

**ASSESSING THE EFFICACY IN THE REGULATION OF RECREATIONAL NOISE
POLLUTION IN EMERGING URBAN CENTRES IN KENYA**

BY

ALOYCE PETER NDEGE

Z51/75125/2014

**A RESEARCH THESIS SUBMITTED IN PARTIAL FULFILMENT OF THE
REQUIREMENTS FOR THE AWARD OF DEGREE OF MASTERS OF ARTS IN
ENVIRONMENTAL LAW, CENTER FOR ADVANCED STUDIES IN
ENVIRONMENTAL LAW AND POLICY (CASELAP) UNIVERSITY OF NAIROBI**

NOVEMBER, 2020

DECLARATION

This research paper is my original work and has not been presented for examination in any university or institution of higher learning.

Signature:  _____

Date: 20th November, 2020

Aloyce Peter Ndege

University of Nairobi

This research paper has been submitted with our approval as university supervisors

Supervisor's name: **Dr. Kariuki Muigua**

School of Law

University of Nairobi

Signature  _____

Date: 20th November, 2020

Supervisor's name: **Prof. Stephen Obiero Anyango**

Centre for Advanced Studies in Environmental Law & Policy

University of Nairobi

Signature  _____

Date: 20/11/2020

DEDICATION

To my departed grandmother, Jemimah Hawala Ogonyo, who passed on during the second semester of my coursework. She took good care of us after the loss of our parents. Her encouragements and motivations earlier in my life laid the foundation for the academic excellence that I have throughout been associated with. May her soul continue to rest in eternal peace.

ACKNOWLEDGEMENTS

First and foremost, I wish to express my gratitude to my supervisors: Dr. Kariuki Muigua and Prof. Obiero Anyango, who were of immense assistance and offered invaluable assistance, sharing the knowledge and offering stimulating clues for the preparation of this thesis. Without their guidance, this thesis would not have been successful. My unwavering gratitude also goes to the respondents who spared some of their time to attend to my research needs. I also take this opportunity to express my gratitude and kindness to my employer, the Judiciary, through Nyahururu and Hola Law Courts, and my colleagues and key justice sector stakeholders at Nyahururu and Hola Law Courts, for creating an enabling environment that is supportive of my academic pursuits that enabled me to successfully undertake the daunting task of balancing my time between academic studies and normal judicial and administrative works. A special tribute to my lecturers, Dr. Nyukuri, Prof. Charles Okidi¹ and Dr. Collins Odote, who accorded me tireless assistance, guidance, criticisms and thoughtful comments that have hugely contributed to the preparation of this thesis. I also acknowledge the efforts of my classmates, Mercy Amai, Pauline Sewe, Lucy Njora and Allan Meso, whose incisive observations and criticisms shaped this work. Special tribute also goes to my family for the support, moral encouragement and patience during the period of preparation of this work. To my lovely children: Boy, Paul, Darren, Wayne and Donald, you uplifted my spirit whenever I felt demoralized. May the almighty Lord bless and reward you all abundantly. Last but not least, I would like to acknowledge the Almighty God for giving me the physical strength, knowledge, health and sound mind that enabled me to complete the preparation of this thesis.

¹ Now retired

ABSTRACT

One of the numerous sources of noise in emerging rural towns in our counties is recreational noise from entertainment joints. With the continued rise in noise pollution, a country cannot make a big step in terms of development because for development to be a reality, a healthy labour force is required. In this study, the researcher therefore sought to find out whether the existing legal frameworks adequately address recreational noise pollution control; and further how to improve the efficacy of the various strategies and instruments currently in force to control and manage recreational noise pollution; mainly through stakeholder involvement and decentralisation. This is mainly because the public appears to condone recreational noise pollution as an everyday, normal and regular affair, oblivious of the immense health and economic issues associated with noise. Specifically, this study sought to assess the efficiency and efficacy of existing instruments for prevention, early detection, eradication and control of recreational noise pollution from entertainment joints in rural towns in Kenya. Hola town was selected as the area of study as it represents most hitherto rural centres that have experienced tremendous growth since the coming into force of devolved governments. The study employed qualitative research methods mainly through key informant interviews, focus group discussions and observations which were used to supplement secondary data from available literature. Through these methods, necessary data were obtained from members of the public (including resident associations), the enforcement officers such as the police and governments officials dealing with environment and liquor licensing, businesspeople and employees in the entertainment industry, and several literatures. The study found out that involving the stakeholder, including the community, is a key factor in improving the efficacy of recreational noise pollution prevention and management in the rural towns. The study concludes that stakeholder involvement positively and significantly predicts the ability of regulatory and other recreational noise management frameworks to perform. It is therefore recommended that all recreational noise pollution control and management measures should involve the stakeholders, including the community, right from the formulation through to the implementation stages. Such involvement should be in the form of decentralisation and localisation of recreational noise control programs, enhanced awareness creation on the dangers of recreational noise pollution and the need for prevention and the empowerment of, and improvement on the existing, institutions dealing with noise pollution control.

TABLE OF CONTENTS

DECLARATION.....	ii
DEDICATION.....	iii
ACKNOWLEDGEMENTS.....	iv
ABSTRACT.....	iv
TABLE OF CONTENTS.....	vi
LIST OF TABLES.....	xii
LIST OF FIGURES.....	xiii
LIST OF ABBREVIATIONS AND ACRONYMS.....	xiv
CHAPTER ONE.....	1
I.0 INTRODUCTION.....	1
1.1 Background of the Study.....	1
1.2 Statement of the Problem.....	4
1.3 Research Questions.....	5
1.4 Objectives.....	5
1.5 Justification of the Study.....	6
1.6 Scope and Limitation of Study.....	6
CHAPTER TWO.....	9
2.0 LITERATURE REVIEW.....	9
2.1. Introduction.....	9
2.2 The Concept of Noise Pollution and its Control.....	9

2.3 Nature, Sources and Effects of Recreational Noise Pollution.....	15
2.4 Environmental Law Principles and their Relevance to Recreational Noise Pollution Control Law and Policy.....	16
2.4.1 Precautionary Principle.....	17
2.4.2 Principle of Sustainable Development.....	17
2.4.3 Polluter Pays Principle (PPP).....	18
2.4.4 Principle of Public Participation.....	19
2.4.5 Inter and Intra Generational Equity Principle	19
2.4.6 Principle of Subsidiarity	23
2.4.7 Common Concern for Human Rights.....	24
2.5 Constitutional Implications on Recreational Noise Management in Kenya.....	25
2.5.1 Introduction.....	25
2.5.2 Rationale for Environmental Provisions within the Constitution.....	26
2.5.3 The Kenya Constitution, 2010.....	26
2.5.4 Obligations in Respect of the Environment.....	27
2.5.5 Enforcement of Environmental Rights.....	29
2.6 Stakeholder Participation in Recreational Noise Pollution Control.....	30
2.6.1 The Concept of Public Participation in Environmental Decision Making in Kenya.....	30
2.6.2 The Legal Regime of Public Participation In Kenya.....	32
2.7 Conceptualizing Devolution as a Form of Environmental Governance.....	37
2.8 Practices in Noise Pollution Control in Devolved Units.....	40

2.9 The Role of the Judiciary and other Law Enforcers.....	44
2.9.1 Conceptualising Enforcement.....	44
2.9.2 Towards a Reformed Judiciary.....	45
2.9.3 The Emerging Environmental Jurisprudence: A Critical Review of Cases	46
2.9.3.1 The Issue of <i>Locus Standi</i>	46
2.9.3.2 Enforcement of Fundamental Rights and Freedoms.....	47
2.9.3.3 Role of the Attorney General in Environmental Litigations.....	48
2.9.3.4 <i>Actio Popularis in Abstracto</i>	49
2.9.4 Independence of the Judiciary.....	50
2.10 Analytical Frameworks.....	53
2.10.1 Theoretical Framework.....	53
2.10.2 Conceptual Framework.....	54
2.11 Summary of the Literature Review and the Gaps Filled in this Study.....	55
CHAPTER THREE	58
3.0 METHODOLOGY.....	58
3.1 Introduction.....	58
3.2 Methods and Study Design.....	58
3.2.1 Study Design.....	58
3.2.2 Study Site.....	58
3.2.3 Target population.....	58
3.2.4 Data Collection Instruments and Procedure.....	59
3.2.5 Sample Size and Sampling Method.....	60
3.2.6 Validity and Reliability of Research Instruments.....	61

3.2.7 Data Processing, Analysis and Presentation.....	62
3.3 Ethical Considerations.....	63
CHAPTER FOUR.....	64
4.0 DISCUSSION OF RESULTS.....	64
4.1 Introduction.....	64
4.2 Knowledge and Awareness on Management and Control of Recreational Noise Pollution.....	64
4.3 State of Recreational Noise Management in the Counties.....	67
4.3.1 Introduction.....	67
4.3.2 Use of Regulatory Tools.....	68
4.2.3 Use of Noise Quality Standards.....	69
4.2.4 Use of Economic instruments.....	70
4.2.5 Environmental Impact Assessment and Cross-Sectoral Co-ordination.....	72
4.4 Principles for Selecting and Combining Recreational Noise Pollution Management Tools.....	73
4.4.1 Balance the Input of Resources.....	73
4.4.2 Ensure Sustainability.....	74
4.4.3 Seek ‘Win-win’ Solutions.....	74
4.4.4 Regulatory versus Economic Instruments.....	74
4.4.5 Levels of Noise Pollution Control.....	77
4.5 The State of Public Participation In Recreational Noise Pollution in Kenyan Counties.....	78
4.6 The Status of the Enforcement of the Rights to a Recreational Noise-Free Environment.....	89
4.6.1. Recreational Noise Pollution Control under the Penal Code.....	89
4.6.2. Recreational Noise Pollution Control under the Public Health Act.....	90

4.6.3. Recreational Noise Pollution under The Alcoholic Drinks Control Act, 2010....	93
4.6.4. Private Remedies against Recreational Noise under The Tort of Nuisance.....	94
4.6.5 Recreational Noise Pollution under The Noise Regulations.....	95
4.6.6 Recreational Noise Pollution under the Factories and Other Places of Work (Noise Prevention and Control) Rules, 2005.....	98
4.7 Legal Remedies and Enforcement.....	100
4.7.1 Introduction.....	100
4.7.2 Injunctions.....	100
4.7.3 Damages.....	101
4.7.4 Restitution and Remediation.....	102
4.7.5 Sanctions and Penalties.....	102
4.7.6 Legal Fees and Costs.....	103
4.7.7 Prerogative Writs.....	103
4.8 Legal Gaps Affecting Effective Public Participation in Noise Pollution Control.....	103
4.9 Stakeholder Initiatives in Recreational Noise Pollution Control.....	108
4.9.1 Participation by the Recreational Noise Producers (Entertainment Joints)	108
4.9.2 Participation on the Part of the Recreational Noise Consumers.....	111
4.9.3 Other Areas of Community Participation in Recreational Noise Pollution Control.....	113
4.9.4 Recreational Noise and Enforcement of Judicial Decisions: Environmental Justice in the Wake of Disobedience of Judicial Orders.....	115
4.10 Conclusion.....	120

CHAPTER FIVE.....	123
5.0 SUMMARY, CONCLUSIONS AND RECOMMENDATIONS.....	123
5.1 Introduction.....	123
5.2 Summary of the Major Research Findings.....	124
5.3. Conclusions.....	125
5.4. Recommendations	126
5.5 Suggestions for Further Research.....	131
BIBLIOGRAPHY.....	133
LIST OF STATUTES.....	147
APPENDICES.....	149
<i>APPENDIX A: QUESTINNAIRE FOR RESIDENTS.....</i>	<i>149</i>
<i>APPENDIX B: QUESTIONNAIRE FOR BUSINESS OWNERS.....</i>	<i>154</i>
<i>APPENDIX C: QUESTIONNAIRE FOR EMPLOYEES.....</i>	<i>160</i>
<i>APPENDIX D: LIST OF CASES.....</i>	<i>165</i>

LIST OF TABLES

Table 1: Sampling Size and Number of Strata.....	66
Table 2: Gender of Victims of Recreational Noise Pollution in Emerging Urban Centres in Rural Kenya.....	72
Table 3: The Extent of Knowledge of the Adverse Effects of Recreational Noise Pollution.....	72
Table 4: Reasons for Producing/ Consuming Recreational Noise from Entertainment Joints in Emerging Urban Centers in Kenyan Counties.....	88
Table 5: The Extent of Participation in EIA by the Public and the Joints Owners at the Inception.....	91
Table 6: Reasons for Non-Participation in EIA Exercise for the Establishment of Entertainment Joints in Emerging Towns in Kenyan Counties.....	92
Table 7: Likely Consequence of Public Participation in the EIA Process for the Establishment of Entertainment Joints in Emerging Towns in Kenyan Counties.....	93

LIST OF FIGURES

Figure 1.0: Noise Management Spectrum.....	45
Figure 2.0: Conceptual Framework on The Promotion of Efficacy in the Regulation of Noise in Urban Areas in Kenya.....	61
Figure 3.0: Awareness of Recreational Noise Pollution in Emerging Urban Centres in Kenya.....	70
Figure 4.0: Frequency of Exposure to Recreational Noise in the Emerging Urban Centers in Kenya.....	71
Figure 5.0: The Frequency of Exposure to Recreational Noise to the Inhabitants of Rural Towns with Post-Secondary School Education.....	71
Figure 6.0: Awareness of Rights to Public Participation, Transparency and Access to Information.....	84
Figure 7.0: Noise Warning Sign at a Factory in Mombasa, Kenya.....	86
Figure 8.0: Individual Member of the Public and Business Person’s Self Report on Noise Pollution in Entertainment Joints.....	87
Figure 9.0: Frequency of Noise Pollutants Emission by Entertainment Joints in Emerging Towns in Kenyan Counties.....	89
Figure 10.0: Effect of Abstinence (non-production or consumption) from Noise Pollution from Entertainment Joints in Emerging Urban Centers.....	90
Figure 11.0: Raven Acoustic Seals in one of the Hotels Help Isolate Buildings from External and Internal Noise	115

LIST OF ABBREVIATIONS AND ACRONYMS

A.C	Appeals Cases
ADR	Alternative Dispute Resolution
AG	Attorney General
BAT	Best Available Technology
BELA	Bangladesh Environmental Lawyers Association
CIEH	Chartered Institute of Environmental Health
CREEL	Centre for Environmental Legal Research and Education
dB	Decibel
DEFRA	Department of Environment, Food and Rural Affairs
DoE	The Department of Environment
DOSHS	Department of Occupational Safety and Health Services
EA	Environment Agency
EA	Environmental Audit
EC	European Community
ECJ	European Court of Justice
EIA	Environmental Impact Assessment
EIAAR	Environmental Impact Assessment/ Audit Rules
ELC	Environment and Lands Court
EMCA	Environmental Management and Co-ordination Act
FAO	Food and Agricultural Organization
GAT	Generally Achievable Technology
GDP	Gross Domestic Product

IEBC	Independent Electoral & Boundaries Commission
ILA	International Law Association
ICCPR	International Covenant on Civil and Political Rights
INRETS	Institut National de Recherché sur les Transorts et leur Securite
JSC	Judicial Service Commission
KLR (E&L)	Kenya Law Reports (Environment and Land)
KUSP	Kenya Urban Support Program
LSK	Law Society of Kenya
LTD	Limited
MSA	Mombasa
NIOSH	National Institute of Occupational Safety and Health
NEAPC	National Environmental Action Plan Committee
NEC	National Environment Council
NEMA	National Environmental Management Authority
NET	National Environmental Tribunal
NGO	Non-governmental Organization
NGAO	National Government Administration Officer
NIHE	Northern Ireland Housing Executive
OSHA	Occupational Health and Safety Act
PIL	Public Interest Litigation
PPE	Personal Protective Equipment
PPP	Polluter Pays Principle
RC	Regional Commissioner
SAP	Structural Adjustment Programs

SCK	Supreme Court of Kenya
TV	Television
SWEPA	South Wales Environment Protection Agency
UK	United Kingdom
UN	United Nations Organization
UNCED	UN Conference on Environment and Development
UNDP	United Nations Development Programme
UNICEF	United Nations Children Fund
US	United States of America
WBCSD	World Commission on Environment and Development
WCED	World Commission on Environment and Development

CHAPTER ONE

INTRODUCTION

1.1 Background of the Study

The fruits of devolution are currently being experienced in numerous hitherto small towns, and trading centres across Kenya which have seen unprecedented socio-economic growth and development spurred mainly by the increase in industries, agricultural activities, tourism and residences. This has essentially been brought about by the expanded importation of technology and innovation, on the one hand, and the concentration of some of the locally based businesses on the other hand. These have in turn prompted the introduction of uncontrolled and hitherto unknown waste into the environment. Noise pollution is one such form of wastes that have been found to have far reaching negative consequences. Most of these new counties are therefore confronted with the dilemma of whether to push for economic development regardless of environmental obliteration in order to catch up with their more advanced counterparts, or to seek after environmentally sustainable advancement that fuses economic matters with ecology.

It is therefore generally recognized that underdeveloped and developing counties are currently encountering extreme environmental challenges that were obscure and unknown quite a while prior. One of such problem is noise pollution whose effects have not been appreciated for long and have therefore grown steadily worse with time but has since ended up becoming one of the significant pollutant to the environment, attracting real local and international attention from most communities around the world.

Noise is defined as unwanted, undesirable or hostile sounds that preposterously barge in into our day to day activities.¹ Several factors, for example the increasing human population and traffic, are attributed to high prevalence of noise pollution in the emerging urban centres in our counties². However, it is still debatable whether the level of community awareness of environmental noise pollution has been enhanced which should lead to a higher desire now for the national and county governments to reduce noise levels³.

¹Singh, M., & Rao, N. (2001). A Reconnaissance of Traffic Noise Pollution in the City of Patna, *Indian Journal of Environmental Health*, 4, 138-43.

² *Ibid*

³ *Ibid*

Despite this perceived deeper awareness of noise pollution, a great part of the information written about its adversity has not been accepted by the medical professionals and the general public. This has made noise pollution to become a fact of life worldwide to the extent that noise nuisance has severely and extensively risen. Currently, noise emanating from entertainment joints has become a critical genesis of pollution to the environment in urban centres.

There is no doubt that urban noise pollution has quickly grown into a major ecological issue⁴. These excessive, undesirable and intrusive sounds of our innovations and technologies follow us throughout our work, recreation, and even resting hours thereby posing a threat to our physical and mental prosperity. Despite some several researches about the effects caused by noise pollution; there are hardly any group, formal or informal, that are attempting to decrease noise pollution. Be that as it may, this crisis has by and large gotten unremarkable consideration in Kenya. This is notwithstanding the potential health impacts of noise pollution which are significant and numerous, both medically and socially. Excessive noise can cause great damage to the body⁵. It meddles with rest, focus, builds stress levels, communication, and recreation⁶. Noise pollution at the work places cause corresponding consequences on the workers, such as hearing loss, mental disturbances, masking of speech communications, disturbance of work performance, rest and sleep⁷. Hearing loss is also caused by exposure to non occupational noise such as recreational noises like loud music, collectively known as sociococcus⁸. The sum total of the antagonistic impacts of noise impairs health, debase private, social, working and learning conditions with related real⁹ and immaterial¹⁰ misfortunes.

The possibility of avoiding noise is quickly vanishing. Noisy clubs and entertainment joints are emerging in our towns and residential areas at an alarming rate¹¹. Unfortunately, in developing countries such as Kenya, data and statistics on pollution are scarce. Additionally, authoritative sources revealing the contribution of noise to pollution are few. The objective of progressive

⁴ Bragdon, C. R. (1978). *The Status of Noise Control in the United States: State and Local Governments*. Environmental Protection Agency: United States of America, 5 - 25

⁵ According to Majanja, J. in *Pastor James Jessie Gitahi & 202 Others vrs Attorney General [2013] eKLR*

⁶ Berglund B., & Lindvall (Eds.). *Community Noise*. Archives of the Centre for Sensory Research. 1995; 2: 1- 195

⁷ Özer, S. & Irmak M. (2008). Determination of roadside noise reduction effectiveness of *Pinus sylvestris* L. and *Populus nigra* L. in Erzurum, Turkey. *Environ.Monit. Assess.*, 144, pp. 191-197.

⁸ NIOSH (National institute of occupational safety and health) (1998). *Criteria for a recommended standard. Occupational noise exposure, revised criteria*. U.S. Department of Health and Human Services. Press release. Cincinnati, Ohio

⁹ Economic, financial losses

¹⁰ Well-being

¹¹ *Ibid*, n.5

government control should, in any case, be to protect the citizens from the unfavourable impacts of airborne pollution, including those produced by noise. Individuals should have the freedom to choose the nature of their acoustical environment; it ought not to be forced on them by others.

In Kenya, noise pollution from entertainment joints is currently regulated mainly by the command and control instruments such as laws, regulations, permit and standards. Specifically, Kenya's regulation of noise pollution is in the form of laws and regulations such as EMCA (Excessive Noise and Vibration Control) Regulations¹², (hereinafter referred to as *the Noise Regulations*); The Factories and other Work Place (Noise Control and Prevention) Rules, 2005¹³; the Convention Dealing with Workers Protection from Occupational Hazards because of Noise and Vibration, 1977¹⁴, and the provisions of Sections 55 and 58 of the Traffic Act¹⁵. These are national laws. The constitution of Kenya, 2010 at Schedule 4, Part 2 (3), made under articles 185 (2), 186(1) and 187(2), however, allocates the function of control of air pollution, noise pollution, and public nuisances and outdoor advertising on the devolved county governments¹⁶.

Decentralization of environmental and natural resources management is, therefore, a new paradigm in Kenya's environmental management scene¹⁷ because environmental management in Kenya has all along been undertaken by the central government in the interest of the people. The command-and-control approach which has overwhelmingly formed the basis of environmental conservation and management in Kenya, according to Ochieng, however, requires a centralized authority for administration in the hands of public institutions, with lesser delegation of responsibilities to other authorities or local communities thereby permitting little room for public participation¹⁸.

The Kenyan Constitution at Article 69(1)(d), however, adopts the public participation approach towards the management of the environment. In addition, it provides for national values and

¹²Legal Notice No. 61 of 2009

¹³Legal Notice No. 25 of 2005

¹⁴Summary of provisions: Art. 2 (a) *Applies to all branches of economic activity, except where special problems of a substantial nature exist (art. 1); (b) Parties may accept the obligations of this Convention separately in respect of air pollution, noise and vibration*.

¹⁵cap 403 Laws of Kenya

¹⁶Part 2(3) of the 4th Schedule

¹⁷Ochieng B. O. (2008). 'Institutional Arrangement for Environmental Management in Kenya' in Okidi C. O. *et al.*, *Environmental Governance in Kenya: Implementing the Framework Law*. East African Educational Publishers Ltd: Nairobi

¹⁸*Ibid*

principles of governance in Kenya which at Article 10(2)(a) includes devolution and public participation. The research work herein studied the practical application of these values and principles as some of the ways of enhancing community participation in, and thereby enhancing the efficacy of the control mechanisms of, recreational noise pollution from entertainment joints in Kenyan rural towns. It assessed the adequacy of the legal frameworks to encourage community participation and found out the various ways to improve their efficacy.

1.2 Statement of the Problem

Though it has been said that public awareness of environmental noise has expanded with a lot more being expected from the developed and developing countries to lessen noise levels¹⁹, the Kenyan public still appears unappreciative and therefore yet to understand that noise is an unnecessary evil in the society. Lack of efficacy in the implementation and enforcement of *the Noise Regulations* is a significant reason for the existence of recreational noise pollution in Kenya. As the level of noise pollution continues to rise every day at an alarming rate; a severe problem is looming to the public population and the nation well-being in terms of health issues, communication troubles, general nuisance, and its corresponding effects on wildlife. The net result is that a nation cannot make a big step in terms of development because for development to be a reality a healthy labour force is required. With noise posing serious health, communication and environmental challenges, sustainable development cannot be realized; hence Vision 2030 will be a far-reaching dream.

In this study, the researcher therefore sought to find out whether the existing legal frameworks do not adequately address recreational noise pollution control and further whether *the Noise Regulations* and the provisions of the Public Health Act²⁰, Penal Code²¹, etc. do not adequately reflect the national values and principles of governance²²; including public participation and devolution. The legal issue which this study sought to address is that noise control laws and regulations currently in force in Kenya do not provide for effective devolution of recreational noise pollution control to communities. This gap has led to ineffective participation of communities in noise pollution control which in turn has impacted negatively on the efficacy

¹⁹*Ibid*, n. 9

²⁰ Cap. 242, Laws of Kenya

²¹ Cap. 63, Laws of Kenya

²²The national values and principles of governance in Article 10 of the Constitution of Kenya, 2010, bind all State organs, State officers, public officers and all persons whenever any of them— (a) applies or interprets the Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions.

of the recreational noise pollution control in urban areas in Kenya. The community thus appears to condone recreational noise pollution as an everyday, normal affair²³. It is therefore necessary to reassess the current approach to noise pollution control so as to increase its efficacy especially in the regulation and control of recreational noise from entertainment joints in emerging urban centres.

1.3 Research Questions

The research mainly sought answers and solutions to the problem of recreational noise pollution from entertainment joints in emerging urban centres in Kenya through the following questions:

- i. What is the extent of knowledge and awareness of the problem of recreational noise pollution in emerging urban centres in Kenya?
- ii. What is the extent of stakeholder involvement in the control of recreational noise pollution from entertainment joints in emerging urban centres in Kenya?
- iii. How can the efficacy of the regulations and laws governing recreational noise pollution be improved?

1.4 Objectives

The research's objective was to critically examine the current state of pollution control appertaining to recreational noise from entertainment joints in emerging urban centres in Kenyan counties with regards to the following specific objectives:

- i. To critically assess the extent of community awareness and knowledge of the nature of, sources and problems associated with, recreational noise emanating from entertainment joints in emerging urban centres in Kenya
- ii. To critically assess the extent of stakeholder involvement in the control of recreational noise pollution from entertainment joints in emerging urban centres in Kenya.
- iii. To critically assess the efficacy of the legal regulations governing recreational noise pollution in Kenya.

²³Okidi C.O (2008). 'Concept, Function and Structure of Environmental Law' in Okidi C. O. *et al. Environmental Governance in Kenya: Implementing the Framework Law*. East African Educational Publishers Ltd: Nairobi

1.5 Justification of the Study

Noise pollution is on the increase in our urban centres which are experiencing a sudden surge in growth and population. This population increase has led to a rise in the number of entertainment joints which provide leisure and other recreational activities to the rising workforce in our counties. Despite there being evidence that noise from these entertainment joints often leads to serious health and medical problems to the human being and even flora and fauna, the research field has limited studies on noise pollution control and how to enhance its efficacy in Kenya²⁴. The challenge for county governments, where noise pollution control has been devolved, is to ensure that the measures they use to achieve the public's objectives of recreational noise pollution control are both effective and efficient. By being effective and efficient it is meant that they resolve the recreational noise pollution problem they were meant to address while minimising both the direct compliance costs borne by those subject to the measures, and other, often more indirect, costs which may be imposed on the public. Whereas first usual response by governments to a perceived policy issue is often to regulate, it may be appropriate to ask whether traditional regulation is the best and only possible course of action. It is believed that in many situations there may be a range of options other than traditional 'command and control' regulations available, including more flexible forms of traditional regulation such as performance-based and incentive approaches, co-regulation and self-regulation schemes, incentive and market based instruments such as tax breaks and tradable permits and information approaches. If the gaps that exist in the enforcement of the noise pollution control laws and regulations currently in place are not cured urgently, then the direct and cumulative adverse effects of noise pollution will affect the economy and the well-being of the population in these counties²⁵. It is believed that new strategies which have come from this study are useful in changing behaviours in ways that shall be beneficial to the society as a whole.

1.6 Scope and Limitation of Study

Since noise pollution control is a devolved function, this research studied the regulations in place for noise pollution created from recreation joints in urban areas with a specific focus on the rising towns and urban centres in our counties (which are occasionally referred to herein as

²⁴Nyangena (2008). 'Economic Issues for Environmental and Resource Management in Kenya' in Okidi C. O. *et al.*, *Environmental Governance in Kenya: Implementing the Framework Law*. East African Educational Publishers LTD: Nairobi.

²⁵*Ibid*, n.9

‘rural towns’). One of the fastest developing towns in our counties is Hola town, the headquarters of Tana River County in North Coast. The town was a few years ago a remote and poorly developed town until the coming into effect of the county governments in 2013. The town has since grown with several residential buildings and hotels, making tourism and leisure services its key economic activities. Several clubs and entertainment joints have since been set up. Despite the existence of other forms of noise pollution such as vehicular or transport noise in these emerging towns, it is the belief of the researcher than noise from entertainment joints has posed the most serious challenge to the inhabitants of these rural towns mainly because of the non-existent zoning regulations and or urban planning in place in these towns.

Because of the wide diversity in the extraneous factors such as age, educational, religious and economic status, which might have affected the research outcome herein if conducted in other homogeneous societies or other urban areas in Kenya which are associated with specific classes, religious or ethnic groups, Hola town represented the increasingly growing numbers of towns in our counties and the information gathered is deemed to be sufficiently representative, comparable and, consequently, applicable across the country and to rural towns of similar background and characteristics such as Lamu²⁶, Kwale²⁷, Wote²⁸, Kajiado²⁹, Nyamira³⁰, Mbale³¹, Kapenguria³², Lodwar³³, Mandera³⁴, Wajir³⁵, Marsabit³⁶, Maralal³⁷, Wundanyi³⁸, Taveta³⁹, Malaba⁴⁰, Homa Bay⁴¹, Siaya⁴², Ol Kalou⁴³, Bomet⁴⁴, Iten⁴⁵, Isiolo⁴⁶, Homa Bay⁴⁷ among others.

²⁶Lamu County Headquarters

²⁷Kwale County Headquarters

²⁸Makueni County Headquarters

²⁹Kajiado County Headquarters

³⁰Nyamira County Headquarters

³¹Vihiga County Headquarters

³²West Pokot County Headquarters

³³Turkana County Headquarters

³⁴Mandera County Headquarters

³⁵Wajir County Headquarters

³⁶Marsabit County Headquarters

³⁷Samburu County Headquarters

³⁸Formerly Taita Taveta District (now a county) Head quarters

³⁹Border town in Taita-Taveta County

⁴⁰Border town in Busia County

⁴¹Homa Bay County Headquarters

⁴²Siaya County Headquarters

⁴³Nyandarua County Headquarters

⁴⁴Bomet County Headquarters

⁴⁵Elgeyo Marakwet County Headquarters

⁴⁶ Isiolo County Headquarters

⁴⁷ Homa Bay County Headquarters

Since no county has successfully passed and implemented a noise pollution control law or formulated a noise pollution control policy⁴⁸, the proposed study shall be limited to the national laws such as The Constitution of Kenya, the *EMCA Noise Regulations* and The Factories and other Places of Work (Noise Prevention and control) Rules, 2005. The study also looked at some of the noise control legislations in some counties such as Embu and Kilifi Counties⁴⁹ that has drawn resistance from the members of the public, businesspersons, religious leaders, and politicians.

⁴⁸ Refer to an attempt by Kilifi County Government to regulate noise in 'Kilifi Club Owners Lament Stringent Noise Control Regulations' in *the Standard*, Friday, Feb 22nd 2019 at 00.00, Available from standardmedia.co.ke

⁴⁹ *Ibid*

CHAPTER TWO

LITERATURE REVIEW

2.1. Introduction

Much consideration has been paid to the issue of noise pollution in environmental law by various scholars. Much of the writings has been in general texts on noise pollution or in scholarly articles. This chapter presents a brief summary of an audit of writings and past and other studies relevant to matters of noise pollution, devolution, public participation, and general noise pollution control. In a nutshell, textbooks, seminar papers, statutes, conventions and journal articles form the basis of this review. The theoretical framework underpinning the study, as well as the inter-relationship between the major variables have also been explicitly explained in the analytical framework in this chapter.

2.2 The Concept of Noise Pollution and its Control

Moela¹, considers noise pollution as an undesirable or excessive sound that unreasonably intrudes into the people's day by day activities. To better understand noise, Sharma and Kacker, traces the genesis of the term 'noise' from the Latin word 'nausea' meaning seasickness². Under regulation 2 of the *Noise Regulations*, 'noise' is defined as any undesirable sound that is inherently objectionable or that may cause adverse impacts on people's health or cause danger to the environment. 'Noise pollution', on the other hand, has been defined to mean the outflow of unrestricted noise that may probably be dangerous to human or the environment. Going by the above definitions and depending upon the circumstances - noise can give rise to 'nuisance,' 'disturbance' and even 'assault'- concepts that can be applied in both criminal and civil law.

Cohen and Weinstein³ argue that having the option to adapt to common daily recurring noise is essential for human prosperity and well-being. According to them, individuals vary in their understanding of noise situations and the appropriate response or adaptation, and they, therefore, appear to be advocating for personalized noise pollution control and prevention strategies. Critics such as Frochlich however argue that whereas personal noise pollution

¹Moela R. D. (2010). *The Impact of Traffic Noise Pollution on the Population of Strubensvalley in Roodepoort*. Unpublished Dissertation. University of Johannesburg, Johannesburg

²Sharma, R. & Kacker, S. (2004). 'Community Participation in Noise Control' in Suzuki, Koboyashi & Koga (eds). *Hearing Impairment*. Springer Verlag: Tokyo

³Cohen S. & Weinstein N. (1981). 'Non Auditory-Effects of Noise on Behavior and Health' in *The Journal of Social Issues*, Vol 37 Issue 1 pp 36 -70, Winter 1981: The Society for the Psychological Study of Social Issues

controls are desirable, ecological noise is not just specific to an individual. It is a societal problem that is outside the ability of control for most individuals⁴.

A few activities have hence been adopted by different nations to control and manage the noise level. For instance, the US has made a move to create zones where human-caused noise pollution is not allowed. Correspondingly, the European Union required 'noise maps' of huge urban centres be drawn up by 2002⁵. To shield against adverse impacts of noise, the laws of the Netherlands do not allow houses in places where average full day noise levels surpass 50dB⁶. According to Hilson, any initiative taken to control noise pollution must have the characteristics of equity, efficiency, certainty, accountability and effectiveness⁷.

Bernstein⁸ characterized most of the environmental pollution control in most countries to be moulded on the command-and-control method which gives the regulator or enforcer a sensible level of consistency about how much pollution will be decreased. Bernstein further contends that despite the fact that the approach has been critiqued for being economically inefficient and hard to implement, command and-control strategies have gained significant grounds in meeting the objectives of environmental statutes and policies⁹. The concept of law as commands, regulatory and control instruments is the foundation of Legal Positivism which states that no law can be said to be efficacious unless followed and obeyed by majority of the populace¹⁰. The command and control regulatory arrangements have however been found to be inadequate to deal with the threat to environmental sustainability in the contemporary world¹¹.

Apart from the command-and-control approach, Bernstein¹² argues that of late, numerous nations, basically developed ones, have embraced economic instruments to encourage greater flexibility, proficiency and cost-viability into pollution control measures. According to Pigou,

⁴Frochlich, P. (2013). *Noise Pollution in the Laboratory*. Haverhill: Parker Hannifin Corporation

⁵Narendra S. & Davar S. C. (2004). 'Noise Pollution - Sources, Effects and Control' in *Journal on Human Ecology*, 16(3), 181 - 187

⁶ Omubo-Pepple, Briggs-Kamara & Tamunobereton-ari (2010). Noise Pollution in Port Harcourt Metropolis: Sources, Effects and Control in *Working and Living Environmental Protection Vol. 7, No. 1, pp 33 - 42*

⁷Hilson, J. C. (1995). *Pollution Control and The Rule of Law*. Unpublished PhD Thesis. University of Sheffield, Department of Law.

⁸Bernstein, J.D. (1993). *Alternative Approaches to Pollution Control and Waste Management Regulatory and Economic Instruments*. Washington D.C.:The World Bank.

⁹*Ibid*

¹⁰Brian A.W. (2011). Reflections on 'The Concept of Law'. Oxford: Oxford University Press.

¹¹Okidi C.O (2008). 'Concept, Function and Structure of Environmental Law' in Okidi C. O. *et al. Environmental Governance in Kenya: Implementing the Framework Law*. East African Educational Publishers Ltd: Nairobi

¹²*Ibid* n.8

the essence of economic instruments is that when pollution remains a freely unpriced externality to market transactions, it will lead to a less optimal allocation of resources than if it is properly priced¹³. Thus by taxing pollution, such as those caused by excessive noise, it is, from Pigou's point of view, possible to equate net marginal private costs with net marginal social costs thereby ensuring that market transactions lead to Pareto optimum outcomes. According to Andersen¹⁴, economic instruments are ideal for the management and implementation of public policies¹⁵. Andersen's study on the use of economic instruments, however, puts institutions at the centre since neither market mechanisms nor market-like policy instruments do not operate on their own. He argues that any regulatory change or shift does not entail abandoning the market to operate alone since formal and informal governance institutions define and determine the conditions that makes it possible for the market systems to work. The policy and administrative contexts in which these economic instruments operate is important mainly because for them to be efficacious, they should apply within existent rules, institutions and policy processes. Applying them shallowly may therefore quickly discredit them¹⁶.

According to Nyangena, a cautious proponent of the economic mechanisms, economic instruments for the environment and natural resource management are economic incentives intended to impact the behaviour of economic agents so as to guarantee sustainable utilization of resources¹⁷. Using the classification used by the World Bank in 1997, Nyangena classifies these instruments into four categories: using markets, creating markets, environmental regulations and public information provision. He thus recognizes that information plays an essential role in policymaking thereby giving or elevating information to be an economic instrument on its own, alongside environmental taxes and charges, subsidy reduction, user charges, deposit-refund systems and targeted subsidies; property and decentralization, tradable permits and rights and international offset systems; standards, bans, permits and quotas, zoning, and liability (environmental regulations)¹⁸. Whereas Hilson provided the essential

¹³ Pigou, A. C. (1920). *The Economics of Welfare*. London: Macmillan

¹⁴ Andersen, M. S. (2001). *Economic Instruments and Clean Water: Why Institutions and Policy Design Matter*. Paris: Organisation for Economic Co-operation and Development

¹⁵ Baumol, W. J. (1972) "On Taxation and the Control of Externalities", *American Economic Review*, 62: 3, pp. 307-21; Baumol, W. J. & Oates, W. E. (1988), *The Theory of Environmental Policy*, Cambridge: Cambridge University Press

¹⁶ *Ibid*

¹⁷ Nyangena (2008). 'Economic Issues for Environmental and Resource Management in Kenya' in Okidi C. O. *et al. Environmental Governance in Kenya: Implementing the Framework Law*.

¹⁸ *Ibid*

characteristics of an efficacious noise pollution control instrument¹⁹, Nyangena goes ahead to specifically provide useful criteria to evaluate when adopting an economic instrument for environmental management such as cost-efficiency, flexibility, effectiveness, equity, political feasibility, legal structure, transparency, and technical capacity. The instruments act as motivators to polluters to choose their own strategies for the control of pollution, hence take charge of the prevention processes. These economic instruments and motivators, their efficacy notwithstanding, cannot, nonetheless, completely remove the need for standards, environmental monitoring, enforcements, and other forms of government and community participation. In addition, in developed nations, there are no known instances of occasions where economic instruments have absolutely been used without direct command-and-control regulations of polluting activities²⁰. Although EMCA acknowledges that economic policy incentives are an important means of maintaining a clean environment, little research has been done to assess the applicability of these tools in Kenya.

According to Mbote, efficacious environmental law enforcement demands the use of all available mechanisms which therefore calls for a balance between the incentives to elicit compliance with (the incentives being the carrots), and, command and control mechanisms (the command and control mechanisms being the stick) in the interest of environmental sustainability. This, however, requires the framing of the enforcement mechanisms that yield optimal compliance. Mbote further stresses this point by contending that criminalizing the behaviour that are part and parcel of peoples' livelihood, makes the people to resist and despise the legal provisions with the result being the immediate infringement of the law. She therefore proposes the sensitization of criminal law enforcement agents to ensure that environmental crimes are appropriately and competently dealt with²¹.

