

Access to Energy as a Constitutional Right in Kenya

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ABSTRACT

This paper discusses the right to energy as a fundamental basis for societal development and as a Constitutional right. It is argued that the existing legal and institutional framework in Kenya does not effectively promote the realization of the right of access to energy. The discourse focuses on the right to energy by utilizing the various categories of human rights; the first, second and third generation. The discussion connects the right to energy to human rights generally. The legal and institutional framework on access to energy in Kenya is briefly analyzed. This is with specific focus to the Constitution of Kenya, 2010. The implications of the various laws and policies on energy in relation to access to energy are critically examined. The writer addresses the various challenges that the legal and institutional framework in Kenya faces in respect of securing the right to access energy. Ultimately, the writer evaluates the energy sector and its efficacy in providing adequate access to energy and recommends opportunities on securing the access to energy for all in Kenya through modifications to the relevant legal and institutional frameworks. Further, this paper seeks to introduce new ideas aimed at enhancing the right to energy and posits the same as a Constitutional right in its own sense. Access to energy is realizable in Kenya. It should be promoted as a human right necessary for the enjoyment of other rights and freedoms.

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1. INTRODUCTION

This paper discusses access to energy as a Constitutional right in the context of Kenya. It examines the access to energy as a human right requisite for the enjoyment of other fundamental rights and freedoms. The paper also seeks to establish the nexus between the right to development and the right of access to energy.

The discussion on the right to development gained momentum in the seventies when the United Nations Commission on Human Rights focused on the “question of the realization of the economic, social and cultural rights contained in the Universal Declaration of Human Rights and in the International Covenant on Economic, Social and Cultural Rights, and the study of special problems relating to human rights in developing countries”.¹ Eleanor Roosevelt, head of the US delegation during the drafting of the Universal Declaration of Human Rights (UDHR, 1948)², advocated the right to development as part of a global bill of rights when she stated that 'one of the most important rights is the opportunity for development'.³

The United Nations (UN) Conference on the Human Environment (UNCHE) was held in Stockholm, Sweden, from 5-16 June 1972, and adopted *the Stockholm Declaration*,⁴ amongst other documents. The Conference mainly discussed issues of environment but also connected the same to development. The Conference declared *inter alia* that the protection and improvement of the human environment is a major issue which affects the well-being of peoples and economic development throughout the world; it is the urgent desire of the peoples of the whole world and the duty of all Governments.

In 1986, the UN General Assembly adopted a Declaration on the Right to Development⁵, which states under Article 1 that "every human person and all peoples are entitled to participate in, contribute to and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized."⁶ Article 1, paragraph 1 proclaims that the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights

¹ Audiovisual Library of International Law, Declaration on the Right to Development, New York, 4 December 1986, *Introductory Note*, Available at <http://legal.un.org/avl/ha/drd/drd.html> Accessed on 24th October, 2013

² UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html> [accessed 30 October 2013]

³ Rebecca Browning, 'The Right To Development In Africa: An Emerging Jurisprudence? Examining the Endorois recommendation by the African Commission for Human and People's Rights,' page August 2011 <Available at <http://www.kenyalaw.org/klr/index.php?id=979> Accessed on 17th October, 2013

⁴ Declaration of the United Nations Conference on the Human Environment, U.N. Doc., A/Conf.48/14/Rev. 1(1973); 11 ILM 1416 (1972)

⁵ A/RES/41/128, 4 December 1986, 97th plenary meeting, 41/128, 'Declaration on the Right to Development' <Available at <http://www.un.org/documents/ga/res/41/a41r128.htm>> Accessed on 17th October, 2013

⁶ Ibid

and fundamental freedoms can be fully realized.⁷ Article 2 thereof proclaims that the human being is the central subject of development (article 2, paragraph 1) and attributes States the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals (article 2, paragraph 3).

The Preamble to the Declaration observes *inter alia* that development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.

The Rio Declaration on Environment and Development, 1992⁸ reaffirmed the Declaration of the United Nations Conference on the Human Environment, adopted at Stockholm on 16 June 1972,⁹ and sought to build upon it.¹⁰ Principle 1 of the Rio Declaration is to the effect that human beings are at the centre of concerns for sustainable development. Principle 3 of the Declaration proclaimed that the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.

According to Karel Vasak's classification of human rights, the third generation of human rights consists of what are also known as the collective-developmental rights. They constitute a broad class of rights that have over time gained acknowledgment in international agreements and treaties though they are still contested by some scholars. The right to development belongs in this category together with the right to enjoyment of environmental rights.¹¹

The first generation of human rights entails the civil-political rights. These are seen as claims against the state. The so-called first-generation (human) rights refer to traditional civil and political liberties such as freedom of speech, religion, and the press, as well as freedom from torture.¹² The second generation of human rights consists of the socio-economic rights. Second-generation rights are considered as rights which require affirmative state action for their realization. Second-generation rights are often referred to as *group rights* or *collective*

⁷ Article 1

⁸ Report Of The United Nations Conference On Environment And Development, Rio de Janeiro, 3-14 June 1992) A/CONF.151/26 (Vol. I)

⁹ Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), U.N. Doc, A/Conf.48/14/Rev. 1(1973); 11 ILM 1416 (1972)

Available at <http://www.unep.org/Documents/Default.asp?DocumentID=97&ArticleID=1503>

¹⁰ Preamble

¹¹ Zoltan Vig, 'Solidarity rights: universality and diversities'

Available at <http://www.studsell.com/view/4134/> Accessed on 30th October, 2013

¹² Oliver C Ruppel, 'Third-generation human rights and the protection of the environment in Namibia' page 102, Available at <http://www.kas.de/upload/auslandshomepages/namibia/HumanRights/ruppel1.pdf> Accessed on 17th October, 2013

rights, in that they pertain to the wellbeing of whole societies. Examples of second-generation rights include the right to education, work, social security, food, self-determination, and an adequate standard of living. These rights are codified in the International Covenant on Economic, Social and Cultural Rights (1966)¹³. These are also covered under Articles 23–29 of the Universal Declaration of Human Rights (1948)¹⁴.

The argument at the international level has been that the three generations of human rights are not capable of being enjoyed independently of each other.¹⁵ Although traditional political theory argues that some rights are antagonistic (and therefore their incompatibility of with other generations), progressive scholars argue that the three generations are in fact deeply interdependent.¹⁶ Human rights are so thoroughly interconnected that it is difficult to conceive of them as operating properly except in an interdependent and mutually supportive manner.¹⁷

Some of the critical concerns that arise in such international discourse are whether the second generation rights create the background conditions necessary for the exercise of first generation rights, as certain sections of the International Bill of Rights¹⁸ suggest, or it is actually the other way round. Should second and third generation rights be viewed as simultaneous? Does one generation take precedence over another, or are all equally important? Should second and third generation rights even be considered rights, or are they something fundamentally different?¹⁹

It is argued that the rights in the different generations, more so the second and third generation rights are dependent of each other and thus the purported classification is superfluous. The second generation of rights which are also referred to as the socio-economic rights requires other resources for their full enjoyment to be realized. Take for instance the right to clean and healthy environment which falls under the third generation of rights. One may be enjoying the second generation of rights as provided for under the law but if they are deprived of a clean and healthy environment, the effect will be that some of

¹³ United Nations International Covenant on Economic, Social and Cultural Rights, 1966; Available at

http://www.unhchr.ch/html/menu3/b/a_cescr.htm Accessed on 16th October, 2013.

¹⁴ United Nations Universal Declaration of Human Rights

Available at <http://www.unhchr.ch/udhr/lang/eng.htm> Accessed on 16th October, 2013

¹⁵ United Nations Population Fund (UNPF), Human Rights Principles,

Available at <http://www.unfpa.org/rights/principles.htm>

¹⁶ See Globalization 101, 'Three Generations of Human Rights' Available at

<http://www.globalization101.org/three-generations-of-rights> Accessed on 15th October, 2013

¹⁷ Ibid.

