rights and are aware of the consequences of corruption, they become a potent force in demanding accountability, transparency, and ethical conduct within the land governance system.[159] By cultivating an informed and engaged citizenry, Kenya can build a resilient defense against corrupt practices and pave the way for a more just and equitable land administration system.

Whistleblower Protection

The recommendation to implement robust whistleblower protection mechanisms within Kenya's land governance system is paramount for creating an environment where individuals feel secure in reporting corrupt practices without fear of retaliation. Whistleblowers play a pivotal role in uncovering corruption, acting as key informants who bring to light illicit activities that undermine

[158] Ibid 156.
[159] Ibid 153.

the integrity of the land administration system.[160] To foster a culture of accountability and transparency, it is imperative to establish comprehensive protections that shield whistleblowers from potential reprisals and ensure their anonymity and well-being.[161]

One fundamental aspect of whistleblower protection is the establishment of legal frameworks that explicitly safeguard individuals who come forward with information on corrupt practices. Clear and unambiguous laws should be enacted to shield whistleblowers from any form of retaliation, including job loss, harassment, or discrimination. These legal protections should extend not only to current employees but also to former employees, ensuring that individuals are shielded even after leaving their positions.[162] Anonymity is a critical component of whistleblower protection, allowing individuals to report corruption without fear of being identified. Mechanisms such as secure hotlines, confidential reporting channels, and independent ombudsman offices can provide whistleblowers with a safe and discreet means of disclosing information. Implementing secure digital platforms and ensuring the confidentiality of whistleblowers' identities are essential steps in creating an environment conducive to reporting without fear.

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[160] Sheila Masinde, 'Towards Whistleblower Protection in Kenya: A Journey of Fits and Starts' (2023) < https://gsdec.network/7784/towards-whistleblower-protection-in-kenya-a-journey-of-fits-and-starts/> accessed 24 January 2023.

[161] Transparency International - Kenya, 'The Need for Whistleblower Protection Legislation in Kenya' (2023) https://tikenya.org/2023/07/21/the-need-for-whistleblower-protection-legislation-in-kenya/

[162] Ibid 55.

Beyond legal and procedural measures, there is a need for a cultural shift that values and respects the contributions of whistleblowers. Public awareness campaigns should be initiated to highlight the crucial role whistleblowers play in upholding integrity within the land governance system. These campaigns can help destigmatize the act of whistleblowing and emphasize the positive impact it has on rooting out corruption, promoting accountability, and safeguarding public resources.

Additionally, whistleblower protection mechanisms should include provisions for financial and emotional support.[163] Offering legal assistance, counseling services, and financial incentives for whistleblowers can help alleviate the potential personal and professional hardships they may face as a result of their courageous actions.[164] This comprehensive support ensures that individuals are not only protected but also provided with the necessary resources to navigate the aftermath of their disclosures.[165]

In conclusion, implementing robust whistleblower protection mechanisms is an indispensable element in fortifying Kenya's land governance system against corruption. By enacting clear legal frameworks, ensuring anonymity, fostering a culture that values whistleblowers, and providing comprehensive support, Kenya can encourage individuals to come forward with information that exposes corruption, ultimately contributing to a more transparent, accountable, and just land administration system. Whistleblower protection is not just a legal necessity but a cornerstone in building a culture of integrity and accountability within the public sector.

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[163] Ibid 160.
[164] Ibid 163.
[165] Ibid 160.

Conclusion

This paper has delved into the intricate landscape of land corruption in Kenya, shedding light on its multifaceted causes, far-reaching impacts, and potential avenues for remediation. The comprehensive analysis of specific case studies and institutional frameworks has provided valuable insights into the complexities of this pervasive issue. The findings underscore the urgent need for concerted efforts to address the root causes of land corruption, bolster institutional capacities, and implement transparent and accountable land governance practices. The consequences of land corruption on societal development emphasize the imperative for immediate action. From hindering economic progress to exacerbating social inequalities, the ramifications of corruption in the land sector are profound and affect the lives of ordinary citizens.[166] It is evident that combating land corruption is not only a moral imperative but also a crucial prerequisite for sustainable development in Kenya. In light of the research findings, a set of recommendations emerges to guide policy interventions. Strengthening legal frameworks, enhancing transparency in land transactions, and empowering anti-corruption agencies are essential steps to curbing land corruption. Additionally, promoting public awareness and civic engagement can play a pivotal role in fostering a culture of integrity and accountability within the land administration system. [167] Ultimately, the success of these recommendations relies on the commitment of government institutions, civil society, and the international community to collaborate in the fight against land corruption. By adopting a comprehensive and inclusive approach, Kenya has the opportunity to transform its land administration system into one that is resilient,

[166] Ibid 88.
[167] Ibid 156.

transparent, and conducive to sustainable development. This paper aspires to contribute to the ongoing discourse on anti-corruption efforts, providing a foundation for evidence-based policies and fostering positive change in the realm of land governance in Kenya.

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Evolving Mediation in Kenya: Opportunities, Challenges and Future Perspectives

By: ***Ontweka Yvonne Kwamboka****

Abstract

Alternative Dispute Resolution Mechanisms are a throughfare to the expeditious access to justice in Kenya. The constitution of Kenya advocates for access to justice to all persons under Article 48. Although the constitution makes ADR as one of the principles of justice administration and that courts should encourage the use of ADR; in the recent past we have seen the courts taking a tougher stance. In support to this, Justice Odunga said this in relation to ADR "Courts and tribunals cannot be said to promote ADR mechanisms when they readily entertain disputes that can be resolved in other legal forums''[1]. The courts and tribunals should be guided by the principles of ADR stipulated in Article 159[2] of the constitution.[2] In accordance I do agree that where there is an alternative remedy and procedure available for the resolution of dispute the remedy ought to be pursued to the uttermost and adhered to. Use of Alternative Dispute Resolution Mechanisms ought to be promoted in the Kenyan society owing to our pluralistic system. The UN General Assembly Resolutions outlined the strengthening the role of Mediation in peaceful settlement of disputes, conflict prevention and resolutions.[3]

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[1] *Mutinda v IEBC Ex parte Patel* (2013) eKLR
[2] The Constitution of Kenya2010, Art. 159(2)(c).
[3] UN General Assembly Resolutions Adopted 22 June 2011.

Introduction

The quality of our lives depends not on whether or not we have conflicts, but on how we respond to them.[4] Before the inception of constitution of Kenya, 2010, justice was viewed as a privilege for a few who could afford to use the official institutions of justice.[5] This is due to the fact that in the past, litigation was the primary method for dispute resolution that was generally accepted by our legal system as a legal remedy.[6] But, due to a range of indicators, litigation did not and still does not guarantee the equitable administration of justice. All conflicts, no matter how intractable, are capable of peaceful resolutions since they are an inevitable part of human interaction, often arising from differing perspectives, interests or misunderstandings. [7] In the realm of dispute resolution, the conventional route of litigation can be costly, time consuming and adversarial process.[8] However, an alternative approach, known as

[4] 'European Institute for Conflict Resolution – European Institute for Conflict Resolution' (*Europeanresolution.com*2016) <https://www.europeanresolution.com/en/european-institute-for-conflict-resolution/> accessed 21 January 2024.

[5] Patricia Mbote and Migai Akech, 'Kenya Justice Sector and the Rule of Law a Review by AfriMAP and the Open Society Initiative for Eastern Africa' (2011) <https://www.opensocietyfoundations.org/uploads/38762285-51db-4bac-b8f9-285cf0ef2efc/kenya-justice-law-20110315.pdf>Accessed 21 January 2024.

[6] Todd B Carver and Albert A Vondra, 'Alternative Dispute Resolution: Why It Doesn't Work and Why It Does' (*Harvard Business Review* May 1994) <https://hbr.org/1994/05/alternative-dispute-resolution-why-it-doesnt-work-and-why-it-does> accessed 21 January 2024.

[7] Brad Spangler, 'Settlement, Resolution, Management, and Transformation: An Explanation of Terms' (*Beyond Intractability*29 June 2016) <https://www.beyondintractability.org/essay/meaning_resolution> accessed 21 January 2024.

[8] Pablo Cortés, 'Embedding Alternative Dispute Resolution in the Civil Justice System: A Taxonomy for ADR Referrals and a Digital Pathway to

alternative dispute resolution [ADR] has emerged as a powerful and effective method to address conflicts in a more amicable and efficient manner.[9]

The main reason as to why the Alternative Dispute Resolution mechanisms are sought is to ensure that justice is served to the people of Kenya failure to which people are unable to have their voices heard, their rights will also have been infringed or rather violated and discriminated.[10] Despite the fact that the postulation of access to justice does not have a single universally accepted definition, customarily the term is used to refer to opening up the formal system and the structures of law to the most disadvantaged groups in the society and this can be primarily done through; removing the legal barriers and this is majorly the financial part of it, the social barriers, lack of knowledge of the legal rights and intimidation by the law but this has been to some extent reduced in the present through legal awareness.[11]

Increase the Uptake of ADR' (2022) 43 Legal Studies 312 <https://www.cambridge.org/core/journals/legal-studies/article/embedding-alternative-dispute-resolution-in-the-civil-justice-system-a-taxonomy-for-adr-referrals-and-a-digital-pathway-to-increase-the-uptake-of-adr/C262D5E21B271975D9339D066CA03350> accessed 21 January 2024.

[9] Kariuki Muigua, '"Alternative Dispute Resolution and Article 159 of the Constitution"' (2018) <https://kmco.co.ke/wp-content/uploads/2018/08/A-PAPER-ON-ADR-AND-ARTICLE-159-OF-CONSTITUTION.pdf> accessed 21 January 2024.

[10] Mwai Maina and Macharia Muriuki, '"Going back to the Roots"; Resolving Disputes through Alternative Means with a Bias in Traditional Justice Systems' <http://kenyalaw.org/kl/fileadmin/pdfdownloads/KLReviewJournal/Resolving-disputes-through-alternative-means.pdf> accessed 21 January 2024.

[11] Ibid

Also, whatever view is taken regarding the correct balance of the relationship between international arbitration and national courts, it is impossible to doubt that at least in some instances the intervention of the court may not only be permissible but highly beneficial.

Mediation as an Alternative Dispute Resolution Mechanism

Mediation may be defined to mean a type of dispute settlement in which parties are assisted to solve their differences by a person external to the conflict known as a mediator helps two or more participants understand better their issues, interests and needs and empower them bridge their differences through a voluntary agreement. [12] Alternatively, mediation is an informal confidential conflict resolution in which an impartial third party cannot make any binding decisions for the conflicting parties but rather assist them to voluntarily reach a mutually acceptable solution to the dispute since the mediator has no power to make an authoritative decision and this may be contrasted with forms of decision making where parties tend to make binding decisions.[13]

Section 2 of the Civil Procedure Act [Cap 21] of the Laws of Kenya defines Mediation as an informal non adversarial process where an impartial mediator encourages and facilitates the resolution of a dispute between two or more parties but does not include attempts

[12] James Njuguna, 'Mediation as a Tool of Conflict Management (2020) Journal of cmsd Volume 5(2)) in Kenya: Challenges and Opportunities: James Ndungu Njuguna Mediation as a Tool of Conflict Management in Kenya: Challenges and Opportunities' <https://journalofcmsd.net/wp-content/uploads/2020/10/Mediation-as-a-Tool-of-Conflict-Management-in-Kenya.pdf>.

[13] 'CPR Mediation Procedure | CPR Dispute Resolution Services' (*Cpradr.org*2022) <https://drs.cpradr.org/rules/mediation/cpr-mediation-procedure> accessed 22 January 2024.

made by a judge to settle a dispute within the course of judicial proceedings related thereto. [14] A mediator in this context is thus defined as an impartial third party selected to carry out mediation. In clarification, Mediation is not evidentiary unlike arbitration or litigation thar are processes which are evidentiary.[15] Mediation can take any forms to suit specific performances for instance it can be facilitative. [16]Further, section 2 of the Civil Procedure Act stipulates that where a dispute is referred to mediation under subsection (1), the parties thereto shall select for that purpose a mediator whose name appears in the mediation register maintained by the mediation accreditation committee.

Mediation is usually voluntary so either may choose to stop at any time and also a mediator may decide to meet with both parties which is a joint session or rather individually with one party, known as a Caucus.[17] To candidly explain, when meeting in caucus, what is said to the mediator is confidential unless the party agrees that the

[14] The Civil Procedure Act, Section 2, Cap 21, Laws of Kenya.
[15] Av Nilgün, Serdar Şimşek and Av Kerim Bölten, 'Mediation as a Charming Dispute Resolution Mechanism' <*https://www.gsghukuk.com/en/publications-bulletins/articles/mediation-as-a-charming-dispute-resolution-mechanism-gsg.pdf*>.accessed 22 January 2024
[16] Uluslararası Uyuşmazlıklar and others, 'Mediation as an Option for International Commercial Disputes' (2016) 65 Annales XLVIII, N <https://dergipark.org.tr/en/download/article-file/853265>.accessed 22 January 2024
[17] John M Delehanty, 'Don't Ignore the Benefits of Joint Sessions in Mediation | New York Law Journal' (*New York Law Journal*7 August 2023) <*https://www.law.com/newyorklawjournal/2023/08/07/dont-ignore-the-benefits-of-joint-sessions-in-mediation/?slreturn=20240022112446*> accessed 22 January 2024.

information can be disseminated or imparted.[18] It is important to note that mediation is not therapy and also if the case cannot be resolved through mediation the parties may sought arbitration[19]. According to the Law Society in England Mediation may contain certain elements.[20]

- Need not be legally represented.
- The third party is neutral.
- The neutral third party helps the parties reach a decision.
- The decision is arrived at by negotiation and without adjudication.
- May take place at any time whether or not there is a legal process.
- The parties agree to appoint a neutral third party.
- The mediator has no authority to make decisions as regard to the issue at hand.

The Law of arbitration the world over admits the notion that the role of the court in arbitration is inevitable and almost universally

[18] 'What Happens in a Mediation Session?' (*U.S. Department of Commerce*16 August 2019) <https://www.commerce.gov/cr/reports-and-resources/eeo-mediation-guide/what-happens-mediation-session> accessed 22 January 2024.

