

Attaining Environmental Justice For Posterity



Kariuki Muigua
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Attaining Environmental Justice for Posterity

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Table of Contents

Dedication	xviii
Acknowledgments	xx
Author’s Note	xxi
List of Cases	xxiii
List of Statutes/Legislation/ Policies/ Bills	xxiv
List of Abbreviations.....	xxv
Overview of Conflict Management in Environmental Matters	1
1. Introduction.....	1
2. Overview of Environmental Conflicts.....	1
3. Why Resolve Environmental Conflicts?	3
4. Conclusion	8
Environmental Conflict Management Institutions and Approaches.....	10
1. Introduction.....	10
2. Environmental Conflict Management Institutions and Approaches	11
3. Methods of Managing Environmental Conflicts.....	13
3.1 Environmental Conflicts and ADR	14
3.2 Environmental Conflicts and ADR – The Link.....	15
3.3 Challenges Facing Application of ADR Mechanisms in Environmental Conflicts	16
3.4 Reform Measures	17
4. Conclusion	18
Understanding Environmental Conflicts: Causes and Manifestations.....	21
1. Introduction.....	21
2. Manifestations of Environmental Conflicts.....	21
2.1 Conflicts Relating to Access to Environmental Resources	22
2.2 Conflicts Relating to Side Effects of Economic Activity	22
3. Types of Environmental Conflicts.....	23
3.1 Biodiversity conflicts.....	23
3.2. Land and Water Conflicts	24
4. Factors Shaping the Course of Conflict.....	25
5. Causes of Conflicts	26
6. Stages of conflict.....	27
7. Costs of Conflicts.....	28
8. Benefits of Conflicts?.....	29
9. Conclusion	30
Nurturing our Wetlands for Biodiversity Conservation	32
1. Introduction.....	32
2. Wetlands, Biodiversity Conservation and Sustainable Development Agenda.....	32
3. Threats to Wetlands Conservation.....	34
4. Looking into the Future: Nurturing Wetlands and Biodiversity Conservation	34
5. Conclusion	41
Promoting Biodiversity Impact Assessment for Sustainable Development in Kenya	43
1. Introduction.....	43
2. Biological Impact Assessment	44
3. Legal Framework on Biodiversity Impact Assessment	45
3.1 Convention on Biological Diversity.....	45

3.2 COP 8 Decision VIII/28, Impact Assessment: Voluntary Guidelines on Biodiversity Inclusive Impact Assessment.....	46
3.3 Constitution of Kenya, 2010.....	46
3.4 Environmental Management and Co-Ordination Act.....	46
3.5 The Environmental (Impact Assessment and Audit) Regulations, 2003	47
4. Embracing Biodiversity Impact Assessment in Kenya.....	47
5. Way Forward	48
6. Conclusion	49
The Neglected Link: Safeguarding Pollinators for Sustainable Development in Kenya.....	51
1. Introduction.....	51
2. Pollinators as Key Players in Environmental Conservation Discourse: The Neglected Link.....	52
3. Protection of Pollinators: the Legal and Policy Framework	53
4. Safeguarding the Future: Addressing the Challenges Affecting Pollinators	59
4.1 Ecosystem Services Approach to Pollinators Conservation	59
4.2 Reduction or Effective Control of Pesticide Use	62
4.3 Environmental Education, Awareness and Ethics	63
4.4 Use of Scientific Research and Traditional Knowledge.....	65
4.5 Addressing Climate Change	68
5. Conclusion	69
Reconceptualising the Right to Clean and Healthy Environment in Kenya	70
1. Introduction.....	70
2. Defining the Right to Clean and Healthy Environment	70
2.1 Scope of the Right to Clean and Healthy Environment.....	73
2.2 National Courts and the Right to a Clean and Healthy Environment	77
3. Reconceptualising the Right to Clean and Healthy Environment in Kenya.....	81
4. Traditional Knowledge for Clean and Healthy Environment	84
4.1 Scientific Knowledge for Clean and Healthy Environment	85
4.2 Poverty Eradication for Clean and Healthy Environment	86
4.3 Public Awareness and Participation for Clean and Healthy Environment.....	86
4.4 Enforcement and Compliance	88
5. Towards a Clean and Healthy Environment in Kenya.....	91
6. Conclusion	93
Attaining Environmental Justice in Kenya	94
1. Introduction.....	94
2. Environmental Justice	94
2.1 Components of Environmental Justice.....	95
2.1.1 Access to Environmental Information.....	96
2.1.2 Public Participation.....	96
2.1.3 Access to Justice	96
2.1.4 Environmental Justice as either Distributive or Procedural Justice	98
3. Background to Environmental Injustice in Kenya.....	100
4. Legal Framework for Environmental Justice in Kenya	104
4.1 Constitution of Kenya 2010	104
4.2 Environmental Management and Coordination Act 1999	107
4.3 The Environment and Land Court Act.....	107
4.4 Water Policy 2012 and Water Act 2016.....	108
4.5 National Land Policy, 2009	110
5. Gender Discrimination and Environmental Justice	110
6. Environmental Justice and Livelihood	112

7. Environmental Justice and Conflict Management	113
8. Enhancing Access to Environmental Justice in Kenya	114
8.1 Environmental Justice and Access to Information	115
8.2 Environmental Justice and Public Participation	116
8.3 Benefit Sharing Arrangements	119
8.4 Demonstrations and Lobbying	121
8.5 Judicial Activism	122
8.6 Role of Academia	123
8.7 Advocacy	123
8.8 Public Interest Litigation.....	123
9. Conclusion	125
The Role of Courts in Safeguarding Environmental Rights in Kenya: A Critical Appraisal.....	126
1. Introduction.....	126
2. Legal Recognition and Protection of Environmental Rights in Kenya: Where are we?	126
3. The Role of Courts in Safeguarding Environmental Rights in Kenya: prospects and Challenges.....	128
3.1 Pre-Constitution 2010 Era.....	128
3.2 Post-Constitution 2010 Era	129
3.3 Enhancing the Role of Courts in Safeguarding Environmental Rights in Kenya	131
3.3.1 Judicial Activism	131
3.3.2 Public Interest Litigation.....	131
3.3.3 National Courts and Sustainable Development	137
4. Conclusion	140
The Future of Environmental Conflict Management	141
1. Introduction.....	141
2. Enhancing Effective Environmental Conflict Management	142
2.1 Addressing Socio-Economic Issues	142
2.2 Enhancing Meaningful Participation in Environmental Management and Governance Issues	143
2.3 Need for Inter- and Transdisciplinary Knowledge Syntheses	144
3. Conclusion	145
The Place of Environmental, Social and Governance (ESG) in Arbitration	146
1. Introduction.....	146
2. The Nexus between Environmental Social and Governance (ESG) and Arbitration	147
3. Enhancing the Role of Arbitration in Management of Environmental Social and Governance (ESG) Disputes	149
3.1 Knowledge in ESG Concerns	149
3.2 Promoting Sustainable Development	150
3.3 Upholding Human Rights	150
3.4 Promoting Good Governance.....	151
3.5 Seeking Expert Assistance in Complex ESG Matters	151
4. Conclusion	151
Environmental Conflicts Management: A Kenyan Perspective	153
1. Introduction.....	153
2. Emergence and Management of Conflicts in Kenya	156
3. Peacebuilding and Conflict Management in Kenya: Towards Effective Peacebuilding and Environmental Conflict Management	157
3.1 Addressing Poverty, Ethnic and Social stratification	157

3.2 Joint and Participatory Efforts in Peacebuilding and Conflict Management	161
3.3. Addressing the Weak or Non-Existent Structures and Institutions for Peacebuilding, Conflict Prevention and Response	164
4. Conclusion	168
Contemporary Issues in Environmental Conflict Management: Challenges and Prospects	169
1. Introduction.....	169
2. Contemporary Issues in Conflict Management and Environmental Matters	169
3. Conclusion	176
Embracing Nature Based Solutions for Sustainable Development in Kenya.....	177
1. Introduction.....	177
2. Nature Based Solutions and Sustainable Development	178
3. Embracing Nature Based Solutions for Sustainable Development in Kenya.....	179
3.1 Climate Change Mitigation.....	179
3.2 Food Security.....	180
3.3 Water Management.....	181
3.4 Promoting Human Health	182
4. Conclusion	182
Understanding the Place of Conflict Management in Sustainable Development Agenda...184	
1. Introduction.....	184
2. Environmental Aspect of Sustainable Development Agenda	185
3. Economic Aspect of Sustainable Development Agenda.....	186
4. Social Aspect of Sustainable Development Agenda.....	188
5. Peace and Sustainable Development: Addressing Causes of Resource Related Conflicts..	189
6. Governance Aspect of Sustainable Development Agenda.....	190
7. Realising Environmental, Social and Governance Tenets for Sustainable Development: Moving Forward	192
8. Conclusion	195
Effective Environmental Conflict management as a Tool for Entrenching Environmental Rights	198
1. Introduction.....	198
2. Rights-Based Approaches to Environmental Conflicts Management	199
2.1. Environmental Democracy	200
3. Principles Underlying Effective Conflict Management Approaches	205
3.1 Principle of Participation	205
3.2 Principle of Inclusion.....	205
3.3. Principle of Empowerment	206
3.4. Principle of Cultural Sensitivity.....	206
3.5. Principle of Equity.....	206
3.6 The Sustainable Livelihoods Approach (SLA)	206
4. Conclusion	207
Best Practices in Environmental Conflicts Management: Developing World Perspectives 209	
1. Introduction.....	209
2. International Environmental Law Framework and Environmental Conflict Management .	210
3. Peacebuilding and Conflict Management in Africa: Continental Status	213
4. African Approaches on the Management of Environmental Conflicts	214
5. Conclusion	220

Role of State Agencies and Communities in Achieving Effective Environmental Conflicts Management	221
1. Introduction.....	221
2. Role of State Institutions in Environmental Conflict Management	222
3. Role of Communities in Conflict Management	223
4. The Place of the State and the Communities in Addressing Environmental Conflicts: Striking the Balance.....	224
5. Conclusion	227
Embracing Environmental, Social and Governance (ESG) Principles for Sustainable Development in Kenya	228
1. Introduction.....	228
2. Environment Social and Governance (ESG) Principles	230
3. Environment, Social and Governance (ESG) Disclosure and Reporting Requirements in Kenya.....	231
4. The ESG Reporting Frameworks Applicable in Kenya	233
4.1 The Capital Markets Authority	234
4.2 Investor groups	234
4.3 United Nations Global Compact	235
4.4 The Carbon Disclosure Project (CDP)	235
4.5 Industry level reporting	236
5. ESG Concerns in Kenya.....	236
6. Way Forward	237
7. Conclusion	239
Realising Environmental, Social and Governance Tenets for Sustainable Development ...	241
1. Introduction.....	241
2. Environmental Aspect of Sustainable Development Agenda	242
3. Economic Aspect of Sustainable Development Agenda.....	243
4. Social Aspect of Sustainable Development Agenda.....	245
5. Role of Law in Promoting Environmental, Social, and Governance (ESG) Approach: Governance Aspect of Sustainable Development Agenda	246
6. Realising Environmental, Social and Governance Tenets for Sustainable Development: Moving Forward	248
7. Conclusion	251
Embracing Technology for Enhanced Efficiency and Access to Justice in the Legal Profession	253
1. Introduction.....	253
2. Legal Practice in Kenya in the Modern Era: Challenges and Prospects	255
3. Progress Towards Embracing Technology as a Tool of access to Justice in the legal Profession in Kenya.....	256
3.1 Virtual Court Infrastructure	256
3.2 Digitization of Legal Services.....	257
4. Challenges and Concerns with the use of technology as a tool of access to justice in the legal profession.....	258
4.1 Data Privacy/Information Security Concerns.....	258
4.2 Challenges in using legal technology	258
4.3 Risk of Technological Failure.....	259
4.4 Credibility concerns during examination of witnesses	259
4.5 Loss of Jobs	259
4.6 Costs	260

5. Way Forward: Embracing Technology for Enhanced Efficiency and Access to Justice in the Legal Profession.....	260
5.1 Investing in Legal Technology	260
5.2 Safeguarding the Privacy of Data	261
5.3 Rolling Out E-Literacy Training/Education.....	261
5.4 Capacity Building	261
5.5 Enhanced e-filing and service of Court Pleadings and Documents	262
5.6 Amendment of Remuneration order to guide on Legal fees payment by clients	262
5.7 A Possibility for Virtual Law Firms in Kenya	262
5.8 Globalization of Legal Services through Enhanced Collaboration Between Local and Foreign Law Firms	263
6. Conclusion	263
Entrenching Biodiversity Impact Assessment in Kenya as a Tool for Enhancing Sustainable Development Agenda	264
1. Introduction.....	264
2. Environmental Impact Assessment in Kenya: Legal and Institutional Framework	265
2.1 The Constitution of Kenya 2010	265
2.2 Environmental Management Coordination Act, 1999 (EMCA).....	266
2.3 Environmental Management and Co-ordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations, 2006	268
3. Environmental (Impact Assessment and Audit) Regulations, 2003.....	269
3.1 Convention on Biological Diversity 1992.....	270
4. Biodiversity Conservation: Challenges and Prospects.....	271
5. Entrenching Biodiversity Impact Assessment in Kenya as a Tool for Enhancing Sustainable Development Agenda.....	272
5.1 Biodiversity Monitoring	273
5.2 Adaptive Management of Biodiversity Resources	273
6. Conclusion	274
Exploring Heritage Impact Assessment in Kenya.....	276
1. Introduction.....	276
2. Framework for Heritage Impact Assessment.....	277
3. Heritage Impact Assessment in Kenya	279
4. Way Forward: Exploring Heritage Impact Assessment for Sustainable Development in Kenya	280
5. Conclusion	281
The Viability of Arbitration in management of Climate Change Related Disputes in Kenya	283
1. Introduction.....	283
2. Nature of Climate Change Related Conflicts and Disputes	284
3. Approaches to Management of Disputes and Conflicts	285
3.1 Conflicts	285
3.2 Disputes	286
4. Arbitration Process and management of Disputes	287
5. Using Arbitration as a Tool for management of Climate Change Disputes: Challenges and Prospects	288
6. Conclusion	292
Transitioning from Fossil Fuel-Based Transport to Clean Energy Vehicles in Africa: Challenges and Prospects	294
1. Introduction.....	294

2. Fossil Fuel-Based Transport and Climate Change: The Connection	295
3. Transport Sector in Kenya.....	296
4. Development of Clean Energy Vehicle Technologies: Challenges and Prospects.....	297
5. Transitioning from Fossil Fuel-Based Transport to Clean Energy Vehicles in Africa.....	298
5.1 Government's Tax Incentives on Electric Cars	299
5.2 Adopting and Implementing Vehicles Standards in Africa	300
5.3 Public-Private Partnerships for Funding, Research and Development and Operation of Electric Vehicles Infrastructure	300
6. Conclusion	301
Fostering a Human Rights Approach to Biodiversity Conservation in Kenya.....	302
1. Introduction.....	302
2. Defining Environmental Democracy and Biodiversity Conservation: The Linkage.....	303
2.1 Linking Environmental Democracy and Biodiversity Conservation	306
3. A Human Rights Approach to Biodiversity Conservation.....	308
4. Fostering A Human Rights Approach to Biological Diversity Conservation in Kenya	311
4.1 Enhancing Environmental Education in School Curricula for Environmental Awareness and Environmental Ethics	311
4.2 Entrenching Rights-Based Approaches in Conservation Laws on Biological Diversity Conservation.....	312
4.3 Effective Pest Control for Biodiversity Conservation	315
4.4 Biodiversity Mainstreaming for Food and Nutrition Security	317
4.5 Place of Indigenous Knowledge in Biodiversity Conservation	318
5. Conclusion	321
Tracing the Role of Biodiversity Conservation in Achieving Sustainable Development Goals.....	322
1. Introduction.....	322
2. Linking Biodiversity Conservation and Sustainable Development Goals	323
3. Conclusion	328
Approaches to Biodiversity Conservation: Embracing Global Resource Conservation Best Practices	330
1. Introduction.....	330
2. Biodiversity: Definition and Scope	331
3. General Approaches to Biodiversity Conservation.....	332
3.1 In-situ Biodiversity Conservation	333
3.2 Ex-situ Conservation.....	334
3.3 Ecosystem Services Approaches for Biodiversity Conservation	335
4. Overview of the Convention on Biological Diversity	337
5. Conclusion	342
Biodiversity Mainstreaming for Food and Nutrition Security in Kenya.....	343
1. Introduction.....	343
2. Place of Biodiversity in Achieving Food and Nutrition Security: International and Domestic Regulatory Framework	344
2.1 International Convention on Protection of New Plant Varieties	345
2.2 Convention on International Trade in Endangered Species of Wild Fauna and Flora	345
2.3 International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) ..	346
2.4 COP 10 Decision X/2, Strategic Plan for Biodiversity 2011-2020.....	346
2.5 COP 8 Decision VIII/23, Agricultural biodiversity: Cross-cutting initiative on biodiversity for food and nutrition	347

2.6 A/RES/70/1 - Transforming our world: the 2030 Agenda for Sustainable Development..	347
2.7 Aichi Target 13	348
2.8 The Crops Act 2013.....	348
2.9 National Food and Nutrition Security Policy, 2011	349
2.10 National Horticulture Policy, 2012	349
2.11 Agriculture and Food Authority (AFA) 2016-2021 Strategic Plan	349
2.12 Constitution of Kenya 2010	349
2.13 Kenya’s Vision 2030	351
2.14 Seeds and Plant Varieties Act, Cap 326	351
2.15 Biosafety Act, 2009	352
2.16 Environmental Management and Co-Ordination (Conservation of Biological Diversity and Resources, And Access to Genetic Resources and Benefits Sharing) Regulations, 2006 ..	352
2.17 Kenya Plant Health Inspectorate Service Act, 2012.....	353
2.18 Challenges in Biodiversity Mainstreaming for Food and Nutrition Security	353
3. Promoting Biodiversity Mainstreaming for Food and Nutrition Security	354
3.1 Adoption of Climate-Smart Agriculture	354
3.2 Protection of Pollinators	354
3.3 Embracing Production and Consumption of Traditional and Indigenous Food Varieties..	355
3.4 Promoting Biological Pest Control Approaches.....	356
4. Conclusion	356
Gender Perspectives in Biodiversity Conservation.....	358
1. Introduction.....	358
2. Gender Perspectives in Biodiversity Conservation: The Legal and Policy Framework.....	360
3. Gender Perspectives in Biodiversity Conservation.....	363
4. Conclusion	364
Promoting Sustainable Land Use Practices and Agricultural Resources Management for Biodiversity Conservation	366
1. Introduction	366
2. Relationship between Agriculture and Biodiversity	367
3. Sustainable Land Use and Agricultural Practices and Biodiversity Resources in Kenya: The Challenges.....	368
4. Legal and Policy Framework on Biodiversity Conservation in Land use and Agricultural Practices in Kenya.....	370
5. Adoption of Sustainable Agricultural Production Methods and Diversification of Livelihoods	373
6. Conclusion.....	376
Boosting Biodiversity Conservation Through Sustainable Forest Resources Management	377
1. Introduction.....	377
2. Forest Resources and Biodiversity Conservation	378
3. Challenges in Biodiversity Conservation and Forest Resources Management in Kenya	380
4. Sustainable Management of Forests for Biodiversity Conservation	383
4.1 Addressing Poverty as a Causation Factor in Deforestation.....	384
4.2 Role of Technology and Innovation in Combating Deforestation	385
4.3 Promoting Agroforestry for Biodiversity Conservation	387
5. Conclusion	388

Addressing the Contemporary Issues in Biodiversity Conservation	390
1. Introduction.....	390
2. Contemporary Issues in Biodiversity Conservation	390
2.1 Sustainable Trade and Investment Regimes.....	391
2.2 Climate Change Mitigation and Biodiversity Conservation.....	395
2.3 Global Partnerships for Biodiversity Conservation and Sustainable Development	397
2.4 Upholding Human Rights and Meaningful Public Participation in Development Projects	398
2.5 Funding Biodiversity Conservation Efforts.....	404
3. Conclusion	408
The Race to Zero Emissions from an African Perspective	409
1. Introduction.....	409
2. Greenhouse Gases Emissions and Climate Change: The Link	410
3. International Regulatory Framework on Carbon Emissions	411
3.1 Conference of Parties 26 (COP 26).....	411
3.2 Intergovernmental Panel on Climate Change (IPCC)	412
3.3 The United Nations Framework Convention on Climate Change 1992	412
3.4 Vienna Convention for the Protection of the Ozone Layer (1985).....	413
3.5 Montreal Protocol on Substances that Deplete the Ozone Layer, 1987 and the Kigali Amendment of 2016	414
3.6 Kyoto Protocol to the United Nations Framework Convention on Climate Change (1997)	415
4. Domestic Regulatory Framework on Carbon Emissions: The Case of Kenya.....	416
4.1 The Constitution of Kenya 2010	416
4.2 Sessional Paper No. 3 of 2016 on National Climate Change Framework Policy	416
4.3 Climate Change Act 2016.....	417
5. The Race to Zero Emissions: The Challenges	418
5.1 The Race to Zero Emissions from an African Perspective: Way Forward	418
5.2 Clean Development Mechanism	419
5.3 Transition from Fuel-Based Transport to Electric Vehicles in Africa	419
5.4 Role of the Private Sector in Reducing Emissions	419
5.5 Investing in Affordable Energy Technology Innovation in Reducing Greenhouse Gas Emissions.....	420
5.6 Poverty Eradication	421
5.7 Investing in Off-Grid and Mini-grid Energy Sources: Renewable Energy for Climate Change Mitigation	422
6. Conclusion	423
Adopting Holistic Approaches to Biodiversity Conservation and Water Resources Management for Sustainable Development.....	425
1. Introduction.....	425
2. Linking Biodiversity Conservation and Water Resources	426
3. Factors Affecting Water Resource Availability and Use.....	427
4. Approaches to Effective Biodiversity Conservation and Water Resources Management	429
4.1 Ecosystem Services Approaches for Biodiversity Conservation.....	430
4.2 Payment for Water Ecosystem Services.....	431
4.3 Integrated River Basin Management.....	432
5. Conclusion	434

Upholding Human Rights and Meaningful Public Participation in Development Projects	436
1. Introduction.....	436
2. Human Rights and Meaningful Public Participation in Development Projects: The Connection	439
3. Kenya’s Legal and Policy Framework on Meaningful Public Participation in Development Projects: Challenges and Prospects	443
4. Upholding Human Rights and Meaningful Public Participation in Development Projects.....	447
4.1 Addressing the Lack of Political Goodwill to enhance Public Participation	447
4.2 Eradicating Illiteracy for Community Empowerment	448
4.3 Enhancing Corporate Social Responsibility for Human Rights Violations	450
4.4 Promoting Meaningful and Effective Impact Assessment Processes	451
4.5 Addressing Corruption.....	452
4.6 Promoting Civil Education	453
4.7 Promoting Fair and Equitable International Trade and Investments Regimes	453
5. Conclusion	453
Attaining Effective Peacebuilding and Conflict Management in Kenya	455
1. Introduction.....	455
2. Peacebuilding, Conflict Management and Development.....	458
3. Peacebuilding and Conflict Management in Africa: Continental Status	459
4. Peacebuilding and Conflict Management in Kenya: Towards Effective Peacebuilding and Conflict Management.....	460
4.1 Addressing Poverty, Ethnic and Social stratification	460
4.2 Joint and Participatory Efforts in Peacebuilding and Conflict Management	463
4.3 Addressing the Weak or Non-Existent Structures and Institutions for Peacebuilding, Conflict Prevention and Response	467
5. Conclusion	471
Delivering Clean and Affordable Energy for All	472
1. Introduction.....	472
2. Place of Clean and Affordable Energy in Sustainable Development Agenda.....	473
3. Accessing Clean and Affordable Energy Needs for All: The Kenyan Experience	474
4. Delivering Clean and Affordable Energy for All: The Global Trends and the Lessons.....	478
4.1 Transition to Cleaner Energy Models	478
4.2 Investing in Science, Technology and Innovation for Provision of Sustainable Energy for All.....	481
4.3 Newer Business Models in Energy Sector: Opening Up the Energy Sector	483
4.4 Enhancing the Role of Private Sector in Renewable Energy Sector.....	487
4.5 Promoting Energy Efficiency in Kenya	489
4.6 Addressing Barriers in Renewable Energy Uptake in Kenya	489
5. Conclusion	490
Conserving Biodiversity for a Better Future.....	492
1. Introduction.....	492
2. Biodiversity: Definition and Scope	493
3. Biodiversity Conservation: International and National Regulatory Frameworks	494
3.1 International and Regional Regulatory framework on Biodiversity Conservation	494
3.2 Kenya’s Regulatory Framework on Biodiversity Conservation	499
4. Effective Conservation of Biological Diversity: Prospects and Challenges in Kenya	510
5. Conserving Biodiversity for a Better Future	511
5.1 Adoption of Sustainable Agricultural Production methods and Diversification of Livelihoods.....	511
5.2 Enhancing Environmental Education in School Curricula	513

5.3 Adopting Rights-Based Approaches to Biological Diversity Conservation	514
5.4 Effective Pest Control for Biodiversity Conservation	516
5.5 Biodiversity Mainstreaming for Food and Nutrition Security	518
6. Conclusion	519

Embracing Science and Technology in Legal Education for Efficiency and Enhanced Access to Justice520

1. Introduction.....	520
2. Growth and Development of Legal Education and Training in Kenya: Looking into the Future	522
3. Embracing Science and Technology in Legal Profession for Efficiency and Enhanced Access to Justice	523
3.1. Use of Legal Technology within the Legal Profession in Kenya: Progressive or Conservative Profession?.....	523
3.2. Legal Practice in the 21 st Century: Challenges and Prospects	526
4. Enhancing Access to Justice through Embracing Technology in the Legal Practice and Legal Education and Training	527
4.1 Artificial Intelligence for Enhanced Productivity and Outreach	527
4.2 Investing in Virtual Hearings Infrastructure.....	531
4.3 Safeguarding the Privacy of Data: Transfer, Processing and Storage of Data	532
4.4 Rolling out E-literacy Trainings/Education	534
4.5 Training, Regulation and Capacity Building: Embracing Science and Technology in Legal Education and Training Institutions	535
4.6 Enhanced e-filing and service of Court Pleadings and Documents	538
4.7 Amendment of Remuneration order to guide on Legal fees payment by clients	539
4.8 Licensing and Regulation of virtual law firms	539
4.9 A Possibility of Online Courts?	540
4.10 Addressing the Disconnect Between Skills Acquired in Law Schools and Market Needs	542
4.11 Enhanced collaboration Between International Law Firms and Local Firms/ Globalization of Legal Services	543
5. Conclusion	543

Recognising a Human Right to Safe, Healthy and Sustainable Environment545

1. Introduction.....	545
2. Safe, Healthy and Sustainable Environment: The Elements.....	547
3. Place of Safe, Healthy and Sustainable Environment in the Sustainable Development Agenda	548
4. Human Right to Safe, Healthy and Sustainable Environment: Prospects and Challenges ..	549
5. Recognising a Human Right to Safe, Healthy and Sustainable Environment	551
6. Conclusion	552

Resource Mobilization for Sustainable Development in Kenya.....553

1. Introduction.....	553
2. Sustainable Development: Laying the Groundwork.....	553
3. Domestic Resource Mobilization in Kenya: Challenges and Prospects.....	556
4. Strengthening Domestic Resource Mobilization for Sustainable Development in Kenya: Way Forward.....	562
5. Conclusion	565

Sustainable Development Goals and Social Justice in Kenya	567
1. Introduction.....	567
1.1 Social Justice: Meaning and Concepts	568
2. Social Justice and the Law: International and National Legal Frameworks.....	570
2.1 International and Regional Legal Frameworks on Social Justice	570
3. Domestic Legal Frameworks: Kenya	571
4. Sustainable Development Goals (SDGs) and Social Justice.....	572
5. Achieving Social Justice in Kenya: Challenges	572
6. Attaining Sustainable Development Goals for Social Justice in Kenya.....	574
7. Conclusion	580
Combating Climate Change in Kenya for Sustainable Development.....	581
1. Introduction.....	581
2. Climate Change: Definition and Causes.....	584
3. The Legal Framework on Climate Change Mitigation and Adaptation	585
4. International Legal Framework on Climate Change Mitigation and Adaptation	585
4.1 Montreal Protocol on Substances that Deplete the Ozone Layer.....	585
4.2 Vienna Convention for the Protection of the Ozone Layer	585
4.3 The Kyoto Protocol.....	585
5. The Kyoto Protocol was essentially replaced by the Paris Climate Accord in 2015.....	586
5.1 Doha Amendment to the Kyoto Protocol	586
5.2 Paris Climate Accord, 2015	586
5.3 United Nations Convention to Combat Desertification.....	587
5.4 Agenda 21.....	587
5.5 United Nations Framework Convention on Climate Change (UNFCCC).....	587
5.6 Intergovernmental Panel on Climate Change (IPCC)	588
6. Kenya’s Legal Framework on Climate Change Mitigation	589
6.1 Environmental Management and Co-ordination Act, 1999.....	589
6.2 Climate Change Action Plan 2018–2022	590
6.3 Climate Change Act, 2016.....	590
6.4 Climate Change Mitigation in Kenya: Challenges and Prospects	590
Kenya’s updated Nationally Determined Contribution (NDC) to the United Nations Framework Convention on Climate Change (UNFCCC) submitted on 28th December 2020	591
7. Combating Climate Change for Sustainable Development: Way Forward.....	591
7.1 International Cooperation on Climate Change Mitigation	591
7.2 Integrated Approach to Reduction of Greenhouse Gases Emission	592
7.3 Inclusion of Communities in Climate Change Impact Reduction and Early Warning Systems.....	595
7.4 Environmental Education and Creating Awareness on Climate Change Mitigation and Resilience	595
7.5 Integrating Traditional Knowledge with Mainstream Scientific Knowledge for Climate Mitigation and Adaptation	597
7.6 Diversification of Economic Activities for Poverty Eradication and Climate Change Mitigation and Adaptation	599
7.7 Embracing Climate Resilient Agricultural Production Methods for Climate Change Mitigation and Poverty Reduction	600
8. Conclusion	601
Promoting Peaceful and Inclusive Societies for Sustainable Development in Kenya	603
1. Introduction.....	603
2. Peace: meaning and Scope	603
3. Peace efforts in Kenya: Challenges and Prospects	604

4. Promoting Sustainable Peace and Inclusive Societies for Sustainable Development in Kenya.....	605
5. Securing Sustainable Community Livelihoods for Peace: Sustainable Development Planning and Capacity Development	606
5.1 Addressing Gender Equality and Equity for Sustainable Peace and Inclusive Society	606
5.2 Streamlining Environmental and Natural Resources Governance and Climate Change Mitigation	608
5.3 Building Accountable and Inclusive Institutions for Peaceful and Inclusive Society...	608
6. Conclusion	609
Fulfilling the Right to Water as a Socio-economic Right for the People of Kenya	611
1. Introduction.....	611
2. Right to Water as a Socioeconomic Right: International legal framework	612
3. National Legal and Institutional Framework on Access to Water	614
4. Challenges Hindering Access to Water in Kenya.....	615
4.1 Climate Change and Access to Clean, Safe and Adequate Water	615
4.2 Legal and Institutional Challenges.....	615
4.3 Poverty.....	616
4.4 Population Growth and Rural-Urban Migration.....	616
4.5 Gender Inequality and Realization of Right to Water	616
5. Fulfilling the Right to Water as a Socioeconomic Right for the People of Kenya	617
5.1 Public Participation and Consultation in Decision-Making	617
5.2 Addressing Poverty for Fulfilling the Right to Water	617
5.3 Addressing Gender Inequality in Water Services.....	617
5.4 Combating Climate Change for Safeguarding Water Resources	619
5.5 Financing of Water Projects.....	619
5.6 A Human Rights Approach to Water Services Provision.....	619
6. Conclusion	621
Actualising the National Policy on Gender and Development in Kenya	623
1. Introduction.....	623
2. The Policy, Legal and Institutional Framework on Gender Issues in Kenya	624
2.1 International and Regional Legal Instruments Relating to Gender Equality and Mainstreaming	624
2.1.1 Universal Declaration of Human Rights	625
2.1.2 Convention on the Elimination of All Forms of Discrimination against Women	626
2.1.3 International Covenant on Civil and Political Rights	627
2.1.4 Nairobi Forward looking Strategies for the Advancement of Women	627
2.1.5 Fourth World Conference on Women, Beijing Declaration and Platform for Action.....	628
2.1.6 United Nations Declaration on the Elimination of Violence against Women	629
2.1.7 African Charter on Human and Peoples Rights (Banjul Charter).....	629
2.1.8 Southern African Development Community (SADC), 1997 Declaration on Gender and Development and 2008 Protocol on Gender and Development	630
2.1.9 African Union (AU), Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa	631
2.1.10 African Union Solemn Declaration of Gender Equality in Africa, 2004.....	631
2.1.11 African Union Gender Policy, 2009.....	632
2.2 National Legal Instruments and Institutions Relating to Gender Equality and Mainstreaming in Kenya.....	632
2.2.1 National Policy on Gender and Development, 2000	632
2.2.2 National Policy for Prevention and Response to Gender Based Violence, 2014.....	633
2.2.3 Constitution of Kenya 2010	633
2.2.4 National Gender and Equality Commission	633

2.2.5 State Department for Gender Affairs	634
3. Gender and Development in Kenya: The Challenges	634
4. 2019 National Policy on Gender and Development: Overview	636
5. Actualising the National Policy on Gender and Development in Kenya: Prospects	640
6. Conclusion	641
Exploring Alternative Sources of Energy in Kenya.....	643
1. Introduction.....	643
2. Energy Sources in Kenya: the Challenges	644
3. Nuclear Power as a Substitute for Fossil Fuels.....	647
4. Nuclear Energy in Kenya: Legal and Institutional Framework	648
4.1 Nuclear Power and Energy Agency (NuPEA)	648
4.2 Nuclear Regulatory Act 2019	648
5. Nuclear Energy in Kenya: Getting it Right	648
5.1 Capacity Building	649
5.2 Public Awareness.....	649
6. Lessons from Elsewhere: Making the Best of Nuclear Power.....	649
6.1 Lessons from Other Jurisdictions.....	650
6.1.1 France	650
6.2 Germany	650
6.3 Sweden	651
7. Realizing the Right to Clean and Sustainable Energy for all.....	651
7.1 Expanding infrastructure and upgrading technology for supplying modern and sustainable energy services	652
7.2 Mainstreaming Gender Issues in Energy and Addressing Poverty.....	652
7.3 Promoting Energy Efficiency in Kenya	652
7.4 Capacity Building for Adoption of Nuclear Power	653
8. Conclusion	654
Adopting the Singapore Convention in Kenya: Insight and Analysis	655
1. Introduction.....	655
2. Scope and Application of the Singapore Convention	656
3. UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002).....	657
4. Application of the Singapore Convention and the Model Law in Kenya	658
5. Adopting the Singapore Convention in Kenya	661
The Place of Human Rights in Environmental and Natural Resources Conflicts Management in Kenya	663
1. Introduction.....	663
2. Linking Human Rights and the Environment.....	665
3. Environmental and Natural Resources Conflicts: Overview of Conflict Management Mechanisms	668
4. Human Rights Protection in Environmental and Natural Resources Conflicts: Prospects and Challenges.....	672
5. Securing Human Rights in Environmental and Natural Resources Conflict Management	676
6. Conclusion	679
Mainstreaming the Role of Women in Peacemaking and Environmental Management in Kenya	681
1. Introduction.....	681
2. Peacemaking and Environmental Management: The Linkage.....	682

3. Role of Women in Peacemaking: Challenges and Prospects	685
4. Role of Women in Environmental Management	688
5. Mainstreaming the Role of Women in Peacemaking and Effective Environmental Management in Kenya	689
5.1 Empowerment of Women through Elimination of Poverty	692
5.2 Formal and Non-Formal Education for Meaningful Participation of Women	693
5.3 Encouraging Active Participation of Women in Peace Negotiation and Mediation Processes	694
6. Conclusion	695
Nurturing Our Environment for Sustainable Development	697
1. Introduction	697
2. Environment and Sustainable Development	698
3. Environmental Sustainability and Sustainable Development: The Framework	699
4. National Obligations on Environment and Sustainable Development	705
5. Definition and Elements of Sustainable Development	706
5.1 Definition of Sustainable Development	706
5.2 Basic Principles of Sustainable Development	710
6. General Approaches to Sustainability and Sustainable Development Debate	719
7. Human Rights, Sustainable Development and the Environment	723
7.1 Environmental Protection and Human Rights	723
7.2 Greening of Human Rights versus Third Generation Rights	726
8. Environment and Sustainable Development in Kenya	728
8.1 Domesticating Principles of Sustainable Development	729
8.2 Legal and Regulatory Framework on Environmental Governance and Sustainable Development in Kenya	730
8.2.1 Equitable Benefit Sharing for Social Sustainability	733
8.2.2 Devolution and Sustainable Development in Kenya: Challenges and Prospects	736
8.2.3 National Courts and Sustainable Development	738
8.2.4 Community Empowerment for Sustainable Use and Management of Natural Resources	741
8.2.5 Environmental Impact Assessment, Environmental Audit and Monitoring of the Environment	744
8.2.6 Addressing Climate Change for Sustainable Development	747
8.2.7 Sustainable and Inclusive Approaches to Environmental Resources Management	752
9. Natural Resources Exploitation and Sustainable Development	758
10. Climate Change and Sustainable Development	760
11. Environmental Security and Sustainable Development	761
12. Food Security and Environmental Sustainability in Kenya	762
13. Promoting the Right to Clean and Healthy Environment for Sustainable Development	763
14. Environment, Trade and Sustainable Development	765
15. Indigenous Knowledge and Sustainable Development	768
16. Attaining Gender Equity for Sustainable Development	770
17. Managing Natural Resource Conflicts for Sustainable Development	772
18. Moving beyond the Law: Sustainable Development as a Way of Life	775
18.1 Poverty Eradication for Sustainable development	775
18.2 Use of Science, Technology and Innovation for Sustainable Development	775
18.3 The Green Economy Approach	776
18.4 Embracing Environmental Ethics for Sustainable Development	776
18.5 Education for Environmental Sustainability and Sustainable Development	777
18.6 Promoting Environmental Justice for Sustainable Development	777

Institutionalizing Traditional Dispute Resolution Mechanisms and other Community Justice Systems.....	780
1. Introduction.....	780
1.1 Background.....	781
1.2 Methodology and Research Design	783
1.3 Stakeholder Consultative Forums	783
1.4 Limitations.....	784
1.5 Recommendations.....	784
2. Status of TDRs and ADR in Kenya.....	784
2.1 Overview of TDRs and ADR in Kenya	785
2.1.1 The Repugnancy Test	787
2.1.2 Conflict Resolution versus Dispute Settlement	788
2.2 Findings and Analysis.....	789
2.2.1 Advantages of TDRs and Other Community Based Justice Systems	789
2.2.2 Disadvantages of TDRs and Other Community Based Systems	790
2.2.3 Disputes Resolved By Use of TDRs	792
2.2.4 Role of Women in the Community Justice System	793
2.2.5 TDR Tribunal Proceedings	795
2.3 Other Field Studies	801
2.4 Alternative Dispute Resolution Mechanisms (ADR)	802
3. Analysis of the Legal, Policy and Administrative Framework for TDRs and Other Community Based Justice Systems.....	804
3.1 Legal Framework.....	804
3.1.1 The Constitution, 2010	804
3.1.2 Civil Procedure Act and Rules, Cap 21.....	805
3.1.3 Evidence Act, Cap 80	807
3.1.4 Judicature Act, 1967	807
3.1.5 Limitation of Actions Act, Cap 22	808
3.1.6 Kadhis’ Courts Act, Cap 11	808
3.1.7 Appellate Jurisdiction Act, Cap 9	809
3.1.8 Land Act, 2012	809
3.1.9 Marriage Act, 2014.....	810
3.1.10 Matrimonial Property Act, 2013	810
3.1.11 Industrial Courts Act, 2011	811
3.1.12 Commission on Administrative Justice Act, 2011	811
3.1.13 The National Land Commission Act, 2012.....	812
3.1.14 National Cohesion and Integration Act, 2008	812
3.1.15 Supreme Court Act No.7 of 2011.....	813
3.1.16 Environment and Land Court Act, 2011	813
3.1.17 The Legal Aid Act, 2016	814
3.1.18 Community Land Act, 2016.....	815
3.1.19 The High Court (Organization and Administration) Act, 2015	815
3.1.20 The Court of Appeal (Organization and Administration) Act, 2015	816
3.2 Policy Framework.....	816
3.2.1 Objectives of the policy framework	817
3.2.2 Policy Proposals.....	817
3.3 Administrative /Institutional Framework	819
3.3.1 Courts and Tribunals.....	819
3.3.2 Independent Commissions	819
3.3.3 Rules Committee of the Judiciary	820
3.3.4 County Governments	820
3.3.5 Civil Society Organizations	820
3.3.6 Councils of Elders.....	820

3.3.7 Local Administration	820
4. A Survey of TDRMs from Other Jurisdictions	820
5. Summary of Recommendations	826
5.1 General Recommendations	826
5.2 Legal and Policy Framework Recommendations	826
5.2.1 Policy Framework Recommendations	826
5.2.2 Legal Framework Recommendations	828
6. Conclusion	830
Actualising Socio-Economic Rights for Sustainable Development in Kenya	832
1. Introduction.....	832
2. Socio-Economic Development as Part of Sustainable Development.....	832
3. Socio-Economic Rights in Kenya: The Scope.....	833
4. Realising Socio-Economic Rights in Kenya: Are We Yet There?.....	837
5. Actualising Socio-Economic Rights under the Constitution of Kenya for Sustainable Development.....	838
5.1 Addressing Unemployment and Low Incomes for Poverty reduction and Empowerment	838
5.2 Enhanced and Diverse Education Opportunities	840
5.3 Role of Businesses in Socio-Economic Development.....	841
5.4 Tackling Corruption in Governance Matters.....	842
5.5 Investing in Science and Technological Development for Socio-Economic Empowerment	842
5.6 Duties of Citizens towards securing Socio-Economic Empowerment	843
7. Conclusion	844
Promoting Community Based Approaches in Environmental and Natural Resources Management in Kenya: A Reality or Mere Formality?.....	845
1. Introduction.....	845
2. Approaches to Environmental and Natural Resources Management	845
2.1 Community Based Approaches in Environmental and Natural Resources Management	846
3. Regulatory Framework on Community Based Approaches in Environmental and Natural Resources Management in Kenya: Challenges and Prospects	847
4. Walking the Talk: Making Community Based Approaches in Environmental and Natural Resources Management Work in Kenya	853
5. Conclusion	856
Bibliography	857

Dedication

Dedicated to the idea
that realising the
Right to a Clean & Healthy
Environment
is a Human right
that is achievable

And that we must
nurture our environment
for the sake of Today
and Tomorrow.

And to the reality
that peace and harmony
are virtues that we should
always seek.

We must stand up
For what we believe
in
And attain
Environmental Justice.

This work honours the thought
that we must dream
and dream big

That what was once a
dream
will one day
become a reality
And that tomorrow
is what we create today.

We must remind ourselves
That we were born to
be great
We were born to win.

And that success
is available to those
who pursue worthwhile goals.

This book is also dedicated
To those who never ever give
up
To those who rise above
adversity
Rise above loss
Rise above pain
grief
and tears

Keep going
A warm sunny tomorrow
will certainly unfold.

The book is also dedicated to the idea
that we must get rid
of the fear of failure
And
The fear of success.

This Race
is ours to run Today
To reach a Green
Tomorrow.

Acknowledgments

I wish to express my gratitude and humility to my maker. He put me here for a reason- To walk the Earth and make a difference. I know I have succeeded in changing a small corner of the world.

I am deeply indebted to all those who have made it possible to make this book a reality. These include the sages at whose feet I learnt and the many bright minds I have interacted with.

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I appreciate those who urge me to keep believing; To never ever give up; And to be strong; And to brave the sun and rain.

Finally, I extend my gratitude to my family. Together we have faced tragedies, pain and grief. Despite the odds, my family has stood by me. They have helped me get back to my feet and enjoy warm days again. May you be blessed.

Author's Note

The book entails a collection of papers on Environmental Justice in Kenya and Africa. Some of the papers have been published in peer-reviewed Journals and book chapters.

Environmental justice involves the right to have access to natural resources; not to suffer disproportionately from environmental policies, laws and regulations; and the right to environmental information, participation and involvement in decision-making¹.

Environmental Justice is a fundamental right in Kenya and Africa at large. In Africa, Environmental Justice mostly entails the right to have access to, use and control over natural resources by communities².

However, attainment of Environmental Justice in Kenya and Africa has been curtailed by several factors including poor governance and the resource curse phenomena that has resulted in prolonged conflicts over natural resources³.

The environment is critical to the well-being and survival of human beings. At the global level, the Sustainable Development Goals represent a shared blueprint towards achieving environmental sustainability through measures such as combating climate change, promoting access to affordable and clean energy and ensuring access to clean water and sanitation⁴.

This book was necessitated by the desire to merge the author's work in Environmental Justice. The papers address some of the salient and pertinent concerns facing the attainment of Environmental Justice in Kenya and Africa. They further cover the author's reflections and recommendations towards Attaining Environmental Justice for Posterity.

Key themes covered in the book include: the nexus between Sustainable Development and Environmental Justice; the right to a clean and healthy environment; the role of Conflict Management in attainment of Environmental Justice; Human Rights Concerns in Environmental Justice; Environmental Impact Assessment; Heritage Impact Assessment; Biodiversity Impact Assessment; Public Participation; Environmental Security and the role of good governance in fostering Environmental Justice.

¹ Ako. R., 'Resource Exploitation and Environmental Justice: the Nigerian Experience.' In Botchway, F.N. (ed), *Natural Resource Investment and Africa's Development*, (Cheltenham, UK: Edward Elgar Publishing, 2011), pp. 74-76

² Obiora. L., 'Symbolic Episodes in the Quest for Environmental Justice.' *Human Rights Quarterly*, Vol. 21, No.2, 1991, p 477

³ Muigua. K., Wamukoya. D & Kariuki. F., *Natural Resources and Environmental Justice in Kenya* Glenwood Publishers Limited, 2015

⁴ United Nations Development Programme., 'Sustainable Development Goals.' Available at https://www.undp.org/sustainable-development-goals?utm_source=EN&utm_medium=GSR&utm_content=US_UNDP_PaidSearch_Brand_English&utm_campaign=CENTRAL&c_src=CENTRAL&c_src2=GSR&gclid=Cj0KCQiA99ybBhD9ARIsALvZavWNMvsCAvNeXqTshLy9LfOyGGBIImao3oJlvkpXGGPI47FPfCeGiLcaAlbQEALw_wcB

The book also addresses emerging concerns such as the COVID-19 pandemic and the concept of Environmental, Social and Governance (ESG) and their place in the Environmental Justice discourse.

Attainment of Environmental Justice for Posterity is an achievable reality.

Kariuki Muigua

Nairobi, Kenya November 2022

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List of Abbreviations

ADR	Alternative Dispute Resolution
EMCA	Environmental Management and Coordination Act
ESG	Environmental Social and Governance
GDP	Gross Domestic Product
IEL	International Environmental Law
NEMA	National Environmental Management Authority
NET	National Environment Tribunal
RBAs	Rights-Based Approaches
SDGs	Sustainable Development Goals
TDR	Traditional Dispute Resolution
TDRMs	Traditional Dispute Resolution Mechanisms
UNDP	United Nations Development Programme
UNSCR	United Nations Security Council Resolution
APSEA	Association of Professional Societies in East Africa
CADR	Centre for Alternative Dispute Resolution
CIArb	Chartered Institute of Arbitrators (Kenya Branch)
CIC	Commission for Implementation of the Constitution
CUCs	Court User Committees
FIDA	Federation of Women Lawyers
ICJ	International Commission of Jurists
KEPSA	Kenya Private Sector Alliances
KLA	Kenya Land Alliance

KLRC	Kenya Law Reform Commission
KNHCR	Kenya National Commission on Human Rights
LSK	Law Society of Kenya
NCIA	Nairobi Centre for International Arbitration
NCMG	Negotiation & Conflict Management Group
NLC	National Land Commission
SDRC	Strathmore Dispute Resolution Centre
TDR	Traditional Dispute Resolution
TDRMs	Traditional Dispute Resolution Mechanisms
TDRs	Traditional Dispute Resolution systems
TJS	Traditional Justice Systems
UNDP	United Nations Development Programme

Overview of Conflict Management in Environmental Matters

Abstract

This paper offers a general overview of conflict management in relation to environmental matters. The paper is informed by the proposition that environmental conflicts are inevitable but what matters is how and why they must be managed in effective ways. The author argues that there is a genuine incentive to manage these conflicts in amicable ways as they greatly affect not only the general stability of the country but also the livelihoods of communities, as a prerequisite for achieving sustainable development agenda.

1. Introduction

This paper is largely informed by the need to address the effect of conflicts on environmental matters and the resultant interactions between the two fields. Notably, the United Nations 2030 Agenda for Sustainable Development Goals (SDGs) acknowledges the place of peace in attaining not only environmental conservation but also the sustainable development goals. The paper seeks to explore the link between conflict management and environmental management, the challenges arising therefrom and offers some viable recommendations on how the same can be addressed. This paper offers a general introduction and background information on conflict management in environmental matters. The paper also provides a glimpse of the general ideas and justifications that inform conflict management in environmental matters to enable the reader appreciate the theme of conflict management in environmental matters.

The discourse on conflict management and the environment in Kenya has come a long way. Various authors have voiced their opinions on the debates based on the developing international jurisprudence and the evolving domestic laws. This paper is informed by the various themes that are closely related environment and conflict management including but not limited to: Access to Justice; Sustainable Development; Environment; and Democracy/Environmental Democracy. It is arguable that unless environmental conflicts are managed effectively, the achievement of most or all of the aforementioned themes will remain a mirage.¹

2. Overview of Environmental Conflicts

The Environmental Management and Coordination Act (EMCA) defines “environment” as follows:

“Environment” includes the physical factors of the surroundings of human beings including land, water, atmosphere, climate sound, odour, taste, the biological factors of animals and plants and the social factor of aesthetics and includes both the natural and built environment.²

¹ Lazarus, L., "Securitizing sustainable development? The coercive sting in SDG 16." In Sustainable Development Goals and Human Rights, pp. 155-169. Springer, Cham, 2020; McDermott, C.L., Acheampong, E., Arora-Jonsson, S., Asare, R., de Jong, W., Hirons, M., Khatun, K., Menton, M., Nunan, F., Poudyal, M. and Setyowati, A., "SDG 16: Peace, justice and strong institutions—a political ecology perspective." (2019): 510-540.

² Environmental (Management and Coordination) Act, No. 8 of 1999 Section 2; See also Regulation 2 of the Environmental (Impact Assessment and Audit) Regulations 2003.

*Dictionaries define “environment” as, “the objects or the region surrounding anything”*³
Environment has also been defined as:

The whole complex of climatic, adaptive and biotic factors that act upon an organism or an ecological community and ultimately determine its form or survival; the aggregate of social and cultural conditions that influence the life of an individual or a community.⁴ Accordingly, the term would seem to encompass both the features and the products of the natural world and human civilization. As such, the environment is broader than but includes “nature” which is concerned only with features of the world itself.⁵ The parameters of the term “environment” as defined in the Kenyan law are wide and include both the natural and built environment.

The environment-conflict nexus is a subset of "environmental security," which examines whether or not conventional ideas of security (which emphasize using military force to counter military threats) should be modified to include risks posed by population growth and declining levels of environmental goods and services.⁶ In order to organize risks and resolve them in a systemic environment that is becoming more interconnected and ecologically deteriorated, environmental security is a conceptual paradigm that departs from conventional paradigms of international relations. Environmental issues like global pollution, regional water scarcity, food shortages, population growth, ecosystem degradation, and other ecological factors are viewed in this paradigm as the independent variables that lead to the dependent variables of political unpredictability, economic volatility, social competition, crisis, conflict, and war.⁷

Conflicts are fundamental to all social relations and interactions because they are primarily about competing aspirations and interests between two or more people.⁸ While conflict is typically associated with violence, the threat of violence, or disruptive (non-violent) disputes, this perception of conflict as negative is not always helpful because in non-violent settings, it can often be seen as a force for positive social change, with its presence being a visible demonstration of society adapting to a new political, economic, or physical environment.⁹

The emphasis on the environment and conflict refers to the numerous effects that humans have on the earth's natural resource base and processes, as well as how natural occurrences, processes,

³ Compact Oxford Dictionary, 2nd Ed (Oxford University Press, London, 1991), p 523.

⁴ Webster's New World Dictionary 3rd ed (Cleveland College, Cleveland, 1998) p.454; See P.W. Birnie and A.E Boyle, *International Law and The Environment*, 2nd Ed, (Oxford, Oxford University Press, 2002) p.3.

⁵ Sands, P., *Principles of International Environmental Law*, 2nd Ed. (Cambridge University Press, Cambridge 2003), p.15.

⁶ Schwartz, D., "Environmental conditions, resources, and conflicts: An introductory overview and data collection." (1999), p.6.

⁷ Wilner, A.S., "The environment-conflict nexus: Developing consensus on theory and methodology." *International Journal* 62, no. 1 (2007): 169-188, p.171.

⁸ Frerks, G., König, R. S., & Ypeij, A., "Rethinking Gender and Conflict: Discourses, Embodiments and Symbolic Practices," In *Gender and Conflict*, pp. 1-17, Routledge, 2016, at p.1.

⁹ Warner, M., "Conflict management in community-based natural resource projects: experiences from Fiji and Papua New Guinea." (2000), p.9. Available at <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.168.4002&rep=rep1&type=pdf> accessed 5 May 2022.

and even environmental protection may affect human existence.¹⁰ Notably, distinction has been made between conflicts over non-renewable resources such as mineral oil which are normally referred to as “resource conflicts” as distinct from “environmental conflicts” over renewable resources.¹¹ It has also been pointed out that due to the realignment of the political and economic forces, socio-environmental conflicts arise when diverse players with divergent interests and values compete for access to and control of natural resources.¹²

The term “environmental conflict” is not a dictionary word and hence lacks a common meaning. While few writers have grappled with the meaning of it, some have attempted to demonstrate the links between environment and conflict, various environmental dimensions, including scarcity and abundance, improvement and degradation, production and marketing, and benefits sharing that underlie the various conflicts within the different conflict systems.¹³ It has been observed that according to actual data spanning all categories, emerging countries appear to be the source of the great majority of environmental conflicts.¹⁴ This may be attributed to the fact that in most of these third world countries, majority of the poor rely on the environment for their livelihoods. Environmental conflicts are thus a social issue that cannot be ignored as their effect affect many areas of a society.

3. Why Resolve Environmental Conflicts?

Today, environmental conflicts mainly have to do with the interaction between the use of and access to natural resources and factors of human development factors such as population growth and socio- economic advancement.¹⁵ This means that environmental conflicts now, more than ever, impact on use of and access to, and by extension management of natural resources. Environmental conflicts also, indirectly and directly, are connected to and/or impact human development factors and especially the quest for social-economic development. For instance, most environmental conflicts are as a result of unsustainable use of natural resources in social-economic development activities of the human populations.¹⁶

Given the imperative nature of social-economic development and its dependency on use and access of natural resources, environmental conflicts resulting from unsustainable use and

¹⁰ U Bob and S Bronkhorst, ‘Environmental Conflicts: Key Issues and Management Implications’ (2011) 10 African Journal on Conflict Resolution 10

<<http://www.ajol.info/index.php/ajcr/article/view/63307>> accessed 5 May 2022.

¹¹ Mason, S.A. and Spillman, K.R., "Environmental conflicts and regional conflict management," *Welfare economics and sustainable development* 2 (2009): 114-143.

¹² Carina Llosa, ‘Socio-Environmental Conflicts as Social Cohesion Thermometers: A Case Study’ (2019) 2 *Tapuya: Latin American Science, Technology and Society* 237

<<https://doi.org/10.1080/25729861.2018.1554344>> accessed 11 August 2022.

¹³ Collins H. Khal, *States Scarcity and Civil Strife in the Developing World*, Princeton University Press, Princeton (New Jersey), 2006.

¹⁴ Daniel S., *Environmental Conditions, Resources, and Conflicts: An Introductory Overview and Data Collection* (United Nations Environment Programme 1999).

¹⁵ Klaus Toepfer, “Forward”, in Daniel Schwartz & Ashbindu Singh, *Environmental conditions, resources and conflicts: An introductory overview and data collection* (UNEP, New York, 1999). p.4.

¹⁶ Examples here include conflicts over extraction of mineral resources which meet opposition because the investors have no adequate mitigation plan in place to reclaim the mined land or a good compensation package for the inhabitants of the subject land. A further example is conflict over human settlement where due to increase in population, human settlement encroaches on vital environmental resources.

inequitable access of environmental resources need to be resolved, if not for anything else, in the interest of attaining sustainable development.¹⁷

In order to promote peace and security among communities and nations, the environmental security strategy includes the resolution of environmental conflicts as a key component.¹⁸ Environmental security approach generally advocates adaptation of traditional notions of security (which emphasize countering military threats with military power) to include threats posed by population growth and diminishing quantity and quality of environmental goods and services.¹⁹ In essence, this approach makes resolution of environmental conflicts more than just a matter between the parties involved given the likelihood of resolution thereof being a key to national or international peace and security.

The term "environmental security" refers to a group of problems that deal with the role that the natural world and its resources can play in promoting peace and security. These problems include environmental causes and drivers of conflict, environmental impacts of conflict, environmental recovery, and post-conflict peacebuilding. Security and instability have much broader implications than only violent conflict or the lack of it, including the foundations of healthy, sustainable livelihoods.²⁰

Environmental conflicts have the potential to destroy the world if they are not controlled. Access to water, oil, food crops, and minerals has led to wars between nations. In fact, preserving a healthy ecosystem and properly resolving environmental problems may be essential to achieving world peace in the future.²¹ In a foreword to a report on Environmental Conditions, Resources and Conflicts, the author emphasizes this point. According to some commentators, "it is clear that the opportunity for the humankind to combat international and intra-national conflict must be seen

¹⁷ Ochieng, C. M., "Toolkit and guidance for preventing and managing land and natural resources conflict: Conflict prevention in resource-rich economies." (2011); Roberts, E. and Finnegan, L., *Building Peace around water, land and food: Policy and practice for preventing conflict*. Quaker United Nations Office, 2013; McCarthy JE, 'Resolving Environmental Conflicts' (ACS Publications, 12 August 2002) <<https://pubs.acs.org/doi/pdf/10.1021/es60112a600>> accessed 30 August 2022.

¹⁸ Dresse, A.; Fischhendler, I.; Nielsen, J. Ø.; Zikos, D. *Environmental Peacebuilding: Towards a Theoretical Framework*. *Cooperation and Conflict* 2019, 54 (1), 99–119. <https://doi.org/10.1177/0010836718808331>.

¹⁹ Daniel Schwartz & Ashbindu Singh, *Environmental conditions, resources and conflicts: An introductory overview and data collection* (UNEP, New York, 1999).

²⁰ Advisory Panel, "Environmental security: dimensions and priorities." (2018). <<https://www.thegef.org/sites/default/files/publications/Environmental%20Security%20and%20the%20GEF%20-%20final1.pdf>> accessed 30 August 2022.

²¹ United Nations, 'International Day for Preventing the Exploitation of the Environment in War and Armed Conflict' (United Nations) <<https://www.un.org/en/observances/environment-in-war-protection-day>> accessed 31 August 2022; EW Chu and JR Karr, 'Environmental Impact: Concept, Consequences, Measurement' [2017] Reference Module in Life Sciences B978 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7157458/>> accessed 31 August 2022; Macartan Humphreys, 'Natural Resources, Conflict, and Conflict Resolution: Uncovering the Mechanisms' (2005) 49 *Journal of Conflict Resolution* 508 <<http://journals.sagepub.com/doi/10.1177/0022002705277545>> accessed 31 August 2022; U Bob and S Bronkhorst, 'Environmental Conflicts: Key Issues and Management Implications' (2011) 10 *African Journal on Conflict Resolution* <<http://www.ajol.info/index.php/ajcr/article/view/63307>> accessed 31 August 2022.

in the light of the connection between environmental conditions and resources".²²

The primary channels for obtaining environmental justice are conflict resolution procedures. There is little doubt that one of the cornerstones of environmental democracy, which is essential for achieving sustainable development in any nation, is access to environmental justice.²³ Environmental democracy is a reflection of the increasing recognition that environmental issues must be addressed by all, or at-least a majority of those affected by their outcome, not just by the minority comprising the governments and leading private-sector actors.²⁴ In other words, Environmental democracy encapsulates the idea that everyone has an equal right to participate in environmental governance, including the general public, community organisations, activists, business executives, employees, governments, academics, and other experts.²⁵ It implies that everyone has the right to freely participate in environmental decision-making just as they do in other topics of public concern, such as education, health care, finance, and governance.²⁶

The procedure for resolving environmental conflicts is a result of the right to seek environmental justice and, consequently, environmental democracy. Since it provides a way for the general people to protest the execution of environmental laws and regulations, the right to seek justice is essential.²⁷ Because it gives citizens the ability to seek judicial review to correct such denial and/or deprivation, access to justice is also the most effective remedy when public engagement in environmental issues has been improperly withheld or is incomplete.²⁸ The *Rio Declaration* in principle 10 emphasizes the importance of public participation in environmental management through access to justice thus:

“Environmental issues are best handled with the participation of all concerned citizens, at the relevant level.... Effective access to judicial and administrative proceedings, including redress

²² Mumma, A., ‘Environmental Law in Kenya’, A paper presented at the ICJ (K) members conference on “New Frontiers in the Law”, held at Nyali Beach Hotel, 11th to 14th, March 1999, p. 6.

²³ CEPAL, NU, "Access to information, participation and justice in environmental matters in Latin America and the Caribbean: situation, outlook and examples of good practice." (2014); Carl Bruch, Environmental Rule of Law: First Global Report (United Nations Environment Programme 2019); CEPAL, NU. "Ensuring environmental access rights in the Caribbean: Analysis of selected case law." (2018) https://repositorio.cepal.org/bitstream/handle/11362/43549/4/S1800510_en.pdf > accessed 31 August 2022.

²⁴ Mumma, A., “Environmental Law in Kenya”, A paper presented at the ICJ (K) members conference on “New Frontiers in the Law”, held at Nyali Beach Hotel, March 11th to 14th, 1999, p.

6.

²⁵ ‘Environmental Democracy? Does Anyone Really Care?’ (E-International Relations, 26 October 2012) <<https://www.e-ir.info/2012/10/26/environmental-democracy-does-anyone-really-care/>> accessed 31 August 2022;

²⁶ Ibid; CEPAL, NU. "Access to information, participation and justice in environmental matters in Latin America and the Caribbean: Towards achievement of the 2030 Agenda for Sustainable Development." (2018).

²⁷ Ibid.

²⁸ See Akech JM, "Land, the Environment and the Courts in Kenya." (2006). Available at https://landportal.org/sites/landportal.info/files/land_env_background_paper.pdf Accessed on 20 August 2022; McAllister, S.T., "The Convention on access to information, public participation in decision-making, and access to justice in environmental matters." *Colo. J. Int'l Envtl. L. & Pol'y* 10 (1999): 187; Toth, B., "Public Participation and Democracy in Practice-Aarhus Convention Principles as Democratic Institution Building in The Developing World." *J. Land Resources & Envtl. L.* 30 (2010): 295.

and remedy, shall be provided.²⁹

Under Principle 10 of the Rio Declaration, the member states are obligated to facilitate the rights of access to information, public participation in decision making and access to justice in environmental matters. The provision of effective avenues for resolution of environmental conflicts is thus far the most practical way of ensuring access to justice, and by extension adhering to public participation principle.³⁰

Environmental conflicts have attendant costs and often erupt into disputes, violence, war, and destruction. Firstly, environmental conflicts occasion human costs epitomized by loss of life as a result of violent conflicts, displacements and reduction of individuals' abilities to earn a living among others. Secondly, conflicts have economic costs both as direct consequences of violence and as foregone choices in order to fund the conflict. Conflicts also reduce tourism including eco-tourism which is one of the main sources of capital for environmental conservation projects. Also, conflicts often produce significant environmental degradation and depletion.³¹

Environmental protection is difficult to defend when there are other pressing issues as a result of the conflict. As a result, increased resource exploitation may cause serious environmental harm. The employment of weapons during battles, such as ammunition and chemical or biological weapons also causes long-term harm to and contamination of natural resources, such as land and water. The primary basis for resolving environmental issues is the reduction and/or elimination of these costs.³² The environment itself always comes out on top when environmental conflicts are successfully resolved. Environmental conflicts typically revolve around preventing environmental resources from being utilized irresponsibly and causing environmental harm.³³

One of the key advantages of resolving environmental conflicts is that it indicates that the issue of access to or use of natural resources is evaluated on the basis of sustainability.³⁴ Effective

²⁹ United Nations Conference on Environment and development, Rio Declaration on Environment and Development, Rio de Janeiro, Brazil, 1992. Available at: <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=78&ArticleID=1163&l=en> <Accessed on 26 August 2022.

³⁰ 'UNEP Implementing Principle 10 of the Rio Declaration' (UNEP, 14 July 2017) <<http://www.unep.org/news-and-stories/story/unep-implementing-principle-10-rio-declaration>> accessed 31 August 2022.

³¹ Daniel S., Environmental Conditions, Resources, and Conflicts: An Introductory Overview and Data Collection (United Nations Environment Programme 1999).

³² Elizabeth Mrema, Carl Bruch and Jordan Diamond, Protecting the Environment during Armed Conflict: An Inventory and Analysis of International Law (UNEP 2009); 'How Does War Damage the Environment?' (CEOBS, 4 June 2020) <<https://ceobs.org/how-does-war-damage-the-environment/>> accessed 31 August 2022; Shelton, D., International environmental law. Brill, 2021.

³³ Schwartz, D., "Environmental conditions, resources, and conflicts: An introductory overview and data collection." (1999); United Nations Environment Programme and UN Department of Political Affairs, "Natural Resources and Conflict: A Guide for Mediation Practitioners." (2015).

³⁴ OECD, "The economic significance of natural resources: key points for reformers in Eastern Europe, Caucasus and Central Asia." (2011) <https://www.oecd.org/env/outreach/2011_AB_Economic%20significance%20of%20NR%20in%20EECC_A_ENG.pdf> accessed 31 August 2022; 'The Sustainable Use of Natural Resources: The Governance Challenge' (International Institute for Sustainable Development) <<https://www.iisd.org/articles/deep-dive/sustainable-use-natural-resources-governance-challenge>> accessed 31 August 2022.

conflict resolution affects the achievement of sustainable use of and access to environmental resources and encourages fair use of natural resources, which is therefore secured for both the current and future generations. In other words, resolving environmental conflicts results in equity between and among generations while using natural resources for socioeconomic development activities.³⁵ Since communities rely largely on natural resources for their livelihoods, environmental conflicts are delicate since they relate to people's way of life. As a result, a large number of environmental conflicts have to do with the provision of necessities like food, water, and shelter.³⁶ For instance, an unresolved wildlife/human conflict may mean that human beings continue to be killed and their crops spoiled by animals leading to misery and human suffering.³⁷ Similarly, the question of whether a person or community will live to see the next week may well depend on whether they can have access to clean water, pasture for their animals and food for themselves.³⁸

Thus, resolving environmental conflicts is essential for the parties' continued existence since it sustains and restores the connections between the various users of environmental resources and/or the users and the resources themselves. The security of continuous access to and use of the natural resources required for human life from generation to generation is also guaranteed by the resolution of environmental conflicts.³⁹ There is a need to enhance the conflict resolution mechanisms already existing for the sake of better environmental governance and sustainable development. The challenges facing the current mechanism and the opportunities for positive change should be examined. It is therefore vital that we look at the existing mechanisms bearing in mind the necessity of resolving environmental conflicts expeditiously, generally and more specifically, in Kenya.

Conflicts involving the environment are crucial to resolve because they require the creation and application of environmental laws, rules, and policies, which otherwise consume a lot of resources.⁴⁰ The contribution from the conflict resolution forums is strong in that it aids in

³⁵ Armin Grunwald, 'Conflict-Resolution in the Context of Sustainable Development: Naturalistic versus Culturalistic Approaches' in Ignacio Ayestaran, Gerhard Banse and Oliver Parodi (eds), *Sustainable Development: Relationships to Culture, Knowledge and Ethics* (KIT Scientific Publishing 2019) <<http://books.openedition.org/ksp/4308>> accessed 31 August 2022.

³⁶ 'Indigenous Peoples and the Nature They Protect' (UNEP, 8 June 2020) <<http://www.unep.org/news-and-stories/story/indigenous-peoples-and-nature-they-protect>> accessed 31 August 2022; USAID, Y, "Issues in Poverty Reduction and Natural Resource Management." Washington, DC: United States Agency for International Development (2006).

³⁷ AJ Dickman, 'Complexities of Conflict: The Importance of Considering Social Factors for Effectively Resolving Human-Wildlife Conflict: Social Factors Affecting Human-Wildlife Conflict Resolution' (2010) 13 *Animal Conservation* 458 <<https://onlinelibrary.wiley.com/doi/10.1111/j.1469-1795.2010.00368.x>> accessed 31 August 2022.

³⁸ United Nations, *Water for people, water for life: The United Nations world water development report; a joint report by the twenty-three UN agencies concerned with freshwater*. Unesco Publ., 2003.

³⁹ Ratner, Blake D., S. T. A. P. Contributors, Ralph Sims, Michael Stocking, Ferenc Toth, Rosina Bierbaum, Secretariat Contributors, Virginia Gorsevski, and Christopher Whaley. "Environmental security: dimensions and priorities."

<:www.stapgef.org/sites/default/files/documents/Environmental%20Security%20and%20the%20GEF%20-%20final1.pdf> accessed 31 August 2022.

⁴⁰ Carl Bruch, "Regional opportunities for improving environmental governance through access information, public participation and access to justice." In a paper delivered at the 8th Session of the

"declaring the entire the scenario of law on the topic." This is essential because just because Parliament hasn't passed a particular legislation on a subject or there isn't a rule or policy expressly addressing it doesn't mean it should be exempt from environmental law and regulation.⁴¹

It is the responsibility of the forum that is settling a conflict on the issue to interpret the unclear legislation, rule, or policy and assist in clarifying or redefining its applicability and significance. Resolution of environmental conflicts is therefore warranted since it guarantees that environmental laws, rules, guidelines, and policies are developed, improved, and interpreted in accordance with the current environmental circumstances.⁴²

Lastly, the process of resolution of environmental conflicts helps in early identification and confrontation of environmental problems.⁴³ The environmental disputes finding their way into the conflict resolution framework are critical pointers of the areas that need attention in environmental management and coordination hence the need for their adequate documentation and statistical analysis. The monitoring of the disputes engaging environmental conflicts bodies in the country is an important tool in environmental planning which helps in reducing the reaction time to environmental problems by the relevant authorities.⁴⁴

4. Conclusion

This paper has offered an overview of conflict management in environmental matters. It also offers justification as to why environmental conflicts are sensitive and ought to be resolved as soon as possible and using the most efficient mechanisms available. Some authors have insisted that when it comes to conflict management, the emphasis is on the adage that it must be in all parties' interests to avoid disputes by managing conflict in such a way that disputes do not arise; this sometimes is described as dispute avoidance.⁴⁵ Environmental conflict management is predicated on the need to avoid disputes and conflict.⁴⁶ All the parties in dispute take measures, either by themselves or with help of a third party, to ensure that disputes do not arise. In other words, conflict management measures are taken to ensure that conflicts do not degenerate to disputes and may in that context be described as dispute avoidance. However, where dispute avoidance is not immediately achieved or possible, the goal of conflict management becomes to

African Ministerial Conference on Environment (AMCEN), held in Abuja, Nigeria, on 3-6 April 2000, pp. 3-6. 2000. < https://pdf.usaid.gov/pdf_docs/Pnacy895.pdf > Accessed on 20 August 2022.

⁴¹ Jackton. B. Ojwang, "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 Kenya Law Review Journal 19 (2007).

⁴² UN Environment, 'Environmental Rule of Law' (UNEP - UN Environment Programme, 5 October 2017) <<http://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/promoting-environmental-rule-law-0>> accessed 31 August 2022; Annika K Nilsson, *Enforcing Environmental Responsibilities: A Comparative Study of Environmental Administrative Law* (Acta Universitatis Upsaliensis 2011).

⁴³ Carl Bruch, "Regional opportunities for improving environmental governance through access information, public participation and access to justice."

⁴⁴ Ibid.

⁴⁵ Fenn, F., "Introduction to Civil and Commercial Mediation", Chartered Institute of Arbitrators Workbook on Mediation, (CIARB London, 2002), pg. 9.

⁴⁶ Carpenter, S.L. and Kennedy, W.J., "Environmental conflict management: New ways to solve problems." *Mountain Research and Development* (1981): 65-70.

Overview of Conflict Management in Environmental Matters

provide interventions that make the conflicts more beneficial and less damaging to the parties.⁴⁷ In a free society, conflict is a necessary ingredient. Everyone is free to vie for advantages. Conflict in a democracy leads to the development of new norms, institutions, and interpersonal patterns. In the quest for justice, conflict could also be required.⁴⁸

In other words, environmental conflict management involves attempts to keep a conflict from getting worse. It involves the use of skills to control the intensity of a conflict and its effects through facilitation, negotiation, and other kinds of intervention and institutional measures, as well as diplomacy.⁴⁹ In contrast to conflict resolution, environmental dispute settlement typically does not address the underlying causes of the issue. It is for this reason and the fact that environmental conflicts are sensitive and affect a great deal of human livelihoods that this paper advocates for resolution of environmental conflicts as opposed to environmental disputes settlement.

⁴⁷ Ajayi, A.T. and Buhari, L.O., "Methods of conflict resolution in African traditional society." *African research review* 8, no. 2 (2014): 138-157.

⁴⁸ Carpenter, S.L. and Kennedy, W.J., "Environmental conflict management: New ways to solve problems." *Mountain Research and Development* (1981): 65-70, p.65.

⁴⁹ Fisher, J., "Managing environmental conflict." *The handbook of conflict resolution: theory and practice* (2014): 3.

Environmental Conflict Management Institutions and Approaches

Abstract

This paper argues that conflict management can only be as effective as the institutions and the approaches employed. The author thus highlights some of the most effective institutional arrangements and approaches that can be employed in addressing environmental conflicts in Kenya and across the world as a step towards achieving sustainable development agenda. The discourse herein recommends the exploration of both formal and informal mechanisms in management of environmental conflicts.

1. Introduction

This paper seeks to explore the various institutional and methodological approaches to environmental conflicts management and answer the question whether the existing legal and institutional frameworks in Kenya for the resolution of environmental conflicts is sufficient to effectively deal with these conflicts.

The nexus between the environmental conflicts and the state of the existing dispute resolution mechanisms for resolving environmental conflicts has not been adequately explored. The institutional and legal mechanisms for resolving environmental conflicts now in place in Kenya apparently have not eliminated environmental conflicts. The issue then is: Why have the existing institutional and legal mechanisms been ineffective in the face of the ever increasing conflicts? Therefore, the author herein seeks to explore the possibilities and opportunities that both formal and informal mechanisms, including ADR mechanisms present in realising the goal of resolving or managing environmental conflicts in Kenya.

The term “environmental conflict” is not a dictionary word and hence lacks a common meaning. While few writers have grappled with the meaning of it, some have attempted to demonstrate the links between environment and conflict, various environmental dimensions, including scarcity and abundance, improvement and degradation, production and marketing, and benefits sharing that underlie the various conflicts within the different conflict systems.¹

For purposes of this paper, the author treats conflict management as an institutional approach to environmental management, where ‘institutions’ are defined as ‘the conventions, norms and formally sanctioned rules of a society, where they provide expectations, stability and meaning essential to human existence and coordination; institutions support certain values, and produce and protect certain interests’.² These institutions may be formal or informal, based on their form and what they achieve.³ In the instant case, environmental conflict management approaches are geared towards securing environmental rights for the most vulnerable groups of people. It has been observed that environmental conflicts cannot always be resolved, but there are a number of ways to transform conflicts and sometimes the process of conflict transformation can be a

¹ Collins H. Khal, *States Scarcity and Civil Strife in the Developing World*, Princeton University Press, Princeton (New Jersey), 2006.

² Arild Vatn, *Environmental Governance: Institutions, Policies and Actions* (Paperback edition, Edward Elgar Publishing 2016) 78.

³ *Ibid*, 78.

pathway towards transition to another state of sustainability.⁴ This paper thus highlights some of the approaches to effective environmental conflicts management with the aim of entrenching environmental rights for all.

2. Environmental Conflict Management Institutions and Approaches

“Environmental conflicts” refer to the contests that exist as a result of the various competing interests over access to and use of natural resources such as land, water, minerals and forests. Various groups, communities, developers, government and other organisations have differing ideas of how to access and utilize environmental resources. Laws and policies which have a conflict generating capacity are often pursued by the various groups leading to further friction among them. There is a legal and institutional framework that is supposed to deal with environmental conflicts and either resolve or manage them. These institutions include the courts of law, tribunals under various Acts⁵, The National Environmental Management Authority⁶, National Environmental Complaints Committee, National Environment Tribunal, and other various informal community based resource governance bodies.⁴ The laws include the numerous statutes that deal with the environment. Notable among them is the framework law, the Environmental Management and Coordination Act (EMCA)⁵, the Public Health Act⁷, the Forest Conservation and Management Act 2016⁸, the Water Act 2016⁹ and the various statutes dealing with land administration.¹⁰ Despite the existence of the aforesaid laws and institutions, environmental conflicts continue to manifest themselves in Kenya. There have been for instance violent conflicts over access to and use of land in Kenya, which conflicts are well documented.¹¹

Over the years, Kenya has been faced with conflicts over natural resources such as water, forests, minerals and land among others. The existing legal and institutional mechanisms that are in place to deal with environmental conflicts have not offered much in stemming the prevalence of environmental conflicts. Environmental conflicts in Kenya are still present and a cause of much concern. The existing legal mechanisms for resolving environmental conflicts include the courts of law both under civil and criminal law¹², the National Environment Tribunal (NET)¹³, National

⁴ E Gunilla Almered Olsson and Pernille Gooch, eds., *Natural resource conflicts and sustainable development*. Routledge, 2019, 5.

⁵ Environmental (Management and Coordination) Act, No. 8 of 1999, laws of Kenya.

⁶ Established under S.7 of the EMCA (Cap 8 of 1999).

⁷ Cap. 242 laws of Kenya.

⁸ Forest Conservation and Management Act, No 34 of 2016, Laws of Kenya.

⁹ Water Act, No. 43 of 2016, Laws of Kenya.

¹⁰ National Land Commission Act, No. 5 of 2012; Land Registration Act (No. 3 of 2012); Land Act (No. 6 of 2012); Community Land Act, No. 27 of 2016; Environment and Land Court (No. 19 Of 2011); Land Adjudication (CAP. 284); Land Consolidation (CAP. 283); Land Control Act (CAP. 302); Physical and Land Use Planning (No. 13 of 2019).

¹¹ The Akiwumi Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya (31st July, 1999) notes the contribution of the issue of land to violent conflicts in Kenya due to the way it is treated with fervent sentimentality and sensitivity and in many ways, considered explosive. The report at pg. 53 notes that “Whereas, the constitution guarantees the right of ownership of property anywhere in the country, the peaceful co-existence of the forty-two tribes that live within our national borders, appears to have been profoundly undermined by diverse man-made problems that are either directly or indirectly connected to land.”

¹² Environmental Management and Co-ordination Act, Act. No. 8 of 1999, Part XIII Section 137-146.

¹³ *Ibid*, Part. XII sections 125-136.

Environmental Conflict Management Institutions and Approaches

Environmental Complaints Committee¹⁴, Arbitral tribunals¹⁵, Statutory tribunals set up under various laws (such as the Land Adjudication Boards)¹⁶ and customary law systems of dispute settlement.¹⁷

Resolving environmental conflicts has mainly been attempted under the institutional and legal framework described hereinabove. However, Alternative Dispute Resolution has not been adequately utilized in the arena of addressing environmental conflicts. Alternative Dispute Resolution refers to those Dispute Resolution Mechanisms that are “alternative” to the court system. These include negotiation, mediation, conciliation, ‘med-arb’ and ‘arb-med’. Sometimes, arbitration is also included in the definition of ADR.

Environmental issues are special and need to be settled quickly. The area where humans reside is where the environment's resources are located. Environmental resources are essential to their way of life. Environmental conflicts may escalate into violence, loss of livelihoods, evictions, and even fatalities if left uncontrolled.¹⁸ ADR may not provide a full solution to the problem. It can however be used in tandem with other existing dispute resolution mechanisms and with certain reform measures in place, the nightmare of ugly environmental conflicts in Kenya may be avoided.

Some of these conflict management mechanisms have not been very effective in resolving or managing environmental conflicts. For instance, courts are formal, rigid, expensive to reach, and bureaucratic. Instead of the parties' interests, they deal with precise legal rights.¹⁹ The court system is adversarial in nature with limited room for negotiation and agreement on issues of interest to the parties. Law itself has at times been a source of conflict rather than a conflict solver.²⁰ Of concern is the way environmental governance is carried out, without adequate participation by the people. Environmental democracy, which involves giving people access to information on environmental rights, easing access to justice in environmental matters and enabling public participation in environmental decision making, *inter alia*, is at its minimum in Kenya.²¹

¹⁴ Ibid, section 31; see also Environmental Management and Coordination (Amendment) Act, 2015.

¹⁵ See Land Adjudication (CAP. 284); Arbitration Act, No. 8 of 1995.

¹⁶ Land Adjudication (CAP. 284).

¹⁷ Community Land Act, No. 27 of 2016; National Land Commission Act, No. 5 of 2012; Constitution of Kenya 2010, Article 67(2)(f); Ajayi, A.T. and Buhari, L.O., "Methods of conflict resolution in African traditional society." African research review 8, no. 2 (2014): 138-157.

¹⁸ Bob, U. and Bronkhorst, S., "Environmental conflicts: Key issues and management implications." African Journal on Conflict Resolution 10, no. 2 (2010): 9-30.

¹⁹ Bingham, L., "The challenges of environmental conflict resolution." In Promise and Performance of Environmental Conflict Resolution, pp. 33-56. RFF Press, 2003; Heikkila, T. and Schlager, E.C., "Addressing the issues: The choice of environmental conflict-resolution venues in the United States." American Journal of Political Science 56, no. 4 (2012): 774-786.

²⁰ Spangler, B., "Settlement, Resolution, Management, and Transformation: An Explanation of Terms." Beyond Intractability. Eds. Guy Burgess and Heidi Burgess. Conflict Information Consortium, University of Colorado, Boulder. Posted: September 2003 <<http://www.beyondintractability.org/essay/meaning-resolution>> accessed 19 August 2022.

²¹ See generally, Dr Susan Hazen, Environmental Democracy, (<<http://www.ourplanet.com>>). Accessed on 16th January 2009. Susan Hazen is a director of the Environmental Assistance Division, Environmental protection Agency, Washington DC; Csaba Kiss and Michael Ewing (eds),

Then there are the procedures of what are known as alternative dispute resolution (ADR). They include of community-based and conventional conflict resolution methods including negotiation, mediation, and conciliation. To achieve the illusive tranquilly that comes with equitable resource sharing amongst communities, which is much desired, these still need to be properly used.

3. Methods of Managing Environmental Conflicts

The different approaches that may be utilized to settle or at least manage environmental conflicts when they occur have typically been offered by authors in the environmental discourse. These techniques include: Party to Party Conflict Management: Negotiation; Fighting It Out; Yielding; Avoidance; Compromise; Involving a Third Party-Mediation. One may add litigation, arbitration, and hybrid dispute resolution methods to the list of conflict management initiatives involving third parties.²² Conflict can be resolved by employing force when one party has the resources and motivation to win regardless of whether the other side loses and regardless of whether or not the winning process harms interpersonal ties. It is significant to highlight that not all sides will be able to employ force; rather, how it is employed will mainly rely on how much power one party has in relation to the other.²³

The parties that want to avoid conflict more than they want to achieve their goals are best suited for a withdrawal-based conflict management technique. Not least because it may be used as a threat to convince hesitant and occasionally more powerful parties to engage in more cooperative discussions, it is crucial to recognise the power of withdrawal (whether it be positive or negative).²⁴

There are instances when one party in a dispute scenario prioritizes preserving a positive relationship with one or more of the other parties over accomplishing its own particular goals when accommodation is used as a conflict management technique. While such outcomes may appear to be the result of force, the difference is that instead of losing outright, the accommodating party perceives itself to have gained by securing good relations, possibly along with an element of good will and the opportunity to accomplish some greater goal at a later time.²⁵ Sometimes people mix up compromise with consensus. Although coming to a compromise during a

“Environmental Democracy: An Assessment of Access to Information, Participation in Decision-making and Access to Justice in Environmental Matters in Selected European Countries.” European Regional Report (published by The Access Initiative Europe.) available at <http://www.accessinitiative.org> accessed on 18 August 2022.

²² Fisher, R., "Sources of conflict and methods of conflict resolution." *International Peace and Conflict Resolution*, School of International Service, The American University (2000); Tyler, S.R., "Policy implications of natural resource conflict management." *Cultivating peace: Conflict and collaboration in natural resource management* (1999).

²³ Warner, M., "Conflict management in community-based natural resource projects: experiences from Fiji and Papua New Guinea." (2000), p.18.

Available at <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.168.4002&rep=rep1&type=pdf>

²⁴ Ibid, p. 18; Author removed at request of original Publisher, '6.2 Conflict and Interpersonal Communication' <<https://open.lib.umn.edu/communication/chapter/6-2-conflict-and-interpersonal-communication/>> accessed 2 September 2022.

²⁵ Ibid, p.18; 'Session 5. Conflict Management' <<https://www.fao.org/3/w7504e/w7504e07.htm>> accessed 2 September 2022; Katz, N & McNulty, K., *Conflict Resolution*. [Online publication], 1994 <https://www.maxwell.syr.edu/docs/default-source/ektron-files/conflict-resolution-nk.pdf?sfvrsn=4de5d71e_5> accessed 2 September 2022.

negotiation may seem advantageous, it really means that at least one side feels forced to make a concession.²⁶ Consensus-building tactics can result in compromises in the final agreement, but there are several key differences between the two approaches. In particular, consensus-building tries to prevent trade-offs and instead generate a "win-win" outcome. On the other side, a compromise approach seeks to minimize what are seen to be unavoidable trade-offs.²⁷

Conflicting parties must avoid the following in order to come to an agreement: compromising on their immediate demands and aggressive stances in order to address the underlying needs that each side believes are really motivating the conflict; focusing on a single solution instead of considering the broadest and most creative variety of solutions to satisfy the underlying needs of the parties; and individualized, frequently inflated requests in favour of being clear and precise.²⁸

3.1 Environmental Conflicts and ADR

Natural resources including water, pasture, land, and forests are among the natural resources that are the subject of environmental conflicts because of access to and usage of these resources. People's means of support are involved. Conflicts may become violent, harm the environment, and threaten livelihoods if they are not resolved..²⁹ Natural resources may lead to conflict whether they are renewable or not. Cropland land, clean water, firewood, and fish are examples of renewable resources. Petroleum and minerals are non-renewable resources.³⁰

The most significant causes of violence, according to some studies, are shortages of forested areas, fresh water, fish, and agricultural land. This is in part due to the absence of respected, efficient conflict resolution procedures among those responsible for managing the aforementioned resources. The environmental disputes in Kenya are not uncommon. Land is "handled with fervent sentimentality and sensitivity and in many respects considered combustible," according to the Akiwumi Report on tribal confrontations in Kenya. This contributes to the problem of land being a factor in violent conflicts in Kenya.³¹ The Report also mentions how many communities viewed the rise of multi-party politics as an attempt to isolate and evict them from their property. Tribal concerns with economic foundations also affected multi-party politics, making it simpler to inspire tribal conflict motivated by politics.³² That situation offered the perfect opportunity for

²⁶ Ibid, p. 18; 'Negotiation and Mediation Techniques for Natural Resource Management' <<https://www.fao.org/3/a0032e/a0032e0a.htm>> accessed 2 September 2022; United Nations, 'The Process of Negotiation' (United Nations) <<https://www.un.org/en/model-united-nations/process-negotiation>> accessed 2 September 2022; Wertheim, E., "Negotiations and resolving conflicts: An overview." College of Business Administration, Northeastern University, [available at: <http://web.cba.neu.edu/~ewertheim/interper/negot3.htm>] (2002).

²⁷ Ibid, p. 18.

²⁸ Ibid, p. 18.

²⁹ See generally Matiru V. (2000) Conflict & Natural Resource Management, Food & Agriculture Organisation (FAO); Buckles D and Rusnak D (1999) "Cultivating Peace: Conflict and collaboration in Natural Resource Management" IDRC/World Bank 1999 p. 3 & 4; Thayer DM (2003) "Nature of Conflict over nature: Protected Areas, Transfrontier Conservation and the meaning of Development" Saratunga Skidmore College-The School for International Training.

³⁰ Canadian Security Intelligence Service and Gizewski, P., Environmental scarcity and conflict. Canadian Security Intelligence Service, 1997. p. 1.

³¹ Akiwumi, Augustus Molade, Report of the judicial commission appointed to inquire into tribal clashes in Kenya. The Commission, 1999.

³² Ibid.

ethnic cleansing to be used for political gain.

According to the Akiwumi Report, the 1992 and 1997 land conflicts in Kenya were caused by the unequal distribution of land resources and by subpar government policies and programmes that were seen as favouring some factions over others. The various conflicts that have taken place in Kenya are caused by concerns over the utilisation of environmental resources. Contests over access to and use of Kenya's natural resources can be partly blamed for the post-election violence in 2007–2008.³³ These conflicts have been brewing since the days of colonialism, when large areas of land were taken over to build communities for European settlers and Africans were sent to live in less productive reserves.³⁴ After independence, the government embarked on mechanisms that saw Africans and not necessarily members of the displaced communities buy back the white owned farms through soft loan schemes. The effect was that rich and “connected” Kenyans took their place and most of the indigenous displaced communities remained squatters in their ancestral land.³⁵

3.2 Environmental Conflicts and ADR – The Link

Environmental conflicts are unique as they involve people's lives. Left to escalate, suffering and death may be the undesirable result. Certain benefits of ADR processes make them suited for use in resolving environmental problems. For instance, the processes that permit the greatest degree of party autonomy, such negotiation, conciliation, and mediation, are informal, cost-effective, and give parties the freedom to come up with their own long-term solutions to issues. Therefore, they are especially well suited for resolving environmental problems.³⁶ Sometimes rigid and bureaucratic, courts and official tribunals do not encourage the upkeep of friendly connections between the parties. The parties leave the hearings before these courts and tribunals angry and dissatisfied. Does ADR have the ability to bring about "win-win" outcomes for all parties and swiftly settle environmental conflicts? This merits investigation. However, it is possible to assert that the characteristics of party autonomy, flexibility, inclusivity, informality, and acceptability by all parties may be utilized to develop solutions to environmental concerns.³⁷

³³ Oucho, J., "Undercurrents of Post-Election Violence in Kenya: Issues in the long-term agenda." In *Tensions and Reversals in Democratic Transitions: The Kenya 2007 General Elections*, pp. 491-533. 2010; Nzau, M. and Guyo, M., "The Challenge of Securing Kenya: Past Experience, Present Challenges and Future Prospects." *The Journal of Social Encounters* 2, no. 1 (2018): 37-59.

³⁴ Youe, C., "Moving the Maasai: A Colonial Misadventure." (2008): 202 <https://ora.ox.ac.uk/catalog/uuid:1eee21c4-035b-4ea9-8b0a-4079690c4f7d/download_file?file_format=application%2Fpdf&safe_filename=604788477.pdf> accessed 2 September 2022; Kanyinga, K., *Re-distribution from above: The politics of land rights and squatting in coastal Kenya*. Vol. 115. Nordic Africa Institute, 2000; Ogot, B.O., "The historical development of African societies, 1500—1800: conclusion." *GENERAL HISTORY OF AFRICA-V* (1992): 895.

³⁵ Akiwumi, *ibid*.

³⁶ Stukenborg, C., "The Proper Rule of Alternative Dispute Resolution (ADR) in Environmental Conflicts." *U. Dayton L. Rev.* 19 (1993): 1305; Weidner, H., "Alternative dispute resolution in environmental conflicts-promises, problems, practical experience." In *Alternative dispute resolution in environmental conflicts: experiences in 12 countries*, pp. 11-55. Berlin: Edition Sigma, 1998.

³⁷ Muigua, K., "Managing natural resource conflicts in Kenya through negotiation and mediation." (2016) <http://erepository.uonbi.ac.ke/bitstream/handle/11295/97031/Muigua_Managing%20Natural%20Resource%20Conflicts%20in%20Kenya%20through%20Negotiation%20and%20Mediation.pdf?sequence=3&isAllowed=y> accessed 2 September 2022; Mugford, J., ed. *Alternative Dispute Resolution: Proceedings*, 22-24 July 1986. No. 15. Australian Institute of Criminology, 1986.

In 2008, Kenya resorted to mediation through the Koffi Annan initiative³⁸ to resolve a political standoff. Mediation offers a dispute resolution mechanism where all parties come to the table and with the help of the mediator find their own solutions. Negotiation also played a part within the mediation process. It was ADR that saved Kenya from the brink of total anarchy. Thus, there must be something in ADR that is worth examining with a view to making use of the same to resolve environmental conflicts which have the potential to tear the country apart if left unchecked.

In the Koffi Annan initiative, ADR (specifically mediation) was used in the face of the apparent failure or impotence of the legal and institutional mechanisms for the resolution of conflict in Kenya. A critical look at ADR methods in the resolution of environmental conflicts is worthwhile considering the many positive attributes and potential for involving the public and reaching of acceptable solutions that can withstand the test of time. ADR can be used to address environmental conflicts with the long-term aim of sustaining environmental democracy, peace keeping and efficient management of environmental resources, to ensure sustainable use of the same.³⁹

It is possible to come up with “win-win” situations. With the flexibility and informality of ADR the parties may come up with ‘tailor made’ solutions to their problems. Apart from arbitration ADR processes involve a large measure of party autonomy. The parties are free to come up with their own agreements and implement them. In the environmental arena, agreed solutions rather than those imposed on the parties are desirable. The people are able to live and abide by them and relationships are preserved. Mechanisms for sound environmental management by all stakeholders can be put in place.

ADR processes have not been given an adequate chance within the Kenyan framework of environmental disputes resolution. Maybe it is time we tried them out in the context of the real environmental conflicts. Given the many positive attributes of ADR the experiment may be worth it and may save Kenyan lives and contribute to sustainable development.

3.3 Challenges Facing Application of ADR Mechanisms in Environmental Conflicts

The existing legal and institutional framework for environmental management is disjointed because different entities are responsible for different aspects of environmental law and policy. The Environmental Management and Coordination Act (EMCA), which was passed with the intention of improving management of Kenya's environmental resources, did little to eliminate the variety of regulatory frameworks in place for various environmental resources.

Furthermore, the development of necessary legislation and rules to support the EMCA framework is still far from completion. This collection creates a misleading impression that there are enough

³⁸ Koffi Annan, the former Secretary General of the United Nations mediated the all-out conflict that was labeled the ‘post-election’ violence in 2007 – 08 in Kenya. Essentially the long-term causes of the conflict were issues relating to access to and use of natural resources. The initiative resulted in the signing of the peace agreement formalized in the National Accord & Reconciliation Act.

³⁹ Susan Hazen (1998), *Environmental Democracy*, (<<http://www.ourplanet.com>) accessed on 25 August 2022; Kariuki Muigua, Paul Musyimi, ‘Enhancing Environmental Democracy’, *Law Society of Kenya Journal* Vol 4 2008 No. 1.

institutions and regulations to resolve environmental concerns. A proper application of the law through the institutions outlined in this collection of laws still leaves many issues unresolved; therefore, it is necessary to update the EMCA and combine all pertinent laws so that it will be simpler to assess the effectiveness of the law and institutions mentioned above. In addition to the foregoing, environmental norms and laws need to be enforced more strictly, and therefore legislative and institutional changes on environmental governance in Kenya are required..⁴⁰

Until recently, there were no substantial legal provisions that addressed the use of ADR techniques to handle or resolve environmental disputes. This implies that any outcomes reached utilising ADR processes lacked a legal foundation under the parent Act and were not given the same respect as those reached through litigation. This changed when Kenyans passed the new Constitution in August 2010, ushering in a new era. Numerous post-constitutional acts have been enacted to codify the different conflict resolution systems outlined in the new Constitution, including alternative dispute resolution processes like mediation and arbitration.

3.4 Reform Measures

In order to increase the use of ADR in the resolution of environmental issues, it is necessary to continuously modify the legal and institutional frameworks in Kenya. ADR and customary dispute resolution processes are recognized in several important acts, such as the EMCA and the Civil Procedure Act, in order to be in compliance with the new Constitution. Kenyans must play a larger role in deciding how to protect the environment. It is necessary to strengthen the principles of environmental democracy, which call for public involvement in environmental issues, access to knowledge, and access to justice.⁴¹ The 2010 Constitution recognises this need and under Article 69, it provides that the state shall encourage public participation in the management, protection and conservation of the environment.⁴²

To effectively manage its natural resources and prevent environmental conflicts, Kenya must educate the general public on environmental issues. To promote intergenerational and intragenerational justice⁴³ and preserve sustainable development, Kenyans should begin receiving instruction in natural resource management in primary schools. The aforementioned educational setting should include a thorough explanation of ADR-related conflict management techniques. It is important to draw attention to and underline each party's advantages and disadvantages. To be able to choose the appropriate ADR techniques to use in specific situations, the public should be well-informed. A public education and consultation process is required whenever a law has to be altered or issued in order to guarantee that any new laws that are enacted will be accepted by the general public. Ideally, the process of establishing laws should be open to everybody. Although environmental conflicts can't always be resolved peacefully, they can be controlled so that Kenya doesn't experience the previous spike in hostilities over disputes over who gets to

⁴⁰ Kenya Vision 2030, p. 104.

⁴¹ Susan Hazen (1998), *supra*.

⁴² Constitution of Kenya, Article 69(1) (d).

⁴³ These concepts have been defined under S. 2 of the EMCA to mean (i) that the present generation should ensure that in exercising its right to beneficial use of the environment the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations and, ii) that all people within the present generation have the right to benefit equally from the exploitation of the environment, and that they have a equal entitlement to a clean and healthy environment.

access and uses whose environmental resources. Only the right situations can benefit from ADR. To make it successful in the face of the continuously growing environmental conflicts, it is necessary to enhance the current institutional and legal framework for the resolution of environmental conflicts. Institutions like the National Environmental Management Authority (NEMA), other institutions included in the Environmental Management and Co-ordination Act (EMCA), the Judiciary, etc., can be extremely important in Kenya's management of environmental conflicts. To be able to operate efficiently and have an impact on the ground, such institutions require support and good management. The domestic justice systems did little while Kenya witnessed post-election violence in 2008.

It was necessary to bring in a mediator from outside Kenya to resolve the disagreement using ADR techniques. Kenya could take notes from other countries that have successfully handled environmental problems by integrating their institutional and legislative frameworks with ADR principles. We may improve our conflict resolution capacities by learning from such nations.

4. Conclusion

The goal of this paper was to examine the Kenyan legal and institutional framework for resolving environmental disputes in greater detail in order to determine its effectiveness. It is obvious that the framework confronts significant difficulties, and environmental issues continue to show themselves in violent confrontations that result in the loss of lives and means of subsistence. Environmental disputes that go uncontrolled make sustainable development impossible. Kenya's framework for resolving environmental conflicts is deficient and in urgent need of revision. Due to the numerous flaws in the current institutional and legal system, environmental disputes continue to have a detrimental impact on Kenyans. In the Kenyan context, ADR has not been extensively utilised. As a result, the environmental sector seldom makes use of factors like cost effectiveness, party autonomy and flexibility. With its beneficial qualities, including as its participatory aspect, ADR may be used to handle environmental problems and make sure Kenyans achieve sustainable development. To guarantee the swift resolution of environmental conflicts, a connection between ADR and those issues must be made. Kenya does not have a good system in place for resolving environmental conflicts. The above-mentioned reform actions can be implemented in order to make the current framework more effective. In certain countries, like Uganda, arranging conferences is a requirement of the legal process, and parties cannot file a lawsuit without appearing in front of a magistrate or the court's registrar. The judicial officer hears both sides' arguments at this point and attempts to determine if it is necessary to file a lawsuit or if the parties can resolve their disagreement via discussion.

The judge here supports negotiations and potential resolutions, and only permits topics or situations that cannot be resolved to be filed as lawsuits. The Court-Annexed Mediation in Kenya is a step in the right direction and should be supported fully and rolled out across the country's judicial stations.⁴⁴

⁴⁴ Mburu, K., 2022. Kericho Law Courts Roll Out Court annexed Mediation – Kenya News Agency. [online] Kenyanews.go.ke. Available at: <<https://www.kenyanews.go.ke/kericho-law-courts-roll-out-court-annexed-mediation/>> [Accessed 9 September 2022]; Mauri Aluda, Maurice. “Judiciary Rolls-out Court Annexed Mediation

In human interactions, environmental conflicts are unavoidable, just like all other types of conflicts. If they are not controlled, however, they have a tendency to turn into disputes that damage relationships between people or groups and result in unintended costs. The utmost possible use of ADR should be used to resolve environmental disputes because it is a realistic option. Given its numerous drawbacks and difficulties, ADR cannot be the solution to every environmental issue. In the environmental sector, ADR is worthwhile to use, nevertheless. In order to minimize or at least manage environmental disputes and guarantee Kenya reaches its aim of sustainable development, the advantages arising from ADR processes should be properly utilized in the Kenyan context. In order to manage a conflict, the parties involved must acknowledge that the issue at hand affects both sides, participate in dialogue with specific objectives in mind, rely on credible evidence, and be conscious of trade-offs.⁴⁵ Of concern is the way environmental governance is carried out, without adequate participation by the people. Environmental democracy which involves giving people access to information on environmental rights, easing access to justice in environmental matters and enabling public participation in environmental decision making, *inter alia*, is at its minimum in Kenya.⁴⁶

Alternative Dispute Resolution (ADR) methods, which include mediation, conciliation, negotiation and traditional/community based dispute resolution mechanisms, are yet to be fully utilized to realise the elusive tranquility that comes with equitable resource sharing between communities, which is much sought after. Therefore, the author herein urges stakeholders to explore the possibilities and opportunities that ADR mechanisms present in realising the goal of resolving or managing environmental conflicts in Kenya. While it is already acknowledged that ADR may not provide a full solution to the problem, it can however be used in tandem with other existing dispute resolution mechanisms and with certain reform measures in place, the nightmare of ugly environmental conflicts in Kenya may be avoided. Environmental conflict management

in Trans Nzoia.” Kenya News Agency, 11 June 2022, <https://www.kenyanews.go.ke/judiciary-rolls-out-court-annexed-mediation-in-trans-nzoia/>; World Bank, “Court Annexed Mediation Offers Alternative to Delayed Justice for Kenyans”, “<https://www.worldbank.org/En/News/Feature/2017/10/05/Court-Annexed-Mediation-Offers-Alternative-to-Delayed-Justice-for-Kenyans>.” Kenya News Agency, 11 June 2022, <https://www.kenyanews.go.ke/judiciary-rolls-out-court-annexed-mediation-in-trans-nzoia/>; Ater, Sarah. “Strides in Court Annexed Mediation in Kenya,” “<https://www.mediate.com/Strides-in-Court-Annexed-Mediation-in-Kenya/>.” Kenya News Agency, 11 June 2022, <https://www.kenyanews.go.ke/judiciary-rolls-out-court-annexed-mediation-in-trans-nzoia/>.

⁴⁵ Redpath, S.M., Young, J., Evely, A., Adams, W.M., Sutherland, W.J., Whitehouse, A., Amar, A., Lambert, R.A., Linnell, J.D., Watt, A. and Gutierrez, R.J., ‘Understanding and Managing Conservation Conflicts’ (2013) 28 Trends in Ecology & Evolution 100
<<https://www.sciencedirect.com/science/article/pii/S0169534712002169>> accessed 19 August 2022.

⁴⁶ See generally, Susan Hazen, Environmental Democracy, (<<http://www.ourplanet.com>). Accessed on 16 August 2022; Csaba Kiss and Michael Ewing (eds), “Environmental Democracy: An Assessment of Access to Information, Participation in Decision-making and Access to Justice in Environmental Matters in Selected European Countries.” European Regional Report (published by The Access Initiative Europe.) available at <http://www.accessinitiative.org> accessed on 16 August 2022.

Environmental Conflict Management Institutions and Approaches

institutions and approaches should be designed in a way that ensures equal access to justice and creation of peaceful societies through effective and swift elimination of conflicts. This is why this paper advocates for exploration of both formal and informal approaches in management of environmental conflicts due to their close association with people's livelihoods and the risks involved.

Understanding Environmental Conflicts: Causes and Manifestations

Abstract

Environmental conflicts relate to environmental resources and their exploitation and they come in many forms. This is because they are all attributed to different aspects of the environment and the conflicts also involve different players. This paper discusses environmental conflicts in respect of their causes and manifestations. The author argues that unless stakeholders fully understand these conflicts in light of their causes and manifestations, they are unlikely to design conflict management responses that would effectively address them.

1. Introduction

The relationship between the environment and conflicts has been described as varied and complex, with causes of environmental conflicts varying across the globe and their manifestations varying significantly, such as control over essential environmental resources such as fossil fuels to struggles over natural resources at the community and/or household level, where conflicts can manifest in a variety of ways – from outright wars and even genocide to disagreements over natural resources.¹ Conflict is exacerbated by poverty and by political, social, and economic inequality among groups; addressing these issues can lower the probability of these conflicts.² This paper discusses environmental conflicts and it looks at their causes and the various ways in which they manifest. This is arguably the first step towards coming up with effective methods of conflict management.

2. Manifestations of Environmental Conflicts

Environmental aspects of conflict and the relevance of environmental concerns in connection to conflict has been the subject of research since the early 1970s and have remained one of the most prominent research topics to this day.³ Conflicts of interest are primarily divided into two categories: those relating to access to environmental resources as a source of livelihoods and as the foundation for economic activity and those relating to what are known as side effects of economic activity.⁴ Conflict, in whatever shape it takes, is likely to have a number of consequences (though at various geographical scales), including physical injury to persons and the natural resource base, as well as an influence on productivity levels and overall economic growth.⁵ Environmental change might also lead to the progressive poverty of societies in both the North and the South, escalating class and ethnic divisions, undermining liberal governments, and

¹ U Bob and S Bronkhorst, 'Environmental Conflicts: Key Issues and Management Implications' (2011) 10 African Journal on Conflict Resolution 10 <<http://www.ajol.info/index.php/ajcr/article/view/63307>> accessed 5 May 2022.

² Stewart F, 'Root Causes of Violent Conflict in Developing Countries' (2002) 324 BMJ: British Medical Journal 342.

³ Hardt, Judith Nora, and Jürgen Scheffran. "Environmental peacebuilding and climate change: peace and conflict studies at the edge of transformation." Toda Peace Institute 68 (2019): 1-20, at p.4.

⁴ Chapter One, Vatn, Arild. Environmental governance: institutions, policies and actions. Edward Elgar Publishing, 2015, at p.2.

⁵ U Bob and S Bronkhorst, 'Environmental Conflicts: Key Issues and Management Implications' (2011) 10 African Journal on Conflict Resolution 10 <<http://www.ajol.info/index.php/ajcr/article/view/63307>> accessed 5 May 2022.

instigating insurgencies.⁶ This section highlights the various ways in which environmental conflicts manifest.

2.1 Conflicts Relating to Access to Environmental Resources

Environmental scarcities of arable land and water are progressively causing poverty, resulting in the loss of livelihoods.⁷ Environmental conflicts are characterized by high levels of societal and ecological complexity and vulnerability, with some studies asserting that society and ecology engage in reciprocal feedbacks, a process known as "resource capture and ecological marginalization," as aptly captured in the following words:

Resource capture occurs when the degradation and depletion of a renewable resource (a decrease in supply) interacts with population growth (an increase in demand) to encourage powerful groups within a society to shift resource access (that is, to change the resource's distribution) in their favour.

These groups tighten their grip on the increasingly scarce resource and use this control to boost their wealth and power. Resource capture intensifies scarcity for poorer and weaker groups in society. Ecological marginalization occurs when unequal resource access (skewed distribution) combines with population growth (an increase in demand) to cause long-term migrations of people to ecologically fragile regions...High population densities in these regions, combined with a lack of knowledge and capital to protect the local ecosystem, cause severe resource degradation (a decrease in supply).⁸

Environmental resources have long been seen as a good predictor of the affluence of people who could make use of them. Therefore, access to non-renewable resources has historically been intimately related to development, and wars have arisen as nations have fought to protect or obtain control of these resources.⁹ It is argued that strategies aiming at granting the poor more "environmental entitlement" (improved access and social justice) are necessary for the prevention of environmental conflict.¹⁰ Arguably, no conflict management mechanism can work without first securing access rights to environmental resources for communities.

2.2 Conflicts Relating to Side Effects of Economic Activity

While access to natural resources and assets is important for achieving livelihood security, especially in poor communities and households that rely on natural assets for daily survival and

⁶ Thomas F Homer-Dixon, 'On the Threshold: Environmental Changes as Causes of Acute Conflict' (1991) 16 *International Security* 76, 78 <<https://www.jstor.org/stable/2539061?origin=crossref>> accessed 5 May 2022.

⁷ Ohlsson, L., *Livelihood Conflicts: Linking Poverty and Environment as Causes of Conflict* (Swedish International Development Cooperation Agency (Sida) 2000).

⁸ Ahmed, F., "Approaches to and tools for managing environmental conflicts in coastal zones in Africa: Challenges and prospects in relation to Integrated Coastal Zone Management (ICZM)," *African Journal on Conflict Resolution* 10, no. 2 (2010), p.32.

⁹ Schwartz, D., "Environmental conditions, resources, and conflicts: An introductory overview and data collection." (1999), p.4 <<https://na.unep.net/siouxfalls/publications/Conflicts.pdf>> accessed 5 May 2022.

¹⁰ Ahmed, F., "Approaches to and tools for managing environmental conflicts in coastal zones in Africa: Challenges and prospects in relation to Integrated Coastal Zone Management (ICZM)," *African Journal on Conflict Resolution* 10, no. 2 (2010), p.33.

livelihoods, livelihood activities have been shown to degrade the natural resource base, contributing to desertification, deforestation, soil erosion, declining water tables, and other types of environmental damage – that in turn affect livelihoods.¹¹ Furthermore, in vulnerable environments with limited resources, the lack of alternatives leads to greater environmental degradation, which leads to increased poverty and danger, contributing to what is known as the poverty trap.¹²

The plunder of Earth's natural resources by humankind is resulting in not just biodiversity loss but also significant changes in biodiversity distribution, composition, and abundance.¹³

Exploitation of natural resources has ramifications that go beyond the intended outcome, such as loss of biodiversity and pollution, which alter possibilities for others through altering the landscape and ecosystem dynamics, among other things.¹⁴ It is indeed these types of conflicts that have inspired the growth and development of environmental justice as a way of securing the environmental rights of affected communities.

3. Types of Environmental Conflicts

Environmental conflicts can take the form of political, social, economic, ethnic, religious, or territorial conflicts, or conflicts over resources or national interests, or any other type of conflict triggered by environmental degradation and characterized by the primary importance of environmental degradation in one or more of the following fields: 1) exploitation of renewable resources; 2) overstress on the environment's sink capacity (pollution); 3) depletion of living space.¹⁵ This section highlights some of the key types of environmental conflicts.

3.1 Biodiversity conflicts

Conflicts between biodiversity conservation and other human activities can arise in every area and have a significant influence on socioeconomic and ecological aspects.¹⁶ Managing conflicts between groups of people is inevitably a part of protecting biodiversity and natural resources. Conservation initiatives must master the art of avoiding and resolving conflicts over protected areas, animals, and access to natural resources if they are to endure the added stresses and effects of climate change and the pandemic.¹⁷

¹¹ U Bob and S Bronkhorst, 'Environmental Conflicts: Key Issues and Management Implications' (2011) 10 African Journal on Conflict Resolution 13

<<http://www.ajol.info/index.php/ajcr/article/view/63307>> accessed 5 May 2022.

¹² Ibid, 13.

¹³ Henrique Miguel Pereira, Laetitia Marie Navarro and Inês Santos Martins, 'Global Biodiversity Change: The Bad, the Good, and the Unknown' (2012) 37 Annual Review of Environment and Resources 25, 26 <<https://www.annualreviews.org/doi/10.1146/annurev-environ-042911-093511>> accessed 4 May 2022.

¹⁴ Chapter One, Vatn, Arild. Environmental governance: institutions, policies and actions. Edward Elgar Publishing, 2015, at p.2.

¹⁵ Mason, Simon A., and K. R. Spillman. "Environmental conflicts and regional conflict management." Welfare Economics and sustainable Development 2 (2009): 114-143, at 116.

¹⁶ Young, J.C., Marzano, M., White, R.M., McCracken, D.I., Redpath, S.M., Carss, D.N., Quine, C.P. and Watt, A.D., 'The Emergence of Biodiversity Conflicts from Biodiversity Impacts: Characteristics and Management Strategies' (2010) 19 Biodiversity and Conservation 3973 <<https://doi.org/10.1007/s10531-010-9941-7>> accessed 2 June 2022.

¹⁷ Crowdcast Inc, "Conflict Resolution for the Future of Biodiversity Conservation" with Dr Alexandra Zimmermann' (Crowdcast) <<https://www.crowdcast.io/e/conflict-resolution-for-the-future-of-biodiversity>> accessed 19 August 2022.

Some of the most critical biodiversity conflicts are highlighted below.

3.2. Land and Water Conflicts

It has been noted that Sub-Saharan Africa has a history of land dispossession and contestation, resulting in various types of inequalities and a skewed distribution of land resources, all of which have had a significant impact on the socioeconomic and political situations of many groups of people.¹⁸ It has also been contended that although many of the issues surrounding land issues and conflicts are not new, they continue to evolve and become increasingly complex and embedded, making it difficult to deal with them and calling into question the legitimacy of conflict intervention and prevention methods; the way in which these issues are addressed frequently fails to consider their major - and thus potentially recurring - causes.¹⁹ Water resources are also depleting due to pollution and resource depletion, while demand for water is fast growing due to population increase, industry, mechanisation, and urbanization.²⁰

In Addition to the foregoing, it has been pointed out that when it comes to land concerns, African countries confront an extra important difficulty, such as combating widespread land grabbing, which is becoming more common across the continent and is generally carried out by the economically most powerful groups, including government officials and politicians.²¹ Land in Africa is never just a commodity or a means of sustenance; it has so many additional connotations, combining being a factor of production with its position as family or communal property, a capital asset, and a source of cultural identity and/or citizenship.²²

Land-related conflicts and disputes occur at all levels: Conflicts between neighbours over field borders; conflicts between men, women, and generations over land rights; conflicts between pastoralists and farmers; conflicts between states and indigenous peoples; conflicts between businesses and local residents over mineral and other resource rights.²³

The indigenous peoples' entitlement to their land is the main source of violent disputes. A lack of access to productive lands and a limited right to their natural resources may be as a result of the improper implementation of national legal frameworks, which can also cause lengthy and complicated land-titling and demarcation procedures, the fragmentation and loss of traditional land, discrepancies between the amounts of land titled to indigenous peoples and the land concessions granted to large-scale businesses, and other issues. The denial of this right has an impact on indigenous peoples' economic and sociocultural well-being because of their close link

¹⁸ Bob U, "Land-related conflicts in sub-Saharan Africa." *African Journal on conflict resolution* 10, no. 2 (2010).

¹⁹ Anseeuw W and Alden C, *The Struggle over Land in Africa: Conflicts, Politics & Change* (HSRC Press 2015) <<https://repository.hsrc.ac.za/handle/20.500.11910/4404>> accessed 1 June 2022.

²⁰ Ashton, P. and Turton, A., "Transboundary water resource management in southern Africa: opportunities, challenges and lessons learned." *Wirkus, L* (2005): 5-32, at 5.

²¹ Lund C, Odgaard R and Sjaastad E, *Land Rights and Land Conflicts in Africa: A Review of Issues and Experiences* (JSTOR 2006), 4.

²² *Ibid.*

²³ Lund C, Odgaard R and Sjaastad E, *Land Rights and Land Conflicts in Africa: A Review of Issues and Experiences* (JSTOR 2006), 5.

with their lands and natural resources and their reliance on them for both their spiritual and physical existence as a people.²⁴

Water is widely recognized as the most important natural resource, supporting and preserving biological diversity as well as social and economic development.²⁵ The sustainability of water resources is threatened by certain natural phenomena and human factors which include, inter alia: the multiplicity of trans-boundary water basins; Extreme spatial and temporal variability of climate and rainfall, coupled with climate change; Growing water scarcity, shrinking of some water bodies, and desertification; Inappropriate governance and institutional arrangements in managing national and transnational water basins; Depletion of water resources through pollution, environmental degradation, and deforestation; Failure to invest adequately in resource assessment, protection and development; Unsustainable financing of investments in water supply and sanitation.²⁶

Water is not only a fundamental requirement, but it is also at the heart of sustainable development and is critical for poverty reduction. Health, agriculture, energy, and biodiversity are all dependent on water.²⁷ Although it is obvious that water resources should be divided among many users, accessible water sources are rare and finite, and the number of consumers continues to grow. As a result, the only way to ensure that no one's interests are harmed is to collaborate and negotiate in order to support the sustainable management of water, as well as all other accessible natural resources that are intertwined with water.²⁸

Water resources can only be managed successfully and efficiently when the entire river basin or catchment is the fundamental management unit, according to modern methods to water resource management. Moreover, since surface water and ground water are closely related, they must be treated as a single resource and managed as such.²⁹

4. Factors Shaping the Course of Conflict

There are many factors that determine the emergence, persistence, and even management of conflicts. The understanding of these factors is essential in developing policies that effectively limit and manage conflict. The factors range from internal to relational and contextual factors.³⁰

²⁴ Lefevre N, 'The Human Rights-Based Approach to Conflict Transformation in Indigenous Contexts' <https://www.academia.edu/9964347/The_Human_Rights_Based_Approach_to_Conflict_Transformation_in_Indigenous_Contexts> accessed 21 August 2022, p.5.

²⁵ Ashton, P. and Turton, A., "Transboundary water resource management in southern Africa: opportunities, challenges and lessons learned." Wirkus, L (2005): 5-32, at 5.

²⁶ LA BANQUE AFRICAINE DDP and BANKGROUP A, 'The Africa Water Vision for 2025: Equitable and Sustainable Use of Water for Socioeconomic Development', 1.

²⁷ Mwanza DD, 'Water for Sustainable Development in Africa' in Luc Hens and Bhaskar Nath (eds), *The World Summit on Sustainable Development: The Johannesburg Conference* (Springer Netherlands 2005) <https://doi.org/10.1007/1-4020-3653-1_4> accessed 4 June 2022.

²⁸ Heyns P, 'Water-Resources Management in Southern Africa' (2003) 1 *International waters in southern Africa* 5, 7.

²⁹ Ashton, P. and Turton, A., "Transboundary water resource management in southern Africa: opportunities, challenges and lessons learned." Wirkus, L (2005): 5-32, at 17.

³⁰ Kriesberg, Louis, "Factors shaping the course of intractable conflict," *Beyond Intractability*. Available at <http://www.beyondintractability.org/essay/factors_shaping_intractable_conflict/> Accessed on 20 August 2022.

The internal factors are factors that are structural in nature and relate to how the conflicting individuals and/or groups affect the course of a conflict. They include, for example, the level of economic development, cultural patterns, individual interests in the conflicts and decision-making institutions. These factors influence self-conceptions, identities, conceptualization of the grievances, goal formulation, and the methods for attaining the goals. The internal factors affect the level of participation of the parties in conflict management.³¹

The nature of the relationships between the parties to the conflict and how those relationships are interpreted by the parties may have an impact on how the conflict develops and is handled.

Size disparities (group disputes), economic endowment (resources), coerciveness between the parties, and cultural norms of behaviour are some of the relationship elements. They also cover the type and level of cooperation between rivals in the social, cultural, and economic spheres. Because both parties are experiencing the burden of the dispute brought on by the lack of the other party's output, conflicts between groups that rely on each other's produce will be simple to handle.³²

5. Causes of Conflicts

Interest conflicts can appear in many different ways. For instance, it may involve natural resources like land, food, territory, water, and energy. These disagreements might be over who should get resources, whether resources should be allocated, and how resources should be divided. Power and control of the resources are other potential drivers of conflict.³³ Conflicts over identity are another issue. These are about the communities that individuals feel a connection to on a cultural, social, and political level. Status conflicts that concern whether individuals feel their traditions and social standing are respected as well as whether they are treated with respect and decency may occur. Differences in values, particularly those expressed in governmental, religious, or ideological systems, may also contribute to conflicts.³⁴ Scholars have stressed that human needs are among the major causes of Conflicts, arguing that deep-seated conflicts result from the lack of basic need for security, identity, respect, safety, and control, which many people feel to be inalienable. Therefore, if they aren't there, the ensuing conflict will persist until society's structure is adjusted to meet everyone's requirements.³⁵

³¹ ashley.faoliu@colorado.edu, 'Factors Shaping the Course of Intractable Conflict' (Beyond Intractability, 6 July 2016) <<https://www.beyondintractability.org/essay/factors-shaping-intractable-conflict>> accessed 1 September 2022.

³² Callanan, G.A., Benzing, C.D. and Perri, D.F., "Choice of conflict-handling strategy: A matter of context." *The Journal of Psychology* 140, no. 3 (2006): 269-288.

³³ Humphreys, M., "Natural resources, conflict, and conflict resolution: Uncovering the mechanisms." *Journal of conflict resolution* 49, no. 4 (2005): 508-537; 'Natural Resources and Conflict | Helvetas' <<https://www.helvetas.org/en/switzerland/what-we-do/our-topics/voice-inclusion-cohesion/conflict-transformation/natural-resources-and-conflict>> accessed 1 September 2022.

³⁴ See Toolkit and guidance for preventing and managing land and natural resources conflict - World | ReliefWeb. <https://reliefweb.int/report/world/toolkit-and-guidance-preventing-and-managing-land-and-natural-resources-conflict> (accessed 2022-09-01); Brahm, E., "Religion and Conflict." *Beyond Intractability*. Eds. Guy Burgess and Heidi Burgess. Conflict Information Consortium, University of Colorado, Boulder. Posted: November 2005 <<http://www.beyondintractability.org/essay/religion-and-conflict>> accessed 1 September 2022.

³⁵ See Burton, J., *Conflict: Human needs theory* (New York: St. Martin's Press), Springer, 1990; Kelman, H., *International Behavior: A Social Psychological Analysis* (New York: Holt, Rinehart and Winston), 1965;

For instance, the need for identity has been described as a fundamental driver of intractable conflict.³⁶ People who perceive threats to their identities as a means of preserving their essence frequently respond in a very negative way to such threats. If identity conflicts are handled through interest-based negotiation, the resolutions are likely to be at most transitory since identity issues in particular are not negotiable interest-based conflicts.³⁷ Conflicts can be categorized in a number of ways. Sometimes an observer may think that the interests of the parties are incompatible but the respective parties are not aware of these incompatibilities. They might be latent conflict or evident, peaceful or manifest. Self-delusion, justification, ignorance, or information suppression might be the root of this. Such undetected or dimly perceived conflicts of interest are referred to as latent. Conflicts emerge when these opposing, unrecognised interests become aware and expressed.³⁸

6. Stages of conflict

Conflicts are said to happen in cycles or episodes that can last anywhere from a few seconds to many minutes. Each episode affects future episodes as well as the outcomes of earlier episodes. The conflict episode model consists of six parts or phases.³⁹ The following explanation deals with just two people in disagreement, but the model may easily be extended to include more. The "latent" stage of conflict occurs if individuals have divergent wants, values, or interests.

A "triggering event" that causes the emergence (or start) of the evident conflict may be necessary for the conflict to become apparent. Emergence may be swiftly followed by settlement or resolution, or it may be followed by escalation, which might turn out to be quite damaging.⁴⁰ The process of escalation, nevertheless, has a limit. Temporary de-escalation or de-escalation as part of a larger trend toward settlement or resolution are both possible. A stalemate, in which neither side can prevail, might result from an intensification of the conflict. If the pain of continuing the fight outweighs the discomfort of sustaining the confrontation, the parties are in what one observer refers to as a "hurting stalemate," which frequently provides an opportune chance for dialogue and a potential resolution. Finally, peace building activities aim to mend strained bonds with the long-term objective of bringing former adversaries together, if and when an agreement is reached.

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Burgess, Heidi and Guy M. Burgess, 'What Are Intractable Conflicts?' (Beyond Intractability, 22 June 2016) <https://www.beyondintractability.org/essay/meaning_intractability> accessed 1 September 2022.

³⁶ Jay Rothman, *Resolving Identity-Based Conflicts* (San Francisco: Jossey Bass), 1997. See also John Paul Lederach, *Building Peace: Sustainable Reconciliation in Divided Societies* (United States Institute of Peace), 1998.

³⁷ Burgess, Heidi and Guy M. Burgess, 'What Are Intractable Conflicts?' (Beyond Intractability, 22 June 2016) <https://www.beyondintractability.org/essay/meaning_intractability> accessed 1 September 2022.

³⁸ Brahm, E., 'Conflict Stages' (Beyond Intractability, 6 July 2016) <https://www.beyondintractability.org/essay/conflict_stages> accessed 1 September 2022.

³⁹ Louis R Pondy, 'Organizational Conflict: Concepts and Models' (1967) 12 *Administrative Science Quarterly* 296 <<https://www.jstor.org/stable/2391553?origin=crossref>> accessed 1 September 2022.

⁴⁰ Katz, N. and McNulty, K., "Reflective listening." Retrieved February 4 (1994): 2021 <https://www.maxwell.syr.edu/docs/default-source/ektron-files/conflict-resolution-nk.pdf?sfvrsn=4de5d71e_5> accessed 1 September 2022.

⁴¹ Brahm, E., "Conflict stages: Beyond intractability (Guy Burgess and Heidi Burgess, Eds.). Boulder: Conflict Research Consortium, University of Colorado." (2003) Available at <http://www.beyondintractability.org/essay/conflict_stages/> Accessed on 23 August 2022.

Some academics extend this list to include other stages. One author adds unsuccessful peacemaking attempts following the intensification and institutionalization of destructive conflict, particularly for intractable conflict. This later stage is strongly related to the hurtful stalemate.⁴²

7. Costs of Conflicts

Conflicts inevitably have expenses associated with them. Conflict may explode into violence, bloodshed, and devastation when it cannot be effectively handled. Conflict expenses are frequently discussed in media reporting.⁴³ The most evident cost of violent intractable conflict is its human cost, which is exemplified by the loss of lives. Other less evident human costs include displacements, long-term wounds sustained by conflict, rape, or torture victims, and impaired people's capacity to make a livelihood. Trauma can also have psychological repercussions, especially in cases of violent disputes. Additional human costs include feelings of extreme anxiety, mistrust, melancholy, and hopelessness.⁴⁴ Secondly, there are a range of economic consequences associated with armed conflict, both as a result of the violence itself and as a result of the decisions made not to be involved in the fight. For example, mounting and maintaining assaults has immediate costs. There are additional ancillary costs, such as the loss resulting from the loss of labour, expenses resulting from lost production time, and expenditures resulting from damaged production equipment.⁴⁵

Significant environmental devastation is another frequent side effect of conflict. It is challenging to defend environmental preservation when there are other, more pressing issues as a result of the struggle. As a result, faster resource exploitation may cause significant environmental harm. The land and well suffer long-term damage from weapons, including chemical and biological ones. Tourism is also affected by conflict, some of which may have aided ecotourism initiatives.⁴⁶ The

⁴² Ibid. Other scholars conceive stages of conflicts differently. Alker, Gurr, and Rupesinghe distinguish between six phases: dispute (equivalent to conflict emergence); crisis (equivalent to escalation); limited violence; massive violence; abatement (equivalent to de-escalation); and settlement. See Rosalia Rodriguez-Garcia, et al. "How Can Health Serve as a Bridge for Peace?" Available online at <http://www.certi.org/publications/policy/gwc-12-a-brief.htm> Accessed on 23 August 2022.

⁴³ Eriksson, J., Adelman, H., Borton, J., Christensen, H., Kumar, K., Suhrke, A., Tardif-Douglin, D., Villumstad, S. and Wohlgemuth, L., The international response to conflict and genocide: lessons from the Rwanda experience: synthesis report. Joint Evaluation of Emergency Assistance to Rwanda, 1996. <<https://www.oecd.org/derec/50189495.pdf>> Accessed on 23 August 2022.

⁴⁴ Ibid.

⁴⁵ Solimano, A., ed. Political crises, social conflict and economic development: The political economy of the Andean region. Edward Elgar Publishing, 2005; Mueller, H. and Tobias, J., "The cost of violence: Estimating the economic impact of conflict." International Growth Centre (2016); Fearon, J. and Hoeffler, A., "Benefits and costs of the conflict and violence targets for the post-2015 development agenda." Conflict and violence assessment paper, Copenhagen Consensus Center (2014): 1-65.

⁴⁶ 'Environmental Conflicts' (ACCORD) <<https://www.accord.org.za/ajcr-issues/environmental-conflicts/>> accessed 1 September 2022; Mukete, B.; Yujun, S.; Zama, E.; John, A.; Tahle, M.; Lisette, N.; Bernard, L. Environmental Degradation in Conflict and Post-Conflict Regions. International Journal of Environmental Protection and Policy 2017, 4, 187–195; 'How Does War Damage the Environment?' (CEOBS, 4 June 2020) <<https://ceobs.org/how-does-war-damage-the-environment/>> accessed 1 September 2022; 'Impact of Terrorism and Conflicts on Travel and Tourism - Unintended Opportunities' (Hotel Management Network, 8 September 2021) <<https://www.hotelmanagement-network.com/comment/impact-of-terrorism-and-conflicts-on-travel-and-tourism-industry/>> accessed 1 September 2022; Mohammad Sharif Karimi, Mohsen Khezri and Somayeh Razzaghi, 'Impacts of Regional Conflicts on Tourism in Africa and the Middle East: A Spatial Panel Data Approach' (2022) 25 Current Issues in Tourism 1649 <<https://doi.org/10.1080/13683500.2021.1931054>> accessed 1 September 2022; Marina Tkalec and Ivan

third consequence of conflict is that it may undermine the sense of community in an organization by harming long-standing connections. Fourth, those participating in conflict experience emotional losses.⁴⁷

8. Benefits of Conflicts?

Conflicts are unavoidable and can be advantageous. They can jolt individuals out of complacency and inspire them to take the necessary action. Conflict might occasionally be essential to rouse people from problematic relationships or behaviour.⁴⁸ Land, riches, power, and other tangible material benefits are frequently the outcomes of conflicts. For instance, self-government in Africa was established as a result of the fight between African nationalists and the colonial authorities.⁴⁹ Similar to this, the first Gulf War provided the US a strategic edge in the Middle East and control over the region's two most significant oil-producing nations, Saudi Arabia and Kuwait.⁵⁰ Conflict may also serve as the catalyst for a process where people come to terms with the fact that they have both shared adversaries and interests. People could start to feel strongly invested in their side's eventual victory as a result. Conflicts over identity, for instance, are perceived as a means of preserving self-esteem. Therefore, people are more willing to fight for it if their identity is more closely related to the organisation. Conflict's danger frequently leads to greater self-identities. Depending on the nature of that identification, this can be advantageous or disadvantageous.⁵¹

A disagreement of some kind is very frequently how social connection starts. As an illustration, lawyers collaborate when they discover one another on the defence team for the other party in a court case. When kids argue over toys, they frequently engage in social interaction that subsequently turns into cooperative play. Adults may also initially encounter one other in a conflict setting. However, when the conflict is settled, the parties can build trust and go on to communicate amicably. As an illustration, businesses and unions typically start out on opposite sides of disputes.⁵² However, they take steps to settle their differences, which are resolved with the signing of the recognition agreement. Soon, they are both actively involved in advancing the interests of employees. In terms of the environment, this is also feasible. Communities that battle

Žilić, 'Does Proximity to Conflict Affect Tourism: Evidence from NATO Bombing' (2021) 16 PLoS ONE e0258195 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8528334/>> accessed 1 September 2022.

⁴⁷ Kenneth W. Thomas and W. H. Schmidt, "A Survey of Managerial Interests with Respect to Conflict," *Academy of Management Journal*, June 1976; Maiese, M., "Emotions." *Beyond Intractability*. Eds. Guy Burgess and Heidi Burgess. Conflict Information Consortium, University of Colorado, Boulder. Posted: July 2005 <<http://www.beyondintractability.org/essay/emotion>> accessed 1 September 2022.

⁴⁸ 'Session 5. Conflict Management' <<https://www.fao.org/3/w7504e/w7504e07.htm>> accessed 1 September 2022; Jason S Wrench, Narissra M Punyanunt-Carter and Katherine S Thweatt, 'Chapter 9: Conflict in Relationships' <<https://milnepublishing.geneseo.edu/interpersonalcommunication/chapter/9/>> accessed 1 September 2022.

⁴⁹ Khapoya, V.B., "African Nationalism and the Struggle for Freedom." In *The African Experience*, pp. 139-167. Routledge, 2015.

⁵⁰ Duffield, John S. "'Oil and the Iraq War: How the United States Could Have Expected to Benefit, and Might Still.'" (2005).

⁵¹ Brahm, E., "Benefits of Intractable Conflict." *Beyond Intractability*. Eds. Guy Burgess and Heidi Burgess. Conflict Information Consortium, University of Colorado, Boulder. Posted: September 2004 <<http://www.beyondintractability.org/essay/benefits>> accessed 1 September 2022.

⁵² Brahm, E., "Benefits of Intractable Conflict." *Beyond Intractability*. Eds. Guy Burgess and Heidi Burgess. Conflict Information Consortium, University of Colorado, Boulder. Posted: September 2004 <<http://www.beyondintractability.org/essay/benefits>> accessed 1 September 2022.

for a resource come to value it and hate its persistent scarcity. They are forced to the negotiating table as a result, where they may discuss and settle their conflict.⁵³

The drawbacks of disputes frequently outweigh their advantages. Conflicts cannot be avoided, but they must be handled well in order to maintain peace among the populace, avert bloodshed, and save lives.⁵⁴ Conflicts don't just happen by accident. They are greatly influenced by the context. Numerous outside influences, each with a different scope and impact, influence their course. The collection of other conflicts that overlay or have an impact on any specific conflict is a significant external factor. Conflicts inside the family structure are one example of an external element sustaining social institutions that differs from those on a tribal size. Another significant external aspect affecting the conflict is the parties' respective income levels. In addition, other issues like the technology supporting communication, transport, and manufacturing play a significant role in how disputes develop. Non-social environmental challenges include things like the climate, the availability of water and mineral resources, pollution, and the condition of the soil.⁵⁵

9. Conclusion

In order to minimize harm to biodiversity, human livelihoods, and human well-being, conservation conflicts are on the rise and must be controlled.⁵⁶ Conflict, in whatever shape it takes, is likely to have a number of consequences (though at different geographical scales), including physical injury to persons and the natural resource base, as well as a negative influence on productivity and overall economic growth.⁵⁷ Interactions with other sectors are rarely considered in development programmes that focus on specific natural resource sectors (forestry, livestock, water, etc.). A reasonable development policy must acknowledge conflict; ignoring discordant parts may win favour in the short term, but it will never result in long-term solutions.⁵⁸ In line with this, it has been argued that:

Understanding natural resource management necessitates a multidisciplinary approach that examines a variety of interconnected and complicated processes:

First and foremost, it is critical to investigate ecological conditions and how resources respond to natural and human-caused changes. The use, management, and tenure relations associated with

⁵³ Ibid.

⁵⁴ Gambari, I. A. Peace Management and Conflict Resolution: A Practitioner's Perspective. In *The State of Peacebuilding in Africa: Lessons Learned for Policymakers and Practitioners*; McNamee, T., Muyangwa, M., Eds.; Springer International Publishing: Cham, 2021; pp 277–292. https://doi.org/10.1007/978-3-030-46636-7_16.

⁵⁵ Bercovitch, J. and Jackson, R., "Negotiation or mediation? An exploration of factors affecting the choice of conflict management in international conflict." *Negotiation Journal* 17, no. 1 (2001): 59-77.

⁵⁶ Redpath, S.M., Young, J., Evely, A., Adams, W.M., Sutherland, W.J., Whitehouse, A., Amar, A., Lambert, R.A., Linnell, J.D., Watt, A. and Gutierrez, R.J., 'Understanding and Managing Conservation Conflicts' (2013) 28 *Trends in Ecology & Evolution* 100 <<https://www.sciencedirect.com/science/article/pii/S0169534712002169>> accessed 19 August 2022.

⁵⁷ U Bob and S Bronkhorst, 'Environmental Conflicts: Key Issues and Management Implications' (2011) 10 *African Journal on Conflict Resolution* 10

<<http://www.ajol.info/index.php/ajcr/article/view/63307>> accessed 5 May 2022.

⁵⁸ Blench R, *Aspects of Resource Conflict in Semi-Arid Africa* (Overseas Development Institute London 1997).

resources are determined by their nature (e.g., density, volume, fluctuation) as well as how they are valued (by users, policymakers, or markets).

Second, because they frequently involve a combination of different groups of local users (pastoralists, farmers, "original" inhabitants, migrants, the political and economic elite, etc.) and State agencies and officials, these tenure relations or property rights are in fact dynamic objects of intricate struggles between various stakeholders.

Third, these fights are fueled by and result from local and national political processes that, in turn, are influenced by global discourses such as "decentralisation," "disengagement from the state," "democratisation," and "environmental degradation."

As a result, in addition to these three sectors of natural resource management (production, property, and politics), the method also incorporates features from the national and global levels, with the main focus remaining on the local level where day-to-day management is practised.⁵⁹

It has been pointed out that while social issues are sometimes overlooked in favour of environmental goals, this might cause certain actors to feel unfairly treated, which could jeopardize the conservation effort's goals.⁶⁰ Access to land, the management of wildlife, resources and benefits from protected areas, sustainable utilization, livelihoods, development, and social justice are all frequent sources of conflict.⁶¹ The first step towards addressing a problem is to appreciate its causes and manifestations. There is a need for the stakeholders to identify the causes and manifestations of conflicts in the country if they are to put in place effective responsive mechanisms to address the same.

⁵⁹ Benjaminsen TA and Lund C, *Politics, Property and Production in the West African Sahel: Understanding Natural Resources Management* (Nordic Africa Institute 2001), 7.

⁶⁰ Lecuyer, L., Calmé, S., Blanchet, F.G., Schmook, B. and White, R.M., "Factors affecting feelings of justice in biodiversity conflicts: Toward fairer jaguar management in Calakmul, Mexico." *Biological Conservation* 237 (2019): 133-144.

⁶¹ Crowdcast Inc, "Conflict Resolution for the Future of Biodiversity Conservation" with Dr Alexandra Zimmermann' (Crowdcast) <<https://www.crowdcast.io/e/conflict-resolution-for-the-future-of-biodiversity>> accessed 19 August 2022.

Nurturing our Wetlands for Biodiversity Conservation

Abstract

Wetlands have a vital role in not just delivering ecological services to meet human needs, but also in biodiversity conservation. Wetlands are vital habitat sites for many species and a source of water, both of which contribute to biodiversity protection. This paper examines the role of wetlands in biodiversity conservation and how these wetland resources might be managed to improve biodiversity conservation.

1. Introduction

Biodiversity conservation is frequently related with a biocentric perspective, in which all life on Earth has intrinsic value.¹ This paper is based on both ecocentric and anthropocentric reasons for taking care of wetlands, for purposes of meeting human needs as well as protecting biodiversity resources therein. This is because wetlands' ecological services are linked to an anthropocentric viewpoint in which biodiversity has instrumental value since it contributes to services that benefit human well-being.² Wetlands are split into two types: coastal/tidal and inland/non-tidal, and both provide essential habitat for a range of aquatic and terrestrial species.³

The United Nations Charter for Nature (1982) promotes an ecocentric approach to biodiversity protection, stating that "every form of life is unique, deserving of respect regardless of its value to man....In accordance with national legislation, all persons shall have the opportunity to participate, individually or in groups, in the formulation of decisions directly affecting their environment, and shall have access to measures of redress if their environment has been damaged or degraded."⁴ This paper adopts both ecocentric and anthropocentric reasons for nurturing our wetlands as a step towards biodiversity conservation and this is justified by the notion that 'where mutually beneficial relationships between biodiversity and ecosystem services exist (win-win), there will be much larger and more powerful sets of potential partners in conservation'.⁵

This page provides a crucial argument on the link between nurturing wetlands resources and supporting successful biodiversity conservation as a means of guaranteeing the future, both for humans and all other living things that inhabit wetlands.

2. Wetlands, Biodiversity Conservation and Sustainable Development Agenda

Wetlands play an important role in hydrological and biogeochemical cycles because they provide a wide range of ecosystem goods and services to humans, including the ability to retain water during the dry season and keep the water table high and moderately stable, the ability to regulate a microclimate, and many ecosystem services that are critical to reducing community

¹ Reyers, B., Polasky, S., Tallis, H., Mooney, H.A. and Larigauderie, A., 'Finding Common Ground for Biodiversity and Ecosystem Services' (2012) 62 *BioScience* 503.

² *Ibid.*

³ 'Wetland Conservation and Its Impact on Biodiversity' (Planet Forward)

<<https://www.planetforward.org/idea/wetland-conservation-biodiversity>> accessed 28 December 2021.

⁴ UN General Assembly, World Charter for Nature., 28 October 1982, A/RES/37/7, Preamble; Principle 23.

⁵ Reyers, B., Polasky, S., Tallis, H., Mooney, H.A. and Larigauderie, A., 'Finding Common Ground for Biodiversity and Ecosystem Services' (2012) 62 *BioScience* 503.

vulnerability to climate change and extreme weather events in particular.⁶ As a result, they serve a key ecological function that is essential for biological survival and human development.⁷ They also offer a wide range of leisure activities, including fishing, hunting, photography, and animal observation.⁸

The *Convention on Wetlands of International Importance especially as Waterfowl Habitat*⁹ (Ramsar Convention on Wetlands) acknowledges the fundamental ecological functions of wetlands as regulators of water regimes and as habitats supporting a characteristic flora and fauna, especially waterfowl in its preamble.