¹⁸ Universal Declaration of Human Rights, 1948; International Covenant on civil and Political Rights; and International Covenant on Economic, Economic, Social and Cultural Rights.

¹⁹ Jerome J. Shestack, 'The Philosophic Foundations of Human Rights' *Human Rights Quarterly* 20.2 (1998) 201-234, Available at

<http://www.princeton.edu/~bsimpson/Human%20Rights/articles/Shestack,%20Philosophical%20Foundati on%20of%20Human%20Rights.htm> Accessed on 18th October, 2013

these other rights will be negated. One such right is the right to health which cannot be realized and/or sustained in a dirty and/or polluted environment.

The United Nations Conference on the Human Environment (Stockholm, 1972) proclaimed that Man is both creature and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth. In the long and tortuous evolution of the human race on this planet a stage has been reached when, through the rapid acceleration of science and technology, man has acquired the power to transform his environment in countless ways and on an unprecedented scale. Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights the right to life itself.²⁰

Further, it states that the protection and improvement of the human environment is a major issue which affects the well-being of peoples and economic development throughout the world; it is the urgent desire of the peoples of the whole world and the duty of all Governments.

The outcome of the Conference which is the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) states in its Principle 8 that Economic and social development is essential for ensuring a favorable living and working environment for man and for creating conditions on earth that are necessary for the improvement of the quality of life.

Indeed, Article 6(2) of the UN Declaration on the Right to Development²¹ reiterates that all human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights. This position gives credence to the argument that all the three generations of human rights are interdependent and cannot be enjoyed independently of each other. Article 6(3) places an obligation on States by stating that they should take steps to eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic, social and cultural rights.

The right to development is said to include: full sovereignty over natural resources, self-determination, popular participation in development, equality of opportunity and the creation of favorable conditions for the enjoyment of other civil, political, economic, social and cultural rights.²² Principle 4 of the Rio Declaration proclaims that in order to achieve sustainable development, environmental protection shall constitute an integral part of the

²⁰ Preamble to the Stockholm Declaration, 1972

²¹ UN General Assembly, *Declaration on the Right to Development* : resolution / adopted by the General Assembly, 4 December 1986, A/RES/41/128, available at:

<http://www.refworld.org/docid/3b00f22544.html> [accessed 30 October 2013]

²² See Shewli Kumar, 'Right to Development: A Sustainable Approach to Substantive Equality', *Indraprastha Public Affairs Centre*, Available at http://www.ipacindia.org/pdf/reports/discussion_paper_on_RTD.pdf Accessed on 30th October, 2013

development process and cannot be considered in isolation from it.²³ Principle 25 further proclaims that Peace, development and environmental protection are interdependent and indivisible.

This position thus supports the foregoing assertion that all the rights are intertwined and dependent on each other in their enjoyment. Further, it places the right to development at a pivotal position in ensuring that the environment is conducive for the enjoyment of all other rights, and its violation affects the realization of all other rights.

The absence of the second generation of rights will result in what is referred to as poverty. Poverty is a term that has a wider scope in its technical meaning. Agenda 21²⁴ provides the framework to tackle the worldwide problem of poverty. It recognizes poverty as a complex multidimensional problem, the resolution of which requires a specific anti-poverty strategy, itself a basic condition for ensuring sustainable development. There exists a strong link between poverty and development. Energy poverty impedes full enjoyment of other fundamental rights and freedoms. In fact, the United Nations Conference on Sustainable Development (UNCSD, or Rio+20), proclaimed that eradicating poverty is the greatest global challenge facing the world today and an indispensable requirement for sustainable development, and in this regard they were committed to free humanity from poverty and hunger as a matter of urgency.²⁵

Despite the crucial importance of energy to the realization of almost all socio-economic goals, to date there has not been a widespread recognition of this fact. This dependence is acknowledged in the sustainable development framework but as yet, this insight has not moved across to the human rights arena. A basic legal right of access to energy services should be designed to ensure access on the basis of equality and non-discrimination to a sufficient, regular, reliable, efficient, safe, and affordable supply of (ideally clean and sustainable) energy.²⁶ There exist advantages in treating access to energy services as a human right. The existence of such a right would impose obligations on States, both at the

²³ Report Of The United Nations Conference On Environment And Development (Rio de Janeiro, 3-14 June 1992)

²⁴ Agenda 21, established at the 1992 United Nations Conference on Environment and Development, or "Earth Summit", in Rio de Janeiro, Brazil, is the blueprint for sustainability in the 21st century. Agenda 21 is a commitment to sustainable development, which was agreed by many of the world's governments. Nations that have pledged to take part in Agenda 21 are monitored by the International Commission on Sustainable Development, and are encouraged to promote Agenda 21 at the local and regional levels within their own countries. Agenda 21 addresses the development of societies and economies by focusing on the conservation and preservation of our environments and natural resources. <http://www.sustainable-environment.org.uk/Action/Agenda_21.php> Accessed on 16th October, 2013

²⁵ Rio+20, 'The Future We Want'

Available at

<http://www.uncsd2012.org/content/documents/727The%20Future%20We%20Want%2019%20June%20123Opm.pdf>

²⁶ See Adrian J Bradbrook, 'Access To Energy Services In A Human Rights Framework' http://www.un.org/esa/sustdev/sdissues/energy/op/parliamentarian_forum/bradbroad_hr.pdf Accessed on 30th October, 2013

national and international level. Generally, it has been posited that a State's obligations in relation to human rights are threefold, to respect, to protect and to promote.²⁷ The human rights framework may thus be relevant in providing a mechanism for addressing the lack of access to energy as a Constitutional right.

2. HUMAN RIGHTS AND ACCESS TO ENERGY

As already pointed out, the third generation of human rights mainly comprises the developmental rights of persons. The lack of access to modern energy services is a serious hindrance to economic and social development, and must be overcome if the UN Millennium Development Goals are to be achieved.²⁸ Energy is critical to economic development and poverty reduction. The provision of reliable, affordable and sustainable energy services, especially for the poorest, contributes decisively to the achievement of the Millennium Development Goals²⁹. Without energy, economies cannot grow and poverty cannot be reduced.³⁰ Such poverty is arguably a multifaceted issue and one of the aspects of poverty is lack of access to energy which is otherwise referred to as energy poverty.³¹ It encompasses lack of access to modern energy services. These services are defined as household access to electricity and clean cooking facilities (e.g. fuels and stoves that do not cause air pollution in houses)³². Modern energy services are central to human well-being and to a country's economic development.

It is against this background that there have been international calls for the recognition of the right of access to energy as a human right. Although the right of access to energy falls under the often disputed class of third generation rights (being part of the developmental rights) thereby making it difficult to legally qualify as a justiciable right³³, it plays such a vital role in promoting the realization of the so called first and second generation rights that it

²⁷ See generally Kenya National Commission on Human Rights, 'Making The Bill Of Rights Operational: Policy, Legal And Administrative Priorities And Considerations' *Occasional Report*, October 2011, Available at <http://www.knchr.org/Portals/0/Reports/MAKING THE BILL OF RIGHTS Operational.pdf> Accessed on 07/11/2013

²⁸ International Energy Agency, *Energy poverty*, Available at <http://www.iea.org/topics/energypoverty/> Accessed on 30th October, 2013

²⁹The Millennium Development Goals (MDGs) are eight goals to be achieved by 2015 that respond to the world's main development challenges, Available at <http://www.un.org/millenniumgoals/> Accessed on 30th October, 2013

³⁰*Energy Poverty in the Daintree*, Available at <http://www.daintreehour.com/energy-poverty.htm>

³¹ See generally Stephen Karekezi, et. al., 'Energy, Poverty, and Development' http://www.iiasa.ac.at/web/home/research/Flagship-Projects/Global-Energy-Assessment/GEA_Chapter2_development_hires.pdf Accessed on 18th October, 2018

³² UN General Assembly, Energy poverty, How to make modern energy access universal?, *Special early excerpt of the World Energy Outlook 2010 for the UN General Assembly on the Millennium Development Goals*, OECD/IEA, September 2010 op. cit.

