

Sustainable Development and Equity in the Kenyan Context

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Abstract

Equity, particularly intergenerational and intragenerational equity, is central to the concept of sustainable development. The rhetoric of equity has been incorporated in sustainable development instruments and is already part of customary international law. In Kenya the right to a clean and healthy environment which *inter alia* includes the right to have the environment protected for the benefit of present and future generations has been codified in the legal framework and the courts have had occasion to interpret this right in the Kenyan context. Kenya has however adopted an anthropocentric definition and approach to sustainable development, which places a lot of emphasis on human beings thus ignoring the ecological perspective in sustainable development. The authors argue that the environment has a right to be safeguarded and protected not necessarily for the benefit of human beings but for ecological reasons.

This paper critically examines the principle of equity (intergenerational and intragenerational equity), and its centrality in the concept of sustainable development in Kenya. The intergenerational rights of future generations and of the environment are explored. Equally the intergenerational and intragenerational obligations of the present generations are assessed. The paper also discusses the extent to which equity has been incorporated into the Kenyan legal framework on environment and natural resources. It will also give Kenyan examples of natural resources that are rare and have been threatened by unsustainable use.

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With the enactment of the new Constitution¹, the Environmental Management and Coordination Act No. 8 of 1999 and the Environment and Land Court Act No. 11 of 2011 it is hoped that sustainable development which is informed by equity will be attained. Achieving sustainable development means that the carrying capacity of the ecosystems will be conserved and protected and that the future generations will have an opportunity to enjoy the fruits of sustainable development. In order to attain these goals the requisite long-term measures have to be taken in conserving environmental and natural resources.

The authors argue that the policy, legal and institutional mechanisms put in place on how to fulfill our duties to the environment and future generations are not adequate as they are designed to handle problems of a short-term nature. The paper notes that most of the measures undertaken in Kenya in conserving environmental and natural resources are short-term and are not suitable in attaining intra and intergenerational equity. It also notes that most of the measures, policies and programmes geared towards attaining sustainable development are largely centered on human beings and thus do not adequately address ecological issues in the country.

1.0 Introduction

Sustainable development was explicitly popularized and contextualized in the Brundtland Commission (*Our Common Future*) where it was defined in terms of equity as: “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”² This definition has been criticized as being centered on human beings and thus ignoring the ecological component in development.³ This is despite the Brundtland Commission focusing on the three pillars

¹ Constitution of Kenya 2010, *Government Printer*, Nairobi.

² The World Commission on Environment and Development, 1987, *Our Common Future*, *Oxford University Press*, Oxford.

³ The Rio Declaration of 1992 in its 27 Principles recognizes that human beings are at the centre of sustainable development, UN Doc. A/CONF.151/26 (Vol. I)

of human well-being which are the economic, socio-political and ecological conditions.⁴ In the *Case Concerning the Gabčíkovo-Nagymoros Project (Hungary-Slovakia)* sustainable development as a concept was judicially interpreted. In this particular case Judge Weeramantry rightly argued that the concept of sustainable development is one that has received worldwide acceptance not only by the developing states but also by the developed countries, as it reaffirms that there must be both development and environmental protection, and that neither of these rights can be neglected at the expense of the other, thus making it part of modern international law.⁵

As the above short prelude reveals and as Weiss has observed, sustainable development relies on a commitment to equity with future generations; a commitment which acts as a constraint on a natural inclination to take advantage of our temporary control over the earth's resources, and to use them only for our own benefit without careful regard for what we leave to our children and their descendants. Sustainable development therefore requires that we look at the earth and its resources not only as an investment opportunity, but as a trust passed to us by our ancestors for our benefit, but also to be passed on to our descendants for their use. She observes that such a notion implies rights and obligations but more importantly that future generations have rights too.⁶

In the Environmental Management and Co-ordination Act sustainable development is defined in equitable terms as development that meets the needs of the present without compromising the ability of future generations to meet their own needs.⁷ As already noted this definition is wanting and it needs further enhancement so

⁴ See a discussion of these pillars in Keith Nurse, *Culture as the Fourth Pillar of Sustainable Development*, available at: <http://www.fao.org/SARD/common/ecg/2785/en/Cultureas4thPillarSD.pdf>. (Accessed on 03/01/2011)

⁵ *Hungary v. Slovakia*, 1997 WL 1168556 (I.C.J-1997).

⁶ Edith Brown Weiss, "In Fairness to Future Generations and Sustainable Development", *American University International Law Review*, Vol.8, 1992

⁷ Section 2 of the Environmental Management and Co-ordination Act No. 8 of 1999, *Government Printer*, Nairobi.

as to include the economic, social and ecological aspects captured in the concept of sustainable development.

