

Devolution and Natural Resource Management in Kenya

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Abstract

Devolution was informed by the need to decentralize national governance and its institutions to the grassroots level, in the spirit of the principle of subsidiarity, so as to enhance public participation, among other development aspects. Devolution as envisaged in the current Constitution of Kenya contemplates a form of governance which will promote and uphold the national values and principles of governance including: national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; good governance, integrity, transparency and accountability; and sustainable development, as provided for in the Constitution.

This paper critically discusses the place of devolution in governance and management of natural resources in Kenya, and how the same can be harnessed to improve the livelihoods of communities.

1. Introduction

This paper discusses devolution as a form of decentralisation, within the context of the Constitution of Kenya 2010 and its implication on natural resource management (NRM) in Kenya. The Constitution creates a decentralized system of government with 47 political and administrative units.¹ The primary objective of decentralisation is to devolve power, functions, resources management and representation down to the local level.² Ideally, decentralisation, a process through which powers, responsibilities and resources are devolved by the central state to

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¹ Art. 6(1), Constitution of Kenya 2010.

² *Ibid*, Art. 174.

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lower territorial entities and regionally/locally elected bodies, is supposed to increase efficiency, participation, equity, and environmental sustainability.³

Decentralisation, or decentralizing governance, is “*the restructuring or reorganization of authority so that there is a system of co-responsibility between institutions of governance at the central, regional and local levels according to the principle of subsidiarity, thus increasing the overall quality and effectiveness of the system of governance, while increasing the authority and capacities of sub-national levels.*”⁴ It contributes to good governance by increasing opportunities for public participation in economic, social and political decisions; developing people's capacities; and enhancing government responsiveness, transparency and accountability.⁵

In natural resources management, decentralisation is justified on several grounds. It enables local people to identify and prioritise their environmental problems accurately; ensure efficient resource allocation; promote greater respect for decisions made with local inputs such as rules for resource use; allow for easier monitoring of resource use and give marginalised groups greater influence on local policy.⁶ This is especially so, where decentralisation adopts democratic forms rather than administrative ones. Democratic decentralisation requires representative and downwardly accountable local authorities, who hold a secure and autonomous domain of powers to make and implement meaningful decisions.⁷

Decentralisation takes several forms. It could be devolution, delegation, deconcentration and divestment or privatisation. Out of all these, devolution, which is the focus of this paper, is the most common understanding of genuine decentralisation.⁸ Devolution is the transfer or transition from one person to another of a right, liability, title, estate, or office.⁹ It seeks to distribute power, duties and responsibilities from one centralized point. It is a system of decentralization that effectively (through the Constitution) locates political and economic power

³ Oyono, P.R., “One step forward, two steps back? Paradoxes of natural resources management decentralisation in Cameroon,” *The Journal of Modern African Studies*, 2004, 42, pp. 91-111, at p. 91.

⁴ United Nations Development Programme, ‘Decentralization: A Sampling of Definitions.’ *Working paper prepared in connection with the Joint UNDP-Government of Germany evaluation of the UNDP role in decentralization and local governance*, October, 1999, p. 2.

⁵ *Ibid.*

⁶ Larson, A.M., ‘Decentralisation and Forest Management in Latin America: Towards a Working Model,’ *Public Admin. Dev.* Vol. 23, (2003), at pp. 211-212.

⁷ *Ibid.*, p. 212.

⁸ *Ibid.*, p.6.

⁹ ‘The Law Dictionary,’ available at <http://thelawdictionary.org/devolution>, [Accessed on 10/09/2018].

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at sub-national levels and that is controlled democratically by the people and not the national/central government.¹⁰ The objective of devolution is to improve the performance of government by making it more accountable and responsive to the needs and aspirations of the people and secondly, to facilitate the development and consolidation of participatory democracy.¹¹ It entails moving away from the costly state-centred control towards approaches in which the local people and authorities play a much more active role in managing the resources around them. Their involvement increases resource user participation in natural resource management decisions and the accruing benefits.¹²

Devolution is one of the creatures of the Constitution of Kenya, 2010, provided for in Chapter 11 thereof. The devolved aspects of devolution in Kenya include political devolution, administrative, fiscal, service delivery and the opportunity for the effective participation of the people.¹³ The Constitution of Kenya requires every county government to decentralise its functions and the provision of services to the extent that is efficient and practicable to do so.¹⁴ National state organs are also required to ensure reasonable access to their services in all parts of the Republic, so far as it is appropriate having regard to the nature of the service.¹⁵

The Fourth Schedule to the Constitution of Kenya outlines the obligations of the central government and those of the county governments.¹⁶ The obligations of the central government towards natural resource management include the protection of the environment and natural resources with a view to establishing a durable and sustainable system of development, including, in particular, fishing, hunting and gathering; protection of animals and wildlife; water protection, securing sufficient residual water, hydraulic engineering and the safety of dams; and energy policy.¹⁷

¹⁰ Nyamwamu, C.O., 'From a Centralized System to A Devolved System of Governments: Past, Present and Future Dynamics,' *op cit*, p.3.

¹¹ Oloo, O.M., 'Devolving Corruption? Kenya's Transition to Devolution, Experiences and Lessons from the decade of Constituency Development Fund in Kenya,' *Paper Presented at Workshop on Devolution and Local Development in Kenya*, June 26th 2014, Nairobi, p.5.

¹² Shackleton, S., *et al*, 'Devolution and community based natural resource management,' *Natural Resource perspectives (ODI)*, No. 76, March 2002, p. 1.

¹³ *Ibid*, p. 3.

¹⁴ *Ibid*, Art. 176(2).

¹⁵ *Ibid*, Art. 6 (3).

¹⁶ Pursuant to Art. 185(2), 186(1) and 187(2) of the Constitution of Kenya. The Schedule provides for the distribution of functions between the national Government and the County Governments.

¹⁷ *Ibid*.

The county government is obligated to implement specific national government policies on natural resources and environmental conservation including, soil and water conservation and forestry.¹⁸ Further, the county governments are also supposed to ensure and coordinate the participation of communities and locations in governance at the local level and assist communities and locations to develop the administrative capacity for the effective exercise of the functions and powers and participation in governance at the local level.¹⁹ Within the devolved system, the Senate is expected to play an important role in fostering good governance in the management of natural resources in Kenya. County assemblies are also to play a role in NRM and development of policies, amongst other roles. The constitutional division notwithstanding, it is the responsibility of both the national and county governments to ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources.²⁰

2. Historical Overview of Devolution in Kenya

Kenya's 1963 Lancaster Constitution had provision for two houses of representatives: upper and lower houses, which included regional governments with legislative assemblies.²¹ However, the then KANU Government was opposed to regionalism (*Majimbo*)²² and sabotaged the regions by refusing to release funds for their operations. This saw increased centralization of powers and functions by the central government.²³ The *Majimbo* system was replaced by a unitary system of government in 1965 through constitutional amendments.²⁴

¹⁸ *Ibid*, Part 2.

¹⁹ *Ibid*.

²⁰ Jackson Mutua Kavila v Government of Makueni County & 2 others [2018] eKLR, Environment & Land Case 195 of 2014, para. 24.

²¹ Media Development Association & Konrad Adenauer Foundation, *History of Constitution Making in Kenya*, 2012. Available at http://www.kas.de/wf/doc/kas_32994-1522-2-30.pdf?121206115057 [Accessed 10/09/2018], pp.7-8.

²² Plural form of *jimbo*, which in Kiswahili means administrative district or region.

²³ Chitere, P., *et al.* 'Kenya Constitutional Documents: A Comparative Analysis.' *CMI Reports*, 2006, p. 12. Available at <http://www.cmi.no/publications/file/2367-kenya-constitutional-documents.pdf>[Accessed 10/09/2018].

²⁴ Omari, A.O., *et al.*, 'Change Dilemma: A Case of Structural Adjustment through Devolution in Kenya.' *International Journal of Arts and Commerce*, Vol. 1(7), December 2012, pp. 491-499, at p. 491.

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The *Draft Constitution of Kenya, 2004* (Bomas Draft),²⁵ sought to restore decentralisation in the form of devolution in the country's governance structure. The Bomas draft had introduced a devolved system with four levels, namely: the national level, the regional level, the district level and the locational level.²⁶ The governments at each level were to be distinct, inter-dependent, consultative and negotiative.²⁷ However, these efforts were thwarted.