³³Carolyn Sehmer, Report of the Parallel Event "Third Generation" Human Rights -Reflections on the Collective Dimension of Human Rights Palais des Nations, Geneva, 22 March 2007, *FES Conference Report*, Available at http://www.fes-globalization.org/geneva/documents/Report_FES-Geneva_3rd-generation_human_rights.pdf Accessed on 25th October, 2013

can only be ignored at the risk of defeating all other rights. In fact the United Nations has even gone ahead to declare that access to energy is essential and plays a central role in the realization of sustainable development. Sustainable development will not be achieved without the realization of the right of access to energy around the world and particularly in Kenya.

However, despite the international recognition of the right of all persons to access energy, the existing situation is that many people around the world are yet to enjoy this right. Globally, it is estimated that over 1.3 billion people are without access to electricity and 2.6 billion people are without clean cooking facilities. More than 95% of these people are either in sub-Saharan Africa or developing Asia and 84% are in rural areas.³⁴ This essentially means that such a class of people has their enjoyment of other rights and fundamental freedoms greatly hampered despite their existence and assurance under the international human rights law. The limitations on the availability of energy services create barriers to socio-economic development. The lack of energy services is correlated with many of the elements of poverty such as low education levels, inadequate healthcare and limited employment possibilities. At the local and national levels, a reliable energy supply is essential for economic stability and growth, jobs, and improved living standards.³⁵

3. LEGAL AND INSTITUTIONAL FRAMEWORK ON ACCESS TO ENERGY IN KENYA

3.1 Legal Framework

3.1.1 The Constitution of Kenya, 2010

The Constitution of Kenya³⁶ has extensively enhanced protection and enforcement of fundamental rights and freedoms. It is significant that Chapter four of the Constitution provides for the Bill of Rights which captures all three generations classification of human rights by Vasek³⁷. Article 43 thereof provides for the economic and social rights of all persons. It provides for the rights of all persons to: to the highest attainable standard of health, which includes the right to health care services, including reproductive health care; to accessible and adequate housing, and to reasonable standards of sanitation; to be free from hunger, and to have adequate food of acceptable quality; to clean and safe water in

³⁴ International Energy Agency, <http://www.iea.org/topics/energypoverty/> Accessed on 30th October, 2013

³⁵Paul Mbutia, et al., 'Gender Audit Of Energy Policy And Programmes In Kenya', Final Report, Government of Kenya, Ministry of Energy, page 42, Available at

http://www.energia.org/fileadmin/files/media/reports/Kenya_gender_audit_report.pdf Accessed on 30th October, 2013

³⁶ 2010, Government of Kenya, Government Printer, Nairobi

³⁷Globalization 101, 'Three Generations of Human Rights' Available at

<http://www.globalization101.org/three-generations-of-rights> Accessed on 30th October, 2013

adequate quantities; to social security; and to education. For the realization of most if not all these rights, there must be access to energy and its absence means that such rights will not be enjoyed despite there being Constitutional guarantee.

Article 35(1) thereof provides that every citizen has the right of access to information held by the State; and information held by another person and required for the exercise or protection of any right or fundamental freedom, *inter alia*. Access to information is important in the realization of right to access to clean and sustainable energy because even if the government does all that is required of it in order to promote that realization of this right, the target people may be ignorant of the existing energy options and unless the same is provided, any efforts may be futile.³⁸

Regarding access to energy, Article 260 recognizes energy as part of the natural resources in Kenya. It provides that “natural resources” means the physical non-human factors and components, whether renewable or non-renewable, including *inter alia* rocks, minerals, fossil fuels and other sources of energy. Article 69 of the Constitution guarantees the right of access to natural resources for the people of Kenya. Equitable sharing of the accruing benefits of these natural resources is also guaranteed. Energy can be seen as an accruing benefit and therefore, Kenyan people are entitled to the benefits of the same. In this regard, Article 69 (h) of the Constitution obligates the state to utilize natural resources for the benefit of the people of Kenya.

The Constitution provides for a two tier structure of government, i.e. the National and the County Governments. It distributes the functions and powers between the two levels as outlined in Chapter Eleven and the Fourth Schedule. Fourth schedule specifically provides that the national Government is mandated with the protection of the environment and natural resources with a view to establishing a durable and sustainable system of development, including, in particular *inter alia* energy policy including electricity and gas reticulation and energy regulation.³⁹ However, this function is not exclusive to the national Government since in county planning and development, the counties are also charged with *inter alia* electricity and gas reticulation and energy regulation.

Although the Constitution does not expressly provide for the right to access to energy, it is important to state that one of the national values and principles of governance is sustainable development, which, under the international law requires access to energy for its effective realization.⁴⁰ Indeed, the United Nations Development Programme⁴¹ asserts that energy is

³⁸ Article 35(1), Constitution of Kenya 2010

³⁹ Fourth Schedule, Constitution of Kenya

⁴⁰ United Nations Development Programme, *Sustainable Energy*, Available at

http://www.undp.org/content/undp/en/home/ourwork/environmentandenergy/focus_areas/sustainable-energy.html

⁴¹<http://www.undp.org/content/undp/en/home.html> Accessed on 30th October, 2013

central to sustainable development and poverty reduction efforts. It affects all aspects of development -- social, economic, and environmental -- including livelihoods, access to water, agricultural productivity, health, population levels, education, and gender-related issues. None of the Millennium Development Goals (MDGs) can be met without major improvement in the quality and quantity of energy services in developing countries.⁴²

Article 69 (2) of the Constitution places a duty on 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.

Further, Article 174 which outlines the objects of devolution provides that such objects shall be *inter alia*: to recognize the right of communities to manage their own affairs and to further their development; and to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya.

The Fourth Schedule (Part 1) to the Constitution provides for the distribution of functions between the National Government and the County Governments. The functions of the national Government include the protection of the environment and natural resources with a view to establishing a durable and sustainable system of development, including, in particular— (a) fishing, hunting and gathering; (b) protection of animals and wildlife; (c) water protection, securing sufficient residual water, hydraulic engineering and the safety of dams; and (d) energy policy, as well as Energy policy including electricity and gas reticulation and energy regulation.

Part 2 of the fourth schedule provides for the functions and powers of the county governments as *inter alia* County planning and development, including: statistics; land survey and mapping; boundaries and fencing; housing; and electricity and gas reticulation and energy regulation.

If the economic and social rights of individuals and/or communities are to be realized, other enabling rights such as right to access to energy need to be guaranteed. Article 21 of the Constitution provides for the duty of the State and every State organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights. The State should even commit the requisite resources for the realization of the same.⁴³ The international recognition of the right to development is premised on the inherent dignity of the human person because it helps to attain both freedom and wellbeing, which is what, gives the humans their equal worth.

Article 19(2) provides that the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings. These Constitutional provisions thus provides for a conducive environment for full enjoyment of

⁴² Ibid

⁴³ Article 20(5)

human rights and freedoms as provided by the Bill of rights therein and calls on the state and all the other relevant human rights actors to do all that is necessary to achieve the Constitutional objectives. Article 21(2) of the Constitution of Kenya provides that the State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43. Lack of access to clean and sustainable energy incapacitates the person in many ways including failure to enjoy most of the economic and social rights, failure to realize the right to self-development amongst others. This ultimately compromises the right to human dignity. The dignity of the human person is not only a fundamental right in itself but constitutes the real basis of fundamental rights.

The lack of access to modern energy services is said to hinder the ability of the population of developing countries like Kenya to benefit from opportunities for economic development and increased living standards.⁴⁴ The lack of access to clean and sustainable energy by most people in Kenya does not only hamper economic growth in the country but also denies many of the poor in the country the chance and opportunity to seek their personal development. The lack of access to modern forms of energy for lighting, cooking, heating and cooling, refrigeration, pumping, transporting, communication and productive purposes means that people must spend much of their time and physical energy on basic subsistence activities with little or no meaningful returns.⁴⁵ This ultimately has the effect of increased poverty in the country thus decelerating the growth of the country's economy. The same also denies the people the conducive environment for enjoyment of the other constitutionally guaranteed human rights. For the benefit of present and future generations, issues like public participation, access to information, access to justice, public action, the human right to energy, poverty (including energy poverty), and indigenous human rights, *inter alia*, will have to be addressed in order to assure the realization of the human right to clean and sustainable energy in Kenya. The Constitutional position is that all laws both national and sectoral must reflect and promote the Constitutional spirit as well as the national values and principles of governance.