The centrality of equity in sustainable development is perhaps more explicit when one looks at the Kenyan constitution which provides that the State shall ensure the sustainable exploitation, utilization, management and conservation of the environment and natural resources and ensure equitable sharing of the accruing benefits.⁸ The constitution thus takes an ecological perspective to sustainable development; a perspective geared towards the protection of the environment for ecological reasons as well as for the satisfaction of human needs.

In this paper we take the view that there is a need to have a balance between the ecocentric and anthropocentric approaches in sustainable development. Such a balance would be achieved by defining sustainable development in terms of the satisfaction of economic, social, and security needs now and in the future without undermining the natural resource base and environmental quality on which life depends on. Judge Weeremantry, in his dissenting opinion in the *Case Concerning the Gabčíkovo-Nagymoros Project (supra)* elaborated the proper role of sustainable development as being the balancing of the competing demands of development and environmental protection. Judge Weeremantry notes that, "*The Court must hold the balance even between the environmental considerations and the developmental considerations raised by the respective Parties.*" He further proceeds to state that, "*it would not be wrong to state that the love of nature, the desire for its preservation, and the need for human activity to respect the requisites for its maintenance and continuance are among those pristine and universal values which command international recognition.*"⁹ What the judge was fronting in the above case is a balance between the ecocentric and anthropocentric approaches to sustainable development. This balance is in our view essential in realizing sustainable development and equity in Kenya.

⁸ Article 69 (1) Constitution of Kenya 2010, *Op. cit.*

⁹ *Hungary v. Slovakia*, 1997 WL 1168556 (I.C.J-1997).

2.0 Intergenerational Equity

The theory of intergenerational equity asserts that all generations hold the natural environment of our planet in common with other species, people, and with past, present and future generations. It has been argued that there are two relationships that shape any theory of intergenerational equity; our relationship with the natural system and our relationship with other generations. With regard to the natural system the present generation can use its resources on a sustainable basis or it can degrade the system and destroy its integrity. Because of our capacity for reason we have a special responsibility to care for the natural environment. The second fundamental relationship is that among different generations of people, where it has been argued that all generations have an equal place in relation to the natural system, and that there is no basis for preferring past, present or future generations in relation to the system.¹⁰

Sharon Beder opines that even though future generations might gain from economic progress, those gains might be more than offset by environmental deterioration.¹¹ Sohn and Weiss postulate that there are problems associated with the allocation of wealth between members of the present and those of future generations. They state these problems to include the depletion of resources for future generations; degradation in quality of resources for future generations and access to the use and benefits of the resources received from prior generations.¹²

2.1 Strong and Weak Sustainability

Beder proposes two different ways of looking at the need to ensure that future generations can supply their needs; *weak* and *strong sustainability*. According to weak sustainability the environment is viewed in terms of the natural resources or natural

¹⁰ Edith Brown Weiss, "In Fairness to Future Generations and Sustainable Development", op. cit.

¹¹ Sharon Beder, "Costing the Earth: Equity, Sustainable Development and Environmental Economics", *New Zealand Journal of Environmental Law*, 4, 2000, pp.227-243.

¹² Louis B. Sohn and Edith Brown Weiss, "Intergenerational Equity in International Law", *American Society of International Law*, Vol. 81, (1987), pp. 126-133.

capital that is available for wealth creation and that the future generations should have the same ability to create wealth as the present generation. Weak sustainability implies that future generations will be adequately compensated for any loss of environmental amenity by having alternative sources of wealth creation. Strong sustainability views the environment as offering more than just economic potential that cannot be replaced by human-made wealth and that future generations should not inherit a degraded environment, no matter how many extra sources of wealth are available to them.¹³ Strong sustainability is preferable to weak sustainability for reasons such as ‘non-substitutability’¹⁴, ‘uncertainty’¹⁵ and ‘irreversibility’¹⁶.

2.2 The Principles of Intergenerational Equity

Sohn and Weiss adopt three basic principles of intergenerational equity which they translate into intergenerational obligations. They argue 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 generations.¹⁷

The first principle is what has been referred to as “*conservation of options*”. This principle implies that each generation should conserve the diversity of the natural and cultural resources so that the options available to future generations to address their

¹³ Sharon Beder, “Costing the Earth: Equity, Sustainable Development and Environmental Economics”, *Op. cit.*

¹⁴ Ibid, The argument is that there are many environmental assets for which there are no substitutes, such as the ozone layer, tropical forests, wetlands etc

¹⁵Ibid, It has been said that scientific knowledge about the functions of natural systems and the possible consequences of depleting and degrading them is uncertain.

¹⁶ Ibid, The depletion of natural capital can lead to irreversible losses such as species and habitats, which cannot be recreated using man-made resources.