Biodiversity is an important part of the efforts towards achieving Sustainable Development agenda as it is the source of all life and all raw materials required to meet human needs. Any efforts to secure human life for both the present and future generations must, therefore, include conservation of biodiversity as a matter of necessity. Conserving Biodiversity for a Better Future is thus an idea that we must deeply reflect on as a matter of urgency. Apart from the moral and legal grounds for respect for human rights in conservation efforts, it has been opined that practically, conservation will often be more effective if people's rights are respected and fulfilled: Local people who benefit from conservation and who are better able to meet their needs and achieve their development objectives are more likely to change any behaviour that may damage the environment through overexploitation; local and indigenous people often have knowledge, skills and organisational capacities that are useful and relevant in resource management; people are more likely to follow resource management agreements and rules if they have had input into these agreements. Participation in decision-making makes it more likely that the agreements will meet their needs and will reflect what is achievable.¹⁰ It is imperative that all stakeholders join hands in conservation of biodiversity.

It is also important to point out that in addition to mitigation, biodiversity and ecosystem services play an important role in adapting to the impacts of climate change, and reducing the risk of climate-related and non-climate-related disasters.¹¹ Unless challenges threatening wetlands and biodiversity resources within these wetlands are addressed, the dream of achieving sustainable development goals will remain a mirage.

⁶ Dinsa TT and Gemedo DO, 'The Role of Wetlands for Climate Change Mitigation and Biodiversity Conservation' (2019) 23 *Journal of Applied Sciences and Environmental Management* 1297, at 1297; see also 'Wetland Conservation and Its Impact on Biodiversity' (Planet Forward) <<https://www.planetforward.org/idea/wetland-conservation-biodiversity>> accessed 28 December 2021.

⁷ Ibid.

⁸ 'Why Are Wetlands Important? - Wetlands (U.S. National Park Service)' <<https://www.nps.gov/subjects/wetlands/why.htm>> accessed 30 December 2021.

⁹ United Nations, *Convention on Wetlands of International Importance especially as Waterfowl Habitat*, Ramsar, Iran, 2.2.1971 as amended by the Protocol of 3.12.1982 and the Amendments of 28.5.1987.

¹⁰ BirdLife International, International B, 'An Introduction to Conservation and Human Rights for BirdLife Partners', 11.

¹¹ OECD (2019), *Biodiversity: Finance and the Economic and Business Case for Action*, report prepared for the G7 Environment Ministers' Meeting, 5-6 May 2019, 31.

3. Threats to Wetlands Conservation

Human development, urbanization, and poor management have all been blamed for the disappearance of wetlands.¹² Due to changes in land-use patterns, such as conversion of wetlands into farmlands, human settlements, urban centers, and infrastructure development, it is estimated that the area of wetlands has decreased by more than half since 1900.¹³ These are exacerbated by current challenges to biodiversity protection, such as habitat loss and degradation, climate change, chemical and biochemical pollution, logging and poaching, invasive species, illness, and the loss of plant pollinators, among others.¹⁴ That wetlands in Kenya also suffer from over-exploitation of their natural resources is one major threat. Others are encroachment, habitat degradation and biodiversity loss.¹⁵

It has been contended that because wetlands produce a wide range of plant, animal, and mineral products that are used and valued by people all over the world, whether in local, rural communities or far-off cities in foreign countries, wetlands have attracted significant portions of human populations who survive by exploiting their resources through various resource utilization activities, often driven by economic and financial considerations. Such reliance on natural resource exploitation for survival always puts the resources in jeopardy, especially if the value of the resources is unknown or undervalued by the stakeholders.¹⁶

4. Looking into the Future: Nurturing Wetlands and Biodiversity Conservation

Wetlands are ecologically diverse and highly productive ecosystems that improve water quality, regulate erosion, sustain stream flows, store carbon, and offer habitat for at least one-third of all threatened and endangered species.¹⁷ Kenyan wetlands are believed to cover up to 4% of the entire landmass, approximately 14,000 km² of the land surface, with a peak of roughly 6% during the rainy season.¹⁸

The High Court correctly pointed out in *Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR* that access to information is a key pillar in our Constitution's environmental governance scheme because effective Public Participation in decision-making requires full,

¹² 'Wetland Conservation and Its Impact on Biodiversity' (Planet Forward)

<<https://www.planetforward.org/idea/wetland-conservation-biodiversity>> accessed 28 December 2021.

¹³ Mwangi B, "Threats of Land Use Changes on Wetland and Water Areas of Murang'a County, Kenya." *Applied Ecology and Environmental Sciences*, vol. 9, no. 6 (2021): 585-590. doi: 10.12691/aees-9-6-2.

¹⁴ Ralf C Buckley, 'Grand Challenges in Conservation Research' (2015) 3 *Frontiers in Ecology and Evolution* 128 <<https://www.frontiersin.org/article/10.3389/fevo.2015.00128>> accessed 28 December 2021.

¹⁵ 'Wetlands and Biodiversity – Nature Kenya' <<https://naturekenya.org/2020/01/29/wetlands-and-biodiversity/>> accessed 30 December 2021.

¹⁶ Oduor FO, Raburu PO and Mwakubo S, "To conserve or convert wetlands: evidence from Nyando wetlands, Kenya." *Journal of Development and Agricultural Economics* 7, no. 2 (2015): 48-54, at 48-49.

¹⁷ 'Why Are Wetlands Important? - Wetlands (U.S. National Park Service)' <<https://www.nps.gov/subjects/wetlands/why.htm>> accessed 30 December 2021.

¹⁸ Mwangi B, "Threats of Land Use Changes on Wetland and Water Areas of Murang'a County, Kenya." *Applied Ecology and Environmental Sciences*, vol. 9, no. 6 (2021): 585-590, at 586. doi: 10.12691/aees-9-6-2; see also Francis O Oduor, Phillip O Raburu and Samuel Mwakubo, 'To Conserve or Convert Wetlands: Evidence from Nyando Wetlands, Kenya' (2015) 7 *Journal of Development and Agricultural Economics* 48, 48 <<https://academicjournals.org/journal/JDAE/article-abstract/82B41C449827>> accessed 30 December 2021.

accurate, and up-to-date information.¹⁹ With enhanced literacy levels, it is possible to carry out civic education regarding various challenges that arise from given projects and also for communities to fully appreciate the merits and demerits of certain projects and environmental resources, including wetlands, and also appreciate the compromises that they need to make, if any.²⁰ There is a need for a more active and meaningful involvement of communities living around wetlands to help them appreciate the importance of wetlands to both their livelihoods and biodiversity conservation. It has been suggested that in order to enhance effective public participation, the duty bearers should do the following: ensuring that as duty bearers (leaders) they are accessible to and represent citizens; ensuring existence of forums and opportunities for citizens to participate and engage in matters affecting their lives; providing civic education; developing effective communication channels with citizens; providing timely information to citizens on critical and emerging issues; and providing resources to facilitate public participation.²¹

In addition to the foregoing, the United Nations Environmental Assembly (UNEA) asserts that this development path should maintain, enhance and, where necessary, rebuild natural capital as a critical economic asset and source of public benefits, especially for poor people whose livelihoods and security depend strongly on nature.²² There is no better way to apply this than in enhancing protection of wetlands. It is proposed that, because management decisions have not adequately considered the economic importance wetland goods and services provide to local communities and the national economy, a valuation of wetlands goods and services would assist policymakers in making decisions regarding wetlands conservation and exploitation in the country.²³ Arguably, this would enhance the participation of these communities as they appreciate the actual benefits they can get from these wetlands.

SDG Goal 1 seeks to ensure that State Parties end poverty in all its forms everywhere by the year 2030.²⁴ "More than one billion people in the globe live in abject poverty on less than \$1.25 a day,"

¹⁹ Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR, Petition 22 of 2012.

²⁰ 'The Role of Civic Education' <https://civiced.org/papers/articles_role.html> accessed 24 July 2021.

²¹ Uraia, 'What is Public Participation?' <https://uraia.or.ke/wp-content/uploads/2016/11/Citizen-Participation-BOOKLET.pdf> accessed 21 July 2021.

²² 'What Is an "Inclusive Green Economy"?' | UNEP - UN Environment Programme' <<https://www.unenvironment.org/explore-topics/green-economy/why-does-green-economy-matter/what-inclusive-green-economy>> accessed 24 December 2020.

²³ Oduor FO, Raburu PO and Mwakubo S, "To conserve or convert wetlands: evidence from Nyando wetlands, Kenya." *Journal of Development and Agricultural Economics* 7, no. 2 (2015): 48-54, at 49.

²⁴ SDG Goal 1, United Nations, Transforming our world: the 2030 Agenda for Sustainable Development, Resolution adopted by the General Assembly on 25 September 2015, A/RES/70/1.

The related targets include:

1.1 By 2030, eradicate extreme poverty for all people everywhere, currently measured as people living on less than \$1.25 a day.

1.2 By 2030, reduce at least by half the proportion of men, women and children of all ages living in poverty in all its dimensions according to national definitions.

1.3 Implement nationally appropriate social protection systems and measures for all, including floors, and by 2030 achieve substantial coverage of the poor and the vulnerable.

according to estimates, "while the richest 1% own nearly half of the world's wealth," implying "a huge gap and inequality in the distribution of the world economy."²⁵ Despite the fact that Africa as a continent is endowed with tremendous natural and human resources as well as great cultural, ecological, and economic diversity, high rates of poverty are more pronounced in developing countries, particularly on the African continent.²⁶ Some of the causes of poverty in Africa include, *inter alia*, population growth, war and crises, climate change, illnesses, inadequate agricultural infrastructure, and unjust trade structures.²⁷ These need to be addressed as a step towards protecting wetlands as poverty arguably contributes to environmental degradation.²⁸ To address

1.4 By 2030, ensure that all men and women, in particular the poor and the vulnerable, have equal rights to economic resources, as well as access to basic services, ownership and control over land and other forms of property, inheritance, natural resources, appropriate new technology and financial services, including microfinance.

1.5 By 2030, build the resilience of the poor and those in vulnerable situations and reduce their exposure and vulnerability to climate-related extreme events and other economic, social and environmental shocks and disasters.

1.A Ensure significant mobilization of resources from a variety of sources, including through enhanced development cooperation, in order to provide adequate and predictable means for developing countries, in particular least developed countries, to implement programmes and policies to end poverty in all its dimensions.

1.B Create sound policy frameworks at the national, regional and international levels, based on pro-poor and gender-sensitive development strategies, to support accelerated investment in poverty eradication actions.

²⁵ 'Poverty is a Human Rights Violation | Apolitical' (17 June 2020)

<https://apolitical.co/en/solution_article/poverty-is-a-human-rights-violation> accessed 24 December 2020.

²⁶ 'Poverty in Africa Is Now Falling—but Not Fast Enough' <<https://www.brookings.edu/blog/future-development/2019/03/28/poverty-in-africa-is-now-falling-but-not-fast-enough/>> accessed 25 December 2020; Chandy L, 'Why Is the Number of Poor People in Africa Increasing When Africa's Economies Are Growing?' (Brookings, 30 November 1AD) <<https://www.brookings.edu/blog/africa-in-focus/2015/05/04/why-is-the-number-of-poor-people-in-africa-increasing-when-africas-economies-are-growing/>> accessed 25 December 2020; 'On the Poorest Continent, the Plight of Children Is Dramatic' (SOS-US-EN) <<https://www.sos-usa.org/SpecialPages/Africa/Poverty-in-Africa>> accessed 25 December 2020; 'Poverty and Development in Africa' <<https://www.globalpolicy.org/social-and-economic-policy/poverty-and-development/poverty-and-development-in-africa.html>> accessed 25 December 2020; 'Poverty and Development in Africa' <<https://www.globalpolicy.org/social-and-economic-policy/poverty-and-development/poverty-and-development-in-africa.html>> accessed 25 December 2020; Muigua K, Utilizing Africa's Natural Resources to Fight Poverty (2014) <<http://kmco.co.ke/wp-content/uploads/2019/06/Utilizing-Africas-Natural-Resources-to-Fight-Poverty-26th-March2014.pdf>> accessed 25 December 2020.

²⁷ 'On the Poorest Continent, the Plight of Children Is Dramatic' (SOS-US-EN) <<https://www.sos-usa.org/SpecialPages/Africa/Poverty-in-Africa>> accessed 25 December 2020.

²⁸ See generally, Kanetasya Sabilla, 'Environmental Degradation and Poverty Nexus: Evidence from Coral Reef Destruction in Indonesia' (2017) 7 Journal of Indonesian Social Sciences and Humanities 81 <<http://jissh.journal.lipi.go.id/index.php/jissh/article/view/143>> accessed 30 December 2021; Zabala A and Sullivan CA, 'Multilevel Assessment of a Large-Scale Programme for Poverty Alleviation and Wetland Conservation: Lessons from South Africa' (2018) 61 Journal of Environmental Planning and Management 493.

biodiversity loss issues, all parties, including private actors, must work together to reduce actions that jeopardize the future of the planet.

To that end, the *United Nations Guiding Principles on Business and Human Rights* were drafted and endorsed in recognition of: States' existing obligations to respect, protect, and fulfill human rights and fundamental freedoms; the role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and respect human rights; and the need for rights and obligations to be matched to appropriate and effective remedial measures.²⁹

One way of ensuring that all human activities foster biodiversity conservation is introducing pricing of biodiversity and actively assessing biodiversity's contribution to economic growth. However, it has been pointed out that while establishing the value of biodiversity to economies is important, as it may partly help policymakers in all countries to appreciate that there is a cost to losing nature, at the same time, an economic assessment must take into account the perspectives of the humanities, of developing countries and of members of indigenous communities.³⁰ Notably, undervaluing the economic and societal values of biodiversity is believed to pose a threat to biodiversity and investment in conservation, and while the value of conventional natural resources such as forestry, fisheries, and wildlife is well appreciated the wider ecological services that biodiversity provides which include water catchments, a natural cleansing of the air, water and soils we pollute, carbon sequestration and, in developing economies such as Kenya, the biomass energy that fuels the lives of most Kenyans in the form of wood and charcoal, are seldom valued.³¹

The government should continue to establish effective systems of Strategic Environmental Assessment (SEA), Environmental Impact Assessment (EIA), Strategic Environmental and Social Assessment (SESA), Environmental Audit and Monitoring, and Environmental Security Assessment (ESA), and ensure that they are reviewed on a regular basis to ensure that they remain effective. Without extensive environmental evaluation processes, development initiatives targeting wetland areas should be avoided. There is a need to ensure that these EIA processes are not only formal but also reflective of what is happening on the ground, and that there is a follow-up mechanism in place to ensure that companies engage with communities throughout and continue to carry out their obligations in accordance with the law and assessment reports.³²

²⁹ UN Guiding Principles on Business and Human Rights, Resolution 17/4, 16 June 2011.

³⁰ 'The Value of Biodiversity Is Not the Same as Its Price' (2019) 573 *Nature* 463; Costanza, R., d'Arge, R., De Groot, R., Farber, S., Grasso, M., Hannon, B., Limburg, K., Naeem, S., O'Neill, R.V., Paruelo, J. and Raskin, R.G., 'The Value of the World's Ecosystem Services and Natural Capital' (1997) 387 *Nature* 253.

³¹ Wakhungu, J.W., Waruingi, L., Agwanda, B., Awori, P., Isiche, J., Itela, S. and Njumbi, S., 'Towards a National Biodiversity Conservation Framework: Policy Implications of Proceedings of the International Conference on Biodiversity, Land-Use and Climate Change', 5.

³² 'Chapter 3: EIA Process' <<http://www.fao.org/3/V8350E/v8350e06.htm>> accessed 24 July 2021; '1.7 Overview of the Stages of the EIA Process' <https://www.soas.ac.uk/cedep-demos/000_P507_EA_K3736-Demo/unit1/page_14.htm> accessed 24 July 2021; 'Our Role in Securing Public Participation in the Kenyan Legislative and Policy Reform Process' (Natural Justice, 23 July 2020) <<https://naturaljustice.org/our-role-in-securing-public-participation-in-the-kenyan-legislative-and-policy-reform-process/>> accessed 24 July 2021; 'Accountability, Transparency, Participation, and Inclusion: A New Development Consensus? - Carnegie Endowment for International Peace' <<https://carnegieendowment.org/2014/10/20/accountability-transparency-participation-and-inclusion-new-development-consensus-pub-56968>> accessed 24 July 2021.

Biodiversity Impact Assessment should be included in these impact assessment processes (BIA). BIA is a subset of EIA that entails finding, measuring, quantifying, valuing, and internalizing the unintended consequences (on biodiversity) of development activities.³³ Arguably, EIA processes should entail BIA, and specifically, ecological impact assessment to the extent that ecological diversity is one aspect of biodiversity, in order to determine how and to what extent, development interventions and projects are affecting biodiversity — composition, structure and function.³⁴ While neither the Constitution of Kenya 2010 nor EMCA expressly mentions BIA, the same can be adopted in line with the provisions of Article 69 of the Constitution as well as sections 57A, 58, 62, and 112 on conservation of environmental resources, including biodiversity.

On a global level, the inclusion of BIA in EIA activities is also supported by Article 14 of the Convention on Biological Diversity, which states that each Contracting Party shall: (a) Introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures; (b) Introduce appropriate arrangements to ensure that the environmental consequences of its programmes and policies that are likely to have significant adverse impacts on biological diversity are duly taken into account; (c) Promote, on the basis of reciprocity, notification, exchange of information and consultation on activities under their jurisdiction or control which are likely to significantly affect adversely the biological diversity of other States or areas beyond the limits of national jurisdiction, by encouraging the conclusion of bilateral, regional or multilateral arrangements, as appropriate; (d) In the case of imminent or grave danger or damage, originating under its jurisdiction or control, to biological diversity within the area under jurisdiction of other States or in areas beyond the limits of national jurisdiction, notify immediately the potentially affected States of such danger or damage, as well as initiate action to prevent or minimize such danger or damage; and (e) Promote national arrangements for emergency responses to activities or events, whether caused naturally or otherwise, which present a grave and imminent danger to biological diversity and encourage international cooperation to supplement such national efforts and, where appropriate and agreed by the States or regional economic integration organizations concerned, to establish joint contingency plans.³⁵ The Conference of the Parties is to examine, on the basis of studies to be carried out, the issue of liability and redress, including restoration and compensation, for damage to biological diversity, except where such liability is a purely internal matter.³⁶

It is, therefore, worth pointing out that Article 14 does not impose a direct obligation that is enforceable by other states to conduct EIAs before undertaking activities that pose risks to biological diversity.³⁷ This is also captured in *COP 8 Decision VIII/28, Impact Assessment: Voluntary Guidelines on Biodiversity-Inclusive Impact Assessment* which ‘emphasizes that the

³³ Wale E and Yalew A, ‘On Biodiversity Impact Assessment: The Rationale, Conceptual Challenges and Implications for Future EIA’ (2010) 28 *Impact Assessment and Project Appraisal* 3, 3.

³⁴ *Ibid*, 3.

³⁵ Article 14(1), Convention on biological Diversity; see also generally, Craik N, ‘Biodiversity-Inclusive Impact Assessment’, Elgar Encyclopedia of Environmental Law (Edward Elgar Publishing Limited 2017).

³⁶ Convention on biological Diversity, Article 14 (2).

³⁷ Craik N, ‘Biodiversity-Inclusive Impact Assessment’, Elgar Encyclopedia of Environmental Law (Edward Elgar Publishing Limited 2017), 2.

voluntary guidelines on biodiversity-inclusive environmental impact assessment are intended to serve as guidance for Parties and other Governments, subject to their national legislation, and for regional authorities or international agencies, as appropriate, in the development and implementation of their impact assessment instruments and procedures'.³⁸

It has been acknowledged that natural habitat loss and fragmentation, as a result of development projects, are major causes of biodiversity erosion, and while Environmental impact assessment (EIA) is the most commonly used site-specific planning tool that takes into account the effects of development projects on biodiversity by integrating potential impacts into the mitigation hierarchy of avoidance, reduction, and offset measures, the extent to which EIA fully address the identification of impacts and conservation stakes associated with biodiversity loss has been criticized as inadequate.³⁹

The *COP 8 Decision VIII/28, Impact Assessment: Voluntary Guidelines on Biodiversity-Inclusive Impact Assessment* provides, *inter alia*, that the Conference of the Parties to the Convention on Biological Diversity:- notes that the Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or used by Indigenous and Local Communities (decision VII/16 F, annex) should be used in conjunction with the voluntary guidelines on biodiversity-inclusive environmental impact assessment contained in the annex below and the draft guidance on biodiversity-inclusive strategic environmental assessment contained in annex II to the note by the Executive Secretary on voluntary guidelines on biodiversity-inclusive impact assessment.⁴⁰

The *Voluntary Guidelines On Biodiversity-Inclusive Environmental Impact Assessment* identifies some biodiversity issues at different stages of environmental impact assessment.⁴¹ The guidelines identify different stages in this process: *Screening*- used to determine which proposals should be subject to EIA, to exclude those unlikely to have harmful environmental impacts and to indicate the level of assessment required. Screening criteria have to include biodiversity measures, or else there is a risk that proposals with potentially significant impacts on biodiversity will be screened out; *Scoping*: used to define the focus of the impact assessment study and to identify key issues, which should be studied in more detail. It is used to derive terms of reference (sometimes referred to as guidelines) for the EIA study and to set out the proposed approach and methodology. Scoping also enables the competent authority (or EIA professionals in countries where scoping is voluntary) to: (a) Guide study teams on significant issues and alternatives to be assessed, clarify how they should be examined (methods of prediction and analysis, depth of analysis), and according to which guidelines and criteria; (b) Provide an opportunity for stakeholders to have their interests taken into account in the EIA; and (c) Ensure that the resulting Environmental

³⁸ Unit B, 'Impact assessment: Voluntary guidelines on biodiversity-inclusive impact assessment' <<https://www.cbd.int/decision/cop/?id=11042>> accessed 10 September 2021.

³⁹ Bigard C, Pioch S and Thompson JD, 'The Inclusion of Biodiversity in Environmental Impact Assessment: Policy-Related Progress Limited by Gaps and Semantic Confusion' (2017) 200 *Journal of environmental management* 35, 35.

⁴⁰ Unit B, 'Impact assessment: Voluntary guidelines on biodiversity-inclusive impact assessment' <<https://www.cbd.int/decision/cop/?id=11042>> accessed 10 September 2021.

⁴¹ *Ibid.*

Impact Statement is useful to the decision maker and is understandable to the public⁴²; *Assessment and evaluation of impacts, and development of alternatives; Reporting: the environmental impact statement (EIS); Review of the environmental impact statement; Decision-making; and, Monitoring, compliance, enforcement and environmental auditing.*⁴³

COP 8 Decision suggests that, taking into account the three objectives of the Convention, fundamental questions which need to be answered in an EIA study include: (a) *Would the intended activity affect the biophysical environment directly or indirectly in such a manner or cause such biological changes that it will increase risks of extinction of genotypes, cultivars, varieties, populations of species, or the chance of loss of habitats or ecosystems?* (b) *Would the intended activity surpass the maximum sustainable yield, the carrying capacity of a habitat/ecosystem or the maximum allowable disturbance level of a resource, population, or ecosystem, taking into account the full spectrum of values of that resource, population or ecosystem?* And, (c) *Would the intended activity result in changes to the access to, and/or rights over biological resources?*⁴⁴

It may be important for stakeholders in environmental law in Kenya to review the requirements and process of EIA in biodiversity rich areas to include BIA as envisaged under Article 69(1) of the Constitution of Kenya. Notably, effective impact assessments and management plans largely rely on a solid foundation of: a) Information on biodiversity (e.g., taxonomic descriptions of species, conservation status assessments of species, conservation status assessments of ecosystems, distribution maps of species and habitats at a scale that is appropriate for project planning, understanding of sensitivity to stressors); b) Understanding of direct, indirect, and where feasible, cumulative impacts (i.e., placing the project in the context of land/resource use trends to ascertain how it contributes to landscape-scale impacts); c) Identification of priorities for biodiversity conservation (e.g., existing and planned protected areas, National Biodiversity Strategies and Action Plans); and d) Demonstrated methods to manage impacts.⁴⁵

Arguably, if development projects are to take into consideration biodiversity conservation, then it is the high time that stakeholders consider inclusion of BIA in EIA and ESIA activities in the country. Fostering Environmental Democracy in these processes will also be important as the impact assessment is not purely technical and it is good practice to consult project stakeholders in all steps of the process, especially in the identification of potential impacts at the outset of the assessment.⁴⁶ This is especially important because local stakeholders may have a greater appreciation than external technical experts of the biodiversity values in the area and their sensitivity to impacts.⁴⁷

It is important for business and financial organisations to actively help achieve national biodiversity goals, the Convention on Biological Diversity (CBD) Aichi Biodiversity Targets and

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Hardner, J., Gullison, R.E., Anstee, S. and Meyer, M., 'Good Practices for Biodiversity Inclusive Impact Assessment and Management Planning' [2015] Prepared for the Multilateral Financing Institutions Biodiversity Working Group, 4.

⁴⁶ Ibid, 7.

⁴⁷ Ibid, 6.

the SDGs, in close co-operation and co-ordination with policy makers and civil society as they also depend on biodiversity for the production of goods and services. The profitability and long-term survival of a number of business sectors (such as agriculture and fisheries which depend directly on biodiversity and well-functioning ecosystems), and loss of biodiversity and ecosystem services can, therefore, result in higher costs and risks for business and financial organisations, and directly affect their performance.⁴⁸

While it has been argued that since Africa's poverty problems run deep, it is only the long process of building democratic institutions and the civil society needed to make them work will bring meaningful development to Africa, where empowerment of local people will ensure long-term poverty reduction.⁴⁹ It has rightly been pointed out that, ironically, indigenous and traditional communities – the very groups which have contributed least to the imminent threats of catastrophic anthropogenic climate change and biodiversity collapse, and whose practices are actually based on a sustainable bio-cultural paradigm – constitute most of those who are at greatest risk.⁵⁰ This is partly attributable to existing social and economic marginalization: globally the indigenous population, estimated at around 370 million, comprises 5 per cent of the world's population but 15 per cent of its poorest people, where climate change, colonialism and economic globalization have also left a legacy of other issues, such as environmental damage, land loss and lack of access to basic services, that have not only resulted in ill health and lower life expectancy but also devastated their complex cultural systems.⁵¹ Tackling the challenges that contribute to loss and deterioration of wetlands can go a long way in ensuring that these biodiversity rich areas are protected for the sake of both humans and other species that inhabit the wetlands.

5. Conclusion

Wetlands provide a variety of key ecosystem services, such as fresh water, nutrient cycling, food and fiber production, carbon fixation and storage, flood control and water storage, water treatment and purification, and biodiversity habitats, as mentioned in this paper.⁵² It has rightly been pointed out that the world's biodiversity is dwindling, and it is becoming clear that freshwater habitats are deteriorating at a quicker rate than terrestrial and marine ecosystems.⁵³

There is a need for active and meaningful involvement of communities in biodiversity conservation efforts especially within wetland areas because while activities that damage the environment, such as mining, industrial development or commercial logging, can deprive people

⁴⁸ OECD (2019), Biodiversity: Finance and the Economic and Business Case for Action, report prepared for the G7

Environment Ministers' Meeting, 5-6 May 2019, 35.

⁴⁹ 'Development Requires Local Empowerment'

<<https://archive.globalpolicy.org/soecon/develop/democracy/2006/0927localempowerment.htm>> accessed 21 July 2021.

⁵⁰ Havemann P, 'Lessons from Indigenous Knowledge and Culture: Learning to Live in Harmony with Nature in an Age of Ecocide' [2016] State of the World's Minorities and Indigenous Peoples, 49.

⁵¹ Ibid, 49.

⁵² Richard T Kingsford, Alberto Basset and Leland Jackson, 'Wetlands: Conservation's Poor Cousins' (2016) 26 Aquatic Conservation: Marine and Freshwater Ecosystems 892, 892

<<https://onlinelibrary.wiley.com/doi/abs/10.1002/aqc.2709>> accessed 28 December 2021.

⁵³ Richard T Kingsford, 'Conservation of Floodplain Wetlands – out of Sight, out of Mind?' (2015) 25 Aquatic Conservation: Marine and Freshwater Ecosystems 727, 727

<<https://onlinelibrary.wiley.com/doi/abs/10.1002/aqc.2610>> accessed 28 December 2021.

Nurturing our Wetlands for Biodiversity Conservation

of their livelihoods and cultural rights, it is also true that strict environmental protection which excludes people and deprives them of resources on which they are dependent, without providing viable alternatives, can affect people's right to a livelihood.⁵⁴

Urgent measures that involve all stakeholders meaningfully need to be taken towards nurturing wetlands as a step towards conservation of biodiversity resources. Nurturing our Wetlands for Biodiversity Conservation is clearly the way to go.

⁵⁴ Ibid, 5.

Promoting Biodiversity Impact Assessment for Sustainable Development in Kenya

Abstract

The paper critically discusses the role of Biodiversity Impact Assessment (BIA) in the attainment of Sustainable Development in Kenya. It conceptualizes BIA and analyses the governing legal framework at both the global and national level. The paper also discusses the progress towards embracing BIA in Kenya and highlights challenges towards this end. It further proposes interventions towards promoting BIA for Sustainable Development in Kenya.

1. Introduction

Biological diversity has been defined as the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part which includes diversity within species, between species and of ecosystems¹. It has also been defined as the diversity of all living forms at different levels of complexity: genes, species, ecosystems and even landscapes and seascapes². Biodiversity is meant to encompass all of life's variation, expressed in genes, individuals, populations, species, communities and ecosystems³. Conservation of biodiversity is thus a critical in the quest towards Sustainable Development.

Biodiversity plays a huge role in not only environmental processes but also in provision of ecosystem resources for all living organisms, including human beings⁴. It has been described as the living fabric of our planet which underpins human wellbeing in both the present and in the future⁵. Biodiversity is key to the proper functioning of earth systems; and to the delivery of those ecosystem services that are crucial to human dignity and well-being including: the provision of potable water, food and fibers; soil fertility; maintenance of the 'genetic library of biodiversity' – an irreplaceable source of new innovations, pharmaceuticals and chemicals; and climate regulation – among others⁶. Conservation of biological diversity has emerged as one of the major global environmental concerns⁷. Biodiversity conservation is threatened by human activities which have the potential of affecting both the quality and quantity of natural habitats⁸. Biodiversity can both be greatly enhanced by human activities and adversely impacted by such

¹Convention on Biological Diversity, United Nations 1992, available at <https://www.cbd.int/doc/legal/cbd-en.pdf> (accessed on 12/10/2022)

²United Nations Educational, Scientific and Cultural Organization (UNESCO), 'UNESCO's commitment to Biodiversity' available at <https://en.unesco.org/themes/biodiversity> (accessed on 12/10/2022)

³Matta, G., Bhadauriya, G., & Singh, V., "Biodiversity and Sustainable Development: A Review." Fecundity of fresh water prawn *Macrobrachium Assamense Penensularae* from Khoh River, India: 72.

⁴Muigua. K., 'Conserving Biodiversity for a Better Future' available at <http://kmco.co.ke/wp-content/uploads/2021/06/Conserving-Biodiversity-for-a-Better-Future-Kariuki-Muigua-June-2021.pdf> (accessed on 12/10/2022)

⁵United Nations Educational, Scientific and Cultural Organization (UNESCO), 'UNESCO's commitment to Biodiversity' Op Cit

⁶'Conserving Biodiversity for Life and Sustainable Development | United Nations Educational, Scientific and Cultural Organization' available at http://www.unesco.org/new/en/media-services/singleview/news/conserving_biodiversity_for_life_and_sustainable_development/ (accessed on 12/10/2022)

⁷Geneletti. D., 'Biodiversity Impact Assessment of roads: an approach based on ecosystem rarity' *Environmental Impact Assessment Review* 23 (2003) 343–365

⁸Ibid

activities due to unsustainable use or by more profound causes linked to human development models⁹. Thus, human activities such as infrastructural developments can affect and modify natural habitats conditions which in turn influence the distribution and abundance of animal and plant species¹⁰. These activities can result in rapid decline of biodiversity and in turn threaten both nature and human beings. Consequently, there is need for making biodiversity an integral part of economic and development strategy¹¹.

The paper seeks to critically discuss the concept of biodiversity impact assessment and its role in promoting Sustainable Development in Kenya. It discusses the legal framework for biodiversity impact assessment. The paper further discusses the extent to which biodiversity impact assessment has been embraced in Kenya and proposes interventions towards promoting biodiversity impact assessment for Sustainable Development in Kenya.

2. Biological Impact Assessment

Biodiversity Impact Assessment (BIA) is subset of Environmental Impact Assessment (EIA)¹². EIA is a tool for integrating environmental and social concerns in decision making processes¹³. Environmental impact assessment (EIA) is the process of identifying potential environmental effects of proposed development and the required mitigation measures¹⁴. EIA has also been defined as a procedure for evaluating the likely impact of a proposed activity on the environment¹⁵. Its object is to provide decision-makers with information about the possible effects of a project before authorizing it to proceed¹⁶. EIA is one of the most widely used planning tools today, but its ability to promote biodiversity conservation is largely unexplored¹⁷.

Biological Impact Assessment (BIA) is a method of integrating biodiversity issues into the early stages of planning processes¹⁸. It is designed to support and achieve the objectives of the Convention on Biological Diversity by enabling proponents to identify and achieve ways of integrating the conservation, sustainable use and equitable sharing of biological resources¹⁹. BIA aims at developing and applying strategies for performing the analysis of the impact of intended projects within the EIA framework²⁰. It entails identifying, measuring, quantifying, valuing and

⁹ Muigua. K., 'Conserving Biodiversity for a Better Future' Op Cit

¹⁰ Ibid

¹¹ Muigua. K., 'Tracing the Role of Biodiversity Conservation in Achieving Sustainable Development Goals' available at <http://kmco.co.ke/wp-content/uploads/2021/11/Tracing-the-Role-of-Biodiversity-Conservation-in-Achieving-Sustainable-Development-Goals-Kariuki-Muigua-November-2021.pdf> (accessed on 12/10/2022)

¹² Bagri. A & Vorhies. F., 'Biodiversity Impact Assessment' available at <https://www.cbd.int/impact/case-studies/cs-impact-iucn-bia-bagri-vorhies-1997-en.pdf> (accessed on 12/10/2022)

¹³ Ibid

¹⁴ Mandelik. Y et al., 'Planning for Biodiversity: the Role of Ecological Impact Assessment' available at https://www.researchgate.net/publication/227495149_Planning_for_Biodiversity_the_Role_of_Ecological_Impact_Assessment (accessed on 12/10/2022)

¹⁵ Muigua. K., 'Environmental Impact Assessment (EIA) in Kenya' available at <http://kmco.co.ke/wp-content/uploads/2018/08/A-Paper-on-Environmental-impact-assessment.pdf> (accessed on 12/10/2022)

¹⁶ Ibid

¹⁷ Mandelik. Y et al., 'Planning for Biodiversity: the Role of Ecological Impact Assessment' Op Cit

¹⁸ Bagri. A & Vorhies. F., 'Biodiversity Impact Assessment' Op Cit

¹⁹ Ibid

²⁰ Geneletti. D., 'Biodiversity Impact Assessment of roads: an approach based on ecosystem rarity' Op Cit

internalizing the unintended impacts (on biodiversity) of development interventions²¹. It has been argued that BIA is not a standalone process but an integral part of EIA with specific attention on biodiversity impacts²².

BIA can be implemented within the EIA framework by ensuring that the impacts on biodiversity are considered. A thorough treatment of the effects of development on biodiversity is to be included in the process of EIA as recommended by the Convention on Biological Diversity²³. It has the potential to enhance the conservation of biodiversity while also serving other important economic and social objectives. Results from the BIA process can inform decisions for integrating biodiversity concerns into development policy processes²⁴.

3. Legal Framework on Biodiversity Impact Assessment

3.1 Convention on Biological Diversity

The Convention on Biological diversity aims to promote the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources²⁵. The Convention contains salient provisions aimed at promoting at biodiversity impact assessment towards conservation and sustainable use of biological diversity. It advocates for the integration of conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies²⁶. It further advocates the integration of consideration on the conservation and sustainable use of biological resources into national decision-making²⁷. Thus, decisions such as infrastructural developments should take into account the conservation and sustainable use of biological resources in accordance with the Convention on Biological Diversity.

Article 14 in particular calls for the adoption of impact assessment as a tool of minimizing adverse impacts of projects on biological diversity. It calls for the introduction of appropriate procedures requiring environmental impact assessment of proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate allow for public participation in such procedures²⁸. The provision further calls for arrangements to ensure that the environmental consequences of programmes and policies that are likely to have significant adverse impacts on biological diversity are duly taken into account in the implementation of projects²⁹. The Convention on Biological Diversity creates the legal basis for Biodiversity Impact Assessment at the global level.

²¹ Wale. E & Yalew. A., 'On biodiversity impact assessment: the rationale, conceptual challenges and implications for future EIA' available at <https://www.tandfonline.com/doi/pdf/10.3152/146155110X492326> (accessed on 12/10/2022)

²² *ibid*

²³ Geneletti. D., 'Biodiversity Impact Assessment of roads: an approach based on ecosystem rarity' *Op Cit*

²⁴ Wale. E & Yalew. A., 'On biodiversity impact assessment: the rationale, conceptual challenges and implications for future EIA' *Op Cit*

²⁵ Convention on Biological Diversity, United Nations 1992, Article 1 available at <https://www.cbd.int/doc/legal/cbd-en.pdf> (accessed on 12/10/2022)

²⁶ *Ibid*, article 6 (b)

²⁷ *Ibid*, article 10 (a)

²⁸ *Ibid*, article 14 (1) (a)

²⁹ *Ibid*, article 14 (1) (b)

3.2 COP 8 Decision VIII/28, Impact Assessment: Voluntary Guidelines on Biodiversity Inclusive Impact Assessment

The Guidelines stipulate whether, when, and how to consider biodiversity in both project and strategic level impact assessments and are also an elaboration and refinement of guidelines previously adopted by the CBD (Decision VI/7-A), the Ramsar Convention on Wetlands (Resolution VIII.9) and the Convention on Migratory Species (Resolution 7.2)³⁰. The Guidelines call for the Conduct of Cultural, Environmental and Social Impact Assessments regarding Developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local Communities³¹. Parties are required to apply the voluntary guidelines on biodiversity-inclusive environmental impact assessment as appropriate in the context of their implementation of the Convention on Biological Diversity³².

3.3 Constitution of Kenya, 2010

The Constitution of Kenya, 2010 certain obligations by the state in respect of the environment and natural resources³³. It outlines a number of cross-sectoral biodiversity concerns set out under the CBD including issues of benefit sharing, traditional knowledge, elimination of activities harmful to biodiversity and the role of the community in conservation and sustainable use of biodiversity³⁴. The Constitution outlines a favourable legislative protection of biodiversity as envisaged in Chapter Five on Land and the Environment, where there is the emphasis on sustainable use of land and other natural resources, including biodiversity as a key principle³⁵. The state is obligated to establish systems of environmental impact assessment, environmental audit and monitoring of the environment³⁶. Protection and conservation of biodiversity should be a key consideration towards this end.

3.4 Environmental Management and Co-Ordination Act

The Environmental Management and Co-Ordination Act (EMCA) advocates for the sustainable management and utilization of biodiversity in Kenya³⁷. Towards this end, the Act requires measures to be taken towards integrating the conservation and sustainable utilisation in relation to biological diversity in existing government activities and activities by private persons³⁸. Thus, projects undertaken by both the state and private persons should integrate the conservation and sustainable use of biological diversity.

³⁰ Biodiversity in Impact Assessment, Background Document to CBD Decision VIII/28: Voluntary Guidelines on Biodiversity-Inclusive Impact Assessment | NBSAP Forum' available at <http://www.nbsapforum.net/knowledge-base/resource/biodiversity-impact-assessment-background-document-cbd-decision-viii28-0> (accessed on 13/10/2022)

³¹ COP 8 Decision VIII/28, Impact Assessment: Voluntary Guidelines on Biodiversity-Inclusive Impact Assessment, Paragraph 1

³² Ibid, Paragraph 5

³³ Constitution of Kenya, 2010, Article 69

³⁴ Ibid, article 69 (1)

³⁵ Muigua. K., 'Conserving Biodiversity for a Better Future' Op Cit

³⁶ Ibid, S 69 (1) (f)

³⁷ Environmental Management and Co-Ordination Act, No. 8 of 1999, S 53 (2) (g)

³⁸ Ibid, S 50 (d)

EMCA sets out the requirement for Environmental Impact Assessment (EIA) for all policies, plans and programmes to be undertaken³⁹. The Act requires project proponents to undertake EIA in relation to intended projects and submit such assessments to the National Environment Management Authority (NEMA) for approval⁴⁰. To this extent, the Act requires a proponent to undertake a full environmental impact assessment study and submit an environmental impact assessment study report to the Authority prior to being issued with any licence by the Authority which authorizes such project to be undertaken⁴¹. NEMA may only issue an EIA licence upon being satisfied that the intended project will adhere to sustainable development and sound environmental management⁴². EMCA creates the legal framework for Biodiversity Impact Assessment in Kenya. It sets out the process of Environmental Impact Assessment which should take into account the conservation and sustainable utilization of biodiversity among other requirements⁴³.

3.5 The Environmental (Impact Assessment and Audit) Regulations, 2003

The regulations govern the process of Environmental Impact Assessment and Environmental Audit as envisaged under EMCA⁴⁴. The regulations require an EIA to be concluded and approved for all projects likely to have a negative effect on the environment or for those projects requiring an EIA under the Act⁴⁵. In carrying out an EIA, the regulations require a project proponent to take into account the protection and conservation of biodiversity⁴⁶. Thus, in preparing a project report under the regulations, a project proponent is required to state the potential impacts of the project on biodiversity and the mitigation measures to be taken during and after implementation of the project⁴⁷. The regulations further require a proponent to undertake an EIA study and submit to NEMA an EIA study report for approval⁴⁸. The EIA study report should contain information on several factors including the environmental effects of the project and an Environmental Management Plan (EMP) proposing the measures for eliminating, minimizing or mitigating adverse impacts of the project on the environment⁴⁹. Protection and conservation of biodiversity is a key consideration in conducting an EIA study and developing an EIA study report under the regulations⁵⁰.

4. Embracing Biodiversity Impact Assessment in Kenya

Biodiversity Impact Assessment has the potential of promoting the protection and conservation of biodiversity⁵¹. Conservation of biodiversity is important in the attainment of Sustainable Development, the proper functioning of earth systems; and to the delivery of those ecosystem

³⁹ Ibid, Part VI

⁴⁰ EMCA, S 57 A (3)

⁴¹ Ibid, S 58 (2)

⁴² Ibid, S 63

⁴³ Ibid, S 53 (2) (g)

⁴⁴ The Environmental (Impact Assessment and Audit) Regulations, 2003, Legal Notice No. 101

⁴⁵ Ibid, regulation 4 (1)

⁴⁶ Ibid, regulation 42 (2) (b)

⁴⁷ Ibid, regulation 7 (1) (f)

⁴⁸ Ibid, Part IV

⁴⁹ Ibid, regulation 18 (1) (k)

⁵⁰ Ibid, regulation 42 (2) (b)

⁵¹ United Nations Educational, Scientific and Cultural Organization (UNESCO), 'UNESCO's commitment to Biodiversity' Op Cit

services that are crucial to human dignity and well-being including: the provision of food and water⁵². The legal framework in Kenya envisages Biodiversity Impact Assessment within the framework of Environmental Impact Assessment.

There has been progress towards promoting Biodiversity Impact Assessment in infrastructural projects such as the Standard Gauge Railway (SGR). The EIA study report concerning the development of the SGR acknowledged the impact of the project on biodiversity especially wildlife in the Tsavo ecosystem⁵³. Consequently, during implementation of the project mitigation measures were put in place through animal crossing points to ensure East-West wildlife movement and avoid loss of wildlife biodiversity through collision⁵⁴. Further, there have been attempts towards conservation of bird species during implementation of wind energy projects. It has been pointed out that areas with high potential for wind power are also key habitats and migratory routes for birds and bats, among other biodiversity⁵⁵. Thus, there is need to apply caution when implementing such projects in order to prevent negative impacts on biodiversity. Mitigation measures that have been adopted towards this end include avoidance of sensitive areas, minimization of impacts, restoration of impacted biodiversity and offsetting to ensure net biodiversity gain⁵⁶.

However, despite this progress, there still a major national challenge on how to maintain Sustainable Development without damaging the environment⁵⁷. Challenges such as land degradation, environmental pollution and loss of biodiversity are still evident during and after implementation of projects⁵⁸. Infrastructural developments have the potential of negatively affecting biodiversity through loss of plant species and impacting natural habitats for wildlife⁵⁹. These factors in turn influence the distribution and abundance of animal and plant species⁶⁰. There is need to embrace Biodiversity Impact Assessment in order to ensure that conservation of biodiversity is a key consideration during and after implementation of projects in order to foster Sustainable Development.

5. Way Forward

It has been argued that the concerns of biodiversity are often overshadowed and ignored in most EIA frameworks at the expense of economic and social concerns⁶¹. However, biodiversity is an important component of the environment and needs to be taken into account in the EIA process.

⁵² Ibid

⁵³ 'Environmental and Social Impact Assessment Study Report for the Mombasa-Nairobi Standard Gauge Railway Project', available at <https://africog.org/wp-content/uploads/2017/06/SGR-EAS-Impact-report.pdf> (accessed on 13/10/2022)

⁵⁴ Ibid

⁵⁵ The East African Natural History Society., 'Strategic Environmental Assessment (SEA) for Wind Energy and Biodiversity in Kenya' available at <https://naturekenya.org/2019/04/03/strategic-environmental-assessment-sea-for-wind-energy-and-biodiversity-in-kenya/> (accessed on 13/10/2022)

⁵⁶ Ibid

⁵⁷ Environmental and Social Impact Assessment Study Report for the Mombasa-Nairobi Standard Gauge Railway Project' Op Cit

⁵⁸ Ibid

⁵⁹ Muigua. K., 'Conserving Biodiversity for a Better Future' Op Cit

⁶⁰ Ibid

⁶¹ Wale. E & Yalew. A., 'On biodiversity impact assessment: the rationale, conceptual challenges and implications for future EIA' Op Cit

Biodiversity conservation is thus an important tool of environmental management and Sustainable Development⁶².

In promoting Biodiversity Impact Assessment, there is need to identify the part of biodiversity likely to be impacted. This could be biological resources in general, crop/animal genetic resources or the diversity of the respective resources⁶³. The magnitude of the impact on biodiversity is also a key consideration in promoting BIA⁶⁴. Through this, it is possible to design effective mitigation measures to promote the conservation of biodiversity. An effective BIA framework should also take into account scoping and the need for baseline studies in order to determine the distribution, rarity, conservation status, and location of plant and animal species in a particular area⁶⁵. This is important in implementing projects in ways that promote the conservation of biodiversity.

The process of BIA should ideally entail identification of biodiversity issues associated with each phase of a project; the laws and regulations governing biodiversity concerns; predicting impacts of intended projects on biodiversity in a particular area and identifying the value of biodiversity likely to be impacted during and after implantation of projects⁶⁶. Further, the process should identify appropriate mitigation measures to address negative impacts on biodiversity and propose monitoring and evaluation measures to ensure implementation of the mitigation measures suggested. Through this framework, it is possible to embrace biodiversity concerns in the EIA framework.

Despite the fact that most development projects have adverse impacts on biodiversity, these are often ignored in the EIA process⁶⁷. There is need to integrate biodiversity concerns in the EIA process by ensuring biodiversity impacts of development projects are identified, quantified and valued and necessary mitigation measures adopted⁶⁸. Biodiversity concerns should be integrated early into the EIA process since the success of BIA relies on its ability to affect changes in the early stages of implementation of projects⁶⁹.

6. Conclusion

Conservation of biological diversity has emerged as one of the major global environmental concerns⁷⁰. Human activities such as infrastructural developments can affect and modify natural habitats conditions which in turn influence the distribution and abundance of animal and plant species⁷¹. Consequently, biodiversity concerns need to be taken into account in the EIA process in order to ensure that mitigation measures are adopted towards conservation of biodiversity.

⁶² Ibid

⁶³ Ibid

⁶⁴ Slloweg. R., 'Biodiversity assessment framework: making biodiversity part of corporate social responsibility' *Impact Assessment and Project Appraisal*, Volume 23, Issue 1

⁶⁵ Ibid

⁶⁶ S. Atkinson et al., 'Treatment of Biodiversity Impacts in a Sample of US environmental Impact statements. *Impact Assessment and Project Appraisal*, 18, 271–282

⁶⁷ Wale. E & Yalew. A., 'On biodiversity impact assessment: the rationale, conceptual challenges and implications for future EIA' *Op Cit*

⁶⁸ Ibid

⁶⁹ Bagri. A & Vorhies. F., 'Biodiversity Impact Assessment' *Op Cit*

⁷⁰ Geneletti. D., 'Biodiversity Impact Assessment of roads: an approach based on ecosystem rarity' *Op Cit*

⁷¹ Muigua. K., 'Conserving Biodiversity for a Better Future' *Op Cit*

Promoting Biodiversity Impact Assessment for Sustainable Development in Kenya

Biodiversity requires attention in EIA because development projects/programmes are resulting in unprecedented rates of biodiversity loss⁷². However, in most instances biodiversity concerns are ignored in the EIA framework⁷³. The concept of Biodiversity Impact Assessment (BIA) has emerged in order to ensure that biodiversity concerns are taken into account in the EIA process as envisaged under the Convention on Biological Diversity⁷⁴. There is need to embrace and promote BIA for Sustainable Development in Kenya.

⁷² Wale. E & Yalew. A., 'On biodiversity impact assessment: the rationale, conceptual challenges and implications for future EIA' Op Cit

⁷³ Ibid

⁷⁴ Convention on Biological Diversity, Article 10

The Neglected Link: Safeguarding Pollinators for Sustainable Development in Kenya

Abstract

Efforts to achieve sustainable development have never been greater the world over. Most, if not all states and non-governmental organisations, are coming up with multisectoral measures to promote the sustainable development agenda, based on the global framework on sustainable development. Kenya has also not been left behind as there is evidence of various actions and programmes put in place to promote sustainable development in all sectors of the economy. However, one area that is arguably indispensable but has received minimal attention is safeguarding pollinators as important players in the sustainable development agenda.

This paper critically discusses and offers recommendations on ways in which Kenya can ensure that pollinators, which play a critical role in environmental conservation and food and nutritional provision, are safeguarded as important players in the sustainable development debate.

1. Introduction

The prevailing debate on sustainable development the world over mainly revolves around minimizing adverse human impact on the environment as part of maximizing Ecosystem Services. The debate has been about balancing anthropocentric and ecocentric approaches to environmental protection and conservation. However, one area of biological diversity conservation that has received little or no attention, especially under the current Kenyan environment and natural resources laws, is the plant-pollinators' community that plays an indispensable role in natural resources and environmental regeneration for ecosystem Services.

Globally, biodiversity loss has been attributed to various factors, including, habitat loss, pest invasion, pollution, over-harvesting and disease.¹ Pollination services are provided both by wild, free-living organisms (mainly bees, but also to name a few, many butterflies, moths and flies), and by commercially managed bee species. Bees are considered the predominant and most economically important group of pollinators in most geographical regions.² Past reports carried in the Kenyan local dailies have highlighted the problem, asserting that Kenyan farmers are driving bees, wasps, butterflies and other pollinators to extinction, consequently threatening food supply.³ Despite this, there is arguably inadequate evidence demonstrating Kenya's commitment

¹ Wilcove D.S, Rothstein J, Dubow A, Phillips and Losos E., "Quantifying threats to imperiled species in the United States", *BioScience*, 48, 1998, pp. 607-615 (As quoted in Kluser, S., Neumann, P., Chauzat, M.P., Pettis, J.S., Peduzzi, P., Witt, R., Fernandez, N. and Theuri, M., Global honey bee colony disorders and other threats to insect pollinators, (United Nations Environmental Programme, 2010), p.1. Available at https://www.researchgate.net/profile/Peter_Neumann5/publication/305160493_Disorders_of_bee_colonies_around_the_world_and_other_threats_to_insect_pollinators/links/5783b17208ae37d3af6c005c/Disorders-of-bee-colonies-around-the-world-and-other-threats-to-insect-pollinators.pdf [Accessed on 24/11/2017].

² Kluser, S., Neumann, P., Chauzat, M.P., Pettis, J.S., Peduzzi, P., Witt, R., Fernandez, N. and Theuri, M., Global honey bee colony disorders and other threats to insect pollinators, op cit., p. 1.

³ "Bees, butterflies face extinction, threatening Kenya food production," *Business Daily Africa*, Monday, April 18, 2016 16:36. Available at

<http://www.businessdailyafrica.com/economy/Bees-butterflies-face-extinction-threatening-Kenya-food/3946234-3164704-xvcgld/index.html> [Accessed on

to protect these important organisms as part of biodiversity conservation, and ultimately, achieving the right to food security for all, as guaranteed under the Constitution of Kenya 2010⁴.

The inadequate or lack of legal responses to pollinators' protection in the Kenyan environmental and natural resources laws has had adverse effect on the pollinators, and arguably, their protection is currently based on a general approach to environmental conservation for provision of ecosystem services. Pollinators are part of the biodiversity and, if any measures geared towards biodiversity conservation are to succeed, they must include pollinators. This paper seeks to highlight and critically discuss some of the challenges that affect these important players in the sustainable development discourse and also suggest some of the legal and non-legal mechanisms through which they can be addressed.

2. Pollinators as Key Players in Environmental Conservation Discourse: The Neglected Link

Pollinators are important for the provision of ecosystem services. Indeed, it has rightly been pointed out that 'the modern concept of 'ecosystem services' has progressed significantly in recent decades, past its conception as a communication tool in the late 1970s to explain societal dependence on nature, to incorporate economic dimensions and provide help to decision makers for implementing effective conservation policies which support human wellbeing and sustainable development'.⁵ Pollination is vital to the ecosystems and to human societies and the health and wellbeing of pollinating insects is considered as crucial to life, be it in sustaining natural habitats or contributing to local and global economies.⁶

While some plants are capable of self-pollination, the highest percentage of plant pollination is attributed to animal-mediated pollination. Animal-Pollinators have been defined as 'animals that enable reproduction of many species of flowering plants by transferring pollen from one flower to another of the same species'.⁷ Therefore, while there may be several types of pollinators, this paper is mainly concerned with the animal pollinators which include, inter alia, bees, beetles, bees, flies, moths, butterflies, bats and birds, amongst others, in what is commonly referred to as biotic pollination.⁸ Biotic pollination is meant to be a symbiotic process in which both the animal pollinators and the plants benefit in terms of food for the former and pollination process for the

24/11/2017].

⁴ Constitution of Kenya, 2010, Art. 43: 43. Economic and social rights(1) Every person has the right—(c) to be free from hunger, and to have adequate food of acceptable quality;

⁵ Dolf de Groot, 'Protecting natural capital for human wellbeing and sustainable development,' Science for Environment Policy – A Weekly News Alert, Special Issue: Ecosystem Services, Issue 20, May 2010, p.1. Available at http://ec.europa.eu/environment/integration/research/newsalert/pdf/20si_en.pdf [Accessed on 24/11/2017].

⁶ Kluser, S., Neumann, P., Chauzat, M.P., Pettis, J.S., Peduzzi, P., Witt, R., Fernandez, N. and Theuri, M., Global honey bee colony disorders and other threats to insect pollinators, op cit., p. 2; See also generally, Ollerton, J., Winfree, R. and Tarrant, S., "How many flowering plants are pollinated by animals?" *Oikos*, Vol.120, No., 2011, pp.321-326.

⁷ San Luis Obispo County, 'Pollinator Information & Resources', Ranching Sustainability Analysis Info Sheet, available at <http://cesanluisobispo.ucdavis.edu/files/136181.pdf> [Accessed on 24/11/2017].

⁸ "Pollination in the Tropics," available at <https://wolfweb.unr.edu/~ldyer/classes/396/plantanimal.pdf> [Accessed on 24/11/2017].

latter.⁹ This discourse is thus meant to address the factors and practices that adversely affect this mutual relationship between the two groups.

Considering that ‘plants serve as air and water filters, are an indispensable part of the water cycle, prevent erosion of valuable soil re-sources, and give us numerous foods, fibers, and medicines, pollinators are considered as critical to biodiversity, ecosystem services, agricultural productivity, world economies, and human quality of life’.¹⁰ Any threats to these animal-pollinators therefore threaten the whole chain of natural provision of ecosystem services.

3. Protection of Pollinators: The Legal and Policy Framework

Internationally, there are a number of policy and legal instruments on biodiversity conservation that carry provisions geared towards conservation of pollinators. One of the most relevant of these is the 1992 *Convention on Biological Diversity*¹¹ was adopted during the Earth Summit in Rio de Janeiro, with the objective of conservation of biological diversity; the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding.¹² While the Convention does not specifically mention pollinators, it accords "Biological diversity" a broad definition to mean ‘the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part: this includes diversity within species, between species and of ecosystems’.¹³

The Convention also defines "Biological resources" to include genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity.¹⁴ Pollinators are thus covered under these broad definitions as part of the biodiversity to be protected and conserved under the Convention. The Convention outlines under Article 6 thereof state obligations on the general measures for conservation and sustainable use of the biological diversity within their territories.¹⁵

⁹ Ibid.

¹⁰ San Luis Obispo County, ‘Pollinator Information & Resources’, op cit., p.1.

¹¹ United Nations Environment Programme, *Convention on Biological Diversity*, 1760 UNTS 79; 31 ILM 818 (1992), United Nations, Treaty Series, vol. 1760, p. 79. The Convention was adopted by the Intergovernmental Negotiating Committee for a Convention on Biological Diversity, during its Fifth session, held at Nairobi from 11 to 22 May 1992. Kenya signed the Convention on 11 Jun 1992 and ratified it on 26 Jul 1994.

¹² *Convention on Biological Diversity*, Art. 1.

¹³ *Convention on Biological Diversity*, Art. 2.

¹⁴ *Convention on Biological Diversity*, Art. 2.

¹⁵ Article 6. General Measures for Conservation and Sustainable Use Each Contracting Party shall, in accordance with its particular conditions and capabilities:

- (a) Develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity or adapt for this purpose existing strategies, plans or programmes which shall reflect, inter alia, the measures set out in this Convention relevant to the Contracting Party concerned; and
- (b) Integrate, as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies.

Article 7 thereof also requires each Contracting Party to, as far as possible and as appropriate, in particular for the purposes of Articles 8 to 10:

The *Agenda 21*¹⁶ also contains provisions under chapter 15 thereof on the conservation of biological diversity. The objectives and activities in chapter 15 of Agenda 21 are intended to improve the conservation of biological diversity and the sustainable use of biological resources, as well as to support the Convention on Biological Diversity.¹⁷ Agenda 21 specifically acknowledges that our planet's essential goods and services depend on the variety and variability of genes, species, populations and ecosystems. Biological resources feed and clothe us and provide housing, medicines and spiritual nourishment. The natural ecosystems of forests, savannahs, pastures and rangelands, deserts, tundras, rivers, lakes and seas contain most of the Earth's biodiversity. Farmers' fields and gardens are also of great importance as repositories, while gene banks, botanical gardens, zoos and other germplasm repositories make a small but significant contribution. Chapter 15 also acknowledges that the current decline in biodiversity is largely the result of human activity and represents a serious threat to human development.¹⁸ The highlighted biodiversity also include animal-pollinators, although not specifically mentioned as such. The *Aichi Biodiversity Target 7* seeks to ensure that, by 2020, areas under agriculture, aquaculture and forestry are managed sustainably, ensuring conservation of biodiversity.¹⁹

The technical rationale for the Aichi Target 7, according to the Convention on Biological Diversity Secretariat, is that the ecologically unsustainable consumption of water, use and run-off of pesticides and excess fertilizers, and the conversion of natural habitats to uniform monocultures, amongst other factors, have major negative impacts on biodiversity inside and outside of agricultural areas, as well as on forest, inland water and coastal ecosystems.²⁰ The Secretariat supports sustainable management on the basis that it not only contributes to biodiversity conservation but can also deliver benefits to production systems in terms of services such as soil fertility, erosion control, enhanced pollination and reduced pest outbreaks, as well as

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- (a) Identify components of biological diversity important for its conservation and sustainable use having regard to the indicative list of categories set down in Annex I:
Annex I provides for monitoring and identification with regard to ecosystems and habitats containing high diversity, large numbers of endemic or threatened species, or wilderness; required by migratory species; of social, economic, cultural or scientific importance; or, which are representative, unique or associated with key evolutionary or other biological processes.
 - (b) Monitor, through sampling and other techniques, the components of biological diversity identified pursuant to subparagraph (a) above, paying particular attention to those requiring urgent conservation measures and those which offer the greatest potential for sustainable use;
 - (c) Identify processes and categories of activities which have or are likely to have significant adverse impacts on the conservation and sustainable use of biological diversity, and monitor their effects through sampling and other techniques; and
 - (d) Maintain and organize, by any mechanism data, derived from identification and monitoring activities pursuant to subparagraphs (a), (b) and (c) above.

¹⁶ Agenda 21 (A/CONF.151/26, vol.II), adopted by the United Nations Conference on Environment and Development on 14 June 1992.

¹⁷ Agenda 21, Para. 15.1.

¹⁸ Agenda 21, Para. 15.2.

¹⁹ Aichi Biodiversity Targets - Convention on Biological Diversity (CBD), <https://www.cbd.int/sp/targets/>

²⁰ Convention on Biological Diversity Secretariat, "TARGET 7 - Technical Rationale extended (provided in document COP/10/INF/12/Rev.1)," available at <https://www.cbd.int/sp/targets/rationale/target-7/> [Accessed on 1/01/2018].

contributing to the well-being and sustainable livelihoods of local communities engaged in the management of local natural resources.²¹

Party states are thus expected to put in place domestic measures that are geared towards achieving these targets. The Constitution of Kenya 2010 envisages the place of international legal instruments under Article 2 which recognises them as forming part of the laws of Kenya.²² The Constitution also places obligations on the state to, inter alia: ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; work to achieve and maintain a tree cover of at least ten percent of the land area of Kenya; protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities; encourage public participation in the management, protection and conservation of the environment; protect genetic resources and biological diversity; establish systems of environmental impact assessment, environmental audit and monitoring of the environment; eliminate processes and activities that are likely to endanger the environment; and utilise the environment and natural resources for the benefit of the people of Kenya.²³

The *Environmental Management and Co-ordination Act 1999*²⁴ (EMCA) calls for conservation of ‘biological diversity’ which is defined under the Act to mean ‘the variability among living organisms from all sources including, terrestrial ecosystems, aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, among species and of ecosystems’.²⁵

In a bid to promote conservation of biological diversity, EMCA provides that the National Environment Management Authority (NEMA) should, in consultation with the relevant lead agencies, prescribe measures necessary to ensure the conservation of biological diversity in Kenya and in this respect the Authority should: identify, prepare and maintain an inventory of biological diversity of Kenya; determine which components of biological diversity are endangered, rare or threatened with extinction; identify potential threats to biological diversity and devise measures to remove or arrest their effects; undertake measures intended to integrate the conservation and sustainable utilisation ethic in relation to biological diversity in existing government activities and activities by private persons; specify national strategies, plans and government programmes for conservation and sustainable use of biological diversity; protect indigenous property rights of local communities in respect of biological diversity; and measure the value of unexploited natural resources in terms of watershed protection, influences on climate, cultural and aesthetic value, as well as actual and potential genetic value thereof.²⁶

²¹ Ibid.

²² Constitution of Kenya, 2010: Article 2(5) “The general rules of international law shall form part of the law of Kenya.”.....(6) “Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.”

²³ Ibid., Article 69(1).

²⁴ Environmental Management and Co-ordination Act, Act No. 8 of 1999, Laws of Kenya [Revised Edition 2012 [1999]]; See also the Environmental Management and Co-ordination (Amendment) Act, 2015 (Amendment Act, No. 5 of 2015, which was enacted to amend the Environmental Management and Co-ordination Act, 1999.

²⁵ Ibid., sec. 2.

²⁶ Ibid., sec. 50.

Notably, EMCA provides for conservation of biological resources in situ and ex-situ. With regard to conservation in situ, it requires the Authority to, in consultation with the concerned lead agencies, prescribe measures adequate to ensure the conservation of biological resources in situ and should issue guidelines for— land use methods that are compatible with conservation of biological diversity; the selection and management of protected areas so as to promote the conservation of the various terrestrial and aquatic ecosystems under the jurisdiction of Kenya; selection and management of buffer zones near protected areas; special arrangements for the protection of species, ecosystems and habitats threatened with extinction; prohibiting and controlling the introduction of alien species into natural habitats; and integrating traditional knowledge for the conservation of biological diversity with mainstream scientific knowledge.²⁷

With regard to Conservation of biological resources ex-situ, the Authority is required to, in consultation with the relevant lead agencies— prescribe measures for the conservation of biological resources ex-situ especially for those species threatened with extinction; issue guidelines for the management of—(i) germplasm banks; (ii) botanical gardens; (iii) zoos or aquaria; (iv) animal orphanages; and (v) any other facilities recommended to the Authority by any of its Committees or considered necessary by the Authority; ensure that species threatened with extinction which are conserved ex-situ are re-introduced into their native habitats and ecosystems where— (i) the threat to the species has been terminated; or (ii) a viable population of the threatened species has been achieved.²⁸

For purposes of protection of environmentally significant areas, the Cabinet Secretary may, in consultation with the relevant lead agencies, by notice in the Gazette, declare any area of land, sea, lake or river to be a protected natural environment for the purpose of promoting and preserving specific ecological processes, natural environment systems, natural beauty or species of indigenous wildlife or the preservation of biological diversity in general.²⁹

Other provisions in EMCA that are germane to protection of pollinators relate to standards of pesticides and toxic substances, where the Act provides that the Standards and Enforcement Review Committee, in consultation with the relevant lead agencies should—prepare and submit to the Authority draft standards for the concentration of pesticides residues in raw agricultural commodities, for the purposes of this paragraph raw agricultural commodities—

- (i) include fresh or frozen fruit and vegetables in their raw state, grains, nuts, eggs, raw milk, meat and other agricultural produce;
- (ii) do not include any agricultural produce or good which is processed, fabricated or manufactured by cooking, dehydrating, milling, or by any other similar means; establish, revisit, modify and submit to the Authority draft standards to regulate the importation, exportation, manufacture, storage, distribution, sale, use, packaging, transportation disposal and advertisement of pesticides and toxic substances with the

²⁷ Ibid., sec. 51.

²⁸ Environmental Management and Co-ordination Act, 1999, sec. 52.

²⁹ Ibid., sec. 53(1).

relevant organisations; establish and submit to the Authority draft procedures for the registration of pesticides and toxic substances; establish and submit to the Authority draft measures to ensure proper labelling and packaging of pesticides and toxic substances; constantly review the use and efficacy of pesticides and toxic substances and submit the findings of such review to the Authority; recommend to the Authority measures for monitoring the effects of pesticides and toxic substances on the environment; recommend to the Authority measures for the establishment and maintenance of laboratories to operate as standards laboratories for pesticides and toxic substances; recommend to the Authority measures for the establishment of enforcement procedures and regulations for the storage, packaging and transportation of pesticides and toxic substances; constantly collect data from industries on the production, use and health effects of pesticides and toxic substances and avail such data to the Authority; keep up-to-date records and reports necessary for the proper regulation of the administration of pesticides and toxic substances; do all other things as appear necessary for the monitoring and control of pesticides and toxic substances.³⁰

EMCA further provides that subject to the provisions of this Act or any other written law applicable in Kenya, any person who intends to manufacture, import or process a new pesticide or toxic substance or who intends to reprocess an existing pesticide or toxic substance for a significantly new use, must apply to the Authority for the registration of the pesticide or toxic substance, before importing, manufacturing, processing or reprocessing such pesticides or toxic substance.³¹ Furthermore, the application referred to in subsection (1) should include the name, trademark, and the molecular structure, proposed categories of use, an estimate of the quantity of the pesticides or toxic substances and any data related to health and other environmental effects thereof that the Authority may require.³²

While animal pollinators include many insects and animals, bees seem to be the most popular in Kenya and around the world (perhaps based on the fact that beekeeping has traditionally been practised in the country over a long time for economic as an enterprise), with even attempts having been made to address them while excluding all the others. For instance, Kenya's *National Beekeeping Policy* which was developed by the Ministry of Livestock in 2009 with the overall objective of enhancing the contribution of the beekeeping sector to food security, employment creation and environmental conservation in the country.³³ This leaves all the other beneficial organisms predisposed to elimination through destructive agricultural practices and chemical use.

Kenya's *National Environment Policy 2012* accords the term 'environment' a very broad meaning to 'include the physical factors of the surroundings of human beings including land, water, atmosphere, sound, odour, taste, the biological factors of animals and plants and the social factors of aesthetics, and includes both the natural and the built environment'.³⁴ The *National*

³⁰ Environmental Management and Co-ordination Act, 1999, sec. 94.

³¹ *Ibid.*, sec. 94(1).

³² *Ibid.*, sec. 94(2).

³³ Republic of Kenya, *National Beekeeping Policy 2009*, para. 2.2.

³⁴ Republic of Kenya, *National Environment Policy 2012*, (Government printer, 2012, Nairobi), para. 1.1.

Environment Policy rightly points out that ‘the main human activities contributing to environmental degradation in Kenya include unsustainable agricultural land use, poor soil and water management practices, deforestation, overgrazing, and pollution’.³⁵ ‘These activities contribute a great deal to degradation of the country’s natural resources such as land, fresh and marine waters, forests and biodiversity threatens the livelihoods of many people. They undermine the sink function of the environment which operates through such processes as nutrient recycling, decomposition and the natural purification and filtering of air and water.’³⁶

Regarding conservation of biodiversity, the *National Environment Policy* provides that ‘Kenya is internationally recognized as a mega diverse country in terms of richness in biodiversity. It also recognises that biodiversity contributes to a wide variety of environmental services, such as regulation of the gaseous composition of the atmosphere, protection of coastal zone, regulation of the hydrological cycle and climate, generation and conservation of fertile soils, dispersal and breakdown of wastes, pollination of many crops, and absorption of pollutants. Furthermore, human health and well-being are directly dependent on biodiversity. Biodiversity also provides genetic resources for food and agriculture, and therefore constitutes the biological basis for food security and support for human livelihoods.’³⁷

The *National Environment Policy* also highlights the fact that loss of biodiversity is going on at unprecedented rate, with the most important drivers being land degradation, climate change, pollution, unsustainable harvesting of natural resources, unsustainable patterns of consumption and production, and introduction of invasive and alien species.³⁸ To address the highlighted problems, the *Policy* document requires the Government to: Revise and implement the National Biodiversity Strategy and Action Plan (NBSAP); Regulate and encourage sustainable utilization and bioprospecting of biological resources in accordance with international law; Develop mechanisms to ensure that the benefits arising from access to genetic resources, including intellectual property rights, traditional knowledge and technology are shared equitably with communities living in areas where the genetic material originated; and Develop and implement a strategy to contain, control and mitigate alien and invasive species.³⁹

The *Pest Control Products Act*⁴⁰ is meant to regulate the importation, exportation, manufacture, distribution and use of products used for the control of pests and of the organic function of plants and animals and for connected purposes.

All the foregoing national laws have some issues that may affect pollinators in their implementation, but notably, most of them hardly mention pollinators.⁴¹ There is no dedicated

³⁵ Republic of Kenya, National Environment Policy 2012, (Government printer, 2012, Nairobi), para. 2.1.

³⁶ Ibid, para. 2.2.

³⁷ Ibid, para. 4.10.1.

³⁸ Ibid, para. 4.10.2.

³⁹ Republic of Kenya, National Environment Policy 2012, (Government printer, 2012, Nairobi), p. 19.

⁴⁰ Cap 346, Laws of Kenya, Revised Edition 2012 [1985].

⁴¹ See also the Wildlife Conservation and Management Act, No.47 of 2013, Laws of Kenya, which provides for, inter alia, protection, conservation, sustainable use and management of wildlife in Kenya and for connected purposes. Its scope includes “biodiversity” and “biological resources” the latter of which is defined to include genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity; See also the Forest Conservation and Management Act, 2016 (No 34 of 2016) which was enacted to give effect to Article 69 of the Constitution

law that is meant to protect the pollinators and currently, their protection can only be done within the framework of all the above laws.

4. Safeguarding the Future: Addressing the Challenges Affecting Pollinators

It has rightly been pointed out that insect pollinators of crops and wild plants are under threat globally and their decline or loss could have profound economic and environmental consequences.⁴² Specifically, insect pollinators are believed to face growing pressure from the effects of intensified land use, climate change, alien species, and the spread of pests and pathogens; and this has serious implications for human food security and health, and ecosystem function.⁴³ There is need to avert the danger facing pollinators, and this can be achieved through various ways. While some require radical change in management approaches, others require all stakeholders to work closely and also include other relevant but often ignored groups in implementing decisions.

4.1 Ecosystem Services Approach to Pollinators Conservation

Studies have indicated that ecological restoration is likely to lead to large increases in both biodiversity and ecosystem services, offering a potential win-win solution if the two goals are combined in restoration projects.⁴⁴ The Convention on Biological Diversity (CBD) defines the ecosystem approach as follows:⁴⁵

The Ecosystem Approach is a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way. Thus, the application of the ecosystem approach will help to reach a balance of the three objectives of the Convention: conservation; sustainable use; and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources. An ecosystem approach is based on the application of appropriate scientific methodologies focused on levels of biological organization, which encompass the essential structure, processes, functions and interactions among organisms

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 and for connected purposes. The Act envisages sustainable management of forest resources for purposes of inter alia, biodiversity; See also the Wildlife Conservation and Management (Protection of Endangered and Threatened Ecosystems, Habitats and Species) Regulations, 2017, Legal Notice No. 242 of 2017, which were enacted to (a) implement the classification of ecosystems, habitats and species into the following categories critically endangered; endangered; vulnerable; protected; and threatened; (b) provide for protection of ecosystems that are threatened or endangered so as to maintain their ecological integrity; (c) provide for the protection of species that are threatened, endangered, vulnerable, or protected to ensure their survival in the wild; (d) implement Kenya's obligations under international agreements regulating international trade in endangered species; and (e) ensure sustainable management and utilisation of biodiversity.

⁴² Vanbergen, A.J., "Threats to an ecosystem service: pressures on pollinators," *Frontiers in Ecology and the Environment*, Vol.11, No. 5, 2013, pp.251-259.

⁴³ *Ibid*, p. 251.

⁴⁴ Rey Benayas, J.M., Newton, A.C., Diaz, A. & Bullock, J.M., 'Enhancement of Biodiversity and Ecosystem Services by Ecological Restoration: A Meta-Analysis,' *Science*, Vol.28, No.325, 2009, pp. 1121-1124. (As quoted in Dolf de Groot, 'Improved biodiversity and ecosystem services go hand-in-hand,' *Science for Environment Policy – A Weekly News Alert*, Special Issue: Ecosystem Services, Issue 20, May 2010, p.5.)

⁴⁵ Convention on Biological Diversity (2000) COP 5 Decision V/6 The ecosystem approach.

and their environment. It recognizes that humans, with their cultural diversity, are an integral component of many ecosystems.

To effectively protect animal pollinators, there is a need to entrench biodiversity management and conservation approaches that eliminate or reduce human activities which pose risks to these organisms. There is also need to empower communities in ways that give them alternative means of making a living for social sustainability as opposed to relying on environment only as well as enabling them make informed decisions that would contribute positively to environmental sustainability.⁴⁶

Integrated Environmental Management provides a set of underpinning principles and a suite of environmental assessment and management tools that are aimed at promoting sustainable development, such as Environmental Impact Assessment (EIA)⁴⁷, which is well developed and mandatory world-wide⁴⁸, Strategic Environmental Assessment (SEA)⁴⁹ which helps to ensure that many of the environmental issues of global importance are considered in policies, plans and programmes at different administrative levels (i.e. national, regional, local)⁵⁰, and Environmental Audit⁵¹ which is the systematic, documented, periodic and objective evaluation of how well

⁴⁶ Muigua, K., “Realising the Right to Education for Environmental and Social Sustainability in Kenya,” available at <http://www.kmco.co.ke/attachments/article/139/REALISING%20RIGHT%20TO%20EDUCATION%20FOR%20ENVIRONMENTAL%20AND%20SOCIAL%20%20JUSTICE%20IN%20KENYA-%20%202022nd%20%20October%20edited.pdf>

⁴⁷ For instance, Article 6b of the Convention on Biological Diversity provides that each Contracting Party should, in accordance with its particular conditions and capabilities, inter alia, integrate, as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies.

Article 14 (1) (b) thereof also provides that each Contracting Party, as far as possible and as appropriate, should, inter alia, introduce appropriate arrangements to ensure that the environmental consequences of its programmes and policies that are likely to have significant adverse impacts on biological diversity are duly taken into account. The need for EIA was also succinctly expressed in Principle 17 of the 1992 Rio Declaration on Environment and Development which affords the strongest evidence of international support for EIA in the following terms;

Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant impact on the environment and are subject to a decision of a competent authority. (1992 Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (vol. I) / 31 ILM 874 (1992).

⁴⁸ DEAT, Overview of Integrated Environmental Management, Integrated Environmental Management, Information Series 0, Department of Environmental Affairs and Tourism (DEAT), Pretoria, 2004, p.2. Available at <https://www.environment.gov.za/sites/default/files/docs/series0%20overview.pdf>

⁴⁹ While the parent Act (EMCA) was initially silent on SEA, the same was introduced via the Environmental Management and Co-ordination (Amendment) Act, 2015 (Amendment Act, No. 5 of 2015, Laws of Kenya). The Amendment Act 2015 introduces a definition of SEA under section 2 thereof to mean ‘a formal and systematic process to analyse and address the environmental effects of policies, plans, programmes and other strategic initiatives’. The Amendment Act also amended EMCA by introducing section 57A (1) which provides that all Policies, Plans and Programmes for implementation should be subjected to Strategic Environmental Assessment (S. 42, Environmental Management and Co-ordination (Amendment) Act, 2015.)

⁵⁰ Fischer, T.B., ‘Strategic environmental assessment in post-modern times,’ Environmental Impact Assessment Review, Vol.23, 2003, pp.155–170 at p. 162.

⁵¹ Environmental auditing has been defined as a process whereby an organisation’s environmental performance is tested against numerous requirements, for example, clearly defined policies, legislated

environmental organisation, management and equipment are performing in conserving or preserving the environment. Kenya has in place a number of other legislation that are relevant to this subject, and would be effective if fully implemented.⁵² For instance, the *Environmental Management And Coordination (Conservation of Biological Diversity And Resources, Access To Genetic Resources And Benefit Sharing) Regulations, 2016* which were enacted to repeal the *Environmental Management and Coordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations, 2006*⁵³ provides that a person should not engage in any activity that may- have an adverse impact on any ecosystem; lead to the introduction of any exotic species; lead to unsustainable use of natural resources, without an Environmental Impact Assessment Licence issued by the Authority under the Act.⁵⁴ Such provisions, coupled with other laws, if effectively implemented, would go a long way in ensuring that environment-degrading activities that adversely affect pollinators are reduced or eliminated.

requirements and key performance indicators. (DEAT, Overview of Integrated Environmental Management, Integrated Environmental Management, op cit., p. 12); Sec. 2 of EMCA also defines “environmental audit” to mean the systematic, documented, periodic and objective evaluation of how well environmental organisation, management and equipment are performing in conserving or preserving the environment. Sec. 68

- (1) of EMCA envisages Environmental Audit and Monitoring and provides that ‘the Authority shall be responsible for carrying out environmental audit of all activities that are likely to have significant effect on the environment. An environmental inspector appointed under this Act may enter any land or premises for the purposes of determining how far the activities carried out on that land or premises conform with the statements made in the environmental impact assessment study report issued in respect of that land or those premises under section 58(2).
- (2) The owner of the premises or the operator of a project for which an environmental impact assessment study report has been made shall keep accurate records and make annual reports to the Authority describing how far the project conforms in operation with the statements made in the environmental impact assessment study report submitted under section 58(2).
- (3) The owner of premises or the operator of a project shall take all reasonable measures to mitigate any undesirable effects not contemplated in the environmental impact assessment study report submitted under section 58(2) and shall prepare and submit an environmental audit report on those measures to the Authority annually or as the Authority may, in writing, require.

⁵² For instance, see the Environmental (Impact Assessment and Audit) Regulations, 2003, Legal Notice No. 101 of 2003 which are to apply to all policies, plans, programmes, project and activities specified in Part IV, Part V and the Second Schedule of the Act. Regulation 4 thereof provides that no proponent shall implement a project -(a) likely to have a negative environmental impact; or (b) for which an environmental impact assessment is required under the Act or these Regulations; unless an environmental impact assessment has been concluded and approved in accordance with these Regulations. It is however worth pointing out that the National Environment Management Authority, pursuant to the Environmental Management and Coordination Act, Cap 387, has since prepared the draft Environmental (Strategic Assessment, Integrated Impact Assessment and Audit) Regulations, 2017 intended to repeal the Environmental (Impact Assessment and Audit) Regulations, 2003.

The overall objective of the Environmental (Strategic Assessment, Integrated Impact Assessment and Audit) Regulations, 2017 is to align it to the Environmental Management and Coordination Act, Cap 387 which was amended in 2015. The Regulations also seek to address emerging issues such as Strategic Environmental Assessments; environmental and social safeguard procedures and Climate Change. (https://www.nema.go.ke/index.php?option=com_content&view=article&id=32&Itemid=174)

⁵³ Environmental Management and Co-ordination Act, No. 8 of 1999, Legal Notice No. 160 of 2006.

⁵⁴ Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations, 2016, Regulation No. 5.

4.2 Reduction or Effective Control of Pesticide Use

A joint Report by the United Nations Food and Agriculture Organisation and Intergovernmental Technical Panel on Soils of the Global Soil Partnership⁵⁵ comprehensively renders a high-level scientific opinion on the effects of plant protection products on soil functions and biodiversity. However, while acknowledging that critical issues such as toxicity in non-soil dwelling organisms (e.g. pollinators, birds, larger mammals) and transport of contaminants to the human food chain are of equal or greater importance, the same are not covered by the Report which dwells mainly on the effect of the said products on soil-dwelling organisms. While this assessment by FAO may not be directly relevant to the subject of discussion in this paper, it demonstrates the serious and broad effect the excessive use of pesticides can have on various organisms.

Pest control practices such as Integrated Pest Management that enhance natural pest controls are believed to be effective to reduce or eliminate the use of Pesticides (herbicides, insecticides, fungicides), while at the same time, they greatly benefit pollinators which may be heavily impacted by pesticides.⁵⁶ It has been suggested that adoption of integrated pest management (IPM) programs can limit pesticide usage to times of economic damage and spraying at certain times in the pest and crop life cycles, through which pest control can be maximized and amount of pesticide used minimized.⁵⁷ This calls for closer working relationship between farmers and the agricultural extension services officers for sensitisation and education on the same.

Scholars have also suggested that incentives should be offered to farmers to restore pollinator-friendly habitats, including flower provisioning within or around crop fields and elimination of use of insecticides by adopting agroecological production methods.⁵⁸ Additionally, conventional farmers are advised to be extremely cautious in the choice, timing, and application of insecticides and other chemicals.⁵⁹ Agriculture is believed to pose many threats to insect pollinators such as changes in land use, loss and fragmentation of habitat, introduction of exotic organisms, modern agricultural practices, and pesticide use.⁶⁰

The *Pest Control Products Act* defines “pest” to mean any injurious, noxious or troublesome insect, fungus, bacterial organism, virus, weed, rodent or other plant or animal pest; and includes any injurious, noxious or troublesome organic function of a plant or animal.⁶¹ This definition is arguably very broad and quite generic in that any product meant to eliminate the defined organisms is also likely to have adverse effects on the non-harmful or useful organisms. It is

⁵⁵ FAO and ITPS, Global assessment of the impact of plant protection products on soil functions and soil ecosystems, (Rome, FAO, 2017). Available at <http://www.fao.org/3/I8168EN/i8168en.pdf>

⁵⁶ Food and Agricultural Organisation of the United Nations, “Pollination Services for Crop Production: Managing Ecosystem Services for Productive and Healthy Agroecosystems,” available at <http://www.fao.org/3/a-at109e.pdf> [Accessed on 29/11/2017].

⁵⁷ Kings River Conservation District (KRCDD), “Agricultural Management Practices,” available at http://www.krcdd.org/water/water_quality/ag_mgt_practices.html [Accessed on 4/01/2018].

⁵⁸ Nicholls, C.I. & Altieri, M.A., "Plant Biodiversity Enhances Bees and Other Insect Pollinators in Agroecosystems: A Review," *Agronomy for Sustainable development*, Vol.33, No. 2, 2013, pp.257-274 at p. 257.

⁵⁹ *Ibid.*, p.257.

⁶⁰ *Ibid.*, p.258.

⁶¹ *Pest Control Products Act*, sec.2.

therefore important for the Pest Control Products Board to work closely with all the relevant stakeholders in the sector in order to ensure that the approved products have minimal adverse effects on non-targeted organisms.

The Pest Control Products Board established under the Act is empowered to: assess and evaluate pest control products in accordance with the provisions of the regulations made under the Act; consider applications for registration of pest control products and to make recommendations thereon to the Minister; and advise the Minister on all matters relating to the enforcement of the provisions of this Act and regulations made thereunder.⁶²

Such a Board ought to closely work with the scientific and technology community and the general public especially the agricultural and pastoral communities in order to reduce or eliminate the use of harmful pesticide products, as a way of minimizing destruction of pollinators and their habitats.

The Board should also have representatives in agricultural trainings and seminars in order to sensitize farmers on any outlawed or potentially dangerous pesticides that have broad spectrum effect on pollinators. This is important for ensuring that the information disseminated to farmers is up-to-date and germane. Such information should also be widely publicized in languages and media that are easy to understand. It is imperative that the general public appreciates that pesticide use is not only harmful to human health but also affects other organisms that may be non-harmful to crop production or even beneficial, as pollinators.

4.3 Environmental Education, Awareness and Ethics

It has been opined that a lack of clear and sustained environmental awareness in many African countries has contributed to environmental degradation within the continent.⁶³ One of the ways of addressing this problem would be promoting environmental education geared towards raising such awareness and environmental ethics.⁶⁴ There have been efforts to address this problem especially by the United Nations and affiliated organisations such as United Nations Environmental Programme (UNEP) which set up the Africa Environmental Education and Training Action Plan (AEETAP) following the 2012 Arusha Declaration 18, which states:

*To agree to strengthen environmental education and training and develop an action plan for Africa, covering formal and non-formal education, capacity-building and information networking components, among others, and to explicitly include a focus on technology enhanced learning in this action plan.*⁶⁵

Environmental education has been defined as ‘a process that allows individuals to explore environmental issues, engage in problem solving, and take action to improve the environment,

⁶² Ibid., Sec. 5 & 6.

⁶³ Heila Lotz-Sisitka, H.L., et. al., Africa Environmental Education and Training Action Plan 2015-2024: Strengthening Sustainable Development in Africa, (United Nations Environment Programme, January, 2017), p.1.

⁶⁴ Ibid.

⁶⁵ Ibid., p. 5.

thus enabling individuals develop a deeper understanding of environmental issues and have the skills to make informed and responsible decisions.’⁶⁶

The *Environmental Management and Co-ordination Act, 1999*⁶⁷ defines environmental education to include ‘the process of recognising values and clarifying concepts in order to develop skills and attitudes necessary to understand and appreciate the inter-relatedness among man, his culture and his biophysical surroundings.’⁶⁸

The identifiable components of environmental education are: Awareness and sensitivity to the environment and environmental challenges; Knowledge and understanding of the environment and environmental challenges; Attitudes of concern for the environment and motivation to improve or maintain environmental quality; Skills to identify and help resolve environmental challenges; and participation in activities that lead to the resolution of environmental challenges.⁶⁹

If empowered through education, people are able to make their own decisions especially in matters relating to exploitation of natural resources, Environmental Impact Assessment (EIA) and other matters that touch on development but have a bearing on the environment and the livelihoods of the people. The local communities would be able to actively engage potential investors in ensuring environmental sustainability. Principles of public participation⁷⁰ in governance and environmental democracy⁷¹ as envisaged in the current Constitution of Kenya becomes easier to implement.

⁶⁶United States Environmental Protection Agency, ‘What is Environmental Education?’ available at <http://www2.epa.gov/education/what-environmental-education> [Accessed on 20/01/2018].

⁶⁷ No. 8 of 1999, Laws of Kenya.

⁶⁸ Ibid., sec. 2.

⁶⁹ United States Environmental Protection Agency, op.cit; See also the touchstone definition of “environmental education” which was developed in a 1978 UNESCO conference and published in the “Tbilisi Declaration.”

⁷⁰ The Aarhus Convention (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) (Article 7), Stockholm Declaration on the Human Environment Stockholm, June 1972 (Principle 19) and the Rio Declaration on Environment and Development Rio De Janeiro June 1992 (principle 10) all recognise the need to involve the populace in environmental decision-making. Principle 19 of the Stockholm Declaration advocates for education in environmental matters for the younger generation as well as the adults giving due consideration to the underprivileged in order to broaden the basis for an enlightened opinion and responsible conduct by individuals enterprises and communities in protecting and improving the environment in its full human dimension. (emphasis added) Principle 10 of the Rio Declaration further affirms the importance of environmental democracy. It provides that environmental issues are best handled with participation of all concerned citizens are relevant level. At the national level each individual shall have access to appropriate information concerning the environment that is held by Public authorities including information on hazardous materials and activities in their communities and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings including redress and remedy shall be provided.

⁷¹ See Article 69 of the Constitution of Kenya; For a more detailed discussion, see also Muigua, K. & Musyimi, P.N., ‘Enhancing Environmental Democracy in Kenya,’ available at http://www.kmco.co.ke/attachments/article/81/072_Envntal_Dem_Kenya.pdf

There is an urgent need to ensure that appreciation and concern for the environment are instilled during the early years of development.⁷² It is important to ensure that all sections of the general public understand the fact that provision of most of the economic and social rights as guaranteed in the Constitution of Kenya 2010 is dependent on the state of the environment.⁷³ As such, environmental matters must be taken seriously and any factors or activities that adversely affect the environment should be minimised or eliminated.

Anthropocentric⁷⁴ and ecocentric⁷⁵ approaches should be well entrenched in environmental management in order to promote the notion that all living organisms, including pollinators, should be accorded legal protection and their habitats protected as part of the universe not necessarily because of the benefits that accrue from their ecological activities.

4.4 Use of Scientific Research and Traditional Knowledge

Continuous scientific research on the effects of various agricultural practices on biodiversity conservation is key in any efforts geared towards protecting animal pollinators. The International Centre of Insect Physiology and Ecology (ICIPE), based in Kenya, conducts research on African insect problems associated with food and health.⁷⁶

There is need for concerted efforts from the Government agencies concerned with agriculture and scientific research to work closely with ICIPE to address some of the problems facing these important players for the realisation of sustainable development agenda.

Agenda 21 advocates for this by calling for improvement in communication and cooperation among the scientific and technological community, decision makers and the public. Notably, Agenda 21 provides that the scientific and technological community and policy makers should increase their interaction in order to implement strategies for sustainable development on the basis of the best available knowledge. This implies that decision makers should provide the necessary framework for rigorous research and for full and open communication of the findings of the scientific and technological community, and develop with it ways in which research results and the concerns stemming from the findings can be communicated to decision-making bodies so as to better link scientific and technical knowledge with strategic policy and programme formulation. At the same time, this dialogue would assist the scientific and technological community in developing priorities for research and proposing actions for constructive solutions.⁷⁷

⁷² Muigua, K., "Realising the Right to Education for Environmental and Social Sustainability in Kenya," op. cit., p.9.

⁷³ See generally, A. Boyle, "Human Rights and the Environment: A Reassessment," Boyle UNEP Paper Revised.

⁷⁴ It considers human beings as the centre or the most important being in the universe and looks at nature and its resources in terms of the benefits that accrue to the humankind (Murdy, W.H., "Anthropocentrism: A Modern Version," *Science, New Series*, Vol. 187, No. 4182 (Mar. 28, 1975), pp. 1168-1172).

⁷⁵ It is an approach that is based on nature-centred as opposed to human-centre system of values. (Amérigo, M., Aragonés, J., De Frutos, B., Sevillano, V., & Cortés, B., "Underlying Dimensions of Ecocentric and Anthropocentric Environmental Beliefs," *The Spanish Journal of Psychology*, 10(1), 2007, 97-103. doi:10.1017/S1138741600006351).

⁷⁶ http://www.icipe.org/about/mission_and_vision

⁷⁷ Agenda 21, para. 31.2.

Arguably, such communication between the scientific and technological community and the policy and lawmakers would go a long way in coming up with policies and laws that are more responsive to the need to protect pollinators. Generalized laws on conservation of biodiversity may not be very effective in addressing the specific challenges affecting pollinators. While the framework law such as EMCA envisages provisions on protection of biodiversity⁷⁸, a closer working relationship between the policy and lawmakers and the scientific and technological community would ensure drafting of effective sectoral laws or guidelines that fully protect pollinators.

The Convention on Biological Diversity Secretariat recommends that one of the ways of implementing the Aichi Biodiversity Target 7 would be incorporating customary use of biodiversity by indigenous and local communities, which can often offer lessons of wider applicability and could be enhanced by increasingly delegating governance and management responsibility to the local level.⁷⁹

The Constitution of Kenya 2010 also supports this idea by providing that it recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.⁸⁰ In addition, it requires the State to, inter alia: recognise the role of science and indigenous technologies in the development of the nation; and promote the intellectual property rights of the people of Kenya.⁸¹ Parliament is also required to enact legislation to, inter alia, recognise and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya.⁸²

Article 69(1) thereof also obligates the State to, inter alia: ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; work to achieve and maintain a tree cover of at least ten percent of the land area of Kenya; protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities; encourage public participation in the management, protection and conservation of the environment; protect genetic resources and biological diversity; eliminate processes and activities that are likely to endanger the environment; and utilise the environment and natural resources for the benefit of the people of Kenya. Additionally, 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.⁸³

Notably, Parliament has since come up with the *Protection of Traditional Knowledge and Cultural Expressions Act, 2016*⁸⁴ which was enacted to provide a framework for the protection and promotion of traditional knowledge and cultural expressions; to give effect to Articles 11, 40

⁷⁸ Sec. 50-53, EMCA, 1999.

⁷⁹ Convention on Biological Diversity Secretariat, "TARGET 7 - Technical Rationale extended (provided in document COP/10/INF/12/Rev.1)," op. cit.

⁸⁰ Constitution of Kenya 2010, Art. 11(1).

⁸¹ Ibid, Art. 11(2).

⁸² Ibid, Art. 11(3).

⁸³ Art. 69(2), Constitution of Kenya 2010.

⁸⁴ No. 33 of 2016, Laws of Kenya.

and 69(1) (c) of the Constitution; and for connected purposes. The Act defines "traditional knowledge" to mean any knowledge- originating from an individual, local or traditional community that is the result of intellectual activity and insight in a traditional context, including know-how, skills, innovations, practices and learning, embodied in the traditional lifestyle of a community; or contained in the codified knowledge systems passed on from one generation to another including agricultural, environmental or medical knowledge, knowledge associated with genetic resources or other components of biological diversity, and know-how of traditional architecture, construction technologies, designs, marks and indications.⁸⁵

Traditional knowledge can play a critical role in eliminating some of the problems affecting animal pollinators such as excessive use of pesticides. Traditional farming and conservation practices can go a long way in reducing the use of pesticides in crop production. The general public and specifically the agricultural communities would also benefit from closer working relationships between them and the government agencies to appreciate how some of the traditional practices in farming can be incorporated into their modern farming practices as a way of reducing the use of harmful chemicals in crop production as well as discarding some of the destructive farming practices.

It is important to note that the protection of traditional knowledge or cultural expressions as envisaged in the foregoing Act should: not restrict or hinder the normal usage, development, exchange, dissemination and transmission of traditional knowledge or cultural expressions by members of a particular community within the traditional practices and in accordance with the customary law and practices of that community.⁸⁶ Communities can and should be encouraged and supported to therefore actively utilise traditional knowledge especially relating to agricultural, environmental and knowledge associated with genetic resources or other components of biological diversity in achieving sustainable agricultural production and enhancing protection of the health of animal pollinators.

The knowledge can also be used together with scientific knowledge to come up with agricultural crops that are fairly resistant to some pests thus reducing the indiscriminate use of pesticides. Some of the traditional farming practices coupled with relevant scientific knowledge can also go a long way in achieving elimination or lower pollution levels on the farm or used in wider areas including, indigenous knowledge of soil management, agricultural practices, animal husbandry, irrigation system, crop breeding, harvesting and storage which have been traditionally used successfully and in a sustainable manner.⁸⁷ Some of the traditional farming practices that have been cited as capable of protecting pollinators while enhancing sustainable agricultural production include farmers improving the biological stability and resilience of the system by choosing more suitable crops, rotating them, growing a mixture of crops, and irrigating, mulching and manuring land.⁸⁸

⁸⁵ Protection of Traditional Knowledge and Cultural Expressions Act, 2016, sec. 2.

⁸⁶ *Ibid*, sec. 19(1).

⁸⁷Thakuria, G., 'Traditional Knowledge for Sustainable Development: A Geographical Analysis,' *International Journal of Research in Applied, Natural and Social Sciences*, Vol. 2, Issue 9, Sep 2014, 39-44, p.42.

⁸⁸ Hayati, D., Zahra R. & Ezatollah, K., "Measuring agricultural sustainability," In *biodiversity, biofuels, agroforestry and conservation agriculture*, Springer Netherlands, 2010, pp. 73-100 at p.74.

It has been suggested that in order to promote sustainable development, partnership between the scientific and technological communities and indigenous people in many areas are essential, which should be founded upon mutual respect and understanding, transparent and open dialogue, and informed consent and just returns for the holders of traditional knowledge through reward and benefits.⁸⁹ A working relationship based on such grounds can potentially enhance conservation measures especially for the pollinators.

4.5 Addressing Climate Change

As part of efforts geared towards protection of animal pollinators and their habitats, there is need to continually address the problem of climate change, as set out in 1992 United Nations Framework Convention on Climate Change (UNFCCC)⁹⁰ which is an intergovernmental treaty developed to address the problem of climate change. Scholars have rightly suggested that climate change may be one of the biggest anthropogenic disturbance factors imposed on ecosystems today.⁹¹ These studies have concluded that climate change affects plants, pollinators and their interactions through increased temperatures, disturbances on rainfall pattern and other many environmental changes, including alteration in the native biodiversity and trophic relationship which result in lower the production of crops.⁹²

The *Agenda 2030 on Sustainable Development* urges countries to take urgent action to combat climate change and its impacts.⁹³ In response to this, Kenya has since taken commendable measures aimed at tackling the problem of climate change. Kenya's *Climate Change Act, 2016*⁹⁴ was enacted to provide for the legal and institutional framework for the mitigation and adaption to the effects of climate change; to facilitate and enhance response to climate change; to provide for the guidance and measures to achieve low carbon climate resilient development and for connected purposes.⁹⁵ It is important that the provisions of this Act be implemented across the various sectors, especially the ones with a direct impact on environment and biodiversity in particular. Within this framework, it is important to continue tackling the problem of climate change and its effect on biodiversity, especially the animal pollinators.

⁸⁹ Thakuria, G., 'Traditional Knowledge for Sustainable Development: A Geographical Analysis,' op cit., p.43.

⁹⁰ UN General Assembly, United Nations Framework Convention on Climate Change: resolution / adopted by the General Assembly, 20 January 1994, A/RES/48/189.

⁹¹ Pudasaini, R., et al., "Effect of climate change on insect pollinator: a review," New York Science Journal, Vol. 8, No.3, 2015, pp.39-42 at p.40.

⁹² Ibid.

⁹³ United Nations, Transforming our world: the 2030 Agenda for Sustainable Development, Goal 13.

⁹⁴ No. 11 of 2016, Laws of Kenya.

⁹⁵ Ibid, preamble. The Act, inter alia, provides: a framework for mitigating and adapting to the effects of climate change on all sectors of the economy and levels of governance; a mechanism for coordination and governance of matters relating to climate change; coordination mechanism for formulation of programmes and plans to enhance the resilience of human and ecological systems against the impacts of climate change; for mainstreaming of the principle of sustainable development in the planning for and on climate change response strategies and actions; for promotion of social and economic measures in climate change responses to support sustainable human development; and a mechanism for coordination of measuring , verification and reporting of climate interventions (S.3 (1)).

5. Conclusion

It has rightly been argued that since sustainable development is a continuous process that considers all human and natural resource as a means to achieve certain goals or objectives, this development process should not be contradictory with nature but should instead be ecologically comfortable, economically viable and socially acceptable.⁹⁶ The protection and conservation of natural resources for future generations arguably depends on, inter alia, pollinators.

Pollinators have an important role to play in crop and food production as well as realisation of the sustainable development agenda. There is need to put in place and employ active and conscious mechanisms specifically geared towards protection of the animal pollinators against adverse effects arising from human activities. Such measures must however go beyond legal responses and include scientific and cultural aspects especially in relation to crop production. Safeguarding pollinators is a part of sustainable development and is crucial for the realisation of food and nutritional security in Kenya, and indeed worldwide. This neglected link between pollinators and sustainable development needs to be addressed as a matter of urgency.

⁹⁶ Thakuria, G., 'Traditional Knowledge for Sustainable Development: A Geographical Analysis,' op cit., p.39.

Reconceptualising the Right to Clean and Healthy Environment in Kenya

Abstract

This paper examines the right to clean and healthy environment as envisaged in the Constitution of Kenya 2010, its legal underpinnings and the extent to which the same has been realised for the Kenyan people. It traces the legal foundations of this right in the international environmental discourse as well as its place in the Kenyan law. The paper argues that there is need to redefine the right to clean and healthy environment as a fundamental right, classify it with the other basic rights as opposed to the existing notion that it is a third generation right. The writer asserts that this right to a clean and healthy environment can be equated to the right to life. Therefore, there is need to reconceptualise and enhance the same in our legal framework so as to make it a reality.

1. Introduction

This paper examines the right to clean and healthy environment as envisaged in the Constitution of Kenya 2010, its legal underpinnings and the extent to which the same has been realised for the Kenyan people. It traces the legal foundations of this right in the international environmental law discourse as well as its place in the Kenyan law. The paper also argues that there is need to reconceptualise the concept of right to clean and healthy environment with a view to enhancing its protection and enforcement for the Kenyan people. The writer proffers the view that there is a need to clarify and define this right so as to make it realisable.

2. Defining the Right to Clean and Healthy Environment

Environment is defined as all the physical, chemical and biological factors external to a person, and all the related behaviours.¹ The *Environmental Management and Coordination Act, 1999* (EMCA), defines “environment” to include the physical factors of the surroundings of human beings including land, water, atmosphere, climate, sound, odour, taste, the biological factors of animals and plants and the social factor of aesthetics and includes both the natural and the built environment.² Environment has also been defined as “...the whole complex of climatic, adaptive and biotic factors that act upon an organism or an ecological community and ultimately determine its form or survival; the aggregate of social and cultural conditions that influence the life of an individual or a community...”³ The *Draft International Covenant on Environment and Development*⁴ defines environment to mean “the totality of nature and natural resources, including the cultural heritage and infrastructure essential for social-economic activities.”⁵

¹ World Health Organization, “Preventing disease through healthy environments,” (World Health Organization, Geneva, 2006).

² Act No. 8 of 1999, Laws of Kenya, s.2.

³ Webster’s New World Dictionary 3rd ed (Cleveland College, Cleveland, 1998) p.454; P. Birnie & A. Boyle, *International Law & the Environment*, 3rd ed. (Oxford University Press, Oxford, 2009), p. 3.

⁴ International Union for Conservation of Nature and Natural Resources Environmental Policy and Law, Paper No. 31 Rev. 3, Draft of the Joint Working Group convened by the Commission on Environmental Law (CEL) of the World Conservation Union (IUCN) and the International Council on Environmental Law (ICEL), 4th Ed., 2010.

⁵ Draft of the Joint Working Group convened by the Commission on Environmental Law (CEL) of the World Conservation Union (IUCN) and the International Council on Environmental Law (ICEL), 1991; The Environment and Land Court Act, 2011, No 19 of 2011, Laws of Kenya, s.2.

It has been argued that the problem in declaring a *right to a clean and healthy environment* (emphasis added) as is found in various documents is that there is yet no clear definition of this right nor is its content clearly demarcated. Pertinent questions abound: what is the measure for a clean and healthy environment? At what point can one say this right has been violated - is it after a single oil spill, or continuously with or without an immediate clean up or after a refusal to return the contaminated environment to status quo ante?⁶ For instance, in the Kenyan case of *Pastor James Jessie Gitahi & 202 others v Attorney General*,⁷ the Court observed that "...prevention of noise and vibration pollution is now recognised as a component of a clean and healthy environment. Noise pollution covers sound which can result in hearing impairment while vibrations pollution covers vibration transmitted to the human body through solid structures. Both excessive noise and vibration can cause injury to the body hence the need to regulate the level of noise through the Regulations".⁸ The Court also stated that "Part II of the *Regulations*⁹ has a general prohibition against, "loud, unreasonable, unnecessary or unusual noise which annoys, disturbs, injures or endangers the comfort, repose, health or safety of others and the environment. In determining whether the noise is loud several factors are considered including the time of the day, the proximity to a residential neighbourhood, whether the noise is recurrent intermittent or constant, the level or intensity of the noise, whether the noise has been enhanced by any electronic or mechanical means or whether the noise can be controlled without effort or expense to the person making the noise." According to the Court, "a violation of the general prohibition is an offence and attracts a penalty under the Act and the Regulations."

Although there is no single universally accepted definition of what entails the environment, it is clear from the foregoing definitions that environment goes beyond the physical surroundings to incorporate such issues as social and cultural conditions that influence the life of an individual or a community. It is, however, important to point out that the foregoing definitions of the right to a clean and healthy environment are now falling by the wayside in view of the fact that this right has been equated to life itself. It has been observed that while a number of States still refuse to recognize the human right to a clean environment, the international jurisprudence developed around numerous universally-recognized substantive rights, such as the right to life, health, food and housing, offers robust legal and conceptual bridges between the social, economic and environmental dimensions of sustainable development, and could shift priorities in the political economy of resource allocation and distribution.¹⁰ At the international level, it has been held that 'the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn.'¹¹

⁶ C. I., Okpara, 'Right to a Clean and Healthy Environment: The Panacea to the Niger Delta Struggle,' *Journal of Politics and Law*, Vol. 5, No. 1; March 2012, pp. 3-8, p.6.

⁷[2013] eKLR, Petition No. 683 of 2009.

⁸ Para. 28.

⁹ Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulation, 2009, Legal Notice No. 61 of 2009.

¹⁰ United Nations Non-Governmental Liaison Service, *Human Rights Approaches to Sustainable Development*, NGLS Roundup 90, May 2002, p. 1. Available at <http://www.un-ngls.org/orf/pdf/ru90hrsd.pdf> [Accessed on 28/08/2015].

¹¹ ICJ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996, p. 241, para. 29.

The right to a clean environment openly became an international concern first in 1968 when the UN General Assembly passed a resolution identifying the relationship between the quality of the environment and the enjoyment of basic rights.¹² However, it was not until the Stockholm conference in 1972 that the right to a healthy environment was explicitly recognized in an international environmental law document (Stockholm Declaration, 1972)¹³. It declared that *man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations* (Emphasis added).¹⁴ It is noteworthy that the Declaration did not just recognise the right to a good quality environment but also placed a responsibility on human beings to protect and improve the environment for present and future generations. This position of rights and responsibility towards the environment is now widely accepted and it goes to the core of the sustainable development discourse.¹⁵

Some human rights lawyers opine that the recognition of third generation rights will devalue the concept of human rights and divert attention from the already recognised first and second-generation rights.¹⁶ The right to a clean and healthy environment, as is with all environmental rights, has for a long time been grouped under the ‘third generation rights’ or ‘solidarity rights’. However, it is arguable that the right to clean and healthy environment is not a ‘third generation right’ but a *fundamental right*, (Emphasis added) a prerequisite for full enjoyment of all the other rights. It is a right, crucial for the realisation of the so-called first and second generation rights. Indeed, it has rightly been argued that when people must struggle to obtain the basic necessities of life, political freedoms and other human rights may appear meaningless to them.¹⁷ This is because the destruction of life-sustaining ecosystems, the pollution of the world's water, land, and air, the inability to control the world's wastes, and other related environmental problems prevent people from securing the minimum requisites for health and survival, thereby impeding and even prohibiting the effective exercise and enjoyment of human rights for much of the world's population.¹⁸

It is against this background that there emerged recognition of the right to a clean and healthy environment, as a distinct right, owing to the importance of the environment to realisation of the other human rights especially the socio-economic rights.

¹² United Nations General Assembly, Problems of the Human Environment, UNGA Res 2398(XXII) 3 December 1968.

¹³ Declaration of the United Nations Conference on the Human Environment Stockholm, 16 June 1972, UN Doc.A/CONF.48/14/Rev.1.

¹⁴ Ibid, Principle 1.

¹⁵ For instance, see Art. 69, Constitution of Kenya, 2010 (Government Printer, Nairobi).

¹⁶ See W.T., Olenasha, ‘The Enforcement Of Environmental Rights: A Case Study Of The New South African Constitutional Dispensation,’ Thesis (LLM (Human Rights and Democratisation in Africa) (University of Pretoria, 2001), available at http://repository.up.ac.za/bitstream/handle/2263/969/olenasha_wt_1.pdf?sequence=1&isAllowed=y [Accessed on 28/08/2015].

¹⁷ J.A. Downs, ‘A Healthy and Ecologically Balanced Environment: An Argument for A Third Generation Right,’ *Duke Journal of Comparative & International Law*, Vol. 3, 1993, pp. 351-385 at p. 351.

¹⁸ Ibid.

2.1 Scope of the Right to Clean and Healthy Environment

The Constitution of Kenya¹⁹ guarantees the right of every person to a clean and healthy environment, which includes the right—to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69²⁰; and to have obligations relating to the environment fulfilled under Article 70²¹.

These constitutional provisions do not clearly define what constitutes the right to clean and healthy environment. However, *Environmental Management and Coordination Act (EMCA)* defines the entitlement to a clean and healthy environment to include ‘access by any person in Kenya to the various public elements or segments of the environment for recreational, educational, health, spiritual and cultural purposes’.²² While the definition is broad, it may present a challenge in determining the mode of its enforcement. This is because its main focus seems to be on ‘access’ to the environment as against concentration on the ‘status’ of the environment.

- i. It is important to take cognisance of *Draft Principles on Human Rights and the Environment of 1994*,²³ an international instrument that comprehensively addresses the linkage between human rights and the environment. The *1994 Draft Principles on Human Rights and the Environment* recognise the interdependence between human rights, peace, environment and development. Principle 1 thereof declares that human rights, an ecologically sound environment, sustainable development and peace are interdependent and indivisible.
- ii. Principle 5 thereof declares that all persons have the right to freedom from pollution, environmental degradation and activities that adversely affect the environment, threaten life, health, livelihood, well-being or sustainable development within, across or outside national boundaries. This is a broader description of the right to clean and healthy environment, which includes such aspects as elimination of environmental

¹⁹ Article 42, Constitution of Kenya 2010.

²⁰ Art. 69 outlines the State and individual obligations in respect of the environment. Clause (1) provides that the State shall—(a) ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; (b) work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya; (c) protect and enhance intellectual property in, and indigenous

knowledge of, biodiversity and the genetic resources of the communities; (d) encourage public participation in the management, protection and conservation of the environment; (e) protect genetic resources and biological diversity; (f) establish systems of environmental impact assessment, environmental audit and monitoring of the environment; (g) eliminate processes and activities that are likely to endanger the environment; and (h) utilise the environment and natural resources for the benefit of the people of Kenya.

²¹ Art. 70(1) provides that if a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter. Clause (2) thereof provides that on application under clause (1), the court may make any order, or give any directions, it considers appropriate—(a) to prevent, stop or discontinue any act or omission that is harmful to the environment; (b) to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or (c) to provide compensation for any victim of a violation of the right to a clean and healthy environment.

²² S. 3(2), No. 8 of 1999, Laws of Kenya.

²³ Draft Principles On Human Rights And The Environment, E/CN.4/Sub.2/1994/9, Annex I (1994).

threats to life, health, livelihood, well-being or sustainable development. Indeed, this Declaration expressly states that such right must be recognised within and outside the national boundaries.

Principle 1 of the *Stockholm Declaration* refers to an ‘environment of a quality that permits a life of dignity and well-being’, while article 24 of the *African Charter on Human and Peoples’ Rights* (the African Charter)²⁴ refers to a ‘general satisfactory environment favourable for their development’. The broad definitions as offered by these legal instruments are important to ensure that the policy makers and other stakeholders consider all the important aspects of the environment. It is perhaps also on such broad definitions that courts and tribunals have declined to give narrow interpretation to the right to clean and healthy environment, even ruling that the right is equivalent to right to life.

The close link between economic and social rights and the environment was also affirmed in the Kenyan case of *Friends of Lake Turkana Trust v Attorney General & 2 others*²⁵ where the Learned Judge stated, *inter alia*, that the right to life, dignity and economic and social rights are all connected and indivisible, and it cannot be said that “one set of rights is more important than another. All these rights of necessity need to be observed for a person to attain a reasonable livelihood.”²⁶

According to the World Health Organization (WHO), environmental health is concerned with all the physical, chemical, and biological factors external to a person, and all the related factors impacting behaviours. It encompasses the assessment and control of those environmental factors that can potentially affect health.²⁷ Health is defined as a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity. WHO has reported that more than three million children under five die each year from environment-related causes and conditions. This, thus, makes the environment one of the most critical contributors to the global toll of more than ten million child deaths annually-as well as a very important factor in the health and well-being of their mothers.²⁸ WHO observes that polluted indoor and outdoor air, contaminated water, lack of adequate sanitation, toxic hazards, disease vectors, ultraviolet radiation, and degraded ecosystems are all important environmental risk factors for children, and in most cases for their mothers as well.²⁹

²⁴ African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986.

²⁵ [2014] eKLR, ELC Suit No. 825 of 2012.

²⁶ *Ibid*, p.11.

²⁷ World Health Organization, Environmental Health, available at http://www.who.int/topics/environmental_health/en/ [Accessed on 1/09/2015].

²⁸ World Health Organization, Children's environmental health: The environment and health for children and their mothers,' available at <http://www.who.int/ceh/publications/factsheets/fs284/en/> [Accessed on 1/09/2015].

²⁹ World Health Organization, Children's environmental health: The environment and health for children and their mothers,' *op cit*.

On a general scale, it is believed that environmental hazards are responsible for an estimated 25% of the total burden of disease worldwide, and nearly 35% in regions such as sub-Saharan Africa.³⁰ In this regard, it has been argued that addressing the effects of the environment on human health is essential if we are to achieve the goal of health for all.³¹ Human health is believed to be connected to environmental health and that the two are mutually dependent.³²

The right to a clean and healthy environment is so interwoven with the realisation and enjoyment of other fundamental rights that any attempt to classify it as an inferior right sabotages the realisation of all the other basic rights, including life, health, livelihood and well-being, amongst others.³³ This right advocates for a healthy human habitat, including clean water, air and soil that are free from toxins or hazards that threaten human health.³⁴

Human rights and the environment are said to be inherently interlinked, as the life and the personal integrity of each human being depends on protecting the environment as the resource base for all life.³⁵ It is noteworthy that the environment is the main reservoir for most of the resources necessary for realisation of economic and social rights. Therefore, efforts towards addressing threats to a clean and healthy environment must adopt an integrated approach that brings on board all actors, drawn from all the sectors especially those that address socio-economic needs of the society. For instance, with regard to health, it is rightly observed that the scope for creating a healthy environment is clearly not limited to hospitals and doctor's surgeries, but includes the myriad factors that influence health, agriculture and food, education, housing, employment status and working environment, water and sanitation, and health care services.³⁶ Further, clean environment indicates freedom from dirt, noise, sound pollution, pollution, garbage, insanitary toilets, and improper disposal of animal waste, improper solid waste management systems.³⁷ These issues normally fall under the mandates of different authorities, as defined by law. This therefore calls for concerted efforts from various sectors to address the potential challenges that may arise in actualizing the right to clean and healthy environment.

³⁰ Health and Environment Linkages Initiative – HELI, Health and Environment Linkages Initiative, available at <http://www.who.int/heli/en/> [Accessed on 1/09/2015].

³¹ N. Higenbottam, 'Nurse's Role as an Environmental Activist,' p.2. Available at <http://www.theluminaryproject.org/downloads/Essay%20Contest%20Higenbottam.pdf> [Accessed on 1/09/2015].

³² World Health Organization, Human health under threat from ecosystem degradation, 9 December 2005, available at <http://www.who.int/mediacentre/news/releases/2005/pr67/en/> [Accessed on 1/09/2015].

³³ See generally Y., Lador, 'The challenges of human environmental rights,' in Human Rights and the Environment: Proceedings of a Geneva Environment Network roundtable, (United Nations Environment Programme for the Geneva Environment Network, 2004).

³⁴ C. I., Okpara, 'Right to a Clean and Healthy Environment: The Panacea to the Niger Delta Struggle,' op cit, p. 5.

³⁵ F.X., Perrez, 'Key questions concerning the human rights and environment debate: An introduction,' in Human Rights and the Environment: Proceedings of a Geneva Environment Network roundtable, (United Nations Environment Programme for the Geneva Environment Network, 2004), p.4.

³⁶ N. Mohammad, 'Environmental Rights for Administering Clean and Healthy Environment towards Sustainable Development in Malaysia: A Case Study,' International Journal of Business and Management; Vol. 9, No. 8; 2014, pp. 191-198 at p.192.

³⁷ Ibid, p.193.

The broad scope of the right to clean and healthy environment was affirmed by the Kenyan Courts in the case of *Peter K. Waweru v Republic*,³⁸ where the Court stated, *inter alia*, that ‘the right of life is not just a matter of keeping body and soul together because in this modern age, that right could be threatened by many things including the environment. The right to a clean environment is primary to all creatures including man; it is inherent from the act of creation, the recent restatement in the Statutes and the Constitutions of the world notwithstanding.’³⁹ This right and the other human rights, including civil, cultural, economic, political and social rights, are universal, interdependent and indivisible.⁴⁰

The Supreme Court of India held in *Subhash Kumar v. State of Bihar*,⁴¹ that the “right to life guaranteed by article 21 of the Constitution includes the right of enjoyment of pollution-free water and air for full enjoyment of life.” Further, in the case of *Dr. Mohiuddin Farooque v. Bangladesh, represented by the Secretary, Ministry of Irrigation, Water Resources and Flood Control and Others*⁴², the Supreme Court interpreted the right to life to include the protection and preservation of the environment and ecological balance free from pollution of air and water.

- iii. In the Indian case of *K. Ramakrishnan and Others Versus State of Kerala and Others* (smoking case), the Court stated that

*“The word ‘life’ in the Constitution has not been used in a limited manner. A wide meaning should be given to the expression ‘life’ to enable a man not only to sustain life but also to enjoy it in a full measure. The sweep of right to life conferred by Article 21 of the Constitution is wide and far-reaching so as to bring within its scope the right to pollution free air and the “right to decent environment.” (Emphasis added)*⁴³

- iv. In the case of *Peter K. Waweru v Republic*, the Court observed that “...environmental crimes under the Water Act, Public Health Act and EMCA cover the entire range of liability including strict liability and absolute liability and ought to be severely punished because the challenge of the restoration of the environment has to be tackled from all sides and by every man and woman....”

It went further to state, “...In the name of environmental justice water was given to us by the Creator and in whatever form it should never *ever be the privilege of a few – the same applies to the right to a clean environment.*”⁴⁴

- v. In light of the foregoing case law, and in enforcement of other Constitutional rights such as economic and social rights and the right to life under the Constitution, courts should accord such provisions broad interpretations so as to address any **environmental** factors that impede access to the resources necessary for enjoyment of

³⁸[2006] eKLR.

³⁹ Ibid, p.8.

⁴⁰ Principle 2.

⁴¹ AIR 1991 SC 420, 1991 (1) SCC 598.

⁴² 48 DLR 1996 (SC Bangladesh, 1996).

⁴³ AIR 1999 Ker 385, p.11.

⁴⁴ [2006] eKLR, Misc. Civ. Applic. No. 118 of 2004, p.14.

the right in question. These include the right, *inter alia*: 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; and to clean and safe water in adequate quantities.⁴⁵ Adequate fulfillment of these rights depends on proper and efficient mechanisms for protection of the right to clean and healthy environment.

The right to clean and healthy environment is inherently connected to the realisation of the other fundamental rights. Such broad approaches to realisation of other rights can go a long way in the protection of the right to clean and healthy environment, considering the central role played by the environment in meeting most the basic rights.

This is a demonstration of the broad definition that can be afforded the right to clean and healthy environment. It however remains a fluid concept that is largely determined or interpreted as per the prevailing law. There is a need to clearly and sharply define it in legal instruments so as to ensure its exercise.

2.2 National Courts and the Right to a Clean and Healthy Environment

It has been argued that while international law plays a vital role in establishing norms and offering a court of last resort for human rights violations, the reality is that most of the action to protect and fulfill rights occurs at the national level.⁴⁶ This is because, within countries, a constitution is the highest and strongest law, as all laws, regulations, and policies must be consistent with it. A constitution protects human rights, sets forth the obligations of the state, and restricts government powers. On a deeper level, constitutions are believed to reflect the most deeply held and cherished values of a society.⁴⁷

It has been pointed out that, whereas the right to a clean and healthy environment has rapidly gained constitutional protection around the world, in some countries, recognition of the right first occurred through court decisions determining that it is implicit in other constitutional provisions, primarily the right to life.⁴⁸ Currently, a number of countries have devoted constitutional provisions to an enforceable right to a clean and healthy environment including, *inter alia*:

⁴⁵ Constitution of Kenya, Art. 43(1).

⁴⁶ D.R. Boyd, 'The Constitutional Right to a Healthy Environment,' *Environment: Science and Policy for Sustainable Development*, July-August 2012, available at <http://www.environmentmagazine.org/Archives/Back%20Issues/2012/July-August%202012/constitutional-rights-full.html> [Accessed on 1/09/2015].

⁴⁷ *Ibid.*

⁴⁸ D.R. Boyd, 'The Implicit Constitutional Right to Live in a Healthy Environment,' *Review of European Community & International Environmental Law*, Vol. 20, No. 2, 2011, pp. 171-179 at p. 171.

Uganda⁴⁹, South Africa⁵⁰, Congo⁵¹ and Ecuador⁵². These provisions however mean little, because they cannot be enforced in the courts, which regard them as insufficient to provide legal standing to anyone who cannot give evidence of personal and direct environmental harm.⁵³

Where the requirement for *locus standi* has been dispensed with, the other impediment that comes in is the prerequisite that one must prove how their right to clean and healthy environment is likely to be denied, violated, infringed or threatened.⁵⁴ It seems that it would not suffice that the particular activity in question poses environmental threat, without necessarily proving direct threat to this right. Arguably, all one should be able to prove is likelihood of pollution or degradation of the environment. For example, in the Ugandan case of *The Environmental Action Network Ltd v Attorney General & NEMA*⁵⁵, the court held that the applicant, a public interest litigation group which had filed the application in its own behalf and on behalf of the non-smoking members of the public under Article 50 (2) of the Constitution, to protect their right to a clean and healthy environment, their right to life and the general good of public health in Uganda, could bring a public interest action on behalf of groups or individual members of the public although the applying organisation had no direct individual interest in the infringing acts it sought to have addressed. This is also to be found under Article 22(2) of the Constitution of Kenya.

The Court should be able to step in and protect the environment without necessarily looking for immediate proof of likely violation of the right to clean and healthy environment. To facilitate the same, the Constitution gives courts the power to make any order, or give any directions, it considers appropriate – to prevent, stop or discontinue any act or omission that is harmful to the environment, or to any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment, or to provide compensation for any victim of a violation of the right to a clean and healthy environment.⁵⁶ An applicant seeking such orders from courts does not have to demonstrate that any person has incurred loss or suffered injury. The Constitution provides that an applicant does not have to demonstrate that any person has incurred

⁴⁹ Constitution of The Republic of Uganda, 1995-S.39 provides that every Ugandan has a right to a clean and healthy environment.

⁵⁰ Constitution of the Republic of South Africa, 1996 –s. 24 provides that everyone has the right - to an environment that is not harmful to their health or well-being; and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that -(i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

⁵¹ Constitution of the Democratic Republic Of The Congo-Article 53 provides that all persons have the right to a healthy environment that is favorable to their development; they have the duty to defend it; The State ensures the protection of the environment and the health of the population.

⁵² Republic of Ecuador, Constitution of 2008- Article 14 provides that the right of the population to live in a healthy and ecologically balanced environment that guarantees sustainability and the good way of living (sumak kawsay), is recognized; Environmental conservation, the protection of ecosystems, biodiversity and the integrity of the country's genetic assets, the prevention of environmental damage, and the recovery of degraded natural spaces are declared matters of public interest.

⁵³ C. I., Okpara, 'Right to a Clean and Healthy Environment: The Panacea to the Niger Delta Struggle,' op cit, p.6.

⁵⁴ See Constitution of Kenya, Art. 70(1).

⁵⁵ Misc. Application No. 39 of 2001 (High Court of Uganda).

⁵⁶ Art. 70(2).

loss or suffered injury.⁵⁷ However, to succeed in their plea one must demonstrate that their Right under Article 42 has been or is likely to be denied, violated, infringed or threatened.⁵⁸

The implication of the foregoing is that if a party is unable to prove the denial, violation, infringement or threat for one reason or the other, then their guarantee to right to clean and healthy environment is likely to be defeated. Indeed, this was demonstrated in the case of *Republic v Lake Victoria South Water Services Board & another*⁵⁹ where the learned Judge observed that the applicants who claimed that their right to clean and healthy environment was likely to be contravened by the respondents if they were allowed to proceed with the implementation of a project, did not indicate clearly how their right to clean and healthy environment was likely to be infringed. However, the Judge went on to state that from the possible impacts set out in the Environmental Impact Assessment (EIA) Report that he had referred to in the case, there was no doubt that the applicants' right to clean and healthy environment would be breached unless adequate mitigation measures are put in place to meet these impacts.⁶⁰ The enforcement of the Constitutional provisions on the right to clean and healthy environment thus seems to be left to the discretion of the presiding Judge.

Recent decisions from the Kenyan Courts confirm this position. In *Said Tahir & 2 others v County Government of Mombasa & 5 others*,⁶¹ the Learned Judge was of the opinion that although the right to a clean and healthy environment is a right under the Bill of Rights (Chapter 4 of the Constitution), the determination of which is conferred upon the High Court under Article 23(1) of the Constitution, there is a duality of jurisdiction between the High Court and the Environment and Land Court by virtue of Article 162 (2) of the Constitution, and by virtue of the jurisdiction conferred upon the latter court by section 13(7) of the *Environment and Land Act*⁶². The Court went further to state that the balance of convenience of jurisdiction lies with the Environment and Land Court by virtue of Article 70 of the Constitution which confers upon the court the power to make any order, or give any directions, it considers appropriate – to prevent, stop or discontinue any act or omission that is harmful to the environment, or to any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment, or to provide compensation for any victim of a violation of the right to a clean and healthy environment.⁶³ In *Timothy Otuya Afubwa & another v County Government of Trans-Nzoia & 3 others*, the Court stated that the Constitution designates the High Court as the only court to address questions on violation of the Bill of Rights. The only right under the Bill of Rights which the Environment and Land Court can hear is the right to clean and healthy environment and thus it has jurisdiction to

⁵⁷ Art. 70(3); See also section 3(1) of Environment (Management and Conservation) Act, 1999 (EMCA)

⁵⁸ Joseph Owino Muchesia & another v Joseph Owino Muchesia & another [2014] eKLR, para. 34.

⁵⁹ [2013] eKLR, Miscellaneous Civil Application 47 of 2012; See also John Kamau Kenneth I Mpapale v City Council of Nairobi & 7 others [2014] eKLR, Formerly Petition No. 63 of 2012 Now ELC No. 867 OF 2012, where the Learned Judge stated that the Petitioners had not made any submissions to the effect that the projects undertaken by the Respondents, being expansion of a road/construction to a link road, would result to environmental degradation or in any way create unclean and unhealthy environment to the Petitioners. In the absence of specificity of the manner in which Arts 42, 69 and 70 had been violated, the Court found that there is no violation of the Petitioner's rights to a clean and healthy environment (p.13).

⁶⁰ Para. 14.

⁶¹ [2015] eKLR, Petition No. 6 of 2015.

⁶² No 19 of 2011, Laws of Kenya.

⁶³ Para 15.

entertain matters relating to violation of this right.⁶⁴ This case does not however seem to have settled the issue of jurisdiction.⁶⁵

Lack of clarity on which Court should handle matters relating to violation of the clean and healthy environment is, arguably, likely to affect efforts to realise the same for the Kenyan people. To overcome such likely challenges, it is important to adopt a broader approach to protection of the right to clean and healthy environment. This should be an approach that does not only rely on proof by the complainant of actual or likely denial, violation, infringement or threat by the respondent, but one that also incorporates ecocentric values. It is also important to point out that the Courts are under a constitutional obligation under Article 10 to uphold the principles of sustainable development. This includes protecting the environment for the sake of future generations, who may not be able to prove the likelihood of denial, violation, infringement or threat to the right. Courts have a duty to protect the right of such future generations.⁶⁶ The Court should, like in the case of *Peter K. Waweru (supra)*, be proactive in promoting environmental protection and conservation for sustainable development.⁶⁷

The proposed approach was adopted in the case of *Joseph Leboo & 2 others v Director Kenya Forest Services & another*⁶⁸ where the Learned Judge observed that "...in my view, any person is

⁶⁴ Timothy Otuya Afubwa & another v County Government of Trans-Nzoia & 3 others [2015] eKLR, para.8.

⁶⁵ See also *Leisure Lodges Ltd v Commissioner of Lands And 767 others* [2016] eKLR; *Mohammed Said vs. County Council of Nandi* [2013] eKLR.

⁶⁶ See *Edgar Kipsase Choge, Harry Jumbati Mbiti, Fred Ombiri, Colleta Inzayi (Suing on behalf of Kamobon Village Residents) v China Overseas Engineering Group Co. Ltd & 3 others* [2017] eKLR where the learned Judge stated, inter alia:

As to irreparable loss which cannot be adequately compensated by an award of damages, I find the damage to the environment has far reaching effects which are not only confined to the current generation but to intrageneration. Even if individuals are compensated it can never be the same once the damage has been done. (Per M.A. Odeny, J., p.7).

⁶⁷ See also the case of *African Centre for Rights And Governance (ACRAG) & 3 others v Municipal Council of Naivasha* [2017] eKLR, where the Learned Judge stated, inter alia:

16. I have considered the matter. This is an important if not welcomed public interest suit. It is vital that all persons be vigilant about the protection of the environment and any person litigating for the sustainability of the environment deserves applause. Of course, each case must be considered in light of the facts tabled and the applicable law.

20. It will be observed from Article 70 (3) above, that it is not necessary for one to demonstrate that they have suffered loss or injury, for them to move the court when claiming that the right to a clean and healthy environment has been violated or is under threat of violation. It is not therefore a requirement for the petitioners to show that they have personally suffered or that the presence of the dumpsite has directly caused them any direct harm. It is sufficient for the petitioners to point out, that there is an ongoing, or imminent threat of harm, to the environment.

33. I have no doubt in my mind that the facility in issue is a threat to a clean and healthy environment. Its operations are indeed illegal. The operation of the facility by the respondent and its successor, the County Government of Nakuru, violates the rights of the petitioners and indeed the rights of the residents of Naivasha, and of all persons resident in Kenya, to a clean and healthy environment as provided for in Article 42 of the Constitution. I do find that there has been a violation of this right by the respondent and now the County Government of Nakuru.

⁶⁸ [2013] eKLR, Environment and Land No. 273 of 2013.

free to raise an issue that touches on the conservation and management of the environment, and it is not necessary for such person to demonstrate, that the issues being raised, concern him personally, or indeed, demonstrate that he stands to suffer individually. Any interference with the environment affects every person in his individual capacity, but even if there cannot be demonstration of personal injury, such person is not precluded from raising a matter touching on the management and conservation of the environment....Any person, without the need of demonstrating personal injury, has the freedom and capacity to institute an action aimed at protecting the environment. The plaintiffs have filed this suit as representatives of the local community and also in their own capacity. The community, of course, has an interest in the preservation and sustainable use of forests. Their very livelihoods depend on the proper management of the forests. Even if they had not demonstrated such interest that would not have been important, as any person *who alleges a violation of any law touching on the environment is free to commence litigation to ensure the protection of such environment....*⁶⁹ (emphasis added)

As stated by the Judges in *Peter K. Waweru* case, “in the name of environmental justice water was given to us by the Creator and in whatever form it should never ever be the privilege of a few – the same applies to the right to a clean environment.” Courts ought to protect this right, for all and going by the above decisions, it is arguable that courts have not done enough in playing this role. An approach that does not emphasize on the likely denial, violation, infringement or threat to the right to clean and healthy environment but one that focuses on the protection and conservation of the environment and its resources, is what is required if the Courts are to ensure that all persons including those who cannot access justice through courts, enjoy the above right.

3. Reconceptualising the Right to Clean and Healthy Environment in Kenya

It is no longer in dispute, at least in Kenya, that there exists a human right to a clean and healthy environment recognised even by the Constitution. Ensuring full enjoyment of a clean and healthy environment, through effective environmental management, will provide multiple benefits to society and the economy.⁷⁰ This calls for a holistic, comprehensive and integrated approach to health and environment to protect both the environment and public health.⁷¹

Notable is the *European Charter on Environment and Health*⁷² which provides for both entitlements and responsibilities. Article 2 thereof provides that every individual has a responsibility to contribute to the protection of the environment, in the interests of his or her own health and the health of others. The Charter’s provisions on principles for public policy are relevant to this discourse. It provides that, *inter alia*: Good health and wellbeing require a clean and harmonious environment in which physical, psychological, social and aesthetic factors are all given their due importance. The environment should be regarded as a resource for improving living conditions and increasing wellbeing; and that Governments, public authorities and private

⁶⁹ Paras 25 & 28.

⁷⁰ United Nations Environmental Programme, “Human Health and the Environment,” UNEP Post 2015 Note No. 3, available at <http://www.unep.org/roap/Portals/96/UNEP-Post-2015-Note-3.pdf> [Accessed on 2/09/2015].

⁷¹ J.P. Narain, “The challenge of health & environment: Profiling risks & strategic priorities for now & the future,” *Indian Journal of Medical Research*, Vol. 136, No.2, August, 2012, pp. 185–191 at p. 186.

⁷²

bodies should aim at both preventing and reducing adverse effects caused by potentially hazardous agents and degraded urban and rural environments.

The foregoing provisions, although not territorially applicable to Kenya, offer a stark reminder for the country on the special relationship between human health and environment and the best approaches to dealing with them. There is need for strengthening multisectoral cooperation, integrating environmental health concerns into all national and county environmental and health-related policies. Under the Fourth Schedule of the Constitution of Kenya, the National and County Governments have shared responsibilities when it comes to environment and natural resources. The National Government is tasked with 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.⁷³ It is also to come up with health policy; agricultural policy; and the energy policy including electricity and gas reticulation and energy regulation.⁷⁴ On the other hand, the functions and powers of the county are, *inter alia*: agriculture, including—crop and animal husbandry; livestock sale yards; plant and animal disease control; and fisheries.⁷⁵ They are also tasked with County health services, including, in particular— county health facilities and pharmacies; ambulance services; promotion of primary health care; licensing and control of undertakings that sell food to the public; and refuse removal, refuse dumps and solid waste disposal.⁷⁶ The other function of county governments is control of air pollution, noise pollution, other public nuisances and outdoor advertising.⁷⁷ The foregoing functions all contribute in one way or the other to creation of a clean and healthy environment. The two government levels should work together to facilitate a coordinated, multisectoral approach for effectiveness in the efforts to ensure realisation of the constitutional right to clean and healthy environment, for all.⁷⁸

⁷³ Fourth Schedule to the Constitution, Part I clause 22.

⁷⁴ Clauses 28, 29, 31.

⁷⁵ Fourth Schedule to the Constitution, Part II, Clause 1

⁷⁶ *Ibid*, clause 2.

⁷⁷ *Ibid*, clause 3.

⁷⁸ This was well articulated by the Learned Judge (Sila Munyao, J) in *African Centre for Rights And Governance (ACRAG) & 3 others v Municipal Council of Naivasha* [2017] eKLR, who ruled as follows:

44. This case has brought forth an important element touching on the management and conservation of our environment. I honestly do not know whether NEMA has conducted an audit of the manner in which all County Governments manage solid waste. I however doubt if NEMA has done so given what has revealed itself in this suit. I believe it is time that NEMA considered a countrywide audit and proceed to embark on measures to ensure that only licenced dumping facilities operate as required by law. NEMA also needs to introduce rules and regulations on the operation of such facilities and have mechanisms to ensure that these rules are followed. The aspect of licencing of transporters of waste also has to be considered. Rules need to be made and to be followed. The National Government also needs to get involved and work together with County Governments and NEMA so that solid wastes are properly managed. Funding will always be an issue and this should be looked at by both County and National Governments. We cannot continue risking the health and lives of Kenyans by failing to have properly managed solid waste management systems.

45. The time to act is now if we have to safeguard a good future for this and the future generations.

Kenya's *Vision 2030* is the long-term development blueprint for the country, with various pillars that include economic, social and political pillars. The social pillar seeks to build a just and cohesive society that enjoys equitable social development in a clean and secure environment.⁷⁹ The transformation targets key social sectors, which include *inter alia*: water and Sanitation; the Environment and Housing and Urbanisation. Concerning the environment, the Blueprint seeks to ensure that Kenya becomes a nation that has a clean, secure and sustainable environment by 2030. This is to be achieved through: (i) promoting environmental conservation to better support the economic pillar's aspirations; (ii) improving pollution and waste management through the application of the right economic incentives; (iii) commissioning of public-private partnerships (PPPs) for improved efficiency in water and sanitation delivery; (iv) enhancing disaster preparedness in all disaster-prone areas and improving the capacity for adaptation to global climatic change.⁸⁰ It is important that these aspirations are achieved as they go to the core of the right to clean and healthy environment. Joint efforts from all the relevant stakeholders including private citizens, coupled with collaborative approach by all the Government authorities can enhance the country's efforts for a prosperous nation.

The *Sessional Paper on Vision 2030* notes that growth will be dependent on agriculture, tourism, manufacturing and the energy sector, which heavily rely on exploitation of natural resources and the environment.⁸¹ Further, major developments, anticipated by Vision 2030 will affect pollution levels and generate larger quantities of solid waste than at present. Anticipated growth in manufacturing activities will also give rise to an increase in effluents discharged, which will require effective disposal management. The Arid and Semi-Arid Lands (ASALs), which constitute approximately 80 per cent of the total land mass and support some 10 million people and more than 70 per cent livestock, will also undergo major changes as a result of new towns, better infrastructure and livestock based industries. All these changes will consequently exert immense pressure on the already declining natural resources base and on the country's fragile environment. The *Sessional Paper on Vision 2030* advocates for a strong policy on the environment in order to sustain economic growth while mitigating the impacts of rapid industrialisation.⁸²

The Blueprint also points out that Kenya's current institutional framework to manage the environment, which is characterised by fragmentation, has various aspects of the environment policy cutting across different institutions. Accordingly, policy and institutional reform for stricter enforcement, therefore, poses a big challenge that must be overcome by Vision 2030. However, policy and legal measures require determination and political goodwill from the citizenry and

46. I therefore order that this judgment be served upon NEMA so that they can proceed to ensure compliance with the orders issued herein, and to report to this court as earlier directed.

47. I also order that this judgment be served upon the Cabinet Secretary of the Ministry of Environment and Natural Resources and the Council of Governors to consider issues of policy, compliance with EMCA on the subject of solid waste management, cooperation, funding, and all other matters touching on this topic, so that countrywide and in the shortest time possible, we will have waste management systems that we can all be proud of.

⁷⁹Sessional paper No. 10 of 2012, On Kenya Vision 2030,

⁸⁰ Ibid.

⁸¹ Ibid, p.123.

⁸² Sessional Paper on Vision 2030, p.123.

leadership, for their successful enforcement and compliance. Realising the right to clean and healthy environment requires an integrated approach that incorporates social, cultural and political measures from all.

The environment should be accorded some right, independent of the human beings. Indeed, the Constitution of Kenya elevates the environment as worthy of protection by stating in the preamble that the People of Kenya are respectful of the environment, which is their heritage, and are determined to sustain it for the benefit of future generations. The constitutional recognition of this position in Kenya should give the law makers, courts and other stakeholders an incentive and clear authority to take strong action to protect the environment.

4. Traditional Knowledge for Clean and Healthy Environment

“Traditional knowledge” is defined as any knowledge originating from a local or traditional community that is the result of intellectual activity and insight in a traditional context, including know-how, skills, innovations, practices and learning, where the knowledge is embodied in the traditional lifestyle of a community, or contained in the codified knowledge systems passed on from one generation to another.⁸³ The term is not to be limited to a specific technical field, and may include agricultural, environmental or medical knowledge, and knowledge associated with genetic resources.⁸⁴

Africa is believed to be endowed with rich and highly diverse biological resources and traditional knowledge which have been practised centuries before the advent of colonialization.⁸⁵ This knowledge reflects the cumulative body of knowledge and beliefs handed down through generations by cultural transmission and the relationship of the local people with their environment.⁸⁶ Traditional knowledge also encompasses belief systems that play a fundamental role in a people’s livelihood, maintaining their health, and protecting and replenishing the environment.⁸⁷

The Constitution of Kenya recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.⁸⁸ Particularly, it obligates the State to, *inter alia*, recognise the role of science and indigenous technologies in the development of the nation, and, recognise and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya.⁸⁹ Further, with respect to the environment, the State is obligated to protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities.⁹⁰ The State should not

⁸³ African Regional Intellectual Property Organization (ARIPO), Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore, Adopted by the Diplomatic Conference of ARIPO at Swakopmund (Namibia) on August 9, 2010.

⁸⁴ Ibid.

⁸⁵ African Regional Intellectual Property Organization, available at <http://www.aripo.org/index.php/services/traditional-knowledge> [Accessed on 1/09/2015].

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Constitution of Kenya, Art. 11(1).

⁸⁹ Ibid, Art. 11(2) (b) & (3) (b).

⁹⁰ Ibid, Art. 69(1) (c).

just protect the indigenous knowledge but should also actively promote the use of this knowledge for environmental protection and conservation for a clean and healthy environment.