Yet the province of regulatory reform dealing with economic instruments has been affected by some serious fallacies from neo-classical economic analysis, the most prominent being that the economic instruments are often treated in a partial equilibrium analysis; that is, they are considered as complete alternatives to the command-and-control regulations, while institutional issues are more or less ignored. To explain it in simpler terms, economic instruments are treated

¹⁹ *Ibid*, n.7

²⁰ *Ibid*

²¹ Mbote P. K. (2008). 'The Use of Criminal Law in Enforcing Environmental Law' in Okidi C. O. *et al.*, *Environmental Governance in Kenya: Implementing the Framework Law*. East African Educational Publishers Ltd: Nairobi

in a vacuum that offers limited incentive to understand how the market and its institutions actually operate. The few instances that institutions may be considered are only when they are regarded negatively as barriers to the functioning of market forces. While such presumptions from neo-classical economics are perhaps suited for the science of economics, they offer only limited advice to public officials and public policy formulators and practitioners; and law makers, who wish to add economic instruments in the existing systems of regulations and institutions²².

The importance of institutions is however, somehow, becoming better understood by neo-institutionalist economists, such as Douglas North, who have pointed out how formal and informal institutions affect the functioning of the market²³. While some of the first contributions to economic neo-institutionalism implicitly treated institutions merely as obstacles to the market mechanism, North and his cohorts offer a more sophisticated and differentiated account of institutions. Such economists are therefore coming closer to sociological neo-institutionalism, which treats institutions – historical, political or social – as indispensable elements of reality when it comes to the success or otherwise of economic instruments for controlling noise pollution²⁴.

When governments consider using economic instruments to control noise pollution, it is therefore crucial to understand the institutional context in which the market-like mechanism will function. Though this context is partly influenced by other regulations that are in place, primarily, it is shaped by the formal operating procedures through which public regulations are formulated and implemented. Such patterns and standards of procedures, when repeated time and again as governments define and solve problems, may eventually be seen as standard styles of policymaking²⁵. The policies may then be implemented through laws and practice. Governments, according to North, therefore need to understand such historical paths of institutional change in order to grasp the complexity of their own public policies, and to understand why policies succeed and fail²⁶.

²²*Ibid*, n.14

²³ North, D. C. (1990). *Institutions, Institutional Change, and Economic Performance*. Cambridge University Press: Cambridge

²⁴ March, J. G. & Olsen, J. P. (1989). *Rediscovering Institutions*. New York: The Free Press.

²⁵ Richardson, J. ed. (1982). *Policy Styles in Western Europe*. London: Allen and Unwin.

²⁶ *Ibid*, n.23

Ochieng, on the other hand, while criticising the traditional command-and-control measures for lacking innovation, advocates for a mixed or fused approach. According to him, institutions charged of the management of the environment and resource use should utilize reasonable mixed key strategies to boost consistency in compliance. He argues, for example, that the command-and-control to environmental policy-making as has solely been applied in Kenya has bred a myopic and punitive system of ensuring compliance founded mainly by use of fines, forfeiture and imprisonment. That this clear lack of innovation has led to the failure in compliance in systems predominated by the command and control approaches. He, therefore, reasons that the evolving environmental management regime in Kenya should shift from the traditional command and-control systems to an integrated arrangement that uses several compliance tools such as market impetuses, insurance requirements, self-regulations, taxes, charges and fees, permits and licences, arbitration and adjudication and inspections in pursuing compliance with environmental laws²⁷.

Angwenyi elaborates that it is possible to have tax and fiscal impetuses and fees to benefit individuals and institutions with advanced sound environmental management through the use of environmentally friendly technology. She argues that such schemes should be encouraged especially to those industries that go over and beyond their call of duty on environmental management since such types of technology may be expensive to purchase yet the benefits are felt not just by the industry but by the general public at large.

EMCA recognizes the application of these financial instruments in Kenya. For example one of the functions of the National Environment Council is to consider for recommendation to the Cabinet Secretary for the National Treasury the individuals or institutions which merit the government tax and other related fiscal incentives, disincentives, or fees which may be used to instigate or advance the proper management of the environment and natural resources such as pollution control²⁸. Indeed, the whole of Part V of EMCA recognises the need for financial incentives and disincentives intended to encourage resource users to comply with

²⁷Ochieng B. O. (2008). 'Institutional Arrangement for Environmental Management in Kenya' in Okidi C. O. *et al.*, *Environmental Governance in Kenya: Implementing the Framework Law*. East African Educational Publishers Ltd: Nairobi

²⁸EMCA, section 57.

environmental requirements. However, NEMA, together with the National Treasury, is yet to come up with the development of such financial mechanisms²⁹.

2.3 Nature, Sources and Effects of Recreational Noise Pollution

Omubo-Pepple, *et al.*³⁰, in a study, recognized audio entertainments, loudspeakers, neighbourhood noise and public address systems utilized for religious and social purposes as the major sources of recreational noise pollution worldwide. The study also concluded that poor urban planning may lead to an increase in recreational noise pollution since side-by-side entertainment joints and residential buildings can result in noise pollution in the nearby residential areas. The study further concluded that noise from fixed recreation facilities transmit from a focal point which is mainly the recreational facility itself and its exposure area takes a generally circular shape, radiating from the focal point.³¹ Common use of loud speakers and amplifiers in social and religious activities thus cause several health hazards, associated with noise pollution³².

Recreational noise, just like other forms of pollution, has tremendous adverse health, social, and economic consequences. Numerous studies on the adverse health effects of noise generally have found that noise interferes with behavior, including communication and concentration, or peaceful rest in a relaxed or sleep mode³³. Such noise exposure can thus lead to acute stress responses and/or chronic stress, and can also lead to heart and psychiatric health complications.

In the realm of urban planning, recreational noise has been found to interfere with home values thereby leading to the escalation of the cost of building as the requirements of sound proofing becomes necessary. For example in post-occupancy studies in the US, the acoustics, specifically the lack of adequate speech privacy and control of noise levels, has been a major complaint with respect to the ability to carry out work tasks³⁴. A study conducted in Holland suggested

²⁹Angwenyi A. N. (2008). 'An Overview of the Environmental Management and Co-ordination Act' in Okidi C. O. *et al. Environmental Governance in Kenya: Implementing the Framework Law*. East African Educational Publishers Ltd: Nairobi

³⁰*Ibid*, n.6

³¹*ibid*

³² Bhargawa, G. (2001). 'Development of India's Urban and Regional Planning' in *21st Century*. New Delhi: Gian Publishing House pp.115-116

³³ Miedema, H. (2007). Annoyance Caused by Environmental Noise: Elements for Evidence-Based Noise Policies. *Journal of Social Issues*, 63 (1): 41-57; Goines, L., and Hagler, L. (2007). Noise Pollution: A Modern Plague. *Southern Medical Journal*, 100 (3): 287-294.

³⁴ Jenson, Arcns & Zagreus (2005). 'Acoustical Quality in Office Workstations, As Assessed by Occupant Surveys'. *Proceedings of Indoor Air Conference*, 2401-2405.

that noise-sensitive people are less satisfied with their living environment and are more willing to move than others³⁵. Another study researching the cumulative effects of noise and temperature on human thermal comfort and ability to perform tasks found that thermal comfort was affected by noise levels, while ratings of building or office noise were not affected by the ambient temperature³⁶.

Being able to cope with daily noise is therefore important for human well-being and health. People, however, differ in their appraisal of noise situations and in their coping style³⁷. The impacts of recreational noise are dependent both on the acoustical characteristics of the noise (e.g., loudness, time pattern etc.) and on aspects of the noise situation that may involve cognitive processing, such as expectations regarding the future development of the noise exposure (whether it will get better or worse), lack of predictability of how soon the noise might abate, combined with a hopeless feeling of lack of control over the source of the noise. However, as applies to most forms of environmental noise, recreational noise pollution is not often only a personal matter, but a wide societal problem that is beyond the control and management of most individuals. According to Cohen & Weinstein, noise is, unfortunately, still considered a relatively minor form of pollution and public awareness on its negative effects is lower than for other forms of air pollution³⁸.

2.4 Environmental Law Principles and their Relevance to Recreational Noise Pollution Control Law and Policy

Part of the overall structure of environmental law comprises the general principles, made up of what is usually referred to as soft law instruments. The principles are mainly in the form of solemn declarations of principal global or regional organizations and have considerable influence in the operation and interpretation of environmental law and have over the last two decades evolved and have been incorporated in different international law instruments³⁹. The

³⁵ Nijland, Hartemink, van Kamp I. & van Wee (2007). 'The Influence of Sensitivity for Road Traffic Noise on Residential Location: Does it trigger a Process of Spatial Selection?' *Journal of Acoustical Society of America*, 122 (3): 1595-1601.

³⁶ Tiller, Wang, Musser & Radik (2010). 'Combined Effects of Noise and Temperature on Human Comfort and Performance'. *ASHRAE Transactions*, 116 (2): 522-540.

³⁷ *Ibid*, n.3

³⁸ *Ibid*,

³⁹ Okidi C.O (2008). 'Concept, Function and Structure of Environmental Law', In Okidi, C.O et al, *Environmental Governance in Kenya: Implementing the framework law*, (Nairobi, EAEP, 2008)

principles are reviewed below with illustration of their relevance to recreational noise pollution control law and policy.

2.4.1 Precautionary Principle

The precautionary principle states that if an action or policy has a suspected risk of causing harm to the environment, in the absence of scientific consensus that the action or policy is not harmful, the burden of proof that it is *not* harmful falls on those taking an action. The precautionary principle has been invoked before the International Courts. The European Court of Justice (ECJ) has adopted the precautionary approach, particularly in respect to environmental risks that pose dangers to human health (such as recreational noise). In its judgment in Cases *C-157/96 (The Queen vrs Ministry of Agriculture, Fisheries and Food)* and *C-180/96 (UK vs Commission of the EC)* the Court held that the Commission had not committed manifest error when banning the export of beef during the ‘mad cow’ crisis. The Court said:

At the time when the contested decision was adopted, there was great uncertainty as to the risks posed by live animals, bovine meat and derived products. Where there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to await the reality and seriousness of those risks to become fully apparent.

2.4.2 Principle of Sustainable Development

Few concepts appear to have captured the public and political imagination more than that of ‘sustainable development’ which is intended to embrace the idea of ensuring that future generations inherit an earth which will support their livelihoods in such a way that they are no worse off than generations today⁴⁰. Whereas the notion of sustainable development has been variously defined in many ways, the original version remains the most appealing: ‘*Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs*’⁴¹. Achieving sustainable development therefore requires reducing hazards from pollution and interferences with life support systems like recreational noise.

⁴⁰Pearce D. & Atkinson G. (1998). ‘Concept of Sustainable Development: An Evaluation of its Usefulness 10 Years after Butland’ in *Environmental Economics and Policy Studies* 1, 95 – 111(1998)

⁴¹World Commission on Environment and Development (WCED) (1987). *Our Common Future*. Oxford University Press: Oxford, 43

In the *Case Concerning the Gabčíkovo-Nagymoros Project (Hungary-Slovakia) 1997 WL 1168556 (I.C.J-1997)* sustainable development as a concept was judicially interpreted when Judge Weeramantry rightly argued that the concept is one that has received worldwide acceptance by all states, whether developed or developing, as it restates the position that there cannot be development without environmental protection, and that neither can be neglected at the expense of the other, thus placing it at the heart of modern international law.

Various domains have been flagged up by the UN and other international organisations for research and analysis of sustainable development. Generally defined, they include ecology, economics, politics and culture. The principal of sustainable development is relevant in recreational noise pollution control in the constitutional and legal provisions in Article 42 of the Constitution and section 3 of EMCA. Article 42 of the Constitution of Kenya, 2010 provides that every person has the right to a clean and healthy environment, which includes the right to have the environment protected for the benefit of present and future generations through legislative and other measures, and further to have obligations relating to the environment performed. Section 3 of EMCA, on the other hand, provides that every person in Kenya is entitled to a clean and healthy environment and has the duty to safeguard and enhance the environment. EMCA defines sustainable development in equitable terms as development that meets the needs of the present without compromising the ability of future generations to meet their own needs⁴².

2.4.3 Polluter Pays Principle (PPP)

The principle is used to broadly imply that whoever is responsible for environmental degradation, including through excessive emission of recreational noise, should be responsible for its reparation covering both civil liability and criminal responsibility⁴³. The PPP has gained wide acceptance since 1972 when it was mooted and has increased in its scope to include, at least in theory, all costs linked to pollution, and has extended beyond the context of developed countries, Kenya included. The Environment and Lands Courts Act, for example, at section 18(a)(v), provides for this principle as one of the guiding principle for the Environment and Lands courts' exercise of its jurisdiction.

⁴² Section 2

⁴³ *Ibid.* n.39

In Kenya the principle was applied in the case of *Nzioka & 2 Others vrs Tiomin Kenya LTD (2001) 1 KLR(E&L)* in a consideration of the principles for granting of injunctions in environmental disputes. The court held as follows:

Although the principle of polluter pays may be argued in aid of the second principle of Giella Versus Cassman Brown Ltd but again without EIA it cannot be assessed. The implication of the phrase is that the cost of preventing pollution or of minimising environmental damage due to pollution should be borne by those responsible for the pollution, but that does not guarantee that payment will be adequate.

2.4.4 Principle of Public Participation

Public participation is premised on a concern that citizens and non-governmental actors should obtain greater control and power over issues of concern to them. Proponents for an expansive citizen participation, for example, often rest on the merits of the process and the belief that an engaged citizenry is better than a passive citizenry when it comes to taking charge of environmental conservation strategies suitable to the local needs⁴⁴. A well engaged public owns the recreational noise pollution control process thereby supplementing the governmental initiatives which increases the efficacy of the control mechanisms. Meaningful stakeholder engagement also enables contributions of the most affected parties to be institutionalized in ways that are fair and adhere to conditions laid out by deliberative criteria⁴⁵.

2.4.5 Inter and Intra Generational Equity Principle

This principle was developed in recent years when it was universally realised that, human activity has the potential to permanently change the world on a large scale. The principle of inter-generational equity was defined by the International Law Association (ILA) as '*the rights of future generations to enjoy a fair level of the common patrimony*'⁴⁶. Inter-generational equity has alternatively been defined as '*that principle of ordering of the community of mankind which will make it possible for every generation, by virtue of its own effort and responsibility, to secure a proportionate share in the common good of the human species*'⁴⁷.

⁴⁴ Kimani, N. (2010). 'Participatory Aspirations of Environmental Governance in East Africa' in *Law, Environment and Development Journal*, p. 200, available at <http://www.lead-journal.org/content/10200.pdf>

⁴⁵ *Ibid*

⁴⁶ International Law Association (2002). 'New Delhi Declaration on Principles of International Law Relating to Sustainable Development, ILA Resolution 3/2002' in *ILA, Report of the Seventieth Conference, New Delhi*. London: ILA

⁴⁷ Agius, E. (1998). 'Obligations of Justice Towards Future Generations: A Revolution on Social and Legal Thought' in E. Agius, ed., *Future Generations and International Law*. London: Earthscan Publications.

It can be said to be an offshoot of the principle of sustainable development whose core belief is that the resources of this world belong to all generations. It therefore follows that the present generation has no right to irreversibly and exhaustively deal with the natural world in a manner that deprives future generations of environmental, social and economic opportunities necessary for well-being. No country, continent or generation has an exclusive right and monopoly to the natural resources of the world over the other. Because these resources were handed over from past generations, consequently, the present generation has an obligation to transmit them in good and even improved conditions to posterity⁴⁸. As currently employed in international instruments, inter-generational equity calls for states to ensure a just allocation in the utilisation of resources between past, present and future generations⁴⁹. It requires attaining a balance between meeting the consumptive demands of existing societies and ensuring that adequate resources are available to accommodate the needs of future generations⁵⁰.

Intra-generational equity, a related concept, has been defined by the ILA as '***the rights of all peoples within the current generation of fair access to the current generation's entitlement to the Earth's natural resources.***⁵¹' Intra-generational equity is directed at the serious socio-economic inequality in access and utilisation of resources within and between societies and nations that have serious environmental degradation and the inability of a significant part of population to adequately satisfy its most basic needs. Simply put, intra-generational equity means '***that everyone is entitled to the necessities of life: food, shelter, health care, education, and the essential infrastructure for social organisation***⁵²'.

The right of future generations has been upheld in some courts in some nations. For example, in the *Minors Oposa case (Philippines - Oposa et. al. v. Fulgencio S. Factoran, Jr. et al. G.R. No. 101083)*, the Supreme Court of the Republic of the Philippines decided that the petitioners could file a class suit, for others of their generation and for the succeeding generations. The Court then considered the concept of inter-generational responsibility and additionally held that each generation has a responsibility to the next to preserve that rhythm and harmony requisite for the full enjoyment of a balanced and healthful environment.

⁴⁸ Franck, T.M. (1995). *Fairness in International Law and Institutions*. Oxford: Oxford University Press.

⁴⁹Weiss, B (1989). *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity*. New York: Transnational

⁵⁰ Schachter, O. (1977). *Sharing the World's Resources*. Bangalore: Allied at 11-12.

⁵¹ *Ibid*, n.46

⁵² *Ibid*, n.50

Sohn and Weiss suggest that the problems associated with the allocation of wealth between members of the present and those of future generations include the exhaustion of resources for upcoming generations; degradation in quality of resources for upcoming generations and access to the use and benefits of the resources received from prior generations⁵³. They thus adopt three basic principles of intergenerational equity which they translate into intergenerational obligations. They however qualify their assertions that these principles only act as constraints on the actions of the present generation in developing and using the resources of the earth but are not intended as dictates on how the present generations are to manage the resources of the earth. The principles ensure a minimum of reasonably secure and flexible natural resource base for the future generations and a reasonably decent and healthy environment for the present and future generations⁵⁴.

Sohn and Weiss refer to the first principle as '*conservation of options*'. This principle states that each generation should conserve the diversity of the natural and cultural resources so that the options available to future generations to address their problems and satisfy their needs are not unnecessarily diminished. This principle advocates for technological developments which create substitutes or alternatives for existing resources or lead to more efficient processes for exploiting and the conservation of existing resources, rather than the maintenance of the status quo⁵⁵. Through this principle, new sound efficient technology can be used to improve the noise/air quality while still promoting development. The second principle is the '*conservation of quality*' and requires each generation to maintain the quality of the resources at its disposal so as to pass it in at least the same, if not better, condition than it was received by it. It should not be misconstrued to mean that the environment must remain unchanged but rather that there ought to be a balanced process of utilisation of resources within set limits⁵⁶. The third principle is the '*conservation of access*' and appeals to each generation to provide its members with fair, just and equitable rights of access to the legacy from previous generations. It offers the present generation the right to use natural resources to improve their economic and social development while at the same time respecting equitable duties to future generations and not to unreasonably

⁵³ Sohn & Weiss (1987). 'Intergenerational Equity in International Law', *American Society of International Law*, Vol. 81, (1987), pp. 126-133.

⁵⁴ *Ibid*

⁵⁵ *Ibid*

⁵⁶ *Ibid*

hinder and interfere with the access of other members of their own generation to the same resources⁵⁷.

Equity in the sense of intergenerational equity as discussed above has been incorporated into the environmental law framework and in the sustainable development discourse. Among the principles of sustainable development that are to guide the environment and lands court under section 3 of the EMCA is the principle of 'intergenerational equity; which under section 2 of the said Act means that the present generation are to ensure that in exercising its rights to beneficial use of the environment, the healthfulness, diversity and productivity of the environment is maintained, if not improved, for the benefit of future generations. Such health and quality, include keeping excessive recreational noise off the environment. According to Section 2 of the EMCA, intragenerational equity means that all people within the present generation have the right to benefit equally from the exploitation of the environment, and that they have an equal right to a clean and healthful environment. The import of this definition is that equity should, be applied across communities and nations within one generation. In the Kenyan case of *Peter K. Waweru vs Republic [2006] eKLR*, a decision resonating well with the dissenting opinion of Judge Weeremantry in the *Gabcikovo case (Supra)*, the high court held that intragenerational equity or environmental justice involves equality within the present generation, such that each member of the generation has an equal right to access the earth's natural and cultural resources. This case also analysed the environmental principles of sustainable development, precautionary principle, polluter pays principle and public trust and categorically affirmed that development should be ecologically sustainable. From this case it is evident that the duo rights to development, cultural and economic, and environmental protection as enshrined in the principle of sustainable development is indeed attainable. The environment does not need to only be protected for the public good but should also be protected for ecological reasons.

Article 60 (1) of the Constitution clearly incorporates the principles of conserving options, quality and access as expounded by Weiss in the context of natural resources in Kenya⁵⁸. Article 60 (1) states that land shall be held in Kenya in a manner that is equitable, efficient, productive and sustainable and in accordance, inter alia, with the principles of sustainable and productive management of land resources, transparent and cost-effective administration of land and sound

⁵⁷ *Ibid*

⁵⁸ *Ibid*, n.3

conservation and protection of ecologically sensitive areas. It can thus be interpreted that Article 60 of the Constitution imposes some obligations on the current generation to conserve the natural resources in land, ensure non-discriminatory access to the use and benefit of land, eschew activities that have negative effect on the quality of land and to impose costs of damage to the polluters. Such activities include recreational noise pollution from entertainment establishments that renders adjacent areas and houses inhabitable. Article 70 of the Constitution has provisions for the enforcement of environmental rights provided for under Article 42 of the Constitution. Under Article 42 of the Constitution the right to a clean and healthy environment includes the right to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and to have obligations relating to the environment fulfilled under Article 70. Article 69 is drafted in ecological terms by requiring the State to, *inter alia*; ensure the sustainable exploitation, utilization, management and conservation of the environment and natural resources and the equitable sharing of the accruing benefits. The State is further required to encourage public participation in environmental protection efforts and the elimination of activities and processes likely to be hazardous to the environment. The measures contemplated under Article 69 of the Constitution are intended to give effective representation to the needs of both the environment and the present and future generations in the exploitation, use, management and conservation of the environment and natural resources. It is believed that implementation of these measures will lead to a development that is ecologically conscious and that meets the needs of the present people of Kenya without compromising the ability of future generations to satisfy their needs. The principle of inter and intra generational equity applies in environmental rights⁵⁹, environmental justice and environmental democracy.

2.4.6 Principle of Subsidiarity

The principle of subsidiarity is one of the key legal tools through which the balance of regulatory power between the central and local levels of a federal or devolved system such as in Kenya is maintained. The principle reflects a preference for making decisions at the lowest level of government or social organization where the issue can be effectively managed.

⁵⁹ Article 42 of the Constitution and Section 3 of EMCA

Subsidiarity thus does not tell us what the right decision is in a given context but where in the hierarchy the decision should be made⁶⁰.

Decisions made at the local level are often viewed as more likely to take account of local environment conditions and the opinions of the local people who often bear the highest environmental costs of development decisions. Apart to the public participation principle, this study also focused on the principle of subsidiarity in vouching for further decentralization of recreational noise pollution control to further lower levels of the society such as the residential estates and villages.

2.4.7 Common Concern for Human Rights

Under this principle, the right to a clean environment as provided for in Articles 42, 69 and 70 of the Constitution of Kenya, 2010, and section 3 of EMCA, is treated as part and parcel of the right to life and courts have been supportive of protecting the right. The High Court of Uganda had occasion to address environmental harm as a breach of the right to privacy and the home in *Dr. Bwogi Richard Kanyerezi vs The Management Committee Rubaga Girls School (Uganda High Court Civil Appeal 3/96, unreported)* where the plaintiff complained that the school's toilets emitted odiferous gases that reached his home thereby unreasonably interfering with and diminishing his ordinary use and enjoyment of his home. Despite the benefit that the school had to the society at large, the court ordered the defendants to cease using the toilets. This case was argued and decided on the basis of the traditional common law tort of nuisance, it nevertheless still illustrates the use of privacy and home rights to protect the environment against such nuisances, that often include recreational noise pollution from entertainment joints.

Apart from the neighbouring Uganda, Kenyan and Tanzanian courts have also had to grapple with what the right to life really means in the context of the environment. The issue has been whether the scope of the right to life be expanded to include a right to the means essential for supporting life. Tanzania was the first African nation whose courts addressed the scope of the constitutional right to life in the context of environmental quality and protection. In the case of *Joseph D. Kessy vs Dar es Salaam City Council (Tanzanian High Court Civil Case No. 29/88- UR)*, the residents of Tabata, an estate in Dar es Salaam, sought an injunctory order stopping the City Council of Dar es Salaam from continuing to dispose waste in the area. The

⁶⁰ Kistenkas F. H. (2000). 'European and Domestic Subsidiarity. An Althusian Conceptionalist View' in *Tilburg Law Review*. 8 (3): 247 - 254

City Council curiously cross-petitioned for an order allowing its continuation with the said activities. The Tanzanian Court of Appeals denied the City Council its requested extension by holding that its actions were hazardous to the health and lives of the applicants and therefore violated the constitutional right to life. Justice Lugakingira specifically stated as follows:

I have never heard it anywhere before for a public authority, or even an individual to go to court and confidently seek for permission to pollute the environment and endanger people's lives, regardless of their number. Such wonders appear to be peculiarly Tanzanian, but I regret to say that it is not given to any court to grant such a prayer. Article 14 of our constitution provides that every person has a right to live and to protection of his life by the society. It is therefore, a contradiction in terms and a denial of this basic right deliberately to expose anybody's life to danger or, what is eminently monstrous, to enlist the assistance of the court in this infringement⁶¹.

Almost ten years later, the Kenyan High Court arrived at a similar verdict with regard to the constitutional right to life. In the case of *Peter K. Waweru vrs Republic*, (*supra*) where the applicants, property owners in the small town of Kiserian, had been charged with polluting a public water source pursuant to provisions of the Public Health Act⁶² at the lower court. At the high court, the applicants filed a constitutional reference against the charge, and the court agreed with them that they had been charged in a discriminatory manner. The High Court however went on *sua sponte* to discuss in the *obiter dictum* consequences of the applicants' action on sustainable development and environmental management. The Court held that the constitutional right to life as enshrined in section 71 of the Kenyan Constitution (repealed Constitution) includes the right to a clean and healthy environment. The court stated as follows:

Under section 71 of the Constitution all persons are entitled to the right to life – In our view the right to life is not just a matter of keeping body and soul together because in this modern age that right could be threatened by many things including the environment...It is quite evident from perusing the most important international instruments on the environment that the word life and the environment are inseparable and the word life means much more than keeping body alive⁶³.

2.5 Constitutional Implications on Recreational Noise Management in Kenya

2.5.1 Introduction

One of the functions of constitutions is to reinstate and guarantee basic human rights and to provide the fundamental guiding principles for the country. By entrenching environmental rights and principles in the constitution, Kenya reaffirmed her unwavering commitment to

⁶¹ *Joseph D. Kessy vrs Dar es Salaam City Council* (Tanzanian High Court Civil Case No. 29/88- UR)

⁶² Cap. 242, Laws of Kenya

⁶³ *Peter K. Waweru vrs Republic*, (2006) 1 KLR (E&L) 677 at 691

sound environmental management and conservation practices⁶⁴. The focus of this section is an analysis of provisions made in the latest constitution for environmental management and their implications on recreational noise pollution control.

2.5.2 Rationale for Environmental Provisions within the Constitution

The provision for legal and institutional mechanisms is one of the basic conceptual tools for environmental management⁶⁵. Environment supports life. It therefore requires firm and stable protection that can only be interfered with, where necessary, by a special and overwhelming majority. This protection is provided by the constitution, which is the highest legal order in any country or society⁶⁶. Constitutional provisions for environmental management are not new, and already exist in other countries⁶⁷. Environmental provisions were contained, though superficially, in the former constitution. The current constitution's explicit provisions on the environment is the deepest detailed presentation of not only the obligations in respect of specific natural resources, but also the human aspects of environmental management.

2.5.3 The Kenya Constitution, 2010

A new constitution was promulgated on 27 August 2010, and became the supreme legislation of Kenya⁶⁸. It contains eighteen chapters and six schedules. The chapters make provisions on the sovereignty of the people and supremacy of the constitution, the general matters to do with the republic, citizenship, a detailed bill of rights, land and environment, leadership and integrity, representation of the people, the legislature, executive and the judiciary, devolved government, public finance, the public service, national security, commissions and independent offices, amendment of the constitution, general provisions, and transitional and consequential provisions. The six schedules present information on the following: counties, national symbols, national oaths and affirmations, distribution of functions between national and county governments; legislation to be enacted by Parliament, and transitional and consequential provisions⁶⁹. Environmental provisions are included in Chapter Four, under 'Rights and

⁶⁴ Ministry of Environment and Natural Resources (2000). *Kenya: Land of Splendor* 1. Nairobi: Ministry of Environment and Natural Resources.

⁶⁵ C. O. Okidi (2003). *Environmental Rights and Duties in the Context of Management of Natural Resources*. Nairobi: Constitution of Kenya Review Commission.

⁶⁶ *Ibid*

⁶⁷ *Ibid*

⁶⁸ Government of Kenya (2010). *The Constitution of Kenya, 2010*. Nairobi: The Government Printer.

⁶⁹ *Ibid*

Fundamental Freedoms’, Chapter Five, under ‘Environment and Natural Resources’, and Chapter Ten, under ‘Judicial Authority and Legal System’. The Fourth Schedule also includes environmental provisions under ‘Distribution of functions between National and County Governments’ and the Fifth Schedule titled ‘Legislation to be enacted by Parliament’⁷⁰.

Article 42 provides for the environmental rights and freedoms as follows:

Every person has the right to a clean and healthy environment, which includes the right –

(a) To have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and

(b) To have obligations relating to the environment fulfilled under Article 70⁷¹.

As already reviewed herein, the right to a clean and healthy environment was merely implied in the previous (1964) constitution under the ‘right to life’ (Section 71) since the constitution did not contain explicit environmental provisions⁷². The notable innovation that came out of the 2010 constitution is first and foremost, the provision on the right to a clean and healthy environment, as well as further elaborating provisions on what exactly is meant when conferring this right. Whereas this right was previously acknowledged in the EMCA of 1999, the anchoring of this right in the constitution has elevated it to a higher status, since it is no longer a mere legal right, but a constitutional one. This has only been achieved by virtue of the current 2010 constitution.

The right is explicitly elaborated in Chapter Five, titled ‘Land and Environment’ and consisting of two parts, respectively applying to land and environment and natural resources. The later part of the chapter which is subtitled ‘Environment and Natural Resources’, consists of four articles detailing obligations, enforcement, agreements and legislation relating to the environment⁷³, and is the main focus of this section.

⁷⁰ *Ibid*

⁷¹ *Ibid*

⁷² Kameri-Mbote, P. (2005). *Towards Greater Access to Justice in Environmental Disputes in Kenya: Opportunities for Intervention*. Geneva: International Environmental Law Research Centre, Working Paper 2005-1, 2005; Mumma A. (2003). *Constitutional Issues relating to Natural Resources*. Nairobi: Constitution of Kenya Review Commission and Wamukoya G. and Situma F. D. P. (2003). *Environmental Management in Kenya: A Guide to the Environmental Management and Coordination Act*. Nairobi: Centre for Environmental Legal Research and Education (CREEL).

⁷³ *Ibid*, n.68

2.5.4 Obligations in Respect of the Environment

These obligations are contained in Article 69 of the Constitution and provides guidance to the state on its role in sustainable management of the environment in Kenya. Article 69 (a) of the constitution acknowledges this role of the state by stating '*the State shall ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits*'⁷⁴. Kenya's long term national planning strategy, 'Vision 2030', also expresses the state's understanding of this role when it emphasizes the need to achieve economic growth in a sustainable manner⁷⁵

The Constitution further provides for public participation in environmental management. Regrettably, public participation has in some instances been viewed as a mere administrative formality⁷⁶, to the extent that environmental degradation in sub-Saharan Africa has many times been attributed to lack of access to information and public participation⁷⁷. Nevertheless, it is still expected that the governments will work with its agencies (and in this case the ministry) to protect the environment from degradation.

Article 69 (d) of the 2010 constitution, demonstrates our commitment to public participation by providing that '*The State shall encourage public participation in the management, protection and conservation of the environment*'⁷⁸. These provisions further reiterate the responsibility on the part of the state to ensure that public participation serves the purposes for which it is intended. Article 69 (f) of the 2010 constitution, recognizes the significant role played by various environmental assessment tools in public participation and environmental management by providing that the State shall establish systems of EIA, EA and monitoring of the environment⁷⁹, encourages the continued establishment of systems to further support EIA and environmental audit and monitoring. EIA is one of the most well-known tools for environmental assessment⁸⁰.

⁷⁴ *Ibid*

⁷⁵ Republic of Kenya (2007). *Kenya Vision 2030* 1 Nairobi: Government Printer.

⁷⁶ *Ibid*, n.68

⁷⁷ *Ibid*, n.44

⁷⁸ *Ibid*, n.68

⁷⁹ *Ibid*

⁸⁰ Benny (2007). *Environmental Studies*. New Delhi: McGraw Hill Company, 2nd ed.; Jay, S et al. (2007). 'Environmental Impact Assessment: Retrospect and Prospect' 27 *Environmental Impact Assessment Review* 287, 298; Haughton, G. (1999). 'Information and Participation within Environmental Management' 11 *Environment and Urbanization* 51, 55 and Kelcey, J. G. (1986). 'Environmental Impact Assessments – Their Development and Application' 19/1 *Long Range Planning* 67.

The second part of Article 69 of the 2010 constitution enjoins every person to cooperate with state organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.⁸¹ This can be viewed as confirmation by the State of its commitment to sustainable environmental management, and the expectation of ready support and participation from the citizens in the performance of its obligation as regards the conservation and protection of the environment.

2.5.5 Enforcement of Environmental Rights

Article 70 of the 2010 constitution consists of three parts, all dealing with the enforcement of environmental rights. The first part provides as follows:

If a person alleges that a right to a clean and healthy environment recognized and protected under Article 42 has been or is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter⁸².

The second part of the article on the other hand states:

On application under clause (1), the court may make any order, or give any directions, it considers appropriate –
(a) To prevent, stop or discontinue any act or omission that is harmful to the environment;
(b) To compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or
(c) To provide compensation for any victim of a violation of the right to a clean and healthy environment⁸³.

The third part of Article 70 has been hailed as one of the best innovations of the 2010 constitution. It states that there is no need for anyone complaining that his right has been violated under the article to prove that any person has incurred loss or suffered injury⁸⁴. The citizen's ability to approach a court for redress on environmental issues, whether affected directly or indirectly, has also been hailed as one of the great innovations of EMCA⁸⁵. Notably, the establishment of the Public Complaints Committee in Section 31 and the National Environment Tribunal in Section 125 to address environmental grievances has been instrumental in realizing this. These two institutions were established to provide the link between environmental management and the judiciary. The existence of these institutions will

⁸¹ *Ibid*

⁸² *Ibid*

⁸³ *Ibid*

⁸⁴ *Ibid*

⁸⁵ Kamau, E. C. (2005). 'Environmental Law and Self-Management by Industries in Kenya' 17 *Journal of Environmental Law* 229, 240

facilitate enforcement of the new constitution as well as provide the necessary foundation for the enforcement of additional environmental legislations and policies including those that are relevant to recreational noise pollution control.

2.6 Stakeholder Participation in Recreational Noise Pollution Control

2.6.1 The Concept of Public Participation in Environmental Decision Making in Kenya

Omondi and Wanjiku defines public participation as the process by which an organisation consults with interested or affected individuals, organisations and governments entities before making a decision⁸⁶. 'Public' are the general population who are keen, for or are probably going, to be influenced, by a decision made, either positively or negatively⁸⁷. Public participation is sometimes interchangeably used with the concept or practice of stakeholder engagement and/or popular participation⁸⁸. Civil society organizations, who on their own, should not be confused with the 'public' as defined herein, have since a long time assumed a huge role in promoting a culture of participation across the world⁸⁹. According to Okidi, management of the environment should involve prominent community participation and that the legal empowerment of the people and open involvement is an important element of good environmental law and practice⁹⁰. He goes on to illustrate his point thus:

...[E]ffective soil and water conservation especially in the cultivated areas will be assured only if there is an involvement of those who cultivate the land and who stand to enjoy the benefits or suffer adverse consequences. In this connection, one is easily reminded of the grassroots protest by the half-a-million inhabitants of the 350-square-miles of the Niger delta, called Ogoniland, who complained that the national Government ignored their complaints against the effect of environmental degradation...⁹¹

According to the International Association for Public Participation, public participation is a two-way communication and collaborative problem solving with the goal of achieving better and more acceptable decisions⁹². Omondi and Wanjiku argue that public participation is a

⁸⁶ Omondi, J. W. & Wanjiku, F. (2015). 'Public Participation in Counties' in *the Bench Bulletin* Issue 30 July - September 2015, Kenya Law: Nairobi

⁸⁷ *Ibid*

⁸⁸ *Ibid*

⁸⁹ *Ibid*

⁹⁰ *Ibid*, n.65

⁹¹ *Ibid*

⁹² International Association for Public Participation (2007). *IAP2 Core Values*. Available: <http://www.iap2.org/> accessed on 29.09.2016

double edged principle of governance in that it is a political principle or practice, on the one hand, and may also be recognised as a right, such as the right to public participation that has accrued to the citizenry in Kenya, and has therefore become a central principle of governance and public policy making⁹³.

Several arguments have emerged in favour of a more participatory approach which stress that public participation is an essential element in environmental governance that contributes to better decision making. According to Pring and Noe, environmental issues cannot be resolved by governments alone⁹⁴. By involving people who are at the root of both causes and solutions, in environmental dialogue, transparency and accountability are bound to be achieved⁹⁵. Arguably, dynamic public participation in environmental governance could expand the dedication with which the stakeholders and other partners comply with and enforce the environmental laws and policies. Additionally, others contend that the right to participate in environmental decision-making is a procedural right which may be viewed as a major aspect of the essential right to environmental protection⁹⁶. From this moral point of view, environmental governance is expected to work within a system that embraces the constitutional principle of fairness and equality which essentially calls for public engagement⁹⁷. Further, with regards to significant scientific uncertainties associated with most environmental issues, public participation helps to counter such uncertainties and bridges the gap between scientifically-defined environmental problems and the experiences of stakeholders⁹⁸.

Stakeholder engagement, large-scale consultations, focus group research, online exchange discussions, or deliberative citizens' meetings are some of the public participation mechanisms, which although different in characteristics, often share common features⁹⁹. The civil societies movements and organisations have also adopted various avenues such as public hearings and

⁹³ *Ibid*, n.86

⁹⁴ Pring, G. & Noe, S. Y. (2002). 'The Emerging International Law of Public Participation Affecting Global Mining, Energy and Resource Development' in Zillman, D. M., Lucas, A. and Pring, G. (eds) *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources*. Oxford: Oxford University Press

⁹⁵ Bulkeley, H. & Mol, P. J. (2003). 'Participation and Environmental Governance: Consensus, Ambivalence and Debat', *Environmental Values* 12 (2): 143 - 54

⁹⁶ Du Plessis, A. (2008). 'Public Participation, Good Environmental Governance and Fulfillment of Environmental Rights', *Potchefstroom Electronic Law Journal*, 11(2): 170 - 201. (4)

⁹⁷ *Ibid*

⁹⁸ Fischer, F. (2000). *Citizens, Experts and the Environment*. Durham, NC: Duke University Press.

⁹⁹ Rowe, G. & Frewer, J. (2005). A Typology of Public Engagement Mechanisms, *Science, Technology, & Human Values*, 30 (2), 251-290.

citizen action groups, among others¹⁰⁰. Through these mechanisms, the civil societies regularly initiate the formation of watchdog committees and citizen advisory groups to facilitate their activities¹⁰¹. Other avenues provided for by the law is the citizen's fora which are provided for in section 22 of Urban Areas and Cities Act, No. 13 of 2011¹⁰².

For public participation to be active, Omondi and Wanjiku propose that the process must be transparent and therefore available to all citizen, without discrimination, apolitical, non-partisan, impartial and focused. There should also be adequate notice of the venue of the place, not less than two weeks before the actual consultation and time dedicated for public response, in the form of feedback and questions, must also be set aside¹⁰³.