3.1.2 The Energy Act, 2006⁴⁶

The Energy Act (the Act) is the main framework law on energy sector in Kenya and it was enacted to amend and consolidate the law relating to energy, to provide for the

⁴⁴United Nations Development Programme, 'Sustainable Energy',

Available at

http://www.undp.org/content/undp/en/home/ourwork/environmentandenergy/focus_areas/sustainable-energy.html Accessed on 30th October, 2013

⁴⁵Salome Misana & Gail v Karlsson, 'Generating Opportunities: Case Studies On Energy And Women'

Available at

http://www.undp.org/content/dam/aplaws/publication/en/publications/environment-energy/www-ee-library/sustainable-energy/generating-opportunities-case-studies-on-energy-and-women/GeneratingOpportunities_2001.pdf Available at 30th October, 2013

⁴⁶ No. 12 of 2006, Revised Edition 2012 [2006]

establishment, powers and functions of the Energy Regulatory Commission and the Rural Electrification Authority, and for connected purposes.⁴⁷ The Act generally has provisions with the various forms of energy sources in the country. Part II⁴⁸ of the Act establishes Energy Regulatory Commission detailing its functions, powers and leadership. Through this Commission the Act regulates the energy sector in the country in relation to licensing major players in production, distribution and supply of various forms of energy. The Act is capable, if well implemented, to ensure that affordability, reliability and efficiency in energy access is achieved.

Part III⁴⁹ provides for licensing and supply of electrical energy in Kenya. It also provides for establishment of the Rural Electrification Authority. Part IV⁵⁰ deals with petroleum and natural gas. It provides for licensing in relation to petroleum business in Kenya. Part V⁵¹ deals with renewable energy, energy efficiency and conservation. The Act can therefore be used to ensure that various alternatives of energy sources are explored in advancement of energy access by all. Through formulation of various policies, programmes and regulations, combined with political goodwill to enforce them would help in realization of the right of access to energy in Kenya.

3.1.3 The National Energy Policy, 2012⁵²

The national policy on energy was developed with the aim of providing affordable quality energy for all Kenyans. The Energy Policy recognizes the importance of access to energy by all and observes that the level and the intensity of energy use in a country is a key indicator of economic growth and development. Further, the Kenya Vision 2030 identified energy as one of the infrastructure enablers of its social economic pillar. Sustainable, affordable and reliable energy for all citizens is a key factor in realization of the Vision.⁵³

The overall objective of the energy policy is to ensure affordable, sustainable and reliable supply to meet national and county development needs, while protecting and conserving the environment.⁵⁴ The Policy provides that the specific objectives are *inter alia* to: utilize energy as a tool to accelerate economic empowerment for the National and County Governments as well as urban and rural development; improve access to quality, reliable and affordable energy services; provide a conducive environment for the provision of energy services; Promote development of indigenous energy resources; Promote energy efficiency and conservation; Ensure that prudent environmental, social, health and safety considerations

⁴⁷ Preamble

⁴⁸ SS 4-26 of the Act

⁴⁹ ss 27-42

⁵⁰ ss 80-102

⁵¹ ss 103-106

⁵² Government of Kenya, Ministry of Energy, Government Printer, May 2012, Sessional Paper No. 4 of 2004

⁵³ *Ibid*, page 19

⁵⁴ Clause 1.2

are factored in energy sector developments; and Ensure that a comprehensive, integrated and well informed energy sector plan is put in place for effective development. The Policy observes that the overall national development objectives of the Government of Kenya are accelerated economic growth; increasing productivity of all sectors; equitable distribution of national income; poverty alleviation through improved access to basic needs; enhanced agricultural production; industrialization; accelerated employment creation and improved rural-urban balance.⁵⁵

It further observes that the extent to which these objectives can be realized on a sustainable basis and environmentally sound manner, is dependent on the degree and economic efficiency with which critical factors of production are made available and combined with each other to produce the desired results. The realization of these objectives is only feasible if quality energy services are availed in a sustainable, cost effective and affordable manner to all sectors of the economy ranging from manufacturing, services, mining, and agriculture to households.⁵⁶

3.2 Energy Sector's Institutional Framework

There exist two separate but interconnected markets in which the energy undertakings operate, namely: (a) the primary market of network operation activities, namely transmission and distribution, which involve physical management of the infrastructure and energy inputs to the system; and (b) the secondary market of 'supply' activities such as wholesale trading and sales of energy to customers.⁵⁷ There are different players in the Kenyan market who are in charge of each of the foregoing operations. The Kenya Electricity Generating Company (KenGen) is the leading company in the production of electricity in power stations, generating about 80% of all the electricity consumed in the country.⁵⁸ Other electricity producers include Geothermal Development Company (GDC) and Independent Power Producers (IPPs).

The institutional framework relating to energy should be responsive to the need for Kenyans to access energy as a constitutional right.

⁵⁵ Government of Kenya, Ministry of Energy, Sessional Paper No. 4 On Energy , May 2004, Available at http://www.renewableenergy.go.ke/downloads/policy-docs/sessional_paper_4_on_energy_2004.pdf Accessed on 30th October, 2013

⁵⁶ National energy Policy third draft, Chapter 1

⁵⁷ Kotlowski, Alexander, Third-Party Access Rights in the Energy Sector: A Competition Law Perspective. Utilities Law Review, Vol. 16, No. 3, 2007. Page 101, Available at SSRN: <http://ssrn.com/abstract=1073962> Accessed on 17th October, 2013

⁵⁸ See <http://www.kengen.co.ke/index.php>

Further, After generation of electricity, the Kenya Electricity Transmission Company (KETRACO) takes over for transmission over high tension cables. See Kenya Electricity Transmission Company Limited (KETRACO), Available at <http://property.n-soko.com/kenya-electricity-transmission-company-limited-ketraco/> Accessed on 17th October, 2013.

The Kenya Power and Lighting Company (KPLC) is mandated with distribution and the transportation of the electricity over the low tension local cables. It also deals with supply, the sales and delivery of the electricity to the customer.

3.2.1 The Rural Electrification Authority

The Rural Electrification Authority is an authority established under section 66 of the *Energy Act*, 2006. One of the functions of the Authority as set out under section 67 is to promote use of renewable energy sources including but not limited to small hydros, wind, solar, biomass, geothermal, hybrid systems and oil fired components taking into account specific needs of certain areas including the potential for using electricity for irrigation and in support of off-farm income generating activities. It is also charged with the management of the Rural Electrification Programme Fund established under section 79. This Authority is thus in a position to play vital role in ensuring that the poor in the rural areas get to realize and enjoy the right to access to clean and sustainable energy. This would in turn unlock more opportunities for the full actualization of the constitutionally guaranteed social economic rights.⁵⁹

3.2.2 The Energy Regulatory Commission

The Energy Regulatory Commission is established under section 4 of the Act. Some of its functions and objects as provided for under section 5 thereof are *inter alia* to: regulate— importation, exportation, generation, transmission, distribution, supply and use of electrical energy; importation, exportation, transportation, refining, storage and sale of petroleum and petroleum products; production, distribution, supply and use of renewable and other forms of energy; protect the interests of consumer, investor and other stakeholder interests; maintain a list of accredited energy auditors as may be prescribed; monitor, ensure implementation of, and the observance of the principles of fair competition in the energy sector, in coordination with other statutory authorities; and collect and maintain energy data; prepare indicative national energy plan; perform any other function that is incidental or consequential to its functions under this Act or any other written law.⁶⁰ Effective discharge of the aforementioned duties by the Commission can facilitate the realization of the right to energy in Kenya.