It has been argued that traditional knowledge may contribute to improved development strategies in several ways such as by helping identify cost-effective and sustainable mechanisms for poverty alleviation that are locally manageable and locally meaningful; by a better understanding of the complexities of sustainable development in its ecological and social diversity, and helping to identify innovative pathways to sustainable human developmental that enhance local communities and their environment.⁹¹

Utilizing the traditional knowledge and avoiding or eliminating practices that contribute to deterioration or degradation of the environment can go a long way in promoting the realisation of the right to clean and healthy environment for all.

4.1 Scientific Knowledge for Clean and Healthy Environment

The Constitution of Kenya protects the right of every person to freedom of expression, which includes: freedom to seek, receive or impart information or ideas; freedom of artistic creativity; and academic freedom and freedom of scientific research.⁹² Further, as already pointed, the Constitution also obligates the State to recognise the role of science and indigenous technologies in the development of the nation.⁹³ These rights are important, not only for the individual citizens, but also for the country in adopting scientific knowledge especially local for eliminating unsustainable and harmful practices that adversely affect realisation right to clean and healthy environment for all.

Adoption of cleaner technologies in such areas as transport, energy production and food production can be an effective preventive measure. Scientific knowledge is also useful in helping the citizenry adopt healthy lifestyles for a better, cleaner and healthier environment. It is common knowledge that the public, mostly around urban areas, also greatly contribute to the violation of the right to clean and healthy environment mainly through pollution and other activities that lead to degradation of the environment.⁹⁴ This does not however mean that the rural folk is excluded. They also contribute to degradation through such means as production methods that lead to degradation, over-exploitation of the limited resources, deforestation, overstocking, amongst others.⁹⁵ Scientific knowledge can play a great role in dealing with the above problems through,

⁹¹African Regional Intellectual Property Organization, op cit.

⁹² Constitution of Kenya, Art. 33(1).

⁹³ Ibid, Art. 11(2) (b).

⁹⁴ See T. Egondi, et al, 'Community Perceptions of Air Pollution and Related Health Risks in Nairobi Slums,' *International Journal of Environmental Research and Public Health*, Vol. 10, 2013, pp. 4851-4868; See also S.M., Kithiia, 'Water Quality Degradation Trends in Kenya over the Last Decade, Water Quality Monitoring and Assessment, 2012. Available at <http://www.intechopen.com/books/water-quality-monitoring-and-assessment/water-quality-degradation-trends-in-kenya-over-the-last-decade> [Accessed on 02/09/2015].

⁹⁵ FAO, 'Land and environmental degradation and desertification in Africa,' available at <http://www.fao.org/docrep/X5318E/x5318e02.htm> [Accessed on 02/09/2015].

inter alia, cleaner production methods, sustainable housing and effective treatment and disposal of wastes.⁹⁶

4.2 Poverty Eradication for Clean and Healthy Environment

It has been argued that conservation can contribute to poverty reduction, particularly through restoring ecosystems and by improving access by the poor to ecosystem services, thus contributing to secure livelihoods for the people who depend on them.⁹⁷ These two concepts are however mutually dependent in that if the State puts effective measures in place to address poverty, some of the contributing factors to violation of the right to clean and healthy environment can arguably be dealt with. Such include deforestation, unsustainable production methods and giving the people a voice to deal with any likely violation through ensuring that they have the means to seek redress from Courts.⁹⁸ Effective natural resources management, along with conservation and restoration, can protect and enhance biodiversity and ecosystem services.⁹⁹ The environment and the ecosystem services are so connected to the human wellbeing that it has been argued that the Millennium Development Goals (MDGs) reflect the relationship between the environment and sustainable development. This is because the targets and indicators are based on delivery of ecosystem services to the poor.¹⁰⁰ Where people engage in unsustainable production activities due to poverty, the State together with other relevant stakeholders can put in place measures that eradicate poverty but at the same time educating the concerned people on the best alternatives that can enhance their livelihoods while still conserving the environment.

4.3 Public Awareness and Participation for Clean and Healthy Environment

The 1994 Draft Declaration on Human Rights and Environment describes the procedural rights, such as the right to participation, necessary for realization of the substantive rights.¹⁰¹ It has been argued that procedural rights, such as rights to information, participation and access to justice, have the potential to empower civil society groups to make social and environmental claims and to hold State bodies and private sector actors accountable for their actions or omissions, while

⁹⁶ See also United Nations, Transforming our world: the 2030 Agenda for Sustainable Development, Resolution adopted by the General Assembly on 25 September 2015, [without reference to a Main Committee (A/70/L.1)], Seventieth session, Agenda items 15 and 116, 21 October 2015:

The Agenda calls upon all countries to ensure that by the year 2030 they upgrade infrastructure and retrofit industries to make them sustainable, with increased resource use efficiency and greater adoption of clean and environmentally sound technologies and industrial processes, all countries taking action in accordance with their respective capabilities.

⁹⁷ IUCN – The World Conservation Union, Depend on Nature: Ecosystem Services supporting Human Livelihoods, 2005, op cit, p.13.

⁹⁸ Examples of unsustainable production methods and infringement on the environment include pollution especially by slum-dwellers, some of who have no sense of responsibility with regard to protection of the environment, and the people who cultivate along rivers and other water sources thus causing degradation of these resources.

⁹⁹ United Nations Environmental Programme, “Human Health and the Environment,” UNEP Post 2015 Note No. 3, op cit.

¹⁰⁰ IUCN – The World Conservation Union, Depend on Nature: Ecosystem Services supporting Human Livelihoods, 2005, p.5. Available at <https://portals.iucn.org/library/efiles/documents/2005-009.pdf> [Accessed on 1/09/2015].

¹⁰¹ Part 3 (Principles 15-24).

exercising basic civil and political rights to be free from harassment and abuse.¹⁰² This is reiterated under Article 1 of the Aarhus Convention “in order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and wellbeing, each Party should guarantee the rights of access to information, public participation in decision-making and access to justice in environmental matters in accordance with the provisions of this Convention.”¹⁰³ It believed that environmental procedural rights such as the access to information, public participation and access to justice may be one of the ways and means to a realistic way for attaining the sustainable development.¹⁰⁴

Kenyans have a role to play in achieving the ideal of a clean and healthy environment. There is need to cultivate a culture of respect for environment by all, without necessarily relying on courts for enforcing the same. The citizenry should be able to practise preventive measures while allowing the courts to come in only in cases of violation of environmental standards. Developing environmental ethics and consciousness can be enhanced through adopting participatory approaches to conservation and management of environment and its resources. Dissemination of information and knowledge in meaningful forms can also enhance participation in decision-making and enhance appreciation of the best ways of protecting and conserving the environment.

It has been argued that when the environment is destroyed, plundered, or mismanaged, we undermine our quality of life and that of our future generations. A degraded environment leads to a scramble for scarce resources and may culminate in poverty and even conflict.¹⁰⁵

The citizenry efforts can go a long way in creating a clean and healthy environment. There is therefore a need to encourage voluntary compliance with environmental regulations, by the general public. This can be achieved through creating public awareness on the impacts of unsustainable and environment-degrading production and social activities, while providing sustainable alternatives. Such awareness can include organizing public forums, use of media to disseminate information and environmental campaigns and introducing comprehensive and up-to-date environmental studies in learning institutions, at all levels. Incentives and disincentives can also be offered to encourage people to discard unsustainable methods of production and other activities that contribute to the degradation of the environment. Environmental rules that reward

¹⁰² United Nations Non-Governmental Liaison Service, Human Rights Approaches to Sustainable Development, NGLS Roundup 90, May 2002, p. 1. Available at <http://www.un-ngls.org/orf/pdf/ru90hrsd.pdf> [Accessed on 28/08/2015]

¹⁰³ Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, UN Doc. Sales No. E/F/R.98.II.E.27.

¹⁰⁴ N. Mohammad, ‘Environmental Rights for Administering Clean and Healthy Environment towards Sustainable Development in Malaysia: A Case Study,’ *International Journal of Business and Management*; Vol. 9, No. 8; 2014, pp. 191-198 at p.192; See Goal 16 of the Proposed Targets of the United Nations Agenda 2030 on the Sustainable Development Goals 2015 – 2030 which seeks to promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.

¹⁰⁵ ‘Wangari Maathai-an excerpt from the Nobel Peace Prize winner’s Acceptance Speech,’ *Earth Island Journal*. Available at http://www.earthisland.org/journal/index.php/eij/article/wangari_maathai_an_excerpt_from_the_nobel_pea ce_prize_winners_acceptance_sp/ [Accessed on 01/09/2015].

environmental leadership, build on best practices, and ensure a level playing field are more likely to succeed in securing compliance.¹⁰⁶

4.4 Enforcement and Compliance

It has rightly been observed that enforcing environmental standards and regulations is one of the surest ways governments can use to checkmate the negative impacts of corporation's activities (and even individuals) on the environment and on the lives of inhabitants of host communities.¹⁰⁷ As such, faced with environmental challenges which include: deforestation: biodiversity loss, drought and desertification, erosion, flooding, air, water and land pollution, industrial pollution, noise pollution, mounting solid wastes and generally unsanitary conditions, the need to effectively enforce environmental laws cannot be overemphasized.¹⁰⁸

Internationally and regionally, there are a number of instruments that strive to facilitate enforcement and compliance with environmental law, and ultimately realisation of the right to clean and healthy environment for all. Article 2 (1) of the *Vienna Convention*¹⁰⁹ outlines some of the States' general obligations towards the ozone layer. The Parties to the Convention are required to take appropriate measures in accordance with the provisions of the Convention and of those protocols in force to which they are party to protect human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer. The Convention requires Parties to, in accordance with the means at their disposal and their capabilities: Co-operate by means of systematic observations, research and information exchange in order to better understand and assess the effects of human activities on the ozone layer and the effects on human health and the environment from modification of the ozone layer; adopt appropriate legislative or administrative measures and co-operate in harmonizing appropriate policies to control, limit, reduce or prevent human activities under their jurisdiction or control should it be found that these activities have or are likely to have adverse effects resulting from modification or likely modification of the ozone layer; co-operate in the formulation of agreed measures, procedures and standards for the implementation of this Convention, with a view to the adoption of protocols and annexes; and co-operate with competent international bodies to implement effectively this Convention and protocols to which they are party. This Convention mainly advocates for preventive and control measures by States implemented through cooperation.

These measures, as observed in the Convention, rotate around protecting human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer. These measures, if implemented can contribute

¹⁰⁶ International Network for Environmental Compliance and Enforcement (INECE), 'The Importance of Environmental Compliance and Enforcement for Sustainable Development for the Rio+20 Conference,' p.2, available at

<http://www.uncsd2012.org/content/documents/332INECE%20Submission%20Rio%20Compilation%20Document.pdf> [Accessed on 04/09/2015].

¹⁰⁷ Z.O., Edo, 'The Challenges of Effective Environmental Enforcement and Compliance in the Niger Delta Region of Nigeria,' *Journal of Sustainable Development in Africa*, Vol. 14, No.6, 2012, p. 262.

¹⁰⁸ Ibid.

¹⁰⁹ United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331. Kenya is a signatory to the Convention.

positively in the realisation of the human right to clean and healthy environment. However, since they are only recommendations, they require political goodwill from the States for their implementation.

According to Kenya's Ministry of Environment and Natural Resources, Kenya has made considerable progress in phasing out substances that deplete the Ozone layer that shields the earth from harmful ultra-violet radiation from the sun.¹¹⁰ The country has already phased out chlorofluorocarbons, halons and methyl bromides which are Ozone depleting substances (ODS) found in applications such as fire-fighting equipment and fumigation for soils and cereals.¹¹¹ The harmful effects of sun radiation include increased cases of skin cancer and eye cataracts among humans, reduced plant and animal activity, poor air quality, damage to plastics and negatively impact on the climate.¹¹²

The *Montreal Protocol*,¹¹³ also an international Treaty, aims to regulate the production and use of chemicals that contribute to the depletion of Earth's ozone layer. The protocol set limits on the production of chlorofluorocarbons (CFCs), halons, and related substances that release chlorine or bromine to the ozone layer of the atmosphere.¹¹⁴

*Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*¹¹⁵ affirms that States are responsible for the fulfillment of their international obligations concerning the protection of human health and protection and preservation of the environment, and are liable in accordance with international law.¹¹⁶ The Convention is also based on the fact that States should take necessary measures to ensure that the management of hazardous wastes and other wastes including their transboundary movement and disposal is consistent with the protection of human health and the environment whatever the place of disposal. Under the Convention, "environmentally sound management of hazardous wastes or other wastes" means taking all practicable steps to ensure that hazardous wastes or other wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes.¹¹⁷

The Convention outlines general obligations of State Parties which include, *inter alia*: Parties exercising their right to prohibit the import of hazardous wastes or other wastes for disposal should inform the other Parties of their decision pursuant to Article 13; Parties are to prohibit or should not permit the export of hazardous wastes and other wastes to the Parties which have prohibited the import of such wastes, when notified pursuant to subparagraph (a) above; and Parties should prohibit or should not permit the export of hazardous wastes and other wastes if

¹¹⁰ Per Principal Secretary for Environment and Natural Resources Dr. Richard Lesiyampe, available at <http://www.environment.go.ke/?p=600> [Accessed on 27/08/2015]

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ Montreal Protocol and (London Amendment) on Substances that Deplete the Ozone layer, 1522 UNTS 3; 26 ILM 1550 (1987). Kenya is a signatory to the Protocol.

¹¹⁴ Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Arts. 2A-I.

¹¹⁵ Basel, 22 March 1989, 1673 UNTS 126; 28 ILM 657 (1989). Kenya is a signatory to the Convention.

¹¹⁶ Preamble.

¹¹⁷ Art. 2.8.

the State of import does not consent in writing to the specific import, in the case where that State of import has not prohibited the import of such wastes.¹¹⁸ Further to the foregoing, each Party should take the appropriate measures to, *inter alia*: ensure that the generation of hazardous wastes and other wastes within it is reduced to a minimum, taking into account social, technological and economic aspects; and ensure the availability of adequate disposal facilities, for the environmentally sound management of hazardous wastes and other wastes, that should be located, to the extent possible, within it, whatever the place of their disposal.¹¹⁹

The Convention requires Parties to co-operate with a view to adopting, as soon as practicable, a protocol setting out appropriate rules and procedures in the field of liability and compensation for damage resulting from the transboundary movement and disposal of hazardous wastes and other wastes.¹²⁰

The International Court of Justice, in the 1997 case concerning the *Gabcikovo-Nagymaros Project* (Hungary and Slovakia)¹²¹, observed that “the protection of the environment is...a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.” The Court held that the corpus of international law which relates to the environment now consists of the general obligation of states to ensure that activities within their jurisdiction and control respects the environment of other states or areas beyond national control. The concept of sustainable development is in consonance with the need to reconcile economic development with the protection of the environment. Hence, the terms of agreements to implement must be negotiated by the parties.¹²²

- i. Locally, the Constitution of Kenya provides that if a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.¹²³ The Constitution goes further to provide that on such an application, the court may make any order, or give any directions, it considers appropriate--to prevent, stop or discontinue any act or omission that is harmful to the environment; to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or to provide compensation for any victim of a violation of the right to a clean and healthy environment.¹²⁴
- ii. The existing environmental laws such as EMCA 1999 provide for the use of Environmental Impact Assessment (EIA) in environmental management and conservation efforts. EIA is defined as an environmental management tool aiming at

¹¹⁸ Art. 4(1).

¹¹⁹ Art. 4(2).

¹²⁰ Art. 12.

¹²¹ *Gabcikovo-Nagymaros Project* (Hungary/Slovakia), Judgment, 1. C. J. Reports 1997, p. 7.

¹²² *Ibid.*

¹²³ Art. 70 (1).

¹²⁴ Art. 70(2).

identifying environmental problems and providing solutions to prevent or mitigate these problems to the acceptable levels and contribute to achieving sustainable development.¹²⁵ EIA can be a powerful tool for keeping the corporate including Multinational Corporations (MNCs) operating in the country in check. However, the general public should be empowered through more meaningful participation in the same to ensure that the EIAs achieve their objectives. This is the only way that the affected sections of population appreciate the use of EIAs and also ensure that such exercises are not mere formalities on paper but are utilised fully for the protection of the right to clean and healthy environment. This is especially for projects taking place within the community dwellings, with potentially great effects on the people. An example of the same is the recent case of lead poisoning at the Coastal region of Kenya, due to unregulated mining activities.¹²⁶

- iii. It has been observed that investing in compliance and enforcement of environmental laws benefits the public by securing a healthier and safer environment for themselves and their children. It also benefits individuals, firms and others in the regulated community by ensuring a level playing field governed by clear rules applied in a fair and consistent manner.¹²⁷
- iv. Strengthening environmental compliance and enforcement requires renewed efforts by individuals and institutions everywhere. Government officials, particularly inspectors, investigators, and prosecutors, must exercise public authority in trust for all of their citizens according to the standards of good governance and with a view to protecting and improving public well-being and conserving the environment.¹²⁸ The judiciary has a fundamental contribution to make in upholding the rule of law and ensuring that national and international laws are interpreted and applied fairly, efficiently, and effectively.¹²⁹ Concerted efforts from all the stakeholders, including the general public can ensure that the compliance and enforcement framework in place is used to promote and safeguard the right to clean and healthy environment as envisaged in the Constitution and environmental laws.

5. Towards a Clean and Healthy Environment in Kenya

The realisation of the right to clean and healthy environment for the Kenyan people calls for the reconceptualization of the right. The existing framework on environment, including EMCA falls short of defining what entails a clean and healthy environment. From the foregoing argument, it

¹²⁵ N.M. Al Ouran, 'Analysis of Environmental Health linkages in the EIA process in Jordan,' *International Journal of Current Microbiology and Applied Sciences*, (2015) Vol. 4, No. 7, 2015, pp. 862-871, p. 862.

¹²⁶ B. Jenje, 'MP to compensate families injured by lead poison 'if guilty',' *Daily Nation*, Wednesday, April 29, 2015, available at <http://www.nation.co.ke/news/politics/MP-to-compensate-families-injured-by-lead-poison-if-guilty/-/1064/2701594/-/15u9ivl/-/index.html> [Accessed on 05/09/2015]; See also M. W. Chege, et al, 'Lead contamination of traditional hand-dug wells in parts of Kwale County, Kenya,' *International Journal of Physical Sciences*, Vol. 8, No.17, 9 May, 2013, pp. 835-839.

¹²⁷ International Network for Environmental Compliance and Enforcement (INECE), 'The Importance of Environmental Compliance and Enforcement for Sustainable Development for the Rio+20 Conference,' op cit, p.2.

¹²⁸ Ibid.

¹²⁹ Ibid.

is the author's assertion that the right to a clean and healthy environment can only be fully realised through addressing all issues that adversely affect the environment. The anthropocentric approach mostly adopted by most of the existing legal instruments creates the false impression that the environment should only be protected for the convenience of human beings. However, a better approach should incorporate both anthropocentric and ecocentric ideals for better incentives.

Sustainable development efforts may not bear much if the country does not move beyond laws. There is need for educating the public on the subject, with emphasis on preventive and conservation measures. The same should include change of attitude by the general public. Through encouraging use of traditional knowledge in conservation and production to active and meaningful participation in decision-making, the citizenry can hopefully appreciate the fact that the creation of a clean and healthy environment is not a State's responsibility only but there is a requirement of cooperation between the State actors and the individuals. It is to be recalled that Article 69(2) of the Constitution provides that every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources. There is need to empower communities so as to actualise these constitutional provisions.

One of the national values and principles of governance as provided under Article 10 of the Constitution is sustainable development. The principles of sustainable development as captured in EMCA¹³⁰ include: the principle of public participation in the development of policies, plans and processes for the management of the environment; the cultural and social principle traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and are not repugnant to justice and morality or inconsistent with any written law; the principle of international co-operation in the management of environmental resources shared by two or more states; the principles of intergenerational and intragenerational equity; the polluter-pays principle; and the pre-cautionary principle. There is need to actively engage the communities in environmental management and conservation in order to help in the implementation of these principles. With the communities empowered, then it is possible to hold to account those who flout environmental laws, be they entities or individuals. It is easier to engage a community that feels a sense of belonging than one that feels sidelined by the state actors.

There is also a need to diversify production methods and waste disposal through use of innovation and technology. The State departments tasked with encouraging innovation and science ought to work closely with communities as way of identifying the most appropriate technology, either arising from the communities themselves or elsewhere, to boost production and address poverty. This also calls for more scientific research to come up with crops that can do well in dry areas to tackle the problem of drought and ultimate desertification. This will also help in diversification in economic activities by the concerned communities. Courts also need to work closely with the public as a way of enhancing identification of activities that violate environmental laws as well as increasing the rate of enforcement and compliance with court decisions, by bodies and individuals. There is also need to sensitise the public on the dangers of environmental degradation

¹³⁰ S. 3(5).

through pollution, overstocking, over-exploitation of resources. Other professionals should be brought on board. These may be drawn from such fields as medical, agricultural, mining, amongst others. When people appreciate that the state of environmental health directly affects their livelihoods, it is possible to engage them in creation of a better environment that is clean and healthy as the first step towards improving their lives.

6. Conclusion

From the foregoing, it is clear that it is possible for the right to clean and healthy environment to be enjoyed in Kenya. The same is protected by the Constitution and has been judicially interpreted. There is however a need to reconceptualise the right to a clean and healthy environment by clearly defining it and according it the correct place in the human rights discourse. The right to a clean and healthy environment can be equated to the right to life. This is the bold declaration that must be made and captured in our legal framework so as to make it a reality.

Attaining Environmental Justice in Kenya

Abstract

Natural resources are vital for human survival. They are sources of livelihood for most communities in Africa. However, access to, control and use of natural resources in most of Africa has been limited, denied or undermined by laws and policies carried over from the colonial period. Using some examples from the colonial era, the paper argues that current environmental injustices in Kenya have roots in colonial laws and policies. It also explores the provisions of the Constitution of Kenya 2010, and some of the sectoral laws enacted under it on environmental justice. The conceptual parameters of environmental justice adopted in this discussion are to assess whether the laws, policies and regulations under study distribute environmental burdens proportionately; whether they have adequate provisions for all to participate in environmental decision-making and whether they allow all to have access and enjoy a fair share of natural resources

1. Introduction

The paper discusses the concept of environmental justice as a tool for effective management of natural resources in the Kenyan context. Natural resources are vital for human survival. They are sources of livelihood for most communities in Africa. However, access to, control and use of natural resources in most of Africa has been limited, denied or undermined by laws and policies carried over from the colonial period. Using some examples from the colonial era, the paper argues that current environmental injustices in Kenya have roots in colonial laws and policies. It also explores the provisions of the Constitution of Kenya 2010, and some sectoral laws enacted under it on environmental justice.

2. Environmental Justice

Broadly defined, environmental justice entails the right to have access to natural resources; not to suffer disproportionately from environmental policies, laws and regulations; and the right to environmental information, participation and involvement in decision-making.¹ In the United States of America (USA), it is defined as the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.² Environmental justice serves two purposes. First, it ensures no groups of persons bear disproportionate environmental burdens and second, that all have an opportunity to participate democratically in decision-making processes.³ In the United Kingdom (UK), environmental justice refers to fairness in the distribution of environmental ‘goods’ or ‘bads’ and fairness in providing information and opportunities necessary for people to participate in decisions about their environment.⁴ Environmental justice also means a struggle to rein in and subject corporate and bureaucratic decision-making and relevant market processes to democratic scrutiny and

¹ R. Ako, ‘Resource Exploitation and Environmental Justice: the Nigerian Experience,’ in F.N. Botchway (ed), *Natural Resource Investment and Africa’s Development*, (Cheltenham, UK: Edward Elgar Publishing, 2011), pp. 74-76.

² U.S. Environmental Justice Agency, ‘What is Environmental Justice?’ Available at <http://www.epa.gov/environmentaljustice/> [Accessed on 08/12/2014].

³ R. Ako, ‘Resource Exploitation and Environmental Justice: the Nigerian Experience,’ in F.N. Botchway (ed), *Natural Resource Investment and Africa’s Development*, op. cit.

⁴ Ibid.

accountability. Environmental justice in this context requires that the exploitation of resources should be done with due regard to environmental and social exigencies. These exigencies act as important constraints in natural resources exploitation.⁵

In Africa, environmental justice mostly entails the right to have access to, use and control natural resources by communities.⁶ This view is exemplified by the *Endorois case*,⁷ where the community was fighting against violations resulting from their displacement from their ancestral lands without proper prior consultations, adequate and effective compensation for the loss of their property, the disruption of the community's pastoral enterprise and violations of the right to practise their religion and culture, as well as the overall process of their development as a people. The African Commission on Human and Peoples' Rights (ACHPR) found Kenya to be in violation of the African Charter,⁸ and urged Kenya to, *inter alia*, recognise the rights of ownership of the Endorois; restitute their ancestral land; ensure the Endorois have unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle. The Government of Kenya is however yet to implement the decision of the Commission in the Endorois case. This demonstrates the Government's laxity in actualizing environmental rights in Kenya.⁹

2.1 Components of Environmental Justice

The 1992 Rio Declaration succinctly captures the key components of environmental justice. It provides that environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual should have appropriate access to information concerning the environment held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. Further, it obligates the States to facilitate and encourage public awareness and participation by making information widely available. In addition, states are to provide effective access to judicial and administrative proceedings, including redress and remedy.¹⁰

Essentially, the Declaration contains the critical legal mechanisms that are germane in promoting environmental justice. These are access to information, public participation and access to justice in environmental matters. The three components are interdependent and functionally interlinked.

⁵ Obiora, L., 'Symbolic Episodes in the Quest for Environmental Justice'. *Human Rights Quarterly*, 21, 2, 1991. P. 477.

⁶ *Ibid.*

⁷ Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, No. 276 / 2003; See also generally, *Kemai & Others vs Attorney General & 3 Others* (2006) 1 KLR (E&L) 326, Civil Case 238 of 1999; *Ogiek People v. District Commissioner* Case No. 238/1999 (2000.03.23) (Indigenous Rights to Tinet Forest).

⁸ Arts. 1, 8, 14, 17, 21 and 22. the Kenyan government had violated their right to religious practice (Art. 8), right to property (Art. 14), right to freely take part in the cultural life of his/her community (Art. 17), right of all peoples to freely dispose of their wealth and natural resources (Art. 21), and right to development (Art. 22)

⁹ United Nations Human Rights Committee, 'Consideration of reports submitted by States parties under Art. 40 of the Covenant Concluding observations adopted by the Human Rights Committee at its 105th session, 9-27 July 2012. CCPR/C/KEN/CO/3, para. 24.

¹⁰ Principle 10, Report of the United Nations Conference on Environment and Development (Rio de Janeiro, 3-14 June 1992), A/CONF.151/26 (Vol. I).

Access to environmental information is a prerequisite to public participation in decision-making and to monitoring governmental and private sector activities. Effective access to justice in environmental matters requires an informed public that can bring actions before informed institutions.¹¹

2.1.1 Access to Environmental Information

Access to information refers to the availability of environmental information (including that on hazardous materials and activities in communities) and mechanisms by which public authorities provide environmental information.¹² Communities cannot be meaningfully engaged on matters relating to the environment and the exploitation of natural resources without an understanding of what the ideals should be in a society where there is environmental justice. As such, the first step towards achieving environmental justice for the Kenyan people must be to afford them access to the relevant environmental information in forms that they would appreciate. This could be done in different ways including through newspapers, television, posters, release of reports, barazas, amongst other processes provided in law where communities can get the relevant information in forms and language that they can understand and appreciate.

2.1.2 Public Participation

Public Participation means the availability of opportunities for individuals, groups and organizations to provide input in the making of decisions which have, or are likely to have, an impact on the environment including in the enactment of laws, the enforcement of national laws, policies, and guidelines and environmental impact assessment procedures.¹³ Public participation in environmental and natural resources governance should not be cosmetic but should be meaningful in order for the public to feel that their concerns are addressed and consequently for them to have trust and support the decisions of the government relating to the particular natural resources and environmental concerns. However, this cannot be achieved in a situation where the citizenry do not have an understanding of those problems, and where they have any knowledge be it traditional or any other, there must be a harmonization of the same with the scientific knowledge. This can be achieved through educating the public on the available scientific knowledge in a comparative manner so as to make them appreciate the similarities or differences arising therein.

2.1.3 Access to Justice

Access to justice is not an easy concept to define. It has been described as a situation where people in need of help, find effective solutions from justice systems that are accessible, affordable, comprehensible to ordinary people, and which dispense justice fairly, speedily and without discrimination, fear or favour and offer a greater role for alternative dispute resolution.¹⁴ It also refers to those judicial and administrative remedies and procedures available to a person (natural or juristic) who is aggrieved or likely to be aggrieved by an issue. Further, it could refer to a fair

¹¹ UNEP, Training Manual on International Environmental Law, (UNEP, 2006), pp.80-81.

¹² Ibid.

¹³ Ibid.

¹⁴ Ladan, M.T., "Access to Justice as a Human Right under the Ecowas Community Law," available at <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=16&cad=rja&uact=8&ved=0CFcQFjAFOAo&url=http%3A%2F%2Fwww.abu.edu.ng%2Fpublications%2F2009-07->, (Accessed on 19/04/2014).

and equitable legal framework that protects human rights and ensures delivery of justice.¹⁵ Access to justice also entails the opening up of formal systems and legal structures to the disadvantaged groups in society, removal of legal, financial and social barriers such as language, lack of knowledge of legal rights and intimidation by the law and legal institutions.¹⁶ Access to justice could also include the use of informal conflict management mechanisms such as Alternative Dispute Resolution mechanisms (ADR) and traditional dispute resolution mechanisms (TDRM), to bring justice closer to the people and make it more affordable.¹⁷

In *Dry Associates Limited v Capital Markets Authority & anor*¹⁸, access to justice was broadly described as including the enshrinement of rights in the law; awareness of and understanding of the law; access to information; equality in the protection of rights; access to justice systems particularly the formal adjudicatory processes; availability of physical legal infrastructure; affordability of legal services; provision of a conducive environment within the judicial system; expeditious disposal of cases and enforcement of judicial decisions without delay.¹⁹ Access to justice is a basic and inviolable right guaranteed in international human rights instruments and national constitutions.²⁰ As a justiciable right, it has two important dimensions: procedural access (fair hearing before an impartial tribunal) and substantive access (fair and just remedy for a violation of one's rights).²¹ The two dimensions are important in facilitating access to justice as observed by Krishna Iyer, J in *Municipal Council, Ratlam vs Shri Vardhichand & Others*²² that '*it is procedural rules which infuse life into substantive rights, which activate them effective* (Emphasis added).' Alternatively, procedural rights without any substantive content are meaningless if entirely cut from material considerations.²³

As such, access to justice is an instrumental right that gives the structural framework necessary for the realisation of all substantive fundamental human rights.²⁴ However, both conceptions of access to justice must be accorded equal importance in legal frameworks, if communities are to have any meaningful access to justice. The Bill of Rights is thus not enough by itself to guarantee access to justice for all persons. There has to be corresponding legal and non-legal frameworks for the enforcement of rights.

¹⁵ Ibid.

¹⁶ Global Alliance against Traffic in Women (GAATW), Available at <http://www.gaatw.org/atj/> (Accessed on 09/03/ 2014).

¹⁷ See Muigua, K. and Kariuki F., 'ADR, Access to Justice and Development in Kenya'. Paper Presented at Strathmore Annual Law Conference 2014 held on 3rd & 4th July, 2014 at Strathmore University Law School, Nairobi.

¹⁸ *Dry Associates Limited V Capital Markets Authority & Another Interested Party Crown Berger (K) Ltd* [2012] eKLR [Petition No. 328 of 2011].

¹⁹ *Dry Associates Limited V Capital Markets Authority & Another Interested Party Crown Berger (K) Ltd* [2012] eKLR [Petition No. 328 of 2011] para. 110.

²⁰ Art. 48 of the Constitution of Kenya 2010, guarantees the right of access to justice for all; See also Art. 159(2) thereof.

²¹ Ibid.

²² 1980 AIR 1622, 1981 SCR (1) 97. Available at <http://indiankanoon.org/doc/440471/> [Accessed on 06/12/2014].

²³ Cullet, P., 'Definition of an Environmental Right in a Human Rights Context,' 13 *Netherlands Quarterly of Human Rights* (1995), p. 25 at p. 37.

²⁴ Ibid.

2.1.4 Environmental Justice as either Distributive or Procedural Justice

Just like access to justice, environmental justice is associated with two elements of justice namely: distributive and procedural justice in relation to the environment. Distributive environmental justice recognizes that the human right to a dignified life is fundamental, and everyone has a right to a healthy and safe environment. On the other hand, procedural environmental justice requires that in order to uphold distributive justice, citizens need to be informed about and involved in decision making, and enabled to identify and stop acts that breach environmental laws and cause environmental injustices. Procedural justice is concerned with how and by whom decisions are made, and encompasses participation and legitimacy as common concepts. The institutional framework addressing environmental issues should be easily accessible to all including the marginalized groups.²⁵

Demands for the recognition of cultural identity and for full participatory democratic rights are integral demands for justice as well, and they cannot be separated from distributional issues.²⁶ One of the crucial components of environmental justice is that it seeks to tackle social injustices and environmental problems through an integrated framework of policies. An equitable distribution of the environmental costs and benefits of economic development, both globally and nationally, is required, based on the premise that everyone should have the right and be able to live in a healthy environment with access to enough environmental resources for a healthy life. It also recognizes that it is predominantly the poorest and least powerful people who are missing the above-stated conditions.²⁷

Secondly, environmental justice examines issues of procedural equity and access to the processes of justice. The procedures and processes needed to tackle negative environmental impacts should therefore be accessible on an equal basis to different social groups since many environmental injustices may be caused or exacerbated by procedural injustices in the processes of policy design, land-use planning, science and law. Therefore, the necessary policy, legal and institutional framework in place is crucial in ensuring environmental justice at the global, regional and national levels.²⁸

Thirdly, environmental justice is inextricably related to sustainable development and social justice. It has been argued that it is possible to have a situation of perfect equality but which is destructive of the environment, and also a situation of perfect environmental sustainability which is inequitable.²⁹ Sustainable development has been described as primarily a social justice project

²⁵ Friends of the Earth Scotland, 'Environmental Justice', available at <http://www.foescotland.org.uk/environmentalrights> [Accessed on 08/12/2014]; See also Agyeman, J., and Evans, B., 'Just sustainability': the emerging discourse of environmental justice in Britain? *The Geographical Journal*, Vol. 170, No. 2, June 2004, pp. 155–164 at p. 156.

²⁶ Schlosberg, D., 'Reconceiving Environmental Justice: Global Movements and Political Theories,' *Environmental Politics*, Vol.13, No.3, Autumn 2004, pp.517 – 540 at p. 537.

²⁷ Todd, H., & Zografos, C., 'Justice for the Environment: Developing a Set of Indicators of Environmental Justice for Scotland,' *Environmental Values*, Vol.14, No.4 (November 2005), pp. 483-501 at p. 484.

²⁸ *Ibid*, p. 484.

²⁹ *Ibid*, p. 484.

focusing on equitable development to meet human needs while still recognizing that the preservation of natural resources is necessary to fulfil these needs.³⁰

Notably, the main outcomes of the Rio+20 Conference was the agreement by member States to launch a process to develop a set of Sustainable Development Goals, which will build upon the Millennium Development Goals and converge with the post 2015 development agenda.³¹ The developed Sustainable Development Goals (SDGs), also known as *the 2030 Agenda for Sustainable Development*,³² includes a set of 17 Sustainable Development Goals (SDGs) which focus on inequalities, economic growth, decent jobs, cities and human settlements, industrialization, energy, climate change, sustainable consumption and production, peace, justice and institutions.³³

The *Sustainable Development Goals, Agenda 2030* (SDGs) define sustainable development broadly to cover issues such as poverty, inequality, gender equality, health, education, governance, climate change and environmental protection.³⁴ The global debate on sustainable development is mainly based on three core elements of sustainability which include:³⁵ Economic: An economically sustainable system must be able to produce goods and services on a continuing basis, to maintain manageable levels of government and external debt, and to avoid extreme sectoral imbalances which damage agricultural or industrial production; Environmental: An environmentally sustainable system must maintain a stable resource base, avoiding over-exploitation of renewable resource systems or environmental sink functions, and depleting non-renewable resources only to the extent that investment is made in adequate substitutes. This includes maintenance of biodiversity, atmospheric stability, and other ecosystem functions not ordinarily classed as economic resources; and Social: A socially sustainable system must achieve distributional equity, adequate provision of social services including health and education, gender equity, and political accountability and participation.³⁶

As a result, the concept of sustainable development is seen an attempt to combine growing concerns about a range of environmental issues, socio-economic issues to do with poverty and inequality and concerns about a healthy future for humanity. It strongly links environmental and

³⁰ Thatcher, A., 'Theoretical definitions and models of sustainable development that apply to human factors and ergonomics,' in Broberg, N. O., et al, (eds), *Human Factors in Organizational Design and Management – Xi*, Nordic Ergonomics Society Annual Conference – 46, 2014, pp. 747-752 at p. 747.

³¹ United Nations Department of Economic and Social Affairs, "Sustainable development goals," available at <https://sustainabledevelopment.un.org/topics/sustainabledevelopmentgoals> [Accessed on 25/08/2017].

³² United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, Resolution adopted by the General Assembly on 25 September 2015, [without reference to a Main Committee (A/70/L.1)], Seventieth session, Agenda items 15 and 116, 21 October 2015.

³³ United Nations General Assembly, "The road to dignity by 2030: ending poverty, transforming all lives and protecting the planet," Synthesis report of the Secretary-General on the post-2015 Sustainable development agenda. A/69/700. para.45.

³⁴ See United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, Resolution adopted by the General Assembly on 25 September 2015.

³⁵ Harris, J.M., "Basic Principles of Sustainable Development," *Global Development and Environment Institute*, Working Paper 00-04, June 2000, op cit., pp.5-6.

³⁶ *Ibid*, p.6.

socio-economic issues.³⁷ Environmental justice may be considered as an alternative discourse to sustainable development. This is because environmental justice emphasizes commitment to the struggle of communities who suffer the most environmental damage by giving them a voice to access decision-making, which links with social justice, to ensure sustainable and equitable development. Environmental justice can therefore address our concerns as to the use of our environmental resources and how to ensure equitable participation in environmental decision-making. This has been framed in academic terms as distributive justice and procedural justice, a distinction which is useful in the environmental justice discourse.³⁸

3. Background to Environmental Injustice in Kenya

The history of natural resources in Kenya depicts a struggle for environmental justice. A classic example is the Mau Mau revolt in the 1920s-1950s. One of the main reasons for the revolt was to claim back land and land-based resources which had been divested from local communities and vested in Her Majesty. The colonialists were able to use law to exercise control over all the natural resources in the colony. In 1899, using the *Foreign Jurisdiction Act*,³⁹ the British were able to declare the land in the protectorate as waste and unoccupied since a settled form of government did not exist and the land had not been appropriated by the local sovereign or individual.⁴⁰ Several laws were therefore introduced in Kenya whose effect was to wrest control over natural resources from local communities. For example, under the *Crown Lands Ordinance of 1915*, all public land in the colony was vested in Her Majesty, leaving Africans as tenants at the will of the crown.⁴¹ Under the Ordinance, all land within the protectorate was declared crown land whether or not it was occupied by the natives or reserved for native occupation.

The effect of the law was to appropriate all land and land based resources from Africans and to vest them in the colonial masters.⁴² In addition, the law gave the colonial authorities powers to appropriate land held by indigenous people and allocate it to the settlers. This position was affirmed in a 1915 opinion delivered by the then Chief Justice to the effect that whatever rights

³⁷ Hopwood, B., et al, "Sustainable development: mapping different approaches," *Sustainable Development*, Vol. 13, Issue 1, February 2005, pp.38–52, p.39.

³⁸ Paaavola, J. and Adger, W.N., "Justice and Adaptation to Climate Change", Tyndall Centre Working Paper 23, 2002.

³⁹ Foreign Jurisdiction Act, 1890. (53 & 54 Vie. c. 37.) s. 2 & 3.

⁴⁰ Njonjo Commission Report, p.23. Towett J. Kimaiyo has recorded that on 15th June, 1895, Kenya was declared a British Protectorate and the legal effect of this declaration was to confer on the British crown Political Jurisdiction over the area, whilst it remained a foreign jurisdiction. The declaration of Protectorate did not confer any rights over land in the territory. Any rights over the land would have to be on the basis of conquest, agreement, treaty or sale with the indigenous people. In 1897, the Indian Land Act was extended to the territory, thus enabling the appropriation of lands in the main land beyond Mombasa for public use. This appropriation was however limited to land within one mile of either side of the railway line. To overcome the problem of title to land in the territory, in 1899 the law officers of the crown advised that the Foreign Jurisdiction Act, 1890 empowered the crown to control and dispose waste and unoccupied land in the protectorates with no settled forms of government and where land had been appropriated to the local sovereign individuals. In 1901 the East African (Lands) ordinance-in- council was enacted conferring on the commissioner of the Protectorate (later named Governor) power to dispose of all public lands on such terms and conditions as he might think fit. [Towett J. Kimaiyo, 'Chapter 6: Kenya Land Policy since 1900,' *Ogiek Land Cases and Historical Injustices, 1902-2004*, Vol. 1, 2004.]

⁴¹ HWO Okoth-Ogendo, *Tenants of the Crown: Evolution of Agrarian Law & Institutions in Kenya*, (ACTS Press, Nairobi, 1991), p.54.

⁴² *Ibid*.

the indigenous inhabitants may have had to the land had been extinguished by the Ordinance leaving them as mere tenants at the will of the crown.⁴³ The colonial authorities were therefore able to grant land rights to settlers in the highlands, while Africans were being driven and restricted to the native reserves. In the natives reserves there was overcrowding, soil erosion, and poor sanitation, amongst many other problems.⁴⁴

At the coastal region the *Land Titles Act*⁴⁵ was enacted to remove doubts that had arisen in regard to titles to land there and to establish a Land Registration Court. The processes of land adjudication and registration under the Act deprived indigenous Coastal Communities of their land. This led to problems of landlessness among the indigenous Coastal people and absentee landowners.⁴⁶ Some of the current land problems at the coast region have been traced back to the now repealed *Land Titles Act*⁴⁷.

The capitalist traders in British territory of Kenya agreed to employ their resources, through private Chartered Companies,⁴⁸ so long as they were guaranteed a monopoly of trade and allowed to exercise exclusive rights over taxation, minerals and land.⁴⁹ To protect these traders and safeguard their future claims, European Governments declared the territories they were occupying protectorates. Since the legality of protectorates was contested, they developed a system of Treaties or Agreements which were accepted as valid titles to the acquisition of African territories and the Africans were alleged to have "voluntarily ceded their sovereign rights." Such treaties were duly attested by a cross which purported to carry the assent of a King or Chief. The so-called assent was obtained by vague promises which were often unrecorded and all they were looking for were grounds to justify the acquisition of African lands.⁵⁰

The two Maasai agreements of 1904 and 1911 illustrate the effect of the treaties and agreements on the rights of the local people to their natural resources. In 1904, the then Commissioner of the Protectorate entered into an agreement with the Chief and certain representatives of the Maasai tribe by which, *inter alia*, it was arranged that certain sections of the tribe should move to a reserve at Laikipia. This removal took place and the tribe was consequently divided in two.⁵¹ In 1911, the

⁴³ See generally the case of *Isaka Wainaina and Anor vs. Murito wa Indagara and others* (1922-23) 9(2) KLR, 102.

⁴⁴ See HWO Okoth-Ogendo, *Tenants of the Crown: Evolution of Agrarian Law & Institutions in Kenya*, (ACTS Press, Nairobi, 1991).

⁴⁵ Cap 282, Laws of Kenya.

⁴⁶ National Land Policy, 2009. p.43.

⁴⁷ Land Titles Act 1908, LTA (Cap 282).

⁴⁸ A good example is the ten-mile coastal strip which was owned by the Sultan of Zanzibar. This land had been leased to the Imperial British East African Company in 1888 by virtue of which all land in the Sultan's territory was ceded to the company except the private lands. Government of Kenya, Report of the Commission of Inquiry into Land Law Systems in Kenya on Principles of a National Land Policy Framework, Constitutional Position of Land and New Institutional Framework for Land Administration (Government Printer Nairobi, 2002) p.21.

⁴⁹ Kiwanuka, S., 'From Colonialism to Independence: A Reappraisal of Colonial Policies & African Reactions.' 1870-1960. KLB. P. 19.

⁵⁰ Ibid; See generally, Watkins, O. F., 'The Report of the Kenya Land Commission, September, 1933', *Journal of the Royal African Society*, Vol. 33, No. 132 (Jul., 1934), pp. 207-216.

⁵¹ 'Judgment of the High Court of the East Africa Protectorate in the Case Brought by the Maasai Tribe Against the Attorney-General of the Protectorate and Others' *The American Journal of International Law*, Vol. 8, No. 2 (Apr., 1914), pp. 380-389 at p. 381.

then Governor of the Protectorate entered into another agreement with the Chief, his regents, and certain representatives of that portion of the tribe living at Laikipia, by which it was arranged that the sections of the tribe which under the former agreement had moved to Laikipia should move south into one reserve with the remainder of the tribe.⁵² Using the two Agreements, the British were able to forcibly move certain sections of the Maasai out of their favourite grazing grounds in the central Rift Valley (Naivasha-Nakuru) into two reserves in order to make way for white settlement.⁵³ Since then, attempts by the community to regain the land have not been successful. The Colonialists chose not to recognise customary property ownership regarding it as an invalid way of claiming any ownership or control over property or environment.⁵⁴

The Maasai representatives have argued that land loss occasioned by the two agreements, is the single most important factor responsible for the ongoing cultural, economic, and social destitution of the Maasai people and has indeed, been responsible for the erosion of their sovereignty as a people.⁵⁵ They feel that they have been neglected by successive Governments of Kenya in redressing these historical injustices on land and related natural resources.⁵⁶

The loss of control rights over natural resources also affected other resources including forests and water. For instance, in 1891 a law was enacted to protect the mangrove forests at Vanga in Coast region. Shortly thereafter in 1897, the *Ukamba Woods and Forests Regulations* established a strip marking two miles each side of Uganda railway and the same was placed under the management and control of the Divisional Forest Officer (DFO) and the railway administration. This changed forest management by communities which was done through customary practices with the accruing benefits extending to all community members in a fair manner. In 1900, the 1891 and 1897 Regulations were extended to cover all the forests in the coastal region and all those along the railway line. To facilitate this state-centric approach to forests management, a post of conservator of forests was established in 1902 as the officer who would oversee the management of all the regulated forests from the national level. Within the same year, the East African Forests Regulations provided for the gazettelement or degazettelement of forests and control of forests exploitation through a system of licences and fines. The culmination of this was in 1932 when a declaration was issued over the remaining expansive forests in order to bring them under control of the government including the high potential areas.⁵⁷

⁵² Ibid.

⁵³ Hughes, L., *Moving the Maasai: A Colonial Misadventure*, (Palgrave Macmillan, 2006), p. 8; Olson, P.A., 'The Struggle for the Land: Indigenous Insight and Industrial Empire in the Semiarid World', U of Nebraska Press, 1990. Available at <https://books.google.co.ke/books?id=OqwF27HZms8C&printsec=frontcover#v=onepage&q&f=false> [Accessed on 26/12/2014]. p. 235.

⁵⁴ The provisions of the Land Titles Act demanded that for any local to claim land at the coast, they ought to possess papers showing ownership.

⁵⁵ Meitamei, O.D., 'Maasai Autonomy and Sovereignty in Kenya and Tanzania', *Mining Indigenous Lands*, 25.1 (Spring 2001). Available at <http://www.culturalsurvival.org/ourpublications/csq/Art./maasai-autonomy-and-sovereignty-kenya-and-tanzania> [Accessed on 26/12/2014].

⁵⁶ See generally, Kantai, P., 'In the Grip of the Vampire State: Maasai Land Struggles in Kenyan Politics,' *Journal of Eastern African Studies*, Vol. 1, No. 1, pp.107-122, March 2007.

⁵⁷ Mogaka, H., 'Economic Aspects of Community Involvement in Sustainable Forest Management in Eastern and Southern Africa.' Issue 8 of *Forest and social perspectives in conservation*. IUCN, 2001. p.74.

The main focus of forests management in reserved forests was production and protection and included collection of revenues, supervisory permits and licences, protection against illegal entry and use, reforestation and afforestation, research and extension.⁵⁸ Further, outside reserved forests, the focus by the government authorities was regulation and control of forest resources utilisation through legislation without considering the interests of the local communities or the existing traditional management systems.⁵⁹

Thus, the colonial government effectively transferred the management of forests from the local communities to the government through exclusionist and protectionist legal frameworks, a move that was inherited by the independent governments of Kenya.⁶⁰ It was only in the 1990s that there emerged a paradigm shift towards community based forests management although this was done with minimal commitment from the stakeholders.⁶¹ Arguably, this has been with little success due to the bureaucracy involved in requiring communities to apply for complicated licences and permits in order to participate in the same. Similarly, in relation to water resources, legal frameworks were enacted chief among which is the Water Ordinance of 1929, vesting water resources on the authorities. This denied local communities the universal water rights that they had enjoyed in the pre-colonial period. It is noteworthy that the problem of environmental injustice in Kenya has in fact continued into independent Kenya and often with ugly results, as has been documented in various Government reports.⁶²

Environmental injustice continues to manifest itself in modern times. The recent conflicts such as those in Lamu County and in some of the pastoral counties are largely attributable to environmental injustices inflicted over the years.⁶³ In some, there are feelings that land and other land-based resources were taken away from local communities, creating a feeling of disinheritance. In other areas, there are conflicts over access to resources such as forests among

⁵⁸ Kigenyi, et al. 'Practice Before Policy: An Analysis of Policy and Institutional Changes Enabling Community Involvement in Forest Management in Eastern and Southern Africa.' Issue 10 of Forest and social perspectives in conservation. IUCN, 2002. P. 9.

⁵⁹ Ibid.

⁶⁰ For instance, in 1985 the Government of the day effected a total ban on the shamba system, which was participatory in nature in that it allowed communities to settle in forests and engage in farming as they took care of the forests. Following the ban, the communities were resettled outside the gazette forest areas. This form of eviction has also been witnessed in such recent cases as the Endorois and the Ogiek cases.

⁶¹ Emerton, L., 'Mount Kenya: The Economics of Community Conservation'. Evaluating Eden Series, Discussion Paper No.4. p. 6.

⁶² See the Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya, July 31, 1999 (Akiwumi Report). The report found that some of the main causes of post-independence tribal clashes have been ambitions by some communities of recovering what they think they lost when the Europeans forcibly acquired their ancestral land; See also the Kriegler and Waki Reports on 2007 Elections, 2009. Government Printer, Nairobi. The Kriegler and Waki Reports stated that the causes of the post-election clashes in the Rift Valley region covered by included conflict over land, cattle rustling, political differences and ecological reasons among others. [p. 59].

⁶³ See generally, Rohwerder, B., *Conflict Analysis of Kenya*, (Birmingham, UK: GSDRC, University of Birmingham, 2015). Available at <http://www.gsdrc.org/wp-content/uploads/2015/12/KenyaConflictAnalysis.pdf> [Accessed on 1/09/2017]; See also Nyanjom, O., "Remarginalising Kenyan Pastoralists: The Hidden Curse of National Growth and Development," *African Study Monographs*, Suppl. 50: October 2014, pp. 43–72; National Environment Management Authority, 'Environmental Sensitivity: Atlas of Lamu County,' 2015. Available at http://www.ku.ac.ke/schools/environmental/images/stories/docs/Lamu_Sensitivity_Atlas.pdf [Accessed on 1/09/2017]

forest communities for livelihood, while in others conflicts emerge due to competition over scarce natural resources and competing land uses.

4. Legal Framework for Environmental Justice in Kenya

4.1 Constitution of Kenya 2010

The history of environmental justice is important in the Kenyan context as it shows how laws and policies can impose environmental burdens disproportionately on people; marginalize and exclude communities from natural resources; and hinder communities from enjoying a fair share of their natural resources. The current Constitution seeks to correct this situation by promoting and requiring environmental justice.

The Constitution provides a foundation for environmental justice by emphasizing the need for public participation in matters of governance including the governance of environmental matters and natural resources in Kenya. The Constitution provides for the national values and principles of governance which include, *inter alia*, 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.⁶⁴

In The Matter of the National Land Commission [2015] eKLR,⁶⁵ the Supreme Court of Kenya extensively addressed itself to the role and place of public participation in the administration and management of land in Kenya. Mutunga, CJ (as he then was) was of the opinion that:

“Public participation was a major pillar, and bedrock of democracy and good governance. It was the basis for changing the content of the State, envisioned by the Constitution, so that the citizens had a major voice and impact on the equitable distribution of political power and resources. With devolution being implemented under the Constitution, the participation of the people in governance would make the State, its organs and institutions accountable, thus making the country more progressive and stable. The role of the Courts, whose judicial authority was derived from the people of Kenya, was the indestructible fidelity to the value and principle of public participation. The realization of the pillars of good governance would become weak and subject to the manipulation by the forces of status quo if the participation of the people was excluded” (emphasis added).⁶⁶ Further, he stated that: “public participation was the community based process, where people organise themselves and their goals at the grassroots level and work together through governmental and non-governmental community organisations to influence decision making processes in policy, legislation, service delivery, oversight and development matters. It was a two way interactive process where the duty bearer communicates information in a transparent and timely manner, engages the public in decision making and is responsive and accountable to their needs. The definition could be applied to the management and administration of land in Kenya. In order to achieve efficient land administration and

⁶⁴ Art. 10(1).

⁶⁵ Advisory Opinion Reference No. 2 of 2014, December 2, 2015.

⁶⁶ Advisory Opinion Reference No. 2 of 2014, para. 45.

management, the national and county governments; the arms of government; and the commissions and independent offices, must conduct meaningful consultation, communication, and engagement with the people” (emphasis added).⁶⁷

The Chief Justice further stated that the principle of the participation of the people did not stand in isolation; it was to be realised in conjunction with other constitutional rights, especially the right of access to information (article 35); equality (article 27); and the principle of democracy (article 10(2)(a)). The right to equality related to matters concerning land, where State agencies were encouraged also to engage with communities, pastoralists, peasants and any other members of the public. Thus, public bodies should engage with specific stakeholders, while also considering the views of other members of the public. Democracy was another national principle that was enhanced by the participation of the people.⁶⁸

In the case of *Friends of Lake Turkana Trust v Attorney General & 2 others*⁶⁹ the Court stated, *inter alia*, that the right to life, dignity and economic and social rights are all connected and indivisible, and it cannot be said that —one set of rights is more important than another. All these rights of necessity need to be observed for person to attain a reasonable livelihood.⁷⁰ The need for environmental justice was also affirmed in the case of *Joseph Leboo & 2 others v Director Kenya Forest Services & another*⁷¹ the Court stated as follows:

“...in my view, any person is free to raise an issue that touches on the conservation and management of the environment, and it is not necessary for such person to demonstrate, that the issues being raised, concern him personally, or indeed, demonstrate that he stands to suffer individually. Any interference with the environment affects every person in his individual capacity, but even if there cannot be demonstration of personal injury, such person is not precluded from raising a matter touching on the management and conservation of the environment....Any person, without the need of demonstrating personal injury, has the freedom and capacity to institute an action aimed at protecting the environment. The plaintiffs have filed this suit as representatives of the local community and also in their own capacity. The community, of course, has an interest in the preservation and sustainable use of forests. Their very livelihoods depend on the proper management of the forests. Even if they had not demonstrated such interest that would not have been important, as any person who alleges a violation of any law touching on the environment is free to commence litigation to ensure the protection of such environment...”⁷² (emphasis added)

The one common component that runs through all these principles and values is their anthropocentric nature. They all recognise the important role of all human beings in matters of

⁶⁷ Ibid, para. 47.

⁶⁸ Ibid, para. 49.; See also Muigua, K., et al, *Natural Resources and Environmental Justice in Kenya*, (Glenwood Publishers Limited, August, 2015), pp. 23-29.

⁶⁹ [2014] eKLR, ELC Suit No. 825 OF 2012.

⁷⁰ Advisory Opinion Reference No. 2 of 2014, p.11.

⁷¹ [2013] eKLR, Environment and Land No. 273 of 2013.

⁷² Ibid, Paras 25 & 28.

governance including governance of natural resources. They call for meaningful involvement of all persons in governance matters. Meaningful involvement has been defined to mean that: potentially affected community residents have an appropriate opportunity to participate in decisions about a proposed activity that will affect their environment and/or health; the public contribution can influence the regulatory agency's decision; the concerns of all participants involved will be considered in the decision making process; and the decision makers seek out and facilitate the involvement of those potentially affected.⁷³

The Constitution guarantees the right of every person to a clean and healthy environment, which includes the right- to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and to have obligations relating to the environment fulfilled under Article 70.⁷⁴ The guarantee does away with the requirement for showing standing in environmental matters.⁷⁵

To realise environmental rights, the constitution guarantees the right to access to information⁷⁶ and access to justice.⁷⁷ Environmental justice as an offshoot of the right of access to justice also needs to be enhanced to facilitate people's enjoyment of the right to a clean and healthy environment as envisaged in the laws of Kenya. If people and communities in general are to have any meaningful access to justice, then both substantive and procedural rights must be accorded equal importance in the access to justice frameworks. The Bill of Rights is thus not enough to guarantee access to justice for all persons but there must be a corresponding effective legal framework for the enforcement of this Bill of Rights. It is within this framework that the right to environmental justice for all persons in Kenya would be realised.

For example, in land matters the Constitution outlines the principles of landholding and management in Kenya to wit; sustainability, efficiency, equity and productivity. These principles are to be realised by ensuring equitable access to land; security of land rights; transparent and cost effective administration of land; elimination of gender discrimination in law, customs and practices related to land and property in land; and encouragement of communities to settle land disputes through recognised local community initiatives consistent with this Constitution.⁷⁸

If well implemented the principles would be a positive step towards realising environmental justice for all in land matters in Kenya.⁷⁹ The poor and women would have access to land for housing and farming to feed their families. The Constitution also requires the enactment of other

⁷³ The National Environmental Justice Advisory Council, Indigenous Peoples Subcommittee, 'Meaningful Involvement and Fair Treatment by Tribal Environmental Regulatory Programs', November 2004, p. 5. Available at

<http://www.epa.gov/environmentaljustice/resources/publications/nejac/ips-final-report.pdf>

⁷⁴ Art. 42.

⁷⁵ See the case of Prof. Wangari Maathai.

⁷⁶ Art. 35

⁷⁷ Art. 48.

⁷⁸ Art. 60(1).

⁷⁹ See also Environmental Management and Co-ordination (Amendment) Act, Act No. 5 of 2015 which was enacted to revise the Environmental Management and Coordination Act, (EMCA) No. 8 of 1999 in line with the current constitutional provisions on environmental management.

laws on land namely: *Land Act*,⁸⁰ *Land Registration Act*⁸¹ and *National Land Commission Act*.⁸² These laws adopted the constitutional principles on land as the guiding principles in their implementation including dealing with historical land injustices.

4.2 Environmental Management and Coordination Act 1999

With regard to sustainable development, the Act⁸³ provides that in exercising the jurisdiction conferred upon it under subsection (3),⁸⁴ the High Court shall be guided by the following principles of sustainable development, *inter alia*; the principle of public participation in the development of policies, plans and processes for the management of the environment; and the cultural and social principle traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and are not repugnant to justice and morality or inconsistent with any written law.⁸⁵

It is noteworthy that EMCA, in a bid to facilitate public participation in environmental governance matters, dispenses with the requirement of proving *locus standi* in environmental litigation. The Act also states that a person alleging violation of a right to clean and healthy environment shall have the capacity to bring an action notwithstanding that such a person cannot show that the defendant's act or omission has caused or is likely to cause him any personal loss or injury provided that such action –is not frivolous or vexations; or is not an abuse of the court process.⁸⁶ The *Environmental Management and Co-ordination (Amendment) Act, 2015*⁸⁷ was enacted to streamline EMCA in accordance with the current Constitution of Kenya and especially making provision for the devolved system of governance with respect to the various environmental bodies in the country.

4.3 The Environment and Land Court Act

The Environment and Land Court Act⁸⁸ establishes an Environment and Land Court (ELC) to hear matters touching on environment and land. The important role to be played by courts in achieving environmental justice was affirmed in the case of *Peter K. Waweru v Republic*,⁸⁹ where the Court, although not the ELC, stated, *inter alia*, that "...environmental crimes under the Water Act, Public Health Act and EMCA cover the entire range of liability including strict liability and absolute liability and ought to be severely punished because the challenge of the restoration of the environment has to be tackled from all sides and by every man and woman....In the name of

⁸⁰ No. 6 of 2012.

⁸¹ No. 3 of 2012.

⁸² National Land Commission Act, 2012 (No. 5 of 2012).

⁸³ Environmental Management and Coordination Act, (EMCA) No. 8 of 1999, Laws of Kenya.

⁸⁴ Powers to enforce the right of every person in Kenya to a clean and healthy environment the duty to safeguard and enhance the environment.

⁸⁵ Environmental Management and Coordination Act 1999, S. 3(5).

⁸⁶ S. 3(4), EMCA; Art. 70 (1) of the Constitution also states that if a person alleges that a right to a clean and healthy environment recognised and protected under Art. 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter. Clause (3) thereof is to the effect that for the purposes of this Art., an applicant does not have to demonstrate that any person has incurred loss or suffered injury.

⁸⁷ Environmental Management and Co-ordination (Amendment) Act, Act No. 5 of 2015, Laws of Kenya.

⁸⁸ Environment and Land Court Act, No. 19 of 2011, Laws of Kenya. Government printer, Nairobi.

⁸⁹ [2006] eKLR.

environmental justice water was given to us by the Creator and in whatever form it should never ever be the privilege of a few – the same applies to the right to a clean environment.”⁹⁰

Article 22(2) of the Constitution of Kenya allows Courts to take action to protect the environment without necessarily looking for immediate proof of likely violation of the right to clean and healthy environment. In *Said Tahir & 2 others v County Government of Mombasa & 5 others*,⁹¹ the Court observed that although the right to a clean and healthy environment is a right under the Bill of Rights (Chapter 4 of the Constitution), the determination of which is conferred upon the High Court under Article 23(1) of the Constitution, there is a duality of jurisdiction between the High Court and the Environment and Land Court by virtue of Article 162 (2) of the Constitution, and by virtue of the jurisdiction conferred upon the latter court by section 13(7) of the *Environment and Land Act*⁹². However, in *Timothy Otuya Afubwa & another v County Government of Trans-Nzoia & 3 others*, the Court stated that the Constitution designates the High Court as the only court to address questions on violation of the Bill of Rights. The only right under the Bill of Rights which the Environment and Land Court can hear is the right to clean and healthy environment and thus it has jurisdiction to entertain matters relating to violation of this right.⁹³ The establishment of the court is part of the recognition of the need to enhance access to justice in environmental matters. Previously, environmental and land court matters used to be heard in the ordinary courts and could take years before justice is realised for the parties.

4.4 Water Policy 2012 and Water Act 2016

In the past, the water sector in the country has been bedeviled by many problems, some of which can be traced back to the colonial times. For instance, the colonial masters made policies that favoured the use of all the water resources in the colony by the settlers at the expense of the locals. The local people lost control over water resources in the country as the colonial laws such as the 1929 *Water Ordinance* divested ownership of all water bodies in the colony from local communities. The main use of water from the water bodies was farming by settlers. The settlers’ main preoccupation was water exploitation without conservation of catchment areas. This led to such problems as soil erosion, siltation and disease outbreaks amongst the Africans who had been restricted to certain reserve areas. Indeed, the state-centric approach to water management in Kenya has been a problem that was also repeated in the now repealed *Water Act 2002*⁹⁴ which vested the control of water resources in the state and the Minister responsible for water resources. Although past policies have contemplated participatory approach to water management in the country, the same has not achieved much positive results.

To correct this, the current Constitution provides for principles of natural resources management which include public participation and also devolution, which seek to empower the locals and give them a voice in the management. The water sector does not have a current and clear sector-specific policy and legal framework to operationalize devolution as envisaged by the current

⁹⁰ [2006] eKLR, Misc. Civ. Applic. No. 118 of 2004, p.14.

⁹¹ [2015] eKLR, Petition No. 6 of 2015.

⁹² No 19 of 2011, Laws of Kenya.

⁹³ *Timothy Otuya Afubwa & another v County Government of Trans-Nzoia & 3 others* [2015] eKLR, para.8.

⁹⁴ Act No. 8 of 2002.

Constitution of Kenya.⁹⁵ As such, the *Water Policy* 2012 seeks to address this alongside other challenges that were identified as *inter alia*: Climate Change, Disaster Management and Environmental Degradation; Water availability and water service provision; absence of reliable information in the rural Water Supply and Sanitation (WSS) sub-sector; mixed and inconsistent performance of sector institutions mainly due to insufficient governance and autonomy of institutions; lack of good governance practices in some sector institutions; insufficient effluent treatment threatening the country's public health and economic growth; incomplete devolution of functions to the basin level in Water Resources Management (WRM) and conflict of interest in regulation and implementation.⁹⁶

Article 43 of the Constitution of Kenya guarantees the right to an adequate standard of living for all and this encompasses right to adequate food, clothing, shelter, clean and safe water, education, health and social security.

The Water Act 2016⁹⁷ was enacted to provide for the regulation, management and development of water resources, water and sewerage services; and for other connected purposes. The Cabinet Secretary, the Water Resources Authority, the Regulatory Board, county governments and any person administering or applying this Act shall be guided by the principles and values set out in Articles 10⁹⁸, 43⁹⁹, 60¹⁰⁰ and 232¹⁰¹ of the Constitution.¹⁰² Thus, while every water resource is vested in and held by the national government in trust for the people of Kenya even under this Act¹⁰³, its management should be aimed at ensuring that communities enjoy their right to water among other economic and social rights that are related to the provision of water services. Section 63 thereof also provides that every person in Kenya has the right to clean and safe water in adequate quantities and to reasonable standards of sanitation as stipulated in Article 43 of the Constitution.

For effective water resources management, environmental justice concepts such as public participation, information sharing, community based natural resource management, amongst others should feature prominently if the sector is to reflect the spirit of the current Constitution. This can be achieved through the Policy guiding principles which include *inter alia*: Right to water with a pro-poor orientation; Integrated Water Resource Management (IWRM) approach; Sector Wide Approach (SWAp) for enhanced development; devolution of functions to the lowest appropriate level; gender provisions in the management of Water Sector Institutions (WSIs) and safeguarding of water; socially responsive commercialization for service delivery; good

⁹⁵ Heymans, C., et al. Devolution in Kenya: opportunities and challenges for the water sector - supporting poor-inclusive WSS sector reform. Water and sanitation program, policy note, World Bank Group, 2013. Available at

<http://documents.worldbank.org/curated/en/2013/09/19122948/devolution-kenya-opportunities-challenges-water-sector-supporting-poor-inclusive-wss-sector-reform>

⁹⁶ National Water Policy, 2012.

⁹⁷ Water Act, No. 43 of 2016, Laws of Kenya, Repealed by the Water Act, No. 43 of 2016.

⁹⁸ Constitution of Kenya 2010, National Values and Principles of Governance.

⁹⁹ Constitution of Kenya 2010, Economic and Social Rights.

¹⁰⁰ Constitution of Kenya, Principles of Land Policy.

¹⁰¹ Constitution of Kenya, Values and Principles of Public Service

¹⁰² Water Act, No. 43 of 2016, sec. 4.

¹⁰³ *Ibid*, sec. 5.

governance practices on all levels; participatory approach; public Private Partnership (PPP); and “User pays and polluter pays” principles. If fully implemented through the relevant sectoral regulations, these principles can go a long way in actualizing environmental justice in the water sector.¹⁰⁴

4.5 National Land Policy, 2009

The Policy¹⁰⁵ identifies the problems facing the land sector in Kenya as including: severe land pressure and fragmentation of land holdings into uneconomic units; deterioration in land quality due to poor land use practices; unproductive and speculative land hoarding; under-utilization and abandonment of agricultural land; severe tenure insecurity due to overlapping rights; disinheritance of women and vulnerable members of society, and biased decisions by land management and dispute resolution institutions; landlessness and the squatter phenomenon; uncontrolled development, urban squalor and environmental pollution; wanton destruction of forests, catchment areas and areas of unique biodiversity; desertification in the arid and semi-arid lands; and growth of extra-legal land administration processes.¹⁰⁶

In order to tackle these challenges, it proposed that the process of acquisition, use and disposal of land rights should be guided by: equal recognition and enforcement of land rights arising under all tenure systems; non-discrimination in ownership of, and access to land under all tenure systems; protection and promotion of the multiple values of land; and development of fiscal incentives to encourage the efficient utilization of land.¹⁰⁷ These values and principles have also been reflected in the Constitutional provisions dealing with land and have also been recognised albeit in broader terms in the various land laws enacted in line with the Constitution.

5. Gender Discrimination and Environmental Justice

Kenya’s quest for environmental justice for all persons cannot be fully realised without tackling the problem of gender discrimination in relation to access to natural resources in Kenya. Gender discrimination in law and policy particularly in access to natural resources and property ownership is an instance of environmental injustice.¹⁰⁸ In the past, women have been discriminated against especially when it comes to access to land and associated resources. Indeed, it has been observed that much of Kenya’s history was in fact marked by growing inequality and division, where women and sexual and gender minorities were oppressed by traditional social and religious attitudes to gender which translated into discriminatory laws and discrimination by both the state and private actors, denied them equal participation in civil, political, economic, social and cultural

¹⁰⁴ Ibid, para. 1.5; For further comment on the place of Water Act 2016 in achieving efficiency in water governance in Kenya, see Muigua, K., “Streamlining Water Governance in Kenya for Sustainable Development,” available at

<http://www.kmco.co.ke/attachments/article/184/Streamlining%20Water%20Governance%20in%20Kenya-%2017TH%20FEBRUARY%202017.pdf>

¹⁰⁵ Sessional Paper No. 3 of 2009 on National Land Policy, August, 2009.

¹⁰⁶ Ibid, Para. 2.3.

¹⁰⁷ Ibid, para. 3.3.2.

¹⁰⁸ It is noteworthy that this is not a Kenyan problem only but has also persisted in other jurisdictions around the world. See generally, UN Human Rights Committee (HRC), Consideration of reports submitted by States parties under Art. 40 of the Covenant: International Covenant on Civil and Political Rights: 4th periodic report: United States of America, 22 May 2012, CCPR/C/USA/4 [accessed 27 December 2014].

life.¹⁰⁹ It is documented that only 3% of women have title deeds in Kenya.¹¹⁰ This has led to instances where women have not only been discriminated against in practice but also in law.

It is against this background that the current Constitution of Kenya has incorporated elaborate provisions to correct the situation. It provides that every person is equal before the law and has the right to equal protection and equal benefit of the law.¹¹¹ Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.¹¹²

The constitution also prohibits the State or any person from discriminating directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.¹¹³ These provisions are important in ensuring that all persons including women have access to, control and use of natural resources. If women are denied opportunities to access, use and manage natural resources they can also exploit the provisions allowing any person whose right to a clean and healthy environment is being or is likely to be, denied, violated, infringed or threatened, to apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.¹¹⁴

Among the principles of land policy as envisaged under Article 60(1) are *inter alia*: equitable access to land; security of land rights; and elimination of gender discrimination in law, customs and practices related to land and property in land. These principles envisage the removal of gender discrimination in access, use, management and ownership of property as this is one of the best ways of achieving environmental justice for all including women.

Women bear a disproportionate burden in environmental matters and are affected more by climate change, pollution and depletion of natural resources. Since they are particularly vulnerable to the earth's sustainability, their involvement in environmental problems is crucial.¹¹⁵ The Constitution of Kenya has provisions that not only encourage but also make it an obligation on the State to ensure that there is meaningful participation by women especially in matters of governance since they form part of the previously marginalised groups in society. It obligates the State to put in place affirmative action programmes designed to ensure that minorities and marginalised groups,

¹⁰⁹ The Equal Rights Trust (ERT), "In the Spirit of Harambee: Addressing Discrimination and Inequality in Kenya," ERT Country Report Series: 1, London, February 2012. p. 1. Available at http://www.equalrightstrust.org/ertdocumentbank/In_the_Spirit_of_Harambee.pdf [Accessed on 20/12/2014].

¹¹⁰ UNDP-Kenya, Millennium Development Goals in Kenya-Ten Years of Implementation and Beyond: The Last Stretch Towards 2015, UNDP-Kenya, Nairobi, 2010, p.33.

¹¹¹ Art. 27(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

¹¹² Art. 27(3).

¹¹³ Art. 27(4) (5).

¹¹⁴ Art. 71, Constitution of Kenya.

¹¹⁵ United Nations Development Programme, 'Women's Empowerment to Environmental Justice'. Available at <http://www.ks.undp.org/content/kosovo/en/home/presscenter/Art.s/2013/05/30/women-s-empowerment-to-environmental-justice-dg-environment-women-empowerment-/> [Accessed on 19/12/2014].

¹¹⁶*inter alia*—participate and are represented in governance and other spheres of life; are provided special opportunities in educational and economic fields; develop their cultural values, languages and practices; and have reasonable access to water, health services and infrastructure.¹¹⁷ These provisions can facilitate the creation of a society where women not only participate in decision making in matters touching on the environment but are also given an opportunity to own and enjoy the natural resources related to the environment.

6. Environmental Justice and Livelihood

Access to justice regarding natural resources is a pre-requisite for improving people's livelihoods. In addition, environmental justice is inextricably linked to people's livelihood thus necessitating greater protection in law and policy. To this extent, environmental justice also dictates that victims of environmental injustice have a right to receive full compensation and reparations for damage as well as quality health care.¹¹⁸

The close relationship between environmental justice and livelihood sustenance was demonstrated in the case of *Kemai & Others vs Attorney General & 3 Others*,¹¹⁹ where members of the Ogiek ethnic community, sought a declaration that their eviction from Tinet Forest by the government contravened their right to life, the protection of the law and the right not to be discriminated against. This was based on the claim that they had been living in Tinet Forest since time immemorial, where they derived their livelihood by gathering food, hunting and farming. Their argument was that they would be left landless if evicted from the forest. They also claimed that their culture was concerned with the preservation of nature so as to sustain their livelihood and that they had never been a threat to the natural environment. The Court, in declining to issue favourable orders, held that the real threat to the right to life and to livelihood is not the government eviction orders in themselves but the negative environmental effect of ecological mismanagement, neglect and the raping of the natural resources. Hence, the importance of the issue of preserving the rain water catchment area. It is noteworthy that the Ogiek community case also moved on to the ACHPR for determination and has since been finalized, with the judgment delivered in favour of the Ogiek community.¹²⁰

While managing resources sustainably, states must have an environmental policy that takes account of those who depend on the resources for their livelihoods. Otherwise, it could have an adverse impact both on poverty and on chances for long-term success in resource and

¹¹⁶ See Art. 260 on interpretation which provides that “affirmative action” includes any measure designed to overcome or ameliorate an inequity or the systemic denial or infringement of a right or fundamental freedom; and “marginalised group” means a group of people who, because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Art. 27(4). Arguably, this definition would include women, based on discrimination on ground of sex.

¹¹⁷ Art. 56, Constitution of Kenya.

¹¹⁸ Agyeman, J., and Evans, T., ‘Toward Just Sustainability in Urban Communities: Building Equity Rights With Sustainable Solutions’ *Annals of the American Academy of Political and Social Science*, Vol. 590, *Rethinking Sustainable Development* (Nov., 2003), pp. 35-53 at p. 50.

¹¹⁹ *Kemai & Others vs Attorney General & 3 Others* (2006) 1 KLR (E&L) 326, Civil Case 238 of 1999; *Ogiek People v. District Commissioner* Case No. 238/1999 (2000.03.23) (Indigenous Rights to Tinet Forest)

¹²⁰ *African Commission on Human and People's Rights v Republic of Kenya*, Appl. No. 006/2012 (Delivered on Friday 26 May 2017).

environmental conservation.¹²¹ Legal and policy constraints that deny the poor access to water for livelihood such as growing food crops for their families including small-scale agriculture to grow food crops for their families should be removed.

The Kenyan economy is largely based on agriculture which relies mostly on the exploitation of natural resources.¹²² Essentially, environmental justice gives people greater opportunities for protecting their fundamental human rights. Some of the basic rights guaranteed in the Constitution of Kenya 2010 include the economic and social rights of every person. These rights include the right—to the highest attainable standard of health, which includes the right to health care services, including reproductive healthcare; 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 adequate quantities; to social security; and to education.¹²³ These rights touch on the livelihoods of persons and they cannot therefore be ignored.

7. Environmental Justice and Conflict Management

It is worth mentioning that natural resources are perceived as an integral part of society the world all over, as sources of income, industry, and identity. Owing to this central role of natural resources to the general wellbeing of communities, conflicts related to the exploitation of natural resources are inevitable. Natural resource based conflicts have been defined as disagreements or disputes that arise with regard to the use, access and management of natural resources.¹²⁴ They have also been defined as situations where the allocation, management, or use of natural resources

¹²¹ United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992, Agenda 21; See also chapter 3, para. 2.

¹²² Office of the Prime Minister Ministry of state for Planning, National Development and Vision 2030, Sessional paper No. 10 of 2012 On Kenya Vision 2030, Government Printer, Nairobi. P. 44; Government of Kenya, Integrated Water Resources Management and Water Efficiency Plan for Kenya, August, 2009. Government Printer, Nairobi; See also the Fisheries Management and Development Act, (No. 35 of 2016) which was enacted to provide for the conservation, management and development of fisheries and other aquatic resources to enhance the livelihood of communities dependent on fishing and to establish the Kenya Fisheries Services; and for connected purposes. The objective of this Act is to protect, manage, use and develop the aquatic resources in a manner which is consistent with ecologically sustainable development, to uplift the living standards of the fishing communities and to introduce fishing to traditionally non-fishing communities and to enhance food security (Sec. 5(1)).

¹²³ Art. 43; ; See also the National Food and Nutrition Security Policy, 2011 whose objective is to increase the quantity and quality of food available and accessible, in order to ensure that all Kenyans have an adequate, diverse and healthy diet. This will be achieved by working towards sustainable production increases for food that is diversified, affordable and helps meet basic nutrition requirements. This policy places an obligation on Government to promote sustainable food production systems with particular attention to increasing soil fertility, agro-biodiversity, organic methods and proper range and livestock management practices; Under the Agriculture and Food Authority (AFA) 2016-2021 Strategic Plan, one of the main goals under the Strategic Plan is to promote increased agricultural production for food and nutrition security; There is also a pending Food Security Bill, 2014 which seeks to give effect to Article 43(1)(c) of the Constitution on the freedom from hunger and the right to adequate food of acceptable quality; Article 53(1)(c) of the Constitution on the right of every child to basic nutrition and Article 21 of the Constitution on the implementation of rights and fundamental freedoms under the Constitution; and for connected purposes.

¹²⁴ Food and Agricultural Organisation, 'Conflict and Natural Resource Management', page 1. Available at <http://www.fao.org/forestry/21572-0d9d4b43a56ac49880557f4ebaa3534e3.pdf> [Accessed on 09/12/2014].

results in: violence; human rights abuses; or denial of access to natural resources to an extent that significantly diminishes human welfare.¹²⁵

Environmental justice is related to conflict management. This is because in the environmental context procedural rights are the vehicle through which substantive rights are articulated by the courts and the other conflict management processes. The procedures and processes needed to tackle negative environmental impacts should therefore be accessible on an equal basis to different social groups since many environmental injustices may be caused or exacerbated by procedural injustices in the processes of policy design, land-use planning, science and law. Therefore, the necessary policy, legal and institutional framework in place is crucial in ensuring environmental justice at the global, regional and national levels.

Access to courts is an important pillar in promoting environmental justice in Kenya. Courts have however been faced by a number of challenges that hinder people particularly local communities from vindicating their environmental rights. Although the Constitution of Kenya guarantees the right of every person to institute proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened with no need to prove *locus standi* to institute the suit, there still lies other challenges hindering access to courts such as the geographical location, complexity of rules and procedure and the use of legalese.¹²⁶

Environmental justice can be enhanced if the conflict management mechanisms allow parties to enjoy autonomy over the process and outcome; they can be expeditious, cost-effective, flexible and employ non-complex procedures. Compared to courts, ADR processes are affordable, flexible, less complex, foster relationships and give communities greater opportunities to participate in the management of natural resources.¹²⁷ ADR and TDRM processes provide additional avenues for people in accessing environmental justice. Alternative Dispute Resolution mechanisms such as negotiation, conciliation and mediation have the potential to enhance environmental justice for the Kenyan people since they allow parties to enjoy autonomy over the process and outcome; they are expeditious, cost-effective, flexible and employ non-complex procedures. To enhance environmental justice there is need to move beyond the law by adopting approaches that give communities greater avenues for protecting their rights and benefiting from the use of natural resources.

8. Enhancing Access to Environmental Justice in Kenya

Any steps towards realising environmental justice for the Kenyan people should arguably ensure that the local people's perception of what entails environmental justice is effectively incorporated in any government measures aimed at achieving the same. With this incorporation, it would be

¹²⁵United States Agency for International Development (USAID), 'Conflict Over Natural Resources At The Community Level in Nepal Including Its Relation to Armed Conflict', May 2006, page 1. Available at pdf.usaid.gov/pdf_docs/PNADF990.pdf [Accessed on 09/12/2014].

¹²⁶ Strengthening Judicial Reform in Kenya: Public Perceptions and Proposals on the Judiciary in the new Constitution, ICJ Kenya, Vol. III, May, 2002; See also Kariuki Muigua, Avoiding Litigation through the Employment of Alternative Dispute Resolution, pp. 6-7, a Paper presented by the author at the In-House Legal Counsel, Marcus Evans Conference at the Tribe Village Market Hotel, Kenya on 8th & 9th March, 2012. Available at <http://www.chuitech.com/kmco/attachments/Art./101/Avoiding.pdf>

¹²⁷ See generally Muigua K. "ADR: The Road to Justice in Kenya." Chartered Institute of Arbitrators (Kenya Branch). 2014; Volume 2 Number 1 (2014):28-94.

possible for the communities to support the government efforts in relation to achieving environmental justice for the Kenyan people. This can be achieved through ensuring that the elements discussed below are effectively incorporated in the laws on environmental governance.

8.1 Environmental Justice and Access to Information

As already pointed out, in order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, there is need to guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters.¹²⁸ The Constitution guarantees the right of access to information held by the State, any other person and required for the exercise or protection of any right or fundamental freedom.¹²⁹ It also obligates the State to publish and publicise any important information affecting the nation.¹³⁰

Guaranteeing access to the relevant information is imperative in facilitating access to environmental justice and enabling the communities to give prior, informed consent where required in relation to exploitation of natural resources. With regard to informed consent, 'informed' has been defined to mean that all information relating to the activity is provided to indigenous peoples and that the information is objective, accurate and presented in a manner or form that is understandable to indigenous peoples.¹³¹ Relevant information includes: the nature, size, pace, duration, reversibility and scope of any proposed project; the reason(s) or purpose of the project; the location of areas that will be affected; a preliminary assessment of the possible economic, social, cultural and environmental impacts, including potential risks and benefits; personnel likely to be involved in the implementation of the project; and procedures that the project may entail.¹³²

This informed consent cannot therefore be given without first ensuring that the concerned communities have access to relevant information. In *Friends of Lake Turkana Trust v Attorney General & 2 others*¹³³ the court was of the view that access to environmental information was a prerequisite to effective public participation in decision making and monitoring governmental and public sector activities on the environment.

The Court, in *Friends of Lake Turkana Trust* case, also observed that article 69(1) (d) of the Constitution of Kenya 2010 placed an obligation on the state to encourage public participation in the management, protection and conservation of the environment. Public participation would only

¹²⁸ Article 1 of the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, UN Doc. ECE/CEP/43. Adopted at the 4th UNECE Ministerial Conference, Aarhus, 25 June, 1998. UN Doc. ECE/CEP/43.

¹²⁹ Art. 35(1); See also Access to Information Act, No. 31 of 2016 which deals with disclosure of information including information on dangers of public health, safety and the environment. The Act was enacted to give effect to Article 35 of the Constitution; to confer on the Commission on Administrative Justice the oversight and enforcement functions and powers and for connected purposes.

¹³⁰ Art. 35(2).

¹³¹ FAO, 'Respecting free, prior and informed consent: 'Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition. Governance of Tenure Technical Guide No. 3, Rome 2014. p.5.

¹³² Ibid.

¹³³ ELC Suit No 825 of 2012.

be possible where the public had access to information and was facilitated in terms of their reception of different views. Such community based forums and Barazas can effectively facilitate this. For example, Rule 5 of the Second Schedule to the *Forest Conservation and Management Act, 2016*¹³⁴ states that where rules made under the Act so require, the responsible authority shall cause a public meeting to be held in relation to a proposal before the responsible authority makes its decision on the proposal. Such public meetings should, as a matter of practice, be conducted in a manner that would ensure full and meaningful participation of all the concerned communities. Well conducted, these are viable forums through which access to environmental information can be realized and consequently enhance access to environmental justice.

8.2 Environmental Justice and Public Participation

Meaningful involvement of people in environmental matters requires effective access to decision makers for all, and the ability in all communities to make informed decisions and take positive actions to produce environmental justice for themselves.¹³⁵ The *Vienna Declaration and Programme of Action*¹³⁶ states that all peoples have the right of self-determination.¹³⁷ By virtue of that right, they freely determine their political status, and freely pursue their economic, social and cultural development. This calls for free prior and informed consent from the affected communities in relation to exploitation of natural resources in their areas.

Free, prior and informed consent is a collective right of indigenous peoples to make decisions through their own freely chosen representatives and customary or other institutions and to give or withhold their consent prior to the approval by government, industry or other outside party of any project that may affect the lands, territories and resources that they customarily own, occupy or otherwise use.¹³⁸ It is thus not a stand-alone right but an expression of a wider set of human rights protections that secure indigenous peoples' rights to control their lives, livelihoods, lands and other rights and freedoms and which needs to be respected alongside other rights, including rights relating to self-governance, participation, representation, culture, identity, property and, crucially, lands and territories.¹³⁹ The Guidelines call for consultation and participation which entails engaging with and seeking the support of those who, having legitimate tenure rights, could be affected by decisions, prior to decisions being taken, and responding to their contributions; taking into consideration existing power imbalances between different parties and ensuring active, free, effective, meaningful and informed participation of individuals and groups in associated decision-making processes.¹⁴⁰

¹³⁴ Forest Conservation and Management Act, No. 34 of 2016, Laws of Kenya.

¹³⁵ US Office of Legacy Management, 'Environmental Justice' What Is Environmental Justice? available at <http://energy.gov/lm/services/environmental-justice/what-environmental-justice> [Accessed on 08/12/2014].

¹³⁶ UN General Assembly, Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23.

¹³⁷ Proclamation 1.2.

¹³⁸ FAO, 'Respecting free, prior and informed consent: 'Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition, op. cit. p.4.

¹³⁹ Ibid; See generally, In The Matter of the National Land Commission [2015] eKLR, Advisory Opinion Reference No. 2 of 2014, December 2, 2015, paras 45-49; See also Muigua, K., et al, Natural Resources and Environmental Justice in Kenya, (Glenwood Publishers Limited, August, 2015), pp. 23-29.

¹⁴⁰ FAO, 'Respecting free, prior and informed consent: 'Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition, op. cit. p.4; See also Community Land Act, No. 27 of 2016 which requires active involvement of affected communities in negotiations involving exploitation of resources lying within such lands.

The Constitution of Kenya provides that the objects of devolved government are *inter alia*-to promote democratic and accountable exercise of power; to foster national unity by recognising diversity; to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them; to recognise the right of communities to manage their own affairs and to further their development; to protect and promote the interests and rights of minorities and marginalised communities; to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya; to ensure equitable sharing of national and local resources throughout Kenya; and to facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya.¹⁴¹

The Constitution provides for the participation of the persons with disabilities,¹⁴² youth¹⁴³ minorities and marginalized groups¹⁴⁴, and older members of society¹⁴⁵, in governance and all other spheres of life. The foregoing provisions are important especially in relation to the provisions of the *County Governments Act*¹⁴⁶ which are to the effect that citizen participation in county governments shall be based upon the principles of *inter alia* —Timely access to information, data, documents, and other information relevant or related to policy formulation and implementation; Reasonable access to the process of formulating and implementing policies, laws, and regulations; protection and promotion of the interest and rights of minorities, marginalized groups and communities; legal standing to interested or affected persons, organizations, and where pertinent, communities, to appeal from or, review decisions, or redress grievances, with particular emphasis on persons and traditionally marginalized communities, including women, the youth, and disadvantaged communities; reasonable balance in the roles and obligations of county governments and non-state actors in decision-making processes; promotion of public-private partnerships; and recognition and promotion of the reciprocal roles of non-state actors' participation and governmental facilitation and oversight.¹⁴⁷

These provisions have an implication on natural resources management. It means that the devolved governments must not purport to make unilateral decisions especially with regard to the management of natural resources. They must recognise the centrality of people in whole debate of natural resources management, since these resources have an impact on the economic, social, cultural and even spiritual lives of the diverse communities in Kenya. As such, they must ensure their active participation in coming up with legislative and policy measures to govern their management and utilisation for the benefit of all. They must also be alive to the fact that any negative impact on the environment directly affects these communities.

The Constitution of Kenya requires Parliament to conduct its business in an open manner, and its sittings and those of its committees to be open to the public; and to facilitate public participation

¹⁴¹ Art. 174, Constitution of Kenya 2010.

¹⁴² Art. 54.

¹⁴³ Art. 55

¹⁴⁴ Art. 56

¹⁴⁵ Art. 57.

¹⁴⁶ No. 17 of 2012, Laws of Kenya.

¹⁴⁷ *Ibid*, S. 87.

and involvement in the legislative and other business of Parliament and its committees.¹⁴⁸ The proposed law, *the Natural Resources (Benefit Sharing) Bill*, 2014, also seeks to have established by each affected local community a Local Benefit Sharing Forum comprising of five persons elected by the residents of the local community.¹⁴⁹ Every affected local community is also to enter into a local community benefit sharing agreement with the respective county benefit sharing committee.¹⁵⁰ Such local community benefit sharing agreement is to include non-monetary benefits that may accrue to the local community and the contribution of the affected organization in realizing the same.¹⁵¹

It is therefore imperative that such communities be involved in the whole process to enable them air their views on the same and where such negative effects are inevitable due to the nature of the exploitation of the natural resources, their appreciation of such impact is the ultimate key to winning social acceptance of these projects.¹⁵² Indeed, it has been observed that participation will bring the most benefit when the process is seen as fair, and processes are seen as more fair if those who are affected have an opportunity to participate in a meaningful way and their opinions are taken seriously.¹⁵³ Indicators of procedural justice have been identified as: presence of local environmental groups, public participation or consultation on local developments and initiatives, Access to information, and responsiveness by public bodies.¹⁵⁴

Indeed, it has been argued that those affected by environmental problems must be included in the process of remedying those problems; that all citizens have a duty to engage in activism on behalf of Environmental Justice; and that in a democracy it is the people, not the government, that are ultimately responsible for fair use of the environment.¹⁵⁵ Active and meaningful public participation, therefore, through such means as suggested in the indicators of procedural justice are important in enhancing access to environmental justice for all. For instance, it is imperative for the general public to not only abide by but also promote the realisation of the recent ban of use of polythene papers in Kenya, which took effect on 28th August 2017, since the government efforts to effect this ban is meant to promote the right to clean and healthy environment for all.

¹⁴⁸ Art. 118(1) (a).

¹⁴⁹ S. 31(1).

¹⁵⁰ S. 32(1).

¹⁵¹ S. 32(2).

¹⁵² S. 115 of the County Governments Act 2012 provides that Public participation in the county planning processes shall be mandatory and be facilitated through— mechanisms provided for in Part VIII of this Act; and provision to the public of clear and unambiguous information on any matter under consideration in the planning process, including—clear strategic environmental assessments; clear environmental impact assessment reports; expected development outcomes; and development options and their cost implications.

¹⁵³ Amerasinghe, M., et. al., 2008. 'Enabling Environmental Justice: Assessment of Participatory Tools. Cambridge, MA: Massachusetts Institute of Technology. p.3.

Available at <http://web.mit.edu/jcarmin/www/carmin/EnablingEJ.pdf> [Accessed on 08/12/2014].

¹⁵⁴ Todd, H., & Zografos, C., Justice for the Environment: Developing a Set of Indicators of Environmental Justice for Scotland, op. cit. p. 495.

¹⁵⁵ Frechette, K.S., 'Environmental Justice: Creating Equality, Reclaiming Democracy', OUP USA (2005). Available at <http://philpapers.org/rec/SHREJC> [Accessed on 10/12/2014].

8.3 Benefit Sharing Arrangements

Benefit-sharing is a way of integrating the economic, social and environmental considerations in the management of natural resources.¹⁵⁶ In order to protect community and individual interests over land based resources and facilitate benefit sharing, the *National Land Policy*, 2009 recommended that the Government should: establish legal frameworks to recognise community and private rights over renewable and non-renewable land-based natural resources and incorporate procedures for access to and sustainable use of these resources by communities and private entities; devise and implement participatory mechanisms for compensation for- loss of land and damage occasioned by wild animals; put in place legislative and administrative mechanisms for determining and sharing of benefits emanating from land based natural resources by communities and individuals where applicable; make benefit-sharing mandatory where land based resources of communities and individuals are managed by national authorities for posterity; and ensure the management and utilization of land-based natural resources involves all stakeholders.¹⁵⁷

Perhaps as a response to the proposals by the *National Land Policy*, 2009, there is a proposed law, *Natural Resources (Benefit Sharing) Bill*, 2014, which seeks to establish a system of benefit sharing in resource exploitation between resource exploiters, the national government, county governments and local communities; to establish the Natural Resources Benefits Sharing Authority; and for connected purposes. The Bill, if passed into a law, is to apply with respect to the exploitation of petroleum; natural gas; minerals; forest resources, water resources; wildlife resources; and fishery resources.¹⁵⁸ Notably, this Bill provides for guiding principles of benefit sharing which include: transparency and inclusivity; revenue maximization and adequacy; efficiency and equity; accountability and participation of the people; and rule of law and respect for human rights of the people.¹⁵⁹

The proposed law also proposes the establishment of the Benefit Sharing Authority,¹⁶⁰ with the mandate to, *inter alia*: coordinate the preparation of benefit sharing agreements between local communities and affected organizations; review, and where appropriate, determine the royalties payable by an affected organization engaged in natural resource exploitation; identify counties that require to enter into a benefit sharing agreement for the commercial exploitation of natural resources within the counties; oversee the administration of funds set aside for community projects identified or determined under any benefit sharing agreement; monitor the implementation of any benefit sharing agreement entered into between a county and an affected organization; conduct research regarding the exploitation and development of natural resource and benefit sharing in Kenya; make recommendations to the national government and county governments on the better exploitation of natural resources in Kenya; determine appeals arising out of conflicts regarding the preparation and implementation of county benefit sharing

¹⁵⁶ Government of Kenya, Sessional Paper No. 3 of 2009 on National Land Policy, Government Printer, Nairobi, p. 23.

¹⁵⁷ *Ibid*, p. 23.

¹⁵⁸ S. 3.

¹⁵⁹ S. 4.

¹⁶⁰ S. 5.

agreements; and advise the national government on policy and the enactment of legislation relating to benefit sharing in resource exploitation.¹⁶¹

The Bill also seeks to establish in each county that has a natural resource, a County Benefit Sharing Committee.¹⁶² Benefit sharing could effectively be used to promote environmental justice among communities and enhance the relationship between the government and communities as well as among communities which in turn enhances peace in the country.

The *Natural Resources (Classes of Transactions Subject to Ratification) Act, 2016*¹⁶³ is meant to give effect to Article 71 of the Constitution of Kenya, 2010 and for connected purposes.¹⁶⁴ It requires certain transactions to be ratified by Parliament if they involve, inter alia, the grant of a right or concession by or on behalf of any person, including the national government, to another person for the exploitation of any natural resource of Kenya.¹⁶⁵ Some of the relevant considerations in deciding whether or not to ratify an agreement are as follows— the applicable Government policy; recommendations of the relevant regulatory agency; comments received from the county government within whose area of jurisdiction the natural resource that is the subject of the transaction is located; adequacy of stakeholder consultation; the extent to which the agreement has struck a fair balance between the interests of the beneficiary and the benefits to the country arising from the agreement; the benefits which the local community is likely to enjoy from the transaction; and whether, in granting the concession or right the applicable law has been complied with.¹⁶⁶

The need for equitable benefit sharing has also been captured in the *Community Land Act 2016*¹⁶⁷ which provides that subject to any other law, natural resources found in community land shall be used and managed- sustainably and productively; for the benefit of the whole community including future generations; with transparency and accountability; and on the basis of equitable sharing of accruing benefits.¹⁶⁸ Further, subject to any other relevant written law, an agreement relating to investment in community land should be made after a free, open consultative process and should contain provisions on the following aspects- an environmental, social, cultural and economic impact assessment; stakeholder consultations and involvement of the community; continuous monitoring and evaluation of the impact of the investment to the community; payment

¹⁶¹ S. 6(1).

¹⁶² S. 28. The functions of the said Committees will include inter alia: negotiate with an affected organization on behalf of the County Government prior to entering into a county benefit sharing agreement; monitor the implementation of projects required to be undertaken in the county pursuant to a benefit sharing agreement; determine the amount of money to be allocated to each local community from sums devolved under this Act; convene public forums to facilitate public participation with regard to proposed county benefit sharing agreements prior to execution by the county government; convene public forums for the purpose of facilitating public participation with regard to community projects proposed to be undertaken using monies that accrue to a county government pursuant to this Act; and make recommendations to the county government on projects to be funded using monies which accrue to the county government pursuant to this Act.(s. 29).

¹⁶³ Natural Resources (Classes of Transactions Subject to Ratification) Act, No. 41 of 2016, Laws of Kenya.

¹⁶⁴ See also S. 124A, Environment (Management and Coordination) Act, No.8 of 1999, Laws of Kenya.

¹⁶⁵ Article 71(1) (a), Constitution of Kenya.

¹⁶⁶ Sec. 9, Natural Resources (Classes of Transactions Subject to Ratification) Act.

¹⁶⁷ No. 27 of 2016, Laws of Kenya.

¹⁶⁸ Sec. 35, Community Land Act 2016.

of compensation and royalties; requirement to re-habilitate the land upon completion or abandonment of the project; measures to be put in place to mitigate any negative effects of the investment; capacity building of the community and transfer technology to the community; and any other matters necessary for determining how local communities will benefit from investments in their land.¹⁶⁹ Such an agreement relating to investment in community land should only be made between the investor and the community, and the same must be approved by two thirds of adult members at a community assembly meeting called to consider the offer and at which a quorum of two thirds of the adult members of that community is represented.¹⁷⁰

8.4 Demonstrations and Lobbying

The Constitution guarantees every person's right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities.¹⁷¹ These are important tools that local communities can use to agitate for environmental rights. For example, communities can, by staging demonstrations and protests, stop corporations that are causing environmental pollution.

Environmental lobbying is either direct or indirect. Direct lobbying takes place when lobbyists meet with politicians and provide them with information that is relevant to the legislation on the floor of the House. The main goal is influencing the politician to vote in a certain way on legislation that is consistent with the interests of the group. Indirect lobbying arises where grass root lobbyists recruit community members to promote the interests of their group by holding demonstrations or writing or calling politicians with the main objective of rallying the community around a certain issue and to empower them to do something about it.¹⁷² A good example of this is the Maasai land claims initiative whose overall goal is to redress historical injustices and wrongs arising from the appropriation of Maasai ancestral land by the British colonial government following the Maasai Agreements of 1904 and 1911 and the failure by successive Governments of independent Kenya to address the said injustices and wrongs.¹⁷³

In many instances, lobbyists' Non-Governmental Organisations (NGOs) usually facilitate the lobbying and activism and communities can join in.¹⁷⁴ With strong governmental and community support, the NGOs involved can play a vital role in offering environmental education especially where government bodies cannot reach thus filling in the education lacuna that may exist. Effectively carried out demonstrations and lobbying can be a powerful tool in addressing such

¹⁶⁹ Sec. 36(1), Community Land Act 2016.

¹⁷⁰ Sec. 36(2) (3), Community Land Act 2016.

¹⁷¹ Art. 37.

¹⁷² Rolli, E., 'Environmental Lobbyist', available at <http://www.sage.wisc.edu/careers/profiles/pdf/Environmental%20Lobbyist.pdf> [Accessed on 22/12/2014]. p. 1.

¹⁷³ Koissaba, B.O., 'Maa Civil Society Forum: Issues Arising From Anglo - Maasai Treaties Of 1904 And 1911'. p.4.

¹⁷⁴ See generally, Ndahinda, F.M., 'Indigenoussness in Africa: A Contested Legal Framework for Empowerment of 'Marginalized' Communities'. Springer Science & Business Media, Apr 27, 2011. Available at https://books.google.co.ke/books?id=ayiB1Ngvd4C&dq=two+Maasai+agreements+of+1904+and+1911&source=gbs_navlinks_s [Accessed on 26/12/2014].

concerns as climate change, benefits sharing, participation in decision making, addressing the issue of environmental hazards all of which have a direct impact on communities and their lives.

8.5 Judicial Activism

There is no clear definition of some of the rights guaranteed in the Constitution of Kenya regarding the environment and thus it is up to the courts to give guidance in certain matters. There is therefore, a need for judicial activism so that jurisprudence in this area can be improved. For instance, there is no explanation of what, for example, amounts to a ‘clean and healthy environment.’ As noted by one author,¹⁷⁵ it took the court’s active role to delineate this right in *Uganda Electricity Transmission Co Ltd v De Samaline Incorporation Ltd*,¹⁷⁶ where the court expanded the meaning of a clean and healthy environment as follows;

‘I must begin by stating that the right to a clean and healthy environment must not only be regarded as a purely medical matter. It should be regarded as a holistic social-cultural phenomenon because it is concerned with physical and mental well-being of human beings... a clean and healthy environment is measured in both ethical and medical context. It is about linkages in human well-being. These may include social injustice, poverty, diminishing self-esteem, and poor access to health services. That right is not restricted to a clinical model...’ (Emphasis added)

Notably, the *Environment and Land Court Act* gives the court *suo moto* jurisdiction.¹⁷⁷ It is arguable that the section allows judges to engage in judicial activism to safeguard environmental rights by ensuring sustainable development using the devices envisaged in Article 159 of the Constitution to ease access to justice. Courts may therefore act without necessarily waiting for filing of any cases on public interest litigation so as to promote environmental justice.

¹⁷⁵ Twinomugisha, B.K., ‘Some Reflections on Judicial Protection of the Right to a Clean and Healthy Environment in Uganda’, 3/3 Law, Environment and Development Journal (2007), p. 244 at pg. 249.

¹⁷⁶ Misc. Cause No. 181 of 2004 (High Court of Uganda).

¹⁷⁷ S.20; See also *Waweru v Republic*, Nairobi High Court, Miscellaneous Civil Application No. 118 of 2004 KLR (E&L) 677 which called for involvement of everyone, including courts, in protection and restoration of the environment and its resources. This has been the trend around the world. For instance, in the Philippine case of *Minors Oposa v. Secretary of the Department of Environmental and Natural Resources*, 33 ILM 173 (1994), the Supreme Court of the Philippines found the following: The right to a clean environment, to exist from the land, and to provide for future generations are fundamental; There is an intergenerational responsibility to maintain a clean environment, meaning each generation has a responsibility to the next to preserve that environment, and children may sue to enforce that right on behalf of both their generation and future generations; The Philippine Constitution requires that the government “protect and promote the health of the people and instill health consciousness among them.” (see Section 15, Article II).

A group of children, including those of renowned environmental activist Antonio Oposa, brought this lawsuit in conjunction with the Philippine Ecological Network, Inc. (a non-profit organisation) to stop the destruction of the fast disappearing rain forests in their country. The plaintiff children based their claims in the 1987 Constitution of the Philippines, which recognises the right of people to a “balanced and healthful ecology” and the right to “self-preservation and self-perpetuation” (see Section 16, Article II). (Child Rights International Network, “*Minors Oposa v. Secretary of the Department of Environmental and Natural Resources*,” available at <https://www.crin.org/en/library/legal-database/minors-oposa-v-secretary-department-environmental-and-natural-resources/> [Accessed on 25/08/2017]

8.6 Role of Academia

The institutions of learning around the country can play an important role in promoting environmental justice. They can be useful channels through which relevant information on environmental matters and natural resources can reach the communities in means that such communities can appreciate. Such information would not only be useful in assisting the communities know how best the resources at their disposal can be utilised for betterment of their livelihoods but would also be useful in enabling the communities to understand the existing legal and institutional frameworks on natural resources management and thus be able to meaningfully engage the authorities during public participation opportunities. Coming up with study programmes that focus on the specific resources in the country and collaborating with funding organisations would be useful in ensuring that a reasonable number of members of the public in general and specific communities in particular are well versed with the exploitation and management of the various natural resources, thus enabling them help the larger community in appreciating the implications of natural resources management.

8.7 Advocacy

The role of civil society, Non-Governmental Organisations (NGOs) and other faith-based organisations has been prominent in agitating for effective and efficient natural resources management. It has been noted that Environmental justice activists call for policy-making procedures that encourage active community participation, institutionalise public participation, recognise community knowledge, and utilise cross-cultural formats and exchanges to enable the participation of as much diversity as exists in a community.¹⁷⁸

8.8 Public Interest Litigation

Public interest litigation is one viable way of enhancing environmental justice in Kenya. When people are given opportunities to move to judicial and other non-judicial forums, natural resource managers are most likely to manage resources more productively, efficiently, sustainably and effectively. The Constitution provides for the enforcement of environmental rights and states that if a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.¹⁷⁹ Further constitutional provisions that are useful in the promotion of the right under Article 70 are to be found under Articles 22¹⁸⁰, 23¹⁸¹ and 48¹⁸² thereof. These are important provisions that are aimed at promoting environmental justice for every person through use of public interest litigation.

¹⁷⁸ Schlosberg, D., 'Reconceiving Environmental Justice: Global Movements and Political Theories', op. cit. at p. 522.

¹⁷⁹ Art. 70(1).

¹⁸⁰ Art. 22(1) guarantees every person's 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. Such persons need not prove locus standi to institute the suit (Art. 22(2)).

¹⁸¹ Art. 23 confers the High Court with jurisdiction, in accordance with Art. 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

¹⁸² Art. 48 obligates the State to ensure access to justice for all persons and, if any fee is required, it be reasonable and not impede access to justice.

For instance, in December 2010 the Africa Network for Animal Welfare (ANAW), a Kenya non-profit organization, filed a case in the East Africa Court of Justice (EACJ) challenging the Tanzanian government's decision to build a commercial highway across the Serengeti National Park. On June 20, 2014, the court ruled that the government of Tanzania could not build a paved (bitumen) road across the northern section of the Serengeti, as it had planned. It issued a permanent injunction restraining the Tanzanian government from operationalising its initial proposal or proposed action of constructing or maintaining a road of bitumen standard across the Serengeti National Park subject to its right to undertake such other programmes or initiate policies in the future which would not have a negative impact on the environment and ecosystem in the Serengeti National Park.¹⁸³ Such decisions show the crucial role that courts can play in promoting environmental justice through stopping any government development plans that might negatively affect the environment or the livelihoods of communities.

In the case of *Lereya & 800 others v AG & 2 others*,¹⁸⁴ the plaintiff and others being the affected residents of Marigat Division of Baringo District sued the AG, Minister for Environment and Natural Resources and the National Environment Management Authority seeking the eradication of a weed plant on their land. They averred that the Food Agricultural Organization (FAO) introduced the weed, *Propis Juliflora* in Ng'ambo location in Marigat Division to curb desertification. The weed, which is invasive in nature allegedly, went out of control and caused harm to humans, livestock and the environment. The suit was objected to on grounds, *inter alia*, that the suit which was brought more than 20 years after the introduction of the plant was time barred and secondly that the plaintiffs had no specific interest in the subject matter and therefore lacked locus standi in the matter. The Court held that the preliminary objection on the ground of time limitation was not tenable because the weed was invasive in nature and its effects in the environment were long-term or continuing. Secondly, on the basis of section 3(3) and (4) of EMCA the preliminary objection on the ground of lack of locus standi had no merit.¹⁸⁵ However, this case was dismissed because the government had not been notified of the proceedings as required under the law.

The foregoing case is a good example of a scenario where the concerted efforts by the affected community to petition the court to enforce the right to clean and healthy environment were thwarted by procedural technicalities. Such technicalities should be addressed so as to ensure that the locals are able to access justice. As already indicated, procedural justice is not limited to environmental justice, but cuts across the whole spectrum of justice.¹⁸⁶ The basis of redress is the obligation on the State to ensure access to justice for all persons at reasonable fees so as not impede access to justice.¹⁸⁷ Further, the Constitution states that in exercising judicial authority, the courts and tribunals are to ensure *inter alia*, that justice is done to all irrespective of status;

¹⁸³ African Network for Animal Welfare (ANAW) v The Attorney General of the United Republic of Tanzania, Reference No. 9 of 2010.

¹⁸⁴ Nairobi HCCC No.115 of 2006 KLR(E&L) P. 761

¹⁸⁵ Previously, such rights as to petition court were unheard of and environmental rights cases were thrown out of the courts on technical grounds. Such infamous cases include, *inter alia*, Wangari Maathai –v- Kenya Times Media Trust (1989) 1KLR (E&L) which was dismissed for lack of standing.

¹⁸⁶ Todd, H., & Zografos, C., *Justice for the Environment: Developing a Set of Indicators of Environmental Justice for Scotland*, op. cit. p. 497.

¹⁸⁷ Art. 48.

justice is not delayed; and that justice is administered without undue regard to procedural technicalities.¹⁸⁸

In the past, public interest litigation has successfully been used to safeguard environmental rights. For instance, in *Hassan & 4 others v KWS*,¹⁸⁹ the applicants sought orders to restrain the respondent from removing and or dislocating a rare and endangered animal called Hirola from its natural habitat in Arawale to the Tsavo National Park on the grounds that it was a gift to the people of the area and should be left there. The respondent contended that the application was seeking to curtail the respondent from carrying out its express statutory mandate.

The court in granting the temporary injunction held, *inter alia*, that although Section 3A (d), (e) and (f) of the *Wildlife (Conservation & Management) Act* empowered the Respondent to conserve wild animals in their habitat, the respondent would be acting outside its powers if it were to move the animals away from their natural habitat without the express consent of those entitled to the fruits of the land which includes flora and fauna.

9. Conclusion

Environmental rights can best be realised through the advocacy of rights to access to information, to consultation in the decision-making process and to access to courts, revamped in an environmental setting. Environmental justice in Kenya is an ideal that can be achieved. Already there are laws, policies and institutions that can be used as platforms for enhancing access to justice. However, due to the many and divergent interests (including local communities, investors and national and county governments) and high stakes involved in natural resources governance, the road to environmental justice may not be easy. It will require the concerted efforts of all parties concerned to make environmental justice in Kenya a reality.

¹⁸⁸ Art. 159 (2).

¹⁸⁹ Nairobi HCCC No2959 of 1996 KLR (E&L) p. 214,

The Role of Courts in Safeguarding Environmental Rights in Kenya: A Critical Appraisal

Abstract

National courts play an important role in promoting and upholding human rights. They are the arm of the government that ensures that all the constitutionally guaranteed rights are enforced and safeguarded against any potential violation by state officials or any other person. This paper critically discusses the place of courts in enforcing and safeguarding environmental rights in Kenya for realisation of environmental justice and sustainable development.

1. Introduction

The preamble to the Constitution of Kenya recognises the importance of the environment and therefore calls for its respect, being the heritage of the Kenyan people, and also requires its sustenance for the benefit of future generations.¹ In addition, it also spells out and guarantees the right of every person to a clean and healthy environment and the need to have the same respected and protected.² Notably, scholars have pointed out that there is ‘considerable evidence that national courts are increasingly willing to apply international environmental obligations’³. It is in light of this that this paper discusses the place of national courts in the pursuit of environmental justice and protection of environmental rights in Kenya.

This paper first examines the status of environmental rights as envisaged under the laws of Kenya. The author then focuses on the role that courts can play in protecting and promoting environmental rights in Kenya. However, throughout the paper, there is a reference to some of the challenges that still hinder the full enjoyment of these rights by the Kenyan citizenry and how courts can help in overcoming them.

2. Legal Recognition and Protection of Environmental Rights in Kenya: Where are we?

The Preamble to the Constitution of Kenya places a duty on every person to conserve and sustainably manage the environment.⁴ Thus, every person has a constitutional duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.⁵ The citizenry should not only cooperate but also actively participate in sustainable environmental and natural resources matters through seeking court’s intervention.

Article 22(1) of the Constitution of Kenya guarantees the right of every person 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. Citizenry have a right of ensuring that their rights in relation

¹ Preamble, Constitution of Kenya, (Government Printer, 2010).

² Art. 42, Constitution of Kenya 2010.

³ Sands, P. and Peel, J., Principles of international environmental law, Cambridge University Press, 2012, p.47.

⁴ We, the people of Kenya—.....Respectful of the environment, which is our heritage, and determined to sustain it for the benefit of future generations...Committed to nurturing and protecting the well-being of the individual, the family, communities and the nation:....

⁵ Constitution of Kenya, Art. 69(2).

to the environment are not violated, by way of litigation.⁶ This is also captured in the various statutes such as the *Environmental Management and Co-ordination Act*⁷. The Constitution also recognises the right of every person to a clean and healthy environment.⁸

The Constitution provides that if a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.⁹ The Constitution goes further to provide that on such an application, the court may make any order, or give any directions, it considers appropriate—to prevent, stop or discontinue any act or omission that is harmful to the environment; to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or to provide compensation for any victim of a violation of the right to a clean and healthy environment.¹⁰

The protection and promotion of environmental rights in Kenya is further reinforced by the constitutionally recognised Environment and Land Court established under the *Environment and Land Court Act, 2011*¹¹, enacted to give effect to Article 162(2)(b) of the Constitution; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers, and for connected purposes.¹² The overriding objective this Act is to enable the Court to facilitate the just, expeditious, proportionate and accessible resolution of disputes governed by this Act.¹³

The Court has original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law

⁶ Art. 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; Art. 70(1) provides that if a person alleges that a right to a clean and healthy environment recognised and protected under Art. 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter. Furthermore, on application under clause (1), the court may make any order, or give any directions, it considers appropriate—to prevent, stop or discontinue any act or omission that is harmful to the environment; to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or to provide compensation for any victim of a violation of the right to a clean and healthy environment (Art. 70(2)). For the purposes of this Art., an applicant does not have to demonstrate that any person has incurred loss or suffered injury (Art. 70(3)). The right to seek legal redress is also guaranteed under s. 3(3) of the Environmental Management and Co-ordination Act, No. 8 of 1999.

⁷ No. 8 of 1999, Laws of Kenya, s. 3(3); See also Environmental Management and Co-ordination (Amendment) Act, 2015 which expands the provisions to include the right to clean and healthy environment and also the right of a person to file suit on his behalf or on behalf of a group or class of persons, members of an association or in the public interest (s. 3).

⁸ Art. 42. This right includes the right—to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Art. 69; and to have obligations relating to the environment fulfilled under Art. 70

⁹ Art. 70 (1).

¹⁰ Art. 70(2).

¹¹ No. 19 of 2011, Laws of Kenya. See S. 4 thereof.

¹² *Ibid*, Preamble.

¹³ *Ibid*, S. 3(1).

applicable in Kenya relating to environment and land.¹⁴ Further, in exercise of its jurisdiction under Article 162(2) (b) of the Constitution, the Court has power to hear and determine disputes, relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources; relating to compulsory acquisition of land; relating to land administration and management; relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests inland; and any other dispute relating to environment and land.¹⁵

The Court is also empowered to hear and determine applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.¹⁶ The Court may make any order and grant any relief as the Court deems fit and just, including, interim or permanent preservation orders including injunctions; prerogative orders; award of damages; compensation; specific performance; restitution; declaration; or costs.¹⁷ Where applicable, the Court is empowered to adopt and implement, on its own motion, with the agreement of or at the request of the parties, any other appropriate means of alternative dispute resolution including conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2) (c) of the Constitution. Indeed, where alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court must stay proceedings until such condition is fulfilled.¹⁸

It is therefore clear that environmental rights in Kenya are well entrenched under the Constitution and statutes on environmental law. All that remains is taking measures geared towards ensuring that all persons get to enjoy these rights as envisaged under the law.

3. The Role of Courts in Safeguarding Environmental Rights in Kenya: prospects and Challenges

3.1 Pre-Constitution 2010 Era

*Environmental Management and Co-Ordination Act*¹⁹ (EMCA) was enacted to provide for the establishment of an appropriate legal and institutional framework for the management of the environment and related matters.²⁰ The Act provides that in exercising the jurisdiction conferred upon it under the Act, the High Court is to be guided by the principles of sustainable development, *inter alia*; the principle of international co-operation in the management of environmental resources shared by two or more states²¹; the principles of intergenerational and intragenerational equity; the polluter-pays principle; and the pre-cautionary principle.²²

¹⁴ Ibid, S. 13(1).

¹⁵ Ibid, S. 13(2).

¹⁶ Ibid, S. 13(3).

¹⁷ Ibid, S. 13(7).

¹⁸ Ibid, S. 20.

¹⁹ Act No 8 of 1999.

²⁰ Ibid, Preamble.

²¹ The case of Friends of Lake Turkana v Attorney General and 2 others, ELC Suit 825 of 2012.

²² EMCA, S. 3(5).

Part XII,²³ section 125 of EMCA establishes the National Environment Tribunal (NET) which is charged with settling disputes that arises in matters provided for under the Act.²⁴ NET is charged with hearing appeals arising from administrative decisions of committees mandated to enforce environmental standards.²⁵ However, its decision is not final and any dissatisfied party may appeal to superior courts. This tribunal is an arbitral tribunal hence offering a much formalized approach to settlement of a dispute. The dispute resolution process is also free of legal and procedural technicalities which bed evils courts.

The Tribunal has over time resolved numerous disputes relating to the environment and it has greatly contributed to the conservation of the environment. One such instance is seen in the case of *Peter Mugoya and another v Director General, National Environment Management Authority (NEMA) and 2 others*,²⁶ which concerned a dispute relating to the construction of a Church building on a community forest land. In this case, the Tribunal cancelled the EIA Licence that had been granted to the Church and also revoked NEMA's letter of development approval that had been issued to the Church. The Church was further directed to restore the land to the condition it was in before their entry. This is just one of the many instances that the Tribunal has positively contributed to environmental conservation and protection of environmental rights for particular groups and the public in general.

Notably, dispute management procedures under EMCA require the active participation of NEMA, being the implementing agency, with any grievances being addressed by NET as an appeal which can however be heard by the Environment and Land Court as the final port of call. The role of NEMA in the safeguarding environment as established under EMCA was well summarized in the case of *Martin Osano Rabera & another v Municipal Council of Nakuru & 2 others [2018] eKLR*²⁷ in the following words:

72. Nevertheless, NEMA is not just an investigator and a prosecutor. Its success cannot be measured in terms of successful investigations and prosecutions. It has a bigger mandate: to be the principal instrument of government and the people of Kenya in the implementation of all policies relating to the environment. In deed under **section 9 (2)**, NEMA has mandatory obligations to among others co-ordinate with lead agencies to ensure the proper management and rational utilization of environmental resources on a sustainable yield basis for the improvement of the quality of human life in Kenya and to render advice and technical support, where possible, to entities engaged in natural resources management and environmental protection.

3.2 Post-Constitution 2010 Era

The constitutionalisation of the role of courts in promotion and protection of environmental rights is a step that seeks to ensure that these rights are treated as any other human rights that are justiciable under the laws of Kenya.

²³ SS. 125-136, No. 8 of 1999.

²⁴ S. 125, No. 8 of 1999.

²⁵ S. 126, No. 8 of 1999.

²⁶ Tribunal Appeal No. 99 of 2012.

²⁷ *Martin Osano Rabera & another v Municipal Council of Nakuru & 2 others [2018] eKLR*, Petition No. 53 of 2012.

It is however worth pointing out that even before the current Constitution of Kenya, Courts in Kenya still successfully handled environmental matters. For instance, in the case of *Waweru v Republic*,²⁸ the Court reiterated the position of Section 3 of Environment (Management and Conservation) Act 1999 (EMCA) which requires that courts take into account certain universal principles when determining environment cases. It also went further to state that apart from the EMCA it was of the view that the principles set out in section 3 do constitute part of international customary law and the courts ought to take cognisance of them in all the relevant situations. It therefore reiterated that courts had and still have a role in promoting sustainable development. In this case, the Court was to deal with four principles which it considered directly relevant to the matter at hand which were: Sustainable development; Precautionary principle; Polluter pays; and Public trust (not spelt out in EMCA).²⁹

The Court also stated that environmental crimes under the *Water Act*, *Public Health Act* and *EMCA* cover the entire range of liability including strict liability and absolute liability and ought to be severely punished because the challenge of the restoration of the environment has to be tackled from all sides and by every man and woman. Courts thus play an important and indispensable role in achieving sustainable development which means conflicts must be dealt with effectively.

The *Environment and Land Court Act*, 2011 provides that in exercise of its jurisdiction under the Act, the Court should be guided by the principles of sustainable development.³⁰ Access to courts is an important pillar in promoting environmental justice in Kenya. Courts have, however, been faced by a number of challenges that hinder people particularly local communities from vindicating their environmental rights. Although the Constitution of Kenya guarantees the right of every person to institute proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened with no need to prove *locus standi* to institute the suit, there still lies other challenges hindering access to courts such as the geographical location, complexity of rules and procedure and the use of legalese.³¹ There is also lack of information amongst the citizenry and ignorance of their rights as far as environmental rights are concerned. Uninformed people cannot make use of courts in fighting for their rights and thus, despite their recognition under the Constitution and other laws of Kenya, a lot still need to be done to achieve this full enjoyment of these rights for all. There are however a number of ways through which this can be addressed. It must however be pointed out that this cannot only be achieved by courts but they need the support of all stakeholders.

²⁸ (2007) AHRLR 149 (KeHC 2006).

²⁹ Ibid, para. 25.

³⁰ S. 18.

³¹ Strengthening Judicial Reform in Kenya: Public Perceptions and Proposals on the Judiciary in the new Constitution, ICJ Kenya, Vol. III, May, 2002; See also Muigua, K., Avoiding Litigation through the Employment of Alternative Dispute Resolution, pp. 6-7, a Paper presented by the author at the In-House Legal Counsel, Marcus Evans Conference at the Tribe Village Market Hotel, Kenya on 8th& 9th March, 2012. Available at <http://www.chuitech.com/kmco/attachments/Art./101/Avoiding.pdf>

3.3 Enhancing the Role of Courts in Safeguarding Environmental Rights in Kenya

3.3.1 Judicial Activism

There is no clear definition of some of the rights guaranteed in the Constitution regarding the environment and thus it is up to the courts to give guidance in certain matters. This would not be new as noted by some scholars. For instance, some scholars have argued that the role of courts in recognition of environmental rights around the world has been so fundamental that some scholars have argued that, whereas the right to a clean and healthy environment has rapidly gained constitutional protection around the world, in some countries, recognition of the right first occurred through court decisions determining that it is implicit in other constitutional provisions, primarily the right to life.³²

There is, therefore, a need for judicial activism so that jurisprudence in this area can be improved. For instance, there is no explanation of what, for example, amounts to a ‘clean and healthy environment.’ As noted by one author,³³ it took the court’s active role to delineate this right in *Uganda Electricity Transmission Co. Ltd v De Samaline Incorporation Ltd*,³⁴ where the court expanded the meaning of a clean and healthy environment as follows:

‘I must begin by stating that the right to a clean and healthy environment must not only be regarded as a purely medical matter. It should be regarded as a holistic social-cultural phenomenon because it is concerned with physical and mental well-being of human beings... a clean and healthy environment is measured in both ethical and medical context. It is about linkages in human well-being. These may include social injustice, poverty, diminishing self-esteem, and poor access to health services. That right is not restricted to a clinical model...’ (Emphasis added)

Notably, the *Environment and Land Court Act* gives the court *suo moto* jurisdiction.³⁵ It is arguable that the section allows judges to engage in judicial activism to safeguard environmental rights by ensuring sustainable development using the devices envisaged in Article 159 of the Constitution to ease access to justice. Courts may therefore act without necessarily waiting for filing of any cases on public interest litigation so as to promote environmental justice.

In the enforcement of other Constitutional rights such as economic and social rights and the right to life under the Constitution, courts should accord such provisions broad interpretations so as to address any environmental factors that impede access to the resources necessary for enjoyment of the rights in question as guaranteed under the Constitution.³⁶

3.3.2 Public Interest Litigation

Courts can support and encourage public interest litigation geared towards protection of environmental rights and enhancing environmental justice in Kenya. The Constitution provides

³² Boyd, D.R., ‘The Implicit Constitutional Right to Live in a Healthy Environment,’ *Review of European Community & International Environmental Law*, Vol. 20, No. 2, 2011, pp. 171-179 at p. 171.

³³ Twinomugisha, B.K., “Some Reflections on Judicial Protection of the Right to a Clean and Healthy Environment in Uganda,” *3/3 Law, Environment and Development Journal* (2007), p. 244, p. 249.

³⁴ Misc. Cause No. 181 of 2004 (High Court of Uganda).

³⁵ S. 20.

³⁶ Constitution of Kenya, Art. 43(1).

for the enforcement of environmental rights and guarantees that any person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.³⁷ Further, constitutional provisions that are useful in the promotion of the right under Article 70 are to be found under Articles 22,³⁸ 23³⁹ and 48⁴⁰ thereof. These are important provisions that are aimed at promoting environmental justice for every person through use of public interest litigation. This was also affirmed in the case of *Joseph Leboo & 2 others v Director Kenya Forest Services & another* [2013] eKLR⁴¹ where the Court stated that:

26. A reading of Articles 42 and 70 of the Constitution, above, make it clear, that one does not have to demonstrate personal loss or injury, in order to institute a cause aimed at the protection of the environment.

27. This position was in fact the applicable position, and still is the position, under the Environment Coordination and Management Act (EMCA), 1999, which preceded the Constitution of Kenya, 2010....

28. It can be seen that Section 3(4) above permits any person to institute suit relating to the protection of the environment without the necessity of demonstrating personal loss or injury. Litigation aimed at protecting the environment, cannot be shackled by the narrow application of the *locus standi* rule, both under the Constitution and statute, and indeed in principle. Any person, without the need of demonstrating personal injury, has the freedom and capacity to institute an action aimed at protecting the environment. The plaintiffs have filed this suit as representatives of the local community and also in their own capacity. The community, of course, has an interest in the preservation and sustainable use of forests. Their very livelihoods depend on the proper management of the forests. Even if they had not demonstrated such interest, that would not have been important, as any person who alleges a violation of any law touching on the environment is free to commence litigation to ensure the protection of such environment. I am therefore not in agreement with any argument that purports to state that the plaintiffs have no *locus standi* in this suit.

For instance, in December 2010, the Africa Network for Animal Welfare (ANAW), a Kenya non-profit organization, filed a case in the East Africa Court of Justice (EACJ) challenging the Tanzanian government's decision to build a commercial highway across the Serengeti National Park. On June 20, 2014, the court ruled that the government of Tanzania could not build a paved (bitumen) road across the northern section of the Serengeti, as it had planned. It issued a permanent injunction restraining the Tanzanian government from operationalising its initial

³⁷ Art. 70 (1).

³⁸ Art. 22(1) guarantee every person's 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. Such persons need not prove *locus standi* to institute the suit (Art. 22(2)).

³⁹ Art. 23 confers the High Court with jurisdiction, in accordance with Art. 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

⁴⁰ Art. 48 obligates the State to ensure access to justice for all persons and, if any fee is required, it be reasonable and not impede access to justice.

⁴¹ *Joseph Leboo & 2 others v Director Kenya Forest Services & another* [2013] eKLR, Environment and Land 273 of 2013.

proposal or proposed action of constructing or maintaining a road of bitumen standard across the Serengeti National Park subject to its right to undertake such other programmes or initiate policies in the future which would not have a negative impact on the environment and ecosystem in the Serengeti National Park.⁴²

Some of the ways through which courts can encourage aggrieved persons to make use of public litigation is being slow in awarding costs where such parties do not get favourable outcomes. This was in fact highlighted in the case of *Brian Asin & 2 others v Wafula W. Chebukati & 9 others [2017] eKLR*⁴³ where the place of public litigation in constitutional matters was summarised in the following words:

48. The rationale for refusing to award costs against unsuccessful litigants in constitutional litigation was appreciated by the South African constitutional court which observed that "an award of costs may have a chilling effect on the litigants who might wish to vindicate their constitutional rights."[27] The court was quick to add that this is not an inflexible rule[28] and that in accordance with its wide remedial powers, the Court has repeatedly deviated from the conventional principle that costs follow the result.[29]

49. The rationale for the deviation was articulated by the South African constitutional Court in *Affordable Medicines Trust vs Minister of Health* where **Ngcobo J** remarked:-

"There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious. There may be conduct on the part of the litigant that deserves censure by the Court which may influence the Court to order an unsuccessful litigant to pay costs. The ultimate goal is to do that which is just having regard to the facts and circumstances of the case."[30]

50. **Sachs J**, set out **three reasons** for the departure from the traditional principle:-

"In the first place it diminishes the chilling effect that adverse costs orders would have on parties seeking to assert constitutional rights. Constitutional litigation frequently goes through many courts and the costs involved can be high. Meritorious claims might not be proceeded with because of a fear that failure could lead to financially ruinous consequences. Similarly, people might be deterred from pursuing constitutional claims because of a concern that even if they succeed they will be deprived of their costs because of some inadvertent procedural or technical lapse.

Secondly, constitutional litigation, whatever the outcome, might ordinarily bear not only on the interests of the particular litigants involved, but on the rights of all those in similar situations. Indeed, each constitutional case that is heard enriches the general body of constitutional jurisprudence and adds texture to what it means to be living in a constitutional democracy.

⁴² African Network for Animal Welfare (ANAW) v The Attorney General of the United Republic of Tanzania, Reference No. 9 of 2010.

⁴³ *Brian Asin & 2 others v Wafula W. Chebukati & 9 others [2017] eKLR*, Petition 429 of 2017.

Thirdly, it is the state that bears primary responsibility for ensuring that both the law and state conduct are consistent with the Constitution. If there should be a genuine, non-frivolous challenge to the constitutionality of a law or of state conduct, it is appropriate that the state should bear the costs if the challenge is good, but if it is not, then the losing non-state litigant should be shielded from the costs consequences of failure. In this way responsibility for ensuring that the law and state conduct is constitutional is placed at the correct door.”^[31]

51. In addition to the above reasons, it is important to point out that costs are awarded at the unfettered discretion of the court, subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, but they must follow the event unless the court has good reason to order otherwise.^[32] Discussing the same point, the supreme court of Kenya in the case of *Jasbir Singh Rai & Others vs Tarlochan Rai & Others*^[33] observed that:-

“in the classic common law style, the courts have to proceed on a case by case basis, to identify “good reasons” for such a departure. An examination of evolving practices on this question shows that, as an example, matters in the domain of public interest litigation tend to be exempted from award of costs.....”

52. The reason for the above reasoning is that in public litigation, a litigant is usually advancing public interest as opposed to personal gain.

53. The primary consideration in constitutional litigation must be the way in which a costs order would hinder or promote the advancement of constitutional justice.^[34] The “nature of the issues” rather than the “characterization of the parties” is the starting point.^[35] Costs should not be determined on whether the parties are financially well-endowed or indigent.^[36]

54. The court in its discretion may say expressly that it makes no order as to costs and in that case each party must pay his own costs. But the court must not apply this or any other general rule in such a way as to exclude the exercise of the discretion entrusted to it and the material must exist upon which the discretion can be exercised. The discretion, like any other must be exercised judicially and the court ought not to exercise it against the successful party except for some reason connected with the case. It is not judicial exercise of the judge’s discretion to order a party who was completely successful and against whom no misconduct is even alleged to pay costs.^[37]

55. It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is a matter in which the trial Judge is given discretion.But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the **exercise of good grounds for doing so.**^[38]

56. It is correct that there are exceptions to the general rule that in constitutional litigation an unsuccessful litigant in proceedings against the state ought not to be mulcted with costs as they

may have a chilling effect on them. One of the exceptions, that justify a departure from the general rule, is where the litigation is frivolous or vexatious.^[39]

60. The Public Interest Litigation was designed to serve the purpose of protecting rights of the public at large through vigilant action by public spirited persons and swift justice.^[42] But the profound need of this tool has been plagued with misuses by persons who file Public Interest Litigations just for the publicity and those with vested political interests. ^[43]The courts therefore, need to keep a check on the cases being filed and ensure the *bona fide* interest of the petitioners and the nature of the cause of action, in order to avoid unnecessary litigations. Vexatious and mischievous litigation must be identified and struck down so that the objectives of Public Interest Litigation aren't violated. The constitution envisages the judiciary as "a bastion of rights and justice.

61. Public interest litigation is a highly effective weapon in the armory of law for reaching social justice to the common man. It is a unique phenomenon in the Constitutional Jurisprudence that has no parallel in the world and has acquired a big significance in the modern legal concerns.

62. Former Chief Justice of India A.S. Anand cautioned the over use of Public Interest Litigation and emphasized "Care has to be taken to see that Public Interest Litigation essentially remains public interest litigation and is not allowed to degenerate into becoming political interest litigation or private inquisitiveness litigation".^[44]

This was also affirmed in the case of *Republic v Independent Electoral and Boundaries Commission & 2 others Ex-Parte Alinoor Derow Abdullahi & others [2017] eKLR*⁴⁴ where the Court observed as follows:

21. With respect to the nature of litigation as a consideration in the award of costs, it is clear that in genuinely public interests litigation, Courts are reluctant to award costs. This in my view must be so for the realisation of the spirit of Article 3(1) of the Constitution which provides that:

Every person has an obligation to respect, uphold and defend this Constitution.

22. One of the ways in which this obligation performed is provided for in Article 258(1) and (2) of the Constitution which states that:

(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

- (a) a person acting on behalf of another person who cannot act in their own name;*
- (b) a person acting as a member of, or in the interest of, a group or class of persons;*
- (c) a person acting in the public interest; or*

⁴⁴ Republic v Independent Electoral and Boundaries Commission & 2 others Ex-Parte Alinoor Derow Abdullahi & others [2017] eKLR, Miscellaneous Application 388 of 2017.

(d) an association acting in the interest of one or more of its members.

23. Therefore the Constitution itself recognises that a person may commence legal proceedings not for his own interest but in the interests of the public. This was clearly appreciated by the Supreme Court in *Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 others* [2014] eKLR where it was held that:

“It is clear that there is no prescribed definition of any set of “good reasons” that will justify a Court’s departure, in awarding costs, from the general rule, costs-follow-the-event. In the classic common law style, the Courts have proceeded on a case-by-case basis, to identify “good reasons” for such a departure. An examination of evolving practices on this question, shows that, as an example, matters in the domain of public-interest litigation tend to be exempted from award of costs. In Amoni Thomas Amfry and Another v. The Minister for Lands and Another, Nairobi High Court Petition No. 6 of 2013, Majanja, J concurred with the decision in Harun Mwau and Others v. Attorney-General and Others, Nairobi High Court Petition No. 65 of 2011, [2012] eKLR, in which it was held [para.180]:

“In matters concerning public-interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the law in question without private gain should not be deterred from adopting a course that is beneficial to the public for fear of costs being imposed. Costs should therefore not be imposed on a party who has brought a case against the State but lost. Equally, there is no reason why the State should not be ordered to pay costs to a successful litigant.”

“It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.”

24. I also agree with Lenaola, J (as he then was) in *Okiya Omtatah Okiti vs. Communications Authority of Kenya & 14 Others* [2015] eKLR, where he expressed himself as hereunder:

“In my view, this Court has a duty to protect the noble motive of public interest litigation from those who file claims out of mischief and less than genuine interest in the guise of protecting a public interest. The filing of false and frivolous public interest litigation which risk diverting the Court’s attention from genuine cases will not be entertained.”

25. This position was also well captured in In **John Harun Mwau and 3 Others vs. Attorney General and 2 Others** [2012] eKLR the Court remarked at paras 179 and 180 that:

“The intent of Articles 22 and 23 of the Constitution is that persons should have free and unhindered access to this court for the enforcement of their fundamental rights and freedoms. Similarly, Article 258 allows any person to institute proceedings claiming the Constitution has been violated or is threatened. The imposition of costs would constitute a deterrent and would have a chilling effect on the enforcement of the Bill of Rights...In matters concerning public interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the law in question without private gain should not be deterred from adopting a course that is beneficial to the public for fear of costs being imposed.”

26. It is therefore clear that where a person is genuinely advancing public interest under the Constitution as he is obliged to do under Article 3(1) of the Constitution he ought not to be penalised in costs.

27. However this right to institute such proceedings ought not to be abused in order to achieve collateral purposes such as to in effect litigate on behalf of other persons who are able to litigate on their own but for some ulterior motives do not want to be in the forefront of litigation.

28. I therefore agree with the decision of **Warsame, J** (as he then was) in **Truth Justice and Reconciliation Commission vs. Chief Justice of the Republic of Kenya & Another [2012] KLR**, that:

“Though as Courts we spare no efforts in fostering and developing liberal and broadened litigation, yet we cannot avoid but express our opinion that while genuine litigants with legitimate grievances relating to matters which are dear to them must be addressed, the meddlesome interlopers having absolutely no grievances but who file claims for personal gain or as a proxy of others or for extraneous motivation break the queue by wearing a mask of public interest litigation and get into the Court corridors filing vexatious and frivolous cases. This criminally wasted the valuable time of the Court and as a result of which genuine litigants standing outside the Court in a queue that never moves thereby creating and fomenting public anger, resentment and frustration towards the courts resulting in loss of faith in the administration of justice.”

Courts dealing with public litigation in environmental matters can therefore, while bearing in mind the safeguards set out in the case of *Brian Asin & 2 others v Wafula W. Chebukati & 9 others* and the others cited above, make orders that promote the state’s efforts towards promotion and protection of environmental rights as well as realisation of the sustainable development agenda in general.

3.3.3 National Courts and Sustainable Development

Access to justice is one of the pillars of the Agenda 2030 on Sustainable Development Goals (SDGs). SDG Goal 16 seeks to ‘promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels’.

It has rightly been argued that there are other regulatory approaches to achieving environmental protection and public health that are not rights-based. These include economic incentives and disincentives, criminal law, and private liability regimes which have all formed part of the framework of international and national environmental law and health law.⁴⁵ For instance, the *Environmental Management and Co-ordination (Amendment) Act, 2015*⁴⁶ seeks to ensure that any area declared to be a protected area under section 54(1), may be managed in cooperation with any individual, community or government with interests in the land and forests and should *provide incentives to promote community conservation* (emphasis added).⁴⁷ Such an approach can boost the State's efforts in sustainable development.

In *Peter K. Waweru v Republic*,⁴⁸ the Court observed that '...environmental crimes under the Water Act, Public Health Act and EMCA cover the entire range of liability including strict liability and absolute liability and ought to be severely punished because the challenge of the restoration of the environment has to be tackled from all sides and by every man and woman...'.⁴⁹ The role of the State and the national courts, and indeed the general public, in promoting sustainable development through striking a balance between environmental conservation and development needs of the country was also reiterated in the case of *Patrick Musimba –vs- National Land Commission & 4 Others* (2016) eKLR⁵⁰ where the Court stated as follows:-

“...the State under Article 69 of the Constitution is enjoined to ensure sustainable development. (See also the preamble to the Constitution). The State is also to ensure that every person has a right to a clean and health environment. However, physical development must also be allowed to foster to ensure that the other guaranteed rights and freedoms are also achieved. Such physical development must however be undertaken within a Constitutional and Statutory framework to ensure that the environment thrives and survives. It is for such reason that the Constitution provides for public participation in the management, protection and conservation of the environment. It is for the same reason too that the Environmental Management and Coordination Act (“the EMCA”) has laid out certain statutory safeguards to be observed when a person or the State initiates any physical development.

At the core is the Environmental Impact Assessment and Study which is undertaken under Section 58 of the EMCA and the regulations thereunder. Under Regulation 17, the Environmental Impact Assessment Study must involve the public. The inhabitants of any area affected by a physical development must be given an opportunity to air their views on the effects of any such development. After the Environmental Impact Assessment Study report is compiled, the same report must be circulated to the affected persons.”

⁴⁵ Shelton, D., 'Human Rights, Health and Environmental Protection: Linkages in Law and Practice: A Background Paper for the WHO,' p. 3. Available at http://www.who.int/hhr/information/Human_Rights_Health_and_Environmental_Protection.pdf [Accessed on 12/1/2019].

⁴⁶ Environmental Management and Co-ordination (Amendment) Act, No. 5 of 2015, Laws of Kenya.

⁴⁷ S. 31, Environmental Management and Co-ordination (Amendment) Act, 2015.

⁴⁸ [2006] eKLR, Misc. Civ. Applic. No. 118 of 2004.

⁴⁹ p.14.

⁵⁰ Patrick Musimba –vs- National Land Commission & 4 Others (2016) eKLR, Petition 613 of 2014.

Courts should thus closely work with the rest of the stakeholders in not only safeguarding the environment but also ensuring that the country meets its international and national obligations towards realisation of the sustainable development agenda. Environmental obligations cannot be achieved by courts alone and this calls for cooperation among all stakeholders, including communities. Synergetic cooperation between the different state organs charged with different social affairs can also go a long way in achieving sustainability. This is one of the ways through which the economic and social rights and the right to life as guaranteed under the Constitution can be achieved. Some of the economic and social rights whose fulfilment largely depend on the state of the environment include *inter alia*, right 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; and to clean and safe water in adequate quantities.⁵¹

It is also important to remember that the Courts are under a constitutional obligation under Article 10 to uphold the principles of sustainable development. This includes protecting the environment for the sake of future generations. Courts can take proactive measures to ensure conservation and protection of the environment for sustainable development. They can ensure that communities and other private persons enjoy environmental democracy especially where such communities approach courts seeking justice and access to environmental information, and demand enforcement of environmental laws or compensation for damage. Courts can work closely with such local bodies to adequately and peaceably address conflict or disputes. Where state decision makers or such local bodies or tribunals attempt to bypass the legal requirements on public participation in decision-making in matters that greatly affect the livelihoods of a particular group of people, courts can use its constitutional powers to enforce and uphold the law.

Courts play an important role in giving life and meaning to human rights, including environmental rights, by providing a forum of last resort for human rights violations, at the national level.⁵² Courts should however consider adopting both anthropocentric and ecocentric approaches in protecting the environment and environmental rights as a way of overcoming any challenges that may arise from a requirement for proof by the complainant of actual or likely denial, violation, infringement or threat by the respondent. This can be pegged on the Courts' constitutional obligation under Article 10 to uphold the principles of sustainable development on protecting the environment for the sake of future generations. Courts ought to adopt an approach that does not emphasize on the likely denial, violation, infringement or threat to the right to clean and healthy environment but one that focuses on the protection and conservation of the environment and its resources, to ensure that all persons including those who cannot access justice through courts enjoy the above right.