2.6.2 The Legal Regime of Public Participation In Kenya

As already reviewed hereinabove, the Kenyan Constitution now recognizes public participation, a political concept, as a right¹⁰⁴. Article 10(2)(a) of the Kenyan Constitution provides that the national values and principles of governance include participation of the people. Others co-related values and principles provided for therein include patriotism, national solidarity, sharing, and devolution¹⁰⁵. Noise pollution control function is a devolved public service performed by the county governments and by virtue of Article 232(2)(a) of the Constitution, is bound by the values and principles of public service which apply to public service in all state organs in both levels of government. Article 232(1) provides that the national values and principles of public service include, involvement of the public in the process of policy making¹⁰⁶, openness and also timely provision of accurate information to the people and on time¹⁰⁷. Article 232(2)(a) states that qualities and standards of open administration work to open administration in all countries organs in both dimensions of the government. In *Doctors for Life International vs. Speaker of the National Assembly and Others (CCT 12/05) 2006 ZACC II*, it was held:

¹⁰⁰*Ibid*, n.3

¹⁰¹*Ibid*

¹⁰²Government of Kenya (2011). *Urban Areas and Cities Act. Chapter 275*. NCLR: Nairobi. Available www.klr.org Accessed on 29.09.2016

¹⁰³*Ibid*, n.109

¹⁰⁴ World Bank (2014). *Delivering Primary Health Services in Devolved Health Systems of Kenya: Challenges and Opportunities*. World Bank Group: Washington D. C.

¹⁰⁵*Ibid*, n.68

¹⁰⁶ *Ibid*, Article 232(1)(d)

¹⁰⁷ *Ibid*, Article 232(1)(f)

The right to political participation is a fundamental human right, which is set out in a number of international and regional human rights instruments. In most of these instruments, the right consists of at least two elements; a general right to take part in the conduct of public affairs; and a more specific right to vote and/or to be elected....Significantly, the ICCPR guarantees not only the “right” but also the “opportunity” to take part in the conduct of public affairs, This imposes an obligation on states to take positive steps to ensure that their citizens have an opportunity to exercise their right to political participation....The right to political participation includes but is not limited to the right to vote in an election. That right, which is specified in Article 25(b) of the ICCPR, represents one institutionalization of the right to take part in the conduct of public affairs. The broader right, which is provided for in Article 25(a), envisages forms of political participation which are not limited to participation in the electoral process. It is now generally accepted that modes of participation may include not only indirect participation through elected representatives but also forms of direct participation...

Since its a fundamental human right, where the right to public participation is required, it must be adhered to the later and ought not to be abrogated simply because there is in place some form of delegated representation such as the current situation as regards devolution of noise pollution control services to the counties.

Justice Lenaola’s decision in *Independent Policing Oversight Authority & Another vrs Attorney General & 660 Others [2014] eKLR* in which the case of *Doctors for Life International vrs Speaker of the National Assembly and Others CCT 12 of 2005* was quoted with approval held that:

*The phrase “facilitate public involvement” is a broad concept, which relates to the duty to ensure public participation in the law-making process. The key words in this phrase are “facilitate” and “involvement”. To “facilitate” means to “make easy or easier”, “promote” or “help forward”. The phrase “public involvement” is commonly used to describe the process of allowing the public to participate in the decision-making process. The dictionary definition of “involve” includes to “bring a person into a matter” while participation is defined as “(a) taking part with others (in an action or matter);...the active involvement of members of a community or organization in decisions which affect them”. According to their plain and ordinary meaning, the words public involvement or public participation refer to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process. That is the plain meaning of section 72(1)(a). This construction of section 72(1)(a) is consistent with the participative nature of our democracy. As this Court held in *New Clicks*, “(t) the Constitution calls for open and transparent government, and requires public participation in the making of laws by Parliament and deliberative legislative assemblies.” The democratic government that is contemplated in the Constitution is thus a representative and participatory*

*democracy which is accountable, responsive and transparent and which makes provision for the public to participate in the law-making process...*¹⁰⁸

This therefore brings us to a secondary, but related concept to direct public participation, which is transparency. Tied to transparency is the right of access to information. Article 35 of the Kenyan Constitution provides for the right to access to information. This therefore safeguards the right for every person to obtain information on environment in custody of a public authority without much hurdles. Critically, what is considered as ‘environmental information’ is widely defined to give the right of access to information the broadest construction. As indicated by Omondi and Wanjiku, this right to know is a fundamental assurance of accountability in institutional activities¹⁰⁹.

Article 69 of Constitution also encourages the state to embrace public participation in the management, protection and conservation of the environment through systems such as EIA, environmental audit and monitoring of the environment. Other aspects of public participation may be found in Articles 48 and 50 of the Constitution which provide for the right to access to Justice and to a fair impartial hearing.

The Environment Management and Coordination Act, 1999 as amended in 2015 (EMCA) has made a unique institutional framework for environmental management and coordination that has the public play an important role. EMCA establishes various institutions, such as National Environment Council (NEC)¹¹⁰, NEMA¹¹¹, NET¹¹², National Environmental Complaints Committee¹¹³, County environment committees¹¹⁴, National Environmental Action Plan Committee (NEAPC)¹¹⁵, all of which allow the public participation and different stakeholder involvement and consultation in decision-making pertaining environmental matters.

Much has been said about the practice of Environmental Impact Assessment (EIA) as provided for in EMCA which acts as a form of environmental-majority-rules system. It draws in people in general in screening ventures, such as establishment of entertainment joints, that impact the environment. The prerequisite for publication of EIA study reports/advertisements permits

¹⁰⁸ *Independent Policing Oversight Authority & Another vrs Attorney General & 660 Others [2014] eKLR*

¹⁰⁹ *Ibid*, n.28

¹¹⁰ *Ibid*, section 4

¹¹¹ *Ibid*, section 7

¹¹² *Ibid*, section 125

¹¹³ *Ibid*, section 31

¹¹⁴ *Ibid*, section 29

¹¹⁵ *Ibid*, section 37

public participation in checking and reviewing an intended project. Section 123 of EMCA gives any individual a right to access any record sent to NEMA. The Environmental Impact Assessment/Audit Regulations, 2013, are founded under Section 147 of the EMCA. The EIA Regulations are said to apply to all policies, plans and projects, specified in Part IV, Part V and the Second schedule of EMCA. The EIA regulations require NEMA to invite the public to make oral or written remarks on the report.

EMCA buried the stringent requirements on locus standi which was a prime constraint to environmental litigation in Kenya. Under section 3(3), everyone whose right(s) to environment has been abused can petition the High Court for redress and remedy without having to establish that the action or omission complained against has caused or is likely to cause a personal damage or misfortune to the person in question. The judiciary in determining environmental matters is obliged to be guided by principles of sustainable development including public participation¹¹⁶.

One crucial aspect of public participation is decentralization, de-concentration, and devolution of decision-making and implementation powers¹¹⁷. This could be the reason why section 87 of the County Governments Act, 2012, provides that citizen cooperation in County governments, where noise pollution control services have been devolved, shall be founded on the principles of timely access to data, information, records and other information relevant or related to policy formulation and implementation; reasonable access to the process of formulating and implementing laws and policies, including approval of development projects, granting of permits and licences, protection and promotion of the interest and rights of marginalised groups and communities and their access to relevant information, right of unfettered access to justice to interested or affected persons, organisations including the right of the communities to, where necessary, appeal from, or seek review of, decisions, or seek for appropriate avenues to remedy grievances, with particular emphasis on persons and traditionally marginalised communities such as women, youth and disadvantaged communities; reasonable balance in the roles and obligations of county governments and non-state actors in decision-making processes to promote shared responsibilities and partnerships, such as joint committees, technical teams and citizen commissions, to encourage direct dialogue and concerted action on sustainable

¹¹⁶ Ojwang' J. B. J. (2007). 'The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development', *1 Kenya Law Review Journal* 19

¹¹⁷ *Ibid*, n.86

development; and the recognition and promotion of the reciprocal roles of non-state actors' participation and governmental facilitation and oversight.

There are several other areas of interest where citizens have been given an avenue to participate in all aspects of their governance, including recreational noise pollution management, at the county level. One such area is found in Section 15 of the County Government Act, 2012, which allows any individual to appeal to the county assembly to consider any matter within its authority, including enacting, amending or repealing any of its legislation. Additionally, section 88 of the County Government Act, 2012, gives the general population the right to appeal to the County government on any particular issue under the responsibility of the County government. Section 89 makes it a duty to County government authorities and organizations to react speedily to petitions and the needs of the citizens. In addition, section 90 of the County Government Act, 2012, provides for the conduct of referendum on local issues such as county legislations, petitions, planning, or investment decisions affecting the County for which a petition has been raised and duly signed by at least 25% of the registered voters where the referendum is to take place.

Thus public participation is mandatory in County planning process as demonstrated in section 113 of the County Government Act. It even goes on further to list the various avenues that the counties should make available for the general population to participate. They include information communication technology based platforms; town hall meetings; budget preparation and validation fora; notice board announcements of jobs, appointments, procurements, awards and other important announcements of public interest; development project; avenues for the participation of the people's representatives such as the members of the National Assembly and the Senate; and the establishment of citizen fora at the county and its decentralised units. Section 115(2) of the Act mandates each county assembly to develop laws and regulations giving effect to the requirement for effective citizen participation. These laws and regulations include those on noise pollution control which is a devolved function.

The Urban Areas and Cities, 2011, similarly, has provisions that take into account citizen participation. The Act at schedule 1, and pursuant to section 5, provides that such urban areas and cities ought to be able to oversee air and noise pollution control services. Section 22 of the Act provides for the citizen fora where the inhabitants of a city or urban area have the right to contribute to the decision-making process of the city or urban area by submitting written or oral

presentations or complaints to a board or town committee through the city or municipal manager or town administrator; prompt responses to their written or oral communications; be informed of decisions affecting their rights, property and reasonable expectations; demand that the proceedings of a board or committee and its committees or sub-committees be conducted impartially and have access to services which the city or municipality provides. These rights have been intricately provided for in the second schedule to the Act. Section 24 of the Act provides for the publication of important information, and access to the information by an inhabitant upon request. This information may include those relating to the policies and programmes, relating to the control, and or management of air noise pollution.

2.7 Conceptualizing Devolution as a Form of Environmental Governance

Noise pollution control is a devolved function. It was therefore necessary to review literature with regard to devolution and its impact on noise pollution control. This literature review found devolution to be a complex and extensive subject with different connotations and meaning across time and space. According to Odero, devolution is a form of decentralization in which the authority for decision making as regards to financial resource management is transferred to semi-autonomous units of local governance. To him, devolution is a political idea that means the transfer of political, administrative and legal authority, power and responsibility from the centre to lower levels¹¹⁸. Cirelli takes a similar position on transfer of powers to local levels of government, with a specific focus on the environmental sector. He observes that there has been a developing tendency towards the devolution of powers of the central government in the environmental sector to local authorities. He argues that increased devolution of power to the local level may result in adequate consultation of communities thereby promoting the efficacy of the policies, laws and regulations governing the environmental sector¹¹⁹. Whereas this work is not solely focussed on devolution or decentralization as political or administrative concepts; these two works are essential to this study to the extent that they discuss the meaning and importance of devolution and its place in the decentralization of governance; including environmental management, and in particular, noise pollution control. The gap in these pieces of literature is that they focus on legal, political and economic devolution to local government. They do not look at devolution in terms of real devolution of the management of the critical

¹¹⁸Odero S. O. (2011) 'Devolved Government', in PLO Lumumba et al., *The Constitution of Kenya: Contemporary Readings*. Law Africa Publishing (K) Ltd: Nairobi, 203.

¹¹⁹ Cirelli, M. T. (2002). 'Legal Trends in Wildlife Management' in *Legislative Study* 74, FAO, 39.

aspects such as noise pollution control or transfer of such other devolved functions to communities.

Musgrave¹²⁰ and Oates have articulated in a better manner the critical rationales for devolution¹²¹. They contend that devolution is meant to promote good governance in public service provisions, which include recreational noise pollution control, by improving the efficiency of resource allocation. Musgrave in particular argues that devolution leads to the enhancement of production efficiency in the devolved units by promoting accountability, reducing corruption and improving cost recovery¹²². They thus argue for devolution from an economic perspective, but, however, agree that sub-national governments are nearer to the people than the national government and consequently, have better understanding about the local needs. Local governments therefore respond better to these diverse preferences of the people. Moreover, devolution narrows down social diversity which makes it easier to manage the local preferences. This consequently reduces the opportunities for conflicts among different communities.

Arguments favouring devolution of resources to lower levels stress that the increased decision-making power, authority and control of resources play a pivotal role in economic and social development¹²³. They contend that devolution results in increased citizen's participation in local governance where local administrations are believed to be able to settle on political and financial decisions impacting on their economic and social well-being¹²⁴. Improved allocation of resources is the most common theoretical argument in favour of devolution¹²⁵.

There are however conflicting scholarly views regarding the desirability and likely consequences of devolution. Arguments against devolution belong to two classes, focusing either on national impacts or local impacts. At the national levels, scholars have argued that establishment of sub-national governments can lead to fiscal deficits, as the national government reluctantly absorbs local government debts¹²⁶. At the local level, rather than

¹²⁰ Musgrave, R. A. (2009). *The Theory of Public Finance: A Study in Public Economy*. New York: McGraw-Hill

¹²¹ Oates W. E. (2002). *Fiscal Federalism*. New York: Harcourt Brace Jovanovich

¹²² *Ibid*, n.120

¹²³ Cheema, Shabbir & Rondinelli, D. A. (Eds.) (2007). *Decentralizing Governance: Emerging Concepts and Practices*. Washington: Brookings Institution Press

¹²⁴ *Ibid*

¹²⁵ Azfar, C. O., Kahokonen, S., Lanyi, A., Meagher, P. & Rutherford, D. (2004). *Decentralization, Governance and Public Services: The Impact of Institutional Arrangement*. Hants: Ashgate Publishing Ltd

¹²⁶ Treisman, D. (2007). *The Architecture of Government: Rethinking Political Decentralisation*. New York: Cambridge University Press

increasing democratic accountability, it has been argued that devolution might lead to local elites who benefits disproportionately from devolution thereby creating authoritarian enclaves in the local setting¹²⁷. Ochieng argues that there is always a possibility of tension between the central and local government in attaining a reasonable balance of power in managing the environment and natural resources. That if such tension result in adversarial relationships that undermine the application of the subsidiarity principle, the net outcome is the dearth of efficacy in the decentralised unit and environment or natural resource policy¹²⁸. A similar result may result from a lack of effective coordination and synergy among various institutions responsible for environmental management. This may be due to competition and shifting of blame or blame games. Ochieng further contends that because of the entrenched command-and-control regime, the citizenry still considers the management of the environment as the preserve of the government and may find it unnecessary to offer themselves to public participation opportunities accorded to them by devolution. He thus also proposes a greater need for awareness creation about the emerging environmental issues such as noise pollution control¹²⁹.

As aforementioned, the adoption of a system of empowerment, public participation and devolution is not without risks, the sound arguments in its favour notwithstanding. If not properly designed and implemented, such a system may still end up devolving the national government bureaucracies, characterised by inefficiency devoid of accountability to the local level¹³⁰. Such systems if not well managed can encourage patronage by the elites at the local¹³¹. With the capture by the elites, the devolved units may not be that effective in performing their functions such as the control and regulation of recreational noise pollution in their rapidly emerging urban centres.

Critics further contend that a centralised government may not be able to reach the entire corner of the territory as it is disadvantaged by the lack of adequate flow of information and communication between the centre and the local population. This impacts its capacity to efficiently and effectively provide balanced distribution of noise pollution control services to

¹²⁷ Diamond, L. (2009). *Developing Democracy: Towards Consolidation*. Baltimore: John Hopkins University Press

¹²⁸Ochieng B. O. (2008). 'Institutional Arrangement for Environmental Management in Kenya' in Okidi C. O. *et al*, *Environmental Governance in Kenya: Implementing the Framework Law*. East African Educational Publishers Ltd: Nairobi

¹²⁹*Ibid*

¹³⁰ *Ibid*, n.39

¹³¹*Ibid*; Nasong'o, W. S. (2002). 'Resource Allocation and the Crisis of Political Conflict in Africa: Beyond the Inter-Ethnic Hatred Crisis', in Okoth, P. & Ogot, B. (eds.) (2002). *Conflict in Contemporary Africa*, pp. 44 - 55

all corners of its territorial jurisdiction¹³². Barkan and Chege argue that accelerated development at the rural areas can be promoted where there is a structured system of consultation and give-and-take bargain processes between the rural groups and the central state¹³³. That kind of arrangement balances the overall policy objectives of the central state with the local defined needs of the rural population. With that in mind, the state might not, therefore, be the best means to regulate, monitor and control noise pollution in the counties. This is because what amounts to noise in one region, might not be noise in other regions. The state's overall policy on noise should therefore be adjusted to be in tandem with the local needs in terms of what amounts to noise. Through this, there shall be local interest and with it, the enhanced efficacy in the management of noise pollution. There are however strong arguments that devolution has set the local governments to economic downfall as it set up regions with poor resources and weak economy in rural areas where there are few working citizens, hence decreased tax base for the local authorities to sustain their recurrent expenses. With less revenue options, the counties might not be able to function optimally, or to adopt other fiscal measures that might raise a lot of revenue at the expense of environmental conservation¹³⁴.

2.8 Practices in Noise Pollution Control in Devolved Units

Most of the studies and literature on noise pollution control practices are not local. Generally, however, action to reduce noise pollution has been accorded lesser priority than those seeking to reduce other forms of pollution such as air and water. According to the United Kingdom's Department of Environment, Food and Rural Affairs (DEFRA) and the Chartered Institute for Environmental Health, local authorities have a range of roles involving responsibility for noise control. These include investigation and abatement of statutory nuisance; land use planning; entertainment licensing; building control and residential landlord¹³⁵. There are Building Regulations, 2000, which provide for sound insulation between and reverberation in the common parts of new and converted residential buildings and acoustic conditions of school buildings¹³⁶. External agencies also take part in the control of noise pollution in the United

¹³² *Ibid*, n.6

¹³³ Barkan, J. & Chege, M. (2009). 'Decentralizing the State: District Focus and the Politics of Reallocation in Kenya'. *The Journal of Modern African Studies*, Vol. 27, No. 3, pp 437 - 453

¹³⁴ *Ibid*

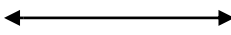
¹³⁵ DEFRA & CIEH (2005). *Neighborhood Noise Policies and Practice for Local Authorities - A Management Guide*. London: Chartered Institute of Environmental Health (CIEH)

¹³⁶ UK Government (2000). *Building Regulations 2000: Approved Document E - Resistance to the Passage of Sound* (2003 Edition). Office of the Deputy Prime Minister: London

Kingdom. These external agencies include Registered Social Landlords (Housing Associations), Environment Agency (EA), and magistrate's courts.¹³⁷

The Department of Environment (DoE) in Northern Ireland is the one in charge of planning control. The Planning Service (organization inside DoE) oversees development control and development plan functions. The Planning Service recognises noise issues as material to the consideration of planning applications and are factored in preparations of development plans. District Council Building Control Officers ensure compliance with the requirements of the Building Regulations relating to sound insulation in new and converted buildings. The Northern Ireland Housing Executive (NIHE) controls public sector housing and, as a landlord, ensures compliance with tenancy conditions¹³⁸. Environmental Health Officers still investigate noise complaints and enforce statutory noise nuisance provisions relating to NIHE dwellings¹³⁹. The police also deals with noisy activities which may constitute public order offence¹⁴⁰.

According to DEFRA and CIEH, an efficacious noise management strategy should be both proactive and receptive, see Figure 1.0 below.

Proactive Measures		Reactive Measures
Noise Impact Prevention		Remediating Existing Noise Impact
Noise Management Tools (Non-regulatory and Regulatory)		
<ul style="list-style-type: none"> ▪ Land use planning ▪ Licensing ▪ Site selection ▪ Use of topography ▪ Distance attenuation ▪ Zoning 	<ul style="list-style-type: none"> ▪ Information and education ▪ Facilitating communication 	<ul style="list-style-type: none"> ▪ Enforcement tools: abatement notices and prosecution. Injunctions, ASBOs and possession proceedings

¹³⁷ *Ibid*
¹³⁸ DEFRA & CIEH (2005). *Neighborhood Noise Policies and Practice for Local Authorities - A Management Guide*. London: Chartered Institute of Environmental Health (CIEH)
¹³⁹ *Ibid*
¹⁴⁰ *Ibid*

<ul style="list-style-type: none"> ▪ Site and building layout ▪ Building insulation and construction methods (securing prior consent for construction works) ▪ Liaison with other LA departments ▪ Relationship with external agencies, e.g., the EA (IPPC) 		<ul style="list-style-type: none"> ▪ Implementing relevant statutory controls ▪ Liaison with other LA departments ▪ Contact with external agencies ▪ Alternative dispute resolution including negotiation and mediation ▪ Complaint management
---	--	---

Figure 1.0: Noise Management Spectrum (adopted from the SWEPA¹⁴¹).

DEFRA and CIEH further argue that the advancement of successful noise regulation services requires well written policies and procedures which set out in clear, unambiguous terms how the service is to be scoped, organised and delivered¹⁴². The local authority may delegate, by formal resolution, the formulation and adoption of noise management policy to officers without need for ratification by members¹⁴³. The formal resolution shield it from unnecessary litigation on account of it being *ultra vires*¹⁴⁴. As a guide, DEFRA and CIEH proposed that the following components ought to be factored in strategy, policy and technical procedure documents for noise services: the title and commencement date of the document together with reference to any amendment; the title of the officer in charge of maintaining quality; details of the legal context in which the service operates; a description of the organisational structure, including specific posts or named officers as appropriate; details of how the service guarantees the competence of its authorised officers, including professional and technical qualifications, experience and developmental trainings, etc.; a detailed description of the scope of the service, including relevant provision for responding to service requests out of hours; a detailed service charter, including relevant performance indicators and targets, where these have been

¹⁴¹ *Ibid*

¹⁴² *Ibid*

¹⁴³ See *R vrs St Edmundsbury Borough Council, exp. Walton* [1999] TLR 5 May

¹⁴⁴ *Ibid*

developed; a practical definition of what constitutes ‘resolution’ of a complaint; an implementation and enforcement policy mirroring the national authorization concordat; a review of stakeholder issues, including equal opportunities, ethnic monitoring and client feedback; service level agreements and procedures for liaison with different local authority departments, police, the Environment Agency and other external agencies as relevant; a set of detailed, procedural direction notes outlining how the service expects to attain consistency in managing specific matters, such as: investigating a complaint, prioritization of cases, record sheets, the use of notebooks etc. - written evidence, the taking of witness statements, the utilization of alternative dispute resolution (ADR), checklist for assessing correct service of noise notice, service of abatement notices, appeals against abatement notices, defences in proceedings for breach of abatement notices, etc.¹⁴⁵. These procedures may be incorporated into the service's quality management system. It is further recommended that key basic components of the strategy for example policy and enforcement procedures, are subjected to scrutiny and approval by elected members and that the strategy is formally adopted by the local authority so as to ensure corporate status and commitment¹⁴⁶.

Examples of inventive and imaginative pro-active local authority initiatives include; dedicated web sites detailing a range of information including descriptions of the scope of service, how to make a complaint, specific topics, for example, recreational noise from recreational joints and publicizing successful prosecutions or convictions etc., increasing awareness of noise issues by participating in Noise Awareness Weeks, improved advertisement and promotion of noise services with a view to increasing uptake and drafting of guidelines on noise for developers and licences to increase the efficacy of the Town Planning, permitting and licensing regimes for prevention of noise problems¹⁴⁷.

For a county government to discharge its statutory duties, base standard of service ought to be resourced, checked, monitored, attained and recorded. Service standards relevant to those duties and local policies ought to be set up at least for the various purposes such as response policy including target response times, provision of technically competent enforcement officers, administrative support at all stages of the complaint, complaint recording and priority criteria (screening standards), internal and external communications, partnership with other local

¹⁴⁵CIEH (2005). *Neighborhood Noise Policies and Practice for Local Authorities - A Management Guide*. London: Chartered Institute of Environmental Health (CIEH)

¹⁴⁶ *Ibid*

¹⁴⁷ *Ibid*

authority service departments, linkages and liaison with police and other external or national agencies, health, safety and security of officers, maintenance, servicing and regular tuning of measurement and recording instruments, individual case and service overall service evaluation and agency arrangements with other authorities. The standards must provide for specific and measurable outputs¹⁴⁸.

2.9 The Role of the Judiciary and other Law Enforcers

2.9.1 Conceptualising Enforcement

According to Angwenyi, the term 'enforcement' relates to those set of actions that government or other designated persons or entities take to achieve compliance to certain requirements so as to correct or prevent situations that are hazardous to the environment or public health¹⁴⁹. She goes on to propose three steps in enforcement. The first one being the setting up of the laws, next step is to ensure compliance, and finally enforcement. She argues that since the legal requirements shall not achieve the desired results automatically, there is need for a strict compliance once the laws are issued. To promote and enhance compliance, there is need for much efforts be put in place to encourage and compel behavioural change - hence the need for enforcement¹⁵⁰. She went further to suggest enforcement actions to include one or a combination of inspection with the aim of assessing the compliance level of the regulated entity, negotiations with the violators or facility managers so as to come up with a mutually agreeable methods of attaining compliance, programmes to sensitise the regulated community on the standards required to be met by them, taking legal action where necessary to compel compliance and compliance promotion among the regulated community through educational programmes, technical assistance and incentives among others¹⁵¹.

She suggests various reasons for non-compliance to include lack of responsibility for management of environment, failure of institutional linkages for management of the environment, lack of enforcement capacity at all levels, violation of environment management requirements during holidays or odd hours, decentralization of management and enforcement responsibility to relevant lead agencies, county authorities and resource users, lack of harmonization of urban planning, large scale agricultural developments and land-use in general

¹⁴⁸*Ibid*

¹⁴⁹*Ibid*, n.29

¹⁵⁰*Ibid*

¹⁵¹*Ibid*

with modern development and conservation goals and poverty and natural resource use relationship¹⁵². Whereas she applauds the decentralization of the enforcement machineries to local levels, she criticizes the local authorities for not translating the authority vested under them for the environment management into meaningful action as far as natural resources and environmental management are concerned¹⁵³. Angwenyi further suggests that there are required actions to enhance enforcement capacity such as the prosecution of violators with severe penalties given out, building of enforcement capacity at the county, sub-county and community levels, publicization of examples of success stories, operationalization of other enforcement actions such as industries to fulfil the requirement for self-monitoring and self-reporting and submission of annual monitoring reports to NEMA, enforcement of the ‘polluter pays principle’ and court action against violators of environmental management requirements, which she notes, is still very limited in scope¹⁵⁴.

2.9.2 Towards a Reformed Judiciary

As has been succinctly stated by the Hon. Justice (Prof.) Jackton B. Ojwang¹⁵⁵:

What is special as regards the Judiciary as the bearer of the people’s mandate is that it is the primary and ultimate arbiter, when the operations of the several public bodies run into conflict; it is the dominant interpreter not only of the totality of the Constitution, but also of all other laws applying in the land... Notable as a central theme of the Constitution constantly falling within the judicial mandate is its longest chapter, on the Bill of Rights. The Bill of Rights indeed, is the main bond in the Constitution that creates the integrality of the judicial function and the processes of governance.

The people of Kenya aspired for an independent, efficient and impartial Judiciary as demonstrated in the transitional provision in section 23 of the Sixth Schedule of the Constitution which provides for the vetting of all judges and magistrates who were in office prior to the effective date of the Constitution, 27th August, 2010, with the main view of determining their suitability to continue to serve as judicial officers. Pursuant to the constitutional provisions, The *Vetting of Judges and Magistrates Act, 2011* was passed by Parliament and it established the Judges and Magistrates Vetting Board which vetted all the officers, recommending some of them

¹⁵²*Ibid*

¹⁵³*Ibid*

¹⁵⁴*Ibid*

¹⁵⁵ Ojwang, J. B. (2013). *Ascendant Judiciary in East Africa: Reconfiguring the Balance of Power in a democratizing Constitutional Order*. Nairobi: Strathmore University Press, p. 26.

for removal. Other officers were subsequently appointed under the new Constitution by the reconstituted and rejuvenated Judicial Service Commission in accordance with the new Constitution. To its credit, the ‘reforming’ Judiciary has presided over a number of cases touching on diverse areas such as human rights, environment and land. In addition, the new Judiciary has exhibited a fresh attitude towards the hitherto stringent requirement for *locus standi* in institution of PIL cases. This attitude shift is exemplified by the increasing involvement of the Law Society of Kenya (LSK) in public interest litigation (PIL) and other public spirited persons such as Okiya Omtatah Okoiti¹⁵⁶, Aluoch Polo Aluochier and Charles Omanga¹⁵⁷.

2.9.3 The Emerging Environmental Jurisprudence: A Critical Review of Cases

2.9.3.1 The Issue of *Locus Standi*: Kenyan Courts have demonstrated impressive boldness since the coming into force of the 2010 Constitution such that organizations and individuals who in the past would have been shut out as busy bodies as was the case in *Maathai v Kenya Times Media Trust Ltd*¹⁵⁸ and *Law Society of Kenya v Commissioner of Lands & 2 others*¹⁵⁹, are currently given favourable standing, thus giving the Latin maxim of *action popularis* its place of pride. As already seen herein, the 2010 Constitution has generous provisions on legal standing, allowing a broad range of individuals and groups to enforce the rights in the Bill of Rights¹⁶⁰. In the case of *Albert Ruturi & 2 others vrs The Minister of Finance & Attorney General and Central Bank of Kenya* – a pre-2010 decision on *locus standi*, the Court held as follows:

If an authority which is expected to move to protect the Constitution drags its feet, any person acting in good faith may approach the Court to seek judicial intervention to ensure that the sanctity of the Constitution of Kenya is protected and not violated. We

¹⁵⁶ Wambulwa, A. (2020). ‘Make Omtatah an Honorary Member of LSK, Advocate Urges’ in *Star*, 2nd, July, 2020, Radio Africa Limited: Nairobi available the-star-co-ke

¹⁵⁷ Lumumba PLO (2014). *Judicial Innovation or Schizophrenia? A Survey of Emerging Kenyan Jurisprudence*. A Paper Presented at the Law Society of Kenya Annual Conference at Leisure Lodge Beach & Golf Resort, Mombasa, 14th August 2014

¹⁵⁸ [1989]eKLR. *In this case the Plaintiff sought to prevent the Defendant from carrying out construction of a high-rise building on Uhuru Park and alleged breaches of Government and Local Government Laws. The Plaintiff sued in her own capacity and the question before the Court was whether the Plaintiff had locus standi to file the suit. The Court ruled that she did not have locus standi.*

¹⁵⁹ In Civil Case No 464 of 2000, High Court, at Nakuru December 19, 2001 (Ombija J.), the LSK sued the Commissioner of Lands (1st Defendant), Lima Ltd (the 2nd Defendant) and Usin Gishu Land Registrar (3rd Defendant) claiming that the 1st Defendant had unlawfully allocated certain land which was held by the Government in trust for its members and the public generally. It argued that it had brought the suit on behalf of its members and the public in general. Despite the provisions of Section 3(3) of the EMCA which gives standing to anybody, the Court found that the LSK lacked individual right in the preservation of the subject matter.

¹⁶⁰ Constitution of Kenya, 2010, Article 22 (2)

*state with a firm conviction, that as a part of reasonable, fair and just procedure to uphold the Constitutional guarantees, the right of access to justice entails a liberal approach to the question of 'locus standi'.*¹⁶¹

Through this, then any person can now move the courts for the enforcement of his or her right to a noise free environment. The main issue could be the accessibility of the courts in terms of the distance covered to reach them.

2.9.3.2 Enforcement of Fundamental Rights and Freedoms: Before the promulgation of the 2010 Constitution economic, social and cultural rights were deemed to be aspirational and the courts in Kenya therefore deemed them non-justiciable thereby effectively rendering them outside of the purview of litigation. Just as the *locus standi* issue, as demonstrated by recent decisions, the current judicial attitude has changed. This is because the judiciary realises that the protection and promotion of human rights creates legal obligations on the state to ensure everyone enjoys rights. In the realm of civil and political rights this has been actively protected as opposed to economic social and cultural rights¹⁶². The protection of economic, social and cultural rights coupled with the principle of non-discrimination focusses on the most excluded, discriminated and marginalized groups in society¹⁶³. This assertion has been judicially enunciated in *John Kabui Mwai & 3 Others vrs Kenya National Examinations Council & Others*¹⁶⁴ where the High Court held that:

The inclusion of Economic, Social and Cultural rights in the Constitution is aimed at advancing the Socio-economic needs of the people of Kenya, including those who are poor, in order to uplift their human dignity. The protection of these rights is an indication of the fact that the Constitution's transformative agenda looks beyond merely guaranteeing abstract equality. There is a commitment to transform Kenya from a society based on socio-economic deprivation to one based on equal and equitable distribution of resources...

The issue of progressive realization of economic and social rights has also been dealt with in a number of cases in Kenya. In the case of *Mitu-Bell Welfare Society vrs AG & 2 others*,¹⁶⁵ Mumbi Ngugi J. stated that:

¹⁶¹ As cited in *Ms Priscilla N. Kanyua vrs Attorney General and anor* [2010] eKLR

¹⁶² Lumumba PL0 (2014). Judicial Innovation or Schizophrenia? A Survey of Emerging Kenyan Jurisprudence. A Paper Presented at the LSK Annual Conference at Leisure Lodge Beach & Golf Resort, Msa, 14th August 2014

¹⁶³ *Ibid*

¹⁶⁴ [2011] eKLR

¹⁶⁵ Nairobi Petition No. 164 of 2011 (Unreported). (See also in *the Matter of the Principle of Gender Representation in the National Assembly & the Senate, SCK Advisory Opinion No. 2 of 2012* [2013] eKLR, *Jeffer Isaak Kanu vrs Ministry of Justice, National Cohesion and Constitutional Affairs & 3 others, Nairobi Petition 556 of 2012, New Vision Kenya & 3 Others vrs IEBC & 4 Others, Nairobi H. C. Constitutional Petition No.331 of 2012*).

The argument that socio-economic rights cannot be claimed at this point, two years after the promulgation of the Constitution also ignores the fact that no provision of the Constitution is intended to wait until the state feels it is ready to meet its constitutional obligations. Article 21 and 43 require that there should be 'progressive realization' of socio-economic rights, implying that the state must begin to take steps, and I might add be seen to take steps, towards realization of these rights.... Its obligation requires that it assists the Court by showing if, and how, it is addressing or intends to address the rights of citizens to the attainment of the social economic rights, and what policies, if any, it has put in place to ensure that the rights are realized progressively, and how the petitioners in this case fit into its policies and plans.

The cases cited hereinabove, though samples, demonstrate the courts renewed attitude towards socio-economic and cultural rights which have sometimes been wished away as mere welfare rights, and which includes the right to a clean and healthy environment free of recreational noise pollution from entertainment joints, amongst other pollutants, are now recognized as justiciable.

2.9.3.3 Role of the Attorney General in Environmental Litigations: The Constitution of Kenya, 2010, at Article 156, establishes the office of the AG as the principal advisor to the Government. The AG is given the authority to represent the national government in court or in any other legal proceedings, except for criminal proceedings, to which the national government is a party. The AG is further given power by Article 156(5) of the Constitution to appear, when permitted by the court, as *amicus curiae* in any other civil proceedings including those which the government is not a party. Moreover, the Office of the Attorney General Act No. 49 of 2012 provides for the mandate of the office as follows:

- i. Advising Government Ministries, Departments, Constitutional Commissions and State Corporations on legislative and other legal matters;*
- ii. Negotiating, drafting, vetting and interpreting local and international documents, agreements and treaties for and on behalf of the Government and its agencies; and*
- iii. Performing any function as may be necessary for the effective discharge of the duties and the exercise of the powers of the Attorney-General.*

The AG thus has immense powers that impact on the efficacy of the environmental regulatory mechanisms, including advising the government and the ministries on environmental legislations and other matters of environmental laws. His role as regards the devolved governments where noise pollution control has been devolved is however not that clear. Several counties do however have county attorneys¹⁶⁶. Moreover there is now a requirement of the Office of the County Attorney Act¹⁶⁷, for each county to have a county attorney who shall perform the

¹⁶⁶ Tana River County has a county attorney in office

¹⁶⁷ No. 14 of 2020

equivalent roles of the AG to the county governments. It is thus expected that the county attorneys shall play their legal role competently towards the development of efficacious laws, policies and regulations on the control of noise pollutions in these counties.

2.9.3.4 Actio Popularis in Abstracto: An *actio popularis* was an action in Roman penal law brought by a member of the public in the interest of public order¹⁶⁸. The action exists in some modern legal systems. For example, in Spain, an *actio popularis* was accepted by Judge Garzón in June 1996 which charged that certain Argentine military officers had committed crimes of genocide and terrorism. The actions were brought by the Free Union of Lawyers, *Izquierda Unida* and the Madrid Argentine Association for Human Rights: private citizens and organizations who were not themselves the victims of the crimes in the action and who proceeded without the sanction of the public prosecuting authorities¹⁶⁹. In India, public interest litigation has been used to guarantee several human rights, including the right to health, livelihood, unpolluted environment, shelter, clean drinking water, privacy, legal aid, speedy trial, and several rights of under-trials, convicts and prisoners¹⁷⁰. In Kenya, the history of *actio popularis in abstracto* or what is locally known as Public Interest Litigation (PIL) is ultimately linked to the early days of Public Law Institute whose attempt in engaging in PIL introduced a new approach to litigation. Some of its landmark cases include the *Maathai Cases* during the hey days of the struggle for expansion of political space. The Law Society of Kenya (LSK) also attempted to engage in PIL. However, these spirited attempts were hamstrung by unfriendly laws which lent themselves to narrow interpretations¹⁷¹. With the advent of the Constitution of Kenya 2010, PIL has been enhanced. Traditionally, Courts frown upon litigation in the nature of *actio popularis in abstracto* on the ground that an interest must crystallize to justify litigation. However, with the promulgation of the Constitution 2010, a new vista has been opened and public interest litigation has received new impetus. The cases that come to mind post 2010

¹⁶⁸ Boudewijn, S. (2009). 'Cognitio and Imperial and Bureaucratic Courts', in Stanley N. Katz, *The Oxford International Encyclopedia of Legal History*. (e-reference ed.) Oxford University Press: Oxford Oxford Reference Online.), ISBN 978-0-19-533651-1

¹⁶⁹ Maria, C. M. & Fernandez, J. (1999). 'In re Pinochet. Spanish National Court, Criminal Division (Plenary Session) Case 19/97, November 4, 1998; Case 1/98, November 5, 1998' (1999) 93 (3) *The American Journal of International Law* 690 at 691

¹⁷⁰ Surya, D. (2009). 'Public Interest Litigation in India: A Critical Review' in *Civil Justice Quarterly* Vol. 28, Issue 1 at 25

¹⁷¹ *Maathai vrs Kenya Times Media Trust Ltd, supra*, and *Law Society of Kenya vrs Commissioner of Lands & 2 others, supra*

Constitution are the *Okiya Omtatah cases*¹⁷², *Charles Omanga cases*¹⁷³ and *Isaac Aluoch Oluochier cases*¹⁷⁴. For example in *Charles Omanga & 8 others vrs Attorney General & another*¹⁷⁵ which was a consolidated petition; the two petitions were consolidated because they relate to the 2nd respondent who is the Cabinet Secretary in charge of the Labour portfolio. He is a State Officer within the meaning of Article 260(k) of the Constitution. In *Petition No. 29 of 2014, Charles Omanga vrs Hon Kazungu Kambi and the Attorney General*, the petition sought the following principal orders:’- **i. An order of access to the 1st respondent’s self-declaration form. ii. An order compelling the 1st respondent to produce his university degree’**. The issue for determination in this matter was whether the petitioner was entitled to the 2nd Respondent’s self-declaration and university degree certificate under Article 35(1) of the Constitution. Article 35 provides as follows:

35. (1) Every citizen has the right of access to—
(a) information held by the State; and
(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.
(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.
(3) The State shall publish and publicise any important information affecting the nation.

The Court held that:

The petitioner’s case is that he seeks to enforce the provisions of Article 73 in respect of the Cabinet Secretary. Article 73 is part of Chapter Six of the Constitution which deals with leadership and integrity. It is not part of Chapter Four and the petitioner has not demonstrated that he requires 2nd respondent’s degree certificate to exercise or protect any of his rights or fundamental freedoms enumerated in Part 2 of Chapter Four of the Constitution. The petitioner’s petition must therefore fail.

The emerging jurisprudence is that Courts have now developed a new attitude towards public spirited persons and their cases are heard and determined on merit. This is important in environmental litigations involving public nuisances such as recreational noise pollution from entertainment joints.