4. CHALLENGES

Despite there being a legal framework and institutional framework in place, the reality on the ground is that a large section of the Kenyan population does not have access to clean and sustainable energy as contemplated under the international legal framework on human rights and access to energy. This is due to a number of challenges that face the framework thus affecting its efficaciousness in ensuring the enjoyment of the universal right of access to energy by all. The effect of these challenges is especially great in the rural areas and among the urban poor.

⁵⁹ Article 43, Constitution of Kenya

⁶⁰ s. 4, Energy Act 2006

4.1 Energy Pricing

The major source of energy in Kenya for the urban is electricity and kerosene while the rural and urban poor mostly depend on and wood fuel. Electricity production in Kenya mostly relies on hydro power generation and this has an impact on its costs. The cost of production is dependent on seasons so that variation in water levels in the production dams affects the price of electricity.⁶¹ The consumers often pay more when the water levels go down thus raising the cost of production.

This makes electricity affordability very expensive thus hampering its reliability as a preferable energy source in Kenya. A good example are the recent reports that Kenya Power would hike the price of new connection from Kenya Shillings thirty five thousand to Kenya shillings seventy thousand. It was not until the executive intervened that the proposal was shelved. Kerosene is also affected by the international oil prices so that its prices become unpredictable and unreliable especially for the poor. Climate change has also greatly affected tree production in Kenya thus affecting its reliability as a source of energy especially in the rural Kenya. It has also wiped out much of the tree coverage in the country thus making affordability of wood fuel very expensive for those who cannot access the same from their own farms.

4.2 Disclosure and Public Participation

Most of the consumers may not be aware of the various options available as a source of energy for their day to day energy needs. Further, some of the providers of the existing sources of energy do not readily provide information on such matters as tariffs, pollution, real costs and other cost and affordability-related issues. This hinders access to the most efficient forms of energy by majority in the country.

Despite the existence of legal provisions requiring dissemination of information to the consumers, the major players in the sector have not complied with the same. The legal provisions are also vague on the quality of information that is to be disseminated especially where such exercises as Environmental Impact Assessment (EIA) are undertaken.

Principle 17 of the Rio Declaration, 1992 provides that Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority⁶².

⁶¹Hydropower, Chapter 5, Available at http://srren.ipcc-wg3.de/report/IPCC_SRREN_Ch05.pdf Accessed on 30th October, 2013

⁶² Report Of The United Nations Conference On Environment And Development, Rio Declaration On Environment And Development (Rio de Janeiro, 3-14 June 1992)

Environmental assessments (EAs) should provide information to all parties with an interest on project impacts on the environment, including alternatives that may achieve the project objectives while alleviating or eliminating such impacts, and means of mitigating impacts. Done well, Environmental Impact Assessments offer objective comparisons of the costs and benefits of energy resources capable of meeting developmental and social needs. They would be good platforms where the communities participate in decision making. In Baringo County, Geothermal Development Company (GDC) has identified areas with geothermal potential. GDC chief executive officer Silas Simiyu, while speaking during the opening of a course on exploration of geothermal sources at Lake Bogoria Hotel, said that the company would involve communities living in potential areas in all the company's activities⁶³. Where communities feel sidelined, notwithstanding the fact that such projects were meant to benefit them, they might not appreciate the investors' presence in their area. A good example is an incidence that was recently reported in one of the local dailies, regarding the oil exploration in the North Eastern Kenya. One of the investors, Tullow Oil Kenya had to suspend its operations after the area residents demonstrated demanding to be employed at the company's sites. Indeed, they were joined by their local Members of Parliament. They demanded to be included not only in the employment opportunities but also in the tendering processes so that they could also offer the locally available services like food and other necessities.⁶⁴ Indeed, Principle 22 of the Rio Declaration, 1992 provides that indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development. Such incidences as the one above could possibly be avoided where people are involved in such crucial matters as to how they are to benefit from projects and also a clear understanding of their role.

4.3 Enforcement

Although there exists laws and a policy on energy in the country, there has been a challenge to enforcement of the same in a bid to ensure that the same are used in the realization of the right of access to energy for all persons in the country. The absence of recognition of access to clean and modern energy as a Constitutional right has for a long time hindered its effective promotion and enforcement as such. The sectoral players including the government did not have a Constitutional duty to promote and protect the right of persons to access energy. This thus meant that no one could go to court to seek enforcement, promotion or protection of this right.

⁶³ "Cheaper Electricity on the Way, says Firm", The Daily Nation, Monday, November 5, 2013, p 23

⁶⁴ The Daily Nation, Monday, October, 28, 2013, pp 1-2

4.4 Complex Regulatory Frameworks

There exists gaps and/loopholes in the regulatory framework on energy which makes realization of the right of access to energy in the country a mirage. The Energy Act, 2006 is the main framework law on energy in the country. It was meant to amend and consolidate the law relating to energy, to provide for the establishment, powers and functions of the Energy Regulatory Commission and the Rural Electrification Authority, and for connected purposes.⁶⁵ However, this law evidently leaves out guiding principles for the energy sector which should essentially reflect those captured in the Constitution of Kenya 2010. There are no provisions that directly lay out objectives of ensuring that all persons have access to affordable and sustainable energy sources. In their place are complex regulations dealing with licensing, exploitation, supply and distribution of various forms energy.

There exist complexities as well as conflicts with regard to the laws and regulations in the energy sector. A good example is *the Energy (Electricity Licensing) Regulations, 2010* which are meant to regulate the generation, transmission, distribution and supply of electrical energy in Kenya.⁶⁶ Regulations 4-6 of these Regulations provide for application for a licence for electric power generation, supply and/or distribution in the country. Regulation 7 makes it mandatory to publish notice of such an application for purposes of the local authorities as well as the communities in the area. Regulation 7(3) provides for the contents of such a Notice. It provides that the Notice shall *inter alia* invite directly affected persons in the areas affected by the undertaking who object to granting of the licence or permit, whether on personal, environmental or other grounds, to lodge with the Commission an objection, setting out the grounds thereof, within thirty days from the date of the application as stated in the notice and that a copy of such objection must be forwarded to the applicant. It is arguable that this provision is unconstitutional in light of Articles 22, 42 and 70 of the Constitution of Kenya 2010.

Article 22(1) of the Constitution gives every person the right to institute court proceedings claiming that a right to or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. Further, clause (2) thereof provides that in addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by: a person acting on behalf of another person who cannot act in their own name; a person acting as a member of, or in the interest of, a group or class of persons; a person acting in the public interest; or an association acting in the interest of one or more of its members. Clause (3) further provides that the Chief Justice should make rules providing for the court proceedings referred to under Article 22, which should satisfy the criteria that *inter alia* the rights of standing provided for under clause (2) are fully facilitated; formalities relating to proceedings, including, commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal

⁶⁵ Preamble

⁶⁶ Regulation 2(1), Energy Regulations, 2010

documentation; no fee may be charged for commencing proceedings; and the court, while observing the rules of natural justice shall not be unreasonably restricted by procedural technicalities. On the other hand, Article 42 guarantees every person's right to a clean and healthy environment. Article 70 gives every person the right to apply to the court for enforcement of environmental rights where such rights are likely to be denied, violated, infringed or threatened. Any person should thus be able to apply for the same and not only those directly affected as provided under the regulations.

*Rio+20 Declaration on Justice, Governance and Law for Environmental Sustainability*⁶⁷ provides for the Principles for the Advancement of Justice, Governance and Law for Environmental Sustainability. It states that meeting environmental objectives is part of a dynamic and integrated process in which economic, social and environmental objectives are closely intertwined. Further, it provides that Environmental sustainability can only be achieved in the context of fair, effective and transparent national governance arrangements and rule of law, predicated on: fair, clear and implementable environmental laws; public participation in decision-making, and access to justice and information, in accordance with Principle 10 of the Rio Declaration, including exploring the potential value of borrowing provisions from the Aarhus Convention⁶⁸ in this regard; accountability and integrity of institutions and decision-makers, including through the active engagement of environmental auditing and enforcement; clear and coordinated mandates and roles; accessible, fair, impartial, timely and responsive dispute resolution mechanisms, including developing specialized expertise in environmental adjudication, and innovative environmental procedures and remedies; recognition of the relationship between human rights and the environment; and specific criteria for the interpretation of environmental law.