[19] Kariuki Muigua, 'Entrenching Family Mediation in the Law in Kenya Entrenching Family Mediation in the Law in Kenya' (2018) <https://kmco.co.ke/wp-content/uploads/2018/08/Entrenching-Family-Mediation-in-the-Law-in-Kenya-Kariuki-Muigua-Ph.D-7TH-JULY-2018.pdf>.accessed 22 January 2024

[20] Nicholas Gould, 'Mediation Guide - the Basics' (*Lexology*23 March 2016) <https://www.lexology.com/library/detail.aspx?g=43a7d3aa-2cef-427c-b22a-25a1f1f903de> accessed 22 January 2024.

provides for it.[21] Importantly, the law also appreciates the need to limit court intervention in arbitration to a basic minimum.[22]

Arbitration is less formal than litigation since the arbitrator acts as the third party assessing, listening and making sound decisions on each specific case without forming judgements, he must remain neutral in order to make virtuous decisions in a case.[23] Unless both parties agree to make information public, it will remain confidential between the disputants because there is need for client confidentiality. [24] Professions emphasize on the fiduciary nature of the relationship the professionals have with their clients. It is argued those professionals are fiduciaries of their clients.[25] For this reason, they are supposed to

[21] Kariuki Muigua, 'ROLE of the COURT under ARBITRATION ACT 1995: COURT INTERVENTION BEFORE, PENDING and after ARBITRATION in KENYA' <https://kmco.co.ke/wp-content/uploads/2018/08/080_role_of_court_in_arbitration_2010.pdf> accessed 22 January 2024.

[22] *Vianney Sebayiga,'* The Right of Appeal under Section 35 of theArbitration Act of Kenya: A Critique of the
Supreme Court Decision in *Nyutu Agrovet vAirtel Networks Limited* (2019) eKLR' (2021) Volume 6, Issue 1 Strathmore Law Review (SLR) 137-166.

[23] Edna Sussman, 'Arbitrator Decision-Making: Heuristics and Other Unconscious Influences' [2023] Cambridge University Press eBooks 1425 <https://www.cambridge.org/core/books/abs/cambridge-compendium-of-international-commercial-and-investment-arbitration/arbitrator-decisionmaking-heuristics-and-other-unconscious-influences/A27861138E34A2397912D0D145A308E3> accessed 22 January 2024.

[24] 'NDA vs Confidentiality Agreement: Understanding the Difference' (*Ironclad*14 November 2023) <https://ironcladapp.com/journal/contracts/nda-vs-confidentiality-agreement/> accessed 22 January 2024.

[25] Paul B Miller, 'The Fiduciary Relationship' [2014] Oxford University Press eBooks 63 <https://academic.oup.com/book/10851/chapter-abstract/159040333?redirectedFrom=fulltext> accessed 22 January 2024.

act as trustees for their clients in all circumstances. Accordingly, it behooves professionals to act in utmost good faith and due diligence when dealing with their clients.[26]

It is argued that mediators should reject notions on neutrality and operate within a framework of social justice and human rights thus it is important to remember that mediation has a very long history, the practice of which falls along a spectrum that defies a strict definition.[27]

Opportunities and future perspectives in mediation.

The dawn of a new day with multitude of solutions means the dawn of a new life.[28] We cannot peer into its storehouse, but the very impenetrable mystery that enwraps the ever-approaching tomorrow is the one thing that keeps the fires of hope constantly burning. Mediation can bring forth very may opportunities.[29] There are a number of factors contributing to the increased interest in mediation for instance the inability of the civil justice systems to deal with the

[26] 'The Duty of Utmost Good Faith' (*Anziif.com*2024) <https://anziif.com/professional-development/the-journal/volume-38/issue-1/the-duty-of-utmost-good-faith> accessed 22 January 2024.

[27] 'What Is Meant by Neutrality in Mediation' (*Ciarb.org*2019) <https://www.ciarb.org/news/what-is-meant-by-neutrality-in-mediation/> accessed 22 January 2024.

[28] Andrew Scott, 'Facing the Dawn of a New Day' (*BahaiTeachings.org*16 March 2023) <https://bahaiteachings.org/facing-dawn-new-day/> accessed 22 January 2024.

[29] James Kerwin, 'How Mediation Works When Both Parties Agree They Need Help Resolving the Dispute' (*PON - Program on Negotiation at Harvard Law School*9 January 2024) <https://www.pon.harvard.edu/daily/mediation/navigating-the-mediation-process/> accessed 22 January 2024.

increasing load of cases which trigger lengthy delays and the rising costs of litigation.[30]

Some perspectives should also be adopted in Kenya to ease the mediation journey for example Lang and Taylor's reflective, artistic approach to mediation stresses the need to use an elicited approach whereby the one training acts as a facilitator of a collaborative learning process to practice and train and allow mediators engage in self-reflexivity, so they can make personal biases and cultural, political and social influences which impact on their so-called neutrality.[31]

Mediation is immensely valuable as it increases the quality of communication and relationships.[32]

Mediation is an informal, non-confrontational process in which solutions are not imposed on the parties but the product of voluntary agreement.[33] No lengthy, time-consuming preparation is required

[30] Kariuki Muigua, 'Reflections on the Use of Mediation for Access to Justice in Kenya: Maximising on the Benefits of Mediation Kariuki Muigua Reflections on the Use of Mediation for Access to Justice in Kenya: Maximising on the Benefits of Mediation 2' (2018) <https://kmco.co.ke/wp-content/uploads/2018/08/Reflections-on-the-Use-of-Mediation-for-Access-to-Justice-in-Kenya-Maximising-on-the-Benefits-of-Mediation-Kariuki-Muigua-14th-June-2018-1.pdf>.

[31] Ibid.

[32] PON Staff, 'What Is Mediation?' (*PON - Program on Negotiation at Harvard Law School*22 January 2024) <https://www.pon.harvard.edu/tag/mediation/> accessed 22 January 2024.

[33] Dragos Marian Radulescu, 'Mediation–an Alternative Way to Solve Conflicts in the International Business Environment' (*ResearchGate*October 2012) <https://www.researchgate.net/publication/257716767_Mediation-

and sessions are scheduled at times and places that are convenient to all parties involved.[34]

The framework for Court Annexed Mediation has been influenced by international practice of Chartered Institute of Arbitrators and this has widened the legal entity in terms of access to justice.[35] Examples of countries outside Kenya that have the most successful Court Annexed Mediation include Uganda and Singapore.[36]

In addition, I would like also to bring in the concept of mediation and technology in the evolving world basically how technology is changing mediation worldwide. Is it time to integrate online dispute resolving in settling mediation disputes in Kenya? How efficient is it? As the world keeps on advancing so does the technique for program of operation commutes. Technology undeniably plays an important role when it comes to Mediation.[37] It enhances scheduling flexibility and also reduces the logistical challenges associated with in-person proceedings since the parties to a dispute may fail to get to the

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An_Alternative_way_to_Solve_Conflicts_in_the_International_Business_Environment> accessed 22 January 2024.

[34] Ibid

[35] 'THE LAW SOCIETY of KENYA' <https://lsk.or.ke/wp-content/uploads/2023/12/The-Law-Society-of-Kenya-Journal-Volume-19-2023.pdf> accessed 22 January 2024.

[36] Kariuki Muigua, 'Adopting the Singapore Convention in Kenya: Insight and Analysis Adopting the Singapore Convention in Kenya: Insight and Analysis' (2020) <https://kmco.co.ke/wp-content/uploads/2020/09/Adopting-the-Singapore-Convention-in-Kenya-Insight-and-Analysis-15th-Sept.pdf> accessed 22 January 2024.

[37] Kelly James, 'Artificial Intelligence (AI) and Mediation: Technology-Based versus Human-Facilitated Dispute Resolution' (*Miles Mediation*7 March 2023) <https://milesmediation.com/blog/learn-how-ai-is-being-using-in-mediation/> accessed 22 January 2024.

mediation table due to circumstances that cannot be evaded so solving the dispute virtually helps manage time and its cost-effective as travelling expenses are reduced and also keeping in mind that the right technology is used for the procedures.[38]

To illustrate, for instance during the outbreak of the covid-19 pandemic even the courts mostly embraced the use of modern technology to serve their clients online especially civil matters and this practically shows how the use of technology can be of great importance.[39]

Mediation has been acknowledged through online platforms and this has also created a wider access to mediation as a way of dispute resolution. [40] Generally, mediation embraces technology through artificial intelligence in Alternative Dispute Resolution and access to justice.[41]To achieve peace, it is important to prioritize mediation as a

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[38] Ibid

[39] Kariuki Muigua, 'Legal Practice and New Frontiers: Embracing Technology for Enhanced Efficiency and Access to Justice Kariuki Muigua Legal Practice and New Frontiers: Embracing Technology for Enhanced Efficiency and Access to Justice Legal Practice and New Frontiers: Embracing Technology for Enhanced Efficiency and Access To' <https://kmco.co.ke/wp-content/uploads/2020/06/Legal-Practice-and-New-Frontiers-Embracing-Technology-for-Enhanced-Efficiency-and-Access-to-Justice-Kariuki-Muigua-Ph.D-June-2020.pdf> accessed 22 January 2024.

[40] PON Staff, 'Using E-Mediation and Online Mediation Techniques for Conflict Resolution' (*PON - Program on Negotiation at Harvard Law School*19 December 2023) <https://www.pon.harvard.edu/daily/mediation/dispute-resolution-using-online-mediation/> accessed 22 January 2024.

[41] Tolu Aderemi, 'The Transformative Potential of Artificial Intelligence in ADR – Businessday NG' (*Businessday.ng*2024) <https://businessday.ng/news/legal-business/article/the-

means of resolving disputes before considering other alternatives. This is because parties are able to agree and solve the issue through peaceful negotiations.

Ideally, the concern about the past automatically changes as a result of engrossing on a different future and also working to ensure all that is required especially in serving justice to the country and further is met. If conflict is managed constructively, we harness its energy for creativity and development.[42]

Challenges

Despite the fact that mediation can be very instrumental, there are some reasons that can make it lag backwards or rather fail to function appropriately.[43] These challenges may include;

1) The interest -based approach to mediation may not be suitable where there are imbalances of power, unless explicit conditions are put in place, as it requires parties to be competent and willing to negotiate for themselves and cooperate. [44]To add on this, Mediation appears to work best where the parties are willing to take part and the difficult part

transformative-potential-of-artificial-intelligence-in-adr/> accessed 22 January 2024.

[42] 'Kenneth Kaye Quote: "If We Manage Conflict Constructively, We Harness Its Energy for Creativity and Development."' (*Quotefancy.com*2024) <https://quotefancy.com/quote/1724651/Kenneth-Kaye-If-we-manage-conflict-constructively-we-harness-its-energy-for-creativity> accessed 22 January 2024.

[43] Anwar Kashif Mumtaz, 'Why Mediation Fails' (*Mediate.com*8 March 2021) <https://mediate.com/why-mediation-fails/> accessed 22 January 2024.

[44] Kariuki Muigua, '"Alternative Dispute Resolution and Article 159 of the Constitution"' <https://kmco.co.ke/wp-content/uploads/2018/08/A-PAPER-ON-ADR-AND-ARTICLE-159-OF-CONSTITUTION.pdf>.

is normally to bring the parties to the negotiation table.[45] However, mediation does not work well where the matter is urgent, where the parties feel coerced, where there is a vexatious litigant, where there is threat to physical violence and in a human rights or constitutional issue.[46]

2) Involuntary agreement can also be a major problem since the participants have ultimate control and decision-making power over the outcome of mediation.[47]
3) Lack of confidentiality. Mediation is strictly confidential and if not may lead to biasness hence justice will not be served well.[48] Therefore, the mediator and the participants should observe confidentiality in their dealings.[49]
4) Mediation is usually effective in the early stage of a dispute.[50]

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[45] 'United Nations Preparedness Guidance for Effective Mediation Consent Impartiality Inclusivity National Ownership' <*https://peacemaker.un.org/sites/peacemaker.un.org/files/GuidanceEffectiveMediation_UNDPA2012%28english%29_0.pdf*>.

[46] *'Petition E282, 397, E400, E401, E416 & E426 of* 2020 & 2 of 2021 (Consolidated) - Kenya Law' (*Kenyalaw.org*2020) <http://kenyalaw.org/caselaw/cases/view/212141/> accessed 22 January 2024.

[47] MyBib Contributors, 'MyBib Citation Manager' (*MyBib*2024) <https://www.mybib.com/#/projects/GXZv6a/citations> accessed 22 January 2024.

[48] 'Mediation Confidentiality: Who, What, Where, When, How?' (*Mdrs.com*2024) <https://www.mdrs.com/faqs/mdrs-articles/mediation-confidentiality-who-what-where-when-how/> accessed 22 January 2024.

[49] Lawrence Freedman and Michael Prigoffs, 'Confidentiality in Mediation: The Need for Protection' <https://core.ac.uk/download/pdf/159574785.pdf>.

[50] PON Staff, 'The Mediation Process and Dispute Resolution' (*PON - Program on Negotiation at Harvard Law School*7 August 2023) <https://www.pon.harvard.edu/daily/mediation/dispute-resolution-how-mediation-unfolds/> accessed 22 January 2024.

5) Another problem that is major to mediation is the fact that it is not binding thus an open arena to endless proceedings where parties fail to agree.[51]
6) Emotional barriers can also pose a problem to the parties and also the mediator since the decisions made can be as a result of emotions and not willingness to solve the dispute.[52]
7) When solving matters through Mediation there is difficulty in cultural barriers or rather the communication barrier in that when another party may be brought to translate the issue to do with confidentiality will have arouse.

Conclusion

To sum up with, the principle applicable in discerning the role of court especially in arbitration may be gleaned from the various legal instruments that address this issue.[53] The fundamental proposition behind Mediation is that it is used when parties to a dispute have tried out negotiation but cave come to a halt.[54]

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[51] Gay R Clarke and Iyla T Davies, 'ADR — Argument for and against Use of the Mediation Process Particularly in Family and Neighbourhood Disputes' (1991) 7 QUT Law Review.

[52] Kariuki Muigua and Muigua, 'Achieving Lasting Outcomes: Addressing the Psychological Aspects of Conflict through Mediation Achieving Lasting Outcomes: Addressing the Psychological Aspects of Conflict through Mediation Achieving Lasting Outcomes: Addressing the Psychological Aspects of Conflict through Mediation' (2018) <https://kmco.co.ke/wp-content/uploads/2018/08/Addressing-the-Psychological-Aspects-of-Conflict-Through-Mediation-3RD-AUGUST-2018-1.pdf>.accessed 22 January 2024

[53] William W Park, 'Arbitrators and Accuracy' (2010) 1 Journal of International Dispute Settlement 25 <https://academic.oup.com/jids/article/1/1/25/879376> accessed 22 January 2024.

[54] PON Staff, 'The Mediation Process and Dispute Resolution' (*PON - Program on Negotiation at Harvard Law School*7 August 2023)

The human spirit is to grow strong by conflict.[55] Having peace is not absence of conflict rather the ability to handle conflict by peaceful means.[56]

Recommendations

Taking time to understand why a conflict is occurring will allow you to prepare how to approach it in a proper manner.[57] There is a quote by the great Socrates that stipulated that, "To know thyself is the beginning of wisdom".[58] One of the maxims of equity is "Equity will not suffer a wrong to be without a remedy".[59] This applies to this paper largely such that everything is put right through conflict resolution.