During the Bomas Conference discussions, devolution was one of the contentious issues. It was opposed on the grounds that a devolved government would be too expensive and complex. Similar reasons had been advanced to oppose regionalism after independence.²⁸ The Government of the day rejected the draft and came up with what is commonly known as the *Wako draft*, which was offered to, but rejected by the people, in a referendum in 2005. The Wako draft omitted altogether the concept of "devolution," reverting to "local government." It proposed only one sub-national unit, the district. Districts would have law making powers but the national government could override district laws even on a subject under the district list.²⁹

Devolution was included in the current Constitution along the lines of the proposals in the Bomas draft, though with a single lower level of governance so as to make the system less complex.³⁰ A major characteristic of the old systems of local government and provincial administration was that local government was not protected by the Constitution. The provincial administration was operating under the direct control of the office of the President (through the Provincial Commissioner at the top and the chief at the bottom), with little or no participation by the people. The need for the devolved system was therefore largely informed by the citizens' calls for opportunity to participate in governance matters including those touching on natural resources.³¹ This paper thus explores the constitutional principles of devolution in the context of natural resources management in Kenya.

²⁵ Constitution of Kenya Review Commission, adopted by the National Constitution Conference on 15 March 2004], See Chapter Fourteen thereof.

²⁶ *Ibid*, S. 6(1).

²⁷ *Ibid*, S. 6(2).

²⁸ Hornsby, C., *Kenya: A History since Independence* (I.B.Tauris, 2013), p. 722.

²⁹ Ghai, Y. 'History and Objectives of Devolution,' *The Star*, Saturday, April 20, 2013, available at <http://www.the-star.co.ke/news/article-117538/history-and-objectives-devolution> [Accessed on 10/09/2018].

³⁰ *Ibid*.

³¹ *Ibid*.

3. Natural Resources Management in Kenya

Natural resource management in Kenya has mainly been a state affair, with little or no involvement of the local communities and the public in general. Any efforts towards facilitating community participation or inclusion in such management had been peripheral. The State acted as the custodian of natural resources with the public being expected to receive only accruing benefits if any, without participation in crucial decision-making. Inequitable benefit sharing, exclusion of the poor and the marginalised in decision making system, and indiscriminate environmental degradation are some of the features that characterized natural resources management system in the past.³² State-centric natural resource management was a result of the colonial legacy. Under this legacy, the colonial masters had mastered the art of grabbing the natives' lands and appropriating all the land related resources such as water, wildlife, forests and mineral resources for their own benefit.³³

In October 1982, former President Daniel Arap Moi announced that Kenya would henceforth allocate its resources for rural development on a decentralised basis, so as to be more responsive to the 'needs and aspirations of wananchi.'³⁴ Over the years, there has been a paradigm shift in conservation and natural resource management from the central government to Community-Based Natural Resource Management (CBNRM) approaches. CBNRM as a form of decentralisation, is expected to be more effective and efficient in attaining sustainable utilization of natural resources and promoting environmental justice when compared to state-centric approaches.³⁵

The main difference between the CBNRM and devolution is that, while in CBNRM the communities are involved in conservation activities with the advantage of sharing accruing

³² National Water Policy, 2012, Government Printer, Nairobi; National Land Policy, 2009; See generally, Yatich T, *et al*, 'Policy and institutional context for NRM in Kenya: Challenges and opportunities for Landcare.' *ICRAF Working paper-no.43*, (World Agroforestry Centre, 2007, Nairobi). Available at <http://www.worldagroforestry.org/downloads/publications/PDFs/wp15330.pdf> [Accessed on 10/09/2018].

³³ See Ogendo, HWO, *Tenants of the Crown: Evolution of Agrarian Law & Institutions in Kenya*, *op cit*

³⁴ Barkan, J.D. & Chege, M. 'Decentralising the State: District Focus and the Politics of Reallocation in Kenya.' *The Journal of Modern African Studies*, September, Vol. 27(3), 1989, pp. 431-453.

³⁵ Misati, J., *et al*. 'Towards a Policy Framework for Community Based Natural Resources Management in Fresh Water Eco - Systems: A case Study of Lake Naivasha Basin, Kenya.' In: Proceedings of the 2012 JKUAT Scientific, Technological and Industrialization Conference, pp.541-552. p. 543; See also generally Mulatu, D.W., *et. al*, 'Farm households' preferences for collective and individual actions to improve water-related ecosystem services: The Lake Naivasha basin, Kenya.' *Ecosystem Services*, Vol. 7, 2014, pp.22-33.

benefits, devolution entails not just administrative but also political decentralization that involves the sharing of power with the central government as defined by legal or constitutional provisions.³⁶ Under devolution, communities have more control and right of participation in decision-making as well as governance matters.

CBNRM has not always been effective in achieving equitable and sustainable natural resource management. This is because there are other factors, relating to its implementation and especially the reconciliation of social and environmental goals, which are to be considered.³⁷ These factors include equity, empowerment, conflict resolution, knowledge and awareness, biodiversity protection, and sustainable resource utilization.³⁸

The success of CBNRM can also greatly benefit from tenure security, clear ownership, congruence between biophysical and socioeconomic boundaries of the resources, effective enforcement of rules and regulations, monitoring, sanctioning, strong leadership with capable local organization, expectation of benefits, common interests among community members, and local authority.³⁹ As such, these factors should be adequately addressed if there is to be any tangible positive change in the way natural resources are managed within the devolution framework.

Under the constitutional provisions on conflicts of laws between the two levels of government, national legislation is to prevail on matters of environment protection in cases where the county governments have unreasonably or prejudicially acted in relation to environmental protection.⁴⁰ The role of the Senate concerning natural resource management is a legislative function where the Senate represents the county government interests and functions.⁴¹ It is not enough that the legal framework on devolution contains provisions addressing these factors, but the same must be seen to inform the procedure for its implementation.

³⁶ Oloo, O.M., 'Devolving Corruption? Kenya's Transition to Devolution, Experiences and Lessons from the decade of Constituency Development Fund in Kenya,' *op. cit.*, p.5.

³⁷ Kellert, S.R., *et al.*, "Community Natural Resource Management: Promise, Rhetoric, and Reality," *Society & Natural Resources*, 2000, Vol. 13(8); See also Oyono, P.R., "Profiling Local-Level Outcomes of Environmental Decentralizations: The Case of Cameroon's Forests in the Congo Basin," *The Journal of Environment Development*, September 2005, Vol. 14, No.3, pp.317-337.

³⁸ *Ibid.*

³⁹ Pagdee, A., *et al.*, "What Makes Community Forest Management Successful: A Meta-Study from Community Forests throughout the World," *Society & Natural Resources: An International Journal*, Vol. 19, No.1, 2006.

⁴⁰ Art. 191.

⁴¹ *Ibid.*, Art. 96.

The effect of devolution on natural resources management is, therefore, not mutually exclusive but largely depends on other laws and practice on tenure security, ownership, effective enforcement of rules and regulations, monitoring, sanctioning, strong leadership with capable local organization, expectation of benefits, common interests among community members, and local authority.⁴²

The various sectoral laws have demonstrated the state's attempts to adopt CBNRM although with little success due to lack of goodwill and as discussed above, limitation due to other factors. Their implementation demonstrates state-centric tendencies with much of the control powers remaining with the government authorities.

4. State-centric approach to Natural Resource Management

The challenges that have bedeviled the unitary system of governance have been identified as, *inter alia*: misuse of power and bad governance under a powerful presidency; systemic marginalization and exclusion of peoples along ethnic and regional lines; skewed distribution and non-sharing of resources by the centralized government; poverty, lack of participation, infantilization of citizens and disempowerment of citizens.⁴³ The legal and institutional framework concentrated much of the powers in natural resource management on the state, completely suppressing the voice of the local communities in NRM. This approach led to a number of challenges.

A state-centric approach encourages internal natural resource-based conflicts.⁴⁴ This is especially so where local communities located within certain localities feel that the government is disproportionately exploiting resources and appropriating the accruing benefits for the 'good' of the country often to their detriment, especially where locals have to bear with environmental hazards resulting from the exploitation.

⁴² Pagdee, A., *et al.*, "What Makes Community Forest Management Successful: A Meta-Study from Community Forests throughout the World," *op cit*.