¹⁷ Louis B. Sohn and Edith Brown Weiss, “Intergenerational Equity in International Law”, *Op. cit.*

problems and satisfy their needs are not restricted. This principle does not mean that the status quo be maintained as this could force poor nations to endure their present condition without improvement but rather it can be achieved by technological developments which create substitutes for existing resources or lead to processes for exploiting them more efficiently and the conservation of existing resources.¹⁸

The second principle requires each generation to maintain the quality of the resources of the planet so as to pass it in a no worse condition than the present generations received it. It however does not mean that the environment must remain unchanged but rather it requires a balancing process and sets limits within which the balancing must take place. This is the principle of "*conservation of quality*".¹⁹

The third principle implores each generation to provide its members with equitable rights of access to the legacy from past generations. It offers the present generation the right to use natural resources to improve their economic and social development and at the same time respecting equitable duties to future generations and not to unreasonably interfere with the access of other members of their own generation to the same resources. This is the principle of "*conservation of access*".²⁰

In order to fulfill these planetary obligations to conserve diversity, quality and access, members of the planet must take positive steps to conserve the natural and cultural resource base; ensure nondiscriminatory access to the use and benefits of these resources; avoid or mitigate adverse impacts on the quality of the environment; to notify and to provide assistance during emergencies and to bear the costs of damage to our environment.²¹ As the above discussion on equity reveals human beings take center stage in the sustainable development discourse. It implies that the environment can

¹⁸ Edith Brown Weiss, "In Fairness to Future Generations and Sustainable Development", *Op. cit.*

¹⁹ Ibid

²⁰ Louis B. Sohn and Edith Brown Weiss, "Intergenerational Equity in International Law", *Op. cit.*

²¹ Sharon Beder, "Costing the Earth: Equity, Sustainable Development and Environmental Economics", *Op. cit.*

only be protected for the benefit of human beings and not for its own sake. It is on this note that we postulate that the environment be conserved and protected for its own sake and without reference to human beings. We as human beings owe a duty to the environment for the sake of tomorrow. Article 69 (1) of the Constitution of Kenya addresses the rights of the environment by providing that the State shall ensure the sustainable exploitation, utilization, management and conservation of the environment and natural resources and ensure equitable sharing of the accruing benefits. We therefore owe a duty to the environment to protect it for its own sake and not only for the benefit of man.

3.0 Intragenerational Equity

According to Section 2 of the Environmental Management and Co-ordination Act 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 entitlement to a clean and healthy environment.²² The import of this definition is that equity can be applied across communities and generations within one generation. In the Kenyan case of *Peter K.Waweru versus Republic*²³ a judgment echoing the dissenting view of Judge Weeremantry in the *Gabcikovo case (Supra)*, the court stated that intragenerational equity or environmental justice involves equality within the present generation, such that each member has an equal right to access the earth's natural and cultural resources. This case also analyzed the principles of sustainable development, precautionary principle; polluter pays principle and public trust and emphatically stated that development should be ecologically sustainable. From this case it is evident that the duo rights to development and environmental protection as captured in the principle of sustainable development can indeed be achieved. The environment need not only be protected for the public good but it can also be protected for ecological reasons.

²² Act No. 8 of 1999, *Government Printer*, Nairobi.

²³ [2006]eKLR

Intragenerational equity is a key principle in sustainable development since inequities among the present generations are a major cause of environmental degradation. Due to poverty members of the present generation especially in the less developed nations are deprived of the choice to make environmentally sound decisions in their activities.²⁴ On this note the Brundtland Commission stated that;

“Those who are poor and hungry will often destroy their immediate environment in order to survive: They will cut down forests; their livestock will overgraze grasslands; they will overuse marginal land; and in growing numbers they will crowd into congested cities. The cumulative effect of these changes is so far-reaching as to make poverty itself a major global scourge.”²⁵

From the Brundtland Commission one can clearly see the link between intergenerational and intragenerational equity in that if the present generation is unable to satisfy their basic needs one cannot expect them to fulfill their obligations to the environment and future generations.²⁶ It is thus arguable that if the earth’s resources do not meet the needs of the poor they in turn may not be in a position to fulfill their obligations to the environment and future generations to conserve the options, quality and access with regards to these natural resources.

On the other hand the highly affluent people in the more developed states have higher levels of consumption which lead to resource depletion and waste accumulation which are also damaging to the environment. The most pressing environmental problems in the world such as global warming, chemical contamination and nuclear waste management are the result of affluence rather than poverty.²⁷

²⁴ Sharon Beder, “Costing the Earth: Equity, Sustainable Development and Environmental Economics”, *Op.cit.* pp.227-243.

²⁵ World Commission on Environment and Development, *Our Common Future*, Australian Edition, Oxford University Press, Melbourne, 1990, p.85.

²⁶ Edith B. Weiss, “Climate Change, Intergenerational Equity, and International Law,” *Vermont Journal of Environmental Law*, Vol.9.