What I can recommend is that, despite the quest to ensure that justice is served to all citizens as also furnished in article 48 of the

<https://www.pon.harvard.edu/daily/mediation/dispute-resolution-how-mediation-unfolds/> accessed 23 January 2024.

[55] 'A Quote by William Ellery Channing' (*Goodreads.com*2019) <https://www.goodreads.com/quotes/7830697-the-human-spirit-is-to-grow-strong-by-conflict> accessed 23 January 2024.

[56] Guest Writer, 'World Peace Day: Conflict Is Inevitable | TheCable' (*TheCable*21 September 2023) <https://www.thecable.ng/world-peace-day-conflict-is-inevitable> accessed 23 January 2024.

[57] Katie Shonk, '5 Conflict Resolution Strategies' (*PON - Program on Negotiation at Harvard Law School*11 January 2024) <https://www.pon.harvard.edu/daily/conflict-resolution/conflict-resolution-strategies/> accessed 23 January 2024.

[58] '"To Know Thyself Is the Beginning of Wisdom." Quote by Socrates | Quote Template' (*Visual-paradigm.com*2024) <https://online.visual-paradigm.com/flipbook-maker/templates/quotes/to-know-thyself-is-the-beginning-of-wisdom-quote-by-socrates/> accessed 23 January 2024.

[59] JA, Morrison, 'R v Stanley [2014] QCA 116' (*Queenslandjudgments.com.au*3 March 2018) <https://www.queenslandjudgments.com.au/caselaw/qca/2014/116> accessed 23 January 2024.

constitution of Kenya, 2010, the Kenyan courts should not be the beginning of conflict resolution but rather sought when other resolution methods have been used and have become futile.[60]

Truly, knowledge is essential to navigate the complexities of the legal practice especially through exposure to real world legal scenarios to unleash potential in unlocking justice through different eye-openings in trying to keep the world a better place. Conflict doesn't have to be ugly-mediate it!

[60] Kariuki Muigua, 'Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya' (2018) <https://kmco.co.ke/wp-content/uploads/2018/09/ACCESS-TO-JUSTICE-AND-ALTERNATIVE-DISPUTE-RESOLUTION-MECHANISMS-IN-KENYA-23rd-SEPTEMBER-2018.pdf>.accessed 23 January 2024

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Efficiency and Access to Justice Legal Practice and New Frontiers: Embracing Technology for Enhanced Efficiency and Access To' <*https://kmco.co.ke/wp-content/uploads/2020/06/Legal-Practice-and-New-Frontiers-Embracing-Technology-for-Enhanced-Efficiency-and-Access-to-Justice-Kariuki-Muigua-Ph.D-June-2020.pdf*> accessed 22 January 2024

——, 'Reflections on the Use of Mediation for Access to Justice in Kenya: Maximising on the Benefits of Mediation Kariuki Muigua Reflections on the Use of Mediation for Access to Justice in Kenya:

Maximising on the Benefits of Mediation 2' (2018) *https://kmco.co.ke/wp-content/uploads/2018/08/Reflections-on-the-Use-of-Mediation-for-Access-to-Justice-in-Kenya-Maximising-on-the-Benefits-of-Mediation-Kariuki-Muigua-14th-June-2018-1.pdf*

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'European Institute for Conflict Resolution – European Institute for Conflict Resolution' (*Europeanresolution.com*2016) <*https://www.europeanresolution.com/en/european-institute-for-conflict-resolution/*> accessed 21 January 2024

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Kaye-If-we-manage-conflict-constructively-we-harness-its-energy-for-creativity> accessed 22 January 2024

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Arbitration Act Of 1995: 28 Years Post-Enactment And Change Is Long Overdue

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Abstract

Using a blend of textual and holistic legal interpretation approaches, this paper analyses the merits and drawbacks of the Kenyan Arbitration Act of 1995, interrogating the effects of the said gaps on the process of arbitration's credibility. In dissecting the law on arbitration's nuances, jurisprudence's aid, and comparative analysis of the law, the paper hypothesizes the surging demand to majorly amend or overhaul the Act to meet the ever-changing needs of the Kenyan, akin to other parts of the world's Arbitration landscape. A touch of philosophy enriches the research though questioning the principles underpinning arbitration. Among the questions raised herein regard the ability of the Act to uphold the foundational tenets of impartiality, fairness, transparency, and accountability while analysing specific provisions' absence thereof in causing inconsistencies hence uncertainties in the practice of arbitration across the various sectors. By further assessing the Act's compatibility with modern international practices concerning how global private international law influences the development of the modern arbitration framework, the needed suggestions will be made to bridge the gap. Such analysis will unearth the disparities between the prevailing standards and the Act's status quo. This would aid in ameliorating any negative legal consequences for purposes of promoting international investment trade arbitration in Kenya, a

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move that would put Kenya at a vantage position of being the Seat of Arbitration. Overall, the consequent reforms proposed will enhance the enforceability of arbitration agreements and streamline the process of appointing arbitrators vis-à-vis the Court's intervention."

Key words: Arbitration, Arbitration Agreement, Arbitration clause, Court Intervention, Amendment, Constitution of Kenya 2010, Arbitration Act of 1995.

Introduction

Maxwell's quote, "change is the law of life hence inevitable," depicts the current state of the 1995 Arbitration Act (from now on, "the Act") enacted by the then parliament of Kenya in pursuit of alternative justice systems.[1] Being the principal legislation governing arbitration of disputes as Part of unclogging the backlog of commercial courts' cases and promoting the alternative dispute resolution spirit of the Constitution of Kenya 2010's (from now on "the Constitution") Article 159 (2)(c), such a law should keep abreast with the developments in the legal system.[2] After two and a half decades of being in force, change is nigh. For this reason, this paper argues in favour of an overdue change, calling for a thorough review of the Act to purposely align with the modern standards and practices pertaining to arbitration.

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[1] Nikhil Desai and Elizabeth Kageni Muthoka, 'Arbitration Procedures and Practice in Kenya: Overview (*Practical Law* 2013) <https://uk.practicallaw.thomsonreuters.com/5-633-8955?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 28 October 2028.

[2] Austin Ouko, 'Arbitration Act 1995: Is a Reform Overdue?' (*Linkedin.com* 2022) <https://www.linkedin.com/pulse/arbitration-act-1995-reform-overdue-austin-ouko#:~:text=The%20Arbitration%20Act%201995%20was,or%20domestic%20arbitration%20in%20Kenya.> accessed 28 October 2028.

The text from the text Sun Tzu's The Art of War verbatim-ly reads, "*If your enemy is secure at all points, be prepared for him.*"[3] While in arbitration, we do not have enemies but rather adversaries seeking to settle Arbitral awards, changes in the guiding chief legislation are long overdue.[4] Compounded by the fact that Kenya is currently experiencing a foreign direct investment through arbitration influx, anabreast legal framework would enable the disputants to resolve matters quickly; the arbitrators get their dues in terms of fees, consequently spurring the general growth of the Kenyan economy.[5] Despite being a coercive type of alternative (specifically) dispute resolution), arbitration remains the most preferred method of dispute resolution[6]: Just like how God commands in the Bible, "*Come ye that are heavy laden that I will give you rest,*"[7] Arbitration, apart from reducing the burden of lengthy court proceedings, it reduces the cases backlog in the corridors of commercial justice.[8] This is why the method, vide its governing Arbitration Act, remains preferred by

[3] David R Shaw, Jeff Carr and Tom Muehleisen, 'The Calculus of Cyber Warfare as Influenced by the Subtle Art of Military Theory' (2017) 5 Journal of The Colloquium for Information Systems Security Education 19 <https://cisse.info/journal/index.php/cisse/article/view/75> accessed 28 October 2028.

[4] Austin Ouko (n2).

[5] JMiles & Co, 'The Landscape of International Arbitration in Kenya' (*The In-House Lawyer | The Legal 500* 7 October 2018) <https://www.inhouselawyer.co.uk/legal-briefing/the-landscape-of-international-arbitration-in-kenya/> accessed 28 October 2028.

[6] Gilles Cuniberti, *Rethinking International Commercial Arbitration* (Edward Elgar Publishing 2017) Chapter 1 <https://www.elgaronline.com/display/9781786432891/10_chapter1.xhtml> accessed 20 October 2028.

[7] Mathew 11:28-30 (New King James Version 2016 (NKJV).

[8] Alituha Jacob, 'Analysis on the Use of Alternative Dispute Resolution (Adr) in Backlog Management in Uganda' [2018] Kiu.ac.ug <https://ir.kiu.ac.ug/handle/20.500.12806/9022> accessed 21 September 2028.

disputants such as foreign direct investors, and companies who prefer the method to dispense their disputes pertaining to commerce without necessarily washing what Dr. Kariuki Muigua opines to be "washing the dirty linen in public."[9]

However, critics find the Arbitration Act of 1995 ill-prepared to handle matters of graft, demanding it to evolve inorder to resolve. As a matter of fact, they argue it has not evolved with the current alternative dispute resolution mechanisms tide and modern arbitration practices such as online dispute resolution.[10] Considering the foregoing, this paper critiques all the provisions of the Act, arguing what ought to be amended to reflect the constitution of Kenya 2010's legal predominance spirit, and the standard Arbitration laws of developed countries such as the United Kingdom and the United States of America.

i. A hit or a miss? Interpretation sections of the Arbitration Act

While provision two of the Act provides for the application of the Arbitration Act to both the domestic and international types of arbitration,[11] it fails to provide the territorial scope and extent to which it cannot apply. [12] In the vast expanse of arbitration

[9] Kariuki Muigua, *Settling Disputes Through Arbitration* (4th edn Glenville Publishers, Nairobi, 2022) Section on the Attributes of Arbitration.

[10] Kariuki Muigua, 'The Evolving Alternative Dispute Resolution Practice: Investing in Digital Dispute Resolution in Kenya Kariuki Muigua the Evolving Alternative Dispute Resolution Practice: Investing in Digital Dispute Resolution in Kenya the Evolving Alternative Dispute Resolution Practice: Investing in Digital Dispute Resolution in Kenya' (2022) <*https://kmco.co.ke/wp-content/uploads/2022/04/The-Evolving-Alternative-Dispute-Resolution-Practice-Investing-in-Digital-Dispute-Resolution-in-Kenya-Kariuki-Muigua.pdf*> accessed 28 October 2028.

[11] Arbitration Act No. 4 of 1995, section 2.

[12] Global Legal Group, 'John M. Ohanga' [2028] International Comparative Legal Guides International Business Reports <https://iclg.com/practice-

proceedings, the section fails to state the stance on whether the Act can apply to the arbitrability of corruption in either domestic or international commercial arbitration.[13] As a matter of fact, the interpretation section fails to describe the contextual use of both international and domestic types of arbitration[14]; the only interpretation of terms described therein encompasses the commonly known definition of arbitration and the arbitrators thereof, the narrowed meaning of agreement devoid of the form and content description, meaning of an arbitral award (literal meaning actually), what an arbitral tribunal is, and who a party is in international commercial arbitration.[15] This, therefore, raises a question of whether, 28 years down the line, the drafters are yet to point out the gap, throwing the age and efficacy of the 28-year-old legal framework out of the dust.

Worrying is that the drafters did not capture key terms such as the confidentiality veil, arbitration clause, competence-competence, arbitrator, meaning and scope of domestic and international

areas/international-arbitration-laws-and-regulations/kenya> accessed 28 October 2028.

[13] Pontian N Okoli, 'Corruption in international commercial arbitration—Domino effect in the energy industry, developing countries, and impact of English public policy Corruption in international commercial arbitration—Domino effect in the energy industry, developing countries, and impact of English public policy' (2022) 15 The Journal of World Energy Law & Business 136 <https://academic.oup.com/jwelb/article/15/2/136/6551539> accessed 20 October 2028.

[14] di Brozolo and Luca Radicati, *International Commercial Arbitration:* International Arbitration and Domestic Law' (Cambridge University Press 2013) 40 <https://www.cambridge.org/core/books/abs/international-commercial-arbitration/international-arbitration-and-domestic-law/7A1BA36161286B79EAB1D953A14E3A67> accessed 28 October 2028.

[15] Arbitration Act, 1995, section 3.

arbitration.[16] Its robustness would have also been enriched if the Act had provided the meaning of the various types of arbitration, such as investment contracts,[17] Employment, and commercial, to mention but a few. Likewise, the raised distinction between domestic and international commercial arbitration on the premises of the parties' nationality, residence and/or where their business is raised raises potential grounds of restrictiveness and discrimination, running contra to the non-discrimination and equality principle enshrined under the Constitution of Kenya 2010[18]-better described by Hans Kelsen's pure theory of law as the grundnorm: This law akin to Albert Vern Dicey's rule of law' tenets[19] predisposes everyone to equal treatment before the law, their nationality and/or residence notwithstanding.

Restrictive is also the implicit and/or express provision decreeing that an arbitration agreement concluded in accordance with the Act under the parties' mutual and informed consent could potentially

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[16] Margaret Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University 2017) the Introductory section. <https://books.google.co.ke/books?id=3M8oDwAAQBAJ&dq=Worrying+is+that+the+drafters+did+to+capture+key+terms+such+as+the+confidentiality+veil,+arbitration+clause,+competence-competence,+arbitrator,+meaning+and+scope+of+domestic+and+international+arbitration.&lr=&source=gbs_navlinks_s> accessed 1 October 2028.

[17] Organisation for Economic Co-operation and Development (OECD), 'Interpretation of the Umbrella Clause in Investment Agreements' [2006] OECD Working Papers on International Investment <https://www.oecd.org/investment/internationalinvestmentagreements/WP-2006_3.pdf> accessed 10 March 2021.

[18] Constitution of Kenya 2010, Article 27.

[19] Matthieu Burnay, *Chinese Perspectives on the International Rule of Law* (Edward Elgar Publishing 2018) Chapter 1 <https://www.elgaronline.com/display/9781788112883/09_chapter1.xhtml> accessed 28 October 2028.

restrict the freedom of the parties to select their preferred seat of arbitration. [20] While the object of the provision is to incentivise the parties to choose Nairobi, for example, as the seat of arbitration, the party autonomy principle as annexed to the vital choice of the seat of arbitration remains a citadel determinant of preference of this alternative dispute resolution process. [21] Given that the principle allows the parties to determine the supervisory jurisdiction and the legal blueprint to anchor the arbitration process, any restrictions thereof serve to infringe on the same principle that appeals to the disputants to prefer the process in privately and confidentially dispensing their commercial disagreement.[22] This not only strangles the legality principle but also obliterates the *ultra vires* principle of the prescribed international dispute resolution norms.