⁴³ Nyamwamu, C.O., 'From A Centralized System to A Devolved System of Governments: Past, Present and Future Dynamics,' *Paper Presented At the FES Conference on State of Implementation of the Constitution since 2010*, p.2, available at

<http://www.feskenya.org/media/publications/From%20A%20Centralized%20System%20To%20A%20Devolved%20System%20Of%20Governments%20-%20Cyprian%20Orina-Nyamwamu.pdf>. [Accessed on 10/09/2018].

⁴⁴ See the *Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya*, July 31, 1999 (Akiwumi Report); the *Kriegler and Waki Reports on 2007 Elections*, 2009. [Government Printer, Nairobi].

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Moreover, it concentrates on political factors and institutional weaknesses,⁴⁵ and as such in order to provide populations with basic services and maintain the rule of law, resource-rich States have to develop well-designed institutions that promote efficiency, equality among citizens, economic growth and stability. When the capacity of these institutions or the will of political leaders is diminished, political opportunities are created for local groups to challenge the government's legitimacy and authority.⁴⁶ Because natural resources are important for livelihood and generation of income, there is need for even greater opportunities for increasing equity, alleviating poverty and providing development opportunities through the redistribution of control, decentralisation of services and infrastructure.⁴⁷ However, this also means that natural resource decentralisation is at greater risk of local elite capture and they are more likely to be resisted by those in a position to lose control over resources in the re-distribution of powers engendered by decentralisation.⁴⁸ In Mali for instance, since the colonial times the central government had sought control, access and use of forestlands and declared them public land, resulting in a very harsh reaction between the foresters and the local people.⁴⁹ This presents the challenge that the central government faces when it tries to manage the resources without the involvement of the local people.

Devolved governments will heavily rely on the environmental resources in order to promote development in the counties. Also important is the constitutional provision that one of the principles of devolved government is that County governments must have reliable sources of revenue to enable them to govern and deliver services effectively.⁵⁰ This is to be achieved through exploitation of the natural resources within their boundaries. However, as it was noted in the *1999 Sessional Paper on Environment and Development*,⁵¹ environmental protection, management, and development should consider broad issues that bind together people, resources,

⁴⁵ Charles, P. D. & Gagne, J.F., "Natural Resources: A Source of Conflict?" *International Journal*, Vol. 62, No. 1, Natural Resources and Conflict (winter, 2006/2007), pp. 5-17, at p. 6.

⁴⁶ *Ibid*, p. 12.

⁴⁷ Larson, A.M., "Decentralisation and Forest Management in Latin America: Towards a Working Model," *Public Admin. Dev.*, Vol. 23, 2003, pp. 211–226, p. 213.

⁴⁸ *Ibid*.

⁴⁹ Local governance institutions for sustainable natural resource management in Mali, Burkina Faso and Niger.

⁵⁰ Art. 175.

⁵¹ *Sessional Paper on environment and development, No. 6 of 1999*, (Government Printer, Nairobi, 1999).

development, and environment.⁵² Indeed, one of the recommendations of the Policy paper was that the Government should encourage the participation of local communities in biodiversity conservation and management; and create incentives for effective conservation of biodiversity by local communities. This was however not effectively implemented through the existing legal framework. If anything, the same was undermined by the often complex and bureaucratic requirements on licences and permits. The framework concentrated on giving communities user rights and not control over the resources thus denying them any voice on how the same should be managed.

The Constitution states that the governments at the national and county levels are distinct and inter-dependent and they must conduct their mutual relations based on consultation and cooperation.⁵³ Therefore, the national government and the county governments should join hands in promoting sustainable and equitable utilisation and management of natural resources for the benefit of the Kenyan citizenry and the ultimate economic development of the country as a whole.

5. Natural Resource Management under the Constitution of Kenya 2010 and Existing Legal Frameworks

Participation by local communities in the governance affairs of a country has been hailed as an indication of good and democratic governance as well as the respect and promotion of the rights of citizens.⁵⁴ One of the most outstanding features of the current Constitution of Kenya, 2010 is the principle of public participation in the governance affairs of the country.⁵⁵ The Constitution calls for respect of the environment, being the people's heritage.⁵⁶ It also lays out the obligations of the State in respect of the environment. Amongst these is the obligation to encourage public participation in the management, protection and conservation of the

⁵² See also *Republic v Lake Victoria South Water Services Board & another* [2013] eKLR, Miscellaneous Civil Application 47 of 2012, para. 28.

⁵³ *Ibid*, Art. 6(2).

⁵⁴ Gaventa, J., 'Towards Participatory Local Governance: Assessing the Transformative Possibilities,' *Applied Knowledge Sciences*, 2004, Available at www.gsdrc.org/go/display/document/id/2682 [Accessed on 29/12/2014].

⁵⁵ Art. 10.

⁵⁶ Preamble to the Constitution.

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environment.⁵⁷ Further, it 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.⁵⁸ This brings about a paradigm shift, in that participation in natural resources, is not only a right but also a duty of every citizen. The implication is that all the existing laws on natural resource management must reflect this position.

This has been well captured and affirmed by Kenyan courts in the interpretation and application of the current Constitution. For instance, in the case of *Nairobi Metropolitan PSV Saccos Union Limited & 25 others v County of Nairobi Government & 3 others* [2013] eKLR, the court stated that:

“The Preamble of the Constitution sets the achievable goal of the establishment of a society that is based on democratic values, social justice, equality, fundamental rights and rule of law and has strengthened this commitment at Article 10(1) of the Constitution by making it clear that the national values and principles of governance bind all state organs, state officers, public officers and all persons whenever any of them enacts, applies or interprets any law or makes or implements policy decisions. Article 10(2) of the Constitution establishes the founding values of the State and includes as part of those values, transparency, accountability and participation of the people. It is thus clear to me that the Constitution contemplates a participatory democracy that is accountable and transparent and makes provisions for public involvement. Consistent with this, Article 174 (c) of the Constitution provides for the principles of devolved government and has given powers to the people to enhance self-governance and enhance their participation in decisions that affect them. Clearly, the making of county laws by members of County Assembly is, in my view, an essential part of public participation.”

In addition, *In the Matter of Mui Coal Basin Local Community* (2015) eKLR, the High Court emphasized the importance of public participation as a constitutional governance principle. The question as to what degree of engagement satisfies the threshold of public participation was also discussed the *Mui Coal Basin Local Community* case where the court stated that:

“(d)..... public participation does not dictate that everyone must give their views on an issue of environmental governance. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, especially in environmental governance matters must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action

⁵⁷ Art. 69 (1).

⁵⁸ Art. 69 (2).

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must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account. (e) Fifth, the right of public participation does not guarantee that each individual's views will be taken as controlling; the right is one to represent one's views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or Public Official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box."

6. The Implication of Devolution on Natural Resource Management

Devolution has been associated with several advantages, which include: making it difficult for individuals or groups of official actors to collude and engage in corrupt practices due to the distributed authority over public goods and revenues; fostering effective cooperation within the devolved units; enabling local communities to mobilize social pressure against rent seeking and corruption; multiplying the opportunities for political participation and therefore promoting a democratic culture; empowering communities to manage their own resources more effectively; effectively promoting productive efficiency in the provision and use of public services and the allocation of resources; and, in terms of poverty alleviation, devolution provides a more effective governance framework for advancing pro-poor policies since the sub-national institutions are likely to be more familiar with the local circumstances and cost conditions and so are better equipped to distribute resources more equitably.⁵⁹

At the heart of the objectives of devolution, is the promotion of environmental justice in exploitation of natural resources.⁶⁰ Devolution gives powers of self-governance to the people and enhances public participation in the exercise of the powers of the State and in making decisions affecting them; recognises the right of communities to manage their own affairs and to further their development; protects and promotes the interests and rights of minorities and marginalised communities; promotes social and economic development and the provision of proximate, easily accessible services throughout Kenya; ensures equitable sharing of national and local resources throughout Kenya; and facilitates the decentralisation of State organs, their functions and

⁵⁹ Institute of Economic Affairs, *et al*, 'A Guide for Understanding Decentralization in Kenya,' 2011, p.9. Available at <http://www.ncck.org/largedocs/Decentralization%20Manual%20-%20Revised%20Feb%202011.pdf> [Accessed on 10/09/2018].

⁶⁰ See generally, Rossouw, N. and Wiseman, K., "Learning from the implementation of environmental public policy instruments after the first ten years of democracy in South Africa," *Impact Assessment and Project Appraisal* 22, no. 2 (2004): 131-140.