²⁷ Sharon Beder, “Costing the Earth: Equity, Sustainable Development and Environmental Economics”, *Op. cit.*

It may therefore seem as though intergenerational equity conflicts with the goal of the present generations to equitably meet their needs out of the natural resources of the earth. However, this is not true since we must devote resources to help people meet their basic human needs and in many instances the measures needed to achieve intragenerational equity are consistent with those advancing intergenerational equity. Moreover, the present generation has an intergenerational right of equitable access to use and benefit from the earth's resources which is derived from the underlying equality among all generations in relation to use of the natural system. However, there may be instances where the measures needed to protect the earth's resources for its own sake and for the benefit of future generations may conflict with the needs of alleviating poverty. When this happens processes must be developed to ensure that the rights of the environment and those of the future generations are adequately protected while addressing poverty as an immediate threat to the environment.²⁸

4.0 Intergenerational and Intragenerational Equity in the Kenyan Context

Equity in the sense of intergenerational equity as discussed above has been incorporated into the Kenyan legal framework and in the sustainable development discourse.

Among the principles of sustainable development that are to guide the High Court under Section 3 of the Environmental Management and Coordination Act is the principle of "intergenerational equity" which under Section 2 of the said Act means that the present generation should ensure that in exercising its rights to beneficial use of the environment, the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations.²⁹ This definition implies that the present generations should conserve the diversity and quality of natural resources and ensure equitable sharing and use of the benefits of natural resources.

²⁸ Edith B.Weiss, "In Fairness to Future Generations and Sustainable Development," *Op. cit.*

²⁹ Act No. 8 of 1999, *Op. cit.*

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 Kenya. 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 conservation and protection of ecologically sensitive areas.³⁰ It can thus be argued that Article 60 of the Constitution imposes some obligations on the current generation to conserve the natural resources in land, ensure nondiscriminatory access to the use and benefit of land, avoid activities that have adverse impact on the quality of land and to impose costs of damage to the polluters. Such a provision in the constitution advances the rights of the environment by ensuring that it is safeguarded and enhanced for its own sake and for the benefit of the present and future generations.

Under Article 42 of the Constitution³¹ 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 70.³² 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. It also requires the State to strive towards achieving and maintaining a tree cover of at least ten per cent of the land area in Kenya; encourage public participation in environmental protection efforts and the elimination of activities and processes likely to endanger the environment.

³⁰ Constitution of Kenya 2010, *Op. cit.*

³¹ *Ibid*

³² Article 70 provides for the enforcement of environmental rights recognized and protected under Article 42 of the Constitution.

The measures contemplated under Article 69 of the Constitution³³ 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. 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 meet their needs. In the Philippines case of *Juan Antonio Oposa and others versus The Honourable Fulgencio S. Factoran and another*³⁴ the court found that the personality of the minors in that case to sue on behalf of the succeeding generations could only be based on the concept of intergenerational equity in so far as the right to a balanced and healthful ecology is concerned. This right to a balanced and healthful ecology is the equivalent to the right to a clean and healthy environment in Article 42 of the constitution of Kenya. As will be seen elsewhere in this paper the court in *Peter K. Waweru (supra)* had occasion to find that the right to a clean environment is equivalent to the right to life. The court acting suo moto noted that “...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.”

5.0 Intergenerational and Intragenerational Equity: Examples from Kenya

In this section we will briefly look at two examples from Kenya of natural resources that are threatened by human activities: the Kaya forests and the wildlife. The two examples will show that a balance has to be achieved in addressing the needs of the present and future generations and maintaining the carrying capacity of the supporting ecosystems. An ecocentric approach to sustainable development is timely. Since everyone is entitled to a clean and healthy environment is nature entitled to health itself? Are wild animals such as lions and lizards entitled to a clean and healthy

³³ Constitution of Kenya 2010, *Op. cit.*

³⁴ G.R. No. 101083, Supreme Court, July 30, 1993.

environment? These are pertinent questions that every sustainable development advocate must address.³⁵

5.1 The Kaya Forests

The Kaya forests are ten separate forested sites spread out along around 200km of the coast province of Kenya , mostly on low hills, ranging in size from 30 to around 300 ha, in which are the remains of fortified villages, Kayas, of the Mijikenda people.³⁶ The Kayas are of great importance to the Mijikenda community because of the spiritual attachment to them. These forests are of high biodiversity value and hold many rare plant species in Kenya.³⁷ The Kaya forests have been listed as a world heritage site by the United Nations Cultural Agency Unesco's World Heritage Committee, meeting for its 32nd session in Canada's Eastern City of Quebec.