The regulatory mechanisms should be efficient not only for the investors but also for the consumers. Any inconsistencies and/ or overlapping of laws can lead to unending court battles and this discourages investors. A good framework should focus on consumer needs, promotion of sustainable indigenous energy supplies, energy efficiency and regional interconnections. It should also seek to balance energy provision and environmental conservation and/ or protection.

4.5 Energy Efficiency

Energy efficiency measures are a proven means to reduce dependence on traditional energy resources by using them more efficiently.⁶⁹ The amount of energy produced in Kenya is

⁶⁷United Nations Conference on Sustainable Development, Rio+20 Declaration on Justice, Governance and Law for Environmental Sustainability, Rio de Janeiro, Brazil, 17– 20 June 2012, Available at

<http://www.unep.org/delc/worldcongress/Portals/24151/Advancing%20Justice,%20Governance%20and%20Law%20%28WV%29.pdf> Accessed on 07th November, 2013

⁶⁸ Convention On Access To Information, Public Participation In Decision-Making And Access To Justice In Environmental Matters, done at Aarhus, Denmark, on 25 June 1998

⁶⁹United Nations, UNEP, 'Handbook for Drafting Laws on Energy Efficiency and Renewable Energy Resources', Available at http://cmsdata.iucn.org/downloads/cel10_ottinger.pdf Accessed on 30th October, 2013

below the energy requirements for the consumers.⁷⁰ This is attributed to such factors that include energy wastage and loss by consumers⁷¹. Many of the consumers especially those utilizing electricity may not have the necessary information and awareness on energy conservation and efficient use.

4.6 Renewable Energy

Section 2 of the Energy Act 2006 defines 'renewable energy' to mean all non-fossil sources including, but not limited to biomass, geothermal, small hydro hydro-power, solar, wind, sewage treatment and plant gas. The major sources of energy in the country are non-renewable and these have adverse effects not only to the consumers but also to the economic development.

Bio-energy is the most common source of energy in Kenya. Problems relating to environmental degradation, land clearance, overgrazing, deforestation, drought and desertification are placing more and more pressure on dwindling Bioenergy resources. Biomass fuels are the largest source of primary energy in Kenya with wood fuel consumption accounting for over 68% of the total primary energy consumption particularly for rural households. Biomass use comes with air and soil pollution, environmental degradation. These also pose a major challenge not only to the health of the users but also to the environmental sustainability and conservation.⁷²

Part V (ss.103-106) of the Energy Act 2006 deals with renewable energy, energy efficiency and conservation. Section 103 (1) obligates the Cabinet Secretary responsible for energy matters to promote the development and use of renewable energy technologies, including but not limited to biomass, biodiesel, bio-ethanol, charcoal, fuel-wood, solar, wind, tidal waves, hydropower, biogas and municipal waste.⁷³ This is to be achieved through *inter alia*: formulating a national strategy for coordinating research in renewable energy; providing an enabling framework for the efficient and sustainable production, distribution and marketing of biomass, solar, wind, small hydros, municipal waste, geothermal and charcoal; promoting the use of fast maturing trees for energy production including bio-fuels and the establishment of commercial woodlots including peri-urban plantations; promoting the use of municipal waste for energy production; and promoting the development of appropriate local capacity for the manufacture, installation, maintenance and operation of basic

⁷⁰ Government of Kenya, Ministry of Energy, Sessional Paper No. 4 On Energy , Third Draft, May 2012, Available at <http://www.kengen.co.ke/documents/National%20Energy%20Policy%20-%20Third%20Draft%20-%20May%2011%202012> .pdf Accessed on 30th October, 2013

⁷¹ United Nations, 'Natural Resource Aspects Of Sustainable Development In Kenya' *Agenda 21*, Available at <http://www.un.org/esa/agenda21/natinfo/countr/kenya/natur.htm> accessed on 7th November, 2013

⁷² Pisces, 'Gender and Equity in Bioenergy Access and Delivery in Kenya'

Available at

<http://www.pisces.or.ke/pubs/pdfs/Gender%20and%20Equity%20in%20Bioenergy%20in%20Kenya.pdf>

Accessed on 30th October, 2013

⁷³ S. 103, Energy Act 2006

renewable technologies such as bio-digesters, solar systems and hydro turbines; promoting international co-operation on programmes focusing on renewable energy sources; harnessing opportunities offered under clean development mechanism and other mechanisms including, but not limited to, carbon credit trading to promote the development and exploitation of renewable energy sources; promoting the utilization of renewable energy sources for either power generation or transportation; promoting co-generation of electric power by sugar millers and sale of such electric power through the national grid directly to the consumers; and promoting the production and use of gasohol and biodiesel.⁷⁴

Despite these provisions, the use of renewable energy in Kenya has not gone large scale as the Government has not done much especially in relation to legal frameworks and financial support so as to promote the same and ensure that even the poor afford it. The local communities have to either do it individually or in community-based groups to make it affordable. For example in Murang'a County farmers have set up mini biogas plants in their own homes.⁷⁵ A local venture titled 'Boosting Young Entrepreneurs' Programme has boosted about eight farmers by extending a loan to them for the project in a bid to promote the use of sustainable energy through community members. The aim is to replace firewood with biogas so as to achieve the broader goal of reversing poverty cycle and providing new opportunities for growth for the residents of the area.⁷⁶

The foregoing scenario shows the inadequacy of government efforts in promoting the same. The above project cost owners about Kenya Shillings seventy five thousand and an accruing interest of about Kenya Shillings five thousand. The reality is that many of the people around the area may not be able to achieve this dream due to abject poverty. Poverty affects people's access to energy due to the involved costs and this adversely affects their efforts to liberate themselves from poverty.

5. OPPORTUNITIES AND WAY FORWARD

5.1 Disclosure and Public Participation

To enhance energy access and availability in the country there is need to include all the relevant stakeholders in renewable energy projects being undertaken in their areas. Community consultation is particularly important to assure citizens that there will be public acceptance and cooperation with the project, especially important if the community will be expected to pay some or all of the costs of the project.

Community acceptance refers to the specific acceptance of siting decisions and renewable energy projects by local stakeholders, particularly residents and local authorities. It has been

⁷⁴ Ibid, S. 103(2)

⁷⁵ *The Standard Xtra* 'Let There Be light' pp 2-2, Tuesday, October 29, 2013, Nairobi Kenya

⁷⁶ Ibid, page 3

argued that the difference between general acceptance and then resistance to specific projects can be explained by the fact that people support renewable energy as long as it is not in their own backyard.⁷⁷ Public Hearings on Environmental Assessments (EA) provide a good vehicle for educating the public and eliciting community concerns. The Energy Act, 2006 provides under section 90 that any person intending to construct a pipeline, refinery, bulk storage facility or retail dispensing site shall, before commencing such construction, apply in writing to the Commission for a permit to do so but such a permit shall *inter alia* be accompanied by an environmental impact assessment report.⁷⁸

Section 91 makes it conditional that for such a Permit to be granted The Commission shall, before issuing a permit under section 90, take into account all relevant factors, including but not limited to *inter alia*: the relevant Government policies; and compliance with the Environmental Management and Co-ordination Act, 1999 (No. 8 of 1999) (EMCA) and in particular, the report of the Environmental (Impact Assessment and Audit) Regulations, 2003, the Physical Planning Act,⁷⁹ the Local Government Act (Cap. 265)⁸⁰ and any other relevant legislation.

Section 58(1) of EMCA makes it mandatory that despite any approval, permit or licence granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall, before financing, commencing, proceeding with, carried out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to the Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information. Subsection (2) provides that the proponent of a project shall undertake or cause to be undertaken at his own expense and environmental impact assessment study and prepare a report thereof where the Authority, being satisfied, after studying the project report submitted under subsection (1), that the intended project may or is likely to have or will have a significant impact on the environment, so directs.