⁵¹ Constitution of Kenya, Art. 43(1).

⁵² Boyd, D.R., 'The Constitutional Right to a Healthy Environment,' Environment: Science and Policy for Sustainable Development, July-August 2012, available at <http://www.environmentmagazine.org/Archives/Back%20Issues/2012/JulyAugust%202012/constitutional-rights-full.html> [Accessed on 12/1/2019].

4. Conclusion

Courts are important players in promoting and securing the environmental rights of persons as well as in environmental conservation and are therefore useful in achievement of peace, sustainable development and environmental justice for all. This therefore means that we cannot dispense with the role of courts in environmental matters. The Constitution stipulates that sustainable development is one of the national values and principles of governance that must bind all State organs, State officers, public officers and all persons whenever any of them—applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.⁵³

The foregoing statutory and constitutional provisions as well as the case law cited on environmental rights in Kenya demonstrate the central role that courts can play as far as recognition, promotion and implementation of the environmental rights and sustainable development agenda are concerned. The environment should be accorded some right, independent of the human beings. The constitutional recognition of the centrality of environment as the heritage of the people of Kenya should give the law makers, courts and other stakeholders an incentive and clear authority to take strong action to protect the environment.

Courts also need to work closely with the public as a way of enhancing identification of activities that violate environmental laws as well as increasing the rate of enforcement and compliance with court decisions, by bodies and individuals. This is because Kenyans have a role to play in achieving the ideal of a clean and healthy environment. There is need to cultivate a culture of respect for environment by all, without necessarily relying on courts for enforcing the same. Developing environmental ethics and consciousness through such means as dissemination of information and knowledge in meaningful forms can also enhance participation in decision-making and enhance appreciation of the best ways of protecting and conserving the environment.

Courts are also under an obligation to take lead role in promoting the use of traditional knowledge in environmental conflict management. They should offer support and uphold the relevant provisions where they are faced with such situations. Courts have a great and important role to play in facilitating realisation and safeguarding of environmental security. They should be driven by not only anthropocentric arguments for environmental conservation but also ecocentric justifications. Courts must discharge their obligations towards the environment on the understanding that anthropocentrism alone cannot effectively protect the environment and thus, ecocentrism should drive them towards being more proactive towards protecting the environment through such means as judicial activism.

Courts can be at the forefront in promoting and protecting environmental rights for realisation of environmental justice and sustainable development in Kenya, as envisaged under the current Constitution of Kenya as well as environmental laws.

⁵³ Constitution of Kenya, Art. 10(2) (d).

The Future of Environmental Conflict Management

Abstract

With the ever growing human population, coupled with decreasing environmental resources due to degradation and climate change, environmental conflicts are bound to increase across the globe but with more serious effects on developing countries. This means that states and other stakeholders must continually come up with more effective approaches to address these conflicts in light of the spirit of sustainable development. This calls for both knowledge-based and practical solutions. The author's main argument is that without continuous research and investment in environmental conflict management, sustainable development agenda may remain a mirage.

1. Introduction

Arguably, 'development policies should be an integral part of the peace-building agenda'.¹ In relation to this, it has also been observed that 'development has multiple dimensions from human rights to environmental sustainability, from economic growth to governance'.² Also notable is the assertion that 'the concept of security has gradually expanded from state security to human security and now includes a range of military as well as non-military threats that recognize no borders'.³

The United Nations 2030 Agenda for Sustainable Development (SDGs)⁴ provides in its Preamble that 'the State Parties were "determined to foster peaceful, just and inclusive societies which are free from fear and violence" as "there can be no sustainable development without peace and no peace without sustainable development".⁵ Notably, development and more so, sustainable development, is a multifaceted concept that requires achieving certain milestones in various sectors, such as social, political, environmental and economic spheres.⁶ It is for this reason that 'the heads of state established five fields of critical importance, or the "five Ps" of the 2030 SDG Agenda, which are people, planet, prosperity, peace and partnerships (Emphasis added).⁷ This paper offers some highlights on some of the main issues that must be addressed going forward as part of strengthening conflict management in environmental matters as well as part of achieving peaceful, just and inclusive societies as envisaged under the Sustainable Development Agenda.

¹ 'Understanding the Conflict-Development Nexus and the Contribution of Development Cooperation to Peacebuilding' (GSDRC) <<https://gsdrc.org/document-library/understanding-the-conflict-development-nexus-and-the-contribution-of-development-cooperation-to-peacebuilding/>> accessed 3 May 2022.

² International Peace Academy, 'The Security-Development Nexus: Research Findings and Policy Implications' (International Peace Institute 2006), 3 <<https://www.jstor.org/stable/resrep09516>> accessed 3 May 2022.

³ Ibid, 3.

⁴ UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1.

⁵ Ibid, Preamble.

⁶ 'Social Development for Sustainable Development | DISD' <<https://www.un.org/development/desa/dspd/2030agenda-sdgs.html/>> accessed 8 May 2022; Rodrigo Goyannes Gusmão Caiado and others, 'A Literature-Based Review on Potentials and Constraints in the Implementation of the Sustainable Development Goals' (2018) 198 Journal of cleaner production 1276.

⁷ Rodrigo Goyannes Gusmão Caiado and others, 'A Literature-Based Review on Potentials and Constraints in the Implementation of the Sustainable Development Goals' (2018) 198 Journal of cleaner production 1276, 4.

2. Enhancing Effective Environmental Conflict Management

2.1 Addressing Socio-Economic Issues

Reduction in poverty and concrete improvements in basic education, gender equality, and basic health, all underpinned by improved governance and environmental sustainability are seen as important in building sustainably peaceful and inclusive societies.⁸ It has been argued that development and peace-building must be integrated (not just linked) at an early stage – for example by including the political context in development policy and practice in conflict-affected fragile states and by addressing the structural causes of conflict.⁹ In addition, it has been acknowledged that strengthening state institutions and enhancing their capacity to provide security and development based on principles of good governance are essential for sound conflict management.¹⁰ In the same way, an effective, credible, and accountable security sector can provide a safe and secure environment in which to entrench other programming initiatives, all embedded in a predictable legal environment supported by culturally appropriate rule of law programs.¹¹

The worldwide community now supports the sustainable development agenda as a result of taking an integrated approach to development concerns and environmental conservation and protection. All development endeavours must be mindful of environmental preservation and protection in order to be considered sustainable.

There is a need for effective natural resources and environmental governance for fighting poverty, through accelerated economic growth and social empowerment of the people, effective and practical management of conflicts for peace-building, without which development cannot take place and ensuring that the right of access to justice is available to all regardless of their social, economic or political standing in the society.

The sustainable development agenda covers more than just environmental issues. This is because both anthropocentric and ecocentric viewpoints are used. Thus, it is necessary to promote sustainable development utilising the two approaches: Poverty eradication, food security, environmental democracy, environmental justice, environmental security, public participation, gender equity, access to information, and conflict resolution are just a few of the recurring themes that are influenced by the anthropocentric approach to environmental management. All of these topics are related to the larger topic of human rights while highlighting the unique connection between those topics and the environment. Conflicts caused by the environment and limited resources might quickly arise if these issues are not addressed. This is crucial given the new

⁸ Bernard Wood, 'Development Dimensions of Conflict Prevention and Peace-Building' [2001] UNDP. (June).

⁹ Thania Paffenholz, '19 Understanding the Conflict–Development Nexus and the Contribution of Development Cooperation to Peacebuilding' [2008] Handbook of conflict analysis and resolution 272.

¹⁰ Flavius Stan, 'The Security-Development Nexus: Conflict, Peace and Security in the 21st Century' (International Peace Institute, 14 October 2004) <<https://www.ipinst.org/2004/10/the-security-development-nexus-conflict-peace-and-security-in-the-21st-century>> accessed 8 May 2022.

¹¹ Ibid.

constitutional provisions on governance and the fact that the Bill of Rights contains Articles of the Constitution that address the environment and natural resources.¹²

Environmental health, environmental conservation for Mother Nature's sake, and discussions on the effects of resource extraction are all influenced by ecocentric ideas. However, advancing rights like the one to a clean, healthy environment has advantages from both an anthropocentric and an ecocentric perspective, thus it should be promoted.¹³

2.2 Enhancing Meaningful Participation in Environmental Management and Governance Issues

Environmental justice and democracy is also important for fighting climate change, environmental degradation and meaningful participation in environmental management and governance issues. The link between Alternative Dispute Resolution (ADR) and Traditional Dispute Resolution (TDR) Mechanisms should be explored continually and how the same can be used in enhancing access to justice for the Kenyan people and Africa in general as far as environmental conflicts are concerned. It is obvious that managing many current environmental and natural resource concerns involves collaboration among all impacted parties given the complexity of social-ecological systems. This is especially true when taking into account the fact that no one stakeholder, or sub-group of impacted stakeholders, has the expertise, authority, resources, or competencies to handle such challenges on their own.¹⁴

As a result, the sustainable development agenda promotes a coordinated strategy for addressing both environmental management issues and societal social issues.¹⁵ This is consistent with the strategy taken by the United Nations Development Programme (UNDP), which has argued for inclusivity, long-term political commitment, and national ownership in addition to the necessity of gender equality, integrated planning, budgeting, and monitoring as part of the 2030 Sustainable Development Goals (SDGs) agenda.¹⁶ There have also been proposals for an integrated strategy to execute sustainable development, with the argument that several SDGs are interrelated with one another. An integrated strategy entails managing trade-offs and maximising synergies across objectives.¹⁷

¹² Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016, pp. xi-xii.

¹³ *Ibid*, p. xii.

¹⁴ Fisher, Joshua. "Managing environmental conflict." *The handbook of conflict resolution: theory and practice* (2014): 3, p.9.

¹⁵ See also Hussein Abaza and Andrea Baranzini, *Implementing Sustainable Development: Integrated Assessment and Participatory Decision-Making Processes* (Edward Elgar Publishing 2002).

¹⁶ United Nations Development Programme, "Implementation of 2030 Agenda has to be inclusive, participatory and bottom-up," Jul 18, 2017. Available at <https://www.undp.org/content/undp/en/home/presscenter/pressreleases/2017/07/18/implementation-of-2030-agenda-has-to-be-inclusive-participatory-and-bottom-up.html> [Accessed on 6 August 2022]; See also Rizza Ambra, 'An Integrated Approach to the Sustainable Development Goals' (Assembly of European Regions, 4 March 2019) <<https://aer.eu/integrated-approach-sdgs/>> accessed 6 August 2022.

¹⁷ Rizza Ambra, 'An Integrated Approach to the Sustainable Development Goals' (Assembly of European Regions, 4 March 2019) <<https://aer.eu/integrated-approach-sdgs/>> accessed 6 August 2022.

In terms of the rule of law and sustainable development for a brighter future for Kenyan children, there is need for embracing and implementing SDG 16 which calls on State Parties to ‘promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels’. This will be important in addressing the issues that have a direct or indirect influence on the origin or management of environmental conflicts. Notably, this should be entwined with Kenya's experience in terms of establishing effectiveness in the frameworks for managing conflicts and the environment in order to realise the sustainable development objectives.

There will certainly be varying levels of complexity in each manifestation of environmental conflict with regard to each of the characteristics of environmental conflicts. This also calls for different approaches in their management, whether formal or informal, based on their nature.¹⁸ It has also been suggested that since social and ecological systems are intertwined, it is challenging to totally and permanently resolve an environmental issue. This is partly because each action has unanticipated and unforeseen effects on the dynamics of the broader system. Therefore, it may be preferable to create solutions that aim to manage disputes in a productive way rather than trying to resolve them.¹⁹ Some of the main reasons why environmental conflicts ought to be resolved expeditiously are that they greatly affect the livelihoods of people and also have the potential to overflow to other sectors of a country's framework.

It is worth pointing out that environment-related or natural resource use conflicts are not only political conflicts, although most of them are connected to public policies, policy programs, political controversies and political actors, unequal exchange and various forms of conflict resolution. The conflicts may originate in everyday practices of resource users, private persons or organisations that act in the institutionally channeled and regulated forms of cultural, political, economic and other specific forms of social systems.

2.3 Need for Inter- and Transdisciplinary Knowledge Syntheses

It has also been rightly pointed out that ‘political or governmental structures or actions are not always necessary for conflict mitigation. Many conflicts involving the use of resources take the form of multi-sectorial, multi-dimensional, and multi-scale conflicts that are concurrently economic, political, social, cultural, and ethnically charged. They can also be conflicts involving values, interests, user and property rights, and conflicts involving the requirements and needs of both human and non-human resource users. They demonstrate how many social realms, social systems, and ecological systems are interconnected due to their multidimensionality’.²⁰

In order to effectively manage and resolve conflicts, it is necessary to analyse the social, economic, and ecological systems and environments in which disputes and conflicts arise. These

¹⁸ Fisher, J., "Managing environmental conflict." *The handbook of conflict resolution: theory and practice* (2014): 3.

¹⁹ *Ibid*, p.9.

²⁰ Olsson, E. Gunilla Almered, and Pernille Gooch, eds. *Natural resource conflicts and sustainable development*. Routledge, 2019, p. 195.

must transcend the existing widely accepted notions of sustainability or sustainable development in environmental science, environmental law, and international environmental governance.²¹

There is a need for inter- and transdisciplinary knowledge syntheses to demonstrate the necessity and the forms of new development perspectives and improved conflict resolution procedures, given the likelihood of additional and intensifying conflicts as a result of global environmental change and the already present difficulties of conflict resolution. This must be done while keeping in mind the interconnectedness of conflict resolution and sustainable transformation in the context of global social and environmental change.²²

Particularly, the social and natural sciences are needed for multidisciplinary knowledge syntheses. Learning how to integrate empirical research, theories, and practical application, as well as how to combine information from social and natural scientific research, are the two main components of the overall socio-ecological transformative process. Both types of knowledge integration require methodological direction, critical analysis, evaluation, and the ability to learn from previous research and policy models, as well as from their successes and mistakes.²³

Notably, Article 11 of the Constitution of Kenya 2010 recognises the place of science and cultural knowledge in the development of the nation. There is a need for exploring the indigenous knowledge and environment and conflict management alongside the scientific knowledge in the quest for more effective conflict management and resolution approaches backed by empirical research, theories, and practical application by and from researchers and target communities. Thus, any existing or new approaches developed to address environmental conflicts must facilitate the active and meaningful participation of affected groups of persons or communities if the same are to bear lasting outcomes. The aggrieved persons must be made to feel that they have accessed justice and have also been part of the process for them to appreciate and embrace the outcome(s) of such processes.

3. Conclusion

This paper offers a discussion on how state agencies and other stakeholders can invest in conflict management in environmental matters through engaging all the stakeholders as well as investing in research and multi-sectoral knowledge in order to appreciate and make use of this knowledge in identifying and addressing the conflicts. The author argues that unless there is continuous engagement with stakeholders and appreciation of the past, current, future and all the contemporary issues surrounding environmental conflicts, finding lasting solutions may not be possible. Addressing these conflicts effectively is a fundamental requirement of achieving sustainable development agenda. The future of Environmental Conflict Management is in clearly in our hands

²¹ Ibid, p. 191.

²² Ibid, p. 195.

²³ Ibid, p. 195.

The Place of Environmental, Social and Governance (ESG) in Arbitration

Abstract

The paper critically discusses the relationship between Environmental, Social and Governance (ESG) and arbitration. The paper argues that arbitration represents a viable mechanism for managing ESG related disputes while simultaneously promoting ESG tenets. It addresses some of the current concerns in ESG and the ability of arbitration to deal with these concerns. The paper further proposes recommendations towards embracing arbitration in management of ESG disputes for Sustainable Development.

1. Introduction

Environment, Social and Governance (ESG) is a concept that seeks to promote sustainable, responsible and ethical corporate behavior by incorporating Environmental, Social and Governance concerns in corporate decision making¹. The growing threat of climate change and climate crisis has forced many investors to embrace sustainability as a key factor in investment decision-making². Further, social concerns touching on issues such as human rights, diversity, consumer protection and welfare and protection of animals especially endangered species have led to many companies taking their social responsibilities and especially impact of their commercial activities on the local communities where they operate more seriously than ever³. In addition, there has been growing corporate governance awareness since the 2008 global economic recession which has led to increase shareholder and stakeholder activism in demanding more responsive management structure, better employee relations, and reasonable executive compensation in companies⁴.

Consequently, how corporations handle environmental, social and governance issues is increasingly becoming a major concern especially for investors and other key stakeholders. Most investment decisions including assessment and valuation are incorporating ESG criteria with companies that are rated as having strong sustainability programs enjoying more preference from investors⁵. Matters touching on climate change and sustainability dominate current ESG focus⁶. In addition, human rights and especially the rights of indigenous peoples and governance structures of companies are enjoying prominent attention⁷. Many projects, investors and sponsors are also demanding more detailed identification and mitigation of environmental and social

¹ Stuart. L.G et al., 'Firms and social responsibility: A review of ESG and CSR research in corporate finance.' *Journal of Corporate Finance* 66 (2021): 101889.

² De Francesco. A.J., 'The impact of sustainability on the investment environment.' *Journal of European Real Estate Research* (2008)

³ Cedric.R., 'Accountability of Multinational Corporations for Human Rights Abuses.' *Utrecht Law Review* 14.2 (2018): 1-5.'

⁴ Martin.C et al., 'Corporate governance and the 2008–09 Financial Crisis.' *Corporate Governance: An International Review* 19.5 (2011): 399-404; See also Erkens. D.H, et al *Corporate governance in the 2007–2008 financial crisis: Evidence from financial institutions worldwide.* *Journal of corporate finance* 18.2 (2012): 389-411.

⁵ Muigua. K., 'Embracing Environmental, Social and Governance (ESG) Principles for Sustainable Development in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2022/07/Embracing-ESG-Principles-for-Sustainable-Development-in-Kenya.pdf> (accessed on 28/09/2022)

⁶ Ibid

⁷ Ibid

impacts of investment projects before making commitment or funding⁸. The importance of ESG tenets is evidenced by the change in the legal and regulatory landscape to reflect the expectations of investors, customers, employees and other stakeholders⁹.

The public scrutiny of corporations and the need to operate within socially acceptable standards have resulted in many corporations incorporating ESG commitments in commercial contracts¹⁰. These commitments can take various forms including respect for the environment, human rights and labour laws.¹¹ ESG related disputes can arise where corporations violate such commitments. Such disputes can be managed through various mechanisms including arbitration.

The paper seeks to discuss the place of Environmental, Social and Governance (ESG) in arbitration. It brings out the nexus between ESG and arbitration. The paper further highlights and discusses the viability of arbitration in management of ESG related disputes. It also proposes interventions towards embracing arbitration in management of ESG disputes for Sustainable Development.

2. The Nexus between Environmental Social and Governance (ESG) and Arbitration

Arbitration is form of Alternative Dispute Resolution (ADR) mechanisms. ADR refers to a set of mechanisms that are applied in management of disputes without resort to adversarial litigation¹². It has been described as a private and consensual process where parties to a dispute agree to present their grievances to a third party for resolution¹³. In Kenya, arbitration alongside other ADR mechanisms has been recognized under the Constitution¹⁴.

It is argued that ESG principles have become a model for sustainable business development through which a corporations' goal for solving environmental, social and governance problems is achieved¹⁵. Consequently, ESG considerations have an increasing impact in international business as evidenced by the incorporation of sustainability clauses in investment contracts¹⁶. In such contracts, investors are required to adhere to the concept of sustainable development as envisaged under the contracts and failure to do so may result in ESG related disputes.

In the wake of the climate change debate, there have been calls for responsible business practice towards climate change mitigation through measures such as reduction of carbon emissions¹⁷. The

⁸ Muigua. K., 'Realising Environmental, Social and Governance Tenets for Sustainable Development' available at <http://kmco.co.ke/wp-content/uploads/2022/07/Realising-Environmental-Social-and-Governance-Tenets-of-Sustainable-Development-Kariuki-Muigua-July-2022.pdf> (accessed on 28/09/2022)

⁹ Ibid

¹⁰ Von Wobeser., 'The Role of Arbitration in ESG Disputes' available at https://www.vonwobeser.com/index.php/publication?p_id=1650 (accessed on 28/09/2022)

¹¹ Ibid

¹² Muigua. K., 'Settling Disputes Through Arbitration in Kenya' Glenwood Publishers Limited, 4th Edition, 2022

¹³ Ibid

¹⁴ Constitution of Kenya, 2010, Article 159 (2) (c)

¹⁵ Mazhorina. M.V., 'ESG Principles in International Business and Sustainable Contracts' available at https://aprp.msal.ru/jour/article/view/3223?locale=en_US (accessed on 28/09/2022)

¹⁶ Ibid

¹⁷ International Arbitration in 2022., 'The Rising Significance of ESG and the Role of International Arbitration' available at <https://www.freshfields.com/en-gb/our-thinking/campaigns/international->

Paris Agreement on Climate Change has raised the awareness of the need for global efforts to combat climate change and the role of responsible and ethical corporate behavior towards achieving this goal¹⁸. Further, corporations are increasingly required to safeguard human rights as envisaged by ‘S’ pillar of ESG¹⁹.

However, some corporations have been accused of violating these ESG concerns as a result of their business practices. Some corporations have been accused of failing to promote climate change mitigation through reduction of carbon emissions and transitioning to cleaner energy production²⁰. Further, some corporations have been accused of violating fundamental human rights such as the right to a clean and healthy environment especially in the investment sphere in Africa²¹. These instances have resulted in an increasing number of ESG-related disputes.

The growth of ESG concerns has seen corporations being increasingly required to embrace ESG principles in their business practices. Consequently, ESG clauses are being adopted in commercial and investment contracts²². In case of violation of such clauses, ESG related disputes are bound to occur. It has been asserted that adoption of ESG-related practices into pre-existing social and governance models adopted by corporations would be disruptive²³. The inclusion of ESG clauses in commercial contracts not only points to the importance of ESG concerns to companies but it also serves as potential source of disputes where such considerations are not complied with²⁴. ESG issues are not only reshaping corporate behavior across the globe but can also be a potential battleground in international disputes²⁵. This creates the need for an effective mechanism of management of such disputes in order to enhance ESG principles in the quest for Sustainable Development.

Arbitration has for a long time been the most viable mechanism for management of international commercial and investment disputes²⁶. It offers a neutral forum for the management of disputes and addresses some of the concerns that parties may have in relation to the other parties’ legal system²⁷. In international commercial and investment arbitration, parties are reluctant to submit

arbitration-in-2022/the-rising-significance-of-esg-and-the-role-of-international-arbitration/ (accessed on 28/09/2022)

¹⁸ Von Wobeser., ‘The Role of Arbitration in ESG Disputes’ Op Cit

¹⁹ Ibid

²⁰ Ibid

²¹ Muigua. K., ‘International Investment Law and Policy in Africa: Human Rights, Environmental Damage and Sustainable Development’ available at <http://kmco.co.ke/wp-content/uploads/2018/11/International-Investment-Law-and-Policy-in-Africa-AILA-Conference-Paper-5-11-2018.pdf> (accessed on 28/09/2022)

²² International Arbitration in 2022., ‘The Rising Significance of ESG and the Role of International Arbitration’ Op Cit

²³ The ALP Review., ‘The Importance of ESG and its effect on International Arbitration’ available at <https://www.alp.company/sites/default/files/ALP%20Review%20-%20The%20Importance%20of%20ESG%20and%20its%20effect%20on%20International%20Arbitration.pdf> (accessed on 28/09/2022)

²⁴ Ibid

²⁵ Hamilton. J & Coulet-Diaz. M., ‘Arbitration & the ESG Era’ available at <https://www.whitecase.com/news/media/arbitration-esg-era> (accessed on 28/09/2022)

²⁶

²⁷ Moses. L.M, ‘The Principles and Practice of International Commercial Arbitration’ 2nd Edition, 2017, Cambridge University Press

to the jurisdiction of the other party due to the likelihood of favoritism by the host judicial system²⁸. Further, arbitration has the potential of facilitating expeditious management of disputes²⁹. In international commercial and investment arbitration, there is need to manage disputes expeditiously in order to preserve the commercial interests of parties.³⁰ The viability of arbitration in management of international commercial disputes is further enhanced by the availability of a legal framework for the recognition and enforcement of foreign arbitral awards. The *New York*³¹ Convention provides the legal framework for the recognition and enforcement of foreign arbitral awards across different jurisdictions.

Consequently, the adoption of ESG elements in international commercial and investment agreements has resulted in the use of arbitration to manage disputes arising from such agreements³². ESG concerns have become prominent in investor-state arbitration with arbitral tribunals having to determine issues relating to climate change, corruption and human rights³³. It has been asserted that the growth of ESG will redefine the practice of arbitration as it seeks to adapt to the new concerns created by ESG³⁴. However, the flexibility of arbitration and its ability to adapt to emerging concerns means that it is well positioned to manage ESG disputes³⁵. However, there is need for reform in order to enhance the role of arbitration in managing ESG disputes.

3. Enhancing the Role of Arbitration in Management of Environmental Social and Governance (ESG) Disputes

Arbitration represents a viable mechanism for management of ESG disputes. The following can be done towards enhancing the use of arbitration in ESG disputes:

3.1 Knowledge in ESG Concerns

Statistics show that many ESG related disputes are being managed through arbitration³⁶. According to the International Chamber of Commerce, engineering, construction and energy disputes represent the highest number of cases handled representing 38% of all cases registered in 2021³⁷. Such disputes entail ESG components such as renewable energy projects, environmental protection and human rights concerns³⁸. This demonstrates that ESG and arbitration are inextricably linked. Arbitration practitioners thus need to equip themselves with knowledge in ESG related matters in order to be better placed to manage ESG related disputes.

²⁸ Ibid

²⁹ Muigua. K., 'Promoting International Commercial Arbitration in Africa' available at <http://kmco.co.ke/wp-content/uploads/2018/08/PROMOTING-INTERNATIONAL-COMMERCIAL-ARBITRATION-IN-AFRICA.pdf>

³⁰ Ibid

³¹ United Nations Conference on International Commercial Arbitration, 'Convention on the Recognition and Enforcement of Foreign Arbitral Awards' United Nations, 1958

³² Von Wobeser., 'The Role of Arbitration in ESG Disputes' Op Cit

³³ Ross. A., 'We need talk about ESG' available at <https://globalarbitrationreview.com/we-need-talk-about-esg> (accessed on 28/09/2022)

³⁴ Hamilton. J & Coulet-Diaz. M., 'Arbitration & the ESG Era' Op Cit

³⁵ Ibid

³⁶ Von Wobeser., 'The Role of Arbitration in ESG Disputes' Op Cit

³⁷ International Chamber of Commerce., 'ICC Dispute Resolution Statistics: 2020' available at <https://iccwbo.org/publication/icc-dispute-resolution-statistics-2020/> (accessed on 28/09/2022)

³⁸ Ibid

3.2 Promoting Sustainable Development

Sustainable Development has been defined as development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs³⁹. This concept entails a combination of elements including environmental protection, economic development and social issues⁴⁰. The importance of Sustainable Development has seen the adoption of the Sustainable Development Goals as the global blueprint of development⁴¹. Most of the Sustainable Development Goals entail aspects of ESG such as clean water and sanitation, affordable and clean energy, industry, innovation and infrastructure and climate action⁴². Arbitration practitioners should therefore promote the principles of sustainable development when managing ESG related disputes. This could entail requiring investors to comply with the host country environmental laws and ESG standards in mining, energy and construction disputes which have an ESG bearing⁴³.

3.3 Upholding Human Rights

The 'S' pillar in ESG seeks to promote responsible and ethical corporate behavior through aspects such as respect for human rights⁴⁴. However, corporate behavior especially in the investment sphere in Africa has resulted in gross violation of human rights⁴⁵. Some corporations which have invested in oil exploration have been accused of human right abuses, environmental degradation and unsustainable peace due to their business culture⁴⁶. In Kenya, a multinational corporation that has invested in the agricultural sector has been accused of human right abuses such as killings, rape, and other forms of sexual and gender-based violence allegedly committed by its guards, bad labour practices and land injustices against the neighbouring communities⁴⁷.

Some of these disputes have ended up in arbitration where tribunals are called upon to adjudicate on human rights issues⁴⁸. Arbitrators should thus seek to uphold human rights in such disputes by

³⁹ World Commission on Environment and Development, *Our Common future*. Oxford, (Oxford University Press, 1987).

⁴⁰ Fitzmaurice, M., 'The Principle of Sustainable Development in International Development Law' *International Sustainable Development Law*, Vol. 1

⁴¹ United Nations., 'Sustainable Development Goals' available at <https://sdgs.un.org/goals> (accessed on 28/09/2022)

⁴² *Ibid*, Goals 6, 7, 9 and 13.

⁴³ The ALP Review., 'The Importance of ESG and its effect on International Arbitration' available at <https://www.alp.company/sites/default/files/ALP%20Review%20-%20The%20Importance%20of%20ESG%20and%20its%20effect%20on%20International%20Arbitration.pdf>

⁴⁴ Muigua. K., 'Embracing Environmental, Social and Governance (ESG) Principles for Sustainable Development in Kenya.' *Op Cit*

⁴⁵ Muigua. K., 'International Investment Law and Policy in Africa: Human Rights, Environmental Damage and Sustainable Development' *Op Cit*

⁴⁶ Maiangwa.B & Agbiboa.D., 'Oil Multinational Corporations, Environmental Irresponsibility and Turbulent Peace in the Niger Delta' *Africa Spectrum* 2/2013: 71-83

⁴⁷ Kenya Human Rights Commission., 'Heavy price for... egregious human rights violations' available at <https://www.khrc.or.ke/2015-03-04-10-37-01/press-releases/737-heavy-price-for-kakuzi-s-egregious-human-rights-violations.html> (accessed on 29/09/2022)

⁴⁸ Amao. O., 'Corporate Social Responsibility, Human Rights and the Law: Multinational corporations in Developing Countries.' Routledge, 2011.

rendering awards that are in line with human rights standards⁴⁹. By promoting human rights, arbitrators will be embracing the ‘S’ pillar that is fundamental in the ESG debate.

3.4 Promoting Good Governance

The Governance pillar in ESG seeks to achieve good financial and accounting standards as well as legal and regulatory compliance, such as transparency, corporate structures and ethics in corporate conduct⁵⁰. It also seeks to align Governance with the Sustainable Development Goals where governance issues include industry, innovation and infrastructure (Goal 9); peace, justice and strong institutions (Goal 16); and partnerships with public and private institutions (Goal 17)⁵¹. Good governance can be promoted through arbitration by rendering awards that adhere to good governance practices such as transparency, accountability, reporting and disclosure.

3.5 Seeking Expert Assistance in Complex ESG Matters

Arbitration has a significant role in promoting ESG tenets in areas such as climate change. Arbitrators play a significant role in shaping and adapting international law to respond to the climate crisis⁵². However, in some instances, arbitration has been slow to act in response to the climate crisis⁵³. Some climate change concerns such as determining adherence to climate change commitments through low carbon transition requires arbitrators to be fully informed and engaged in such concepts⁵⁴. This may require expert analysis and guidance from persons with requisite knowledge in environmental matters⁵⁵. Arbitrators should therefore seek expert assistance in such issues in order to be fully informed and render awards that promote ESG principles.

4. Conclusion

The relationship between Environmental, Social and Governance (ESG) and arbitration continues to grow. Adoption of ESG by corporations as a means of promoting responsible and ethical business practices and the wide use of arbitration in management of international commercial and investment disputes points to increased use of arbitration in management of ESG related disputes⁵⁶. In managing such disputes, arbitrators should promote ESG considerations whilst balancing the needs and interests of parties involved in issues such as climate change⁵⁷. Arbitration represents a viable mechanism for managing ESG disputes while simultaneously

⁴⁹ Krajewski, M. ‘Human Rights in International Investment Law: Recent Trends in Arbitration and Treaty-Making Practice.’ Available at SSRN 3133529 (2018).

⁵⁰ RL360, “Governance-The G in ESG,” Available at: <https://www.rl360.com/row/funds/investment-definitions/g-in-esg.htm> (accessed on 29/09/2022)

⁵¹ Sustainable Development’ available at <https://sdgs.un.org/goals> (accessed on 29/09/2022)

⁵² Greenwood, L., ‘The Canary is Dead: Arbitration and Climate Change’ *Journal of International Arbitration*, Volume 38, Issue 3 (2021)

⁵³ Ibid

⁵⁴ Miles, W., ‘BVI: A Frontline Focus for Resolving Future Climate Change Related Disputes’ available at https://www.bviiac.org/Portals/0/Files/Publications/Wendy%20Miles%20QC_BVI_A%20Frontline%20Focus%20for%20Resolving%20Future%20Climate%20Change%20Related%20Disputes.pdf (accessed on 29/09/2022)

⁵⁵ Cummins, T et al., ‘ESG Litigation – How Companies Can Get Ready, Respond and Resolve Claims’ available at <https://www.emerald.com/insight/content/doi/10.1108/JOIC-07-2021-0032/full/html> (accessed on 29/09/2022)

⁵⁶ Von Wobeser., ‘The Role of Arbitration in ESG Disputes’ Op Cit

⁵⁷ Ibid

The Place of Environmental, Social and Governance (ESG) in Arbitration

promoting Sustainable Development. There is need to enhance the viability of arbitration in management of ESG related disputes.

Environmental Conflicts Management: A Kenyan Perspective

Abstract

Certain areas of Kenya have often been faced with environmental conflicts related to access, ownership and control of environmental resources. This has regularly made the government of the day to put in place and employ approaches that they hope will resolve the problem. However, this has not prevented more conflicts to arise in the targeted areas and more. This paper highlights some perspectives relating to environmental conflicts management in Kenya ranging from emergence and management of environmental conflicts, and access to justice using both formal and informal mechanisms. The argument is that even as Kenya strives towards achieving sustainable development and addressing environmental conflicts, it must do so by taking into account its unique needs and circumstances.

1. Introduction

Three development pillars, including the economic, social, and political pillars, serve as the foundation for Kenya's Vision 2030.¹ As it has been noted, "Kenya's road towards universal prosperity also requires the establishment of a just and cohesive society that experiences equitable social development in a clean and safe environment," the Social Pillar of the Vision 2030 aspires to invest in the people.² It is noteworthy that the Political pillar of Vision 2030 also aims to create "a democratic political system that is issue-based, people-centered, result-oriented, and accountable to the public" and "a country with a democratic system reflecting the aspirations and expectations of its people, in which equality is entrenched, irrespective of one's race, ethnicity, religion, gender, or socio-economic status; a nation that not only respects but also harnesses the diversity of its people's values".³

It's important to note that the aforementioned motivations are closely related to peacebuilding initiatives, which are also supported by the United Nations 2030 Agenda for Sustainable Development (SDGs), which states in its Preamble that "the State Parties were "determined to foster peaceful, just and inclusive societies that are free from fear and violence" because "there can be no sustainable development without peace and no peace without sustainable development."⁴ The SDGs also state that "the new Agenda recognizes the need to build peaceful, just, and inclusive societies that provide equal access to justice and that are based on respect for human rights (including the right to development), on effective rule of law and good governance at all levels, and on transparent, effective, and accountable institutions."⁵ According to the aforementioned, SDG 16 is the substantive objective devoted to peace and it states that States shall "promote peaceful and inclusive societies for sustainable development, offer access to justice for all, and build effective, accountable, and inclusive institutions at all levels."⁶

¹ 'About Vision 2030 | Kenya Vision 2030' <<http://vision2030.go.ke/about-vision-2030/>> accessed 1 May 2022.

² 'Social Pillar | Kenya Vision 2030' <<http://vision2030.go.ke/social-pillar/>> accessed 1 May 2022.

³ 'Foundation for The Pillars | Kenya Vision 2030' <<https://vision2030.go.ke/enablers-and-macros/>> accessed 1 May 2022.

⁴ Ibid, Preamble.

⁵ Ibid, para. 35.

⁶ Ibid, SDG 16.

While Kenya's attempts to implement the Sustainable Development Agenda are impressive in terms of economic growth and even certain social goals,⁷ the same cannot be said about the social pillar, and particularly, peacebuilding efforts. For instance, it has been observed that 'Kenya is a large multi-ethnic country, with over 40 different ethnic groups and many overlapping conflicts which range from high levels of sexual and gender-based violence and of intercommunal violence; low levels of persistent violence; cycles of election-related violence; and increasing numbers of terrorist attacks'.⁸ The high levels of violence in Kenya have been attributed to a range of factors including: ethnic intolerance; border conflicts; political party zoning; competition over land and other resources; proliferation of small arms; weak security; and poverty, underdevelopment, and marginalization.⁹

Existing literature on causes of conflict has highlighted the fact that there is not a single developmental variable that causes conflict, but many variables that foster violence when combined in specific contexts and this may be in relation to issues such as:

Globalisation and the transformation of societies: The first stage of democratization, when pressure is exerted on authoritarian governments, is often accompanied by violence; Economic growth and income: Economic growth may increase the risk of armed conflict in very poor economies, but decrease this risk in richer economies; Poverty and inequality: A simple link between each of these factors and conflict has been questioned as each context involves specific, complex variables; Resources: Whether environmental conflict becomes violent depends largely on the government's environmental policy. The 'war economy' debate suggests that war may be seen as an alternative way of generating profit, power and protection; and aid: The aid system can inadvertently exacerbate conflict, as it did in Rwanda, where some have gone further to suggest that donors may use aid allocation as a political instrument.¹⁰

While conflict has been defined variously by different scholars, some of the most comprehensive definitions include: conflict is a struggle over values and claims to scarce status, power and resources in which the aims of the conflicting parties are to injure or eliminate their rivals; conflict is a particular relationship between states or rival factions within a state which implies subjective

⁷ 'Kenya Making Steady Progress towards Attainment of SDGs, President Kenyatta Says | The Presidency' <<https://www.president.go.ke/2019/09/25/kenya-making-steady-progress-towards-attainment-of-sdgs-president-kenyatta-says/>> accessed 1 May 2022; 'Lessons From the South: Towards Sustainable Development a Green Economy in Kenya | Youthpolicy.Org' <<https://www.youthpolicy.org/blog/sustainability/kenya-green-economy-transition/>> accessed 1 May 2022; James Macharia, 'Sustainable Development in Kenya' [2019] *Horizons: Journal of International Relations and Sustainable Development* 172; 'Sustainable Development in Kenya' (CIRSD) <<http://www.cirsd.org/en/horizons/horizons-winter-2019-issue-no-13/sustainable-development-in-kenya>> accessed 1 May 2022.

⁸ 'Conflict Analysis of Kenya' (GSDRC) <<https://gsdrc.org/publications/conflict-analysis-of-kenya/>> accessed 1 May 2022.

⁹ *Ibid.*

¹⁰ Thania Paffenholz, '19 Understanding the Conflict–Development Nexus and the Contribution of Development Cooperation to Peacebuilding1' [2008] *Handbook of conflict analysis and resolution* 272 <<https://gsdrc.org/document-library/understanding-the-conflict-development-nexus-and-the-contribution-of-development-cooperation-to-peacebuilding/>> accessed 3 May 2022.

hostilities or tension manifested in subjective economic or military hostilities.¹¹ Though there are two broad categories of conflicts, that is, on the one hand, internal conflicts (or intra- states conflict) as one in which the governmental authorities of a state are opposed by groups within that state seeking to overthrow those authorities with force of arms or one in which armed violence occurs primarily within the borders of a single states, and on the other hand, international conflicts or interstate conflicts which is between two or more nations involving forces of more than one state¹², Kenya has often struggled with internal conflicts mainly relating to ethnic clashes influenced by ethnic diversity and the provision of public goods, natural resources scarcity or abundance as well as political influence,¹³ with a few international ones.¹⁴ The conflicts exacerbating situation has also been attributed to ‘weak or non-existent structures and institutions for conflict prevention and response’.¹⁵ This has often dragged the country in achieving its development goals and sustainability in all spheres of life.

Kenya has documented instances of violence ranging from high levels of sexual and gender-based violence and intercommunal violence to low levels of chronic violence, cycles of violence tied to elections, and an increase in terrorist attacks.¹⁶ Numerous causes contribute to the high levels of violence, such as: i) racial intolerance; ii) boundary disputes; iii) political party zoning; iv) rivalry over land and other resources; v) the proliferation of small arms; vi) lax security; and vii) poverty, underdevelopment, and marginalization.¹⁷ Although there have long been issues with land conflict in Africa, there have been heated discussions about how to resolve them. The majority of these discussions have focused on reforms that put the needs of the people first and market-based land regimes.¹⁸ During the 1990s and the beginning of the 2000s, Kenya's conflict transformation

¹¹ AJ Olaosebikan, ‘Conflicts in Africa: Meaning, Causes, Impact and Solution’ (2010) 4 African Research Review 549, 550-551.

¹² Ibid, 551.

¹³ Kenya Human Rights Commission, *Maasive Internal Displacements in Kenya Due to Politically Instigated Ethnic Clashes* (Kenya Human Rights Commission 2007); see also Eric Thomas Ogwora, ‘Electoral Bribery and Corruption: A Deterrent and a Game Changer towards Democratic Process and Fair Election in Kenya’ (2017) 1 Journal of Popular Education in Africa; Caroline Elkins, ‘What’s Tearing Kenya Apart? History, for One Thing’ [2008] Washington Post; Beneah M Mutsotso, ‘The Boundary Shifters of North Western Kenya’; Dominic Burbidge and Nic Cheeseman, ‘Trust, Ethnicity and Integrity in East Africa: Experimental Evidence from Kenya and Tanzania’ (2017) 2 Journal of Race, Ethnicity and Politics 88.

¹⁴ ‘Kenya Denies Role in Somalia’s Internal Conflict | Voice of America - English’ <<https://www.voanews.com/africa/kenya-denies-role-somalias-internal-conflict>> accessed 8 May 2022; Deutsche Welle (www.dw.com), ‘Stability at Risk as Somalia and Kenya Spat over Sea Border | DW | 15.03.2021’ (DW.COM) <<https://www.dw.com/en/kenya-somalia-border-dispute-threatens-stability/a-56879109>> accessed 8 May 2022; ‘Summaries | Maritime Delimitation in the Indian Ocean (Somalia v. Kenya) | International Court of Justice’ <<https://www.icj-cij.org/en/case/161/summaries>> accessed 8 May 2022;

¹⁵ Lillian Mworira and J Ndiku, ‘Inter Ethnic Conflict in Kenya: A Case of Tharaka-Tigania Conflict, Causes, Effects and Intervention Strategies’, 163.

¹⁶ Rohwerder, Brigitte. "Conflict analysis of Kenya." Birmingham, UK: GSDRC, University of Birmingham (2015), p.2. Available at <http://www.gsdrc.org/wp-content/uploads/2015/12/KenyaConflictAnalysis.pdf> [Accessed on 13 February 2022].

¹⁷ Ibid, p.2.

¹⁸ Onguny, P. and Gillies, T., "Land Conflict in Kenya: A Comprehensive Overview of Literature." Les Cahiers d'Afrique de l'Est/The East African Review 53 (2019), p.53.

process was largely influenced by the relationship between political, security, economic, social, legal, and environmental variables in conflict.¹⁹

Considering the central role that land plays in community livelihoods, any decisions affecting the same is a potential trigger of resource and environmental conflicts. Kenya is no exception to these circumstances as some of the worst conflicts in the country have been as a result of land issues. Africa's core industries are agriculture and urbanization, and for nations that rely so largely on agriculture, the effects of climate change are slowly making these issues worse, particularly in terms of land arability, erosion, sterility, and water shortage.²⁰ When it comes to humanitarian issues on a global scale, climate change makes matters worse by increasing the number of environmental refugees, which makes things more fragile and eventually invites assaults against state sovereignty.²¹

Kenya has made great progress in its pursuit of addressing environmental issues and conflict resolution. Many authors have weighed in on the arguments surrounding the emerging international jurisprudence and the changing domestic legislation. In Kenya, environmental narratives regarding land conflicts may be found in the literature on conservation, and they serve as a major justification for conflicts over land. Environmental justifications for land disputes are based on the escalating fights for food and water security as a result of climatically unpredictable weather.²²

This paper highlights some perspectives relating to environmental conflicts management in Kenya ranging from emergence and management of environmental conflicts, access to justice using ADR mechanisms.

2. Emergence and Management of Conflicts in Kenya

The Constitution of Kenya outlines the State's responsibility to protect the environment, and it calls for citizen engagement and the use of natural resources for the good of all Kenyans. It enables the Environmental and Land Court to hear and decide on claims for redress of denial, violation, or infringement of rights and basic freedoms linked to a clean and healthy environment.²³

Frameworks for thorough impact assessments and environmental restoration are provided under the Environmental Management and Coordination Act. Conflicts over the ownership, usage, and extraction of natural resources, whether they be land, water, or non-renewable resources like

¹⁹ Republic of Kenya, "National Conflict Mapping and Analysis: Peace and Conflict Trends in Kenya," Simplified Version 2011, p.6. Available at file:///C:/Users/user/Downloads/Conflict_Mapping_Simplified_Version.pdf [Accessed on 13 February 2022].

²⁰ Onguny, P. and Gillies, T., "Land Conflict in Kenya: A Comprehensive Overview of Literature." *Les Cahiers d'Afrique de l'Est/The East African Review* 53 (2019), p.55.

²¹ *Ibid*, p.55.

²² Onguny, P. and Gillies, T., "Land Conflict in Kenya: A Comprehensive Overview of Literature." *Les Cahiers d'Afrique de l'Est/The East African Review* 53 (2019), p.60.

²³ Nolasco, Lazarus Kubasu, "The management of conflicts in Kenya" (2017), p. 18. Available at https://www.rosalux.de/fileadmin/images/Dossiers/Positiver-Frieden/Conflicts_and_Their_Management_in_Kenya.pdf [accessed 14 April 2022].

hydrocarbons and minerals, can, nonetheless, have a negative impact on peace and security.²⁴ Resource conflicts can propagate potentially harmful elements affecting community stability even if there is no open, violent confrontation.²⁵

Conflicts over land are growing more common in Sub-Saharan Africa, a region where access to land has historically been seen as being quite egalitarian. Localized land disputes have the potential to escalate into widespread social unrest and political movements.²⁶ The States employs both formal and informal mechanisms in addressing the environmental conflicts in the country.

3. Peacebuilding and Conflict Management in Kenya: Towards Effective Peacebuilding and Environmental Conflict Management

3.1 Addressing Poverty, Ethnic and Social stratification

As already pointed, some of the conflicts in Kenya have been attributed to ethnic clashes as well as poverty and marginalisation of some parts of the country by successive governments.²⁷ It has been observed that ‘the politicized nature of ethnicity in Kenya, and the fact that both elections and land tenure are closely associated with ethnic identity, are highlighted as key factors explaining the prevalence of violent communal conflict’, with the four main drivers of conflict being: electoral politics, cattle raiding, local resources, and boundaries and local authority.²⁸ Some conflicts among neighbouring communities in Kenya such as the Turkana and Pokot who have had periodic conflicts have been attributed to scarcity and competition over pasture and water as well as border disputes, and often compounded by the minimum routine interaction and communication between the two communities.²⁹

Poverty is a major contributing factor to insecurity and instability especially in the rural areas where communities mainly rely on scarce land based natural resources which are affected by climate change and population growth, among others. It has been observed that ‘rural poverty can be caused by a combination of: living and farming in unfavourable conditions (climate, soils, access to markets, small land holdings); lack of resource access rights, legal protection or recognition; lack of ecosystem services (provisioning, regulating, cultural/spiritual, regenerative);

²⁴ Ibid, p.18.

²⁵ Ibid, p.18.

²⁶ Moyo, S., *The land question in Africa: research perspectives and questions*. Codesria, 2003. <<https://sarpn.org/documents/d0000692/P763-Moyo.pdf>> [accessed 14 April 2022].

²⁷ Friedrich Elbert Stiftung, ‘Regional Disparities and Marginalisation in Kenya’ [2012] Nairobi: Elite PrePress; Emma Elfversson, ‘Patterns and Drivers of Communal Conflict in Kenya’ in Steven Ratuva (ed), *The Palgrave Handbook of Ethnicity* (Springer 2019) <https://doi.org/10.1007/978-981-13-2898-5_50> accessed 14 April 2022.

²⁸ Emma Elfversson, ‘Patterns and Drivers of Communal Conflict in Kenya’ in Steven Ratuva (ed), *The Palgrave Handbook of Ethnicity* (Springer 2019) <https://doi.org/10.1007/978-981-13-2898-5_50> accessed 14 April 2022; Anne R Gakuria, ‘Natural Resource Based Conflict among Pastoralist Communities in Kenya’ (PhD Thesis, University of Nairobi 2013); Lillian Mworira and J Ndiku, ‘Inter Ethnic Conflict in Kenya: A Case of Tharaka-Tigania Conflict, Causes, Effects and Intervention Strategies’.

²⁹ Lillian Mworira and J Ndiku, ‘Inter Ethnic Conflict in Kenya: A Case of Tharaka-Tigania Conflict, Causes, Effects and Intervention Strategies’, 163.

lack of income opportunities (on- or off-farm) in local economies; and lack of investment in the (few) opportunities that exist for market-based ventures.³⁰

Social stratification in any society may lead to bottled up anger and bitterness which is a recipe for violent and non-violent conflicts.³¹ Despite the constitutional guarantee on freedom from non-discrimination³², protection of the minority and marginalized groups including women through affirmative action,³³ it is a documented fact that inequalities are manifest in Kenya's economic, social and political arenas.³⁴ It has rightly been observed that 'a degree of equality in social, political, economic and cultural rights is essential for rebuilding the trust between the state and

³⁰ Meine van Noordwijk, 'Integrated Natural Resource Management as Pathway to Poverty Reduction: Innovating Practices, Institutions and Policies' (2019) 172 *Agricultural Systems* 60, 61.

³¹ Ben Fine, *Theories of Social Capital: Researchers Behaving Badly* (Pluto press 2010); Philip Arestis, Aurelie Charles and Giuseppe Fontana, 'Power, Intergroup Conflicts and Social Stratification in the United States: What Has the Global Crisis Taught Us?' (2015) 73 *Review of Social Economy* 370.

³² Article 27, Constitution of Kenya 2010.

³³ Article 11 recognizes culture as the foundation of the nation and obliges the state to promote all forms of cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage. The state is also obliged to recognize the role of indigenous technologies in the development of the nation.

Article 56. Minorities and marginalised groups

The State shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups—

- (a) participate and are represented in governance and other spheres of life;
- (b) are provided special opportunities in educational and economic fields;
- (c) are provided special opportunities for access to employment;
- (d) develop their cultural values, languages and practices; and
- (e) have reasonable access to water, health services and infrastructure.

100. Promotion of representation of marginalised groups

Parliament shall enact legislation to promote the representation in Parliament of—

- (a) women;
- (b) persons with disabilities;
- (c) youth;
- (d) ethnic and other minorities; and
- (e) marginalised communities.

177. Membership of county assembly

(1) A county assembly consists of—

- (c) the number of members of marginalised groups, including persons with disabilities and the youth, prescribed by an Act of Parliament;

Article 204. Equalisation Fund

(1) There is established an Equalisation Fund into which shall be paid one half per cent of all the revenue collected by the national government each year calculated on the basis of the most recent audited accounts of revenue received, as approved by the National Assembly.

(2) The national government shall use the Equalisation Fund only to provide basic services including water, roads, health facilities and electricity to marginalised areas to the extent necessary to bring the quality of those services in those areas to the level generally enjoyed by the rest of the nation, so far as possible.

³⁴ Jeremiah Owiti, 'Political Drivers of Inequality in Kenya' (2014) 57 *Development* 547, 548.

society and among social groups.³⁵ It has also been suggested that there is a correlation between more inclusive and open models of negotiations and a higher likelihood that the outcome agreements will hold and prevent a relapse into conflict.³⁶

Under the Constitution of Kenya 2010, the devolved system of governance was meant to, *inter alia*, promote democratic and accountable exercise of power, and foster national unity by recognizing diversity; give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them; recognize the right of communities to manage their own affairs and to further their development; facilitate the decentralization of State organs, their functions and services, from the capital of Kenya, Nairobi; and enhance checks and balances and the separation of powers.³⁷ While devolution has achieved commendable steps towards attaining equality and equity within the rural Kenya³⁸, the poverty levels and social, political and economic inequalities in the country are still high.³⁹ Rampant corruption and misallocation of political and economic resources in Kenya and especially at the county levels of governance may be some of the main factors that may be contributing to the slow pace of poverty alleviation despite the proximity of the rural areas to the devolved governance.⁴⁰

There is need for stakeholders to go back to the drawing board on why devolution was introduced by the drafters of the Constitution while also ensuring that the national values and principles of governance are applied and upheld at both levels of governance, and these include: a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized; (c) good governance, integrity, transparency and accountability; and (d) sustainable development.⁴¹ Chapter six of the Constitution on leadership and integrity, Chapter Twelve on Public Finance, Values and principles of public service under Chapter Thirteen of the Constitution on Public service, *Leadership and Integrity Act*, 2012⁴² should also be strictly enforced to ensure that there is real development at the grassroots in efforts to eradicate abject poverty. This will also potentially address the concerns on ethnic, nepotism and favouritism during employment of devolved governments' staff.⁴³

³⁵ Hanny Cueva Beteta, Colleen Russo and Stephanie Ziebell, *Women's Participation in Peace Negotiations: Connections between Presence and Influence* (New York: UN Women 2010), 3.

³⁶ *Ibid.*, 3.

³⁷ George Nyabuga, 'Devolved Power: A Critical Interrogation of the Place, Roles and Obligations of the Media at the Grassroots in Kenya' (2017) 42 *Africa Development / Afrique et Développement* 105, 107.

³⁸ Michelle D'Arcy, 'Kenya Illustrates Both the Promise as Well as the Pitfalls of Devolution' (The Conversation) <<http://theconversation.com/kenya-illustrates-both-the-promise-as-well-as-the-pitfalls-of-devolution-96729>> accessed 8 May 2022.

³⁹ Brendon J Cannon and Jacob Haji Ali, 'Devolution in Kenya Four Years On: A Review of Implementation and Effects in Mandera County' (2018) 8 *African Conflict and Peacebuilding Review* 1.

⁴⁰ Brendon J Cannon and Jacob Haji Ali, 'Devolution in Kenya Four Years On: A Review of Implementation and Effects in Mandera County' (2018) 8 *African Conflict and Peacebuilding Review* 1; George Nyabuga, 'Devolved Power: A Critical Interrogation of the Place, Roles and Obligations of the Media at the Grassroots in Kenya' (2017) 42 *Africa Development / Afrique et Développement* 105.

⁴¹ Article 10, Constitution of Kenya 2010.

⁴² *Leadership and Integrity Act*, No 19 of 2012, Laws of Kenya.

⁴³ Paul Olendo Ombanda, 'Nepotism and Job Performance in the Private and Public Organizations in Kenya' (2018) 8 *International Journal of Scientific and Research Publications* 474; see also Kefa Ruto Plimo,

Some commentators have also explored the role of culture in causing ethnic conflicts especially within the North-Western region of Kenya, where cattle rustling between the Nilotic communities is the main cause of conflicts.⁴⁴ For instance, it has been argued that ‘cattle rustling is a cultural aspect of the Pokot founded on their myth of origin and a belief that all cattle belong to them’.⁴⁵ While Article 11 of the Constitution of Kenya 2010 recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation, the practice of such cultural activities should not violate constitutional provisions especially on the Bill of Rights. Arguably, there is a need for the stakeholders in peacebuilding to address this notion through education as an empowerment tool for more people within the community (both formal and informal education) as well as creating opportunities for alternative sources of livelihoods for these communities to supplement their income and hence have a sense of security as far as their livelihoods are concerned.

Notably, Peace Education Programme at primary and secondary schools’ levels of study was introduced in 2008 whose overall goal was to promote peaceful co-existence among members of the school community hence contributing to peace and national cohesion in the country; and enhance the capacity of the education sector to promote peaceful coexistence through conflict sensitive policies and programming.⁴⁶ The specific objectives of the programme include:

To promote conflict sensitive policies and programmes within the education sector; to create awareness among learners on the causes of conflict and how to constructively resolve them in their daily lives; to prepare learners to become good citizens in their communities, nation and the world and to equip them with skills that promote peace and human dignity at all levels of interaction; to use the classroom as a springboard through which global values of positive inter-dependence, social justice and participation in decision-making are learned and practiced; and to foster positive images that lead to respect for diversity to enable young people learn to live peacefully in diverse communities in the world.⁴⁷ This may be a good step towards restoring and achieving lasting and sustainable peace and cohesion among the warring communities and the country in general.

‘Assessing Determinants of Effective Human Resource Functions Devolution in County Government of West Pokot, Kenya’ (PhD Thesis, COHRED-JKUAT 2017); Buagu Musazi Says, ‘Ethnic Favouritism in Kenya and Uganda’s Public Sector’ (Africa at LSE, 1 August 2019) <<https://blogs.lse.ac.uk/africaatlse/2019/08/01/has-ethnic-favouritism-in-public-sector-hiring-in-kenya-and-uganda-been-exaggerated/>> accessed 14 April 2022; Njagi Ireri and Wario Guyo, ‘The Influence of the County Public Service Board (CPSB), on the Devolved Human Resources Governance in Kenya’ (2018) 8 International Journal of Humanities and Social Science; Hamun A Jubase, ‘Challenges of Human Resource Management in Wajir Public Service Board’ (PhD Thesis, University of Nairobi 2018).

⁴⁴ David M Kimaiyo, ‘Women Involvement in Cattle Rustling between the Marakwet and the Pokot Communities of North-Western Kenya’ (Thesis, University of Nairobi 2016) <<http://erepository.uonbi.ac.ke/handle/11295/97405>> accessed 8 May 2022.

⁴⁵ Daniel Nganga, ‘Culture as the Cause of Conflict: A Case Study in West Pokot District, Kenya’ (2012) 6 Journal of Peace and Justice 51; see also Mutsotso, B. M., Kimaiyo, D., & Gaciuki, P., "The centrality of cattle in the social organization of the East Pokot pastoralists of North Western Kenya." European Scientific Journal 10, no. 8 (2014).

⁴⁶ Kangethe, Mary Wanjiru. "The peace education programme in Kenya." The Global Campaign for Peace Education 121 (2015).

⁴⁷ Ibid.

3.2 Joint and Participatory Efforts in Peacebuilding and Conflict Management

Peacebuilding for achievement of sustainable peace as a prerequisite for realizing the sustainable development is an imperative that requires the concerted efforts of all groups of people in society.⁴⁸ It is important for State organs to acknowledge that peacebuilding and conflict management is and should be a joint effort involving all stakeholders. As a such, their greatest efforts should be towards empowering the other relevant stakeholders to build capacity for sustainability. Within most indigenous communities, elders still play a vital role in conflict management and should thus be involved in peacebuilding efforts and conflict management. For instance, within Somali people of North Eastern Kenya, it has been observed that ‘traditional elders’ roles include negotiating application of customary law –an important source of conflict management, conflict resolution and enforcement of peace agreements’.⁴⁹ However, elders can and have indeed been used to mobilize communities along ethnic lines and this can be a threat to sustainable peace.⁵⁰ As such, it is suggested that the Government should work closely with the elected elders as well as religious leaders and positively empower them to ensure that they are only used as agents of peace and not divisive politics.

While it is widely acknowledged that violent conflict affects men and women in different ways, women and children are arguably the greatest victims in conflict situations.⁵¹ The disproportional burden borne by women is often attributed to the inequalities that exist between men and women in social, economic and political spheres.⁵² Notably, Kenya ranks 109 out of 153 countries in the Global Gender Gap Report 2020, with a score of with significant inequalities between males and females in education attainment, health outcomes, representation in parliament, and labour force participation.⁵³ Arguably, these factors predispose women to greater losses and suffering during conflicts. They also make them vulnerable to recruitment to armed gangs such as Al-Shabaab which has been attacking Kenya frequently in the last several years. For instance, it has been observed that Al-Shabaab has been actively (and forcibly) recruiting women in Kenya, including through social media, religious indoctrination in schools, marriage, employment incentives, and abduction.⁵⁴ Just like men, their support for the terrorist group is informed by: ideology, grievances over socio-political and economic circumstances, among others, with economic pressures being an especially strong motive for women.⁵⁵

⁴⁸ Office for ECOSOC Support and Coordination United Nations, *Achieving Sustainable Development and Promoting Development Cooperation: Dialogues at the Economic and Social Council (UN 2008)*; ‘5 – Quest for Sustainable Peace and Development under Militarized Security Approaches’ (2030 Spotlight) <<https://www.2030spotlight.org/en/book/1730/chapter/5-quest-sustainable-peace-and-development-under-militarized-security-approaches>> accessed 9 May 2022.

⁴⁹ Huma Haider, *Conflict analysis of North Eastern Kenya. K4D Emerging Issues Report*36.Brighton, UK: Institute of Development Studies, 16.

⁵⁰ *Ibid*, 16.

⁵¹ ‘Gender in Fragile and Conflict-Affected Environments’ (GSDRC) <<https://gsdrc.org/topic-guides/gender/gender-in-fragile-and-conflict-affected-environments/>> accessed 8 May 2022.

⁵² Iffat Idris, *Gender, countering violent extremism and women, peace and security in Kenya. K4D Factsheet*. Brighton, UK: Institute of Development Studies <https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/15832/K4D_Factsheet_Kenya_2.4.pdf?sequence=1&isAllowed=y> accessed 8 May 2022.

⁵³ *Ibid*.

⁵⁴ *Ibid*.

⁵⁵ *Ibid*.

Considering that women have needs just like men which, if not met, may make women be used as tools off propagating violence and hatred, often to their detriment, women are regularly considered and should indeed be among the greatest stakeholders in peacebuilding and conflict management if sustainable peace is to be achieved.⁵⁶ Despite this, statistics from many countries around the globe show that the number of women in decision-making positions remains relatively small.⁵⁷ It has also been observed that the underrepresentation of women at the peace table is much more pronounced compared to other public decision-making roles, where though women are still underrepresented the gap has been steadily narrowing.⁵⁸ Ironically, this persists despite the fact that women have been closing the gap in professions and roles that typically dominate peace talks: politician, lawyer, diplomat and member of a party to armed conflict.⁵⁹

The United Nations Security Council *Resolution 1325* (2000)⁶⁰ in its Preamble reaffirms the important role of women in the prevention and resolution of conflicts and in peace-building, and stresses the importance of their equal participation and full involvement in all efforts for the maintenance and promotion of peace and security, and the need to increase their role in decision-making with regard to conflict prevention and resolution.⁶¹ Kenya's *National Action Plan for the Implementation of United Nations Security Council Resolution 1325 and Related Resolutions*⁶² (KNAP) was titled 'Kuhusisha Wanawake ni Kudumisha Amani' ('to involve women is to sustain peace') and acknowledges the changing nature of insecurity and incorporates a human security approach whose focus is on the protection of individual citizens. In addition, this broader paradigm of human security was meant to expand the meaning of security to include secure livelihoods, environmental protection, and access to resources.⁶³ The *Action Plan* also recognizes that security threats include social, economic, and environmental factors and women's vulnerability is exacerbated by unequal access to resources, services, and opportunities.⁶⁴ The Kenya National Action Plan was to be executed over a three-year period (2016–2018) and was meant to provide a comprehensive approach to the implementation of UNSCR 1325, and also enhance coordination among the relevant actors, raise awareness among stakeholders, and increase accountability among actors responsible for its implementation.⁶⁵ The KNAP also aimed

⁵⁶ Clare Castillejo, 'Building a State That Works for Women: Integrating Gender into Post-Conflict State Building' [2011] Documentos de Trabajo FRIDE 1; 'Why Women Should Have a Greater Role in Peacebuilding' (World Economic Forum) <<https://www.weforum.org/agenda/2015/05/why-women-should-have-a-greater-role-in-peacebuilding/>> accessed 14 April 2022.

⁵⁷ 'Why Women Should Have a Greater Role in Peacebuilding' (World Economic Forum) <<https://www.weforum.org/agenda/2015/05/why-women-should-have-a-greater-role-in-peacebuilding/>> accessed 8 May 2022; 'Facts and Figures: Women's Leadership and Political Participation | What We Do' (UN Women) <<https://www.unwomen.org/en/what-we-do/leadership-and-political-participation/facts-and-figures>> accessed 14 April 2022.

⁵⁸ Hanny Cueva Beteta, Colleen Russo and Stephanie Ziebell, *Women's Participation in Peace Negotiations: Connections between Presence and Influence* (New York: UN Women 2010), 3.

⁵⁹ *Ibid*, 3.

⁶⁰ UN Security Council, Security Council resolution 1325 (2000) [on women and peace and security], 31 October 2000, S/RES/1325 (2000).

⁶¹ *Ibid*, Preamble.

⁶² Republic of Kenya, *National Action Plan for the Implementation of United Nations Security Council Resolution 1325 and Related Resolutions, 2016–2018* <<http://peacewomen.org/sites/default/files/Kenya%20NAP-with-cover-final.pdf>> accessed 14 April 2022.

⁶³ *Ibid*, 11-12.

⁶⁴ *Ibid*, 12.

⁶⁵ *Ibid*, 13.

to mainstream UNSCR 1325 into national conflict resolution, conflict prevention, peace promotion, and peacebuilding strategies contained in prior agreements, including the 2008 National Accord and its implementing agreements, the National Peace Policy, and relevant gender policies, among others.⁶⁶ KNAP I mainly focused on equal protection of individual citizens and endeavoured to better understand and *address the root causes of socio-economic and political inequalities around peace and security issues*, designed around four pillars: Participation and Promotion, Prevention, Protection, and Relief and Recovery (Emphasis added).⁶⁷

The second *Kenya National Action Plan for the Advancement of United Nations Security Council Resolution 1325 on Women, Peace and Security 2020–2024*⁶⁸ which was launched in May 2020 focuses on key objectives, priority actions, expected outcomes, and interventions/responsibilities of relevant actors and stakeholders and also provides clear indicators, monitoring and evaluation benchmarks, and projected targets. It is also based on the above 4 pillars.⁶⁹ The KNAP II is a commendable step towards enhancing empowerment and greater participation of women in development and in peace, security, and disaster management.

Women can participate in peace processes as: mediators or as members of mediation teams; delegates of the negotiating parties; all-female negotiating parties representing a women's agenda; signatories; representatives of women's civil society with an observer role; witnesses; in a parallel forum or movement; gender advisers to mediators, facilitators or delegates; or as members of technical committees, or a separate table or working group devoted to gender issues.⁷⁰

It has been argued that while the full impact of women's participation on peace and security outcomes remains poorly understood, existing data shows how women's inclusion helps prevent conflict, create peace, and sustain security after war ends.⁷¹ Women's empowerment and gender equality are also associated with peace and stability in society.⁷² Women's participation in peace talks is also associated with the following advantages: Women promote dialogue and build trust as conflict parties may see women as less threatening because they are typically acting outside of formal power structures and are not commonly assumed to be mobilizing fighting forces; Women bridge divides and mobilize coalitions; Women raise issues that are vital for peace; and women prioritize gender equality.⁷³

⁶⁶ Ibid, 14.

⁶⁷ Ibid.

⁶⁸ Republic of Kenya, Kenya National Action Plan for the Advancement of United Nations Security Council Resolution 1325 on Women, Peace and Security 2020–2024 < <http://peacewomen.org/sites/default/files/KNAP-II-digital-30-Apr.pdf>> accessed 14 April 2022.

⁶⁹ Ibid, 14.

⁷⁰ Hanny Cueva Beteta, Colleen Russo and Stephanie Ziebell, *Women's Participation in Peace Negotiations: Connections between Presence and Influence* (New York: UN Women 2010), 5-10.

⁷¹ Marie O'Reilly, 'Why Women?' [2015] *Inclusive Security* 1, 3 < <https://www.almendron.com/tribuna/wp-content/uploads/2019/02/why-women-report-2017.pdf>> accessed 14 April 2022.

⁷² Ibid, 4.

⁷³ Ibid, 7-9.

It is, therefore, important to ensure that women are empowered and included in peacebuilding and conflict management in Kenya⁷⁴, as a step towards building peaceful, cohesive and inclusive societies as part of the bigger sustainable development agenda.⁷⁵ The civil society organizations as well as the private sector, both have a role to play in peacebuilding and conflict management in Kenya. A past report focusing on the role of the private sector in peacebuilding within the context of Kenya's 2013 election cycle observed that 'the private sector undertook a sustained, systematic, and comprehensive peacebuilding campaign that almost certainly contributed to the peaceful nature of the electoral process', where the 'private-sector engagement influenced key political actors, spread messages of peace across the country, brought together disparate sectors of Kenyan society, prevented incitement, and ensured a return to normalcy as challenges to electoral results worked their way through the courts'.⁷⁶ The report also documented the fact that 'the motivations for business involvement included a desire to never go back to the dark days of 2007–08; a deep concern for the people with whom they did business; an acceptance of their mandate, especially in regard to providing uninterrupted service; the allure of, and pressure to exercise, the formidable power of a united business front; and, the fact that remaining aloof to developments that have an impact on their continued existence is bad for the sector'.⁷⁷

3.3. Addressing the Weak or Non-Existent Structures and Institutions for Peacebuilding, Conflict Prevention and Response

SDG 16 calls on State Parties to promote just, peaceful and inclusive societies. The associated relevant Targets require States to, *inter alia*: promote the rule of law at the national and international levels and ensure equal access to justice for all; by 2030, significantly reduce illicit financial and arms flows, strengthen the recovery and return of stolen assets and combat all forms of organized crime; develop effective, accountable and transparent institutions at all levels; ensure responsive, inclusive, participatory and representative decision-making at all levels; broaden and strengthen the participation of developing countries in the institutions of global governance; ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements; strengthen relevant national institutions, including through international cooperation, for building capacity at all levels, in particular in developing countries, to prevent violence and combat terrorism and crime; and promote and

⁷⁴ 'How Women in Kenya Mobilised for Peace after Surviving Violence - Kenya' (ReliefWeb) <<https://reliefweb.int/report/kenya/how-women-kenya-mobilised-peace-after-surviving-violence>> accessed 8 May 2022.

⁷⁵ Kariuki Muigua, 'Mainstreaming the Role of Women in Peacemaking and Environmental Management in Kenya' (2020) *Journal of cmsd* Volume 4(5) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3834364> accessed 14 April 2022; Katie Zaroni, 'Kenyan Girls as Agents of Peace: Enhancing the Capacity of Future Women Peacebuilders' (2017) 12 *Research in Comparative and International Education* 110; Irene Cherotich Loyatum, 'The Role of Women in Peace Building in Conflicting Society: The Case of West Pokot County, Kenya, 2000-2018' (PhD Thesis, United States International University-Africa 2019); Jeanne Izabiliza, 'The Role of Women in Reconstruction: Experience of Rwanda' [2003] Source unknown.

⁷⁶ Victor Owuor and Scott Wisor, 'The Role of Kenya's Private Sector in Peacebuilding: The Case of the 2013 Election Cycle' [2014] Broomfield, CO: One Earth Future Foundation' ii <<https://www.oefresearch.org/sites/default/files/documents/publications/kenyaprivatsectorreport-digital.pdf>> accessed 3 May 2022.

⁷⁷ *Ibid*, 26.

enforce non-discriminatory laws and policies for sustainable development.⁷⁸ SDG 16 is premised on the fact that ‘sustainable development cannot be achieved without peace, stability, human rights and effective governance, based on the rule of law’.⁷⁹

It is worth pointing out that while some conflicts call for use of formal systems such as national courts to deal with them, especially where criminal activities are concerned, there is a need to explore and exploit non-violent and/or non-confrontational approaches, in the spirit of the 2010 Constitution of Kenya which ‘encourages of communities to settle land disputes through recognized local community initiatives consistent with this Constitution’⁸⁰, and requires that ‘in exercising judicial authority, the courts and tribunals should be guided by, *inter alia*, the principles of alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3)’.⁸¹

The drafters of the *National Land Policy 2009*⁸² as well as the 2010 Constitution of Kenya also acknowledged that to address some of the protracted conflicts that have afflicted some parts of Kenya, there was a need to address what is popularly referred to as present or historical land injustices. The National Land Commission⁸³ and the Environment and Land Court⁸⁴ are the two main institutions that are charged with addressing this problem. It is important that land issues are addressed in ways that fully address the underlying issues that have often resulted in conflicts. This is because secure rights to land are important to the development of economic activities,

⁷⁸ Martin, ‘Peace, Justice and Strong Institutions’ (United Nations Sustainable Development) <<https://www.un.org/sustainabledevelopment/peace-justice/>> accessed 14 April 2022.

⁷⁹ ‘Sustainable Development Goals | United Nations Development Programme’ <<https://www.undp.org/sustainable-development-goals#peace-justice-and-strong-institutions>> accessed 8 May 2022.

⁸⁰ See Articles 60(1)(g) & 67(2)(f), Constitution of Kenya 2010.

⁸¹ Article 159(2) (c) & (3), Constitution of Kenya 2010; 159 (3): Traditional dispute resolution mechanisms shall not be used in a way that—(a) contravenes the Bill of Rights;(b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or (c) is inconsistent with this Constitution or any written law; Nairobi Centre for International Arbitration, Alternative Dispute Resolution Policy, Draft October 2019< <https://www.ncia.or.ke/wp-content/uploads/2019/10/DRAFT-NATIONAL-ADR-POLICY.pdf>> accessed 8 May 2022; Mediation Bill, 2020, Kenya Gazette Supplement No. 92 (National Assembly Bills No. 17).

⁸² Republic of Kenya, Sessional Paper No. 3 of 2009 on National Land Policy, August, 2009 (Government Printer, Nairobi, 2009), para. 3.6.2.

⁸³ Article 67 (2)(e), Constitution of Kenya 2010; see also National Land Commission Act, No. 5 of 2012, Laws of Kenya. Revised Edition 2016 [2015], sec. 15; see also National Land Commission Citation. (Investigation of Historical Land Injustices) Regulations, 2017, Legal Notice No. 258, Kenya Gazette Supplement No. 154, 6th October, 2017, Laws of Kenya.

⁸⁴ Environment and Land Court Act, No. 19 of 2011, Laws of Kenya. Notably, Regulation 29 of the NLC (Investigation of Historical Injustices) Regulations 2017 stipulates as follows:

“A person aggrieved by the decision of the Commission may, within twenty-eight days of the publication of the decisions, appeal to the Court.”

Regulation 3 of the NLC (Investigation of Historical Injustices) Regulations 2017 defines "Court" to mean the Environment and Land Court established under the Environment and Land Court Act, 2011 and includes other courts having jurisdiction on matters relating to land.

capital accumulation, food security, and a wide variety of other socioeconomic benefits, all important for assurance of peace.⁸⁵

Indeed, in recognition of the important role that these Alternative Dispute Resolution (ADR) and Traditional Dispute Resolution Mechanisms (TDRMs) can play in not only addressing internal conflicts but also doing so in ways that enhance sustainable peace rather than dividing people further as would be the case with adversarial court mechanisms⁸⁶, Kenya's Judiciary has been making strides towards promoting and encouraging their use in the country, while working closely with other stakeholders in the sector.⁸⁷ This is because, more often than not, the court process fails to address the underlying real issues that brought the conflict in the first place.⁸⁸ This has been attributed to the fact that since the official law is based on a different understanding of justice, it is rarely effective in creating stability and societies are, therefore, more interested in solving conflicts through informal means - although they may ask the police to trace their cattle and the local administration to help in negotiating peace.⁸⁹ Arguably, local leaders prefer to deal with the conflicts of their communities as they are convinced that they have better solutions than the state can provide.⁹⁰ In *Geoffrey Muthinja Kabiru & 2 Others -vs- Samuel Munga Henry & 1756 Others (2015) eKLR*, the Court of Appeal stated as follows regarding use of ADR and TDRMs:-

"It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts...This accords

⁸⁵ Unruh, Jon. "Land rights and peacebuilding: challenges and responses for the international community." *International Journal of Peace Studies* (2010): 89-125, 89.

⁸⁶ Tanja Chopra, 'Reconciling Society and the Judiciary in Northern Kenya' [2008] Justice for the Poor and Legal Resources Foundation Trust Research Report.

⁸⁷ 'List of MAC Accredited Mediators as at 1st January 2021 – The Judiciary of Kenya' <<https://www.judiciary.go.ke/download/list-of-mac-accredited-mediators-as-at-1st-january-2021/>> accessed 8 May 2022; see also 'State of the Judiciary and the Administration of Justice Annual Report 2019 – 2020 – The Judiciary of Kenya' <<https://www.judiciary.go.ke/download/state-of-the-judiciary-and-the-administration-of-justice-annual-report-2019-2020/>> accessed 8 May 2022; 'Inside the Judiciary Magazine, Edition No. 15 – The Judiciary of Kenya' <<https://www.judiciary.go.ke/download/inside-the-judiciary-magazine-edition-no-15/>> accessed 8 May 2022; 'Court Annexed Mediation Virtual Dispute Resolution – The Judiciary of Kenya' <<https://www.judiciary.go.ke/download/court-annexed-mediation-virtual-dispute-resolution/>> accessed 8 May 2022; 'Judiciary Strategic Plan 2019 -2023 – The Judiciary of Kenya' <<https://www.judiciary.go.ke/download/judiciary-strategic-plan-2019-2023/>> accessed 8 May 2022; Nairobi Centre for International Arbitration, Alternative Dispute Resolution Policy, Draft October 2019<<https://www.ncia.or.ke/wp-content/uploads/2019/10/DRAFT-NATIONAL-ADR-POLICY.pdf>> accessed 8 May 2022; Mediation Bill, 2020, Kenya Gazette Supplement No. 92 (National Assembly Bills No. 17).

⁸⁸ Tanja Chopra, 'Reconciling Society and the Judiciary in Northern Kenya' [2008] Justice for the Poor and Legal Resources Foundation Trust Research Report, 21<<http://documents1.worldbank.org/curated/en/590971468272735172/pdf/716920ESW0P1110ry0in0Northern0Kenya.pdf>> accessed 8 May 2022.

⁸⁹ *Ibid.*, 21.

⁹⁰ *Ibid.*, 21.

*with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution."*⁹¹

Use of ADR and TDRM mechanisms in addressing ethnic tensions and other intergroup conflicts in Kenya has a potential to bring the country closer to attaining sustainable peace as a step towards achieving SDG 16.⁹² Indeed, the Draft *Alternative Dispute Resolution Policy*, 2019 has acknowledged that 'ADR, through its reconciliatory and non-adversarial nature is a major contributor to peace and cohesion in the country.'⁹³ It also acknowledges that 'the rule of law is essential for democracy and economic growth and is the backbone of human rights, peace, security, and development'.⁹⁴

The importance of these mechanisms is also acknowledged in Kenya's *National Policy on Peace-building and Conflict Management, 2011*⁹⁵ which calls for capacity building through, *inter alia*, training various stakeholders in relevant areas such as alternative conflict resolution mechanisms.⁹⁶

It has been argued that where there have been harsh and violent conflicts, there is usually firstly the temporary management of the conflict; which typically involves negotiation, meditation and arbitration, and rests on leaders and elites, although it still requires support by the general population, while secondly, deeper, level involves reconciliation which requires change in the societal repertoire shared by society members.⁹⁷ This is because reconciliation involves the formation or restoration of genuine peaceful relationships between societies and that this requires extensive changes in the socio-psychological repertoire of group members in both societies.⁹⁸ In addition, reconciliation is associated with socio-psychological processes consisting of changes of motivations, goals, beliefs, attitudes and emotions by the majority of society members.⁹⁹ This is the kind of approach that is recommended for such conflicts as the one involving Pokot and Turkana communities, among others. It is, however, acknowledged this should be accompanied with poverty eradication projects by the State since poverty and limited sources of livelihood can aggravate competition for scarce natural resources thereby contributing to instability.¹⁰⁰ The

⁹¹ Geoffrey Muthinja Kabiru & 2 Others -vs- Samuel Munga Henry & 1756 Others (2015) eKLR.

⁹² K Muigua, 'Institutionalising Traditional Dispute Resolution Mechanisms and Other Community Justice Systems' [2017] Nairobi: Published online < <http://kmco.co.ke/wp-content/uploads/2018/08/Institutionalising-Traditional-Dispute-Resolution-Mechanisms-and-other-Community-Justice-Systems-25th-April-2017.pdf>> accessed 8 May 2022.

⁹³ Nairobi Centre for International Arbitration, *Alternative Dispute Resolution Policy*, Draft October 2019, 4.

⁹⁴ *Ibid*, 8.

⁹⁵ Republic of Kenya, *Kenya: National Policy on Peace-building and Conflict Management, 2011*, 11 December 2011 < <https://www.refworld.org/pdfid/5a7ad25f4.pdf>> accessed 8 May 2022.

⁹⁶ *Ibid*, see Chapter Five.

⁹⁷ Daniel Bar-Tal, 'Reconciliation as a Foundation of Culture of Peace', *Handbook on building cultures of peace* (Springer 2009), 363.

⁹⁸ *Ibid*, 365.

⁹⁹ *Ibid*, 365.

¹⁰⁰ Noro Aina Andrimihaja, Matthias Cinyabuguma and Shanta Devarajan, 'Stop Conflict, Reduce Fragility and End Poverty: Doing Things Differently in Fragile and Conflict-Affected Situations'; Olsson, Lennart, Maggie Opondo, Petra Tschakert, Arun Agrawal, and Siri EH Eriksen. "Livelihoods and poverty." (2014); 'Poverty and Conflict' (GSDRC) <<https://gsdrc.org/professional-dev/poverty-and-conflict/>> accessed 8 May

State's involvement in addressing natural resources scarcity through climate change mitigation measures as well as adopting a participatory approach to resource management can potentially help in alleviating poverty and consequently address the insecurities that these communities face as far as food security and access to resources are concerned.¹⁰¹ County peace committees should be empowered through capacity building because, as some commentators have argued, County governments have better local knowledge and are likely to enjoy greater local legitimacy thus placing them at a better position to address conflicts and promote peace, in partnership with the National Government.¹⁰²

Based on the foregoing, it is thus important for the State to continually promote and strengthen the use of local leadership and community peace groups in efforts to reach sustainable peace solutions in Kenya.¹⁰³

4. Conclusion

As already acknowledged, peace and development are interlinked and one may not take place in the absence of the other. As Kenya strives towards achieving sustainable development agenda, this paper has argued that the stakeholders must first work towards building sustainable peace and enhancing conflict management capacity of the various relevant stakeholders in the peace sector. Unless the underlying factors that result in conflicts are fully addressed, the dream of sustainable peace will remain a mirage. Similarly, without peace, realisation of sustainable development goals in the country, alongside other development goals such as the Vision 2030 will arguably remain a pipe dream. Working towards effective peacebuilding and conflict management in Kenya, especially in relation to environmental conflicts, is a necessary step in the quest for Sustainable Development.

2022; Jonathan Goodhand, 'Violent Conflict, Poverty and Chronic Poverty' [2001] Chronic Poverty Research Centre Working Paper.

¹⁰¹ Meine van Noordwijk, 'Integrated Natural Resource Management as Pathway to Poverty Reduction: Innovating Practices, Institutions and Policies' (2019) 172 *Agricultural Systems* 60.

¹⁰² Huma Haider, *Conflict analysis of North Eastern Kenya. K4D Emerging Issues Report* 36. Brighton, UK: Institute of Development Studies

<https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/15570/EIR%2036_Conflict_analysis_of_Northern_Kenya.pdf?sequence=1&isAllowed=y> accessed 8 May 2022.

¹⁰³ David Pottebaum and Christopher Lee, 'In Control of Their Future: Community-Led Reconciliation and Recovery', World Bank workshop "Moving out of Poverty in Conflict-Affected Areas", available at (2007); Ervin Staub, 'Reconciliation after Genocide, Mass Killing, or Intractable Conflict: Understanding the Roots of Violence, Psychological Recovery, and Steps toward a General Theory' (2006) 27 *Political psychology* 867; Michael Wessells, 'Community Reconciliation and Post-Conflict Reconstruction for Peace', *Handbook on building cultures of peace* (Springer 2009); Daniel Bar-Tal, 'Reconciliation as a Foundation of Culture of Peace', *Handbook on building cultures of peace* (Springer 2009); Nyambura Githaiga, 'When Institutionalisation Threatens Peacebuilding: The Case of Kenya's Infrastructure for Peace' (2020) 15 *Journal of Peacebuilding & Development* 316.

Contemporary Issues in Environmental Conflict Management: Challenges and Prospects

Abstract

This paper argues that environmental conflict management is not a linear process involving progression from the causes to the full blown conflict. It is affected by many factors in terms of contributing to the origin or progression of the conflict. The paper thus highlights the contemporary factors that play a role in either triggering or exacerbating the environmental conflict either directly or having adverse effects on environmental resources and consequently, affecting efforts towards peace and development.

1. Introduction

The paper highlights the national obligations on environment and sustainable development; basic principles of sustainable development; general approaches to sustainability and sustainable development debate; the link between human rights and sustainable development; natural resources exploitation; climate change; environmental security; food security; trade; indigenous knowledge; gender equity; and natural resource conflicts, among others. This paper is necessary in light of the fact that conflicts and especially environmental conflicts never take place in isolation. They have either triggering or exacerbating factors. It has been observed that ‘when we talk about sustainability or sustainable human development, we frequently instantly consider how people interact with their environmental, physical, or biological surroundings. To put it another way, we prioritise protecting the environment and the world. From an economic standpoint, however, sustainability is also linked to rationed production methods that are environmentally friendly and that restrict growth to provide resources time to regenerate and avoid resource depletion. It may be considered to focus on the harmony between nature and human activity’.¹

2. Contemporary Issues in Conflict Management and Environmental Matters

It is worth noting that Political, economic, and social inequality, extreme poverty, economic stagnation, inadequate government services, high unemployment, environmental degradation, and personal (economic) motivations to fight are some of the fundamental causes of conflict.² Environmental conflicts are generally understood to be societal conflicts involving the environment. They are distinct from other conflicts based on gender, class, territory, or identity, but they also commonly overlap with them.³ It is important to understand some of these factors especially in search of solution to these conflicts.

¹ Martínez-Martín, R. and Lozano-Martín, A.M., "Sustainability and Conflict Management in the University Environment. Analysis of Students of the Degrees in Labour Relations and Human Resources, and Social Work at the University of Granada (Spain)." *Sustainability* 13, no. 23 (2021): 13431.

² Stewart F, 'Root Causes of Violent Conflict in Developing Countries' (2002) 324 *BMJ: British Medical Journal* 342.

³ Scheidel, A., Del Bene, D., Liu, J., Navas, G., Mingorría, S., Demaria, F., Avila, S., Roy, B., Ertör, I., Temper, L. and Martínez-Alier, J., "Environmental conflicts and defenders: A global overview." *Global Environmental Change* 63 (2020): 102104.

a) Gender and Conflict Management

It is imperative to ensure that the gender component is taken into account when calling for public engagement and the involvement of all stakeholders in the sustainable development agenda. Article 27 of the Constitution, which protects everyone's right to equality and freedom from discrimination, supports this stance as well.⁴ The need to ensure that both groups are actively and meaningfully involved in all management issues is vital since the misuse of natural resources and the subsequent conflicts hurt both men and women, especially due to their perceived traditional roles.

Although the Kenyan Constitution calls for the protection and empowerment of historically underrepresented and vulnerable groups, including women, it is crucial that these efforts extend beyond positions of national leadership to include them in all facets of everyday life. Individually empowering men and women will strengthen institutions, even as lawmakers and policymakers make sure that gender issues are given enough weight in conflict resolution systems and that female conflict resolvers, such as mediators and arbitrators, are included when necessary, such as when land rights are at stake.⁵

According to UN Security Council Resolution 1325, a gender perspective would include measures that encouraged women's peace efforts and indigenous conflict resolution techniques (2000). It also stressed the need of protecting women's and girls' human rights, especially those that pertain to constitutions, electoral processes, law enforcement, and the judicial system.⁶

Domestic laws on conflict management should continually embrace gender inclusivity in responses to conflicts by promoting participation of both men and women as either facilitators of resolution or those seeking justice.

b) Traditional Ecological Knowledge, Conflict Management and Environmental Management

Through the application of both formal knowledge and traditional ecological knowledge, it is important to recognise the role that ecological knowledge plays in attaining successful environmental and conflict management for sustainable development. This covers the role of traditional or indigenous knowledge in managing the environment and resolving disputes. This is

⁴ 27(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

⁵ Fitzpatrick, D., "Dispute Resolution; Mediating Land Conflict in East Timor", in AusAID' Making Land Work Vol 2; Case Studies on Customary Land and Development in the Pacific, (2008), Case Study No. 9, p. 175. Sourced from <http://www.ausaid.gov.au/publications/pdf>, [Accessed on 12 April 2022].

⁶ Sikoska, T., & Solomon, J., "Introducing gender in conflict and conflict prevention: Conceptual and policy implications," Gedownload op 20 (2002).

based on African traditional traditions and the global consensus that respect for indigenous knowledge, cultures, and traditional practices promotes sustainable and equitable development and effective environmental management.⁷ Since indigenous knowledge is now recognised internationally, national governments should offer it more respect and encourage communities to actively adopt and apply it.⁸

Furthermore, while there are admirable statutory and constitutional provisions in light of the fact that they have recognised indigenous or traditional knowledge within the legal framework, the real challenge lies in putting these provisions into practice and creating opportunities for the incorporation of such knowledge in decision-making. There is a need to go beyond simply recognising traditional knowledge in Kenya and to make sure that it has been adequately assimilated, considered, and applied when the Constitution so mandates.⁹

It has rightly been observed that similar to many other linkages between trade and the environment, there are complicated relationships between biodiversity and intellectual property that have the potential for both harmony and conflict. A financial motivation for preserving biological variety might come from intellectual property. The commercialization of products developed on the basis of information encoded in genetic resources has been made possible by the patenting of products and processes based on those resources, including new crop and plant varieties, pharmaceuticals, herbicides, and pesticides, as well as new biotechnological products and processes. Thus, as the importance of biodiversity has grown commercially over the past few decades, so has understanding of its relevance.¹⁰

Along with the aforementioned, it is evidently necessary to combine traditional and formal sciences in order to implement adaptive solutions for managing natural resources through participatory monitoring and feedback.¹¹ The management of natural resources cannot be left to any one body of knowledge, such as Western science, but rather must take into account a variety of knowledge systems. Integration of knowledge systems is being done for a deeper, more basic cause. Application of scientific research with local knowledge benefits both the sustainability of natural resources and the fairness, opportunity, security, and empowerment of local populations.

Local expertise is useful for scenario analysis, data gathering, management planning, building adaptive ways to learn and receive feedback, and institutional support for implementing policies. On the other side, science either develops new technologies or aids in their improvement. Additionally, it offers tools for networking, storing, visualising, analysing, and forecasting long-term patterns so that effective solutions to challenging issues may be found.¹² It is feasible to

⁷ 61/295. United Nations Declaration on the Rights of Indigenous Peoples, Preamble.

⁸ See also Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016, p. 254.

⁹ *Ibid*, pp. 257-258.

¹⁰ Bernasconi-Osterwalder, N., Magraw, D., Oliva, M.J., Tuerk, E. and Orellana, M., *Environment and trade: a guide to WTO jurisprudence*. Routledge, 2012, p. 306.

¹¹ Pandey, D.N., 'Traditional Knowledge Systems for Biodiversity Conservation,' available at http://www.infinityfoundation.com/mandala/t_es/t_es_pande_conserve.htm [Accessed on 13 April 2022].

¹² *Ibid*.

include the interests and sincere wishes of the locals in natural resource exploitation operations by assimilating indigenous knowledge. Conflict between members of the impacted communities and the government is also lessened as a result of this. These communities are inclined to support development initiatives if they do not sense a threat to their way of life, and they are also less prone to use unusual means of defending it.¹³ Therefore, traditional ecological knowledge is crucial to resolving environmental issues and managing conflicts in a productive manner.

c) Role of science and Technology in environmental management

The provisions of Kenya's 2010 Constitution give stakeholders a platform to employ technology and innovation to solve environmental problems since they acknowledge the significance of science and technology in achieving sustainable development.¹⁴ It is a commonly held belief that innovation, technology, and science all contribute to accomplishing the Sustainable Development Goals.¹⁵ This essential role include environmental management as well, as it is one of the Sustainable Development Goals.¹⁶ Chapter 35 of Agenda 21 places a strong emphasis on growing scientific knowledge, developing scientific aptitude, and building the scientific foundation for long-term management. Science for sustainable development is also at the core of this chapter.¹⁷

Even though science and technology have contributed to many environmental problems, they can and have solved most, if not all, of the world's environmental problems, notably those related to climate change, waste management, and environmental degradation.¹⁸ In order to enhance environmental management and protection, this may be done by utilising science and technology in the management of industrial waste. It can also be done by implementing green and clean technologies as well as climate change mitigation techniques.¹⁹

¹³ Muigua, K., *Nurturing Our Environment for Sustainable Development*, p. 258.

¹⁴ See Constitution of Kenya, 2010, Article 11 (2) (b):

(2) The State shall—

(b) recognise the role of science and indigenous technologies in the development of the nation;

¹⁵ Florian Kongoli, 'Role of Science and Technology on Sustainable Development' [2016] Sustainable Industrial Processing Summit, SIPS 1; Kongoli, Florian. "Investments needed for new sustainable technologies." *Copper Worldwide* 6, no. 1 (2016): 3; See also Likens, Gene E. "The role of science in decision making: does evidence-based science drive environmental policy?" *Frontiers in Ecology and the Environment* 8, no. 6 (2010): e1-e9; Miller, Clark A., Paul N. Edwards, and Paul Edwards, eds. *Changing the atmosphere: Expert knowledge and environmental governance*. MIT press, 2001; Christmann, Petra. "Effects of "best practices" of environmental management on cost advantage: The role of complementary assets." *Academy of Management journal* 43, no. 4 (2000): 663-680; Cashmore, Matthew. "The role of science in environmental impact assessment: process and procedure versus purpose in the development of theory." *Environmental Impact Assessment Review* 24, no. 4 (2004): 403-426.

¹⁶ See also Sustainable Development Goals Targets 17.6 and 17.8 which respectively aim to "Enhance North-South, South-South and triangular regional and international cooperation on and access to science, technology and innovation and enhance knowledge sharing on mutually agreed terms, including through improved coordination among existing mechanisms, in particular at the United Nations level, and through a global technology facilitation mechanism" and to "fully operationalize the technology bank and science, technology and innovation capacity-building mechanism for least developed countries by 2017 and enhance the use of enabling technology, in particular information and communications technology".

¹⁷ 'Science.: Sustainable Development Knowledge Platform'

<<https://sustainabledevelopment.un.org/topics/science>> accessed 14 April 2022.

¹⁸ *Ibid*, p. 12.

¹⁹ *ibid*.

d) Climate Change as a Catalyst for Environmental Conflicts

A variety of violent conflicts have been caused by changing rainfall patterns, droughts, changes in natural vegetation, and a scarcity of resources overall. The link between pastoralist conflicts and these other violent conflicts is particularly obvious. That said, it is not always the case that violent conflict results from climate change; typically, the political, social, and economic context is important.²⁰ The harmful effects of climate change on people's livelihoods can be significant since a sizable section of the local population depends on rain-fed agriculture and pastoralism. In addition, groups may be more likely to resort to violence to settle disputes or get access to resources when environmental changes are coupled with additional socioeconomic stressors, such as political marginalisation.²¹ Due to its negative consequences on the environment and human livelihoods, climate change has grown to be a global issue throughout time.

Climate change is a significant issue that has an impact on many facets of the environment and human existence.²² The fight against climate change is linked to the goal of sustainable development and the elimination of poverty. Given that disproportionate numbers of people are affected by climate change, including women, youth, coastal populations, local communities, indigenous populations, fishermen, the impoverished, and the elderly, it is imperative that action be taken quickly. Additionally, excluded from the international efforts to combat climate change are the local communities, those who are impacted, and indigenous peoples. This is true despite the fact that the effects of climate change also put local economies that rely on natural resources and food sovereignty in danger. Furthermore, they have the potential to endanger the health of communities all over the world, particularly those who are weak and disenfranchised, such as children and the elderly.²³

e) International investments/Trade and Environment

International commerce and investments are now widely accepted to have a significant influence on both the environment and human rights.²⁴ All countries' economies are seen to be driven by trade, which is often geared toward promoting development and eradicating poverty.²⁵ Given that

²⁰ Mobjörk, Malin. "Exploring the climate–conflict link: The case of East Africa." *Stockholm International Peace Research Institute, SIPRI yearbook 2017: Armaments, disarmament and international security* (2017): 287-299, at pp. 292-93.

²¹ Mobjörk, Malin. "Exploring the climate–conflict link: The case of East Africa." *Stockholm International Peace Research Institute, SIPRI yearbook 2017: Armaments, disarmament and international security* (2017): 287-299, at p. 293.

²² Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016; Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, Glenwood Publishers, Nairobi – 2015.

²³ Muigua, *Securing Our Destiny through Effective Management of the Environment*, Glenwood Publishers Limited (2020), ISBN: 978-9966-046-06-1.

²⁴ 'Trade and the Environment - OECD' <<https://www.oecd.org/trade/topics/trade-and-the-environment/>> accessed 21 September 2022; 'OHCHR | Trade and Investment' (OHCHR) <<https://www.ohchr.org/en/development/trade-and-investment>> accessed 21 September 2022; Frankel, J.A., "Environmental effects of international trade." *HKS Faculty Research Working Paper Series* (2009).

²⁵ 'The Link between Trade and Development: What Role for the EU Trade Policy?' AIF Conference, Christiansborg, 12 September 2000; See also Preamble, World Trade Organization, "Marrakesh Agreement Establishing the World Trade Organization. Annex 1A: Multilateral Agreements on Trade in Goods-Agreement on Trade-Related Investment Measures", *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* (World Trade Organization, Geneva, 1995), pp. 163-167.

promoting economic growth alone may not result in inclusive, sustainable, and equitable development results, the global trade and investment system has a significant influence on human rights.²⁶

On the one hand, environmental legislation, both national and international, and environmental policies, such as the development of renewable energy, environmental taxes, and conservation measures, aid in defining how nations will structure their economic operations.²⁷ On the other hand, trade law has an impact on how nations formulate their laws and policies in areas that are crucial to environmental policy, such as subsidies, technical regulations, investment policy, and taxation.²⁸

The use of non-renewable raw commodities to generate foreign exchange has been considered to be the primary relationship between commerce and sustainable development.²⁹ This, it has been argued, is a result of a situation in which the developed market economies' dependence on other mineral imports from developing countries has also increased, and non-renewable resources like fuels and minerals, as well as manufactured goods, are now significantly more significant than tropical goods and other agricultural materials in the flow of primary goods from developing to industrial countries.³⁰ The Agenda 2030 for Sustainable Development seeks to ensure that there is a significant increase in exports of developing countries, with a focus on doubling the share of least developed countries in global exports by 2020. This has been such a serious issue that it has continuously impacted third world countries.³¹

Economic expansion brought about by increased commerce may have a clear negative effect on the environment by causing pollution to rise or the degradation of natural resources. Additionally, if environmental regulation rigour varies between nations, trade liberalisation may result in specialisation in pollution-intensive businesses in specific nations - the so-called pollution haven hypothesis.³² On the other hand, equitable international commerce may help nations attain food

²⁶ 'OHCHR | Trade and Investment' (OHCHR)

<<https://www.ohchr.org/en/development/trade-and-investment>> accessed 21 September 2022.

²⁷ International Institute for Sustainable Development & United Nations Environment Programme, *Trade and Green Economy: A Handbook*, (International Institute for Sustainable Development, Geneva, 2014), pp. 3-4.

²⁸ *Ibid*, pp. 3-4.

²⁹ "World commission on environment and development." *Our common future* 17, no. 1 (1987): 1-91., para. 41. However, this is not to say that it is the only link. There are other links between trade and sustainable development; if protectionism raises barriers against manufactured exports, for example, developing nations have less scope for diversifying away from traditional commodities. And unsustainable development may arise not only from overuse of certain commodities but from manufactured goods that are potentially polluting. The Commission also observed that the increase in protectionism in industrial countries stifles export growth and prevents diversification from traditional exports. Consequently, if developing countries are to reconcile a need for rapid export growth with a need to conserve the resource base, it is imperative that they enjoy access to industrial country markets for non-traditional exports where they enjoy a comparative advantage. (para. 51).

³⁰ *Ibid*, para. 40.

³¹ United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, op cit., para. 17.11.

³² 'OHCHR | Trade and Investment' (OHCHR) <<https://www.ohchr.org/en/development/trade-and-investment>> accessed 21 September 2022.

security, create good jobs for the unemployed, and encourage technological transfer³³, maintain national economic stability and aid in the construction of infrastructure, not just for the transportation of products to and from ports but also for the provision of essential services like energy, water, and sanitation.³⁴

When included as an SDG facilitator in the framework for sustainable development, equitable trade may be more successfully used to achieve possible objectives including the eradication of poverty, the creation of jobs, access to universal healthcare and education, and a healthy environment.³⁵ Under the right circumstances, trade may be helpful for growth and development. Trade enables nations to access bigger foreign markets, as well as skills, technology, and money, which in turn enables a better use of productive resources to accelerate structural change. Trade also gives a way to get over limitations provided by tiny local markets.³⁶

While it is obvious that the environment, commerce, and development are related, it would be preferable to take an integrated strategy that completely takes into account environmental issues, fair trade, and sustainable development.³⁷ The goal of an efficient investment legal and policy framework should be to advance sustainable development. Additionally, it need to guarantee little to no environmental harm.³⁸ Furthermore, human rights must always be respected. Arguably, the regimes governing intellectual property, technological transfer, climate change, and energy also intersect and influence one another. Any review must take into account how different regime convergent, divergent, and intersectional trends affect the realisation of human rights.³⁹

The principles of sustainable development, particularly those that strive to protect human rights as well as good environmental management and governance must, therefore, be adhered to for long-term and sustainable investment strategies to have a beneficial influence on the lives of communities.⁴⁰ A human rights-based approach to trade and investment should take the following

³³ Art. 7 of the TRIPS states that: “The protection and enforcement of intellectual property should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.”

³⁴ Galmés, G.V., ‘Trade as an enabler of sustainable development and poverty eradication,’ in United Nations, *The Road from Rio+20: Towards Sustainable Development Goals*, Issue 4, September 2014, p. 10. UNCTAD/DITC/TED/2014/1 Available at

http://unctad.org/en/PublicationsLibrary/ditcted2014d1_en.pdf [Accessed on 05 April 2022].

³⁵ *Ibid*, p.10.

³⁶ United Nations Conference on Trade and Development, *Towards an enabling multilateral trading system for inclusive and sustainable development*, op cit, para. 5.

Available at http://unctad.org/meetings/en/SessionalDocuments/cimem5d5_en.pdf [Accessed on 5 April 2022].

³⁷ Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016, chapter Ten.

³⁸ Muigua, K., *International Investment Law and Policy in Africa: Human Rights, Environmental Damage and Sustainable Development - Paper Presented at the Africa International Legal Awareness (AILA) Africa International Legal Awareness (AILA) Conference Held on 5th November, 2018 at Riara University, Nairobi, Kenya.*

³⁹ ‘OHCHR | Trade and Investment’ (OHCHR) <<https://www.ohchr.org/en/development/trade-and-investment>> accessed 21 September 2022.

⁴⁰ Muigua, K., *International Investment Law and Policy in Africa: Human Rights, Environmental Damage and Sustainable Development - Paper Presented at the Africa International Legal Awareness (AILA) Africa*

factors into account: how obligations under trade and investment law agreements may affect a state's capacity to uphold its human rights obligations; what steps States and other actors should be taking to ensure positive impacts and prevent negative impacts; and consideration of action that is necessary to mitigate against any negative impacts that do occur.⁴¹ To do this, the current frameworks for foreign trade and investment must change from being engines of economic growth to serving as a multifunctional platform for the promotion of comprehensive, people-centered development.⁴²

3. Conclusion

The issues highlighted in this paper are critical and require to be effectively considered when coming up with institutions and approaches designed to address environmental conflicts. The 2030 Agenda on Sustainable Development Goals recognises the cross cutting issues that affect people's livelihoods, pursuit of peace and development.

As such, the theme of conflict management should always be explored within the larger lens of sustainable development agenda.

International Legal Awareness (AILA) Conference Held on 5th November, 2018 at Riara University, Nairobi, Kenya.

⁴¹ 'OHCHR | Trade and Investment' (OHCHR) <<https://www.ohchr.org/en/development/trade-and-investment>> accessed 21 September 2022.

⁴² Ibid.

Embracing Nature Based Solutions for Sustainable Development in Kenya

Abstract

The paper critically discusses the role of Nature Based Solutions (NbS) in the attainment of Sustainable Development in Kenya. It defines the concept of Nbs and discusses its relationship with Sustainable Development. The paper argues that NbS are integral in the Sustainable Development agenda since they provide eco-friendly measures that are effective and adaptable in addressing societal challenges such as climate change, food and water security and human health. The paper argues case for the adoption of NbS towards attainment of Sustainable Development in Kenya.

1. Introduction

Nature-based Solutions (NbS) have been defined as actions to protect, sustainably manage and restore natural or modified ecosystems, which address societal challenges such as climate change, food and water security and natural disasters effectively and adaptively, while simultaneously providing human well-being and biodiversity benefits¹. They adopt the use of ecosystems and their services towards addressing societal challenges². NbS are therefore actions inspired by, supported by or copied from nature³. It has been asserted that nature based solutions have significant yet underutilized potential to address global threats including climate change, loss of biodiversity, food and water security, human health and natural disasters⁴. NbS are informed by benefits that arise from healthy ecosystems and are critical to sustainable development⁵.

The concept of NbS emerged due to the need for solutions that worked with ecosystems⁶. Prior to development of this concept, most mechanisms adopted towards mitigating global challenges relied on conventional science and technological approaches such as engineering interventions⁷. NbS seeks to mitigate this gap by adopting eco-friendly approaches towards mitigating global social, environmental and economic concerns. They are intended to support the attainment of the development goals of a society while safeguarding human well-being through measures that

¹ International Union for Conservation of Nature, 'Nature-Based Solutions' available at <https://www.iucn.org/our-work/nature-based-solutions> (accessed on 16/09/2022)

² Cohen-Shacham et al., 'Nature-Based Solutions to address Global Societal Challenges' available at <https://portals.iucn.org/library/node/46191> (accessed on 16/09/2022)

³ Scott. M et al., 'Nature-based solutions for the contemporary city/Re-naturing the city/Reflections on urban landscapes, ecosystems services and nature-based solutions in cities/Multifunctional green infrastructure and climate change adaptation: brownfield greening as an adaptation strategy for vulnerable communities?/Delivering green infrastructure through planning: insights from practice in Fingal, Ireland/Planning for biophilic cities: from theory to practice, (2016) *Planning Theory & Practice*, 17:2, 267-300

⁴ IUCN, 'Ensuring Effective Nature Based Solutions' available at <https://www.iucn.org/resources/issues-brief/ensuring-effective-nature-based-solutions> (accessed on 16/09/2022)

⁵ UK Pact., 'Nature-Positive Actions: Lessons from Forests' available at https://apps.worldagroforestry.org/downloads/Publications/PDFS/nature_positive_actions.pdf (accessed on 16/09/2022)

⁶ Cohen-Shacham et al., 'Nature-Based Solutions to address Global Societal Challenges' Op Cit

⁷ Ibid

Embracing Nature Based Solutions for Sustainable Development in Kenya

reflect societal and cultural values and promote resilience of ecosystems⁸. NbS thus provide simultaneous benefits to the environment, the society and the economy.

The paper seeks to critically discuss the role of Nature Based Solutions in the attainment of Sustainable Development in Kenya. It examines the nexus between Nature Based Solutions and Sustainable Development. The paper then proposes interventions towards addressing current concerns in Kenya including climate change, food and water security and loss of biodiversity through Nature Based Solutions in the quest towards Sustainable Development.

2. Nature Based Solutions and Sustainable Development

Sustainable Development was defined in the *Report of the World Commission on Environment and Development: Our Common Future* as development that meets the needs of the present without compromising the ability of future generations to meet their own needs⁹. Sustainable Development entails a combination of elements including environmental protection, economic development and social issues¹⁰. The concept of Sustainable Development has emerged as the global blueprint for development as envisioned by the Sustainable Development Goals. The Sustainable Development Goals (SDGs) were adopted by United Nations member states in 2015 as a universal call to action to end poverty, protect the planet and ensure that all people enjoy peace and prosperity by the year 2030¹¹. The 2030 Agenda for Sustainable Development entails a shared blueprint for peace and prosperity for people and the planet for both the present and future generations¹². This approach contains both an anthropocentric approach that focuses on human development and an ecocentric approach that focuses on environmental conservation and further incorporates elements of inter and intra generational equity¹³. The Rio Declaration captures the concept of inter and intra generation equity and sets out that the right to development must be fulfilled in order to equitably developmental and environmental needs of present and future generations¹⁴.

Nature Based Solutions are integral to the Sustainable Development agenda since they adopt an ecosystem-based approach to mitigate and adapt to climate change, while also improving livelihoods and biodiversity¹⁵. Achieving most of the Sustainable Development Goals such as food security, clean water and sanitation and combating climate change may necessitate the adoption of nature based ecosystem approaches. The ecosystem approach towards Sustainable Development has been recognized in a number of legal instruments. The *Convention on*

⁸ Ibid

⁹ World Commission on Environment and Development, *Our Common Future*. Oxford, (Oxford University Press, 1987).

¹⁰ Fitzmaurice, M., 'The Principle of Sustainable Development in International Development Law' *International Sustainable Development Law*, Vol. 1

¹¹ United Nations General Assembly, *Transforming our World: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1

¹² United Nations, Department of Economic and Social Affairs, 'Sustainable Development' available at <https://sdgs.un.org/goals> (accessed on 26/04/2022)

¹³ Muigua, K., 'Nurturing Our Environment for Sustainable Development' Glenwood Publishers Limited, 2016

¹⁴ Rio Declaration on Environment and Development, A/CONF.151/26 (Vol. I), Principle 3

¹⁵ Cousins, J., 'Justice in Nature-Based Solutions: Research and Pathways' *Ecological Economics* (2021) 180

Embracing Nature Based Solutions for Sustainable Development in Kenya

Biological Diversity seeks to promote the conservation of biodiversity, the sustainable use of its components and the fair and equitable sharing of benefits arising out of the utilization of genetic resources¹⁶. The Convention advocates for the use of traditional knowledge and customary approaches towards sustainable use and conservation of biological diversity¹⁷. Traditional Ecological Knowledge is an essential component on Nature Based Solutions.

Further, the *United Nations Framework Convention on Climate Change*¹⁸ recognizes the role of nature in mitigating the effects of climate change. The Convention seeks to achieve a climate change mitigation framework that allows ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner¹⁹. The *Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention)*²⁰ seeks to promote the conservation and sustainable use of wetlands and calls for the establishing of nature reserves on wetlands²¹. In addition, the *African Convention on the Conservation of Nature and Natural Resources*²² seeks to enhance environmental protection; to foster the conservation and sustainable use of natural resources; and to harmonize and coordinate policies with a view to achieving ecologically rational, economically sound and socially acceptable development policies and programmes²³. Nature based solutions are thus integral in the Sustainable Development agenda.

3. Embracing Nature Based Solutions for Sustainable Development in Kenya

Nature based solutions represent viable and eco-friendly solutions towards addressing societal challenges²⁴. The following measures can be adopted towards embracing nature based solutions for Sustainable Development in Kenya.

3.1 Climate Change Mitigation

Sustainable Development Goal 13 calls upon nations to take urgent action to combat climate change and its impacts²⁵. Among the targets under this goal is strengthening resilience and adaptive capacity to climate related hazards and natural disasters in all countries and integrating climate change measures into national policies, strategies and planning²⁶. Climate change is arguably one of the most fundamental global concerns at the moment. Alive to this challenge, the *Paris Agreement*²⁷ was adopted with the aim to strengthen the global response to the threat of climate change in the context of Sustainable Development and efforts to eradicate poverty. The

¹⁶ Convention on Biological Diversity (1992), 1760 UNTS 79

¹⁷ Ibid, article 8 (j)

¹⁸ United Nations Framework Convention on Climate Change, United Nations, 1992

¹⁹ Ibid, Article 2

²⁰ Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar, 2.2. 1971)

²¹ Ibid, Article 4

²² African Union, African Convention on the Conservation of Nature and Natural Resources, OAU, 1001 UNTS 3.

²³ Ibid, Article 1

²⁴ Seddon, N, et al. "Understanding the value and limits of nature-based solutions to climate change and other global challenges." *Philosophical Transactions of the Royal Society B* 375.1794 (2020)

²⁵ United Nations, Sustainable Development Goals, available at <https://sdgs.un.org/goals/goal13> (accessed on 16/09/2022)

²⁶ Ibid

²⁷ Paris Agreement, United Nations, 2015

Embracing Nature Based Solutions for Sustainable Development in Kenya

Agreement aims to achieve this through inter alia holding the increase in the global average temperature and increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production²⁸.

Nature Based Solutions can play an important role in climate change mitigation by preventing the degradation and loss of natural ecosystems²⁹. Degradation and loss of natural ecosystems makes them susceptible to adverse effects of climate change. This can be caused by deforestation and forest degradation and poor land use practices. These practices increase carbon emissions into the atmosphere increasing the risk of climate change³⁰. Nature based solutions can be adopted through restoration, conservation and sustainable use of land, wetlands, forests and ocean ecosystems towards climate change mitigation³¹.

Good farming practices such as the use of organic manure can help improve crop yields without increasing carbon emissions³². Further, a move towards plant-based diets can help reduce land demand and emissions³³. In addition, practices such as agroforestry and reforestation can help to sustainably manage and restore ecosystems with the aim of increasing productivity and resilience to climate change³⁴. Nature Based Solutions thus have a role to play in increasing resilience to climate change impacts in both the short term and long term³⁵. The efficacy of nature based solutions in mitigating the effects of climate change is dependent on the resilience of the ecosystem and the extent of the impacts of climate change³⁶.

In Kenya, the Climate Change Act recognizes the role of indigenous knowledge related to climate change mitigation and adaptation³⁷. This knowledge can be harnessed in order to promote sound agricultural practices and protection of biodiversity including forest ecosystem which is critical in climate change mitigation and adaptation³⁸.

3.2 Food Security

Sustainable Development Goal Number 2 seeks to achieve food security by seeking to end all forms of hunger and malnutrition by the year 2030³⁹. The United Nations has identified various

²⁸ Ibid, Article 2

²⁹ Cohen-Shacham et al., 'Nature-Based Solutions to address Global Societal Challenges' Op Cit

³⁰ Ibid

³¹ Ibid

³² Miles. L et al., 'Nature-Based Solutions for Climate Change Mitigation' available at <https://www.unep.org/resources/report/nature-based-solutions-climate-change-mitigation> (accessed on 16/09/2022)

³³ Ibid

³⁴ Ibid

³⁵ Ibid

³⁶ United Nations Environment Programme., 'Nature-Base Solutions for Climate Change Mitigation' available at <https://www.unep.org/resources/report/nature-based-solutions-climate-change-mitigation> (accessed on 16/09/2022)

³⁷ Climate Change Act, No. 11 of 2016, S 13 (5) (g)

³⁸ Apraku. A, John. M & Apraku. G "Climate change and small-scale agriculture in Africa: Does indigenous knowledge matter? Insights from Kenya and South Africa." *Scientific African* 12 (2021)

³⁹ United Nations, Sustainable Development Goals, available at <https://www.undp.org/sustainable-development-goals#zero-hunger> (accessed on 16/09/2022)

Embracing Nature Based Solutions for Sustainable Development in Kenya

targets towards achieving this goal including ensuring sustainable food production systems and implementing resilient agricultural practices that increase productivity and production, that help maintain ecosystems, that strengthen capacity for adaptation to climate change, extreme weather, drought, flooding and other disasters and that progressively improve land and soil quality⁴⁰. Food insecurity is an urgent concern across the globe especially in developing countries⁴¹.

In the recent past, technological approaches towards food production have proved to be insufficient in improving food security as demonstrated by ongoing global food challenges⁴². Nature Based Solutions can thus be adopted in enhancing food security through protecting wild genetic resources, managing wild species such as fish and providing water for irrigation⁴³. It has been asserted that in Kenya, food security policies need to be conceived within the more integrated context of sustainable rural development and therefore consider linkages with issues such as environmental and natural resource management, poverty reduction, economic growth, human health, and social and gender equity⁴⁴. Approaches that have been adopted to increase food production in Kenya include maize-legume intercropping among many agricultural communities in Kenya⁴⁵. There is immense potential for the use of nature based solutions to enhance food availability, access and use in Kenya.

3.3 Water Management

Access to clean and safe water is a fundamental human right. In Kenya, this right has been enshrined under the Constitution⁴⁶. The United Nations estimates that more than 40% of the global population experiences water scarcity a situation likely to be worsened due to adverse effects of climate change brought about by drought and desertification⁴⁷. Sustainable Development Goal 6 seeks to achieve the universal goal of clean water and sanitation through measures such as improving water quality by reducing pollution, implementing integrated water resources management at all levels and protecting and restoring water-related ecosystems, including mountains, forests, wetlands, rivers, aquifers and lakes⁴⁸. Nature Based Solutions can aid in achieving these targets and promoting access to clean water and sanitation.

Nature based solutions can be used in water management through the planned and deliberated use of the ecosystem to improve water quality and quantity through mechanisms that also enhance resilience to climate change⁴⁹. It has been correctly pointed out that nature plays an important role

⁴⁰ Ibid

⁴¹ Hickey. G et al., 'Challenges and Opportunities for Enhancing Food Security in Kenya' *Food Sec.* (2012) 4:333–340

⁴² Ibid

⁴³ Cohen-Shacham et al., 'Nature-Based Solutions to address Global Societal Challenges' *Op Cit*

⁴⁴ Hickey. G et al., *Op Cit*

⁴⁵ Muna. M & Mugendi. D., 'Increasing Productivity through Maize-Legume Intercropping in Central Kenya' available at https://www.researchgate.net/publication/262679891_Increasing_Productivity_Through_Maize-Legume_Intercropping_in_Central_Kenya (accessed on 16/09/2022)

⁴⁶ Constitution of Kenya, 2010, Article 43 (1) (d)

⁴⁷ UNDP, Sustainable Development Goals, Goal 6- Clean Water and Sanitation, available at <https://www.undp.org/sustainable-development-goals#clean-water-and-sanitation> (accessed on 16/09/2022)

⁴⁸ Ibid

⁴⁹ UNEP., Water Based Solutions for Water Management, available at

Embracing Nature Based Solutions for Sustainable Development in Kenya

in water management through ways such as reducing the impact of heavy rainfall by vegetation cover thus reducing soil erosion and pollution, holding of water by wetlands and accumulation of large volumes of water by flood plains during extreme events⁵⁰. Nature Based Solutions can thus be adopted through Integrated Water Resources Management to protect, restore and extent water services⁵¹.

Integrated Water Resources Management balances various concerns including water use between socio-economic activities and ecosystems⁵². It has been lauded as an effective alternative to the traditional approaches to water and wetlands resources governance. This can be achieved through various ways including management of water resources along natural catchment/basin boundaries, embracing a participatory approach for better use of water resources, treatment of effluents and re-use and recycling of water⁵³. Nature Based Solutions thus have a role to play in water management towards achieving access to clean and safe water.

3.4 Promoting Human Health

Among the aims of the Sustainable Development Goals is to promote good health and well-being for all persons⁵⁴. It has been argued that the natural environment including the ecosystem, climate and biodiversity are key determinants of human health and well-being⁵⁵. To this extent, it has been pointed out the green space provided by the natural environment can improve human health and well-being through since it enhances air quality and regulation of heat and noise⁵⁶. Further, the natural environment can enhance spiritual and mental being typically through experiences in remote green spaces⁵⁷. Further, ecosystems such as forests have for a long time been a source of herbal medicine especially among indigenous communities⁵⁸. Nature based solutions are thus essential in promoting human health.

4. Conclusion

The concept of Nature Based Solutions recognizes the important role that ecosystems play in addressing societal challenges such as climate change, food and water security and natural disasters⁵⁹. It seeks to promote solutions that are effective and adaptable to the needs of both human beings and the environment⁶⁰. It adopts both an anthropocentric and eco-centric

<https://wedocs.unep.org/handle/20.500.11822/32058> (accessed on 16/09/2022)

⁵⁰ Ibid

⁵¹ Ibid

⁵² Muigua.K., Wamukoya. D & Kariuki. F., 'Natural Resources and Environmental Justice in Kenya' Glenwood Publishers Limited, 2015, Pg 53

⁵³ Ibid

⁵⁴ UNDP, Sustainable Development Goals- Goal 3, Good Health and Well-Being, available at <https://www.undp.org/sustainable-development-goals#good-health> (accessed on 16/09/2022)

⁵⁵ Naeem. S et al., 'Get the Science Right When Paying for Nature's Services.' *Science* 347(6227): 1206–1207.

⁵⁶ Hartig. T et al., 'Nature and Health.' *Annual Review of Public Health* (2014) 35: 207–28.

⁵⁷ Cohen-Shacham et al., 'Nature-Based Solutions to address Global Societal Challenges' Op Cit

⁵⁸ Ibid

⁵⁹ Cohen-Shacham et al., 'Nature-Based Solutions to address Global Societal Challenges' Op Cit

⁶⁰ Seddon. N, et al. "Understanding the value and limits of nature-based solutions to climate change and other global challenges." Op Cit

Embracing Nature Based Solutions for Sustainable Development in Kenya

approaches in mitigating global challenges⁶¹. There is thus a need to embrace Nature Based Solutions in Kenya towards the attainment of Sustainable Development.

⁶¹ Ibid

Understanding the Place of Conflict Management in Sustainable Development Agenda

Abstract

The Preamble to the 2030 Agenda for Sustainable Development envisages a world where there is a plan of action for people, planet and prosperity as well as strengthening universal peace in larger freedom through integrating the indivisible three dimensions of sustainable development: the economic, social and environmental, by striking a balance across them. Each of these three dimensions is likely to result in conflicts and defeat the very purpose of the sustainable development agenda. It is for this reason that the 2030 Agenda acknowledges the need for strengthening universal peace. This paper discusses the importance of effective conflict management as a step towards achieving sustainable development. The author argues that unless peace is achieved, it may not be possible to achieve the sustainable development agenda.

1. Introduction

The Sustainable Development Goals (SDGs) adopted by the United Nations (UN) in 2015 are widely hailed as a huge success: they represent a global agreement on a comprehensive strategy to address the social and environmental issues that are affecting people all over the world.¹ Instead of relying on nature for survival, as we have done for ages, sustainable development offers a framework for people to coexist with and thrive in harmony with the natural world.²

The main principles of sustainable development agenda as captured in the *2030 Agenda for Sustainable Development*³ include the economic, social and environmental sustainability. These are encapsulated in the 17 Sustainable Development Goals and 169 targets, which are meant to lay out a plan of action for people, planet, and prosperity that will strengthen universal peace in larger freedom. They also identify eradicating poverty in all of its manifestations, including extreme poverty, as the greatest global challenge and a crucial prerequisite for sustainable development.⁴ The Sustainable Development Goals (SDGs) also envisage a world in which democracy, good governance and the rule of law as well as an enabling environment at national and international levels, are essential for sustainable development, including sustained and inclusive economic growth, social development, environmental protection and the eradication of poverty and hunger.⁵ The term "governance" is used to describe "steering" in this context, which includes both processes and institutions and involves an element of authority. Process relates to how decisions are made on priorities, how conflicts are addressed and maybe handled, and how

¹ Higgs, Kerryn. "How sustainable are the SDGs?" (2020): 109-130, 109 < <https://anzsee.org.au/wp-content/uploads/2020/07/EESolutionsFutureRoyalDraftJuly2ndFINALEbook.pdf#page=109>> accessed 13 July 2022.

² Dernbach, J.C. and Mintz, J.A., "Environmental laws and sustainability: An introduction." *Sustainability* 3, no. 3 (2011): 531-540, 531.

³ UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

⁴ United Nations, *Transforming Our World: The 2030 Agenda for Sustainable Development* | Department of Economic and Social Affairs' <<https://sdgs.un.org/2030agenda>> accessed 13 July 2022.

⁵ *Ibid.*

coordination of people's actions with regard to resource usage is made easier. On the other hand, the structural aspect relates to how these procedures are set up and 'managed'.⁶

It has been observed that COVID-19 tremendously disrupted the world's economy where the pandemic left the world's informal employees, especially young workers and women, on their own with no support or protection against financial and health issues. This was as a result of massive job losses, enlarged market gender gap, informal workers' lack of social safety, and decreased work and education opportunities for youth.⁷

Despite having adopted the SDGs into its domestic laws and planning, Kenya still faces the risk of widespread poverty, natural resources and biodiversity degradation, lack of access to safe water for all, escalating climate change, desertification, land degradation, soil erosion, flooding and drought; and increased natural disaster risks.⁸ This paper argues that these challenges cannot and should not be addressed in a disjointed manner, if any real progress is to be made.

This paper seeks to analyze the aspects of governance as well as how they interact with the environmental and social tenets of sustainable development with the aim of ensuring that the SDGs are achieved, especially post the COVID-19 pandemic. Arguably, sustainable development as a process of transformation of the economy must, in consequence, also result in a transformation of society and its governance structures for a sustainable future.⁹ All this must also be accomplished in a way that takes into account environmental sustainability.

The paper discusses the Environmental, Social, and Governance (ESG) approach to sustainability and how different players, including governments, communities and businesses can participate in promoting and achieving sustainability through ESG approach as a way of addressing and avoiding conflict. Addressing conflict of whatever nature is part of the social aspects of sustainability that must be put into consideration if sustainable development agenda is to be achieved. This paper discusses the place of conflicts, especially those related to environmental resources, in achieving the sustainable development agenda.

2. Environmental Aspect of Sustainable Development Agenda

The world leaders who signed the 2030 Agenda stated in the preamble that they are "Determined to protect the planet from degradation, including through sustainable consumption and production, sustainably managing its natural resources, and taking urgent action on climate

⁶ Vatn, Arild, *Environmental governance: institutions, policies and actions*, Edward Elgar Publishing, 2015, p. 133.

⁷ Fallah Shayan, N., Mohabbati-Kalejahi, N., Alavi, S. and Zahed, M.A., 'Sustainable Development Goals (SDGs) as a Framework for Corporate Social Responsibility (CSR)' (2022) 14 Sustainability 1222, 8 <<https://www.mdpi.com/2071-1050/14/3/1222>> accessed 13 July 2022.

⁸ National Environment Management Authority, Kenya State of Environment Report 2019-2021 <https://www.nema.go.ke/images/Docs/EIA_1840-1849/Kenya%20State%20of%20Environment%20Report%202019-2021%20final-min.pdf> accessed 17 July 2022.

⁹ Ketschau, T.J., "Social sustainable development or sustainable social development-two sides of the same coin? the structure of social justice as a normative basis for the social dimension of sustainability." *International Journal of Design & Nature and Ecodynamics* 12, no. 3 (2017): 338-347, 338.

change, so that it can support the needs of the present and future generations."¹⁰ A number of SDGs are dependent on the health of the environment for their realisation. These include but are not limited to: Goal 2 seeks to end hunger, achieve food security and improved nutrition and promote sustainable agriculture; Goal 6 seeks to ensure availability and sustainable management of water and sanitation for all; Goal 12 seeks to ensure sustainable consumption and production patterns; Goal 13 urges State parties to take urgent action to combat climate change and its impacts; Goal 14 calls for conservation and sustainable use of the oceans, seas and marine resources for sustainable development; and Goal 15 urges State parties to protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss.¹¹

In order to achieve environmental sustainability, natural resources management and disaster risk management, there is also a need for improved management of natural resources and biodiversity; access to safe water for all; climate change; desertification, land degradation, soil erosion, flooding and drought; and natural disaster risk reduction and management.¹² It is thus arguable that unless the environmental problems facing the planet are addressed, the other SDGs will remain a mirage. In addition, environmental related conflicts will continue affecting communities.

3. Economic Aspect of Sustainable Development Agenda

The SDGs envisage a world in which every country enjoys sustained, inclusive and sustainable economic growth and decent work for all.¹³ The economic aspect is to be achieved through ensuring that every State has, and shall freely exercise, full permanent sovereignty over all its wealth, natural resources and economic activity.¹⁴

SDG 8 seeks to promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all.¹⁵ Some of the related relevant targets include: Sustain per capita economic growth in accordance with national circumstances and, in particular, at least 7 per cent gross domestic product growth per annum in the least developed countries;¹⁶ achieve higher levels of economic productivity through diversification, technological upgrading and innovation, including through a focus on high-value added and labour-intensive sectors;¹⁷ promote development-oriented policies that support productive activities, decent job creation, entrepreneurship, creativity and innovation, and encourage the formalization and growth of micro,

¹⁰ Environment UN, 'Sustainable Development Goals' (UNEP - UN Environment Programme, 19 October 2017) <<http://www.unep.org/evaluation-office/our-evaluation-approach/sustainable-development-goals>> accessed 17 July 2022.

¹¹ 'List of the 17 Sustainable Development Goals | Agora' <<https://agora-parl.org/resources/aoe/list-17-sustainable-development-goals>> accessed 17 July 2022.

¹² Urama, Kevin, Nicholas Ozor, and Ernest Acheampong, "Achieving Sustainable Development Goals (SDGs) Through Transformative Governance Practices and Vertical Alignment at the National and Subnational Levels in Africa," SDplanNet Africa Regional Workshop, March 3–5, 2014, 3.

¹³ United Nations, 'Transforming Our World: The 2030 Agenda for Sustainable Development | Department of Economic and Social Affairs' <<https://sdgs.un.org/2030agenda>> accessed 13 July 2022.

¹⁴ Ibid.

¹⁵ SDG 8, UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1.

¹⁶ Target 8.1.

¹⁷ Target 8.2.

Understanding the Place of Conflict Management in Sustainable Development Agenda

small- and medium-sized enterprises, including through access to financial services;¹⁸ improve progressively, through 2030, global resource efficiency in consumption and production and endeavour to decouple economic growth from environmental degradation, in accordance with the 10-year framework of programmes on sustainable consumption and production, with developed countries taking the lead;¹⁹ by 2030, achieve full and productive employment and decent work for all women and men, including for young people and persons with disabilities, and equal pay for work of equal value;²⁰ by 2020, substantially reduce the proportion of youth not in employment, education or training;²¹ take immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour, including recruitment and use of child soldiers, and by 2025 end child labour in all its forms;²² protect labour rights and promote safe and secure working environments for all workers, including migrant workers, in particular women migrants, and those in precarious employment;²³ by 2030, devise and implement policies to promote sustainable tourism that creates jobs and promotes local culture and products;²⁴ strengthen the capacity of domestic financial institutions to encourage and expand access to banking, insurance and financial services for all;²⁵ increase Aid for Trade support for developing countries, in particular least developed countries, including through the Enhanced Integrated Framework for Trade-Related Technical Assistance to Least Developed Countries;²⁶ and by 2020, develop and operationalize a global strategy for youth employment and implement the Global Jobs Pact of the International Labour Organization.²⁷

The underlying affirmation of these targets are that “economic, social, and technological progress” must occur “in harmony with nature,” envisaging “a world in which ... consumption and production patterns and use of all natural resources—from air to land, from rivers, lakes and aquifers to oceans and seas—are sustainable ... One in which humanity lives in harmony with nature and in which wildlife and other living species are protected,” but the SDGs fail to offer any quantified target for resource efficiency, and do not specify what a sustainable level of material footprint might be.²⁸

It has been noted that in the economic debate, sustainable development is most frequently defined as the requirement to maintain a continuous flow of income for humanity, produced from non-declining capital stocks. In this perception, at least, steady stocks of human, man-made, natural, and social capital are seen as necessary and frequently sufficient criteria for sustainable

¹⁸ Target 8.3.

¹⁹ Target 8.4.

²⁰ Target 8.5.

²¹ Target 8.6.

²² Target 8.7.

²³ Target 8.8.

²⁴ Target 8.9.

²⁵ Target 8.10.

²⁶ Target 8.A.

²⁷ Target 8.B.

²⁸ Hickel, J., "The contradiction of the sustainable development goals: Growth versus ecology on a finite planet." *Sustainable Development* 27, no. 5 (2019): 873-884, at 874 & 875.

development.²⁹ Economic sustainability has been defined as the meeting the economic needs of the present without diminishing the economic needs of the future.³⁰ Although intergenerational equity is frequently viewed as a factor in economic sustainability, it is not always clear what exactly needs to be perpetuated.³¹ The question that has, therefore, been frequently asked is whether the world be able to sustain economic growth indefinitely without running into resource constraints or despoiling the environment beyond repair.³² Thus, the relationship between economic growth and the environment is, and always remains, controversial.³³

However, what may be universally accepted is that increased private earnings are only one aspect of economic growth; it may also make a substantial contribution to the production of resources that can be mobilised to enhance social services (such as public healthcare, epidemiological protection, basic education, safe drinking water, among others).³⁴ These are ultimately important in realisation of SDGs. Economic empowerment of individuals as well as investing in social services that will benefit the current wider citizenry as well as future generations is thus an important step towards achieving sustainability.

4. Social Aspect of Sustainable Development Agenda

Social sustainability entails robust, inclusive communities where people may voice their opinions and governments act on them. In order to achieve social sustainability, opportunities must be increased for everyone, both now and in the future. It is essential for eradicating poverty and promoting shared wealth, together with economic and environmental sustainability.³⁵

Social problems, in particular, prohibit individuals from living healthy lifestyles, disturb communities, and interfere with businesses. While most of these problems are universal, some are particular to particular regions or populations. These problems may include, but are not limited to, discrimination (based on race, colour, and gender), poverty, homelessness, hunger, malnutrition, and obesity, a lack of basic freedoms, the unemployment crisis, pandemics and

²⁹ Joachim H Spangenberg, 'Economic Sustainability of the Economy: Concepts and Indicators' (2005) 8 International Journal of Sustainable Development 47, 48
<<http://www.inderscience.com/link.php?id=7374>> accessed 14 July 2022.

³⁰ Solin, J., "Principles for Economic Sustainability: Summary," (a summary of John Ikerd's Principles of Economic Sustainability. It was developed based on attendance a 5-day workshop taught by John and John's Essentials of Economic Sustainability book)
<<https://www3.uwsp.edu/cnr-ap/wcee/Documents/Principles%20for%20Economic%20Sustainability%205%20page%20summary.pdf>> accessed 14 July 2022.

³¹ Sudhir Anand and Amartya Sen, 'Human Development and Economic Sustainability' (2000) 28 World Development 2029, 2029 <<https://linkinghub.elsevier.com/retrieve/pii/S0305750X00000711>> accessed 14 July 2022.

³² Panayotou, T., "Economic Growth and the Environment." CID Working Paper Series (2000), 1.

³³ Brock, W.A. and Taylor, M.S., "Economic growth and the environment: a review of theory and empirics." Handbook of economic growth 1 (2005): 1749-1821.

³⁴ Ibid, 2032.

³⁵ 'Overview' (World Bank) <<https://www.worldbank.org/en/topic/socialsustainability/overview>> accessed 14 July 2022.

epidemics, disabilities and chronic diseases, violence, crime, and insecurity as well as wars and political conflicts, gender inequality, and a lack of education and opportunities.³⁶

The distribution of economic opportunities and social services while resolving power disparities constitutes the process of social development, which involves institutions at all levels, from national governments to various civil society groups.³⁷ Social development has also been defined as "a process of planned social change designed to promote people's welfare within the context of a comprehensive process of economic development".³⁸ The emphasis of social sustainability and inclusion is on the requirement to "put people first" throughout the development process. By empowering individuals, creating cohesive and resilient societies, and making institutions accessible and answerable to citizens, it fosters social inclusion of the underprivileged and vulnerable.³⁹ Efforts towards sustainability must thus take note of these aspects of social sustainability for creation of an inclusive society.

5. Peace and Sustainable Development: Addressing Causes of Resource Related Conflicts

Sustainable development agenda has gained the support of the international community as part of adopting an integrated approach to development issues and environmental conservation and protection. Sustainable development seeks to ensure that all development activities are conscious of environmental conservation and protection. The underlying thread in this paper is to promote sound environmental governance and management for sustainable development. The discourse recognises that sustainable development agenda not only deals with the environment, but it seeks to address all the factors that affect people's livelihoods and consequently the sustainability of environment and natural resources. This is in recognition of the fact that people's livelihoods mainly depend on the natural and other environmental resources. It has rightly been pointed out that "When people lose their means of subsistence, their capacity to exercise political voice, their...access to social services, jobs, and their fundamental right to remain on their property, you create a vacuum in which radicals may come and exploit that sense of insecurity".⁴⁰

Sustainable development agenda is not only concerned with environmental matters. Instead, it adopts both anthropocentric and ecocentric approaches. There is a need for promotion of sustainable development using the two approaches: Some of the running themes that are informed by the anthropocentric approach to environmental management include Poverty Eradication, Food Security, Environmental Democracy, Environmental Justice, Environmental Security, Public Participation, Gender Equity, Access To Information, Conflicts Management, amongst

³⁶ Fallah Shayan, N., Mohabbati-Kalejahi, N., Alavi, S. and Zahed, M.A., 'Sustainable Development Goals (SDGs) as a Framework for Corporate Social Responsibility (CSR)' (2022) 14 Sustainability 1222, 14 <<https://www.mdpi.com/2071-1050/14/3/1222>> accessed 13 July 2022.

³⁷ Julie L Drolet, 'Chapter 14 - Societal Adaptation to Climate Change' in Trevor M Letcher (ed), *The Impacts of Climate Change* (Elsevier 2021) <<https://www.sciencedirect.com/science/article/pii/B9780128223734000112>> accessed 14 July 2022.

³⁸ Kramer, J.M. and Johnson, C.D., "Sustainable Development and Social Development: Necessary Partners for the Future." *Sustainable Development* (1996), 79.

³⁹ 'Social Sustainability and Inclusion' (World Bank) <<https://www.worldbank.org/en/topic/socialsustainability>> accessed 14 July 2022.

⁴⁰ 'In Sustainable Development and Conflict Resolution, Women Seeing Larger Roles' (New Security Beat, 22 June 2016) <<https://www.newsecuritybeat.org/2016/06/sustainable-development-conflict-resolution-women-larger-roles/>> accessed 17 September 2022.

others. All these themes are discussed within the broader theme of human rights while emphasizing the special relationship between human rights and the environment. This is particularly important in light of the new Constitutional provisions on governance and in the Bill of Rights including Articles of the Constitution that touch on environment and natural resources.⁴¹

Ecocentric arguments also inform the discussion on themes such as combating climate change, impact of resource extraction, environmental health, and environmental conservation for the sake of the Mother Nature. However, promoting such rights as the right to a clean and healthy environment has both anthropocentric and ecocentric benefits and should therefore be pursued.⁴² Thus, the sustainable development agenda advocates for an integrated approach to tackling environmental management challenges as well as social problems affecting the society.⁴³ This is in line with the UNDP's approach in the recent past where it has been advocating for inclusivity, sustained political commitment and national ownership alongside the need to have gender equality, and integrated planning, budgeting and monitoring as part of achieving the 2030 Sustainable Development Goals (SDGs) agenda.⁴⁴ OECD also calls for an integrated approach to the implementation of sustainable development and argues that many SDGs are interconnected with each other; an integrated approach implies managing trade-offs and maximising synergies across targets.⁴⁵

6. Governance Aspect of Sustainable Development Agenda

The environmental rule of law is crucial to sustainable development because it combines environmental requirements with the fundamental components of the legal system and lays the groundwork for better environmental governance.⁴⁶ In addition, by linking environmental sustainability to fundamental rights and responsibilities, it draws attention to environmental sustainability, reflects universal moral principles and ethical standards of conduct, and establishes a basis for environmental rights and obligations. Without environmental rule of law and the enforcement of legal rights and responsibilities, it is possible to argue that environmental governance will be arbitrary, that is, discretionary, subjective, and unpredictable.⁴⁷

⁴¹ Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016, pp. xi-xii.

⁴² *Ibid*, p. xii.

⁴³ See also Hussein Abaza and Andrea Baranzini, *Implementing Sustainable Development: Integrated Assessment and Participatory Decision-Making Processes* (Edward Elgar Publishing 2002).

⁴⁴ United Nations Development Programme, "Implementation of 2030 Agenda has to be inclusive, participatory and bottom-up," Jul 18, 2017. Available at <https://www.undp.org/content/undp/en/home/presscenter/pressreleases/2017/07/18/implementation-of-2030-agenda-has-to-be-inclusive-participatory-and-bottom-up.html> [Accessed on 6 April 2022]; See also Rizza Ambra, 'An Integrated Approach to the Sustainable Development Goals' (Assembly of European Regions, 4 March 2019) <<https://aer.eu/integrated-approach-sdgs/>> accessed 6 April 2022;

⁴⁵ Rizza Ambra, 'An Integrated Approach to the Sustainable Development Goals' (Assembly of European Regions, 4 March 2019) <<https://aer.eu/integrated-approach-sdgs/>> accessed 6 April 2022.

⁴⁶ Environment UN, 'Promoting Environmental Rule of Law' (UNEP - UN Environment Programme, 5 October 2017) <<http://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/promoting-environmental-rule-law>> accessed 17 July 2022.

⁴⁷ *Ibid*.

The rule of law fosters equality of treatment, increases personal and property security, and offers a fair and amicable means of resolving conflicts.⁴⁸ The rule of law was defined by United Nations Secretary-General Kofi Anan in 2004 as follows:

The rule of law . . . refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.⁴⁹

The place of rule of law in promoting sustainability is well captured under SDG 16 which seeks to promote just, peaceful and inclusive societies.⁵⁰ The law is important as it provides essential tools and institutions for governing resources sustainably.⁵¹ In addition to being critical (and frequently last) stages in itself for effectively adopting sustainability solutions, laws and governance are also vital elements to assist technological and economic progress.⁵² It has been emphasised that the presence of robust, well-resourced public institutions at the national and international levels is essential for the execution of the 2030 Agenda's necessary policy reforms.⁵³

It has been observed that the SDGs have thus far mostly been implemented through a top-down, government-led strategy, with goals and initiatives determined at the global (and increasingly, national) level.⁵⁴ To achieve the SDGs, grassroots action for sustainable development, also known as "solutions that react to the local context and the interests of the communities concerned," is necessary.⁵⁵ The SDGs' localization is based on Local Agenda 21, a bottom-up, participatory initiative allowing local governments to interact with their citizens on sustainable development.⁵⁶

To co-create locally relevant sustainability routes, communities, stakeholders, and academics must collaborate, and participatory approaches are crucial for fostering this cooperation in

⁴⁸ Michel J, *The Rule of Law and Sustainable Development*. Center for Strategic & International Studies, 2020, 5

<https://www.researchgate.net/profile/James-Michel-3/publication/342881527_The_Rule_of_Law_and_Sustainable_Development/links/5f0b3464a6fdcc4ca46389c5/The-Rule-of-Law-and-Sustainable-Development.pdf> accessed 17 July 2022.