The Kaya forests in Kenya represent an example of a natural resource that is facing major threats and may not be available for the enjoyment of future generations as it does not have a substitute. As a result of poverty, rapid development, an increasing disregard for traditional values and a rising demand for land, fuel wood, iron ore, and construction and carving wood materials the local people and foreign multinationals have put severe pressure on many of the kaya forests.³⁸ Over the last 50 years, many of the Kayas have been drastically reduced in size, and land that was communal property has been registered under individual title and sold to nationals or foreign speculators.³⁹

The protection and conservation of the Kayas is thus important to make them economically viable for the benefit of the present and future generations. Since the

³⁵ See generally, Christopher D. Stone, *Should Trees Have Standing?-Toward Legal Rights for Natural Objects*, 45 *Southern California Law Review*, 450 (1972).

³⁶ Sourced from, <http://whc.unesco.org/en/list/1231>, accessed on 1/11/2011.

³⁷ Anthony Gitonga, *'Destroying Kayas Breeds Hunger and Poverty'* Reported in The Standard Newspaper on 28th October 2011.

³⁸ Ibid

³⁹ Sourced from, <http://whc.unesco.org/en/list/1231>, *Op. cit.*

Kayas are rich in biodiversity the options they avail to future generations to address their problems and satisfy their needs should not be restricted by destroying them. A balance has to be struck between meeting the needs of the local people and the conservation of the kaya forests. To protect the forests long-term measures geared towards alleviating poverty and unemployment will be vital in ensuring that the forests are protected for the present and future generations. Such measures have been undertaken by the Coastal Forest Conservation Unit (CFCU) of National Museums of Kenya and the formation of a community bank, Kaya Kinondo FSA, which has helped the local people save money and get loans to invest instead of destroying the forests to for their livelihood.⁴⁰ There have been efforts to promote alternatives to potentially damaging utilization of the natural resources of key biodiversity areas. In the case of the Kayas, the CFCU, in conjunction with donors, has supported local farmers' groups by providing them with potting materials, seeds, and seedlings to assist them in setting up small tree nurseries to raise seedlings to plant on their farms.⁴¹ Such an initiative will ensure that the carrying capacity of the Kaya's is conserved and at the same time addressing the needs of the present and future generations.

5.2 Wildlife

Kenya's wildlife is one of the richest and most diversified in Africa with several of its protected areas and wetlands being internationally recognized and protected as World Heritage Sites, RAMSAR sites and Man and Biosphere Reserves. Kenya's wildlife resource also constitutes a unique natural heritage that is of great importance both nationally and globally.⁴²

However, due to the loss of biodiversity, land use changes and rural and urban development, Kenya's great reservoir of wildlife is increasingly under threat and

⁴⁰ Anthony Gitonga, *'Destroying Kayas Breeds Hunger and Poverty'*, *Op.cit.*

⁴¹ Anthony N. Githitho, *"The Sacred Mijikenda Kaya Forests of Coastal Kenya and Biodiversity Conservation"* Session I: Presentations of Case Studies from Africa and Latin America.

⁴² Sourced from, www.tourism.go.ke/ministry.nsf/doc, Final Draft of the Wildlife Policy-2007, Ministry of Tourism and Wildlife. (Accessed on 13/12/2011).

consequently opportunities are being lost for it to positively contribute to economic growth, wealth creation and increased employment. The other threats faced by wildlife in Kenya include the destruction of habitats, insecure tenures to land and illegal allocation, illegal and unsustainable off-take of wildlife and bush meat trade, pollution and climate change. There is a need to provide a framework for conserving, in perpetuity, Kenya's rich diversity of species, habitats and ecosystems for the well being of its people and the global community. On this note the Final Draft on the Wildlife Policy of 2007 stated that the conservation and management of wildlife in Kenya will have to be based on a long-term view where the present generation will make choices that will benefit future generations, in accordance with the principles of inter- and intra-generational equity.⁴³

In support of this goal, the Government has adopted the ecosystem approach to wildlife conservation and management throughout the country which is seen as being in line with the principles of intergenerational equity of conserving options, quality and access of natural resources for the benefit of natural resources. Therefore, a balance has to be struck in ensuring that the present generation meets its developmental needs and wildlife conservation as a national heritage to achieve long term sustainability.⁴⁴

The above examples clearly reveal that long-term measures have to be developed in order to manage and conserve the resources of the earth both for the benefit of the present and future generations within the carrying capacity of the supporting ecosystems.