Moreover, the specific Act's interpretive section stressing a central control or incorporation of a juridical corporate disputant in Kenya as a qualifier for the domestic type of arbitration potentially conflicts with the values and principles of the Constitution of Kenya 2010,

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[20] Kariuki Muigua, 'Looking into the Future: Making Kenya a Preferred Seat for International Arbitration Kariuki Muigua Looking into the Future: Making Kenya a Preferred Seat for International Arbitration Looking into the Future: Making Kenya a Preferred Seat for International Arbitration' (2020) Section 5 on making Kenya the preferred Seat of Arbitration <http://kmco.co.ke/wp-content/uploads/2020/12/Looking-into-the-Future-Making-Kenya-a-Preferred-Seat-for-International-Arbitration-Kariuki-Muigua-Ph.D.-28TH-DECEMBER-2020.pdf> accessed 28 October 2028.

[21] Anubhav Pandey, 'Ten Factors to Consider before Deciding Seat of Arbitration' (*iPleaders*10 August 2017) <https://blog.ipleaders.in/seat-of-arbitration-factors/> accessed 28 October 2028.

[22] Sagi Peari and Saloni Khanderia, 'Party Autonomy in the Choice of Law: Some Insights from Australia' (2021) 42 Liverpool Law Review 275 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7927766/> accessed 28 October 2028.

equality, transparency, honesty, and non-discrimination being one of them.[23] This also hinders the freedom of foreign juridical bodies and corporations undertaking their commercial activities in Kenya's ability to access domestic arbitration freely, hence terminable as an unnecessary limitation, consequently discouraging direct foreign investment in Kenya and loss of revenue in the form of the legal and process fees to the Arbitrators and the government of Kenya.[24] Following the proverbial edict that "*a bird in the hand is too worthy in the bush,*" it is time to amend the provisions to sound more friendly to both domestic and foreign companies to encourage foreign investment by removing the perceived unnecessary bottlenecks.

Shifting the focus to the discharge of obligations or the link of the dispute's subject matter being in Kenya as a form of domestic arbitration prerequisite appears overly ambiguous, if not unnecessarily broad. The ambiguity/overly broad conundrum is worsened by the blurred statutory clarity with respect to the threshold set for determining the "substantial part" or ascertaining the closest nexus, which potentially presents inconsistencies and difficulties in the provision's application the certainty and predictability offered by arbitration as a preferred method of expediting matters privately and confidentially in place of the belaboring commercial litigation.[25] The above criticisms do not,

[23] Constitution of Kenya 2010, Article 10 analysing the National Values and Principles.

[24] Kariuki Muigua, 'Nurturing International Commercial Arbitration in Kenya' Kariuki Muigua and Co Associates 3-5 <http://kmco.co.ke/wp-content/uploads/2021/10/Nurturing-International-Commercial-Arbitration-in-Kenya.pdf> accessed 28 October 2028.

[25] LexisNexis.com, 'Six Key Differences between Litigation and Arbitration' (*LexisNexis 22 August 2021*) <https://www.lexisnexis.com/community/insights/legal/b/thought-

however, overlook the positive aspects (in terms of the provisions and sub-provisions thereof) of the Act's sections and sub-sections under the interpretation section. One such area the drafters nailed that has aged well with time is the sectional clause dealing with claims, more specifically, the counterclaims, which provide the interpretation of agreements to encompass clarity on arbitration rules.[26] The section, therefore, offers a high degree of certainty and predictability, which should be ordinarily offered in the process of arbitration, clearly demystified by *Dr. Kariuki Muigua's* text "*Settling Disputes through Arbitration in Kenya.*"

ii. A critique of the Act's general provisions considering the modern practices

The drafters of the Constitution of Kenya 2010 were deliberate in their drafting of every constitutional article, provision, and clause therein.[27] Such a level of detail is emphasized by Justices Majanja and Patrick Kiage's jurisprudence.[28] A similar standard is expected from the Arbitration Act of 1995 despite being 15 years ahead of the CoK 2010. This is attainable through the required amendments wherein reviewing the enforceability, form, arbitration agreements' non-compliance, and enforceability, among other aspects thereof, form the

leadership/posts/six-key-differences-between-litigation-and-arbitration> accessed 28 October 2028.

[26] Arbitration Act, 1995 Part V on Arbitral Proceedings and Awards.

[27] Njeri Githang'a, 'A Compilation of Summaries of Selected Cases on the Interpretation of the Constitution of Kenya, 2010 | Kenya Law' (*Kenyalaw.org* 2013) <http://kenyalaw.org/kenyalawblog/a-compilation-of-summaries-of-selected-cases-on-the-interpretation-of-the-constitution-of-kenya-2010/> accessed 28 October 2028.

[28] Richard Albert, 'Kenyan Judges Stop President's Reforms as Attempt to "Dismember" the Constitution' (*The Conversation*24 August 2021) <https://theconversation.com/kenyan-judges-stop-presidents-reforms-as-attempt-to-dismember-the-constitution-166587> accessed 28 October 2028.

crux of the general provisions therein.[29] On a positive note, the arbitration agreement prescribed form's provision conforms to the best modern international practices, hence preserving the party autonomy principle during the preservation of the preferred form of arbitration.[30] It is common practice across the various jurisdictions that arbitration agreements be reduced into writing. As is the case with contracts' formalities, such an approach allows for evidence of such an agreement.[31] Additionally, the same grants the arbitration agreements the flexibility of existing as a clause within a particular agreement (commercial or contractual, for example, employment) or a mutual agreement that is separate and standalone.

Apart from the above practice across the civil and common law jurisdictions providing the much-needed certainty of proof and clarity, enshrining a written agreement's agreeable forms, for example, a correspondence's exchange or a signed document, streamlines the process of forming and enforcing arbitration agreements; allowing parties and/or disputants to subject a particular matter to arbitration.[32] Moreover, incorporating a claim and defense thereof as part of statements exchange as a replica of a written arbitration agreement heralds the recognition of procedural practicality wherein parties may agree to arbitrate (albeit inadvertently) through their pleadings (synonymous with written submissions). Advantageously, the provisions allow the disputants

[29] Njeri Kariuki, 'Arbitration in Kenya ' (*Lexology* 13 July 2018) <https://www.lexology.com/library/detail.aspx?g=65f704c5-d59b-4f5b-ba27-e060132bbf09> accessed 14October 2028.

[30] Arbitration Act, 1995 section 4 (1).

[31] *Euromec International Limited v Shandong Taikai Power Engineering Company Limited* (Civil Case E527 of 2020) [2021] KEHC 93 (KLR) (Commercial and Tax) (21 September 2021) Ruling on the Stay of proceedings.

[32] Arbitration Act, 1995 section 3(1).

to evade potential disputes regarding whether an agreement exists during the consideration of arbitration proceedings that might potentially emanate from there.[33]

On the flipside, the existence of a written agreement and/or evidentiary service through the pleadings does not negate the intricacies or arbitration proceedings, for example, the imbalance of power between the disputants such as that between an employer and employee contracts or between a particular business versus a weaker individual. [34] If overlooked, such issues potentially lead to a miscarriage of justice if left unchecked, for the Kenyan Arbitration 1995 Act entirely concerns itself with the evidentiary proof between the disputants and overlooking the intricacies/ conundrum surrounding such power imbalances.[35]

Another overlooked yet vital Part of the Kenyan Arbitration Act of 1995's provision delves into the arbitration clause's reference. An arbitration clause is recognised under the Act provided its contractual reference and if that contract has met the formal requirements, being in writing.[36] The pros of such arbitration clause reference lie in the

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[33] Peter Berger and Klaus Peter Berger, 'Principle XIII.1.1 - Arbitration Agreement' (*Trans-lex.org* March 2016) <https://www.trans-lex.org/968900/_/arbitration-agreement/> accessed 21 October 2028.

[34] *Omusamia v Upperhill Springs Restaurant* (Cause 852 of 2017) [2021] KEELRC 3 (KLR) (5 October 2021) (Judgment)

[35] Muigua and Kariuki Muigua, 'Arbitration Law and the Right of Appeal in Kenya Kariuki Muigua Paper First Presented at the Law Society of Kenya Continuing Professional Development Webinar on Arbitration Held on 13th Arbitration Law and the Right of Appeal in Kenya Arbitration Law and the Right of Appeal in Kenya' (2020) the Introductory section <http://kmco.co.ke/wp-content/uploads/2021/01/Arbitration-Law-and-the-Right-of-Appeal-in-Kenya-Kariuki-Muigua-9th-January-2021.pdf> accessed 20 October 2028.

[36] Arbitration Act, 1995 section 4(4).

fact that it ensures the parties are not required to entrench a whole arbitration contract within a particular agreement. Rather, they have leeway to refer to a separate document comprising that arbitration clause,[37] providing the agreed way of dispensing any potential matter that shall arise through the arbitration process.

While this alternative commercial dispute resolution approach minimizes documentary duplication while enhancing contractual efficiency, if information asymmetry between the disputants and/or drafters of the arbitration clause goes unchecked (given the Act is silent on the same), either party being grossly disadvantaged is a probability.[38] This is the very reason why, under section 9(4) of the 2007 Employment Act, with respect to the particulars of an employment contract, for example, an arbitration clause as enshrined under section demands the employee be explained to the particulars of employment in a language that they understand. Therefore, looking at both sides of the "reference to an arbitration clause" coin during the clamoured amendment process of the arbitration clause is crucial lest the legal framework remains inadequate in overseeing access to justice to all vide Article 159 (2)(c).

Waiving the "right to object" under the 1995 Arbitration remains a vital part of the arbitration agreement, which ought not to be neglected. Construed, this Part of the Act places a caveat on the parties against raising an objection based on the ground of non-

[37] 'A Court Can Depart from the Rule of Arbitral Referral Where a Dispute Would Not Be Resolved If a Stay of Legal Proceedings Was Granted | Kenya Law' (*Kenyalaw.org* 2013) <http://kenyalaw.org/kenyalawblog/rule-of-arbitral-referral/> accessed 19 October 2028.

[38] 'Drafting Efficient Dispute Resolution Clauses' (*Wipo.int* 2028) <https://www.wipo.int/amc/en/clauses/clause_drafting.html> accessed 10 October 2028.

compliance to an arbitration agreement or Act's provisions when parties commence an arbitration proceeding devoid of a timely objection: This corresponds the maxim of equity coined as "*Equity favours the vigilant and not the indolent.*"[39] While the provision's intent seems to be encouraging parties to raise objections in a timely manner and deterring disputants from hiding under the veil of non-compliance as a vexatious tactic to derail the arbitration process, it contravenes the spirit of the CoK's access to justice tenet which thus decrees that; "*justice shall be administered without undue regard to procedural technicalities.*" [40] A recipe of statutory amendment necessitates a legislative drafting meal-demanding striking a balance of the "waiver of the right to object" vis-à-vis non-contravention of the provision that the procedural technicalities notwithstanding, disputants are guarantees access to the fountain of justice.

iii.The "stay of proceedings" dilemma

Among outstanding statutory provisions yet so controversial under the 1995 Arbitration Act is the stay of legal proceedings in case of a valid arbitration agreement. This is inspired by the party autonomy principle vis-à-vis the enforceability of arbitration agreements.[41] This nascent statutory creature, despite being borrowed from other jurisdictions such as the UK law and the UNICTRAL Model laws, compels the parties to follow the principle underpinning the "*exhaustion of local remedies doctrine set out in the Dawda K Jawara v The*

[39] 'Sarala Srinath v. M. Muthusamy, Madras High Court [2005] <https://www.casemine.com/judgement/in/560901b6e4b0149711157505>.

[40] Constitution of Kenya 2010, Article 159(3)(d).

[41] Hiro Aragaki, 'Does Rigorously Enforcing Arbitration Agreements Promote "Autonomy"?' (2016) 91 Indiana Law Journal Indiana Law Journal 1160-65 <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=11215&context=ilj> accessed 15 October 2028.

Gambia case[42] by first exploring the path of arbitration before moving to Court as an avenue of last resort. The applause notwithstanding, the grounds provided under the Act are only when: a. the arbitration agreement is incapable of being performed, b. nullity, hence void, c. inoperative or where there exists no genuine controversy between the disputants.[43] Therefore, while the provisions oust the Court's power to impede unduly the process of arbitration save for legitimate reasons, reforms are vital to expand the grounds, such as when either party was not well-informed of the costs they are going to incur or when the contracts made such a clause mandatory in such a way the employee has low bargaining power-potentially betokening a miscarriage of justice.[44] The woes of uncertainty continue whereby the Act fails to specify the timeframe the Court hearing the stay of procedures is to render a ruling on the same. [45] An amendment clearly establishing the time limit would, apart from ensuring the process predictability, guarantee expedience for purposes of meeting the needs of justice.

One of the Act's general provisions further decrees that any clause within an agreement to the arbitration proceeding, making it a condition precedent to initiate an arbitral proceeding, remains

[42] '147/95_149/96 Sir Dawda K. Jawara v Gambia (The) • Page 1 • African Human Rights CLA 2.0' (*Ihrda.org*2015) <https://caselaw.ihrda.org/en/entity/e40rz60vzqmhi2y9zncwpzaor> accessed 16 October 2028.

[43] Arbitration Act, 1995, section 6(1).

[44] Kariuki Muigua, 'Role Of The Court Under Arbitration Act 1995: Court Intervention Before, Pending And After Arbitration In Kenya' (2009) The Chartered Institute of Arbitrators course on Advocacy in Mediation and Arbitral Proceedings on 5th February 2009. (Revised on 1st March 2010) <http://kmco.co.ke/wp-content/uploads/2018/08/080_role_of_court_in_arbitration_2010.pdf> accessed 13 October 2028.

[45] Ibid.

invalidated.[46] This serves the purpose of ensuring the parties' access to justice by allowing them to institute parallel legal proceedings or those after arbitration without feeling like the process of arbitration is duly burdensome. For the Court's interim measures provisions, the Arbitration Act, akin to the UNICTRAL Model laws, grants the High Courts, either prior to or during the arbitral proceedings, the right to grant interim requests as a protective measure.[47] These measures are vital for preserving the status quo while safeguarding the involved parties' interests and rights. [48] Therefore, the drafters hit the proverbial nail on the head, given that parties seeking such interim from the Court are given an effective avenue to exploit in addressing vitally pertinent issues likely to arise during the arbitration.