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services, from the capital of Kenya.⁶¹ Devolution was thus expected to address the main challenges facing the struggle for environmental justice in Kenya especially in relation to natural resources management. There has however been debate on the success of devolution in achieving this.⁶²

The involvement of the public in local governance enhances their understanding in environmental matters making them appreciate the necessity of conserving and sustainable use of the resources around them.⁶³ State-controlled management of natural resources leads to institutions with conflicting and overlapping mandates.⁶⁴ With devolution the roles, decision making, appropriation, monitoring and enforcement becomes more clear and precise. Devolution also enhances commitment of local community members in natural resources management.⁶⁵

The objects and principles of devolved government are articulated in the Constitution. Devolution is to ensure the equitable sharing of national and local resources throughout Kenya.⁶⁶ One of the objects of devolved government is to give powers of self-governance to the people and enhance their participation in the exercise of the powers of the State and in making decisions affecting them.⁶⁷ It also recognizes the right of communities to manage their own affairs and to further their development. Devolution is also expected to give powers of self-governance to the people and enhance their participation in the exercise of the power of the state and in making decisions affecting them.⁶⁸ The powers of the state and obligations in relation to the environment and natural resources are provided under Article 69.

⁶¹ Art. 174.

⁶² Nduta, R.W., Shisia, A., Kamau, G. and Asienga, I., "Challenges Facing Public Resources Management Of Devolved Governments In Kenya: A Case Of Machakos County", *International Journal of Economics, Commerce and Management*, Vol. V, Issue 9, September 2017.

⁶³ See QC, M.I.J., "Environmental Governance: A Comparative Analysis of Public Participation And Access To Justice," *Journal of South Pacific Law* 9, no. 2 (2005): 2009.

⁶⁴ Shackleton, S., Campbell, B., Wollenberg, E. and Edmunds, D., "Devolution and community-based natural resource management: Creating space for local people to participate and benefit." *Natural resource perspectives* 76, no. 1 (2002): 1-6 at 4.

⁶⁵ Gruber, J.S., 'Key principles of community-based natural resource management; a synthesis and interpretation of identified effective approaches for managing the commons,' 2008.

Available at http://iasc2008.glos.ac.uk/conference%20papers/papers/G/Gruber_132301.pdf [Accessed on 10/09/2018].

⁶⁶ Constitution of Kenya, Art. 174.

⁶⁷ *Ibid*, Art.174(c).

⁶⁸ *Ibid*.

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The county governments are expected to establish the policy, legal and social framework and conditions needed for local management to succeed, facilitate and regulate private activity, helping the local organizations enforce locally designed and monitored regulations and sanctions, addressing local inequality and ensuring representation of marginalised groups so that downward accountability of organization receiving devolved authority is assured and helping communities defend their rights including protection against powerful external groups such as mining and timber companies and cartels.⁶⁹

Natural resource management has become a key development strategy in recent times. Control of resources by the local people and communities improves local governance through participation and hence empowers the poor, centralized decision making, control and enforcement of natural resource management through government agencies has often proven ineffective and brought about resource degradation rather than sustainable use.⁷⁰ With the devolved government, they will become the primary implementers, though they still need the assistance of the central government especially on issues that affect not just the locals around but the nation at large. In fact, it has been observed that since natural resource management is multi-sectoral, encompassing many sectors, including environment, agriculture, irrigation, forestry, livestock, water supply and energy, amongst others, there is a necessity for multi-sectoral cooperation, particularly at the decentralised district levels, which are the focal points of service delivery and support to sustainable community management of natural resources.⁷¹

The *Transition to Devolved Government Act*⁷² sought to, *inter alia*, provide a legal and institutional framework for a coordinated transition to the devolved system of government while ensuring continued delivery of services to citizens; and provide for the mechanism for capacity building requirements of the national government and the county governments and make

⁶⁹ Shackleton, S., *op cit*, 'Devolution and community based natural resource management,'

⁷⁰ Serageldin, M., *et al*, 'Treating People and Communities as Assets: Local Government Actions to Reduce Poverty and Achieve the Millennium Development Goals,' *Global Urban Development Magazine*, Vol. 2(1), March 2006. Available at <http://www.globalurban.org/GUDMag06Vol2Iss1/Serageldin,%20Sollosolo,%20&%20Valenzuela.htm> [Accessed on 10/09/2018].

⁷¹ DANIDA, 'Natural Resource Management,' available at <http://kenya.um.dk/en/danida-en/nrm/> [Accessed on 10/09/2018].

⁷² Act No. 1 of 2012, Laws of Kenya is meant to provide a framework for the transition to devolved government pursuant to S. 15 of the Sixth Schedule to the Constitution, and for connected purposes.

proposals for the gaps to be addressed.⁷³ The Constitution also requires that the Government at either level should liaise with government at the other level for the purpose of exchanging information, coordinating policies and administration and enhancing capacity.⁷⁴

It is within this legal framework, that the now defunct Transition Authority was expected to assist the County governments to build capacity to effectively undertake the role of natural resources management on behalf of the local people. Under the devolved system, natural resource management seems to have adopted what is commonly referred to as the adaptive governance approach that calls for wide-ranging public involvement in a never-ending process of knowledge generation, decision-making, and implementation.⁷⁵ Under the approach, policies are required to legitimize the rights of all stakeholders, especially marginalized groups, to information, participation in decision-making and policy implementation processes, and access to justice through the courts.⁷⁶

Although community participation, in a people-centred environmental project or programme, can mean many different things, the use of local knowledge is a valuable indicator of the type and level of participation and ‘ownership’ of a development process by the local residents, producers or users.⁷⁷ Notably, the range of local knowledge transcends empirical facts, since it includes information, attitudes, values, skills and practices concerning a high diversity of biological resources.⁷⁸ This is precisely what the devolved system of governance seeks to actualize as one of its main objectives under the Constitution and the *County Governments Act* 2012.⁷⁹

The *County Governments Act*, 2012, contains elaborate provisions on public participation, public communication and access to information and civic education all of which have an implication on natural resources management at the county level. The Act provides the principles

⁷³ *Ibid*, S. 3.

⁷⁴ Art. 189 (1) (c).

⁷⁵ Akamani, K. & Wilson, P. I., “Toward the adaptive governance of transboundary water resources,” *Conservation Letters*, Vol.4, No.6, 2011, pp. 409-416.

Available at http://opensiuc.lib.siu.edu/cgi/viewcontent.cgi?Art.=1001&context=for_articles [Accessed on 10/09/2018].

⁷⁶ *Ibid*.

⁷⁷ Atkinson, D., ‘People-centred environmental management and municipal commonage in the Nama Karoo,’ *Commons Southern Africa occasional paper*, 2005, No. 11, p. 7.

⁷⁸ *Ibid*.

⁷⁹ Act No. 17 of 2012.

upon which citizen participation in counties should be based.⁸⁰ These include timely access to information, data, documents, and other information relevant or related to policy formulation and implementation. This is in appreciation of the fact that, meaningful public participation of the citizens, requires access to the relevant information that is also useful in decision making by the citizenry in relation to the management of natural resources in their counties.⁸¹

Further, the Act calls for reasonable access to the process of formulating and implementing policies, laws, and regulations, including the approval of development proposals, projects and budgets, the granting of permits and the establishment of specific performance standards. This is an important procedural aspect of the natural resources management that enables the public to appreciate the whole process and to be able to voice their concerns and proposals regarding the whole process.

The effect of this in the face of devolution is that the policies, laws and regulations that are put in place and any development projects that are undertaken in relation to exploitation of natural resources are more likely to be responsive to the real needs of the people at the county level and this facilitates effective natural resources management for the improvement of people's livelihoods. It is also important to note that without the relevant information, the affected communities may miss out on actual benefits accruing from localized natural resources management, as the whole process may be hijacked by other interested parties thus defeating the essence of devolution.⁸²

The Act requires that to enhance the participation of marginalized groups and communities they should also have access to relevant information. This is important in actualizing Article 56 of the Constitution which obligates the State to put in place affirmative action programmes designed to ensure that minorities and marginalised groups *inter alia*, participate and are represented in governance and other spheres of life.

The other principle is that of legal standing to interested or affected persons, organizations, and where pertinent, communities, to appeal from or, review decisions, or redress grievances, with

⁸⁰ *Ibid*, S. 87.