6.0 Challenges and Opportunities

Even though the Kenyan legal framework has elaborate provisions on sustainable development, a lot of emphasis has been put on intragenerational equity as compared to intergenerational equity. The implementation mechanisms on how to

⁴³ Ibid

⁴⁴ Ibid.

fulfill our responsibilities to the environment and to future generations are lacking or if there, they are designed to handle problems of a short-term nature. The policy makers in Kenya do not have in their contemplation the rights of both the environment and future generations while directing resources to environmental management as there are no immediate tangible results. It will also be noted that the approach taken in attaining sustainable development is often anthropocentric and little or no emphasis has been made at conserving the environment for its own sake. There have also been conflicting laws on environment and this has also been a hindrance to sustainable development in Kenya. For example, the definition of the term environment under the Environmental Management and Coordination Act and under the Environment and Land Court Act is conflicting. While EMCA incorporates anthropocentric notions in defining the term environment⁴⁵ the Environment and Land Court Act⁴⁶ adopts an ecocentric definition as the totality of nature and natural resources, including the cultural heritage and infrastructure essential for social-economic activities. Such a conflict could have far reaching ramifications in achieving sustainable development.

It has been argued that intergenerational rights can be regarded as group rights, violations of which will benefit other members of the generation, not only the individual. The same applies to the environment which has no one to speak for it. The enforcement of environmental rights and those of future generations could appropriately be done by a guardian or representative as a group.⁴⁷ This position was judicially noted in the Philippines case of *Juan Antonio Oposa and others (supra)* where the petitioners were a group of Filipino minors who brought the action on their own behalf and on behalf of generations yet unborn, through their respective parents claiming, inter alia, that as citizens and taxpayers they were entitled to the full benefit, use and enjoyment of "the natural resource treasure that is the country's virgin rain

⁴⁵ Section of the Environmental Management and Co-ordination Act No. 8 of 1999, *Op. cit.*

⁴⁶ Section 2 of the Environment and Land Court Act No. 11 of 2011, *Government Printer, Nairobi.*

⁴⁷ Edith Brown Weiss, "In Fairness to Future Generations and Sustainable Development", *Op. cit.*

forests." The *Oposa's case* thus discredits arguments by some writers⁴⁸ who argue that rights only exist when there are identifiable interests to be protected and that as a consequence, future generations cannot have enforceable rights. The decision also addresses the need to protect the environment not necessarily for the benefit of human beings but as a national heritage.

The question on how to implement intergenerational rights and obligations is not an easy one. Weiss opines that one way is to give representation to the interests of future generations in administrative decision-making processes, judicial decision-making and more importantly including the market.⁴⁹ The *Oposa case* is a classic example of a case where the judicial decision-making process made recognition of the rights of the future generations on the one side and the obligations of the present generation on the other, to protect the natural resources for those yet to be born. Klaus Toepfer's message to the UNEP Global Judges Programme 2005, in South Africa, rightly observed that the judiciary is also a crucial partner in promoting environmental governance, upholding the rule of law and in ensuring a fair balance between environmental, social and developmental consideration through its judgments and declarations.⁵⁰ Section 20 of the Environment and Land Court Act gives the court *suo moto* jurisdiction. It is arguable that the section allows judges to engage in judicial activism to safeguard the environment and ensure sustainable development using the devices envisaged in Article 159 of the Constitution to ease access to justice. Article 159 of the Constitution requires the courts and tribunals to ensure that justice is done to all irrespective of status, justice is not delayed, that alternative forms of conflict management such as mediation are promoted, that justice is administered without undue regard to procedural technicalities and that the spirit of the constitution is

⁴⁸ Derek Parfit, "On Doing the Best for Our Children", in *Ethics and Population 100* edited by M. Bayles, Schenkman Publishing Co, 1976.

⁴⁹ Edith Brown Weiss, "In Fairness to Future Generations and Sustainable Development", *Op. cit.*, p. 25.

⁵⁰ Dinah Shelton and Alexandre Kiss, "Judicial handbook on Environmental Law," United Nations Environment Programme, 2005.

promoted and protected.⁵¹ Section 20 is thus vital since sustainable development is not possible in an atmosphere of unresolved conflicts.⁵² The application of suo moto jurisdiction was evident in *Peter K. Waweru (supra)* where the court addressed environmental issues on its own motion and even went further to equating the right to a clean environment with the right to life. By the time the court was making this decision the people's right to a clean environment was merely a statutory right but has now received constitutional endorsement.⁵³ Suo moto jurisdiction is now statutory in Kenya and this is an opportunity to safeguard and protect the environment for its sake and for the needs of human beings.

Kenyan courts should borrow from other jurisdictions such as India where the courts have made significant contributions to good governance in relation to the environment. This has been possible since the Indian Constitution enables the Indian courts to play a proactive role in environmental matters and exercise jurisdiction suo moto or through public interest litigation. The Indian Supreme Court has even equated the right to a clean environment with the right to life. Based on the foregoing the Indian Courts have created new-fangled laws for effective environmental compliance and enforcement. The efforts of the Indian courts resulted in the enactment of National Green Tribunal Act of 2010 which provides for the effective and expeditious disposal of cases relating to environmental protection and conservation of forests and the natural resources including enforcement of legal rights relating to the environment and the giving of relief and compensation for damages to persons and property and for matters enumerated therewith or incidental thereto.⁵⁴

⁵¹ Article 159 (2) of the Constitution of Kenya 2010, *Op.cit.*

⁵² Act No. 11 of 2011, *Op.cit.*

⁵³ See Article 42 of the Constitution of Kenya 2010, *Op. cit.*

⁵⁴ See Bakshi Pradeep & Yadav Madhur, *New Judicial Roles and Green Courts in India*, available at: http://inece.org/conference/9/papers/Bakshi_India_Final.pdf. (Accessed on 03/01/2011).