¹⁷²*Okiya O. Okoiti & 3 others vrs AG & 5 others* [2014] eKLR; *Okiya Omtatah Okiiti & another vrs AG & 7 others* 28 [2013] eKLR

¹⁷³ *Charles Omanga & another vrs IEBC & another & another* [2012] eKLR

¹⁷⁴ *Isaac Aluoch Polo Aluochier vrs IEBC and 19 others* [2013]eKLR

¹⁷⁵ [2014] eKLR

2.9.4 Independence of the Judiciary

The foundation of the principle of Judicial Independence rests on the doctrine of separation of powers. The rule of law as an element of constitutionalism depends more upon how and by what procedure it is interpreted and enforced by the Judiciary as an independent arm of the Government¹⁷⁶. Constitutionalism betokens limited Government under the rule of law¹⁷⁷. This was elaborated by Chief Justice Brian Dickson of the Supreme Court of Canada when he said that: ***‘The role of the Courts as resolver of disputes, interpreter of the law and defender of the Constitution requires that they be completely separate in authority and function from all other participants in the justice system’***¹⁷⁸.

Judges and magistrates play a role in balancing competing interests at a constitutional level¹⁷⁹. In *Liyanage vrs R*¹⁸⁰ the Privy Council decided that the arrangement of the Constitution in parts among them one headed *Judicature* demonstrates an intention to separate the judicial power from the Legislature and the Executive.

In Kenya, judicial independence has constitutional underpinning in Article 160(1) of the Constitution of Kenya, 2010, which provides that: ***‘[I]n the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority’***. An independent Judiciary can dispense environmental justice and safeguard environmental rights, including the right to a clean and healthy environment free from pollutants, impartially and fairly based on the rule of law and therefore is the cornerstone of democracy. In their book, *The Constitution of Kenya, 2010: An Introductory Commentary*¹⁸¹ Prof PLO Lumumba and Dr Luis Franceschi rightly, while making a commentary on the above provisions of Article 160 of the Constitution, rightly state that:

A close interrogation of the provisions reveals a marked intention to protect the Judiciary from devices that have been used in the past to undermine the independence of the Judiciary in Kenya. There are two types of independence- institutional and

¹⁷⁶ Nwabueze B.O (1973). *Constitutionalism in the Emergent States*. Associated University Press P. 14

¹⁷⁷ Ongoya Z. E. (2008). *The Law, the Procedure and the Trends in Jurisprudence on Constitutional and Fundamental Rights Litigation in Kenya*. Kenya Law Review (2008) vol. ii (2008-2010). P 12.

¹⁷⁸ *The Queen v. Beaugard*, [1986] 2 S.C.R. 56 at para. 30 [Beaugard].

¹⁷⁹ Malleson K. (1997). ‘Judicial Training and Performance Appraisal: The Problem of Judicial Independence’. *The Modern Law Review*, Vol 60. No 5(1997) 659; See also decision in *Marbury v Madison* (1803) 1 Cranch 137

¹⁸⁰ (1967) 1 A.C. 259. See also Griffith, J. A. G. (1985). *The Politics of the Judiciary*, 3rd ed. London: Fontana Press, p.199

¹⁸¹ Lumumba & Franceschi (2014). *The Constitution of Kenya, 2010: An Introductory Commentary*. Nairobi: Strathmore University Press, p 477

decisional independence... Decisional independence is the idea that Judges should be able to decide cases solely based on the law and facts, without letting the media, politics or other concerns sway their decisions, and without fearing penalty in their careers for their decisions.

Judicial Independence must therefore be viewed from the standpoint of citizens. Their lack of confidence in the Judicial Institution and the Judicial officers can seriously affect the delivery of justice. The Chief Justice of Canada explained the importance of Judicial Independence thus:

Judicial independence is valued, because it serves important societal goals – it is a means to secure those goals. One of these goals is the maintenance of public confidence in the impartiality of the Judiciary, which is essential to the effectiveness of the Court system. Independence contributes to the perception that justice will be done in individual cases. Another social goal, served by judicial independence is the maintenance of the rule of law, one aspect of which is the constitutional principle that the exercise of all public power must find its ultimate source in a legal rule.¹⁸²

Besides independence of the judicial institution, the independence of the Judges and magistrates is not an overemphasis. Various instruments emphasise individual Judges' independence or rather impartiality as stated by the Canadian Supreme Court in the case of ***Valiente vrs The Queen***¹⁸³ that in view of the personal independence of the Judges, their decisions should be insulated from extraneous pressure.

To enhance judicial independence and authority, it behoves all citizens to respect judicial decisions. It is unfortunate, that in the recent past a trend has been emerging where Court Orders are disobeyed without consequences by public officers who in their exaggerated and jaundiced think their offices are too important to be supervised¹⁸⁴. This is because the Judiciary in Kenya exercises the judicial authority on behalf, and for the benefit, of the people of Kenya. Indeed Article 1(3)(c) of the Constitution of Kenya grants the sovereign judicial power to the people, and delegates that power to the judiciary which consists of the courts and other independent tribunal. While interpreting the law, including those on environmental management, the courts and tribunals must therefore give effect to the constitutional principles such as public participation and devolution¹⁸⁵. While recognizing the role being played by the judiciary in the enforcement of environment management laws, regulations and requirements; Angwenyi recognises that given that environmental law is still new in Kenya, the judicial officers need

¹⁸² *Re Provincial Court Judges*, [1997] 3 S.C.R. 3

¹⁸³ See (1985) 2 S.C.R. *Valiente vrs The Queen* 673, to be found at http://www.lexum.umontreal.ca/csc-scc/en/pub/1985/vol2/html/1985scr2_0673.html (Accessed 5th May 2018).

¹⁸⁴ *Ibid*, n.162

¹⁸⁵ See *Robert N. Gakuru & others vrs Governor, Kiambu County and three others, petition no. 532 of 2013*

sensitisation and education to improve their knowledge in environmental matters. He proposes sensitisation workshops and symposia on environmental matters which shall increase the officer's capacity to judicially intervene in such matters¹⁸⁶. Former Attorney-General of the Republic of Kenya, Wako, in the foreword to the book *Environmental Governance in Kenya: Implementing the Framework Law*, has however lauded the Kenyan judiciary for providing leadership in environmental law jurisprudence¹⁸⁷.

Other measures of enhancing enforcement proposed by Angwenyi includes engagement with the private sector in ways of ensuring compliance in a non-confrontational manner, and the strengthening of the civil society institutions and resident associations through institutions such as the Kenya Alliance of Residents Associations which are essential stakeholders in various ways, such as in the implementation of various environmental management initiatives and the promotion of compliance, since they act as environmental watchdogs¹⁸⁸. These institutions further promotes public participation necessary for compliance and enforcement, are involved in advocacy, training and public policy research and making¹⁸⁹.

2.10 Analytical Framework

2.10.1 Theoretical Framework

The theory underpinning this study focusses on the impact the application of law has on the social behaviour with the philosophical belief that the law shall lead to the improvement of human conditions and environment¹⁹⁰. The positive political economy theory views laws and policies as component parts of a political market framework made of interest groups with demands for particular instruments, law and policies and legislators and political leaders who, in return, deliver the necessary political backing for such mechanisms. The demands of various interest groups are aggregated, as are the supplies of support from individual legislator and political leader, such as the governor, executive committee member, member of the county assembly etc. The interest of such aggregate demand and supply, produces an equilibrium level of aggregate support for the instrument with each member simultaneously determining his or her effective support level. The effective levels of the various political leaders are then

¹⁸⁶ *Ibid*, n.29

¹⁸⁷ *Ibid*, n.39

¹⁸⁸ *Ibid*, n.29

¹⁸⁹ *Ibid*

¹⁹⁰ Llewellyn, K. (1962). *Jurisprudence*. Chicago: University of Chicago Press

combined, in an institutional context, to produce the choice policy and legal instrument¹⁹¹. This theory therefore postulates that a noise control program will be forthcoming if the benefit is sufficiently high to all stakeholders.

Applying the above theory in noise pollution control, then efficacious noise pollution control laws and policies, can best be attained when all the stakeholders, including the members of the communities, political leaders, legislators, police, judiciary and lawyers are involved right from the formulation to the implementation stages in a win-win scenario to all. Such laws and policies if well formulated through stakeholders and community participation shall achieve a higher level of compliance, enforcement, interpretation and implementation which shall contribute positively to behavioural and attitudinal changes towards recreational noise pollution control, and shall have a purposeful change impact in the community as regards the prevention and control of recreational noise pollution in our counties.

2.10.2 Conceptual Framework

As defined by Mugenda & Mugenda, this framework diagrammatically helps to show the relationship among various variables in this study¹⁹². This study is based on various legal concepts. The first concept is based on the notion that communities will have little interest in recreational noise pollution control if they are not allowed to fully participate in it. Secondly, participation is best achieved if noise pollution control is fully devolved to the community level. Thirdly, effective public and stakeholder participation is dependent on the extent of awareness of the problem of noise pollution and the need for its control amongst the members of the community and stakeholders. The overriding concept is therefore that devolution and public participation lead to the greatest levels of transfer of power of management and control to local levels.

Devolution and public participation are best utilised in the new governance concept which strongly advocates for decentralization and challenges the traditional focus on formal regulation mainly in the form of command and control as the dominant locus of change¹⁹³. Other avenues

¹⁹¹ Pettman S. (1976). *Towards a More General Theory of Regulations*. 19 J. C. ECON. 211

¹⁹² Mugenda, O & Mugenda, A. (2003). *Research Methods: Quantitative and Qualitative Approaches*. Nairobi: Acts Press

¹⁹³ Lobel, O. (2004). 'The Renew Deal: The Fall of Regulation and Rise of Governance in Contemporary Legal Thought' 89 *Minnesota Law Review* 262, 264

for public participation includes stakeholder engagement practices such as public-private partnerships, civic environmentalism and the emergence of new managerial technologies¹⁹⁴.

With these new approaches, the efficacy of noise pollution control is enhanced as civic environmentalism concepts of participatory, collaboratory and decentralisation are focused on problem solving. These lead to optimum results as the noise control policies are streamlined and implemented in such a way as to enable those mostly affected by the problem to understand their efficacy and reasonableness. The government thus restricts its role to facilitating by incentivizing and promoting self-implementation programmes and encouraging public participation.

This study, therefore, conceptualizes the efficacy of recreational noise pollution regulation and control in emerging urban centres (dependent variable) as being influenced by the extent of public participation and embracing of the new governance concepts such as civil environmentalism and devolution (independent variable). Public participation is on the other hand influenced by the extent of awareness of the problem of noise pollution within the community and the stakeholders. The extent of awareness of the problems of noise pollution is however dependant on the influence of a number of extraneous variables such as education, age, religious status, economic status, personality, government legislation on noise and societal tolerance of noise. The external variables influence and determine the dependent variable, which in this case is efficacious recreational noise pollution control and regulation, and are more likely to influence and determine the magnitude and direction of the independent variables.

The relationships between the variables herein is diagrammatically illustrated in figure 2.0 next page.

2.11 Summary of the Literature Review and the Gaps Filled in this Study

Based on a review of literature addressing noise pollution control, public participation and devolution, there are limited studies providing in-depth evaluations of the application of regulatory and economic instruments in developing countries. The few reports reviewed herein

¹⁹⁴Trubek & Trubek (2006). 'New Governance and Legal Regulation: Complementarity, Rivalry and Transformation' 13 *Columbia Journal of European Law* 1, 4

have provided some useful information on the existence of standards or other regulatory or economic instruments and have gone further to highlight the inadequacy of existing institutions

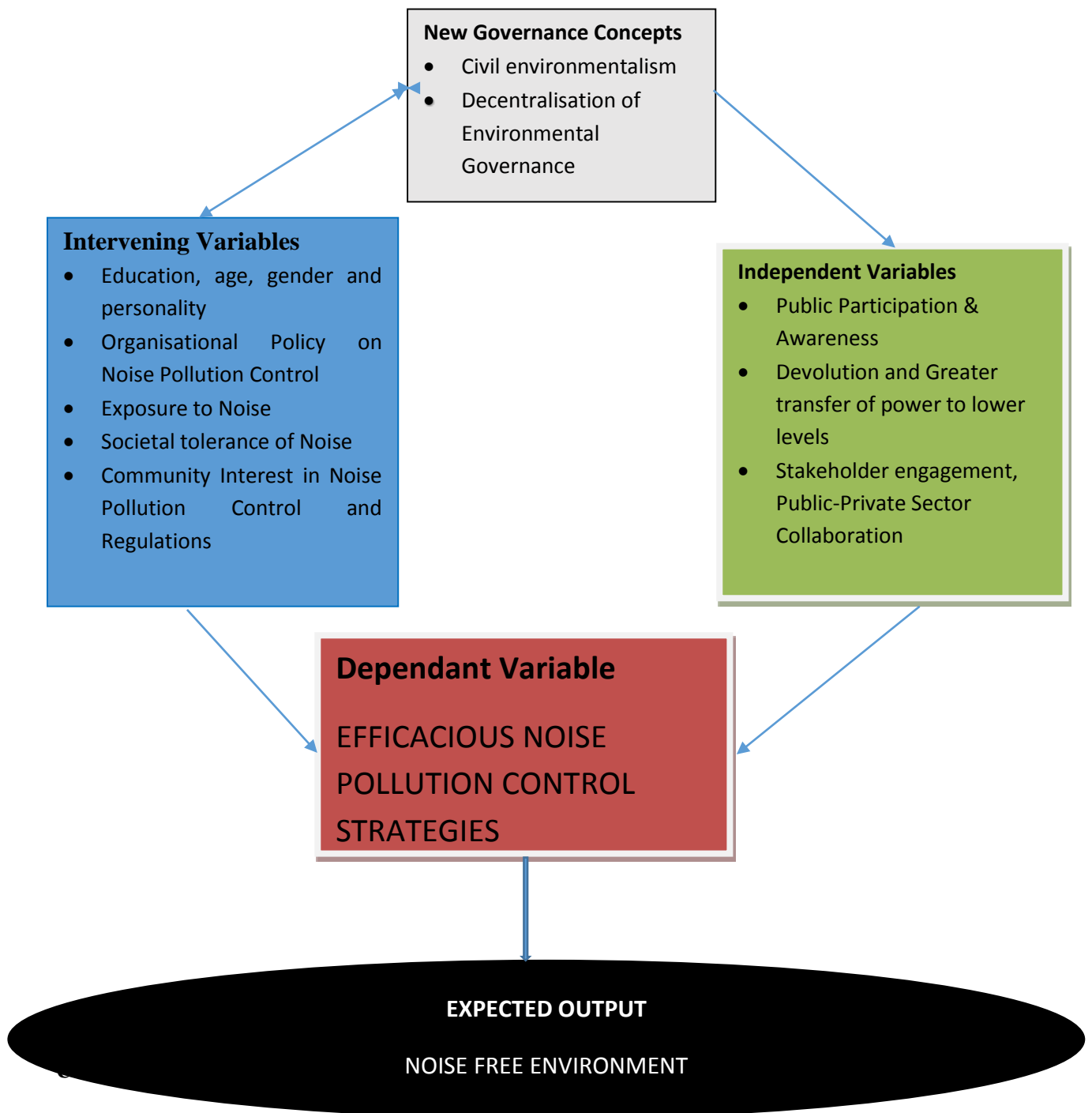


Fig. 2.0: Conceptual Framework on Assessing the Efficacy in the Regulation of Noise Pollution in Emerging Urban Areas in Kenya

¹⁹⁵Source: The Researcher

and personnel to carry out effective monitoring and enforcement undertakings. It has also been noted that only a few countries in the developed world have been cited as having successfully applied regulatory and economic instruments to noise pollution control. Even so, experience in developed countries points to a number of considerations that should be taken into account when formulating policies and instruments for environmental management for developing countries such as Kenya.

The first consideration is that economic instruments cannot be efficaciously applied without established appropriate standards and effective monitoring and enforcement capacities. Even though economic incentives have been seen by some as alternatives to the traditional command-and-control approach - which requires in most developing countries the development of laws, institutions, and monitoring and enforcement capabilities - they cannot be considered a substitute to recreational noise pollution control. Secondly, it is unlikely that economic instruments can replace the traditional regulatory mechanisms, even if effective monitoring and enforcement capacities are established. Because of the experience in advanced economies, efficient environmental management calls for the use of more than one policy instrument in environmental governance.

Previous research in devolution were conducted when Kenya was a centralised governed country. None was carried out on environmental management even when there were some elements of decentralisation through the defunct weak local authorities on matters such as public health, garbage collection, disposal of dead bodies and animals, licensing of slaughter houses, dogs etc. This suggests that there is very limited information on devolution vis-à-vis environmental management in Kenya.

The study herein looks at how the county governments have embraced these new concepts of governance, particularly public participation and sustainable development, in the promotion of efficacy in the environmental governance in Kenya, especially in recreational noise pollution control. This shall enrich the existent knowledge on Kenya's devolved governance system, which includes the devolution of the function of control and regulation of noise pollution. The findings herein bring into perspective the challenges faced by the Kenyan counties in relation to environmental governance and pollution control.

CHAPTER THREE

METHODOLOGY

3.1 Introduction

This chapter presents the methods and procedures used in data and information collection, the sampling design and how data were analysed. Generally, the methodology applied in executing this research was largely guided by the questions and corresponding research objectives.

3.2 Methods and Study Design

3.2.1 Study Design

The research adopted a qualitative research design using case study approach. Through this design, the study herein has focussed on the assessments of attitudes, opinions, views and behaviours of the community members and other key stakeholders at Hola town, representing similar rapidly growing towns in Kenyan counties, towards the regulation and control of recreational noise pollution, balanced with the researcher's insights and impressions¹. The results were, therefore, mainly qualitative. Some statistical data, mainly those that related to the first research question, were, however, quantified.

3.2.2 Study Site

The study was carried out in Hola town, the headquarters of Tana River County situated in North Coast, which is one of the fastest growing rural towns in Kenya. The town was a few years ago a remote and poorly developed town until the coming into effect of the county governments in 2013. The town has since grown with several residential buildings and hotels, with tourism and recreational services being one of its economic activities. Several clubs and entertainment joints have since been set up. It is believed that this town represents the increasingly growing numbers of towns in our counties and that is the main reason why it was chosen.

¹Kothari, C. R. (2004): *Research Methodology: Methods and Techniques*. New Delhi: New Age International Publishers

3.2.3 Target population

As guided by the research problem, the target population was mainly the members of the public, mainly residents, businesspeople and employees in the entertainment industry and the enforcement officers such as the police and the national and county governments officials dealing with environment and liquor licensing as main respondents. These officials came from NEMA, Tana River County Liquor Licensing Board and National Police Service officers from Tana River County. The targeted groups were those that were presumed to be directly involved with, or affected by, recreational noise and the extraneous factors such as age, education and economic status, ethnicity, etc. were not considered in sampling.

The researcher got a list of the licensed entertainment joints and clubs from the Liquor Licensing Board. Focus was, however, put on those notable for club entertainments based on the magnitude of physical noise emanating from therein and the location and proximity to the population.

3.2.4 Data Collection Instruments and Procedure

This study collected data from the respondents necessary to answer the research questions using qualitative data collection methods; mainly through questionnaires, general interview schedules, key informant interview guides, recreational noise survey and observation methods and stakeholder consultation and focus group discussions guides.

The researcher administered the questionnaires to the target group sampled. The questionnaires were both open and close-ended. Through the questionnaires, the researcher was able to gather confidential information from most of the respondents within a reasonably short time frame needed for the finishing of this academic study. A pre-test was carried out to ensure the effectiveness of the questionnaires, piloting them with a small representative sample. After the piloting, necessary amendments were made and the revised questions evaluated.

In this study, the interview method was through key informant interviews. The interviewers asked questions generally in a face-to-face contact or through telephone calls to the respondents. The interviewer then collected the information from the respondents in the form of the responses given during the interview. A key informant interview guide with a set of predetermined questions was used. Through this most of the respondents were subjected to the same type of questions and the reliability of the data collected has, therefore, been enhanced.

Stakeholder consultations and Focussed Group Discussions were conducted with the key stakeholders and specialised groups of respondents, for example, businesspeople, residents, employees and workers in the entertainment establishments, county enforcement officers etc. It was meant to focus attention on the specific experiences and views of the respondents and their effects on the efficacy of recreational noise pollution control and regulations.

This study also utilized qualitative data collection methods mainly from secondary data. These are information that were already available, for example in past studies². The researcher, therefore, relied on published data available in various publications of the national and county governments in Kenya and other jurisdictions, professional publications, newspaper reports, publications of various associations connected with environmental conservation and management, academic and scholarly reports in the field of environmental law, noise pollution, governance and devolution among other published information. These secondary data on devolution, noise pollution control, and citizen participation were obtained from libraries, newspapers and internet through desk research. The researcher therefore visited public libraries, institutional libraries, the government press and cyber cafes to collect the information. The researcher also relied on unpublished data such as academic articles and thesis on noise pollution, pollution control, governance and devolution. Other useful unpublished data were obtained from other relevant sources such as trade unions, businesses and industrial establishments. The researcher was meticulous in utilizing the secondary information so as to verify their reliability, suitability and adequacy with regards to the problem of noise pollution control and regulations. These data were obtained from literature in public libraries and internets through desk research; or directly from the individuals or organizations concerned.

3.2.5 Sample Size and Sampling Method

In order to get a representative sample of the various target groups described herein above, the study employed a purposive sampling method, supplemented by the snow balling technique. As recommended by Mugenda and Mugenda³, 10 percent – 30 percent of the target population was deemed adequate for the qualitative study design herein. The sample sizes for each class of the

²*Ibid*

³ Mugenda, O. & Mugenda, A. (2003). *Research Methods: Quantitative and Qualitative Approaches*. Nairobi: Acts Press

respondent in this study, however, varied given the vast discrepancy in the numbers of the target groups.

The strata, population and sample size per strata is as tabulated in Table 1.0 below:

Table 1.0 Sampling Size and Number of Strata

	Key informants	No of Focus Groups	TOTAL
Resident association members	12	1	25
Police	3	-	3
Environment officials/ NEMA	1	-	1
Business people	5	1	18
Employees and Workers	12	1	25
Liquor Licensing Board Members	2	-	2
TOTAL	35	3	74

3.2.6 Validity and Reliability of Research Instruments

‘Content authenticity’ or ‘Expert Judgment’ was used to assess the validity of the behavioural variables. Some experts in the field of research were given the data collection instruments to validate or advise on their appropriateness for the study before it is exposed to the respondents. Two experts, one of them being a university lecturer with a Doctorate of Philosophy qualification in Environmental Law, and the other one having knowledge and experience of fifteen years in legal research and two classmates were consulted to scrutinise the relevance of the instruments against the set objectives of the proposed study. Their responses were noted in terms of precision and easiness in answering the questions. The resultant suggestions were then incorporated in the final drafts of the instruments in order to improve the items and make the results more meaningful.

The study used questionnaires and schedules which were framed without ambiguity or biasness as advised by other researchers. The questions were clear, precise and based on the objectives of the research. A pilot research was conducted before the study to assess the reliability and accuracy of the tools and feasibility of the whole study.

The purpose of pre-testing was to eliminate some ambiguous uncertain items, establish if there was any problem in administering the instruments, test data collection guidelines, find out the feasibility of the study, predict and correct any logistical and procedural hurdle as regards the study and permit preliminary (dummy) data analysis. Pre-testing also assisted in testing the reliability of the instruments.

3.2.7 Data Processing, Analysis and Presentation

The data collected were taken through various closely related processes with the view to summarise and organise them in a user friendly manner which tends to effectively answer the research questions⁴. Generally, the data collected were edited, coded, classified and then analysed using the thematic analytical technique which involves data organization, data transcribing, data coding, coming up with a summary report, generating and interpreting information. The sets of transcripts were studied with a view to identify the main themes and sub-themes. Data were then coded according to the themes and categorised accordingly. Ideas and patterns were inferred from the participants' specific response. Major themes and their association were then developed. Statistical data were however analysed using descriptive and inferential statistics. The findings of the analysis were presented in narrative form, and where applicable and according to the objectives of the study, quotation, photographs, graphs and tables for statistical data.

Statistical data such as those relating to the employees or workers from the recreational facilities were however analyzed using the SPSS version 16 statistical package for comparison of the occupational noise measurements against the standards of NIOSH⁵, OSHA 2007 and *The Factories and other Places of Work (Noise Prevention and Control) Rules, 2005*, Legal Notice number 25 of 2005. Five compliance items were identified from the standards as: permissible noise levels, recreational noise prevention programme, recreational noise measurements records, awareness creation and training of workers, periodic medical examinations and hearing tests. The statistical tests results were analyzed at the 95% confidence level. The data were interpreted for frequencies, distribution percentages and comparisons on different aspects and then conclusions were drawn.

⁴ *Ibid*

⁵ NIOSH (National Institute of Occupational Safety and Health)(1998). *Criteria for a Recommended Standard. Occupational Noise Exposure, Revised Criteria*. U.S. Department of Health and Human Services: Cincinnati, Ohio

3.3 Ethical Considerations

The research did not affect any third party. The researcher sought and obtained the necessary consents and permits from Ministry of Education, County Government of Tana River, NEMA, and the University of Nairobi. The names and identities of the respondents were concealed and have not been unnecessarily revealed without permission herein.

CHAPTER FOUR

DISCUSSION OF RESULTS

4.1 Introduction

This chapter presents a detailed summary of the results of the analysis of the data gathered. The research sought to critically examine the current state of pollution control pertaining to recreational noise from entertainment joints in Hola, an emerging urban centre in Tana River County. To address this objective, the following aspects about noise pollution management and control were assessed: the knowledge and awareness about recreational noise pollution and control; the laws and regulations currently in force which govern stakeholder (public) participation in the counties, the extent of individuals engagement or involvement in the management of noise pollution from entertainment joints, the general regulatory frameworks governing the entertainment joints and county law enforcement mechanisms.

4.2 Knowledge and Awareness on Management and Control of Recreational Noise Pollution

Recreational noise pollution cannot be efficaciously managed and controlled without sufficient knowledge and the necessary awareness among all key stakeholders on the nature and concept of recreational noise pollution and its control strategies. It was therefore first important to find out the level of awareness on the management and control of recreational noise pollution amongst the key stakeholders in the rural towns. To address this objective, the following aspects about recreational noise pollution management and control were assessed: awareness of the prevalence of recreational noise pollution cases in the rural towns, frequency of, and reasons for, exposure to recreational noise and the adverse effects of recreational noise pollution. Respondents were asked whether they were aware of the prevalence of recreational noise in the rural towns.

In a nutshell, 93.1 per cent of the respondents (Figure 3) were aware of the existence of recreational noise mainly in form of loud music from entertainment joints and households, while only 6.9 per cent were not. From the interviews and discussions, the respondents confirmed the existence of recreational noise pollution within their localities. All the respondents (100 per cent) had had an encounter with recreational noise. This suggests that all the residents and

stakeholders had first-hand experience of recreational noise and that recreational noise pollution was prevalent and common in the rural towns, and the residents, business owners and employees in the entertainment industry and county, environment and other enforcement officials were aware of it. The study indicates that cases of recreational noise pollution in these rural towns were no longer a secret.

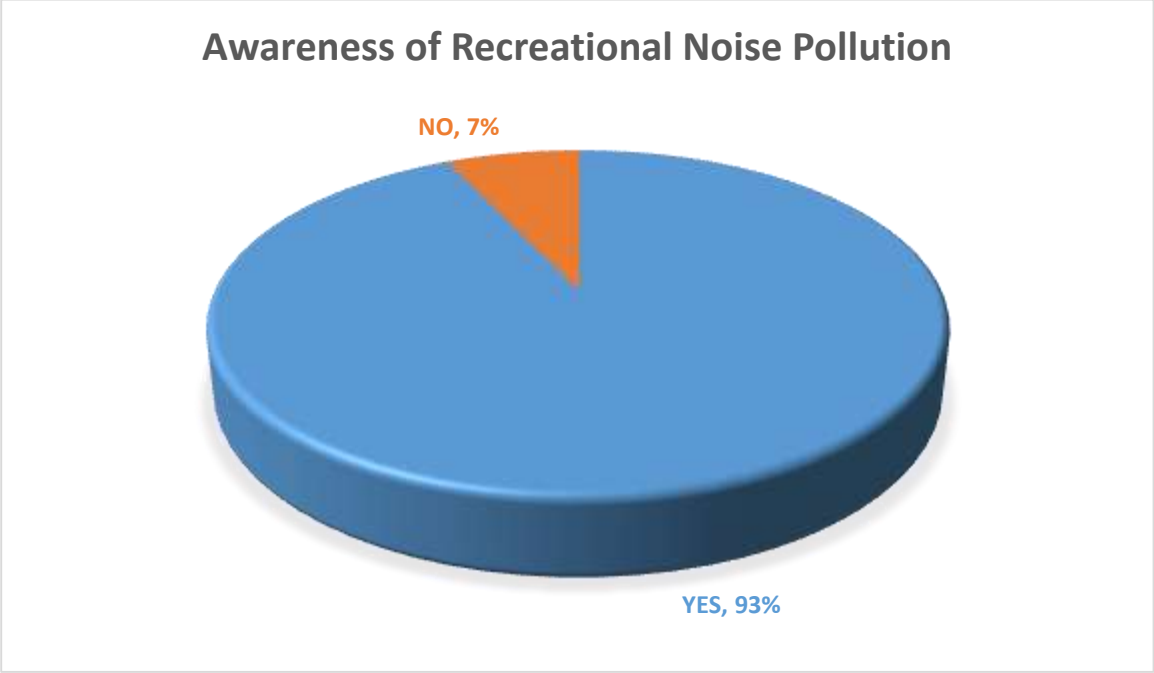


Figure 3.0: Awareness of Recreational Noise Pollution in Emerging Urban Centres in Kenya

Figure 4 shows the frequency of exposure to recreational noise pollution by the residents and various stakeholders in rural towns in Kenya. 23 per cent of the respondents admitted to be exposed to recreational noise pollution always, while 40 per cent are exposed often. 37 per cent admitted to be exposed to recreational noise rarely. This is mainly because recreational noise exposure is often proportional to the rate of alcohol use and/or abuse.

In terms of gender, more male (99%) admitted to be more exposed to recreational noise often and always, than female (1%). In terms of age and level of education, the exposure frequencies were evenly spread, without any specific pattern as illustrated in Figure 4. Gender was also a factor in the knowledge and awareness of recreational noise pollution and its dangers in the emerging urban centres in Kenya. Table 2 contains views on the gender of respondents exposed to recreational noise pollution from entertainment joints in emerging urban areas in Kenya.

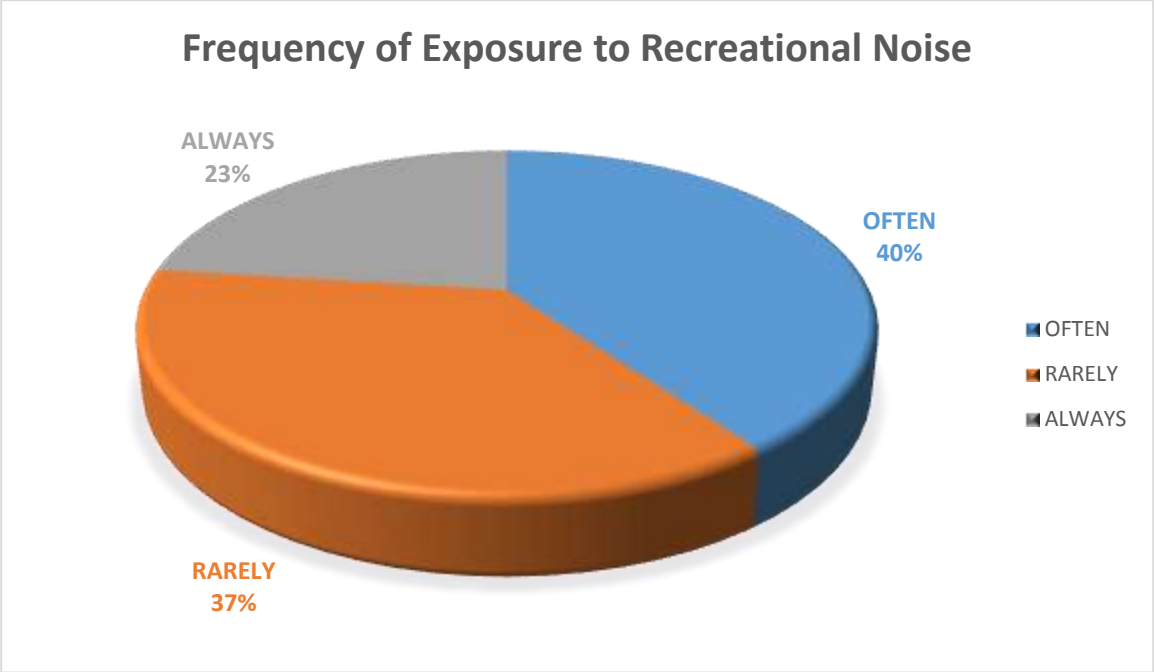


Figure 4.0: Frequency of Exposure to Recreational Noise in the Emerging Urban Centers in Kenya

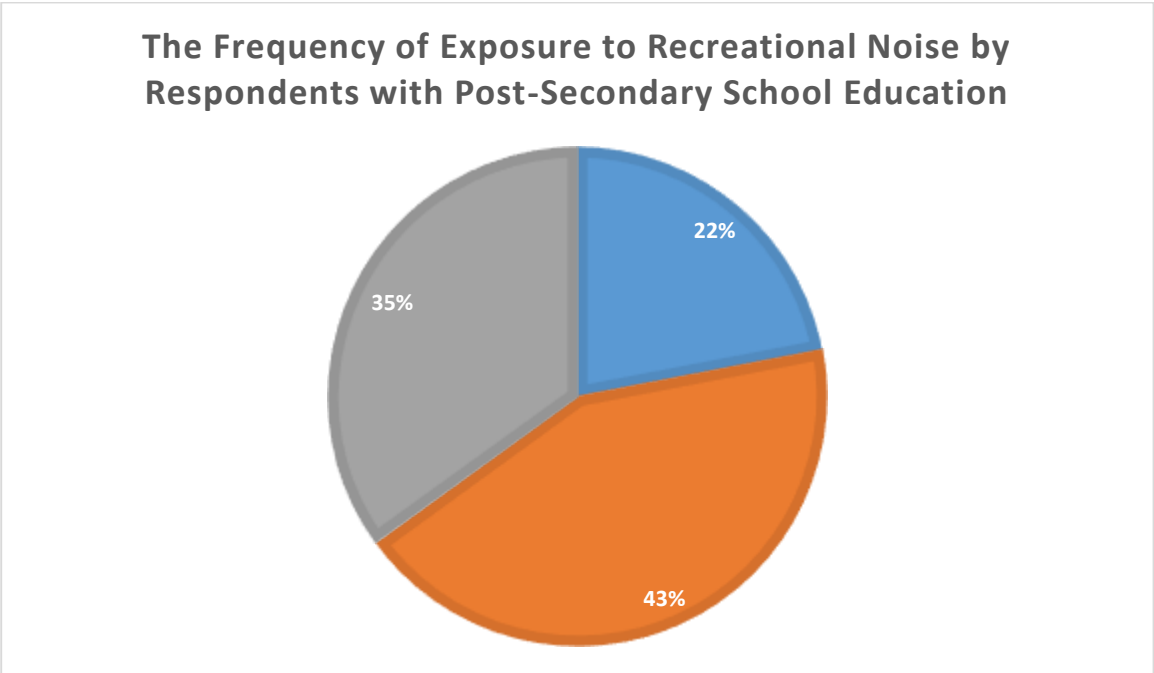


Figure 5.0: The Frequency of Exposure to Recreational Noise to the Inhabitants of Rural Towns with Post-Secondary School Education

The study sought to find out the extent of stakeholder, including the community, participation in recreational noise pollution management and control. It was however first important to find

Table 2: Gender of Victims of Recreational Noise Pollution in Emerging Urban Centres in Rural Kenya

Gender	Percentage
Male	99
Female	1
Total	100

out the extent of the respondent’s knowledge of the adverse effects of recreational noise pollution (Table 3).

Table 3: The Extent of Knowledge of the Adverse Effects of Recreational Noise Pollution

Awareness	Percentage
Yes	89.62
No	10.37
Total	100

Over 89 per cent of the residents, investors, workers and enforcements officers are aware of the adverse effects of recreational noise pollution mainly in the form of hearing incapacitation. Only 10 per cent, mainly youthful uneducated members of the society, lacked awareness. This implies that the awareness level among the residents, investors, workers in the entertainment industry and the county and enforcement officers in the rural towns of the adverse effects of recreational noise pollution is high.

4.3 State of Recreational Noise Management in the Counties

4.3.1 Introduction

This section discusses a number of noise management tools and instruments available for use at the counties together with principles for their application. The study found three basic approaches currently being used to reducing recreational noise exposure: reducing noise at source - from music machines, loud speakers etc, limiting the transmission of noise by placing barriers between the source and the people affected and reducing noise at the reception point such as through noise insulation of buildings. These are individual or stakeholder (community) initiatives that have not been given any attention by way of legislation, policy or action plan.

There is thus no policy instrument or action plan in place to provide for or guide in the implementation of these methods.

For example, there is no specific legislation prescribing emission standards for individual sources, emission standards based on noise quality criteria, land use planning, infrastructure and building standards measures, various economic instruments, standard operational procedures, research, development, education and information actions to enhance awareness.

4.3.2 Use of Regulatory Tools

In terms of regulations, this study found no county law, regulations, action plan or management procedures in most counties, including Tana-River, the focus of the study herein governing noise pollution generally. These county laws are meant to provide the framework for the exercise of the devolved functions such as the control and management of recreational and other sources of noise. They are made by county governments and are binding on local residents, and can be used to determine the regulation of noise pollution at the local level. Further decentralised units such as the sub-counties, wards, villages, members' clubs, sports clubs etc. might also formulate their by-laws that are binding on their residents or members. The doctrine or principle of *ultra vires* applies to these by-laws, and they cannot therefore contradict those made by higher level institutions.

Simply put, regulations are the supporting rules of the relevant legislation. Regulations can be made and amended at short notice, and in most cases need only the approval of the cabinet secretary or an executive officer to become binding. In certain cases, approval by the entire cabinet or executive committee may be required. The current *Noise Regulations*, for example, were formulated at the national level and apply uniform standards countrywide, hence undesirable to counties with specific socio-economic and cultural needs. For example, Hola town was found not to have any development plan. Residential houses and estates have cropped up haphazardly. Restaurants and entertainment joints have been established next to hospitals, churches and schools. Clearly, the *Noise Regulations provisions* and permits may not be applicable in Hola as they appear *ultra vires* other substantive laws that regulate the entertainment industry such as the Alcoholic Drinks Control Act.

Management procedures, on the other hand, are basically guidelines and codes of practice that guarantee consistent responses in problem solving and decision making in similar situations. Such guidelines are attached to the enabling legislations or regulations and acts as detailed explanations of the specific steps to be taken in implementing particular provisions.

The key advantages of regulatory instruments are the directness and relative certainty of outcomes due to compliance measures. For example, strong regulatory programs and other regulatory efforts have had a significant effect on the control of air pollution in many countries¹. It is however contended herein that regulatory measures alone might still not be sufficient to reduce recreational noise emissions to the desired level. This might therefore call for effective pricing or fiscal policies, sound land use planning and the provision of environmentally sound systems which if well implemented can reinforce such regulatory measures².

Regulatory instruments thus still present a lot of issues that require further investigation before their widespread introduction in the rural counties. This study found out that the most important issue confronting environmental policy makers in most rural counties with regards to recreational noise pollution control is the choice of the regulatory policy instrument and the design of the implementation mechanisms. This has led to the blatant lag in the formulation and implementation of the recreational noise control measures.

4.3.3 Use of Noise Quality Standards

For purposes of this study, it was found that a music band or disco, for example, produces approximate sound level of 115 dB³ which when slightly enhanced can reach the 140 decibels that are sufficient to cause serious damages to the human ear. These sound level measurements thus form the fulcrum on which the noise quality standards are based.

Standards for ambient air quality (quality objectives) are commonly designated according to the intended use of the noise (e.g. religious function, emergency or warning signage, advertisement etc.). Noise quality standards, or guidelines for noise quality standards, have therefore been issued in *the Noise Regulations* with the intention of defining the maximum acceptable limit of noise pollution by various pollutant sources and at different times. This

¹ Ringquist, E. J. (1993). 'Does Regulation Matter? Evaluating the Effects of State Air Pollution Control Programs'. *The Journal of Politics* 55 (4): 1022-1045.