⁸¹ See generally, Muigua, K., "Towards Meaningful Public Participation in Natural Resource Management in Kenya," available at <http://dc-artlab.com/kmco/wp-content/uploads/2018/08/TOWARDS-MEANINGFUL-PUBLIC-PARTICIPATION-IN-NATURAL-RESOURCE-MANAGEMENT-IN-KENYA.pdf>

⁸² Oyono, P.R., "The social and organisational roots of ecological uncertainties in Cameroon's forest management decentralisation model," *The European Journal of Development Research*, 2004, Vol. 16, No.1.

particular emphasis on persons and traditionally marginalized communities, including women, the youth, and disadvantaged communities. This is an important provision and it is in line with section 3(5) of the *Environmental (Management and Coordination) Act 1999* and Article 70(3) of the Constitution both of which dispense with the requirement for *locus standi* in environmental litigation. The Act also calls for reasonable balance in the roles and obligations of county governments and non-state actors in decision-making processes to promote shared responsibility and partnership, and to provide complementary authority and oversight.⁸³

This is an important principle that will go a long way in ensuring that County governments do not make unilateral decisions especially with regard to natural resources management at the county level but instead they bring on board all the affected stakeholders in a fruitful consultative forum. If well implemented through the county laws on natural resources management, these principles are bound to bring an overhaul of the way in which natural resources have been managed in the past through the state-centric management approaches.

Regional economic development is one of the major goals of devolution. Greater control over one's own livelihood is a key factor to development, empowerment and poverty alleviation.⁸⁴ Local democratic control over natural resources can improve local livelihood and have positive ecological effects as well.⁸⁵ Development comes with associated problems of soil degradation and waterways, altered landscape and destroyed biodiversity and habitat.⁸⁶ Consequently, environment and development issues should be considered as integral activities. Local people should be empowered in a collaborative manner to enable them deal with negative environmental effects. The county governments and the senate have the powers to create institutions and laws ensuring good practice in natural resource management.⁸⁷ County executives being the policy makers need to pay attention to political contexts in which stakeholders will vie for access and control over natural resources.⁸⁸

⁸³ S. 87(e), *County Governments Act*, 2012.

⁸⁴ Larson, A.M., 'Decentralisation and Forest Management in Latin America: Towards a Working Model'. *op cit*, at p. 212.

⁸⁵ *Ibid*.

⁸⁶ 'Policy, Legal and Institutional Framework Governing Environmental Management in Kenya,' p. 305, available at http://www.tanariverdelta.org/tana/975DSY/version/default/part/AttachmentData/data/MUMIAS_Tana_EIA_part5.pdf [Accessed on 10/09/2018].

⁸⁷ See Arts. 174 & 96 of the Constitution of Kenya.

⁸⁸ S. 36, *County Governments Act*, 2012.

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Sustainable development should in the long term ameliorate the negative effects of poverty, provide basic needs, and meet people's aspirations for a better life. Sustainable development can be satisfactorily achieved through the meaningful involvement of the people in the counties in the natural resources exploitation. The devolved system of government holds a promise to deal with rampant poverty in many parts of the country.⁸⁹

There is bound to be a paradigm shift in the management of natural resources including on the way the government combats such challenges as climate change, deforestation, afforestation, soil and water conservation measures, pollution, amongst others.

Although the national government, has the role of protecting the environment and natural resources,⁹⁰ county governments have a role in pollution control⁹¹ and implementation of specific national government policies on natural resources and environmental conservation including soil and water conservation and forestry.⁹² Climate change is not listed in the Fourth Schedule of the Constitution as a function of either level of government, with the implication that by default, Article 186(3) of the Constitution applies so that climate change can be interpreted as a function of the national government.⁹³ Cooperation between the national government and county governments in the design and overall implementation of climate change response strategies is seen as imperative, as the counties are the likely implementers.

Indeed, with regard to climate change mitigation, the *Climate Change Act, 2016*⁹⁴ recognises that the county governments are to play a central role alongside the national government in the efforts towards mitigating the effects of climate change. The climate change law establishes the Climate Change Council.⁹⁵ The Council is to provide an overarching national climate change coordination mechanism and should— ensure the mainstreaming of the climate change function by the national and county governments; approve and oversee implementation of the National Climate Change Action Plan; advise the national and county governments on

⁸⁹ *Sessional paper on Environment and Development* [Government Printer, Nairobi, 1999].

⁹⁰ S. 22, Constitution of Kenya, 2010.

⁹¹ *Ibid*, S. 3 of Part II.

⁹² *Ibid*, S. 10.

⁹³ International Development Law Organization (IDLO), 'Enabling Legislative and Institutional Framework for Climate Change Response in Kenya,' 2012, p. 47.

⁹⁴ Climate Change Act, No. 11 of 2016, Laws of Kenya. The Act was enacted to provide for a regulatory framework for enhanced response to climate change; to provide for mechanism and measures to achieve low carbon climate development, and for connected purposes.

⁹⁵ *Ibid*, S. 5.

legislative, policy and other measures necessary for climate change response and attaining low carbon climate change resilient development; approve a national gender and intergenerational responsive public education awareness strategy and implementation programme; provide policy direction on research and training on climate change including on the collation and dissemination of information relating to climate change to the national and county governments, the public and other stakeholders; provide guidance on review, amendment and harmonization of sectoral laws and policies in order to achieve the objectives of this Act; administer the Climate Change Fund established under this Act; and set the targets for the regulation of greenhouse gas emissions.⁹⁶⁹⁷

The principles of planning and development facilitation in a county should, *inter alia*, protect and develop natural resources in a manner that aligns national and county governments' policies.⁹⁸ For instance, the Constitution provides that one of the obligations of the State in relation to the environment is to work to achieve and maintain a tree cover of at least ten percent of the land area of Kenya.⁹⁹ In line with this, the County Governments Act, 2012 provides that one of the objectives of county planning is to work towards the achievement and maintenance of a tree cover of at least ten per cent of the land area of Kenya as provided in Article 69 of the Constitution.¹⁰⁰ It is, therefore, clear that county governments have an important role in climate change mitigation efforts, which effectively touches on the way natural resources are used, managed and conserved. To achieve this and ultimately sustainable development, county governments need to cooperate with the national Government.¹⁰¹

6.1 Land Management and Devolution

The *National Land Policy*,¹⁰² perhaps in contemplation of devolution, provides that the institutional framework on land will be reformed to ensure devolution of power and authority, participation and representation, justice, equity and sustainability. It advocates for three institutions to be set up namely the National Land Commission, the District Land Boards and

⁹⁶ S. 6, Climate Change Act, 2016.

⁹⁷ *Ibid*, S. 5.

⁹⁸ *County Governments Act*, No. 17 of 2012. S. 101.

⁹⁹ Art. 69(1) (b).

¹⁰⁰ *County Governments Act*, S. 103.

¹⁰¹ *Ibid*, S. 106.

¹⁰² *Sessional Paper No. 3 of 2009*, (Government Printer, Nairobi, 2009).

Community Land Boards. Indeed, some of these were captured in the Constitution of Kenya 2010 and the resulting sectoral laws on land. The National Land Commission was established by the Constitution of Kenya.¹⁰³ The *Community Land Act*, 2016 as envisaged under the Constitution also seeks to give effect to Article 63(5) of the Constitution; to provide for the recognition, protection, management and administration of community land; to establish and define the functions and powers of Community Land Boards and management committees; to provide for the powers of county governments in relation to unregistered community land; and for connected purposes. This Act provides for holding of unregistered community land in trust by county governments.¹⁰⁴

According to the National Land Policy, land issues requiring special intervention, such as historical injustices, land rights of minority communities (such as hunter-gatherers, forest-dwellers and pastoralists) and vulnerable groups are to be addressed. The rights of these groups are to be recognized and protected. It also provides that measures should be initiated to identify such groups and ensure their access to land and participation in decision making over land and land-based resources.¹⁰⁵

Where community land is to be converted to public land by transfer, the community land law states that such transfer is subject to the approval of the members of the community in a general meeting, and it is to be done in accordance with the Land Act.¹⁰⁶ Further, where community land is to be converted to private land by either transferor allocation by the Committee or a county government, such conversion of land requires approval of the County Assembly in the case of land held by the County Government; and members of a community in a general meeting in the case of land managed and administered by a Committee.¹⁰⁷ It is also important to note that where land is set aside by a community for public purposes, through consultation between the concerned communities with the Commission the involved county government, is to ensure that prompt and adequate compensation is made to the affected community.¹⁰⁸

¹⁰³ Art. 67, Constitution of Kenya.