However, the drafters were oblivious to the fact that justice is a multifaceted concept whereby an urgent matter might arise during a particular arbitration process only for an interim of orders not to be granted, for example, because of time-lapse or failure to follow a particular procedure or delay in filing a particular document in due time.[49] While the High Court is time-sensitive, matters out of hand, such as technicalities as a derailment of the arbitration proceedings, should be considered while granting such orders to avoid any miscarriage of justice.[50] Similarly, the Court's interim measures fail to

[46] Arbitration Act, 1995, Section 6(3).

[47] *Ibid.,* section 7.

[48] Kariuki Muigua , 'Preliminary Proceedings And Interlocutories: The Birth, Teething, Immunization And Weaning Of Arbitration Proceedings' (2010) <http://kmco.co.ke/wp-content/uploads/2018/08/079_prel_proceedings_2010.pdf>.

[49] *Jetways Airlines Limited v Ocean Airlines Limited* [2021] eKLR.

[50] Walter Mattli, 'Private Justice in a Global Economy: From Litigation to Arbitration' (2001) 55 International Organization 919 <https://www.jstor.org/stable/pdf/3078620.pdf> accessed 28 October 2028.

clearly define the scope of these interim measures that the parties/ disputants can seek from the courts. For this reason, an amendment would be vital, for it would provide better guidance in determining the various array of interim measures the Court can grant lest the uncertainty looms. The amendment would also follow specifications as to whether such interim measures granted by the Court can be subjected to either review and/or appeal to create certainty while promoting the certainty of outcomes.

iv. Defending the wretched principle of survivorship upon the party's death

Whereas the party's death to a contract would most likely discharge a contract, the contrary is the case of the Arbitration Act. The readership of the Act implores the non-discharge of an arbitration agreement (the death of the party thereof notwithstanding) against or by the deceased's representatives.[51] How such agreements were drafted corresponds with the arbitration agreements' principle of survivorship vis-à-vis their binding nature over either party. However, a lacuna emerges by the fact that the provision fails to address a scenario whereby an arbitration agreement is personal and expressed towards the deceased parties and whether, in such instances, the agreement remains enforceable[52]. The amendments providing clarification pertaining to the issue at hand would be very beneficial.

The Act's provisions stipulate rules for the receipt of deemed written communications under an arbitration proceeding. By using the

[51] Arbitration Act, 1995 section 8.

[52] Mertcan İpek, 'Assignment of Contractual Rights and Its Impact on Arbitration Agreements' (2016) 5-15 <https://dergipark.org.tr/tr/download/article-file/274363> accessed 30 September 2028.

recognised means of electronic mail, a facsimile, and/or a physical method, any method chosen thereof determines the date of receipt.[53] While the provisions underpin the vitality of effective communication between the parties during arbitration proceedings, they failure to specify the effect of non-receipt and receipt of communications.[54] This is crucial given instances where a party alleges not to receive communication. An amendment or refinement of the statute would, therefore, guide how such an issue can be addressed.

v. The stretch of the Court's intervention

The Act's provision ousting the Court's intervention upholds the party autonomy principle except under the circumstances or exceptions thereof not contemplated under the Act. The advantage of such court restriction is the party's freedom to settle their matters privately and confidentially without washing their dirty linen in an open court.[55] Nevertheless, this similar Act does not specify either the extent and/or the circumstances in which the Court's intervention is permissible under the Act. So overdue yet beneficial, an amendment that would clarify the circumstance and stretch the Court's intervention is permissible.[56] This would not only cure the undesired

[53] Arbitration Act, 1995, section 9.

[54] 'Smile Communications Uganda Limited v ATC Uganda Limited and Another (Arbitration Cause 4 of 2022) [2028] UGCommC 30 (11 April 2028)' (*Ulii.org* 2022) <https://ulii.org/akn/ug/judgment/ugcommc/2028/30/eng@2028-04-11> accessed 15 October 2028.

[55] Mitch Zamoff, 'Safeguarding Confidential Arbitration Awards in Uncontested Confirmation Actions' (2022) 59 American Business Law Journal 505 <https://onlinelibrary.wiley.com/doi/full/10.1111/ablj.12211> accessed 20 October 2028.

[56] Arbitration Act, 1995, section 10.

outcomes of an arbitration process but also allow the disputants to explore the available remedies to meet the ends of justice. Furthermore, the Court's intervention would ensure the rule of law is upheld through clear and consistent application of legal authorities.

vi. "Selling the Sizzle rather than the steak of the Arbitration Act's part III'

Part III of the Arbitration Act of 1995 pertaining to the Arbitral Tribunal's jurisdiction (and composition as well) remains minimally critiqued, given slight or close to no changes in the procedural adjustment aspect.[57] For instance, the Part anchors the parties' freedom to determine their preferred number of arbitrators to be involved in arbitration commercial justice. This echoes the internationally set arbitration standards of the parties' freedom of choice, encompassing the number and the preferred type of arbitrators.[58] It is also the flexibility aspect and autonomy over the arbitrators and/or the arbitral tribunal that makes the disputants prefer arbitration over the strict procedurally cloaked commercial litigation. As an addition, however, an amendment adding a more specific provision or a rule akin to the civil procedure rules would come in handy to guide the parties in their determination of an appropriate number of arbitrators for purposes of standardizing,

[57] David L Noll, 'Regulating Arbitration' (2017) 105 California Law Review 985 <https://www.jstor.org/stable/pdf/44630778.pdf> accessed 21 October 2028.

[58] Michael Patchett-Joyce, 'Private Autonomy in International Commercial Dispute Resolution' [2022] Cambridge University Press eBooks 388 <https://www.cambridge.org/core/books/abs/international-commercial-courts/private-autonomy-in-international-commercial-dispute-resolution/522BE31660D29BDBD8DF1EA07CA71AAA> accessed 28 October 2028.

providing clarity and ensuring consistency in the practice of arbitration.[59]

Moreover, the provision addressing the arbitrator's appointment provides inter-alia that no potential arbitrator is disqualified because of their nationality unless the parties have so agreed, which remains commendable 28 years down the line. This is because the provision aligns with the Constitutional provision entrenching the freedom of non-discrimination and the right to equality as borrowed from a wide array of international legal instruments. [60] The Part further underscores the party autonomy and freedom of choice provisions by allowing the disputants to freely agree on the procedure of appointing an arbitrator, the chairman inclusive.[61] So internationally commendable is the provision, even in international commercial arbitration, that even eminent scholars such as Kariuki Muigua agree that such should be the party autonomy embodying spirit throughout the arbitration Act. The Part, however, fails to provide the specific statutory way forward when parties cannot agree, let alone carve a procedure to govern the arbitration proceedings. An amendment to this effect would, therefore, be more thoughtful; it should, apart from enshrining the default provisions, supply the much-needed clarity to this principal legislation.

What if the parties do not appoint the arbitrators in the required timeframe? The Part's relevant provision allows either party that appoints an arbitrator as a sole arbitrator subject to default because of a duration timelapse to be a practicable solution of hearing and

[59] *University of Nairobi v Nyoro Construction Company Limited & another* (Arbitration Cause E011 of 2021) [2021] KEHC 380 (KLR).
[60] Arbitration Act 1995, section 11.
[61] Michal Malacka, 'Party Autonomy in the Procedure of Appointing Arbitrators' (2017) 17 International and Comparative Law Review 93-96.

dispensing the matter expeditiously.[62] Such a provision ensures that the defaulting party does not frustrate (by way of hindering) the arbitration process. Unfortunately, the Act does not specify what the reasonable timeframe is in the spirit of upholding the *doctrine of laches* vis-à-vis the Statute of Limitations. To fill the legal lacuna, an amendment by way of adding a statutory provision guiding what amounts to a reasonable timeframe will evade potential delays and disputes that often reveal the negative side of arbitration proceedings. In the spirit of Judicial authority regarding open access to justice, the spirit of the Act's Part III's fourth and fifth subsections granting the appointment of a sole arbitrator in case of the defaulting party's indolence rather than the prescribed vigilance under the law of equity is fairly and duly justified.[63] This avoids inordinate delays akin to the backlog of cases in Court, enabling the process of arbitration to go on. The Constitution of Kenya's right to a fair hearing, however, grants the defaulting party a legal recourse of applying to the High Court within 14 days challenging the sole arbitrator's appointment or even filing a preliminary objection but providing valid legal and factual reasons for their failure to appoint an arbitrator in time.[64] Such ensures the due process is followed while granting the defaulting party's right to a fair trial.[65] A nascent amendment that would grant the defaulting party a chance to appoint an arbitrator outside the recommended timeframe upon providing a justifiable ground would make the Arbitration Act more robust and avoid the tedious process

[62] Arbitration Act 1995, section 12.
[63] Alfred Hayes, 'Article 1 Specific Performance of Contracts for Arbitration or Valuation, 1 Cornell L' (1916) 1 Cornell Law Review <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2854&context=clr> accessed 28 October 2028.
[64] Arbitration Act 1995, section 12(5).
[65] Constitution of Kenya 2010, Article 50.

of applying to the High Court and the incurred litigation costs in the process.

Part III emphasises the discretionary power granted to the High Court to appoint an arbitrator when circumstances demand so. The Part's relevant section grants the parties the right to appoint a sole arbitrator, providing an alternative remedy as Part of setting aside the non-defaulting party's selected arbitrator.[66] Apart from eliminating biases and safeguarding judicial authority's principle justice with undue regard to procedural technicalities, the scope of the Court's intervention and guiding principles of appointing the arbitrator remain unspecified under the Act. An amendment providing rules of procedural guidelines thereof would fill such a procedural gap, thereby permitting the Court's intervention only when it is necessary. Similarly, the vitality of appointing an arbitrator who is impartial and independent pursuant to an arbitration agreement cannot be overemphasized. This is why the Act allows qualification and merit to trump nationality and arbitrators' preferences. That notwithstanding, the Act recognizes party autonomy as king, for they decide who will arbitrate their commercial dispute.

vii. Conclusion

At the core of the paper's critical arguments was the hypothesis that reforms (by way of amendments or repeal with a replacement of a new Act) to the Arbitration Act of 1995 are long overdue. The paper argued that the 28 years of the Act's minimal amends have rendered it deficient and not reflective of the CoK's 2010 complimentary legal outfit. The first Part argued that the Act's Part I's provisions needed expansion in terms of implementation therein and harmonisation to reflect the principles of modern party autonomy, non-discrimination,

[66] Arbitration Act (n36) Article 12 (1).

and equality-this would provide clarity of modern domestic arbitration's confines for purposes of an up-to-date regime of international commercial arbitration. The critique of the party argued the need to strengthen the framework governing arbitration agreements (or clause) formation, their enforceability, and the consequences of non-compliance. Central to the arguments was the need to redraft provisions therein as Part of promoting an efficient and effective arbitration system. The essay discussed the Court's interim measures provision, finding their scope unclearly defined. For the party's death provision vis-à-vis perpetual enforceability, an amendment for purposes of clarity would do the provisions justice. Additional provisions on the receipt of written and non-written communications would equally increase the Act's robustness.

The paper has also analysed the lack of clarity surrounding the court intervention, recommending the insertion of a provision (by way of amendment) clarifying the manner a court ought to intervene without obliterating the law. Positive from the arbitration Act is the aspect dealing with the stay of proceedings by virtue of ensuring equitable access to legal remedies. The limited grounds of appeal argued hereinabove water down the advantages of ADR, hence why an amendment to expand the grounds for appeal is vital. The aspect of selecting the arbitrators and their jurisdictions thereof found the amendment of PART III vital to ensure clarity of the needed number of arbitrators for purposes of clarity and consistency in practice.

While the research limited its scope to Part I, II and III of the Arbitration Act as a litmus test, albeit other provisions promoting clarity, fairness, and consistency in the practice of arbitration, other laws pertaining to the intervention of the Court need a thorough review before the long overdue amendment. In so doing, the party autonomy principle will be enriched, impartiality will be strongly

anchored, and the due process of the law will be strongly adhered to. In terms of the essay's limitations, the paper adopted a purposive-textual interpretation; hence prior to the needed amendments, relevant stakeholders would need to thoroughly interrogate and analyse the Act in tandem with the grundnorm law. The practice will be repeated with the consultation of relevant stakeholders, case law digests, and other scholarly critics. Otherwise, the clamour for legislative reforms has reached its crescendo and is on the verge of a precipice.

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Past Way Their Time; Reflecting on the Right to Cultural Practice and Children Rights

By: ***Onesmus W. Musungu****

Culture has no age. Age is something we learn today because of our westernasation.

Abstract

People's way of life appears to be a defining feature that is centric in our societies. Since the society is not static, it's appreciable to own the morphing facets within the society which achieves the societal practice though they might be done in a different approach. Culture is produced and developed through our lives and everyday activities in social, political and economic spheres and it varies from different epochs. However, with the development of new phenomena in terms of laws, culture which ascribes within customary law has been perceived to be static. This has seen the intervention of law which is discerned as better option for a progressive society.

Children Act, 2022 has been hailed since it has substantively introduced and covered more of children rights in tandem with the new world order and the developing society. However, where is the place of culture? Section 14 of 2001 Children Act prohibited harmful cultural practices such as female circumcision and early marriages among the children. This has been boosted by the 2022 Children Act vide section 23 where it supplements the list to include forced circumcision among male child, virginity testing, girl child beading, organ change or removal of organ among the intersex children. All these prohibitions are aimed at ensuring social wellbeing of the children. In the same vein, the Constitution of Kenya 2010, allows the enjoyment of culture save for such enjoyment should not be compelled. However, where is the place of the law in protecting a child from appreciatable outcome of a cultural practice where the process is defined by human rights violation? For instance, traditional circumcision among the Bukusu community.

This paper employs qualitative research in analyzing the lacuna that the Children Act has sealed with regards to cultural practices. It endevaours to identify the loopholes that the Children Act 2001 had exposed children to human right violation and how the panacea of these loopholes have been effectively provided for in the 2022 Children Act. Further, this paper will focus more on male circumcision and child marriages which has been prevalence among many communities as a cultural practice.

This paper recommends proper civic education to the community so that they can be fully aware of the changing phenomena in the society with regards to cultural practices that affects children. Institutions dealing with rights of children and its enforcement should emphasize on the need to protect children from harmful cultural practices. Further, proper implementation of the 2022 Children Act.

Introduction

Human rights in its entirety have brought forth non-ending battle between itself and culture.[1] It is evident that Human Rights have hamstringed the culture.[2] This is through high elevated Human Rights as against culture which has succumbed to the superiority nature of laws.[3] The implication resulting therein is seen vide Article

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[1] UNESCO, Individual Rights and Respect for All," https://articles.unesco.org/en/articles/individual-rights-and-respect-all-cultures> accessed on 21st January 2024

[2] UNESCO, Individual Rights and Respect for All," https://articles.unesco.org/en/articles/individual-rights-and-respect-all-cultures> accessed on 21st January 2024.