² Faiz, Gautam, & Burki (1995). 'Air Pollution from Motor Vehicles: Issues and Options for Latin American countries'. *Science of The Total Environment* 169: 1-3: 303-310.

³ *Ibid*

strategy based on the fixed emission standard approach may be the most efficacious, at least as a starting point in many poorly developed counties, such as Tana-River, because of their often limited administrative capacities. The dangers concomitant with automatically aping or embracing noise quality standards from western industrialised countries or more developed counties must however still be emphasised. The definition of noise quality standards should therefore be determined by the level of economic and social development of a society.

This study, for example, found out that the noise/ air quality standards and emission standards set out in *the Noise Regulations* are too stringent to be met and, in most cases, to be measured. This is the reason why, as a result, the standards have generally been ignored equally by both recreational noise polluters and managers. This has been a constant factor affecting their efficacy. The county governments are thus incapable of efficaciously implementing them. Moreover, the necessary administrative capacity to enforce very high noise quality standards may be prohibitive. It is always recommended that only regulations that are enforceable are implemented. Noise quality standards applied in poor and developing counties such as Tana-River should, therefore, be adjusted to reflect the local (achievable) economic and technological level. The implication of this approach is that standards may be enhanced in tandem with the growth in economic capability to absorb higher standards. *The Noise Regulations* in force in Kenya, for example, fix maximum sound levels permissible for emission. There has however been no implementation of the standards and this study has revealed nil impact of the standards. The reason for this nil impact is that there is no implementation and enforcement mechanism coupled with significant growth in the entertainment industry. In addition, without a regular inspection procedure to ensure maintenance of the acoustical design features, the noise levels emitted continues to increase over time. For comparative purposes, some countries have had success with noise inspection especially in transportation noise where there are periodic noise inspections for in-use vehicles in the street, subjections of vehicles to on-road spotting and subsequent testing, and testing of vehicles each year thereby achieving average reductions of emission of 9 dB(A) at a relatively low cost⁴. The success in these countries should be an incentive to the local managers of the potential in noise inspections and can therefore be employed in the management of recreational noise pollution from entertainment joints in the emerging towns in our counties.

⁴OECD (1991). *Fighting Noise in the Nineteen Nineties*. OECD

4.3.4 Use of Economic Instruments

This study found most authorities to be relying primarily on regulatory measures to control noise pollution. However, application of economic instruments in noise pollution control may offer several advantages, such as providing incentives for environmentally sound behaviour, raising revenue to help finance pollution control activities and ensuring that noise/air quality objectives are achieved at the least possible (overall) cost to society. When implemented properly, economic instruments can promote cost-effective means for achieving acceptable levels of recreational noise pollution; stimulate the development of recreational noise pollution control technology and expertise in the entertainment industry; fuel the necessary flexibility in recreational noise pollution control technology and ease information flow to the governments thereby helping them determine the most feasible and appropriate level of control for each joint or firm.

The main types of economic instruments applicable in a noise pollution context include: resource pricing, noise charges, subsidies or removal of subsidies and non-compliance fees (administrative fines)⁵. Most of these economic instruments thus incorporate the polluter-pays-principle to various degrees. The research herein found no direct use of economic instruments for noise abatement in the Kenyan Counties. These instruments are not applied even in the prevention of transport noise pollution, despite studies from other jurisdictions of their appropriateness in the control of such kinds of noise pollution. The OECD, however, in its report *Fighting Noise in the 1990s* concluded that economic incentives for noise reduction have shown their effectiveness in relation to road vehicles in the few cases where they have been used and their argument for much more general use may be used to implement them in recreational noise pollution control⁶.

Noise charges have been used even less than incentives and where these have been used, mainly as part of application fees or conditions for permits, they have generally been set too low to encourage noise reduction. Their main function has thus not been to raise funds for noise control measures such as insulation of buildings, but as administrative costs of licensing noise emission.

⁵ Warford, J.J. (1994). *Environment, Health and Sustainable Development: The Role of Economic Instruments and Policies*. Discussion paper. Director General's Council on the Earth Summit Action Programme for Health and Environment, World Health Organization, Geneva.

⁶ *Ibid*, n.4

Incentives in the form of grants to purchase low noise machines and noise control materials have also not been applied.

One of the key factors for a successful implementation of economic instruments is the appropriate setting of prices and tariffs. For example, this study found out that if prices are set too low, polluters (mainly the entertainment joints) may opt to pollute and pay. Furthermore, artificially low prices will not generate adequate revenues for the administration of the compliance measures. Setting appropriate prices is however a challenge because ideally prices should factor in direct costs, opportunity costs and environmental costs (externalities)⁷. This study however found the prerequisites for the successful implementation of most economic instruments such as appropriate standards, effective administrative, monitoring and enforcement capacities, institutional co-ordination and economic stability to be lacking therefore rendering the successful adoption and implementation of the instrument to be a near impossibility in our rural towns. Noise product charges, have however been found to be relatively simple to administer and it is the recommendation herein that their use can be adopted in the control and management of recreational noise pollution in the rural towns⁸.

4.3.5 Use of Environmental Impact Assessment and Cross-Sectoral Co-ordination

This study found that EIA are being used increasingly as environmental management tools in Kenya and recreational noise pollution control should not therefore be left behind. The main objectives of impact assessments used for the purposes of noise management are to identify potential impact on environment arising from proposed plans, actions and other development ventures. They should therefore serve to assist decision makers in making informed decisions on project developments and final project prioritisation, to provide, where possible, relevant and quantitative noise quality information so that potential impacts can be avoided or reduced at the project design stage and to provide a basis for development of management measures to avoid or reduce negative impacts during the project implementation.

⁷ Nordic Freshwater Initiative (1991). *Copenhagen Report. Implementation Mechanisms for Integrated Water Resources Development and Management*. Background document for the UN Conference on Environment and Development, Nordic Freshwater Initiative, Copenhagen.

⁸ *Ibid*, n.4

One of the fundamental element in an EIA is the encouragement and involvement of the public and stakeholders in the assessment. This sector wide participation can often ease the implementation of environmental projects mainly because of the increased feeling of ownership and influence that it produces amongst directly-involved users.

The operational functions of the environmental noise impact assessment should be to provide the necessary background for approval or rejection of noise emission permit applications, inclusion of operation conditions in noise emission permits, input to EIAs, inclusion of air quality consequences in the final prioritisation of projects (made by authorities at different levels), and developing modifications in the technical design of projects with the aim of protecting air/ noise quality.

As a general rule, this study found out that noise pollution issues are not prioritised in the EIA/ project approval processes thus making it difficult to appropriately secure adequate exchange of information between bodies preparing the project, the environmental officers and the final decision makers. This was noted by the haphazard and unco-ordinated manner in which various entertainment joints have been licenced to operate next to major referral hospitals, busy residential estates, churches and schools.

This is despite requirements that information about new proposals for entertainment joints projects which may impact or imply specific requirements for noise pollution should reach the environmental authorities dealing with noise pollution control in good time for the elaboration of impact assessments and recommendations before final decisions are take. The same authorities should possess rapid access to relevant information about registered, planned and ongoing noise-related projects through sufficient and efficient database tools.

4.4 Principles for Selecting and Combining Recreational Noise Pollution Management Tools

This study has found various management tools and instruments being used and/or available for use in controlling and managing recreational noise pollution control. The dilemma to noise managers at the rural towns is however which tools or instrument to use. This study therefore sought to find out the criteria to be used in deciding on which management tools and instruments to apply in order to improve recreational noise pollution control in rural towns. The overriding objectives of the principles are to balance the input of resources against the severity of problem

and available resources, sustainability and a guarantee of ‘win-win’ solutions, whereby environmental as well as other objectives are met.

4.4.1 Balance the Input of Resources

This principle requires a balanced allocation of financial, human or other resources to handle recreational noise problem according to the priority and severity of the problem in a given area. For example, this study found out that the entertainment joints emitting recreational noise are mostly concentrated in particular streets, locations or leaving most regions or areas unaffected by recreational noise pollution, and if this situation is anticipated to continue, there would be no need to build technical and administrative capacities to handle the problem in all regions or areas. Similarly, the noise control measures and the threshold size for activities requiring a noise emission permit might be more lenient if only a few emitters exist and if the recipients show no symptoms of pollution effects.

4.4.2 Ensure Sustainability

This principle has a bearing upon the methods and technical solutions that should be considered for the purposes of recreational noise pollution control. In most under-developed and developing counties, Tana River included, capacities for the use and maintenance of advanced technical equipment and tools to control recreational noise pollution are non-existent. Thus, as a general rule, this study found out that in such counties, it is best to maintain the use of simple uncomplicated technical measures while at the same time ensuring optimisation of objectivity, rather than building new structures. This is because existing institutions or methods have, to some extent, proved their viability and it is therefore more rational that the allocation of resources for existing institutions would be continued rather than additional resources would be allocated for new institutions.

4.4.3 Seek ‘Win-win’ Solutions

‘Win-win’ situations are created by applying instruments that lead to improvement in recreational noise pollution control as well as in other sectors (e.g. improved health or improvement in economy)⁹. Through this the challenge of balancing between environmental

⁹ Bartone, Bernstein, Leitmann & Eigen (1994). *Toward Environmental Strategies for Cities: Policy considerations for Urban Development Management in Developing Countries*. UNDP/UNCHS/World Bank, Urban Management Programme, Washington, D.C

benefits and other weaknesses is evaded. This study found out that economic instruments are often in the 'win-win' category.

4.4.4 Regulatory versus Economic Instruments:

This study found that the two principal approaches to recreational noise pollution control are the command-and-control and economic strategies. Although command-and-control strategies have made substantial progress in reducing pollution, this approach has been criticized for being inefficient since its effective implementation is often pegged on the regulatory agency having detailed information concerning emission processes and the suitability of various noise pollution control devices. The entertainment industry being diverse, it is extremely expensive and time-consuming to obtain the necessary information and expertise on each of the joints. Other associated problems with the command and control approach are the high costs for pollution control that leave scant opportunity to take advantage of economies of scale. Although standards may be applied differently depending on the size or type of facility, most polluters using the same noise production process are required to meet the same standards and some entertainment joints that could reduce recreational noise pollution at a lower cost are therefore not given the opportunity. Further, there is little flexibility for noise polluters who already have invested in some type of noise pollution control system. Consequently, the command-and-control approach provides little incentive for innovation in recreational noise pollution control technology once the standards are achieved.

Despite the strength of economic instruments especially in providing the necessary incentives for compliance and operationalizing the polluter pay principle, one significant problem is that the effects of economic instruments on environmental quality are not as predictable as those under the traditional regulatory approach, since polluters may choose their own solutions so as to avoid or, worse, evade the economic and financial processes involved. Moreover, in the case of charges, some polluters such as entertainment joints in case of recreational noise pollution may choose to pollute if the charge is not set at an appropriate level. Whereas, theoretically, economic instruments have the capacity to control recreational noise pollution according to market mechanisms and thus facilitate deregulation and a scale-down in government involvement, they have not, practically, eliminated the need for regulations, enforcement, and other forms of government involvement. This study for example found no known examples of instances where economic instruments have fully replaced direct regulation of polluting activities even in highly industrialized countries. In most cases, economic instruments

contribute to the attainment of policy objectives by supplementing, rather than replacing, direct regulations.

Even though there are some fees imposed by the *Noise Regulations* that are applicable in most counties, Tana-River included, their effect on environmental noise quality, have however not produced impressive results. Their direct effect on environmental noise quality therefore appears to be neutral or at best modest, although the indirect environmental effect of earmarking the revenue raised by the charges and fees for noise pollution control actions, where applied, has been positive¹⁰.

This study has however found out that despite the potential benefits of economic, government officials, the entertainment joints, and environmentalists are not in overwhelming support of the economic incentive approach. The environmental officers interviewed herein objected to these instruments largely because they afford them less stringent control over polluters and provide less predictability about the amount of pollution emitted into the environment. This is a replica of a finding in developed countries, where the entertainment industry and other polluters have resisted economic instruments because they contend that they have greater negotiating power over the design and implementation of regulations than they do over economic instruments. Economic instruments therefore act as an additional constraint on industry when they supplement existing regulations. Some economic instruments (especially charges) impose a financial burden beyond the cost of complying with regulations¹¹. We are however still way behind in comprehending and internalizing the workings of the economic instruments. For example, when existing firms are protected from new competition by new source restrictions, they likely would object to lowering barriers to entry. Further, if high charges are introduced in one county, more favorable market conditions will result in those counties with less stringent environmental controls. Further, some environmental officers object to any principle that implies a right to pollute, even though the existing regulatory system operates under permits to release stated quantities of pollutants at little or no cost to the polluter. This is in line with the opinion in Anderson et al¹².

¹⁰ Hahn, R. W. 1989. "Economic Prescriptions for Environmental Problems: How the Patient Followed the Doctor's Orders." *Journal of Economic Perspectives*, Volume 3, Number 2, Spring.

¹¹ Organization for Economic Cooperation and Development (OECD) (1989). 'The Application of Economic Instrument for Environmental Protection (Summary and Conclusion).' *Environment Monograph* No. 18. Paris

¹² *Ibid*

The main advantages of the regulatory approach over economic instruments in noise pollution control is that it offers a reasonable degree of predictability about the reduction of pollution, i.e. it offers control to authorities over what environmental goals can be achieved and when they can be achieved¹³. Economic instruments, on the other hand, have the advantages of providing incentives to tilt the behaviour of the entertainment joints to support recreational noise pollution control while providing revenue to finance noise pollution control activities. Against this background, it seems appropriate for most counties to apply a mixture of regulatory and economic instruments for controlling recreational noise pollution. In poor rural counties such as Tana-River, where financial resources and institutional capacity are very limited, the most important criteria for balancing economic and regulatory instruments should be cost-effectiveness (those that achieve the objectives at the least cost) and administrative feasibility. Finally, in cases of highly serious noise pollution, such as those near the hospital, religious institutions and schools, or when a drastic reduction or complete halt in the pollution is required, regulatory instruments (e.g. a ban) rather than economic instruments should be applied.

The regulatory and economic instruments selected to achieve environmental objectives will have broad implications for the institutions at the national, county or local levels responsible for implementing and enforcing them. Generally, the county governments that are responsible for recreational noise pollution control, the courts and non-governmental organizations (NGOs) all play roles in the development and enforcement of environmental regulations. The choice of instrument will determine in large part the responsible level of government and type of institution as well as the mechanisms for enforcement. Generally, activities requiring the greatest degree of political consensus and highest level of complexity (for example, setting standards) and risk should and are assigned to the national government level institutions such as NEMA, while the rest are left for the local level (county) governments and institutions. NGOs should also play a significant role in the development and enforcement of noise pollution control regulations.

4.4.5 Levels of Noise Pollution Control

This study found that the level or state of noise pollution determines the management tools and measure to be applied in the control and management of recreational noise. The levels can be

¹³ *Ibid*

categories into five tiers depending on the increasing level of development, economic and administrative capacity, as follows:

- i. *Crisis management*: This is a non-proactive mode with very little management (e.g. no regulation). Action at this level is taken only to respond to disasters or emergencies, where a group of specialists is assigned to handle the problem and no efforts are made to prevent the problem in the future. This approach is adequate in only a very few cases today as most counties have surpassed the level.
- ii. *The criteria/standard only strategy*: At this level, the risk of environmental problems occurring justifies a more proactive approach to noise pollution management. Noise quality criteria and standards may be formulated accompanied by monitoring of compliance with standards. This is however still a passive mode of management in which no attempts are made to modify the system.
- iii. *Controlling strategy*: If the results of monitoring using the previous strategy showed that noise quality standards have been violated, more management tools are introduced. Noise standards and noise emission permits may be introduced in combination with enforcement and penalty procedures to handle violations. Management of recreational noise pollution has thus entered the proactive mode.
- iv. *Compliance assistance strategy*: In many poor counties, widespread violations of permits still occur because the control and prevention costs needed to meet the emission standards are higher than many businesses can afford. In such situation, decision makers may decide to offer financial aid to firms in order to control their emissions adequately, rather than a total ban, which would often be the preferred substitute to allowing continued violations. The management is thus at a supportive mode which therefore calls for setting priorities for financial and technical aid.
- v. *Enhancement of the science/policy of management*: The noise managers are in an interactive mode. They therefore design for the future by offering grants for research in noise pollution control and for application of modern techniques, forecasting future potential problems and preparing to prevent the occurrence of such problems. The management is thus in an interactive mode.

4.5 The State of Public Participation In Recreational Noise Pollution in Kenyan Counties

Noise pollution control function is a devolved public service performed by the county governments and by virtue of Article 232(2)(a) of the Constitution, is bound by the values and principles of public service which apply to public service in all state organs in both levels of government, county governments included. Transparency, a related concept, is anchored on Article 35 of the Kenyan Constitution which provides for the right to access to information. This right to know, has been hailed as a fundamental assurance of accountability in institutional activities, especially those that relate to the licensing, control and management of noise emanating from entertainment joints in the emerging urban centres in the Kenyan counties. Respondents were asked whether they were aware of these rights.

In a nutshell, only 10 per cent of the respondents (Figure 6.0) were aware of the requirements and rights to public participation and access to information, while 90 per cent. From the interview, the respondents confirmed being aware of the prevalence of recreational noise pollution from entertainment joints. All the respondents (100 per cent) had witnessed or encountered incidents of recreational noise pollution from entertainment joints within Hola town. This study therefore finds that recreational noise pollution is prevalent and common among the entertainment joints in Hola, and the owners, employees, customers, county officials among other enforcement officers are aware of it. The study further indicates that cases of recreational noise pollution from entertainment joints were no longer a secret.

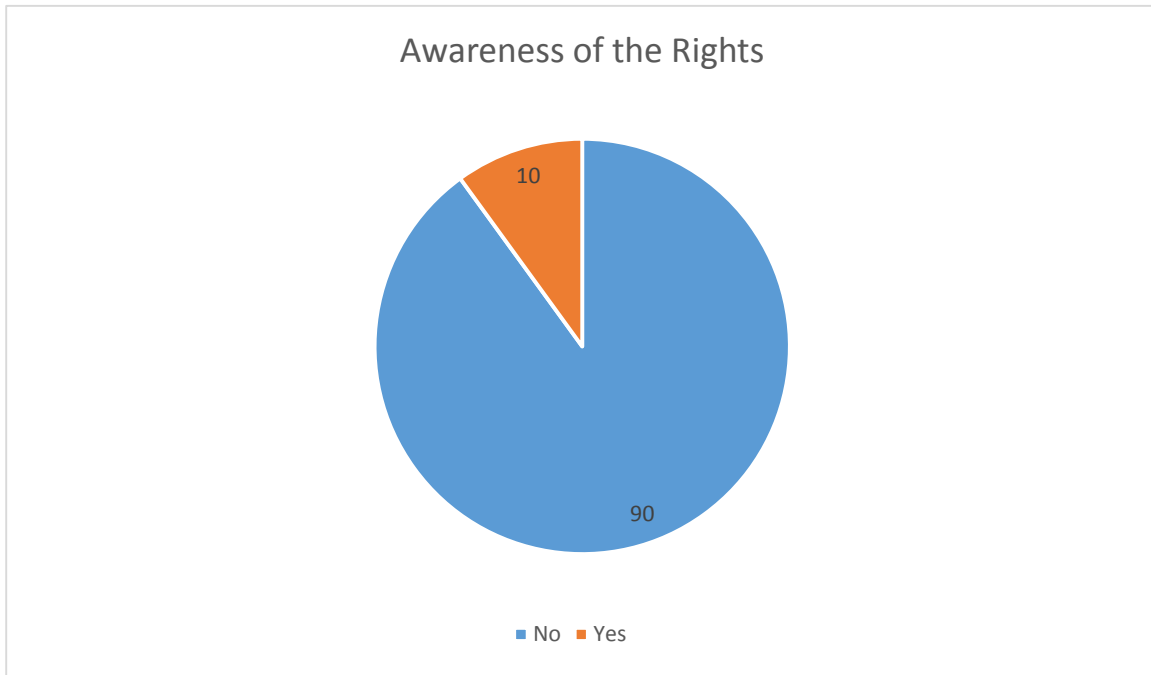


Figure 6.0: Awareness of Rights to Public Participation, Transparency and Access to Information

Respondent employees were asked to give their self-report of recreational noise pollution from the entertainment establishments where they work. On working routinely in a noisy environment 28 per cent had problems, 12.2 per cent were not sure while 54.5 per cent were comfortable. Specifically, there were several questions put to the respondents regarding communication in noisy environment where a majority agreed to have problems. Rule 11 of the *Factories and other Work Place (Noise Control and Prevention) Rules*¹⁴ states that ***‘The occupier shall install where noise gives rise to difficulties in verbal or sound communication, a visual warning system or any other means of communication’***. Such signage requirements are a must and vigorously enforced in some developed countries. Figure 7.0 below illustrates such a sign in a mechanical factory in Mombasa, Kenya. In this study there were no such signs in all the entertainment joints sampled. Ninety-six per cent of the respondents agreed that they need a peaceful and quite place to perform tasks that required a lot of concentration. The pattern of induced hearing complications and the need for treatment is consistent with the finding of Boateng and Amedofu¹⁵, in their study on the effects of noise on hearing. Rule number 12 of the legal notice states: ***‘Where noise cannot be controlled by engineering measures and***

¹⁴Legal Notice No. 25 of 2005

¹⁵Boateng, C.A. and Amedofu, G.K. (2004). Industrial Noise pollution and its effects on the hearing capabilities of workers: A study from saw mills, printing presses and corn mills. *African Journal on Health Science*; 11, pp. 5- 60

exceeds 90 dB(A), the employer shall provide and maintain suitable hearing protection to the affected workers: and ensure that the hearing protection is always worn correctly’.

The noise pollution levels were measured against set standards of NIOSH, OSHA 2007 and Legal Notice number 25 of 2005¹⁶. Five compliance items were identified as follows: permissible noise levels, noise prevention programme, noise measurements records, information and training of workers, medical examinations and hearing tests. The results showed that none of the establishments sampled (0%) carry out noise surveys.

Before being employed in a noisy environment, employees are required to undertake pre-employment hearing test as required by Legal Notice no. 25 of 2005¹⁷. None of the establishment institution (0%) agreed to have done this test. On the compliance on permissible noise levels, none of the establishment (0%) were complying. On whether they have had any training on noise hazards at work, none (0%) had carried such a specialized training. No organization (0%) had a noise control programme in place. The law, legal notice 25 states that:

Where noise in a workplace exceeds the continuous equivalent of 85 dB(A) the occupier must develop and implement an effective noise control and hearing conservation programme; The programme must be in writing and should address;

¹⁶ *Ibid*, n.14

¹⁷ *Ibid*



Figure 7.0: Noise Warning Sign at a Factory in Mombasa, Kenya

noise measurement; education and training: engineering noise control; hearing protection; posting of notices in noisy areas: hearing tests and annual programme review

In this study no institution was compliant with most of the requirements of the Legal Notice No. 25 of 2005 on work place noise. Noncompliance has a significant effect on the health of the workers. This study shows that majority of the employees in the selected establishments are ignorant of most risks associated with excessive noise in their work environment, save for the more mature ones whose only awareness is those associated with hearing problems, and thus the organization should be conducting regular education on noise hazards and the need to use noise PPE. DOSHS should strictly enforce the law in order to safe innocent employees who are being exposed to high levels of noise yet they are not aware of the dangers of high noise levels.

Away from the workers and employees, other respondents such as the general public (customers and guests), residents and the owners of the establishments (businesspeople), were asked to give their self-report on recreational noise pollution from the entertainment joints. About 36.1 per cent admitted that they have experienced and/or been exposed to severe form of noise pollution from these joints. Since admission of the noise problem could potentially have negative results when it comes to the business, business owners in such instances tend not to report their problem¹⁸. To compound the problem, other business owners are in denial. This has been proved in this study in that the observation made by the general public and customers was relatively high (70 – 80 per cent) compared to the self-report (business people) of about forty percent (Figure 8.0).

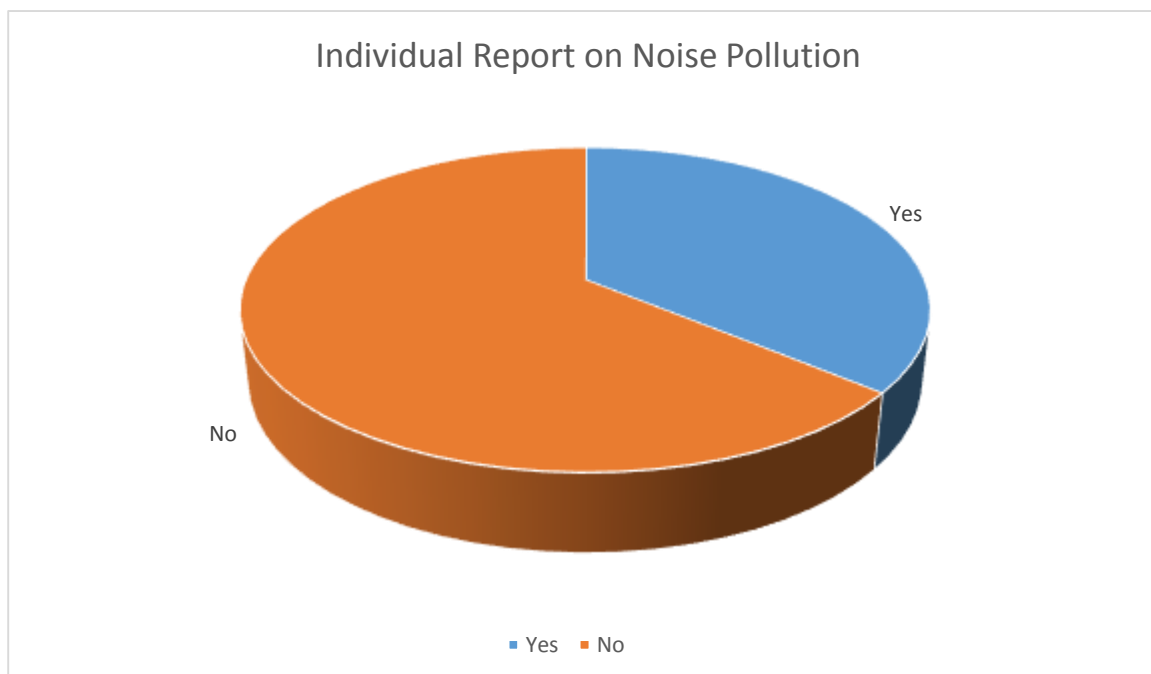


Figure 8.0: Individual Member of the Public and Business Person’s Self Report on Noise Pollution in Entertainment Joints

Figure 9.0 shows the frequency of emission of recreational noise pollutants among the entertainment joints in Hola town. 23 percent of the joints admitted to be emitting recreational noise pollutants always, while 40 per cent emit noise pollutants often. 37 per cent admitted to be emitting noise pollutants rarely.

¹⁸ Frone, M. (2004). Alcohol, Drugs and Workplace Safety Outcomes: A View from a General Model of Employee Substance Use and Productivity, *The Psychology of Workplace Safety* (pp 127 – 156). Washington, DC: American Psychological Association

Recreational noise was emitted, or noise emission occurs, for various reasons. The respondents in this study were therefore asked why the entertainment joints continue to emit noise (Table 4).

Table 4: Reasons for Producing/ Consuming Recreational Noise from Entertainment Joints in Emerging Urban Centers in Kenyan Counties.

Reasons	Frequency	Percentage
Relieve/ reduce stress	95	78.5
Customer Attraction & Exposure	114	94.2
Societal Tolerance to Noise	51	42.1
Enhancing Business Performance	102	84.2
Absence or Laxity in Enforcement	76	62.8
Ignorance of the laws/ Regulations	76	62.8
Prohibitive Costs of Prevention and Control	111	91.7
Disposable Income/ Capital to Invest or revel in Noise	118	97.5
Creation of more Employment Opportunity in Noise	64	52.8

Frequency of Noise Pollutants Emmission by the Entertainment Joints

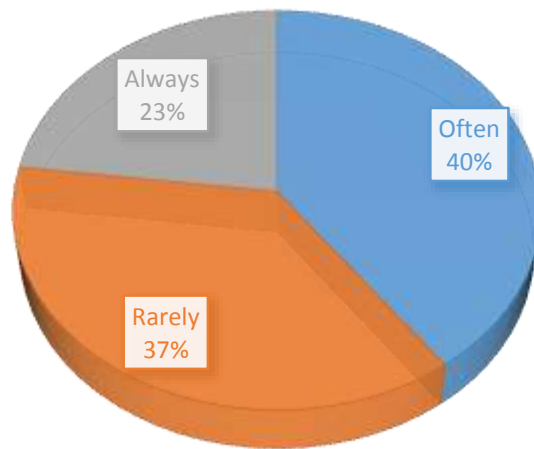


Figure 9.0: Frequency of Noise Pollutants Emission by Entertainment Joints in Emerging Towns in Kenyan Counties.

The population in emerging urban towns in Kenyan counties are mostly exposed to recreational noise from entertainment joints because of the availability of disposable income at these hitherto rural towns (over 97%) and, inversely, because of the prohibitive costs of investing in noise prevention and control mechanisms (over 91%). Others enjoy musical noise from entertainment joints as a means of relaxing, leisure and pastime after a long day or week on duty. Additionally, they believe that this, combined with alcohol, khat or any other stimulant, is key in building their prestige and self-esteem. Others use musical noise to overcome or reduce stress and presume that it was the only way to respond to the challenges of working in these hitherto rural towns where other forms of amenities are still few and are just starting to develop. It was observed that the lack of social amenities that are mostly associated with more advanced urban life, such as club membership, uninterrupted electric power supply, libraries, cinemas, well received television and radio signals etc., lead most residents to boredom and therefore idleness. To the business owners, this crowding at their joints at the end of the day and week, enhances the business performance of these joints, hence noise is not a waste to them, but a source of business (over 84%). The business owners reported that they cannot optimize their profits well while noise free. Most find the loud music as a source of exposure to potential customers, especially, during the week ends and peak or theme nights such as Wednesdays, Fridays, Saturdays and Sundays; or any night preceding a public holiday (over 94%).

To establish the extent of noise-dependent economy, it was first important to establish whether noise avoidance (or ‘abstinence’) from noise affected the noise producer/emitter and the user/exposed, in any way. The response is illustrated in Figure 10.0. 65% of the respondents indicated that they will fail to go to the joints, mainly because of lack of adequate supply of music. This will lead them to be prone to alcohol related withdrawal syndromes. The spiral effect will not end there. The business owners will suffer loss due to reduced customers. Most might be forced to close or reduce employees. Their employees will therefore be rendered jobless. The remaining 35% had no issue with abstinence.

Interviews with the resident members of the public, business owners, employees, police and county officials revealed that several factors lured the members of the public, employees and the business owners to produce, work in, or use and consume recreational noise from the entertainment joints. Most of them blamed it on the high poverty levels and lack of adequate

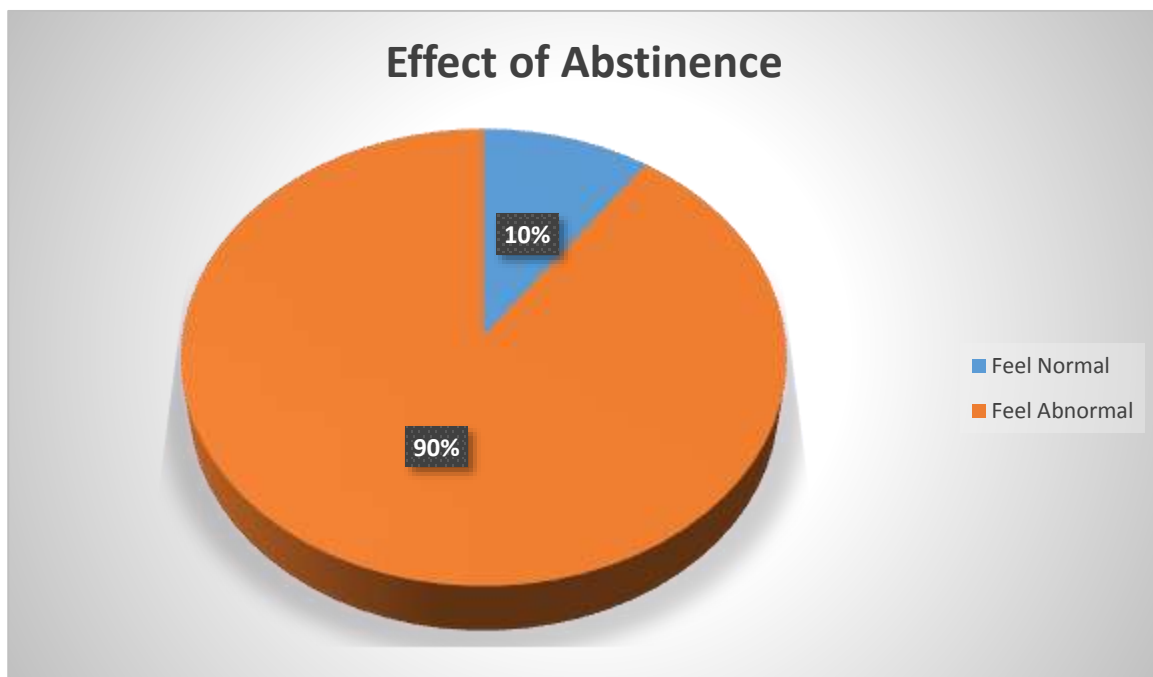


Figure 10.0: Effect of Abstinence (non-production or consumption) from Noise Pollution from Entertainment Joints in Emerging Urban Centers

and reliable information which they can relate with about the consequences. Whereas some residents and business owners indulge in noise due to poverty and/or inadequate funds; others largely generate and misuse noise due to excess and free money that they are left with because of leisure activities associated with musical and related recreational noise such as from football commentaries; and the enhanced profits to the business owners which translate to more

employment opportunities to the workers. The dominant factor is alcoholism. There is less supervision in remote towns which prompts the residents therein to indulge in alcohol abuse at their free time to relax and pass time. This alcoholism is related to loud music.

Article 69 of Constitution encourages the state to embrace public participation in the management, protection and conservation of the environment through systems such as EIA, environmental audit and monitoring of the environment Articles 48 and 50 of the Constitution on the other hand provide for the right to access to Justice and to a fair impartial hearing. The practice of Environmental Impact Assessment (EIA) as provided for in EMCA is a form of environmental-majority-rules system. It draws in people in general in screening ventures that impact the environment. The prerequisite for publication of EIA study reports/advertisements permits public participation in checking and reviewing an intended project. Section 123 of EMCA gives any individual a right to access any record sent to NEMA. The Environmental Impact Assessment/Audit Regulations, 2013, are founded under Section 147 of the EMCA. The EIA Regulations are said to apply to all policies, plans and projects, specified in Part IV, Part V and the Second schedule of EMCA. The EIA regulations require NEMA to invite the public to make oral or written remarks on the report.

The study interviewed the business owners and the residents on whether they have ever participated in an EIA public participation exercise during the inception of the entertainment joints (Table 5.0).

Table 5: The Extent of Participation in EIA by the Public and the Joints Owners at the Inception

Participation	Frequency	Percentage
Yes	2	1.82
No	108	98.18
Total	110	100

Over 98% of the public and the business owners of the entertainment joints are not aware of, and as a consequence, have not participated in, an EIA exercise involving the establishment of the entertainment joints. Only slightly under 2% have participated in such an exercise. This therefore shows that the entertainment joints in emerging urban centres in the counties are haphazardly developed, licensed and operated. This could be the reason behind very high exposure to noise pollution in the towns.

On the reason for non-participation, majority of the 2% stated that they are never informed or invited to the venue or any other mode of participation. Others cited various reasons such as lack of time, lack of money to use to access the mass media or transport for logistical reasons, lack of information (ignorance) about the proposed project and its likely impact on health and the environment, fear of the mighty, and under appreciation. Others viewed the system as too corrupt and rigid to put any meaningful use to their views. Most felt withdrawn from governments even at the county level that no input from them shall be accorded any seriousness. This withdrawal by the county governments where noise pollution control has been devolved has in fact proved the critics of devolution right. Critics have cautioned that the general presumptions in favour of devolution are ‘hard to justify’, as it is hard to identify political conditions that will favour positive or negative effects of devolution. Thus the political devolution such as happened in Kenya has so far resulted in unfulfilled expectation and unanticipated problems¹⁹. The reasons are represented in Table 6.0 below.

Table 6.0: Reasons for Non-Participation in EIA Exercise for the Establishment of Entertainment Joints in Emerging Towns in Kenyan Counties

Reason	Frequency	Percentage
Lack of Information/Invitation	100	92.59
Lack of Time	12	11.11
Lack of Money/ Poverty	25	23.15

¹⁹ Grindle, M. S. (2007). *Going Local: Decentralization, Democratization and the Promise of Good Governance*. New Jersey: Princeton University Press

Ignorance	84	77.78
Fear	45	41.67
Corruption and Rigidity of the System	93	86.11
Failure of Devolution	96	88.89

The respondents were presented with several likely scenarios if they could have all participated in the EIA exercises at the time of the inception of the entertainment joints and as required by the laws (Table 7.0).

Table 7.0: Likely Consequence of Public Participation in the EIA Process for the Establishment of Entertainment Joints in Emerging Towns in Kenyan Counties

Consequence	Frequency	Percentage
Enhance Compliance on the part of the owners	60	12
Monitor Compliance	58	11.6
Report Non-Compliance	48	9.6
Prosecute Non-Compliance	36	7.2
Protest Non-Compliance	56	11.2
Do Nothing	242	48.4

It is worth noting that majority of the respondents (48.4%) will do nothing once the EIA process is concluded. This shows the extent to which the laws and regulations in place to manage the environment, and mainly noise pollution, are still underappreciated. It still goes a long way in

reinforcing the researcher's view that the community still do not appreciate the extent of the problem of noise pollution as they view its control and regulations to be the sole function of governments and not them. They otherwise view it as a necessary evil.

Apart from the EIA, The Environment Management and Coordination Act, 1999 (EMCA) establishes various institutions, such as National Environment Council (NEC)²⁰, NEMA²¹, NET²², Public Complaints Committee²³, County environment committees²⁴, National Environmental Action Plan Committee (NEAPC)²⁵, all of which allow the public participation and different stakeholder involvement and consultation in decision-making pertaining to environmental matters. The county environmental committees are however still under the national government administrations, with them being manned by National Government Administration Officers (NGAOs) right from the Regional Commissioners (RC) to the Assistant Chiefs. The place of noise pollution control, a devolved function, is therefore still in limbo. It is not known what role the NGAOs, national government officers, can play in the management of noise pollution. Moreover, none of the respondent interviewed (0%) has ever sat in such a committee in this region.

4.6 The Status of the Enforcement of the Rights to a Recreational Noise-Free Environment

Out of the management tools and instruments outlined hereinabove, the study found laws and regulations to be the most applied tools in Kenya. This is despite there being no policy or action plan on the control and management of noise pollution in Tana River. This section therefore analyses the various legal instruments applicable to recreational noise pollution control in Kenya. The problem of recreational noise pollution can be tackled under both criminal or civil law.

²⁰Government of Kenya (1999). *The Environment Management and Co-ordination Act*. NCLR: Nairobi. Available www.klr.org Accessed on 29.09.2018, section 4

²¹*Ibid*, section 7

²²*Ibid*, section 125

²³*Ibid*, section 31

²⁴*Ibid*, section 29

²⁵*Ibid*, section 37

4.6.1. Recreational Noise Pollution Control under the Penal Code²⁶

Recreational Noise is considered as common nuisance under Section 175²⁷ of the Penal Code and thus, there is a criminal liability in a person relating to his illegal omission resulting in common damage, danger or simply, annoyance to the people in general as a result of recreational noise. Such a common nuisance is actionable per se, is a strict liability offence and is not therefore excused on the ground that it causes some convenience or advantage.

Various other provisions and offences in the Penal Code and other laws, such as the Alcoholic Drinks Control Act²⁸ and Public Health Act²⁹, relating to the public health, safety, convenience, decency, morals, excessive recreational drinking can also be used to penalise recreational noise pollution. The legal solutions to noise pollution may be characterized as private or public remedies. For example the whole of chapter XVII, XX and XXIII of the Penal Code has offences which when suitably applied, can be used to penalise various aspects of noise pollution.