¹⁰⁴ s. 6.

¹⁰⁵ Sessional Paper No. 3 of 2009, *op cit* p.x.

¹⁰⁶ s.22.

¹⁰⁷ s. 23.

¹⁰⁸ S. 26.

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Thus, the community land law recognises the important role of county governments facilitating sustainable, fair and equitable management of community land. This law will go a long way in promoting sustainable management of community land, in a way that stands to benefit the concerned communities. The law will also be useful in preventing a repeat of the historical injustices that had become synonymous with land matters in the country.

The *Land Act*¹⁰⁹ provides principles that will afford local communities greater opportunity to participate in land management.¹¹⁰ Regarding the conversion of land from one category to another, the Act requires that any substantial transaction involving the conversion of public land to private land must be with the approval by the National Assembly or county assembly as the case may be.¹¹¹ This is important so as to ensure that illegal land allocation do not take place as to deny the locals their right to the use of such land.

The Act also has provisions on notification requirements applicable to allocation of public land, and the same is to be effected at least thirty days before, offering for allocation, a tract or tracts of public land.¹¹² Amongst the persons to receive the notice are, *inter alia*, the governor in whose county the public land proposed for allocation is located; and other known interested parties including, but not limited to, adjoining landowners, persons in actual occupation of the land including marginalised communities and groups living in the general vicinity of the public lands being proposed for allocation.¹¹³

Failure to provide notice of proposed allocations as required under this section may be grounds for the Commission to direct that the notification procedures be repeated; or void the allocation on grounds that the notification requirements were not properly conducted.¹¹⁴ This procedure will allow the affected communities either by themselves or through their county governments to protest any unjust allocation of land.

¹⁰⁹ Act No. 6 of 2012, Laws of Kenya.

¹¹⁰ S. 4(2). These include: participation, accountability and democratic decision making within communities, the public and the Government; affording equal opportunities to members of all ethnic groups; non-discrimination and protection of the marginalized; and democracy, inclusiveness and participation of the people. S. 4(1). This provision echoes Art. 10 (1) of the Constitution.

¹¹¹ *Land Act*, S. 9(3).

¹¹² *Ibid.*, S. 14(1).

¹¹³ *Ibid.*, S. 14(4) (5).

¹¹⁴ S. 14(8).

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The *National Land Commission Act*¹¹⁵ was enacted to make further provision as to the functions and powers of the National Land Commission, qualifications and procedures for appointments to the Commission; to give effect to the objects and principles of devolved government in land management and administration.¹¹⁶ It mandates the National Land Commission with, *inter alia*, managing public land on behalf of the national and county governments and recommending a national land policy to the national government.¹¹⁷ While carrying out their functions, the Commission is to be guided by the principles of land policy as provided for under Article 60 of the Constitution.¹¹⁸

6.2 Forests Management and Devolution

The *National Forest Policy 2014*,¹¹⁹ provides a revised policy framework for forest conservation and sustainable management and one of its main features is the enactment of a revised forests law to implement the policy; the mainstreaming of forest conservation and management into national land use systems; clear division of responsibilities between public sector institutions and regulatory functions of the sector, thereby allowing Kenya Forest Service to focus on the management of forests on public land, and the role of the county governments in implementing national policies, county forest programmes including the delivery of forest extension services to communities, farmers and private land owners, and management of forests other than those under Kenya Forest Service; the devolution of community forest conservation and management, implementation of national forest policies and strategies, deepening of community participation in forest management by the strengthening of community forestry associations, and the introduction of benefit-sharing arrangements; the adoption of an ecosystem approach for the management of forests, and recognition of customary rights and user rights to support sustainable forest management and conservation; and the establishment of national programmes to support community forest management and afforestation/reforestation on community and private land.¹²⁰

¹¹⁵ Act No. 5 of 2012.

¹¹⁶ Preamble, *National Land Commission Act*.

¹¹⁷ See also s.5, *The National Land Commission Act*, 2012.

¹¹⁸ S. 3(a), *National Land Commission Act*, 2012; Art.67 (2) of the Constitution.

¹¹⁹ [Government Printer, Nairobi].

¹²⁰ Forest Policy, 2014, p. ii.

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The Forest Policy recognises ineffective regulatory mechanisms and inadequate law enforcement, as some of the challenges facing the forestry sector in the country. Further, it observes that these challenges are compounded by dwindling public land, meaning that forestry development has to expand into private and community land, which need incentives and clear methods of engagement to encourage investments in commercial forestry.¹²¹

With regard to forestry governance, the Policy proposes that there is need to enact supporting legislation following the promulgation of the Constitution to minimize conflicts between industry, communities and governments at both national and county levels over resource management and benefit sharing. In addition, forest governance needs to take into account emerging issues and best practices at global, regional and national level.

The Policy also observes that the forest sector has had to contend with low productivity of tree crops, low conversion efficiency and weak value addition schemes. These arise from climate change, small genetic base of crops, emerging pests and diseases, low investments in technology development, and poor investment in forest based industry. The Policy thus recommends that there is need for research and development to refocus on basic forestry disciplines such as productivity, health, crop diversification, processing, value addition, intellectual property rights and indigenous knowledge. Further, the sector also faces challenges in building capacity for sustainable utilization and management.¹²² With regard to the County governments, the Policy recommends that there is great need to build the capacity of county governments to undertake forestry development on community and private lands. Mechanisms for engaging county governments in forestry research and development should also be developed.¹²³ Further, livelihood enhancement will be one of the guiding principles with a focus on fighting poverty as a major consideration for all strategies and programmes in forest sector development.¹²⁴

In order to promote public participation in forests management, the Policy recommends enhancement of participatory approaches as one of the guiding principles in forest conservation and management so as to ensure that the relevant government agencies, county governments, private sector, civil society and communities are involved in planning, implementation and

¹²¹ *Ibid.*

¹²² National Forest Policy, 2014, para. 2.2.2.

¹²³ *Ibid.*, para. 2.2.3.

¹²⁴ *Ibid.*

decision making processes.¹²⁵ The Policy also advocates for commercialization of forestry activities where forestry operations are to be undertaken in a business manner focusing on result-based management. In this regard, the government will invite private sector to invest in tree growing, wood processing and value addition.¹²⁶

The Forest Policy is intended to provide a framework for improved forest governance, resource allocation, partnerships and collaboration with the state and non-state actors to enable the sector contribute in meeting the country's growth and poverty alleviation goals within a sustainable environment.¹²⁷

In response to the Policy, the *Forest Conservation and Management Act, 2016*¹²⁸ was enacted to give effect to Article 69 of the Constitution with regard to forest resources; to provide for the development and sustainable management, including conservation and rational utilization of all forest resources for the socio-economic development of the country.¹²⁹ It is noteworthy that this Act mainly concentrates on affording communities user rights as against actual control of forests resources.¹³⁰ It is also noteworthy that although the Act was to be aligned with the current Constitution of Kenya and the devolved system of governance and therefore, has provisions addressing the issue of devolution, it is still a rather bureaucratic law, with such requirements as application by communities for any intended participation in the management of forests resources.¹³¹

Implementation of the law is to be guided by such principles as: good governance and access to public information, and a participatory approach to forest conservation and management; devolution of forest resources management and conservation wherever possible and appropriate to those owners and managers of forest resources; adoption of an 'ecosystem approach' in the conservation and management of forests wherever possible; recognition of the rights and responsibilities of communities and private land owners to manage and utilize forest and forest resources; equitable sharing and enjoyment of the benefits accruing from forest

¹²⁵ *Ibid*, para.3.3 (e).

¹²⁶ *Ibid*.

¹²⁷ *Ibid*.

¹²⁸ Act No. 34 of 2016, Laws of Kenya.

¹²⁹ Preamble, *Forest Conservation and Management Act, 2016*.

¹³⁰ S. 49 & 50, *Forest Conservation and Management Act, 2016*.

¹³¹ *Ibid*, S. 48.

conservation and management by the people of Kenya; and protection of indigenous knowledge and intellectual property rights embodied in forest biodiversity and genetic resources.¹³²

Despite the bureaucratic tendencies still retained in the Act, these guiding principles, if well implemented, will go a long way in facilitating equitable and effective management of forest resources under the devolution system.