[3] UNESCO, Individual Rights and Respect for All," https://articles.unesco.org/en/articles/individual-rights-and-respect-all-cultures> accessed on 21st January 2024

2(4) of the Constitution that makes the provision of the Constitution supersede the customary law that majorly reflects culture.[4]

When it comes to development, culture plays a significance role.[5] It is crystal clear that culture is the defining output of an individual since in one way or the other; people have to appreciate it even in its minimum application.[6] However, as the society progress, it has negative implications to some cultures which according to reasonable standard of medical examination, it has negative implications on human health. This has been seen through laws developed that seek to ensure maximum protection of Human rights.[7]

The universality of human rights has been culminated in the existing international and national structure.[8] The universal nature of all Human rights and fundamental freedoms is beyond question.[9] This is a clear reflection of Children rights which are also human rights

[4] Constitution of Kenya (2010), article 2(4).
[5] What Role Does Culture Play in Development? https://www.weforum.org/agenda/2014/12/what-role-does-culture-play-in-development/> accessed on 21st January 2024
[6] Charles Herman, ' Defining Culture: The Role of the Person as Carrier of Cultural Meang, January 2017 https://www.researchgate.net/publication/312446624_Defining_Culture_The_Role_of_the_Person_as_Carrier_of_Cultural_Meaning/link/5f8fb249299bf1b53e3793c3/download?_tp=eyJjb250ZXh0Ijp7ImZpcnN0UGFnZSI6InB1YmxpY2F0aW9uIiwicGFnZSI6InB1YmxpY2F0aW9uIn19> accessed on 21st January 2024
[7] David Napier, Beverly Butler, Clyde Ancarno, Joseph Calabrese, 'Culture and Health' November 2014, https://www.researchgate.net/publication/269175928_Culture_and_health> accessed on 21st January 2024.
[8] United Nations, ' Universality, Cultural Diversity and Cultural Rights, 24 October 2018, https://www.ohchr.org/en/stories/2018/10/universality-cultural-diversity-and-cultural-rights> accessed on 22nd January 2024.
[9] Vienna Convention on the Law of Treaties, 1986.

that is not objectionable as per Chapter Four of the Constitution under Bill of Rights.

Culture is important as it defines people's way of life.[10] As much as it defines the status quo of the society, the grappling facet that calls for internal soul searching is when it is harmful to children.[11] In our societies, as a matter of fact, culture has been used to justify acts which are not in tandem with human rights.[12] As such embracing culture in our so called progressive society has led to development of laws that ensure that culture does not in any chance outdo best interest of a child.[13] This is evidence in the Kenyan constitution which in the first instance speaks of customary laws that are repugnant to justice and morality is null and void.[14]

Traditional cultural practices reflect values and beliefs held by members of a community for periods, i.e. it is generational.[15] It follows that every social grouping or any societal setting has specific traditional cultural practices and beliefs. Some of these cultural beliefs and practices are beneficial to all members, while others are meant to target a certain group of persons in the society. We can entertain no doubt that those beliefs and practices which are meant to

[10] Mathew Thomas Johnson, What is Culture? What Does it Do? What Should it Do? January 2018 https://www.researchgate.net/publication/304818111_What_Is_Culture_What_Does_It_Do_What_Should_It_Do> accessed on 22nd January 2024.
[11] Khamati Shilabukha, 'Culture and Children's Rights in Africa: A conceptual Framework (April 2017)
[12] Khamati Shilabukha, 'Culture and Children's Rights in Africa: A conceptual Framework (April 2017)
[13] Khamati Shilabukha, 'Culture and Children's Rights in Africa: A conceptual Framework (April 2017)
[14] Constitution of Kenya, 2010, Article 2 (4)
[15] UN Fact Sheet No.23, *Harmful Traditional Practices Affecting the Health of Women and Children* (UN 1995),

target certain group of persons appears to be detrimental on them since they majorly focus on the vulnerable members of the society, such as children.[16]

Despite their harmful nature which has partial and fully irreparable implications and their open violation of both national and international human rights laws, the peculiar nature of such practices is that it is rampant because they are not questioned and on the eyes of those practicing it, it takes an aura of morality.[17]

Cultural underpinnings

International Framework

Under international jurisprudence on the practice of culture by children, the Convention on the Rights of the Child (CRC) established in 1989 under the UNICEF body under Article 30 stipulates that a child shall not be denied the right to enjoy his/her own culture, to profess and practice his/her own religion, or to use his/her own language.[18] This in essence shows how the international community appreciates the importance of culture.

Article 31 of CRC allows the state party to the Convention to recognize the right of the child to participate freely in cultural life and the arts.[19] Further, the child's right to participate fully in the cultural

[16] UN Fact Sheet No.23, *Harmful Traditional Practices Affecting the Health of Women and Children* (UN 1995),
[17] UN Fact Sheet No.23, *Harmful Traditional Practices Affecting the Health of Women and Children* (UN 1995),
[18] Convention on the Right of the Child, 2 September 1990, Resolution 44/25 Article 30.
[19]Convention on the Right of the Child, article 31(1).

and artistic life shall be respected and promoted.[20] This provision is reiterated in Article 12 of the African Charter on the Rights and Welfare of a Child (ACRWC). The above provision sanctifies the existing phenomenon of appreciating cultural aspects which have been practiced in different epochs.

Looking into the African Charter on the Rights and Welfare of a Child, it has some limitation with regards to cultural rights. Vide Article 1(3) it stipulates that any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall, to the extent of such inconsistency, be discouraged.[21] The ACRWC has provided exceptions for such practices which have charmed its way in our existing societies which is something not objectionable.

In analyzing the appreciation of harmful cultural practice by African Charter on the Rights and Welfare of a Child, Article 21 deliberately speaks about protection against harmful social and cultural practices. It stipulates that state parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular: those customs and practices prejudicial to the health or life of the child.[22] Children Act 2022 has depicted the Kenya's appreciation of ACRWC and it has shown the country's spirit in putting measures to realize this provision to the later.

[20] Convention on the Right of the Child, article 31(2).
[21] African Charter on the Rights and Welfare of a Child, CAB/LEG/24.9/49 (1990), article 1(3).
[22] African Charter on the Rights and Welfare of a Child, article 21(1)(a).

Further, it prohibits child marriages and the betrothal of girls and boys and effective actions including legislation to be put into place to specify the minimum age of marriage to be 18 years.[23] However, Article 31 of the Charter which spells out the responsibility of the child states that a child shall have the duty to preserve and strengthen African cultural values in relations with other members of the society…[24] The above provision does not support cultural values which interferes with the best interest principle as it follows the maximalist interpretation of the Constitution[25] and the Children Act.[26]

National framework

During colonization, the only way to get Africans to the so called civilization was through eradication of culture.[27] However, after colonization and acquiring of independence, most communities had some of their cultures intact.[28] In Africa, we appreciate the fact that culture being our identity has indeed made it viable that we have different tribes in Kenya. The fact is that these tribes are differentiated through cultural practices they practice. These practices are practiced way before, during and after a child is born.[29] Therefore, the whole growth of a child is defined through culture which makes them

[23] African Charter on the Rights and Welfare of a Child, article 21(2).
[24] African Charter on the Rights and Welfare of a Child, article 31(d).
[25] Constitution of Kenya (2010).
[26] Children Act, (No. 29 of 2022).
[27] Mamta Rani,' The Impact of Colonization on African Identity and Culture in Chinua Achebe's Things Fall Apart (Volume 7, Issue 1 pg 167.
[28] Mamta Rani,' The Impact of Colonization on African Identity and Culture in Chinua Achebe's Things Fall Apart (Volume 7, Issue 1 pg 167.
[29] Mamta Rani,' The Impact of Colonization on African Identity and Culture in Chinua Achebe's Things Fall Apart (Volume 7, Issue 1 pg 167.

appreciate all cultural activities.[30] However, it is important to appreciate that we have regulators of these practices.[31] The first place to borrow leave is from our laws which appreciate culture but determines the extent that these cultures can be practiced.

In the Preamble, the Constitution of Kenya appreciates the fact that we the people of Kenya are proud of our ethnic, cultural and religious diversity…Further, we appreciate the fact that we gave the constitution to ourselves and our future generations.[32] This in itself entirety acknowledges the probable value of culture and the future generation.

Article 11 of the Constitution has submitted itself fully on the foundation of Kenya. It has attributed culture as the foundation of a nation and as the cumulative civilization of the Kenyan people and nation.[33] Thus as a nation, we have a mandate to ensure that we develop and appreciate culture amongst ourselves.

In quest to protect individual's belief, Article 32 stipulates that every person has the right, either individually or in community with others, in public or in private, to manifest any religion or belief through worship, practice, teaching or observance, including observance of a day of worship.[34]

[30] Mamta Rani,' The Impact of Colonization on African Identity and Culture in Chinua Achebe's Things Fall Apart (Volume 7, Issue 1 pg 167.
[31] UNESCO, Kenya 2016 Report, https://en.unesco.org/creativity/monitoring-reporting/periodic-reports/available-reports-20> accessed on 22nd January 2024
[32] Constitution of Kenya (2010), PREAMBLE.
[33] Constitution of Kenya (2010), article 11.
[34] Constitution of Kenya (2010), article 32.

Article 44 of the Constitution of Kenya, 2010, recognizes the question of culture and language in our society. It stipulates that every person has the right to use the language, and to participate in the cultural life, of the person's choice.[35] Further, the article connotes that a person belonging to a cultural or linguistic community has the right, with other members of that community to enjoy the person's culture and use the person's language or to form, join and maintain cultural and linguistic associations and other organs of civil society.[36] In enjoying this right, we are reminded to ensure that it does not affect the wellbeing of an individual.

Going a step beyond the constitutional protection of children from harmful practices is the inception of a more comprehensive legislation on children's rights, the 2022 Children Act.

Section 126(1) of Children Act recognizes culture in terms of customary guardianship. It enunciates that the court may appoint a guardian on application by any person in accordance with the customs, culture or tradition of specific community… [37] In the guardianship process, culture has been seen as one of the key factors in determining it.

Section 170 of Children Act, 2022 connotes that among the overriding objectives of foster care placement is the promotion of family relationship in the context of Kenya's cultural, ethnic and community diversity.[38]

[35] Constitution of Kenya (2010), article 44(1).
[36] Constitution of Kenya (2010), article 44(2) (a) and (b).
[37] Children Act, (No. 29 of 2022), section 126(1).
[38] Children Act, (No. 29 of 2022), section 170(1)(e).

Section 30 of the Children Act, 2022 under parental responsibility, there are duties and responsibilities of a child among them being to preserve and strengthen the positive cultural values of his community in his relations with other members of that community.[39] Under section 95 of the Children Act, 2022, there are general principles that a court should put into consideration before making an order under the Children Act with respect to a child among the principles includes the child's age, sex, religious persuasion and cultural background.[40] Further, the customs and practices of the community to which the child identifies themselves with and the need to ensure that the child easily integrates in the community while not subjected to harmful cultural practices.[41]

Limits of cultural practices.

As much as the current constitution acknowledges the practice of culture, the same is not absolute. Articles 2(4) of the Constitution stipulates that any law, including customary law, that is inconsistent with this constitution is void to the extent of inconsistency, and any act or omission in contravention of this constitution is invalid.[42] From the above connotation, it is crystal clear that the right to participate to cultural life is not absolute; it is limited to the extent of its inconsistency with this constitution. Therefore, we need to understand what constitutes inconsistency to this Constitution.

Further, Article 44(3) provides that a person shall not compel another person to perform, observe or undergo any cultural practice or rite. This limits the extent of cultural practice to a matter of consent. This begs the question on how is consent realized? And if it's a person's

[39] Children Act, (No. 29 of 2022), section 30(g).
[40] Children Act, (No. 29 of 2022), section 95(2)(d).
[41] Children Act, (No. 29 of 2022), section 95(2)(g).
[42] Constitution of Kenya (2010), article 2(4).

initiative, what happens to children who in law are believed not to have the capacity to consent in any legal aspect so do in cultural life? Article 32(4) stipulates that a person shall not be compelled to act, or engage in any act, that is contrary to the person's belief or religion.[43] This insinuates that act which one belief that they are not mandated to undergo, they have a right not to accept them. Breach of this right associate with a violation or right to human dignity.

Article 25 of the Constitution prescribes core rights and freedoms that shall not be limited. The right to enjoy one's culture religion and belief are derogable.[44] In other words cultural rights are not absolute; they are subject to constitutional oversight. Therefore, any acts that results to breach of human rights are subject to scrutiny and thus under the Constitution, it is subject to undergo constitutional interpretation in human rights observance.

While reading Article 25 of the Constitution, it is also important to look into Article 24 which connotes that rights and fundamental freedom may be limited to the extent that the limitation is reasonable and justifiable based on human dignity equality and freedom.

What does the Children Act say?

Section 14 of Children Act, 2022 provides that in addition to the right to basic education guaranteed under section 13, every child shall be entitled to leisure, play and participation in non-harmful cultural and artistic activities.[45]

Under section 23 of Children Act 2022, no person shall subject a child in the case of a male child, forced circumcision, child marriage…any

[43] Constitution of Kenya (2010), article 32(4).
[44] Constitution of Kenya (2010), article 25.
[45] Children Act, (No. 29 of 2022), section 14(1).

other cultural or religious rite, custom or practice that is likely to negatively affect the child's life, health, social wellbeing, dignity, physical, emotional or psychological development.[46]

Section 25 stipulates that every child has the right to freedom from torture and cruel, inhuman or degrading treatment or punishment as provided for under Article 25(a) of the Constitution and that any person who undertakes any cultural or religious practice which dehumanizes or is injurious to the physical, mental and emotional wellbeing of the child in essence breaches the child's right.[47]

Section 31 of the Children Act, 2022, speaks of parental responsibility and thus among the duties under parental responsibility includes the provision of parental guidance in religious, moral, social, cultural and other values that are not harmful to the child.[48]

Harmful cultural practices

Culture is dynamic and not static and will continue to grow responding to new factors. It is also fluid and changes from time to time. It is susceptible to be swayed by many factors such as religion, education, and influence from other communities, inter-marriage and urbanization. But there are certain aspects of culture that identify a particular group, their history, ancestry and way of life and this diversity is recognized and protected by the Constitution.[49]

[46] Children Act, (No. 29 of 2022), section 23.
[47] Children Act, (No. 29 of 2022), section 25.
[48] Children Act, (No. 29 of 2022), section 31(2)(c) (i).
[49] Mohamed Ali Baadi and others v Attorney General & 11 others, Petition No. 22 of 2012, [2018] eKLR

Culture, although an ambiguous term, has depicted itself to be important across, especially in the African Context.[50] As we praise the place of culture, we need to look at the negative aspects that it has. These negative aspects clash with matters of human rights because of the codification of customary law.[51] We can attribute the static nature of culture as a result of codification of customary law.