These provisions, however, do not lead us to uniform and certain rules which can be applied to the criminal nuisances. Moreover, the Penal Code was enacted when there were no such scientific, social and industrial developments and therefore the Penal Code's drafters had no idea of such noise pollution by so many irritants of the modern society. This study therefore finds the provisions of the Penal Code and other aspects of criminal law to be inadequate to cope with increasing menace of recreational noise pollution mainly from entertainment joints.

4.6.2. Recreational Noise Pollution Control under the Public Health Act³⁰

The Public Health Act³¹ at Part IX deals directly with public nuisance, which includes excessive noise from entertainment joints³². Section 115 prohibits nuisance in the following terms: '*No*

²⁶ Cap 63, Laws of Kenya

²⁷ Section 175 provides thus: '*175. (1) Any person who does an act not authorized by law or omits to discharge a legal duty and thereby causes any common injury, or danger or annoyance, or obstructs or causes inconvenience to the public in the exercise of common rights, commits the misdemeanor termed a common nuisance and is liable to imprisonment for one year.*

(2) It is immaterial that the act or omission complained of is convenient to a larger number of the public than it inconveniences, but the fact that it facilitates the lawful exercise of their rights by a part of the public may show that it is not a nuisance to any of the public'.

²⁸ No. 4 of 2010

²⁹ Cap 242, Laws of Kenya

³⁰ *Ibid*

³¹ *Ibid*

³² Section 118 of the Public Health Act defines nuisance in broad terms thus: *118. What constitutes nuisance: (1) The following shall be deemed to be nuisances liable to be dealt with in the manner provided in this Part—(a) any vessel, and any railway carriage or other conveyance, in such a state or condition as to be injurious or dangerous*

person shall cause a nuisance or shall suffer to exist on any land or premises owned or occupied by him or of which he is in charge any nuisance or other condition liable to be injurious or dangerous to health.'

Local authorities (county governments to which health matters have been devolved) are required under section 116 to maintain cleanliness and prevent nuisances. Under this section, it is the duty of every local authority to take all lawful, necessary and realistic measures for preserving its area of jurisdiction at all times in clean and hygienic condition, and for averting the happening therein of, or for correcting or causing to be corrected, any nuisance or condition likely to be harmful or hazardous to health, and to take legal actions against any person causing or responsible for the perpetuation of any such nuisance or condition.

to health;(b) any dwelling or premises or part thereof which is or are of such construction or in such a state or so situated or so dirty or so verminous as to be, in the opinion of the medical officer of health, injurious or dangerous to health, or which is or are liable to favor the spread of any infectious disease; (c) any street, road or any part thereof, any stream, pool, ditch, gutter, watercourse, sink, water-tank, cistern, water-closet, earth-closet, privy, urinal, cesspool, soak-away pit, septic tank, cesspit, soil-pipe, waste-pipe, drain, sewer, garbage receptacle, dust-bin, dung-pit, refuse-pit, slop-tank, ash-pit or manure heap so foul or in such a state or so situated or constructed as in the opinion of the medical officer of health to be offensive or to be injurious or dangerous to health; (d) any well or other source of water supply or any cistern or other receptacle for water, whether public or private, the water from which is used or is likely to be used by man for drinking or domestic purposes or in connection with any dairy or milk shop, or in connection with the manufacture or preparation of any article of food intended for human consumption, which is in the opinion of the medical officer of health polluted or otherwise liable to render any such water injurious or dangerous to health; (e) any noxious matter, or waste water, flowing or discharged from any premises, wherever situated, into any public street, or into the gutter or side channel of any street, or into any mullah or watercourse, irrigation channel or bed thereof not approved for the reception of such discharge; (f) any stable, cow-shed or other building or premises used for keeping of animals or birds which is so constructed, situated, used or kept as to be offensive or which is injurious or dangerous to health;(g) any animal so kept as to be a nuisance or injurious to health; (h) any accumulation or deposit of refuse, offal, manure or other matter whatsoever which is offensive or which is injurious or dangerous to health;(i) any accumulation of stones, timber or other material if such in the opinion of the medical officer of health is likely to harbor rats or other vermin; (j) any premises in such a state or condition and any building so constructed as to be likely to harbor rats; (k) any dwelling or premises which is so overcrowded as to be injurious or dangerous to the health of the inmates, or is dilapidated or defective in lighting or ventilation, or is not provided with or is so situated that it cannot be provided with sanitary accommodation to the satisfaction of the medical officer of health;(l) any public or other building which is so situated, constructed, used or kept as to be unsafe, or injurious or dangerous to health; (m) any occupied dwelling for which such a proper, sufficient and wholesome water supply is not available within a reasonable distance as under the circumstances it is possible to obtain;(n) any factory or trade premises not kept in a clean state and free from offensive smells arising from any drain, privy, water-closet, earth-closet or urinal, or not ventilated so as to destroy or render harmless and inoffensive as far as practicable any gases, vapors, dust or other impurities generated, or so overcrowded or so badly lighted or ventilated as to be injurious or dangerous to the health of those employed therein; (o) any factory or trade premises causing or giving rise to smells or effluvia which are offensive or which are injurious or dangerous to health; (p) any area of land kept or permitted to remain in such a state as to be offensive, or liable to cause any infectious communicable or preventable disease or injury or danger to health;(q) any chimney sending forth smoke in such quantity or in such manner as to be offensive or injurious or dangerous to health;(r) any cemetery, burial-place or place of sepulture so situated or so crowded or otherwise so conducted as to be offensive or injurious or dangerous to health; (s) any act, omission or thing which is, or may be, dangerous to life, or injurious to health. (2) The author of a nuisance means the person by whose act, default or sufferance nuisance is caused, exists or is continued, whether he is the owner or occupier or both owner and occupier or any other person.

Under section 117, health authorities in the counties are required to prevent or remedy danger to health from unsuitable dwellings, including those used for businesses such as the entertainment joints by taking similar measures as those in section 116 so as avert or limit the damages or nuisance caused by such dwellings or premises. Due process is accorded to the person responsible such that the medical officer of health³³, is required to issue notices to the person responsible, or the occupier of the premises where the owner cannot be found, to remove nuisance, such as excessive recreational noise, within a specified time.³⁴ If the owner fails or ignores to comply with the notice, then section 120 provides that the medical officer of health shall cause a complaint relating to such nuisance to be made before a magistrate, who shall thereupon issue a summons requiring the person on whom the notice was served to appear before his court. The court, upon satisfaction that the alleged nuisance is happening, is required to make an order requiring the perpetrator or the occupier or owner of the dwelling or premises, to comply with all or any of the terms of the notice or otherwise to remove, within a specified timeframe, the nuisance and, further, to undertake any works necessary for that purpose. The court may, in addition, impose a fine not exceeding two hundred shillings on such a person, order payments as to costs or make a further order banning the activity causing the nuisance. There are similar provisions for instances where such nuisances after having been dealt with recurs or are likely to recur, or where the perpetrator fails to comply with such additional requirements as ordered, providing for such further due processes including further fines.

Section 121 provides for various offences and the penalties respecting such nuisances, the relevant ones herein being under subsection 1 thereof which provides that any person who fails to obey an order to comply with the requirements of the medical officer of health or otherwise to remove the nuisance shall, where he or she fails to satisfy the court that he or she has used all diligence to implement such order, commits an offence for which he or she may be liable to a fine of not more than one thousand five hundred shillings for each day during which the default continues; and any person willfully acting in contravention of a closing order issued under section 120 shall be committing an offence for which he or she may be liable to a fine of

³³ A county government employee

³⁴ Provided that— (i) where the nuisance arises from any want or defect of a structural character, or where the dwelling or premises are unoccupied, the notice shall be served on the owner; (ii) where the author of the nuisance cannot be found and it is clear that the nuisance does not arise or continue by the act or default or sufferance of the occupier or owner of the dwelling or premises, the medical officer of health shall remove the same and may do what is necessary to prevent the recurrence thereof.

not more than one thousand five hundred shillings for each day during which the contravention continues. The medical officer of health may in such case enter the premises to which any such order relates for purposes of removing the nuisance and do whatever may be necessary in the execution of such order including the recovery of the expenses incurred from the perpetrator.

The provisions of this Act has however rarely been used. The criminal cases or County cases registers for HOLA Law Courts indicates that no public nuisance or county case has been lodged at the court station for the last twenty years. Moreover, the penalty provisions sound outdated, inadequate and make a mockery of the entire prosecution or litigation process under the Act.

4.6.3 Recreational Noise Pollution under The Alcoholic Drinks Control Act, 2010

The Alcoholic Drinks Control Act, 2010³⁵, came into operation on 22nd November, 2010, when it also repealed the former Chang'aa Prohibition Act (Cap. 70); and the Liquor Licensing Act (Cap 121). It provided the law for the regulation of production, making, trade, labelling, advertising, funding and consumption of alcoholic beverages with the objective of protecting the health of persons and consumers of such drinks from false and deceptive inducements, protect the health of children, raise awareness and educate the public on health impacts of alcohol abuse, adopts and implement measures to eliminate illicit trade in alcohol like smuggling, encourage and make provisions for treatment and rehabilitation programs, and promote research and propagation of relevant information and materials. Alcohol is not supposed to be sold near schools, colleges and other educational institutions. The relevant provisions to the study herein, is however, those that restrict the hours during which alcoholic drinks can be served (from 5pm on weekdays and 2pm on Saturdays). The restrictions are meant to prevent drinking or access to alcohol during working hours. This study has, however, found that only 75% of the residents and business owners are aware of these restrictions. The primary purpose of recreational noise from the entertainment joints is music to accompany the revelers. By restricting the time in which the alcohol can be sold, this Act collaterally also restricts the time of emission and exposure to this loud music from the entertainment joints. Severally penalties are provided for breach, ranging from a fine of Kshs. 500 to Kshs. 10,000,000. There is however an issue herein. This is a national law. There is no corresponding law restricting the times of opening of the entertainment joints, or the sale of alcohol, from the county government

³⁵ *Ibid*, n.28

of Tana River, under which Hola falls. A liquor Licensing Act was passed by the Tana River County Assembly in 2016, but has never been enforced as the business operators adopt a carefree lifestyle. The business community claims that they were not adequately consulted before the coming into operation of the County Act. Subsequently, there has been no enforcement of the County Act. There has been no arrest nor prosecution of any offender under the Act. The police, on the other hand, has occasionally continued to enforce the Alcoholic Drinks Control Act, 2010.

Prior to the arrests and prosecution by the police, none of the entertainment joint in Hola town had a proper license to operate as a liquor store from the County Government as required. This halted the prosecutions for some time as the county officials were feeling guilty and therefore partly to blame for the lack of licenses, yet the joints have been paying the registration fees as required. A leading joint, amongst the loudest which however has installed sound proofing to their rooms, is actually situated next to a church and the main referral hospital.

4.6.4 Private Remedies against Recreational Noise under The Tort of Nuisance

Kenya is a common-law country where polluters have been responsible for their damages before as well as after the enactment of pollution control legislation. Based on the common law torts of private and public nuisances, this liability is enforceable through the civil courts, by injured parties, or, on their behalf, by the government. The torts herein are mainly independent of government regulatory activity which has made them attractive to those who favor minimal interference by governments with the functioning of the market system³⁶.

In private nuisance the main idea is that of interference with the enjoyment of the plaintiff's land, generally speaking by the defendant's entertainment joint, causing some sort of injurious invasion of it, by recreational noise. Private nuisance derives in the words of Lord MacMillan in *Reads vrs Lyons & Co.*³⁷ 'from a conception of mutual duties of adjoining or neighbouring landowners'³⁸ Nevertheless, the tort is not limited to the case of adjacent landowners, although it still requires the plaintiff to be in occupation of land. Private nuisance can therefore be

³⁶ Bohm, Peter & Clifford (1985). 'Comparative Analysis of Alternative Policy Instruments' in Kneese and Sweeney, (eds.), *Handbook of Natural Resources and Energy Economics, Vol 1*. Elsevier Science Publishers B.V.

³⁷ [1947] A.C. 156

³⁸ The words were actually spoken in relation to *Rylands vrs Fletcher (1868) L.R. 3 H.L. 330*, but there is no question they also apply to nuisance.

committed by entertainment joints in the form of loud music even from rented premises besides a highway³⁹.

Public nuisance, on the other hand, derives from the criminal law, its place in the law of tort depending upon the fact that a member of the public who can prove that he has suffered special damage from the defendant's (entertainment joint owners) commission of the common law crime of public nuisance may sue the defendant in tort. Thus from the above provisions of the Penal Code⁴⁰, Public Health Act⁴¹ and the Alcoholic Drinks Control Act⁴², a resident who feels that through the violations of the laws, he has suffered immensely, and monetarily, can bring a civil action against, the business owners, or the government for inaction⁴³, the claim being based on public nuisance. This tort does not require the invasion of private land, but just proof of an annoyance of the public by such acts. If any individual suffers any loss of hearing or any other hurt or injury on account of any act done on the part of the government in exercise of its non-sovereign functions then the government can be held liable for damages under the tort of nuisance⁴⁴. Under certain circumstances a limit is put on the usefulness of instituting law suits relating to nuisance. In urban areas, for example, it will be difficult to identify infinite number of sources of noise pollution such that proving that the damages were caused by recreational noise from entertainment joint and not other forms of noise pollution such as road transport etc., may be burdensome and can put insurmountable barriers to a plaintiff's suit. In certain cases, private citizen cannot sue where large public interest is to be served. This study did not however find any large public interest being served by the entertainment joints in these emerging rural towns.

4.6.5 Recreational Noise Pollution under *The Noise Regulations*

The Environmental Management and Co-ordination (Noise and Excessive Vibration Pollution) (Control) Regulations, 2009, were formulated for NEMA in 2009, but since noise pollution control is a devolved function, are currently enforced by the county governments. These

³⁹ *Ward Lock vrs. Operative Printers' Society (1906) 22 T.L.R. 327; Hubbard vrs Pitt [1975] 2 W.L.R. 254*

⁴⁰ *Ibid*, n. 26

⁴¹ *Ibid*, n.29

⁴² *Ibid*, n.28

⁴³ Refer to the recent landmark decision of the ELC against the government and its agencies in *Centre for Justice, Governance and Environmental Action (Suing on their Behalf and on behalf of all the Residents of Owino Uhuru village in Mikindani Chagamwe area, Mombasa vrs The Honourable Attorney General and others, Msa ELC Petition No. 1 of 2016*

⁴⁴ *Ibid*

regulations are aimed at ensuring the maintenance of a healthy environment and peaceful atmosphere and psychological wellbeing for all people in Kenya by regulating noise levels and excessive vibration. The acceptable noise levels in different zones for different facilities and activities are prescribed therein. The Regulations further prescribe the maximum permissible noise levels from a facility or activity to which a person may be exposed to, noise control measures and mitigating measures for its reduction. These regulations apply even to work places and supplement, rather than negate, the Factories and Other Places of Work (Noise Prevention and Control) Rules, 2005⁴⁵. Under the regulations, any person who is likely to be involved in activities that emit noise or excessive vibrations beyond the permissible levels must obtain a license or a permit respectively from the authority. Several offences and penalties are prescribed therein.

Under regulation 6 (5), any person who makes noise in excess of the prescribed levels commits an offence. As appertains to recreational noise, regulation 8 provides that a person commits an offence if he or she uses or operates any radio or receiving set or any such electronic device for producing or amplifying sound in a loud, annoying or offensive manner, such as phonograph, TV set etc., thereby creating a risk within any building or outside a building, from a distance of not less than 30 meters from the source of the noise, or interferes with the conversation of members of the public who are 30 meters or more from the source of such sound. Under regulation 9, it is an offence for any person in charge of a party or other social event which occurs on any private or public property shall ensure that the party or event does not produce noise in a loud, annoying or offensive manner such that noise from the party interferes with the comfort, repose, health or safety of members of the public within any building or, outside of a building, or recklessly creates the risk thereof, at a distance of 30 meters or more from the source of such sound.

The regulations further provide for noise from workplaces such as the recreational noise affecting the restaurant workers and provide that the provisions of The Factories and Other Places of Work (Noise Prevention and Control) Rules, 2005 shall apply *mutatis mutandis*⁴⁶. There are also some provisions for noise mapping. Under regulation 25, where an Environmental Inspector has reasonable cause to believe that any person is emitting or is likely

⁴⁵ Legal Notice No. 25 of 2005

⁴⁶ Regulations 20

to emit noise in any area in excess of the maximum permissible levels, or is causing or is likely to cause annoyance, the Environmental Inspector may, with the approval of the Director-General (should be the County Executive Member in charge of Environment or noise pollution control), in consultation with the relevant lead agency, serve an improvement notice similar to those issuable under the Public Health Act⁴⁷, generally directing the person to stop from emitting the noise or improve on prevention measures. If such person fails or refuses to not comply with the conditions in an improvement notice, he commits an offence and is liable, upon conviction, to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding more than twenty-four months, or to both. There is an additional risk of closure to the violator which operates as a ban, and is provided for under regulation 26.

Regulation 28 provide for a general penalty of a fine not exceeding more than three hundred and fifty thousand or to imprisonment for a term not exceeding eighteen months or to both, for any person who commits any other offence under the regulations, for which no specific penalty is provided.

The regulations have been enacted to regulate the level of noise pollution in all areas, including the rural towns, from various sources of noise pollution. But these regulations are inadequate or insufficient to control the noise pollution, or have simply been ignored. They appear to be more centralists than devolved and the environmental officer interviewed herein, felt that they can best be enforced by NEMA, rather than the county governments. Moreover, recreational noise pollution has not been adequately defined and captured in the regulations. The punishment provided under the Regulations appears prohibitive on paper. This study however finds that the penalties are not adequate and deterrent as compared to the economical benefits to the entertainment joints, and the effect on health and environment. Nowonder businessmen have vowed not to comply with the provisions. Because of these provisions for lenient penalties, the Noise Regulations are deemed inadequate and hence inefficacious in the control and management of recreational noise pollution. No time limit is prescribed in the regulations for compliance and/ or trial under the regulations and also the Criminal Procedure Code⁴⁸. A delay in the decision will obviously frustrates the object of the regulations. There are also no provisions made under the regulations for public awareness, public participation or public coordination for controlling the noise pollution. There is generally a wide gap between the

⁴⁷ *Ibid*, n.29

⁴⁸ Cap 75, Laws of Kenya

regulations in theory and their implementation in practice. There is no provision for coordination between the different departments of governments (whether at the national or county levels) in *the Noise Regulations* for controlling noise pollution. There are also no provisions for permanent restrictions or complete ban on noise producing areas as a means of effectively ending cases of incessant or stubborn noise pollution.

These are therefore the various limitations of the *Noise Regulations* for controlling recreational noise pollution. Many provisions which could be helpful to control noise pollution should be maintained in the *Noise Regulations*. These provisions should be implemented fully and uniformly. The provisions for public awareness, public coordination and public participation to control noise pollution should be mentioned in the regulation⁴⁹. Adequate punishment must be provided in these Regulations. The coordination among various departments of Government must be ensured under these Regulations for controlling noise pollution. Permanent restrictions for controlling noise pollution must also be provided.

4.6.6 Recreational Noise Pollution under the Factories and Other Places of Work (Noise Prevention and Control) Rules, 2005

Entertainment joints in rural towns definitely have employees. These employees work as waiters, disc jockeys, ushers, bar men and ladies, bouncers, managers, room attendants, cooks, cleaners, watchmen/ guards etc. They are affected with the noise from these joints just as much as the customers and the adjacent residents⁵⁰. In 2005, the minister for labour formulated the above rules so as to safeguard the health and safety of the workers from dangerous and harmful noise pollution. 'Worker' has been defined in the rules to include a person who has entered into or works under a contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labor or otherwise; and a 'workplace' includes any land, premises, location, vessel or thing at, in, upon or near which a worker performs his duty in accordance with his contract of employment.

⁴⁹ Singh, R. (2016). 'Legal Control of Noise Pollution In India : A Critical Evaluation' *International Journal of Research in Humanities and Social Studies* V3. I4. April 2016 44

⁵⁰ Include neighboring churches and a major hospital in HOLA

Under Rule 4, no worker shall be exposed to a noise level in excess of the continuous equivalent of ninety dB (A) in eight hours within any twenty-four hours' duration; and one hundred and forty dB (A) peak sound level at any given time. Where noise is intermittent, noise exposure shall not exceed the sum of the partial noise exposure equivalent continuous sound level of ninety dB (A) in eight-hour duration within any twenty-four hours' duration. It shall be the duty of the occupier to ensure that noise that gets transmitted outside the workplace shall not exceed fifty-five dB (A) during the day and forty-five dB (A) during the night; and any person who does not comply with this provision shall commit an offence.

Under rule 7 (1) the occupier is required to inform in writing all the workers in any process where noise level is below ninety dB(A) on the results of any noise exposure measurements; the relation between the results and the risks of hearing loss; and upon request by the worker, the use of hearing protection and testing. The occupier is further required to inform in writing all workers exposed to noise above ninety dB(A) on the results of any noise exposure measurements; effects of noise on hearing; proper use and maintenance of hearing protection; and the purpose of hearing test. The occupier shall also ensure that all workers exposed to noise are fully trained on the hazards involved, and instructed in the measures available for the prevention, control and protection against noise exposure.

Under Rule 9, every occupier is required to take suitable engineering noise reduction measures at the source of the noise to reduce it and limit its spreading; adopt methods of work, which shall reduce noise exposure of workers to the recommended noise levels; and as far as practicable, walls and ceilings of workplaces shall be lined with suitable sound absorbing material to prevent reflection of noise. The penalties provided herein are similar to those in section 109 of the Occupational Health and Safety Act⁵¹.

⁵¹ Cap 514, Laws of Kenya, the sections provides thus: '109 (1) Any person who commits an offence under this Act for which no express penalty is provided shall on conviction be liable to a fine not exceeding three hundred thousand shillings or to imprisonment for a term not exceeding three months or to both. (2) Where the contravention in respect of which a person is convicted is continued after the conviction, shall that person subject to the provisions of section 110, be guilty of a further offence and liable in respect thereof to a fine not exceeding ten thousand shillings for each day on which the contravention is so continued.110. Court may order cause of contravention to be remedied (1) Where the occupier or owner of workplace is convicted of an offence under this Act, the court may, in addition to or instead of imposing any penalty, order him, within the time specified in the order, to take such steps as may be specified to remedy the matters in respect of which the contravention occurred, and may, on application, extend the time so specified. (2) Where an order is made under subsection (1), the occupier or owner shall not be liable under this Act in respect of the continuation of the contravention during the time allowed by the court, but if, after the expiration of that time as originally specified or extended by subsequent order, the order is not complied with, the occupier or owner, as the case may be, shall be liable to a fine not exceeding ten thousand shillings for each day on which the non-compliance continues. 111. Penalty in case of death or injury If any person is killed, or dies, suffers any bodily injury, in consequence of the occupier or owner

The Rules have similar provisions as in the Public Health Act⁵², and the Regulations, regarding inspections and improvement notices, and the manner of their enforcements. It is however, worth noting that this study found out that the provisions are not being enforced. With the exception of the sanitation aspect of the workplaces, other health and safety issues such as noise pollution have been left for the national government rather than the devolved authorities. There is thus still a conflict of institutions when it comes to enforcement.

4.7 Legal Remedies and Enforcement

4.7.1 Introduction

Actions that are brought based upon harm to the environment require the creation of appropriate remedies by the courts. It is in the fashioning of appropriate remedies that judges and magistrates work most directly with the principles of sustainable development and polluter pays. Through the fashioning of appropriate remedies judges and magistrates reinforce the rule of law necessary in the environmental context by ensuring that violators and polluters do not gain undeserved advantage by virtue of their transgressions. Judges and magistrates may, for example, order a halt to an environmental wrong, direct that specific performance of a remedial actions, compensate for a wrong, and/or provide for an intricate, protracted system of compliance.

In most circumstances, judicial remedies in environmental cases combine different elements of relief. While remedies are often case-specific, and depend on the nature of the harm and the prayer sought in the suit, courts tend to give priority to the following kinds of remedies in environmental cases involving noise pollution: injunctions, damages, restitution or order of amends, punitive, deterrent or exemplary sanctions, awards of costs and fees and prerogative writs via judicial review.

of a workplace having contravened any provision of this Act, the occupier or owner of the workplace shall, without prejudice to any other penalty, be liable to a fine not exceeding one million shillings or, to imprisonment for a term not exceeding twelve months; and the whole or any part of the fine may be applied for the benefit of the injured person or his family or otherwise as the Minister may determine: Provided that— in the case of injury to health, the occupier or owner shall not be liable to a penalty under this section unless the injury was caused directly by the contravention; and (ii) the occupier or owner shall not be liable to a penalty under this section if a charge against him under this Act in respect of the act or default by which the death or injury was caused has been heard and dismissed before the death or injury occurred'

⁵² *Ibid*, n.28

4.7.2 Injunctions

The court's primary objective is the prevention of harm. This is because there exists a constitutional or legislative obligation to protect the environment. The principle of prevention will most likely necessitate injunctive relief where the threat of harm is imminent or a harmful noise - related activity is on-going. Injunctive relief is a long-standing remedy that can abate noise pollution or other environmental harm. Injunctions can be interlocutory (immediate/preliminary), interim or permanent, and commonly issue upon the fulfillment of certain conditions such as irreparable harm, the absence of other adequate remedies, practicality of compliance, threats to public health, financial effect on the respondent etc. Interlocutory injunctions issued under certificates during emergency, in an expedited procedure, can be particularly appropriate in certain emergency situations where urgent action is needed.

The decision to issue an injunction and the form of the injunction are left to the trial judge and magistrate as an exercise of equitable discretion. In most instances, injunctions are useful in securing compliance with the law and requiring positive remediation of harmful environmental conditions such as recreational noise pollution. The equitable remedy of injunction can be used in the common law tort of nuisance when harm is threatened and before irreparable harm ensues. It can also be used to abate a continuing or recurring nuisance, as necessary

4.7.3 Damages

Where the harm has already occurred and cannot therefore be enjoined, indemnities or compensatory damages may be awarded to the injured party. Damages mainly compensate for the full losses and injuries suffered to the environment and the services it provides as well as the expenses that have been suffered due to the environmental harm. The exact type of award depends upon the nature of the harm and the technical capacity to repair the damage.

Any award of damages or indemnity, however, requires giving an economic value to the losses suffered. This therefore causes a lot of difficulties especially when environmental damage occurs since not all parts of the environment can easily be valued or quantified. Since it is difficult, for example, to assign an economic value to a noise-free atmosphere, the economic value of the environment as a whole can be considered as the sum of all the goods and services, such as life support and recreation, provided during the time a given activity is taking place. Any attenuation in the quality or quantity of the flow of goods and services associated with an alteration of the environment due to the activity can be considered as environmental harm.

When it comes to recreational noise pollution, property damages have been recovered for loss of value, lost profits when it comes to lodges, other economic loss such as rental value, costs of repair or remediation to the property. Personal injury damages have been assessed for injury, disease, increased risk of disease, emotional distress, fear of contracting disease, and medical monitoring for early detection. All these are applicable when it comes to the enforcement of the right to a noise-free environment.

4.7.4 Restitution and Remediation

Restitution is the preferred remedy in most jurisdictions especially where it is possible for the environmental harm to be wiped out and the situation restored to its natural state. In environmental cases courts often order the damaged ecosystem returned to a healthy state. Such orders, appear closely related to injunctions for also compelling action, may substitute for compensation and will often produce a better result for the environment⁵³.

4.7.5 Sanctions and Penalties

The objective of the remedies herein is punishing violators not so much for punishment's sake but rather to express community condemnation of the conduct and send a message of 'deterrence' that discourages similar delinquency in the future. While in some occasions punitive exemplary and aggravated damages may serve a role in punishing noncompliance, the two principal means of penalizing environmental misdeeds are civil penalties and criminal sanctions, such as criminal fines and imprisonment. Other sanctions may be in the form of community service and other innovative measures that have a connection with the wrong.

a) *Financial sanctions*: Financial sanctions generally involves punitive civil penalties and criminal fines and it is often recommended that the deterrence value in the sanction and measure of consistency in approach shall at a very minimum, disgorge the economic benefit that a polluter realized by virtue of the violation. Many entertainment joints blatantly opt to violate the law, assuming that they will not be caught or if they are apprehended that the penalties assessed will be less expensive than taking the actions required to conform with the law. In order to enhance profits, the joints are tempted to ignore *the Noise Regulations* mandating anti-pollution measures.

⁵³ See *Paul K. Nzangu vrs Mbiti Ndili* (High Court of Kenya at Machakos, Case 8/1991)

b) Community service for the environment: This is necessary especially where the violator is ordered to engage in general environmental conservation initiatives for the entire community in a manner that he appears to be compensating for the environmental damage that he has caused. Such actions are always alternative to fines or order of imprisonment and are suitable for minor infractions especially by first time offenders.

c) Imprisonment: Noise polluters, especially the managers and proprietors of the noisy entertainment joints, are liable to imprisonment. This reflects a growing awareness among the judicial officers of the seriousness of environmental transgressions and most serious violators are increasingly being sent to the prisons. Opinions are however still divided on the overall value of imprisonment when it comes to the efficacy of criminal law in environmental management.

4.7.6 Legal Fees and Costs

Most common law jurisdictions, Kenya included, normally award legal fees and costs to prevailing parties. Generally, the successful party in a litigation gets the costs. Awards are generally not granted for trivial success or purely procedural victories. Reasonable awards of fees tend to enable citizen lawsuits to enforce environmental law, as many citizen litigants cannot afford to sue large companies or other powerful interests unless their costs can be recovered. A growing issue is whether or not public interest litigation should be subject to the same rules as private litigation or whether the public is better served by having such cases brought. It is however generally provided in Kenya that in public interest litigations, each party bears its or his/her own costs⁵⁴.

4.7.7 Prerogative Writs

A superior Court such as the Environment and Lands Court can review the decisions of an administrative nature that have impacts on the environment such as policies, licenses, permits, laws, rules and regulations for being ultra vires (against the constitution or law), illegal or violating any known legal or constitutional principle such as public participation etc. Such writs include certiorari, prohibition and mandamus.

⁵⁴ See *Republic vrs Independent Electoral and Boundaries Commission & 2 others Ex- Parte Alinoor Derow Abdullahi & others* [2017] eKLR

4.8 Legal Gaps Affecting Effective Public Participation in Noise Pollution Control

Having analysed the findings on public participation in recreational noise pollution control in emerging towns in Kenyan counties viz-a-viz the legal regime governing public participation in Kenya, several gaps have been realised, which hinder the effective participation of the people in recreational noise pollution control. These gaps can be summarised as follows: -

- a. The main provisions of the Occupational Health and Safety Act relating to noise pollution at the workplace are beyond the scopes of the county governments. They fall under the national government's State Department of Labor. The National Construction Authority, has also not been effectively involved, so as to supervise the building constructions with the aim of enforcing building standards to require quite interiors for the entertainment joints. The quite interiors prevent the noise from filtering outside. Under present arrangements, the County governments lack the infrastructure and capacity to generate and maintain databases, detailed technical standards or advisory services. The counties might still therefore rely on the technical expertise of the national government departments and institutions such as NEMA. However, NEMA officials on the ground are adamant and not willing to assist in the enforcement of the noise standards at the counties, insisting that the Constitution is clear that noise pollution control is a county function. This leads to a confusion amongst the governments and departments as noise pollution from the entertainment joints creates not only a labor issue, but a serious health and environmental issue. Recreational noise tend therefore to be tackled in a piecemeal way by different personnel for different objectives, under separate laws and regulations. This makes it difficult to implement a cross-cutting approach to prevention and mitigation. Coordinating processes are needed at and between these levels and sectors to ensure sectoral consistency and more efficient use of available resources and tools.
- b. This study found out that those who take the risks are seldom those affected by the consequences of a harmful introduction. There are currently few deterrents to the creation, production and emission of recreational noise pollutants by the entertainment joints in the rural towns. The penalties imposed are not being enforced and appear not deterrent to the polluters. The polluter-pays principle has not been embraced in the laws. There are also few positive incentives for the business owners, emitters and other stakeholders to develop alternative practices based on locally-available native solutions or undertake land management practices to promote a noise pollution free environment.

- c. This research found that existing market mechanisms and other economic instruments are not sufficiently developed to provide deterrents for recreational noise production and emission. In most counties, tools are not in place to generate sustainable funding for public investment in recreational noise pollution prevention and control programmes. This is a serious deficit, particularly for poor and developing counties such as Tana River and calls for priority research into innovative new approaches. The economic dimension of noise pollution has not been effectively dealt with in the laws. The laws simply provide for sanctions without providing for economic incentives. Most business owners complained that it is economically sensible to pollute than to prevent or control. This is mainly because of the huge costs involved in setting up control measures, on the one hand, and the huge clientele attracted by the noise, which leads to enormous profits. Economic incentives therefore make sense. These includes incentivizing businesses to adopt to and enforcing, sound proofing where machineries and equipment are installed in new buildings. Conversely, there are no legal provisions in place for subsidising acoustical retrofit such as double pane windows, mechanical ventilations, for existing residential buildings near the entertainment joints.
- d. Generic environmental management tools rarely reference noise pollution risks or cover a broad enough range of activities. Environmental Impact assessment regulations and criteria need to address economic, environmental and societal implications of activities and processes involving noise pollution. Operating and siting rules for installations conducting potentially hazardous operations should cover premises where recreational noise pollution is likely to occur.
- e. The law do not also provide for effective enforcement of Physical Planning Act⁵⁵ especially in the emerging towns in the counties. These towns were hitherto market or trading centres with no working development plan. There was also no effective consultations when they were selected to be the main towns for the counties⁵⁶. There are therefore no clearly demarcated zones within the towns. The zoning areas within towns avoid conflicting land use within close proximity.
- f. The noise regulations in place do not adequately provide for noise standards for loud equipment, such as those in discos, which involves restricting the use, location or timing of specific equipment or activities so as to protect health and sleep. Inasmuch as the regulations set under

⁵⁵ Cap. 286, Laws of Kenya

⁵⁶ For example, refer to the dispute in Tana River involving the relocation of the headquarters to Dayate in *Daudi Omar Bare and another vrs The County Government of Tana River [2019] eKLR*

the Alcoholics Drinks Control Act⁵⁷, did classify the time which clubs, bars and such other joints could open and close, the noise standards has left it open, and do not effectively deal with the issue of loud music from the entertainment joints during night time. This is mainly because it is difficult to accurately measure the decibels indicated therein. Regulation of time would have effectively supplemented the decibel standard fixed herein.

- g. The laws basically criminalise and outlaw noisy activities without providing a solution. Noise is an important aspect of the economies of these young towns. Stopping at criminalising such an aspect of an economy without providing a remedy is a recipe for defiance and hence anarchy. Dialogue on trade and environment should be initiated on a more systematic basis between business owners and NEMA or the county governments. This should have been the first step in public or community participation.
- h. The County Environment Committees provided for in EMCA provides a better avenue for community participation in recreational noise management. However, the challenge is that these committees are still under the National Government Administration Officers (NGAOs) right from the Regional Commissioners (RC) to the Assistant Chiefs. The place of noise pollution control which is a devolved function, is therefore still in limbo and questions have always been raised about the conflicting licensing roles of the county administrators vis-à-vis the national government administrators and the police. It is not known what role the NGAOs, national government officers, can play in the management of noise pollution. This could explain the reason why none of the respondent interviewed (0%) has ever sat in such a committee in this region.
- i. The I-don't-care attitude towards noise pollution exhibited by most of the residents has mainly been blamed on ignorance. There are no provisions for awareness campaigns on the danger posed by excessive noise pollution. As already stated herein, most residents still do not view loud music as noise.
- j. There is lack of inter-counties linkages or regional and sub-regional co-operations, which is essential for effective frameworks in the control of recreational noise pollution especially in border towns. This study found out that efficiency and efficacy can be increased by sharing information, ensuring basic consistency in policies, legislation and practice and cooperating on

⁵⁷ *Ibid*, n.28

risk analysis (e.g. of trade that concern several counties in a region) and eradication/control programmes. Sound implementation has therefore been hampered because of lack of a harmonised regulatory framework. NEMA often lacks the teeth to bite in such instances where the sectorial regulatory agencies are also involved.

- k. Existing instruments give little guidance on how to engage target audiences close to the ground. Despite general requirements for public participation in the various instruments, there is no specific provision requiring support to local populations to develop and implement remedial action in degraded areas where recreational noise pollution is rampant. This study still insists that recreational noise pollution can best be controlled if the local population are actively involved. Stakeholders involved in or affected by recreational noise-related activities are currently not being engaged and, are therefore not accountable. Appropriate communication strategies need to be developed, tailored to different target audiences and groups, including enforcement personnel.
- l. Management of noise pollution control is yet to be decentralized to the lowest appropriate level, such as the villages. There are no specific provisions for this decentralisation, leaving the decision, on the individual county governments. This study found out that this decentralisation is the cornerstone of community participation.
- m. Despite the fact that the Kenyan government harmonized environmental laws under Environmental Management and Coordination Act (EMCA), 1999, nearly twenty-one years ago, few Kenyans seem to be aware of the goodies of this piece of legislation. The first limitation of the good intentions of the EMCA, including the requirements for EIA, the rules and regulations (including excessive noise and vibration control regulations) made thereunder is therefore ignorance on the part of the public. The members of the public are ignorant of the role and mandate of NEMA, the county governments, police, the courts and other regulatory institution. They often perceive institutional involvement as harassment.
- n. It is very common for the EIA process to be politicised. Most major projects have always been passed to proceed. The organisations responsible for implementing EIA provisions in developing countries like Kenya are frequently lacking in status and political clout, and work in a culture where an absence of information sharing considerably reduces their influence. These environmental organisations such as NEMA are often 'bypassed' by other, more powerful,

ministries such as the Office of the President. This lack of organisational capacity explains why EIA largely remains a ‘top-down’ requirement imposed by external agencies.

- o. The quality of the assessment is often in doubt. The environmental assessors are often not highly trained in environmental assessment. Undercutting in terms of fees to be charged often lead to poor quality output and submissions of inaccurate or false report. The motivation to the assessors is just to earn, and not to protect the environment.
- p. Despite the requirement of public participation, there exists certain reluctances by many in authority or obstacles to have the public involved or to make information easily accessible. This is compounded by poverty. The records of EIA reports are obtained from NEMA at a fee of Ksh200/- which is not affordable to many. This may as well mean information inaccessibility because often spending is prioritized to other factors such as food⁵⁸. This has meant that very few EIA reports have been made available to the public (or even for training purpose). Moreover, the language used in the EIA process has been technical thereby making no sense to the few lay readers able to access and review them. This was confirmed by Kameri-Mbote who states that public participation in EA in Kenya has often been ‘adversarial’ (conflict in nature) with NGOs and sectorial representatives often lobbying and petitioning the government on environmental and sustainability issues⁵⁹. The public on the other hand lacks the confidence to believe that their views shall be taken on board in decision making.

4.9 Stakeholder Initiatives in Recreational Noise Pollution Control

Having made significant findings on the legal gaps that hinder effective community participation in the control of recreational noise pollution, this section summarises some non-state/ governmental initiatives that have impacted on the control and or prevention of recreational noise pollution within the emerging towns. Some of the initiatives shall require legal backing, and when incorporated into the laws, shall greatly promote the efficacies of recreational noise pollution control strategies within the Kenyan counties.

⁵⁸ Amombo, A. O. (2006). *EIA as a tool to support Sustainable Development: a case study of water related development projects in Kenya*. MSc Thesis. UNESCO-IHE, Delft

⁵⁹ *Ibid*

4.9.1 Participation by the Recreational Noise Producers (Entertainment Joints)

This study found out that complaints about noise can be the undoing of the hotels. The main bother to the guests and the residents is the effect of recreational noise on sleep. *‘Noise costs hotels money. Angry guests often demand discounts or extra services, or, even worse, don’t return and also steer their friends away from your hotel. So, the key thing for us in a hotel environment is to make sure guests don’t get awakened by noise⁶⁰’.*

There have been some traditional approaches to addressing noise which have been used for example reducing it at the source, blocking it with reinforced walls, windows and doors and absorbing it with soft furniture and flooring. These approaches remain essential, but are not always enough. However, there seems not to be a uniform solution to all hotels on this issue of noise. Thus each solution depends with the prevailing situation in each hotel. To this extent, there cannot be any law developed to regulate this kind of problem, given that laws apply evenly and uniformly.