6.3 Water Resources Management and Devolution

The *Water Act 2016*¹³³ vests ownership and control of water resources, including their use, in the state to be held by the national government in trust for the people of Kenya.. Every water resource in the country is vested in the State, subject to any rights of user granted by or under the Act or any other written law.¹³⁴ Further, the Act allows the Cabinet Secretary to exercise control over every water resource in accordance with the Act.¹³⁵ The Water Resources Authority is vested with the responsibility for overall sector oversight including policy formulation, coordination and resource mobilisation.¹³⁶ The Water Resources Authority is to serve as an agent of the national government and regulate the management and use of water resources.¹³⁷

With regard to the user water rights, the Water Act 2016 provides that every person has the right to access water resources, whose administration is the function of the national government as stipulated in the Fourth Schedule to the Constitution.¹³⁸

Communities are allowed to participate in water resources management through the formation of the

Water Resource Users Associations may be established as associations of water resource users at the sub-basin level in accordance with Regulations prescribed by the Authority. A Water Resource Users Association should be a community based association for collaborative

¹³² *Forest Conservation and Management Act, 2016*, s. 4.

¹³³ No. 43 of 2016, Laws of Kenya.

¹³⁴ *Ibid*, S. 5, 7 & 9.

¹³⁵ *Ibid*, SS. 4(1), 5.

¹³⁶ S. 11 & 12, Water Act, 2016.

¹³⁷ *Ibid*, S. 6.

¹³⁸ S. 9, No.43 of 2016, Laws of Kenya.

management of water resources and resolution of conflicts concerning the use of water resources.¹³⁹

The Act specifically provides for public consultation in the development of national strategies such as the Water Services Strategy.¹⁴⁰

The courts have affirmed that the provision and management of water services is a shared constitutional function, distributed between the two levels of government.¹⁴¹ This will be useful in addressing some of the challenges that have been experienced in relation to devolution of water services. An example is the conflict between Kwale County and Mombasa County; and Murang'a and Nairobi Counties. Kwale and Murang'a counties were under the impression that they can charge for the export of water from their counties to other counties.¹⁴²

The water resources management functions that have been allocated to the national government are spelt out in the Fourth Schedule, Part I, and include: use of international waters and water resources; national public works-water resources development especially on permitting and ensuring compliance to permit conditions on water retaining infrastructure and works on water bodies; protection of the environment and natural resources with a view to establishing a durable and sustainable system of development, including, in particular-water protection, securing sufficient residual water, hydraulic engineering and the safety of dams; disaster management- water related disasters like flooding, drought and landslides; and capacity building and technical assistance to the counties.¹⁴³

On the other hand, the water resources management functions that have been devolved to county governments are spelt out in the Fourth Schedule Part 2. These include, implementation of specific national government policies on natural resources and environmental conservation, including, soil and water conservation; county public works and services, including-storm water management systems in built-up areas; firefighting services and disaster management-especially on water related disasters.¹⁴⁴

¹³⁹ Ibid, S. 29(2).

¹⁴⁰ Ibid, S. 64(2)..

¹⁴¹ *Okiya Omtatah Okioti & 3 others v Nairobi City County & 5 others* [2014] eKLR, para. 84.

¹⁴² Musyoka, A., 'Kenya: MCAs Want Policy on Water Use,' *The Star Newspaper*, 12 July 2014, available at <http://allafrica.com/stories/201407140580.html> [Accessed on 10/09/2018].

¹⁴³ Water Resources Management Authority, *Water Resources Management Authority Brief 2013, op cit*, p.10.

¹⁴⁴ *Ibid*, p. 11.

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In order to actualise, the principles of natural resources management as envisaged in the current Constitution, in a framework that engages the county governments, WRMA intends to: provide information on water resources availability, use, allocation and viable options for water resources investments planning to meet any water deficit for the county's developmental needs; support the assessment of water resources to inform planning and decision making; work with the concerned county governments to domesticate the development and management plans as contained in the National Water Master Plan 2030 and jointly prepare an implementation matrix for each plan; apportion the water resources equitably among various users and uses, including maintaining the reserve; and work with the concerned County Governments to protect water resources from harmful impacts.¹⁴⁵

The Water Act 2016 empowers county governments to establish water services providers, which may be a public limited liability company established under the Companies Act, 2015 or other body providing water services as may be approved by the Regulatory Board. In establishing a water services provider, a county government must comply with the standards of commercial viability set out by the Regulatory Board.¹⁴⁶ A water services provider shall be responsible for- the provision of water services within the area specified in the licence; and the development of county assets for water service provision.¹⁴⁷ The Act also provides that a county water services provider may with the approval of the relevant licensing authority extend water services to rural or developing areas.¹⁴⁸ The Act further provides that nothing in its provisions should deprive any person or community of water services on the grounds only that provision of such services is not commercially viable.¹⁴⁹

The Act also requires every county government to put in place measures for the provision of water services to rural areas which are considered not to be commercially viable for the provision of water services.¹⁵⁰ The measures referred to in subsection (2) shall include the development of point sources, small scale piped systems and standpipes which meet the standards set by the Regulatory Board and which may be managed by the Water community

¹⁴⁵ *Ibid*, p. 5.

¹⁴⁶ Water Act 2016, S. 77.

¹⁴⁷ *Ibid*, S. 78(1).

¹⁴⁸ *Ibid*, S. 81.

¹⁴⁹ *Ibid*, S. 94(1).

¹⁵⁰ *Ibid*, S. 33(2).

associations, public benefits organizations or a private person under a contract with the county government.¹⁵¹ Further, in order to implement its obligations under this section, a county government should formulate and submit annually to the Regulatory Board and to the Cabinet Secretary, a five year development plan incorporating an investment and financing plan for the provision of water services in the rural areas referred to subsection (1) within its area of jurisdiction.¹⁵² The Cabinet Secretary is also to provide technical, financial and other assistance to a county government to enable the county government to discharge its responsibility under this section.¹⁵³

The implementation of these laws and policies calls for wide consultation and participation of all stakeholders, not only between the national government and the county governments but also with all the other relevant stakeholders, including the locals.

7. Lessons from other Jurisdictions

The rationale behind devolution is guided by different historical dispensations unique to every country.¹⁵⁴ Several countries have adopted a program referred to as community-based natural resource management. Though devolution has advantages, there have been different responses in different countries. In Uganda, decentralization reforms were found to be more effective where they take account of the differences between people and groups and where they introduce bargaining mechanisms to increase the power of marginal groups to negotiate.¹⁵⁵

In Zambia, the decentralization process has been institutionalized in response to structural adjustment policies. While devolution has limited communication between the central government and the county government, at the local level institutions created there locally have been more successful.¹⁵⁶ In Tanzania, there is the Joint Forest Management (JFM), where village

¹⁵¹ Ibid, S. 33(3).

¹⁵² Ibid, S. 33(4).

¹⁵³ Ibid, S. 33(5).

¹⁵⁴ Juma, T.O., *et al.* "Devolution and Governance Conflicts in Africa: Kenyan Scenario," *Public Policy and Administration Research*, Vol.4, No.6, 2014, p. 4.

¹⁵⁵ Campbell, T., "Devolved natural resource management as a means of empowering the poor; Rhetoric or Reality," *Trocaire Review*, 2006, p. 122.

¹⁵⁶ See Mukwena, R.M., 'Situating Decentralisation in Zambia in a Political Context,' *African Training and Research Centre in Administration for Development*, available at <http://unpan1.un.org/intradoc/groups/public/documents/cafrad/unpan017692.pdf> [Accessed on 10/09/2018].

communities are entrusted with the protection and management of nearby forests. The areas concerned are usually degraded or even deforested areas. The communities are required to organize forest protection committees, village forest committees, village forest conservation and development societies, etc. Each of these bodies has an executive committee that manages its day-to-day affairs.¹⁵⁷

In Zimbabwe, they have wildlife and eco-tourism programmes such as CAMPFIRE.¹⁵⁸ Such strategies and shift in thinking have usually been driven by broader decentralization/devolution and local government reform policies, which involve restructuring the power relations between central government and other governments. Bringing decision-making closer to the people increases public sector accountability and effectiveness.¹⁵⁹ Zimbabwean communities are legally defined through political administrative boundaries, and the interests of individual resource users combine in wards. By virtue of their residing in a geographic area, communities are defined as resource users, and are automatic holders of use and access rights over wildlife and forest resources within the administrative boundaries of their places of residence.¹⁶⁰

Niger and Mali have adopted forest policies known as *strategie energie domestique*, the objective of the policies being to transfer forest management responsibilities to rural communities. Part of the accruing taxes and the revenue generated are used for community projects. These kinds of benefits that the community generates go a long way in making the locals appreciate the importance of conserving the resources around them sustainably. Customary and local governance institutions have played a very important role in natural resource management. Maintaining and strengthening local capacity for dialogue and negotiation is essential for the sustainability of resource use practice, local peace and rural livelihood.