⁴⁹ *Ibid*, 8.

⁵⁰ Martin, 'Peace, Justice and Strong Institutions' (United Nations Sustainable Development) <<https://www.un.org/sustainabledevelopment/peace-justice/>> accessed 17 July 2022.

⁵¹ Dernbach, J.C. and Mintz, J.A., "Environmental laws and sustainability: An introduction." *Sustainability* 3, no. 3 (2011): 531-540, 532.

⁵² Clune WH and Zehnder AJB, 'The Three Pillars of Sustainability Framework: Approaches for Laws and Governance' (2018) 9 *Journal of Environmental Protection* 211.

⁵³ Martens, Jens. "Redefining policies for sustainable development." *Exploring* (2018): 11, 20 <https://www.2030spotlight.org/sites/default/files/spot2018/chaps/Spotlight_Innenteil_2018_redefining_policies_martens.pdf> accessed 13 July 2022.

⁵⁴ Szetey, K., Moallemi, E.A., Ashton, E., Butcher, M., Sprunt, B. and Bryan, B.A., 'Co-Creating Local Socioeconomic Pathways for Achieving the Sustainable Development Goals' (2021) 16 *Sustainability Science* 1251, 1251 <<https://doi.org/10.1007/s11625-021-00921-2>> accessed 13 July 2022.

⁵⁵ *Ibid*.

⁵⁶ *Ibid*.

governance issues.⁵⁷ Notably, the 2010 Constitution of Kenya provides that ‘all State organs, State officials, public offices, and all individuals are bound by the national values and principles of governance whenever any of them: apply or interpret this Constitution; enact, apply, or interpret any legislation; or make or implement public policy choices’.⁵⁸ Good governance, integrity, transparency, accountability, sharing and devolution of power, the rule of law, democracy, and public participation are among the national values and guiding principles of governance. Other national values and guiding principles include good governance, integrity, transparency, and accountability, patriotism, national unity, as well as sustainable development.⁵⁹ "Social Development is based on positive, humane, people oriented development in society....The basic principles... are human dignity, equality, social justice, and equitable distribution of resources.... People's participation and empowerment are necessary conditions...."⁶⁰

These principles are especially relevant in light of the spirit of devolution, where the Constitution states that ‘the objects of the devolution of government are, among other things—to promote democratic and accountable exercise of power; to give powers of self-governance to the people and enhance their involvement in the exercise of State authority and in making decisions that affect them; to acknowledge the right of communities to manage their own affairs and to further their development; to protect and promote the interests and rights of minorities and marginalised communities’.⁶¹

There is a need for efforts geared towards achievement of the principle of sustainable development to be molded around the foregoing national values and principles of governance to ensure that there is an inclusive approach to governance matters in the country, for the benefit of all.

7. Realising Environmental, Social and Governance Tenets for Sustainable Development: Moving Forward

Integrated decision-making, or the process of incorporating environmental, social, and economic goals and factors into choices, is the key action principle of sustainable development.⁶² It has rightly been pointed out that despite the fact that all countries, regardless of their economic, social, or environmental contexts, can benefit from the Sustainable Development Goals (SDGs) framework, norms, and principles, translating global objectives into specific national contexts is difficult because of varying starting points, capacities, and priorities, among other factors.⁶³

⁵⁷ See Szetey, K., Moallemi, E.A., Ashton, E., Butcher, M., Sprunt, B. and Bryan, B.A., ‘Co-Creating Local Socioeconomic Pathways for Achieving the Sustainable Development Goals’ (2021) 16 Sustainability Science 1251 <<https://doi.org/10.1007/s11625-021-00921-2>> accessed 13 July 2022.

⁵⁸ Article 10 (1), Constitution of Kenya 2010.

⁵⁹ Ibid, Article 10 (2).

⁶⁰ Kramer, J.M. and Johnson, C.D., "Sustainable Development and Social Development: Necessary Partners for the Future." *Sustainable Development* (1996), 79.

⁶¹ Article 174, Constitution of Kenya 2010.

⁶² Dernbach, J.C. and Mintz, J.A., "Environmental laws and sustainability: an introduction. *Sustainability*, 3 (3), 531-540." (2011), 532.

⁶³ Urama, Kevin, Nicholas Ozor, and Ernest Acheampong, "Achieving Sustainable Development Goals (SDGs) Through Transformative Governance Practices and Vertical Alignment at the National and Subnational Levels in Africa," *SDplanNet Africa Regional Workshop*, March 3–5, 2014, 2 < https://www.iisd.org/system/files/publications/sdplannet_africa.pdf> Accessed on 25 June 2022.

Global goals will be transformed into targets and indicators that take into account the specific national settings of each country in order to be relevant to all nations (and to foster national ownership). Keeping broad global aims and very different national settings coherent will be a problem.⁶⁴

Economic, social and governance aspects of sustainable development must take into account the environmental aspect of sustainable development. This is because environmental protection is essential to promoting sustainable economic growth because the natural environment supports economic activity both directly and indirectly through ecosystem services like carbon sequestration, water purification, managing flood risks, and nutrient cycling. Directly, the natural environment provides resources and raw materials such as water, timber, and minerals that are required as inputs for the production of goods and services.⁶⁵

In the institutional arrangements of governments and parliaments, scholars have argued that it is crucial to reflect the encompassing nature of the 2030 Agenda and the SDGs. If competent national equivalents do not reflect and "own" the new, more cogent global government, the effort will be in vain.⁶⁶ To make the UN system "fit for purpose" on a global scale, it is necessary to reform already-existing institutions and establish new bodies in regions where there are governance gaps. This can only be done by making a commitment to address the unequal distribution of resources as well as access to participation and decision-making.⁶⁷ This is especially important considering that the SDG index, which displays each country's compliance with the SDGs and breaks down each score by SDG, reflects the fact that governments have varying degrees of commitment to the SDGs.⁶⁸

The 2030 Agenda presents a challenge to UN Environment to create and improve integrated approaches to sustainable development, methods that will show how enhancing environmental health would have positive social and economic effects. UN Environment's initiatives support the environmental component of sustainable development and promote socio-economic development by aiming to lower environmental hazards and boost society's and the environment's overall resilience.⁶⁹

⁶⁴ Ibid, 2.

⁶⁵ UN Environment, 'GOAL 8: Decent Work and Economic Growth' (UNEP - UN Environment Programme, 2 June 2021) <<http://www.unep.org/explore-topics/sustainable-development-goals/why-do-sustainable-development-goals-matter/goal-8>> accessed 13 July 2022.

⁶⁶ Martens, J., "Redefining policies for sustainable development." *Exploring* (2018): 11, 20 <https://www.2030spotlight.org/sites/default/files/spot2018/chaps/Spotlight_Innenteil_2018_redefining_policies_martens.pdf> accessed 13 July 2022.

⁶⁷ Ibid.

⁶⁸ Del-Aguila-Arcentales, S., Alvarez-Risco, A., Jaramillo-Arévalo, M., De-la-Cruz-Diaz, M. and Anderson-Seminario, M.D.L.M., 'Influence of Social, Environmental and Economic Sustainable Development Goals (SDGs) over Continuation of Entrepreneurship and Competitiveness' (2022) 8 *Journal of Open Innovation: Technology, Market, and Complexity* 73, 1 <<https://www.mdpi.com/2199-8531/8/2/73>> accessed 13 July 2022.

⁶⁹ Environment UN, 'Sustainable Development Goals' (UNEP - UN Environment Programme, 19 October 2017) <<http://www.unep.org/evaluation-office/our-evaluation-approach/sustainable-development-goals>> accessed 17 July 2022.

The Sustainable Development Goals (SDGs) are global, multifaceted, and ambitious, and it is arguable that in order to fulfil them, we need an integrated framework that encourages a growth path that protects the environment and whose benefits are shared by everyone, not just by the fortunate few.⁷⁰ Thus, the idea of sustainable development forces us to reconsider how we interact with the world and how we anticipate that governments would implement policies that promote that worldview.⁷¹ Local communities need to concentrate on a locally relevant subset of goals and comprehend potential future pathways for key drivers which influence local sustainability because the Sustainable Development Goals (SDGs) recognise the importance of action across all scales to achieve a sustainable future.⁷² There is need for continuous creation of public awareness, civic education and creating avenues for public participation among the communities because to guide long-term local planning and decision-making to achieve the SDGs, local communities also need to understand the range of potential future pathways for their region and how they align with local sustainability objectives.⁷³

It has rightly been pointed out that ‘since the world's poor understand scarcity and live "closer to nature," they have a better understanding of the finite nature of natural resources than the world's powerful and affluent elite, and they have a much greater immediate and vested interest in promoting change in the way that the world does business. As a result, they have a better understanding of the need to focus social development strategies on empowering the poor. They must thus be given the authority and influence to actively shape economic policy rather than just responding to circumstances outside their control’.⁷⁴

This calls for adoption of participatory and inclusive governance approaches that give all members of society and/or their representatives to air their views and actively participate in governance matters, in a meaningful way that impacts their lives positively. It has also been pointed out that while environmental law is essential to attaining sustainability, we also need to acknowledge that there is a need for a wide range of other pertinent laws, such as those governing land use and property, taxes, our governmental system, and other issues.⁷⁵ This is important in ensuring that sustainability is achieved in environmental, economic, social and governance aspects of development.

Corporations, through following ESG frameworks or guidelines, such as the *Nairobi Securities Exchange ESG – Disclosures Guidance Manual, 2021*, can also play a huge role in promoting sustainability within the localities that they operate in and the country at large. ESG Reporting should be encouraged and used as a tool of promoting sustainability within the companies,

⁷⁰ Ramos, G., "The Sustainable Development Goals: A duty and an opportunity." (2016): 17-21, in Love, P. (ed.), *Debate the Issues: New Approaches to Economic Challenges*, OECD Publishing, Paris, <https://doi.org/10.1787/9789264264687-3-en>.

⁷¹ Ibid.

⁷² Szetey, K., Moallemi, E.A., Ashton, E., Butcher, M., Sprunt, B. and Bryan, B.A., ‘Co-Creating Local Socioeconomic Pathways for Achieving the Sustainable Development Goals’ (2021) 16 *Sustainability Science* 1251, 1251 <<https://doi.org/10.1007/s11625-021-00921-2>> accessed 13 July 2022.

⁷³ Ibid, 1251.

⁷⁴ Kramer, J.M. and Johnson, C.D., "Sustainable Development and Social Development: Necessary Partners for the Future." *Sustainable Development* (1996), 84.

⁷⁵ Dernbach, J.C. and Mintz, J.A., "Environmental laws and sustainability: An introduction," *Sustainability* 3, no. 3 (2011): 531-540, 532.

communities and country. Under this, organisations make it part of their operational procedures to report publicly on their economic, environmental, and/or social impacts, and hence its contributions – positive or negative – towards the goal of sustainable development.⁷⁶ As the business community seeks to invest in various sectors, there is a need for them to take into account ESG requirements under SDGs. The law (government) and other policy makers should work towards supporting businesses in their efforts to transition to more sustainable business models, through using various legal, policy and other effective incentives. The law should move towards ensuring that non-financial reporting on ESG becomes the standard mode of operation for ease of enforcing such principles as “the polluter pays principle”, among others. This is especially important as it has been pointed out that ‘previous literature, which attempted to investigate the link between sustainability and investment performance, found that a critical barrier to ESG integration is that investors lack reliable and non-manipulated information’, at least in other jurisdictions, practices which may also take place in Kenya.⁷⁷ While it may not be disputed that institutional investors vary in their approaches to integrating ESG factors into their investment decisions, the end game should at least show some tangible and verifiable positive results.⁷⁸

It has also been suggested that businesses and companies should embrace technology and innovation in engineering and product development as well as with regard to management structures and entrepreneurship, which will arguably continue to be crucial to overall sustainability strategy. Doing more with less may be a challenge that technology may help solve since it can reduce the strict ecological limitations while also relieving political and economic pressures (thereby allowing space and opportunity for more sustainability solutions from all quarters).⁷⁹

8. Conclusion

It has rightly been opined that conflict is a complex phenomenon that contributes significantly to sustainability challenges, necessitating a holistic approach to its prevention through the integration of Strategic Sustainable Development (SSD) at the structural level of conflict prevention that can offer long-term solutions to conflict escalation throughout the world. This is due to the fact that SSD offers a comprehensive strategy for tackling sustainability issues and the complexity of conflict resolution.⁸⁰

⁷⁶ Nairobi Securities Exchange ESG – Disclosures Guidance Manual, November 2021 <<https://sseinitiative.org/wp-content/uploads/2021/12/NSE-ESG-Disclosures-Guidance.pdf>> accessed 17 July 2022.

⁷⁷ Roy, P.P., Rao, S., Marshall, A.P. and Thapa, C., ‘Mandatory Corporate Social Responsibility and Foreign Institutional Investor Preferences’ (2020).

⁷⁸ OECD, OECD Business and Finance Outlook 2020: Sustainable and Resilient Finance (OECD 2020) <https://www.oecd-ilibrary.org/finance-and-investment/oecd-business-and-finance-outlook-2020_eb61fd29-en> accessed 17 July 2022.

⁷⁹ Clune WH and Zehnder AJB, ‘The Three Pillars of Sustainability Framework: Approaches for Laws and Governance’ (2018) 9 Journal of Environmental Protection 211.

⁸⁰ Odiniya, A.B., Fofuleng, B.J. and Vong, P., "Strategic Sustainable Development as an Approach to Conflict Prevention in Conflict-Prone Societies." (2014).

Understanding the Place of Conflict Management in Sustainable Development Agenda

Conflicts wipe out years of development work and have long-lasting negative effects on the economy, society, politics, and regions involved.⁸¹ Citizens' fundamental rights are viewed as the cornerstone for managing and resolving disputes, promoting economic development, and preserving human dignity in nations with democratic freedoms where people can live up to their full potential.⁸² Additionally, it has been suggested that democratic nations that uphold citizens' rights and uphold the rule of law both at home and abroad are safer places to live, work, and conduct business.⁸³

According to stakeholders, the primary pillars of economic transformation and inclusive growth are: inclusive growth that reduces inequality; sustainable agriculture, food self-sufficiency and nutrition; diversification, industrialization and value addition; developing the service sector; and infrastructure development.⁸⁴ These focus on the economic growth as well as social aspects of development. The main goal of Social Sustainability and Inclusion's work is to support people in overcoming barriers that prevent them from fully participating in society, regardless of their gender, race, religion, ethnicity, age, sexual orientation, or disability, by collaborating with governments, communities, civil society, the private sector, and other stakeholders to create more inclusive societies, empower citizens, and foster more sustainable communities.⁸⁵

It has rightly been pointed out that 'every objective and target in the SDG framework is implied to depend on and impact one another, although the precise nature of these connections is yet unknown at this time. Due to the goals' and targets' integrated structure, advancements made toward one objective or another are connected to other goals and targets via causal chains and feedback loops. For these reasons, an integrated and systems-based approach to the SDGs is required to guarantee that these feedbacks are understood and handled. Countries will be better positioned to realise the transformational potential of the 2030 Agenda if mutually reinforcing activities are implemented and target trade-offs are minimised'.⁸⁶ As already pointed out, achieving sustainable development agenda requires an integrated approach that looks at the economic welfare of the people and the nation at large, while adopting a socially inclusive approach in all governance matters. Economically and socially empowered people are more likely to participate in governance matters objectively, without being distracted by poverty and other social ills, in order to also on the intergenerational aspect of sustainable development agenda for the sake of future generations.

⁸¹ Bitterman, M., Lopez, V. and Wright, F., "A bridge to peace: Strategic sustainable development as an approach to conflict resolution." (2007).

⁸² 'Democracy, Human Rights and Governance | U.S. Agency for International Development' (26 March 2022) <<https://www.usaid.gov/democracy>> accessed 21 May 2022.

⁸³ 'The Role of Human Rights, Democracy, and Good Governance in Promoting Sustainable Development' (GSDRC) <<https://gsdrc.org/document-library/the-role-of-human-rights-democracy-and-good-governance-in-promoting-sustainable-development/>> accessed 21 May 2022.

⁸⁴ Urama, Kevin, Nicholas Ozor, and Ernest Acheampong, "Achieving Sustainable Development Goals (SDGs) Through Transformative Governance Practices and Vertical Alignment at the National and Subnational Levels in Africa," SDplanNet Africa Regional Workshop, March 3–5, 2014, 3 <https://www.iisd.org/system/files/publications/sdplannet_africa.pdf> Accessed on 25 June 2022.

⁸⁵ 'Social Sustainability and Inclusion: Overview' (World Bank) <<https://www.worldbank.org/en/topic/socialsustainability/overview>> accessed 14 July 2022.

⁸⁶ Cameron, A., Metternicht, G. and Wiedmann, T., "Initial progress in implementing the Sustainable Development Goals (SDGs): a review of evidence from countries." *Sustainability Science* 13, no. 5 (2018): 1453-1467, 1453.

Understanding the Place of Conflict Management in Sustainable Development Agenda

Thus, it is necessary at the local level, to support the economic and social self-determination of oppressed individuals and groups by enlisting the help of community leaders and the general public in creating locally tailored institutional responses to issues (such as fostering environmentally friendly industries as a means of combating unemployment) and encouraging communication between local interest groups regarding issues of sustainable development, and at the national level, for the government to offer all necessary support in promoting sustainability.⁸⁷ There is a need to adopt innovative governance approaches which integrate economic, social development and sustainable development principles at multiple levels of social organization in addressing the serious challenges facing our globe and achievement of the 2030 Agenda on Sustainable Development Goals.⁸⁸

What can be deduced from the foregoing discussion is that it is not enough to achieve sustainable development, as conceptualized by the ruling class and those in positions of decision-making; communities must actively be involved in decision-making to come up with strategies and approaches that take into account the unique economic, social and governance needs of particular group or class of people. The fundamental principles and values have already been captured under Article 10 of the 2010 Constitution of Kenya and if fully adopted and implemented within the development agenda, they can go a long way in ensuring that Kenya achieves satisfactory results as far as implementation and localization of the 2030 Agenda for Sustainable Development, and the SDGs are concerned. This is the only way that sustainability can be truly achieved and appreciated by all the people affected, while leaving a positive mark on their lives and the country in general. Thus, it is important to consider conflict management as being fundamental to democratic institutional design.⁸⁹ Additionally, the process of managing conflicts should be seen as a crucial component of continuous co-management practices of resource usage rather than as a separate stage of dispute settlement.⁹⁰ Managing conflicts effectively is indeed a prerequisite for realising Environmental, Social and Governance (ESG) tenets of the Sustainable Development agenda.

⁸⁷ Kramer, J.M. and Johnson, C.D., "Sustainable Development and Social Development: Necessary Partners for the Future." *Sustainable Development* (1996), 85.

⁸⁸ *Ibid*, 89.

⁸⁹ Kyllönen, S., Calpaert, A., Heikkinen, H., Jokinen, M., Kumpula, J., Marttunen, M., Muje, K. and Raitio, K., 'Conflict Management as a Means to the Sustainable Use of Natural Resources' (2006) 40 *Silva Fennica* <<https://www.silvafennica.fi/article/323>> accessed 17 September 2022.

⁹⁰ *Ibid*.

Effective Environmental Conflict management as a Tool for Entrenching Environmental Rights

Abstract

Environmental rights are all about enjoying the ecosystem and natural resources that the earth provides and getting the assurance that one will have access to justice if and when these guarantees are interfered with. However, due to intervening factors that either affect the availability or amount of these resources and the ever growing human population, conflicts relating to access and control of these resources are bound to arise. When this happens, it is no longer possible to enjoy these rights in a peaceful manner. This paper offers the perspective of addressing conflicts related to environmental resources as a prerequisite for securing environmental rights for citizens. It offers recommendations on what effective environmental conflict management should entail to guarantee such rights for all.

1. Introduction

A concern for protecting civilians throughout the course of a conflict has contributed to the rise of human rights norms as a crucial part of the global policy framework for thinking about and responding to violent conflict.¹ When used in this context, the term "human rights" refers to standards that define acceptable conduct and encapsulate the notion that all people are morally equal.² The denial of human rights and the ensuing marginalisation and poverty are the fundamental causes of all conflicts; however, in indigenous contexts, the fundamental causes can be further outlined as the denial of their collective rights as a group, particularly the loss of control over and separation from their traditional lands, territories, and natural resources, as well as the denial of their right to self-determination, which includes maintaining their own way of life, language, traditions, and culture.³

Notably, environment has been defined as 'the natural environment-to the physical space in which human activities take place and from which we acquire the resources necessary for sustaining our lives'.⁴ Flowing from this is the fact that the human-nature interactions are likely to result in conflicts as some groups of persons may feel threatened by access to and control of some finite resources by another group.⁵ For both sustenance and as a pillar of the economy, environmental resources are vital to the survival of individuals and nations. In some situations, having access to or controlling an environment's resources has been a contentious matter that frequently causes tensions and violent confrontations inside, between, and among nations.⁶ It has also been observed

¹ Parlevliet M, "The transformative potential of human rights in conflict resolution," In Human Rights and Conflict Resolution, pp. 16-40. Routledge, 2017, p.17.

² Ibid, p. 18.

³ Lefevre N, 'The Human Rights-Based Approach to Conflict Transformation in Indigenous Contexts' <https://www.academia.edu/9964347/The_Human_Rights_Based_Approach_to_Conflict_Transformation_in_Indigenous_Contexts> accessed 21 August 2022, p. 5.

⁴ Arild Vatn, Environmental Governance: Institutions, Policies and Actions (Paperback edition, Edward Elgar Publishing 2016) 14.

⁵ Ibid, 14.

⁶ Onuoha, Freedom C. "Environmental degradation, livelihood and conflicts: A focus on the implications of the diminishing water resources of Lake Chad for north-eastern Nigeria." African journal on conflict resolution 8, no. 2 (2008): 35-61, at 36.

that the issues of land tenure, land use rights, use of commons, customary rights, privatization of the commons, among others, are related to access and availability of natural resources- as sources for conflicts.⁷

In addition to the possibility of resource scarcity occasioned by 'resource capture' by the powerful, environmental conflicts may also be as a result of environmental degradation and the resultant biodiversity loss.⁸ International human rights norms that are ingrained in international law, broadly accepted by governments, adopted into domestic law (if not practice), and embraced by individuals from all cultures and walks of life serve as the foundation for contemporary international human rights activism.⁹ This paper looks at how effective conflict management can be used as a tool to entrench environmental rights especially within the most vulnerable communities.

2. Rights-Based Approaches to Environmental Conflicts Management

The quest for justice in Kenya predates the current Constitution of Kenya which was promulgated in 2010. Before then, there was little by way of statutory or legal instruments in Kenya that provided for the legal channels that guaranteed the citizenry's access to justice. Indeed, much of the debate surrounding access to justice were mainly based on enhancing the efficacy of the national courts and tribunals, which were considered as the major channels of accessing justice. While the 2010 Constitution acknowledged the place of Courts in the access to justice agenda, it also recommended the exploration of alternative means that would address such challenges as cost-effectiveness, time, physical accessibility and the differing literacy levels among consumers of justice, among others.¹⁰

Almost all societies have sporadic conflicts over ecological concerns, such as land use, environmental quality, water allocation, waste disposal, and natural resource management, among others.¹¹ It has been observed that "Rights-Based Approaches" (RBAs) to conservation are a promising way forward, but they also raise a variety of new challenges and questions, including what such approaches are, when and how they can be put into practice, and what their implications are for conservation. This is true even though there are many and complex links between human rights and biodiversity and natural resource conservation. Additionally, RBAs may assist with better governance but are themselves molded by the governing systems in which they function as well as by history, politics, socioeconomics, and culture.¹² It is commendable that environmental

⁷ E Gunilla Almered Olsson and Pernille Gooch, eds., *Natural resource conflicts and sustainable development*. Routledge, 2019, 5.

⁸ Bob, Urmilla, and Salomé Bronkhorst. "Environmental conflicts: Key issues and management implications." *African Journal on Conflict Resolution* 10, no. 2 (2010): 9-30.

⁹ Lutz EL, Babbitt EF and Hannum H, 'Human Rights and Conflict Resolution from the Practitioners' Perspectives' (2003) 27 *The Fletcher Forum of World Affairs* 173, at p. 174.

¹⁰ Muigua, K., *Access to Justice: Promoting Court and Alternative Dispute Strategies* (Available at <http://www.kmco.co.ke/index.php/publications/108-access-to-justice-promoting-court-and-alternative-dispute-resolution-strategies>).

¹¹ Fisher, J., "Managing environmental conflict," *The handbook of conflict resolution: theory and practice* (2014): 3.

¹² Campese, J., Sunderland, T.C.H., Greiber, T., Oviedo, G., eds., *Rights-Based Approaches: Exploring Issues and Opportunities for Conservation* (Center for International Forestry Research (CIFOR) and The International Union for Conservation of Nature (IUCN) 2009) <<https://cgspace.cgiar.org/handle/10568/20183>> accessed 23 June 2022.

rights are no longer in doubt in Kenya and there even exists several court decisions affirming every person's right to pursue the same¹³. However, this did not mark the push for clearer framework to protect and implement these rights especially in Kenya.

Where a party is unable to prove the denial, violation, infringement or threat to environmental rights for one reason or the other, then the same risks being continually violated. Even in such scenarios, courts should step in and use their *suo motu* powers in respect of environmental protection and conservation to safeguard the right to clean and healthy environment of all and promote the sustainable development agenda.¹⁴

Rights-based approaches in the context of this chapter entail: Rights to access, own and benefit from land, water and other natural resources (substantive rights); and Rights to take part in governing natural resources and access justice for redress (procedural rights).¹⁵ Demands for equitable access to resources, resistance to discrimination, and the desire for self-determination all lead to violent conflicts. A cycle of dehumanization based on fear is created by violations of human rights. Conflict can be sparked and fueled by the denial of human rights as much as by the desire for those same rights. In order to pursue their demands, groups may resort to using force if the state fails to uphold fundamental human rights and offer channels for peaceful conflict resolution.¹⁶

2.1. Environmental Democracy

Environmental Democracy is an important component in realisation of environmental rights in that it seeks to ensure that environmental and natural resources management decisions take into consideration and equitably address the concerns of citizens in relation to those resources, through promoting free access to meaningful information on environmental quality and problems by affected people, to enable their meaningful participation in decision-making, and empowering them to seek enforcement of environmental laws or compensation for damages.¹⁷ Notably, the concept of Environmental Democracy is informed by the idea 'that an informed and legally

¹³ Article 42 of the Constitution of Kenya provides that every person has the right to a clean and healthy environment, which includes the right—to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and to have obligations relating to the environment fulfilled under Article 70.

¹⁴ Ibid, see also Muigua, K., *Reconceptualising the Right to Clean and Healthy Environment in Kenya*, Paper Presented at the side event at the 3rd United Nations Environment Assembly held in Nairobi, organized by the UoN School of Law & the Centre International de Droit Comparé de l'Environnement (CIDCE), at the UoN School of Law on Friday 1st December 2017; Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016, chapter Nine;

¹⁵ 'How to Support a Rights-Based Approach to Nature-Based Solutions | DIIS' <<https://www.diis.dk/en/research/how-to-support-a-rights-based-approach-to-nature-based-solutions>> accessed 23 June 2022.

¹⁶ Mertus, J. A., and J. Helsing, 'Introduction: Exploring the Intersection between Human Rights and Conflict', in Idem (eds), *Human Rights and Conflict: Exploring the Links between Human Rights, Conflict, and Peacebuilding*, USIP Press, Washington – GSDRC (17 April 2008) <<https://gsdrc.org/document-library/exploring-the-intersection-between-human-rights-and-conflict/>, <https://gsdrc.org/document-library/exploring-the-intersection-between-human-rights-and-conflict/>> accessed 21 August 2022.

¹⁷ Peeters M, 'Judicial Enforcement of Environmental Democracy: Critical Analysis of Case Law on Access to Environmental Information in the European Union' (2020) 4 *Chinese Journal of Environmental Law* 13.

empowered citizen is the most important aspect of environmental democratisation'.¹⁸ The concept of Environmental Democracy thus emerged to promote and ensure public engagement in governmental environmental decision-making.¹⁹ Arguably, people have a right to obtain information upon request, and to be informed of planned projects, developments or other initiatives which will affect them, their environment or their natural resources through Free, Prior And Informed Consent (FPIC), under which duty bearers are expected to obtain the agreement for specific activities from an appropriate entity (rights holders), following a consultative process involving full disclosure of all relevant information, sufficiently in advance of the activities commencing, and without coercion or manipulation.²⁰ The principle of FPIC also extends to the use of indigenous knowledge and practices relating to the environment, and the sharing of any resulting benefits.²¹

The idea finds credence in Article 1 of the *Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* and Principle 10 of the 1992 *Rio Declaration on Environment and Development* which provides that: "environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."²²

It has however been argued that while concepts of ecological and Environmental Democracy seek to reconcile two normative ideals: ensuring environmental sustainability while safeguarding democracy, these ideals are frequently conceived as being in conflict, as democracy is perceived as too slow and cumbersome to deliver the urgent large-scale collective action needed to tackle environmental problems.²³ The perceived conflict is based on the assertion that, on the one hand, if citizens accord low priority to ecological values, efforts to strengthen environmental protection and sustainability through democratic processes may falter, and on the other hand, securing environmental values through authoritarian rule comes at a high democratic price.²⁴

¹⁸ See Parola G, *Environmental Democracy at the Global Level: Rights and Duties for a New Citizenship* (Walter de Gruyter 2013), 50.

¹⁹ Peeters M, 'Judicial Enforcement of Environmental Democracy: Critical Analysis of Case Law on Access to Environmental Information in the European Union' (2020) 4 *Chinese Journal of Environmental Law* 13, 14.

²⁰ BirdLife International, International B, 'An Introduction to Conservation and Human Rights for BirdLife Partners', 8.

²¹ *Ibid*, 8.

²² Peeters M, 'Judicial Enforcement of Environmental Democracy: A Critical Analysis of Case Law on Access to Environmental Information in the European Union' (2020) 4 *Chinese Journal of Environmental Law* 13.

²³ Pickering J, Bäckstrand K and Schlosberg D, 'Between Environmental and Ecological Democracy: Theory and Practice at the Democracy-Environment Nexus' (2020) 22 *Journal of Environmental Policy & Planning* 1.

²⁴ *Ibid*, 1.

The Convention on Biological Diversity (CBD) Aichi Target 1 requires that “by 2020, at the latest, people are aware of the values of biodiversity and the steps they can take to conserve and use it sustainably”.²⁵

Notably, ecological democracy seeks environmentally sustainable ends through broad, active democratic participation.²⁶ As a result, national political institutions constitute an important arena for biodiversity conservation.²⁷ It has been observed that while the proximate drivers of biodiversity loss such as habitat loss, climate change, overexploitation, and invasive species are relatively well-mapped, one of the causes to those triggers is countries’ institutional set-ups and thus, the formal and informal rules shaping the decision-making and the implementation of biodiversity management are considered to be paramount.²⁸

The right to participation refers to the procedural right to have a say in the decisions that are made, where there exists a gradient in the level of participation in decision-making, from simple ‘consultation’ to active partnership of stakeholders in project conception, design, implementation, monitoring and evaluation; and from ‘limited’ participation to ‘full and effective participation’ of ‘all relevant stakeholders’ with special attention given to the most vulnerable groups, minorities and those sectors of society that are underrepresented.²⁹ The participation of the people in biodiversity conservation is important considering that actions to conserve nature and natural resources are closely related to the rights of people to secure their livelihoods, enjoy healthy and productive environments and live with dignity and as a result, the pursuit of conservation goals can contribute positively to the realization of many fundamental human rights.³⁰ There is thus, a need for States to continue establishing effective legal and institutional frameworks to protect biodiversity, and to conduct social and environmental assessments of projects and policies and to facilitate public participation in conservation decisions.³¹ Environmental Democracy is associated with on transparency, participation, and justice and as a result, it is considered to be more participatory and inclusive and provides opportunities for everyone, including those in the most marginalised positions to participate in decision-making.³²

²⁵ Unit B, ‘Aichi Biodiversity Targets’ (18 September 2020) <<https://www.cbd.int/sp/targets/>> accessed 8 March 2022.

²⁶ Takacs D, ‘Whose Voices Count in Biodiversity Conservation? Ecological Democracy in Biodiversity Offsetting, REDD+, and Rewilding’ (2020) 22 *Journal of Environmental Policy & Planning* 43.

²⁷ Rydén, O., Zizka, A., Jagers, S.C., Lindberg, S.I. and Antonelli, A., ‘Linking Democracy and Biodiversity Conservation: Empirical Evidence and Research Gaps’ (2020) 49 *Ambio* 419.

²⁸ *Ibid*, 419.

²⁹ BirdLife International, International B, ‘An Introduction to Conservation and Human Rights for BirdLife Partners’, 8.

³⁰ Springer J, Campese J and Painter M, ‘Conservation and Human Rights: Key Issues and Contexts. Scoping Paper for the Conservation Initiative on Human Rights’ [2011] Unpublished report. Conservation Initiative on Human Rights Working Group, 5.

³¹ See Bigard C, Pioch S and Thompson JD, ‘The Inclusion of Biodiversity in Environmental Impact Assessment: Policy-Related Progress Limited by Gaps and Semantic Confusion’ (2017) 200 *Journal of environmental management* 35.

³² ‘Will Democracy Save Us from the Biodiversity Crisis?’ (Demo Finland, 27 November 2020) <<https://demofinland.org/en/will-democracy-save-us-from-the-biodiversity-crisis/>> accessed 20 March 2022.

Environmental Democracy in Kenya has come a long way from being a virtually non-existent concept under the laws of Kenya to one that is now prominently recognised both under the law and the case law emanating from the highest courts. The wording of the statutes may not specifically mention the words ‘environmental democracy’ but the idea is captured in various words, especially in the 2010 post- constitutional era. For instance, Article 10 of the Constitution provides for the following national values and principles: patriotism; 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. These values and principles ought to bind all state organs, state officers, public officers and all persons whenever any one of them: applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.³³

The lack of environmental democracy was largely informed by the top-down approach previously adopted in Kenya.³⁴ Environmental democracy in environmental management matters led to the buttressing of the co-management of natural resources and environmental resources. Co-management of these resources has several advantages as it overcomes the many limitations and pitfalls of centralized, top-down resource management hence resulting in more efficient, appropriate and equitable resource management.³⁵ Further, it fosters meaningful communication in the decision-making process thus contributing to effective management of the marine resources.³⁶

*In the Matter of the National Land Commission [2015] eKLR*³⁷, the Supreme Court of Kenya in its advisory opinion observed as follows:

Kariuki Muigua, Didi Wamukoya, Francis Kariuki in their book, [Natural Resources and Environmental Justice in Kenya (Glenwood Publishers Limited, Nairobi: 2015)] discuss the link between the growth of government structures, and the delegation of decision-making powers to state agencies, such as commissions. They observe as follows (pages 24 to 25):

“In Kenya today, as the size and scope of government continues to grow, decisions that have previously been made by elected officials in a political process are now being delegated by statute to technical experts in state agencies and constitutional commissions. The rationale is, therefore, to incorporate public values into decisions, improve the substantive quality of decisions, resolve conflicts among competing interests and build trust in institutions and educate and inform the public.”³⁸

The Supreme Court went further to capture the place of democracy (including environmental democracy) in the following words:

³³ Article 10 (1), Constitution of Kenya, 2010.

³⁴ See Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, (Glenwood Publishers, Nairobi, 2015).

³⁵ *Ibid*; Article 10, Constitution of Kenya.

³⁶ *Ibid*.

³⁷ *In the Matter of the National Land Commission [2015] eKLR*, Advisory Opinion Reference 2 of 2014.

³⁸ *Ibid*, para. 346.

[348] “It is thus clear that the principle of the participation of the people does not stand in isolation; it is to be realised in conjunction with other constitutional rights, especially the right of access to information (Article 35); equality (Article 27); and the principle of democracy (Article 10(2)(a)). The right to equality relates to matters concerning land, where State agencies are encouraged also to engage with communities, pastoralists, peasants and any other members of the public. Thus, public bodies should engage with specific stakeholders, while also considering the views of other members of the public. Democracy is another national principle that is enhanced by the participation of the people.”³⁹

[352] “The participation of the people is a constitutional safeguard, and a mechanism of accountability against State organs, the national and county governments, as well as commissions and independent offices. It is a device for promoting democracy, transparency, openness, integrity and effective service delivery. During the constitution-making process, the Kenyan people had raised their concerns about the hazard of exclusion from the State’s decision-making processes. The Constitution has specified those situations in which the public is assured of participation in decision-making processes. It is clear that the principle of public participation did not stop with the constitution-making process; it remains as crucial in the implementation phase as it was in the constitution-making process.”

[353] “I agree fully with the views of Odunga J. in the case of Robert Gakuru, that public participation is not an abstract notion and, on matters concerning land, State organs, the Ministry, and the NLC must breathe life into this constitutional principle, and involve the public in land management and administration; legislative plans and processes; and policy-making processes. This is clear from the terms of Article 10 of the Constitution, which requires these bodies to: (a) apply or interpret this Constitution; (b) enact, apply or interpret any law; or (c) make or implement public policy decisions bearing in mind the participation of the people, and the goals of democracy, and transparency.”

[354] “I would refer to the Draft Public Participation Guidelines for County Governments, which is of persuasive authority in this Advisory Opinion. It states that the importance of public participation includes to: strengthen democracy and governance; increase accountability; improve process, quality and results, in decision-making; manage social conflicts; and enhance process legitimacy. Although these are not the final guidelines, they bear similar objectives of public participation as those articulated in the Constitution, and in the County Governments Act. Finally, the Draft Guidelines provide conditions for meaningful public participation, such as: (i) clarity of subject-matter; (ii) clear structures and process on the conduct of participation; (iii) opportunity for balanced influences from the public in general; (iv) commitment to the process; (v) inclusive and effective representation; (vi) integrity; (vii) commitment to the value of public input; (viii) capacity to engage; (ix) transparency; and (x) considerations of the social status, economic standing, religious beliefs and ethnicity of the members of the public. These conditions are comparable to the constitutional values and principles of democracy, transparency, accountability and integrity.”

³⁹ Ibid, para. 348.

[355] *"In conclusion, an array of rich ingredients of the participation of the people, emerge from various sources: decisions by superior Courts in Kenya; comparative jurisprudence from another jurisdiction; works by scholars; draft principles and guidelines bearing upon public participation by various State organs and governments; and relevant constitutional and legal provisions. The categories of these ingredients are not closed. It will devolve to the citizens, as well as stakeholders, to monitor the practicability of these ingredients, and to appraise the scope for improvement, so they may increasingly reflect the vision of the Constitution."*

3. Principles Underlying Effective Conflict Management Approaches

This section highlights a number of principles which, if incorporated into conflict management approaches, may go a long way in enhancing the protection of human rights of the participants. Conflict resolvers and human rights activists both contribute to conflict resolution through a variety of methods. On the one hand, there is the interest-based approach, which aims to balance needs, wants, and worries, for instance through conciliation dialogues, mediation, or making suggestions for legal reform. The rights-based approach, on the other hand, is based on the laws, norms, and values of societies or organisations in a particular setting, and may include things like criminal prosecution, legal action, constitutional interpretation, disciplinary measures, or punishment.⁴⁰ It is recommended that stakeholders advocate for adoption of both interest-based as well as rights-based approaches in addressing environmental-related conflicts.

3.1 Principle of Participation

The parties who directly benefit from the decision must actively participate in the negotiating and decision-making processes in order for them to be successful. Bringing parties together in some form of informal or formal venue and assuring them of a chance for valuable input are the fundamental objectives of conflict resolution.⁴¹ Participation in conflict management can be facilitated in various ways based on the conflict management approach employed and each situation may require choosing the best approach based on the circumstances and there is, therefore, no one-size fits all approach to enhancing participation.⁴²

3.2 Principle of Inclusion

Unlike participation, this focuses on who participates rather than how they participate. Since those excluded will have a larger motive to thwart any agreements that are achieved, it is preferable in the field of conflict resolution to involve as many stakeholders as possible, even those who may be potentially disruptive.⁴³ It is imperative that any conflict management approach includes as

⁴⁰ Gomes-Mugumya, A., "Reflections on rights and conflict from Uganda." *Human Rights and Conflict Transformation: The Challenges of Just Peace* (2010), p.76. Available at <https://core.ac.uk/download/pdf/71733154.pdf#page=72> accessed 21 August 2022.

⁴¹ Lutz EL, Babbitt EF and Hannum H, 'Human Rights and Conflict Resolution from the Practitioners' Perspectives' (2003) 27 *The Fletcher Forum of World Affairs* 173, p. 177.

⁴² See Valerie A. Brown, *Risks and Opportunities: Managing Environmental Conflict and Change* (Routledge 2019); Omene, G.R., "Conflict management strategies as a prerequisite for effective organizational performance: An exploratory analysis." *International Journal of Business & Law Research* 9 (4) (2021): 187-199; Rummel, Rudolph J. "Understanding conflict and war: Vol. 5: The just peace." Beverly Hills, California: Sage Publications (1981).

⁴³ Lutz EL, Babbitt EF and Hannum H, 'Human Rights and Conflict Resolution from the Practitioners' Perspectives' (2003) 27 *The Fletcher Forum of World Affairs* 173, p. 177.

many parties as possible especially where such parties have a stake in such a process and its outcome.

3.3. Principle of Empowerment

Lack of resources, experience, or both on the side of one or more parties may make multi-party conversation less effective. Conflict resolution professionals may include teaching, training, and coaching in the process to assist balance the sides. This will increase the effectiveness of all parties and create a more solid foundation for sincere conversations.⁴⁴

3.4. Principle of Cultural Sensitivity

It has rightly been pointed out that the causes of conflict can range from societal to personal, and they can happen at both the intergroup and interpersonal levels. At the social level, cultural factors may have an impact on a person's attitude to social interactions, perception of the situation, and method of decision-making. In very different societies, the same circumstance may elicit very diverse responses.⁴⁵ Conflict resolution techniques are common throughout most civilizations. Long after an outside intervener has left, methods and solutions that are culturally acceptable and known will continue to be effective. As a result, it is crucial to understand these patterns and, whenever possible, improve on native behaviours.⁴⁶

3.5. Principle of Equity

The idea of equity, as opposed to equality, is that a third party umpire should treat all parties at the table with same respect, providing everyone an equal amount of time and attention, despite the fact that they have different levels of power. This appreciation and respect helps to improve the forum's suitability for productive debate and problem-solving.⁴⁷

3.6 The Sustainable Livelihoods Approach (SLA)

The Sustainable Livelihoods Approach (SLA), a participatory approach to analysing and improving the lives of those living in poverty and disadvantage, is founded on the understanding that everyone has skills and resources that may be developed to assist them improve their lives.⁴⁸ A livelihood includes the skills, resources, and activities necessary for a way of life. It is considered sustainable when it can withstand stress, recover from shocks, and maintain or improve its skills, resources, and activities both now and in the future without depleting the base of natural resources.⁴⁹ By improving equal access to resources and decision-making processes

⁴⁴ Ibid, p. 177.

⁴⁵ Kaushal, R. and Kwantes, C.T., "The role of culture and personality in choice of conflict management strategy." *International journal of intercultural relations* 30, no. 5 (2006): 579-603, p. 581.

⁴⁶ Lutz EL, Babbitt EF and Hannum H, 'Human Rights and Conflict Resolution from the Practitioners' Perspectives' (2003) 27 *The Fletcher Forum of World Affairs* 173, p. 177.

⁴⁷ Ibid, p. 177.

⁴⁸ 'The Sustainable Livelihoods Approach: Toolkit for Wales' (Oxfam Policy & Practice) <<https://oxfamlibrary.openrepository.com/bitstream/handle/10546/297233/sustainable-livelihoods-approach-toolkit-wales-010713-en.pdf?sequence=8>> accessed 20 August 2022.

⁴⁹ Serrat, O., "The sustainable livelihoods approach." In *Knowledge solutions*, pp. 21-26. Springer, Singapore, 2017, p. 15.

and making sure that decision-making bodies are accountable to all, conflict management can also increase the sustainability of livelihoods for communities.⁵⁰

It is important to note that while the sustainable livelihoods approach makes it easier to identify practical priorities for actions that are based on the opinions and interests of those involved, it does not replace other tools like sector-wide approaches, participatory development, or integrated rural development. Instead, it: connects people to the overall enabling environment that influences how people live their lives; and it brings attention to bear on the inherent potential of people in terms of their skills, social networks, access to physical and financial resources, and ability to influence core institutions.⁵¹

Arguably, communities enjoying sustainable livelihoods are less likely to engage in destructive conflicts and even where such conflicts emerge, they have better incentives to address the same the quickest way possible.⁵²

4. Conclusion

As already pointed out, environmental factors, whether they are caused by nature or humans, can also put people at risk and leave them feeling vulnerable.⁵³ It has been argued that including a human rights perspective in an analysis or response to violent or destructive conflict increases knowledge of the issues involved and raises the question of how to work effectively toward a lasting peace. More focus is placed on underlying factors, such as the role of the state, governance systems, and power dynamics, than is typically the case in conflict resolution attempts, when human rights considerations are taken into account. The design of conflict resolution procedures and the evaluation of settlement possibilities both benefit from taking human rights into account.⁵⁴ In general, the protection of human rights is essential for establishing and maintaining peace, and peacemaking and peacebuilding are essential for the preservation of human rights, and both are thus equally important as they complement and advance each other.⁵⁵

Conflict is less likely to occur in a society where human rights are upheld. This holds true for both political and civil rights, in addition to social, economic, and cultural rights. A society may be considered to be extensively addressing its citizens' problems if social and economic rights are upheld, and it may also be considered to have some degree of political accountability if political rights are upheld.⁵⁶

⁵⁰ McNairn R, 'Building Capacity to Resolve Conflict in Communities: Oxfam Experience in Rwanda' (2004) 12 *Gender & Development* 83.

⁵¹ Serrat, O., "The sustainable livelihoods approach." In *Knowledge solutions*, pp. 21-26. Springer, Singapore, 2017, p. 15.

⁵² See generally, Adams, W.M., Aveling, R., Brockington, D., Dickson, B., Elliott, J., Hutton, J., Roe, D., Vira, B. and Wolmer, W., 'Biodiversity Conservation and the Eradication of Poverty', *science* 306, no. 5699 (2004): 1146-1149.

⁵³ Bob, Urmilla, and Salomé Bronkhorst. "Environmental conflicts: Key issues and management implications." *African Journal on Conflict Resolution* 10, no. 2 (2010): 9-30, 13.

⁵⁴ Parlevliet M, "The transformative potential of human rights in conflict resolution," In *Human Rights and Conflict Resolution*, pp. 16-40. Routledge, 2017, p. 16.

⁵⁵ Gomes-Mugumya, A., "Reflections on rights and conflict from Uganda." *Human Rights and Conflict Transformation: The Challenges of Just Peace* (2010), p. 82.

⁵⁶ Manikkalingam, R., "Promoting peace and protecting rights: how are human rights good and bad for resolving conflict?" *Essex Human Rights Review* 5, no. 1 (2008): 1-12, p. 2.

Effective Environmental Conflict management as a Tool for Entrenching Environmental Rights

In order to promote peace and protect rights, it is important to have a better understanding of how human rights and conflict resolution can both complement and conflict with one another during peace processes. This is because the two topics are inextricably linked in ways that make it difficult to separate one from the other.⁵⁷ Effective Conflict Management can indeed be applied as tool for entrenching Environmental Rights.

⁵⁷ Ibid, p. 12; see also Nations U, ‘Conflict Resolution and Human Rights in Peacebuilding: Exploring the Tensions’ (United Nations) <<https://www.un.org/en/chronicle/article/conflict-resolution-and-human-rights-peacebuilding-exploring-tensions>> accessed 21 August 2022; Corissajoy, ‘When Human Rights and Conflict Resolution Clash: Can Both Prevail Together?’ (Beyond Intractability, 12 September 2016) <<https://www.beyondintractability.org/casestudy/when-human-rights-and-conflict-resolution-clash-can-both-prevail-together>> accessed 21 August 2022.

Best Practices in Environmental Conflicts Management: Developing World Perspectives

Abstract

This paper offers a discussion on developing world perspectives as far as management of environmental conflicts is concerned. The argument is that while environmental conflicts occur the world over, the stakes are usually high in the developing world as the communities have a closer relationship and interest in these resources due to high dependence on them for their livelihoods. These economies also largely rely on these resources for their development needs. The third world economies also face the greater challenges of high population, poverty, illiteracy and corruption, all of which make the environmental resources all the more critical and thus increasing chances of conflicts related to access and control of environmental resources. The author argues that the foregoing issues call for a unique approach to management of these resources and the conflicts that arise in order to take into account the unique circumstances that face the third world countries. This, the paper argues, is important if these countries are to achieve the global goals on sustainable development agenda.

1. Introduction

The conservation of biodiversity and sustainable development are two global objectives that are significantly threatened by the pervasive problem of conservation conflicts. Conflicts are expected to become more frequent and more intense as the human population grows and more environmental problems, such habitat destruction and climate change, become more serious.¹ It has rightly been pointed out that in the twenty-first century, our ability to sustain development will depend on two converging threats to humanity: rising inequality between and within nations, and the complex risks from environmental change as we continue to push Earth's planetary boundaries. This is highlighted by global dialogues around the Sustainable Development Goals (SDGs) in the context of the post-2015 development agenda and the UN Conference on Sustainable Development (Rio+20).²

This paper highlights the emerging global best practices as far as environmental conflict management is concerned but also has a specific focus on the developing world's approaches to environmental conflicts management.

¹ Hodgson ID, Redpath SM, Sandstrom C & Biggs D (2020) The State of Knowledge and Practice on Human-Wildlife Conflicts. O'Neill M (Editor) & Villat J (Editor) The Luc Hoffman Institute. Gland, Switzerland. <https://luchoffmanninstitute.org/the-surprising-new-way-to-approach-human-wildlife-conflict-a-new-report/> [Accessed on 10 August 2022].

² Khoday, K., Inglis, S., Hussein, S., Scott, T. and Raine, A., "Environmental Justice: Comparative Experiences in Legal Empowerment." United Nations Development Programme: New York, NY, USA (2014), p.5. < <https://www.undp.org/sites/g/files/zskgke326/files/publications/Environmental-Justice-Comparative-Experiences.pdf>> [Accessed on 10 August 2022].

2. International Environmental Law Framework and Environmental Conflict Management

A complex ecosystem of international environmental law has resulted from state efforts to manage shared environmental resources, protect natural ecosystems, and lessen environmental impact.³ There are many instances of environmental harm that give rise to duty and potential liability in times of peace, and international environmental law (IEL) covers these situations.⁴ Due to the potential catastrophic harm that armed conflict may have to the environment and its long-term effects on the environment and human health, international environmental law is also crucial to take into account during times of war.⁵

This is achieved through application of multilateral environmental agreements and principles of IEL; Customary international environmental law and soft law instruments; and scholarly commentaries.⁶ The majority of multilateral environmental accords is built upon and makes reference to certain international environmental law concepts. The *Rio Declaration on Environment and Development*, which was approved during the *Rio Conference* in 1992, codified many of these, including state sovereignty over own resources and the notion of common but differentiated responsibilities. International environmental law principles can serve a variety of purposes.⁷ It is usually challenging to determine the bounds or the precise international legal status

³ Mitchell, R.B., Andonova, L.B., Axelrod, M., Balsiger, J., Bernauer, T., Green, J.F., Hollway, J., Kim, R.E. and Morin, J.F., "What we know (and could know) about international environmental agreements." *Global Environmental Politics* 20, no. 1 (2020): 103-121, p. 103

< https://rmitchel.uoregon.edu/sites/rmitchell1.uoregon.edu/files/resume/articles_refereed/2020-globalenvlpolitics-introductiontoieadb.pdf>

⁴ Mrema, E., Bruch, C. and Diamond, J., *Protecting the environment during armed conflict: an inventory and analysis of international law*. UNEP/Earthprint, 2009, p.34

<https://wedocs.unep.org/bitstream/handle/20.500.11822/7813/-Protecting%20the%20Environment%20During%20Armed%20Conflict_An%20Inventory%20and%20Analysis%20of%20International%20Law-2009891.pdf?sequence=3&isAllowed=>

Accessed 3 September 2022.

⁵ Leins K (ed), 'International Environmental Law and Principles', *New War Technologies and International Law: The Legal Limits to Weaponising Nanomaterials* (Cambridge University Press 2022)

<<https://www.cambridge.org/core/books/new-war-technologies-and-international-law/international-environmental-law-and-principles/E5DC37DB202991EF3959FD5535429ED7>> accessed 3 September 2022.

⁶ *Ibid*, p.34.

⁷ Vietnam Ministry of Natural Resources and Environment. Department of Legal Affairs (2017) *International Environmental Law: Multilateral Environmental Agreements*, p. 20. Available at: <https://wedocs.unep.org/20.500.11822/21491> (Accessed: 3 September 2022).

The other principles include:

- (1) the principle of preventive action;
- (2) the principle of co-operation;
- (3) the principle of sustainable development;
- (4) the precautionary principle; and
- (5) the polluter pays principle.

(Peel J and Sands P (eds), 'General Principles and Rules', *Principles of International Environmental Law* (3rd edn, Cambridge University Press 2012) <<https://www.cambridge.org/core/books/principles-of-international-environmental-law/general-principles-and-rules/FCABFEBB1A87CAC34F18C0C0F80C706F>> accessed 3 September 2022).

of any general concept or rule in the absence of unambiguous judicial authority and in light of the contradictory interpretations under state practice. The application of each principle in relation to a specific action or incident, and its ramifications, must be taken into account on the facts and circumstances of each case, taking into account a number of factors, such as the principle's origin, the text's content and language, the specific action at issue, the activity's environmental and other consequences, and the circumstances under which it occurs (including the actors and the geographical region).⁸ The legal position of certain broad concepts or norms may be less established than that of others, while others may indicate growing legal duties. In each instance, the concept or rule enjoys widespread acceptance and is reflected in widespread state practice by frequent usage or citation in a framework of international law.⁹

Pacta sunt servanda, which literally translates to "agreements must be respected," is the foundational concept of international law. A State is obligated by the conditions of a multilateral environmental agreement once it joins as a Party and must concentrate on its implementation. States frequently have to develop or modify policies and laws in order to carry out the obligations of multilateral environmental accords. Institutional setup or reorganization, as well as being ready for routine reporting on implementation, may be additional duties. Multilateral environmental accords can include compliance checks and dispute resolution processes. If the Parties fail to carry out their obligations, the compliance mechanism may be utilized to facilitate compliance and the dispute resolution processes may be applied to address disagreements that may arise between the Parties.¹⁰

One of the most significant changes in recent decades has been the rise in environmental awareness among people all around the world. More than ever before, globalization has aided in bridging the gap between societies and the state of their environments. At the same time, environmental issues are spreading beyond national borders and have a significant influence on Earth's health. Thus, it has become crucial to change economic development and progress to a route toward environmental sustainability that more effective environmental laws and legal frameworks be developed across the globe.¹¹

Environmental law serves as a cornerstone for environmental sustainability, and it is increasingly important that its goals be fully realized in light of mounting environmental pressures.¹² Around

⁸ Peel J and Sands P (eds), 'General Principles and Rules', *Principles of International Environmental Law* (3rd edn, Cambridge University Press 2012) <<https://www.cambridge.org/core/books/principles-of-international-environmental-law/general-principles-and-rules/FCABFE1A87CAC34F18C0C0F80C706F>> accessed 3 September 2022.

⁹ *Ibid.*

¹⁰ Vietnam Ministry of Natural Resources and Environment. Department of Legal Affairs (2017) *International Environmental Law: Multilateral Environmental Agreements*, pp. 16-17. Available at: <https://wedocs.unep.org/20.500.11822/21491> (Accessed: 3 September 2022).

¹¹ Anshu Singh, "Principles and Development of International Environmental Law", *Pen Acclaims*, Volume 10, May 2020, ISSN 2581-5504, pp.1-2. < <http://www.penacclaims.com/wp-content/uploads/2020/06/Anshu-Singh.pdf>>

¹² Norul Mohamed Rashid, 'Environmental Law' (*United Nations and the Rule of Law*) <<https://www.un.org/ruleoflaw/thematic-areas/land-property-environment/environmental-law/>> accessed 3 September 2022.

the world, both urban and rural populations rely heavily on informal systems to administer justice. In the *Declaration of the High-level Meeting on the Rule of Law*¹³, Member States acknowledged that everyone, including women and members of vulnerable groups, should have full and equal access to informal judicial systems where they are in conformity with international human rights law.¹⁴

The *Declaration* emphasizes the ‘importance of the rule of law as one of the key elements of conflict prevention, peacekeeping, conflict resolution and peacebuilding, stresses that justice, including transitional justice, is a fundamental building block of sustainable peace in countries in conflict and post-conflict situations, and the need for the international community, including the United Nations, to assist and support such countries, upon their request, as they may face special challenges during their transition’.¹⁵

In recognition of the place of both formal and informal mechanisms in global conflict management framework, and in line with paragraph 15 of the above mentioned *Declaration*, it has been observed that in many developing countries, almost 80% of cases are settled through informal systems, which are also sometimes referred to as "traditional," "indigenous," "customary," or "non-state" justice systems. The protection of land, property, and cattle; the settlement of family and community disputes; and the preservation of entitlements, such as access to public services, are all topics that informal justice systems frequently deal with. They also handle personal security and local crime.¹⁶ Despite the fact that delivering accessible justice is a state duty mandated by international human rights standards, this duty does not call for all justice to be delivered by means of formal court institutions. The provision of justice through informal justice systems is not against human rights standards if done in a manner that respects and upholds human rights. In fact, it can be a way to better fulfil human rights obligations by providing accessible justice to people and communities where the formal justice system is unable to do so due to capacity issues or geographical limitations.¹⁷ The use of non-combative approaches to conflicts and disputes is also reflected in various international environmental law regulatory instruments. For instance, through its Non Compliance procedure, which aims to provide a multilateral mechanism for non-confrontational discussion rather than adjudication and aid parties in seeking an amicable resolution to protocol-related problems, the Montreal Protocol offers an effective method for resolving conflicts.¹⁸

¹³ UN General Assembly, Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels: resolution / adopted by the General Assembly, 30 November 2012, A/RES/67/1.

¹⁴ Norul Mohamed Rashid, ‘Informal Justice’ (United Nations and the Rule of Law) <<https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/informal-justice/>> accessed 3 September 2022.

¹⁵ Para. 18, UN General Assembly, Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels: resolution / adopted by the General Assembly, 30 November 2012, A/RES/67/1.

¹⁶ Norul Mohamed Rashid, ‘Informal Justice’ (United Nations and the Rule of Law) <<https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/informal-justice/>> accessed 3 September 2022.

¹⁷ ‘Informal Justice Systems | United Nations Development Programme’ (UNDP) <<https://www.undp.org/publications/informal-justice-systems>> accessed 3 September 2022.

¹⁸ Siang E, ‘Main Principles of International Environmental Law’

The main driver of innovation in international environmental law has been close interaction with national laws and policies, to the point where economists have noted the "non-ergodic world" of environmental regimes, which is teeming with regulatory approaches that are new, frequently divergent, and competing. This world is subject to unforeseeable natural and technological changes as well as being subject to unforeseeable natural and technological changes.¹⁹

Rapid environmental change poses challenges to the global order that are becoming acknowledged as defining characteristics of our time. Some academics have argued that it is necessary to investigate normative and institutional responses in international law to such environmental change by focusing on two central issues: first, whether law can foresee, prevent, and adapt to environmental transformations; and second, whether international legal responses to social, economic, and technological innovation can adequately reflect the evolving needs of contemporary societies at national and international scales.²⁰ There is a need for continued discussions around these issues as they not only affect the realization of sustainable development agenda but also the effective responses and management of related environmental conflicts. Africa must also strive to be part and parcel of these debates in its efforts to achieve 2030 Agenda on Sustainable Development Goals.

3. Peacebuilding and Conflict Management in Africa: Continental Status

Conflicts have occurred often throughout Africa, which has been caused by a number of factors, including but not limited to natural resources, the struggle for political dominance, poverty, negative ethnicity, religion, environmental causes, and outside pressure, among others.²¹ It is also important to note that some of the frequent ethnic conflicts have been linked to the former colonial rulers in Africa, where colonial authorities drew local and national territorial boundaries based on a rather simplistic understanding of the nature of ethnic communities, forcing people who previously lived apart into political entities and dividing those who previously lived together, undermining the normal process of state creation and nation building.²² This has arguably been a major source of conflict among communities in some African countries, such as Nigeria.²³

https://www.researchgate.net/publication/318125898_Main_principles_of_International_Environmental_Law accessed 3 September 2022.

¹⁹ Sand P, 'The Evolution of International Environmental Law', *The Oxford Handbook of International Environmental Law* (2007)

https://www.researchgate.net/publication/288662385_The_Evolution_of_International_Environmental_Law/link/56c8689b08aee3cee53d619e/download accessed 3 September 2022.

²⁰ Craik, Neil, Cameron Jefferies, Sara Seck, and Timothy Stephens. "Global Environmental Change and Innovation in International Law." *Articles, Book Chapters, & Popular Press*, January 1, 2018. https://digitalcommons.schulichlaw.dal.ca/scholarly_works/248. Accessed on 3 September 2022.

²¹ 'The Environmental Challenges in Sub Saharan Africa'

<http://web.mit.edu/africantech/www/articles/EnvChall.htm> accessed 3 June 2022; Macartan Humphreys, 'Natural Resources, Conflict, and Conflict Resolution: Uncovering the Mechanisms' (2005) 49 *Journal of conflict resolution* 508; AJ Olaosebikan, 'Conflicts in Africa: Meaning, Causes, Impact and Solution' (2010) 4 *African Research Review* 549; Huma Haider, *Conflict analysis of North Eastern Kenya*. K4D Emerging Issues Report 36. Brighton, UK: Institute of Development Studies, 15

https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/15570/EIR%2036_Conflict_analysis_of_Northern_Kenya.pdf?sequence=1&isAllowed=y accessed 3 June 2022.

²² Lillian Mworira and J Ndiku, 'Inter Ethnic Conflict in Kenya: A Case of Tharaka-Tigania Conflict, Causes, Effects and Intervention Strategies', 162.

²³ *Ibid*, 162-163; see also Simone Datzberger, 'Civil Society as a Postcolonial Project: Challenging Normative Notions in Post-Conflict Sub-Saharan Africa', *Negotiating Normativity* (Springer 2016).

According to the African Union, "in 2013, during the 50th Anniversary of the OAU/AU, African Heads of State and Government made a Solemn Declaration committing to tackle head-on the scourge of violent conflict in Africa and pronounced their firm determination to achieve the noble goal of a conflict-free Africa, thereby making peace a reality for the African people, ridding the continent of wars, violent conflicts, human rights violations, humanitarian crises, as well as preventative measures."²⁴

African Union's *Agenda 2063*, Africa's blueprint and master plan for transforming Africa into the global powerhouse of the future²⁵, seeks to achieve a peaceful and secure Africa.²⁶ It is noteworthy that the continent will not make any tangible progress in peacebuilding unless individual states commit to work towards achieving sustainable peace in their territories using both indigenous and contemporary approaches that are effective.

4. African Approaches on the Management of Environmental Conflicts

In order to present the African tale as viewed through the eyes of the African people, it is important to not only emphasize on the difficulties and challenges facing the African continent but also how they may be overcome utilizing indigenous solutions. The assertion that African issues may be solved locally is supported by the continent's abundance of natural resources, which has led to many exploration and exploitation efforts across the whole of the continent.²⁷ Africa has a large quantity of natural resources like oil, gold, diamonds, iron, cobalt, copper, bauxite, silver, uranium, titanium, petroleum among others.²⁸

The people of Africa are entitled to the richness of the continent's natural resources. Governments in African nations are in charge of protecting these resources. Utilizing Africa's resources should assist in achieving the economic rights of its citizens as outlined in different international legal agreements and state legislation.²⁹

While a quick glance would suggest that Africa is a wealthy continent with a population that is expected to have a high standard of living and excellent development, as well as good infrastructure, high employment rates, high-quality education, good health, and a long life expectancy, as well as a conflict-free region where everyone is at ease with life due to the abundance of resources, the reality in Africa is ironically glaringly the opposite.³⁰ Instead of being

²⁴ African Union, 'Silencing the Guns: Creating Conducive Conditions for Africa's Development' (The East African) <<https://www.theeastafrican.co.ke/tea/sponsored/silencing-the-guns-creating-conducive-conditions-for-africa-s-development-1435754>> accessed 3 June 2022.

²⁵ 'Agenda 2063: The Africa We Want. | African Union' <<https://au.int/en/agenda2063/overview>> accessed 3 June 2022.

²⁶ African Union, *Agenda 2063*, 2 <https://au.int/sites/default/files/documents/33126-doc-03_popular_version.pdf> accessed 3 June 2022.

²⁷ Rajaram, A., "Rich Countries, Poor People; Will Africa's Commodity Boom Benefit the Poor", available on <http://blogs.worldbank.org/african/rich-countries-poor-people-will-africa-s-commodity-boom-benefit-poor> [Accessed on 3 May 2022].

²⁸ World Resources, 'Natural Resources of Africa', available at www.worldresources.envi.org/natural-resources-africa/ [Accessed on 3 May 2022].

²⁹ Muigua, K., *Nurturing Our Environment for Sustainable Development*, p. 107.

³⁰ *Ibid.*

used to solve African people's problems, Africa's resources are fueling the world economy while Africa itself remains economically crippled; exploited and neglected.³¹

This unfortunate state of affairs may be largely attributed to national leaders who, despite being entrusted with the responsibility of protecting natural resources for the benefit of the populace, have betrayed that trust by engaging in high levels of corruption in the application of natural resource revenues and by not having the interests of the populace at heart when they enter into resource extraction contracts. In actuality, Africans have been denied their right to profit from and have control over how their natural resources are used. There is a large majority of poor people and a very small percentage that are highly affluent.³²

At the continental level, the *Africa Mining Vision 2009*³³ was expected to address most of these challenges including: exploitative multinational corporations, lack of expertise and corruption, and African countries negotiating unfavourable mining development agreements. The *Africa Mining Vision* was formally established in 2009 by the African Union (AU), to promote equitable, broad-based development through the prudent utilization of the continent's natural wealth.³⁴

³¹ Ibid.

³² World Bank, Economic Survey for Sub-Saharan Africa, 2013, Africa Pulse October, 2013 Vol.8 available at http://www.worldbank.org/content/dam/Worldbank/document/Africa/Report/Africas-Pulse-brochure_Vol8.pdf [Accessed 3 June 2022].

³³ African Union, *Africa Mining Vision: "Transparent, equitable and optimal exploitation of mineral resources to underpin broad-based sustainable growth and socio-economic development"*, (United Nations Economic Commission for Africa (ECA), February, 2009). Available at https://www.uneca.org/sites/default/files/PublicationFiles/africa_mining_vision_english.pdf [Accessed on 3 June 2022].

³⁴ African Union, *Africa Mining Vision*, February 2009. Available at https://au.int/sites/default/files/documents/30995-doc-africa_mining_vision_english_1.pdf [Accessed 3 June 2022].

This shared vision will comprise:

- A knowledge-driven African mining sector that catalyses & contributes to the broad-based growth & development of, and is fully integrated into, a single African market through:
 - Down-stream linkages into mineral beneficiation and manufacturing;
 - Up-stream linkages into mining capital goods, consumables & services industries;
- Side-stream linkages into infrastructure (power, logistics; communications, water) and skills & technology development (HRD and R&D);
 - Mutually beneficial partnerships between the state, the private sector, civil society, local communities and other stakeholders; and
 - A comprehensive knowledge of its mineral endowment.
- A sustainable and well-governed mining sector that effectively garners and deploys resource rents and that is safe, healthy, gender & ethnically inclusive, environmentally friendly, socially responsible and appreciated by surrounding communities;
- A mining sector that has become a key component of a diversified, vibrant and globally competitive industrialising African economy;

However, African countries still struggle with making the mineral resources work for them, in uplifting the lives of their people.³⁵ For instance, this is demonstrated in the case of Nigeria where it has been reported that, despite the enactment of various Acts, the culture of impunity and corruption has continued to occupy the country's oil industry and poverty reduction remains elusive.³⁶

Kenya is no exception as it has a number of mineral deposits albeit in smaller amounts, which, as already pointed out, have not contributed much to the country's GDP as would be expected. The communities are also yet to boast of any significant benefits from the mining activities going on within their regions.³⁷ The challenges affecting the extractives sector in Kenya are not only limited to those related to modes of benefit sharing. There has been a general lack of openness, transparency and accountability as far as the mining activities are concerned.

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- A mining sector that has helped establish a competitive African infrastructure platform, through the maximisation of its propulsive local & regional economic linkages;
 - A mining sector that optimises and husbands Africa's finite mineral resource endowments and that is diversified, incorporating both high value metals and lower value industrial minerals at both commercial and small-scale levels;
 - A mining sector that harnesses the potential of artisanal and small-scale mining to stimulate local/national entrepreneurship, improve livelihoods and advance integrated rural social and economic development; and
 - A mining sector that is a major player in vibrant and competitive national, continental and international capital and commodity markets.

³⁵ See generally, Abuya, W.O., "Mining Conflicts and Corporate Social Responsibility in Kenya's Nascent Mining Industry: A Call for Legislation," In *Social Responsibility*, IntechOpen, 2018; African Union, *Assessment of the Mining Policies and Regulatory Frameworks in the East African Community for Alignment with the Africa Mining Vision*, op cit.; Kimani, M., "Mining to profit Africa's people," *Africa Renewal* 23, no. 1 (2009): 4-5; Bush, R., "Conclusion: mining, dispossession, and transformation in Africa," In *Zambia, mining, and neoliberalism*, pp. 237-268. Palgrave Macmillan, New York, 2010. Available at https://www.sahistory.org.za/sites/default/files/file%20uploads%20/alastair_fraser_miles_larmer_zambia_mining_anbook4you.pdf#page=260 [Accessed 3 June 2022]; Murombo, T., "Regulating mining in South Africa and Zimbabwe: Communities, the environment and perpetual exploitation," *Law Env't & Dev. J.* 9 (2013): 31.

³⁶ Poncian, J., & Kigodi, H. M., "Transparency initiatives and Tanzania's extractive industry governance," *Development Studies Research* 5, no. 1 (2018): 106-121, p. 108.

³⁷ Ndemo, B., "Kenya's mineral resources could pull millions out of poverty, Daily Nation, Monday June 24 2019. Available at <https://www.nation.co.ke/oped/blogs/dot9/ndemo/2274486-5169428-990fwj/index.html> [Accessed 3 June 2022]; Economic and Social Rights Centre (Hakijamii) (Kenya), *Titanium mining benefit sharing in Kwale County: HAKIJAMIIA comprehensive analysis of the law and practice in the context of Nguluku and Bwiti*, September, 2017. Available at <http://www.hakijamii.com/wp-content/uploads/2017/09/Titanium-mining-benefit-sharing.pdf> [Accessed on 3 June 2022]; cf. Base Titanium, "Response to Hakijamii's Draft Report on Base Titanium's Impacts on the Community," 25th August, 2017. Available at https://www.business-humanrights.org/sites/default/files/documents/Hakijamii%20Base%20Response%20Final%20-%202017%2008%2028_0.pdf [Accessed on 3 June 2022; see also Masinde, J., "Are Kwale residents expecting too much?" *Daily Nation*, Tuesday February 12 2013. Available at <https://www.nation.co.ke/lifestyle/smartcompany/Are-Kwale-residents-expecting-too-much/1226-1690904-nb7rqyz/index.html> [Accessed on 3 June 2022.

Kenya and many other African nations have yet to see the effects of the Africa Mining Vision, which was launched in 2009 and aims to promote transparent, equitable, and optimal exploitation of mineral resources. This is because there are still many instances of illicit financial flows, a lack of mineral value addition, and poverty among communities living in mining areas.³⁸

The extractives industry in Kenya holds high hopes for the Kenyan people with not only increased revenues but also lowered cost of living as the prices of petroleum products have a significant effect on the cost of essential commodities in the country.³⁹ Some of the mechanisms that are meant to enhance the economies of the national, county governments and communities through benefit sharing include but not limited to: direct investment in projects that benefit the people, jobs and employment creation and technology transfer amongst others. Notably, this is in line with one of the (Extractive Industries Transparency Initiative (EITI) principles that the prudent use of natural resource wealth should be an important engine for sustainable economic growth that contributes to sustainable development and poverty reduction.⁴⁰

While the current legislation on the extractives industry in the country has several requirements on disclosure and reports touching on various aspects, Kenya cannot currently pride itself as having transparency by governments (both national and counties) and companies in the extractive industries and thus, there is the need to enhance public financial management and accountability. There is hardly any publicly available information on the important aspects that shed light on the status of the revenues from the extractives industry. Its only recently when the President mentioned that the first batch of oil had been exported, and there was mention of the amount exported or its value.⁴¹ The details of such deals remain few. Kenya's scenario is not unique to this country but is also reflected across many African countries, to the detriment of the local communities.⁴²

In the spirit of ensuring that African countries and especially Kenya only adopts what works for them, while we push for adoption of best practices in management of revenues from the extractives sector in Kenya, and considering that Kenya has had no previous experience in oil production, there is a temptation to adopt frameworks from other countries despite the contextual differences between countries.⁴³ It is therefore recommended that the Government of Kenya has

³⁸ Kitimo, A., "Call to adopt mining values and principles in East Africa," *The East African*, Saturday July 27 2019. Available at <https://www.theeastafrican.co.ke/business/Call-to-adopt-mining-values-and-principles-in-East-Africa/2560-5212362-hwctkgz/index.html> [Accessed on 3 June 2022].

³⁹ Munyua, J., & Ragui, M., "Drivers of instability in prices of petroleum products in Kenya," *Prime Journal of Business Administration and Management (BAM)* 3, no. 3 (2013): 919-926.

⁴⁰ Muigua, *Securing Our Destiny through Effective Management of the Environment*, Glenwood Publishers Limited (2020), ISBN: 978-9966-046-06-1.

⁴¹ Presidential Strategic Communication Unit, "Kenya in Sh1.3bn oil export deal," *Daily Nation*, Thursday, August 1, 2019. Available at <https://www.nation.co.ke/news/Kenya-joins-list-of-oil-exporters/1056-5219572-qkp633z/index.html> [Accessed 3 June 2022].

⁴² Muigua, *Securing Our Destiny through Effective Management of the Environment*, Glenwood Publishers Limited (2020), ISBN: 978-9966-046-06-1.

⁴³ Kenya Civil Society Platform on Oil & Gas, "Setting the Agenda for The Development Of Kenya's Oil And Gas Resources – The Perspectives Of Civil Society," Aug 11, 2014. Available at <http://kcsfog.org/setting-the-agenda-for-the-development-of-kenyas-oil-and-gas-resources-the-perspectives-of-civil-society/> [Accessed on 3 June 2022].

a responsibility to adopt frameworks that are consistent with the prevailing social, economic, political and cultural circumstances in the country so as to facilitate the development of the oil and gas industry.⁴⁴

This does not however mean that all is lost within the African continent as there are some success stories within the continent. For instance, Botswana has extractive mineral industries that have played a crucial role in the development of the country. Through proper management of its resources and thus achieving a mineral-led economic growth, the country has been transformed from one of the poorest countries in the world at the time of independence in 1966 to an upper-middle income country.⁴⁵ Botswana mainly exports diamonds, as the world's largest producer in value terms, as well as copper and nickel.⁴⁶ Botswana's record of mineral-led development is remarkable and the country is also considered to be relatively free of the corruption and environmental damage that is often associated with mining industries. Public finances are strong, debt is minimal, and the country enjoys investment-grade credit ratings.⁴⁷ Thus, Kenya and the African continent in general, stands to benefit greatly from its oil, gas and mineral resources but only if the same are well managed through accountability and transparency in revenues declaration and ultimately, proper utilization of such revenues in promoting growth, development and investment in other sectors of the economy.⁴⁸

Natural resources and the fight for control of these resources inevitably come with conflicts. The risks of violent conflict increase when exploitation of natural resources causes environmental damage, loss of livelihood, or unequal distribution of benefits.⁴⁹ Sudan, DRC and Nigeria are just but few examples of African states that have gone on internal armed conflict because of their rich natural resources. There are natural resources in Democratic Republic of Congo in the tropical rain forest which covers more than 100 Million hectares. However, there have been recorded cases of terrible violence and immense human suffering.⁵⁰ The war has largely impacted on the environment and native wildlife. Parties to armed conflicts have resorted to occupying natural habitats thereby scaring animals away.⁵¹ Indigenous conflict management mechanisms can be utilized alongside the judicial systems to address the many conflicts that have ravaged the continent for long.

⁴⁴ Muigua, *Securing Our Destiny through Effective Management of the Environment*, Glenwood Publishers Limited (2020), ISBN: 978-9966-046-06-1.

⁴⁵ Jefferis, K., "The role of TNCs in the extractive industry of Botswana," *Transnational corporations* 18, no. 1 (2010): 61-92 at p.61.

⁴⁶ *Ibid.*, p.61.

⁴⁷ *Ibid.*, p.61; See also International Monetary Fund, Botswana: 2017 Article iv Consultation—Press Release; Staff Report, August 2017, IMF Country Report No. 17/249. Available at <https://www.imf.org/~media/Files/Publications/CR/2017/cr17249.ashx> [Accessed 3 June 2022].

⁴⁸ *Ibid.*

⁴⁹ United Nations, "Environmental Rule of Law," available at <https://www.unenvironment.org/explore-topics/environmental-rights-and-governance/what-we-do/promoting-environmental-rule-law-0> [Accessed on 3 June 2022].

⁵⁰ Samndong, R.A. & Nhantumbo, I., *Natural resources governance in the Democratic Republic of Congo: Breaking sector walls for sustainable land use investments*, (International Institute for Environment and Development Country Report, February 2015), p. 11. Available at <http://pubs.iied.org/pdfs/13578IIED.pdf> [Accessed on 23 March 2022].

⁵¹ Muigua, *Securing Our Destiny through Effective Management of the Environment*, Glenwood Publishers Limited (2020), ISBN: 978-9966-046-06-1.

Natural resources are a source of livelihood for many, and any development activities that affect the same in any way ought to seek the social licence through engaging the affected communities through public participation. Competition for scarce resources may lead to a ‘survival of the fittest’ situation.⁵² In such circumstances, environmental degradation poses a higher potential for conflict, as every group fights for their survival.⁵³ Even where resources are abundant, conflicts can arise when one group controls a disproportionate portion of the same (“Resource capture”). Resource capture occurs when the supply of a resource decreases due to either depletion or degradation and/or demand increases (due to population and/or economic growth).⁵⁴ This encourages the more powerful groups in a society to exercise more control and even ownership of the scarce resource, thereby enhancing their wealth and power.⁵⁵ For instance, land has been an emotive issue in Kenya as it is in the hands of a few people in the country, and this has often led to tribal clashes.⁵⁶

Considering that most of these conflicts have underlying issues that may not be fully addressed through the adversarial court system, the use of Alternative Dispute Resolution (ADR) and Traditional Dispute Resolution (TDR) mechanisms such as negotiation and mediation processes can cure this as they can help them in playing a more meaningful and active role in conflict management and decision-making processes. Having forums for negotiation and mediation between the stakeholders and communities can go a long way in averting conflicts and allowing proposed and ongoing developmental activities enjoy social acceptance in the community since concerns and expectations are more likely to be managed through such forums. Conflict resolution mechanisms such as negotiation and mediation are recommended because they afford the affected communities or sections of the public an opportunity to negotiate and reach a compromise agreement, where all sides get satisfactory outcome.⁵⁷ ADR and TDR mechanisms, especially negotiation and mediation, still have relevance in natural resource conflicts management, a role recognized in the Constitution of Kenya.⁵⁸ This is the true essence of environmental democracy; affording communities guaranteed and meaningful participation in the decision making process by presenting proof and reasoned arguments in their favour, as tools for obtaining a socio-economic justice.⁵⁹

⁵² See generally, “Chapter 5: Survival at Stake: Violent Land Conflict in Africa,” Small Arms Survey 2013, available at <http://www.smallarmssurvey.org/fileadmin/docs/A-Yearbook/2013/en/Small-Arms-Survey-2013-Chapter-5-EN.pdf> [Accessed on 23 March 2022].

⁵³ See Bowman, K., et al, “Chapter 1: Environment for Development,” (United Nations), available at http://www.unep.org/geo/geo4/report/01_Environment_for_Development.pdf [Accessed on 23 March 2022].

⁵⁴ Khagram, S., et al, “From the Environment and Human Security to Sustainable Security and Development,” *Journal of Human Development*, Vol. 4, No. 2, July 2003, pp. 289-313, p. 295.

⁵⁵ *Ibid.*

⁵⁶ See the Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya', (the 'Akiwumi Commission'), (Government Printer, Nairobi, 1999).

⁵⁷ Warner, M., ‘Conflict Management in Community-Based Natural Resource Projects: Experiences from Fiji and Papua New Guinea,’ Working Paper No. 135, (Overseas Development Institute, April 2000), p. 16.

⁵⁸ See Art. 60(1) (g); Art. 159.

⁵⁹ Ristanić, A., ‘Alternative Dispute Resolution and Indigenous Peoples: Intellectual Property Disputes in the Context of Traditional Knowledge, Traditional Cultural Expressions and Genetic resources,’ (Lund University, April 2015), available at

These processes have been indigenous to the African continent for centuries and they hold a key in addressing these conflicts with a relatively high degree of success.⁶⁰ These processes have social acceptance and using them alongside the formal mechanisms can go a long way in not only enhancing management of environmental resources but also managing and even possibly eradicating the conflicts that attach to access and control of these resources.

5. Conclusion

Since the advent of international environmental law, there have been continuous changes occasioned by both practice and law. Domestic laws must bear this in mind at all times. Such principles as public participation, environmental democracy, public awareness and sustainable development must take root in all spheres of environmental law, including management of environmental conflicts. Embracing and engaging communities in conflict management approaches that work for them in their various contexts is also critical if the people are to identify with governments' efforts in managing environmental resources and conflicts that arise within their localities.

Technological developments must also be embraced in not only addressing environmental conflicts but also enhancing environmental management and governance to prevent occurrence of these conflicts in the spirit of the principle of preventive action and the precautionary principle. If Africa and other third world regions are to move in tandem with the rest of the world in achieving sustainability and also effectively managing conflicts that come with access and control of environmental resources, there is a need for them to adopt approaches that meaningfully and effectively address the unique challenges that face these economies.

[https://www.law.lu.se/webuk.nsf/%28MenuItemById%29/JAMR32exam/\\$FILE/Alternative%20Dispute%20Resolution%20and%20Indigenous%20Peoples.%20Intellectual%20Property%20Disputes%20in%20the%20Context%20of%20Traditional%20Knowledg.pdf](https://www.law.lu.se/webuk.nsf/%28MenuItemById%29/JAMR32exam/$FILE/Alternative%20Dispute%20Resolution%20and%20Indigenous%20Peoples.%20Intellectual%20Property%20Disputes%20in%20the%20Context%20of%20Traditional%20Knowledg.pdf) [Accessed on 15 February 2022].

⁶⁰ Muigua, K., *Settling Disputes through Arbitration in Kenya*, 3rd Ed., Glenwood Publishers, Nairobi – 2017; Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers, Nairobi – 2015; Muigua, K., *Resolving Conflicts through Mediation in Kenya*, Glenwood Publishers, Nairobi – 2013; Muigua, K., “Chapter 25: Natural Resource Conflicts in Kenya: Effective Management for Attainment of Environmental Justice”, in Patricia Kameri-Mbote and Collins Odote, eds., *Blazing the Trail - Professor Charles Okidi's Enduring Legacy In The Development of Environmental Law* (University of Nairobi, March, 2019).

Role of State Agencies and Communities in Achieving Effective Environmental Conflicts Management

Abstract

Environmental conflicts affect not only the stability of a country but also the livelihoods of communities. This is especially true for communities living around the environmental resources causing the conflict in question. Considering that these conflicts have different actors involved in their origin as well as their management, it calls for concerted efforts from state agencies and communities towards addressing them. This paper discusses the role of state agencies as well as communities in management of environmental conflicts.

1. Introduction

Almost every community in the world occasionally has conflicts over ecological concerns, including, but not limited to, land use, environmental quality, water allocation, waste disposal, and natural resource management.¹ Environmental variables are important in many conflicts, either as direct causes of conflict or as its main drivers. There are many different types of environmental conflicts, ranging from value-based disputes over divergent notions of location, space, and our relationship with the natural world to interest-based rivalry over limited or valuable natural resources. Conflicts involving the environmental drivers of identity, security, and health can also be based on needs.²

Notably, the management of natural resources in Africa using community-based methods has gained popularity over time.³ It has been argued that the two main ways for improving people's lives in order to create peace, stability, human security, and development are good governance and conflict management.⁴ In addition, the majority of conflicts arise as a result of the state's failure to address critical issues such as human rights, the rule of law, better economic opportunities, particularly for youths, health, educational, housing, and transportation facilities for the general public, and, most importantly, a functioning justice system. These challenges, it has been suggested, can be addressed if the government focuses on good administration and improving people's quality of life.⁵ States automatically become one of the key players in any conflict transformation process when they reframe conflict in terms of concerns relating to human rights since they have a responsibility to respect, safeguard, and uphold human rights.⁶

¹Humphreys, M., "Natural resources, conflict, and conflict resolution: Uncovering the mechanisms." *Journal of conflict resolution* 49, no. 4 (2005): 508-537; Bob, U. and Bronkhorst, S., "Environmental conflicts: Key issues and management implications." *African Journal on Conflict Resolution* 10, no. 2 (2010): 9-30.

² Fisher, J., "Managing environmental conflict." *The handbook of conflict resolution: theory and practice* (2014): 3, p.1.

³ See Haro, G.O., Doyo, G.J. and McPeak, J.G., "Linkages between community, environmental, and conflict management: Experiences from Northern Kenya." *World development* 33, no. 2 (2005): 285-299.

⁴ Ahmar, Moonis. "Conflict Management and Good Governance in Pakistan: Lessons from Germany." *Journal of Political Studies, Special Conference Issue*, 2019, 211:221, at 211.

⁵ *Ibid*, at 211.

⁶ Lefevre N, 'The Human Rights-Based Approach to Conflict Transformation in Indigenous Contexts' <https://www.academia.edu/9964347/The_Human_Rights_Based_Approach_to_Conflict_Transformation_in_Indigenous_Contexts> accessed 21 August 2022, p.3.

The need for concerted efforts in addressing environmental conflicts is justified by the observation that while the nation-states are the main players in global politics, they are not the only ones; the international system also includes international institutions, business entities, and non-state actors.⁷ Indigenous peoples see the deprivation of their basic human and indigenous rights as a threat to their very existence. This results in conflict between the state and its indigenous peoples and, if handled incorrectly, can result in bloodshed. Since disputes between indigenous peoples and the state are fundamentally about rights, it makes sense to think about using a human rights-based strategy to resolve disputes in these situations.⁸ This chapter discusses the place of State agencies in managing internal conflicts, non-state actors as well as the role of communities in achieving lasting peace.

2. Role of State Institutions in Environmental Conflict Management

Article 69(1) of the Constitution of Kenya outlines the obligations of State in respect of the environment as follows: The State should: ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya; protect and enhance the intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities; encourage public participation in the management, protection and conservation of the environment; protect genetic resources and biological diversity; establish systems of environmental impact assessment, environmental audit and monitoring of the environment; eliminate processes and activities that are likely to endanger the environment, and utilize the environment and natural resources for the benefit of the people of Kenya. Besides, every person is obligated to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.⁹

In addition to helping to modify institutional norms, the law can also help to influence attitudes and behaviour.¹⁰ Due to its distinguishing characteristics, the rule of law offers a practical framework for the peaceful resolution of conflicts. These characteristics include: establishing the societal norms and thereby ensuring dependability, justice, and stability; institutions capable of resolving conflicts; laws and mechanisms protecting citizens' rights.¹¹ It goes without a saying that the State obligations relating to environmental conservation and promoting sustainable development are part of the process of addressing environmental conflicts as well as preventing their emergence.

⁷ Ataman, M., "The impact of non-State actors on world politics: a challenge to Nation-States." *Alternatives: Turkish Journal of International Relations* 2, no. 1 (2003), p. 42.

⁸ Broberg M and Sano H-O, 'Strengths and Weaknesses in a Human Rights-Based Approach to International Development – an Analysis of a Rights-Based Approach to Development Assistance Based on Practical Experiences' (2018) 22 *The International Journal of Human Rights* 664; Davis, M., "Indigenous struggles in standard-setting: The United Nations Declaration on the Rights of Indigenous Peoples." *Melbourne Journal of International Law* 9, no. 2 (2008): 439-471.

⁹ Article 69(2), Constitution of Kenya, 2010.

¹⁰ Muigua, K., "Securing Our Destiny Through Effective Management of the Environment", *Journal of Conflict Management and Sustainable Development*, Volume 4, No 3, (May, 2020).

¹¹ Peace Building Initiative, "Introduction: Justice, Rule of Law & Peacebuilding Processes, 2009" <<http://www.peacebuildinginitiative.org/indexe33f.html?pageId=1844>> accessed 21 August 2022.

Notably, depending on the nature of the conflict, the state, including state institutions and officials, plays a strategic role in the management of domestic conflict, either as a mediator and peacekeeper or as a participant.¹² It has additionally been contended that while by and large, many (maybe most) country states emerged by success (e.g., by triumph of the most impressive primitive lord over more vulnerable adjoining medieval masters), and accordingly were brought into the world as struggle members instead of as referees, on account of Africa, imperialism assumed a significant part in using together people groups from a welter of nationalities, commonwealths, societies and areas under a solitary country state where it likewise granted struggle between people groups of various foundation, especially concerning influence and asset.¹³

Regardless of the course of state arrangement, it is the obligation of the state to guarantee the upkeep of peace and lawfulness in the public eye where in dealing with the variety of human necessities and setting up systems for overseeing questions, the state capacities as a referee. Beside administration structures, the state likewise plans strategies and projects pointed toward working with serene conjunction among its assorted residents. Experiencing the same thing of savage struggle, the state liability goes past only the stoppage of viciousness, to executing drives focused on the goal of the contention issue(s) among the disputants.¹⁴

3. Role of Communities in Conflict Management

In some African nations, violent inter - group conflict is seen on a yearly basis. It is frequently organised according to identity. The conflicts frequently revolve around local land, raw materials, or political power. These conflicts pose a serious danger to human security and development, despite the fact that they often stay localized and are not directed at the central state.¹⁵

While communal conflicts in some areas only result in a few fatalities or are resolved before any fatalities occur, in other areas, these disagreements turn violent and result in the deaths of dozens, hundreds, or even thousands of people.¹⁶ The term "communal conflict" refers to disputes between non-state organisations that are unified by a common identity.¹⁷ Since group identity is thought to be socially constructed rather than a static phenomenon, some people would equate the concept of communal identity with ethnic or religious identity, but others have purposefully left the definition more ambiguous. The communal identity is conceptualized as subjective group identification based on, for example, a common history, culture, or core values.¹⁸

Governments, it has been said, are rarely able to act as an impartial arbitrator in situations of intercommunal conflict since, when such a dispute arises, political leaders are frequently linked

¹² Abdulrahman, Imran, and Usman A. Tar, "Conflict management and peacebuilding in Africa: the role of state and non-state agencies," *Information, society and justice journal* 1, no. 2 (2008): 185-202, at 190.

¹³ *Ibid*, at 190.

¹⁴ *Ibid*, at 191.

¹⁵ Elfversson E, 'How Government Bias Can Fuel Communal Conflicts in Africa' (The Conversation) <<http://theconversation.com/how-government-bias-can-fuel-communal-conflicts-in-africa-121640>> accessed 26 August 2022.

¹⁶ Brosché, Johan, 'Causes of Communal Conflicts: Government Bias, Elites and Conditions for Cooperation,' Expert group for Aid Studies, Swedish Ministry of Foreign Affairs, 2015, p.3. Available at <https://uu.diva-portal.org/smash/get/diva2:899332/FULLTEXT01.pdf> accessed 21 August 2022.

¹⁷ *Ibid*, p.4.

¹⁸ *Ibid*, p.4.

to its origin. This can happen directly through bias or provocation, or it can happen inadvertently due to poor policies and a failure to treat all individuals equally. As a result, politicians have to make an effort to find and promote conflict resolution techniques that are respected in the community. Traditional leaders, community-based organisations, and NGOs may fall under this category.¹⁹ Communities must be given the chance to describe how conflicts are manifesting in the broader socioeconomic setting. They must be given the chance to recognize external elements that fuel conflict and to create locally suitable conflict resolution techniques.²⁰

4. The Place of the State and the Communities in Addressing Environmental Conflicts: Striking the Balance

a) Addressing the Bias and legitimacy

The government's capacity to control intercommunal disputes declines if the state is biased toward the conflict players. The circumstances that support collaboration are subject to other players' influence. Because it has the power to change a number of variables crucial to intercommunal interactions, the government's behaviour is crucial. The strategic interests of the government are important when determining whether or not to interfere in a community conflict, because biased choices about property rights raise the likelihood of conflicts. Additionally, central players might form alliances with local actors engaged in conflict, which could intensify contacts between central and local elites as well as interactions among local elites, potentially leading to war.²¹

The government will be better able to control the community strife if the state has a high level of democracy. The ability of democratic institutions and procedures to support the aspects of rights, equality, and accountability is directly correlated with the degree to which government is responsive to the interests and requirements of the greatest number of individuals.²² Some academics advise using the following set of best practices when using collaborative decision-making processes: An agency should first decide if a cooperative strategy to finding agreements is necessary; Stakeholders should be able and willing to engage in the process and support it; Agency executives should encourage the process and guarantee there are enough resources to hold the process; A collaborative procedure to find an agreement should start with an evaluation; There should be consensus among all participants about ground rules, rather than just the sponsoring organisation setting them; The sponsoring organisation ought to guarantee the facilitator's objectivity and responsibility to each participant; Planning for execution of the agreement should begin as soon as the process is initiated by the agency and participants; and these processes should be governed by guidelines rather than rigid rules.²³

¹⁹ Elfversson E, 'How Government Bias Can Fuel Communal Conflicts in Africa' (The Conversation) <<http://theconversation.com/how-government-bias-can-fuel-communal-conflicts-in-africa-121640>> accessed 26 August 2022.

²⁰ Frank, E., "A participatory approach for local peace initiatives: The Lodwar border harmonization meeting," *Africa Today* (2002): 69-87, p. 72.

²¹ Brosché J, 'Conflict Over the Commons: Government Bias and Communal Conflicts in Darfur and Eastern Sudan' (2022) 0 *Ethnopolitics* 1.

²² United Nations, 'Rule of Law and Democracy: Addressing the Gap between Policies and Practices' (United Nations) <<https://www.un.org/en/chronicle/article/rule-law-and-democracy-addressing-gap-between-policies-and-practices>> accessed 26 August 2022.

²³ Walker GB and Daniels SE, 'Collaboration in Environmental Conflict Management and Decision-Making: Comparing Best Practices with Insights from Collaborative Learning Work' (2019) 4 *Frontiers in*

b) Environmental Governance Through Civic Engagement

Institutionalized participation can go a long way in enhancing the role of communities in addressing environmental conflicts in the country. To guarantee citizens enjoy unhindered justice and the rule of law, which are essential for sustainable development, responsible and inclusive institutions guided by the law may help to promote and ensure inclusive public policymaking that leaves no one behind.²⁴

Decision-making about environmental and natural resource policies is evolving. As parties resolve policy issues, citizens and management agency staff are increasingly looking for methods to "do things differently" and to actively engage in the decision-making process. Nowadays, "doing things differently" refers to working together.²⁵

c) Capacity building for Enhancing Participatory Conflict Management

In order for less powerful parties to participate fairly in a process of consensual negotiation, it is essential to create a level playing field.²⁶ Although the terms "capacity building" and "capacity development" are frequently used to refer to a wide range of activities, in the broadest sense, capacity refers to a party's ability to solve problems and accomplish goals, and capacity building aims to improve parties' ability to collaborate for their mutual benefit by giving them the knowledge and resources they need to identify problems and formulate solutions.²⁷ Since it encompasses the total system, environment, or context in which people, organisations, and societies operate and interact, capacity building is larger than organizational development. It is seen as the process through which people, groups, organisations, institutions, and communities improve their capacity to: (1) carry out essential tasks, solve issues, set and attain goals; and (2) comprehend and address their developmental requirements in a comprehensive and sustainable manner.²⁸

It has also been correctly noted that the provision of basic human needs, such as food, clean drinking water, health care, basic education, and economic possibilities within a society, is a prerequisite for developing capacity for effective governance and conflict management.²⁹

Communication <<https://www.frontiersin.org/articles/10.3389/fcomm.2019.00002>> accessed 26 August 2022.

²⁴ 'SDG 16 as an Accelerator for the 2030 Agenda' (UNDP)

<https://www.undp.org/content/undp/en/home/blog/2019/sdg-16-as-an-accelerator-for-the-2030-agenda.html> accessed 26 July 2022.

²⁵ Daniels S and Walker G, 'Working through Environmental Conflict: The Collaborative Learning Approach' [2001] Working through Environmental Conflict 1.

²⁶ Warner, M., "Conflict management in community-based natural resource projects: experiences from Fiji and Papua New Guinea" (2000), p. 30.

²⁷ Corissajoy, 'Capacity Building' (Beyond Intractability, 6 July 2016)

<<https://www.beyondintractability.org/essay/capacity-building>> accessed 20 August 2022; see also Lattanzio DJ, 'Capacity Building: A Powerful Tool to Prevent and Resolve Conflicts' (MediateGuru, 20 March 2021) <<https://www.mediateguru.com/post/capacity-building-a-powerful-tool-to-prevent-and-resolve-conflicts>> accessed 20 August 2022.

²⁸ Geene, J. V. "Participatory Capacity Building: A Facilitator's Toolbox for Assessment and Strategic Planning of NGO Capacity." The Institute of Cultural Affairs, Zimbabwe, available at http://assets.sportanddev.org/downloads/participatory_capacity_building_full.pdf. Accessed on February 10 (2003): 2020, p. 4.

²⁹ Corissajoy, 'Capacity Building' (Beyond Intractability, 6 July 2016)

<<https://www.beyondintractability.org/essay/capacity-building>> accessed 20 August 2022.

Nevertheless, capacity building goes well beyond meeting the minimum requirements. It is an issue of development at all societal levels, which includes institutional, community, and economic development. Knowledge and technical skills, organizational and institutional capacity, and the capacity to foresee, manage, and resolve disputes are some of the key assets that people, organisations, communities, and governments need in order to reach their full potential.³⁰

Notably, capacity building is a perpetual and mutually reinforcing process of changing people's attitudes, values, and organizational practices while accumulating the necessary knowledge and skills among different partners in a partnership. The goal is to improve each partner's capacity to make wise decisions about their own lives and to fully accept the consequences of those decisions.³¹ It has also been pointed out that despite the fact that there are many different approaches to building capacity, the capacity-building strategy for resolving conflicts is essential because it gives people the tools they need to recognize conflicts, properly analyze their options for dealing with them, solve them, and prevent future ones.³²

The need for capacity building is justified on the observation that long-term, conflict resolvers help parties build better relationships with one another in order to increase institutional and interpersonal capacity to resolve or de-escalate conflict in the future and stop it from turning violent. This entails helping the parties examine their underlying presumptions and attitudes about their enemies and, if necessary, change them.³³ While acknowledging that conflict is common and frequently beneficial, conflict resolvers detest the bloodshed, suffering, and loss of life it causes. They support constructive tactics over destructive ones because they feel that there are both productive and destructive ways to handle conflict.³⁴

Sustainable Development Goal (SDG) 16 seeks to 'promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels'. In line with this, there is a need for the Government to invest in strengthening conflict management institutions both formal and informal. While formal institutions are mainly pegged on the state, the informal ones require strong and empowered communities for their efficiency. As such, there should be empowerment of both state institutions and the communities.³⁵

³⁰ Ibid.

³¹ Geene, J. V. "Participatory Capacity Building: A Facilitator's Toolbox for Assessment and Strategic Planning of NGO Capacity." The Institute of Cultural Affairs, Zimbabwe, available at http://assets.sportanddev.org/downloads/participatory_capacity_building_full.pdf. Accessed on February 10 (2003): 2020, p. 4.

³² Lattanzio DJ, 'Capacity Building: A Powerful Tool to Prevent and Resolve Conflicts' (MediateGuru, 20 March 2021) <<https://www.mediateguru.com/post/capacity-building-a-powerful-tool-to-prevent-and-resolve-conflicts>> accessed 20 August 2022.

³³ Lutz EL, Babbitt EF and Hannum H, 'Human Rights and Conflict Resolution from the Practitioners' Perspectives' (2003) 27 *The Fletcher Forum of World Affairs* 173, p. 179.

³⁴ Ibid, p. 179.

³⁵ 'Peacebuilding Needs Strong Communities as Well as Strong Institutions' (Peace Insight) <<https://www.peaceinsight.org/en/articles/peacebuilding-needs-strong-communities-as-well-as-strong-institutions/>> accessed 12 September 2022; '4 Governance and Conflict Resolution in Multi-Ethnic Societies' <<https://archive.unu.edu/unupress/unupbooks/uu12ee/uu12ee05.htm>> accessed 12 September 2022.

5. Conclusion

It is possible for the various parties (government agencies, stakeholder organisations, and citizens) to look for a collaborative approach as an alternative to adversarial conflicts when environmental or natural resource conflicts have arisen. By doing this, they will be able to work through conflicts to find common ground and make wise decisions.³⁶ SDG 16 and the SDGs as a whole must be accomplished through partnerships, integrated solutions, and the initiative and leadership of countries and member states in reshaping the institutional and social landscape and laying the foundation for significant reforms that support the establishment of sustainable peace.³⁷ Because marginalization and exclusion may have a destabilizing effect, it is essential to adopt an inclusive and participatory approach to development.³⁸

Better economic climates, greater per capita incomes, higher educational achievement, and more social cohesiveness have all been benefits of peaceful societies.³⁹ Better interpersonal ties within a community tend to promote higher levels of peace by preventing the emergence of tensions and lowering the likelihood that conflicts would turn violent.⁴⁰ It is imperative that conflict management efforts should aim at strengthening both state agencies and communities as both have a distinct role to play

³⁶ Gregg B Walker and Steven E Daniels, 'Collaboration in Environmental Conflict Management and Decision-Making: Comparing Best Practices with Insights from Collaborative Learning Work' (2019) 4 *Frontiers in Communication* <<https://www.frontiersin.org/articles/10.3389/fcomm.2019.00002>> accessed 26 August 2022.

³⁷ 'SDG 16 as an Accelerator for the 2030 Agenda' (UNDP) <<https://www.undp.org/content/undp/en/home/blog/2019/sdg-16-as-an-accelerator-for-the-2030-agenda.html>> accessed 20 August 2022.

³⁸ 'SDG 16 as an Accelerator for the 2030 Agenda' (UNDP) <<https://www.undp.org/content/undp/en/home/blog/2019/sdg-16-as-an-accelerator-for-the-2030-agenda.html>> accessed 20 August 2022

³⁹ The Institute for Economics and Peace (IEP), 'Pillars of Peace - Understanding the Key Attitudes and Institutions That Underpin Peaceful Societies - International Security Sector Advisory Team (ISSAT)', p. 2 <<https://issat.dcaf.ch/ser/Learn/Resource-Library/Policy-and-Research-Papers/Pillars-of-Peace-Understanding-the-key-attitudes-and-institutions-that-underpin-peaceful-societies>> accessed 20 August 2022

⁴⁰ The Institute for Economics and Peace (IEP), 'Pillars of Peace - Understanding the Key Attitudes and Institutions That Underpin Peaceful Societies - International Security Sector Advisory Team (ISSAT)', p. 6.

Embracing Environmental, Social and Governance (ESG) Principles for Sustainable Development in Kenya

Abstract

The paper critically examines the extent to which Environmental, Social and Governance (ESG) principles have been embraced in Kenya. It argues that ESG has emerged as arguably the most important tool of corporate governance. ESG seeks to shape corporate decision making by advocating for sustainable, responsible and ethical investments. It analyses each of the ESG principles and the progress made towards embracing this concept in Kenya. The paper further addresses some of the ESG challenges in Kenya and suggests the way forward towards embracing ESG principles for sustainable development in Kenya.

1. Introduction

The growing threat of climate change and climate crisis has forced many investors to embrace sustainability as a key factor in investment decision-making¹. At the same time, social concerns touching on issues such as human rights, diversity, consumer protection and welfare and protection of animals especially endangered species have led to many companies taking their social responsibilities and especially impact of their commercial activities on the local communities where they operate more seriously than ever². The growth of social media has also increased the public risks associated with socially irresponsible behavior due to more scrutiny on companies and the emergence of socially conscious consumers³. Further, there has been growing corporate governance awareness since the 2008 global economic recession which has led to increase shareholder and stakeholder activism in demanding more responsive management structure, better employee relations, and reasonable executive compensation in companies⁴.

Consequently, how companies handle environmental, social and governance issues is increasingly becoming a major concern especially for investors and other key stakeholders. ESG is an acronym for Environmental, Social and (Corporate) Governance, the key aspects of sustainable, responsible or ethical investment⁵. It has been defined as “a generic term used in capital markets and used by investors to evaluate corporate behaviour and to determine the future financial performance of companies⁶. ESG “is a subset of non-financial performance indicators which include sustainable, ethical and corporate governance issues such as managing a company’s

¹ De Francesco. A.J., ‘The impact of sustainability on the investment environment.’ *Journal of European Real Estate Research* (2008).

² Cedric.R., ‘Accountability of Multinational Corporations for Human Rights Abuses.’ *Utrecht Law Review* 14.2 (2018): 1-5.’

³ Mariarosaria. S & Scarpato. D ‘Sustainable Consumption: How Does Social Media Affect Food Choices?’ *Journal of Cleaner Production* 277 (2020): 124036.

⁴ Martin.C et al., ‘Corporate governance and the 2008–09 Financial Crisis.’ *Corporate Governance: An International Review* 19.5 (2011): 399-404; See also Erkens. D.H, et al Corporate governance in the 2007–2008 financial crisis: Evidence from financial institutions worldwide.” *Journal of corporate finance* 18.2 (2012): 389-411.

⁵ Stuart. L.G et al., ‘Firms and social responsibility: A review of ESG and CSR research in corporate finance.’ *Journal of Corporate Finance* 66 (2021): 101889.

⁶ The Financial Times Lexicon, Available at: <https://markets.ft.com/glossary/searchLetter.asp?letter=E> (accessed on 21/07/2022)

carbon footprint and ensuring there are systems in place to ensure accountability⁷.” ESG has also been defined as standing for the three broad categories, or areas, of interest for “socially responsible investors” who consider it important to incorporate their values and concerns (such as environmental concerns) into their selection of investments instead of simply considering the potential profitability and/or risk presented by an investment opportunity.⁸

Globally, the importance of Environmental, Social and Governance (ESG) issues is evidenced by the change in the legal and regulatory landscape to reflect the expectations of investors, customers, employees and other stakeholders. Increasingly, the investment decisions including assessment and valuation are incorporating ESG criteria with companies that are rated as having strong sustainability programs enjoying more preference from investors⁹. Issues touching on climate change and sustainability dominate current ESG focus. In addition, human rights and especially the rights of indigenous peoples and governance structures of companies are enjoying prominent attention¹⁰. Many projects investors and sponsors are also demanding more detailed identification and mitigation of environmental and social impacts of investment projects before making commitment or funding¹¹.

According to the Organisation for Economic Co-operation and Development (OECD), the growth of ESG approaches by investors has been driven by private and public sector initiatives to reach the objectives of the Paris Agreement and the Sustainable Development Goals (SDGs)¹². This has seen the incorporation of climate transition factors into investment decisions and the growth of what has come to be known as ESG investing as a leading form of sustainable finance for long-term value and alignment with societal values. OECD defines ESG investing as generally referring to the process of considering Environmental, Social and Governance (ESG) factors when making investment decisions. Bloomberg estimates that the value of ESG investing around the world has risen to almost USD 40 trillion in 2021¹³. At the same time, as at 2020 ESG ratings were being applied to companies representing around 80% of market capitalization¹⁴.

This paper seeks to critically examine the extent to which ESG principles have been embraced in Kenya. It analyses each of the ESG principles and the progress made towards embracing this concept in Kenya. The paper further addresses some of the ESG challenges in Kenya and suggests the way forward towards realising ESG tenets for sustainable development in Kenya.

⁷ Ibid

⁸CFI, ESG (Environmental, Social and Governance), Available at: <https://corporatefinanceinstitute.com/resources/knowledge/other/esg-environmental-social-governance/> (accessed on 21/07/2022)

⁹ Muigua.K., ‘Introduction to ESG (Environmental, Social and Governance) available at <https://thelawyer.africa/2022/02/04/esg-environmental-social-and-governance/> (accessed on 22/07/2022)

¹⁰ Ibid

¹¹Norton Rose Fulbright, “Environmental, Social and Governance,” Available at: <https://www.nortonrosefulbright.com/en/services/203f40d1/environmental-social-and-governance-esg> (accessed on 21/07/2022)

¹²OECD., ‘Environmental Social and Governance (ESG) Investing’ available at <https://www.oecd.org/finance/esg-investing.htm> (accessed on 21/07/2022)

¹³ Ibid

¹⁴ Ibid

2. Environment Social and Governance (ESG) Principles

The Environmental ‘E’ pillar of ESG is being increasingly used as a tool to align investments and capital flows with a low-carbon transition and to unlock valuable forward-looking information on firms’ climate transition risks and opportunities¹⁵. The environmental considerations in areas such as climate risk, water scarcity, extreme temperatures and carbon emissions are now considered as key issues that can impact competitive positioning for businesses. Companies are expected to appreciate their role as stewards of the natural or physical environment and to take into account the utilisation of natural resources and the impact of their overall operations on the environment, both locally and across its global supply chains¹⁶. Companies are now required to take precautions against environmental incidents such as oil spills or pollution from mining operations as safeguards against damage to their reputation and shareholder value¹⁷. At the same time, more than 13,000 companies and 3,000 non-business signatories in 160 countries that are signatories of the United Nations Global Compact (UNGC), which helps businesses contribute positively toward some or all of the 17 United Nations (UN) sustainable development goals (SDGs) by 2030¹⁸.

The COVID-19 pandemic, and its diverse implications including healthcare access, workplace safety, cybersecurity and other issues related to the communities that businesses , have proven to be a watershed moment for the often-underappreciated ‘S’ pillar of environmental, social and governance (ESG) considerations with the need to tackle the inequalities exposed and exacerbated by the pandemic becoming a key reason for investors to make allocations for socially conscious investments despite intangibility of social facts¹⁹. Companies are beginning to appreciate the role taking social responsibility can play in mitigating issues such data theft, worker strikes, litigation, workplace accidents and other people-related disruptions that can hurt a business reputation and finances. The repercussions of work-related injuries and deaths on families including on their financial security are also acknowledged as having a bearing on the United Nations Sustainable Development Goals (SDGs) of no poverty, zero hunger, good health and well-being, decent work and economic growth even as many investors are aligned with these goals²⁰.

The “G” Pillar in ESG is the oldest as governance has been an integral part of robust investment for ages²¹. However, what is considered effective governance keeps evolving and the speed of evolution has quickened as institutional investors’ definition of stakeholders continues to broaden beyond shareholders²². While older forms of Governance focused on serving and protecting shareholders, the newer approaches stretch beyond basic dimensions related to financial and

¹⁵ OECD (2021), ESG Investing and Climate Transition: Market Practices, Issues and Policy Considerations, OECD Paris, <https://www.oecd.org/finance/ESG-investing-and-climatetransition-Market-practices-issues-and-policy-considerations.pdf> (accessed on 21/07/2022)

¹⁶ Ibid

¹⁷ Ibid

¹⁸ Ojiambo, S., “Leadership of the UN Global Compact: Message of CEO and Executive Director,” Available at: <https://www.unglobalcompact.org/about/governance/executive-director> (accessed on 21/07/2022)

¹⁹ Create Research, “Passive Investing 2021: Rise of the social pillar of ESG,” Available at: <https://cdn.e-fundresearch.com/files/RcfPdrQdAaVI9tiBgrgLq4baO7Wciz6eepZTODEO.pdf> (accessed on 21/07/2022)

²⁰ Standard Chartered Singapore, “The S in ESG,” Available at: <https://www.sc.com/sg/wealth/insights/the-s-in-esg/> (accessed on 21/07/2022)

²¹ Muigua, K., ‘Introduction to ESG (Environmental, Social and Governance) Op Cit

²² RL360, “Governance-The G in ESG,” Available at: <https://www.rl360.com/row/funds/investment-definitions/g-in-esg.htm> (accessed on 21/07/2022)

accounting misconduct as well as legal and regulatory non-compliance, such as transparency, corporate structures and ethics²³. Investors are also aligning Governance with the 17 United Nations Sustainability Development Goals (SDGs), where governance issues include industry, innovation and infrastructure (Goal 9); peace, justice and strong institutions (Goal 16); and partnerships with public and private institutions (Goal 17)²⁴.

3. Environment, Social and Governance (ESG) Disclosure and Reporting Requirements in Kenya

The Nairobi Securities Exchange has developed an ESG Disclosure Manual to guide listed companies in Kenya on ESG reporting. The Manual (ESG Manual) provides that ESG reporting should be on a materiality basis²⁵. In financial reporting, materiality is the threshold for influencing the economic decisions of those using an Organisation's financial statements²⁶. A similar concept is also important in ESG reporting. In ESG reporting, "materiality is the principle that determines which relevant topics are sufficiently important that it is essential to report on them²⁷." It is necessary to undertake materiality analysis because not all ESG topics are of equal importance to an organization and an ESG report has to reflect their relative priority of the various topics²⁸.

The ESG Manual requires that listed companies have a structured, documented process on assessment of materiality for ESG disclosure topics²⁹. It is recommended that a materiality assessment exercise be conducted at least on an annual basis and as part of every new ESG reporting season. The ESG Manual also requires that every organization discloses its approach to materiality within the ESG report³⁰. The Global Reporting Initiative (GRI) gives guideline for what is material by providing that the ESG report should cover topics that Reflect the reporting organisation's significant economic, environmental, and social impacts; or substantively influence the assessments and decisions of stakeholders. In other words, for a topic to be relevant and potentially material, it should be based on only one of these dimensions³¹.

It is recommended that a materiality assessment grid be used as a structured guide in prioritizing ESG topics to report on³². That way, by applying an internally developed rating criteria, organisations can plot ESG topics on a grid or heat map indicating the assessed level of

²³ Ibid

²⁴ United Nations, Department of Economic and Social Affairs, 'Sustainable Development' available at <https://sdgs.un.org/goals> (accessed on 21/07/2022)

²⁵ Nairobi Securities Exchange, 'ESG Disclosures Guidance Manual', available at <https://sseinitiative.org/wp-content/uploads/2021/12/NSE-ESG-Disclosures-Guidance.pdf> (accessed on 21/07/2022)

²⁶ Ruth.J., 'The Convergence of Financial and ESG Materiality: Taking Sustainability Mainstream.' *American Business Law Journal* 56.3 (2019): 645-702.'

²⁷ Muigua. K., 'What are the Material Issues for ESG Reporting in Kenya?' available at <https://thelawyer.africa/2022/06/05/material-issues-for-esp-reporting-in-kenya/> (accessed on 21/07/2022)

²⁸ Ibid

²⁹ Nairobi Securities Exchange, 'ESG Disclosures Guidance Manual' Op Cit

³⁰ Ibid

³¹ Global Reporting Initiative., 'ESG Standards, Frameworks and Everything in Between' available at <https://www.globalreporting.org/media/jxkgrggd/gri-perspective-esp-standards-frameworks.pdf> (accessed on 21/07/2022)

³² Ibid

importance considering both dimensions of materiality³³. In that regard, materiality is dependent on whether a topic is of low or high importance to the stakeholders and the significance of ESG impacts on economy, environment and/or society. GRI gives detailed guidance that listed companies can refer to when identifying material topics³⁴. The starting point is using the sector standards to understand the sector's content and then deduce the organization content from it³⁵.

The next step is to consider the topics and impact as described in the sector standard and then identify the actual and potential impact to the organization stakeholders, economy, environment and society³⁶. It takes the engagement of the relevant stakeholders and experts on ongoing basis to achieve assessment of the impact of the topics. In the aftermath, the material topics should be tested against the sector standard to prioritize the most significant impacts for reporting³⁷. After this, the material topics should be tested with experts and information users to determine and come up with a comprehensive list of material topics for ESG reporting for the respective organization.

The approach applied for each step will vary according to the specific circumstances of the organisation, such as its business model; sector; geographic, cultural and legal operating context; ownership structure; and the nature of its impacts³⁸. Given these specific circumstances, the steps should be systematic, documented, replicable, and used consistently in each reporting period. The organisation should document any changes in its approach together with the rationale for those changes and their implications. The organisation's highest governance body should oversee the process and review and approve the material topics³⁹.

The ESG Manual proposes mandatory ESG disclosures for NSE listed companies to help achieve comparability and to facilitate compliance with the CMA Code, relevant international treaties, ESG standards and local regulations⁴⁰. Further, the Capital Markets Authority (CMA) Code of Corporate Governance Practices for Issuers of Securities to the Public in 2015 provides examples of topics that the Boards of listed companies should treat as material⁴¹. As per CMA code, material information means any information that may affect the price of an issuer's securities or influence investment decisions⁴². Listed firms are advised to refer to the Code when selecting material topics for disclosure⁴³. The ESG Manual also recommends the Sustainable Development Goals (SDGs) as helpful guide in the identification of material topics and or impact as by aligning

³³ Ibid

³⁴ GRI., 'The Global Standards for Sustainability Reporting' available at <https://www.globalreporting.org/standards/> (accessed on 21/07/2022)

³⁵ Ibid; See also Fonseca.A et al., 'Sustainability reporting among mining corporations: a constructive critique of the GRI approach.' *Journal of cleaner production* 84 (2014): 70-83.'

³⁶ Ibid

³⁷ Ibid

³⁸ Muigua. K., 'What are the Material Issues for ESG Reporting in Kenya?' Op Cit

³⁹ Ibid

⁴⁰ Nairobi Securities Exchange, 'ESG Disclosures Guidance Manual' Op Cit

⁴¹ Capital Markets Authority., Code of Corporate Governance Practices for Issuers of Securities to the Public in 2015 , Legal Notice No. 1420

⁴² Ibid

⁴³ Ibid

organisational objectives with the SDGs, organisations can identify significant impact areas that affect their contribution to the SDGs⁴⁴.

The concept of double-materiality is the latest introduction in the discussions around assessment of materiality in ESG reporting. According to the European Commission Guidelines on Non-financial Reporting, “double-materiality refers to assessing materiality from two perspectives, namely, the extent necessary for an understanding of the company’s development, performance and position” and “in the broad sense of affecting the value of the company”; and environmental and social impact of the company’s activities on a broad range of stakeholders⁴⁵. The concept of double-materiality implies the need to assess the interconnectivity of the two.

A GRI research on how double-materiality is implemented in ESG reporting, and the benefits and challenges found that identification of financially materiality issues are incomplete if companies do not first assess their impacts on sustainable development⁴⁶. The GRI white paper also revealed that reporting material sustainable development issues can enhance financial performance, improve stakeholder engagement and enable more robust disclosure⁴⁷. Further, it was established that focusing on the impacts of organisations on people and planet, rather than financial materiality, increases engagement with the Sustainable Development Goals (SDGs)⁴⁸. The ESG Manual thus encourages listed companies to assess impact of ESG issues to their organisations (such as climate change and human rights) in addition to their organisations own ESG impacts to society (such as material resource use and emissions) when determining material ESG impacts for disclosure. ESG reporting is thus essential in promoting sustainable development.

4. The ESG Reporting Frameworks Applicable in Kenya

In addition to the ESG Disclosure Manual formulated by the Nairobi Securities Exchange, there are several other organizations that have adopted ESG reporting requirements relevant to listed companies in Kenya⁴⁹. These include the Capital Markets Authority, the United Nations Global Compact, various investment groups, the Carbon Disclosure Programme (CDP) and industry level reporting requirements like those imposed by the Central Bank of Kenya touching on the operations of licensed Banks⁵⁰. This part explores the basics of each of these ESG reporting requirements and how listed companies in Kenya comply with them.

⁴⁴ Nairobi Securities Exchange, ‘ESG Disclosures Guidance Manual’ Op Cit

⁴⁵ European Commission ‘Guidelines on Non-Financial Reporting’, available at https://ec.europa.eu/info/publications/non-financial-reporting-guidelines_en (accessed on 21/07/2022)

⁴⁶ Adams, C.A., Alhamood, A., He, X., Tian, J., Wang, L. and Wang, Y. (2021) The Double-Materiality Concept: Application and Issues, published by the Global Reporting Initiative (GRI) as a White Paper, Available at: <https://www.globalreporting.org/media/jrbntbyv/griwhitepaper-publications.pdf> (accessed on 21/07/2022)

⁴⁷ Ibid

⁴⁸ Ibid

⁴⁹ Muigua.K., ‘The ESG Reporting Frameworks Applicable in Kenya’ available at <https://thelawyer.africa/2022/06/05/esg-reporting-frameworks-applicable-in-kenya/> (accessed on 21/07/2022)

⁵⁰ Ibid

4.1 The Capital Markets Authority

The Capital Markets Authority (CMA) published the Code of Corporate Governance Practices for Issuers of Securities to the Public in 2015⁵¹. It requires listed companies to explain in their annual reports how they have applied the recommendations contained in the Code⁵². Within the Code, the CMA also provides examples of topics that the Boards of listed companies should treat as material⁵³. The ESG Manual gives guidelines on how the ESG reporting approach suggested in it can be used to meet the reporting requirements of the CMA code⁵⁴. These include by identifying the CMA as a key stakeholder for listed companies within the situational analysis and stakeholder engagement phases⁵⁵. Second, it involves analysing the CMA's expectations of the organisation and the reporting requirements contained in the CMA Code⁵⁶.

Third, complying with the CMA code under the ESG Manual means including disclosures requirements on the Code as part of the assessed material ESG topics for disclosure⁵⁷. These have been proposed as a mandatory disclosure topic for all listed companies, that is, governance under general disclosure topics. In addition, it takes generating content on the organisation's performance around these topics using the guide proposed in this manual and reference to the GRI Standards on governance disclosures. It also entails submitting extracts or the full ESG report discussing performance on these indicators to the CMA within the agreed timelines with the CMA. In this case, the ESG report should be published within the reporting timelines required for CMA submissions.

4.2 Investor groups

As a way of managing assessed environmental and social risk in debt and equity investments, some institutional investors typically require the implementation of an environmental and social management system⁵⁸. Thus, depending on the assessed risk profile, beneficiary organisations are required to report at least annually on performance on several pre-identified environmental and social performance metrics⁵⁹. Through such reporting process, investors should be able to develop content around the organisation's approach to these topics and demonstrate performance during the reporting period⁶⁰. It is noteworthy that environmental and social risk management is one of the mandatory ESG topics proposed for all listed companies. The International Finance Corporation (IFC) Performance Standards on Environmental and Social Sustainability is one

⁵¹ Capital Markets Authority., Code of Corporate Governance Practices for Issuers of Securities to the Public in 2015, Legal Notice No. 1420

⁵² Ibid

⁵³ Ibid

⁵⁴ Nairobi Securities Exchange, 'ESG Disclosures Guidance Manual' Op Cit

⁵⁵ Ibid; See also Magale. E., 'Developing a green bond market in Kenya: perspectives from practitioners and lessons from developing markets.' *Journal of Sustainable Finance & Investment* (2021): 1-18.

⁵⁶ Ibid

⁵⁷ Ibid

⁵⁸ Muigua.K., 'The ESG Reporting Frameworks Applicable in Kenya' available at <https://thelawyer.africa/2022/06/05/esg-reporting-frameworks-applicable-in-kenya/> (accessed on 21/07/2022)

⁵⁹ Ibid

⁶⁰ Ibid

example of ESG indicators and metrics that investors commonly refer to when evaluating investments⁶¹.

4.3 United Nations Global Compact

There are more than 200 Organisations in Kenya, including some listed companies, that are participants of the Global Compact Network Kenya, the local arm of the United Nations Global Compact (UNGC)⁶². The UNGC has developed a set of 10 principles that organisations can voluntarily adopt and integrate into their own strategies and operations⁶³. These principles cover four issue areas including Human Rights, Labour, Environment and Anti-corruption⁶⁴. In turn, the Ten Principles of the United Nations Global Compact is a key guideline in that regard.

The UNGC encourages participants to self-assess, prepare, and submit a Communication on Progress report to the UNGC on their performance around these four topical areas⁶⁵. According to the UNGC, the Communication on Progress report should be fully integrated into a company's main stakeholder communications, most often the annual or sustainability report⁶⁶. By developing an annual ESG report discussing organisational performance around these topics, listed companies can submit an extract of the ESG report to fulfil the requirements of the annual Communication on Progress report submissions to the UNGC. Further, applying the Global Reporting Initiative standards ensures compliance to the Communication on Progress reporting requirements⁶⁷. Organisations can also refer to the UNGC guidance document on Using GRI's Guidelines to Create a CoP.

4.4 The Carbon Disclosure Project (CDP)

The CDP is a non-profit charity helps in promoting transparency in environmental reporting by cities and companies around the world⁶⁸. Signatory companies provide performance data on climate change, water security and deforestation on a self-disclosure basis⁶⁹. This self-reported data is then used by investors and other stakeholders to make informed data driven decisions with regards to the reporting company's environmental impacts⁷⁰. For example, investors can use data in the CDP database to calculate the carbon intensity of their portfolio⁷¹. Investors can also select entities that demonstrate climate resilience by evidenced implementation of strategies that future

⁶¹ International Finance Corporation., 'Performance Standards on Environmental and Social Sustainability' available at https://www.ifc.org/wps/wcm/connect/c02c2e86-e6cd-4b55-95a2-b3395d204279/IFC_Performance_Standards.pdf?MOD=AJPERES&CVID=kTjHBzk (accessed on 21/07/2022)

⁶² United Nations Global Compact: available at <https://www.unglobalcompact.org/engage-locally/africa/kenya> (accessed on 21/07/2022)

⁶³ Ibid

⁶⁴ Ibid; See also Global Compact Network Kenya., 'The Ten Principles of the United Nations Global Compact' available at <https://www.globalcompactkenya.org/what-we-do/ten-principles> (accessed on 22/07/2022)

⁶⁵ Ibid

⁶⁶ Ibid

⁶⁷ Muigua.K., 'The ESG Reporting Frameworks Applicable in Kenya' Op Cit

⁶⁸ Carbon Disclosure Project, available at <https://www.cdp.net/en> (accessed on 21/07/2022)

⁶⁹ Ibid; See also Matisoff.D et al., 'Convergence in environmental reporting: assessing the Carbon Disclosure Project.' *Business Strategy and the Environment* 22.5 (2013): 285-305.'

⁷⁰ Ibid

⁷¹ Muigua.K., 'The ESG Reporting Frameworks Applicable in Kenya' Op Cit

proof their organisations against climate related policies and regulations⁷². There is need to consider that the CDP and GRI use common metrics on reporting on carbon emissions. ESG reporting can be used to collect and report data to the CDP. Organisations can select any or all the disclosure topics as part of their materiality assessment exercise and build reporting content within the ESG report that meets the CDP self-disclosure requirements.

4.5 Industry level reporting

Certain industry groups in Kenya have developed voluntary ESG related guidelines for consideration by member organisations. For example, in the banking sector in Kenya, the Kenya Bankers Association, the trade association for banks in Kenya, has developed the Sustainable Finance Initiative (SFI) industry principles for the banking sector⁷³. Further, recently the Central Bank of Kenya (CBK) has developed Guidance on Climate Related Risk Management for the banking sector⁷⁴. The aim of the Guidance is to sensitize the banking sector on mitigation of climate-related risks and harnessing of opportunities⁷⁵. It also offers guidance on the development and implementation of appropriate climate-related strategies and policies⁷⁶. Given the current trajectory of ESG and emphasis placed by investors on ESG integration, it is expected that more trade associations and industry groupings in Kenya will develop specific ESG guidelines for adoption by their members. Industry guidelines provide relevant insights on ESG issues impacting the industry and listed companies can refer to such guidelines when identifying material ESG topics for disclosure using the framework proposed in this manual.

5. ESG Concerns in Kenya

The concept of ESG acknowledges some of the Environmental, Social and Governance concerns that arise from the activities of corporations. From an environmental perspective, the activities of corporations have resulted in direct and indirect greenhouse gas emissions contributing to the climate change menace⁷⁷. Further, the activities of multinational corporations especially those involved in the exploration of natural resources have resulted in environmental concerns such as environmental degradation, extinction of biodiversity, contamination and destruction of soil and air pollution affecting the socio-economic lives of indigenous populations⁷⁸.

In the social context, ESG acknowledges some of the challenges that organization's face in their relationship with stakeholders. Some of these challenges include unfair labour practices and standards. In Kenya, there have been accusations of human right abuses such as killings, rape, and other forms of sexual and gender-based violence, bad labour practices and land injustices

⁷² Ibid

⁷³ Sustainable Finance Initiative, available at <https://sfi.kba.co.ke/> (accessed on 22/07/2022)

⁷⁴ Central Bank of Kenya., 'Guidance on Climate-Related Risk Management' October 2021, available at <https://www.centralbank.go.ke/wp-content/uploads/2021/10/Guidance-on-Climate-Related-Risk-Management.pdf> (accessed on 22/07/2022)

⁷⁵ Ibid

⁷⁶ Ibid

⁷⁷ Peterdy.K., 'ESG (Environment, Social and Governance): A Framework for Understanding and Measuring How Sustainably an Organization is Operating' available at <https://corporatefinanceinstitute.com/resources/knowledge/other/esg-environmental-social-governance/> (accessed on 21/07/2022)

⁷⁸ Ajibade, L.T & Awomuti, A.A. 'Petroleum Exploitation or Human Exploitation? An Overview of Niger Delta Oil Producing Communities in Nigeria' African Research Review Vol. 3 (1), 2009. Pp. 111-124

against the neighbouring communities perpetrated by certain multinational corporations⁷⁹. The activities of an organization can also impact the communities where such an organization operates resulting in social concerns such as land injustices and displacement of people.

Governance challenges have also impacted the profitability and sustainability of organizations. These challenges include mismanagement of organizations, lack of transparency, accountability by the board of directors, conflict of interest and poor internal controls⁸⁰. These challenges have resulted in failure of some of the leading organizations in Kenya. ESG acknowledges these challenges and seek to integrate good governance practices in the affairs of organizations.

6. Way Forward

There is need for corporations to embrace the concept of ESG in Kenya in order to promote sustainable development. According to the Nairobi Securities Exchange, listed companies in Kenya have a general awareness of ESG issues and corporate sustainability but there is need for capacity building on how to integrate ESG into business strategies of listed companies and how to report ESG performance in a consistent, transparent and principle-based approach that meets stakeholder expectations⁸¹. The ESG Disclosures Guidance Manual (ESG Manual) is thus designed to guide listed companies in Kenya and other organizations interested in ESG reporting on how to collect, analyse, and publicly disclose important ESG information in a way that meets international sustainability reporting standards⁸².

The ESG Manual is proposed to act as a guide on how to progressively integrate ESG in strategy, operations, and performance management. It recommends the adoption of the Global Reporting Initiatives (GRI) Standards as the common framework for ESG Reporting for listed companies in Kenya to help reduce uncertainties⁸³. For an organization to claim that it has prepared information in accordance with the GRI Standards, it is required to have applied the GRI Reporting Principles. This is a set of reporting principles which guide organizations in ensuring the quality and proper presentation of the reported information⁸⁴. The principles include accuracy, balance, clarity, comparability, completeness, sustainability context, timeliness and verifiability⁸⁵.

According to a 2020 Global Survey on Sustainability reporting conducted by KPMG, the GRI Standards are the most widely used framework for sustainability reporting⁸⁶. The listed companies on the NSE that were reporting on ESG performance had already settled on and were using the GRI standards as their preferred framework for ESG Reporting even before the ESG Manual⁸⁷.

⁷⁹ Kenya Human Rights Commission., 'Heavy price for Kakuzi's egregious human rights violations' available at <https://www.khrc.or.ke/2015-03-04-10-37-01/press-releases/737-heavy-price-for-kakuzi-s-egregious-human-rights-violations.html> (accessed on 21/07/2022)

⁸⁰ Seth.A., 'Corporate governance challenges in emerging economies.' Corporate Governance: An International Review, Forthcoming (2017).

⁸¹ Nairobi Securities Exchange, 'ESG Disclosures Guidance Manual' Op Cit

⁸² Ibid

⁸³ Ibid

⁸⁴ GRI., 'The Global Standards for Sustainability Reporting' Op Cit

⁸⁵ Ibid

⁸⁶ KPMG, "The Time has Come: The KPMG Survey on Sustainability Reporting 2020," Available at: https://assets.kpmg/content/dam/kpmg/be/pdf/2020/12/The_Time_Has_Come_KPMG_Survey_o (accessed on 22/07/2022)

⁸⁷ Ibid

The ESG Manual proceeds to propose a common set of ESG metrics for reporting by all listed companies to help facilitate comparability of ESG performance of listed companies in Kenya. It is also projected that over time, upon maturity of the ESG disclosures, it will become possible for stakeholders to correlate financial performance with specific ESG indicators such as diversity and air emissions⁸⁸.

Further, applying the ESG Manual is expected to assist listed companies comply with reporting requirements for other organizations such as the Carbon Disclosure Project (CDP) and UN Global Compact (UNGC). The manual also includes a guide on how to meet corporate governance reporting requirements contained in the Capital Markets Authority (CMA) Corporate Governance Code. The ESG Manual also includes examples of sector specific ESG disclosures for reference by listed companies in its Annex 6⁸⁹. The ESG Manual is expected, with time, to make it possible to compare the ESG performance of organizations reporting within the same sectors including adopting common reporting framework for the respective sectors. The ESG Manual also seeks to support future plans for a responsible investment index by the Nairobi Securities Exchange (NSE).

The ESG criteria proposed in the Manual is also anticipated to be applied in investment selection given the momentum the trend has gained in recent years which is expected to continue in the future⁹⁰. According to the Manual, along with national policies and directives, ESG considerations in investments have become the most important driving force for ESG integration and disclosure in capital markets. As such, companies seeking to attract responsible investors are incentivized to ensure that they adopt the top ESG metrics commonly sought by investors⁹¹. These include having an overarching ESG policy, assigning ESG management responsibility, having a Corporate code of ethics, presence of litigation on matters touching on environmental, social and ethical affairs, the presence or absence of People diversity among employees, Board and management, net employee composition including ratio of part-time and full-time employees, having formal environmental policy and estimation of carbon footprint, data and cybersecurity incidents if any that can put the company at risk and health and safety events that affect ability to provide safe working environments for employees, contractors and the wider value chain⁹².

The expected benefits for Listed Companies adopting the ESG Manual include ensuring transparency in ESG disclosures which helps in building integrity and trust in the capital markets thus enhancing competitiveness to attract investment to the capital markets. The adoption and promotion of ESG reporting by the NSE is expected to enhance trust and integrity of the capital markets in Kenya by providing valuable information that is of increasing importance to investors, thus contributing to more efficient capital allocation⁹³. Other key benefits of integrating and disclosing ESG performance by listed companies in Kenya include the fact that it ensures

⁸⁸ Nairobi Securities Exchange, 'ESG Disclosures Guidance Manual' Op Cit

⁸⁹ Ibid

⁹⁰ Muigua.K., 'The Need and Benefits of ESG Reporting in Kenya' available at <https://thelawyer.africa/2022/06/04/benefits-of-esg-reporting-in-kenya/> (accessed on 22/07/2022)

⁹¹ Ibid

⁹² Broderick, S., "The Top 10 ESG Metrics Private Equity Funds Should Collect," IHS Markit, 2019; Available at: <https://cdn.ihsmarkit.com/www/pdf/0720/ESGTop10-Digital-Final-HiRes.pdf> (accessed on 22/07/2022)

⁹³ Muigua.K., 'The Need and Benefits of ESG Reporting in Kenya' Op Cit

investors can assess and preferentially invest in issuers that demonstrate better ESG linked financial performance, resulting in more efficient capital allocation⁹⁴. Further, implementation of the ESG Manual is geared to ensure that organisations that demonstrate responsible investment practices are able to access new sources of capital from sustainability conscious investors such as Development Finance Institutions (DFIs) and Private Equity firms⁹⁵.

In addition, a holistic view of corporate value facilitates product innovation by enabling consideration and management of the embodied environmental and social impacts of products and services. Measuring and reporting ESG performance also enables organisations embed circularity in their operating models and achieve operational efficiencies by optimizing energy and raw costs in production⁹⁶. By adding and demonstrating ESG integration into their supply chains, production systems and service delivery, the listed companies applying the manual will benefit from preferential access to new markets. ESG value creation framework also helps organisations to proactively address non-financial but critical environmental and social risks, thereby preserving and creating long term value for stakeholders. ESG integration enhances regulatory compliance and helps anticipate the impact of future ESG related regulations and policies. Finally, organizations are perceived as responsible corporate citizens and achieve brand value enhancement by systematically identifying and responding to stakeholder needs and expectations⁹⁷.

The implementation timelines of the ESG Manual for listed companies on the NSE includes the requirement of issuing a public report on their ESG performance at least annually⁹⁸. The steps outlined in the ESG Disclosures Guidance Manual are expected to guide such reporting. In addition, the manual is also made available as a public good for other organisations in Kenya that would be interested in ESG reporting. On their part, listed companies have been given a grace period of one year from the date of issuance of the guidelines (29th November 2021) to interact and familiarize themselves with the ESG reporting steps contained in these guidelines for implementation⁹⁹. Thus, listed companies will after 29th November 2022 be expected to include a sustainability/ESG report in their annual integrated reports¹⁰⁰. The Sustainability/ESG Report under the NSE ESG Manual must at minimum contain the mandatory ESG disclosures discussed in Chapter 6 of the manual. Issuers can also choose to publish a separate ESG/sustainability report. Adopting and adhering to the ESG manual will thus be an important step in promoting ESG in Kenya.

7. Conclusion

Environment, Social and Governance (ESG) has emerged as arguably the most important tool of corporate governance in the current era. It acknowledges the environmental, social and governance concerns faced by corporations and seeks to integrate these concerns in corporate

⁹⁴ Ibid

⁹⁵ Nairobi Securities Exchange, 'ESG Disclosures Guidance Manual' Op Cit

⁹⁶ Ibid

⁹⁷ Ibid; See also Africa Sustainability Matters., 'What do ESG guidelines mean for corporates?' available at <https://africasustainabilitymatters.com/what-do-esg-guidelines-mean-for-corporates/> (accessed on 22/07/2022)

⁹⁸ Ibid

⁹⁹ Nairobi Securities Exchange, 'ESG Disclosures Guidance Manual' Op Cit

¹⁰⁰ Ibid

Embracing Environmental, Social and Governance (ESG) Principles for Sustainable Development in Kenya

decision making in order to promote sustainable, responsible and ethical investments. There is need for organizations to continue embracing ESG in order to promote corporate sustainability. Embracing ESG as a pillar of sustainable development is an ideal whose time has come.

Realising Environmental, Social and Governance Tenets for Sustainable Development

Abstract

This paper discusses the Environmental, Social and Governance (ESG) aspects of sustainable development agenda and how the same affect sustainability. The paper looks at the best practices as far as these tenets are concerned. The author argues that unless countries and stakeholders ensure that there is convergence of efforts in pursuit of environmental, social and governance aspects of sustainability, then the struggle for achievement of the 2030 Agenda for Sustainable Development will remain a mirage.

1. Introduction

The Sustainable Development Goals (SDGs) adopted by the United Nations (UN) in 2015 are widely hailed as a huge success: they represent a global agreement on a comprehensive strategy to address the social and environmental issues that are affecting people all over the world.¹ Instead of relying on nature for survival, as we have done for ages, sustainable development offers a framework for people to coexist with and thrive in harmony with the natural world.²

The main principles of sustainable development agenda as captured in the *2030 Agenda for Sustainable Development*³ include the economic, social and environmental sustainability. These are encapsulated in the 17 Sustainable Development Goals and 169 targets, which are meant to lay out a plan of action for people, planet, and prosperity that will strengthen universal peace in larger freedom. They also identify eradicating poverty in all of its manifestations, including extreme poverty, as the greatest global challenge and a crucial prerequisite for sustainable development.⁴ The Sustainable Development Goals (SDGs) also envisage a world in which democracy, good governance and the rule of law as well as an enabling environment at national and international levels, are essential for sustainable development, including sustained and inclusive economic growth, social development, environmental protection and the eradication of poverty and hunger.⁵ The term "governance" is used to describe "steering" in this context, which includes both processes and institutions and involves an element of authority. Process relates to how decisions are made on priorities, how conflicts are addressed and maybe handled, and how coordination of people's actions with regard to resource usage is made easier. On the other hand, the structural aspect relates to how these procedures are set up and 'managed'.⁶

¹ Higgs, Kerryn. "How sustainable are the SDGs?" (2020): 109-130, 109 < <https://anzsee.org.au/wp-content/uploads/2020/07/EESolutionsFutureRoyalDraftJuly2ndFINALEbook.pdf#page=109> > accessed 13 July 2022.

² Dernbach, J.C. and Mintz, J.A., "Environmental laws and sustainability: An introduction." *Sustainability* 3, no. 3 (2011): 531-540, 531.

³ UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

⁴ 'Transforming Our World: The 2030 Agenda for Sustainable Development | Department of Economic and Social Affairs' <<https://sdgs.un.org/2030agenda>> accessed 13 July 2022.

⁵ *Ibid.*

⁶ Vatn, Arild, *Environmental governance: institutions, policies and actions*, Edward Elgar Publishing, 2015, p. 133.

It has been observed that COVID-19 has tremendously disrupted the world's economy where the pandemic left the world's informal employees, especially young workers and women, on their own with no support or protection against financial and health issues. This was as a result of massive job losses, enlarged market gender gap, informal workers' lack of social safety, and decreased work and education opportunities for youth.⁷

Despite having adopted the SDGs into its domestic laws and planning, Kenya still faces the risk of widespread poverty, natural resources and biodiversity degradation, lack of access to safe water for all, escalating climate change, desertification, land degradation, soil erosion, flooding and drought; and increased natural disaster risks.⁸ This paper argues that these challenges cannot and should not be addressed in a disjointed manner, if any real progress is to be made.