One of the best approach to solving recreational noise pollution from entertainment joints and hotels has been through the installation of raven doors (see figure 11.0). These kinds of doors and windows provide an effective and proven barrier to airborne sound while increasing the acoustic performance of the door assembly among other collateral safety benefits. For example, a small capital investment in upgrading existing doors with raven acoustic smoke seals has brought about a quick and lasting return while ensuring compliance with the building regulations and the comfort and safety of the occupants.

The business owners (99%) are however not willing to comply with the noise pollution control measures currently in place. They are ready to resist any such move towards compliance. They view noise from the economical angle, rather than the health side of it, and its likely impact on the environment. Most businessmen interviewed urged the government not to consider enforcing the limitation on noise levels in entertainment spots in Hola. They said they stare at counting losses similar to their counterparts in Kilifi county where authorities started enforcing the 35-decibel limit to control of noise pollution. Most clubs in Hola operate in the open and parties are held every week. One of the general manager said that by following the National Environment Management Authority (NEMA) laws, the club owners shall lose business running into millions of shillings. A general manager of another hotel in Hola fear that many

⁶⁰ Interview with Ms. Jane W. Buya, Manager, Hola City Restaurant, Hola, Jan., 2020



Figure 11.0: Raven Acoustic Seals Help Isolate Buildings from External and Internal Noise

customers will cancel bookings due to the low music volumes and the impromptu raids by county officials.

I will not be happy because like in Malindi, the patrols started and the tourists have been running away from the premises and this is affecting our operations. We have been receiving calls from outside the country from tourists who used to come because of the open parties, but are now unwilling to come if the music levels are down⁶¹

Only 10 people interviewed (2%) were aware that noise pollution permits are a must have if one is holding an event in Hola, Tana River or any other county and that the permits ensures that the celebration is not disrupted by National Environment Management Authority (NEMA) officials should they decide to do their patrols as part of the enforcement. To this extent, most county towns are doing poorly when it comes to noise pollution control.

4.9.2 Participation on the Part of the Recreational Noise Consumers

When EMCA buried the stringent requirements on locus standi which was a prime constraint to environmental litigation in Kenya, it was expected that they would be an influx of PIL. When the Magistrates Court Act, 2015, allowed special magistrates to be appointed to exercise the functions of the Environment and Lands Courts (ELC), it was hoped that the important judicial services of adjudications of such environmental disputes would be enhanced. Whereas these courts and magistrates have continued to play their roles as far as land disputes adjudications is concerned, there has been fewer or less activities when it comes to the enforcements and prosecutions of environmental rights. This still reinforces the researcher's view that environmental matters are still pushed to the periphery as the Kenyan population stresses on the enforcement of their proprietary rights. Of the few cases registered in the court, none of them has been on the protection of the right to safe and clean environment. In the criminal law aspect, there has been no case brought relating to public health and safety, except those that relate to dealing, use and possession of forest and wildlife resources.

Hola town is served by a Principal magistrate who is a gazetted judicial officer for purposes of the Environment and Lands Courts Act. Under section 3(3), of EMCA, everyone whose right(s) to environment has been abused can petition the High Court for redress and remedy without having to established that the action or omission complained against has caused or is likely to cause a personal damage or misfortune to the person in question. For this purpose, there is an Environment and Lands Court at Malindi and Garissa, approximately 180 km from Hola. This

⁶¹ Interview on 20.01.2020

distance, compounded by high poverty level and ignorance might be the strong reasons why the residents in Hola continue and are willing to suffer in silence, rather than take steps to enforce their right to public participation, access to information and clean and healthy environment. This is because such environmental matters, once in court, must be determined on the basis of the principles of sustainable development including public participation⁶².

Respondents were interviewed on the aspect of enforcement of the right to clean and healthy environment. Only 30% of the respondents were aware of the rights to clean and healthy environment, including that which is free from noise pollution. Over 70% were ignorant. Various reasons were cited for non-compliance and non-enforcement. Lack of responsibility for management of environment (40%) was the key reason. The authorities and agencies at the local level are still not aware of their respective roles. For instance, the police shifted the blame of the enforcement of noise pollution control regulations to the county enforcement officers. The county government on the other hand, has no legislation of its own, that deals with the prevention and control of noise pollution. This is despite it being a devolved function, and the county government being in existent since 2013. Other reasons include failure of institutional linkages for management of the environment and lack of enforcement capacity at all levels (45%).

There is a County Liquor Licensing Act⁶³, but which has never been enforced. The county Act has faced serious opposition from the stakeholders that the weak county government enforcement machineries has been unable to enforce it⁶⁴. The police on the other hand, use the Alcoholics Drinks Control Act, 2010⁶⁵, to deal with any perceived wrong involving the entertainment industry. Thus the noise regulations have been abandoned and it seems no one cares. Thus the decentralisation of management and enforcement responsibility to relevant lead agencies, local authorities and resource users, lack of harmonisation of urban planning, large scale agricultural developments and land-use in general with modern development and conservation goals and poverty and natural resource use relationship have all fused and hence conspired to leave the entertainment industry unregulated as far as noise pollution control is

⁶² Ojwang', J. B. J. (2007). 'The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development', *1 Kenya Law Review Journal* 19

⁶³ Gazette Supplement No. 31 of 2016 (Special Issue)

⁶⁴ Interview with the Chairman of Hola Bar Owners Association, Mr. Kobia, Laiberia Restaurant, Hola, January, 2020.

⁶⁵ *Ibid*, n.28

concerned. The decentralisation of the enforcement machineries to local levels has therefore not translated into any meaningful action as far as natural resources and environmental management are concerned. These findings reflect the reasoning by Agwenyi⁶⁶.

On enforcement or prosecuting a violation of the right, the results reflected those in Table 4.0 above. Respondents mainly cited poverty, lack of time, rigidity and corruption in the system and accessibility of the law enforcement agencies, including the courts. It therefore translates to an I-don't-Care Culture on the part of the residents and the law enforcers at these towns. The police and the environmental officers interviewed also cited corruption, failure to report and the rigidity of the system as the main reasons for their failure to arrest and file charges relating to noise pollution. It was noted that most of the entertainment joints are in a rent-seeking relationship with both county and police authorities, thereby making it difficult for the law enforcers to act against them even when reports have been made against them.

4.9.3 Other Areas of Stakeholder Participation in Recreational Noise Pollution Control

There are however several other areas of interest where citizens have been given an avenue to participate in their governance at the county level which the citizens of the counties rarely use. One such area is found in Section 15 of the County Government Act, 2012, which allows any individual to appeal to the county assembly to consider any matter within its authority, including enacting, amending or repealing any of its legislation. Additionally, section 88 of the County Government Act, 2012, gives the general population the right to appeal to the county government on any particular issue under the responsibility of the county government. Section 89 makes it a duty to county government authorities and organizations to react speedily to petitions and the needs of the citizens. In addition, section 90 of the County Government Act, 2012, provides for the conduct of referendum on local issues such as county legislations, petitions, planning, or investment decisions affecting the County for which a petition has been raised and duly signed by at least 25% of the registered voters where the referendum is to take place. Thus public participation is mandatory in county planning process as demonstrated in section 113 of the County Government Act. It even goes on further to list the various avenues that the counties should make available for the general population to participate. They include

⁶⁶ Angwenyi A. N. (2008). 'An Overview of the Environmental Management and Co-ordination Act' in Okidi C. O. *et al.* (2008). *Environmental Governance in Kenya: Implementing the Framework Law*. East African Educational Publishers Ltd: Nairobi

information communication technology based platforms; town hall meetings; budget preparation and validation fora; notice board announcements of jobs, appointments, procurements, awards and other important announcements of public interest; development project; avenues for the participation of the people's representatives such as the members of the National Assembly and the Senate; and the establishment of citizen fora at the county and its decentralised units. Section 115(2) of the Act mandates each county assembly to develop laws and regulations giving effect to the requirement for effective citizen participation. These laws and regulations include those on recreational noise pollution control which is a devolved function. Despite these provisions, the research found that public participation at the county level is very minimal, if not perfunctory. Residents still do not understand that the county government is a government in the traditional sense. They thus do not care much about the policy issues, as they are preoccupied with making an extra shilling from the county governments through corrupt tenders and cheap retrogressive politics. To most, county governments devolved the authority, political power and corruption closer to them, and nothing more. Environmental conservation concepts are still alien to them as they believe that it is the function of NGOs fuelled by cheap donor funds that should also be shared with them.

The Urban Areas and Cities, 2011, similarly, has provisions that take into account citizen participation as relates the management and control of air and noise pollution services. Section 22 of the Act provides for the citizen fora where the inhabitants of a city or urban area have the right to contribute to the decision-making process of the city or urban area by submitting written or oral presentations or complaints to a board or town committee through the city or municipal manager or town administrator; prompt responses to their written or oral communications; be informed of decisions affecting their rights, property and reasonable expectations; demand that the proceedings of a board or committee and its committees or sub-committees be conducted impartially and have access to services which the city or municipality provides. These rights have been intricately provided for in the second schedule to the Act. Section 24 of the Act provides for the publication of important information, and access to the information by an inhabitant upon request. This information may include those relating to the policies and programmes, relating to the control, and or management of recreational noise pollution. Homa Bay town is on paper under a Town Management headed by a town manager. Several years since the operationalisation of the county government, the town board and the management are however still not in place. These institutions if established, shall provide the best one stop shop

for effective management of recreational noise pollution in these rural towns. This is because interviewed public officials admitted that often residents must file multiple complaints before any action as they feel that acting *suo moto* might raise counter complaints of harassment or extortion against them. They also indicated that many business owners believe that they are above the law and ignore notices to reduce noises sent by public institutions. A few residents file anonymous complaints due to fear of violent retaliation by affected businesses. National police and county enforcement officers are not immune to this fear. Moreover, these officials are prone to corrupt practices, as confirmed by an interview with a nightclub employee.

4.9.4 Recreational Noise and Enforcement of Judicial Decisions: Environmental Justice in the Wake of Disobedience of Judicial Orders

One of the causes of the lack of adequate pollution control and management in Kenya is, generally, weak institutions. These weak institutions are the ones which were sought to be remedied by the Constitution which Kenyans ratified on 4th August 2010. The Constitution provided for a system of checks and balances among the executive, the legislative and judicial branches of government, thereby restating one of the hallmarks of democracy.

As foreseen hereinabove, courts are some of the institutions which play an important role in controlling recreational noise pollution, e.g. by issuing sanctions and various remedies, reviewing of agency decisions and demanding compliance with noise pollution standards from violators thereby further solidifying the authority of the standards.

Usually, persons aggrieved by recreational noise pollution can bring nuisance actions in court against the party responsible for the nuisance. The court to be effective in such cases must determine not only if a nuisance exists, but further, the likelihood of the nuisance to recur if halted. The courts may in appropriate circumstances also order for the payment of damages. The decision on the remedy to grant commonly requires the judge or magistrate to take into consideration public health and welfare. In some instances, courts have found that no judicial action is needed. For example, in *Bangladesh Environmental Lawyers Association vrs The Election Commission and Others, SC of Bangladesh, High Court Div., Writ Petition No. 186 of 1994*, the Secretary-General of the Bangladesh Environmental Lawyers Association (BELA) alleged that political candidates were breaking poll laws and causing environmental noise pollution in the city with noise from loudspeakers and impulsive parades. Whereas the Supreme Court of Bangladesh found that *'it is desirable to mitigate the environmental pollution as*

alleged by the Petitioner,' it still went ahead to rule that the Election Commission and the Dhaka City Corporation had taken clear steps to stop the alleged pollution. The court then found it unnecessary to give further directions because the AG had assured that the government would take all necessary steps to implement the directions of the Election Commission. In most times, however, consideration of the facts may show an environmental health hazard that merits judicial mitigation. Judicial orders are, however, only effective if they are well-framed and adhered to by the parties concerned.

ELC Judges and magistrates thus have an important educational role in management, prevention and control of recreational noise pollution. Because of the respect that they have on the society, judges and magistrates both reflect and set the tone for compliance with environmental management measures. For this to be achieved, the voice of the ELC judge and corresponding magistrate should represent reason, impartiality, and understanding of all the interests at stake. A judicial officer's serious reaction to a given case helps to shape and reinforce a society's view of the gravity of the problem represented by that case. Through this, judicial officers are able to inspire all stakeholders in society – government, industry and citizens – to partake in the duty of environmental stewardship. Since the protection and conservation of the environment often calls for a reconsideration and change of economic practices and even ways of life, as well as assuming and sharing new responsibilities and costs, the judge is the eventual referee of the resultant push and pulls and inconsistent interests. Judicial officers will only be able to achieve this result through effective participation by key stakeholders such as the community, prosecutors, environmental law enforcers and the business people. This mainly happens when the cases are filed before them. Judicial education to all these important stakeholders in this area is therefore necessary. Public participation and public access to justice, directly by access to and involvement in hearings, and indirectly through the media, are thus critical to the enforcement and implementation of environmental law. In essence, the courts are guarantors of such participation.

Whereas courts in Kenya have had recourse to innovative oversight mechanisms to ensure compliance with judgments in environmental cases, judicial authorities still face cases of or willful disobedience of, or non-compliance with, judgments. When this happens most courts have power to punish such acts as contempt of court. Just as judicial enforcement of environmental requirements is critical to the integrity of those requirements, judicial enforcement of judgments is essential to the integrity of those judgments and to societal

reverence for the rule of law. This study found that the Kenyan Judiciary has acted in an exemplary manner since the Constitution came into operation in 2010. It has observed the high standards which are maintained by democracies where judges and magistrates have served as true guardians of the Constitution by ensuring that all arms and organs of the government observe the rule of law by obeying court orders and decisions, save where the same have been reviewed or overturned on appeal. The High Court, for example, acted commendably in both *Martin Nyaga Wambora and 4 Others vrs Speaker of the Senate and 6 Others*⁶⁷ and *Judicial Service Commission vrs Speaker of the National Assembly*⁶⁸ cases. They nullified two actions of the Senate, the National Assembly and the President which had been taken in disobedience of court orders. In the latter, a five judge bench comprising Hon Justice Mwongo, Hon. Lady Justice Omondi, Hon. Lady Justice Meoli, Hon. Lady Justice Mumbi Ngugi and Hon Justice Chemitei stated as follows,

94. The President's actions were predicated on actions taken by the National Assembly resulting in a petition to the President under Article 251(3). The validity and bona fides of this petition is in contention. If, as the Petitioner contends, it was invalid for having been the result of a process in Parliament that took place in violation of a Court order, then the President's acts would have been based on an invalid act; and as the Court observed in the case of Clarke and Others v Chadburn and Others [1985] 1 ALL ER 211, an act done in willful disobedience of a Court order is both a contempt of Court and an illegal and invalid act which cannot effect any change in the rights and liabilities of others. (See also the decision in Commercial Bank of Africa Ltd v Isaac Kamau Ndirangu (Civil Appeal No. 157 of 1995 {1990 – 1994} EA, 69).

95. We are further bolstered in our finding on this issue by the decision of the High Court in Hon. Mr. Justice Joseph Mbalu Mutava v The Attorney General and The Judicial Service Commission High Court Petition No. 337 of 2013 where the Court had no hesitation in making orders invalidating the appointment of a tribunal by the President, even though he was not a party to the matter before it⁶⁹.

Through these two decisions, among others, the High Court has indicated its determination to uphold the rule of law. Long before the 2010 Constitution there were several cases which evidenced the reluctance of the executive branch to use its legitimate force to enforce the Constitution generally and specifically, to protect property. For example in, *Methodist Church in Kenya Trustees Registered v Attorney General*⁷⁰ on 13th June 2006, about 1, 000 people used force to shut down a dispensary which belongs to the Petitioner. When the Police were asked to provide protection, the local police station which did not seek re-enforcement, sent

⁶⁷ [2014] eKLR

⁶⁸ Nairobi High Court Petition No. 518 of 2013 delivered on 15th April, 2014

⁶⁹ *Ibid*

⁷⁰ Meru High Court Petition No. 4 of 2010

only five to seven police officers to deal with that group of people. They merely pleaded with them to leave but they were ignored. The Police did not see the need to protect the Constitution with a larger force supplied by other police stations. It appears to have been reluctant to confront a lawless group of people. Two years later, the Executive branch of the government started arranging to take the dispensary from the Petitioner which petitioned for the enforcement of its rights. Its petition was heard and allowed by Honorable Lady Justice Kasango who issued the following orders –

- 1. That it be and is hereby declared that the Petitioner is the owner of Plot No. 5118 within Upper Athiru Gaiti Adjudication Section.***
- 2. That the District Land Adjudication and Settlement Officer Igembe District be and is hereby directed to record the Petitioner as the owner of that Plot No. 5118, Upper Athiru Gaiti Adjudication Section.***
- 3. That an order of certiorari is hereby issued to call to this court and quash gazette No. 1640 dated 23rd February, 2007 whereby Kiraone Dispensary was gazetted as an approved institution under section 22(2)(b) of the Medical Practitioners and dentists Act chapter 253 of the laws of Kenya.***
- 4. That a permanent injunction be and is hereby issued against all the respondents their servants, agents or anyone claiming under them from interfering with the running by the Petitioner of Kiraone Dispensary on Plot No. 5118, Upper Athiru Gaiti Adjudication Section.***
- 5. That the officer in charge of Police station near Kiraone Dispensary do afford and provide the Petitioner, its employees and agents security as they provide health services to the community of Kiraone Dispensary.***
- 6. That the 3rd 4th and 5th Respondents do pay the Petitioner Kshs. 3,000,000/= as general damages.***
- 7. That the respondents do pay the Petitioner's costs.***

The Church is however still out of its property fourteen years after the episode despite the fact that a judgment was delivered in its favor on 22nd October 2010. The State obtained a stay of execution. The other case is ***Roshanali Karmali Khimji Pradhan vs. The Attorney General***⁷¹. The Plaintiff was an owner of a farm known as Ziwani Farm who sued the government for breach of its statutory duty and negligence which resulted in the destruction of his farm. He claimed damages. Between 15th May 1997, and 8th August, 1997 when his farm was invaded, he reported of the presence of raiders in neighboring farms to the security authorities and requested them to take action to arrest the thugs. However, no action was taken by security agents. As a result, his property was vandalized. Senior police officers gave evidence for the government which opposed his claim. They admitted that the government was in a position to crush the tribal clashes but did not do so. He was awarded damages in the sum of Kshs 17, 930,

⁷¹ Mombasa High Court Civil Suit No. 276 of 1998

180. The cases prove that the executive arm of the government lacked the will to enforce the Constitution, but that our transformed judiciary is still able to flex its arm and ensure compliance with the constitutional provisions, including those that safeguards environmental rights.

The cases discussed hereinabove are however not the only ones of the most embarrassing reminder of our rule of law failures. In recent times, the Chief Justice has taken the president head on the latter's blatant disregard of court orders, including his refusal to appoint twenty judges of the Environment and Lands Court, despite several court orders⁷². The Chief Justice in a statement to the media stated '*unfortunately, this disregard for Court Orders by the President is part of the pattern by the Executive*'⁷³.

When making both the 1963 and 2010 Constitutions, Kenyans acted on the truth that they can, like other people in the world, make democracy work. Whether they can be said to be proud and optimistic about that is still debatable. As Justice Breyer of the United States of America Supreme Court has observed, it is through good practices that that nation has become great. In his book titled *Making Our Democracy Work* he gives this illustration which is relevant to our current situation.

*A Chief Justice of an African nation struggling to maintain an independent judiciary recently asked me directly, 'Why do Americans do what the courts say? What in the Constitution makes this likely? What is the institutional drive that makes court decisions effective? What she wondered is the secret?' I answered that there is no secret, there are no magic words on paper. Following the law is a matter of custom, of habit, of widely shared understanding as to how those in government and members of the public should, and will, act when faced with a court decision they strongly dislike. My short answer to the Chief Justice's question was to say that history, not legal doctrine, tells us how Americans came to follow the Supreme Court's rulings. My longer answer consists of several examples that illustrate different challenges the court and the nation faced as gradually over time the American public developed those customs and habits*⁷⁴.

All that is needed is for them to uphold the ideals and practices which other people in the world uphold. The ratification by Kenyans of the Constitution signified their determination to make a new Kenya. That is why they made for themselves that Constitution which the Supreme Court

⁷² In *High Court Petition No. 313 of 2014, Law Society of Kenya vrs AG & Another*, a High Court bench of 5 judges clearly defined the President's role in the appointment of judges and held that once he received the recommendation of JSC, the President had no option than to appoint the Judges. Also *Petition 427 of 2019 – David Kariuki Ngari & Another vs. JSC & Others* and *Petition 369 of 2019 – Adrian Kamotho Njenga vs. The Hon. AG & Others*.

⁷³ Radio Africa Group (2020), Uhuru was to pick judges next week before Maraga attack in The Star, 09 June 2020, available www.the-star.co.ke

⁷⁴ Breyer, S. (2010). *Making Our Democracy Work: A Judge's View*. Alfred A. Knopf: New York, at page 22

has described as a transformative document in *Speaker of the Senate & another v Hon. AG & another & 3 others*⁷⁵,

[52] The transformative concept, in operational terms, reconfigures the interplays between the States majoritarian and non-majoritarian institutions, to the intent that the desirable goals of governance, consistent with dominant perceptions of legitimacy, be achieved. ...

The scholar states the object of this South African choice:

“By transformative Constitutionalism I mean a long-term project of Constitutional enactment, interpretation, and enforcement committed ... to transforming a country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative Constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law.”

The implications of the foregoing are that the 2010 Constitution is a charter for renewing Kenya; as the Supreme Court has pointed out, it embodies a long-term project of Constitutional enactment, interpretation, and enforcement committed to transforming a country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. This reality appears not to have been accepted; a transformed Kenya is one in which the Constitutional organs perform the roles which the Kenyans have assigned to them through the Constitution. Further it shows that democracy demands that the Chief Executive uses the entire might to defend the Constitution even during the peace time if a need arises; the different organs of the state must act in tandem. It has been seen that in several cases, the High Court has made orders which have never been enforced. This blatant disobedience of court orders does not bode well for the future of recreational noise pollution management through the enforcement of the right to clean and healthy noise-free environment.

4.10 Conclusion

The inclusion of explicit environmental provisions in Kenya’s 2010 constitution is first and foremost a recognition of the citizens’ right to an environment that nurtures life and provides for human activities. The specific obligations in respect of the environment spelt out in the 2010 constitution demonstrate further commitment to Kenya’s citizens for improved environmental management. These environmental considerations will, however, only be operationalized by improved commitment from the state, governments and support to the citizens. Kenya can, on paper, now also be said to be better positioned to manage its environment in a more effective

⁷⁵ [2013] eKLR

manner mainly as a result of the inclusion of explicit environmental provisions in the Constitution.

Forty seven devolved county governments were created pursuant to the Constitution with the main object of enabling increased self-governance by the citizens⁷⁶. Tasks that were deemed local or applicable for decentralization, such as noise pollution, were therefore conveniently assigned to the county governments.

This study has however found that, despite this devolution, public actions to control and reduce noise levels have been very limited. Specifically, interventions to protect against recreational noise pollution have been limited. These few interventions have mainly resulted from the will of key public officials rather than an accountable administrative system to ensure constant monitoring and enforcement. Part of the noise pollution is due to rapid development pattern and laissez-faire zoning regulations, which allows recreational noise generation in neighboring residential estates and other critical institutions such as major hospitals, churches and schools. However, the main problem affecting effective recreational noise pollution control in the rural towns is the lack of the necessary institutional capacities for addressing problems related to noise.

This research found that recreational noise is a growing concern for residents in the emerging rural towns. While it is well known that central area residents experience serious distress due to recreational noise pollution, even more peripheral neighborhoods are affected. Recreational noise pollution has, however, remained mostly untackled because the overall institutional framework dealing with noise pollution management is plagued with redundancies and gaps and a lack of clear functional division among competing or overlapping authorities and levels. Additionally, sleaze and preferentialism are rampant at all government levels.

In this framework, a section of business owners who belong to the upper income groups resist restrictions on activities that generate recreational noise and are able to bend the law in their favor. Any past interventions to protect residents from recreational noise pollution have been the result of the will of individual politicians, which makes consistent enforcement of the recreational noise pollution control measures ambiguous. No clear institutional system has been set to permanently and consistently deal with recreational noise management. Furthermore, the

⁷⁶ *Ibid*

resident public of these rural towns have no belief that the citizenry can bring about public action for its benefit or much belief in the legitimacy of the law.

Generally, a set of a significant proportion of respondents feel that public education programs and government can help in controlling recreational noise-level. A sufficiently empowered police and civil service could facilitate the monitoring of the noise-levels. The data herein, however, suggests that a single measure cannot achieve the goal of recreational noise reduction, which therefore calls for a multi-dimensional approach. This study further shows that majority of the employees in the entertainment industries are ignorant of the risk associated with excessive noise in their work environment and thus the organizations should be conducting regular education on noise hazards and the need to use noise PPE. DOSHS should strictly enforce the law in order to save innocent employees who are being exposed to high levels of noise yet they are not aware of the dangers of high noise levels.

Public officials interviewed generally agreed that, in order to reduce recreational noise pollution, institutional capacities must be strengthened. County employees felt that they should have more legal authority to intervene in case of noise complaints. Other proposed measures included strengthening the traditional noise pollution control measures by, for example, the use of noise barriers (such as trees or green walls), building permit requirements to soundproof new housing construction and zoning regulations that require wide prohibition of noise sources from night clubs in neighborhoods that are mostly residential.

CHAPTER FIVE

SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

This chapter presents a summary of the major research findings based on the objectives, conclusions of the findings and recommendations derived from the conclusions. The research sought to critically examine the current state of pollution control appertaining to recreational noise from entertainment joints in urban centres in Kenyan counties with regards to the following specific objectives: -

- i. To critically assess the extent of community awareness and knowledge of the nature of, sources and problems associated with, recreational noise emanating from entertainment joints in emerging urban centres in Kenya
- ii. To critically assess the extent of stakeholder involvement in the control of recreational noise pollution from entertainment joints in emerging urban centres in Kenya.
- iii. To critically assess the efficacy of the legal regulations governing recreational noise pollution in Kenya.

Both primary and secondary data were used to explain the state of recreational noise pollution control in Kenya's devolved units, and the effective means of promoting the efficacy of noise pollution control. Primary data were collected using qualitative data collection methods; mainly through questionnaire, focus group discussions, key informant interview and general interview schedules and guides, recreational noise survey and observation methods. Samples of residents, police and environmental officers, investors and employees in the entertainmnet industry and county liquor licensing officers were interviewed and/or involved in the research. Secondary data were collected from documented information available in various publications of the national and county governments in Kenya and other jurisdictions, professional publications, newspaper reports, publications of various associations connected with environmental conservation and management, academic and scholarly reports in the field of environmental law, governance and devolution among other published information. These secondary data on devolution, noise pollution control, and citizen participation were obtained from libraries,

newspapers and internet through desk research. The collected data were analysed using the thematic analytical technique, descriptive and inferential statistics.

5.2 Summary of the Major Research Findings

From the research objectives and questions, and the analysis of the data collected; the following major research findings are presented:

- i. Whereas the rate of knowledge and awareness on the nature, kind and form of recreational noise pollution is high in the emerging urban centres, there is no corresponding knowledge on the means and opportunities necessary for effective community and stakeholder participation in the management and control of recreational noise pollution from entertainment joints. This gap in knowledge has led to recreational noise being one of the most unregulated and overlooked forms of pollution in the towns.
- ii. As compared to more advanced counties, problems with noise in rural county towns are often not rated at the highest level of concern. The underlying factors for this are ignorance and poverty. Noise pollution does not therefore rank highly in the priority list of these rural counties. The link between noise and human health is not taken seriously and hence there is not much being done to curb the emission of recreational noise from entertainment joints.
- iii. Poor land use planning and increased economic activities have also contributed to the elevation of noise levels in such areas. For a harmonious coexistence between different land uses to be promoted, externalities, recreational noise included, generated by various land uses meant to meet a wide array of needs must be managed. This can only be done through the incorporation of economic standards and instruments to control noise pollution as opposed to the current state of exclusive use of the command-and-control regulations.
- iv. It is very difficult for the counties to place restrictions on noise produced by the entertainment joints in the rural towns because of the inadequacy of the laws pertaining to noise pollution control. The various legislative enactments and regulations and the legal remedies available in civil law of torts and criminal law are inadequate to control the noise pollution mainly because of weaknesses in the institutions that are supposed to enforce and facilitate enforcements. The remedies already available in the legislation

are also scattered in various enactments and are not adequate and effective in tackling this new and technical by-product of technological advancement of the society. This study found no specific and detailed legislation, policy or action plan to control recreational noise pollution in Kenya

- v. It was found that enforcement of noise pollution laws and restrictions is often inconsistent. This is mainly because noise is typically regarded as a nuisance rather than a health hazard or safety issue, so noise issues are given lower priority. Many counties and agencies (including NEMA) also lack the funding and personnel necessary to carry out their enforcement roles. In addition, noise is unlike other types of pollution in that it is invisible and highly intermittent, making noise infractions difficult to prove.
- vi. Other factors, which are responsible for the ineffectiveness of laws and continuous noise pollution are wide gap between law in theory and its implementation in practice, illiteracy and unawareness among general public about recreational noise pollution control measures, public non-cooperation towards control of noise pollution, inactive role, or the disobedience, of the Judiciary to control or curb the problem of noise pollution, inadequate laws for controlling of noise pollution, rapid growth of urbanization and industrialization, ineffective laws to prevent pollution of environment by loudspeakers and other innumerable sources of recreational noise, customs, festivals or cultural obligations, economic factors such as the prohibitive cost of installing sound proof devices and political interference in pollution control matters generally. These various factors are the main causes of recreational noise pollution and are also responsible for the ineffectiveness of noise pollution control laws and hence the continuance of noise-pollution.

5.3. Conclusions

Making and emitting excessive noise by entertainment joints indicate a lack of respect for others and leads to community deterioration. This is because not everyone within the entertainment joint's vicinity enjoys being entertained with the noise and this study reports that noise from entertainment joints is the number one complaint people in rural towns have about their neighbourhoods, and the major reason why they wish to move. It is reiterated herein that by including environmental considerations in the 2010 Constitution, Kenya acknowledges the importance of the environment to its socio-economic development, and has identified the

requirements necessary to enable enhanced environmental management. The country is thus encouraged to evaluate its current development, economic and social activities, and how these can be aligned to the requirements of the new constitution. The Constitution has since its promulgation in 2010 led to a significant increase in the opportunities for improved environmental management in Kenya and is superior to the previous constitution in this regard. Further negotiations and agreement will therefore be required between all stakeholders for focused and effective implementation of these constitutional provisions for the actual realisation of the right to clean and healthy environment free from recreational noise pollution. For this to become a reality, undivided and untiring commitment and energy is required of Kenyans through the state, institutions and individuals.

This therefore calls for the involvement of stakeholders, including the citizens. This is especially important with regards to local action plans and policies which often directly affect people living nearby. But citizens should be enabled to contribute in earlier phases, such as during the actual environmental assessment of projects and undertakings with regards to recreational noise pollution. The existing enactments, laws and policies which directly or indirectly relate to the problem of recreational noise pollution in our counties, are found inadequate to control it at the local level and here below, are the suggested recommendations to enhance the efficacy of recreational noise pollution control in the rural counties.

5.4. Recommendations

The overall awareness rate of the recreational noise pollution is very high in the rural towns. The problem is in the enforcement and participation in management and control. The public are however not conscious of their rights and availability of various remedies for enforcement. This fact becomes more conspicuous in case of recreational noise pollution because our masses are still ignorant of the grave effects of noise pollution. The Constitution of Kenya has also imposed a 'fundamental duty' upon all the citizens for the protection of environments. For seeking and securing public co-operation in the control and prevention of recreational noise pollution, the following specific measures are recommended:

- a. There is an urgent need to promote a participatory culture amongst the community. The citizens should be empowered to take up the control and prevention of noise pollution from entertainment joints into their hands. They should be trained, coached and equipped on the essentials of local democracy and citizen science. Citizens can be

provided with instrumentation tools for citizens to collect fine grained data (e.g. Evidence of harmful noise exposure levels) to convince local authorities and influence decision making on local issues, without waiting for the data to be gathered for them by the officials.

- b. Education on dangerous consequences of noise pollution through mass media like cinema, radio, television and public relation departments of both the governments and NGOs.
- c. Enforcement of the polluter-pay principle by making and enforcing the awards of damages through the various legal and other remedies available to the public for the control of recreational noise pollution.
- d. Involving the people actively in the environmental protection movement through educational and social organizations and through the fora and media outlined and or recommended hereinabove that encourages and promotes public participation.
- e. Encouraging and the residents' associations, social and neighborhood organizations engaged in environmental protection activities such as noise pollution awareness and control.

On the implementation role of the environmental executives, this study recommends that there should be an action plan, in each county, for recreational noise pollution control. The action plan should be continuously monitored and adjusted in order to take account of recent development trends and only a flexible and non-prescriptive approach will allow for such changes. Training and capacity development of the enforcement officers and noise managers have to be integrated elements of the proposed actions that apply to all categories. In addition to skill-based training related to developing assessment capabilities, there may be a need for different training, education and information activities at various levels (such as orientation programmes, curriculum development and extension training) in order to carry out the functions described in the short term strategy.

There is need to move away from the traditional command-and-control regulatory instruments by adopting modern market based instruments. This can only be done when a supportive policy making process is adopted and embraced. Such a process must support and encourage the consideration of alternative regulatory instruments thereby ensuring that governments are able

to make informed decisions regarding the options available to deal with recreational noise pollution issues. Policy makers are also encouraged to carry out, in earlier stages in the regulatory policy making process, a thorough analysis of the benefits and shortcomings of the options presented. This is because if the consideration of alternatives is left until very late in the policy making process they are unlikely to be explored fully and policy makers may have developed a preconceived notion of the need for regulation.

Each county is called upon to declare noise a dangerous form of pollution, a serious health hazard, and a widespread problem subject to government's jurisdiction. All towns and municipalities should adopt a comprehensive Noise Code which would form the general framework for county and local laws within the county. Towns, municipalities and villages would be required to adopt the elements of the Noise Code containing at least the following essential provisions relevant to recreational noise from entertainment joints:

- a. *Plainly audible standard*: Police and other enforcement officials shall detect excessive noise from buildings and houses according to the plainly audible standard.
- b. *Ten foot rule*: No joint shall emit an electronically amplified sound plainly audible beyond ten feet from its source.
- c. *No loud amplifiers*: The installation of electronic amplification equipment capable of generating noise beyond a specified decibel level within a building shall be deemed a misdemeanor or better and subject the installer to a prescribed punishment and/or fine.
- d. *Fines for loud noise*: The owner and/or operator of any joint issuing excessive noise or noises shall be subject to a prescribed punishment and/or fine.
- e. *Impoundment of loud machines*: Any machine or installations issuing excessive noise or noises shall be subject to immediate impoundment either according to mandate or at the discretion of the enforcement officer. In the case of impoundment, the offending equipment shall be confiscated, and the owner and/or operator shall be subject to impoundment fees, equipment removal costs, and a prescribed punishment and/or fine.
- f. *No public funded training*: No school or institution receiving public funding shall offer courses on the installation of prohibited electronic amplification devices in buildings which exceed public-mandated noise levels. Nor shall any student receive public

funding or bursary in order to pursue such a course at any teaching institution, private or public.

- g. *Limitations on outdoor amplified speakers*: Outdoor amplified music shall be subject to county and local regulation based on guidelines prescribed within the County Noise Code.
- h. *Anti-noise curriculum*: A broad-based public education anti-noise campaign should be implemented in all schools.
- i. *County Anti-noise Coordinator*: Each county's governor shall appoint an anti-noise coordinator who will oversee the implementation of the Noise Code, assure compliance by towns and municipalities boards and localities, arbitrate the changes and modifications requested by counties and localities, and oversee the selection and training of sworn non-police 'noise monitors' who will be granted full powers of enforcement for noise statutes.
- j. *Adequate funding*: Counties, their devolved units, municipal and town boards shall provide funding and resources necessary for enforcement of these provisions.
- k. *Noise-silencing technologies*: The county governments should give high priority to the goal of reducing by at least half the current 'noise quotient' near existing entertainment joints within 12 months using noise cancellation and silencing technologies. In addition, substantial cash prizes should be awarded to designers and builders of prototypes noise efficient establishments and equipments.
- l. *County Specific Laws*: The existing national (NEMA) regulations and a few county legislations, which directly or indirectly relate to the problem of noise pollution in Kenyan counties, are found inadequate to control it at the local level. Hence, there is need to have some sector-specific and effective legislation to control noise pollution in the counties which will be best suited to the local culture and social set-up.
- m. *Other general recommendations* include the promulgation of noise standards from various component sources at specific time of the day by the county government, declaration of noise as an offence on individual's freedom, privacy and health, creation of specialized county courts for the trial of criminal cases of noise, prescription of

volume/ pitch level for loudspeakers at the entertainment joints, public ceremonies and festivals, prompt award of compensation to recreational noise victims, fixing of responsibility on the local towns, municipal boards and administrative authorities for strict vigil on noise sources along with training them about the procedure to deal with noise offences, appointment of inspectors in local towns and municipal boards for mounting check on noise proliferation due to social activities and banning of entertainment establishments alongside other noisy trades / works in residential areas.

The national government is on the other hand called upon to declare noise a dangerous form of pollution, a serious health hazard, and a public menace. Towards this end, this study recommends the following:

- a. *Establish a noise agency*: The Office of Noise Abatement and Control within NEMA or the Ministry of Environment and Forestry should be set up with full funding.
- b. *National studies of noise pollution*: NEMA, the Ministries of Health and Environment and Forestry should study and publicize the health and safety hazards of noise pollution.
- c. *Kenya Bureau of Standards warning labels*: The Kenya Bureau of Standards should require warning labels on products that are capable of causing hearing damage; and set a maximum dB level for all electronically amplified products such as not to exceed 'safe and reasonable'.

International Co-operation can also help in great way to deal with the problem of noise pollution in general. There is need to supplement national actions with international measures and co-operation in tackling this menace. This co-operation can help especially the developing countries such as Kenya who do not possess latest technology and are financial unable to conduct their own research programs. International co-operation can specifically help in the following manner in controlling recreational noise pollution.

- a. Exchange of technology equipped with lesser musical noise producing equipment.
- b. Exchange of research programs directed towards various methods of recreational noise control.
- c. Exchange of legal and other methods used in controlling recreational noise pollution.

d. Learning from the success or failure of others

This study further calls upon private businesses to voluntarily limit noise from the entertainment joints such as malls, restaurants and workplaces, loud television or radio sets in their joints. There is need for the community and the business players in the entertainment industry to embrace or adopt self and co-regulation strategies.

Land use planning and controls constitute another approach to managing pollution from stationary sources such as recreational noise from entertainment joints. The counties and its local authorities can designate all or parts of its areas as Noise Free Areas, in which it is an offense to emit noise. Land use planning authorities should be responsible for supervising and preventing the installation of noise polluting equipment close to these protected areas.

Finally, the study herein maintains that it is necessary to reassess the current approach to noise pollution control in order to increase its effectiveness by improving the coherency of the multitude actions being undertaken for the different sources. Furthermore greater integration and coordination is necessary to ensure that the actions proposed under stakeholder participation policies which can directly or indirectly influence the noise environment, will make a positive contribution to noise pollution control.

5.5 Suggestions for Further Research

The subject of the management and control of recreational noise pollution from entertainment joints in the rural towns has attracted limited scholarly research attention in developing countries, and especially Kenya. However, from the research findings, it is established that, unless properly checked and managed, the issue of recreational noise pollution shall negatively affect and reverse the little gains made from the limited research in this field of study. This study, therefore proposes the following areas as candidates for further research:

- a. A Scientific research should be carried into the effects of environmental noise, the methods of noise abatement and low noise technologies and the development of special low noise entertainment products with a view to supporting instruments which initiate improvements in the state of art of noise reduction, emphasising on the advantages of technical and planning measures to reduce the noise exposure of citizens.
- b. Further research on environmental management strategies is needed to provide sound

guidance applicable to developing nations in the process of establishing new policies and programs and selecting policy instruments aimed at recreational noise pollution control and management. The research should include detailed studies on the efficacy of various regulatory and economic tools in developing countries, the practical aspects of applying and operating economic instruments and the circumstances under which they can be efficaciously employed, the combinations of regulatory and economic tools that are most suitable for developing countries, methods that take into account cross-media noise pollution effects and applicable standards for developing countries.