¹⁵⁷ Prasad, R., 'Forest management in India and the impact of state control over non-wood forest products,' *Unasylva*, Vol. 50, No. 3 (Non-Wood Forest Products and Income Generation), available at <http://www.fao.org/docrep/x2450e/x2450e0c.htm#TopOfPage>, [Accessed on 10/09/2018].

¹⁵⁸ CAMPFIRE means Communal Areas Management Programme for Indigenous Resources.

¹⁵⁹ Ribot, J.C., "Decentralization, Participation and Accountability in Sahelian Forestry: Legal Instruments of Political-Administrative Control," *Africa*, Vol.69 (1), 1999, pp.23–65.

¹⁶⁰ Mosimane, A.W. & Aribeb, K.M., "Exclusion through defined membership in people-centred natural resources management: Who defines?" *Commons Southern Africa occasional paper*, No. 14, p.7.

8. Way Forward

The implementation of the current Constitution, especially devolution, has not been without challenges. Some of the challenges are: inadequate civic education for citizens which hinders their effective participation in national and county governance; delays in remission of funds to county governments, persistent disregard of the legislative process of Bills as well as failure to develop policies that would anchor the legislation; underfunding of commissions, delay in development of required regulations and inadequate legislative capacity in the county governments.¹⁶¹

It is noteworthy that the *Environmental Management Co-ordination (Amendment) Act, 2015*¹⁶² was enacted to make provisions to align the Environmental Management and Coordination Act, with the Constitution of Kenya, 2010. The Amendment Act takes into account the devolved system of government, rationalizing of state resources, sound environmental practices, structures for dispute resolution and principles such as transparency, accountability and participatory environment management. Further, the Act disbanded Provincial and District Environmental Committees and constituting County Environmental Committees in accordance with Chapter 11 of the Constitution. The Act empowers the Governor of every county to appoint the members of such committees.¹⁶³ The functions of the County Environmental Committees will be to ensure the proper management of the environment for the respective counties. The Amendment Act also requires every County Environment Committee to prepare a county environment action plan for each county.¹⁶⁴

The amendment law, although important in aligning EMCA 1999, with the Constitution of Kenya 2010 and especially the devolved system of governance, is not comprehensive on how the proposed public participation will be undertaken. The implication is that, just like the current Act, the amendment law risks promoting public participation through less meaningful ways. Much more needs to be done in order to promote meaningful and quality public participation within the devolution framework.

¹⁶¹ Commission for the Implementation of the Constitution, *2013-2014: Annual Report*, Available at <http://www.cickenya.org/index.php/reports/annual-reports/item/446-2013-2014-annual-report> [Accessed on 10/09/2018].

¹⁶² No. 5 of 2015, Laws of Kenya.

¹⁶³ S. 18, *Environmental Management Co-ordination (Amendment) Act, 2015*.

¹⁶⁴ S. 19, *Environmental Management Co-ordination (Amendment) Act, 2015*.

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Just like in Niger and Mali, where the accruing taxes and the revenue generated are used for community projects, there is need to ensure that the accruing benefits from natural resources management, reach the communities so as to enable the locals appreciate the importance of conserving the resources around them sustainably. Further, there should be efforts towards maintaining and strengthening local capacity for dialogue and negotiation which are essential for the sustainability of resource use local peace and rural livelihood, as demonstrated in Niger and Mali.

Kenya can also learn a lot from Zimbabwe in determining how to define the communities. Just like in Zimbabwe, where the Zimbabwean communities are legally defined through political administrative boundaries, and the interests of individual resource users combined in wards, Kenyan communities benefitting from natural resources may not necessarily be defined through certain fixed parameters such as tribe but should incorporate other unifying factors such as residential status in a county. By virtue of their residing in a geographic area, communities should be defined as resource users, and therefore automatic holders of use and access rights over wildlife and forest resources within the administrative boundaries of their places of residence.¹⁶⁵

To ensure the success of the devolution of NRM, there is a need for management frameworks that encourage the engagement of multiple actors across the two levels of government and affected communities. The central Government still remains relevant in the natural resource management setup, as it is more effective in keeping the county governments in check in a system of counter-checks and balances amongst the 47 county governments and the national government. The active involvement of independent organizations and Non-Governmental Organisations (NGO's) will also go a long way in ensuring that the appropriate standards in natural resource management are maintained, educating the locals on the benefits that accrue and from sustainable utilization of the resources around them.¹⁶⁶

If local communities are to benefit from the natural resources in the country, then there is a need to ensure maximum and quality participation by such communities in their management,

¹⁶⁵ Mosimane, A.W. & Aribeb, K.M., "Exclusion through defined membership in people-centred natural resources management: Who defines?" *op. cit.*

¹⁶⁶ See generally, *Final Report of the Taskforce on Devolved Government*, Vol. I (Office of the Deputy Prime Minister and Ministry of Local Government, (Government Printer, Nairobi, 2011).

through the devolved system of governance. Indeed, this will promote sustainable development which is one of the national values and principles of governance as envisaged under the Constitution. In *Olum & Another v Attorney General*,¹⁶⁷ it was held that although the national objectives and directive principles of State policy are not on their own justiciable, they and the preamble of the Constitution should be given effect wherever it was fairly possible to do so without violating the meaning of the words used. Further, in the context of Kenya, courts have observed that Article 10 of the Constitution does not purport to set out what exclusively amounts to national values and principles of governance. Respect and sustenance of the environment is one of the said values and principles, and since sustainable development is one of the express values and principles, the Court was enjoined to consider the same in arriving at its decision.¹⁶⁸ Devolution and CBNRM can effectively work in the wildlife, forestry, water, and fisheries sectors, amongst others.

9. Conclusion

Devolution must entail transfer of real powers and real resources from national to local administration, otherwise, their ability to operate will be hampered severely.¹⁶⁹ With Kenya and the devolution experiences in the new dispensation, a proper legal and institutional framework will be of great help in ensuring efficient natural resource management programmes are implemented.

The central government can still maintain a role in: protecting wider ‘public goods’ (watersheds, biodiversity, carbon sinks and other ecological services); establishing the policy, legal and social frameworks and conditions needed for local management to succeed; facilitating and regulating private activity; mediating conflict; helping local organisations enforce locally designed and monitored regulations and sanctions; providing legal recourse; providing technical assistance; addressing local inequality and ensuring representation of marginal groups so that downward accountability of organisations receiving devolved authority is assured; helping

¹⁶⁷[1995-1998] 1 EA, 258.

¹⁶⁸*Republic v Kenya Forest Service Ex-parte Clement Kariuki & 2 others* [2013] eKLR (Judicial Review Case 285 of 2012).

¹⁶⁹ Campbell, T., ‘Devolved natural resource management as a means of empowering the poor; Rhetoric or Reality,’ *op cit.*

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communities to defend their rights, including protection against powerful external groups such as mining and timber companies and organised traders; and supporting local capacity building.¹⁷⁰

Devolution can indeed be used to facilitate effective natural resources management that is people-centred and one that benefits the people of Kenya. It is a good recipe for attainment of environmental justice in Kenya and eradication of poverty. Problems such as inequitable benefit sharing, exclusion of the poor and the marginalised in decision making system, and indiscriminate environmental degradation are some of the challenges that can be addressed through the devolved system of governance and management of natural resources.

Devolution frameworks can go a long way in overcoming the challenges associated with state-centric approaches to natural resources management and effectively promote efficiency, equality among citizens, economic growth and stability in the counties. The overall effect would be growth and stability in the national economy.

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¹⁷⁰ Shackleton, S., *et al.* ‘Devolution and community based natural resource management,’ *op cit*, p. 2.

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