However, as much as the static nature has been attributed by culture, we need to appraise the fact that development of children rights has made societies to be progressive. The challenge we face comprehends the process and the product. What happens if the product is within the confines of human rights and the process has aspects of conflicts with children rights? What I mean is that where do we draw the line if the cultural practice is lawful but the way it is practiced calls a number of interventions due to its breach of rights ascribed in the Constitution?

The concept of harmful cultural practices was developed by the UN as a way to identify and fight some of the cultural practices that appears to affect the daily life of a person.[52]

It should be noted that some harmful cultural practices have been valued as traditional cultural heritage. From the above connotation, it's clear that cultural rights intertwine with human rights in certain social spaces, and are not easily sieved out, but the grundnorm law,

[50] Nesisa Amanda Ncube, 'The Clash between Human Rights and Culture: Case Studies of South Africa and Zimbabwe' published LLM Dissertation, Stellenbosch University, 2018, 1.
[51] Nesisa Amanda Ncube, 'The Clash between Human Rights and Culture: Case Studies of South Africa and Zimbabwe' , 2.
[52] Nesisa Amanda Ncube, 'The Clash between Human Rights and Culture: Case Studies of South Africa and Zimbabwe'.

the constitution as much as it appreciates the cultural rights, it offers exceptions to them.[53] It offers the standard against which the relevance of all other laws, religions, customs, and practices are to be measured. This is determined through its consistency with the provision of the constitution.

Generally, laws in Kenya have not defined harmful cultural practices. The Black's Law Dictionary defines harm as injury, loss, damage; material or tangible detriment and bodily harm as physical pain, illness or impairment of the body.[54]

Article 53 stipulates that every child has the right to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour.[55]

Definition of harmful cultural practices is fluid. Justice Chitembwe in Council of Imams and Preachers of Kenya, Malindi & 4 others v. Attorney General & 5 Others opined that the idea of harmful cultural practice must be broadly interpreted to include religious practices which are not in line with the Constitution.[56] Therefore, we can discern the fact that harmful cultural practices can adopt its definition to include any cultural practice that is inconsistent to the provision of the constitution. Any acts that seems to be detrimental to Chapter four of the Constitution on the Bill of rights.

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[53] Tatu Kamau v Attorney General & 2 others; Equality Now & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae), Constitutional Petition 244 of 2019, [2021] eKLR.
[54] Black's Law Dictionary 10th Edition, pg 832
[55] Constitution of Kenya (2010), article 53(1)(d).
[56] Council of Imams and Preachers of Kenya, Malindi & 4 others v. Attorney General & 5 Others, Malindi High Court Constitutional Petition No 40 of 2011(2015) eKLR.

Reflection of harmful cultural practices

In determining whether an act is a harmful cultural practice, it is important to critically analyze the practice, its cause and the harm occasioned as a result of the practice.[57] The question that might arise in determination of whether a cultural practice is harmful is in consideration of the cultural practice vis-à-vis the right to culture in enjoyment of human rights.

Harmful cultural practice articulates the negative effect of the harmful practices on the child's best interest which circumvents the full enjoyment of child rights.[58] As a matter of inescapable assertion is that the context of cultural practice is associated with societal pressure and punitive sanctions which might come in form of negative discrimination in the society.

Scientifically, those who undergo a harmful cultural practice suffer from health complications.[59] Children are vulnerable due to their place in the society which involves not consenting to any decision made by the elders.[60]

[57] Tatu Kamau v Attorney General & 2 others; Equality Now & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae), Constitutional Petition 244 of 2019. [2021] eKLR.
[58] Alston, P. (1994). The best interests principle: Towards a reconciliation of culture and human rights.
International Journal of Law and the Family, 8, 1–25.
[59]Tatu Kamau v Attorney General & 2 others; Equality Now & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae), Constitutional Petition 244 of 2019, [2021] eKLR.
[60] Tatu Kamau v Attorney General & 2 others; Equality Now & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae), Constitutional Petition 244 of 2019 ,[2021] eKLR.

However, there are some cultural practices which have been accepted scientifically health wise but the way it is practiced traditionally has some health effects. Such practices include male circumcision. It is accepted since it has positive effect health wise to the individual.

In Katet Nchoe & ano v. Republic, High Court Nakuru, Consolidated Criminal Appeals No. 115 & 117 of 2010 [2011] eKLR, the accused persons were charged with manslaughter arising out of FGM carried on a 16 year old child. The Court held that FGM is certainly harmful to the physical and no doubt psychological and sound well-being of the victim. It may lead to premature birth complications; in that case, it led to premature death of a teenager.[61] The court further stated that such kind of custom could be truly well be discarded and buried in the annals of history, just as we no longer remove our 2, 4 or 6 teeth from our lower jaw, or adorn our faces, cheeks with healed blisters.[62] Thus, FGM being a cultural practice, it was nonetheless declared a harmful cultural practice which has negative impact to individual's health.

UN on harmful cultural practices

When delving into the United Nations approach to harmful cultural practices, our major point of reference is the Fact Sheet No. 23 which espouses on harmful traditional practices affecting the health of women and children.

It is to be noted under the Fact Sheet that states parties shall take all appropriate measures…to modify the social and cultural phenomenon of conduct of men and women, with an objective of

[61] Katet Nchoe & ano v. Republic, High Court Nakuru, Consolidated Criminal Appeals Nos 115 & 117 of 2010 [2011] eKLR.
[62] Katet Nchoe & ano v. Republic, High Court Nakuru, Consolidated Criminal Appeals Nos 115 & 117 of 2010 [2011] eKLR.

eliminating the prejudices and customary and all other associated practices which focus on the inferiority or superiority ideology of men and women.[63]

In the Fact Sheet pronunciation, traditional cultural practices are pegged upon reflection of values and beliefs which are zealously held by communities over a period of time.[64]

The Fact Sheet analyzes the menace of early marriage and dowry which it attributes it to be problematic to girls as opposed to boys. The consequence of such action is that it robs a girl of her childhood-time necessary to develop physical, emotional and psychological aspects of her life. It has been attributed that early marriages goes hand in hand with son preference treatment.[65]

Culture vis-à-vis children rights

In our multi-layered legal framework, human rights are protected at two levels, [66] which are national level under internal national mechanism and its legal order and International and regional level which conforms to both ratified treaties and binding legal writing.

Cultural circumcision among the boys: Forced to be a man while being a boy

In the quest to initiate the four-tier approach of societal rite of passage, initiation takes precedence as the second step in which a

[63] Fact Sheet No. 23, Harmful Traditional Practices Affecting the Health of Women and Children.
[64] Fact Sheet No. 23, Harmful Traditional Practices Affecting the Health of Women and Children.
[65] Fact Sheet No. 23, Harmful Traditional Practices Affecting the Health of Women and Children.
[66] G.L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, Stanford Law Review, 2003, 1863.

person should undergo. It is perceived that initiation prepares a child for adulthood. In most communities, initiation is done through circumcision which involves the cutting of the foreskin among the boys.[67] During this stage, boys are taught how to become responsible members of the society and previously it was used to prepare boys for marriage.

Previously, persons above the age of majority were the one's circumcised but due to the progressive nature of our societies, children who have not attained the age of eighteen years are being circumcised. Therefore, do we require children rights in protecting children during this monumental moment which involves changing from one stage to another? Does this stage change a boy who is below the age of 18 years to adulthood?

As a matter of fact, World Health Organization (WHO) has appreciated the importance of circumcision and its epitomic importance. However, can we unpackage its importance vis-à-vis human rights requirement? What is the right procedure that is to be followed?

Traditionally, this rite of passage involves different procedures which subscribes to the societal requirements according to the practice of the society. Should we fault such practices if they do not conform to the best interest principle? The answer to this is in affirmative since the best interest principle supersedes any action whether form or content that has impact on the life of a child.

[67] Traditional Male Circumcision A mong Young People: A Public Health Perspective in the Context of HIV Prevention, WHO, November 2009.

Is it prudent to associate some cultural circumcision to be a forced male circumcision? Children Act, 2022 defines forced male circumcision to comprise all procedures involving partial or total removal of the male genitalia or other injury to the male genital organs, or any harmful procedure to the male genitalia, for non-medical reasons, that is performed with or without any undue influence, inducement, enticement, coercion, or intimidation on a male child… in a manner that infringes on a child's right to privacy or subjects a child to ridicule, embarrassment, humiliation or otherwise harms a child.[68]

From the above connotation, is it prudent for us to inescapably conclude that traditional cultural circumcision is for medical purposes or it is a rite of passage which a male child has to undergo? Suppose it is argued that it is for medical purposes, what is the role of the law where the circumcision is conducted in a manner that infringes on a child's right to privacy or subjects a child to ridicule, embarrassment, humiliation or otherwise harms a child? Attributing the above connotation to factual basis, we can take into account the Bukusu cultural circumcision where the above criterion is fully met under their cultural circumcision. From the definition of forced male circumcision, it is clear that the Bukusu cultural circumcision will become a culprit since the way it is practiced, it circumvents fully around forced male circumcision.

Under Section 144 of the Children Act, 2022, a child is in need of care and protection where they have been subjected to forced male circumcision.[69]

[68] Children Act, (No. 29 of 2022), section2.
[69] Children Act, (No. 29 of 2022), section 144 (m).

Traditional male circumcision is regarded as sacred and indispensable cultural rite intended to prepare initiates for the responsibilities of adulthood.[70] Tragically, these initiates experience medical complications and require treatment which seemingly is meant to correct the damage caused.[71]

Arguably, this situation creates moral dilemma, which involves conflicting right of people to participate in their cultural practices and the protection of the initiates who ought to be protected from harm. How do we balance these competing obligations? To address the above conflict it is important to borrow leave from the Children Act 2022 which takes into account child's protection as the first priority. The right to traditional circumcision is limited, and should only be protected insofar as it does not cause any harm.[72] In conformity with the above argument, it does not imply that the practice should be abolished but rather, it should be regulated and measures put across to prevent harm.[73]

As a general rule, the dominant theme in the Children's Act is to protect the best interest of the child, and to do so by protecting

[70] Ntombana L. Should Xhosa male initiation be abolished? International Journal of Cultural Studies 2011;14(6):631-640. [http://dx.doi.org/10.1177/1367877911405755]
[71] Kepe T. Secrets that kill: Crisis, custodianship and responsibility in ritual male circumcision in the eastern Cape Province, South Africa. Soc Sci Med 2010;70(5):729-735. [http://dx.doi.org/10.1016/j.socscimed.2009.11.016]
[72]K G Behrens, 'Traditional male circumcision: Balancing cultural rights and the prevention of serious, avaoidable harm', http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S0256-95742014000100010> on 23 January 2023.
[73]K G Behrens, 'Traditional male circumcision: Balancing cultural rights and the prevention of serious, avaoidable harm', http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S0256-95742014000100010> on 23 January 2023.

children from practices such as circumcision which, in certain cases, may not be in the best interest of the child.[74]

The Constitution and the Children's Act correctly recognize the right to practice religious and cultural practices such as circumcisions. However, the difficulty with recognizing this right is that little has been done by the health and traditional affairs authorities at the national level to regulate the practice and to protect young boys from harm. Literature in the medical fraternity supporting male circumcision diverges on the issues of what is medically appropriate for boys to curb the transmission of HIV and the human rights of circumcised boys. It is hoped that the best interests of young boys and initiates who are to be circumcised are remembered and protected.[75] The right to participate in cultural practices should be protected and thus our Kenyan internal legal framework protects it. However, this right is limited and thus any activities that can cause breach of best interest principle cannot be entertained. The harm associated with circumcision process entails the activities performed during and after circumcision ceremony among different communities.[76]

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[74] Anele Khumalo, 'Balancing culture, religion and health: the legal framework for male circumcision,' https://www.lexology.com/commentary/healthcare-life-sciences/south-africa/werksmans-attorneys/balancing-culture-religion-and-health-the-legal-framework-for-male-circumcision>on 12 January 2023.

[75] Anele Khumalo, 'Balancing culture, religion and health: the legal framework for male circumcision,' https://www.lexology.com/commentary/healthcare-life-sciences/south-africa/werksmans-attorneys/balancing-culture-religion-and-health-the-legal-framework-for-male-circumcision>on 12 January 2023.

[76]K G Behrens, 'Traditional male circumcision: Balancing cultural rights and the prevention of serious, avaoidable harm', http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S0256-95742014000100010> on 13 January 2023.

Traditional circumcision is lawful, but the question we need to ask ourselves, is it morally justified? Our constitution establishes a right to cultural practice but as it is, it is not absolute. Where serious and avoidable harm results from exercise of any right, does society have any justified grounds for limiting the exercise of that right? Generally, what is the extent and nature of the harms caused by traditional circumcision?[77]

Badly performed and managed circumcisions can result in serious infections and subsequently result in mutilation of the genitals. Further, there is also a concern regarding transmission of infections when traditional practitioners fail to use sterilized instruments.[78]

It is not circumcision that places initiates in danger; it is how it is done. The avoidable death, penile amputations, genital mutilation, and other health threats are very serious harms, and the right of initiates not to be harmed in these ways put weighs the right to cultural practice.[79]

[77]K G Behrens, 'Traditional male circumcision: Balancing cultural rights and the prevention of serious, avaoidable harm', http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S0256-95742014000100010> on 13 January 2023.
[78] Kepe T. Secrets that kill: Crisis, custodianship and responsibility in ritual male circumcision in the eastern Cape Province, South Africa. Soc Sci Med 2010;70(5):729-735. [http://dx.doi.org/10.1016/j.socscimed.2009.11.016]
[79] K G Behrens, 'Traditional male circumcision: Balancing cultural rights and the prevention of serious, avaoidable harm', http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S0256-95742014000100010> on 23 January 2023.

Early marriages among the girls; Why should she wait for age of majority?