This paper seeks to analyze the aspects of governance as well as how they interact with the environmental and social tenets of sustainable development with the aim of ensuring that the SDGs are achieved, especially post the COVID-19 pandemic. Arguably, sustainable development as a process of transformation of the economy must, in consequence, also result in a transformation of society and its governance structures for a sustainable future.⁹ All this must also be accomplished in a way that takes into account environmental sustainability.

The paper discusses the Environmental, Social, and Governance (ESG) approach to sustainability and how different players, including governments, communities and businesses can participate in promoting and achieving sustainability through ESG approach.

2. Environmental Aspect of Sustainable Development Agenda

The world leaders who signed the 2030 Agenda stated in the preamble that they are "Determined to protect the planet from degradation, including through sustainable consumption and production, sustainably managing its natural resources, and taking urgent action on climate change, so that it can support the needs of the present and future generations."¹⁰ A number of SDGs are dependent on the health of the environment for their realisation. These include but are noted limited to: Goal 2 seeks to end hunger, achieve food security and improved nutrition and promote sustainable agriculture; Goal 6 seeks to ensure availability and sustainable management of water and sanitation for all; Goal 12 seeks to ensure sustainable consumption and production patterns; Goal 13 urges State parties to take urgent action to combat climate change and its impacts; Goal 14 calls for conservation and sustainable use of the oceans, seas and marine resources for sustainable development; and Goal 15 urges State parties to protect, restore and

⁷ Fallah Shayan, N., Mohabbati-Kalejahi, N., Alavi, S. and Zahed, M.A., 'Sustainable Development Goals (SDGs) as a Framework for Corporate Social Responsibility (CSR)' (2022) 14 Sustainability 1222, 8 <<https://www.mdpi.com/2071-1050/14/3/1222>> accessed 13 July 2022.

⁸ National Environment Management Authority, Kenya State of Environment Report 2019-2021<https://www.nema.go.ke/images/Docs/EIA_1840-1849/Kenya%20State%20of%20Environment%20Report%202019-2021%20final-min.pdf> accessed 17 July 2022.

⁹ Ketschau, T.J., "Social sustainable development or sustainable social development-two sides of the same coin? the structure of social justice as a normative basis for the social dimension of sustainability." International Journal of Design & Nature and Ecodynamics 12, no. 3 (2017): 338-347, 338.

¹⁰ Environment UN, 'Sustainable Development Goals' (UNEP - UN Environment Programme, 19 October 2017) <<http://www.unep.org/evaluation-office/our-evaluation-approach/sustainable-development-goals>> accessed 17 July 2022.

promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss.¹¹

In order to achieve environmental sustainability, natural resources management and disaster risk management, there is also a need for improved management of natural resources and biodiversity; access to safe water for all; climate change; desertification, land degradation, soil erosion, flooding and drought; and natural disaster risk reduction and management.¹² It is thus arguable that unless the environmental problems facing the planet are addressed, the other SDGs will remain a mirage.

3. Economic Aspect of Sustainable Development Agenda

The SDGs envisage a world in which every country enjoys sustained, inclusive and sustainable economic growth and decent work for all.¹³ The economic aspect is to be achieved through ensuring that every State has, and shall freely exercise, full permanent sovereignty over all its wealth, natural resources and economic activity.¹⁴ SDG 8 seeks to promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all.¹⁵

Some of the related relevant targets include: Sustain per capita economic growth in accordance with national circumstances and, in particular, at least 7 per cent gross domestic product growth per annum in the least developed countries;¹⁶ achieve higher levels of economic productivity through diversification, technological upgrading and innovation, including through a focus on high-value added and labour-intensive sectors;¹⁷ promote development-oriented policies that support productive activities, decent job creation, entrepreneurship, creativity and innovation, and encourage the formalization and growth of micro, small- and medium-sized enterprises, including through access to financial services;¹⁸ improve progressively, through 2030, global resource efficiency in consumption and production and endeavour to decouple economic growth from environmental degradation, in accordance with the 10-year framework of programmes on sustainable consumption and production, with developed countries taking the lead;¹⁹ by 2030, achieve full and productive employment and decent work for all women and men, including for young people and persons with disabilities, and equal pay for work of equal value;²⁰ by 2020, substantially reduce the proportion of youth not in employment, education or training;²¹ take immediate and effective measures to eradicate forced labour, end modern slavery and human

¹¹ 'List of the 17 Sustainable Development Goals | Agora' <<https://agora-parl.org/resources/aoe/list-17-sustainable-development-goals>> accessed 17 July 2022.

¹² Urama, Kevin, Nicholas Ozor, and Ernest Acheampong, "Achieving Sustainable Development Goals (SDGs) Through Transformative Governance Practices and Vertical Alignment at the National and Subnational Levels in Africa," SDplanNet Africa Regional Workshop, March 3–5, 2014, 3.

¹³ 'Transforming Our World: The 2030 Agenda for Sustainable Development | Department of Economic and Social Affairs' <<https://sdgs.un.org/2030agenda>> accessed 13 July 2022.

¹⁴ Ibid.

¹⁵ SDG 8, UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1.

¹⁶ Target 8.1.

¹⁷ Target 8.2.

¹⁸ Target 8.3.

¹⁹ Target 8.4.

²⁰ Target 8.5.

²¹ Target 8.6.

trafficking and secure the prohibition and elimination of the worst forms of child labour, including recruitment and use of child soldiers, and by 2025 end child labour in all its forms;²² protect labour rights and promote safe and secure working environments for all workers, including migrant workers, in particular women migrants, and those in precarious employment;²³ by 2030, devise and implement policies to promote sustainable tourism that creates jobs and promotes local culture and products;²⁴ strengthen the capacity of domestic financial institutions to encourage and expand access to banking, insurance and financial services for all;²⁵ increase Aid for Trade support for developing countries, in particular least developed countries, including through the Enhanced Integrated Framework for Trade-Related Technical Assistance to Least Developed Countries;²⁶ and by 2020, develop and operationalize a global strategy for youth employment and implement the Global Jobs Pact of the International Labour Organization.²⁷

The underlying affirmation of these targets are that “economic, social, and technological progress” must occur “in harmony with nature,” envisaging “a world in which ... consumption and production patterns and use of all natural resources—from air to land, from rivers, lakes and aquifers to oceans and seas—are sustainable ... One in which humanity lives in harmony with nature and in which wildlife and other living species are protected,” but the SDGs fail to offer any quantified target for resource efficiency, and do not specify what a sustainable level of material footprint might be.²⁸

It has been noted that in the economic debate, sustainable development is most frequently defined as the requirement to maintain a continuous flow of income for humanity, produced from non-declining capital stocks. In this perception, at least, steady stocks of human, man-made, natural, and social capital are seen as necessary and frequently sufficient criteria for sustainable development.²⁹ Economic sustainability has been defined as the meeting the economic needs of the present without diminishing the economic needs of the future.³⁰ Although intergenerational equity is frequently viewed as a factor in economic sustainability, it is not always clear what exactly needs to be perpetuated.³¹

²² Target 8.7.

²³ Target 8.8.

²⁴ Target 8.9.

²⁵ Target 8.10.

²⁶ Target 8.A.

²⁷ Target 8.B.

²⁸ Hicel, J., "The contradiction of the sustainable development goals: Growth versus ecology on a finite planet." *Sustainable Development* 27, no. 5 (2019): 873-884, at 874 & 875.

²⁹ Joachim H Spangenberg, 'Economic Sustainability of the Economy: Concepts and Indicators' (2005 8 *International Journal of Sustainable Development* 47, 48<<http://www.inderscience.com/link.php?id=7374>> accessed 14 July 2022.

³⁰ Solin, J., "Principles for Economic Sustainability: Summary," (a summary of John Ikerd's *Principles of Economic Sustainability*. It was developed based on attendance a 5-day workshop taught by John and John's Essentials of Economic Sustainability book) <<https://www3.uwsp.edu/cnr-ap/wcee/Documents/Principles%20for%20Economic%20Sustainability%205%20page%20summary.pdf>> accessed 14 July 2022.

³¹ Sudhir Anand and Amartya Sen, 'Human Development and Economic Sustainability' (2000) 28 *World Development* 2029, 2029 <<https://linkinghub.elsevier.com/retrieve/pii/S0305750X00000711>> accessed 14 July 2022.

The question that has, therefore, been frequently asked is whether the world be able to sustain economic growth indefinitely without running into resource constraints or despoiling the environment beyond repair.³² Thus, the relationship between economic growth and the environment is, and always remains, controversial.³³

However, what may be universally accepted is that increased private earnings are only one aspect of economic growth; it may also make a substantial contribution to the production of resources that can be mobilised to enhance social services (such as public healthcare, epidemiological protection, basic education, safe drinking water, among others).³⁴ These are ultimately important in realisation of SDGs. Economic empowerment of individuals as well as investing in social services that will benefit the current wider citizenry as well as future generations is thus an important step towards achieving sustainability.

4. Social Aspect of Sustainable Development Agenda

Social sustainability entails robust, inclusive communities where people may voice their opinions and governments act on them. In order to achieve social sustainability, opportunities must be increased for everyone, both now and in the future. It is essential for eradicating poverty and promoting shared wealth, together with economic and environmental sustainability.³⁵

Social problems, in particular, prohibit individuals from living healthy lifestyles, disturb communities, and interfere with businesses. While most of these problems are universal, some are particular to particular regions or populations. These problems may include, but are not limited to, discrimination (based on race, colour, and gender), poverty, homelessness, hunger, malnutrition, and obesity, a lack of basic freedoms, the unemployment crisis, pandemics and epidemics, disabilities and chronic diseases, violence, crime, and insecurity as well as wars and political conflicts, gender inequality, and a lack of education and opportunities.³⁶ The distribution of economic opportunities and social services while resolving power disparities constitutes the process of social development, which involves institutions at all levels, from national governments to various civil society groups.³⁷ Social development has also been defined as "a process of planned social change designed to promote people's welfare within the context of a comprehensive process of economic development".³⁸ The emphasis of social sustainability and inclusion is on the requirement to "put people first" throughout the development process. By empowering individuals, creating cohesive and resilient societies, and making institutions accessible and answerable to citizens, it fosters social inclusion of the underprivileged and

³² Panayotou, T., "Economic Growth and the Environment." CID Working Paper Series (2000), 1.

³³ Brock, W.A. and Taylor, M.S., "Economic growth and the environment: a review of theory and empirics." Handbook of economic growth 1 (2005): 1749-1821.

³⁴ Ibid, 2032.

³⁵ 'Overview' (World Bank) <<https://www.worldbank.org/en/topic/socialsustainability/overview>> accessed 14 July 2022.

³⁶ Fallah Shayan, N., Mohabbati-Kalejahi, N., Alavi, S. and Zahed, M.A., 'Sustainable Development Goals (SDGs) as a Framework for Corporate Social Responsibility (CSR)' (2022) 14 Sustainability 1222, 14 <<https://www.mdpi.com/2071-1050/14/3/1222>> accessed 13 July 2022.

³⁷ Julie L Drolet, 'Chapter 14 - Societal Adaptation to Climate Change' in Trevor M Letcher (ed), The Impacts of Climate Change (Elsevier 2021)

<<https://www.sciencedirect.com/science/article/pii/B9780128223734000112>> accessed 14 July 2022.

³⁸ Kramer, J.M. and Johnson, C.D., "Sustainable Development and Social Development: Necessary Partners for the Future." Sustainable Development (1996), 79.

vulnerable.³⁹ Efforts towards sustainability must thus take note of these aspects of social sustainability for creation of an inclusive society.

5. Role of Law in Promoting Environmental, Social, and Governance (ESG) Approach: Governance Aspect of Sustainable Development Agenda

The environmental rule of law is crucial to sustainable development because it combines environmental requirements with the fundamental components of the legal system and lays the groundwork for better environmental governance.⁴⁰ In addition, by linking environmental sustainability to fundamental rights and responsibilities, it draws attention to environmental sustainability, reflects universal moral principles and ethical standards of conduct, and establishes a basis for environmental rights and obligations. Without environmental rule of law and the enforcement of legal rights and responsibilities, it is possible to argue that environmental governance will be arbitrary, that is, discretionary, subjective, and unpredictable.⁴¹

The rule of law fosters equality of treatment, increases personal and property security, and offers a fair and amicable means of resolving conflicts.⁴² The rule of law was defined by United Nations Secretary-General Kofi Anan in 2004 as follows:

The rule of law . . . refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.⁴³

The place of rule of law in promoting sustainability is well captured under SDG 16 which seeks to promote just, peaceful and inclusive societies.⁴⁴ The law is important as it provides essential tools and institutions for governing resources sustainably.⁴⁵ In addition to being critical (and frequently last) stages in itself for effectively adopting sustainability solutions, laws and governance are also vital elements to assist technological and economic progress.⁴⁶

³⁹ 'Social Sustainability and Inclusion' (World Bank)

<<https://www.worldbank.org/en/topic/socialsustainability>> accessed 14 July 2022.

⁴⁰ Environment UN, 'Promoting Environmental Rule of Law' (UNEP - UN Environment Programme, 5 October 2017) <<http://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/promoting-environmental-rule-law>> accessed 17 July 2022.

⁴¹ Ibid.

⁴² Michel J, The Rule of Law and Sustainable Development. Center for Strategic & International Studies, 2020, 5

<https://www.researchgate.net/profile/James-Michel/3/publication/342881527_The_Rule_of_Law_and_Sustainable_Development/links/5f0b3464a6fdcc4ca46389c5/The-Rule-of-Law-and-Sustainable-Development.pdf> accessed 17 July 2022.

⁴³ Ibid, 8.

⁴⁴ Martin, 'Peace, Justice and Strong Institutions' (United Nations Sustainable Development)

<<https://www.un.org/sustainabledevelopment/peace-justice/>> accessed 17 July 2022.

⁴⁵ Dernbach, J.C. and Mintz, J.A., "Environmental laws and sustainability: An introduction." Sustainability 3, no. 3 (2011): 531-540, 532.

⁴⁶ Clune WH and Zehnder AJB, 'The Three Pillars of Sustainability Framework: Approaches for Laws and Governance' (2018) 9 Journal of Environmental Protection 211.

It has been emphasised that the presence of robust, well-resourced public institutions at the national and international levels is essential for the execution of the 2030 Agenda's necessary policy reforms.⁴⁷

It has been observed that the SDGs have thus far mostly been implemented through a top-down, government-led strategy, with goals and initiatives determined at the global (and increasingly, national) level.⁴⁸ To achieve the SDGs, grassroots action for sustainable development, also known as "solutions that react to the local context and the interests of the communities concerned," is necessary.⁴⁹ The SDGs' localization is based on Local Agenda 21, a bottom-up, participatory initiative allowing local governments to interact with their citizens on sustainable development.⁵⁰

To co-create locally relevant sustainability routes, communities, stakeholders, and academics must collaborate, and participatory approaches are crucial for fostering this cooperation in governance issues.⁵¹ Notably, the 2010 Constitution of Kenya provides that 'all State organs, State officials, public offices, and all individuals are bound by the national values and principles of governance whenever any of them: apply or interpret this Constitution; enact, apply, or interpret any legislation; or make or implement public policy choices'.⁵² Good governance, integrity, transparency, accountability, sharing and devolution of power, the rule of law, democracy, and public participation are among the national values and guiding principles of governance. Other national values and guiding principles include good governance, integrity, transparency, and accountability, patriotism, national unity, as well as sustainable development.⁵³ "Social Development is based on positive, humane, people oriented development in society....The basic principles... are human dignity, equality, social justice, and equitable distribution of resources.... People's participation and empowerment are necessary conditions...."⁵⁴

These principles are especially relevant in light of the spirit of devolution, where the Constitution states that 'the objects of the devolution of government are, among other things—to promote democratic and accountable exercise of power; to give powers of self-governance to the people and enhance their involvement in the exercise of State authority and in making decisions that affect them; to acknowledge the right of communities to manage their own affairs and to further their development; to protect and promote the interests and rights of minorities and marginalised communities'.⁵⁵

⁴⁷ Martens, Jens. "Redefining policies for sustainable development." Exploring (2018): 11, 20 <https://www.2030spotlight.org/sites/default/files/spot2018/chaps/Spotlight_Innenteil_2018_redefining_policies_martens.pdf> accessed 13 July 2022.

⁴⁸ Szetey, K., Moallemi, E.A., Ashton, E., Butcher, M., Sprunt, B. and Bryan, B.A., 'Co-Creating Local Socioeconomic Pathways for Achieving the Sustainable Development Goals' (2021) 16 Sustainability Science 1251, 1251 <<https://doi.org/10.1007/s11625-021-00921-2>> accessed 13 July 2022.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ See Szetey, K., Moallemi, E.A., Ashton, E., Butcher, M., Sprunt, B. and Bryan, B.A., 'Co-Creating Local Socioeconomic Pathways for Achieving the Sustainable Development Goals' (2021) 16 Sustainability Science 1251 <<https://doi.org/10.1007/s11625-021-00921-2>> accessed 13 July 2022.

⁵² Article 10 (1), Constitution of Kenya 2010.

⁵³ Ibid, Article 10 (2).

⁵⁴ Kramer, J.M. and Johnson, C.D., "Sustainable Development and Social Development: Necessary Partners for the Future." Sustainable Development (1996), 79.

⁵⁵ Article 174, Constitution of Kenya 2010.

There is a need for efforts geared towards achievement of the principle of sustainable development to be molded around the foregoing national values and principles of governance to ensure that there is an inclusive approach to governance matters in the country, for the benefit of all.

6. Realising Environmental, Social and Governance Tenets for Sustainable Development: Moving Forward

Integrated decision-making, or the process of incorporating environmental, social, and economic goals and factors into choices, is the key action principle of sustainable development.⁵⁶ It has rightly been pointed out that despite the fact that all countries, regardless of their economic, social, or environmental contexts, can benefit from the Sustainable Development Goals (SDGs) framework, norms, and principles, translating global objectives into specific national contexts is difficult because of varying starting points, capacities, and priorities, among other factors.⁵⁷ Global goals will be transformed into targets and indicators that take into account the specific national settings of each country in order to be relevant to all nations (and to foster national ownership). Keeping broad global aims and very different national settings coherent will be a problem.⁵⁸

Economic, social and governance aspects of sustainable development must take into account the environmental aspect of sustainable development. This is because environmental protection is essential to promoting sustainable economic growth because the natural environment supports economic activity both directly and indirectly through ecosystem services like carbon sequestration, water purification, managing flood risks, and nutrient cycling. Directly, the natural environment provides resources and raw materials such as water, timber, and minerals that are required as inputs for the production of goods and services.⁵⁹

In the institutional arrangements of governments and parliaments, scholars have argued that it is crucial to reflect the encompassing nature of the 2030 Agenda and the SDGs. If competent national equivalents do not reflect and "own" the new, more cogent global government, the effort will be in vain.⁶⁰ To make the UN system "fit for purpose" on a global scale, it is necessary to reform already-existing institutions and establish new bodies in regions where there are governance gaps. This can only be done by making a commitment to address the unequal distribution of resources as well as access to participation and decision-making.⁶¹ This is especially important considering that the SDG index, which displays each country's compliance

⁵⁶ Dernbach, J.C. and Mintz, J.A., "Environmental laws and sustainability: an introduction. *Sustainability*, 3 (3), 531-540." (2011), 532.

⁵⁷ Urama, Kevin, Nicholas Ozor, and Ernest Acheampong, "Achieving Sustainable Development Goals (SDGs) Through Transformative Governance Practices and Vertical Alignment at the National and Subnational Levels in Africa," SDplanNet Africa Regional Workshop, March 3–5, 2014, 2 <https://www.iisd.org/system/files/publications/sdplannet_africa.pdf> Accessed on 25 June 2022.

⁵⁸ Ibid, 2.

⁵⁹ UN Environment, 'GOAL 8: Decent Work and Economic Growth' (UNEP - UN Environment Programme, 2 June 2021) <<http://www.unep.org/explore-topics/sustainable-development-goals/why-do-sustainable-development-goals-matter/goal-8>> accessed 13 July 2022.

⁶⁰ Martens, Jens. "Redefining policies for sustainable development." *Exploring* (2018): 11, 20 <https://www.2030spotlight.org/sites/default/files/spot2018/chaps/Spotlight_Innenteil_2018_redefining_policies_martens.pdf> accessed 13 July 2022.

⁶¹ Ibid.

with the SDGs and breaks down each score by SDG, reflects the fact that governments have varying degrees of commitment to the SDGs.⁶²

The 2030 Agenda presents a challenge to UN Environment to create and improve integrated approaches to sustainable development, methods that will show how enhancing environmental health would have positive social and economic effects. UN Environment's initiatives support the environmental component of sustainable development and promote socio-economic development by aiming to lower environmental hazards and boost society's and the environment's overall resilience.⁶³

The Sustainable Development Goals (SDGs) are global, multifaceted, and ambitious, and it is arguable that in order to fulfil them, we need an integrated framework that encourages a growth path that protects the environment and whose benefits are shared by everyone, not just by the fortunate few.⁶⁴ Thus, the idea of sustainable development forces us to reconsider how we interact with the world and how we anticipate that governments would implement policies that promote that worldview.⁶⁵ Local communities need to concentrate on a locally relevant subset of goals and comprehend potential future pathways for key drivers which influence local sustainability because the Sustainable Development Goals (SDGs) recognise the importance of action across all scales to achieve a sustainable future.⁶⁶ There is need for continuous creation of public awareness, civic education and creating avenues for public participation among the communities because to guide long-term local planning and decision-making to achieve the SDGs, local communities also need to understand the range of potential future pathways for their region and how they align with local sustainability objectives.⁶⁷

It has rightly been pointed out that 'since the world's poor understand scarcity and live "closer to nature," they have a better understanding of the finite nature of natural resources than the world's powerful and affluent elite, and they have a much greater immediate and vested interest in promoting change in the way that the world does business. As a result, they have a better understanding of the need to focus social development strategies on empowering the poor. They must thus be given the authority and influence to actively shape economic policy rather than just responding to circumstances outside their control'.⁶⁸

⁶² Del-Aguila-Arcenales, S., Alvarez-Risco, A., Jaramillo-Arévalo, M., De-la-Cruz-Diaz, M. and Anderson-Seminario, M.D.L.M., 'Influence of Social, Environmental and Economic Sustainable Development Goals (SDGs) over Continuation of Entrepreneurship and Competitiveness' (2022) 8 Journal of Open Innovation: Technology, Market, and Complexity 73, 1 <<https://www.mdpi.com/2199-8531/8/2/73>> accessed 13 July 2022.

⁶³ Environment UN, 'Sustainable Development Goals' (UNEP - UN Environment Programme, 19 October 2017) <<http://www.unep.org/evaluation-office/our-evaluation-approach/sustainable-development-goals>> accessed 17 July 2022.

⁶⁴ Ramos, G., "The Sustainable Development Goals: A duty and an opportunity." (2016): 17-21, in Love, P. (ed.), *Debate the Issues: New Approaches to Economic Challenges*, OECD Publishing, Paris, <https://doi.org/10.1787/9789264264687-3-en>.

⁶⁵ Ibid.

⁶⁶ Szetey, K., Moallemi, E.A., Ashton, E., Butcher, M., Sprunt, B. and Bryan, B.A., 'Co-Creating Local Socioeconomic Pathways for Achieving the Sustainable Development Goals' (2021) 16 Sustainability Science 1251, 1251 <<https://doi.org/10.1007/s11625-021-00921-2>> accessed 13 July 2022.

⁶⁷ Ibid, 1251.

⁶⁸ Kramer, J.M. and Johnson, C.D., "Sustainable Development and Social Development: Necessary Partners for the Future." *Sustainable Development* (1996), 84.

This calls for adoption of participatory an inclusive governance approaches that give all members of society and/or their representatives to air their views and actively participate in governance matters, in a meaningful way that impacts their lives positively. It has also been pointed out that while environmental law is essential to attaining sustainability, we also need to acknowledge that there is a need for a wide range of other pertinent laws, such as those governing land use and property, taxes, our governmental system, and other issues.⁶⁹ This is important in ensuring that sustainability is achieved in environmental, economic, social and governance aspects of development.

Corporations, through following ESG frameworks or guidelines, such as the *Nairobi Securities Exchange ESG – Disclosures Guidance Manual, 2021*, can also play a huge role in promoting sustainability within the localities that they operate in and the country at large. ESG Reporting should be encouraged and used as a tool of promoting sustainability within the companies, communities and country. Under this, organisations make it part of their operational procedures to report publicly on their economic, environmental, and/or social impacts, and hence its contributions – positive or negative – towards the goal of sustainable development.⁷⁰ As the business community seeks to invest in various sectors, there is a need for them to take into account ESG requirements under SDGs. The law (government) and other policy makers should work towards supporting businesses in their efforts to transition to more sustainable business models, through using various legal, policy and other effective incentives.

The law should move towards ensuring that non-financial reporting on ESG becomes the standard mode of operation for ease of enforcing such principles as “the polluter pays principle”, among others. This is especially important as it has been pointed out that ‘previous literature, which attempted to investigate the link between sustainability and investment performance, found that a critical barrier to ESG integration is that investors lack reliable and non-manipulated information’, at least in other jurisdictions, practices which may also take place in Kenya.⁷¹ While it may not be disputed that institutional investors vary in their approaches to integrating ESG factors into their investment decisions, the end game should at least show some tangible an verifiable positive results.⁷²

It has also been suggested that businesses and companies should embrace technology and innovation in engineering and product development as well as with regard to management structures and entrepreneurship, which will arguably continue to be crucial to overall sustainability strategy. Doing more with less may be a challenge that technology may help solve since it can reduce the strict ecological limitations while also relieving political and economic

⁶⁹ Dernbach, J.C. and Mintz, J.A., "Environmental laws and sustainability: An introduction," *Sustainability* 3, no. 3 (2011): 531-540, 532.

⁷⁰ Nairobi Securities Exchange ESG – Disclosures Guidance Manual, November 2021 <<https://sseinitiative.org/wp-content/uploads/2021/12/NSE-ESG-Disclosures-Guidance.pdf>> accessed 17 July 2022.

⁷¹ Roy, P.P., Rao, S., Marshall, A.P. and Thapa, C., ‘Mandatory Corporate Social Responsibility and Foreign Institutional Investor Preferences’ (2020).

⁷² OECD, *OECD Business and Finance Outlook 2020: Sustainable and Resilient Finance* (OECD 2020) <https://www.oecd-ilibrary.org/finance-and-investment/oecd-business-and-finance-outlook-2020_eb61fd29-en> accessed 17 July 2022.

pressures (thereby allowing space and opportunity for more sustainability solutions from all quarters).⁷³

7. Conclusion

According to stakeholders, the primary pillars of economic transformation and inclusive growth are: inclusive growth that reduces inequality; sustainable agriculture, food self-sufficiency and nutrition; diversification, industrialization and value addition; developing the service sector; and infrastructure development.⁷⁴ These focus on the economic growth as well as social aspects of development. The main goal of Social Sustainability and Inclusion's work is to support people in overcoming barriers that prevent them from fully participating in society, regardless of their gender, race, religion, ethnicity, age, sexual orientation, or disability, by collaborating with governments, communities, civil society, the private sector, and other stakeholders to create more inclusive societies, empower citizens, and foster more sustainable communities.⁷⁵

It has rightly been pointed out that 'every objective and target in the SDG framework is implied to depend on and impact one another, although the precise nature of these connections is yet unknown at this time. Due to the goals' and targets' integrated structure, advancements made toward one objective or another are connected to other goals and targets via causal chains and feedback loops. For these reasons, an integrated and systems-based approach to the SDGs is required to guarantee that these feedbacks are understood and handled. Countries will be better positioned to realise the transformational potential of the 2030 Agenda if mutually reinforcing activities are implemented and target trade-offs are minimised'.⁷⁶ As already pointed out, achieving sustainable development agenda requires an integrated approach that looks at the economic welfare of the people and the nation at large, while adopting a socially inclusive approach in all governance matters. Economically and socially empowered people are more likely to participate in governance matters objectively, without being distracted by poverty and other social ills, in order to also on the intergenerational aspect of sustainable development agenda for the sake of future generations.

Thus, it is necessary at the local level, to support the economic and social self-determination of oppressed individuals and groups by enlisting the help of community leaders and the general public in creating locally tailored institutional responses to issues (such as fostering environmentally friendly industries as a means of combating unemployment) and encouraging communication between local interest groups regarding issues of sustainable development, and at the national level, for the government to offer all necessary support in promoting sustainability.⁷⁷

⁷³ Clune WH and Zehnder AJB, 'The Three Pillars of Sustainability Framework: Approaches for Laws and Governance' (2018) 9 *Journal of Environmental Protection* 211.

⁷⁴ Urama, Kevin, Nicholas Ozor, and Ernest Acheampong, "Achieving Sustainable Development Goals (SDGs) Through Transformative Governance Practices and Vertical Alignment at the National and Subnational Levels in Africa," SDplanNet Africa Regional Workshop, March 3–5, 2014, 3 <https://www.iisd.org/system/files/publications/sdplannet_africa.pdf> Accessed on 25 June 2022.

⁷⁵ 'Social Sustainability and Inclusion: Overview' (World Bank) <<https://www.worldbank.org/en/topic/socialsustainability/overview>> accessed 14 July 2022.

⁷⁶ Cameron, A., Metternicht, G. and Wiedmann, T., "Initial progress in implementing the Sustainable Development Goals (SDGs): a review of evidence from countries." *Sustainability Science* 13, no. 5 (2018): 1453-1467, 1453.

⁷⁷ Kramer, J.M. and Johnson, C.D., "Sustainable Development and Social Development: Necessary Partners for the Future." *Sustainable Development* (1996), 85.

Realising Environmental, Social and Governance Tenets for Sustainable Development

There is a need to adopt innovative governance approaches which integrate economic, social development and sustainable development principles at multiple levels of social organization in addressing the serious challenges facing our globe and achievement of the 2030 Agenda on Sustainable Development Goals.⁷⁸

What can be deduced from the foregoing discussion is that it is not enough to achieve sustainable development, as conceptualized by the ruling class and those in positions of decision-making; communities must actively be involved in decision-making to come up with strategies and approaches that take into account the unique economic, social and governance needs of particular group or class of people. The fundamental principles and values have already been captured under Article 10 of the 2010 Constitution of Kenya and if fully adopted and implemented within the development agenda, they can go a long way in ensuring that Kenya achieves satisfactory results as far as implementation and localization of the 2030 Agenda for Sustainable Development, and the SDGs are concerned. This is the only way that sustainability can be truly achieved and appreciated by all the people affected, while leaving a positive mark on their lives and the country in general. Realising Environmental, Social and Governance (ESG) tenets of Sustainable Development is an imperative whose time is ripe.

⁷⁸ Ibid, 89.

Embracing Technology for Enhanced Efficiency and Access to Justice in the Legal Profession

Abstract

The COVID-19 pandemic has destabilized the traditional ways through which many professions operated and ushered in a new era of technology. One of the sectors that has been caught by the wind of change is the legal profession. The use of technology as a tool of access to justice has been embraced by the legal profession as a matter of necessity. Such technology includes the use of virtual court sessions, digital filing through the e-filing platform, electronic case management systems and digitization of land services. This has arguably marked the beginning of a worldwide trend that is likely to proceed post COVID-19.

Technology is revolutionizing the way businesses and various sectors operate. However, technology comes with its advantages and disadvantages. The use of technology in the legal profession has been hailed for promoting efficiency, cost effective and expeditious management of disputes. However, it has also come with its share of concerns such as data privacy and loss of employment due to automation of legal services.

The paper seeks to critically discuss the impact of technology on modern legal practice in Kenya. It seeks to reconcile the two opposing views by discussing both the advantages and disadvantages of technology in modern legal practice. The paper argues that the legal profession has more to gain than lose if it embraces technology as a tool of access to justice. The paper explores the various ways through which the legal profession can utilise legal technology to not only enhance access to justice but also improve the efficiency of law firms, the Judiciary and even law schools. It suggests practical ways through which the legal profession can embrace technology as a tool of trade in commerce and dispute resolution while also noting to address the concerns associated with the use of technology in the legal profession.

1. Introduction

Technology has impacted the nature and practice of the legal profession in Kenya and across the globe in the 21st century. Traditionally, legal practice in many parts of the world including Africa has been through physical processes such as in person court room attendances where different players including judicial officers, advocates and litigants participate in court processes¹. However, this position is no longer tenable due to rapid developments that have been witnessed at the global stage. The outbreak of the Coronavirus disease (COVID-19) pandemic destabilized the global economy which resulted in a ripple effect on many sectors including the legal profession². The preventive measures recommended by the World Health Organisation and

¹ Could the Pandemic Be Grinding Justice to a Halt?' (ALN Kenya)

<<https://www.africalegalnetwork.com/kenya/news/coronavirus-pandemic-grinding-justice-halt/>> accessed 4 April 2021; 'IBA - The Global Impact of the Covid-19 Pandemic on Commercial Dispute Resolution in the First Seven Months' available at <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=bd404ce3-3886-48a8-98f6-38eaacd5f53> (accessed on 22/06/2022)

² Muigua. K., 'Legal Practice and New Frontiers: Embracing Technology for Enhanced Efficiency and Access to Justice' available at <http://kmco.co.ke/wp-content/uploads/2020/06/Legal-Practice-and-New->

imposed by most states such as physical distancing meant that it became difficult for most professions to operate from their traditional physical places³.

The legal profession was not spared by the effects of the COVID-19 pandemic. Due to the preventive measures adopted in most states, the physical attendance of employees at places of work such as law firms became difficult⁴. To address this challenge, law firms devised alternative methods of work such as remote working. The Judiciary in Kenya also acknowledged the effects of the COVID-19 pandemic and adopted alternative means of access to justice such as virtual court sessions and electronic filing (e-filing) of court pleadings and documents. Conveyancing practice has also been disrupted through the digitization of services by the Ministry of Lands through the Ardhisasa platform. This has arguably disrupted the legal profession in an unprecedented manner⁵.

The disruptions caused by the COVID-19 pandemic have brought to light, the impact of technology on modern legal practice. Processes such as virtual court sessions, electronic filing and remote working heavily rely on technology for their success. It can thus be argued that the legal profession has adopted technology as a matter of necessity. This can also be attributed to the ascendancy of information technology, the globalization of economic activity, the blurring of differences between professions and sectors, and the increasing integration of knowledge⁶.

However, while legal technology has won critical acclaim for streamlining and improving the accuracy, efficiency and effectiveness of laborious processes within daily practice, it has also been criticized for the concerns it raises such as data privacy and loss of employment due to automation of legal services. The paper seeks to critically discuss the impact of technology on modern legal practice in Kenya.

It seeks to reconcile the two opposing views by discussing both the advantages and disadvantages of technology in modern legal practice. The paper argues that the legal profession has more to gain than lose if it embraces technology as a tool of access to justice. It suggests practical ways through which the legal profession can embrace technology as a tool of trade in commerce and dispute resolution while also noting to address the concerns associated with the use of technology in the legal profession.

Frontiers-Embracing-Technology-for-Enhanced-Efficiency-and-Access-to-Justice-Kariuki-Muigua-Ph.D-June-2020.pdf (accessed on 22/06/2022)

³ Ibid

⁴ Meganne Tillay | February 28 and 2020 at 03:39 AM, 'Baker McKenzie Shuts down London Office Following Coronavirus Scare' (Law.com International) available at <https://www.law.com/international/edition/2020/02/28/baker-mckenzie-shuts-down-london-office-following-coronavirus-scare> (accessed on 22/06/2022)

⁵ Muigua.K., 'Embracing Science and Technology in Legal Education for Efficiency and Enhanced Access to Justice' available at <http://kmco.co.ke/wp-content/uploads/2021/04/Embracing-Science-and-Technology-in-legal-education-for-Efficiency-and-Enhanced-Access-to-Justice-Kariuki-Muigua-April-2021.pdf> (accessed on 22/06/2022)

⁶ Kellogg Sarah, 'Cover Story: The Transformation of Legal Education' From Washington Lawyer, May 2011 available at <https://www.dcb.org/bar-resources/publications/washington-lawyer/articles/may-2011-legal-education.cfm> (accessed on 22/06/2022)

In this paper, ‘legal technology’ (Legal Tech) is used to mean the use of technology and software to provide and aid legal services⁷. Legal Technology applies technology and software to assist law firms in practice management, billing, big data, e-discoveries, predictive analytics, knowledge management and document storage⁸. While Legal Tech is meant to enable the bigger firms improve overall efficiency in order to adapt to a progressively popular agile working environment, it also allows smaller firms and sole practitioners to compete with the leading names in the field, giving them access to powerful research tools⁹. This paper discusses these new developments and proceeds on the hypothesis that the legal profession has more to gain than lose if it continues to embrace technology as a tool of access to justice.

2. Legal Practice in Kenya in the Modern Era: Challenges and Prospects

Since the introduction of the formal justice system in Kenya during colonialism, the legal profession has been a major player in facilitating access to justice¹⁰. However, the road towards access to justice in Kenya has been riddled with many obstacles including high fees of litigation, geographical location of courts, complexity of rules and procedures among others¹¹. These problems are compounded by economic turbulence due to societal and economic changes; adaption to new technology; compliance and ethical issues; and continuing professional development which directly impact on the legal profession especially among lawyers¹². The changing times and the above listed issues have made clients to continue to demand efficiency and responsiveness from their lawyers for less cost.

These challenges have been exacerbated by the COVID-19 pandemic which changed the landscape of the legal profession. The idea of remote working which was widely embraced as a result of the pandemic has not only changed the way lawyers view their approach to legal work but has also created an opportunity for them to weigh and reconsider how law firms will operate in the near future¹³. It is also argued that as law firms embrace the idea of working remotely due to the COVID-19 pandemic, there has been a growing likelihood that physical offices will look

⁷ What Is Legal Technology and How Is It Changing Our Industry?’ (The Lawyer Portal, 29 January 2019) available at <https://www.thelawyerportal.com/blog/what-is-legal-tech-and-how-is-it-changing-industry> (accessed on 22/06/2022)

⁸ Business Models for Law Firms - p.Xel Marketing Agency’ available at <https://www.p-xel.co/business-models-for-digital-disruption-in-the-legal-industry> (accessed on 22/06/2022)

⁹ What Is Legal Technology And How Is It Changing Our Industry?’ available at <https://www.thelawyerportal.com/blog/what-is-legal-tech-and-how-is-it-changing-industry> (accessed on 22/06/2022)

¹⁰ Muigua. K., ‘Legal Practice and New Frontiers: Embracing Technology for Enhanced Efficiency and Access to Justice’ Op Cit

¹¹ Strengthening Judicial Reform in Kenya: Public Perceptions and Proposals on the Judiciary in the new Constitution, ICJ Kenya, Vol. III, May, 2002; See also Kariuki Muigua, Avoiding Litigation through the Employment of Alternative Dispute Resolution, pp 6-7, a Paper presented by the author at the In-House Legal Counsel, Marcus Evans Conference at the Tribe Village Market Hotel, Kenya on 8th& 9th March, 2012.

¹² Mboya, Apollo, ‘The Bar: Challenges and Opportunities’, in Ghai, Y.P. and Cottrell, J. eds., The legal profession and the new constitutional order in Kenya. Strathmore University Press, 2014, p. 242.

¹³ Samantha Stokes | April 27 and 2020 at 06:59 PM | The original version of this story was published on The American Lawyer, ‘The Coronavirus Will Change the Legal Industry’s Approach to Remote Work— But How?’ (Law.com International) available at <https://www.law.com/international-edition/2020/04/27/the-coronavirus-will-change-the-legal-industrys-approach-to-remote-work-but-how-378-140355/> (accessed on 23/06/2022)

very different in the future compared to what they are now¹⁴. These are some of the expected and unexpected effects of the COVID-19 pandemic on law firms where remote working is expected to take off as never before and firms will operate with more prudent and flexible financial models¹⁵.

Despite the challenges highlighted above, modern legal practice is considered one with staggering prospects. It has been argued that the strength of the 21st century lawyer lies in the understanding and use of Technology as a practice tool and area of core competence¹⁶. For a long time, the legal profession and lawyers in particular have been characterized as technology antagonists who are slow to change and wary of innovation¹⁷. However, this position is no longer tenable in modern legal practice. The practice of law has evolved from an era of using desktop phones, filing cabinets, and yellow legal pads to a period when all these have been replaced by laptops, tablets, cell phones, and other mobile devices and often virtual or cloud-based platforms¹⁸. This coupled with the challenges in legal practice that have emerged as a result of the COVID-19 pandemic means that technology has become part and parcel of the legal profession. The paper discusses the extent to which the legal profession has embraced technology in Kenya largely as a result of the COVID-19 pandemic. It further discusses the challenges and prospects associated with the use of legal technology.

3. Progress Towards Embracing Technology as a Tool of access to Justice in the legal Profession in Kenya

3.1 Virtual Court Infrastructure

The outbreak of the COVID-19 pandemic severely affected the administration of justice. Physical court sessions were no longer tenable due to the need to avoid the risk of transmission of COVID-19 and ensure the health of judicial officers, lawyers and litigants¹⁹. At the height of the pandemic, the Judiciary in Kenya announced a scale down of court activities throughout the country due to the concerns created by the outbreak of the pandemic²⁰. Courts were seen as possible hotspots for the spread of the pandemic owing to the large crowds of persons including judicial officers,

¹⁴ Paul Hodkinson | May 05 and 2020 at 01:00 AM | The original version of this story was published on The American Lawyer, 'Welcome to the Law Firm Office of the Future: Smaller, Higher-Tech and One-Way' (Law.com International) available at <https://www.law.com/international-edition/2020/05/05/smaller-higher-tech-and-one-way-welcome-to-the-law-firm-office-of-the-future/> (accessed on 23/06/2022)

¹⁵ Ibid

¹⁶ Kingsley Ugochukwu Ani, 'The 21st Century Lawyer: Challenges and Prospects' (Social Science Research Network 2018) SSRN Scholarly Paper ID 3270279 <https://papers.ssrn.com/abstract=3270279> (accessed on 23/06/2022)

¹⁷ Ready or not: artificial intelligence and corporate legal departments' available at <https://legal.thomsonreuters.com/en/insights/articles/artificial-intelligence-ai-report> (accessed on 23/06/2022)

¹⁸ Gaffney Nick, 'Law Practice Management: Transforming a Law Practice with Technology' available https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2017/september-october/law-practice-management-transforming-law-practice-technology/ (accessed on 23/06/2022)

¹⁹ Virtual Hearings: The Way Forward in the UK in Uncertain Times' <https://www.dentons.com/en/insights/alerts/2020/march/29/virtual-hearings-the-way-forward-in-the-uk-in-uncertain-times> (accessed on 23/06/2022)

²⁰ Muigua. K., 'Virtual Arbitration Amidst Covid19 : Efficacy and Checklist for Best Practices' available at <http://kmco.co.ke/wp-content/uploads/2020/05/Virtual-Arbitration-Proceedings-Amidst-COVID-19-Efficacy-and-Checklist-for-Best-Practices69523-Revised.pdf> (accessed on 23/06/2022)

advocates, court staff and litigants who are normally part of the day to day court operations²¹. This forced the judiciary in most countries including Kenya to embrace technology in order to continue administering justice in the midst of the pandemic.

Owing largely to the impact of the COVID-19 pandemic, the Judiciary in Kenya has enhanced the use of technology in judicial proceedings including the use of e-filing; e-service of documents; digital display devices; real time transcript devices; video and audio conferencing; digital import devices and electronic delivery of rulings and judgments²². This represents an important milestone towards embracing technology as a tool of access to justice in the legal profession.

It has been rightly pointed out that the COVID-19 pandemic may prove a catalyst for courts to embrace technology and reduce their reliance on in-person hearings and hard copy documents, particularly for case management purposes, even after the pandemic²³. This calls for the continued use of legal technology post COVID-19 pandemic period as well as infrastructural investment to ensure that the processes run smoothly and efficiently²⁴. It also calls for equipping the courts and all registries with the relevant infrastructure through setting up some permanent virtual courts and tribunals²⁵. Embracing virtual court technology is likely to be an essential component of access to justice both now and in the future.

3.2 Digitization of Legal Services

There have been significant strides towards digitization of legal services in order to enhance efficiency and service delivery. Key among these services include land registration. The Land Registration Act mandates the Registrar to maintain the register of lands and other related documents in a secure, accessible and reliable format including electronic files²⁶. The Act further requires the Registrar to make information in the register accessible to the public by electronic means²⁷.

To give effect to the above provisions, the Cabinet Secretary for Land and Physical Planning formulated the Land Registration (Electronic Transactions) Regulations, 2020 vide a legal notice²⁸. The regulations mandate the Chief Land Registrar to maintain an electronic land registry²⁹. They further provide that all registry transactions under the Land Registration Act shall be carried through the electronic registry³⁰. This has facilitated the digitization of land records through the creation of a Document Management System (DMS) for all approved physical

²¹ Ibid

²² Kenya Law: Electronic Case Management Practice Directions, 2020' available at <http://kenyalaw.org/kl/index.php?id=10211> , Rule 6, (accessed on 23/06/2022)

²³ The Remote Courtroom: Tips and Tricks for Online Hearings' available at <https://www.ashurst.com/en/news-and-insights/legal-updates/the-remote-courtroom-tips-and-tricks-for-online-hearings> (accessed on 23/06/2022)

²⁴ Muigua.K., 'Embracing Science and Technology in Legal Education for Efficiency and Enhanced Access to Justice' Op cit

²⁵ Ibid

²⁶ Land Registration Act, No.3 of 2012, S 9 (1) (b)

²⁷ Ibid, S 10

²⁸ The Land Registration (Electronic Transactions) Regulations, 2020, Legal Notice 130, Government Printer, Nairobi

²⁹ Ibid, Regulation 4

³⁰ Ibid, Regulation 6

development plans³¹. Further, it has resulted in the development of a system for the management for land titles documents that involves scanning, indexing and archiving deed files and land rent cards among other digital processes.

In addition, the Ministry of Lands and Physical planning and the National Land Commission have jointly developed the Ardhisasa platform that allows citizens, other stakeholders and interested parties to interact with land information held and processes undertaken by Government³². The platform is aimed at enhancing the security of land records, speeding up land transactions, efficient allocation of settlement files, achieving reasonable timelines in all settlement transactions and curbing fraud and corruption³³. This has contributed in reducing human interactions, delays and inconveniences that characterized manual registries.

The digitization of legal services has also been facilitated via other platforms such as the Kenya Law platform by the National Council for Law Reporting that offers access to laws of Kenya, bills pending in Parliament, judgments and rulings, publications among other services³⁴. Further, the eCitizen platform offers a gateway to most government services some which were exclusively undertaken by lawyers such as the registration of companies and businesses³⁵. Digitization of legal services has changed the landscape of legal practice in Kenya. While the move has been praised for enhancing efficiency and expeditiousness in the delivery of legal services, it has also been faced with its fair share of challenges as shall be discussed.

4. Challenges and Concerns with the use of technology as a tool of access to justice in the legal profession

4.1 Data Privacy/Information Security Concerns

The use of legal technology such as videoconferencing, e-filing and e-service of documents creates data privacy/information security concerns. The technological systems supporting these processes such as e-filing platform and emails may be subject to cyberattacks such as hacking³⁶. In such cases, unauthorized persons may access the system and engage in unwarranted practices such as stealing of information, deleting information or sending unwanted information to the detriment of some parties³⁷. It is thus important to address the cybersecurity concerns associated with the use of legal technology in order to ensure the success and efficiency of legal technology.

4.2 Challenges in using legal technology

The fast pace of technological revolution could result in the legal profession lagging behind in keeping up with changes. This can be seen through the use of old technologies in some law firms such as old versions of desktops and hard drives used for storage of data at the expense of modern technologies such as laptops and cloud based storage systems. Further, the ability of judicial

³¹ 'Digitization of Land Records in Kenya' available at <https://mmsadvocates.co.ke/digitization-of-land-records-in-kenya/> (accessed on 23/06/2022)

³² What is Ardhisasa, available at <https://ardhisasa.lands.go.ke/home> (accessed on 23/06/2022)

³³ Ibid

³⁴ Kenya Law, available at <http://kenyalaw.org/kl/> (accessed on 23/06/2022)

³⁵ eCitizen, available at <https://www.ecitizen.go.ke/ecitizen-services.html> (accessed on 23/06/2022)

³⁶ Ngotho, P., "Expediting Ad Hoc Arbitrations through Emails: the Experience of a Kenyan Arbitrator," (2015) 1 Alternative Dispute Resolution, pp 133-134.

³⁷ Ibid

officers and lawyers to effectively use legal technology is also a challenge³⁸. There have been cases of judicial officers and lawyers having challenges in joining virtual court sessions or using the e-filing platform³⁹. The success of legal technology thus lies with judicial officers and lawyers possessing the requisite skills and keeping up with technological revolution in order to enhance efficiency.

4.3 Risk of Technological Failure

Since processes such as virtual court sessions rely on internet connectivity, affordable and secure internet connectivity is crucial for the success of the process. The conduct of virtual court proceedings in Kenya has been faced with challenges such failure of video links or poor internet connectivity that hinders the success of the process⁴⁰. It further becomes difficult to address such technical issues since participants would be in different locations⁴¹. In criminal cases being conducted virtually where accused persons do not have strong internet connection, their ability to fully defend themselves may be compromised undermining the right of access to justice⁴². Further, these challenges may be compounded by poor or limited electrical connectivity. The success of legal technology is thus predicated upon the ability to maintain the efficient working of such systems.

4.4 Credibility concerns during examination of witnesses

Where witnesses are examined virtually, there are concerns that the loss of in-person observation will impair a court's ability to assess the credibility and strength of the evidence especially during cross examination⁴³. One of the advantages of in person court hearings is that a court is able to discern the credibility of a witness by observing his/her body language, facial expressions and tone. Assessment of such non-verbal cues is essential in determining the credibility of a witness⁴⁴. This purpose may be defeated through the use of legal technology such as virtual court proceedings a situation that could potentially undermine the right of access to justice.

4.5 Loss of Jobs

There are concerns that embracing legal technology could result in loss of jobs due to automations of legal services. The automation of land services through the electronic land registry and Ardhisasa platforms can potentially result in loss of business for conveyancing advocates and clerks who conducted services offered by such platforms. Further, services offered by e-citizen platform such as registration of businesses and companies can be done by any person potentially resulting in loss of employment for lawyers who initially provided such services.

³⁸ Kenya Institute for Public Policy Research and Analysis (KIPPRA), 'Leveraging on Digital Technology in Administration of Justice' available at <https://kippra.or.ke/leveraging-on-digital-technology-in-administration-of-justice/> (accessed on 24/06/2022)

³⁹ Ibid

⁴⁰ Walker.J., Virtual Hearings: An Arbitrator's Perspective, available at <https://int-arbitrators.com/wpcontent/uploads/2020/03/Virtual-Hearings-An-Arbitrators-Perspective.pdf> (accessed on 24/06/2022)

⁴¹ Ibid

⁴² Ibid

⁴³ Walker.J., Virtual Hearings: An Arbitrator's Perspective, Op Cit

⁴⁴ Ibid

4.6 Costs

The costs associated with the use of legal technology could result in a large majority of the population being locked out of the justice system. The use of legal technology relies on devices such as computers, laptops, smartphones and internet connectivity that may be out of reach for poor citizens. It is thus important to take into account such concerns in the move towards embracing legal technology in order to ensure that the right of access to justice for all Kenyans is upheld.

5. Way Forward: Embracing Technology for Enhanced Efficiency and Access to Justice in the Legal Profession

5.1 Investing in Legal Technology

The challenges brought about by the COVID-19 pandemic have brought into focus the need to embrace technology as a tool of access to justice in the legal profession⁴⁵. Legal technology such as the use of virtual court sessions has now been embraced by the judiciary. Further, law firms have embraced legal technology through aspects such as remote working. While this technology has been widely adopted due to the challenges brought about by the COVID-19 pandemic, there is need for both the judiciary and law practitioners to continue embracing legal technology post COVID-19⁴⁶. This necessitates investment in legal technology in order to enhance efficiency, cost effectiveness and expeditiousness in the administration of justice⁴⁷.

Investment in technology is also crucial in helping lawyers and law firms to reap from the fruits of globalization and enhance their appeal at the global stage. Lawyers can use the technology to tap into the ever growing international Alternative modes of Dispute Resolution such as international arbitration, mediation and Online Disputes Resolution (ODR) especially in the face of rapidly growing networking and borderless legal practice, with the introduction of diverse social media platforms that allow interconnectivity beyond the national boundaries and enabling cross-border relationships between clients and their lawyers and law firms amongst themselves⁴⁸. They should tap into the tremendous growth of international trade, interstate deals, bilateral and multilateral treaties, where legal practice is increasingly becoming global and smart practitioners must therefore up their game with international best practices as with the advent of internet, telecommunication systems, clients are no longer limited to lawyers in their regions nor are they limited to the need for legal services within their jurisdiction⁴⁹. Investment in legal technology is likely to enhance the role of the judiciary in the administration of justice and promote the success of law firms.

⁴⁵ Virtual Hearings: The Way Forward in the UK in Uncertain Times available at <https://www.dentons.com/en/insights/alerts/2020/march/29/virtual-hearings-the-way-forward-in-the-uk-in-uncertain-times> (accessed on 27/06/2022)

⁴⁶ Muigua.K., 'Embracing Science and Technology in Legal Education for Efficiency and Enhanced Access to Justice' Op cit

⁴⁷ Ibid

⁴⁸ Emmanuel Oluwafemi Olowononi and Ogechukwu Jennifer Ikwanusi, 'Recent Developments in 21st Century Global Legal Practice: Emerging Markets, Prospects, Challenges and Solutions for African Lawyers' (2019) 5 KIU Journal of Social Sciences 31; Samuel Omotoso, 'Law, Lawyers And The Social Media In The 21st Century: Challenges And Prospects' Law, Lawyers And The Social Media In The 21st Century: Challenges And Prospects available at https://www.academia.edu/40663364/Law_Lawyers_And_The_Social_Media_In_The_21st_Century_Challenges_And_Prospects (accessed on 27/06/2022)

⁴⁹ Ibid

5.2 Safeguarding the Privacy of Data

The use of legal technology is associated with certain risks and challenges as far as data is concerned such as cyber-attacks and data breaches⁵⁰. There is need for the legal profession to invest in data protection infrastructure in order to enhance efficiency and protect clients' data regardless of the status of the local data protection laws⁵¹. This may also necessitate relooking into the existing laws on data protection in order to enhance their effectiveness⁵². Further, it is essential to equip players in the legal profession such as judges and lawyers with necessary skills and knowledge regarding data protection including information security management⁵³. Through this, it becomes possible to guarantee the privacy, confidentiality and integrity of data available to legal practitioners.

5.3 Rolling Out E-Literacy Training/Education

As the legal profession continues to embrace technology, there is need for sustained and enhanced e-literacy training on the efficient use of such technology. The training should target all players in the legal profession including judicial officers, lawyers and staff. The Judiciary can liaise with relevant stakeholders including the government and technology firms in order to facilitate such training. Such training should also target law students whereby law schools should design relevant courses to be included in their curricula in order to arm them with relevant skills. The training should also target the public in order to enable citizens have meaningful interaction with the justice sector through platforms such as the e-filing portal⁵⁴. Such training can enhance the capacity of judicial officers and lawyers and contribute towards enhanced use of legal technology. Further, staff such as law clerks should also be trained on the use of legal technology in order to prevent the risk of losing jobs by ensuring that they are adept with new developments and are able to discharge their roles through the use of technology.

5.4 Capacity Building

With the ongoing investment in physical infrastructure to enhance the use of technology in the administration of justice, there is need to put in place legal and institutional frameworks to not only facilitate the uptake of technological developments but also to ensure that there is an effective regulatory framework to deal with numerous challenges that arise from legal technology⁵⁵.

Institutions such as the Law Society of Kenya should enhance their capacity and that of lawyers in legal technology through measures such as incorporating training in Information Communication Technology (ICT) in its Continuing Professional Development (CPD) training. Further, legal institutions such as the judiciary and law firms should be collaborative, diverse,

⁵⁰ Katharine Perekslis, 'Four Strategies to Navigate Data Privacy Obligations for Compliance, Litigation, and E-Discovery Professionals' (Law.com) available at <https://www.law.com/native/?mvi=7bd540437dde4b60991f35c257adc521> (accessed on 27/06/2022)

⁵¹ Muigua.K., 'Embracing Science and Technology in Legal Education for Efficiency and Enhanced Access to Justice' Op cit

⁵² Ibid

⁵³ What Is Information Security Management?' (Sumo Logic) available at

<https://www.sumologic.com/glossary/information-security-management/> (accessed on 27/06/2022)

⁵⁴ Muigua. K., 'Legal Practice and New Frontiers: Embracing Technology for Enhanced Efficiency and Access to Justice' Op Cit

⁵⁵ Ibid

international, technologically friendly, and entrepreneurial in order to enhance their capacity in the use of legal technology⁵⁶.

5.5 Enhanced e-filing and service of Court Pleadings and Documents

The judiciary should consider fully adopting and shifting to electronic systems for filing documents. This would save both law firms and courts enormous resources in terms of finances and storage facilities for the hardcopy documents. It would also enhance efficiency in terms of accessibility and review of the documents as both sides can access the documents from anywhere. All that is required is enhancing the security of such data to safeguard privacy. This can be achieved through investing in modern infrastructure as well as offering information management training to the staff charged with such.

5.6 Amendment of Remuneration order to guide on Legal fees payment by clients

The traditional remuneration technique by lawyers generally entail billing for time and services offered based on the Advocates Remuneration Order. However, there is need to implore members of the Bar to transition away from the traditional billable time and services system to alternative billing strategies by understanding that apart from “legal services” and “time”, lawyers are also selling knowledge, which may include fixed, results based, hourly, graduated, or any such combination⁵⁷. This situation is further enhanced by legal technology that allows lawyers to serve clients or attend court virtually without the need for physical meetings. This therefore creates a need to consider amending/revising the current Remuneration Order so as to accommodate these new possibilities.

5.7 A Possibility for Virtual Law Firms in Kenya

The COVID-19 pandemic resulted in the closure of some law firms law firms with others allowing employees to work from home a situation that still persists at the moment. This situation has seen cases where some law firms have decided to close their physical offices and turning to virtual firms where their employees will permanently work from home⁵⁸. There is a possibility that this trend will continue with lawyers turning to virtual law firms due to the flexibility and cost effectiveness associated with running such firms. It is thus argued that for the profession to stay relevant and thrive, lawyers should consider investing in modern legal practices such virtual law firms in order to reap from the benefits of technology⁵⁹.

However, the growth of virtual law firms will inevitably come with certain challenges including those of regulation. The regulators of provision of legal services should adequately prepare to

⁵⁶ Kellogg Sarah, ‘Cover Story: The Transformation of Legal Education’ From Washington Lawyer, May 2011 available at <https://www.dcbarr.org/bar-resources/publications/washington-lawyer/articles/may-2011-legal-education.cfm> (accessed on 27/06/2022)

⁵⁷ Mboya, Apollo, ‘The Bar: Challenges and Opportunities’, Op Cit.

⁵⁸ Meganne Tillay | May 27 and 2020 at 10:13 AM, ‘Slater & Gordon to Close London Office, Staff to Work From Home Permanently’ (Law.com International) <https://www.law.com/international-edition/2020/05/27/slater-and-gordon-to-close-london-office-staff-to-work-from-home-permanently/?cmp_share> accessed 3 June 2020; Meganne Tillay, Simon Lock | May 29 and 2020 at 08:38 AM, ‘Slater & Gordon Working From Home: How Will It Work?’ (Law.com International) available at <https://www.law.com/international-edition/2020/05/29/slater-gordon-working-from-home-how-will-it-work> (accessed on 27/06/2022)

⁵⁹ Mboya, Apollo, ‘The Bar: Challenges and Opportunities’ Op Cit

respond to the impact of technology on law practice and lawyer regulation, including the growth in cloud computing, virtual law offices, and outsourcing of legal services⁶⁰.

5.8 Globalization of Legal Services through Enhanced Collaboration Between Local and Foreign Law Firms

Some law firms in Kenya have already tapped into the benefits of legal technology by collaborating with other firms in Africa and beyond⁶¹. Examples of such law firms in Kenya include Bowmans, Iseme Kamau & Maema (IKM) Advocates and Dentons Hamilton Harrison & Mathews that have expanded their reach in Africa and beyond through alliances with other firms and opening offices in foreign countries. Such alliances give law firms a global appeal with the ability to access a wider clientele where they are able to tap into the benefits of technology to serve clients across different jurisdictions⁶². There is need for more local firms to consider the idea in order to broaden their services and serve clients across different jurisdictions.

6. Conclusion

Technology has had a significant impact on the nature and practice of law. The legal profession which has hitherto been slow to adapt to change has been forced to embrace technology as a matter of necessity. This need was laid bare by the COVID-19 pandemic which changed the landscape of legal practice in many countries including Kenya. There is need for lawyers and law firms to embrace technology for them to remain relevant in the face of technological developments and globalization. The Judiciary is further called upon to embrace technology in order to enhance efficiency and access to justice for all. Despite the challenges posed by technology, effective adoption of legal technology can address such challenges and be a game changer in the quest towards access to justice in an efficient, affordable and expeditious manner. Embracing technology for enhanced efficiency and access to justice in the legal profession is an achievable dream.

⁶⁰ Laurel S Terry, Steve Mark and Tahlia Gordon, 'Trends and Challenges in Lawyer Regulation: The Impact of Globalization and Technology' (2011) 80 Fordham L. Rev. 2661, p. 2662.

⁶¹ Karangizi, S., 'Future Proofing the Legal Profession in East Africa | ALSF' available at <https://www.afsf.org/director-article/future-proofing-legal-profession-east-africa> (accessed on 27/06/2022)

⁶² Muigua, K., 'Legal Practice and New Frontiers: Embracing Technology for Enhanced Efficiency and Access to Justice' Op Cit

Entrenching Biodiversity Impact Assessment in Kenya as a Tool for Enhancing Sustainable Development Agenda

Abstract

Environmental Impact Assessment is globally considered as an important tool for environmental regulation and management. Impact assessments are performed to determine how particular projects, policies, and programmes will shape the environment. The Environmental Impact Assessment (EIA), according to UNEP, is a tool used to determine the environmental, social, and economic effects of a project before making a decision. It seeks to anticipate environmental effects early in the project planning and design process, identify strategies for minimising negative effects, adapt projects to the local environment, and give predictions and options to decision-makers. It is arguably the most widely used environmental tool globally when determining the potential impact of a project on the environment.

This paper argues that in the most sensitive ecological areas, such impact assessments should include biodiversity impact assessment as the most effective tool in safeguarding the biological diversity that may be found within these areas and also enhancing their conservation. The author argues that the ordinary EIA may not successfully reflect the real effect of the particular project, policy or programme on the biological diversity.

1. Introduction

The 1992 Convention on Biological Diversity¹ defines “biological diversity” to mean the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part: this includes diversity within species, between species and of ecosystems.² Every living creature, from people to things we know little about like bacteria, fungi, and invertebrates, is included in biodiversity, not only the species we regard to be uncommon, vulnerable, or endangered.³ The majority of our daily activities depend on biodiversity. There are a variety of practical and fundamental reasons why we cherish biodiversity. Thus, we appreciate biodiversity both for what it offers to us and for its intrinsic worth.⁴

It is for this reason that human activities ought to take into consideration conservation and protection of biodiversity. One of the ways that this may be achieved is through environmental impact assessment exercises during approval of various projects. Environmental Impact Assessment is globally considered as an important tool for environmental regulation and management. Impact assessments are performed to determine how particular projects, policies,

¹ United Nations, 1992 Convention on Biological Diversity, 1760 UNTS 79, 31 ILM 818 (1992). Adopted in Rio de Janeiro, Brazil on 5 June 1992.

² Ibid, Article 2.

³ ‘What Is Biodiversity? Why Is It Important?’ | AMNH’ (American Museum of Natural History) <<https://www.amnh.org/research/center-for-biodiversity-conservation/what-is-biodiversity>> accessed 7 November 2022.

⁴ Ibid.

and programmes will shape the environment.⁵ The Environmental Impact Assessment (EIA), according to UNEP, is a tool used to determine the environmental, social, and economic effects of a project before making a decision. It seeks to anticipate environmental effects early in the project planning and design process, identify strategies for minimising negative effects, adapt projects to the local environment, and give predictions and options to decision-makers. It is arguably the most widely used environmental tool globally when determining the potential impact of a project on the environment.⁶

This paper is informed by the argument that EIA processes and conservation measures as currently carried out in Kenya do not adequately put into account the biodiversity impact assessment aspect of environmental assessments. Biodiversity assessment has been defined as identification and classification of the species, habitats, and communities found in a certain area or region. The main objective is to provide the information needed to determine if management is necessary to protect biological diversity. Assessments also contain information and data that may be applied to scientific research endeavours.⁷

The author argues that with the growing population and development activities, the increasing conversion of biodiversity rich areas into settlement areas to take care of the population and economic needs of the country requires the country to embrace biodiversity impact assessment exercises as part of the conservation efforts and race towards achieving sustainable development agenda.

2. Environmental Impact Assessment in Kenya: Legal and Institutional Framework

Environmental Impact Assessment (EIA) in Kenya is provided for under the 2010 Constitution of Kenya as well as Environmental Management and Coordination Act (EMCA) 1999⁸ and related regulations. International environmental regulatory framework also shapes the domestic framework.

2.1 The Constitution of Kenya 2010

Article 10(1) states that the national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—applies or interprets this Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.⁹ These national values and principles include, *inter alia*: good governance, integrity, transparency and accountability; and sustainable development.¹⁰ The Constitution outlines the principles of land policy in Kenya and states that land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in

⁵ Unit B, 'What Is Impact Assessment?' (27 April 2010) <<https://www.cbd.int/impact/whatis.shtml>> accessed 7 November 2022.

⁶ Ibid.

⁷ Henderson, A., Comiskey, J., Dallmeier, F. and Alonso, A., "Framework for Assessment and Monitoring of Biodiversity." Encyclopedia of Biodiversity Online Update 1 (2007) <https://repository.si.edu/bitstream/handle/10088/20985/nzp_Dallmeier_et_al_2013_Framework_for_Asses_s_and_Monit_of_Bd_022813.pdf> accessed 7 November 2022.

⁸ Environmental Management and Co-ordination Act, No. 8 of 1999, Laws of Kenya, Revised Edition 2019 [1999].

⁹ Article 10 (1), Constitution of Kenya 2010.

¹⁰ Article 10 (2), Constitution of Kenya 2010.

accordance with the principles of, *inter alia*—sustainable and productive management of land resources; and sound conservation and protection of ecologically sensitive areas.¹¹

Article 69 of the Constitution outlines the obligations of the State in respect of the environment as including, to: ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya; protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities; encourage public participation in the management, protection and conservation of the environment; protect genetic resources and biological diversity; establish systems of environmental impact assessment, environmental audit and monitoring of the environment; eliminate processes and activities that are likely to endanger the environment; and utilise the environment and natural resources for the benefit of the people of Kenya.¹²

Notably, Article 260 of the Constitution defines “natural resources” to mean the physical non-human factors and components, whether renewable or non-renewable, including, *inter alia*—forests, biodiversity and genetic resources.¹³

2.2 Environmental Management Coordination Act, 1999 (EMCA)

The *Environmental Management Coordination Act (EMCA)*¹⁴ envisages environmental impact assessments (EIA). Indeed, various requirements relating to the implementation of environmental impact assessments (EIA), strategic environmental assessments (SEA), environmental audits (EA), and management activities for air, water, wastes, and noise are included in the Environmental Management and Control Act (EMCA). Conservation of wildlife, management of forests and water resources, as well as worker health and safety, are additional requirements relating to environmental concerns.

Section 42 (1) of EMCA states that no person shall, without the prior written approval of the Authority given after an environmental impact assessment, in relation to a river, lake, sea or wetland in Kenya, carry out any of the following activities: erect, reconstruct, place, alter, extend, remove or demolish any structure or part of any structure in, or under the river, lake, sea or wetland; excavate, drill, tunnel or disturb the river, lake, sea or wetland; introduce any animal, whether alien or indigenous, dead or alive, in any river, lake, sea or wetland; introduce or plant any part of a plant specimen, whether alien or indigenous, dead or alive, in any river, lake, sea or wetland; deposit any substance in a lake, river or wetland or in, on or under its bed, if that substance would or is likely to have adverse environmental effects on the river, lake, sea or wetland; direct or block any river, lake, sea or wetland from its natural and normal course; drain any lake, river, sea or wetland; or any other matter prescribed by the Cabinet Secretary on the advice of the Authority.¹⁵

¹¹ Article 60 (1), Constitution of Kenya 2010.

¹² Article 69 (1), Constitution of Kenya 2010.

¹³ Article 260, Constitution of Kenya 2010.

¹⁴ Environmental Management Coordination Act, No. 8 of 1999, Laws of Kenya.

¹⁵ S. 42(1), EMCA.

Section 58 of EMCA provides for EIA and states that ‘notwithstanding any approval, permit or license granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, should before for financing, commencing, proceeding with, carrying 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 this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.¹⁶ EMCA defines “environmental impact assessment” to mean a systematic examination conducted to determine whether or not a programme, activity or project will have any adverse impacts on the environment.¹⁷

The contents of the reports from environmental impact assessment are provided for the *Environmental (Impact Assessment and Audit) Regulations, 2003*¹⁸. However, it is worth noting that CBD COP 6 Decision VI/7 recognises that although legislation and practice vary around the world, the fundamental components of an environmental impact assessment would necessarily involve the following stages: Screening to determine which projects or developments require a full or partial impact assessment study; Scoping to identify which potential impacts are relevant to assess, and to derive terms of reference for the impact assessment; Impact assessment to predict and identify the likely environmental impacts of a proposed project or development taking into account inter-related consequences of the project proposal, and the socio-economic impacts; Identifying mitigation measures (including not proceeding with the development, finding alternative designs or sites which avoid the impacts, incorporating safeguards in the design of the project, or providing compensation for adverse impacts); Deciding whether to approve the project or not; and monitoring and evaluating the development activities, predicted impacts and proposed mitigation measures to ensure that unpredicted impacts or failed mitigation measures are identified and addressed in a timely fashion.¹⁹

As far as protection of environmentally significant areas is concerned, EMCA provides that the Cabinet Secretary may, in consultation with the relevant lead agencies and in accordance with the Constitution, the Convention on Biological Diversity and other treaties, by notice in the Gazette, declare any area of land, sea, lake, forests or river to be a protected natural environment for the purpose of promoting and preserving specific ecological processes, natural environment systems, natural beauty or species of indigenous wildlife or the preservation of biological diversity in general.²⁰

EMCA defines “biological diversity” to mean the variability among living organisms from all sources including, terrestrial ecosystems, aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, among species and of ecosystems.²¹ It also defines “biological resources” to include genetic resources organisms or parts thereof,

¹⁶ S. 58(1), EMCA.

¹⁷ S. 2, EMCA.

¹⁸ Environmental (Impact Assessment and Audit) Regulations, 2003, Legal Notice No. 101 of 2003, Laws of Kenya.

¹⁹ Unit B, ‘COP Decision’ <<https://www.cbd.int/decision/cop/?id=7181>> accessed 9 November 2022.

²⁰ S. 54(1), EMCA, 1999.

²¹ S. 2, EMCA, 1999.

populations, or any other biotic component or ecosystems with actual or potential use or value for humanity.²²

Section 50 of EMCA deals with conservation of biological diversity where it provides that the Cabinet Secretary should, on the advice of the Authority, prescribe measures necessary to ensure the conservation of biological diversity in Kenya and in this respect the Authority should: identify, prepare and maintain an inventory of biological diversity of Kenya; determine which components of biological diversity are endangered, rare or threatened with extinction; identify potential threats to biological diversity and devise measures to remove or arrest their effects; undertake measures intended to integrate the conservation and sustainable utilisation ethic in relation to biological diversity in existing government activities and activities by private persons; specify national strategies, plans and government programmes for conservation and sustainable use of biological diversity; protect indigenous property rights of local communities in respect of biological diversity; and measure the value of unexploited natural resources in terms of watershed protection, influences on climate, cultural and aesthetic value, as well as actual and potential genetic value thereof.²³

The Act envisages both *in situ* and *ex situ* conservation of biological resources.²⁴ In terms of *in situ* approach to conservation of biological resources, the Act provides that the Cabinet Secretary should, on the recommendation of the Authority, prescribe measures adequate to ensure the conservation of biological resources *in situ* and in this regard shall issue guidelines for, *inter alia*, land use methods that are compatible with conservation of biological diversity.

It is against the foregoing provisions that NEMA came up with regulations on conservation of biological diversity in 2006²⁵ as per section 147 of the Act.²⁶

2.3 Environmental Management and Co-ordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations, 2006

The *Environmental Management and Co-ordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations, 2006*²⁷ are to apply to:

²² Ibid.

²³ S. 50, EMCA.

²⁴ S. 51 & 52, EMCA.

²⁵ Environmental Management and Co-ordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations, 2006.

²⁶ 147. Power to make regulations

(1) The Cabinet Secretary may, on the recommendation of the Authority and upon consultation with the relevant lead agencies, make regulations prescribing for matters that are required or permitted by this Act to be prescribed or are necessary or convenient to be prescribed for giving full effect to the provisions of this Act.

(2) Regulations made under subsection (2) may—

(a) make provisions for the issue, amendment and revocation of any licence;

(b) provide for the charging of fees and levying of charges;

(c) adopt wholly or in part or with modifications any rules, standards, guidelines, regulations, by laws, codes, instructions, specifications, or administrative procedures prescribed by any lead agency either in force at the time of prescription or publication or as amended from time to time.

²⁷ the Environmental Management and Co-ordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations, Legal Notice No. 160 of 2006, Laws of Kenya.

(a) the exchange of genetic resources, their derivative products, or the intangible components associated with them, carried out by members of any local Kenyan community amongst themselves and for their own consumption; access to genetic resources derived from plant breeders in accordance with the Seeds and Plant Varieties Act (Cap. 326); human genetic resources; and approved research activities intended for educational purposes within recognized Kenyan academic and research institutions, which are governed by relevant intellectual property laws.²⁸ The Regulations also state that a person shall not engage in any activity that may— have an adverse impact on any ecosystem; lead to the introduction of any exotic species; lead to unsustainable use of natural resources, without an Environmental Impact Assessment Licence issued by the Authority under the Act.²⁹

3. Environmental (Impact Assessment and Audit) Regulations, 2003

The Environmental (Impact Assessment and Audit) Regulations, 2003³⁰ are to apply to all policies, plans, programmes, projects and activities specified in Part IV, Part V and the Second Schedule of the Act.³¹

Regulation 7 (2) thereof provides that the project report submitted under sub regulation 7(1) shall specify — the nature of the project; the location of the project including —(i) proof of land ownership, where applicable; (ii) any environmentally sensitive area to be affected; (iii) availability of supportive environmental management infrastructure; and (iv) conformity to land use plan or zonation plan; and potential environmental impacts of the project and the mitigation measures to be taken during and after implementation of the project. On the other hand, comprehensive project report prepared pursuant to a recommendation under regulation 7 (3) (a), must specify — the nature of the project; the location of the project including — (i) proof of land ownership; (ii) the Global Positioning System coordinates; and (iii) the physical area that may be affected by the project's activities; the activities that shall be undertaken during the project construction, operation and decommissioning phases; a description of the international, national and county environmental legislative and regulatory frameworks on the environment and socio-economic matters; the preliminary design of the project; the materials to be used, products and by-products, including waste to be generated by the project and the methods of their disposal; the potential environmental impacts of the project and the mitigation measures to be taken during and after implementation of the project; an analysis of available alternatives including an alternative (i) project site; (ii) design; (iii) technologies; and (iv) processes, and the reasons for preferring the proposed site, design, technologies and processes; an action plan for the prevention and management of possible accidents during the project cycle; a plan to ensure the health and safety of the workers and neighbouring communities; the economic and socio-cultural impacts to the local community and the nation in general; a plan to ensure the relocation or resettlement of persons affected by the project; a strategic communication plan to ensure inclusive participation during the study and provide a summary of issues discussed at the public participation forum; an environmental management plan; integration of climate change vulnerability assessment, relevant

²⁸ Regulation 3, LN No. 160 of 2006, laws of Kenya.

²⁹ Ibid, regulation 4.

³⁰ Environmental (Impact Assessment and Audit) Regulations, Legal Notice No. 101 of 2003, Laws of Kenya.

³¹ Regulation 3, LN No. 101 of 2003.

adaptation and mitigation actions; the project cost; and any other information the Authority may require.³²

As for environmental impact assessment study reports, they must incorporate, *inter alia*, information on — the proposed location of the project; a concise description of the national environmental legislative and regulatory framework, baseline information and any other relevant information related to the project; the objectives of the project; the technology, procedures and processes to be used, in the implementation of the project; the materials to be used in the construction and implementation of the project; the products, by-products and waste generated by the project; a description of the potentially affected environment; the environmental effects of the project including the social and cultural effects and the direct, indirect, cumulative, irreversible, short-term and long-term effects anticipated; alternative technologies and processes available and reasons for preferring the chosen technology and processes; analysis of alternatives including project site, design and technologies and reasons for preferring the proposed site, design and technologies; an environmental management plan proposing the measures for eliminating, minimizing or mitigating adverse impacts on the environment; including the cost, time frame and responsibility to implement the measures; provision of an action plan for the prevention and management of foreseeable accidents and hazardous activities in the cause of carrying out activities or major industrial and other development projects; the measures to prevent health hazards and to ensure security in the working environment for the employees and for the management of emergencies; an identification of gaps in knowledge and uncertainties which were encountered in compiling the information; an economic and social analysis of the project; an indication of whether the environment of any other state is likely to be affected and the available alternatives and mitigating measures; and such other matters as the Authority may require.³³

In all the above reports, Second Schedule thereof outlines the issues that may, among others, be considered in the making of environmental impact assessments. These issues include, *inter alia*, ecological Considerations such as biological diversity including— effect of proposal on number, diversity, breeding habits, etc. of wild animals and vegetation; gene pool of domesticated plants and animals e.g. monoculture as opposed to wild types. Thus, while biodiversity is mentioned as one of the considerations that may be made during EIA, biological diversity assessment is not substantively provided for.

3.1 Convention on Biological Diversity 1992

The *1992 Convention on Biological Diversity*³⁴ is the international legal framework for the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits resulting from the use of genetic resources, including through appropriate access to genetic resources and through appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding.³⁵ The CBD offers a powerful worldwide platform for using impact assessment methods

³² Regulation 7 (4), LN No. 101 of 2003

³³ Regulation 18 (1), LN No. 101 of 2003, Laws of Kenya.

³⁴ United Nations, 1992 Convention on Biological Diversity, 1760 UNTS 79, 31 ILM 818 (1992). Adopted in Rio de Janeiro, Brazil on 5 June 1992.

³⁵ *Ibid*, Article 1.

to conserve biodiversity. It expressly demands that projects, programmes, and policy choices address biodiversity through impact assessment procedures (Article 14). Parties must conduct environmental impact assessments (EIAs) for projects that might have a detrimental impact on biodiversity under the Convention on Biological Diversity (CBD). The CBD calls for impact assessments to take biodiversity into account, but it also gives room for a more proactive approach, allowing for the identification of potential for both effect mitigation and biodiversity enhancement.³⁶

4. Biodiversity Conservation: Challenges and Prospects

One of the main worldwide environmental challenges today is the preservation of biological diversity (biodiversity). Therefore, as suggested by the Convention on Biological Diversity, a detailed examination of the consequences of developments on biodiversity has to be included in the process of Environmental Impact Assessment (EIA): Each Contracting Party is required to "implement suitable processes requiring environmental impact assessment of any proposed projects that are expected to have considerable detrimental impact on biological diversity."³⁷

Ecological impact assessments concentrate on both the advantages of biodiversity obtained through ecosystem services as well as the spatially constrained biophysical environment and biodiversity as composition, structure, and important activities. It deals with the distribution of space in complicated circumstances marked by ambiguity and opposing actor values. The entire proposal of a project, plan, or programme, its goals, alternate options and their acceptability from the perspective of biodiversity, and knowledge of the biodiversity and ecosystem services it provides are shaped in the process of ecological impact assessment, which is a part of environmental impact assessment (EIA) and strategic environmental assessment (SEA).³⁸

It has been pointed out that despite the fact that 80% of Kenya's population depends on its biological resources for survival, insufficient management of these resources results in a broad range of biological resources. In addition, there is little knowledge of the non-consumptive values of resources, little access to biodiversity data and information, and poor adoption rates for new technologies, including biotechnology.³⁹

According to *Kenya State of Environment Report 2019-2021*⁴⁰, a 2021 publication of the National Environment Management Authority (NEMA) Kenya, currently, it is thought that the nation is home to over 260 species of reptiles, over 250 small mammals, several big animals, over 7,004 kinds of plants, over 25,000 types of invertebrates, over 769 species of fish, and around 1,100

³⁶ Brooke, C., 'Biodiversity and Impact Assessment,' prepared for the conference on Impact Assessment in a Developing World Manchester, England, Oct 1998, RSPB/BirdLife International <<https://www.cbd.int/impact/case-studies/cs-impact-bia-brooke-1998-en.pdf>> accessed 9 November 2022.

³⁷ Davide Geneletti, 'Biodiversity Impact Assessment of Roads: An Approach Based on Ecosystem Rarity' (2003) 23 *Environmental Impact Assessment Review* 343, 344 <<https://linkinghub.elsevier.com/retrieve/pii/S0195925502000999>> accessed 8 November 2022.

³⁸ Söderman, T., "Biodiversity and ecosystem services in impact assessment: from components to services," (2012), p. 3 <<https://core.ac.uk/download/pdf/14924073.pdf>> accessed 8 November 2022.

³⁹ Mwenda, A. and Kibutu, T.N., "Implications of the New Constitution on Environmental Management in Kenya' (2012)." *Law, Environment and Development Journal* 8: 76-78.

⁴⁰ National Environment Management Authority, Kenya State of Environment Report 2019-2021, 2021, ISBN: 978-9966-1987-0-9 <https://www.nema.go.ke/images/Docs/EIA_1920-1929/NEMA%20SoE%202019-2021.pdf> accessed 7 November 2022.

species of birds. The nation's national parks, national reserves, and conservancies are among the places where the biodiversity of the nation is most abundant. In lands used for communal settlement, biodiversity may also be found outside of protected areas.⁴¹

Kenya's conservation efforts are threatened by climate unpredictability, wildlife crime, urban sprawl, and rapid population increase.⁴² It is crucial to analyse how each biophysical change can affect biodiversity by determining whether the change has an impact on one of the following aspects of biodiversity: composition, structure, or key processes. This will help us determine impacts on biodiversity for the ecosystems that are influenced.⁴³

5. Entrenching Biodiversity Impact Assessment in Kenya as a Tool for Enhancing Sustainable Development Agenda

The objective of an environmental impact assessment (EIA) is to provide decision-makers a sense of the anticipated environmental effects of activities that might modify the environment and, if required, to enable for adjustments to be made to these actions to lessen any negative effects.⁴⁴ Arguably, ecological repercussions have frequently received less attention in impact assessments.⁴⁵ EIAs have traditionally concentrated on impacts on protected species and ecosystems. Other elements of biodiversity, such as diversity across species and ecosystems, changes through time, species abundance and distribution, and the functional components of biodiversity, have received less attention.⁴⁶

The Conference of the Parties (COP) agreed to establish recommendations for including biodiversity-related problems in environmental impact assessment laws, procedures, and strategic environmental assessment in COP 6 Decision VI/7.⁴⁷ The COP guidelines for incorporating biodiversity-related issues into environmental-impact-assessment legislation or processes and in strategic impact assessment are meant to provide general advice on incorporation of biodiversity considerations into new or existing environmental impact assessment procedures, noting that existing procedures take biodiversity into consideration in different ways.⁴⁸ The framework will need to be improved in order to address how biodiversity may be included into the latter phases of the environmental impact assessment procedure, such as impact assessment, mitigation, evaluation, and monitoring, as well as strategic environmental assessment.⁴⁹ However, depending

⁴¹ Ibid, p. xviii.

⁴² 'Environment | Kenya | U.S. Agency for International Development' (24 May 2022) <<https://www.usaid.gov/kenya/environment>> accessed 8 November 2022.

⁴³ Sloomweg, R., "Biodiversity assessment framework: making biodiversity part of corporate social responsibility." *Impact Assessment and Project Appraisal* 23, no. 1 (2005): 37-46.

⁴⁴ Ritter, C.D., McCrate, G., Nilsson, R.H., Fearnside, P.M., Palme, U. and Antonelli, A., 'Environmental Impact Assessment in Brazilian Amazonia: Challenges and Prospects to Assess Biodiversity' (2017) 206 *Biological Conservation* 161.

⁴⁵ Brooke, C., 'Biodiversity and Impact Assessment,' prepared for the conference on Impact Assessment in a Developing World Manchester, England, Oct 1998, RSPB/BirdLife International <<https://www.cbd.int/impact/case-studies/cs-impact-bia-brooke-1998-en.pdf>> accessed 9 November 2022.

⁴⁶ Ibid.

⁴⁷ Unit B, 'Case Studies - Impact Assessment'

<<https://www.cbd.int/programmes/cross-cutting/impact/search.aspx>> accessed 9 November 2022.

⁴⁸ Unit B, 'COP Decision' <<https://www.cbd.int/decision/cop/?id=7181>> accessed 9 November 2022.

⁴⁹ Ibid.

on their institutional and legal frameworks, individual nations may modify the phases in the approach to suit their needs and wants.⁵⁰

Therefore, conducting a biodiversity impact assessment necessitates a more thorough research and analysis of potential effects on an ecological unit and the species and populations that make up its ecosystem. According to the CBD, biodiversity refers to variety at the levels of species (both within and between species) and ecosystems. Therefore, ecological impacts might be viewed as a subset of biodiversity impacts, which focus on the broader interactions between animals and their habitats at the species, community, and ecosystem levels.⁵¹ Because of the challenges that other disciplines, including social impact assessment, have had when attempting to "go it alone," biodiversity impact assessment should thus be viewed as a component of current impact assessment systems rather than being marketed as a distinct entity. The term "biodiversity impact assessment" might be used to bring these concerns to the attention of the impact assessment community because the biodiversity agenda has some momentum.⁵²

In contrast to the conventional EIA strategy of mitigating consequences, this provides a focus on the more advantageous features of biodiversity, looking at the ecosystem perspective, dealing with fragmentation difficulties, and so forth. In addition to protecting endangered species and their ecosystems, biodiversity also entails improving damaged landscapes, halting species extinctions, and establishing new habitats.⁵³

5.1 Biodiversity Monitoring

As a result of a wide range of internal and external stimuli, biodiversity is by its very nature a dynamic component of ecosystems, changing in composition, structure, and functional qualities. The term "monitoring" refers to the systematic and targeted observation and assessment of current changes in biodiversity in its different forms (genes, species, structures, functions, and ecosystems), often within a specific context defined by, for example, a research topic or a management aim.⁵⁴ There are several purposes for biodiversity monitoring. Feedback on the effectiveness of conservation efforts is provided by observing protected species' population numbers in their protected zones. An early warning system for farmers or medical services can benefit from tracking the spread of hazardous invasive species or contagious organisms. Population management systems may be optimized thanks to monitoring systems at gaming farms. These are but a few instances of the numerous uses available.⁵⁵

5.2 Adaptive Management of Biodiversity Resources

Adaptive management is a process for putting management into practice while learning which management activities are most successful at accomplishing certain objectives.⁵⁶ In other words,

⁵⁰ Ibid.

⁵¹ Brooke, C., 'Biodiversity and Impact Assessment,' prepared for the conference on Impact Assessment in a Developing World Manchester, England, Oct 1998, RSPB/BirdLife International, p.3.

⁵² Ibid., p.3.

⁵³ Ibid, p.3.

⁵⁴ Juergens, N. "Monitoring of biodiversity." *Biodiversity: Structure and Function-Volume I 1* (2009): 229.

⁵⁵ Ibid.

⁵⁶ Department of Planning and Environment, 'Adaptive Management' (NSW Environment and Heritage) <<http://www.environment.nsw.gov.au/research-and-publications/our-science-and-research/our-work/adaptive-management>> accessed 8 November 2022.

adaptive management is a methodical strategy for enhancing resource management by taking lessons from management results.⁵⁷

The evolution of scientific knowledge, as well as numerous societal and political shifts, have all influenced how natural resource management has changed through time. Management's typical objective is to guarantee the continuity of one or more system-of-interest properties. This is sometimes seen as a necessity for managers to either work to maintain system stability or to preserve certain system linkages and components while permitting or promoting system change. A comprehension of resilience is especially important when taking into account the dynamics of management and system change.⁵⁸

Arguably, EIA procedures should not be different. They should be adoptive to the changing environmental conditions due to climate change and other factors adversely affecting the environment and biological resources. These processes should be expanded to include biodiversity impact assessment especially where the EIA relates to a parcel of land that is rich in biological resources, such as those contemplated under section 42 of EMCA. It has been suggested that in order to take advantage of the role of science and innovation in enhancing biodiversity conservation measures, the challenge for researchers is to change their emphasis from discovery to the science of implementation, while managers and policy-makers must abandon their socio-political norms and institutional frameworks in order to adopt new thinking and effectively use the wealth of potent new scientific tools for learning by doing.⁵⁹ For instance, it has been documented that wetlands are losing their biodiversity more quickly than any other ecosystem and thus, data on species status and risks are necessary to properly manage and conserve the biodiversity of wetlands.⁶⁰ Thus, biological diversity monitoring offers recommendations for managing biological variety in terms of productivity and conservation. Monitoring analyses changes across time and place and evaluates the state of biological variety at one or more ecological levels.⁶¹

6. Conclusion

It has been suggested that programs for biodiversity monitoring and assessment (BMAP) offer a way to gather and present scientific data for use in managing natural resources. Establishing the objectives is the first step in creating the BMAP programme. The types of species and habitats

⁵⁷ 'Adaptive Management' (Conservation in a Changing Climate) <<https://climatechange.lta.org/get-started/adapt/adaptive-management/>> accessed 8 November 2022.

⁵⁸ Allen, C.R. and Garmestani, A.S., "Adaptive Management." *Adaptive Management of Social-Ecological Systems* (2015): 1, p. 2 <<http://ndl.ethernet.edu.et/bitstream/123456789/67461/1/Craig%20R.%20Allen.pdf>> accessed 8 November 2022.

⁵⁹ Keith, D., Martin, T., McDonald-Madden, E. and Walters, C., "Uncertainty and adaptive management for biodiversity conservation." (2011) <https://www.sciencedirect.com/science/article/abs/pii/S0006320710004933?via%3Dihub> accessed 8 November 2022.

⁶⁰ Stephenson PJ, Ntiamoa-Baidu Y and Simaika JP, 'The Use of Traditional and Modern Tools for Monitoring Wetlands Biodiversity in Africa: Challenges and Opportunities' (2020) 8 *Frontiers in Environmental Science* <<https://www.frontiersin.org/articles/10.3389/fenvs.2020.00061>> accessed 9 November 2022.

⁶¹ Niemelä J, 'Biodiversity Monitoring for Decision-Making' (2000) 37 Niemelä, J. 2000. Biodiversity monitoring for decision-making. *Annales Zoologici Fennici* 37: 307-317.

that should be taken into account as part of the programme are then frequently determined by doing a baseline biological assessment. Following completion of the assessment, trends in biodiversity will be shown in the environment by tracking the chosen indicators and utilising science to offer answers. The results of monitoring operations reveal concerns that call for management methods, such as the need to safeguard vulnerable or endangered species or eradicate invasive non-native species.⁶² Monitoring is a crucial part of an effective adaptive management programme since it is used to evaluate the progress achieved toward achieving management objectives.⁶³

If the Sustainable Development Goal 15 of the 2030 Agenda for Sustainable Development which is devoted to “*protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss*” is to be achieved, then biodiversity assessments must become part of environmental management approaches in the country. It is only through such assessments that the true status and impact on biodiversity can be established. It is important that given that a legislative requirement for an environmental impact assessment based on environmental considerations does not ensure that biological diversity will be taken into account, it should be taken into account to include biodiversity criteria in either current or future screening criteria. This is especially important where EIA processes are to be carried out in ecologically sensitive areas. It has thus been suggested that there is a need to solve the two key issues that biodiversity conservation poses for impact assessment, namely: First, current impact assessment techniques must be enhanced to address biodiversity impacts; second, they need to be broadened to give additional positive advantages for biodiversity.⁶⁴ If these goals for biodiversity and impact assessment are to be accomplished, changes must be made at all levels of impact assessment, including legal requirements, standards, training, and impact assessment practice.⁶⁵

⁶² Henderson, A., Comiskey, J., Dallmeier, F. and Alonso, A., "Framework for Assessment and Monitoring of Biodiversity." Encyclopedia of Biodiversity Online Update 1 (2007), p. 545.

⁶³ Ibid, p. 545.

⁶⁴ Brooke, C., 'Biodiversity and Impact Assessment,' prepared for the conference on Impact Assessment in a Developing World Manchester, England, Oct 1998, RSPB/BirdLife International, p.4.

⁶⁵ Ibid, p. 6.

Exploring Heritage Impact Assessment in Kenya

Abstract

The paper critically discusses the concept of Heritage Impact Assessment (HIA) in Kenya. It conceptualizes Heritage Impact Assessment and its role in the Sustainable Development Agenda. The paper further highlights the legal framework on HIA at both the global and national level. It discusses the extent to which HIA has been embraced in Kenya and challenges thereof. Finally, the paper suggests recommendations towards embracing heritage impact assessment for Sustainable Development in Kenya.

1. Introduction

World Heritage has been defined as the designation for places on Earth that are of outstanding universal value to humanity and as such, have been inscribed on the World Heritage List to be protected for future generations to appreciate and enjoy¹. The Convention Concerning the Protection of the World Cultural and Natural Heritage defines World Heritage to entail cultural and natural heritage². Cultural heritage includes monuments; architectural works; archeological sites; inscriptions, cave dwellings and buildings that are of outstanding value from the point of view of history, art and science³. Natural heritage on the other hand includes natural features consisting of physical and biological formations; geological and physiographical formations and natural sites of outstanding value from the point of view of science, conservation or natural beauty⁴. UNESCO lists World Heritage sites in Kenya to include Lake Turkana National Park; Mount Kenya National Park and Natural Forest; Lamu Old Town; Fort Jesus; the Sacred Mijikenda Kaya Forests and the Lake System in the Great Rift Valley among others⁵.

Conservation of World Heritage is a key component of sustainability. The Sustainable Development Goals seek to promote sustainable cities and communities among other goals⁶. Among the targets under this goal is strengthening efforts to protect and safeguard the world's cultural and natural heritage⁷. Conservation of World Heritage is thus a key component of the Sustainable Development agenda. Further, the Convention Concerning the Protection of the World Cultural and Natural Heritage recognizes the importance of world heritage and the need to preserve it as part of the world heritage of mankind as a whole⁸. It calls upon state parties to take measures towards protection and conservation of World Heritage and its transmission to future generations⁹.

¹ United Nations Educational, Scientific and Cultural Organisation (UNESCO), 'World Heritage Conservation' available at <https://whc.unesco.org/en/faq/19> (accessed on 19/10/2022)

² UNESCO., 'The Convention Concerning the Protection of the World Cultural and Natural Heritage' available at <https://whc.unesco.org/archive/convention-en.pdf> (accessed on 19/10/2022)

³ Ibid

⁴ Ibid

⁵ UNESCO., 'World Heritage List' available at <https://whc.unesco.org/en/list/> (accessed on 19/10/2022)

⁶ Sustainable Development Goal 11., available at <https://www.undp.org/sustainable-development-goals#sustainable-cities-and-communities> (accessed on 19/11/2022)

⁷ Ibid

⁸ UNESCO., 'The Convention Concerning the Protection of the World Cultural and Natural Heritage' Op Cit

⁹ Ibid, article 4

The Constitution of Kenya anchors the importance of protection and conservation of cultural and natural heritage. It acknowledges the important role the environment plays in sustaining our heritage and is determined to protect it for the benefit of future generations¹⁰. The Constitution further recognizes the role of culture as the foundation of the nation and mandates the state to promote and protect cultural heritage in the country¹¹.

The conservation of world heritage is threatened by certain factors including modernization and urban growth¹². Further, cultural and natural heritage is threatened by traditional causes of decay and emerging social and economic conditions including developments and construction¹³. Consequently, the concept of Heritage Impact Assessment has emerged as a conservation tool to improve World Heritage in line with the Sustainable Development Goals¹⁴. It is aimed at promoting the protection and management of world heritage from adverse effects of developments and construction¹⁵.

The paper seeks to critically discuss the concept of Heritage Impact Assessment. The paper further discusses the extent to which heritage impact assessment has been embraced in Kenya and proposes interventions towards promoting heritage impact assessment for Sustainable Development in Kenya.

2. Framework for Heritage Impact Assessment

Heritage Impact Assessment is conducted within the framework of Environmental Impact Assessment (EIA). EIA is a tool for integrating environmental and social concerns in decision making processes¹⁶. Environmental impact assessment (EIA) is the process of identifying potential environmental effects of proposed development and the required mitigation measures¹⁷. EIA has also been defined as a procedure for evaluating the likely impact of a proposed activity on the environment¹⁸. Its object is to provide decision-makers with information about the possible effects of a project before authorizing it to proceed¹⁹. It is also aimed at identifying, predicting, evaluating and mitigating the biophysical, social and other relevant environmental effects of development proposals prior to major decisions being taken and commitments being made²⁰.

¹⁰ Constitution of Kenya, 2010, Preamble

¹¹ Ibid, Article 12

¹² Ashrafi. B et al., 'Heritage Impact Assessment, Beyond an Assessment Tool: A comparative analysis of urban development impact on visual integrity in four UNESCO World Heritage Properties' *Journal of Cultural Heritage* 47 (2021) 199–207

¹³ UNESCO., 'The Convention Concerning the Protection of the World Cultural and Natural Heritage' Op Cit

¹⁴ Ashrafi. B et al., 'A Conceptual Framework for Heritage Impact Assessment: A Review and Perspective' available at <http://publications.rwth-aachen.de/record/839877/files/839877.pdf> (accessed on 19/10/2022)

¹⁵ Ibid

¹⁶ Muigua. K., 'Environmental Impact Assessment (EIA) in Kenya' available at <http://kmco.co.ke/wp-content/uploads/2018/08/A-Paper-on-Environmental-impact-assessment.pdf> (accessed on 19/10/2022)

¹⁷ Mandelik. Y et al., 'Planning for Biodiversity: the Role of Ecological Impact Assessment' available at https://www.researchgate.net/publication/227495149_Planning_for_Biodiversity_the_Role_of_Ecological_Impact_Assessment (accessed on 19/10/2022)

¹⁸ Muigua. K., 'Environmental Impact Assessment (EIA) in Kenya' Op Cit

¹⁹ Ibid

²⁰ Ashrafi. B et al., 'A Conceptual Framework for Heritage Impact Assessment: A Review and Perspective' Op Cit

The concept of Heritage Impact Assessment has emerged in order to identify and evaluate the impacts of human activities on world heritage towards striking a balance between the protection of world heritage and promoting economic and social development²¹. It entails the requirement to undertake Environmental Impact Assessment at the project level or more strategic level in order to assist decision makers in identifying and preventing approval of developments that may destroy cultural and natural heritage²². Heritage Impact Assessment explores the damage or benefits that may accrue on cultural and natural heritage as a result of human activities such as economic development²³. HIA is anchored in the *Convention Concerning the Protection of the World Cultural and Natural Heritage*. The Convention requires state parties to adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community and to *integrate the protection of that heritage into comprehensive planning programmes* (emphasis added)²⁴. It further requires state parties to *develop scientific and technical studies and research* and to work out such operating methods as will make the State capable of counteracting the dangers that threaten its cultural or natural heritage (emphasis added)²⁵.

The Convention thus acknowledges the role of Heritage Impact Assessment as a planning tool towards conservation and protection of world heritage. The process of Heritage Impact Assessment follows similar steps as the EIA process. The first phase of the HIA process entails understanding the potential impacts of development projects on world heritage as well as existing gaps that may negatively affect cultural and natural heritage²⁶. This involves screening of proposed projects, scoping and examination of different alternative stages in implementing projects towards mitigating their impact on world heritage²⁷. The second phase entails carrying out the assessment process in order to identify and predict threats emanating from proposed projects and their impact on world heritage²⁸. Mitigation measures ought to be proposed in order to minimize adverse impacts as well as enhancing positive effects of developments of cultural and natural heritage²⁹.

The third phase involves preparation of a Heritage Impact Assessment Report for critical and technical review³⁰. The report should capture all relevant information including the impact of the proposed development on cultural and natural heritage and the proposed mitigation measures towards mitigating the impacts³¹. The final phase involves decision making in relation to the

²¹ Ashrafi. B et al., 'Heritage Impact Assessment, Beyond an Assessment Tool: A comparative analysis of urban development impact on visual integrity in four UNESCO World Heritage Properties' Op Cit

²² Pereira Roders. A & Van Oers. R., 'Guidance on Heritage Impact Assessments: Learning from its application on World Heritage site management' Journal of Cultural Heritage Management and Sustainable Development Vol. 2 No. 2, 2012

²³ Ibid

²⁴ The Convention Concerning the Protection of the World Cultural and Natural Heritage' Article 5 (a)

²⁵ Ibid, article 5 (c)

²⁶ Ashrafi. B et al., 'A Conceptual Framework for Heritage Impact Assessment: A Review and Perspective' Op Cit

²⁷ International Association for Impact Assessment and UK (IEA) Institute for Environmental Assessment. Principles of Environmental Impact Assessment Best Practice. 1999. Available at http://www.iaia.org/publicdocuments/specialpublications/Principles%20of%20IA_web.pdf (accessed on 19/10/2022).

²⁸ Ibid

²⁹ Ibid

³⁰ Ashrafi. B et al., 'A Conceptual Framework for Heritage Impact Assessment: A Review and Perspective' Op Cit

³¹ Ibid

project. The project may be disapproved if it may result in significant harm to world heritage or where the mitigation measures proposed are not appropriate³². The project may also be approved and subsequently implemented. In this case, there is need for monitoring in order to ensure that the project adheres to the mitigation strategies set out in the HIA report³³.

3. Heritage Impact Assessment in Kenya

Kenya has in the recent past experienced rapid industrialization and growth in population which puts pressure on both cultural and natural heritage³⁴. These developments affect both the natural environment and heritage resources creating the need for heritage impact assessment within the EIA framework for sustainability. Protection of cultural and natural heritage in Kenya is recognized under the *Environmental Management and Co-Ordination Act* which creates the legal framework for environmental management and conservation in Kenya³⁵. EMCA provides for the formulation of national environment action plan which takes into account all monuments and protected areas under the National Museums and Heritage Act³⁶. EMCA thus envisions protection of cultural and natural heritage as a key process in environmental management³⁷.

Protection and conservation of natural and cultural heritage in Kenya is governed by the *National Museums and Heritage Act*³⁸. The Act recognizes the role of environmental impact assessment in the conservation and protection of natural and cultural heritage in Kenya. It requires the National Museums of Kenya to conduct environmental impact assessments within the framework of EMCA towards fulfilling its mandate which includes the protection, conservation and transmission of cultural and natural heritage in Kenya³⁹. Development projects whose implementation may affect heritage resources need to be subjected to Heritage Impact Assessment as envisioned under the National Museums and Heritage Act.

Heritage Impact Assessment has been undertaken in a number of projects in Kenya involving the National Museums of Kenya. Cultural Heritage Impact Assessment was conducted in relation to the optical fibre cable project at Fort Jesus Museum in Mombasa which is listed as a world heritage site by UNESCO⁴⁰. Subsequently, during implementation of the project mitigation measures were adopted in order to minimize impacts on both marine and terrestrial cultural resources⁴¹. A number of cultural materials were excavated and stored for prosperity as result of the Heritage Impact Assessment⁴². Heritage Impact Assessment was also conducted during the

³² UNESCO. Convention Concerning the Protection of the World Cultural and Natural Heritage. In Proceedings of the General Conference at Its 17th Session, Paris, France, 17 October–21 November 1972. available at: <http://whc.unesco.org/archive/convention-en.pdf> (accessed on 19/10/2022)

³³ Ibid

³⁴ Kiriamia. H et al., 'Cultural Heritage Impact Assessment in Africa: An Overview' available at https://www.researchgate.net/publication/306118471_Impact_assessment_and_heritage_management_in_Africa_An_Overview/link/5bd529992851c6b27931ba6/download (accessed on 20/10/2022)

³⁵ Environmental Management and Co-Ordination Act, No. 8 of 1999, Government Printer, Nairobi

³⁶ Ibid, S 38

³⁷ Ibid

³⁸ National Museums and Heritage Act, No. 6 of 2006, Government Printer, Nairobi

³⁹ Ibid, S 5 (1) (n)

⁴⁰ Busolo. N., 'Archaeological Impact Assessment for the Optical Fibre Cable at Swahili Cultural Centre, Mombasa' National Museums of Kenya

⁴¹ Ibid

⁴² Kiriamia. H et al., 'Cultural Heritage Impact Assessment in Africa: An Overview' Op Cit

proposed construction of children's park at Mama Ngina Heritage Site in Mombasa⁴³. After the HIA, the project was halted after it emerged that it would result in adverse impacts on cultural heritage at the site⁴⁴. The HIA established that the site was a cemetery of an ancient Tuaca settlement, an ancient civilization in the island of Mombasa thus amounting to significant cultural heritage⁴⁵. Further, Heritage Impact Assessment was also conducted in relation to the Lamu Port South Sudan-Ethiopia Transport (LAPSSET) Corridor project in order to determine its impacts on the Lamu World Heritage Site⁴⁶. The HIA report revealed that the project may have adverse impacts on heritage resources linked to the Lamu World Heritage Site, ancient settlements along the Lamu coastline and islands and marine conservation in the area. Mitigation measures were recommended in order to reduce the direct and indirect impacts caused by the project.

Despite attempts to promote the protection and conservation of world heritage in Kenya, challenges still exist in striking a balance between development and conservation of heritage. In the course of development projects touching on world heritage, artefacts have been seized and sold and monuments destroyed due to the failure to fully appreciate the importance of world heritage⁴⁷. There is need to effectively implement Heritage Impact Assessment towards Sustainable Development in Kenya.

4. Way Forward: Exploring Heritage Impact Assessment for Sustainable Development in Kenya

Protection and conservation of cultural and natural heritage is a key component of the Sustainable Development agenda. Both the *Sustainable Development Goals* and the *Convention Concerning the Protection of the World Cultural and Natural Heritage* envisage the importance of world heritage and the need for its protection for the benefits of the present and future generations⁴⁸. Heritage Impact Assessment is an important tool in the protection and conservation of world cultural and natural heritage.

In order to effectively promote HIA, there is need for a more systematic and integrated approach in the EIA framework⁴⁹. Concerns involving cultural and natural heritage should be fully addressed within the EIA process in order to effectively identify and evaluate impacts of projects on world heritage and the need to come up with effective mitigation measures⁵⁰. Further, there is need for involving an interdisciplinary team with sufficient knowledge in cultural and natural heritage in order to effectively conduct a comprehensive HIA. The HIA in relation to the

⁴³ Ibid

⁴⁴ Ibid

⁴⁵ Ibid

⁴⁶ UNESCO., 'World Heritage Committee on Lamu Old Town World Heritage Site: State of Conservation Report' available at <https://www.google.com/search?q=State+of+conservation+report+lamu+old+town&oq=State+of+conservation+report+lamu+old+town&aqs=chrome..69i57j33i160.12156j0j7&sourceid=chrome&ie=UTF-8> (accessed on 20/10/2022)

⁴⁷ Kiriama. H et al., 'Cultural Heritage Impact Assessment in Africa: An Overview' Op Cit

⁴⁸ See Sustainable Development Goal 11 and article 4 of the Convention Concerning the Protection of the World Cultural and Natural Heritage

⁴⁹ Ashrafi. B et al., 'A Conceptual Framework for Heritage Impact Assessment: A Review and Perspective' Op Cit

⁵⁰ Ibid

LAPSSET project involved experts including those from UNESCO World Heritage Centre and local experts in cultural and natural heritage in order to effectively conduct the process⁵¹.

Further, there is need to promote public participation in order to fully embrace HIA. Public participation plays an important role in the EIA process since it guarantees acceptability of development projects and prevents disputes between developers and local communities⁵². Public participation can play a central role conservation and protection of world heritage due to the sentimental value that communities may attach to cultural and natural heritage sites.⁵³ Communities may possess traditional indigenous knowledge concerning management of such sites⁵⁴. Thus, there is need to promote public participation and public sensitization in order to fully promote HIA.

Finally, there is need to effectively capture the framework of HIA in national legislation in order to guarantee its adoption⁵⁵. The Environmental Management and Co-ordination Act (EMCA) restricts the definition of environment to the natural and biophysical environments only comprising of air, land, fauna, flora and water⁵⁶. This definition does not capture cultural heritage. Further, the Environmental (Impact Assessment and Audit) Regulations, 2003 do not capture the concerns related to cultural and natural heritage. There may be need to capture cultural and natural heritage concerns in these legislations in order to fully promote HIA. Through these measures, HIA will be promoted in the quest towards Sustainable Development.

5. Conclusion

World heritage sites are of universal value to humanity for both present and future generations⁵⁷. Protection and conservation of cultural and natural heritage is a key component of the Sustainable Development agenda⁵⁸. However, the conservation of world heritage is threatened by certain factors including modernization and urban growth⁵⁹. Further, cultural and natural heritage is threatened by traditional causes of decay and emerging social and economic conditions including developments and construction⁶⁰. The concept of Heritage Impact Assessment has emerged as

⁵¹ UNESCO., 'World Heritage Committee on Lamu Old Town World Heritage Site: State of Conservation Report' Op Cit

⁵² M. Hasan., 'Public participation in EIA: A comparative study of the projects run by government and non-governmental organizations.' *Environmental Impact Assessment Review* 72 (2018): 12-24.; Art.69(d) of The Constitution of Kenya, Government Printer 2010

⁵³ Siamak. S et al 'Managing world heritage site stakeholders: A grounded theory paradigm model approach." *Journal of Heritage Tourism* 14.4 (2019): 308-324.; See the case of Mohamed Ali Baadi and others v Attorney General & 11 others, Petition No. 22 of 2012, [2018] eKLR; See also the case of Save Lamu & 5 others v National Environmental Management Authority (NEMA) & another, Tribunal Appeal NET 196 of 2016, [2019] eKLR

⁵⁴ Ibid; See Art.69(c) of the Constitution of Kenya on protection of indigenous knowledge.

⁵⁵ Ashrafi. B et al., 'A Conceptual Framework for Heritage Impact Assessment: A Review and Perspective' Op Cit

⁵⁶ EMCA, No.8 of 1999, S 2

⁵⁷ UNESCO, 'World Heritage' available at <https://whc.unesco.org/en/about/> (accessed on 20/10/2022)

⁵⁸ Ibid; See Art.10 (2)(d) of the Constitution of Kenya-Sustainable Development is a National Value and Principle of Governance.

⁵⁹ Ashrafi. B et al., 'Heritage Impact Assessment, Beyond an Assessment Tool: A comparative analysis of urban development impact on visual integrity in four UNESCO World Heritage Properties' Op Cit

⁶⁰ UNESCO., 'The Convention Concerning the Protection of the World Cultural and Natural Heritage' Op Cit

Exploring Heritage Impact Assessment in Kenya

key tool in the conservation and protection of world cultural and natural heritage by ensuring that heritage concerns are captured in the EIA process as envisaged under the *Convention Concerning the Protection of the World Cultural and Natural Heritage*⁶¹. There is need to fully embrace and promote Heritage Impact Assessment for Sustainable Development in Kenya.

⁶¹ Convention Concerning the Protection of the World Cultural and Natural Heritage, article 5 (a)

The Viability of Arbitration in Management of Climate Change Related Disputes in Kenya

Abstract

Climate change has affected many areas of the society ranging from environmental, economic, political and even social aspects. It has also brought about disputes and conflicts that have been associated with climate change, both directly and indirectly, as it is seen as a conflict multiplier. This paper discusses the disputes related to climate change implications, and how the same can be addressed using arbitration as a dispute settlement mechanism. The author argues that arbitration has certain advantages over litigation which makes it more viable in addressing the disputes in question.

1. Introduction

Climate change is considered to be one of the greatest challenges facing mankind in this century and beyond.¹ Climate change and conflict have been linked by some observers in both industrialized and poor countries, although the connection is deemed to be indirect.² Climate change's effects on poverty, mental health, food security, and migration further complicate the link between climate change and war.³ As a result, the goals of the Conference of Parties Twenty Sixth session (COP 26), held in Glasgow from 31 October to 13 November 2021 included to: secure global net zero by mid-century and keep 1.5 degrees within reach; adapt to protect communities and natural habitats; mobilise finance; and work together to deliver,⁴ where countries were expected to, *inter alia* accelerate action to tackle the climate crisis through collaboration between governments, businesses and civil society.⁵ Achieving these will naturally require some adjustments by countries' leadership and other stakeholders. Arguably, climate change comes with a lot of conflicts and/or disputes that need sustainable means of handling them.⁶

Over the years, there has been an appreciation of the impact that climate may have in economic results, as well as rising public concern about climate change.⁷ The term "climate" refers to observations of climatic factors such as temperature, rainfall, and water availability, as well as

¹ See Dervis, K., "Devastating for the World's Poor Climate Change Threatens the Development Gains Already Achieved," UN Chronicle Online Edition <<https://www.unclearn.org/wp-content/uploads/library/undp30.pdf>> accessed 6 April 2022.

² 'Does Climate Change Cause Conflict?' (IGC, 2 June 2021) <<https://www.theigc.org/blog/does-climate-change-cause-conflict/>> accessed 6 April 2022.

³ Ibid.

⁴ 'COP26 Goals' (UN Climate Change Conference (COP26) at the SEC – Glasgow 2021) <<https://ukcop26.org/cop26-goals/>> accessed 5 April 2022.

⁵ Ibid.

⁶ See Vally Koubi, 'Climate Change and Conflict' (2019) 22 Annual Review of Political Science 343 <<https://www.annualreviews.org/doi/10.1146/annurev-polisci-050317-070830>> accessed 11 April 2022.

⁷ Marshall Burke, Solomon M Hsiang and Edward Miguel, 'Climate and Conflict' (2015) 7 Annual Review of Economics 577, 578 <<https://www.annualreviews.org/doi/10.1146/annurev-economics-080614-115430>> accessed 27 March 2022.

climate indices that serve as proxy measures for these variables.⁸ While climatic circumstances do not generate conflict on their own, they can modify the environment under which particular social interactions take place, potentially altering the risk of conflict.⁹ The environmental principle of polluter pays, which holds that polluters should be held accountable for destroying the environment, justifies the concept of resolving climate change disputes through restorative dispute management approaches.¹⁰ It is, however, worth noting that despite the constitutional provisions that seek to promote the use of Alternative Dispute Resolution (ADR) Mechanisms in the country, Kenya's *Climate Change Act 2016*¹¹ is silent on the role of ADR in addressing climate change related disputes and conflicts and only provides for the role of Environment and Land Court.¹²

This paper critically discusses the nature of climate change related conflicts and disputes, and how arbitration, both domestic and international, can be used to address the disputes, in the context of achieving sustainability in Kenya. It is worth noting that the discussion leans more towards management of the disputes as against conflicts. The paper, in justifying the use of arbitration, will discuss the differences between conflicts and disputes, and why the climate change related disputes are more suitable for arbitration than the conflicts.

2. Nature of Climate Change Related Conflicts and Disputes

Climate is described as a region's averaged temperature and precipitation patterns, as well as their range of fluctuation, across time.¹³ "Climate change" is defined by the UNFCCC as "a change in climate that is ascribed directly or indirectly to human activity that modifies the composition of the global atmosphere and is in addition to natural climate variability seen over comparable time periods."¹⁴ Kenya's *Climate Change Act 2016* defines "climate change" to mean 'a change in the climate system which is caused by significant changes in the concentration of greenhouse gases as a consequence of human activities and which is in addition to natural climate change that has been observed during a considerable period'.¹⁵ Climate change mitigation is one of the key environmental goals of the United Nations' 2030 Agenda for Sustainable Development Goals (SDGs)¹⁶, as encapsulated in Sustainable Development Goal 13, which aims to help countries attain resilience and adaptability.¹⁷

⁸ Marshall Burke, Solomon M Hsiang and Edward Miguel, 'Climate and Conflict' (2015) 7 Annual Review of Economics 577, 578 <<https://www.annualreviews.org/doi/10.1146/annurev-economics-080614-115430>> accessed 27 March 2022.

⁹ Ibid, 579.

¹⁰ K. Segerson, Environment, in Encyclopedia of Energy, Natural Resource, and Environmental Economics Volume 3, 2013.

¹¹ Climate Change Act, No. 11 of 2016, Laws of Kenya.

¹² Ibid, section 23.

¹³ '15.1: Global Climate Change' (Geosciences LibreTexts, 26 December 2019) <[https://geo.libretexts.org/Bookshelves/Geology/Book%3A_An_Introduction_to_Geology_\(Johnson_Affolter_Inkenbrandt_and_Mosher\)/15%3A_Global_Climate_Change/15.01%3A_Global_Climate_Change](https://geo.libretexts.org/Bookshelves/Geology/Book%3A_An_Introduction_to_Geology_(Johnson_Affolter_Inkenbrandt_and_Mosher)/15%3A_Global_Climate_Change/15.01%3A_Global_Climate_Change)> accessed 20 March 2022.

¹⁴ Article 1(2), UN General Assembly, United Nations Framework Convention on Climate Change: resolution / adopted by the General Assembly, 20 January 1994, A/RES/48/189.

¹⁵ Section 2, Climate Change Act, No. 11 of 2016, laws of Kenya.

¹⁶ UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1.

¹⁷ Ibid, SDG 13.

There is no universally accepted definition of a climate change-related dispute.¹⁸ Some authors have observed that climate change is a "threat multiplier," which can increase human security issues such as food and water scarcity while also leading to (violent) conflict in climate-vulnerable countries.¹⁹ This is as a result of the fact that climate change's negative repercussions, such as water scarcity, crop failure, food insecurity, economic shocks, migration, and displacement, can exacerbate the risk of conflict and violence²⁰. Environmental conflicts and disputes can be divided into two categories: first, access to environmental resources as a source of livelihood and as a foundation for economic activity, and second, conflicts over what are known as "side effects" of economic activity, such as biodiversity loss and pollution.²¹

3. Approaches to Management of Disputes and Conflicts

There are numerous techniques for preventing conflicts, resolving conflicts, settling disputes, and transforming conflicts.²² The choice of mechanism chosen depends on whether one is dealing with conflicts or disputes, as both have different causes and underlying issues.²³

3.1 Conflicts

Conflicts are concerns of non-negotiable ideals. The parties share these wants and ideals. Needs or values are inherent in all human beings and are at the foundation of conflict, whereas interests and issues are surface-level and are not at the root of conflict.²⁴ They're limitless. Conflicts develop as a result of the conflicting parties' non-negotiable wants or values not being met. As a result, if all requirements are addressed, the outcome is non-zero-sum, resulting in integrative and innovative solutions rather than a zero-sum answer.²⁵ A conflict usually involves at least two parties that disagree over the allocation of material or symbolic resources or who believe their underlying cultural values and beliefs are irreconcilable. Conflicts may also arise as a result of society's social and political makeup and structure, according to some theories.²⁶ This supports

¹⁸ C. Mark Baker, Cara Dowling, Dylan McKimmie, Tamlyn Mills, Kevin O’Gorman, Holly Stebbing, Martin Valasek, “What are climate change and sustainability disputes? Key arbitration examples (Part 1 contractual disputes)”, in James Rogers, London; Cara Dowling, Vancouver (eds), International arbitration report, Norton Rose Fulbright – Issue 16 – June 2021, p. 40. < <https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/publications/international-arbitration-report-issue-16.pdf?revision=40c8a703-6e1d-413c-8c7e-ac1201697383&revision=40c8a703-6e1d-413c-8c7e-ac1201697383>> accessed 30 March 2022.

¹⁹ Froese, Rebecca, and Janpeter Schilling, "The Nexus of Climate Change, Land Use, and Conflicts." (2019).

²⁰ ‘Tackling the Intersecting Challenges of Climate Change, Fragility and Conflict’ <<https://blogs.worldbank.org/dev4peace/tackling-intersecting-challenges-climate-change-fragility-and-conflict>> accessed 30 March 2022.

²¹ Arild Vatn, Environmental Governance: Institutions, Policies and Actions (Paperback edition, Edward Elgar Publishing 2016) 2.

²² Corissajoy, ‘Settlement, Resolution, Management, and Transformation: An Explanation of Terms’ (Beyond Intractability, 29 June 2016) <https://www.beyondintractability.org/essay/meaning_resolution> accessed 6 April 2022.

²³ See K. Muigua, Resolving conflicts through mediation in Kenya, Glenwood Publishers, Nairobi, 2nd Ed., 2017, Chapter Four.

²⁴ Bloomfield, D., “Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland”, Journal of Peace Research, Vol.32, No. 2 (May, 1995), pp.152-153.

²⁵ Fetherston, A.B., “From Conflict Resolution to Transformative Peacebuilding: Reflections from Croatia”, Centre for Conflict Resolution-Department of Peace Studies: Working Paper 4 (April, 2000), pp. 2-4.

²⁶ See Serge, L, et al, “Conflict Management Processes for Land-related conflict”, A Consultancy Report by the Pacific Islands Forum Secretariat, available at www.forumsec.org, [Accessed on 04/06/2012].

the viewpoint that conflict must be addressed on two levels: psychologically to overcome 'blocks' to positive communication and ontologically to discover the 'true' causes of conflict.²⁷

Conflicts are usually resolved because they are about fundamental values, hence the term "conflict resolution." Resolution is the mutual development of a valid relationship in which each party's demands are met. It is the mutual construction of a conflict because conflict is dynamic, interactive, and ever-changing with different stages of escalation and de-escalation such as formation, escalation, crisis, and endurance, improvement and de-escalation, settlement or resolution, and finally reconstruction and reconciliation through political processes such as negotiation and mediation. As a result, conflict resolution is stated to probe into the roots or underlying causes of conflict and relationships, with the goal of resolving them completely.²⁸

3.2 Disputes

When conflicts are not or cannot be adequately managed, disputes arise.²⁹ It's about an issue or a situation that interests you. Needs are not negotiable, divisible, or finite, while interests are. They aren't negotiable due to their intrinsic nature. They are not transferable or divisible. Needs are also inexhaustible, which means that the more security I have, the less security you have. When two or more persons or groups believe their rights, interests, or aims are incompatible, they communicate their perspective to the other person or group, which can lead to a dispute. Similarly, conflicts can arise from societal power imbalances, rights, or interests. These issues or interests can be discussed and even bargained over.³⁰

Because a dispute can be based on interests, rights, or power, the approaches to resolving it vary. Negotiation and mediation are the best ways to resolve an interest-based dispute. If the issue is about rights, the best response is litigation; if the issue is about power, the best response is the use of force, threats, and violence, such as that used by the police and the army. Understanding the roots or grounds of a dispute is critical because if it is not addressed appropriately, the likelihood of escalatory responses grows, which can lead to violence and long-term societal fission.

It's worth noting that tensions tend to repeat in specific sorts of disputes, such as those concerning natural resource use and access. The recurrence of a disagreement over time could be a sign of a much deeper conflict in which people or organizations are involved. In such circumstances, the responses used must take into account the greater context of the dispute's interests, rights, and power imbalances. As a result, answers must be tailored to the various levels of the conflict. Some solutions could be aimed at resolving the specific conflict, such as through adjudication processes like courts and arbitration.

²⁷ Fetherston, A.B., "From Conflict Resolution to Transformative Peacebuilding: Reflections from Croatia", op.cit.

²⁸ Cloke, K., "The Culture of Mediation: Settlement vs. Resolution", The Conflict Resolution Information Source, Version IV, December 2005.

²⁹ Fenn, P., "Introduction to Civil and Commercial Mediation", in Chartered Institute of Arbitrators, Workbook on Mediation, (CI Arb, London, 2002), pp.12-13.

³⁰ Fetherston, A.B., "From Conflict Resolution to Transformative Peacebuilding: Reflections from Croatia", op.cit; Mwangi, M., *The Water's Edge: Mediation of Violent Electoral Conflict in Kenya*, op.cit, pp.36-38.

Other intervention techniques might seek to address the dispute's underlying causes, which are frequently considerably broader. This can be done, for example, through political negotiations or mediation involving the entire community or perhaps a number of communities, with the goal of airing complaints and injustices seen by various groups in the region. Other intervention techniques might attempt to rebuild or restore the community's broken or damaged ties as a result of disagreements or conflicts.³¹

Interests or concerns are only surface-level; they do not address the conflict's basic or primary causes. As a result, conflicts can be resolved, thus the term "conflict resolution." A settlement, according to eminent conflict management specialists, is an agreement on the dispute's issue(s), which frequently entails a compromise. A settlement aims to appease the opposing party without addressing the dispute's root causes. As a result, adjudicatory, legal, or coercive processes like courts and arbitration can be used to settle disputes.

When it comes to disputes about interests rather than values, coercive means such as litigation and arbitration are useful.³²

4. Arbitration Process and management of Disputes

Arbitration is a mechanism for settling disputes that usually occurs in private, pursuant to an agreement between two or more parties, under which the parties agree to be bound by the arbitrator's decision based on law, or, if so agreed, other considerations, following a full hearing and such decision is enforceable at law.³³ Arbitration restricts appeals against decisions, which benefits the arbitral process' efficiency, and the arbitrator's award is final and binding on the parties save in the most glaring instances of incompetent arbitrating.³⁴ As previously stated, adjudicatory, coercive, or legal procedures can be used to settle disputes, whereas non-legal, non-adjudicatory, or non-coercive approaches can be used to resolve conflicts. The key power- and rights-based mechanisms include litigation and arbitration. They're mechanisms for settling disputes. The parties in a disagreement have little or no autonomy, and the means for settling disputes are coercive. Legal tools like as courts, police, and the army, among others, are used to enforce a settlement.

Although the parties have considerable autonomy in choosing the venue and arbitrator in arbitration, one party will be offended when an award is made, despite the fact that the parties agree to be bound by the arbitrator's judgment at the outset. As a result, it becomes coercive because the parties must comply with the decision, diminishing its usefulness as a conflict resolution method but effective in settlement.³⁵

³¹ See Serge, L, et al, "Conflict Management Processes for Land-related conflict", A Consultancy Report by the Pacific Islands Forum Secretariat, op.cit.

³² Mwangi, M., Conflict in Africa; Theory, Processes and Institutions of Management, op. cit. pp. 109-114.

³³ Barnstein, R. The Handbook of Arbitration Practice: General Principles (Part 2) (Sweet & Maxwell, London, 1998), p. 313.

³⁴ Section 35-The Arbitration Act, 1995- Grounds of setting aside an arbitral award.

³⁵ Mwangi, M., The Water's Edge: Mediation of Violent Electoral Conflict in Kenya, op.cit, pp.36-38.

Arbitration is viewed as a viable alternative to state court litigation with the purpose of getting a legally binding and enforceable outcome from a panel of legal and industrial experts.³⁶ Arbitration has great attributes which include: parties can agree on an arbitrator to decide the subject; the arbitrator has experience in the field of dispute; anybody can represent a party in the dispute; adaptability; cost-effective; confidential; quick; and the outcome is binding. Thus, unlike court procedures, which are accessible to the public, commercial arbitration proceedings are private, thus parties that want to keep their trade secrets confidential may select commercial arbitration while still benefiting from the binding character of court verdicts.

5. Using Arbitration as a Tool for management of Climate Change Disputes: Challenges and Prospects

Disputes related to climate change may increase in future due to: actions of commercial entities giving rise to groups or affected individuals having rights of action; climate change inaction – failure by states to take measures in response to climate change, giving rise to potential inter-state and investor-state disputes, and claims by groups of concerned citizens; climate change action-taking response measures, giving rise to potential inter-state and investor-state disputes; dilution or revocation of responsive measures by states, giving rise to potential renewable energy treaty arbitrations; commercial contract enforcement –private sector is central to climate change mitigation, and there may be an increase commercial contracts relating to climate change mitigation and adaptation; coming into effect of the Paris Agreement, which may give rise to arbitration.³⁷

While discussing the role of arbitration in addressing climate change disputes, some commentators have highlighted the following disputes: 1. cases brought to either mandate or change climate-related policy or conduct; 2. cases brought to seek financial redress for damages associated with the effects of climate change; 3. contractual disputes arising out of the industry transitions which the energy sector and all major industries are currently undergoing; 4. contractual disputes resulting from climate-related weather events; 5. related disputes between foreign investors and host states; and 6. related disputes between states, and between other transnational actors, while observing that a key reason for selecting these categories is that the potential role for arbitration varies significantly depending on the category of dispute, with arbitration having a greater role (in practice and in potential) in categories 3 to 6.³⁸

Notably, Kenya’s Environment and Land Court Act, 2011³⁹ provides for the jurisdiction of the Environment and Land Court as including power to hear and determine disputes relating to climate issues.⁴⁰ Also worth pointing out is the recognition of alternative means of dispute

³⁶ ‘Arbitration in Africa | White & Case LLP’ <<https://www.whitecase.com/publications/insight/arbitration-africa>> accessed 4 April 2022.

³⁷ ‘Resolving Climate Change Disputes through Arbitration’ (Pinsent Masons) <<https://www.pinsentmasons.com/out-law/analysis/resolving-climate-change-disputes-through-arbitration>> accessed 7 April 2022.

³⁸ C. Mark Baker, Cara Dowling, Dylan McKimmie, Tamlyn Mills, Kevin O’Gorman, Holly Stebbing, Martin Valasek, “What are climate change and sustainability disputes? Key arbitration examples (Part 1 contractual disputes)”, in James Rogers, London; Cara Dowling, Vancouver (eds), International arbitration report, Norton Rose Fulbright – Issue 16 – June 2021, p. 41.

³⁹ Environment and Land Court Act, No. 19 of 2011, Laws of Kenya.

⁴⁰ *ibid.*, section 13(2)(a).

resolution and even affirming that where alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court is mandated to stay proceedings until such condition is fulfilled.⁴¹ While it is to be acknowledged that the judges appointed to head environment and land courts are appointed on the basis of having relevant knowledge in the area, it must also be acknowledged that they may not always be well versed with all matters that come before them. It is during such times, either on court's own motion, with the agreement of or at the request of the parties, that the court may consider any other appropriate means of alternative dispute resolution including arbitration especially in respect of technical issues relating to climate change disputes.

The provisions of *Climate Change Act 2016*⁴² acknowledge the role of courts in upholding rights relating to climate change and spells out the role of the court in the following words: "a person may, pursuant to Article 70 of the Constitution, apply to the Environment and Land Court, alleging that a person has acted in a manner that has or is likely to adversely affect efforts towards mitigation and adaptation to the effects of climate change".⁴³ In such applications, the court may make an order or give directions to: prevent, stop or discontinue an act or omission that is harmful to the environment; compel a public officer to take measures to prevent or discontinue an act or omission that is harmful to the environment; or provide compensation to a victim of a violation relating to climate change duties.⁴⁴

While this is a commendable step towards empowering local courts in discharging their mandate in promotion of sustainable development, parties may not always be both citizens of Kenya and where the violating party is a foreign investor, there may be need to invoke international commercial or investment arbitration. In addition, it must be noted that parties may invoke section 20 (2) of the Environment and Land Court Act 2011 which provides that '*where alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court shall stay proceedings until such condition is fulfilled*'. Such parties may opt to have the dispute settled by expert arbitrators in the area of climate change disputes and only go back to court for declaratory rights and enforcement of the outcome(s).

The advantages of arbitration highlighted above make it a viable alternative way of managing climate change related disputes as against litigation, while still ensuring that the outcome thereof can be enforced. Parties, even where they already filed a case before a court, may not always be willing to let out commercial secrets and may, therefore, wish to refer the matter to arbitration, court-annexed or otherwise.

⁴¹ 20. Alternative dispute resolution

(1) Nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion, with the agreement of or at the request of the parties, any other appropriate means of alternative dispute resolution including conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2) (c) of the Constitution.

(2) Where alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court shall stay proceedings until such condition is fulfilled.

⁴² Climate Change Act, No. 11 of 2016, Laws of Kenya.

⁴³ Section 23(1), Climate Change Act, 2016.

⁴⁴ Section 23(2), Climate Change Act, 2016.

The distinction between conflicts and disputes, as discussed above, is important in analyzing any disagreements that are attributable to climate change in a bid to decide the most viable mechanism of addressing them. Such analysis and management of disputes may require expertise in that particular area of law, namely environmental law and climate change. This is where arbitration becomes useful because, as already pointed out, parties in arbitration proceedings are allowed to pick the third party expert with the relevant experience and knowledge to help them settle the particular aspects of the dispute.

It has also been noted that local disputes over food and water supplies can spread to neighboring nations as people seek extra resources and safety, putting further strain on other countries' resources and perhaps escalating tensions.⁴⁵ In light of such possibilities, addressing such problems through local courts becomes impossible. However, in addition to the specialized expertise that is potentially available to parties through arbitration, there is also the advantage of the transnational nature of arbitration process unlike litigation, and the subsequent nature of ease of enforcement of arbitral awards across borders.

Article 14.1 of 1992 *United Nations Framework Convention on Climate Change* provides that 'in the case of a dispute between two or more Parties concerning the interpretation or application of the Convention, the Parties concerned should seek a settlement of the matter by discussion or any other peaceful measures of their own choice.' Article 14.2(b) envisages the use of arbitration in accordance with procedures to be adopted by the Conference of the Parties as soon as practicable, in an annex on arbitration. Article 19 of *Kyoto Protocol* also provides that "the provisions of Article 14 of the Convention on settlement of disputes shall apply mutatis mutandis to this Protocol". Similarly, Article 24 of the *Paris Agreement*, a legally binding international treaty which entered into force on 4 November 2016, provides that "the provisions of Article 14 of the Convention on settlement of disputes shall apply mutatis mutandis to this Agreement".

While legislators should make climate change policy, courts and arbitral tribunals also have a role to play, as climate change disputes are on the rise and will likely continue to do so in the future, and disagreements over the proper interpretation and application of climate change legislation may arise.⁴⁶

It has been observed that even where international dispute settlement mechanisms exist, they are deemed ineffective due to a lack of mandatory rules or enforcement procedures, so mechanisms like 'international adjudication are unlikely to provide effective relief, either in reducing emissions or compensating victims'.⁴⁷ Arbitration, on the other hand, has huge benefits over litigation in dealing with climate change disputes because arbitrators with the right mix of expertise can be picked, multiparty proceedings can be handled, and the New York Convention on the Enforcement of Arbitral Awards provides certainty pertaining award enforcement.⁴⁸ The

⁴⁵ UNESCO, 'Climate Change Raises Conflict Concerns' (UNESCO, 29 March 2018)

<<https://en.unesco.org/courier/2018-2/climate-change-raises-conflict-concerns>> accessed 11 April 2022.

⁴⁶ 'Resolving Climate Change Disputes through Arbitration' (Pinsent Masons)

<<https://www.pinsentmasons.com/out-law/analysis/resolving-climate-change-disputes-through-arbitration>> accessed 11 April 2022.

⁴⁷ 'LSE Law Review Blog' <<https://blog.lselawreview.com/2022/03/commercial-arbitration-fight-against-climate-change-role-actually-play>> accessed 11 April 2022.

⁴⁸ 'Resolving Climate Change Disputes through Arbitration' (Pinsent Masons)

Permanent Court of Arbitration (PCA) has been noted as a regular forum for dispute resolution under bilateral and multilateral treaties, contracts, and other instruments relating to natural resources and the environment, and provides specialized rules for arbitration and conciliation of these disputes.⁴⁹ Notably, PCA already has in place the *PCA Optional Rules for Arbitration of Disputes Relating to the Environment and/or Natural Resources* (“Environmental Rules”), adopted in 2001⁵⁰, and the Rules are applicable where all parties have agreed in writing that a dispute that may arise or that has arisen between them shall be referred to arbitration under the Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment.⁵¹

It is also worth noting that the PCA Environmental Rules provide for the establishment of a specialized list of arbitrators considered to have expertise in this area, establishment of a list of scientific and technical experts who may be appointed as expert witnesses pursuant to these Rules, and parties to a dispute are free to choose arbitrators, conciliators and expert witnesses from these Panels but with the understanding that the choice of arbitrators, conciliators or experts is not limited to the PCA Panels.⁵²

As a way of supporting and building capacity of States, States, international organizations, and private parties involved in the creation and administration of new, specialized environmental dispute settlement procedures can seek guidance and support from the PCA.⁵³ This is possible considering that the PCA is responsible for resolving disputes between States and non-State players that arise through a variety of bilateral and multilateral investment treaties, contracts, and other instruments.⁵⁴

Just like PCA has special rules for arbitration of environmental and natural resource related disputes, there may be a need, going forward, for both domestic and international institutions (both courts and arbitral institutions) to build capacity in terms of expertise and legal framework in preparation for the climate change related disputes ranging from energy, finance and technology sectors, as follows: Energy – in particular, the transition away from fossil fuels to renewables, and the growth especially of the solar and wind sectors; Finance – carbon trading and green certificates; and Technology – the drive for efficient power grids, as well as low emission

<<https://www.pinsentmasons.com/out-law/analysis/resolving-climate-change-disputes-through-arbitration>> accessed 11 April 2022.

⁴⁹ 'Environmental Dispute Resolution' (Permanent Court of Arbitration, 2022) <<https://pca-cpa.org/en/services/arbitration-services/environmental-dispute-resolution/>> accessed 11 April 2022.

⁵⁰ 'Environmental Dispute Resolution' (PCA Optional Rules for Arbitration of Disputes Relating to the Environment and/or Natural Resources, 2001) <https://docs.pca-cpa.org/2016/01/Optional-Rules-for-Arbitration-of-Disputes-Relating-to-the-Environment-and_or-Natural-Resources.pdf> accessed 11 April 2022.

⁵¹ Article 1 (1), PCA Optional Rules for Arbitration of Disputes Relating to the Environment and/or Natural Resources, 2001.

⁵² 'Panels of Arbitrators and Experts for Environmental Disputes' (Permanent Court of Arbitration, 2022) <<https://pca-cpa.org/en/about/structure/panels-of-arbitrators-and-experts-for-environmental-disputes/>> accessed 11 April 2022.

⁵³ 'Environmental Dispute Resolution' (Permanent Court of Arbitration, 2022) <<https://pca-cpa.org/en/services/arbitration-services/environmental-dispute-resolution/>> accessed 11 April 2022.

⁵⁴ *ibid.*

energy and data storage.⁵⁵ The other areas that may need special attention have already been identified by the International Chamber of Commerce Commission on Environment and Energy task force on “Arbitration of Climate Change Related Disputes” (the “Task Force”) in their 2019 Report titled *Report on Resolving Climate Change Related Disputes through Arbitration and ADR* (the “Report”)⁵⁶ where they observed that a number of specific features of international arbitration that may assist in resolving climate change related disputes going forward include utilization and optimization of: use of and recourse to appropriate scientific and other expertise; existing measures and procedures for expediting early resolution of disputes or providing urgent interim or conservatory relief; integration of climate change commitments and principles of international law, including arising out of the UNFCCC and Paris Agreement; enhanced transparency of proceedings; potential third-party participation, including through amicus curiae briefs; and costs, including advances and allocation of costs, to promote fair, transparent and appropriate conduct of climate change related disputes.⁵⁷

As already observed, Kenya’s Climate Change Act, 2016 does not make reference to the use of ADR mechanisms, including arbitration in addressing disputes that arise therefrom. However, it makes reference to Environment and Land Court Act 2011 (ELC Act) which empowers Environment and Land Court to hear and determine disputes relating to climate issues. The ELC Act, however, gives these courts the power to resort to ADR mechanisms. There is a need for policy makers and other stakeholders to borrow a leaf from the PCA Environmental Rules and the recommendations from the 2019 ICC Task Force Report to consider coming up with special rules and panel of experts that may either address disputes requiring specialized knowledge such as those relating to climate change or those who may offer specialized guidance to courts while dealing with these disputes. Arbitral institutions such as Chartered Institute of Arbitrators and Nairobi Centre for International Arbitration, among others, should also be left behind in building specialized capacity along the same lines. Climate change related disputes are unlikely to go away in the near future and stakeholders should, therefore, prepare adequately.

6. Conclusion

Climate change related disputes come with many implications across all sectors of economy from environmental, political, economic and even social, where they also come with disputes and conflicts. While different approaches to conflict management apply to conflicts and disputes due to the underlying issues therein, this paper has focused on disputes relating to climate change. As already pointed out by various commentators, this paper acknowledges that some of these disputes may be indirectly linked to climate change, which is seen as a multiplier of already existing causative factors. However, the settlement of these disputes may require specialized knowledge, may be of transnational nature and may require coercion in abiding by outcome. This paper argues that these features may not be met through litigation, hence the need to explore arbitration, both domestic and international, in addressing the said disputes.

⁵⁵ ‘Arbitrating climate change disputes | Actualités | DLA Piper Global Law Firm’ (DLA Piper) <<https://www.dlapiper.com/fr/france/insights/publications/2020/01/arbitrating-climate-change-disputes/>> accessed 11 April 2022.

⁵⁶ ‘ICC Arbitration and ADR Commission Report on Resolving Climate Change Related Disputes through Arbitration and ADR’ (ICC - International Chamber of Commerce) <<https://iccwbo.org/publication/icc-arbitration-and-adr-commission-report-on-resolving-climate-change-related-disputes-through-arbitration-and-adr/>> accessed 11 April 2022.

⁵⁷ Report on Resolving Climate Change Related Disputes through Arbitration and ADR, p. 19.

Arguably, putting in place measures meant to address the related disputes is part of the mitigation and adaptation approaches to address climate change since while mitigation and adaptation policies have different goals and opportunities for implementation, many drivers of mitigation and adaptation are common, and solutions can be interrelated.⁵⁸ There is a need for local policy makers and conflict management institutions, including courts and arbitral institutions, to build capacity towards utilizing arbitration in management of climate change related disputes.

⁵⁸Grafakos, S., Pacteau, C., Delgado, M., Landauer, M., Lucon, O., and Driscoll, P. (2018), “Integrating mitigation and adaptation: Opportunities and challenges,” In Rosenzweig, C., W. Solecki, P. Romero-Lankao, S. Mehrotra, S. Dhakal, and S. Ali Ibrahim (eds.), *Climate Change and Cities: Second Assessment Report of the Urban Climate Change Research Network*. Cambridge University Press, New York. 101–138, 102 < https://uccrn.ei.columbia.edu/sites/default/files/content/pubs/ARC3.2-PDF-Chapter-4-Mitigation-and-Adaptation-wecompress.com_.pdf> accessed 7 April 2022.