On their part environmental economists argue that environmental resources tend to be overused or abused resulting to their damage because they are free or underpriced. They do not have a price tag as they are not owned and thus there are no incentives to protect them like in the case of personal property. They thus postulate that the solution will involve putting a price on the environment and charging people to use it. This reasoning of environmental economists is to be found in Agenda 21, the Action Plan for Sustainable Development.⁵⁵ Under Principle 16 of the Rio Declaration the internalization of environmental costs and polluter pays principle was adopted as follows:

“National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the application that the polluter should in principle bear the cost of pollution with due regard to the public interest and without distorting international trade and investment.”⁵⁶

The Precautionary principle offers another opportunity and requires that ecological, cultural, economic, social, intrinsic and aesthetic value of natural resources are identified, and the impacts of human uses on those values are determined, before decisions are made. It is an integral principle of sustainable development, as it safeguards against serious and, particularly, irreversible harm to the natural resource base that might jeopardize the carrying capacity of these resources and the capacity of future generations to provide for their needs.⁵⁷ It is geared towards ensuring that irreversible harm is avoided to the environment even in the absence of scientific certainty and thus is a notorious notion informing intra and intergenerational equity.

Measures such as the fiscal incentives under Section 57 of the Environmental Management Coordination Act may be useful in ensuring proper management of the

⁵⁵ Sharon Beder, “Costing the Earth: Equity, Sustainable Development and Environmental Economics”, *Op. cit.*

⁵⁶ Rio Declaration on Environment and Development 1992, A/CONF.151/26 (Vol. I)

⁵⁷ *Ibid*, Principle 15.

environment and natural resources or the prevention or abatement of environmental degradation for future generations, if the same were to be effected as long-term measures.⁵⁸ These tax and fiscal incentives, disincentives and fees may include among other things tax incentives to deter bad environmental behavior that leads to environmental degradation and user fees to ensure that those who use environmental resources pay proper value for the utilization of such resources.⁵⁹

With regard to administrative decision-making processes there are institutions such as the National Environment Management Authority, which require one to carry out an Environmental Impact Assessment (EIA) to determine whether or not a programme, activity or project will have any adverse effects on the environment.⁶⁰ Even though these assessments are not long-term in nature their results may be beneficial in protecting the quality of the environment. What could be said to be long-term measures geared towards the protection and conservation of natural resources under the Act are the Strategic Environmental Assessments (SEA). The Act requires lead agencies in liaison with the National Environment Management Authority to subject all proposals for public policy, plans and programmes for implementation to a strategic environmental assessment to determine those which are environmentally friendly and cost effective when implemented either individually or in combination with others.⁶¹ The Act also contains provisions to ensure that laws regarding the environment and natural resources are observed, for investigating complaints,⁶² environmental audit⁶³ and monitoring⁶⁴ and for providing warnings of pending threats to the environment.

⁵⁸ Act No. 8 of 1999, *Op.cit.*

⁵⁹ Section 57 (2), Act No.8 of 1999, *Op.cit.*

⁶⁰ Section 58, *Op. cit.*

⁶¹ Regulation 42 L.N. No.101, Environmental (Impact Assessment and Audit), Regulations, 2003.

⁶² Section 31, Act No. 8 of 1999, *Op.cit.*

⁶³ Section 68, Act No. 8 of 1999, *Op.cit.*

⁶⁴ Section 69, Act No. 8 of 1999, *Op.cit.*

It is proposed that long-term scientific research and development is part of an intergenerational strategy. The research could be geared towards developing substitutes for depleted resources, to extract and use resources more efficiently and to understand and manage long-term threats to environmental quality, such as hazardous wastes in ground water. In *Peter K. Waweru versus Republic (supra)* the court found that the right to a clean and healthy environment of the users of the water downstream was threatened by raw sewage or waste water and further posed a serious threat to the water table in terms of pollution. The decision thus addressed both the ecocentric concerns and the needs of the users of the water downstream.

Traditional societies were able to come up with sustainable solutions through the use of traditional dispute resolution avenues such as negotiations and mediation. Such solutions effectively addressed the ecological concerns and needs of the people by maintaining the carrying capacity of the supporting ecosystems. This way the environment in the traditional set up used to be greener. The State should thus encourage and enhance the use of traditional protection systems, conflict resolution mechanisms and indigenous knowledge in the conservation and management of environmental resources.