Child marriage is defined to mean marriage or cohabitation with a child or any arrangement made for such marriage or cohabitation.[80] It has also been described as any legal or customary union involving a person below the age of 18.[81] Child marriage can be identified vide religious or cultural practice and it may be associated with a number of factors such as poverty and inadequate access to education which sees changes in the societal view of early marriage.[82]

Child marriage is widely practiced in rural areas where we have deeply entrenched cultural traditions.[83] To actualize this notion, Kenyan communities such as the Maasai, Gusii, Kamba, and Kipsigis highly practice child marriage.[84] This phenomenon has been accepted, supported, and promoted as a cultural norm in such

[80] Children Act, (No. 29 of 2022), section 2.
[81] Tabitha Gitau, Lincie Kusters, Maryse Kok, Anke van der Kwaak, 'A baseline study on child marriage, teenage pregnancy and female genital mutilation/ cutting in Kenya, < https://www.kit.nl/wp-content/uploads/2018/10/Baseline-report-Kenya-Yes-I-Do.pdf> on 3 January 2023.
[82] Tabitha Gitau, Lincie Kusters, Maryse Kok, Anke van der Kwaak, 'A baseline study on child marriage, teenage pregnancy and female genital mutilation/ cutting in Kenya, < https://www.kit.nl/wp-content/uploads/2018/10/Baseline-report-Kenya-Yes-I-Do.pdf> on 3 January 2023.
[83] Nelly Awuor Maina,' The Socio-Cultural and Economic Drivers of Child Marriages and their Effects on the Well-being of Women in Nyakach Sub-county, Kisumu County, Unpublished LLM Dissertation, University of Nairobi, 2022, 1.
[84] Nelly Awuor Maina,' The Socio-Cultural and Economic Drivers of Child Marriages and their Effects on the Well-being of Women in Nyakach Sub-county, Kisumu County,1

communities.[85] In Kenya, the national child marriage rate was 26.4% although as it is, it varies depending on the region. Looking at the Nyanza province and the North Eastern province which are inhabited by pastoral communities such as Samburu, Maasai and the Pokot early arranged marriages are used to increase the family wealth when cattle is used as the bride price.[86]

Interestingly, the sugarcoating of kidnapping by some communities so as it can appear legal is another factor of Child Marriage. Among the Kikuyu, Turkana, and Maasai have "Romantic Kidnapping" which is a factor the bolsters child marriage.[87] In such communities, the girl's views are not taken into consideration.[88]

Equally, harmful consequences are associated with Child Marriage, yet these marriages are still rampant due to the enmeshment circumventing between culture and community which has the impact of influencing lifestyle thus making child marriage to be a norm and the way of life.[89]

Point to note is the effect associated with child marriage. They include, but are not limited to maternal mortality due to postpartum hemorrhage, obstetric fistula and obstructed labour, sexually

[85]Nelly Awuor Maina,' The Socio-Cultural and Economic Drivers of Child Marriages and their Effects on the Well-being of Women in Nyakach Sub-county, Kisumu County, 1
[86] Birech J. Child marriage: A cultural health phenomenon. International Journal of Humanities and Social Science 2013; 3(17): 97-103.
[87] Wako A. 'Child marriage rampant in Kenya due to poverty, gender inequality,' *The Star*, 11 Dec, 2017.
[88] Migiro K. '*When women rule: Kenyan rebel evades child marriage and Maasai curses to win* power' Thomson Reuters Foundation, 2017.
[89] Birech J. Child marriage: A cultural health phenomenon. International Journal of Humanities and Social Science 2013; 3(17): 97-103

transmitted infections, and cervical cancer.[90] The risks associated are because child brides are not able to reject unsafe sexual practice and there is also societal pressure to prove their fertility which results to early pregnancies when their bodies are not well developed.[91]

However, over the past decades Child Marriage has been identified by some international and regional human rights and civil society organizations as one of the pervasive violations of human rights.[92]

Drivers to Child Marriages

As the case may be, culture has proved to be one of the main drivers of early marriages. It is clear that forced marriages are essentially a means of consolidating relations between families or it has been used as a way of settling disputes or sealing deals over land and property.[93] Child marriage is not only a violation of girl's rights; it also compromises the much dedicated efforts to reduce gender-based violence, advance education, overcome poverty and improve girl's health.[94]

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[90] AU. Campaign to end child marriage in Africa. The effects of traditional and religious practices of child marriage on Africa's socio-economic development: A review of research reports and toolkits from Africa. AU, 2015.

[91] US Agency for International Development (USAID). Ending child marriage and meeting the needs of married children: The USAID vision for action. Washington, DC, 2012.

[92] UNICEF 2010

[93] Myers, Juliette and Harvey, Rowan. Breaking Vows: Early and Forced Marriage and Girls' Education. London: Plan International. 2011. Retrieved from:< http://www.plan-uk.org/resources/documents/BreakingVows-Early-and-Forced-Marriage-and-Girls-Education/ > on 4 January 2023.

[94] Children's Dignity Forum of Tanzania. Preventing and Eliminating of Child, Early and Forced Marriages in Tanzania. Dar es Salaam. 2013.

The practice of early marriage is deeply rooted in cultures and traditions of the people. As a matter of fact, in our existing societal precept, the ability of a girl to attain their life potential was often shaped by various cultural beliefs and interpretation. Child marriage is a harmful traditional practice; however, those who practice it may see it as a way of preserving their cultures and family norms. Therefore, to changing people's mindset and attitudes requires understanding gender roles and stereotypes prevalent in the areas of intervention.[95]

Delving into cultural connotations, it is a common belief in most nations that marriage safeguards against inappropriate and immoral behavior. Example, cultural practices among the Luos have indeed led to boys and girls being married of at a tender age particularly in areas where traditional rules are followed to the later.[96] Further, the Luos belief that a girl who has reached puberty and dies before she is married will remain a malevolent ghost which causes barrenness to all her female kinsfolk. Interestingly, it is said that the dead will return to reproach the living unmarried girls in visions and in dreams and ask them "why did our fathers and our brothers allow me to go into the grave without tasting the joy of man?"[97] This culture has enhanced and supported early and forced marriages among the Luos.

[95] African Union, 'Campaign to End Child Marriage in Africa', The Effects of Traditional and Religious Practices of Child Marriage on Africa's Socio-Economic Development, https://au.int/sites/default/files/documents/31018-doc-5465_ccmc_africa_report.pdf > on 16 January 2023.
[96] Wilson, Gordon. (1967). Luo customary law and marriage law customs. Kenya government printer.
[97] Ogutu Gem. Marriage Rights and Privilages in Africa. Arusha, Tanzania, 2007.

Laws against child marriage

The UN declares it a violation of children's rights and a direct form of discrimination as it deprives children and particularly girls the right to health, education, development and fair treatment.[98]

Similarly, the Universal Declaration of Human Rights, the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages and the Convention on the Rights of the Child highlight the required threshold for a valid marriage which in essence dismisses children.[99]

The right to consent to marriage is generally acknowledged and emphasized. Thus it is crucial to note that consent should "free and full" thus this criteria cannot be achieved if one of the parties entering the marriage is not mature enough to make informed decision.[100]
The Marriage Act 2014 outlaws marriage below the age of 18 years. It strictly specifies that no person shall get engaged or betrothed to another who is under the age of 18 years. Failure to adhere to this provision calls for a stiff penalty.

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[98] Millicent Mwololo, "Day of the African Child, 2015; Theme: Accelerating our Collective Efforts to End Child Marriage in Africa. <https://gvrc.or.ke/wp-content/uploads/2015/09/DN-African-Child-2.pdf> on 17 January 2023.

[99] UN. UNCRC. 1990.< https://www.ohchr.org/en/professionalinterest/pages/ crc.aspx> , UN. Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages. 1964. <https://www.ohchr.org/EN/ProfessionalInterest/Pages/MinimumAgeForMarriage.aspx,> Chaudhuri ER. Thematic report: Unrecognised sexual abuse and exploitation of children in child, early and forced marriage. Bangkok: ECPAT, Plan International, 2015.

[100] Ajwang' Warria, " Child Marriages, Child Protection and Sustainable Development in Kenya: Is Legislation Sufficient? http://www.bioline.org.br/pdf?rh19028> accessed on 1/17/2023.

Article 53(2) provides that the best interest of a child is of paramount importance in every matter concerning a child.[101] This provision is preceded by a rider in Article 52 which elaborates certain rights in ensuring greater certainty as to the application of rights and fundamental freedoms to specific group of persons.[102]

Under Chapter 4 of the Constitution on Bill of rights, under Article 28 of the Constitution of Kenya 2010, "Every person has inherent dignity and the right to have dignity respected and protected. Equally, when children are married off by their guardians, it is a degrading act. Thus, we can seamlessly equate child marriages to be a form of child trafficking as children are exposed in marital environment which resemble enslavement and sometimes are required to perform forced labour since they have no say in such marriages. Article 30 spells out that a person shall not be held in slavery or servitude.[103]

Skweyiya, ADCJ in the South African Constitutional Court (SACC) in the case of J v. National Director of Pubic Prosecution and Anor, held that the contemporary foundations of children's rights and subsequently the best interest principle encapsulate the idea that the child is a developing being, capable of change and in need of appropriate and honest nurturing so as to enable them to determine themselves to the fullest extent and to develop their moral compass.[104]

Dissecting the Children Act

The previous children act 2001, protected children from harmful cultural rights and it indicated that nobody should make child

[101] Constitution of Kenya (2010), article 53(2).
[102] Constitution of Kenya (2010), article 52.
[103] Constitution of Kenya (2010), article 30.
[104] J vs. National Director of Public Prosecutions and Anor (CCT 114/13) [2014] ZACC 13; 2014 (2) SACR 1 (CC); 2014 (7) BCLR 764 (CC).

undergo "…early marriage or other cultural rites, customs or traditional practices that are likely to negatively affect the child's life, health, social welfare, dignity or physical or psychological development.[105] The previous children act did not stipulate the punishment as it was believed that the punishment was outlined in the Sexual Offences Act provision.[106] The punishment as outlined in the new Children Act 2022 stipulates that such persons shall be imprisoned for a period not less than three years or to a fine of not less than five hundred thousand shillings, or both.[107]

The reading of Section 21 of the Children Act 2001 appeared to be supporting cultural practices which seemed to be detrimental to children. It stipulated that duties and responsibilities of the Child was to include work for the cohesion of family, respecting elders and superiors and preserve and strengthen positive cultural values in his/her community, with dues regard for their age and ability.[108]

A child who is married is a child who is in need of care and protection. According to section 144 of the Children Act 2022 it delves into circumstances in which a child is in need of care and protection and among them is where a child has been or is likely to be subjected to female genital mutilation, intersex genital mutilation, child marriage, or to other customs and practices prejudicial to the child's life, education or health.[109]

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[105]Children Act, 2001, Section.
[106] Ajwang' Warria, " Child Marriages, Child Protection and Sustainable Development in Kenya: Is Legislation Sufficient? http://www.bioline.org.br/pdf?rh19028> accessed on 1/17/2023.
[107] Children Act, (No. 29 of 2022), section 23 (2).
[108] Children Act, 2001, Section 21
[109] Children Act, (No. 29 of 2022), section 144.

What happens if a child is subjected to early marriage? Section 150(2)(h) of Children Act, 2022 stipulates that if a child is subjected to early marriage, the court is should make an order declaring that such marriage is a nullity and requiring that the child to be placed under the care of a fit person, or that the child be accommodated in a place of safety.[110]

Section 23(2) of Children Act 2001 talked of duties of the parents which included protecting the child from neglect, discrimination and abuse and they have the right to give parental guidance in religious, moral, social, cultural and other values.[111]

Section 91(1)(a) of the Marriage Act, makes it a criminal offence to celebrate or witness a marriage knowing very well that one of the parties is under the age of 18 years.[112]

An in-depth analysis of child marriage breaches the Counter-trafficking act which defines trafficking for sexual exploitation in Part I as trafficking with the intention of doing anything or in respect of a particular person during or after a journey within Kenya or in any part of the world, which if done will involve the commission of an offence under the Sexual Offences Act, 2006…[113]

Recommendations

There is need for the government, non-governmental organizations, community groups, and individual families to mobilize and build the capacities and competencies of men, boys and the community as a

[110] Children Act, (No. 29 of 2022), section 150(2)(h).
[111] Children Act, 2001, Section 23(1).
[112] Marriage Act 2014, Section 91(1)(a)
[113] The Counter-trafficking in persons Act (No. 8 of 2010).

whole towards eradication of child marriage.[114] Further, calling for improved access to education for both girls and boys in eliminating gender gaps in education.[115] This facet has seen increase in awareness and thus reducing the chances of child marriages.

At the national level the government ministries need to work as a team in coordinating efforts to tackle the social and economic barriers to girl's education among them being culture which has affected the girl's education.[116]

The Children Act 2022 which is among the laws enacted to promote best interest of the child in prohibiting and addressing harmful cultural practices is gaining momentum. The Children Act is in its infancy stage and thus the main challenge is its implementation. Thus to promote its full implementation, it requires all the stakeholders to equally put in collective effort in ensuring mass education and awareness-raising initiatives. This will prevent the practice from running deep underground where it is hidden from the public domain.[117] Education is an empowerment tool which not only makes available knowledge and information but also enlightens the courses of action to be taken.[118]

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[114] Millicent Mwololo, "Day of the African Child, 2015; Theme: Accelerating our Collective Efforts to End Child Marriage in Africa.
[115] Millicent Mwololo, "Day of the African Child, 2015; Theme: Accelerating our Collective Efforts to End Child Marriage in Africa.
[116] Millicent Mwololo, "Day of the African Child, 2015; Theme: Accelerating our Collective Efforts to End Child Marriage in Africa.
[117] Protecting Children from Harmful Practices in Plural Legal Systems, with a special empgasis on Africa; "Publication produced by the Office of the Special Representative of the Secretary-General on Violence against Children and Plan International in 2012".
[118] R Hanzi, 'Sexual abuse and exploitation of the girl child through cultural practices in Zimbabwe: A human rights perspective', unpublished LLM dissertation, University of Pretoria, 2006, 51.

Further, there is a need to initiate a change in the social norm through a collective approach. For instance, religious leaders play a decisive role in the protection of children from violence, including harmful cultural practices. [119] Governments should adopt legislation to prohibit all forms of harmful cultural practices. We appreciate the adoption and thus the implementation and enforcement should be the key role of the government.

Conclusion

Right to participate in cultural life in essence should not be fussed with individual's liberty, but rather it should run concurrently with the communities' general accepted practices. Thus we can collectively attribute the fact that individuals' decision to undergo a cultural practice is a misnomer. One shudders to contemplate whether effort to promote cultural diversity recognizes internal diversity; that they respect, promote and protect the rights of all individuals within a community of shared cultural values. However, the major determinant to enjoyment of cultural rights among the children is its conformity with the constitution's bill of rights and the Children Act which supplements the constitution. Therefore, children rights is of utmost importance and thus any cultural practices that breaches the principles under children act which enhances the best interest of a child should be condemned.

[119] Protecting Children from Harmful Practices in Plural Legal Systems, with a special empgasis on Africa; "Publication produced by the Office of the Special Representative of the Secretary-General on Violence against Children and Plan International in 2012".

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