Transitioning from Fossil Fuel-Based Transport to Clean Energy Vehicles in Africa: Challenges and Prospects

Abstract

Sustainable Development Goal 7 captures the commitments of nations in moving the world towards cleaner energy technologies. One of the greatest threats to this transition, however, is the transport sector especially in Africa which contributes a lot to air pollution as it still relies heavily on fossil fuel which contribute heavily to greenhouse gas emissions. This paper argues that if Africa is to keep up with the rest of the world in this transition, then it is the high time that it invested in electric vehicles in order to address the challenge of fossil fuel pollution sources.

1. Introduction

According to the current trends, the global number of light-duty cars will roughly double by midcentury, owing to increased prosperity, and demand for freight transportation (road, rail, sea, and air) as well as passenger aviation will also increase.¹ It has been argued that the transport sector has the potential to create an enabling environment for Africa's economic progress.² The downside to this is that in Africa, road transport emissions will continue to rise significantly as governments attempt to improve their road infrastructure networks for commercial activity, meeting the demands of a growing population and a growing middle class.³ According to studies, mortality rates from outdoor air pollution in Africa have climbed by 57 percent over the last three decades, with pollution from motor vehicles accounting for at least 85 percent of the continent's vehicle fleet, some of which are antiquated and utilise outdated technologies.⁴

Notably, the Paris Agreement urges countries to increase their mitigation ambition in their Nationally Determined Contributions (NDCs) by reviewing and assessing their ambition and developing long-term low-carbon development policies.⁵ Climate change mitigation requires a shift in production and consumption patterns in order to embrace more sustainable ways.⁶ Notably, transportation is one of the main sectors that plays a critical role in attaining poverty eradication and sustainable development goals, as it is closely linked to and influences the development of other sectors of the economy.⁷ It is against this background that this paper

¹ Creutzig, F., Jochem, P., Edelenbosch, O.Y., Mattauch, L., van Vuuren, D.P., McCollum, D. and Minx, J., 'Transport: A Roadblock to Climate Change Mitigation?' *Science* 350, no. 6263 (2015): 911-912, at 911.

² 'Transforming Africa's Transport Sector with the Implementation of Intended Nationally Determined Contributions' 1 <<https://repository.uneca.org/handle/10855/23728>> accessed 2 February 2022.

³ *Ibid*, 2.

⁴ Ayetor, G. K., Innocent Mbonigaba, M. N. Sackey, and P. Y. Andoh. "Vehicle regulations in Africa: Impact on used vehicle import and new vehicle sales." *Transportation Research Interdisciplinary Perspectives* 10 (2021): 100384.

⁵ 'Road Transport • The Road towards Low Carbon Mobility' <<https://www.climate-change.org/en/card/road-towards-low-carbon-mobility/>> accessed 2 February 2022.

⁶ Weijnen MP, Lukszo Z and Farahani S, 'Shaping an Inclusive Energy Transition' (Springer Nature, 2021).

⁷ "United Nations. Economic Commission for Africa.; United Nations. Economic and Social Council (2009-08). Africa review report on transport: a summary. UN. ECA Committee on Food Security and Sustainable Development (CFSSD)/Regional Implementation Meeting (RIM) for CSD-18 (6th session: 2009, Oct. 27-30: Addis Ababa, Ethiopia).

discusses the challenges and prospects of Africa moving towards adopting low or no emissions transport infrastructure.

2. Fossil Fuel-Based Transport and Climate Change: The Connection

SDG 7 states that increased use of fossil fuels without actions to mitigate greenhouse gases will have global climate change implications. Energy efficiency and increased use of renewables contribute to climate change mitigation and disaster risk reduction.⁸ Vehicle emissions are a major source of tiny particles and nitrogen oxides, both of which contribute to urban air pollution, and cars account for 25% of all energy-related greenhouse gas emissions globally.⁹ Poor fuel quality, an aging vehicle fleet, and a lack of mandatory roadworthy emission tests are all contributing to Africa's rising greenhouse gas emissions, which are expanding at a rate of 7% per year.¹⁰

The global road transport carbon emissions have increased since 2000 as a result of a complex combination of human behavior, economic growth, public policy, and transportation legislation.¹¹ In many African cities and most African countries, the transportation sector is the leading source of urban air pollution and energy-related greenhouse gas emissions.¹² Millions of secondhand cars, vans, and minibuses transported from Europe, the United States, and Japan to low- and middle-income nations are hampering efforts to mitigate climate change, according to a UNEP report released in 2020. They pollute the air and are frequently engaged in car accidents. Many are of poor quality and would fail roadworthiness tests in exporting countries.¹³

Globally, the transportation industry is anticipated to be responsible for roughly 23% of total energy-related carbon dioxide emissions, with the sector developing at a faster rate than most others with emissions expected to double by 2050.¹⁴ Most African countries rely on used and old automobiles that are mainly outdated in technology, harming the environment significantly, especially when using contaminated fuel.¹⁵ Electric vehicles, on the other hand, are rapidly growing in popularity among the countries that export the most used automobiles.¹⁶ For example, Europe, which primarily exports cars to West and North Africa, has announced internal

⁸ Environment UN, 'GOAL 7: Affordable and Clean Energy' (UNEP - UN Environment Programme, 2 October 2017) <<http://www.unep.org/explore-topics/sustainable-development-goals/why-do-sustainable-development-goals-matter/goal-7>> accessed 3 February 2022.

⁹ 'Used Vehicles Get a Second Life in Africa – but at What Cost?' (UNEP, 26 October 2020) <<http://www.unep.org/news-and-stories/story/used-vehicles-get-second-life-africa-what-cost>> accessed 3 February 2022.

¹⁰ Ayetor GK and others, 'Investigating the State of Road Vehicle Emissions in Africa: A Case Study of Ghana and Rwanda' (2021) 11 *Transportation Research Interdisciplinary Perspectives* 100409.

¹¹ 'Road Transport • The Road towards Low Carbon Mobility' <<https://www.climate-chance.org/en/card/road-towards-low-carbon-mobility/>> accessed 2 February 2022.

¹² 'African Countries Move toward Cleaner Car Imports' (Climate & Clean Air Coalition) <<https://www.ccacoalition.org/en/news/african-countries-move-toward-cleaner-car-imports>> accessed 2 February 2022.

¹³ Environment UN, 'Global Trade in Used Vehicles Report' (UNEP - UN Environment Programme, 23 October 2020) <<http://www.unep.org/resources/report/global-trade-used-vehicles-report>> accessed 2 February 2022.

¹⁴ Creutzig, F., Jochem, P., Edelenbosch, O.Y., Mattauach, L., van Vuuren, D.P., McCollum, D. and Minx, J., 'Transport: A Roadblock to Climate Change Mitigation?' *Science* 350, no. 6263 (2015): 911-912.

¹⁵ Ayetor G and others, 'Vehicle Regulations in Africa: Impact on Used Vehicle Import and New Vehicle Sales' (2021) 10 *Transportation Research Interdisciplinary Perspectives* 100384.

¹⁶ 'Africa's Bumpy Road to an Electric Vehicle Future' (E3G, 6 January 2021) <<https://www.e3g.org/news/africa-s-bumpy-road-to-an-electric-vehicle-future/>> accessed 2 February 2022.

combustion engine phase-out targets, and a stronger electrification push is expected across Europe to meet its net zero 2050 goal and stronger new 2030 carbon target, while Japan, the largest exporter of used cars to Mozambique and other right-hand-drive countries in Eastern and Southern Africa, has set a 2035 phase-out date for internal combustion engine cars.¹⁷

While countries across Africa, South Asia, and Latin America are now aware of the consequences of used vehicles and are erecting import barriers to contain them, an outright ban on used vehicle import is not possible in many African countries due to growing consumer demand for cheap used cars, making it difficult for governments to prohibit the import of old cars or impose improved emissions standards even after adopting cleaner fuels.¹⁸ Addressing carbon emissions from the transport industry through adoption of cleaner technologies is one of the steps towards tackling climate change.

3. Transport Sector in Kenya

According to studies, Kenya's transportation sector contributes for 8.3% of the country's total GDP.¹⁹ Because of Kenya's role as a trans-shipment hub for goods moving on to landlocked countries in East and Central Africa, with the Port of Mombasa serving as a critical landing point for goods, and links to the Northern Corridor that runs west across the country to the neighboring markets of Uganda, Rwanda, Burundi, and the Democratic Republic of Congo, transportation and logistics are at the heart of Kenya's economic narrative.²⁰ Furthermore, the road sub-sector accounts for over 80% of passenger traffic and 76 percent of freight, with Kenya's road network estimated to be 160,886 kilometers long, of which 61,945 kilometers are classified, and used by over 740,000 vehicles with a 6% annual traffic growth rate.²¹ The downside is that Kenya's transportation sector is the country's largest consumer of petroleum products and thus a major contributor to GHG emissions, accounting for roughly 67 percent of Kenya's energy-related CO₂ emissions and 11.3 percent of total GHG emissions in 2015 for fuel consumption in civil aviation, road transport, and rail.²² This may have a negative impact on Kenya's contribution to the Paris Agreement's goal of keeping global warming well below 2 degrees Celsius compared to pre-industrial times.²³

Kenya is ranked among the African countries with the highest numbers of imported cars as shown below, as at 2019.

¹⁷ Ibid.

¹⁸ 'Consumer Demand Doesn't Let Countries Ban Import of Cheap Used Cars' <<https://www.downtoearth.org.in/news/governance/consumer-demand-doesn-t-let-countries-ban-import-of-cheap-used-cars-62135>> accessed 2 February 2022.

¹⁹ 'Transport in Kenya's Nationally Determined Contribution' (Changing Transport) 1 <<https://changing-transport.org/publication/transport-in-kenyas-nationally-determined-contribution/>> accessed 26 January 2022.

²⁰ 'Transport' (Oxford Business Group, 21 May 2017) <<https://oxfordbusinessgroup.com/kenya-2017/transport>> accessed 26 January 2022.

²¹ Christopher Onyango, 'Kenya's Transport Sector: Measuring Its Value Chains and Exploiting Its Potential, Mr. Christopher Onyango, KIPPRA' (2019) 4 <https://unctad.org/system/files/non-official-document/aldc2019_kenya_servicetrade_Onyango_KIPPRA_en.pdf> accessed 26 January 2022.

²² 'Transport in Kenya's Nationally Determined Contribution' (Changing Transport) 4 <<https://changing-transport.org/publication/transport-in-kenyas-nationally-determined-contribution/>> accessed 26 January 2022.

²³ Ibid.

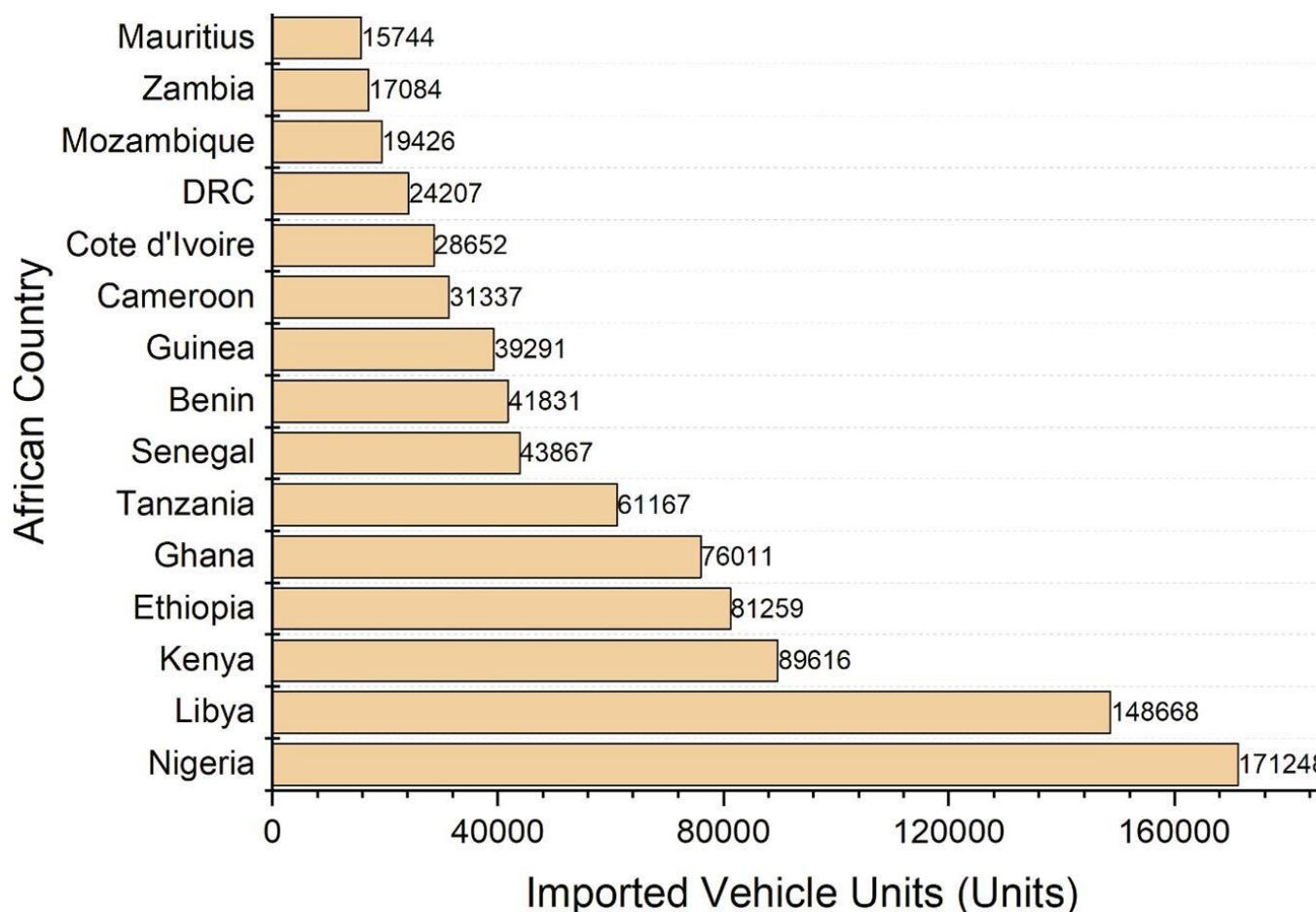


Fig. 1. Number of used vehicle units imported to some African countries in 2019.²⁴ Kenya’s system, thus, requires a transition to more sustainable forms more than ever.

4. Development of Clean Energy Vehicle Technologies: Challenges and Prospects

With the Kigali Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer, which entered into force on January 1, 2019, the world took an important step toward drastically reducing the production and consumption of powerful greenhouse gasses known as hydrofluorocarbons (HFCs) and limiting global warming.²⁵

Only four African countries—Egypt, Morocco, South Africa, and Sudan—have banned the import of old vehicles, with another 25 imposing age limitations ranging from 15 to three years.²⁶ Several countries are combining age restrictions with tax measures to raise the cost of importing

²⁴ Ayetor GK and others, ‘Vehicle Regulations in Africa: Impact on Used Vehicle Import and New Vehicle Sales’ (2021) 10 Transportation Research Interdisciplinary Perspectives 100384. <https://ars.els-cdn.com/content/image/1-s2.0-S2590198221000919-gr5_lrg.jpg> accessed 27 January 2022.

²⁵ ‘World Takes a Stand against Powerful Greenhouse Gases with Implementation of Kigali Amendment’ (UN Environment, 3 January 2019) <<http://www.unep.org/news-and-stories/press-release/world-takes-stand-against-powerful-greenhouse-gases-implementation>> accessed 27 January 2022.

²⁶ ‘Consumer Demand Doesn’t Let Countries Ban Import of Cheap Used Cars’ <<https://www.downtoearth.org.in/news/governance/consumer-demand-doesn-t-let-countries-ban-import-of-cheap-used-cars-62135>> accessed 2 February 2022.

older vehicles, such as Kenya, which, in addition to limiting the age to eight years, has levied an added tax on older vehicles, raising the whole cost.²⁷

The used car market has also hampered the development of a dependable manufacturing industry, with African governments failing to persuade manufacturers to invest in assembly plants, owing to a lack of suppliers, distributors, and component makers, as well as a lack of new vehicle demand.²⁸

SDG 9 calls for construction of new greener infrastructures, retrofitting or reconfiguring existing infrastructure systems and exploiting the potential of smart technologies which can greatly contribute to the reduction of environmental impacts and disaster risks as well as the construction of resilience and the increase of efficiency in the use of natural resources.²⁹

Target 9.a thereof seeks to facilitate sustainable and resilient infrastructure development in developing countries through enhanced financial, technological and technical support to African countries, least developed countries, landlocked developing countries and small island developing States. Equally, SDG 17 envisages that stronger partnerships will contribute to environmental protection and sustainable development by mobilizing resources, sharing knowledge, promoting the creation and transfer of environmentally sound technologies, and building capacity. Countries can build on this to move towards cleaner energy and sustainable transport system.

5. Transitioning from Fossil Fuel-Based Transport to Clean Energy Vehicles in Africa

Reduced emissions in the transportation sector will almost certainly necessitate a move to low-emission vehicles and fuels, with governments taking praiseworthy steps to minimize emissions in the transportation sector through law.³⁰

Energy is regarded as Africa's key to development and the foundation for industrialization, with the expansion of renewables going beyond providing reliable energy and climate protection to promoting economic development, which will benefit and create new jobs and opportunities for entire industries, and reliable, sustainable energy will promote the provision of important basic socioeconomic services.³¹ It has been argued that while a 100 percent renewable economy would provide a long-term answer to climate change, energy security, sustainability, and pollution, converting the current transportation infrastructure appears to be one of the more difficult components of such a sustainable transition.³²

²⁷ Ibid.

²⁸ Alison, 'Are Africa's Used Car Import Bans Effective?' (Global Fleet, 22 June 2021) <<https://www.globalfleet.com/en/safety-environment/africa-middle-east/analysis/are-africas-used-car-import-bans-effective>> accessed 2 February 2022.

²⁹ Environment UN, 'GOAL 9: Industry, Innovation and Infrastructure' (UNEP - UN Environment Programme, 2 October 2017) <<http://www.unep.org/explore-topics/sustainable-development-goals/why-do-sustainable-development-goals-matter/goal-9>> accessed 3 February 2022.

³⁰ Ayetor GK and others, 'Vehicle Regulations in Africa: Impact on Used Vehicle Import and New Vehicle Sales' (2021) 10 Transportation Research Interdisciplinary Perspectives 100384.

³¹ 'The Renewable Energy Transition in Africa: Powering Access, Resilience and Prosperity | Africa Energy Portal' 3 <<https://africa-energy-portal.org/reports/renewable-energy-transition-africa-powering-access-resilience-and-prosperity>> accessed 14 January 2022.

³² Antonio García-Olivares, Jordi Solé and Oleg Osychenko, 'Transportation in a 100% Renewable Energy System' (2018) 158 Energy Conversion and Management 266

While countries are working on adopting use of electric cars, importing countries, on the other hand, require regional coordination on age limits, fiscal measures, pollution rules, and fuel quality. They also need emissions, roadworthiness, and safety inspections, as well as a standardized methodology for vehicle registration and verification. To avoid dieselization, fuel efficiency efforts must be matched with increased emissions restrictions. Several countries that are building their own manufacturing and assembly capacities and enacting restrictive import restrictions must set pollution and safety regulations, as well as quality control for domestic production.³³

5.1 Government's Tax Incentives on Electric Cars

The competition between used and new vehicles is primarily driven by price, and African countries' strategies to close the price gap have included banning the importation of used vehicles and encouraging the establishment of vehicle assembly plants by providing tax breaks and rebates to original equipment manufacturers, resulting in lower new vehicle costs.³⁴

If Kenya and Africa in general is to ensure that their citizens embrace zero emissions vehicles, then they must work towards creating tax incentives on the cost of the vehicles. Rwanda's efforts are commendable, as the government approved an electric mobility adaptation strategy in April 2021, with the goal of increasing electric vehicles and motorcycles. The strategy includes a number of incentives for electric vehicles, plug-in hybrid electric vehicles, and hybrid electric vehicles.³⁵ In order to lower the cost of ownership and maintenance of electric vehicles, the Rwandan cabinet approved a strategy that exempted electric vehicles, spare parts, batteries, and charging station equipment from import and excise duties, as well as a zero-rated Value Added Tax on electric vehicles, spare parts, batteries, and charging station equipment from the ordinary vehicle import taxes of 25% import duty, 18% VAT, and 5% to 15% excise duty.³⁶

While Kenya has made some similar efforts, the rate is so slow and the impact so small that it was previously reported that the Kenyan government aims to increase the uptake of electric vehicles in the country over the next five years, with a goal of having 5% of all registered vehicles in Kenya be electric by 2025, and all new public buildings must have charging stations.³⁷ This is a very low rate of progress considering that it was estimated that as at 2019 the electric vehicle industry in Kenya was still young with only 300 electric vehicles in the country.³⁸ African

<<https://www.sciencedirect.com/science/article/pii/S0196890417312050>> accessed 27 January 2022.

³³ 'Consumer Demand Doesn't Let Countries Ban Import of Cheap Used Cars'

<<https://www.downtoearth.org.in/news/governance/consumer-demand-doesn-t-let-countries-ban-import-of-cheap-used-cars-62135>> accessed 2 February 2022.

³⁴ Ayetor GK and others, 'Vehicle Regulations in Africa: Impact on Used Vehicle Import and New Vehicle Sales' (2021) 10 *Transportation Research Interdisciplinary Perspectives* 100384.

³⁵ 'Rwanda Unveils New Incentives to Drive Electric Vehicle Uptake' (The New Times | Rwanda, 16 April 2021) <<https://www.newtimes.co.rw/news/rwanda-unveils-new-incentives-drive-electric-vehicle-uptake>> accessed 26 January 2022.

³⁶ Ibid.

³⁷ 'Electric Vehicles to Make up 5% of Registered Vehicles in Kenya by 2025 - Kenyan Wallstreet' (28 October 2020) <<https://kenyanwallstreet.com/electric-vehicles-to-make-up-5-of-registered-vehicles-in-kenya-by-2025/>> accessed 26 January 2022.

³⁸ Ibid.

countries thus need to invest more in encouraging production and uptake of electric vehicles to enable them eventually get rid of internal combustion engine vehicles.

5.2 Adopting and Implementing Vehicles Standards in Africa

It has been observed that the different enforcement and testing regimes of world vehicle standards have made it difficult for Africa to adopt a unified vehicle standard, despite the fact that a unified vehicle standard has become even more necessary with the introduction of the African Continental Free Trade Area (AfCFTA), which should facilitate free vehicle trade across the continent.³⁹ At the moment, African countries are at various stages of adopting vehicle standards, with the African Organization for Standardization (ARSO) kicking off the development of a regulatory framework for the continent's automotive sector, with the only roadblocks being poor fuel quality, low consumer purchasing power, and a lack of data on used vehicle import.⁴⁰ There is also hope as Kenya banned used automobile imports older than eight years old in 2015, Tanzania charges an extra excise duty on used vehicles eight years old or older (counted from the year of production), and the entire East African Community began to apply standardised depreciation rates to these imports.⁴¹ There is a continuous need for African countries to explore frameworks such as AfCFTA to move the continent towards achieving verifiable vehicle standards.

5.3 Public-Private Partnerships for Funding, Research and Development and Operation of Electric Vehicles Infrastructure

Notably, worldwide vehicle legislation depends entirely on technology to reduce harmful emissions.⁴² It has been correctly stated that the public and private sectors must collaborate openly, and state transportation agencies must remember their true purpose, which is to efficiently and effectively connect a region in a way that is inclusive of all parties who will be reliant on transportation infrastructure.⁴³ In other countries, such as the United States, the Department of Energy (DOE) collaborates with public and private sector partners to study, develop, and deploy technologies that improve the performance of electric vehicles.⁴⁴

Notably, the construction and operation of a suitable electric vehicle charging infrastructure are prerequisites for the development and sustained operation of electric vehicles, as well as being important strategic measures for promoting a revolution in energy consumption and green development and as such, in order to promote the development of electric vehicles, it may be useful to offer these services to mobilize initiatives by the government and market, where the government may play a leading role in infrastructure construction according to the public–private partnership (PPP) model, to share risks and achieve a win–win situation if the public and private sectors engage in clear communication and reach agreements about how social capital can be

³⁹ Ayetor GK and others, 'Vehicle Regulations in Africa: Impact on Used Vehicle Import and New Vehicle Sales' (2021) 10 *Transportation Research Interdisciplinary Perspectives* 100384.

⁴⁰ *Ibid.*

⁴¹ 'African Countries Move toward Cleaner Car Imports' (Climate & Clean Air Coalition) <<https://www.ccacoalition.org/en/news/african-countries-move-toward-cleaner-car-imports>> accessed 2 February 2022.

⁴² Ayetor GK and others, 'Vehicle Regulations in Africa: Impact on Used Vehicle Import and New Vehicle Sales' (2021) 10 *Transportation Research Interdisciplinary Perspectives* 100384.

⁴³ Callaway M, 'Transport in Kenya: Creating a More Efficient Network through Public-Private Partnerships', 7.

⁴⁴ 'Alternative Fuels Data Center: Electric Vehicle Research and Development' <https://afdc.energy.gov/fuels/electricity_research.html> accessed 26 January 2022.

guided to participate actively in the provision of public goods and services.⁴⁵ Such collaborations are important if the continent is to achieve its dream of transitioning to electric vehicles.

6. Conclusion

Africa is considered the last frontier in the automotive industry, and it is expected to be the last to transition from fossil fuels to electric vehicles. As a result, it is critical that clean mobility become a priority immediately.⁴⁶ Because of high rates of urbanization and economic growth, the continent is experiencing an unprecedented rate of motorization, and as a result, most countries in the region are unable to plan and provide adequate transportation infrastructure and services, as well as take advantage of technological advancements seen in other regions to improve energy efficiency and reduce vehicle emissions.⁴⁷ In the fields of environment and transportation, there is a need for governments, the private sector, civil society, and development to collaborate, as this will allow the continent to develop a set of measures to move to cleaner mobility, based on good practices and case studies from within and outside the region.⁴⁸ Notably, SDG 17 provides that achieving the ambitious targets of the 2030 Agenda requires a revitalized and enhanced global partnership that brings together Governments, civil society, the private sector, the United Nations system and other actors, mobilizing all available resources.⁴⁹

With global automobile markets rapidly shifting due to a mix of technological advancements, rapidly falling costs, and technological advancements, the African continent may have an opportunity to adopt electric mobility as a more sustainable means of transportation.⁵⁰ Through targeted regulatory reforms, strategic international cooperation and public-private partnerships, Africa is capable of investing and achieving the global dream of transitioning to hybrid and electric vehicles and modes of transport as part of the larger agenda of achieving sustainability in all sectors of economy and combating climate change.

⁴⁵ Tong Yang and others, 'Innovative Application of the Public-Private Partnership Model to the Electric Vehicle Charging Infrastructure in China' (2016) 8 Sustainability 738, 738 <<https://www.mdpi.com/2071-1050/8/8/738>> accessed 27 January 2022.

⁴⁶ Ayetor GK and others, 'Investigating the State of Road Vehicle Emissions in Africa: A Case Study of Ghana and Rwanda' (2021) 11 Transportation Research Interdisciplinary Perspectives 100409.

⁴⁷ 'Africa Clean Mobility Week' (UNEP - UN Environment Programme) <<http://www.unep.org/events/conference/africa-clean-mobility-week>> accessed 2 February 2022.

⁴⁸ Ibid.

⁴⁹ Environment UN, 'GOAL 17: Partnerships for the Goals' (UNEP - UN Environment Programme, 2 October 2017) <<http://www.unep.org/explore-topics/sustainable-development-goals/why-do-sustainable-development-goals-matter/goal-17>> accessed 3 February 2022.

⁵⁰ 'Africa's Bumpy Road to an Electric Vehicle Future' (E3G, 6 January 2021) <<https://www.e3g.org/news/africa-s-bumpy-road-to-an-electric-vehicle-future/>> accessed 2 February 2022.

Fostering a Human Rights Approach to Biodiversity Conservation in Kenya

Abstract

This paper explores the linkages between human-rights approaches to conservation and biodiversity conservation. The author argues that environmental resources conservation measures should not only consider the needs of the communities who mainly rely on such resources but should also create opportunities for such communities to actively participate in such efforts through environmental democracy, especially in the case of biological diversity conservation.

1. Introduction

Biological diversity is a term used to refer to the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part: this includes diversity within species, between species and of ecosystems.¹ These resources play a huge role in not only facilitating environmental processes but also in provision of ecosystem resources for all living organisms, including human beings.² Arguably, if the world is to achieve the sustainable development goals, then the conservation of these resources must be treated with urgency and it also calls for the concerted efforts of all stakeholders and cooperation from all countries, at least at the international level. The world must address the human activities that have been contributing to the degradation of these resources.³

The need for this cooperation was born out of the fact that ‘the responsibility for biodiversity conservation has traditionally been seen as a function of government and, particularly, of its environment departments and conservation agencies, where Non-governmental organisations, local communities and other interest groups have supported this role by championing specific environmental issues and conversely, business and industry are typically regarded as competitors to environmental causes, needing land and resources for production’.⁴ However, it is now a non-contentious position that ‘biodiversity is considered to be an essential component for sustainable development and human well-being, which underpins the provision of food and water; mitigates and provides resilience to climate change; supports human health, and provides jobs in agriculture, fisheries, and forestry, among other sectors.’⁵ This, therefore, not only affirms the need for biodiversity conservation for sustainable development but also the need for participation of all persons and players, especially citizens through enhanced Environmental Democracy. Indeed, the Constitution of Kenya 2010 creates an opportunity for the participation of all citizens in environmental management and conservation by providing that ‘every person has a duty to

¹ Article 2, United Nations, Convention on Biological Diversity of 5 June 1992 (1760 U.N.T.S. 69).

² United Nations Development Programme. "The future we want: Biodiversity and ecosystems—driving sustainable development." (2012),1.

³ Ibid.

⁴ Ginsburg, A., Stephens, A., Tau, M., Botts, E., & Holness, S., ‘Biodiversity Mainstreaming in South Africa’s Production Landscapes: Lessons and Achievements’ [2020] International Grassland Congress Proceedings <<https://uknowledge.uky.edu/igc/22/2-15/1>> accessed 24 July 2021.

⁵ United Nations, “Biodiversity at the Heart of Sustainable Development”, Input to the 2018 High-level Political Forum on Sustainable Development (HLPF), Secretariat of the Convention on Biological Diversity (CBD), 27 April 2018, 1.

Fostering a Human Rights Approach to Biodiversity Conservation in Kenya

cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources'.⁶ While the wording of the above provision maybe debatable in creating a right to participate in environmental decision-making processes, the same can borrow credence from other provisions on the principles of public participation and it is a commendable step towards promoting Environmental Democracy in biodiversity conservation.

It is worth pointing out that globally, early environmental conservation and natural resource management initiatives concentrated on improving water and land management, by the 1980s, there had been a shift in country-level's environmental focus to integrate biodiversity conservation into mainstream development processes, with an emphasis on production sector projects, national and sub-national policy and planning, institutional development, and disaster risk reduction.⁷

This paper discusses the linkages between Human Rights, Environmental Democracy and Biodiversity Conservation, some of the challenges affecting the environment with a bias on biodiversity conservation, and offers recommendations on effective conservation of biodiversity resources for a better future for both the human community and the environment, using rights-based approaches. It also discusses the place of Environmental Democracy as a tool for promoting active and meaningful participation of communities in the conservation efforts, in a bid to strike a balance between ecocentric and anthropocentric approaches in biodiversity conservation.

It has been argued that the key to sustainable development is achieving a balance between the exploitation of natural resources for economic development and conserving ecosystem services that are critical to everyone's wellbeing and livelihoods.⁸ This paper offers some recommendations on how countries, and Kenya in particular, can achieve sustainable development agenda through promoting Environmental Democracy and enhancing biodiversity conservation which is a prerequisite to not only healthy environment but also important for replenishing the ecosystem services which meet the basic human needs as captured in the United Nations 2030 Agenda for Sustainable Development Agenda.

2. Defining Environmental Democracy and Biodiversity Conservation: The Linkage

Environmental Democracy is an important component in realisation of environmental rights in that it seeks to ensure that environmental and natural resources management decisions take into consideration and equitably address the concerns of citizens in relation to those resources, through promoting free access to meaningful information on environmental quality and problems by affected people, to enable their meaningful participation in decision-making, and empowering them to seek enforcement of environmental laws or compensation for damages.⁹ Notably, the

⁶ Article 69(2), Constitution of Kenya 2010.

⁷ United Nations Development Programme, 'The Future We Want: Biodiversity and Ecosystems—Driving Sustainable Development.' (Biodiversity and ecosystems global framework 2012–2020, 2012), 9-10.

⁸ McCartney, M., Finlayson, M., de Silva, S., Amerasinghe, P., & Smakhtin, V., 'Sustainable Development and Ecosystem Services'. Sustainable development and ecosystem services (No. 612-2016-40661).

⁹ Peeters M, 'Judicial Enforcement of Environmental Democracy: Critical Analysis of Case Law on Access to Environmental Information in the European Union' (2020) 4 Chinese Journal of Environmental Law 13.

Fostering a Human Rights Approach to Biodiversity Conservation in Kenya

concept of Environmental Democracy is informed by the idea ‘that an informed and legally empowered citizen is the most important aspect of environmental democratisation’.¹⁰ The concept of Environmental Democracy thus emerged to promote and ensure public engagement in governmental environmental decision-making.¹¹ Arguably, people have a right to obtain information upon request, and to be informed of planned projects, developments or other initiatives which will affect them, their environment or their natural resources through Free, Prior And Informed Consent (FPIC), under which duty bearers are expected to obtain the agreement for specific activities from an appropriate entity (rights holders), following a consultative process involving full disclosure of all relevant information, sufficiently in advance of the activities commencing, and without coercion or manipulation.¹² The principle of FPIC also extends to the use of indigenous knowledge and practices relating to the environment, and the sharing of any resulting benefits.¹³

The idea finds credence in Article 1 of the *Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* and Principle 10 of the 1992 *Rio Declaration on Environment and Development* which provides that: “environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”¹⁴

It has, however, been argued that while concepts of ecological and Environmental Democracy seek to reconcile two normative ideals: ensuring environmental sustainability while safeguarding democracy, these ideals are frequently conceived as being in conflict, as democracy is perceived as too slow and cumbersome to deliver the urgent large-scale collective action needed to tackle environmental problems.¹⁵ The perceived conflict is based on the assertion that, on the one hand, if citizens accord low priority to ecological values, efforts to strengthen environmental protection and sustainability through democratic processes may falter, and on the other hand, securing environmental values through authoritarian rule comes at a high democratic price.¹⁶ The

¹⁰ See Parola G, *Environmental Democracy at the Global Level: Rights and Duties for a New Citizenship* (Walter de Gruyter 2013), 50.

¹¹ Peeters M, ‘Judicial Enforcement of Environmental Democracy: Critical Analysis of Case Law on Access to Environmental Information in the European Union’ (2020) 4 *Chinese Journal of Environmental Law* 13, 14.

¹² BirdLife International, International B, ‘An Introduction to Conservation and Human Rights for BirdLife Partners’, 8.

¹³ *Ibid.*, 8.

¹⁴ Peeters M, ‘Judicial Enforcement of Environmental Democracy: A Critical Analysis of Case Law on Access to Environmental Information in the European Union’ (2020) 4 *Chinese Journal of Environmental Law* 13

¹⁵ Pickering J, Bäckstrand K and Schlosberg D, ‘Between Environmental and Ecological Democracy: Theory and Practice at the Democracy-Environment Nexus’ (2020) 22 *Journal of Environmental Policy & Planning* 1.

¹⁶ *Ibid.*, 1.

Fostering a Human Rights Approach to Biodiversity Conservation in Kenya

Convention on Biological Diversity (CBD) Aichi Target 1 requires that “by 2020, at the latest, people are aware of the values of biodiversity and the steps they can take to conserve and use it sustainably”.¹⁷

Notably, ecological democracy seeks environmentally sustainable ends through broad, active democratic participation.¹⁸ As a result, national political institutions constitute an important arena for biodiversity conservation.¹⁹ It has been observed that while the proximate drivers of biodiversity loss such as habitat loss, climate change, overexploitation, and invasive species are relatively well-mapped, one of the causes to those triggers is countries’ institutional set-ups and thus, the formal and informal rules shaping the decision-making and the implementation of biodiversity management are considered to be paramount.²⁰

The right to participation refers to the procedural right to have a say in the decisions that are made, where there exists a gradient in the level of participation in decision-making, from simple ‘consultation’ to active partnership of stakeholders in project conception, design, implementation, monitoring and evaluation; and from ‘limited’ participation to ‘full and effective participation’ of ‘all relevant stakeholders’ with special attention given to the most vulnerable groups, minorities and those sectors of society that are underrepresented.²¹ The participation of the people in biodiversity conservation is important considering that actions to conserve nature and natural resources are closely related to the rights of people to secure their livelihoods, enjoy healthy and productive environments and live with dignity and as a result, the pursuit of conservation goals can contribute positively to the realization of many fundamental human rights.²² There is thus, a need for States to continue establishing effective legal and institutional frameworks to protect biodiversity, and to conduct social and environmental assessments of projects and policies and to facilitate public participation in conservation decisions.²³ Environmental Democracy is associated with on transparency, participation, and justice and as a result, it is considered to be more participatory and inclusive and provides opportunities for everyone, including those in the most marginalised positions to participate in decision-making.²⁴

¹⁷ Unit B, ‘Aichi Biodiversity Targets’ (18 September 2020) <<https://www.cbd.int/sp/targets/>> accessed 8 September 2021.

¹⁸ Takacs D, ‘Whose Voices Count in Biodiversity Conservation? Ecological Democracy in Biodiversity Offsetting, REDD+, and Rewilding’ (2020) 22 *Journal of Environmental Policy & Planning* 43.

¹⁹ Rydén O and others, ‘Linking Democracy and Biodiversity Conservation: Empirical Evidence and Research Gaps’ (2020) 49 *Ambio* 419.

²⁰ *Ibid*, 419.

²¹ BirdLife International, International B, ‘An Introduction to Conservation and Human Rights for BirdLife Partners’, 8.

²² Springer J, Campese J and Painter M, ‘Conservation and Human Rights: Key Issues and Contexts. Scoping Paper for the Conservation Initiative on Human Rights’ [2011] Unpublished report. Conservation Initiative on Human Rights Working Group, 5.

²³ See Bigard C, Pioch S and Thompson JD, ‘The Inclusion of Biodiversity in Environmental Impact Assessment: Policy-Related Progress Limited by Gaps and Semantic Confusion’ (2017) 200 *Journal of environmental management* 35.

²⁴ ‘Will Democracy Save Us from the Biodiversity Crisis?’ (Demo Finland, 27 November 2020) <<https://demofinland.org/en/will-democracy-save-us-from-the-biodiversity-crisis/>> accessed 9 September 2021.

Fostering a Human Rights Approach to Biodiversity Conservation in Kenya

2.1 Linking Environmental Democracy and Biodiversity Conservation

Notably, the close relationship between environmentalism and liberal democracy are now internationally recognised in a range of international declarations and agreements which include: principle 10 of the 1992 Rio Declaration which calls for access to environmental information, public participation in decision-making, and access to justice on environmental matters; in the *Aarhus Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters 1998*; in the *United Nations Environment Program's Bali Guidelines* (UNEP 2010) and the *Environmental Democracy Index* (DICE Database 2016), an online platform that tracks and compares the state performance according to a set of indicators based on access to environmental information, the right to participate in decision-making, and the right to seek enforcement of environmental laws and/or compensation and redress for environmental harm.²⁵

Several commentators have made attempts at linking democracy and biodiversity conservation. One such commentator argues that 'national political institutions constitute an important arena for biodiversity conservation' since 'the national management of biodiversity is part of decision-making in the political system, where variation in the political institutions (i.e. being more or less democratic) that structure the selection of decision-makers, and the processes of decision-making, should be expected to impact the success of biodiversity conservation across countries.'²⁶ The impact of political institutions on biodiversity conservation is pegged on the fact 'national governments are the main actors responsible for mapping and protecting their biodiversity, but countries differ in their capacity, willingness, and effectiveness to do so'.²⁷

It has rightly been pointed out that '*proponents of Environmental Democracy are friendly critics of liberal democracy who seek to work with, and revitalise, the norms and institutions of liberal democracy to bring about environmental change. They seek greater transparency and accountability of policymakers to publics, including neglected communities suffering environmental injustices. They seek to make the most of the civil and political rights that are protected in liberal democracies by fostering greater public awareness of ecological problems and their consequences, greater public engagement and participation in environmental policy and rule-making in all branches of government, including the courts*'.²⁸

In the Kenyan case of *Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR*²⁹, a four-judge High Court bench pointed out the following in relation to the concept of Environmental Democracy:

109. In addition to the above, one of the issues implicated in this Petition is what is now generally recognized *minimum requirements for existence of Environmental Democracy, namely, "the*

²⁵ Eckersley R, 'Ecological Democracy and the Rise and Decline of Liberal Democracy: Looking Back, Looking Forward' (2020) 29 Environmental Politics 214.

²⁶ Rydén, O., Zizka, A., Jagers, S. C., Lindberg, S. I., & Antonelli, A., 'Linking Democracy and Biodiversity Conservation: Empirical Evidence and Research Gaps' (2020) 49 Ambio 419.

²⁷ Klein, J., Aronsson, H., Perrigo, A., Silvestro, D., Jagers, S. C., Lindberg, S. I., & Antonelli, A., 'Exploring the Impact of Political Regimes on Biodiversity' (2020) 98 V-Dem Working Paper.

²⁸ Eckersley R, 'Ecological Democracy and the Rise and Decline of Liberal Democracy: Looking Back, Looking Forward' (2020) 29 Environmental Politics 214.

²⁹ Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR, Petition 22 of 2012.

Fostering a Human Rights Approach to Biodiversity Conservation in Kenya

tripartite of the so-called access rights in environmental matters, namely, (a) access to information, (b) participation in decision-making, and (c) access to justice."^[53] These three access rights have the common denominator that they empower individuals to have a meaningful voice in decisions that affect them and their development. The Constitution of Kenya and Environmental Law recognizes these three access rights.

110. As pointed out later in this judgment, the above rights are also intertwined in that achievement and application of each impact on realization of the others. For instance, access to information ensures that all persons who choose to participate in environmental decision-making are equipped with the necessary, or at least, basic facts about quality of their environment and their legitimate expectation on the same.^[54]

111. Thus, violation of rights to a clean and healthy environment can easily lead to the violation of other rights in the Bill of Rights such as the right to life. Yet, the determination of violations or threats of violation of any rights in the Bill of Rights undoubtedly falls within the province of this Court.

112. It is also correct to state that Environmental Law has been described as Administrative Law in action,^[55] for the reason that environmental conflicts often depend on the exercise of administrative decision-making powers. Such powers, if not properly exercised can be challenged by way of a Constitutional petition which is also within the jurisdiction of this Court.

113. Where such failures occur, the citizens have a right to move to Court to seek appropriate reliefs such as prohibition, *mandamus*, *certiorari*, declaration of unconstitutionality, Judicial Review, or otherwise of the challenged decisions, damages or any other relief that the Court may deem just and appropriate.

.....

215. It may be tempting to ask why the law and indeed the Constitution generally imposes this duty of public participation yet the State is generally a government for and by the people. The people elect their representative and also participate in the appointment of most, if not all public officers nowadays. The answer is, however, not very far. Our democracy contains both representative as well as participatory elements which are not mutually exclusive but supportive of one another. The support is obtained even from that singular individual.

216. We also have no doubt that our local jurisprudence deals at length with why the Constitution and statute law have imposed the obligation of public participation in most spheres of governance and generally we take the view that it would be contrary to a person's dignity (see Article 28) to be denied this constitutional and statutory right of public participation.

The foregoing excerpt cements the importance of fostering Environmental Democracy as a step towards achieving biodiversity conservation, and ultimately demonstrates the important role that [environmental] human rights can play in achieving biodiversity conservation. The link between Environmental Democracy and biodiversity conservation has also been said to be important in poverty eradication and the preamble of the CBD indeed acknowledges that "economic and social

Fostering a Human Rights Approach to Biodiversity Conservation in Kenya

development and poverty eradication are the first and overriding priorities of developing countries” (United Nations 1993).³⁰ While there are still contentions on the nature of the links between the biodiversity conservation and poverty alleviation, what is clear, however, is that if biodiversity and ecosystem services continue to be depleted, their potential to not only contribute to poverty alleviation but also act as a safety net for the poor especially in rural areas will be greatly affected.³¹

3. A Human Rights Approach to Biodiversity Conservation

Due to the increasingly important role of the environment and its resources in the realization of international human rights, the connection between human rights and environmental law has received increasing attention at the international and regional legal frameworks.³²

As such, there has been an increased call for adoption of a rights-based approach to environmental conservation in order to strike a balance between environmental protection and realization of basic human rights.³³ Indeed, this seems to be the approach adopted in the drafting and implementation of sustainable development goals which seek to strike a balance among environmental

³⁰ Roe, Dilys, "Linking biodiversity conservation and poverty alleviation: a state of knowledge review." CBD Technical Series 55 (2010), 9 < <https://www.cabdirect.org/cabdirect/abstract/20103329917>> Accessed 30 July 2021.

³¹ Roe, Dilys, "Linking biodiversity conservation and poverty alleviation: a state of knowledge review." CBD Technical Series 55 (2010), 13,49; Adams WM and Hutton J, 'People, Parks and Poverty: Political Ecology and Biodiversity Conservation' (2007) 5 Conservation and Society 147; Suich H, Howe C and Mace G, 'Ecosystem Services and Poverty Alleviation: A Review of the Empirical Links' (2015) 12 Ecosystem Services 137; Adams W and others, 'Biodiversity Conservation and the Eradication of Poverty' (2004) 306 Science (New York, N.Y.) 1146; Billé R, Lapeyre R and Pirard R, 'Biodiversity Conservation and Poverty Alleviation: A Way out of the Deadlock?' [2012] S.A.P.I.EN.S. Surveys and Perspectives Integrating Environment and Society <<https://journals.openedition.org/sapiens/1452>> accessed 15 September 2021; Barrett CB, Travis AJ and Dasgupta P, 'On Biodiversity Conservation and Poverty Traps' (2011) 108 Proceedings of the National Academy of Sciences of the United States of America 13907.

³² Philippe Cullet, 'Definition of an Environmental Right in a Human Rights Context' (1995) 13 Netherlands Quarterly of Human Rights 25; Osmani SR, 'The Human Rights Approach to Poverty Reduction' [2010] Freedom from Poverty as a Human Right 85; Clark C, 'Does the Human Right to Water Address the Gendered Nature of Water Poverty' (2015) 24 Hum. Rts. Defender 31; Prior TL and Heinämäki L, 'The Rights and Role of Indigenous Women in Climate Change Regime' (2017) 8 Arctic Review.

³³ Thomas Greiber, Melinda Janki and Marcos A Orellana, Conservation with Justice: A Rights-Based Approach (IUCN 2009); Sébastien Jodoin, Annalisa Savaresi and Margaretha Wewerinke-Singh, 'Rights-Based Approaches to Climate Decision-Making' (2021) 52 Current Opinion in Environmental Sustainability 45; Tauli-Corpuz, V., Alcorn, J., Molnar, A., Healy, C., & Barrow, E., 'Cornered by PAs: Adopting Rights-Based Approaches to Enable Cost-Effective Conservation and Climate Action' (2020) 130 World Development; Willmann, R., Franz, N., Fuentevilla, C., McNerney, T. F., & Westlund, L., 'A Human Rights-Based Approach to Securing Small-Scale Fisheries: A Quest for Development as Freedom' [2017] The small-scale fisheries guidelines 15; Gina Zheng, 'Human Rights for Conservation: A Rights-Based Approach to Fisheries Governance' (2018) 43 Alternative Law Journal 55; Mohamed Behnassi, 'Mainstreaming a Rights-Based Approach in the Global Climate Regime', Human and Environmental Security in the Era of Global Risks (Springer 2019); Sébastien Jodoin, Kathryn Hansen and Caylee Hong, 'Displacement Due to Responses to Climate Change: The Role of a Rights-Based Approach', Research handbook on climate change, migration and the law (Edward Elgar Publishing 2017); Khondokar H Kabir, Andrea Knierim and Ataharul Chowdhury, 'No Forest, No Dispute: The Rights-Based Approach to Creating an Enabling Environment for Participatory Forest Management Based on a Case from Madhupur Sal Forest, Bangladesh' (2021) 64 Journal of Environmental Planning and Management 22; Oluwabunmi Lucy Niyi-Gafar, 'Adopting a Human Rights-Based Approach to Access to Water in Nigeria: Lessons from Selected Jurisdictions' (PhD Thesis, University of Pretoria 2017).

Fostering a Human Rights Approach to Biodiversity Conservation in Kenya

conservation, economic development and human rights protection.³⁴ For instance, people participation in natural resources management is seen as an important step towards eradicating abject poverty, a sustainable development goal 1 (SDG 1), where some authors have argued that decentralised natural resource management is a potential way in which rural people can generate money and manage resources sustainably.³⁵ Poverty is a major contributing factor to insecurity and instability especially in the rural areas where communities mainly rely on scarce land based natural resources which are affected by climate change and population growth, among others. It has been observed that ‘rural poverty can be caused by a combination of: living and farming in unfavourable conditions (climate, soils, access to markets, small land holdings); lack of resource access rights, legal protection or recognition; lack of ecosystem services (provisioning, regulating, cultural/spiritual, regenerative); lack of income opportunities (on- or off-farm) in local economies; and lack of investment in the (few) opportunities that exist for market-based ventures.’³⁶

As a result, it has been observed that the adoption of rights-based approaches in development work – that is, approaches that are informed and guided by the framework of international human rights law, and the values that underpin it – has had a significant impact on the ways in which development agencies operate.³⁷ It is possible to have investments in the name of development that do not meet the needs or respect the human rights of poor or marginalised communities where these local communities can be affected both by the lack of consultation and participation and by the negative impact such projects have on the environment and their livelihoods.³⁸

A rights-based approach, it has been observed, encourages responsible actions mindful of the rights of others, and of obligations to help respect, protect and promote the enjoyment of those rights, also contribute to building a climate of transparency and accountability that enhances the opportunities for long-term conservation.³⁹ It is, therefore, arguable that while participation means that people are closely involved in the economic, social, cultural and political processes that affect their lives, it may mean complete and direct control over these processes, or, partial or indirect; the most important thing being that people have constant access to decision-making and power.⁴⁰

³⁴ Daniela García Villamil, ‘Indigenous Self-Determination and the Human-Rights Based Approach to Sustainable Development: Potentials and Limitations’ (2021); Annelie de Man, ‘The Sustainable Development Goals and the Rights-Based Approach to Development: Compatible or Missing the Point’ (2019) 19 Afr. Hum. Rts. LJ 445; Patrick Toussaint and Adrian Martinez Blanco, ‘A Human Rights-Based Approach to Loss and Damage under the Climate Change Regime’ (2020) 20 Climate policy 743; UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1.

³⁵ Dan Brockington, Jim Igoe and KAI Schmidt-Soltau, ‘Conservation, Human Rights, and Poverty Reduction’ (2006) 20 Conservation Biology 250.

³⁶ Meine van Noordwijk, ‘Integrated Natural Resource Management as Pathway to Poverty Reduction: Innovating Practices, Institutions and Policies’ (2019) 172 Agricultural Systems 60, 61.

³⁷ ‘Rights-Based Approaches’ (GSDRC)

<<https://gsdrc.org/topic-guides/human-rights/rights-based-approaches/>> accessed 22 July 2021.

³⁸ ‘Business & Human Rights | Protection International’ <<https://www.protectioninternational.org/en/our-work/what/business-human-rights>> accessed 24 July 2021.

³⁹ Springer J, Campese J and Painter M, ‘Conservation and Human Rights: Key Issues and Contexts. Scoping Paper for the Conservation Initiative on Human Rights’ [2011] Unpublished report. Conservation Initiative on Human Rights Working Group, 6.

⁴⁰ "UNDP. 1993. Human Development Report 1993, 21.

Fostering a Human Rights Approach to Biodiversity Conservation in Kenya

Article 21(1) of the *United Nations Universal Declaration of Human Rights*⁴¹ guarantees that everyone has the right to take part in the government of his country, directly or through freely chosen representatives. Article 22 thereof also guarantees that everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality. Notably, measures for the conservation of biodiversity and the sustainable use of ecosystems very often require changes in the way natural resources are managed, affecting how, when, how much and by whom natural resources, ecosystem services and biodiversity are used. Based on the links between human rights and the environment, steps taken to conserve biodiversity can affect peoples' rights in positive ways.⁴²

Under the Constitution of Kenya 2010, the devolved system of governance was meant to, *inter alia*, promote democratic and accountable exercise of power, and foster national unity by recognising diversity; give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them; recognise the right of communities to manage their own affairs and to further their development; facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya, Nairobi; and enhance checks and balances and the separation of powers.⁴³ While devolution has achieved commendable steps towards attaining equality and equity within the rural Kenya⁴⁴, the poverty levels and social, political and economic inequalities in the country are still high.⁴⁵ Rampant corruption and misallocation of political and economic resources in Kenya and especially at the county levels of governance may be some of the main factors that may be contributing to the slow pace of poverty alleviation despite the proximity of the rural areas to the devolved governance.⁴⁶

There is need for stakeholders to go back to the drawing board on why devolution was introduced by the drafters of the Constitution while also ensuring that the national values and principles of governance are applied and upheld at both levels of governance, and these include: a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; (c) good governance, integrity, transparency

<http://www.hdr.undp.org/en/reports/global/hdr1993>."

⁴¹ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

⁴² BirdLife International, 'An Introduction to Conservation and Human Rights for BirdLife Partners', 13.

⁴³ George Nyabuga, 'Devolved Power: A Critical Interrogation of the Place, Roles and Obligations of the Media at the Grassroots in Kenya' (2017) 42 *Africa Development / Afrique et Développement* 105, 107.

⁴⁴ Michelle D'Arcy, 'Kenya Illustrates Both the Promise as Well as the Pitfalls of Devolution' (The Conversation) <<http://theconversation.com/kenya-illustrates-both-the-promise-as-well-as-the-pitfalls-of-devolution-96729>> accessed 8 May 2021.

⁴⁵ Brendon J Cannon and Jacob Haji Ali, 'Devolution in Kenya Four Years On: A Review of Implementation and Effects in Mandera County' (2018) 8 *African Conflict and Peacebuilding Review* 1.

⁴⁶ Brendon J Cannon and Jacob Haji Ali, 'Devolution in Kenya Four Years On: A Review of Implementation and Effects in Mandera County' (2018) 8 *African Conflict and Peacebuilding Review* 1; George Nyabuga, 'Devolved Power: A Critical Interrogation of the Place, Roles and Obligations of the Media at the Grassroots in Kenya' (2017) 42 *Africa Development / Afrique et Développement* 105.

Fostering a Human Rights Approach to Biodiversity Conservation in Kenya

and accountability; and (d) sustainable development.⁴⁷ This is especially important considering that integration of human rights into conservation matters also introduces new elements to conservation practice, particularly related to: grounding in defined standards, especially based on international human rights frameworks, and relationships of accountability between “rights-holders” and “duty bearers”.⁴⁸ Devolution can go a long way in encouraging Environmental Democracy and the realisation of Article 69 of the Constitution of Kenya 2010, which not only spells out the obligations of the State as a “duty-bearer”⁴⁹ but also those of citizens as both “rights-holders” and “duty bearers”.⁵⁰ Notably, human rights entail both rights and obligations, with States (duty bearers) assuming obligations and duties under international law to respect, to protect and to fulfill human rights (of rights holders), and at the individual level while we are entitled our human rights, we (and organisations) should also respect the human rights of others.⁵¹ Refraining from engaging in anthropogenic activities that adversely biological diversity is part of exercising this responsibility as such activities would negatively affect nature’s ability to meet the needs of other human beings, both current and in future.

4. Fostering A Human Rights Approach to Biological Diversity Conservation in Kenya

Conservation of biodiversity and natural resources can help create environments that provide sustainable supplies of the goods and services necessary for healthy, fulfilled and dignified lives – helping to fulfil people’s right to development and to life and livelihood.⁵² This section offers some recommendations on some viable rights-based approaches that can foster countries’ efforts to achieve the twin goals of biodiversity conservation and promotion of human rights.

4.1 Enhancing Environmental Education in School Curricula for Environmental Awareness and Environmental Ethics

Agenda 21 recognises the role of education in achieving sustainable livelihoods and thus calls for “re-orientation” of all education toward sustainability.⁵³ It states that both formal education and non-formal education are indispensable to changing people's attitudes so that they have the capacity to assess and address their sustainable development concerns as well as achieving environmental and ethical awareness, values and attitudes, skills and behaviour consistent with sustainable development and for effective public participation in decision-making.⁵⁴

Environmental education has been defined as a process that allows individuals to explore environmental issues, engage in problem solving, and take action to improve the environment. As a result, individuals develop a deeper understanding of environmental issues and have the skills

⁴⁷ Article 10, Constitution of Kenya 2010.

⁴⁸ Springer J, Campese J and Painter M, ‘Conservation and Human Rights: Key Issues and Contexts. Scoping Paper for the Conservation Initiative on Human Rights’ [2011] Unpublished report. Conservation Initiative on Human Rights Working Group, 7.

⁴⁹ Article 69 (1), Constitution of Kenya, 2010.

⁵⁰ Article 69 (2), Constitution of Kenya, 2010.

⁵¹ BirdLife International, "An introduction to conservation and human rights for BirdLife Partners." (2011), 2.

⁵² BirdLife International, ‘An Introduction to Conservation and Human Rights for BirdLife Partners’, 2.

⁵³ Chapter 36, Agenda 21.

⁵⁴ Ibid, para. 36.3.

Fostering a Human Rights Approach to Biodiversity Conservation in Kenya

to make informed and responsible decisions.⁵⁵ Students are expected to be equipped with the following: awareness and sensitivity to the environment and environmental challenges; knowledge and understanding of the environment and environmental challenges; attitudes of concern for the environment and motivation to improve or maintain environmental quality; skills to identify and help resolve environmental challenges; and participation in activities that lead to the resolution of environmental challenges.⁵⁶ Notably, while environmental information is important, environmental education is more than that as it goes beyond the citizens' right to giving their opinion to incorporate: increased public awareness and knowledge of environmental issues; building up critical thinking capacity; enhanced individuals' problem-solving and decision-making skills; and it does not advocate a particular viewpoint.⁵⁷ Environmental education is thus important for creating awareness and understanding about environmental issues which eventually leads to responsible individual and group actions.⁵⁸ As far as the role of education in achieving sustainable development is concerned, education is considered to play an important role in ensuring that human beings acquire knowledge, skills, attitudes, and values necessary to shape a sustainable future.⁵⁹ Continued enhanced and effective environmental education in Kenyan school curricula is important if Kenyans are to appreciate from their formative years the need to protect and conserve their environment and biodiversity in particular, as a prerequisite for achieving sustainable development.⁶⁰

4.2 Entrenching Rights-Based Approaches in Conservation Laws on Biological Diversity Conservation

Rights-based approaches to conservation have been defined to mean "integrating rights norms, standards, and principles into policy, planning, implementation, and outcomes assessment to help ensure that conservation practice respects rights in all cases, and supports their further realisation where possible".⁶¹

Conservation of ecosystem goods and services is considered important for upholding economic, social and cultural rights, such as the rights to health, an adequate standard of living, freedom from hunger and cultural freedom.⁶² The discussion on human rights approaches to conservation

⁵⁵ OA US EPA, 'What Is Environmental Education?' (US EPA, 13 December 2012) <<https://www.epa.gov/education/what-environmental-education>> accessed 3 June 2021.

⁵⁶ Ibid.

⁵⁷ OA US EPA, 'What Is Environmental Education?' (US EPA, 13 December 2012) <<https://www.epa.gov/education/what-environmental-education>> accessed 3 June 2021.

⁵⁸ Beatus Mwendwa, 'Learning for Sustainable Development: Integrating Environmental Education in the Curriculum of Ordinary Secondary Schools in Tanzania.' [2017] *Journal of Sustainability Education*.

⁵⁹ Ibid.

⁶⁰ AM Karugu, 'Aspects of Environmental Education in Kenya's Preschool Curriculum' <<https://ir-library.ku.ac.ke/handle/123456789/8020>> accessed 3 June 2021; see also Unger, Suanne, "Environmental education in Kenya: the need for a community-based biology curriculum in the secondary schools." (1993) Graduate Student Theses, Dissertations, & Professional Papers. 7615 <<https://scholarworks.umt.edu/cgi/viewcontent.cgi?article=8650&context=etd>> accessed 3 June 2021; Matthias Winfried Kleespies and Paul Wilhelm Dierkes, 'Impact of Biological Education and Gender on Students' Connection to Nature and Relational Values' (2020) 15 *PLOS ONE* e0242004.

⁶¹ 'Rights-Based Approaches to Conservation' (IUCN, 14 December 2015) <<https://www.iucn.org/theme/governance-and-rights/about/our-work/governance-and-rights-based-approaches/rights-based-approaches-conservation>> accessed 4 June 2021.

⁶² Campese, J., Sunderland, T., Greiber, T. and Oviedo, G. (eds.), *Rights-based approaches:*

Fostering a Human Rights Approach to Biodiversity Conservation in Kenya

is usually informed by the procedural rights, such as to participate in decision making, acquire information and access justice; and the substantive rights, such as to life, personal security, health, an adequate standard of living, education, freedom to practice culture and freedom from all forms of discrimination, amongst others.⁶³

Notably, many international human rights instruments and multilateral environmental agreements now recognise rights to participation in environmental decision making, the importance of the environment for sustainable development and substantive rights to a clean and healthy environment.⁶⁴ Furthermore, at the national level, many national constitutions, including Kenya's, explicitly recognise rights to a clean or healthy environment and acknowledge the need for environmental protection and conservation as a prerequisite for the fulfillment of other social and economic rights. For instance, the Constitution of Kenya provides that:

19. (1) The Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies.

(2) The purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.

At the international law level, CBD Decision XII/7 2, encourages Parties to give gender due consideration in their national biodiversity strategies and action plans and to integrate gender into the development of national indicators.⁶⁵ Adopting a rights-based approach to biodiversity conservation can go a long way in enhancing the rights of both men and women. These rights include both procedural and substantive rights.⁶⁶ Procedural rights relate to access to the processes by which people can assert their rights where procedural rights are important in themselves, and also help ensure the realization of substantive rights, including by informing rights-holders and duty-bearers about their respective rights and responsibilities, and giving rights-holders space to make effective claims in systems of mutual accountability.⁶⁷ The relevant procedural rights conservation include: Right to information⁶⁸; Right to participation⁶⁹; and the right to access to justice (including redress)⁷⁰.

Exploring issues and opportunities for conservation. (CIFOR and IUCN. Bogor, Indonesia, 2009), p.1.

⁶³ Ibid, p. 2.

⁶⁴ Ibid, p. 5.

⁶⁵ CBD Decision XII/7, para.2.

⁶⁶ UN Environment, 'What Are Environmental Rights?' (UNEP - UN Environment Programme, 2 March 2018) <<http://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/advancing-environmental-rights/what>> accessed 7 June 2021.

⁶⁷ Jenny Springer, Jessica Campese and M Painter, 'Conservation and Human Rights: Key Issues and Contexts. Scoping Paper for the Conservation Initiative on Human Rights' [2011] Unpublished report. Conservation Initiative on Human Rights Working Group, 16-17.

⁶⁸ See Article 10 of the Constitution on national values and principles of governance; Article 33 on freedom of expression; Article 35 on access to information; Article 69 on State obligations in respect of the State; Access to Information Act, No. 31 of 2016, Laws of Kenya.

⁶⁹ See Article 10 of the Constitution on national values and principles of governance; Article 33 on freedom of expression; Article 69;

⁷⁰ Article 10 of the Constitution on national values and principles of governance; Article 21 on implementation of rights and fundamental freedoms; Article 22 on enforcement of Bill of rights; Article 23 on authority of Courts to uphold and enforce the Bill of Rights; Article 27 on equality and freedom from

Fostering a Human Rights Approach to Biodiversity Conservation in Kenya

On the other hand, substantive rights are defined as rights to the “substance” of human wellbeing (such as rights to life, housing, water and a healthy environment) and contextually include:⁷¹ Right to life;⁷² Right to health;⁷³ Right to an adequate standard of living, including food;⁷⁴ Right to water;⁷⁵ Right to development;⁷⁶ Right to practice one’s culture;⁷⁷ Right to work;⁷⁸ Right to property;⁷⁹ and the peoples’ right to self-determination, use of natural wealth and resources, and not to be deprived of means of subsistence.⁸⁰

As already pointed out, biodiversity and generally ecosystem services are important in fulfilment of the foregoing substantive rights and hence, any efforts towards conservation of biodiversity should bear this in mind not only for the sake of fulfilling human rights but also to ensure that the benefiting group of persons have the incentive to participate in conservation measures as envisaged under Article 69(2) of the Constitution of Kenya.⁸¹ This is also in line with the Aichi targets of the Convention on Biological Diversity (CBD) which calls upon States to ensure that biodiversity resources are “effectively and equitably managed”, where equity or justice is conceptualized in three areas of concern: (i) distribution of costs and benefits from conservation;

discrimination; Article 48 on access to justice; Article 70 on enforcement of environmental rights; and Article 159 on judicial authority.

⁷¹ Jenny Springer, Jessica Campese and M Painter, ‘Conservation and Human Rights: Key Issues and Contexts. Scoping Paper for the Conservation Initiative on Human Rights’ [2011] Unpublished report. Conservation Initiative on Human Rights Working Group.

⁷² See Article 26 of the Constitution of Kenya 2010 on right to life; see also the case of Peter K. Waweru v Republic [2006] eKLR12 where the Court relied on, inter alia, case law from India to equate right to life to the right to clean and healthy environment.

⁷³ See Article 42 of the Constitution of Kenya on right to clean and healthy environment; see also Article 43(1) (a) on the economic and social rights which include the right- to the highest attainable standard of health, which includes the right to health care services, including reproductive health care.

⁷⁴ See Article 43(1) (b) (c) on the economic and social rights which include the right- (b) to accessible and adequate housing, and to reasonable standards of sanitation; and (c) to be free from hunger, and to have adequate food of acceptable quality.

⁷⁵ See Article 43(1) (d) on the economic and social rights which include the right- o clean and safe water in adequate quantities.

⁷⁶ See Article 10 of the Constitution on national values and principles of governance; see also Article 27 on the equality and freedom from discrimination; Part 3 of the constitution on the specific application of rights relating to persons with disabilities, youth, minorities and marginalised groups, older members of society and specifically in reference to their right to participate in national development affairs.

⁷⁷ See Article 11 of the Constitution of Kenya; Article 32 on freedom of conscience, religion, belief and opinion; and Article 44 on language and culture.

⁷⁸ See Article 41 of the Constitution of Kenya on labour relations; Employment Act, 2007, Cap 226; Employment and Labour Relations Court Act, No. 20 of 2011; Labour Relations Act, 2007.

⁷⁹ See Article 40 of the Constitution on protection of property rights.

⁸⁰ See United Nations. Declaration on the Rights of Indigenous Peoples, 2007; International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171; International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3; Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

⁸¹ 69. Obligations in respect of the environment:

(2) Every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources;

see also Emily Woodhouse and J Terrence McCabe, ‘Well-Being and Conservation: Diversity and Change in Visions of a Good Life among the Maasai of Northern Tanzania’ (2018) 23 Ecology and Society.

Fostering a Human Rights Approach to Biodiversity Conservation in Kenya

(ii) procedure referring to participation in decision making; (iii) recognition of social and cultural difference.⁸²

Thus, building strategies for the protection of ecosystem services into conservation and land-use planning is essentially the promotion of human survival, and not merely a luxury task.⁸³ The *Natural Resources (Benefit Sharing) Bill, 2018* is meant to establish a system of benefit sharing in resource exploitation between resource exploiters, the national government, county governments and local communities; and for connected purposes.⁸⁴ The legislation is to apply to: sunlight; water resources; forests, biodiversity and genetic resources; wildlife resources; industrial fishing; and wind.⁸⁵ Its application is to be guided by the following principles: transparency and inclusivity; revenue maximization and adequacy; efficiency and equity; accountability and participation of the people; rule of law and respect for human rights of the people; and sustainable natural resources management.⁸⁶ Once enacted, this legislation has the potential to entrench a rights-based approach to natural resources management in Kenya.

4.3 Effective Pest Control for Biodiversity Conservation

Pests have a negative effect not only on agricultural production but also on biodiversity conservation. It has been observed that the damage caused by pest organisms is one of the most important factors in the reduced productivity of any crop plant species, losses can occur in the field (pre-harvest) and during storage (post-harvest).⁸⁷ However, accurate estimates of agricultural losses caused by insects are difficult to obtain because the damage caused by these organisms depends on a number of factors related to environmental conditions, the plant species being cultivated, the socioeconomic conditions of farmers, and the level of technology used.⁸⁸ It is important to address the problem of pests if food security and biodiversity conservation are to be achieved. Pest control is part of the ecosystem services that improve and sustain human life.⁸⁹

One of the possible and effective approaches in pest control for biodiversity conservation is the integrated pest control. Integrated Pest Management (IPM) is an ecosystem approach to crop production and protection that combines different management strategies and practices to grow healthy crops and minimize the use of pesticides.⁹⁰ IPM has been developed as a way to control pests without relying solely on pesticides.

⁸² Emily Woodhouse and J Terrence McCabe, 'Well-Being and Conservation: Diversity and Change in Visions of a Good Life among the Maasai of Northern Tanzania' (2018) 23 *Ecology and Society*, 52.

⁸³ Wenny, D.G., Devault, T.L., Johnson, M.D., Kelly, D., Sekercioglu, C.H., Tomback, D.F. and Whelan, C.J., 'The Need to Quantify Ecosystem Services Provided by Birds' (2011) 128 *The Auk* 1.

⁸⁴ Preamble, *Natural Resources (Benefit Sharing) Bill, 2018*.

⁸⁵ *Ibid*, clause 3.

⁸⁶ *Ibid*, clause 4.

⁸⁷ Oliveira, C. M., A. M. Auad, S. M. Mendes, and M. R. Frizzas, "Crop Losses and The Economic Impact of Insect Pests on Brazilian Agriculture," *Crop Protection* 56 (2014), pp. 50-54, p.51.

⁸⁸ *Ibid*.

⁸⁹ Philpott Stacy M., *Biodiversity and Pest Control Services*. In: Levin S.A. (ed.), *Encyclopedia of Biodiversity*, second edition, Waltham, MA: Academic Press, 2013, Volume 1, pp. 373-385.

⁹⁰ FAO, 'AGP - Integrated Pest Management,' available at <http://www.fao.org/agriculture/crops/core-themes/theme/pests/ipm/en/>.

Fostering a Human Rights Approach to Biodiversity Conservation in Kenya

FAO promotes IPM as the preferred approach to crop protection and regards it as a pillar of both sustainable intensification of crop production and pesticide risk reduction.⁹¹ FAO defines Integrated Pest Management to mean ‘*the careful consideration of all available pest control techniques and subsequent integration of appropriate measures that discourage the development of pest populations and keep pesticides and other interventions to levels that are economically justified and reduce or minimize risks to human health and the environment. IPM emphasizes the growth of a healthy crop with the least possible disruption to agro-ecosystems and encourages natural pest control mechanisms.*’⁹²

The *Protection of Traditional Knowledge and Cultural Expressions Act, 2016*⁹³ was enacted to provide a framework for the protection and promotion of traditional knowledge and cultural expressions; to give effect to Articles 11, 40 and 69(L) (c) of the Constitution; and for connected purposes. The Act defines "traditional knowledge" to include any knowledge contained in the codified knowledge systems passed on from one generation to another including agricultural, environmental or medical knowledge, knowledge associated with genetic resources or other components of biological diversity, and know-how of traditional architecture, construction technologies, designs, marks and indications.⁹⁴

Similarly, Aichi Target 18 envisages that by 2020, *the traditional knowledge, innovations and practices of indigenous and local communities relevant for the conservation and sustainable use of biodiversity, and their customary use of biological resources, are respected, subject to national legislation and relevant international obligations, and fully integrated and reflected in the implementation of the Convention with the full and effective participation of indigenous and local communities, at all relevant levels.*⁹⁵

CBD Decision XIII/15 calls for Parties to encourage businesses involved in the development, manufacturing and sale of pesticides to develop and revise risk assessments of products, applying the precautionary approach and be fully transparent in releasing the results of all toxicity studies.⁹⁶

The *Plan of Action on Pollinators* includes suggestions to identify and promote possible improvements in the policy environment, including consideration of how existing or new certification schemes might contribute to the conservation and sustainable use of pollinator diversity.⁹⁷ CBD Decision XIII/3 and CBD Decision X/32⁹⁸ called for Parties to make use of voluntary sustainability standards and/or of voluntary certification schemes, and promote their further development for sustainably produced goods and services.⁹⁹ Farmers should be

⁹¹ Ibid.

⁹² ‘Plant Production and Protection Division: Integrated Pest Management’

<<http://www.fao.org/agriculture/crops/thematic-sitemap/theme/pests/ipm/en/>> accessed 7 June 2021.

⁹³ Protection of Traditional Knowledge and Cultural Expressions Act, No. 33 of 2016, Laws of Kenya.

⁹⁴ Protection of Traditional Knowledge and Cultural Expressions Act, s.2.

⁹⁵ ‘Target 18 – Traditional Knowledge and Customary Sustainable Use – Local Biodiversity Outlooks’ <<https://localbiodiversityoutlooks.net/targets/target-18-traditional-knowledge-and-customary-sustainable-use/>> accessed 7 June 2021.

⁹⁶ CBD Decision XIII/15, para. 6.

⁹⁷ CBD Decision VI/5, Annex II, Element 3, capacity-building, para. 3.2.

⁹⁸ CBD Decision X/32, para. 2(i).

⁹⁹ CBD Decision XIII/3, para. 17(h).

Fostering a Human Rights Approach to Biodiversity Conservation in Kenya

encouraged to use the least harmful approaches to pest control, including applying indigenous methods of pest control.¹⁰⁰

4.4 Biodiversity Mainstreaming for Food and Nutrition Security

The Constitution of Kenya guarantees the right of every person to be free from hunger and thirst: Every person has the right— (c) to be free from hunger, and to have adequate food of acceptable quality; (d) to clean and safe water in adequate quantities.¹⁰¹ Conservation of biodiversity for securing food and nutrition security in Kenya thus becomes an important step towards guaranteeing human rights of all.

Biodiversity for food and agriculture includes the variability among living organisms contributing to food and agriculture, including also the forestry and fisheries sectors.¹⁰² The sustainable use of genetic resources for food and agriculture will be the foundation for many of the adaptation strategies required in food and agriculture. Arguably, in order to adapt to climate change, plants and animals important for food security will need to adjust to abiotic changes such as heat, drought, floods and salinity.¹⁰³

Genetic resources are generally seen as the living material that local communities, breeders and researchers use to adapt to changing socio-economic needs and ecological challenges. Maintaining and using a wide basket of genetic diversity at a time of climate change is considered an essential insurance policy for the food and agriculture sectors.¹⁰⁴ Crop genetic diversity is considered a source of continuing advances in yield, pest resistance and quality improvement, and it is widely accepted that greater varietal and species diversity would enable agricultural systems to maintain productivity over a wide range of conditions.¹⁰⁵ It has been argued that maintaining and enhancing the diversity of crop genetic resources is of increasing importance to ensure the resilience of food crop production particularly in light of climate change challenges.¹⁰⁶ One of the ways of promoting food security in the face of climate change is adoption of climate smart agriculture. FAO defines Climate-Smart Agriculture (CSA) as an approach that helps to guide actions needed to transform and reorient agricultural systems to effectively support development and ensure food security in a changing climate.¹⁰⁷ CSA aims to tackle three main objectives: sustainably increasing agricultural productivity and incomes; adapting and building resilience to climate change; and reducing and/or removing greenhouse gas emissions, where possible. CSA is an approach for developing agricultural strategies to secure sustainable food security under

¹⁰⁰ D Grzywacz and others, 'The Use of Indigenous Ecological Resources for Pest Control in Africa' (2014) 6 Food Security 71; 'Cultural Methods of Pest, Primarily Insect, Control' <<https://eap.mcgill.ca/publications/eap58.htm>> accessed 6 June 2021.

¹⁰¹ Article 43, Constitution of Kenya 2010.

¹⁰² FAO, 'Climate Change and Biodiversity for Food and Agriculture,' Technical Background Document From The Expert Consultation Held on 13 to 14 February 2008, p.1.

Available at http://www.fao.org/uploads/media/FAO_2008a_climate_change_and_biodiversity_02.pdf

¹⁰³ Ibid.

¹⁰⁴ Ibid, p.3.

¹⁰⁵ Carpenter, Janet E., "Impact of GM crops on biodiversity," GM crops 2, no. 1 (2011): 7-23, p.7.

¹⁰⁶ Ibid, P.7.

¹⁰⁷ 'Climate-Smart Agriculture | Food and Agriculture Organization of the United Nations' <<http://www.fao.org/climate-smart-agriculture/en/>> accessed 7 June 2021.

Fostering a Human Rights Approach to Biodiversity Conservation in Kenya

climate change. CSA provides the means to help stakeholders from local to national and international levels identify agricultural strategies suitable to their local conditions.¹⁰⁸

Pollinators are part of the food production chain and must therefore be taken care of. Experts have warned that climate change will profoundly impact insects, including their physiology (how they live and reproduce), their behaviour and physical features, as well as relationships with other species (like host plants and natural enemies).¹⁰⁹ As a result, immense shifts are predicted in population dynamics, abundance and geographical spread of insects. In turn, these alterations will have positive and negative outcomes for people, livestock and crops, in terms of vulnerability to insect-transmitted diseases, and availability of essential services provided by insects such as pollination and pest regulation.¹¹⁰ Thus, this must form part of the wider debate in the quest for food and nutrition security.

4.5 Place of Indigenous Knowledge in Biodiversity Conservation

The rights of Indigenous Peoples are considered to be of special relevance to conservation for two main reasons: The first is that priority sites for biodiversity conservation frequently overlap with the territories of Indigenous Peoples. This is often because of Indigenous Peoples' custodianship of those lands which has meant that they have retained their value for biodiversity; and secondly, Indigenous Peoples very often have a close relationship to the land and to nature and, therefore, conservation has the potential to affect that relationship – both positively and negatively.¹¹¹

It has rightly been observed that the livelihoods of indigenous peoples, custodians of the world's forests since time immemorial, were eroded as colonial powers claimed de jure control over their ancestral lands, where the continuation of European land regimes in Africa and Asia meant that the withdrawal of colonial powers did not bring about a return to customary land tenure.¹¹² This is despite the acknowledgement that the rights of indigenous peoples' are often particularly relevant for conservation and sustainable use of natural resources, due to the frequent overlap of high-biodiversity areas and indigenous lands, and the vulnerability of natural resource-dependent customary livelihoods to changes in access or use.¹¹³ In addition, indigenous peoples' traditional ecological knowledge, traditional systems of control, use and management of lands and resources, and traditional institutions for self-governance also contribute substantially to conservation.¹¹⁴

While across sub-Saharan Africa, natural resources remain central to rural people's livelihoods with local norms and customs shaping people's everyday forms of resource use, the commercial

¹⁰⁸ FAO, "Climate-Smart Agriculture," available at <http://www.fao.org/climate-smart-agriculture/en/>

¹⁰⁹ 'Insects and Climate Change | Icipe - International Centre of Insect Physiology and Ecology' <<http://www.icipe.org/news/insects-and-climate-change>> accessed 7 June 2021.

¹¹⁰ International Centre of Insect Physiology and Ecology (icipe), 'Insects and Climate Change,' available at <http://www.icipe.org/news/insects-and-climate-change> Accessed on 6/06/2021.

¹¹¹ BirdLife International, International B, 'An Introduction to Conservation and Human Rights for BirdLife Partners', 9.

¹¹² Domínguez L and Luoma C, 'Decolonising Conservation Policy: How Colonial Land and Conservation Ideologies Persist and Perpetuate Indigenous Injustices at the Expense of the Environment' (2020) 9 Land 65, 65.

¹¹³ Jenny Springer and Jessica Campese with Michael Painter, "Conservation and Human Rights: Key Issues and Contexts," Scoping Paper for the Conservation Initiative on Human Rights, October 2011, 19.

¹¹⁴ Ibid, 19.

Fostering a Human Rights Approach to Biodiversity Conservation in Kenya

uses of natural resources often remain highly centralized, conditioned by government policies of the colonial and post-colonial eras.¹¹⁵

Notably, the term "indigenous knowledge" is generally used refer to how members of a community perceive and understand their environment and resources, particularly the way they convert those resources through labour.¹¹⁶ Indigenous groups should be included in reforestation and forest management plans as they can potentially offer alternative knowledge and perspectives based on their own locally developed practices of resource use.¹¹⁷ Indigenous knowledge is the local knowledge that is unique to a culture or society,¹¹⁸ seen as the social capital of the poor since it is their main asset to invest in the struggle for survival, to produce food, to provide for shelter and to achieve control of their own lives.¹¹⁹ The SDGs recognises the importance of this body of knowledge as it has several goals that seek to incorporate the knowledge vested in indigenous people in order to achieve its main agenda. Indigenous knowledge has been hailed as capable of solving local problems, as it offers a resource to help grow more and better food, adds to maintain healthy lifestyles, and it provides opportunities to share wealth and prevent conflicts.¹²⁰

For instance, some commentators have observed that: with regard to agro-ecology, indigenous people practised mixed farming where organic manure in the form of plant remains, cow dung and urine, and chicken droppings was applied to gardens to improve soil fertility as they are good sources of organic fertilizer which tended to promote organic farming; the use of nitrogen fixing pulses in mixed cropping, growing of plants of different patterns, maturity and duration assisted significantly in stabilizing soil fertility and prevention of soil erosion; in addition, the practice was an effective way, biologically, of managing pests and diseases; it also conserved biodiversity of animal and biannual crops and plants while reducing labour costs; in addition, trees were planted in gardens to provide shade for the plants, to act as wind breaks, and also to demarcate people's farmlands and homes; and as such, reviving organic agriculture would help conserve water, mitigate climate change and ensure sustained biodiversity.¹²¹

Some of the main ways through which indigenous knowledge may be used in promoting biodiversity conservation include but not limited to: trees which were traditionally regarded as

¹¹⁵ Roe D, Nelson F and Sandbrook C, *Community Management of Natural Resources in Africa: Impacts, Experiences and Future Directions* (IIED 2009).

¹¹⁶ Castro, A.P. & Ettenger, K., 'Indigenous Knowledge And Conflict Management: Exploring Local Perspectives And Mechanisms For Dealing With Community Forestry Disputes,' Paper Prepared for the United Nations Food and Agriculture Organization, Community Forestry Unit, for the Global Electronic Conference on "Addressing Natural Resource Conflicts Through Community Forestry," (FAO, January-April 1996) <http://www.fao.org/docrep/005/ac696e/ac696e09.htm> >Accessed on 20 August 2021.

¹¹⁷ Berkes, F., et. al., 'Rediscovery of Traditional Ecological Knowledge as Adaptive Management,' *Ecological Applications*, Vol. 10, No. 5., October 2000, pp. 1251-1262 at p. 1251.

¹¹⁸ SGJN Senanayake, 'Indigenous Knowledge as a Key to Sustainable Development' (2006) 2 *Journal of Agricultural Sciences-Sri Lanka* <https://www.researchgate.net/publication/265197993_Indigenous_knowledge_as_a_key_to_sustainable_development> accessed 16 July 2020.

¹¹⁹ Ibid.

¹²⁰ Hens L, 'Indigenous Knowledge and Biodiversity Conservation and Management in Ghana' (2006) 20 *Journal of Human Ecology* 21, 22.

¹²¹ Gathogo J, 'Environmental Management and African Indigenous Resources: Echoes from Mutira Mission, Kenya (1912-2012)' (2013) 39 *Studia Historiae Ecclesiasticae* 33, at 37.

Fostering a Human Rights Approach to Biodiversity Conservation in Kenya

housing spirits or sacred were not be felled without performing rituals, thus achieving a protective effect on trees such as *mugumo* tree (*Ficus natalensis/Ficus thonningii*) among the Gikuyu community of Kenya;¹²² animals in a particular habitat may be regarded as sacred and are therefore protected from hunting; sacred groves or forests are pieces of land set aside for spiritual purposes, as shrines; traditional farming practices are champions in sustainable land and water management as they involve land rotation and shifting cultivation allowing the land for more than 10 years to restore its natural fertility; all over sub-Saharan Africa indigenous plants are used in preventing and curing diseases in plants, animals and humans thus guaranteeing their protection and conservation.¹²³

Arguably, while there is a need for deeper research to demonstrate to what extent indigenous knowledge rules are able to realize targets of sustainable use and the questions on effectiveness and efficiency of community based approaches to biodiversity conservation and management arise, in theory, when biodiversity can be maintained and monitored through customary laws, this is preferable over maintenance through codified law.¹²⁴ Notwithstanding this, the provisions in the *Protection of Traditional Knowledge and Traditional Cultural Expressions Act, 2016* offer a rare opportunity for the state to realize the vision of the 2030 SDGs by incorporating Kenyan communities' indigenous knowledge in the roadmap to the achievement of the sustainable development agenda. By including these communities and their knowledge, any development policies aimed to benefit these communities will be more likely to not only respond to their cultural needs and preferences but will also enable them meaningfully participate.

Some commentators rightly argue that, despite any gaps in knowledge in the place of indigenous knowledge in biodiversity conservation for realisation of SDGs, the following indigenous and other traditional communities' rights should be respected, in relation to the lands, territories, waters, coastal seas and other resources which they traditionally own or otherwise occupy or use, and which fall within protected areas, subject to agreements with the agencies in charge of national protected area systems, and in the context of agreed management regulations and plans: rights with regard to sustainable, traditional use of their lands and resources; rights to participate in management; rights to participate in decision-making; rights to participate in determining priorities and strategies for the development or use of their lands; rights to use their own traditional institutions and authorities to co-manage their lands and resources; rights to require that States obtain the free and informed consent of the respective communities, prior to the approval of any project affecting their lands and resources; rights to improve the quality of their lives, and to benefit directly and equitably from the conservation and ecologically sustainable use of natural

¹²² Gathogo J, 'Environmental Management and African Indigenous Resources: Echoes from Mutira Mission, Kenya (1912-2012)' (2013) 39 *Studia Historiae Ecclesiasticae* 33; Karangi M, 'Revisiting the Roots of Gikūyū Culture through the Sacred Mūgumo Tree' (2008) 20 *Journal of African Cultural Studies* 117; Karangi MM, *The Sacred Mugumo Tree: Revisiting the Roots of Gikuyu Cosmology and Worship: A Case Study of the Gicugu Gikuyu of Kirinyaga District in Kenya* (University of London, School of Oriental and African Studies (United Kingdom) 2005).

¹²³ Hens L, 'Indigenous Knowledge and Biodiversity Conservation and Management in Ghana' (2006) 20 *Journal of Human Ecology* 21, 24; Brown, C., Tacio, H. D., & Ishikawa, M. (eds), *In Search of Excellence: Exemplary Forest Management in Asia and the Pacific* (FAO, Regional Office for Asia and the Pacific 2005).

¹²⁴ Hens L, 'Indigenous Knowledge and Biodiversity Conservation and Management in Ghana' (2006) 20 *Journal of Human Ecology* 21, 28.

Fostering a Human Rights Approach to Biodiversity Conservation in Kenya

resources; collective rights to maintain and enjoy their cultural and intellectual heritage, and the knowledge related to biodiversity and natural resource management; and rights not to be removed from the zones they have traditionally occupied within protected areas.¹²⁵ Some, however, argue that protected areas and community agriculture can indeed co-exist. As the number of crop species and varieties declines, local nitrogen-fixing bacteria, mycorrhizae, predators, pollinators, seed dispersers and other species that co-evolved over centuries with traditional agricultural systems die out.¹²⁶ In addition, the use of fertilizers, pesticides and high-yielding varieties to maximize production and profits over the short term exacerbates this loss of biodiversity. Arguably, diversity of crop species and the diversity of varieties within a species have traditionally strengthened the resilience of agriculture, and Protected areas can contribute to this effort through maintaining wild relatives of crops. As such, the agricultural community should be seen as part of a larger and more comprehensive ecosystem which provides both goods and services from nature through a well-managed protected system. Fostering this positive relationship between agriculture and protected areas may however require broader adoption of the new approaches.¹²⁷

5. Conclusion

This paper has made recommendations on some of the rights-based approaches that Kenya, and indeed any other country keen on enhancing its biodiversity conservation efforts, can adopt. The recommendations are notably cross-cutting, ranging from economic, social, environmental and political measures, all bound by the fact that they focus on human rights and public participation in conservation efforts. It is hoped that exploring these recommendations within the context of rights-based approaches to conservation will go a long way in achieving biodiversity conservation, as a prerequisite for realisation of SDGs.

¹²⁵ BirdLife International, International B, 'An Introduction to Conservation and Human Rights for BirdLife Partners', 10.

¹²⁶ McNeely JA, 'The Role of Protected Areas for Conservation and Sustainable Use of Plant Genetic Resources for Food and Agriculture', DSE/ATSAF/IPGRI Workshop in situ Conservation and Sustainable Use of Plant Genetic Resources for Food and Agriculture in Developing Countries, Bonn (Germany), 2-4 May 1995 (IPGRI 1996).

¹²⁷ Ibid.

Tracing the Role of Biodiversity Conservation in Achieving Sustainable Development Goals

Abstract

As the world focuses on achieving the Sustainable Development Goals (SDGs) by the year 2030, attention must also be paid to the important role that biodiversity will play if the dream of SDGs is to be realised. Biodiversity conservation will not only help in keeping the ecosystem services replenished for the sake of satisfying the human needs but also in protecting the health of the nature for the sake of future generations. This paper critically discusses the connection between biodiversity conservation and realisation of SDGs, which focus on challenges ranging from clean energy access, to poverty reduction and responsible consumption. The author argues that these SDGs cannot be met in and by an environment struggling with biodiversity loss and degradation.

1. Introduction

Arguably, biodiversity and ecosystems feature prominently across many of the Sustainable Development Goals (SDGs) and associated targets as they contribute directly to human well-being and development priorities.¹ It has been argued that there is a need for making biodiversity an integral part of economic and development strategy as it has the potential to bring a return on investment in economic, social and environmental terms.² This is important considering that the sustainable development agenda seeks to strike a working balance between development plans of a country an environmental conservation.³ This is because humans rely on the environment for ecosystem services which include regulating services (e.g., filtering pollution, coastal protection, pest regulation, pollination), material provisioning services (e.g., food, energy, materials), and nonmaterial services (e.g., aesthetics, experience, learning, physical and mental health, recreation).⁴

The World Health Organization observes that since healthy communities rely on well-functioning ecosystems for clean air, fresh water, medicines and food security as well as limiting disease and stabilizing the climate, biodiversity loss can have adverse effects on human life and health by causing loss of livelihoods, income, local migration and, on occasion, may even cause or

¹ United Nations Environment Programme, 'Biodiversity and the Sustainable Development Goals,' CBD Press Brief, Secretariat of the Convention on Biological Diversity <www.cbd.int/development/doc/biodiversity-2030-agenda-policy-brief-en.pdf> 31 July 2021.

² Limited BPPC, 'Biodiversity Dividend' Bangkok Post <<https://www.bangkokpost.com/business/2165927/biodiversity-dividend>> accessed 26 August 2021.

³ See Basiago AD, 'Economic, Social, and Environmental Sustainability in Development Theory and Urban Planning Practice' (1998) 19 Environment Systems and Decisions 145; Stephen Polasky, Catherine L. Kling, Simon A. Levin, Stephen R. Carpenter, Gretchen C. Daily, Paul R. Ehrlich, Geoffrey M. Heal, Jane Lubchenco, 'Role of Economics in Analyzing the Environment and Sustainable Development' (2019) 116 Proceedings of the National Academy of Sciences 5233.

⁴ Stephen Polasky, Catherine L. Kling, Simon A. Levin, Stephen R. Carpenter, Gretchen C. Daily, Paul R. Ehrlich, Geoffrey M. Heal, Jane Lubchenco, 'Role of Economics in Analyzing the Environment and Sustainable Development' (2019) 116 Proceedings of the National Academy of Sciences 5233.

exacerbate political conflict, and limited discovery of potential treatments for many diseases and health problems, all critical elements of SDGs.⁵

The political leaders participating in the United Nations Summit on Biodiversity in September 2020, in their Pledge for Nature, themed *United to Reverse Biodiversity Loss by 2030 for Sustainable Development*, acknowledged the interdependent crises of biodiversity loss and ecosystem degradation and climate change - driven in large part by unsustainable production and consumption - requiring urgent and immediate global action since biodiversity loss, land and ocean degradation, pollution, resource depletion and climate change are accelerating at an unprecedented rate causing irreversible harm to our life support systems and aggravating poverty and inequalities as well as hunger and malnutrition.⁶

This paper generally discusses the role of biodiversity in the quest for achieving sustainable development agenda. Considering that biodiversity is a term used to refer to the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part, it is arguably important to conserve the same since most, if not all, of the socio-economic needs required to fulfil the SDGs directly rely on healthy ecosystems.

2. Linking Biodiversity Conservation and Sustainable Development Goals

Notably, the unusual rates of biodiversity loss, coupled with rising human population and consumption rates, threaten the sustainability of Earth's life support systems.⁷ It has been observed that rapid environmental change has resulted in reshaping ecosystems and increased species loss globally.⁸ Sustainable development goals (SDGs) set the 2030 agenda to transform the world by tackling multiple challenges humankind is facing to ensure well-being, economic prosperity, and environmental protection, thus providing a holistic and multidimensional view on development.⁹

Biodiversity and ecosystems feature prominently across many of the Sustainable Development Goals (SDGs) and associated targets.¹⁰ They contribute directly to human well-being and development priorities, where biodiversity is at the centre of many economic activities, particularly those related to crop and livestock agriculture, forestry, and fisheries and globally,

⁵ 'Biodiversity and Health' <<https://www.who.int/news-room/fact-sheets/detail/biodiversity-and-health>> accessed 25 November 2021.

⁶ Hub ISK, 'Leaders' Pledge for Nature Commits to Reverse Biodiversity Loss by 2030 | News | SDG Knowledge Hub | IISD' <<https://sdg.iisd.org/443/news/leaders-pledge-for-nature-commits-to-reverse-biodiversity-loss-by-2030/>> accessed 25 November 2021.

⁷ Cavender-Bares, J., Heffernan, J., King, E., Polasky, S., Balvanera, P. and Clark, W.C., 'Sustainability and Biodiversity' in Simon A Levin (ed), *Encyclopedia of Biodiversity (Second Edition)* (Academic Press 2013) <<https://www.sciencedirect.com/science/article/pii/B9780123847195003907>> accessed 12 September 2021.

⁸ Smith, M.M., Gilbert, J.H., Olson, E.R., Scribner, K.T., Van Deelen, T.R., Van Stappen, J.F., Williams, B.W., Woodford, J.E. and Pauli, J.N., 'A Recovery Network Leads to the Natural Recolonization of an Archipelago and a Potential Trailing Edge Refuge' n/a *Ecological Applications* e02416.

⁹ Pradhan, P., Costa, L., Rybski, D., Lucht, W. and Kropp, J.P., 'A Systematic Study of Sustainable Development Goal (SDG) Interactions' (2017) *5 Earth's Future* 1169.

¹⁰ Schultz, M., Tyrrell, T.D. and Ebenhard, T., "The 2030 Agenda and Ecosystems-A discussion paper on the links between the Aichi Biodiversity Targets and the Sustainable Development Goals." SwedBio at Stockholm Resilience Centre, Stockholm, Sweden (2016).

Tracing the Role of Biodiversity Conservation in Achieving Sustainable Development Goals

nearly half of the human population is directly dependent on natural resources for its livelihood, and many of the most vulnerable people depend directly on biodiversity to fulfil their daily subsistence needs.¹¹

Regarding SDG 1 on ending poverty in all its forms everywhere, biodiversity provides resources and income, particularly for the rural poor. Ecosystem services and other non-marketed goods make up between 50% and 90% of the total source of livelihoods among poor rural and forest-dwelling households.¹²

The *2030 Agenda for Sustainable Development*, under Goal 2, aims to end hunger, achieve food security and improved nutrition and promote sustainable agriculture:- *By 2030, end hunger and ensure access by all people, in particular the poor and people in vulnerable situations, including infants, to safe, nutritious and sufficient food all year round; By 2030, double the agricultural productivity and incomes of small-scale food producers, in particular women, indigenous peoples, family farmers, pastoralists and fishers, including through secure and equal access to land, other productive resources and inputs, knowledge, financial services, markets and opportunities for value addition and non-farm employment; By 2030, ensure sustainable food production systems and implement resilient agricultural practices that increase productivity and production, that help maintain ecosystems, that strengthen capacity for adaptation to climate change, extreme weather, drought, flooding and other disasters and that progressively improve land and soil quality; By 2020, maintain the genetic diversity of seeds, cultivated plants and farmed and domesticated animals and their related wild species, including through soundly managed and diversified seed and plant banks at the national, regional and international levels, and promote access to and fair and equitable sharing of benefits arising from the utilization of genetic resources and associated traditional knowledge, as internationally agreed; increase investment, including through enhanced international cooperation, in rural infrastructure, agricultural research and extension services, technology development and plant and livestock gene banks in order to enhance agricultural productive capacity in developing countries, in particular least developed countries.*

The *CBD Aichi Target 13* states that countries should ensure: by 2020, the genetic diversity of cultivated plants and farmed and domesticated animals and of wild relatives, including other socio-economically as well as culturally valuable species, is maintained, and strategies have been developed and implemented for minimizing genetic erosion and safeguarding their genetic diversity.

One of the aims of the Programme of Work on Agricultural Biological Diversity is to promote the fair and equitable sharing of benefits arising out of the use of genetic resources.¹³ Whilst the CBD refers to the concept of benefit sharing in the context of the use of genetic resources¹⁴ a

¹¹ Secretariat of the Convention on Biological Diversity, Biodiversity and the 2030 Agenda for Sustainable Development, available at: www.cbd.int/development/doc/biodiversity-2030-agenda-policy-brief-en.pdf accessed 12 September 2021.

¹² Ibid.

¹³ CBD Decision III/11, para. 1.

¹⁴ CBD Arts. 1 and 15.

number of CBD decisions make reference to benefit sharing that is not confined to genetic resources¹⁵, including CBD Decision VII/11 which refers to "the equitable sharing of benefits derived from the use of *biodiversity*"¹⁶ (emphasis added). The concept of benefit sharing is linked to traditional knowledge.¹⁷

CBD Decision XIII/15 called for Parties to develop and implement incentives for farmers and indigenous peoples and local communities to protect pollinators and pollinator habitats, for example through benefit-sharing schemes, including payments for pollinator services schemes.¹⁸

As regards relevant international instruments, the *International Treaty on Plant Genetic Resources for Food and Agriculture*, (ITPGRFA) states that the Contracting Parties should take measures to protect and promote farmers' rights, including the right to equitably participate in sharing benefits arising from the utilization of plant genetic resources for food and agriculture.¹⁹

The *Voluntary Principles* provide that responsible investment in agriculture and food systems respects traditional knowledge by, among other things, promoting fair and equitable sharing of benefits arising from the utilization of genetic resources for food and agriculture and that this should be done within applicable systems of access to genetic resources for food and agriculture, while respecting the rights of indigenous peoples and local communities under national law.²⁰

In order to achieve SDG 3 on ensuring healthy lives and promoting well-being for all at all ages, healthy ecosystems help mitigate the spread and impact of pollution by both sequestering and eliminating certain types of air, water and soil pollution.²¹

SDG 5 requires countries to achieve gender equality and empower all women and girls. The targets therein are, *inter alia*: ensuring women's full and effective participation and equal opportunities for leadership at all levels of decision-making in political, economic and public life; undertaking reforms to give women equal rights to economic resources, as well as access to ownership and control over land and other forms of property, financial services, inheritance and natural resources, in accordance with national laws; and adopting and strengthen sound policies and enforceable legislation for the promotion of gender equality and the empowerment of all women and girls at all levels.²²

¹⁵ Schroeder, Doris, "Benefit sharing: it's time for a definition," *Journal of medical ethics*, Vol. 33, no. 4 (2007), pp. 205-209, p. 205.

¹⁶ CBD Decision VII/11, Annex I, annotations to rationale to Principle 10.

¹⁷ The CBD calls for the parties to encourage the equitable sharing of the benefits arising from the utilisation of the knowledge, innovations and practices of indigenous and local communities (CBD, Article 8(j)).

¹⁸ CBD Decisión XIII/15, para. 7(q).

¹⁹ ITPGRFA, Article 9.2(b).

²⁰ Principles for Responsible Investment in Agriculture and Food Systems provides, Principle 7, para. 27.

²¹ Lajaunie C and Morand S, 'Biodiversity Targets, SDGs and Health: A New Turn after the Coronavirus Pandemic?' (2021) 13 *Sustainability* 4353.

²² 'Sustainable Development Goal 5: Gender Equality' (UN Women)

<<https://www.unwomen.org/en/news/in-focus/women-and-the-sdgs/sdg-5-gender-equality>> accessed 15 September 2021.

The CBD, in its preamble, recognizes “the vital role that women play in the conservation and sustainable use of biological diversity and affirms the need for the full participation of women at all levels of policy-making and implementation for biological diversity conservation.”²³ Healthy ecosystems can go a long way in achieving SDG 6 which seeks to ensure the availability and sustainable management of water and sanitation for all.²⁴

Biodiversity and ecosystems underpin many national and global economic activities, including those related to agriculture, forestry, fisheries and aquaculture, energy, tourism, transport and trade, and as such, biodiversity conservation and sustainable use can lead to higher productivity, more efficient resource use, and long-term viability of resources thus helping in achievement of SDG 8 which seeks to promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all.²⁵

More importantly, SDG 15 is dedicated to “*protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss*”.²⁶

Being the supreme law of the land, the Constitution of Kenya sets a favourable environment for legislative protection of biodiversity. This is seen in Chapter Five on Land and the Environment, where there is the emphasis on sustainable use of land and other natural resources, including biodiversity as a key principle.²⁷ There is also the establishment of the National Land Commission, mandated to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities.

Article 69 of the Constitution remains relevant in the quest for biodiversity conservation especially in relation to the obligations of the State in respect of the environment and natural resources management. It is comprehensive, addressing a number of cross-sectoral biodiversity concerns outlined by the CBD including issues of benefit sharing, traditional knowledge, elimination of activities harmful to biodiversity and the role of the community in conservation and sustainable use of biodiversity. Article 69(1) provides that: - *the State shall— (a) ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; (c) protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic*

²³ UN Women, “Towards a gender-responsive post-2020 global biodiversity framework: Imperatives and Key Components”, A submission by the United Nations Entity for Gender Equality and the Empowerment of Women

(UN-Women) as an input to the development of the post-2020 global biodiversity framework, 1 May 2019.

²⁴ Environment UN, ‘GOAL 6: Clean Water and Sanitation’ (UNEP - UN Environment Programme, 2 June 2021) <<http://www.unep.org/explore-topics/sustainable-development-goals/why-do-sustainable-development-goals-matter/goal-6>> accessed 13 September 2021.

²⁵ Secretariat of the Convention on Biological Diversity, Biodiversity and the 2030 Agenda for Sustainable Development, available at: www.cbd.int/development/doc/biodiversity-2030-agenda-policy-brief-en.pdf accessed 12 September 2021.

²⁶ ‘Biodiversity and Ecosystems.: Sustainable Development Knowledge Platform’

<<https://sustainabledevelopment.un.org/topics/biodiversityandecosystems>> accessed 13 September 2021.

²⁷ The Constitution of Kenya 2010, Article 60, 69.

resources of the communities; (h) utilise the environment and natural resources for the benefit of the people of Kenya.

Mainstreaming of biodiversity into different economic activities is considered necessary to both halt biodiversity loss and achieve the SDGs.²⁸ The highly interconnected SDGs will only be achieved in their entirety through transformative changes in our societies.²⁹ The Constitution also designates sustainable development as a national principle which is binding on all State organs, State officers, public officers and all persons.³⁰ In addition, it places an obligation upon the State to recognize the role of science and indigenous technologies in the development of the nation³¹. It goes further to mandate Parliament to enact legislation to ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage; and legislation to recognise and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya.

Notably, the political leaders participating in the United Nations Summit on Biodiversity in September 2020, representing 93 countries from all regions, and the European Union, committed to reversing biodiversity loss by 2030, same year SDGs are to be achieved.³² As part of the UN Decade of Action to achieve sustainable development, the leaders at the Summit committed to achieve the vision of Living in Harmony with Nature by 2050 by undertaking, *inter alia*: mainstreaming biodiversity into relevant sectoral and cross-sectoral policies at all levels, including in food production, agriculture, fisheries and forestry, energy, tourism, infrastructure and extractive industries, and trade and supply chains, as well as into key international agreements and processes.³³

In addition, in the 26th Conference of the Parties (or COP) to the UN Framework Convention on Climate Change (COP 26) Declaration on Forests and Land Use, the world leaders emphasised the critical and interdependent roles of forests of all types, biodiversity and sustainable land use in enabling the world to meet its sustainable development goals; to help achieve a balance between anthropogenic greenhouse gas emissions and removal by sinks; to adapt to climate change; and to maintain other ecosystem services.³⁴ Notably, the COP26 presidency, held by the U.K., themed the summit around a “Nature Campaign” that advocates for ecosystem and biodiversity

²⁸ Hub ISK, ‘Policy Brief: Why Biodiversity Matters: Mapping the Linkages between Biodiversity and the SDGs | SDG Knowledge Hub | IISD’ <<https://sdg.iisd.org/443/commentary/policy-briefs/why-biodiversity-matters-mapping-the-linkages-between-biodiversity-and-the-sdgs/>> accessed 13 September 2021.

²⁹ Obrecht A and others, ‘Achieving the SDGs with Biodiversity’ (2021) 16 11.

³⁰ The Constitution of Kenya 2010, Article 10 (2) (d).

³¹ Ibid, Article 11 (2) (b).

³² ‘Leaders’ Pledge for Nature’ (Leaders Pledge for Nature) <<https://www.leaderspledgefornature.org/>> accessed 25 November 2021.

³³ Ibid.

³⁴ ‘Glasgow Leaders’ Declaration on Forests and Land Use’ (UN Climate Change Conference (COP26) at the SEC – Glasgow 2021, 2 November 2021) <<https://ukcop26.org/glasgow-leaders-declaration-on-forests-and-land-use/>> accessed 25 November 2021.

conservation serving as the foundation for transforming food and agriculture systems to become more sustainable.³⁵

A World Wide Fund for Nature (WWF) 2021 Report titled *NDCs - A Force for Nature?*, and which was presented at COP 26 found that countries have started embracing nature based solutions in climate adaptation responses through their Nationally Determined Contributions (NDCs), country climate pledges under the Paris Agreement, where there was an increase from 82% to 92% of NDCs that included nature: 105 out of 114 (92%) of enhanced NDCs include nature-based solutions (NBS): 96 in the context of mitigation measures, 91 in the context of adaptation plans, with an overlap of 82 in both mitigation and adaptation.³⁶ For instance, *Kenya's Updated Nationally Determined Contribution (NDC) and JCM Activities*, submitted on 28th December, 2020, captures mitigation measures which include: making progress towards achieving a tree cover of at least 10% of the land area of Kenya; making efforts towards achieving land degradation neutrality; scaling up Nature Based Solutions (NBS) for mitigation; and enhancement of REDD+ activities, among others.³⁷ Nature-based Solutions are defined as 'actions to protect, sustainably manage, and restore natural and modified ecosystems that address societal challenges effectively and adaptively, simultaneously providing human well-being and biodiversity benefits'.³⁸

3. Conclusion

At the United Nations Summit on Biodiversity 2020, the political leaders acknowledged that our societies are intimately linked with and depend on biodiversity and its loss and the degradation of its contributions to people jeopardize progress towards the Sustainable Development Goals (SDGs) and human wellbeing.³⁹

Arguably, successful efforts to meet the needs of current and future generations will require a global perspective that considers the complex relationships between biodiversity, poverty, and equity as well as a progressive perspective that considers the nonlinear dynamics and potential tipping points in human and Earth systems.⁴⁰ It has been observed that the broader role of biodiversity and ecosystem function and the need to address drivers and pressures in order to maintain the flow of ecosystem services includes raising awareness of the values of biodiversity,

³⁵ 'Nature-Based Solutions at Center of COP26 Discussions' (Landscape News, 10 November 2021) <<https://news.globallandscapesforum.org/55761/nature-has-its-moment-at-the-center-of-cop26-discussions/>> accessed 25 November 2021.

³⁶ 'More Countries Including Nature in Their Climate Action Plans, but Step Change Still Needed To' <https://wwf.panda.org/wwf_news/?4248391/NDCsreport> accessed 25 November 2021.

³⁷ Republic of Kenya, *Kenya's Updated Nationally Determined Contribution (NDC) and JCM Activities*, 28th December, 2020.

³⁸ 'COP26: SDG or NDC? Our Guide to the Language You Need to Know' (UN News, 26 October 2021) <<https://news.un.org/en/story/2021/10/1104022>> accessed 25 November 2021.

³⁹ 'United Nations Summit on Biodiversity --30 September 2020' (Convention on Biological Diversity) <<https://www.cbd.int/article/2020-UN-Biodiversity-Summit>> accessed 25 November 2021.

⁴⁰ Cavender-Bares, J., Heffernan, J., King, E., Polasky, S., Balvanera, P. and Clark, W.C., 'Sustainability and Biodiversity' in Simon A Levin (ed), *Encyclopedia of Biodiversity (Second Edition)* (Academic Press 2013) <<https://www.sciencedirect.com/science/article/pii/B9780123847195003907>> accessed 12 September 2021.

Tracing the Role of Biodiversity Conservation in Achieving Sustainable Development Goals

effectively addressing perverse incentives, pollution, the concept of safe ecological limits within sustainable use, and the breadth of roles of traditional knowledge, culture and practices.⁴¹

Biodiversity has been identified as essential for sustainable development and human well-being as it underpins the provision of food and water; it mitigates and provides resilience to climate change; it supports human health, and provides jobs in agriculture, fisheries, forestry and many other sectors. Without effective measures to conserve biodiversity and use its components in a sustainable manner, the 2030 Agenda for Sustainable Development will not be achievable.

⁴¹ Schultz, M., Tyrrell, T.D. and Ebenhard, T., "The 2030 Agenda and Ecosystems-A discussion paper on the links between the Aichi Biodiversity Targets and the Sustainable Development Goals." SwedBio at Stockholm Resilience Centre, Stockholm, Sweden (2016), 4.

Approaches to Biodiversity Conservation: Embracing Global Resource Conservation Best Practices

Abstract

This paper critically discusses the main approaches to biological diversity conservation, namely: in-situ and ex-situ conservation, highlighting their main features that countries can adopt as a way to enhance their conservation measures and move closer to achieving sustainable development goals. The author argues that countries should embrace the global best practices in resource conservation while paying attention to both climate change adaptation and biodiversity conservation.

1. Introduction

It has rightly been observed that while ‘biodiversity can be greatly enhanced by human activities, it can also be adversely impacted by such activities due to unsustainable use or by more profound causes linked to our development models’.¹ This is despite the fact that biodiversity is considered to be very important for sustenance of all forms of life on earth.² Biodiversity is essential not only to the proper functioning of earth systems, it is also key to the delivery of those ecosystem services that are crucial to human dignity and well-being including: the provision of potable water, food; soil fertility; maintenance of the ‘genetic library of biodiversity’ – an irreplaceable source of new innovations, pharmaceuticals and chemicals; and climate regulation – among others.³ The concept of ecosystem services was inspired by the desire to give an economic assessment of these functions thus leading to the appearance of the concept of ecosystem services, that is, consideration with regard to their usefulness for humans.⁴ Arguably, ecosystem services are divided into four categories namely: provisioning services refer to natural products that are directly used by humans for food, clothing, medicines, tools, or other uses; cultural services provide recreational opportunities, inspiration for art and music, and spiritual value; regulating services include pest control and carcass removal; and supporting services, such as pollination, seed dispersal, water purification, and nutrient cycling, provide processes essential for ecological communities and agricultural ecosystems.⁵

It is against this background that this paper discusses the global best practices and approaches to biodiversity conservation due to the important role of biodiversity in ensuring that the sustainable

¹ ‘Conserving Biodiversity for Life and Sustainable Development | United Nations Educational, Scientific and Cultural Organization’ <http://www.unesco.org/new/en/media-services/single-view/news/conserving_biodiversity_for_life_and_sustainable_development/> accessed 29 July 2021;

‘Threats to Biodiversity – Biodiversity Clearing House Mechanism’ <<http://meas.nema.go.ke/cbdchm/major-threats/>> accessed 31 July 2021.

² Dmitrii Pavlov and Elena Bukvareva, ‘Biodiversity and Life Support of Humankind’ (2007) 77 *Herald of the Russian Academy of Sciences* 550.

³ ‘Conserving Biodiversity for Life and Sustainable Development | United Nations Educational, Scientific and Cultural Organization’ <http://www.unesco.org/new/en/media-services/single-view/news/conserving_biodiversity_for_life_and_sustainable_development/> accessed 29 July 2021.

⁴ Dmitrii Pavlov and Elena Bukvareva, ‘Biodiversity and Life Support of Humankind’ (2007) 77 *Herald of the Russian Academy of Sciences* 550, 551.

⁵ Wenny, D.G., Devault, T.L., Johnson, M.D., Kelly, D., Sekercioglu, C.H., Tomback, D.F. and Whelan, C.J., ‘The Need to Quantify Ecosystem Services Provided by Birds’ (2011) 128 *The Auk* 1.

development agenda is achieved for the sake of current and future generations. The concept of sustainable development seeks to strike a balance between using ecosystem services to improve human lives and the need to ensure that the environment can comfortably replenish itself, that is, a balance between the ecocentric approaches to conservation against the anthropocentric approaches.⁶

Some scholars identify three forms of biodiversity such as alpha (genetic diversity), beta (species richness) and gamma (ecological diversity) and the services that accrue from biodiversity include materialistic gains, ecological services (flood control, climate maintenance, and nutrient cycling), and non-materialistic benefits such as recreation.⁷ This paper critically discusses some of the major approaches that have been adopted globally in conserving all the above mentioned forms of biodiversity. The paper also highlights the salient provisions of the 1992 Convention on Biological Diversity, the key international legal instrument on biological diversity conservation.

2. Biodiversity: Definition and Scope

Notably, *Biodiversity*, a contraction of the phrase "biological diversity," can be traced to the first usage by Walter G. Rosen during a planning meeting for the 1986 National Forum on Biodiversity held in Washington, DC, while the first appearance of the word in the print literature likely occurred with the 1988 publication of the proceedings of the said conference.⁸ The *1992 Convention on Biological Diversity*⁹ defines 'biodiversity' to mean "the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part: this includes diversity within species, between species and of ecosystems".¹⁰

The United Nations Educational, Scientific and Cultural Organization (UNESCO) on the other hand defines 'biodiversity' as the 'diversity of all living forms at different levels of complexity: genes, species, ecosystems and even landscapes and seascapes'.¹¹ Biological diversity or

⁶ Louis J Kotzé and Duncan French, 'The Anthropocentric Ontology of International Environmental Law and the Sustainable Development Goals: Towards an Ecocentric Rule of Law in the Anthropocene' (2018) 7 *Global Journal of Comparative Law* 5; 'Putting Ecosystems into the SDGs' (Water, Land and Ecosystems, 9 October 2015) <<https://wle.cgiar.org/news/putting-ecosystems-sdgs>> accessed 3 June 2021; Bullock, C. H. "Nature's values: From intrinsic to instrumental. A review of values and valuation methodologies in the context of ecosystem services and natural capital." *National Economic and Social Council* 10 (2017); 'Striking a Balance between Conservation and Development' (UNEP, 13 May 2019) <<http://www.unep.org/news-and-stories/story/striking-balance-between-conservation-and-development>> accessed 3 June 2021; McCartney, M., Finlayson, M., de Silva, S., Amerasinghe, P., & Smakhtin, V., 'Sustainable Development and Ecosystem Services' (2014); Rülke, J., Rieckmann, M., Nzau, J. M., & Teucher, M., 'How Ecocentrism and Anthropocentrism Influence Human-Environment Relationships in a Kenyan Biodiversity Hotspot' (2020) 12 *Sustainability* 8213.

⁷Tamanna Kumari, Pinky Deswal and Vineeta Shukla, 'Approaches to Biodiversity Conservation In India', February 2021 <https://www.researchgate.net/publication/349338888_APPROACHES_TO_BIODIVERSITY_CONSERVATION_IN_INDIA> accessed 11 July 2021.

⁸ John Creech, 'Biodiversity Web Resources' <<http://www.istl.org/12-fall/internet.html>> accessed 29 July 2021; David L Hawksworth and Royal Society (Great Britain), *Biodiversity: Measurement and Estimation* (Springer Science & Business Media 1995).

⁹ United Nations, *Convention on Biological Diversity* of 5 June 1992 (1760 U.N.T.S. 69).

¹⁰ Article 2, *Convention on Biological Diversity*.

¹¹ United Nations Educational, Scientific and Cultural Organization, 'Conserving Biodiversity for Life and Sustainable Development | United Nations Educational, Scientific and Cultural Organization'

biodiversity has also been defined as ‘the variety of the planet’s living organisms and their interactions’.¹² The term is meant to encompass all of life’s variation, expressed in genes, individuals, populations, species, communities and ecosystems.¹³

A broader definition of ‘biodiversity’ has been propounded as referring to three dimensions within which variability occurs: *genetic*, meaning the variation of genes within a species, sub-species or population; *population/species*, meaning the variation between living species and their component populations at different spatial scales (local, regional or global); and *community/ecosystem*, meaning the variation within ecological complexes of which species are a part.¹⁴

These definitions are relevant especially in the context of Sustainable Development debate as they reflect the important role that biological diversity can and indeed plays in meeting the essentials of realising Sustainable Development goals such as food security, alleviating poverty, among others.¹⁵ The World Bank argues that while biodiversity provides many instrumental benefits, from food and fuel to recreation, even where biodiversity is not immediately instrumental, it represents global public goods that must be protected, if only for their potential value in the future.¹⁶

3. General Approaches to Biodiversity Conservation

There are mainly two approaches to biological diversity conservation, namely: in-situ and ex-situ conservation. There is also the Ecosystem Services Approaches for Biodiversity Conservation. Notably, over the past century a wide range of different conservation-oriented approaches have been enacted, from local and regional scale activities, such as protected area establishment, ex-situ conservation, recovery planning for species and ecosystems, specific threat management (e.g. disease, fire), and biodiversity off-sets, to global scale inter-governmental policy developments such as the *Convention on Biological Diversity* (CBD) and the *Convention on International Trade on Endangered Species* (CITES), all approaches based on multiple values of biodiversity,

<http://www.unesco.org/new/en/media-services/single-view/news/conserving_biodiversity_for_life_and_sustainable_development/> accessed 29 July 2021.

¹² Wes Sechrest and Thomas Brooks, ‘Biodiversity – Threats’ (2002).

¹³ Ibid, 1; see also Matta, G., Bhadauriya, G., & Singh, V., "Biodiversity and Sustainable Development: A Review." Fecundity of fresh water prawn *Macrobrachium Assamense Penensularae* from Khoh River, India: 72.

¹⁴ Roe, Dilys, "Linking biodiversity conservation and poverty alleviation: a state of knowledge review." CBD Technical Series 55 (2010), 13.

¹⁵ Måns Nilsson, ‘Biodiversity’s Contributions to Sustainable Development’ [2019] Nature Sustainability <<https://www.sei.org/publications/biodiversity-contributions-sustainable-development/>> accessed 3 June 2021; Gagan Matta, Gaurav Bhadauriya and Vikas Singh, ‘Biodiversity and Sustainable Development: A Review’ Fecundity of fresh water prawn *Macrobrachium Assamense Penensularae* from Khoh River, India 72.

¹⁶ Sobrevila, Claudia; Hickey, Valerie, *The Role of Biodiversity and Ecosystems in Sustainable Development*. 2010 Environment Strategy Analytical Background Papers; World Bank, Washington, DC. © World Bank, 2010. <https://openknowledge.worldbank.org/handle/10986/27584> License: CC BY 3.0 IGO< accessed 29 July 2021.

including those values not related to humans.¹⁷ This section discusses these approaches within the context of the 1992 CBD.

3.1 In-situ Biodiversity Conservation

In situ conservation is defined as the on-site conservation of genetic resources in natural populations of plants or animal species such as forest genetic resources, in natural populations of tree and animal species.¹⁸ The *Convention on Biological Diversity* 1992 defines it to mean ‘the conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings and, in the case of domesticated or cultivated species, in the surroundings where they have developed their distinctive properties’.¹⁹ Notably, Article 8 of the Convention on Biological Diversity (CBD) specifies in-situ conservation as the primary conservation strategy, and states that ex-situ measures should play a supportive role to reach conservation targets.²⁰

Article 8 of CBD provides that in order to promote in-situ conservation, each Contracting Party should, as far as possible and as appropriate: (a) Establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity; (b) Develop, where necessary, guidelines for the selection, establishment and management of protected areas or areas where special measures need to be taken to conserve biological diversity; (c) Regulate or manage biological resources important for the conservation of biological diversity whether within or outside protected areas, with a view to ensuring their conservation and sustainable use; (d) Promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings; (e) Promote environmentally sound and sustainable development in areas adjacent to protected areas with a view to furthering protection of these areas; (f) Rehabilitate and restore degraded ecosystems and promote the recovery of threatened species, inter alia, through the development and implementation of plans or other management strategies; (g) Establish or maintain means to regulate, manage or control the risks associated with the use and release of living modified organisms resulting from biotechnology which are likely to have adverse environmental impacts that could affect the conservation and sustainable use of biological diversity, taking also into account the risks to human health; (h) Prevent the introduction of, control or eradicate those alien species which threaten ecosystems, habitats or species; (i) Endeavour to provide the conditions needed for compatibility between present uses and the conservation of biological diversity and the sustainable use of its components; (j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and

¹⁷ Ingram JC, Redford KH and Watson JEM, ‘Applying Ecosystem Services Approaches for Biodiversity Conservation: Benefits and Challenges’ [2012] S.A.P.I.E.N.S. Surveys and Perspectives Integrating Environment and Society <<https://journals.openedition.org/sapiens/1459>> accessed 12 September 2021.

¹⁸ Ajayi SS, ‘Chapter 9 - Principles for the Management of Protected Areas’ in SS Ajayi (ed), *Wildlife Conservation in Africa* (Academic Press 2019)

<<https://www.sciencedirect.com/science/article/pii/B9780128169629000090>> accessed 12 September 2021.

¹⁹ Article 2, Convention on Biological Diversity (CBD) 1992.

²⁰ ‘In-Situ Conservation Definition| Biodiversity A-Z’ <<https://biodiversitya-z.org/content/in-situ-conservation>> accessed 12 September 2021.

practices; (k) Develop or maintain necessary legislation and/or other regulatory provisions for the protection of threatened species and populations; (l) Where a significant adverse effect on biological diversity has been determined pursuant to Article 7, regulate or manage the relevant processes and categories of activities; and (m) Cooperate in providing financial and other support for in-situ conservation outlined in subparagraphs (a) to (l) above, particularly to developing countries.

In-situ initiatives beyond protected areas may thus include: habitat restoration, recovery or rehabilitation; strategies for the sustainable use and management of biological resources; recovery programmes for nationally or sub-nationally threatened or endangered wild species; on-farm agricultural biodiversity conservation targeted at traditional crop varieties and crop wild relatives; genetic reserve conservation, that is, monitoring of genetic diversity in natural wild populations within a delineated area (known as genetic sanctuaries or gene management zones); control of threats to biodiversity such as invasive alien species, living modified organisms or over exploitation; preservation and maintenance of traditional knowledge and practices; and implementation of the regulatory, legislation, management or other frameworks needed to deliver the protection of species or habitats.²¹

Some commentators have observed that while agriculture and protected areas are sometimes seen as opposite ends of a spectrum, in fact, they can play important complementary roles, especially when the protected areas are managed in ways explicitly designed to support agricultural development.²² Notably, in situ conservation of wild relatives and forest tree resources focuses on responding to the drivers and pressures that threaten the natural populations so as to maintain the genetic diversity and geographic range of species, thereby maximizing their potential to respond to natural or human-made environmental change.²³

3.2 Ex-situ Conservation

Ex situ conservation is defined as the relocation of endangered or rare species from their natural habitats to protected areas equipped for their protection and preservation, as an essential alternative strategy when in situ conservation is inadequate.²⁴ The *Convention on Biological Diversity* 1992 defines "*ex-situ conservation*" to mean the conservation of components of biological diversity outside their natural habitats.²⁵ Ex-situ conservation involves maintenance and breeding of endangered plants and animals under partially or wholly controlled conditions in specific areas including zoo, gardens, nurseries, etc. That is, the conservation of selected plants

²¹ Ibid.

²² 'The Role of Protected Areas for Conservation and Sustainable Use of Plant Genetic Resources for Food and Agriculture - Jeffrey A. McNeely'
<https://www.biodiversityinternational.org/fileadmin/biodiversity/publications/Web_version/62/ch07.htm>
accessed 12 September 2021.

²³ Bellon, M.R., Dulloo, E., Sardos, J., Thormann, I. and Burdon, J.J., 'In Situ Conservation—Harnessing Natural and Human-Derived Evolutionary Forces to Ensure Future Crop Adaptation' (2017) 10 *Evolutionary Applications* 965.

²⁴ Ajayi SS, 'Chapter 9 - Principles for the Management of Protected Areas' in SS Ajayi (ed), *Wildlife Conservation in Africa* (Academic Press 2019)

<<https://www.sciencedirect.com/science/article/pii/B9780128169629000090>> accessed 12 September 2021.

²⁵ Article 2, *Convention on Biological Diversity* (CBD) 1992.

and animals in selected areas outside their natural habitat is known as *ex-situ* conservation.²⁶ Article 9 of CBD provides for *ex-situ* conservation and states that: each Contracting Party should, as far as possible and as appropriate, and predominantly for the purpose of complementing *in-situ* measures: (a) Adopt measures for the *ex-situ* conservation of components of biological diversity, preferably in the country of origin of such components; (b) Establish and maintain facilities for *ex-situ* conservation of and research on plants, animals and micro- organisms, preferably in the country of origin of genetic resources; (c) Adopt measures for the recovery and rehabilitation of threatened species and for their reintroduction into their natural habitats under appropriate conditions; (d) Regulate and manage collection of biological resources from natural habitats for *ex-situ* conservation purposes so as not to threaten ecosystems and *in-situ* populations of species, except where special temporary *ex-situ* measures are required under subparagraph (c) above; and (e) Cooperate in providing financial and other support for *ex-situ* conservation outlined in subparagraphs (a) to (d) above and in the establishment and maintenance of *ex-situ* conservation facilities in developing countries.

It has been observed that during recent years, dramatic progress has been made with the development of new conservation techniques for non-orthodox and vegetatively propagated species, and the current *ex situ* conservation concepts should be modified accordingly to accommodate these technological advances.²⁷ However, it is suggested that considering the fact that the requirements for optimal conservation vary from species to species, as well as the available infrastructural and human resources, it is important to consider all these aspects as well as the wider socio-economic conditions under which a given conservation effort takes place when deciding how to optimize these parameters into the conservation strategy.²⁸

3.3 Ecosystem Services Approaches for Biodiversity Conservation

Notably, ecosystem services as a concept and framework for understanding the way in which nature benefits people has led to a suite of approaches that are increasingly being used to support sustainable management of biodiversity and ecosystems.²⁹ While the ecosystem approach is a well-established strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way, the Ecosystem Services Approach (ESA) takes this strategy one step further, and through the inclusion of ecosystem services ensures that the complex relationships between nature and humans are more clearly understood and explicitly included.³⁰ Ecosystem-based management, with a primary focus on ecosystem services, is seen as a viable approach as it can also help broaden constituencies and influence decision-making to support conservation, as an integrated approach to natural resource management that

²⁶ Jaisankar I, Velmurugan A and Sivaperuman C, 'Chapter 19 - Biodiversity Conservation: Issues and Strategies for the Tropical Islands' in Chandrakasan Sivaperuman and others (eds), *Biodiversity and Climate Change Adaptation in Tropical Islands* (Academic Press 2018)

<<https://www.sciencedirect.com/science/article/pii/B9780128130643000193>> accessed 12 September 2021.

²⁷ Engelmann F and Engels JMM, 'Technologies and Strategies for Ex Situ Conservation' [2002] *Managing plant genetic diversity* 89, 99.

²⁸ *Ibid*, 100.

²⁹ Ingram, J.C., Redford, K.H. and Watson, J.E., 'Applying Ecosystem Services Approaches for Biodiversity Conservation: Benefits and Challenges' [2012] *SAPI EN. S. Surveys and Perspectives Integrating Environment and Society*.

³⁰ Beaumont NJ, Mongruel R and Hooper T, 'Practical Application of the Ecosystem Service Approach (ESA): Lessons Learned and Recommendations for the Future' (2017) *13 International Journal of Biodiversity Science, Ecosystem Services & Management* 68.

considers the entire ecosystem, including humans, and has the goal of “maintaining an ecosystem in a healthy, productive and resilient condition so that it can provide the services humans want and need”.³¹

An Ecosystem Services Approach (ESA) has been associated with four common characteristics: (1) ecosystem services are valued on the basis of their benefits to humans; (2) ecosystem services are underpinned by ecosystem processes and this relationship is made explicit; (3) the approach requires interdisciplinary collaboration and stakeholder engagement at multiple scales; and (4) the outcomes of the approach can be incorporated into environmental policy and management decisions.³²

At COP 26 in Glasgow, Scotland, Climate change experts from United Nations University (UNU) and World Food Programme (WFP) encouraged countries to embrace better integration of nature-based solutions in adaptation planning.³³ Arguably, these nature-based solutions can have the twin benefits of climate adaptation and biodiversity conservation.³⁴

At COP 26, embracing nature-based solutions was seen as a way to not only take care of the environment but also ensuring that the ecosystem in turn takes care of human basic needs, and participants thus resolved to explore solutions that cover both the climate and biodiversity crises.³⁵ A Draft Decision published from COP 26 emphasised “the critical importance of nature-based solutions and ecosystem-based approaches, including protecting and restoring forests, to reducing emissions, enhancing removals and protecting biodiversity”.³⁶

The new opportunities that ecosystem services approaches provide for biodiversity conservation include: the development of broader constituencies for conservation and expanded possibilities to influence decision-making; opportunities to add or create new value to protected areas; and the opportunities to manage ecosystems sustainably outside of protected areas.³⁷

³¹ Ingram, J.C., Redford, K.H. and Watson, J.E., ‘Applying Ecosystem Services Approaches for Biodiversity Conservation: Benefits and Challenges’ [2012] SAPI EN. S. Surveys and Perspectives Integrating Environment and Society, 4.

³² Beaumont NJ, Mongrue R and Hooper T, ‘Practical Application of the Ecosystem Service Approach (ESA): Lessons Learned and Recommendations for the Future’ (2017) 13 International Journal of Biodiversity Science, Ecosystem Services & Management 68.

³³ ‘COP26: Nature-Based Solutions Win in Science and on the Ground - World’ (ReliefWeb) <<https://reliefweb.int/report/world/cop26-nature-based-solutions-win-science-and-ground>> accessed 24 November 2021.

³⁴ Key, I., Smith, A., Turner, B., Chausson, A., Girardin, C., MacGillivray, M. and Seddon, N., “Can Nature-Based Solutions Deliver a Win-Win for Biodiversity and Climate Change Adaptation?” (2021).

³⁵ United Nations, ‘COP26 Day 7: Sticking Points and Nature-Based Solutions’ (United Nations) <<https://www.un.org/en/climatechange/cop26-day-7-sticking-points-and-nature-based-solutions>> accessed 24 November 2021.

³⁶ “‘Nature-Based Solutions’ Prove Divisive at Glasgow Climate Talks’ (Climate Home News, 11 November 2021) <<https://www.climatechangenews.com/2021/11/11/nature-based-solutions-prove-divisive-glasgow-climate-talks/>> accessed 24 November 2021; See also United Nations, Draft CMA decision proposed by the President, Draft Text on 1/CMA.3, Version 10/11/2021 05:51.

³⁷ Ingram, J.C., Redford, K.H. and Watson, J.E., ‘Applying Ecosystem Services Approaches for Biodiversity Conservation: Benefits and Challenges’ [2012] SAPI EN. S. Surveys and Perspectives Integrating Environment and Society, 3.

The main concern, however, despite the increasing adoption of ecosystem services as a framework and suite of tools by the conservation community, regard the application and efficacy of these approaches for conserving all of the components of biodiversity that the conservation community is charged with protecting. This is because at their core, ecosystem services approaches prioritize those processes that contribute to human wellbeing; very different from a biodiversity conservation approach, which is concerned with identifying conservation management actions to promote the persistence of all biodiversity, including species or ecosystems that do not have an identified value for humans.³⁸ Thus, it is suggested that when utilising ecosystem services approaches for conservation, planners and managers must be realistic and recognise that these approaches are not all-encompassing and there are going to be gap species, ecosystems, and ecological processes whose conservation will require tools tailored to address those issues.³⁹

4. Overview of the Convention on Biological Diversity

The Convention on Biological Diversity (CBD) is the first global agreement to cover all aspects of biological diversity: the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding,⁴⁰ and the same was signed at the Earth Summit in Rio de Janeiro, Brazil, in 1992 and entered into force on 29 December 1993.⁴¹

The main principle that guides the application of CBD is that ‘States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.’⁴²

The CBD calls for cooperation among Contracting States in conservation and sustainable use of biological diversity.⁴³ As for individual States, the CBD requires them to develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity or adapt for this purpose existing strategies, plans or programmes which should reflect, *inter alia*, the measures set out in this Convention relevant to the Contracting Party concerned; and integrate, as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies.⁴⁴

³⁸ Ingram, J.C., Redford, K.H. and Watson, J.E., ‘Applying Ecosystem Services Approaches for Biodiversity Conservation: Benefits and Challenges’ [2012] SAPI EN. S. Surveys and Perspectives Integrating Environment and Society, 5; Reyers B and others, ‘Finding Common Ground for Biodiversity and Ecosystem Services’ (2012) 62 BioScience 503.

³⁹ Ingram, J.C., Redford, K.H. and Watson, J.E., ‘Applying Ecosystem Services Approaches for Biodiversity Conservation: Benefits and Challenges’ [2012] SAPI EN. S. Surveys and Perspectives Integrating Environment and Society.

⁴⁰ Article 1, Convention on Biological Diversity.

⁴¹ Biosafety Unit, ‘Welcome to the CBD Secretariat’ (8 April 2013) <<https://www.cbd.int/secretariat/>> accessed 29 July 2021.

⁴² Article 3, Convention on Biological Diversity.

⁴³ *Ibid*, Article 5.

⁴⁴ Article 6, Convention on Biological Diversity.

As for sustainable use of components of biological diversity, CBD requires Contracting States to, as far as possible and as appropriate: integrate consideration of the conservation and sustainable use of biological resources into national decision-making; adopt measures relating to the use of biological resources to avoid or minimize adverse impacts on biological diversity; protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements; support local populations to develop and implement remedial action in degraded areas where biological diversity has been reduced; and encourage cooperation between its governmental authorities and its private sector in developing methods for sustainable use of biological resources.⁴⁵

CBD also requires each Contracting Party to, as far as possible and as appropriate, adopt economically and socially sound measures that act as incentives for the conservation and sustainable use of components of biological diversity.⁴⁶ In order to build capacity through research and training, CBD requires all the Contracting Parties, taking into account the special needs of developing countries, to: establish and maintain programmes for scientific and technical education and training in measures for the identification, conservation and sustainable use of biological diversity and its components and provide support for such education and training for the specific needs of developing countries; promote and encourage research which contributes to the conservation and sustainable use of biological diversity, particularly in developing countries, inter alia, in accordance with decisions of the Conference of the Parties taken in consequence of recommendations of the Subsidiary Body on Scientific, Technical and Technological Advice: and in keeping with the provisions of Articles 16, 13 and 20, promote and cooperate in the use of scientific advances in biological diversity research in developing methods for conservation and sustainable use of biological resources.⁴⁷ In addition to this, the Contracting Parties should: promote and encourage understanding of the importance of, and the measures required for, the conservation of biological diversity, as well as its propagation through media, and the inclusion of these topics in educational programmes; and cooperate, as appropriate, with other States and international organizations in developing educational and public awareness programmes, with respect to conservation and sustainable use of biological diversity.⁴⁸ In order to reduce or eliminate adverse impacts on biodiversity, CBD requires States to invest in impact assessment measures and/or procedures.⁴⁹

Notably, Kenya is a signatory to the Convention on Biological Diversity, and thus obligated to consider as well as adopt the Aichi Targets in its national plans and programs on biological diversity conservation.⁵⁰ It is noteworthy that development and agricultural activities are likely to adversely affect biodiversity conservation measures. As a result, the government should continually establish efficient systems of Strategic Environmental Assessment (SEA),

⁴⁵ Ibid, Article 10.

⁴⁶ Ibid, Article 11.

⁴⁷ Ibid, Article 12.

⁴⁸ Article 13, Convention on Biological Diversity.

⁴⁹ Article 14, Convention on Biological Diversity.

⁵⁰ Biosafety Unit, 'Main Details' <<https://www.cbd.int/countries/profile/?country=ke>> accessed 3 June 2021; 'Convention on Biological Diversity | Treaties Database' <<http://kenyalaw.org/treaties/treaties/87/Convention-on-Biological-Diversity>> accessed 3 June 2021; 'Ministry of Environment and Forestry » Blog Archive » Statement By Kenya On Strategic Plan For Biodiversity 2011-2020' <<http://www.environment.go.ke/?p=3091>> accessed 3 June 2021.

Environmental Impact Assessment (EIA), Strategic Environmental and Social Assessment (SESA) and Environmental Audit and Monitoring of the environment and Environmental Security Assessment (ESA) and ensure that the same are periodically reviewed to ensure that they remain effective. There is a need to ensure that these EIA processes are not only carried out as a formality but are also reflective of what is on the ground and there should also be a follow up mechanism to ensure that the companies engage the communities throughout and that they continually carry out their duties as per the law and the assessment reports.⁵¹

These impact assessment activities should also include Biodiversity Impact Assessment (BIA). BIA, a subset of EIA, has been defined as an evaluation exercise which involves identifying, measuring, quantifying, valuing and internalizing the unintended impacts (on biodiversity) of development interventions.⁵² Arguably, EIA processes should entail BIA, and specifically, ecological impact assessment to the extent that ecological diversity is one aspect of biodiversity, in order to determine how and to what extent, development interventions and projects are affecting biodiversity — composition, structure and function.⁵³ While neither the Constitution of Kenya 2010 nor EMCA expressly mentions BIA, the same can be adopted in line with the provisions of Article 69 of the Constitution as well as sections 57A, 58, 62, and 112 on conservation of environmental resources, including biodiversity.

Internationally, the inclusion of BIA in EIA activities is also supported by Article 14 of the *Convention on Biological Diversity* which states that: each Contracting Party, as far as possible and as appropriate, shall: (a) Introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures; (b) Introduce appropriate arrangements to ensure that the environmental consequences of its programmes and policies that are likely to have significant adverse impacts on biological diversity are duly taken into account; (c) Promote, on the basis of reciprocity, notification, exchange of information and consultation on activities under their jurisdiction or control which are likely to significantly affect adversely the biological diversity of other States or areas beyond the limits of national jurisdiction, by encouraging the conclusion of bilateral, regional or multilateral arrangements, as appropriate; (d) In the case of imminent or grave danger or damage, originating under its jurisdiction or control, to biological diversity within the area under jurisdiction of other States or in areas beyond the limits of national jurisdiction, notify immediately the potentially affected States of such danger or damage, as well as initiate action to prevent or minimize such danger or damage; and (e) Promote national arrangements for emergency responses to activities or events, whether caused naturally or otherwise, which present

⁵¹ 'Chapter 3: EIA Process' <<http://www.fao.org/3/V8350E/v8350e06.htm>> accessed 24 July 2021; '1.7 Overview of the Stages of the EIA Process' <https://www.soas.ac.uk/cedep-demos/000_P507_EA_K3736-Demo/unit1/page_14.htm> accessed 24 July 2021; 'Our Role in Securing Public Participation in the Kenyan Legislative and Policy Reform Process' (Natural Justice, 23 July 2020) <<https://naturaljustice.org/our-role-in-securing-public-participation-in-the-kenyan-legislative-and-policy-reform-process/>> accessed 24 July 2021; 'Accountability, Transparency, Participation, and Inclusion: A New Development Consensus? - Carnegie Endowment for International Peace' <<https://carnegieendowment.org/2014/10/20/accountability-transparency-participation-and-inclusion-new-development-consensus-pub-56968>> accessed 24 July 2021.

⁵² Wale E and Yalew A, 'On Biodiversity Impact Assessment: The Rationale, Conceptual Challenges and Implications for Future EIA' (2010) 28 *Impact Assessment and Project Appraisal* 3, 3.

⁵³ *Ibid*, 3.

a grave and imminent danger to biological diversity and encourage international cooperation to supplement such national efforts and, where appropriate and agreed by the States or regional economic integration organizations concerned, to establish joint contingency plans.⁵⁴ The Conference of the Parties is to examine, on the basis of studies to be carried out, the issue of liability and redress, including restoration and compensation, for damage to biological diversity, except where such liability is a purely internal matter.⁵⁵

It is, therefore, worth pointing out that Article 14 does not impose a direct obligation that is enforceable by other states to conduct EIAs before undertaking activities that pose risks to biological diversity.⁵⁶ This is also captured in *COP 8 Decision VIII/28, Impact Assessment: Voluntary Guidelines on Biodiversity-Inclusive Impact Assessment* which ‘emphasizes that the voluntary guidelines on biodiversity-inclusive environmental impact assessment are intended to serve as guidance for Parties and other Governments, subject to their national legislation, and for regional authorities or international agencies, as appropriate, in the development and implementation of their impact assessment instruments and procedures’.⁵⁷

It has been acknowledged that natural habitat loss and fragmentation, as a result of development projects, are major causes of biodiversity erosion, and while Environmental impact assessment (EIA) is the most commonly used site-specific planning tool that takes into account the effects of development projects on biodiversity by integrating potential impacts into the mitigation hierarchy of avoidance, reduction, and offset measures, the extent to which EIA fully address the identification of impacts and conservation stakes associated with biodiversity loss has been criticized as inadequate.⁵⁸

The *COP 8 Decision VIII/28, Impact Assessment: Voluntary Guidelines on Biodiversity-Inclusive Impact Assessment* provides, *inter alia*, that the Conference of the Parties to the Convention on Biological Diversity:- notes that the Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or used by Indigenous and Local Communities (decision VII/16 F, annex) should be used in conjunction with the voluntary guidelines on biodiversity-inclusive environmental impact assessment contained in the annex below and the draft guidance on biodiversity-inclusive strategic environmental assessment contained in annex II to the note by the Executive Secretary on voluntary guidelines on biodiversity-inclusive impact assessment.⁵⁹

⁵⁴ Article 14(1), Convention on biological Diversity; see also generally, Craik N, ‘Biodiversity-Inclusive Impact Assessment’, Elgar Encyclopedia of Environmental Law (Edward Elgar Publishing Limited 2017).