Inter and intragenerational equity has also been given a religious and/or a spiritual dimension where different faiths have been used as forums for advancing awareness on environmental protection. On this note it has been argued that caring for life on earth is a spiritual commitment and thus the members of the present and future generations have the right, to have their right to life unthreatened by the destruction and degradation of environmental resources.⁶⁵ For example, with respect to the kaya forests in Kenya, the Kayas were regarded as sacred places of worship. The main objective of the traditional management of sacred sites is to maintain their separateness or sanctity by controlling access to them. This can be achieved largely through the

⁶⁵ A Statement from the WCC to the High-Level Ministerial Segment of the UN Climate Conference in Nairobi, COP12/MOP2, 17 November, 2006, delivered by Dr Jesse Mugambi, University of Nairobi and member of the WCC Working Group on Climate Change.

strength of spiritual beliefs and social rules and norms and has been fairly effective in reinforcing self-restraint among individual members of the groups where applied.⁶⁶

Sustainable development also requires that if the resources of the earth have no substitutes, then there should be efforts to promote alternatives instead of depleting, degrading and diminishing access and use of the benefits arising out of these natural resources to future generations, particularly within key biodiversity areas such as tropical forests, kaya forests in Kenya and in the wetlands. In order to conserve the kaya forests local farmers' groups have been provided with potting materials, seeds, and seedlings to assist them in setting up small tree nurseries to raise seedlings to plant on their farms.⁶⁷

Creating public awareness on the critical role natural resources play in the development process and the importance of sustainable use of resources for the benefit of present and future generations is vital. Such forums should also create public consciousness on the dangers of depleting and degrading natural resources and the resulting impact on equitable sharing and use of the benefits of environmental resources.⁶⁸

The judiciary also has a crucial role to play in achieving sustainable development. Courts can achieve this by giving the right interpretation to the Constitution and the other Acts of Parliament, promoting environmental governance, upholding the rule of law and ensuring a fair balance between environmental, social and developmental consideration through judgments and declarations. The courts have a role in reaffirming the rights of the present and future generations and in pushing for the rights of the environment as seen in section 13 (3) of the Environment and Land Court which confers on the court the power to hear and determine applications for

⁶⁶ Anthony N. Githitho , "The Sacred Mijikenda Kaya Forests of Coastal Kenya and Biodiversity Conservation", *Op. cit*

⁶⁷ Ibid.

⁶⁸ Edith Brown Weiss, "In Fairness to Future Generations and Sustainable Development", *Op. cit.*, p. 26.

denial, violation or infringement of, or threat to, rights relating to the environment and land under Articles 42, 69 and 70 of the Constitution.⁶⁹ This role has now been enhanced by the Environment and Land Court which in section 20 confers on the court suo moto jurisdiction in environmental matters.⁷⁰ This is an opportunity in future sustainable development efforts.

The State must come up with measures to alleviate poverty among the members of the present generation. As noted elsewhere in this paper, if the people are poor they cannot fulfill their obligations to future generations. It is high time the sustainable development discourse in Kenya takes a new path by addressing the needs of the present generation while at the same time conserving the diversity, quality and access of environmental resources for the present and future generations. Attaining this balance is the way to go.

More particularly, the State should ensure that the legislation and other measures contemplated under Article 69 are enacted and implemented and the obligations with respect to the environment under Article 70 of the Constitution enforced if the right to a clean and healthy environment is to be realized in Kenya.⁷¹

7.0 Conclusion

The paper has argued that the policy, legal and institutional mechanisms put in place in Kenya on how to fulfill our duties to the environment and future generations are not adequate as they are designed to handle problems of a short-term nature and that they are largely anthropocentric. The measures we have in Kenya are thus not adequate in addressing long-range problems of say a hundred years or more. Sustainable development is threatened by the problems of resource depletion; degradation in quality of resources for future generations and access to the use and benefits of the resources received from prior generations. It has been shown that the

⁶⁹ Act No. 19 of 2011, *Op.cit.*

⁷⁰ *Ibid.*

⁷¹ Constitution of Kenya 2010, *Op. cit*

present generation has an obligation to safeguard and protect the environment in order to bequeath the resources of the earth in a no worse situation than they inherited them from the past generations.⁷² As argued above it is possible to attain sustainable development and equity in the Kenyan context. It is possible to achieve the balance required by sustainable development and equity in Kenya, which is, protecting the environment, safeguarding the rights of the people and achieving developmental needs. Balancing the ecocentric and anthropocentric concerns in the sustainable development and equity discourse is thus necessary in the Kenyan context.

⁷² Ibid.