Section 59(1) further provides that upon receipt of an environmental impact assessment study report from any proponent under section 58(2), the Authority shall cause to be published in each of two successive weeks in the Gazette and newspaper circulating in the area or proposed area of the project once at least in each of two successive weeks in some one and the same a notice which shall state *inter alia* a time limit of not exceeding ninety days for the submission of oral or written comments by any member of the public on the environmental impact assessment study, evaluation or review report. However, any

⁷⁷ Rolf Wu" stenhagen, et al, 'Social acceptance of renewable energy innovation: An introduction to the concept', *Energy Policy* 35 (2007) 2683–2691, page2685, Elsevier, Available at https://www.alexandria.unisg.ch/publications/Rolf_Wuestenhagen/40501/L-en Accessed on 28th October, 2013

⁷⁸ S. 90(1)(2)

⁷⁹No. 6 of 1996

⁸⁰ Repealed by the *County Government Act*, No. 17 of 2012

meaningful public participation requires access by the public to all information concerning the specifications, benefits and costs of a project. Without such information, participation will be limited to a few and this will not reflect the true picture of the community's take on the project. Any purported public fora attended by a group of ignorant members of the community are nothing but a formality.

There the main advantages for the promotion of citizen participation have been said to include the mitigation of conflicts, increased transparency to decisions reached, and increase in the possibility of acceptance of the project. Citizen participation is however not a straightforward process and includes questions on: (1) who should participate, and (2) what mechanism should be designed for effective participation. It has also been suggested that the successes of participation requires good information, solid background, a clear budget, and clear options and proposals of the proposed development activity.⁸¹

Article 35(1) of the Constitution is to the effect that every citizen has the right of access to information held by the State; and information held by another person and required for the exercise or protection of any right or fundamental freedom, *inter alia*. Further, Article 35(3) obligates the State to publish and publicize any important information affecting the nation.

Also notable is section 104 of the *Energy Act 2006* which provides for the Cabinet Secretary's functions and powers as may be necessary under the Act to enhance energy efficiency and conservation, including but not limited to *inter alia*: taking all measures necessary to create awareness and for the dissemination of information for efficient use of energy and its conservation; and supporting the preparation of educational curriculum on efficient use of energy and its conservation for educational institutions, and coordinate with them for inclusion of such curriculum in their syllabus.

There is need for better enforcement mechanisms to enhance the full implementation of the foregoing provisions. However, the same should be expanded to include information on the various forms of energy sources including their costs and availability among other details. Enforcement provisions cover the capacity of the relevant agencies to grant, deny or specify conditions for granting permits for the project, to inspect the project site during and after construction and to stop projects found not to be complying with relevant laws. However, there should also be evidence of quality and meaningful participation by communities and recording of their views. Such can be achieved through having representatives from the licensing bodies who also file their report on the quality of public hearing gatherings held by the licence applicants.

⁸¹ Mark Lancelot Bynoe, 'Citizen Participation in the Environmental Impact Assessment Process in Guyana: Reality or Fallacy?', *2/1 Law, Environment and Development Journal* (2006), p. 36, available at <http://www.lead-journal.org/content/06034.pdf> Accessed on 28th October, 2013

Where there are complaints from the concerned public members of their dissatisfaction on the quality of disseminated information there are Constitutional provisions allowing for public suits to challenge allegedly illegal actions. Article 22(1) provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. To facilitate this, the need for *locus standi* and legal fees has been dispensed with.⁸² This Constitutional position thus makes it easy for communities to push for their inclusion in such environmental impact assessment undertakings in a bid to make sure that proposed energy projects in their area are not only environmentally friendly but also useful in advancing the realization of their right of access to clean and modern energy.

Potential developers must consult members of the public, interested bodies and organizations with the mechanisms for consultation including scoping meetings, structured interviews, key informant interviews and written submissions if such participation is to be achieved. The requirement for publication should be complemented with actual visitation to the relevant areas so as to ensure that even those who cannot access such local dailies participate in such undertakings. Environmental Impact Assessments are very important to the determination of whether non-renewable fuels or renewable or efficiency resources will be used.

5.2 Pricing

If the pricing of the energy sources in Kenya are to be stabilized there is need to diversify the energy production sources as well as enhancing the existing ones. For instance, hydropower energy producers should explore alternatives to water in energy production so as to boost reliability. Hydropower production is often impacted by climate change and this adversely affects the cost of electricity production which is then passed over to consumers. Over-reliance on imported petroleum also affects the cost of the energy in the country since such petroleum is subject to international oil market prices.

It may be necessary for the Government to subsidize the price of electricity, petroleum and other fuels to enable Kenyans realize the constitutional right to access energy.

5.3 Energy Efficiency

Much needs to be done to streamline the energy sector in the country in relation to energy services provision so as to enhance efficiency. One of the steps that can enhance energy efficiency is a putting in place and enforcing a workable mechanism for dissemination of relevant and quality information on viable means of energy conservation and efficient utilization.

⁸²One does not need to pay for such proceedings or prove any direct harm. Also, article 70 of the Constitution entitles any person who alleges that a right to a clean and healthy environment has been violated, denied, infringed or threatened to apply to court for redress and any legal remedies.

There is also need for implementation of the clean development mechanism. ‘Clean development mechanism’ has been defined to mean a mechanism that allows emission-reduction projects in developing countries to earn certified emission reduction (CER) credits each equivalent to one tonne of CO₂, which can be traded and sold, and used by industrialized countries to meet a part of their emission reduction targets under the Kyoto Protocol.⁸³

The Energy (Energy Management) Regulations, 2012 should be fully implemented to achieve their purpose of management and conservation of energy by owners or occupiers of industrial, commercial and institutional facilities using any form of energy.⁸⁴ If these regulations are fully implemented, they can enhance energy conservation and facilitating an inventory of the energy use, demand and requirements in the country. This will be useful in energy investment options to meet any deficiencies.

5.4 Renewable Energy

There is need to put in place measures that encourage more investment in the renewable energy options. This will not only eliminate the environmental problems that come with non-renewable energy sources but will also expand the energy sources in country thus ensuring a wider distribution and affordability by consumers. The stakeholders should exploit the various alternative source of energy to boost reliability and availability of energy in the country. Such alternatives include but are not limited to biomass, geothermal, solar, wind, small hydros, municipal waste and charcoal.

These options are a viable option for ensuring that at least the Kenyan population enjoys the right of access to modern and clean energy for personal development. However, much needs to be done to facilitate their successful roll out to the communities. Solar energy, if efficiently harnessed, can be used to power very many households and businesses especially in the rural areas and the peri-urban areas in the country.

Indeed, solar energy has the potential to ensure Kenyans access energy as a constitutional and developmental right.

Kenya’s energy profile is said to be predominated by traditional biomass energy to meet the energy needs of the rural households and a heavy dependence on imported petroleum for the modern economic sector needs. As a result, the country faces challenges related to unsustainable use of traditional forms of biomass and exposure to high and unstable oil import prices.⁸⁵

⁸³ Energy (Energy Management) Regulations, 2012, Legal Notice NO. 102 of 2012, Rule 3

⁸⁴Ibid

⁸⁵ Ibid

Bioenergy comes from any fuel that is derived from biomass. Biomass means any plant-derived organic matter available on a renewable basis. The other form of biomass is Liquid bio-fuels which are liquid fuels that can be produced from agricultural and forest products or the biodegradable portion of industrial and municipal waste. The most widely used forms of liquid bio-fuels are bio-ethanol and biodiesel. Bio-ethanol is produced from agricultural products such as starchy and cereal crops (sugarcane, corn, beets, wheat and sorghum) while the main feedstock used in biodiesel production are oil crops and trees such as rapeseed, soy, sunflower, palm, jatropha or coconut.⁸⁶ Section 2 of the *Energy Act 2006* defines biomass to mean ‘non-fossilized and biodegradable organic material originating from plants, animals and micro-organism and includes bio-ethanol, biogas, charcoal, fuel-wood and agro-waste’.