- c. Further research is necessary to identify appropriate means for building suitable monitoring and enforcement competences in developing countries.
- d. A similar study should be carried out in more developed urban centers in Kenya to validate the results and recommendations of this study.
- e. Other studies may examine the efficacy of the regulatory mechanisms for other aspects of noise pollution control such as vehicular noise, aircraft noise etc.

BIBLIOGRAPHY

- Ackerman, F. (1992). *Waste Management: Taxing the Trash Away*. World Bank: Washington, DC
- Agius, E. (1998). 'Obligations of Justice Towards Future Generations: A Revolution on Social and Legal Thought' in Agius, E. ed., *Future Generations and International Law*. London: Earthscan Publications.
- Ali, M. & Suliman (1999). 'Official Development Assistance to Africa: An Overview'. *Journal of African Economies*, Vol 5, No. 4, December 1999
- Amechi, E. P. (2010). 'Linking Environmental Protection and Poverty Reduction in Africa: An Analysis of the Regional Legal Responses to Environmental Protection' *6/2 Law, Environment and Development Journal* 112 (2010), available at <http://www.lead-journal.org/content/10112.pdf>.
- Angwenyi A. N. (2008). 'An Overview of the Environmental Management and Co-ordination Act' in Okidi C. O. et al. *Environmental Governance in Kenya: Implementing the Framework Law*. East African Educational Publishers Ltd: Nairobi
- Azfar, C. O., Kahokonon, S., Lanyi, A., Meagher, P. & Rutherford, D. (2004). *Decentralization, Governance and Public Services: The Impact of Institutional Arrangement*. Hants: Ashgate Publishing Ltd
- Barbier & Edward, B. (2006). [*Natural Resources and Economic Development*](#). Cambridge: Cambridge University Press. pp. 44–45.
- Barbier, E. (1987). 'The Concept of Sustainable Economic Development'. *Environmental Conservation* 14 (2): 101–110
- Bartone, C., Bernstein, J., Leitmann, J. & Eigen, J. (1994). *Toward Environmental Strategies for Cities: Policy considerations for Urban Development Management in Developing Countries*. UNDP/UNCHS/World Bank, Urban Management Programme: Washington, D.C
- Baumol, W. J. (1972). 'On Taxation and the Control of Externalities', *American Economic Review*, 62: 3, pp. 307-21

- Baumol, W. J. & Oates, W. E. (1988). *The Theory of Environmental Policy*. Cambridge: Cambridge University Press
- Barkan, J. D. & Chege, M. (2009). 'Decentralizing the State: District Focus and the Politics of Reallocation in Kenya'. *The Journal of Modern African Studies*, Vol. 27, No. 3, pp 437 - 453
- Benny (2007). *Environmental Studies*. New Delhi: McGraw Hill Company, 2nd ed.
- Bernstein, J.D. (1993). *Alternative Approaches to Pollution Control and Waste Management Regulatory and Economic Instruments*. Washington D.C.:The World Bank.
- Bhargawa, G. (2001): *Development of India's Urban and Regional Planning in 21st Century*. Gian Publishing. House: New Delhi, pp.115-116
- Boateng, C.A. & Amedofu, G.K. (2004). Industrial Noise Pollution and its Effects on the Hearing Capabilities of Workers: A Study from Saw Mills, Printing Presses and Corn Mills. *African Journal on Health Science*; 11, pp. 5- 60
- Bohm, P. & Russell, C. (1985). 'Comparative Analysis of Alternative Policy Instruments' in Kneese & Sweeney, (eds.), *Handbook of Natural Resources and Energy Economics, Vol 1*. Elsevier Science Publishers B.V.
- Boudewijn S. (2009). 'Cognitio and Imperial and Bureaucratic Courts', in Stanley N. Katz, *The Oxford International Encyclopedia of Legal History*. (e-reference ed.) Oxford University Press: Oxford Oxford Reference Online.), ISBN 978-0-19-533651-1
- Bragdon, C. R. (1978). *The Status of Noise Control in the United States: State and Local Governments*. Environmental Protection Agency, United States of America, 5 – 25
- Brown, L. R. (2011). *World on the Edge*. Earth Policy Institute: Norton
- Bulkeley, H. & Mol, A. P. J. (2003). 'Participation and Environmental Governance: Consensus, Ambivalence and Debate', *Environmental Values* 12 (2): 143 - 54
- Chafee, Z. (1919). 'Freedom of Speech in Wartime'. *Harvard Law Review* 32 (8): 932–973
- Cheema, Shabbir & Rondinell, D. A (Eds.) (2007). *Decentralizing Governance: Emerging Concepts and Practices*. Washington: Brookings Institution Press

- CIEH (2005). *Neighbourhood Noise Policies and Practice for Local Authorities - A Management Guide*. London: Chartered Institute of Environmental Health (CIEH)
- Cohen, S. & Weinstein N. (1981). 'Non Auditory-Effects of Noise on Behavior and Health' in *The Journal of Social Issues*, Vol 37 Issue 1 pp 36 -70, Winter 1981, The Society for the Psychological Study of Social Issues
- DEFRA & CIEH (2005). *Neighbourhood Noise Policies and Practice for Local Authorities - a Management Guide*. London: Chartered Institute of Environmental Health (CIEH)
- DeSimone, L. & Popoff, F. (1997). *Eco-efficiency: The business Link to Sustainable Development*. Cambridge: MIT Press
- Diamond, L. (2009). *Developing Democracy: Towards Consolidation*. Baltimore: John Hopkins University Press
- Dilys R. *et al.* (eds) (1994). *Evaluating Eden; Exploring the Myths and Realities of Community Based Wildlife Management* (Series No. 8, IIED 1994) 30
- Du Plessis, A. (2008). 'Public Participation, Good Environmental Governance and Fulfillment of Environmental Rights', *Potchefstroom Electronic Law Journal*, 11(2): 170 - 201. (4)
- Dyllick, T. & Hockerts, K. (2002). 'Beyond the Business Case for Corporate Sustainability'. *Business Strategy and the Environment*, 11(2): 130–141
- Erickson, T. & Kellogg, W. (2003). 'Social Translucence: Using Minimalist Visualizations of Social Activity to Support Collective Interaction' (Eds. Höök, K., Benyon, D. and Munro, J.). *Designing Information Spaces: The Social Navigation Approach*, Series: Computer Supported Cooperative Work, Springer, 17-42
- Franck, T.M. (1995). *Fairness in International Law and Institutions*. Oxford: Oxford University Press
- Fischer, F. (2000.) *Citizens, Experts and the Environment*. Durham, NC: Duke University Press
- Frochlich, P. (2013). *Noise Pollution in the Laboratory*. Haverhill: Parker Hannifin Corporation

Frone, M. (2004). Alcohol, Drugs and Workplace Safety Outcomes: A View from a General Model of Employee Substance Use and Productivity, *The Psychology of Workplace Safety* (pp 127 – 156). Washington, DC: American Psychological Association

Gatundu, C. (2003). *Policy and Legislative Framework for Community Based Natural Resource Management in Kenya: A Review of Existing and Proposed Laws and Policies*. Nairobi: Forest Action Network

Geary, J. (1996). 'Saving the sounds of silence'. *New Scientist*, 13 April: 45

Gholami, A., Parvin, N., Monazzam, M., Alireza, G., Monavvari, S. & Ali, A. (2012). Evaluation of Traffic Noise Pollution in a Central Area of Tehran through Noise Mapping in GIS. *Advances in Environmental Biology*, 6, 2365-2371

Goines, L., & Hagler, L. (2007). Noise Pollution: A Modern Plague. *Southern Medical Journal*, 100 (3): 287-294

Government of Kenya (1977). *The Convention Concerning the Protection of Workers against Occupational Hazards in the Working Environment due to Air Pollution, Noise, and Vibration, 1977*. NCLR: Nairobi. Available www.klr.org Accessed on 29.09.2018

Government of Kenya (1999). *The Environmental Management and Co-ordination Act*. NCLR: Nairobi. Available www.klr.org Accessed on 29.09.2018

Government of Kenya (2005). *The Factories and other Places of Work (Noise Prevention and Control) Rules, 2005*. NCLR: Nairobi. Available www.klr.org Accessed on 29.09.2016

Government of Kenya (2009): *The Environmental Management and Coordination Act (Noise & Excessive Vibration pollution) (Control) Regulations, 2009*. NCLR: Nairobi. Available www.klr.org Accessed on 29.09.2016

Government of Kenya (2010). *The Constitution of Kenya, 2010*. NCLR: Nairobi. Available www.klr.org Accessed on 29.09.2016

Government of Kenya (2010). *The Penal Code, Cap. 63*. NCLR: Nairobi. Available www.klr.org Accessed on 29.09.2016

- Government of Kenya (2010). *The Public Health Act*. NCLR: Nairobi. Available www.klr.org Accessed on 29.09.2016
- Government of Kenya (2010). *The Traffic Act*. NCLR: Nairobi. Available www.klr.org Accessed on 29.09.2016
- Government of Kenya (2011). *Urban Area and Cities Act. Chapter 275*. NCLR: Nairobi. Available www.klr.org Accessed on 29.09.2016
- Government of Kenya (2012). *The County Government Act, 2012*. NCLR: Nairobi. Available www.klr.org Accessed on 29.09.2018
- Griffith, J. A. G. (1985). *The Politics of the Judiciary*, 3rd ed. London: Fontana Press, p.199
- Grindle, M. S. (2007). *Going Local: Decentralization, Democratization and the Promise of Good Governance*. New Jersey: Princeton University Press
- Hahn, R. W. (1989). 'Economic Prescriptions for Environmental Problems: How the Patient Followed the Doctor's Orders'. *Journal of Economic Perspectives*, Volume 3, Number 2, Spring
- Haughton, G. (1999). 'Information and Participation within Environmental Management' 11 *Environment and Urbanization* 51, 55
- Hilson, J. C. (1995). *Pollution Control and The Rule of Law*. Unpublished Ph.D. Thesis. University of Sheffield, Department of Law
- INFRAS/IWWW (1994). *External Effects of Transport*. UIC: Paris
- INRETS (1994). *Study Related to the Preparation of a Communication on a Future EU Noise Policy*. Arcueil: Institut National de Recherché sur les Transports et leur Securite
- International Law Association (2002). 'New Delhi Declaration on Principles of International Law Relating to Sustainable Development, ILA Resolution 3/2002' in ILA, *Report of the Seventieth Conference, New Delhi*. London: ILA
- Jackson, T. (1990). *Blueprint for a green economy*. Earthscan Publications: London, UK

- Jay, S *et al.* (2007). 'Environmental Impact Assessment: Retrospect and Prospect' 27 *Environmental Impact Assessment Review* 287, 298
- Kamau, E. C. (2005). 'Environmental Law and Self-Management by Industries in Kenya' 17 *Journal of Environmental Law* 229, 240
- Kameri-Mbote, P. (2005). *Towards Greater Access to Justice in Environmental Disputes in Kenya: Opportunities for Intervention*. Geneva: International Environmental Law Research Centre, Working Paper 2005-1, 2005
- Kelcey, J. G. (1986). 'Environmental Impact Assessments – Their Development and Application' 19/1 *Long Range Planning* 67
- Kimani, N. (2010). 'Participatory Aspirations of Environmental Governance in East Africa' in *Law, Environment and Development Journal*, p. 200, available at <http://www.lead-journal.org/content/10200.pdf>
- Kistenkas F. H. (2000). 'European and Domestic Subsidiarity. An Althusian Conceptionalist View' in *Tilburg Law Review*. 8 (3): 247 – 254
- Kothari, C. R. (2004). *Research Methodology: Methods and Techniques*. New Delhi: New Age International Publishers
- Llewellyn, K. (1962). *Jurisprudence*. Chicago: University of Chicago Press
- Llewellyn K. (2009). *The Bramble Bush: On Our Law and Its Study*. Oxford: Oxford University Press
- Lobel, O. (2004). 'The Renew Deal: The Fall of Regulation and Rise of Governance in Contemporary Legal Thought' 89 *Minnesota Law Review* 262, 264
- Lumumba & Franceschi (2014). *The Constitution of Kenya, 2010: An Introductory Commentary*. Nairobi: Strathmore University Press, p 477
- Lumumba PLO. (2014). *Judicial Innovation or Schizophrenia? A Survey of Emerging Kenyan Jurisprudence*. A Paper Presented at the Law Society of Kenya Annual Conference at Leisure Lodge Beach & Golf Resort, Mombasa, 14th August 2014

- Lumumba PLO *et al.* (2011). *The Constitution of Kenya: Contemporary Readings*. Law Africa Publishing I (K) Ltd.: Nairobi 203
- Malleson K. (1997). 'Judicial Training and Performance Appraisal: The Problem of Judicial Independence'. *The Modern Law Review*, Vol 60. No 5(1997) 659
- Malte F. (2008). How to be an Ecological Economist. *Ecological Economics* 66(1):1-7
- Maria, C. M. C. & Fernandez, J. A. (1999). 'In re Pinochet. Spanish National Court, Criminal Division (Plenary Session) Case 19/97, November 4, 1998; Case 1/98, November 5, 1998' (1999) 93 (3) *The American Journal of International Law* 690 at 691
- March, J. G. and Olsen, J. P. (1989). *Rediscovering Institutions*. New York: The Free Press
- Maundu, P. M., Ngugi G. W. & Kabuye C. H. S. (1999). *Traditional Food Plants of Kenya*. Nairobi: National Museums of Kenya
- Mbote P. K. (2008). 'The Use of Criminal Law in Enforcing Environmental Law' in Okidi C. O. *et al.*, *Environmental Governance in Kenya: Implementing the Framework Law*. East African Educational Publishers Ltd: Nairobi
- Miedema, H. (2007). 'Annoyance Caused by Environmental Noise: Elements for Evidence-Based Noise Policies'. *Journal of Social Issues*, 63 (1): 41-57
- Ministry of Environment and Natural Resources (2000). *Kenya: Land of Splendor*. Nairobi: Ministry of Environment and Natural Resources
- Mitchell, B. (2002). *Resource and Environmental Management*. Essex: Pearson Education Ltd.
- Moela R. D. (2010). *The Impact of Traffic Noise Pollution on the Population of Strubensvalley in Roodepoort*. Unpublished Dissertation. University of Johannesburg, Johannesburg
- Moore, J. L. *et al.* (1989). *Using Incentives for Environmental Protection: An Overview*. Washington, D.C.: Library of Congress
- Moreira, S.B. (2005). 'Evaluating the Impact of Foreign Aid on Economic Growth: A Cross Country Study'. *Journal of Economic Development*, Vol. 30 No. 2 December 2005 p.26

- Mugenda, O & Mugenda, A. (2003). *Research Methods: Quantitative and Qualitative Approaches*. Nairobi: Acts Press
- Mumma, A. (2003). *Constitutional Issues relating to Natural Resources*. Nairobi: Constitution of Kenya Review Commission
- Musgrave, R. A. (2009). *The Theory of Public Finance: A Study in Public Economy*. New York: McGraw-Hill
- Nachmias & Nachmias (1996). *Research Methods in the Social Sciences*. St Martin's Press
- Narendra, S. & Davar, S. C. (2004). 'Noise Pollution- Sources, Effects and Control' in *Journal on Human Ecology*, 16(3), 181-187
- Nasong'o, W. S. (2002). 'Resource Allocation and the Crisis of Political Conflict in Africa: Beyond the Inter-Ethnic Hatred Crisis', in Okoth, P. G. & Ogot, B. (eds.) (2002). *Conflict in Contemporary Africa*, pp. 44 - 55
- Nijland, H., Hartemink, S., van Kamp I., & van Wee, B. (2007). The Influence of Sensitivity for Road Traffic Noise on Residential Location: Does it trigger a Process of Spatial Selection? *Journal of Acoustical Society of America*, 122 (3): 1595-1601
- NIOSH (National Institute of Occupational Safety and Health) (1998). *Criteria for a Recommended Standard. Occupational Noise Exposure, Revised Criteria*. U.S. Department of Health and Human services: Cincinnati, Ohio
- Nordic Freshwater Initiative (1991). *Copenhagen Report. Implementation Mechanisms for Integrated Water Resources Development and Management*. Background document for the UN Conference on Environment and Development, Nordic Freshwater Initiative, Copenhagen
- North, D. C. (1990). *Institutions, Institutional Change, and Economic Performance*. Cambridge University Press: Cambridge
- Nyangena (2008). 'Economic Issues for Environmental and Resource Management in Kenya' in Okidi C. O. *et al.*, *Environmental Governance in Kenya: Implementing the Framework Law*. East African Educational Publishers LTD: Nairobi

Nwabueze B.O (1973). *Constitutionalism in the Emergent States*. Associated University Press
P. 14

Oates W. E. (2002). *Fiscal Federalism*. New York: Harcourt Brace Jovanovich

Ochieng B. O. (2008). 'Institutional Arrangement for Environmental Management in Kenya' in
Okidi C. O. *et al.*, *Environmental Governance in Kenya: Implementing the Framework Law*.
East African Educational Publishers Ltd: Nairobi

Odero S. O. (2011) 'Devolved Government', in Lumumba *et al.*, *The Constitution of Kenya:
Contemporary Readings*. Law Africa Publishing (K) Ltd: Nairobi

Ojwang, J. B. (2013). *Ascendant Judiciary in East Africa: Reconfiguring the Balance of Power
in a democratizing Constitutional Order*. Nairobi: Strathmore University Press, p. 26

Ojwang' J. B. J. (2007). 'The Role of the Judiciary in Promoting Environmental Compliance and
Sustainable Development', *1 Kenya Law Review Journal* 19

Okidi, C. O. (2003). *Environmental Rights and Duties in the Context of Management of Natural
Resources*. Nairobi: Constitution of Kenya Review Commission

Omubo-Pepple, Briggs-Kamara & Tamunobereton-ari (2010). Noise Pollution in Port Harcourt
Metropolis: Sources, Effects and Control in *Working and Living Environmental Protection Vol.
7, No. 1, pp 33 – 42*

Omondi, J. W. & Wanjiku, F. (2015). 'Public Participation in Counties' in *the Bench Bulletin*
Issue 30 July - September 2015, Kenya Law: Nairobi

Ongoya Z. E. (2008). *The Law, the Procedure and the Trends in Jurisprudence on
Constitutional and Fundamental Rights Litigation in Kenya*. Kenya Law Review (2008) vol. II
(2008-2010). P 12

Organization for Economic Cooperation and Development (OECD) (1989). 'The Application
of Economic Instrument for Environmental Protection (Summary and Conclusion).'
Environment Monograph No. 18. Paris

Organization for Economic Cooperation and Development (OECD) (1990). *Environmental
Policies for Cities in the 1990s*. Paris

Özer, S. & Irmak, M. (2008). 'Determination of Roadside Noise Reduction Effectiveness of Pinus sylvestris L. and Populus nigra L. in Erzurum, Turkey'. *Environ. Monit. Assess.*, 144, pp. 191- 197

Pearce D. & Atkinson G. (1998). 'Concept of Sustainable Development: An Evaluation of its Usefulness 10 Years after Butland' in *Environmental Economics and Policy Studies* 1, 95 – 111(1998)

Pearce, D.W. & Turner, R. K. (1990). *Economics of Natural Resources and Environment*. Baltimore: The Johns Hopkins University Press

Pettman S. (1976). 'Towards a More General Theory of Regulations'. 19 *J. C. ECON.* 211

Pigou. A. C. (1920). *The Economics of Welfare*. London: Macmillan

Pring, G. & Noe, S. Y. (2002). 'The Emerging International Law of Public Participation Affecting Global Mining, Energy and Resource Development' in Zillman, D. M., Lucas, A. & Pring, G. (eds). *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources*. Oxford: Oxford University Press

Quinet, E. (1993). 'Transport between Monopoly and Competition: Supply Side and Markets', in Polak, J & Heerte A. (eds), *European Transport Economics*. Oxford: Blackwell

Rae, M. G. & Singh, N. (2003). *The Political Economy of Centre-State Fiscal Transfers in India*. Colombia - World Bank Conference

Rashid, A. M. *et al.* (2006). 'Motivating Participation by Displaying the Value of Contribution'. in *Proceedings of the SIGCHI Conference on Human Factors in Computing Systems*, ACM Press: New York, NY, USA, 955-958

Repetto, R. (1990). *Promoting Environmentally Sound Economic Progress: What the North Can Do*. Washington, D.C.: World Resources Institute

Republic of Kenya (2007). *Kenya Vision 2030* 1 Nairobi: Government Printer

Richardson, J. *ed.* (1982). *Policy Styles in Western Europe*. London: Allen and Unwin

Ringquist, E. J. (1993). 'Does Regulation Matter? Evaluating the Effects of State Air Pollution Control Programs'. *The Journal of Politics* 55 (4): 1022-1045

- Rowe, G. & Frewer, L. J. (2005). 'A Typology of Public Engagement Mechanisms', *Science, Technology, & Human Values*, 30 (2), 251-290
- Saenz & Stephen (1986). *Noisy Pollution*. Wiley: New York
- Seik, F. T. (1996) 'Urban Environmental Policy: The Use of Regulatory and Economic Instruments in Singapore'. *Habitat International* 20 (1): 5-22
- Scerri, A. & Paul (2010). '[Accounting for Sustainability: Combining Qualitative and Quantitative Research in Developing 'Indicators' of Sustainability](#)'. *International Journal of Social Research Methodology* 13 (1): 41–53
- Schachter, O. (1977). *Sharing the World's Resources*. Bangalore: Allied at 11-12
- Schaltegger, S. & Sturm, A. (1998). *Eco-Efficiency by Eco-Controlling*. Zürich: vdf.
- Sharma, R. P. & Kacker, S. K. (2004). 'Community Participation in Noise Control' in Suzuki, J. I., Koboyashi, T., & Koga, K. (eds). *Hearing Impairment*. Springer Verlag: Tokyo
- Simpson (2011). *Reflections on 'The Concept of Law'*. Oxford: Oxford University Press
- Singh, R. (2016). 'Legal Control of Noise Pollution In India : A Critical Evaluation' *International Journal of Research in Humanities and Social Studies* V3. I4. April 2016 44
- Singh & Rao (2001). A Reconnaissance of Traffic Noise Pollution in the City of Patna, *Indian Journal of Environmental Health*, 4, 138-43
- Sohn L. B. & Weiss (1987). 'Intergenerational Equity in International Law', *American Society of International Law*, Vol. 81, (1987), pp. 126-133
- Surya D. (2009). 'Public Interest Litigation in India: A Critical Review' in *Civil Justice Quarterly* Vol. 28, Issue 1 at 25
- Tasker, M.L. & Weir, C. (eds.): *Proceedings of the Seismic and Marine Mammals Workshop*, London, 23-25 June 1998. <http://smub.st-and.ac.uk/seismic/pdfs/6.pdf>
- Tiebout, C. M. (2006). *A Pure Theory of Local Expenditures*. *Journal of Political Economy*. Vol. 64(5), 416 – 424

- Tiller, D., Wang, L., Musser, A. & Radik, M. (2010). Combined Effects of Noise and Temperature on Human Comfort and Performance. *ASHRAE Transactions*, 116 (2): 522-540
- Treisman, D. (2007). *The Architecture of Government: Rethinking Political Decentralisation*. New York: Cambridge University Press
- Trubek, D. M. & Trubek, L. G. (2006). 'New Governance and Legal Regulation: Complementarity, Rivalry and Transformation' 13 *Columbia Journal of European Law* 1, 4
- United Nations Environment Programme & African Centre for Technology Studies. (2001). *The Making of a Framework Environmental Law in Kenya*. Nairobi, Kenya: United Nations Environment Programme
- Vassileva, J. & Sun, L. (2007). 'Using Community Visualization to Stimulate Participation in Online Communities'. *e-Service Journal*, 6, 1, Special Issue on Groupware, 3-40
- Wambulwa, A. (2020). 'Make Omtatah an Honorary Member of LSK, Advocate Urges' in *Star*, 2nd, July, 2020, Radio Africa Limited: Nairobi available the-star-co-ke
- Wamukoya, G. & Situma F. D. P. (2003). *Environmental Management in Kenya: A Guide to the Environmental Management and Coordination Act*. Nairobi: Centre for Environmental Legal Research and Education (CREEL)
- Warford, J.J. (1994). *Environment, Health and Sustainable Development: The Role of Economic Instruments and Policies*. Discussion paper. Director General's Council on the Earth Summit Action Programme for Health and Environment, World Health Organization, Geneva
- Weiss, B (1989). *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity*. New York: Transnational
- White, Stallones & Last (2013). [*Global Public Health: Ecological Foundations*](#). Oxford University Press: Oxford
- Winter (1981). 'The Society for the Psychological Study of Social Issues Contemporary Legal Thought' (2004) 89 *Minnesota Law Review* 262, 264

World Bank (2014). *Delivering Primary Health Services in Devolved Health Systems of Kenya: Challenges and Opportunities*. World Bank Group: Washington D. C.

World Commission on Environment and Development (WCED) (1987). *Our Common Future*. Oxford University Press: Oxford, 43

LIST OF STATUTES

Alcoholic Drinks Control Act, No. 4 of 2010
Chang'aa Prohibition Act, Cap. 70, Laws of Kenya (*Repealed*)
Constitution of Kenya, 2010
County Government Act, 2012
Occupational Health and Safety Act Cap 514, Laws of Kenya
EMCA (Noise and Excessive Vibrations Control) Regulations Legal Notice No. 61 of 2009
Environmental Impact Assessment/Audit Regulations, 2013
Environmental Management and Co-ordination Act, 1999
Environment and Lands Courts Act, No. 19 of 2011
Liquor Licensing Act, Cap. 121, laws of Kenya (*Repealed*)
Noise Act, 1996 (of the Great Britain)
Office of the County Attorney Act, No. 14 of 2020
Office of the Attorney General Act No. 49 of 2012
Physical Planning Act, Cap 286, Laws of Kenya
Public Health Act Cap 242, Laws of Kenya
The Convention Dealing with Workers Protection from Occupational Hazards because of Noise and Vibration, 1977
The Factories and other Work Place (Noise Control and Prevention) Rules, 2005
The Penal Code Cap 63, Laws of Kenya
The Traffic Act, Cap 404
Urban Areas and Cities Act, No. 13 of 2011
U.S. Noise Pollution and Abatement Act of 1970
Vetting of Judges and Magistrates Act, 2011

APPENDICES

APPENDIX A

QUESTIONNAIRE FOR THE RESIDENTS

QUESTIONNAIRE ON THE EFFICACY IN THE REGULATION OF RECREATIONAL NOISE POLLUTION IN EMERGING URBAN CENTRES IN KENYA

My name is Aloyce Peter Ndege. I am a student pursuing a Masters of Arts Degree in Environmental Law. As part of the programme requirements, I am carrying out a research on the efficacy in the regulation of recreational noise pollution in emerging urban centres in Kenya.

I kindly request you to fill in this questionnaire and return it to me within the shortest time possible. You should not write your name on the questionnaire. This guarantees anonymity. Honest responses to all the questions are requested and will be highly appreciated. There are 'no right' or 'wrong' answers. The researcher is only interested in your opinion. The responses you give will be treated with utmost confidentiality. Thank you for taking time to complete this questionnaire.

Section 1: Demographic Information

1. Gender

Male

Female

2. How old are you?

Below 18

18 – 35

35 – 60

Over 60

3. What is your level of Education?

Never been to school

- Primary School Leaver
- Secondary School Leaver
- Tertiary Education
- Graduate

4. Are you in employment?

- Yes
- No

Section 2: Knowledge and Awareness of the Problem of Noise Pollution

5. What is your understanding of the term ‘noise’?

6. What are some of the sources of noise that you are aware of?

7. How many entertainment joints do you know in Hola?

8. Have you ever encountered noise from any of the entertainment joints?

- Yes
- No

9. How frequent do you get exposed to the noise?

- Always
- Often
- Rarely

10. What are the reasons for subjecting yourself to a noisy entertainment joint?

11. What are the effects of failing to subject yourself to entertainment noise?

12. Are you aware of any effect of noise?

- Yes
- No

Section 3: Extent of Stakeholder Involvement in Noise Pollution Control

13. Kindly list any step you have taken towards the control of noise pollution from the entertainment joints

14. Are you aware of any requirement for a permit or licence issued to the Entertainment Joint before commencing operations?

- Yes
- No

15. Are you aware of any public participation forum before such licences or permit is granted?

- Yes
- No

16. Have you participated in any such fora?

- Yes
- No

17. If you could have complied, what could have been the likely consequence on noise pollution control?

- Enhance compliance on the part of the owners
- Monitor compliance
- Report Compliance
- Prosecute Non-Compliance
- Protest Non-Compliance
- Do nothing

17. If no, Kindly state the reasons why you did not participate

Section 3: Efficacy of The Legal Regulations Governing Noise Pollution

18. Are you aware of your rights to a noise-free environment?

Yes ()

No ()

19. If the answer to the above question is Yes, then have you ever reported any case of noise pollution?

Yes ()

No ()

20. In your view, how should noise pollution be controlled

21. What actions do you recommend to curb noise pollution control in HOLA?

APPENDIX B

QUESTIONNAIRE FOR THE BUSINESS OWNERS

**QUESTIONNAIRE ON THE EFFICACY IN THE REGULATION OF
RECREATIONAL NOISE POLLUTION IN EMERGING URBAN CENTRES IN
KENYA**

My name is Aloyce Peter Ndege. I am a student pursuing a Masters of Arts Degree in Environmental Law. As part of the programme requirements, I am carrying out a research on the efficacy in the regulation of recreational noise pollution in emerging urban centres in Kenya.

I kindly request you to fill in this questionnaire and return it to me within the shortest time possible. You should not write your name on the questionnaire. This guarantees anonymity. Honest responses to all the questions are requested and will be highly appreciated. There are ‘no right’ or ‘wrong’ answers. The researcher is only interested in your opinion. The responses you give will be treated with utmost confidentiality. Thank you for taking time to complete this questionnaire.

Section 1: Demographic Information

b. Gender

Male

Female

17. How old are you?

Below 18

18 – 35

35 – 60

Over 60

18. What is your level of Education?

Never been to school

Primary School Leaver

- Secondary School Leaver ()
- Tertiary Education ()
- Graduate ()

19. Are you in any other form of employment?

- Yes ()
- No ()

4. How many entertainment joints do you own?

Section 2: Knowledge and Awareness of the Problem of Noise Pollution

20. What is your understanding of the term 'noise'?

21. What are some of the sources of noise that you are aware of?

22. How many entertainment joints do you know in Hola?

23. How many employees do you have in your entertainment joint?

- Less than 5
- Between 5 and 20
- More than 20

24. Have you ever encountered noise from any of the entertainment joints?

- Yes
- No

25. How frequent do you get exposed to the noise?

- Always
- Often
- Rarely

26. What are the reasons for subjecting yourself to the noise?

27. What are the effect of abstaining from the noisy entertainment joints?

28. Have you conducted or been involved in any form of noise survey or research?

- Yes

No ()

29. Are you aware of any effect of noise?

Yes ()

No ()

Section 3: Extent of Stakeholder Involvement in Noise Pollution Control

30. Kindly list any step you have taken towards the control of noise pollution from the entertainment joints

31. What steps have you taken (if any) towards the reduction or control of noise pollution in your entertainment joint

32. Are you aware of any requirement for a permit or licence issued to the Entertainment Joint before commencing operations?

Yes ()

No

33. Are you aware of any public participation forum before such licences or permit is granted?

Yes

No

34. Have you participated in any such fora?

Yes

No

35. If you could have complied, what could have been the likely consequence on noise pollution control?

Enhance compliance on the part of the owners

Monitor compliance

Report Compliance

Prosecute Non-Compliance

Protest Non-Compliance

Do nothing

36. If no, Kindly state the reasons why you did not participate

Section 3: Efficacy of The Legal Regulations Governing Noise Pollution

37. Are you aware of your rights to a noise-free environment?

Yes

No

38. If the answer to the above question is Yes, then have you ever reported any case of noise pollution?

Yes ()

No ()

39. Have you ever subjected your employees in the entertainment joint to a hearing test?

Yes ()

No ()

40. Have you participated, or been involved, in any training on noise hazard at the work place?

Yes ()

No ()

41. In your view, how should noise pollution be controlled

42. What actions do you recommend to curb noise pollution control in Hola?

APPENDIX C

QUESTIONNAIRE FOR THE EMPLOYEES

**QUESTIONNAIRE ON THE EFFICACY IN THE REGULATION OF
RECREATIONAL NOISE POLLUTION IN EMERGING URBAN CENTRES IN
KENYA**

My name is Aloyce Peter Ndege. I am a student pursuing a Masters of Arts Degree in Environmental Law. As part of the programme requirements, I am carrying out a research on the efficacy in the regulation of recreational noise pollution in emerging urban centres in Kenya.

I kindly request you to fill in this questionnaire and return it to me within the shortest time possible. You should not write your name on the questionnaire. This guarantees anonymity. Honest responses to all the questions are requested and will be highly appreciated. There are 'no right' or 'wrong' answers. The researcher is only interested in your opinion. The responses you give will be treated with utmost confidentiality. Thank you for taking time to complete this questionnaire.

Section 1: Demographic Information

1. Gender

Male

Female

2. How old are you?

Below 18

18 – 35

35 – 60

Over 60

3. What is your level of Education?

Never been to school

Primary School Leaver

Secondary School Leaver

Tertiary Education

Graduate

4. Are you employed in an entertainment joint?

Yes

No

Section 2: Knowledge and Awareness of the Problem of Noise Pollution

5. What is your understanding of the term 'noise'?

6. What are some of the sources of noise that you are aware of?

7. How many entertainment joints do you know in Hola?

8. Have you ever encountered noise from any of the entertainment joints?

Yes

No

9. How frequent do you get exposed to the noise?

Always

Often

Rarely

10. Are you aware of any effect of noise?

Yes

No

Section 3: Extent of Stakeholder Involvement in Noise Pollution Control

11. Kindly list any step you have taken towards the control of noise pollution from the entertainment joints

12. Are you aware of any requirement for a permit or licence issued to the Entertainment Joint before commencing operations?

Yes

No

13. Have you participated or involved in any noise survey at your work place?

Yes

No

14. Have you been subjected to a hearing test at your work place?

Yes

No

15. Have you undergone any training on noise hazards at your work place?

Yes

No

16. Are you aware of any public participation forum before such licences or permit is granted?

Yes

No

17. Have you participated in any such fora?

Yes

No

18. If you could have complied, what could have been the likely consequence on noise pollution control?

Enhance compliance on the part of the owners

Monitor compliance

Report Compliance

Prosecute Non-Compliance

Protest Non-Compliance

Do nothing

19. If no, Kindly state the reasons why you did not participate

Section 3: Efficacy of The Legal Regulations Governing Noise Pollution

20. Are you aware of your rights to a noise-free environment?

Yes

No

21. If the answer to the above question is Yes, then have you ever reported any case of noise pollution?

Yes ()

No ()

22. In your view, how should noise pollution be controlled

23. What actions do you recommend to curb noise pollution control in HOLA?

APPENDIX D

LIST OF CASES

Adrian Kamath Njenga vrs The Hon. Attorney General & Others, Petition 369 of 2019

Albert Ruturi, JK Wanyela & Kenya Bankers' Association vrs The Minister of Finance & Attorney General and Central Bank of Kenya [2010] eKLR

Bangladesh Environmental Lawyers Association vrs. The Election Commission and Others, SC of Bangladesh, High Court Div., Writ Petition No. 186 of 1994

Beatrice Wanjiku & Anor. vrs Attorney General & others [2012] eKLR

Case Concerning the Gabcikovo-Nagymoros Project (Hungary-Slovakia) 1997 WL 1168556 (I.C.J-1997)

Centre for Justice, Governance and Environmental Action (Suing on their Behalf and on behalf of all the Residents of Owino Uhuru village in Mikindani Changamwe area, Mombasa vrs The Honourable Attorney General and others, Msa ELC Petition No. 1 of 2016

Charles Omanga & 8 others vrs Attorney General & another [2014] eKLR

Charles Omanga & another vrs Independent Electoral & Boundaries Commission & another & another [2012] eKLR

Daudi Omar Bare and another vrs The County Government of Tana River [2019] eKLR

David Kariuki Ngari & Another vrs Judicial Service Commission & Others, Petition 427 of 2019

Doctors for Life International vrs Speaker of the National Assembly and Others (CCT 12/05) 2006 ZACC 11

Dr. Bwogi Richard Kanyerezi vrs The Management Committee Rubaga Girls School (Uganda High Court Civil Appeal 3/96, unreported)

Hubbard vrs Pitt [1975] 2 W.L.R. 254

Independent Policing Oversight Authority & Another vs. Attorney General & 660 Others [2014] eKLR

In the Matter of the Principle of Gender Representation in the National Assembly & the Senate SCK Advisory Opinion No. 2 of 2012 [2013] eKLR

Isaac Aluoch Polo Aluochier vrs Independent Electoral And Boundaries Commission (IEBC) and 19 others [2013]eKLR

Jeffer Isaak Kanu vrs Ministry of Justice, National Cohesion and Constitutional Affairs & 3 others, Nairobi Petition 556 of 2012

John Kabui Mwai & 3 Others vrs Kenya National Examinations Council & Others [2011] eKLR

Joseph D. Kessy vrs Dar es Salaam City Council (Tanzanian High Court Civil Case No. 29/88)

Judicial Service Commission vrs Speaker of the National Assembly Nairobi High Court Petition No. 518 of 2013

Law Society of Kenya vrs Commissioner of Lands & 2 others Civil Case No 464 of 2000, High Court at Nakuru

Law Society of Kenya vrs Attorney General & Another, High Court Petition No. 313 of 2014

Liyanage vrs R (1967) 1 A.C. 259

Maathai vrs Kenya Times Media Trust Ltd [1989]eKLR

Marbury vrs Madison (1803) 1 Cranch 137

Martin Nyaga Wambora & 4 Others vrs Speaker of the Senate & 6 Others [2014] eKLR

Methodist Church in Kenya Trustees Registered vrs Attorney General, Meru High Court Petition No. 4 of 2010

Minister of Home Affairs (Bermuda) vrs Fisher [1980] AC 319, 32H

Minors Oposa case (Philippines - Oposa et. al. vrs Fulgencio S. Factoran, Jr. et al. G.R. No. 101083)

Mitu-Bell Welfare Society vrs Attorney General & 2 others, Nairobi Petition No. 164 of 2011 (Unreported)

Ms Priscilla N. Kanyua vrs Attorney General & anor [2010] eKLR

New Vision Kenya & 3 Others vrs Independent Electoral and Boundaries Commission & 4 Others, Nairobi H. C. Constitutional Petition No.331 of 2012

Nzioka & 2 Others vrs Tiomin Kenya LTD (2001) 1 KLR(E&L)

Okiya Omtatah Okoiti & 3 others vrs Attorney General & 5 others [2014] eKLR

Okiya Omtatah Okoiti & another vrs Attorney General & 7 others 28 [2013] eKLR

Pastor James Jessie Gitahi & 202 Others vrs Attorney General [2013] eKLR

Paul K. Nzangu vrs Mbiti Ndili (High Court of Kenya at Machakos, Case 8/1991)

Peter K. Waweru vrs Republic [2006] eKLR

Reads vrs Lyons & Co. [1947] A.C. 156

Robert N. Gakuru & others vrs Governor, Kiambu County, & three others, Petition no. 532 of 2013

R vrs St Edmundsbury Borough Council, ex p. Walton (1999) Times Law Reports 5 May

Roshanali Karmali Khimji Pradhan vrs The Attorney General Mombasa High Court Civil Suit No. 276 of 1998

Re Provincial Court Judges, [1997] 3 S.C.R. 3

Republic vrs Independent Electoral and Boundaries Commission & 2 others Ex- Parte Alinoor Derow Abdullahi & others [2017] eKLR

R vrs St Edmundsbury Borough Council, exp. Walton [1999] TLR 5 May

Rylands vrs Fletcher (1868) L.R. 3 H.L. 330

Speaker of the Senate & another vrs Hon. AG & another & 3 others [2013] eKLR

The Queen vrs Beauregard, [1986] 2 S.C.R. 56 at para. 30 [Beauregard].

The Queen vrs Ministry of Agriculture, Fisheries and Food, C-157/96

UK vrs Commission of the EC, C-180/96

Valiente vrs The Queen 1985) 2.S.C.R

Ward Lock vrs Operative Printers' Society (1906) 22 T.L.R. 327