Although renewable energy is available in Kenya, large scale exploration of all the sources of renewable energy have not been successfully achieved for various reasons which may include *inter alia* funds, lack of political goodwill and ignorance amongst consumers. If such sources of energy as solar, wind, bio-fuel (biogas) geothermal amongst others are harnessed and fully exploited, energy poverty in Kenya would be a thing of the past and economic development as well as personal development amongst the populace would be realized.

5.4.1 Economic Tools to Promote Renewable Energy

a. Feed-in Tariffs (FITs)

A feed-in tariff (FIT) has been defined as a policy instrument that makes it mandatory for energy companies or “utilities” responsible for operating the national grid to purchase electricity from renewable energy sources at a pre-determined price that is sufficiently attractive to stimulate new investment in the renewables sector. This, in turn, ensures that those who produce electricity from identified renewable energy sources such as solar, wind and other renewable sources have a guaranteed market and an attractive return on investment for the electricity they produce. Aspects of an FIT include access to the grid, long-term power purchase agreements and a set price per kilowatt hour (kWh).⁸⁷

Kenya has introduced feed-in tariffs (FITs) to promote renewable energy generation in the country.⁸⁸ FiTs were introduced in Kenya in 2008 and were revised in 2010 to accommodate

⁸⁶ Annie Dufey, *Biofuels production, trade and sustainable development: emerging issues*, International Institute for Environment and Development, page 1, 2006, London. Available at <http://pubs.iied.org/pdfs/15504IIED.pdf> Accessed on 4th November, 2013

⁸⁷ United Nations Environment Programme, *Green Economy, Feed-in tariffs in Kenya*, Available at <http://www.unep.org/greeneconomy/SuccessStories/FeedintariffsinKenya/tabid/29864/Default.aspx> Accessed on 17th October, 2013

⁸⁸ Norton Rose Fulbright, ‘Scaling-up renewable energy in Africa: Kenya’ <Available at <http://www.nortonrosefulbright.com/knowledge/publications/58980/scaling-up-renewable-energy-in-africa-kenya>> Accessed on 17th October, 2013

additional renewable energy sources and reviewed the tariffs. These included wind, biomass, hydro, geothermal, biogas and cogeneration projects. FiTs levels have been set at 12 US cents per kWh for wind, 8 US Cents per KWh for biomass and 8.5 US Cents per KWh for geothermal.⁸⁹ However, the success of FITs would help alleviate the problem and enhance access to energy by all including the poor.

Kenya's FIT policy is guided by the following objectives: to facilitate resource mobilization by providing investment security and market stability for investors in Renewable Energy Sources (RES) electricity generation; to reduce transaction and administrative costs by eliminating the conventional bidding processes; and to encourage private investors to operate the power plant prudently and efficiently so as to maximize its returns.⁹⁰ It has been noted that a FITs policy will achieve the following: environmental integrity including the reduction of greenhouse gas emissions; enhancing energy supply security, reducing the country's dependence on imported fuels; and coping with the global scarcity of fossil fuels and its attendant price volatility; and finally enhancing economic competitiveness and job creation.⁹¹

The above make advantages make FITs policy worth exploration as it is a step towards realization of the right to energy in the country.

For rural inhabitants, there is need to explore a combination of grid for those living close to the transmission lines, with decentralized renewable energy options (including micro hydro, solar PV and small wind) for off-grid electricity supply. For cooking in rural areas, biomass is likely to remain the main fuel option for the majority. Thus the government and other relevant sectoral players can develop tree seeds according to different localities and climatic adaptations. The tree planting campaign should also be encouraged. However, to ensure energy conservation there also arises a need for provision of Modern bio-energy technology covering a number of technological areas including: Biomass powered electric power plants (Combined heat and power, CHP); Liquid biomass fuels: bio-ethanol and bio-diesel; (iii) biogas production technologies; and Improved efficiency cook stove technology.⁹² With these, energy access and efficiency in its utilization becomes possible.

b. Tax and fiscal incentives

Another economic tool that can enhance realization of this right is extension of fiscal incentives. Section 57(1) of EMCA, 1999 provides the Minister responsible for finance may, on the recommendation of the Council, propose to Government tax and other fiscal

⁸⁹Ibid. See also Ministry of energy website <<http://www.energy.go.ke>> Accessed on 17th October, 2013

⁹⁰Government of Kenya, Ministry of Energy, *Feed-in-Tariffs policy for wind, biomass, small hydros, geothermal, biogas and solar*, 2nd revision, December, 2012, page 6

⁹¹Ibid

⁹²Pisces, 'Gender and Equity in Bio-energy Access and Delivery in Kenya' op. cit. page 5

incentives, disincentives or fees to induce or promote the proper management of the environment and natural resources or the prevention or abatement of environmental degradation. The tax and fiscal incentives, disincentives or fees may include: customs and excise waiver in respect of imported capital goods which prevent or substantially reduce environmental degradation caused by an undertaking; tax rebates to industries or other establishments that invest in plants, equipment and machinery for pollution control, recycling of wastes, water harvesting and conservation, prevention of floods and for using other energy resources as substitutes for hydrocarbons; tax disincentives to deter bad environmental behavior that leads to depletion of environmental resources or that cause pollution; or user fees to ensure that those who use environmental resources pay proper value for the utilization of such resources.⁹³ This can be used in promoting provision of essential equipment for energy services. Fiscal incentives can be effective tool in enhancing efficiency and affordability in energy access. The various agencies and Government ministries concerned would have to collaborate and work closely together to ensure Kenyans access energy as a constitutional right.

Further, section 104 of the *Energy Act*, 2006 mandates the Cabinet Secretary responsible for Energy to develop and manage a prudent national energy efficiency and conservation programme.⁹⁴ So as to enhance energy efficiency and conservation in the country, the Cabinet Secretary is to *inter alia*: give financial assistance to institutions for promoting efficient use of energy and its conservation; give financial incentives for any investment made to replace or install additional capital investments to improve energy efficiency; and make it mandatory, in collaboration with Kenya Bureau of Standards, the importation of energy efficient but cost effective technologies. Indeed, in the financial year 2011/2012 national budget, the Finance Cabinet Secretary zero-rated all the solar energy equipment imports (photovoltaic devices or solar cells) so as to encourage solar energy exploration in the country.⁹⁵

These incentives are very important for encouraging investment in the energy sector and this will facilitate the realization of the right of access to energy as a Constitutional right. The measures, as stated above would also be viable in balancing between the right of access to energy and the obligation to conserve and protect the environment.

6. CONCLUSION

The foregoing discourse has focused on access to energy as human right that goes hand in hand with the enjoyment of other rights and freedoms. The legal and institutional framework relating to access to energy in Kenya has been critically examined in the spirit of

⁹³ S. 57(2), No 8 of 1999

⁹⁴ S. 104(1), Energy Act 2006

⁹⁵ Federal Ministry of Economics and Technology, 'Grid Connection of Solar PV Technical and Economical Assessment of Net-Metering in Kenya' Available at

www.africansolardesigns.com/component/simpledownload/?task Accessed on 7th November, 2013

realizing the right of access to energy as a constitutional right. Clearly, the current framework does not effectively promote the realisation of this right.

The institutional and legal framework of the energy sector has been scrutinized in a bid to call for stronger enforcement of laws and policies to ensure enforcement of all the positive aspects of the existing laws.

There is need to put in place policies, programmes and legal mechanisms that will ensure energy access. This is one of the strategies that can ensure that the gains made through legal strategy based on human rights will provide clear and tenable answers to the issue of ensuring access to energy services for Kenyans and to overcoming poverty. There is also need for the provision of a mechanism for utilizing existing international legal mechanisms that have the potential to play a valuable part in efforts to facilitate energy access. If access to energy is enforced as a Constitutional right, it will be a positive step towards ensuring that even the other rights, including economic and social rights shall be fully enjoyed.

Access to energy can be realised as a Constitutional right in Kenya. It is imperative if the dream of sustainable development is to be achieved. It should be promoted as a human right necessary for the enjoyment of other rights and freedoms.

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