⁵⁵ Convention on biological Diversity, Article 14 (2).

⁵⁶ Craik N, ‘Biodiversity-Inclusive Impact Assessment’, Elgar Encyclopedia of Environmental Law (Edward Elgar Publishing Limited 2017), 2.

⁵⁷ Unit B, ‘Impact assessment: Voluntary guidelines on biodiversity-inclusive impact assessment’ <<https://www.cbd.int/decision/cop/?id=11042>> accessed 10 September 2021.

⁵⁸ Bigard C, Pioch S and Thompson JD, ‘The Inclusion of Biodiversity in Environmental Impact Assessment: Policy-Related Progress Limited by Gaps and Semantic Confusion’ (2017) 200 *Journal of environmental management* 35, 35.

⁵⁹ Unit B, ‘Impact assessment: Voluntary guidelines on biodiversity-inclusive impact assessment’ <<https://www.cbd.int/decision/cop/?id=11042>> accessed 10 September 2021.

The *Voluntary Guidelines On Biodiversity-Inclusive Environmental Impact Assessment* identifies some biodiversity issues at different stages of environmental impact assessment.⁶⁰ The guidelines identify different stages in this process: *Screening*- used to determine which proposals should be subject to EIA, to exclude those unlikely to have harmful environmental impacts and to indicate the level of assessment required. Screening criteria have to include biodiversity measures, or else there is a risk that proposals with potentially significant impacts on biodiversity will be screened out; *Scoping*: used to define the focus of the impact assessment study and to identify key issues, which should be studied in more detail. It is used to derive terms of reference (sometimes referred to as guidelines) for the EIA study and to set out the proposed approach and methodology. Scoping also enables the competent authority (or EIA professionals in countries where scoping is voluntary) to: (a) Guide study teams on significant issues and alternatives to be assessed, clarify how they should be examined (methods of prediction and analysis, depth of analysis), and according to which guidelines and criteria; (b) Provide an opportunity for stakeholders to have their interests taken into account in the EIA; and (c) Ensure that the resulting Environmental Impact Statement is useful to the decision maker and is understandable to the public⁶¹; *Assessment and evaluation of impacts, and development of alternatives*; *Reporting: the environmental impact statement (EIS)*; *Review of the environmental impact statement*; *Decision-making*; and, *Monitoring, compliance, enforcement and environmental auditing*.⁶²

COP 8 Decision suggests that, taking into account the three objectives of the Convention, fundamental questions which need to be answered in an EIA study include: (a) *Would the intended activity affect the biophysical environment directly or indirectly in such a manner or cause such biological changes that it will increase risks of extinction of genotypes, cultivars, varieties, populations of species, or the chance of loss of habitats or ecosystems?* (b) *Would the intended activity surpass the maximum sustainable yield, the carrying capacity of a habitat/ecosystem or the maximum allowable disturbance level of a resource, population, or ecosystem, taking into account the full spectrum of values of that resource, population or ecosystem?* And, (c) *Would the intended activity result in changes to the access to, and/or rights over biological resources?*⁶³

It may be important for stakeholders in environmental law in Kenya to review the requirements and process of EIA in biodiversity rich areas to include BIA as envisaged under Article 69(1) of the Constitution of Kenya. Notably, effective impact assessments and management plans largely rely on a solid foundation of: a) Information on biodiversity (e.g., taxonomic descriptions of species, conservation status assessments of species, conservation status assessments of ecosystems, distribution maps of species and habitats at a scale that is appropriate for project planning, understanding of sensitivity to stressors); b) Understanding of direct, indirect, and where feasible, cumulative impacts (i.e., placing the project in the context of land/resource use trends to ascertain how it contributes to landscape-scale impacts); c) Identification of priorities for biodiversity conservation (e.g., existing and planned protected areas, National Biodiversity Strategies and Action Plans); and d) Demonstrated methods to manage impacts.⁶⁴

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Hardner, J., Gullison, R.E., Anstee, S. and Meyer, M., 'Good Practices for Biodiversity Inclusive Impact Assessment and Management Planning' [2015] Prepared for the Multilateral Financing Institutions Biodiversity Working Group, 4.

Arguably, if development projects are to take into consideration biodiversity conservation, then it is the high time that stakeholders consider inclusion of BIA in EIA and ESIA activities in the country. Fostering Environmental Democracy in these processes will also be important as the impact assessment is not purely technical and it is good practice to consult project stakeholders in all steps of the process, especially in the identification of potential impacts at the outset of the assessment.⁶⁵ This is especially important because local stakeholders may have a greater appreciation than external technical experts of the biodiversity values in the area and their sensitivity to impacts.⁶⁶

5. Conclusion

The fundamental difference between the two main conservation strategies are: ex situ conservation involves the sampling, transfer, and storage of target taxa from the target area, whereas in situ conservation involves the designation, management, and monitoring of target taxa where they are encountered.⁶⁷ It is suggested that each ecosystem should be managed depending on its biodiversity composition and the choice of the management approach should also be informed by the same. If Kenya and the rest of the African countries are to achieve sustainable development goals through effective biodiversity conservation, they must not only embrace the global best practices in biodiversity conservation but must ensure that the same are entrenched and implemented through their domestic laws on environmental conservation.

⁶⁵ Ibid, 7.

⁶⁶ Ibid, 6.

⁶⁷ Maxted N, 'In Situ, Ex Situ Conservation' in Simon A Levin (ed), Encyclopedia of Biodiversity (Second Edition) (Academic Press 2013)
<<https://www.sciencedirect.com/science/article/pii/B9780123847195000496>> accessed 12 September 2021.

Biodiversity Mainstreaming for Food and Nutrition Security in Kenya

Abstract

The United Nations Sustainable Development Goals aims to not only achieve biodiversity conservation but to also mainstream such measures into efforts towards achieving food and nutrition security. This is due to the important role that biodiversity plays in achieving food and nutrition security. This paper makes a case for some of the ways that countries can mainstream biodiversity conservation debates into measures geared towards achieving food and nutritional security.

1. Introduction

The global population is predicted to reach 8.6 billion by 2030, necessitating the protection of a finite and diminishing quantity of natural resources, since the livelihoods of billions of people employed in the agricultural value chain are at risk.¹ Providing enough, safe, and nutritious food to all people has always been a major worldwide challenge, even in the twenty-first century, where food availability, access to food, food use/utilization, and food stability are the four elements that most people think of when they think of food security.² The Food and Agriculture Organization of the United Nations (FAO) describes food security in following terms: “Food security exists when all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food which meets their dietary needs and food preferences for an active and healthy life”.³

The Constitution of Kenya guarantees the right of every person to be free from hunger and thirst: Every person has the right— (c) to be free from hunger, and to have adequate food of acceptable quality; (d) to clean and safe water in adequate quantities.⁴ Conservation of biodiversity for securing food and nutrition security in Kenya thus becomes an important step towards guaranteeing human rights of all.

Biological diversity affects agricultural and livestock output, as well as the structure and function of agroecosystems, in both good and negative ways.⁵ The Convention on Biological Diversity (CBD) of 1992, for example, recognized the link between biodiversity, agriculture, and nutrition, and has called for greater mainstreaming of agricultural biodiversity into policies and practices aimed at food and nutrition security, as well as increased coordination between the environment, agriculture, and nutrition sectors, as far back as 2006 CBD, COP 8 Decision VIII/23.⁶ The second

¹ ‘Innovations for Sustainable Food Systems’ (Farming First) <<https://farmingfirst.org/food-systems/>> accessed 21 December 2021.

² Anand S, ‘The Role of Science, Technology and Innovation in Ensuring Food Security by 2030’.

³ Brief, FAO Policy. "June 2006." Food security issue 2 (2017): 1.

⁴ Article 43, Constitution of Kenya 2010.

⁵ Karl S Zimmerer, ‘Biological Diversity in Agriculture and Global Change’ (2010) 35 Annual Review of Environment and Resources 137 <<https://www.annualreviews.org/doi/10.1146/annurev-environ-040309-113840>> accessed 21 December 2021.

⁶ Beltrame, D., Gee, E., Guner, B., Lauridsen, N., Samarasinghe, W.L.G., Wasike, V., Hunter, D. and Borelli, T., ‘Mainstreaming Biodiversity for Food and Nutrition into Policies and Practices: Methodologies and Lessons Learned from Four Countries’ (2019) 29 ANADOLU Ege Tarımsal Araştırma Enstitüsü Dergisi 25, at 25.

and third objectives of the Convention on the sustainable use of biodiversity and its components, as well as the fair and equitable sharing of the benefits emerging from the use of genetic resources, for example, contain various pertinent clauses. Articles 6 (b), 10 (a) (c), 14, 11, 7 (c), and 8(l) of the Convention further call for biodiversity to be mainstreamed.⁷ COP 26 side activities on November 3, 2021, for example, underlined that feeding humanity required a systemic transformation to build climate change resilience and safeguard soils, water, ecosystems, and farmers, which is fundamentally different from the "green revolution."⁸ Innovative technologies and approaches being developed and applied around the world will be critical in making our food systems more sustainable. These technologies must generate cash and create jobs in order to be economically viable. They must include impoverished and vulnerable communities and lower hunger and malnutrition levels in order to be socially sustainable. They must help us protect water, soil, and air quality while reducing greenhouse gas emissions, food loss, and waste in order to be environmentally sustainable.⁹

This paper critically discusses the place of biodiversity mainstreaming in achieving food and nutrition security for the people of Kenya, in line with the aforementioned sustainability goals.

2. Place of Biodiversity in Achieving Food and Nutrition Security: International and Domestic Regulatory Framework

The link between biodiversity and food security can be seen in a variety of ways, from genes to species, landscapes, and biomes, making biodiversity a valuable resource for humanity.¹⁰

Biodiversity in food and agriculture refers to the diversity of living species that contribute to food and agriculture, as well as the forestry and fisheries industries.¹¹ Many of the adaptation techniques required in food and agriculture will be based on the sustainable use of genetic resources for food and agriculture.

Plants and animals that are crucial for food security may need to adapt to abiotic changes such as heat, drought, floods, and salinity in order to adapt to climate change.¹² Local communities, breeders, and researchers employ genetic resources to adapt to shifting socioeconomic requirements and environmental problems. Maintaining and utilizing a diverse genetic pool in the face of climate change is regarded as a critical insurance policy for the food and agriculture industries.¹³ Indeed, this is so important that during COP 26, the UN Food and Agriculture Organization hosted a number of side events aimed at assisting countries in climate negotiations,

⁷ Unit B, 'Biodiversity Mainstreaming' (16 November 2021) <<https://www.cbd.int/mainstreaming/>> accessed 21 December 2021.

⁸ Hub ISK, 'COP 26 Events Aim to Support Negotiations on Food Systems | News | SDG Knowledge Hub | IISD' <<https://sdg.iisd.org/443/news/cop-26-events-aim-to-support-negotiations-on-food-systems/>> accessed 21 December 2021.

⁹ 'Innovations for Sustainable Food Systems - Farming First' <<https://farmingfirst.org/food-systems#home>> accessed 21 December 2021.

¹⁰ Cramer, W., Egea, E., Fischer, J., Lux, A., Salles, J.M., Settele, J. and Tichit, M., 'Biodiversity and Food Security: From Trade-Offs to Synergies' (2017) 5 Regional Environmental Change 1257, at 1257.

¹¹ FAO, 'Climate Change and Biodiversity for Food and Agriculture,' Technical Background Document From The Expert Consultation Held on 13 to 14 February 2008, p.1.

Available at http://www.fao.org/uploads/media/FAO_2008a_climate_change_and_biodiversity_02.pdf

¹² Ibid.

¹³ Ibid, p.3.

particularly through boosting action linked to food and agriculture, ecosystems, and biodiversity, as well as working with countries to secure climate finance.¹⁴

Crop genetic diversity is regarded as a source of ongoing improvements in yield, pest resistance, and quality, and it is commonly believed that increased varietal and species diversity will enable agricultural systems to maintain output under a variety of conditions.¹⁵ It has been stated that maintaining and improving crop genetic variety is becoming increasingly important to ensure the resilience of food crop supply, especially in light of climate change issues.¹⁶

2.1 International Convention on Protection of New Plant Varieties

The *International Convention on Protection of New Plant Varieties*¹⁷ established the International Union for the Protection of New Varieties of Plants (UPOV) as an intergovernmental organization with headquarters in Geneva (Switzerland), to provide and promote an effective system of plant variety protection, with the aim of encouraging the development of new varieties of plants, for the benefit of society.¹⁸ The UPOV Convention encourages and rewards the ingenuity and creativeness of breeders developing new varieties of plants.¹⁹ The UPOV system establishes basic legal principles of protection by providing the breeders exclusive rights to their plant invention for a specific period of time, while making available the genetic material to others to use in their breeding programs.²⁰

2.2 Convention on International Trade in Endangered Species of Wild Fauna and Flora

The *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES)²¹ was adopted in March 1973 to regulate worldwide commercial trade in wild animal and plant species in order to ensure that international trade does not threaten the survival of any species.²² CITES is a legally binding Convention on state parties to the convention, which are obliged to adopt their own domestic legislation to implement its goals.²³ CITES assigns each protected species to one of three lists namely; Appendix I lists endangered species that are at risk of extinction and these species require both import and export permits approved by the “management authority and scientific authority” of the nations involved; Appendix II species are

¹⁴ Hub ISK, ‘COP 26 Events Aim to Support Negotiations on Food Systems | News | SDG Knowledge Hub | IISD’ <<https://sdg.iisd.org:443/news/cop-26-events-aim-to-support-negotiations-on-food-systems/>> accessed 21 December 2021.

¹⁵ Carpenter, Janet E., "Impact of GM crops on biodiversity," *GM crops* 2, no. 1 (2011): 7-23, p.7.

¹⁶ *Ibid*, P.7.

¹⁷ International Union for the Protection of New Varieties of Plants, *International Convention for the Protection of New Varieties of Plants* of December 2, 1961, as Revised at Geneva on November 10, 1972, on October 23, 1978, and on March 19, 1991, UPOV Publication no: 221(E).

¹⁸ ‘International Union for the Protection of New Varieties of Plants (UPOV)’ <<https://www.upov.int/portal/index.html.en>> accessed 5 June 2021.

¹⁹ ‘International Convention for the Protection of New Varieties of Plants (UPOV)’ <<https://www.uspto.gov/ip-policy/patent-policy/international-convention-protection-new-varieties-plants-upov>> accessed 5 June 2021.

²⁰ *Ibid*.

²¹ United Nations, *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, March 3rd, 1973, 993 U.N.T.S. 243.

²² ‘Convention on International Trade in Endangered Species | Description, Members, & Provisions’ (Encyclopedia Britannica) <<https://www.britannica.com/topic/Convention-on-International-Trade-in-Endangered-Species>> accessed 6 June 2021.

²³ *Ibid*.

those that are not threatened with extinction but that might suffer a serious decline in number if trade is not restricted and their trade is thus regulated by permit; and Appendix III species are protected in at least one country that is a CITES member and that has petitioned others for help in controlling international trade in that species.²⁴

2.3 International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA)

The *International Treaty on Plant Genetic Resources for Food and Agriculture*²⁵ was adopted in 2001 with the objectives of conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of the benefits arising out of their use, in harmony with the Convention on Biological Diversity, for sustainable agriculture and food security.²⁶ The sustainable use of plant genetic resources for food and agriculture may include such measures as, *inter alia*: strengthening research which enhances and conserves biological diversity by maximizing intra- and inter-specific variation for the benefit of farmers, especially those who generate and use their own varieties and apply ecological principles in maintaining soil fertility and in combating diseases, weeds and pests; and supporting, as appropriate, the wider use of diversity of varieties and species in on-farm management, conservation and sustainable use of crops and creating strong links to plant breeding and agricultural development in order to reduce crop vulnerability and genetic erosion, and promote increased world food production compatible with sustainable development.²⁷

There is a need for countries to use this Treaty in crop production for food security, as applied genetics mixed with practical plant breeding is a potent instrument in agricultural development and food security, and biodiversity provides the foundation for effective use of these genomic techniques.²⁸

2.4 COP 10 Decision X/2, Strategic Plan for Biodiversity 2011-2020

The *COP 10 Decision X/2, Strategic Plan for Biodiversity 2011-2020*²⁹, with its *Aichi Targets*³⁰, were adopted by the United Nations where Parties and other Governments, with the support of intergovernmental and other organizations, as appropriate, were urged to implement the Strategic

²⁴ Kathryn A Saterson, 'Government Legislation and Regulations in the United States' in Simon A Levin (ed), *Encyclopedia of Biodiversity* (Second Edition) (Academic Press 2013) <<https://www.sciencedirect.com/science/article/pii/B9780123847195001866>> accessed 6 June 2021; 'Convention on International Trade in Endangered Species | Description, Members, & Provisions' (Encyclopedia Britannica) <<https://www.britannica.com/topic/Convention-on-International-Trade-in-Endangered-Species>> accessed 6 June 2021.

²⁵ United Nations, *International Treaty on Plant Genetic Resources for Food and Agriculture*, Food and Agriculture Organization of the United Nations 13 December 2006, 2400 (p.303).

²⁶ *Ibid*, Article 1.1.

²⁷ *Ibid*, Article 6.2 (b)(f).

²⁸ Louwaars, N.P., Thörn, E., Esquinas-Alcázar, J., Wang, S., Demissie, A. and Stannard, C., 'Access to Plant Genetic Resources for Genomic Research for the Poor: From Global Policies to Target-Oriented Rules' (2006) 4 *Plant Genetic Resources* 54 <<https://www.cambridge.org/core/journals/plant-genetic-resources/article/abs/access-to-plant-genetic-resources-for-genomic-research-for-the-poor-from-global-policies-to-targetoriented-rules/DC2B65BA1B3230D9A6BFFA9C6CD6A3C4>> accessed 21 December 2021.

²⁹ 'The Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets' <<https://www.cbd.int/kb/record/decision/12268>> accessed 3 June 2021.

³⁰ Biosafety Unit, 'Aichi Biodiversity Targets' (18 September 2020) <<https://www.cbd.int/sp/targets/>> accessed 3 June 2021.

Plan for Biodiversity 2011-2020 whose main mission is to: "take effective and urgent action to halt the loss of biodiversity in order to ensure that by 2020 ecosystems are resilient and continue to provide essential services, thereby securing the planet's variety of life, and contributing to human well-being, and poverty eradication. To ensure this, pressures on biodiversity are reduced, ecosystems are restored, biological resources are sustainably used and benefits arising out of utilization of genetic resources are shared in a fair and equitable manner; adequate financial resources are provided, capacities are enhanced, biodiversity issues and values mainstreamed, appropriate policies are effectively implemented, and decision-making is based on sound science and the precautionary approach."³¹

The Plan was meant to provide an overarching framework on biodiversity, not only for the biodiversity-related conventions, but for the entire United Nations system and all other partners engaged in biodiversity management and policy development.³²

2.5 COP 8 Decision VIII/23, Agricultural biodiversity: Cross-cutting initiative on biodiversity for food and nutrition

The *COP 8 Decision VIII/23 on Agricultural biodiversity*³³, urged Parties and other Governments to integrate biodiversity, food and nutrition considerations into their national biodiversity strategies and action plans and other national plans and activities, including national plans of action for nutrition and strategies for achievement of the Millennium Development Goals.³⁴

As an Annexure, it provided for a *Proposed Framework For A Cross-Cutting Initiative On Biodiversity For Food And Nutrition*, whose overall aim was to promote and improve the sustainable use of biodiversity in programmes contributing to food security and human nutrition, as a contribution to the achievement of Millennium Development Goal 1, Goal 7 and related goals and targets and, thereby, to raise awareness of the importance of biodiversity, its conservation and sustainable use.³⁵

In promoting integration of biodiversity, food and nutrition issues into research and policy instruments, Element 2 thereof called for mainstreaming of the conservation and sustainable use of biodiversity into agendas, programmes and policies related to nutrition, health, agriculture and hunger and poverty reduction.³⁶

2.6 A/RES/70/1 - Transforming our world: the 2030 Agenda for Sustainable Development

The 2030 Agenda for Sustainable Development, under Goal 2, aims to end hunger, achieve food security and improved nutrition and promote sustainable agriculture:-

³¹ Ibid.

³² Biosafety Unit, 'Strategic Plan for Biodiversity 2011-2020, Including Aichi Biodiversity Targets' (21 January 2020) <<https://www.cbd.int/sp/>> accessed 3 June 2021.

³³ United Nations, "COP 8 Decision VIII/23, Agricultural biodiversity: Cross-cutting initiative on biodiversity for food and nutrition", Decision Adopted by The Conference of the Parties to The Convention On Biological Diversity at Its Eighth Meeting, UNEP/CBD/COP/DEC/VIII/23, 15 June 2006.

³⁴ Ibid, Preamble, para. 5.

³⁵ Ibid, Annex, para. 2.

³⁶ Ibid, Element 2.

By 2030, end hunger and ensure access by all people, in particular the poor and people in vulnerable situations, including infants, to safe, nutritious and sufficient food all year round; By 2030, double the agricultural productivity and incomes of small-scale food producers, in particular women, indigenous peoples, family farmers, pastoralists and fishers, including through secure and equal access to land, other productive resources and inputs, knowledge, financial services, markets and opportunities for value addition and non-farm employment; By 2030, ensure sustainable food production systems and implement resilient agricultural practices that increase productivity and production, that help maintain ecosystems, that strengthen capacity for adaptation to climate change, extreme weather, drought, flooding and other disasters and that progressively improve land and soil quality; By 2020, maintain the genetic diversity of seeds, cultivated plants and farmed and domesticated animals and their related wild species, including through soundly managed and diversified seed and plant banks at the national, regional and international levels, and promote access to and fair and equitable sharing of benefits arising from the utilization of genetic resources and associated traditional knowledge, as internationally agreed; increase investment, including through enhanced international cooperation, in rural infrastructure, agricultural research and extension services, technology development and plant and livestock gene banks in order to enhance agricultural productive capacity in developing countries, in particular least developed countries.

2.7 Aichi Target 13

By 2020, the genetic diversity of cultivated plants and farmed and domesticated animals and of wild relatives, including other socio-economically as well as culturally valuable species, is maintained, and strategies have been developed and implemented for minimizing genetic erosion and safeguarding their genetic diversity.

2.8 The Crops Act 2013

Under Section 8 of the Crops Act 2013, the Authority is to: in consultation with the National Biosafety Authority, advise the government on the introduction, safe transfer, handling and use of genetically modified species of plants and organisms in the country; establish experimental stations and seed farms for the development of varieties suitable to the agro-climatic conditions of the area and markets that will provide greatest value added to scheduled crops.

The Genetic Resources Research Institute (GeRRI), under the Kenya Agricultural and Livestock Research Act of 2013, and a semi-autonomous research Institute, is responsible for conserving plant genetic resources, animal and microbial genetic resources. Under the Food Security Bill, 2015, the National and county governments shall to the extent of their constitutional mandate promote the physical and economic access to adequate food of acceptable quality; in ensuring that, the National government fulfils its obligations under subsection (1), the Authority shall promote traditional and other practices and technologies of food production that ensure the conservation of biodiversity. Notably, the structure of the food economy as a whole, as well as its components including agricultural output, technology, food processing diversity, markets, and consumption, all have an impact on food system resilience.³⁷

³⁷ Brief, FAO Policy. "June 2006." Food security issue 2 (2017): 1.

The functions of the Authority shall be to promote measures to improve security and access to land and water resources and the optimum and sustainable utilization of these resources promote diversification and the use of alternative methods of agriculture and livestock Systems and the production of diverse food crops to mitigate against drought and other climatic conditions that negatively impact food production; The functions of a county food security committee shall be to initiate, undertake and participate in the collection, preparation, production and dissemination of data and information on food security and nutrition in the county.

2.9 National Food and Nutrition Security Policy, 2011

The government policy objective is to increase the quantity and quality of food available and accessible in order to ensure that all Kenyans have an adequate, diverse and healthy diet. This will be achieved by working towards sustainable production increases for food that is diversified, affordable and helps meet basic nutrition requirements.

2.10 National Horticulture Policy, 2012

Over the last few decades, horticulture has emerged as one of the leading sub-sectors in the agricultural sector in terms of foreign exchange earnings, food security, employment creation, and poverty alleviation. The importance of this policy in enhancing agriculture's contribution towards the projected economic growth of 10 percent per annum over the next 20 years, as stipulated in the Kenya Vision 2030, cannot be over-emphasised.

2.11 Agriculture and Food Authority (AFA) 2016-2021 Strategic Plan

This strategic plan is a blueprint against which the strategic direction of AFA is documented. It is premised on the context introduced by the AFA Act 2013 and Crops Act 2013 and the operating environment that the Authority operates. It takes into account the institutional frameworks, economic indicators, government policies and agriculture sub sector performances that are likely to impact on the Authority's future operations.

It also takes cognisance of the fact that a wide range of investors are involved in the agricultural sector and policies should aim at increasing private investment in agriculture as well as ensuring that investments are sustainable. AFA aims at ensuring that policies, laws and regulations are well designed and effectively implemented to ensure that such investments bring both economic and social benefits to the country while guaranteeing a sustainable use of natural resources.

This strategic plan also takes into account the relationship between policies and productivity and sustainability outcomes and seeks to provide a platform where such issues such as innovation, structural change, and access to and impact on natural resources and climate change as key drivers of productivity growth and sustainability are addressed.

2.12 Constitution of Kenya 2010

The Constitution of Kenya 2010³⁸ took bolder steps than its predecessor to not only incorporate environmental conservation and sustainable development issues as a stand-alone chapter but also notably puts emphasis on a rights-based approaches to conservation which require such conservation measures to also focus on the livelihoods and rights aspects of projects, programmes,

³⁸ The Constitution of Kenya, 2010.

and activities.³⁹ It has been argued that adopting rights-based approaches to conservation serves to ensure that the protection of rights and biodiversity conservation are mutually reinforcing.⁴⁰ These rights are both procedural and substantive.⁴¹

The Constitution outlines favourable legislative protection of biodiversity as envisaged in Chapter Five on Land and the Environment, where there is the emphasis on sustainable use of land and other natural resources, including biodiversity as a key principle.⁴² Article 69 of the Constitution is relevant in the quest for biodiversity conservation especially in relation to the obligations of the State in respect of the environment and natural resources management.⁴³ The provisions of Article 69(1) are notably comprehensive, addressing a number of cross-sectoral biodiversity concerns outlined by the CBD including issues of benefit sharing, traditional knowledge, elimination of activities harmful to biodiversity and the role of the community in conservation and sustainable use of biodiversity.⁴⁴ However, it is worth pointing out that ‘every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources’.⁴⁵

The Constitution also altered the legal landscape in Kenya by introducing a devolved system of governance in Kenya, with authority, roles and responsibilities split between the national government and the 47 county governments.⁴⁶ Regarding the environment and biodiversity conservation, the National Government is charged with: use of international waters and water resources; 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; agricultural policy; and capacity building and technical assistance to the counties.⁴⁷

As for the county governments, they are charged with: Agriculture, including—(a) crop and animal husbandry; (b) livestock sale yards; (c) county abattoirs; (d) plant and animal disease control; and (e) fisheries; control of air pollution, noise pollution, other public nuisances and outdoor advertising; implementation of specific national government policies on natural resources and environmental conservation, including-- (a) soil and water conservation; and (b) forestry; and ensuring and coordinating the participation of communities and locations in governance at the

³⁹ See Preamble; Article 10; and Chapter Five of the Constitution of Kenya 2010.

⁴⁰ ‘Rights-Based Approaches to Conservation’ (IUCN, 14 December 2015) <<https://www.iucn.org/theme/governance-and-rights/about/our-work/governance-and-rights-based-approaches/rights-based-approaches-conservation>> accessed 4 June 2021.

⁴¹ Joshua Gellers and Chris Jeffords, ‘Procedural Environmental Rights and Environmental Justice: Assessing the Impact of Environmental Constitutionalism’ [2015] SSRN Electronic Journal; Dinah Shelton, ‘Developing Substantive Environmental Rights’ (2010) 1 *Journal of Human Rights and the Environment* 89; UN Environment, ‘What Are Environmental Rights?’ (UNEP - UN Environment Programme, 2 March 2018) <<http://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/advancing-environmental-rights/what>> accessed 7 June 2021.

⁴² The Constitution of Kenya 2010, Article 60, 69.

⁴³ The Constitution of Kenya 2010, Article 69(1).

⁴⁴ *Ibid.*

⁴⁵ Article 69 (2), Constitution of Kenya, 2010.

⁴⁶ Fourth Schedule to the Constitution of Kenya 2010 on Distribution of functions between National and the county governments.

⁴⁷ Fourth Schedule, Part 1, Constitution of Kenya, 2010.

local level and assisting 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.⁴⁸ However, Counties may perform other functions assigned through an Act of Parliament. Notably, some of the functions related to environmental conservation fall within the shared jurisdiction of both national and county levels of government and should, therefore, be performed in a cooperative way.⁴⁹

2.13 Kenya's Vision 2030

The Vision 2030⁵⁰ was launched in 2008 as a long-term development blue print for the country, with the goal of transforming Kenya into “a newly-industrialised, middle-income country providing a high quality of life to all its citizens in a clean and secure environment”.⁵¹ The Vision 2030 is grounded on three development pillars namely: economic, social and political pillars.⁵² The development blueprint acknowledges the environment and all its aspect as an important part of achieving sustainable development and calls for conservation and sustainable use of these resources. The Vision 2030 acknowledges that invasive alien species and lack of a biodiversity inventory and inadequate procedures for access and benefit-sharing for biodiversity resources remain key challenges for the country.⁵³

The Social Pillar of the Vision 2030 seeks to invest in the people where it has been pointed out that ‘Kenya’s journey towards widespread prosperity also involves the building of a just and cohesive society that enjoys equitable social development in a clean and secure environment’.⁵⁴ Notably, the Political pillar of Vision 2030 also envisions “a democratic political system that is issue based , people-centred, result-oriented and accountable to the public” and ‘a country with a democratic system reflecting the aspirations and expectations of its people, in which equality is entrenched, irrespective of one’s race, ethnicity, religion, gender or socio-economic status; a nation that not only respects but also harnesses the diversity of its people’s values, traditions and aspirations for the benefit of all’.⁵⁵

2.14 Seeds and Plant Varieties Act, Cap 326

This is an Act of Parliament to confer power to regulate transactions in seeds, including provision for the testing and certification of seeds, for the establishment of an index of names of plant varieties, to empower the imposition of restriction on the introduction of new varieties, to control the importation of seeds, to authorize measures to prevent injurious cross-pollination, to provide for the grant of proprietary rights to persons breeding or discovering and developing new varieties,

⁴⁸ Fourth Schedule, Part 2, Constitution of Kenya, 2010 on distribution of functions between National and the county governments; see also Section 5 of the County Governments Act (2012) which outlines the functions of County Governments.

⁴⁹ Article 186, 189, Constitution of Kenya.

⁵⁰ Sessional Paper 10 of 2012 on Kenya Vision 2030, Government of Kenya.

⁵¹ Sessional Paper 10 of 2012 on Kenya Vision 2030, Government of Kenya, Office of the Prime Minister Ministry of State for Planning, National Development and Vision 2030.

⁵² ‘About Vision 2030 | Kenya Vision 2030’ <<http://vision2030.go.ke/about-vision-2030/>> accessed 1 May 2021.

⁵³ Chapter 4.6, Vision 2030.

⁵⁴ ‘Social Pillar | Kenya Vision 2030’ <<http://vision2030.go.ke/social-pillar/>> accessed 1 May 2021.

⁵⁵ ‘Foundation for The Pillars | Kenya Vision 2030’ <<https://vision2030.go.ke/enablers-and-macros/>> accessed 1 May 2021.

to establish a national centre for plant genetic resources and to establish a Tribunal to hear appeals and other proceedings and for connected purposes.⁵⁶

This Act establishes a National Plant Genetic Resources Centre which shall be responsible for the conservation and sustainable utilization of plant biodiversity in Kenya.

2.15 Biosafety Act, 2009

Biosafety Act, 2009⁵⁷ is an Act of Parliament to regulate activities in genetically modified organisms, to establish the National Biosafety Authority, and for connected purposes. The objectives of this Act include to facilitate responsible research into and minimize the risks that may be posed by genetically modified organisms; to ensure an adequate level of protection for the safe transfer, handling and use of genetically modified organisms that may have an adverse effect on the health of the people and the environment and to establish a transparent, science-based and predictable process for reviewing and making decisions on the transfer, handling and use of genetically modified organisms and related activities.⁵⁸

2.16 Environmental Management and Co-Ordination (Conservation of Biological Diversity and Resources, And Access to Genetic Resources and Benefits Sharing) Regulations, 2006

The *Environmental Management and Co-Ordination (Conservation of Biological Diversity and Resources, And Access to Genetic Resources and Benefits Sharing) Regulations, 2006*⁵⁹ are to apply to access to genetic resources or parts of genetic resources, whether naturally occurring or naturalised, including genetic resources bred for or intended for commercial purposes within Kenya or for export, whether in in-situ conditions or ex-situ conditions.⁶⁰ The Regulations shall, however, not apply to- the exchange of genetic resources, their derivative products, or the intangible components associated with them, carried out by members of any local Kenyan community amongst themselves and for their own consumption; access to genetic resources derived from plant breeders in accordance with the Seeds and Plant Varieties Act, Cap 326; human genetic resources; and approved research activities intended for educational purposes within recognized Kenyan academic and research institutions, which are governed by relevant intellectual property laws.⁶¹

⁵⁶ Preamble, Seeds and Plant Varieties Act, Cap 326, Laws of Kenya.

⁵⁷ Biosafety Act (No. 2 of 2009), Laws of Kenya.

⁵⁸ See also United Nations, Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Montreal, 29 January 2000, United Nations, Treaty Series, vol. 2226, p. 208. Article 1 thereof outlines the objective of the Protocol as follows:

In accordance with the precautionary approach contained in Principle 15 of the Rio Declaration on Environment and Development, the objective of this Protocol is to contribute to ensuring an adequate level of protection in the field of the safe transfer, handling and use of living modified organisms resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health, and specifically focusing on transboundary movements.

⁵⁹ Environmental Management and Co-Ordination (Conservation of Biological Diversity and Resources, and Access to Genetic Resources and Benefits Sharing) Regulations, Legal Notice No. 160 of 2006, Laws of Kenya.

⁶⁰ 'National Environment Management Authority (NEMA) - Biodiversity Regulations'

<https://www.nema.go.ke/index.php?option=com_content&view=article&id=30&Itemid=170> accessed 3 June 202.

⁶¹ Environmental Management and Co-Ordination (Conservation of Biological Diversity and Resources, and Access to Genetic Resources and Benefits Sharing) Regulations, 2006, sec. 3.

The Regulations require Environmental Impact Assessment for activities that may: have an adverse impact on any ecosystem; lead to the introduction of any exotic species; or lead to unsustainable use of natural resources.⁶² The Regulations also require the National Environment Management Authority (NEMA), in consultation with the relevant lead agencies, to impose bans, restrictions or similar measures on the access and use of any threatened species in order to ensure its regeneration and maximum sustainable yield as a way to conserve threatened species.⁶³ NEMA is also tasked with, in consultation with the relevant lead agencies, to identify and prepare an inventory of biological diversity of Kenya, which should include threatened, endangered, or rare species.⁶⁴

2.17 Kenya Plant Health Inspectorate Service Act, 2012

The Kenya Plant Health Inspectorate Service Act⁶⁵ is an Act of Parliament to establish the Kenya Plant Health Inspectorate Service as a regulatory body for the protection of plants, seeds and plant varieties and agricultural produce, to be responsible for administering several other written laws and for matters incidental thereto or connected therewith.

2.18 Challenges in Biodiversity Mainstreaming for Food and Nutrition Security

Food security is threatened by interacting changes in biodiversity and its inherent biophysical structures and processes with changes in biodiversity and its inherent biophysical structures and processes, as has been correctly pointed out. Thus, solutions for reconciling biodiversity and food security require more than just controlling the environmental footprint of food production.⁶⁶

Biodiversity conservation in developing countries is affected by several challenges which include, *inter alia*, slow economic development, high levels of poverty, unequal land distribution, a highly segmented society, high population increase as well as commercial interests in natural resource extraction.⁶⁷ Kenya's National Environment Management Authority (NEMA) highlights *drivers of biodiversity loss* as including *both direct and indirect causes* where direct threat includes land use change, habitat destruction, and introduction of invasive alien species, among others, while indirect threats are economic system and policy of the country; unsustainable exploitation of resources and weak management system; gaps in spatial information, and lack of public awareness, to mention but a few (Emphasis added).⁶⁸

This is also highlighted in the country's Sixth national report to the Convention on Biological Diversity⁶⁹ dated January 2021 which points out that 'while the Government of Kenya has been

⁶² Ibid, Regulation 4(1).

⁶³ Ibid, Regulation 5.

⁶⁴ Ibid, Regulation 6.

⁶⁵ Kenya Plant Health Inspectorate Service Act, No. 54 of 2012, Laws of Kenya.

⁶⁶ Cramer, W., Egea, E., Fischer, J., Lux, A., Salles, J.M., Settele, J. and Tichit, M., 'Biodiversity and Food Security: From Trade-Offs to Synergies' (2017) 5 Regional Environmental Change 1257, at 1258.

⁶⁷ Regina Birner and others, 'Prospects and Challenges for Biodiversity Conservation in Guatemala' [2005] Valuation and Conservation of Biodiversity: Interdisciplinary Perspectives on the Convention on Biological Diversity 285.

⁶⁸ NEMA, 'Threats to Biodiversity – Biodiversity Clearing House Mechanism'

<<http://meas.nema.go.ke/cbdchm/major-threats/>> accessed 31 July 2021.

⁶⁹ Government of the Republic of Kenya, Kenya Sixth national report to the Convention on Biological Diversity, Ministry of Environment and Forestry, 2020 < www.environment.go.ke/wp-

making efforts towards biodiversity conservation, land degradation and ecosystem destruction are still witnessed through increasing siltation of water bodies and rivers, waste management, air and water pollution in most of our urban centers mostly due to rapid population growth and urbanization.⁷⁰ Efforts to improve the management and conservation of environment and natural resources are affected by impacts of climate change, increasing population, as well as expansion of agriculture and settlements into fragile and water towers ecosystems.⁷¹ It is, therefore, arguable that unless these challenges are addressed, any efforts towards sustainable use of environmental resources for biodiversity conservation will remain a mirage.

3. Promoting Biodiversity Mainstreaming for Food and Nutrition Security

Biodiversity mainstreaming is defined as ensuring that biodiversity and the services it offers are correctly and adequately included into policies and practices that rely on and affect it.⁷²

3.1 Adoption of Climate-Smart Agriculture

Plant productivity varies due to variances in inherent soil fertility, climate and weather, and chemical inputs and agricultural methods, resulting in patterns of biological diversity linked to the agricultural component of economic productivity.⁷³ One of the ways of promoting food security in the face of climate change is adoption of climate smart agriculture. FAO defines Climate-Smart Agriculture (CSA) as an approach that helps to guide actions needed to transform and reorient agricultural systems to effectively support development and ensure food security in a changing climate.⁷⁴ CSA aims to tackle three main objectives: sustainably increasing agricultural productivity and incomes; adapting and building resilience to climate change; and reducing and/or removing greenhouse gas emissions, where possible. CSA is an approach for developing agricultural strategies to secure sustainable food security under climate change. CSA provides the means to help stakeholders from local to national and international levels identify agricultural strategies suitable to their local conditions.⁷⁵

3.2 Protection of Pollinators

Pollinators are an important part of the food supply chain and must be protected. Climate change, according to experts, will have a significant impact on insects' physiology (how they live and reproduce), behavior, and morphological characteristics, as well as their connections with other species (like host plants and natural enemies).⁷⁶ As a result, huge changes in insect population dynamics, abundance, and geographic distribution are expected. In terms of vulnerability to insect-transmitted diseases and availability of key services supplied by insects such as pollination and pest regulation, these changes will have both beneficial and negative consequences for people,

content/uploads/2021/01/FINAL-REPORT-MOEF-CBD-SIXTH-NATIONAL-REPORT-January-2021.docx> accessed 31 July 2021.

⁷⁰ Ibid, p. 15.

⁷¹ Ibid, p. 15.

⁷² Unit B, 'Biodiversity Mainstreaming' (16 November 2021) <<https://www.cbd.int/mainstreaming/>> accessed 21 December 2021.

⁷³ Michael Huston, 'Biological Diversity, Soils, and Economics' (1993) 262 *Science* 1676 <<https://www.science.org/doi/abs/10.1126/science.262.5140.1676>> accessed 21 December 2021.

⁷⁴ 'Climate-Smart Agriculture | Food and Agriculture Organization of the United Nations' <<http://www.fao.org/climate-smart-agriculture/en/>> accessed 7 June 2021.

⁷⁵ FAO, "Climate-Smart Agriculture," available at <http://www.fao.org/climate-smart-agriculture/en/>

⁷⁶ 'Insects and Climate Change | Icipe - International Centre of Insect Physiology and Ecology' <<http://www.icipe.org/news/insects-and-climate-change>> accessed 7 June 2021.

livestock, and crops.⁷⁷ Thus, this must form part of the wider debate in the quest for food and nutrition security.

3.3 Embracing Production and Consumption of Traditional and Indigenous Food

Varieties

To face the problem of feeding the world's population of about nine billion people by 2050, it has been suggested that we should consider not just producing enough food responsibly, but also working toward diverse nutrition, which implies providing a good diet for everyone.⁷⁸ Traditional dietary patterns are being phased out, which is having significant nutritional effects for rural Indigenous peoples, who are already suffering from nutritional deficiencies and excesses. Traditional food consumption and production practices can help to increase nutritional security by smoothing out dietary transitions, supplying nutrients, and increasing agricultural resilience.⁷⁹ Traditional agriculture practices assist healthy ecosystems by restoring biodiversity.⁸⁰

Native foods are thought to have untapped potential to help the 26% of Kenyan children who suffer from chronic undernutrition (which impairs development and growth), as well as the 4.1 percent who are overweight or obese, mostly in urban areas.⁸¹ A lack of established market channels, poor agronomic practices, and limited information about the production, consumption, and marketing of traditional plants have also been reported as hurdles to increasing nutrition status, food security, and overall wellbeing in Kenyan families.⁸² As a result, a grassroots strategy is required in Kenya, where stakeholders can perform cooperative plant research and coordinate school, policymaker, and farmer meetings in order to boost productivity and establish an enabling policy and market environment for underutilized crops.⁸³

Projects like the Biodiversity for Food and Nutrition Project, which is funded by the Global Environment Facility and led by the UN Environment Programme and the UN Food and Agriculture Organization, are taking steps in the right direction to promote traditional foods in Kenyan homes and schools, and they should be supported and expanded especially within the rural areas.⁸⁴

⁷⁷ International Centre of Insect Physiology and Ecology (icipe), 'Insects and Climate Change,' available at <http://www.icipe.org/news/insects-and-climate-change> Accessed on 6/06/2021.

⁷⁸ 'New Agricultural Biodiversity Project to Improve Nutrition and Food Security Worldwide | GEF' <<https://www.thegef.org/newsroom/press-releases/new-agricultural-biodiversity-project-improve-nutrition-and-food-security>> accessed 21 December 2021.

⁷⁹ Deaconu, A., Mercille, G. and Batal, M., 'Promoting Traditional Foods for Human and Environmental Health: Lessons from Agroecology and Indigenous Communities in Ecuador' (2021) 7 BMC Nutrition 1.

⁸⁰ Ibid.

⁸¹ Beltrame, D., Gee, E., Guner, B., Lauridsen, N., Samarasinghe, W.L.G., Wasike, V., Hunter, D. and Borelli, T., 'Mainstreaming Biodiversity for Food and Nutrition into Policies and Practices: Methodologies and Lessons Learned from Four Countries' (2019) 29 ANADOLU Ege Tarımsal Araştırma Enstitüsü Dergisi 25, at 29.

⁸² Ibid, 29.

⁸³ Ibid, 29.

⁸⁴ 'Root Vegetables: Kenyan Schools Embrace Indigenous Foods' (UNEP, 18 November 2020) <<http://www.unep.org/news-and-stories/story/root-vegetables-kenyan-schools-embrace-indigenous-foods>> accessed 21 December 2021; see also 'New Agricultural Biodiversity Project to Improve Nutrition and Food Security Worldwide | GEF' <<https://www.thegef.org/newsroom/press-releases/new-agricultural-biodiversity-project-improve-nutrition-and-food-security>> accessed 21 December 2021.

3.4 Promoting Biological Pest Control Approaches

Biological control is a part of a comprehensive pest management plan. It is described as the use of natural enemies to reduce pest populations, and it usually involves human involvement.⁸⁵ In terms of the quantity of species and agricultural uses, agricultural habitats and landscapes serve as a diversity reservoir (pollination, recycling of organic matter, amongst others). Agricultural intensification, on the other hand, puts this variety in jeopardy.⁸⁶ The use of mineral fertilisers and synthetic pesticides, as well as the "simplification" of agricultural landscapes due to a decline in the diversity of production systems, are said to have contributed to an increase in cultivated area productivity.⁸⁷ Agricultural intensification has thus been cited as one of the key drivers of global biodiversity decrease, despite the fact that it has helped humanity to feed a growing global population.⁸⁸

Mineral fertilizers and pesticides can degrade habitat quality at the local-field level, while the conversion of perennial habitats (grassland) to arable fields, as well as the destruction of field boundaries and hedges, results in the loss of semi-natural habitats and simplification at the landscape level, including changes in the distribution and supply of resources for many species and the food webs that depend on them.⁸⁹ Biodiversity is valued at all scales of the agricultural landscape, from soil bacteria that assist cycle nutrients and decompose organic matter, to wasps and bats that help decrease crop pests, to birds and insects that pollinate high-value crops.⁹⁰ Not only does maintaining biodiversity aid crop productivity, but many organisms and species have evolved to rely on specific agricultural environments for their very survival. Agriculture, in other words, both supports and is supported by biodiversity preservation.⁹¹ To this end, biological pest control in arable fields is a vital ecosystem service given by high-diversity landscapes and species-rich enemy populations, but it is vulnerable to agricultural intensification.⁹²

4. Conclusion

Law and regulations are key tools in the conservation of environmental and biological resources because they define rights and responsibilities and function as a deterrent to individuals who would engage in actions that harm these resources.⁹³ The law establishes the required framework

⁸⁵ 'What Is Biological Control?' <<https://biocontrol.entomology.cornell.edu/what.php>> accessed 21 December 2021.

⁸⁶ Le Roux, X., R. Barbault, J. Baudry, F. Burel, I. Doussan, E. Garnier, F. Herzog et al. "Agriculture and biodiversity: benefiting from synergies. Multidisciplinary Scientific Assessment." Synthesis Report, INRA (France) (2008), p.1.

⁸⁷ Ibid, p.2.

⁸⁸ Kleijn, D., F. Kohler, A. Báldi, P. Batáry, E. D. Concepción, Y. Clough, M. Díaz et al. "On the relationship between farmland biodiversity and land-use intensity in Europe." *Proceedings of the Royal Society of London B: Biological Sciences* 276, no. 1658 (2009): 903-909, p.903.

⁸⁹ Thies, Carsten, Sebastian Haenke, Christoph Scherber, Janne Bengtsson, Riccardo Bommarco, Lars W. Clement, Piotr Ceryngier et al., "The relationship between agricultural intensification and biological control: experimental tests across Europe." *Ecological Applications* 21, no. 6 (2011): 2187-2196, p. 2187.

⁹⁰ GRACE Communications Foundation, Biodiversity, available at <http://www.sustainabletable.org/268/biodiversity>.

⁹¹ Ibid.

⁹² Thies, Carsten, Sebastian Haenke, Christoph Scherber, Janne Bengtsson, Riccardo Bommarco, Lars W. Clement, Piotr Ceryngier et al., "The relationship between agricultural intensification and biological control: experimental tests across Europe." *Ecological Applications* 21, no. 6 (2011): 2187-2196, p. 2187.

⁹³ Richardson BJ and Wood S, 'Environmental Law for Sustainability'; Prip C, 'The Convention on Biological Diversity as a Legal Framework for Safeguarding Ecosystem Services' (2018) 29 *Ecosystem*

within which all stakeholders can collaborate in the conservation of natural resources, both for the sake of the environment and to meet human needs. The international and regional legal instruments on biodiversity conservation recognize biodiversity's potential to aid in the achievement of various Sustainable Development Goals (SDGs), particularly those related to food systems, as it is clear that global food production improvements are failing to meet human nutrition needs and feed the planet in a healthy, sustainable, and environmentally friendly manner.⁹⁴

This paper explored ways in which countries can embark on mainstreaming biodiversity conservation issues as part of their response to food and nutrition security challenges. The preservation of biodiversity is a prerequisite for attaining long-term development. As a result, it must be mainstreamed into all sectors and across sectors.⁹⁵

Dietary diversity, which is based on a variety of farming techniques, results in better nutrition and health, as well as benefits to human productivity and livelihoods.⁹⁶ It is imperative that the focus on food security also shifts to biodiversity conservation and exploring the link between the two areas as part of enhancing the mutual benefits that arise from this approach. Biodiversity is mainstreamed to ensure that meeting development demands and safeguarding the environment are not mutually exclusive, but that development is accompanied by the sustainable use of natural resources.⁹⁷ Investing in research and innovation as well as diversification and embracing traditional foods for enhancing dietary needs of communities in Kenya are bold steps that would move the country closer to achieving SDGs on food and nutritional security as well as biodiversity conservation for the sake of present and future generations.

Services 199; Van Dyke F (ed), 'The Legal Foundations of Conservation Biology', Conservation Biology: Foundations, Concepts, Applications (Springer Netherlands 2008) <https://doi.org/10.1007/978-1-4020-6891-1_3> accessed 15 September 2021; Fischer F, 'The Importance of Law Enforcement for Protected Areas: Don't Step Back! Be Honest - Protect!' (2008) 17 GAIA - Ecological Perspectives for Science and Society 101; McDonald, J., McCormack, P.C., Dunlop, M., Farrier, D., Feehly, J., Gilfedder, L., Hobday, A.J. and Reside, A.E., 'Adaptation Pathways for Conservation Law and Policy' (2019) 10 Wiley Interdisciplinary Reviews: Climate Change e555; de Klemm, C. and Shine, C. (1993), Biological Diversity Conservation and the Law, IUCN, Gland, Switzerland and Cambridge, UK. xix + 292 pp.

⁹⁴ Beltrame, D., Gee, E., Guner, B., Lauridsen, N., Samarasinghe, W.L.G., Wasike, V., Hunter, D. and Borelli, T., 'Mainstreaming Biodiversity for Food and Nutrition into Policies and Practices: Methodologies and Lessons Learned from Four Countries' (2019) 29 ANADOLU Ege Tarımsal Araştırma Enstitüsü Dergisi 25, at 25.

⁹⁵ 'Mainstreaming Biodiversity' (IUCN, 8 February 2016) <<https://www.iucn.org/theme/global-policy/our-work/mainstreaming-biodiversity>> accessed 21 December 2021.

⁹⁶ 'New Agricultural Biodiversity Project to Improve Nutrition and Food Security Worldwide | GEF' <<https://www.thegef.org/newsroom/press-releases/new-agricultural-biodiversity-project-improve-nutrition-and-food-security>> accessed 21 December 2021.

⁹⁷ 'Mainstreaming Biodiversity' (SANBI) <<https://www.sanbi.org/biodiversity/science-into-policy-action/mainstreaming-biodiversity/>> accessed 21 December 2021.

Gender Perspectives in Biodiversity Conservation

Abstract

Environmental conservation discourse has paid increased attention to the gender perspectives due to the different roles and needs of both men and women when it comes to conservation measures. As far as biological conservation is concerned, this paper argues that both men and women have an important role to play in achieving sustainable development agenda. This is especially so because men and women all have different contributions to make since they are also affected in different ways by deterioration of environmental resources. The main argument is that unless the policymakers and other stakeholders pay increased attention to the place of gender in biodiversity conservation debates, the dream of achieving sustainability in the area will remain elusive. Arguably, participatory approaches in biodiversity conservation should also include gender issues, not as special groups' issues but as mainstream issues.

1. Introduction

The term “gender” is used to refer to the set of social norms, practices and institutions that regulate the relations between women and men (also known as “gender relations”).¹ It has also been defined as a social construct that ascribes different qualities and rights to women and men regardless of individual competence or desires.² In addition, the term ‘gender’ is also used to refer to the socially-constructed expectations about the characteristics, aptitudes and behaviours associated with being a woman or a man, and while gender defines what is feminine and masculine, it shapes the social roles that men and women play and the power relations between them, which can have a profound effect on the use and management of natural resources.³

It is noteworthy that gender does not mean ‘women’ or ‘girls’ – although the word is frequently (mis)used as shorthand for women, women’s empowerment, women’s human rights, or, more broadly, for any initiative that is geared towards girls or women.⁴ Gender inequality has been defined as the differential treatment and outcomes that deny women the full enjoyment of the social, political, economic and cultural rights and development. It is the antithesis of equality of men and women in their human dignity, autonomy and equal protection.⁵ Gender equality is,

¹ United Nations, “The Role of Men and Boys in Achieving Gender Equality,” Women 2000 and Beyond, December 2008, p.4. Available at

<http://www.unwomen.org/~media/headquarters/media/publications/un/en/w2000menandboyseweb.pdf>.

² G. J. Latham, “A study on gender equality as a prerequisite for sustainable development,” Report to the Environment Advisory Council, Sweden 2007:2, p. 17. Available at http://www.uft.oekologie.uni-bremen.de/hartmutkoehler_fuer_studierende/MEC/09-MEC-reading/gender%202007%20EAC%20rapport_engelska.pdf.

³ ‘What Is Gender and Biodiversity?’ <<https://www.cbd.int/gender/biodiversity/>> accessed 21 November 2021.

⁴ UNICEF, “Promoting Gender Equality: An Equity-Focused Approach to Programming,” Operational Guidance Overview, p. 10. Available at

http://www.unicef.org/gender/files/Overarching_Layout_Web.pdf.

⁵ Baraza, N., ‘Lost Between Rhetoric and Reality: What Role for the Law and Human Rights in Redressing Gender Inequality?’ Kenya Law Reform Vol. II [2008-2010] p 1. Available at

<http://www.kenyalaw.org/klr/index.php?id=874>.

however, not a 'women's issue' but refers to the equal rights, responsibilities and opportunities of women and men, girls and boys, and should concern and fully engage men as well as women.⁶

While the degradation of natural resources and the loss of biodiversity has an impact on everyone regardless of their status or gender, it has been argued that these changes affect women more due to their closer interactions with natural resources and biological diversity.⁷ For this reason, there is a need for active participation of both men and women in biodiversity conservation. Arguably, the central role of women in the conservation and sustainable use of natural resources has been overlooked in studies on biodiversity, most of which have been done from the perspective of natural science.⁸ The Convention on Biological Diversity, which was signed at the Rio Earth Summit in June 1992, explicitly recognizes in its preamble as it states that "the vital role that women play in the conservation and sustainable use of biological diversity" and affirms "the need for the full participation of women at all levels of policy-making and implementation for biological diversity conservation."⁹ Similarly, in addition, the 1992 Earth Summit held in Rio emphasized the central role of women in promoting ecologically sound and sustainable development. Since then, feminists all over the world have embraced the environmental challenge and are among the most ardent activists for protecting the planet and its inhabitants.¹⁰

Kenya's *Draft National Forest Policy 2020*'s overall goal is to develop, manage, utilize and sustainably conserve forest resources to cover at least 10% of the total land mass, for equitable sharing of the accrued benefits including the flow of ecosystem services for present and future generations, and one of the cross-cutting issues covered therein is gender and social inclusion.¹¹ It was inspired by the fact that 'the absence of an approved updated National Forest Policy since 1968 and a decade after the promulgation of the Constitution 2010 means that legal requirements brought about by the Constitution with respect to natural resource management such as public participation, community and gender rights, equity in benefit sharing, devolution and the need to achieve 10% forest cover are not anchored in policy'.¹²

Initially, due to the gender-specific nature of women's chores as homemakers, they were seen as a problem, responsible for the destruction of the environment where the millions of women collecting firewood every day to cook for their families was seen as one of the main causes of deforestation and ecological crisis, although this later change to Women and women's groups all over the world becoming actively engaged in grassroots movements defending the environment against destruction in such movements as the late Prof. Wangari Maathai's Green Belt movement in Kenya.¹³

⁶ See generally 'Universal Declaration of Human Rights - In six cross-cutting themes' Available at http://www.ohchr.org/EN/UDHR/Documents/60UDHR/Stories_on_Human_Right_PressKit_en.pdf.

⁷ Bechtel JD, 'Gender, Poverty and the Conservation of Biodiversity' [2010] A review of issues and opportunities. MacArthur Foundation Conservation White Paper Series, 4.

⁸ Zweifel H, 'The Gendered Nature of Biodiversity Conservation' (1997) 9 NWSA Journal 107.

⁹ Ibid, 107.

¹⁰ Ibid.

¹¹ Republic of Kenya, *Draft National Forest Policy 2020*, Chapter Three.

¹² Ibid, para. 1.4.2.

¹³ Zweifel H, 'The Gendered Nature of Biodiversity Conservation' (1997) 9 NWSA Journal 107, 109.

Arguably, considering gender issues in relation to biodiversity involves identifying the influence of gender roles and relations on the use, management and conservation of biodiversity, where gender roles of women and men include different labour responsibilities, priorities, decision-making power, and knowledge, which affect how women and men use and manage biological resources.¹⁴ It has also been opined that biodiversity is closely connected to development, access to resources, income-generating activities, food, and essential household products, and from this perspective, the disciplines of biodiversity and gender overlap, and certainly are intrinsically linked.¹⁵ This paper seeks to discuss and affirm the place of both men and women in biodiversity conservation as part of their contribution towards realisation of the 2030 Agenda on sustainable development goals.

2. Gender Perspectives in Biodiversity Conservation: The Legal and Policy Framework

Gender is now considered to be a key consideration for equitable and effective biodiversity conservation practice since ethically, ensuring gender-equitable participation is a cornerstone for respecting, protecting, and promoting human rights and for not disadvantaging anyone in the process of conserving biodiversity.¹⁶ At the international law level, *CBD Decision XII/7 2* encourages Parties to give gender due consideration in their national biodiversity strategies and action plans and to integrate gender into the development of national indicators.¹⁷

Under the Constitution of Kenya, Article 10, the national values and principles of governance include—(a) *patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised.* Under Article 27(1), *every person is equal before the law and has the right to equal protection and equal benefit of the law; (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms; (3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.*

Article 59 establishes the Kenya National Human Rights and Equality Commission whose functions include inter alia promoting gender equality and equity generally and to coordinate and facilitate gender mainstreaming in national development. Article 175 (c) provides that one of the principles of principles of devolved government is that no more than two-thirds of the members of representative bodies in each county government should be of the same gender. In the spirit of equality and non-discrimination, gender mainstreaming in the agricultural sector becomes an important aspect of human rights approaches to biodiversity conservation.

The *National Gender and Equality Commission Act, 2011*¹⁸ was enacted to establish the National Gender and Equality Commission as a successor to the Kenya National Human Rights and Equality Commission pursuant to Article 59(4) of the Constitution; to provide for the membership, powers and functions of the Commission, and for connected purposes.

¹⁴ ‘Gender and Biodiversity’ <<https://www.cbd.int/gender/>> accessed 21 November 2021.

¹⁵ ‘Why Gender Is Important for Biodiversity Conservation’ <<https://www.unep.org/news-and-stories/story/why-gender-important-biodiversity-conservation>> accessed 21 November 2021.

¹⁶ Lau JD, ‘Three Lessons for Gender Equity in Biodiversity Conservation’ (2020) 34 *Conservation Biology* 1589, 1589.

¹⁷ CBD Decision XII/7, para.2.

¹⁸ National Gender and Equality Commission Act, No. 15 of 2011, Laws of Kenya.

Some of the functions of the Commission under the Act include, inter alia, to—promote gender equality and freedom from discrimination in accordance with Article 27 of the Constitution; monitor, facilitate and advise on the integration of the principles of equality and freedom from discrimination in all national and county policies, laws, and administrative regulations in all public and private institutions; act as the principal organ of the State in ensuring compliance with all treaties and conventions ratified by Kenya relating to issues of equality and freedom from discrimination and relating to special interest groups including minorities and marginalised persons, women, persons with disabilities, and children; co-ordinate and facilitate mainstreaming of issues of gender, persons with disability and other marginalised groups in national development and to advise the Government on all aspects thereof; work with other relevant institutions in the development of standards for the implementation of policies for the progressive realization of the economic and social rights specified in Article 43 of the Constitution and other written laws; and co-ordinate and advise on public education programmes for the creation of a culture of respect for the principles of equality and freedom from discrimination.

Understanding gender roles and relation in agriculture along value chains and identifying key factors that contribute to gender gaps in agriculture is considered crucial for the design and formulation of gender inclusive policy and institutional innovations that equalize opportunities for women and men farmers and equally benefit women and men from the agricultural research for development and dissemination of technologies.¹⁹

It is worth pointing out that commentators in the last two decades observed that most sustainable development efforts, including biodiversity initiatives, derived from a gendered vision of segmented sustainability that divides home, habitat and workplace into separate domains, with women at 'home', men in the 'workplace' and protected 'habitats' devoid of humans.²⁰ However, over the years, there has been a paradigm shift, at least theoretically on the relationship between men and women in relation to biodiversity as well as the general relationship between man's day to day life and the natural habitats, in light of the United Nations 2030 Agenda on Sustainable Development (SDGs Agenda). The SDGs Agenda seeks to adopt a holistic approach to sustainability that not only includes both men and women but also recognises the interconnectivity between human life and the natural habitats.²¹ This was informed by the realisation that in many rural communities throughout the world women are responsible for the reproduction of the work force, the production of daily subsistence, and the maintenance of the complex ecosystems and particular species that support agriculture, livestock and forest production, yet, most women are legally landless and not officially part of the work force.²²

¹⁹ International Centre of Insect Physiology and Ecology (icipe), 'Gender Research and Mainstreaming,' available at <http://www.icipe.org/research/social-science-and-impact-assessment/gender-research-and-mainstreaming> Accessed on 13 July 2021.

²⁰ Rocheleau DE, 'Gender and Biodiversity: A Feminist Political Ecology Perspective' (1995) 26 IDS bulletin 9, 9.

²¹ See UNGA, Transforming our world: the 2030 Agenda for Sustainable Development, Resolution adopted by the General Assembly on 25 September 2015 [without reference to a Main Committee (A/70/L.1)].

²² Rocheleau DE, 'Gender and Biodiversity: A Feminist Political Ecology Perspective' (1995) 26 IDS bulletin 9, 9; see also Mackenzie AFD, 'Land Tenure and Biodiversity: An Exploration in the Political Ecology of Murang'a District, Kenya' (2005) 62 Human Organization 255; Verma R, "'Without Land You Are Nobody": Critical Dimensions of Women's Access to Land and Relations in Tenure in East Africa' [2007] Unpublished IDRC Scoping Study for East Africa on Women's Access and Rights to Land and Gender Relations in Tenure.

The traditional stereotypical role of women in most African homes makes them important players in conservation and use of Plant Genetic Resources (PGR) worldwide where they are often responsible for ensuring household food security and family health, which makes them have greater knowledge and a more diversified perspective than men on PGR because they are responsible for producing or procuring a large number of plant resources and for storing and transforming plants to meet household needs.²³

Notably, the Constitution of Kenya provides that the objects of devolved government are, *inter alia*, to promote democratic and accountable exercise of power; to foster national unity by recognising diversity; 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; to recognise the right of communities to manage their own affairs and to further their development; to protect and promote the interests and rights of minorities and marginalised communities; to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya; to ensure equitable sharing of national and local resources throughout Kenya; and to facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya.²⁴ In addition, it provides for participation of, *inter alia*, minorities and marginalized groups,²⁵ in governance and all other spheres of life. The foregoing provisions are important especially in relation to the provisions of the *County Governments Act*,²⁶ which also affirm the fact that citizen participation in county governments should be based upon the principles of, *inter alia*, protection and promotion of the interest and rights of minorities, marginalized groups and communities; legal standing to interested or affected persons, organizations, and where pertinent, communities, to appeal from or, review decisions, or redress grievances, with particular emphasis on persons and traditionally marginalized communities, including women, the youth, and disadvantaged communities; reasonable balance in the roles and obligations of county governments and non-state actors in decision-making processes; promotion of public-private partnerships; and recognition and promotion of the reciprocal roles of non-state actors' participation and governmental facilitation and oversight.²⁷

Notably, United Nations *Agenda 21* requires that Governments at the appropriate level, with the support of the relevant international and regional organizations, should, *inter alia*, promote a multidisciplinary and cross-sectoral approach in training and the dissemination of knowledge to local people on a wide range of issues which include various resources management.²⁸ Further, *Agenda 21* states that Coastal States should promote and facilitate the organization of education and training in integrated coastal and marine management and sustainable development for scientists, technologists, managers (including community-based managers) and users, leaders, indigenous peoples, fisherfolk, *women* and youth, among others.

²³ Howard-Borjas P and Cuijpers W, 'Gender Relations in Local Plant Genetic Resource Management and Conservation' [2002] *Biotechnology*, in encyclopedia for life support systems. EOLSS Publishers, Cambridge.

²⁴ Art. 174, Constitution of Kenya 2010.

²⁵ *Ibid*, Art. 56.

²⁶ County Governments Act, No. 17 of 2012, Laws of Kenya.

²⁷ *Ibid*, S. 87.

²⁸ Clause 13.22.

3. Gender Perspectives in Biodiversity Conservation

Notably, dependence on their natural environments means that when biological resources are depleted, women and men can end up being vulnerable in different ways, although women are often more vulnerable than men partly because women's roles can often be "invisible" compared to that of men and so policies, programmes and related initiatives may not fully take into account the differences in how women and men use and contribute to biological resources.²⁹

It has been recommended that some of the specific actions which need to be undertaken to create an enabling environment for biodiversity benefits and improved well-being to be enjoyed by all people, women and men, boys and girls, include: Mainstream gender consideration into all national and local biodiversity policies, programmes, budgeting and monitoring mechanisms; Make awareness-raising and capacity building components mandatory for conservation interventions to inform men and women, including indigenous, local and rural women of their roles, rights and benefits in relation to the intervention; Develop and provide training and capacity building on gender issues and mainstreaming in the context of biodiversity conservation and sustainable use, to policy-makers and those involved in planning and undertaking biodiversity-related projects and programmes; Facilitate evidence-based policies by developing gender-sensitive monitoring and reporting frameworks and promoting gender analysis, including in the National Reports of Parties to the CBD; and Dedicate or increase the allocation of financial resources and strengthen expertise to advance the collection and use of data disaggregated by sex, age, ethnicity, disability and other relevant factors, to inform the development and implementation of gender-responsive biodiversity policies and programmes; Identify opportunities to access climate finance to address relevant gender objectives, and ensure new and innovative biodiversity-related financing mechanisms include avenues for access by marginalized and small-scale actors, particularly women and women's organizations; Identify synergies and reinforce efforts to implement the gender-specific targets and/or mandates of the sustainable development goals and the Rio Conventions, including through collaboration with organizations leading the work on these initiatives, and the identification of approaches to mainstream biodiversity and apply common indicators for monitoring and assessing progress and gaps.³⁰

Some commentators have suggested that in order to advance gender equality and women's empowerment in the implementation of the post-2020 global biodiversity framework, there is need to ensure: equal opportunities for leadership, decision-making and effective engagement at all levels of decision-making in matters related to the three objectives of the Convention; equal access, ownership and control over biological resources; and equal access to benefits from biodiversity conservation and sustainable use, and from the utilization of genetic resources.³¹

²⁹ Secretariat of the Convention on Biological Diversity, *Addressing Gender Issues and Actions in Biodiversity Objectives*, 2020, at p. 3 < https://www.cbd.int/gender/doc/cbd-towards2020-gender_integration-en.pdf > accessed 21 November 2021.

³⁰ UN-Women, "Towards a gender-responsive post-2020 global biodiversity framework: Imperatives and Key Components," A submission by the United Nations Entity for Gender Equality and the Empowerment of Women

(UN-Women) as an input to the development of the post-2020 global biodiversity framework, 1 May 2019, 8.

³¹ UN-Women, "Integrating a gender perspective in the post-2020 global biodiversity framework," Issues Brief – January 2021.

Gender roles affect economic, political, social and ecological opportunities and constraints faced by both men and women. Recognizing women's roles as primary land and resource managers is central to the success of biodiversity policy.³² Because of the inherent connectedness between poverty, biodiversity use, and gender and the mutually self-reinforcing nature of these links, addressing rural poverty and environmental degradation requires a holistic, multidisciplinary approach and an understanding of gender in order to achieve successful sustained results.³³

There is need for governments to establish policies to incorporate gender and other special perspectives into all policies, laws, procedures, programmes and practices relating to ecosystem services, and to identify gaps in the protection of persons and groups of concern, in line with Aichi Biodiversity Target 14 which requires States to ensure that 'by 2020, ecosystems that provide essential services, including services related to water, and contribute to health, livelihoods and well-being, are restored and safeguarded, taking into account the needs of women, indigenous and local communities, and the poor and vulnerable.'³⁴ The need for equal and active participation of women in sustainable use and conservation of biodiversity is pegged on the fact that they play critical roles as primary land managers and resource users, and they face disproportionate impacts both from biodiversity loss and gender-blind conservation measures.³⁵ Governments should thus continually towards promoting equity and equality in biodiversity conservation efforts.

4. Conclusion

It has been observed that ensuring that women and men are equally engaged in biodiversity decision-making is not just a matter of equality, it is critical for ensuring biodiversity conservation and sustainable use efforts are successful over the long term.³⁶ It is no longer a secret that the recognition, reinforcement, and improvement of both men and women's position, knowledge, and capabilities with respect to the sustainable management of biological diversity are key factors in the success of the conservation and use of natural resources, as well as in the empowerment of women.³⁷ There is a need for efforts towards biodiversity conservation to ensure active and meaningful inclusion of all people, both men and women, as access to these resources affects men and women in different ways. As acknowledged in COP 26, held in Glasgow, Scotland in November 2021, while environmental degradation has serious consequences for all human

³² Secretariat of the Convention on Biological Diversity, "Gender and Biodiversity," www.cbd.int/gender.

³³ Bechtel JD, 'Gender, Poverty and the Conservation of Biodiversity' [2010] A review of issues and opportunities. MacArthur Foundation Conservation White Paper Series.

³⁴ United Nations Environment Programme, *Law and National Biodiversity Strategies and Action Plans*, 2018, Nairobi, Kenya, at 53.

³⁵ 'The Role, Influence and Impact of Women in Biodiversity Conservation' (International Institute for Environment and Development, 9 October 2018) <<https://www.iied.org/role-influence-impact-women-biodiversity-conservation>> accessed 15 September 2021.

³⁶ United Nations, *Enabling A Gender-Responsive Process for The Development of The Post2020 Biodiversity Framework: Supplementary Background and Tools*, CBD/COP/14/INF/15, 1 November 2018, Conference of The Parties to The Convention On Biological Diversity, Fourteenth meeting, Item 17 of the provisional agenda*, Sharm El-Sheikh, Egypt, 17-29 November 2018, <<https://www.cbd.int/doc/c/5ab6/13f3/3cff0c5b52c856db19b279ec/cop-14-inf-15-en.pdf>> Accessed 21 November 2021.

³⁷ Zweifel H, 'The Gendered Nature of Biodiversity Conservation' [1997] *Nwsa Journal* 107, 119.

beings, it affects, in particular, the most vulnerable sectors of society, mainly women, whose health is most fragile during pregnancy and motherhood.³⁸

Disregarding gender issues in conservation efforts may increase the loss of biodiversity, due to mismanagement and unsustainable use, [and] the loss of important traditional knowledge, skills and experiences.³⁹ As a result, participants at the UN climate change conference COP26 called for greater representation of women's voices in climate change policies.⁴⁰ Indigenous women, who are seen as conveyors of traditional knowledge to the new generations, have an extremely important role in combating climate change.⁴¹ It has also been observed that disregarding gender can aggravate poverty and inequality.⁴² Notably, The Sustainable Development Goals (SDGs), and the goals therein to end hunger and poverty, depend on biodiversity and natural capital.⁴³ During COP 26, it was observed that persistent discriminatory social and cultural norms, such as unequal access to land, water, and other resources, as well as their lack of participation in decisions regarding planning and management of nature, often lead to ignorance of the tremendous contributions women can make.⁴⁴ It is thus the high time that all stakeholders not only acknowledge but also do what is reasonably possible to ensure that the role of both men and women in biodiversity conservation takes a centre stage for the sake of achieving sustainable development agenda.

³⁸ 'Women Bear the Brunt of the Climate Crisis, COP26 Highlights' (UN News, 9 November 2021) <<https://news.un.org/en/story/2021/11/1105322>> accessed 21 November 2021.

³⁹ 'Why Gender Is Important for Biodiversity Conservation' <<https://www.unep.org/news-and-stories/story/why-gender-important-biodiversity-conservation>> accessed 21 November 2021.

⁴⁰ 'COP26 Focuses on Gender Issues | NHK WORLD-JAPAN News' (NHK WORLD) <https://www3.nhk.or.jp/nhkworld/en/news/20211110_06/> accessed 21 November 2021.

⁴¹ 'Women Bear the Brunt of the Climate Crisis, COP26 Highlights' (UN News, 9 November 2021) <<https://news.un.org/en/story/2021/11/1105322>> accessed 21 November 2021.

⁴² Ibid.

⁴³ 'COP15 on Biodiversity Is Our Chance to Get to a World We Want' (UNEP, 12 October 2021) <<http://www.unep.org/news-and-stories/speech/cop15-biodiversity-our-chance-get-world-we-want>> accessed 21 November 2021.

⁴⁴ 'Women Bear the Brunt of the Climate Crisis, COP26 Highlights' (UN News, 9 November 2021) <<https://news.un.org/en/story/2021/11/1105322>> accessed 21 November 2021.

Promoting Sustainable Land Use Practices and Agricultural Resources Management for Biodiversity Conservation

Abstract

Sustainable Land use practices as well as sustainable agriculture can arguably go a long way in promoting biodiversity conservation. However, a number of factors which include unsustainable agricultural practices and poor approaches to land use, among other social factors such as poverty and growing population pose a threat to not only biodiversity conservation but also guaranteeing human wellbeing for the sake of achieving sustainable development. This paper highlights the existing challenges in this area especially in the context of Kenya, and offers some recommendations on the way forward.

1. Introduction

While the threats to biodiversity conservation in Kenya are varied and acute, human population growth and the pressure on land and renewable natural resources have been identified as are the biggest threats.¹ Arguably, current land use practices reflect the economic priorities of powerful interested parties, including governments, development banks and companies, private land holders, farmers and others.² A combination of anthropogenic land-use practices and climate change have been attributed to massive biodiversity loss globally.³ Most commentators have identified the major direct causes of human-induced biodiversity loss as the fragmentation, degradation or loss of habitats (land-use change); the over-exploitation of natural resources; pollution of air and water (by several activities such as agriculture); the introduction of non-native (alien, or exotic) species and climate change-induced biodiversity loss - these factors being inextricably linked with some or all of the other direct causes and in turn are driven by underlying causes.⁴ In addition, studies have concluded that one major cause of future species loss will be land use change from agriculture. Further, infrastructure development and settlement expansion as well as the consequences of climate change will be significant contributors to future biodiversity loss if no new policy measures are being implemented.⁵

This paper critically discusses the biodiversity conservation issues that arise from land use and agricultural activities and makes some recommendations on how to promote sustainable land use practices as well as promoting sustainable agricultural practices to promote and protect biodiversity conservation.

¹ Wakhungu, J.W., Waruingi, L., Agwanda, B., Awori, P., Isiche, J., Itela, S. and Njumbi, S., 'Towards a National Biodiversity Conservation Framework: Policy Implications of Proceedings of the International Conference on Biodiversity, Land-Use and Climate Change', 5.

² Murray MG and Williamson D, 'Current Issues in Biodiversity Conservation' [2002] Wildlife Management Working Paper (FAO), 8.

³ Smith, M.M., Gilbert, J.H., Olson, E.R., Scribner, K.T., Van Deelen, T.R., Van Stappen, J.F., Williams, B.W., Woodford, J.E. and Pauli, J.N., 'A Recovery Network Leads to the Natural Recolonization of an Archipelago and a Potential Trailing Edge Refuge' n/a Ecological Applications e02416.

⁴ Slingenberg, A., Braat, L., van der Windt, H., Rademaekers, K., Eichler, L. and Turner, K., "Study on understanding the causes of biodiversity loss and the policy assessment framework." (2009).

⁵ Ibid.

2. Relationship between Agriculture and Biodiversity

It is generally agreed that the services provided by biodiversity cover a large spectrum of factors contributing to the generation of agricultural income: crop yield and quality, soil fertility, pest control and pollination. Other services, such as contributions to landscape quality are not directly beneficial to the farmer, but are beneficial to the community as a whole.⁶ Agricultural environments and landscapes constitute a reservoir of diversity in terms of the number of species and the number of functions useful for agriculture (pollination, recycling of organic matter, amongst others). However, intensification of agricultural practices threatens this diversity.⁷ Intensification of agricultural production is believed to have led to an increase in the productivity of cultivated areas, associated with the use of mineral fertilisers and synthetic pesticides and with the "simplification" of agricultural landscapes resulting from a reduction in the diversity of production systems.⁸ Thus, while agricultural intensification has allowed mankind to feed the growing world population it has been cited as one of the main drivers of worldwide biodiversity decline.⁹ The effect of biodiversity decline has been felt on broad ecosystems and environmental aspects. For instance, freshwater ecosystems have suffered as excess nutrients from agricultural practices enter surface and ground waters and inefficient irrigation systems deplete water sources.¹⁰ Furthermore, biological control of pests in arable fields is an important ecosystem service provided by high-diversity landscapes and species-rich enemy communities, but it can be affected by the intensification of agriculture.¹¹

Inputs of mineral fertilizers and pesticides can lead to degradation of habitat quality at local-field scales, while transformation of perennial habitats (grassland) to arable fields and destructions of field boundaries and hedges leads to a loss of semi-natural habitats and simplification at landscape scales, including changes in the distribution and supply of resource for many species and the food webs building on them.¹² It has been observed that since the world cannot stop producing food and, arguably, the world can little afford to lose more of its biological diversity, the challenge, therefore, is to find a system of agriculture that will produce food in a sustainable manner that enhances biodiversity rather than depleting it.¹³

⁶ Le Roux, X., R. Barbault, J. Baudry, F. Burel, I. Doussan, E. Garnier, F. Herzog et al. "Agriculture and biodiversity: benefiting from synergies. Multidisciplinary Scientific Assessment." Synthesis Report, INRA (France) (2008), p.3.

⁷ Ibid, p.1.

⁸ Ibid, p.2.

⁹ Kleijn, D., F. Kohler, A. Báldi, P. Batáry, E. D. Concepción, Y. Clough, M. Díaz et al. "On the relationship between farmland biodiversity and land-use intensity in Europe." *Proceedings of the Royal Society of London B: Biological Sciences* 276, no. 1658 (2009): 903-909, p.903.

¹⁰ Geier, Bernward, Jeffrey A. McNeely, and Sue Stolton. "The relationship between nature conservation, biodiversity and organic agriculture." *Stimulating positive linkages between agriculture and biodiversity. Recommendations for building blocks for the EC-Agricultural Action Plan on Biodiversity.* European Centre for Nature Conservation, ECNC Technical report series, Tilburg, The Netherlands (2000): 101-105 at p. 102.

¹¹ Thies, Carsten, Sebastian Haenke, Christoph Scherber, Janne Bengtsson, Riccardo Bommarco, Lars W. Clement, Piotr Ceryngier et al., "The relationship between agricultural intensification and biological control: experimental tests across Europe." *Ecological Applications* 21, no. 6 (2011): 2187-2196, p. 2187.

¹² Ibid, p. 2187.

¹³ Geier, Bernward, Jeffrey A. McNeely, and Sue Stolton. "The relationship between nature conservation, biodiversity and organic agriculture." *Stimulating positive linkages between agriculture and biodiversity. Recommendations for building blocks for the EC-Agricultural Action Plan on Biodiversity.* European Centre for Nature Conservation, ECNC Technical report series, Tilburg, The Netherlands (2000): 101-105 at p. 102.

Biodiversity is, therefore, considered important at all scales of the agricultural landscape, from the different soil microbes that help cycle nutrients and decompose organic matter, to wasps and bats that help reduce crop pests, and to birds and insects that pollinate high value crops, biodiversity helps farmers successfully grow food and maintain sustainable farm landscapes.¹⁴ Thus, not only does the maintenance of biodiversity help ensure viable crop production, but many organisms and species have come to rely on particular agricultural landscapes for their very survival. That is, agriculture both supports, and is supported by, the maintenance of biodiversity.¹⁵ It is on this basis that this chapter discusses some viable options that can be useful in Kenya's efforts towards enhancing agricultural production through biodiversity conservation while eliminating the adverse agricultural practices and land use.

3. Sustainable Land Use and Agricultural Practices and Biodiversity Resources in Kenya: The Challenges

The Food and Agriculture Organization of the United Nations defines 'sustainable land management (SLM)' as 'comprising measures and practices adapted to biophysical and socio-economic conditions aimed at the protection, conservation and sustainable use of resources (soil, water and biodiversity) and the restoration of degraded natural resources and their ecosystem functions'.¹⁶ SLM is associated with activities that are meant to: prevent land conversion and protect vulnerable lands; prevent and mitigate land degradation and restore degraded soils; control soil erosion; improve soil-water storage; manage soil organic matter for soil carbon sequestration; manage and enhance soil fertility; promote integrated soil-crop-water management and integrated agroforestry and agrosilvopastoral systems; rehabilitate and sustainably manage dryland environments (e.g. managing grazing and livestock; rainwater harvesting; sand-dune reclamation; oasis management; drought management; and precision agriculture); and improve crop-water productivity and manage soil salinity in irrigated dryland agriculture.¹⁷

The agricultural sector in Kenya comprises the following subsectors: industrial crops, food crops, horticulture, livestock, fisheries and forestry—and employs such factors of production as land, water and farmer institutions (cooperatives, associations).¹⁸ It is estimated that Kenya has an area of about 587,000 km² out of which 11,000 km² is water. Of the remaining 576,000 km² landmass, only about 16 per cent is of high and medium agricultural potential with adequate and reliable rainfall. This potentially arable land is dominated by commercial agriculture with cropland occupying 31 per cent, grazing land 30 per cent, and forests 22 per cent. The rest of the land is used for game parks, urban centres, markets, homesteads and infrastructure.¹⁹

Arguably, the services provided by biodiversity cover a large spectrum of factors contributing to the generation of agricultural income: crop yield and quality, soil fertility, pest control and

¹⁴ GRACE Communications Foundation, Biodiversity, available at <http://www.sustainabletable.org/268/biodiversity>.

¹⁵ Ibid.

¹⁶ 'SLM Practices | Land & Water | Food and Agriculture Organization of the United Nations | Land & Water | Food and Agriculture Organization of the United Nations' <<https://www.fao.org/land-water/land/sustainable-land-management/slm-practices/en/>> accessed 17 November 2021.

¹⁷ Ibid.

¹⁸ Republic of Kenya, Agricultural Sector Development Strategy 2010–2020, p. 1.

¹⁹ Republic of Kenya, Agricultural Sector Development Strategy, 2010–2020, p. 9. (Government Printer, Nairobi, 2010).

pollination.²⁰ It is also worth pointing out that agricultural environments and landscapes constitute a reservoir of diversity in terms of the number of species and the number of functions useful for agriculture (pollination, recycling of organic matter, amongst others).²¹

In 2008, Kenya launched *Vision 2030*, a long term development blue print for the country, with the goal of transforming Kenya into “a newly-industrialised, middle-income country providing a high quality of life to all its citizens in a clean and secure environment”.²² Agriculture is identified as a key sector to deliver the 10 per cent economic growth rate per annum envisaged under the economic pillar. As a result, the Development Blueprint leans heavily towards promotion of a commercially-oriented, and modern agricultural sector, which it plans to accomplish by institutional reforms in agriculture and livestock, increasing productivity of crops and livestock, introducing land use policies for better utilisation of high and medium potential lands, developing more irrigable areas in arid and semi-arid lands for both crops and livestock and improving market access for our smallholders through better supply chain management. This comes with its own fair share of challenges.

Agriculture has been termed as the largest contributor to biodiversity loss with expanding impacts due to changing consumption patterns and growing populations as it destroys biodiversity by converting natural habitats to intensely managed systems and by releasing pollutants, including greenhouses gases.²³ Historically in Kenya, the colonialists used the law to appropriate all land and land-based resources from Africans and to vest them in the colonial masters.²⁴ In addition, the law gave the colonial authorities powers to appropriate land held by indigenous people and allocate it to the settlers.²⁵ The colonial authorities were, therefore, able to grant land rights to settlers in the highlands, while Africans were being driven and restricted to the native reserves. In the natives’ reserves, there was overcrowding, soil erosion, and poor sanitation, amongst many other problems.²⁶ This colonial practice naturally led to massive loss of biodiversity in the country, with the Africans trying to maximize productivity in the small portions of land that they were allowed to control and cultivate for their own livelihoods.²⁷ Arguably, the African continent has never recovered from this and the negative effects on environment and biodiversity continue

²⁰ Le Roux, X., Barbault, R., Baudry, J., Burel, F., Doussan, I., Garnier, E., Herzog, F., Lavorel, S., Lifran, R., Roger-Estrade, J. and Sarthou, J.P., ‘Agriculture and Biodiversity: Benefiting from Synergies’ [2008] Multidisciplinary Scientific Assessment. INRA, Paris.

²¹ Ibid, 1.

²² Sessional Paper 10 of 2012 on Kenya Vision 2030, Government of Kenya, Office of the Prime Minister Ministry of State for Planning, National Development and Vision 2030.

²³ Dudley N and Alexander S, ‘Agriculture and Biodiversity: A Review’ (2017) 18 Biodiversity 45, 31.

²⁴ Ogendo, HWO, *Tenants of the Crown: Evolution of Agrarian Law & Institutions in Kenya*, (ACTS Press, Nairobi, 1991), p.54.

²⁵ See generally the case of *Isaka Wainaina and Anor v Murito wa Indagara and others*, [1922-23] 9 E.A.L.R. 102.

²⁶ See Ogendo, HWO, *Tenants of the Crown: Evolution of Agrarian Law & Institutions in Kenya*, (ACTS Press, Nairobi, 1991).

²⁷ Domínguez L and Luoma C, ‘Decolonising Conservation Policy: How Colonial Land and Conservation Ideologies Persist and Perpetuate Indigenous Injustices at the Expense of the Environment’ (2020) 9 Land 65; Le Billon P and Lujala P, ‘Environmental and Land Defenders: Global Patterns and Determinants of Repression’ (2020) 65 Global Environmental Change 102163.

to manifest in present day land use and practices, especially in Kenya.²⁸ Arguably, conflicts between local groups and other more powerful actors, including both state agencies and private sector investors, remain widespread across the sub-continent and are often intensifying with strong political economic incentives for political elites and central bureaucracies to consolidate their control over natural resources.²⁹ In summary, some of the main challenges affecting efforts towards sustainable land management and land use are: land degradation, attributable to overgrazing; arable farming and conversion of arid and semi-arid lands to other uses; increasing population pressure; poverty; and climate change, among others.³⁰ There a need for conscious efforts by all stakeholders in addressing these challenges.

4. Legal and Policy Framework on Biodiversity Conservation in Land use and Agricultural Practices in Kenya

Article 60 of the Constitution of Kenya 2010 provides for the principles of land policy in Kenya and states that land in Kenya should be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with, *inter alia*, the principles of— equitable access to land; security of land rights; sustainable and productive management of land resources; transparent and cost effective administration of land; sound conservation and protection of ecologically sensitive areas; elimination of gender discrimination in law, customs and practices related to land and property in land; and encouragement of communities to settle land disputes through recognised local community initiatives consistent with this Constitution.³¹

The *Land Act 2012*³² provides that—the National Land Commission should take appropriate action to maintain public land that has endangered or endemic species of flora and fauna, critical habitats or protected areas. The Commission should also identify ecologically sensitive areas that are within public lands and demarcate or take any other justified action on those areas and act to prevent environmental degradation and climate change.³³ It also envisages a management body which should, on its own motion or at the request of the Commission, submit to the Commission for approval a plan for the development, management and use of the reserved public land vested in the management body. However, before submitting a plan to the Commission a management body should— (a) consider any conservation, environmental or heritage issues relevant to the development, management or use of the public land in its managed reserve for the purpose of that managed reserve; and (b) incorporate in the plan a statement that it has considered those issues in drawing up the plan; (c) submit an environmental impact assessment plan pursuant to existing law on environment; and (d) comply with the values and principles of the Constitution.³⁴

²⁸ Domínguez L and Luoma C, ‘Decolonising Conservation Policy: How Colonial Land and Conservation Ideologies Persist and Perpetuate Indigenous Injustices at the Expense of the Environment’ (2020) 9 Land 65.

²⁹ Roe D, Nelson F and Sandbrook C, *Community Management of Natural Resources in Africa: Impacts, Experiences and Future Directions* (IIED 2009), ix.

³⁰ Waswa PF, ‘Opportunities and Challenges for Sustainable Agricultural Land Management in Kenya’ (2006) 1 environment and sustainable development: a guide for higher education in Kenya 1.

³¹ Article 60 (1), Constitution of Kenya 2010.

³² Land Act, No. 6 of 2012, Laws of Kenya.

³³ Land Act, Section 11.

³⁴ *Ibid*, Section 17.

The Land Act states that: - The National Land Commission shall make rules and regulations for the sustainable conservation of land based natural resources. The rules and regulations may contain—(a) *measures to protect critical ecosystems and habitats; (b) incentives for communities and individuals to invest in income generating natural resource conservation programmes; (c) measures to facilitate the access, use and co-management of forests, water and other resources by communities who have customary rights to these resources; (d) procedures for the registration of natural resources in an appropriate register; (e) procedures on the involvement of stakeholders in the management and utilization of land-based natural resources; and (f) measures to ensure benefit sharing to the affected communities.*

The Agriculture and Food Authority (AFA) 2016-2021 Strategic Plan³⁵ also states the need to: - *Establish institutional capacity for data collection and collation on agricultural land use; continuously monitor emerging environmental issues that affect the value chains; Enhance technical capabilities of the counties to increase agricultural production for food security and wealth creation. The overarching idea is to boost farmers' capacity to produce food crops in more efficient, climate-resilient and ecologically responsible ways; develop and implement climate change adaptation and mitigation measures in agriculture responsible ways; Establish a Research Advisory Unit composed of AFA's Technical Team, and Researchers (KALRO, universities, other research institutions) to drive innovation in the Agricultural sub sectors; Create collaborative linkages with institutions such as KALRO, KEPHIS, Kenya Seed, universities and other research institutions on innovation and technology; Facilitate establishment of a collaborative arrangement between County Governments and KALRO on use of existing Agriculture Training Centres (ATCs) as technology transfer and innovation centres and provide technical assistance to the counties in promoting the concept of green growth economy as a way of ensuring environmental protection and sustainability through agricultural practices. AFA in conjunction with the Ministry of Environment and Natural Resources and other institutions should take on this task.*

The *National Land Policy 2009*³⁶ is also relevant to land-based biodiversity conservation. The overall objective of the National Land Policy 2009 is to secure rights over land and provide for sustainable growth, investment and the reduction of poverty in line with the Government's overall development objectives. The Policy also offers a framework of policies and laws designed to ensure the maintenance of a system of land administration and management that provides: All citizens with the opportunity to access and beneficially occupy and use land; economically viable, socially equitable and environmentally sustainable allocation and use of land; efficient, effective and economical operation of land markets; efficient and effective utilisation of land and land-based resources; and efficient and transparent land dispute resolution mechanisms.

The *National Spatial Plan 2015-2045* (NSP) aims at creating a spatial planning context that enhances economic efficiency and strengthens Kenya's global competitiveness, promoting balanced regional development for national integration and cohesion, optimizing utilization of land and natural resources for sustainable development, creating livable and functional human settlements in both urban and rural areas, securing the natural environment for a high quality of life and establishing an integrated national transportation network and infrastructure

³⁵ Republic of Kenya, Agriculture and Food Authority (AFA) 2016-2021 Strategic Plan.

³⁶ Republic of Kenya, Sessional Paper No. 3 of 2009 on National Land Policy, Laws of Kenya.

system. In order to boost agricultural productivity in Kenya, the *National Spatial Plan* seeks to develop policies and measures that will spur a positive shift in the sector such as: establishment of fertilizer factories to reduce the cost of agricultural inputs, increase investment in irrigation to reduce dependency on rain fed agriculture and increase amount of land under crop production and to ensure that each county has at least one agricultural value addition processing plant.³⁷

The NSP provides strategies and policies to guide future growth of towns and assignment of roles to different urban areas.³⁸

The *Urban Areas and Cities Act, 2011*³⁹ calls for city and municipality established under its provisions to operate within the framework of an integrated urban areas and city development planning, whose objectives should be, *inter alia*: (d) be the basis for—(i) the preparation of environmental management plans; (ii) the preparation of valuation rolls for property taxation; (iii) provision of physical and social infrastructure and transportation; (iv) preparation of annual strategic plans for a city or municipality; (v) disaster preparedness and response; (vi) overall delivery of service including provision of water, electricity, health, telecommunications and solid waste management; and (vii) the preparation of a geographic information system for a city or municipality; (e) nurture and promote development of informal commercial activities in an orderly and sustainable manner; (f) provide a framework for regulated urban agriculture; and (g) be the basis for development control.⁴⁰

A city or urban area integrated development plan should be aligned to the development plans and strategies of the county governments.⁴¹ The *Preparation and Implementation of County Spatial Plans, Draft Guidelines, February 2017* is an instrument to provide support to the County Governments to facilitate preparation of County Integrated Development Plans as required by law and also to realize coordinated and sustainable development planning in the counties. The manual guides: the process of plan preparation; Visioning; stakeholder engagement; presentation of the plan outputs; plan implementation; monitoring and Evaluation framework. The Manual also provides a reference frame to enable the realization of a unified understanding of the intention of the Integrated Planning framework among the planners, the County Governments and other public and private agencies that have a stake in County Integrated Planning.

It advocates for a mainstreaming approach in order to ensure mainstreaming of cross cutting issues into the County Spatial Plans. Such issues include, *inter alia*, land, infrastructure, tourism, agriculture, livestock and fisheries, trade, manufacturing, education and training; health; environment, water and sanitation, Population, Urbanization and Housing, Gender, vulnerable Groups and Youth, sports and culture. The *National Horticulture Policy, 2012*, mandates the Government to finalize the development and implementation of a land- use policy which shall guide agricultural land use including land subdivision.

The *National Environment Policy, 2013* was formulated to: provide a framework for an integrated approach to planning and sustainable management of Kenya's environment and natural resources;

³⁷ National Spatial Plan 2015-2045, p.65.

³⁸ Ibid, p.103.

³⁹ Urban Areas and Cities Act, No. 13 of 2011, Laws of Kenya.

⁴⁰ S. 36, Urban Areas and Cities Act, No. 13 of 2011.

⁴¹ S. 37, Urban Areas and Cities Act, No. 13 of 2011.

strengthen the legal and institutional framework for good governance, effective coordination and management of the environment and natural resources; ensure sustainable management of the environment and natural resources, such as unique terrestrial and aquatic ecosystems, for national economic growth and improved livelihoods; promote and support research and capacity development as well as use of innovative environmental management tools such as incentives, disincentives, total economic valuation, indicators of sustainable development, Strategic Environmental Assessments (SEAs); Environmental Impact Assessments (EIAs), Environmental Audits (EA) and Payment for Environmental Services (PES); promote and enhance cooperation, collaboration, synergy, partnerships and participation in the protection, conservation, sustainable management of the environment and natural resources; ensure inclusion of cross-cutting and emerging issues such as poverty reduction, gender, disability, HIV&AIDS and other diseases in the management of the environment and natural resources and promote domestication, coordination and maximisation of benefit from Strategic Multilateral Environmental Agreements (MEAs).

Some of the aims of the Environment Policy were to give the framework to guide the country's efforts in addressing the ever-growing environmental issues and challenges such as: *Loss of biodiversity*: Kenya continues to lose her biodiversity due to habitat destruction, overgrazing, deforestation, pollution, unsustainable harvesting of natural resources, biopiracy and introduction of invasive and alien species, among others. Invasive and alien species are a major threat to the environment. They threaten indigenous species through the effects of predation, alteration of habitat or disruption of ecosystem processes.

The challenge of dealing with loss of biodiversity becomes even more complicated when one is dealing with shared resources where laws and policies of respective countries are not harmonized;⁴² *Rehabilitation and restoration of environmentally degraded areas*: There are several degraded areas in Kenya which require rehabilitation and restoration. These include wetlands, riverbanks, deforested areas, eroded shoreline, hilltops and disused quarries and mines;⁴³ *Climate change, energy, security and disaster management*: Climate change poses significant environmental challenges for Kenya as evidenced by the frequent droughts and water shortages that even affect power supplies. This is happening at a time when power demand is on the rise and utilisation of renewable energy sources exclusive of hydro remains relatively low. Other adverse impacts of climate change can be seen in the form of frequent and severe natural disasters such as floods, landslides and prolonged droughts. Increased frequency and intensity of extreme climatic conditions continue to undermine the country's sustainable development. Managing climate-related disasters remains a significant challenge.⁴⁴ The foregoing policy and statutory instruments are some of the legal tools used to lay a foundation for protection and conservation of land-based biodiversity resources.

5. Adoption of Sustainable Agricultural Production Methods and Diversification of Livelihoods

It has been argued that Agricultural land serves many purposes beyond food production and mechanisms are needed to pay farmers for wider stewardship of land resources and thus a

⁴² National Environment Policy, p.5.

⁴³ Ibid.

⁴⁴ Ibid, p.6.

multifunctional landscape approach balances different needs at a landscape scale while incorporating site-level specificity on land use, demand, and condition.⁴⁵ In addition, consumers are believed to play a critical role in reducing unsustainable food waste and many of the techniques and strategies for biodiversity-friendly farming systems exist; the challenge is to bring them to scale.⁴⁶

Notably, under Kenya's Vision 2030, agriculture is identified as a key sector to deliver the 10 per cent economic growth rate per annum envisaged under the economic pillar. As a result, the Development Blueprint leans heavily towards promotion of a commercially-oriented, and modern agricultural sector, which it plans to accomplish through institutional reforms in agriculture and livestock, increasing productivity of crops and livestock, introducing land use policies for better utilisation of high and medium potential lands, developing more irrigable areas in arid and semi-arid lands for both crops and livestock and improving market access for our smallholders through better supply chain management.⁴⁷

While intensification of agricultural production has the potential to lead to an increase in the productivity of cultivated areas, associated with the use of mineral fertilizers and synthetic pesticides and with the "simplification" of agricultural landscapes resulting from a reduction in the diversity of production systems in order to feed the growing world population,⁴⁸ the same has also been cited as one of the main drivers of worldwide biodiversity decline.⁴⁹ The adverse effect has been on broad ecosystems and environmental aspects such as freshwater ecosystems which have suffered as excess nutrients from agricultural practices enter surface and ground waters and inefficient irrigation systems deplete water sources,⁵⁰ while biological control of pests in arable fields which is an important ecosystem service provided by high-diversity landscapes and species-rich enemy communities can be affected by the intensification of agriculture.⁵¹

In addition, use of mineral fertilizers and pesticides can lead to degradation of habitat quality at local-field scales, while transformation of perennial habitats (grassland) to arable fields and destructions of field boundaries and hedges can lead to a loss of semi-natural habitats and simplification at landscape scales, including changes in the distribution and supply of resource

⁴⁵ Dudley N and Alexander S, 'Agriculture and Biodiversity: A Review' (2017) 18 *Biodiversity* 45.

⁴⁶ *Ibid.*

⁴⁷ Sessional Paper 10 of 2012 on Kenya Vision 2030, para. 3.3.

⁴⁸ Le Roux, X., Barbault, R., Baudry, J., Burel, F., Doussan, I., Garnier, E., Herzog, F., Lavorel, S., Lifran, R., Roger-Estrade, J. and Sarthou, J.P., 'Agriculture and Biodiversity: Benefiting from Synergies', p.2.

⁴⁹ Kleijn, D., F. Kohler, A. Báldi, P. Batáry, E. D. Concepción, Y. Clough, M. Díaz et al. "On the relationship between farmland biodiversity and land-use intensity in Europe." *Proceedings of the Royal Society of London B: Biological Sciences* 276, no. 1658 (2009): 903-909, p.903; Poisson, M.C., Garrett, D.R., Sigouin, A., Bélisle, M., Garant, D., Haroune, L., Bellenger, J.P. and Pelletier, F., 'Assessing Pesticides Exposure Effects on the Reproductive Performance of a Declining Aerial Insectivore' n/a *Ecological Applications* e02415.

⁵⁰ Geier, Bernward, Jeffrey A. McNeely, and Sue Stolton. "The relationship between nature conservation, biodiversity and organic agriculture." *Stimulating positive linkages between agriculture and biodiversity. Recommendations for building blocks for the EC-Agricultural Action Plan on Biodiversity.* European Centre for Nature Conservation, ECNC Technical report series, Tilburg, The Netherlands (2000): 101-105 at p. 102.

⁵¹ Thies, Carsten, Sebastian Haenke, Christoph Scherber, Janne Bengtsson, Riccardo Bommarco, Lars W. Clement, Piotr Ceryngier et al., "The relationship between agricultural intensification and biological control: experimental tests across Europe." *Ecological Applications* 21, no. 6 (2011): 2187-2196, p. 2187.

for many species and the food webs building on them.⁵² Soils may also deteriorate as a result of erosion, compaction, loss of organic matter and contamination with pesticides, and in some areas, heavy metals.⁵³

It has rightly been argued that where the connection between producers and consumers is weak or costly, farmers' earnings are reduced, creating disincentives to adopt agricultural productivity enhancing technologies. This is because, certain types of technologies or innovations are only profitable when farmers are integrated into market.⁵⁴ Furthermore, the understanding of the structure and function of markets and value chains; farmers' output market participation level and participation of various actors and constraints along the value chain is essential for accelerating technology adoption and increasing growth of agricultural production and the competitiveness of smallholder farmers.⁵⁵

The National Horticulture Policy, 2012 ascribes to the Government the mandate to: -

enhance environmental conservation and measures to mitigate the effects of climate change and global warming; Encourage and offer incentives for green and conservation farming; Establish a clear framework to enhance inter-institutional coordination; Partner with the private sector to enable the country participate in carbon trading, sustainably protect fragile ecosystems like riparian areas and the country's major water towers, promote water use efficiency and adopt green energy; Introduce incentives for investment on green energy and other alternative sources of energy; Support initiatives on carbon and water trading, and green water credit; Enhance horticultural production, the Government will strengthen and harmonize public extension services to offer specialized extension services.

The Crops Act, 2013, in Section 4 sets out that:

- the national government and county governments shall be guided by the principles in the management and administration of agricultural land that land owners and lessees of agricultural land, being stewards, have the obligation to cultivate the lands they own or lease and make the land economically productive on a sustainable and environmentally friendly manner.

Biodiversity is important at all levels of the agricultural landscape, from the different soil microbes that help cycle nutrients and decompose organic matter, to wasps and bats that help reduce crop pests, and to birds and insects that pollinate high value crops, biodiversity helps farmers successfully grow food and maintain sustainable farm landscapes.⁵⁶ Thus, not only does

⁵² Ibid, p. 2187.

⁵³ Chris Stoate and others, 'Ecological Impacts of Arable Intensification in Europe' (2002) 63 Journal of Environmental Management 337.

⁵⁴ International Centre of Insect Physiology and Ecology (icipe), 'Markets and Value Chains Research,' available at <http://www.icipe.org/research/social-science-and-impact-assessment/markets-and-value-chains-research> [Accessed on 11/07/2017].

⁵⁵ Ibid.

⁵⁶ GRACE Communications Foundation, Biodiversity, available at <http://www.sustainabletable.org/268/biodiversity>; see also Benton, T.G., Bryant, D.M., Cole, L. and Crick, H.Q., 'Linking Agricultural Practice to Insect and Bird Populations: A Historical Study Over Three Decades'

the maintenance of biodiversity help ensure viable crop production, but many organisms and species have come to rely on particular agricultural landscapes for their very survival. That is, agriculture both supports, and is supported by, the maintenance of biodiversity.⁵⁷

6. Conclusion

Arguably, while secure rights, such as tenure and access to resources, can also contribute to biodiversity conservation by providing the incentives and legal frameworks for careful stewardship of resources, conservation can also impact negatively on people's rights, for example by denying access to resources, and weak rights can undermine conservation efforts.⁵⁸ There is thus a need to strike a balance between achieving conservation and ensuring that communities exploit natural resources sustainably to meet their basic needs and also improve their lives. A sustainable land management approach should ensure active participation of affected communities especially those engaged in agricultural practices, if the same is to be achieved for the sake of conservation of biological resources in the country.

(2002) 39 *Journal of applied ecology* 673; Saunders, M.E., Peisley, R.K., Rader, R. and Luck, G.W., 'Pollinators, Pests, and Predators: Recognizing Ecological Trade-Offs in Agroecosystems.' (2016) 45 *AMBIO-A Journal of the Human Environment*; Wenny, D.G., Devault, T.L., Johnson, M.D., Kelly, D., Sekercioglu, C.H., Tomback, D.F. and Whelan, C.J., 'The Need to Quantify Ecosystem Services Provided by Birds' (2011) 128 *The auk* 1.

⁵⁷ Ibid.

⁵⁸ BirdLife International, 'An Introduction to Conservation and Human Rights for BirdLife Partners', 2.

Boosting Biodiversity Conservation Through Sustainable Forest Resources Management

Abstract

As far as biodiversity conservation is concerned, forests are seen as not only a critical habitat for biological diversity but also as a tool for their conservation through sustainable management of forest resources. Communities living around forested areas rely heavily on these forest resources for their livelihoods. Indeed, conflicts have at times arisen from the use and control of forests, between authorities and the communities. This paper argues that managing these forests sustainably and in collaboration with the communities is not only likely to benefit the citizenry more but also boost efforts towards conservation of biodiversity.

1. Introduction

This paper discusses the challenges, and explores some of the ways that communities can be effectively included in forest resources management through fostered Environmental Democracy for biodiversity conservation and human rights protection. Arguably, loss of biodiversity in general, and in tropical forests in particular, has been identified as a major concern for modern society the world over.¹ It has been argued that deforestation is a major contributor to global emissions and reducing emissions from deforestation and degradation is a potentially cost-effective method of limiting emissions which can also yield important benefits in terms of biodiversity, watershed management, and local livelihoods, indeed development more generally.²

The *2030 Agenda for Sustainable Development Goals*³ under Goal 15 (SDG 15) recognises the importance of forests and obligates States to ‘protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification and halt and reverse land degradation and halt biodiversity’.⁴ Among the targets associated with this Goal are that States should: by 2020, ensure conservation, restoration and sustainable use of terrestrial and inland freshwater ecosystems and their services, in particular forests, wetlands, mountains and drylands, in line with obligations under international agreements; by 2030, ensure the conservation of mountain ecosystems, including their biodiversity, to enhance their capacity to provide benefits which are essential for sustainable development; take urgent and significant action to reduce degradation of natural habitat, halt the loss of biodiversity, and by 2020 protect and prevent the extinction of threatened species; ensure fair and equitable sharing of the benefits arising from the utilization of genetic resources, and promote appropriate access to genetic resources; by 2020, integrate ecosystems and biodiversity values into national and local planning, development processes and poverty reduction strategies, and accounts; mobilize and significantly

¹ Lele, S., Wilshusen, P., Brockington, D., Seidler, R. and Bawa, K., ‘Beyond Exclusion: Alternative Approaches to Biodiversity Conservation in the Developing Tropics’ (2010) 2 *Current Opinion in Environmental Sustainability* 94.

² Masundire HM, ‘Achieving Sustainable Development and Promoting Development Cooperation—Dialogues at the ECOSOC’ (New York: United Nations, 2008),28.

³ United Nations General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, Resolution adopted by the General Assembly on 25 September 2015 [without reference to a Main Committee (A/70/L.1)].

⁴ UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, Goal 15.

increase from all sources financial resources to conserve and sustainably use biodiversity and ecosystems; and enhance global support to efforts to combat poaching and trafficking of protected species, including by increasing the capacity of local communities to pursue sustainable livelihood opportunities.⁵ Notably, these targets not only recognise the link between forests and biodiversity conservation but also calls for empowerment of local communities through capacity building to enable them pursue sustainable livelihood opportunities. This arguably means ensuring that they fully participate in forests resources management in the spirit of Environmental Democracy.

2. Forest Resources and Biodiversity Conservation

Notably, forests are considered as critical habitats for biodiversity and are also essential for the provision of a wide range of ecosystem services that are important to human well-being.⁶ Forest resources offer a range of benefits and opportunities for local and national economic development, improved livelihoods and provision of environmental goods and services such as watershed protection and carbon sequestration.⁷ They contribute directly and indirectly to the national and local economies through revenue generation and wealth creation, and it is estimated that forestry contributes to 3.6% of Kenya's GDP, excluding charcoal and Direct Subsistence Uses.⁸ Forests also support most productive and service sectors in the country, particularly agriculture, fisheries, livestock, energy, wildlife, water, tourism, trade and industry that contributes about 33% to 39 % of the country's GDP.⁹ Biomass comprises about 80% of all energy used in the country, while they also provide a variety of goods, which support subsistence livelihoods of many communities.¹⁰ Other services provided include erosion control, natural hazard and disease regulation. Forest adjacent communities benefit directly through subsistence utilization of the forests. Deforestation in Kenya is, however, estimated at 50,000 hectares annually, with a consequent yearly loss to the economy of over USD 19 million.¹¹

While Kenya is endowed with a wide range of forest ecosystems ranging from montane rainforests, savannah woodlands; dry forests and coastal forests and mangroves, the current forest cover is estimated at 6.99% of the land area of the country, below the constitutional requirement of 10%.¹² Forest resources conservation is provided for both in the international and national legal frameworks. The CBD Aichi Target 5 provides that “by 2020, the rate of loss of all natural habitats, including forests, should at least be halved and where feasible brought close to zero, and degradation and fragmentation is significantly reduced. Notably, the CBD Aichi Biodiversity Target 7 also provides that countries should ensure that “by 2020 areas under agriculture, aquaculture and forestry are managed sustainably, ensuring conservation of biodiversity”. The overall goal of Kenya's *Forest Policy 2014* was sustainable development, management,

⁵ ‘SDG 15: Protect, Restore and Promote Sustainable Use of Terrestrial Ecosystems, Sustainably Manage Forests, Combat Desertification, Halt and Reverse Land Degradation and Halt Biodiversity Loss – SDG Compass’ <<https://sdgcompass.org/sdgs/sdg-15/>> accessed 13 August 2021.

⁶ Brockerhoff, E.G., Barbaro, L., Castagneyrol, B., Forrester, D.I., Gardiner, B., González-Olabarria, J.R., Lyver, P.O.B., Meurisse, N., Oxbrough, A., Taki, H. and Thompson, I.D., ‘Forest Biodiversity, Ecosystem Functioning and the Provision of Ecosystem Services’ (2017) 26 *Biodiversity and Conservation* 3005.

⁷ Republic of Kenya, Policy 2014, Laws of Kenya.

⁸ Ibid.

⁹ Ibid, para. 1.1.2.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

utilization and conservation of forest resources and equitable sharing of accrued benefits for the present and future generations of the people of Kenya. The *Draft National Forest Policy, 2020*, being a revised policy framework for forest conservation and sustainable management seeks to provide a framework for improved forest governance, resource allocation, partnerships and collaboration with the state and non-state actors and monitoring and evaluation to enable the sector contribute to the achievement of the country's growth and poverty alleviation goals within a sustainable environment.¹³

The *Forest Conservation and Management Act 2016*¹⁴ 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.¹⁵ The *National Spatial Plan 2015-2045* highlights some of the challenges facing forest ecosystems to include overwhelming pressure from competing land uses like agriculture, industry, human settlement and development of infrastructure; extraction of forest products, illegal logging, cutting trees for fuel wood and charcoal and grazing of livestock have also contributed to the degradation of forests. These competing land uses have adverse environmental effects on long-term sustainability of forest ecosystems. Under this Plan, the Government is mandated to: *prepare integrated forest resource management plans to promote sustainable use of forest resources; develop and implement national standards, principles and criteria of sustainable forest management; indigenous forests shall be identified and protected from logging and involve and empower communities in the management of forest ecosystems through controlled logging, agro-forestry, re-forestation and natural regeneration.*

The Constitution of Kenya 2010 also requires under Article 69(1) that the State should, *inter alia*,—(a) ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; (b) work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya; (d) encourage public participation in the management, protection and conservation of the environment; (e) protect genetic resources and biological diversity; (f) establish systems of environmental impact assessment, environmental audit and monitoring of the environment.

The *Community Land Act*¹⁶ provides that: for purposes of the sustainable conservation of land based natural resources within community land across counties, every respective registered community should abide by the relevant applicable laws, policies and standards on natural resources.¹⁷ With respect to subsection (1), the communities should establish - measures to protect critical ecosystems and habitats; incentives for communities and individuals to invest in income generating natural resource conservation programmes; measures to facilitate the access, use and co-management of forests, water and other resources by communities who have customary rights to these resources; procedures for the registration of natural resources in an appropriate register;

¹³ Republic of Kenya, Draft Policy 2020, May 2020, Laws of Kenya.

¹⁴ No. 34 of 2016, Laws of Kenya.

¹⁵ Preamble, No. 34 of 2016, Laws of Kenya.

¹⁶ Community Land Act, No. 47 of 2016, Laws of Kenya.

¹⁷ *Ibid*, sec. 20 (1).

and procedures for the involvement of communities and other stakeholders in the management and utilization of land-based natural resources.¹⁸

3. Challenges in Biodiversity Conservation and Forest Resources Management in Kenya

The management and conservation of forests is often associated with tension between powerful, centralised state authorities or the ruling elite and less powerful local communities.¹⁹ Over the years, this state of affairs has led to decentralization of forest rights and tenure to local communities and indigenous groups in both developing and developed nations, giving greater local control of forest resources as a response to the failure of government agencies to exercise adequate stewardship over forests and to ensure that the values of all stakeholders are adequately protected.²⁰ While the law provides for community based approaches to forest management, there exists challenges at the local level, when local governance institutions are not downwardly accountable to the community and benefits are disproportionately captured by local elites.²¹ As a result, tensions exist in some places between the development of locally accountable governance and traditional authorities, with Community-based natural resource management (CBNRM) interventions not being accompanied by the type of long-term investments in capacity-building required to ensure broader participation and the accountability of local leaders to their community.²²

The loss of control rights over natural resources during the colonial period affected other resources including forests and water.²³ The focus of forests management in reserved forests was production and protection and included collection of revenues, supervisory permits and licences, protection against illegal entry and use, reforestation and afforestation, research and extension.²⁴ Further, outside reserved forests, the focus by the government authorities was regulation and control of forest resources utilisation through legislation without considering the interests of the local communities or the existing traditional management systems.²⁵

Thus, the colonial government effectively transferred the management of forests from the local communities to the government through exclusionist and protectionist legal frameworks, a move that was inherited by the independent governments of Kenya.²⁶ It was only in the 1990s that there

¹⁸ Ibid, se. 20 (2).

¹⁹ Sayer, J., Elliott, C., Barrow, E., Gretzinger, S., Maginnis, S., McShane, T., & Shepherd, G., 'The Implications for Biodiversity Conservation of Decentralised Forest Resources Management Paper Prepared on Behalf of IUCN and WWF for the UNFF Inter-Sessional Workshop on Decentralisation Interlaken, Switzerland, May 2004'.

²⁰ Sayer J, Margules C and Boedhihartono AK, 'Will Biodiversity Be Conserved in Locally-Managed Forests?' (2017) 6 Land 6.

²¹ Roe D, Nelson F and Sandbrook C, *Community Management of Natural Resources in Africa: Impacts, Experiences and Future Directions* (IIED 2009), ix.

²² Ibid.

²³ Mogaka, H., 'Economic Aspects of Community Involvement in Sustainable Forest Management in Eastern and Southern Africa,' Issue 8 of *Forest and social perspectives in conservation*, IUCN, 2001, 74.

²⁴ Kigenyi, et al, 'Practice Before Policy: An Analysis of Policy and Institutional Changes Enabling Community Involvement in Forest Management in Eastern and Southern Africa,' Issue 10 of *Forest and social perspectives in conservation*, (IUCN, 2002), p. 9.

²⁵ Ibid.

²⁶ For instance, in 1985 the Government of the day effected a total ban on the shamba system, which was participatory in nature in that it allowed communities to settle in forests and engage in farming as they took

emerged a paradigm shift towards community-based forests management, although this was done with minimal commitment from the stakeholders.²⁷ Arguably, this has been with little success due to the bureaucracy involved in requiring communities to apply for complicated licenses and permits in order to participate in the same.

A closer examination of the *Forest Conservation and Management Act, 2016*²⁸ reveals this challenge. For instance, all indigenous forests and woodlands are to be managed on a sustainable basis for purposes of water, soil and biodiversity conservation; riverine and shoreline protection; cultural use and heritage; recreation and tourism; sustainable production of wood and non-wood products; carbon sequestration and other environmental services; education and research purposes; and as habitats for wildlife in terrestrial forests and fisheries in mangrove forests.²⁹ In this regard, the law requires the Kenya Forest Service to consult with the forest conservation committee for the area where the indigenous forest is situated in preparing a forest management plan.³⁰ Furthermore, the Forests Board is empowered to enter into a joint management agreement for the management of any state indigenous forest or part thereof with any person, institution, government agency or forest association.³¹ While such arrangements can potentially promote co-management and are important in promoting environmental justice since communities get to participate in management of indigenous forests, there is little evidence of active involvement of these communities. If anything, these communities have been suffering eviction from the indigenous forests.³²

care of the forests. Following the ban, the communities were resettled outside the gazetted forest areas. This form of eviction has also been witnessed in such recent cases as the Endorois and the Ogiek cases.

²⁷ Emerton, L., 'Mount Kenya: The Economics of Community Conservation,' Evaluating Eden Series, Discussion Paper No.4, p. 6.

²⁸ Forest Conservation and Management Act, No. 34 of 2016, Laws of Kenya.

²⁹ Sec. 42 (1), Forest Conservation and Management Act, No. 34 of 2016; See also Article 60, Constitution of Kenya 2010.

³⁰ Ibid, S. 42(2).

³¹ Ibid, S. 44(3).

³² 'Kenya: Indigenous Peoples Targeted as Forced Evictions Continue despite Government Promises' <<https://www.amnesty.org/en/latest/news/2018/08/kenya-indigenous-peoples-targeted-as-forced-evictions-continue-despite-government-promises/>> accessed 7 July 2021; 'Kenya: Indigenous Ogiek Face Eviction from Their Ancestral Forest... Again' (Mongabay Environmental News, 8 October 2018) <<https://news.mongabay.com/2018/10/kenya-indigenous-ogiek-face-eviction-from-their-ancestral-forest-again/>> accessed 7 July 2021; 'Families Torn Apart: Forced Eviction of Indigenous People in Embobut Forest, Kenya - Kenya' (ReliefWeb) <<https://reliefweb.int/report/kenya/families-torn-apart-forced-eviction-indigenous-people-embobut-forest-kenya-0>> accessed 7 July 2021; 'Imminent Forced Eviction by Kenya Threatens Indigenous Communities' Human Rights and Ancestral Forests - Kenya' (ReliefWeb) <<https://reliefweb.int/report/kenya/imminent-forced-eviction-kenya-threatens-indigenous-communities-human-rights-and>> accessed 7 July 2021; 'Kenya Defies Its Own Courts: Torching Homes and Forcefully Evicting the Sengwer from Their Ancestral Lands, Threatening Their Cultural Survival | Forest Peoples Programme' <<http://www.forestpeoples.org/topics/legal-human-rights/news/2014/01/kenya-defies-its-own-courts-torching-homes-and-forcefully-evi>> accessed 7 July 2021; 'Kenya's Sengwer People Demand Recognition of "Ancestral Land" | Voice of America - English' <<https://www.voanews.com/africa/kenyas-sengwer-people-demand-recognition-ancestral-land>> accessed 7 July 2021; Jacqueline M Klopp and Job Kipkosgei Sang, 'Maps, Power, and the Destruction of the Mau Forest in Kenya' (2011) 12 *Georgetown Journal of International Affairs* 125; 'Kenya Forest Service - Kenya Forest Service' <http://www.kenyaforestservice.org/index.php?option=com_content&view=article&catid=223&id=149&Itemid=98> accessed 7 July 2021.

The *Draft National Forest Policy 2020* acknowledges that ‘while the Forests Act No. 7 of 2005 and the Forest Conservation and Management Act 2016 provide for PFM (a model where the authority managing forest land invites local people to participate in some activities with responsibilities outlined in participatory agreements and participatory forest management plans (PFMPs)), the implementation of PFMPs through management agreements between KFS and CFAs has been limited due to inadequate funding, where the PFM process needs to be strengthened, improved upon, and adequately financed’. In addition, the Policy document states that ‘participation should extend to community engagement in the management and utilization of national gazetted forests through community forestry. Other issues that need to be addressed are: sustainable access, user rights and benefit sharing; enhancing the livelihoods of communities; adoption and mainstreaming of innovative climate change adaptation and mitigation models in forest resource management strategies; and identification of best practices on grievance and redress mechanisms between communities and forest management institutions’.³³

It has been argued that many, if not all of the planet’s environmental problems and certainly its entire social and economic problems, have cultural activity and decisions – people and human actions – at their roots.³⁴ As such, solutions are likely to be also culturally-based, and the existing models of sustainable development forged from economic or environmental concern are unlikely to be successful without cultural considerations.³⁵ Culture in this context, has been defined as: the general process of intellectual, spiritual or aesthetic development; culture as a particular way of life, whether of people, period or group; and culture as works and intellectual artistic activity.³⁶ Notably, the generation, adaptation and use of indigenous knowledge are greatly influenced by the culture.³⁷ It has rightly been observed that despite the indigenous populations having suffered from invasion and oppression, and oftentimes they have seen their knowledge eclipsed by western knowledge, imposed on them through western institutions, indigenous populations have managed to survive for centuries adapting in many different ways to adverse climate conditions and managing to create sustainable livelihood systems.³⁸ Indeed, their diverse forms of knowledge, deeply rooted in their relationships with the environment as well as in cultural cohesion, have allowed many of these communities to maintain a sustainable use and management of natural resources, to protect their environment and to enhance their resilience; their ability to observe, adapt and mitigate has helped many indigenous communities face new and complex circumstances that have often severely impacted their way of living and their territories.³⁹ It is, therefore, worth including indigenous knowledge and culture in any plans, programmes and policies aimed at realisation of sustainable development agenda.

³³ Republic of Kenya, *Draft National Forest Policy 2020*, para. 2.2.2.

³⁴ Dessein, J. et al (ed), ‘Culture in, for and as Sustainable Development: Conclusions from the COST Action IS1007 Investigating Cultural Sustainability,’ (University of Jyväskylä, Finland, 2015), p. 14. Available at <http://www.culturalsustainability.eu/conclusions.pdf> [Accessed on 7 July 2021].

³⁵ *Ibid*, p.14.

³⁶ *Ibid*, p. 21.

³⁷ SGJN Senanayake, ‘Indigenous Knowledge as a Key to Sustainable Development’ (2006) 2 *Journal of Agricultural Sciences–Sri Lanka*.

³⁸ Giorgia Magni, ‘Indigenous Knowledge and Implications for the Sustainable Development Agenda.’ (2017) 52 *European Journal of Education* 437, p.3 < <https://unesdoc.unesco.org/ark:/48223/pf0000245623>> Accessed 7 July 2021.

³⁹ *Ibid*; See also Anders Breidlid, ‘Culture, Indigenous Knowledge Systems and Sustainable Development: A Critical View of Education in an African Context’ (2009) 29 *International Journal of Educational Development* 140.

Economically, forests provide timber which is an important source of revenue and a major foreign exchange earner. Forests also serve as habitats and a source of livelihoods for indigenous peoples and forest dwellers.⁴⁰ The *Africa Forest Law Enforcement and Governance (AFLEG) Ministerial Declaration of 2003*⁴¹ recognized the role of forests in its preamble noting that Africa's forest eco-systems are essential for the livelihoods of the African people; especially the poor and that forests play important social, economic and environmental functions.⁴²

Environmental injustice continues to manifest itself in modern times through conflicts such as those in Lamu County and in the pastoral counties, largely attributable to environmental injustices inflicted over the years.⁴³ The conflicts also rise as a result of some sections of the society harbouring feelings that land and other land-based resources were taken away from local communities, creating a feeling of disinheritance. In other areas, there are conflicts over access to resources such as forests among forest communities for livelihood, while in others conflicts emerge due to competition over scarce natural resources and competing land uses.⁴⁴

4. Sustainable Management of Forests for Biodiversity Conservation

The environment and forest sector is the foundation upon which the performance of the key primary sectors of the economy is anchored including, manufacturing, energy, health and agriculture.⁴⁵ It was estimated that by 2010 the national forest cover stood at 4.18 million Ha, representing 6.99% of the total land area while the gazetted public forests managed by Kenya Forest Service covered 2.59 million Ha.⁴⁶ In 2015, the forest cover was estimated at 7.2% based on the national projection from the 2010 forest cover data.⁴⁷ This is below the recommended minimum global standard of 10% thus necessitating Kenya's goal of increasing and maintaining the national tree cover to at least 10% by 2022.⁴⁸ Most of the forestland in Kenya has been attributed to change of and use over the years thus shrinking the country's forest cover

⁴⁰ UNFF Memorandum <www.iucnael.org/en/.../doc.../849-unit-3-forest-game-backgrounder.html> Accessed on 15 August 2021; See also UNEP, *Global Environment Outlook 5: Environment for the future we want*, (UNEP, 2012), pp.145-154.

⁴¹ *Africa Forest Law Enforcement and Governance (AFLEG), Ministerial Conference 13-16 October, 2003; Ministerial Declaration, Yaoundé, Cameroon, October 16, 2003.*

⁴² Sec. 2, *Forest Conservation and Management Act, No. 34 of 2016, Laws of Kenya.*

⁴³ "They Just Want to Silence Us" (Human Rights Watch, 17 December 2018) <<https://www.hrw.org/report/2018/12/17/they-just-want-silence-us/abuses-against-environmental-activists-kenyas-coast>> accessed 9 July 2021; Rachel Berger, 'Conflict over Natural Resources among Pastoralists in Northern Kenya: A Look at Recent Initiatives in Conflict Resolution' (2003) 15 *Journal of International Development* 245.

⁴⁴ 'FAO Working Paper 1' <<http://www.fao.org/3/X2102E/X2102E01.htm>> accessed 9 July 2021; Urmilla Bob and Salomé Bronkhorst, 'Environmental Conflicts: Key Issues and Management Implications' (2010) 10 *African Journal on Conflict Resolution*.

⁴⁵ Republic of Kenya, *Draft National Strategy for Achieving and Maintaining Over 10% Tree Cover By 2022, May 2019* <<http://www.environment.go.ke/wp-content/uploads/2019/08/revised-Draft-Strategy-for-10-Tree-Cover-23-5-19-FINAL.pdf>> accessed 31 July 2021, para. 1.1.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ <https://www.the-star.co.ke/authors/gilbertkoech>, 'Why State Wants You to Plant Trees on 10% of Your Land' (The Star) <<https://www.the-star.co.ke/news/2021-03-14-why-state-wants-you-to-plant-trees-on-10-of-your-land/>> accessed 3 June 2021; Anyango Otieno and Jeckoniah Otieno, 'Sh48b Needed to Raise Forest Cover to 10 per Cent' (The Standard) <<https://www.standardmedia.co.ke/kenya/article/2001394403/sh48b-needed-to-raise-forest-cover-to-10-per-cent>> accessed 3 June 2021.

to below the international accepted standards.⁴⁹ This is despite the fact that forests are considered important for the provision of vital ecosystem services to communities living around them, contributing immensely to their livelihoods.⁵⁰ Natural forests also provide many ecosystem services needed for biodiversity conservation and sustainable management.⁵¹

Sustainable forest management is impossible without the conservation of biological diversity in forest ecosystems. In addition to the establishment and functioning of protected areas (PA) and a network of protective forests to maintain biodiversity, it is necessary to ensure the existence and species dispersal in the territories actively involved in forest management.⁵² Sustainable forest management practices that reduce the depletion of carbon stock and enhance forest resiliency (e.g., through reduced impact logging and longer harvesting cycles) could benefit biodiversity if they are applied in forests that have unsustainable harvest rates but would negatively impact forest biodiversity if applied in intact old-growth forests.⁵³

4.1 Addressing Poverty as a Causation Factor in Deforestation

Kenya's Draft Forest Policy 2020 acknowledges that while forestlands provide an important resource base for rural people's livelihoods, rapidly increasing populations, poverty, demand for fuel wood and grazing have put pressure on land forcing large segments of the rural poor to resort to poor land use practices.⁵⁴ Arguably, there are better chances of maintaining biodiversity if local benefits are maximized and local costs are minimized through carefully negotiated allocation of forest land to different purposes and by optimising the balance between all the goods and services derived from forests, especially where poor people live in proximity to forests rich in biodiversity.⁵⁵ It is suggested that policies that address links between ecological services and poverty can affect a lot of forest and many people.⁵⁶ Indeed, SDG 1 also acknowledge that one of the steps towards achieving sustainability will be eradicating abject poverty among the global citizenry. Some studies posit that policy options for reducing poverty can be sustainably effective

⁴⁹ Donald Kipruto Kimutai and Teiji Watanabe, 'Forest-Cover Change and Participatory Forest Management of the Lembus Forest, Kenya' (2016) 3 *Environments* 20; Sylvester Ngome Chisika and Chunho Yeom, 'Enhancing Ecologically Sustainable Management of Deadwood in Kenya's Natural Forests' (2021) 2021 *International Journal of Forestry Research* e6647618; Jebiwott, A., Ogendi, G. M., Makindi, S. M., & Esilaba, M. O., 'Forest Cover Change and Ecosystem Services of Katimok Forest Reserve, Baringo County, Kenya'.

⁵⁰ Jebiwott, A., Ogendi, G. M., Makindi, S. M., & Esilaba, M. O., 'Forest Cover Change and Ecosystem Services of Katimok Forest Reserve, Baringo County, Kenya'.

⁵¹ Sylvester Ngome Chisika and Chunho Yeom, 'Enhancing Ecologically Sustainable Management of Deadwood in Kenya's Natural Forests' (2021) 2021 *International Journal of Forestry Research*, 1.

⁵² 'Biodiversity Conservation in Forest Management' (WWF Russia) <<https://wwf.ru/en/what-we-do/forests/biodiversity-conservation-in-forest-management/>> accessed 13 September 2021.

⁵³ Harvey CA, Dickson B and Kormos C, 'Opportunities for Achieving Biodiversity Conservation through REDD' (2010) 3 *Conservation Letters* 53.

⁵⁴ Republic of Kenya, Draft Forest Policy 2020, para. 1.2.4.

⁵⁵ Szaro, R.C., Sayer, J.A., Sheil, D., Snook, L., Gillison, A., Applegate, G., Poulsen, J. and Nasi, R., 'Biodiversity Conservation in Production Forests' [1999] Center for International Forestry Research, Jakarta, Indonesia and International Union for Forestry Research Organizations, Vienna, Austria. 61pp, 2. Available at: http://www.cifor.cgiar.org/publications/pdf_files/others/biodiversity.pdf

⁵⁶ Kerr, S., Pfaff, A., Cavatassi, R., Davis, B., Lipper, L., Sanchez, A. and Timmins, J., *Effects of Poverty on Deforestation: Distinguishing behaviour from location*. No. 854-2016-56193. 2004, 2.

in reducing deforestation and can be used in place of policies that, *inter alia*, restrict forest use excessively in order to reconcile forest conservation with social welfare.⁵⁷

It is perhaps against this background that at COP 26, in an attempt to address poverty through diversified livelihood sources, world leaders acknowledged that meeting our land use, climate, biodiversity and sustainable development goals, both globally and nationally, will require transformative further action in the interconnected areas of sustainable production and consumption; infrastructure development; trade; finance and investment; and support for smallholders, Indigenous Peoples, and local communities, who depend on forests for their livelihoods and have a key role in their stewardship.⁵⁸ Efforts towards addressing deforestation thus involve poverty eradication as both a means and an end.

4.2 Role of Technology and Innovation in Combating Deforestation

Technological and social innovation has an important role in delivering a low-carbon growth through: short-term cost-effective emissions reductions using known technologies (for example, in energy generation and transmission), land use change (for example, in reduced deforestation), and energy efficiency; and in the medium – to longer-term, through delivering next-generation low-carbon technologies, especially for the power, transport, industry, and building sectors.⁵⁹ However, it must be noted that due to the development differences between countries, there would be different policy frameworks for different technologies at different stages of development.⁶⁰

Social innovation refers to the reconfiguration of social practices and new institutions such as networks, partnerships, collaborations and governance arrangements—in response to societal challenges and opportunities, and it is seen as crucial for addressing challenges as it has the potential to deliver tangible and positive benefits for rural communities.⁶¹ Arguably, its potential lies in offering ‘new ways of framing, knowing, doing and organising and transforming the way researchers, development agents and rural stakeholders usually work together, and it represents a shift in the perspective and approach to development that provides opportunities for better inclusion of stakeholders’ voices, values and vision in matters that concern them and for valuing their experience.⁶²

⁵⁷ Miyamoto M, ‘Poverty Reduction Saves Forests Sustainably: Lessons for Deforestation Policies’ (2020) 127 *World Development* 104746; see also Fagariba CJ, Song S and Soule SKG, ‘Livelihood Economic Activities Causing Deforestation in Northern Ghana: Evidence of Sissala West District’ (2018) 8 *Open Journal of Ecology* 57.

Some authors, however, contend this causality link between deforestation and poverty- Geist, H. and Lambin, E.,

“Is poverty the cause of tropical deforestation?” *The International Forestry Review* 5, no. 1 (2003): 64-67.

⁵⁸ ‘Glasgow Leaders’ Declaration on Forests and Land Use’ (UN Climate Change Conference (COP26) at the SEC – Glasgow 2021, 2 November 2021) <<https://ukcop26.org/glasgow-leaders-declaration-on-forests-and-land-use/>> accessed 12 November 2021.

⁵⁹ Masundire HM, ‘Achieving Sustainable Development and Promoting Development Cooperation—Dialogues at the ECOSOC’ (New York: United Nations, 2008),28.

⁶⁰ *Ibid*, 28.

⁶¹ Barlagne, C., Bézard, M., Drillet, E., Larade, A., Diman, J.L., Alexandre, G., Vinglassalon, A. and Nijnik, M., ‘Stakeholders’ Engagement Platform to Identify Sustainable Pathways for the Development of Multi-Functional Agroforestry in Guadeloupe, French West Indies’ [2021] *Agroforestry Systems* <<https://doi.org/10.1007/s10457-021-00663-1>> accessed 15 September 2021.

⁶² *Ibid*.

Some of these innovations, it is hoped, will help in predicting changes in future land use and the effects of climate-related deforestation and this will in turn help governments and environment-oriented organizations to use the readily available vast data to hopefully make better policies to protect the forests.⁶³ Indeed, Kenya's *Draft National Forests Policy 2020* acknowledges that 'the forest sector suffers from low productivity of tree crops, low conversion efficiency and weak value addition schemes, as a result of climate change, small genetic base of crops, emerging pests and diseases, delayed investments in silvicultural technology⁶⁴, low investments in technology development, and poor investment in forest-based industry. As such, it states that research and development is needed to refocus basic forestry disciplines to pertinent issues such as productivity, low cost silvicultural technologies, health, crop diversification, processing, value addition, intellectual property rights and indigenous knowledge.⁶⁵

The United Nations climate negotiations on Reducing Emissions From Deforestation And Degradation (REDD), a kind of payments for environmental services (PES)⁶⁶, provide a rare opportunity for conservation of tropical forests and biodiversity.⁶⁷ It has been observed that since Reducing emissions from deforestation and forest degradation (REDD+) policies, projects, and interventions focus on forests, they simultaneously affect socioeconomic and ecological outcomes at local, subnational, national, regional, and global levels.⁶⁸ Reducing emissions from deforestation and forest degradation in developing countries (REDD) is based on the following basic idea: reward individuals, communities, projects and governments that reduce greenhouse gas (GHG) emissions from forests.⁶⁹

There is a need for countries to continue exploring such projects as part of innovative responses to deforestation and climate change.⁷⁰ At the 26th UN Climate Change Conference of the Parties (COP26) in Glasgow, Scotland, held in November 2021, the *Glasgow Declaration on Forests and Land Use* was announced to the world, and was signed by 100 countries representing 85% of

⁶³ 'Technology to Tackle Deforestation' (AZoCleantech.com, 29 November 2013) <<https://www.azocleantech.com/article.aspx?ArticleID=470>> accessed 15 September 2021.

⁶⁴ Developing silvicultural systems for sustainable forestry involves assembling the components of a silvicultural prescription such that the prescription will successfully maintain a range of ecosystem attributes (values). Those components include a suite of harvesting, regeneration, and tending methods. 'Developing Silvicultural Systems for Sustainable Forestry in Canada' <<http://www.fao.org/3/XII/0596-B1.htm>> accessed 15 September 2021.

⁶⁵ Republic of Kenya, *Draft National Forest Policy 2020*, para. 2.2.10.

⁶⁶ Pagiola S and Bosquet B, 'Estimating the Costs of REDD at the Country Level'.

⁶⁷ Harvey CA, Dickson B and Kormos C, 'Opportunities for Achieving Biodiversity Conservation through REDD' (2010) 3 *Conservation Letters* 53.

⁶⁸ Duchelle, A.E., De Sassi, C., Jagger, P., Cromberg, M., Larson, A.M., Sunderlin, W.D., Atmadja, S.S., Resosudarmo, I.A.P. and Pratama, C.D., 'Balancing Carrots and Sticks in REDD+ Implications for Social Safeguards' (2017) 22 *Ecology and Society*; Duchelle AE and others, 'What Is REDD+ Achieving on the Ground?' (2018) 32 *Current Opinion in Environmental Sustainability* 134; Arun Agrawal, Daniel Nepstad, and Ashwini Chhatre, 'Reducing Emissions from Deforestation and Forest Degradation', *Annu. Rev. Environ. Resour.* 2011. 36:373–96, at 373.

⁶⁹ Verbist, B., Vangoidsenhoven, M., Dewulf, R. and Muys, B., 'Reducing Emissions from Deforestation and Degradation (REDD)' [2011] KLIMOS, Leuven, Belgium 1.

⁷⁰ Cf. Duchelle AE and others, 'Balancing Carrots and Sticks in REDD+ Implications for Social Safeguards' (2017) 22 *Ecology and Society*.

the globe's forested land, pledging to end or reduce deforestation by 2030.⁷¹ Overall, the sustainable management and conservation of the world's forests received a significant boost at COP26 with financial pledges, technical progress and a declaration by World Leaders and other stakeholders on 'Forests and Land Use'.⁷² Through the Declaration, the Participants emphasised the critical and interdependent roles of forests of all types, biodiversity and sustainable land use in enabling the world to meet its sustainable development goals; to help achieve a balance between anthropogenic greenhouse gas emissions and removal by sinks; to adapt to climate change; and to maintain other ecosystem services.⁷³ It is hoped that the countries in question will uphold their commitments in combating deforestation for climate change mitigation and biodiversity conservation.

4.3 Promoting Agroforestry for Biodiversity Conservation

As already pointed out, Environmental Democracy is an important tool in promoting participatory management of resources, including forests. As a result, it has been suggested that social innovation is critical in shaping human-forest relationships and how farmers and scientists engage with each other to design sustainability transitions, where it has been observed that if countries are to address synergies between rural livelihoods, biodiversity conservation and the capacity of the natural environment to provide ecosystem services, the role of local communities is central.⁷⁴ Agroforestry is a participatory approach that can be used in enhancing the participation of communities in sustainable management of forest resources for biodiversity conservation.⁷⁵

With declining biodiversity affecting food security, agricultural sustainability and environmental quality, agroforestry has been hailed as a possible partial solution for biodiversity conservation and improvement.⁷⁶ Agroforestry systems try to balance various needs: 1) to produce trees for timber and other commercial purposes; 2) to produce a diverse, adequate supply of nutritious foods both to meet global demand and to satisfy the needs of the producers themselves; and 3) to ensure the protection of the natural environment so that it continues to provide resources and environmental services to meet the needs of the present generations and those to come.⁷⁷

⁷¹ 'COP26 Glasgow Declaration: Salvation or Threat to Earth's Forests?' (Mongabay Environmental News, 3 November 2021) <<https://news.mongabay.com/2021/11/cop26-glasgow-declaration-salvation-or-threat-to-earths-forests/>> accessed 11 November 2021.

⁷² 'COP26: Pivotal Progress Made on Sustainable Forest Management and Conservation | UNFCCC' <<https://unfccc.int/news/cop26-pivotal-progress-made-on-sustainable-forest-management-and-conservation>> accessed 11 November 2021.

⁷³ Preamble< 'Glasgow Leaders' Declaration on Forests and Land Use' (UN Climate Change Conference (COP26) at the SEC – Glasgow 2021, 2 November 2021) <<https://ukcop26.org/glasgow-leaders-declaration-on-forests-and-land-use/>> accessed 11 November 2021.

⁷⁴ Barlagne, C., Bézard, M., Drillet, E., Larade, A., Diman, J.L., Alexandre, G., Vinglassalon, A. and Nijnik, M., 'Stakeholders' Engagement Platform to Identify Sustainable Pathways for the Development of Multi-Functional Agroforestry in Guadeloupe, French West Indies' [2021] *Agroforestry Systems* <<https://doi.org/10.1007/s10457-021-00663-1>> accessed 15 September 2021.

⁷⁵ P Udawatta R, Rankoth L and Jose S, 'Agroforestry and Biodiversity' (2019) 11 *Sustainability* 2879.

⁷⁶ Ibid.

⁷⁷ 'What Is Agroforestry?' (World Agroforestry | Transforming Lives and Landscapes with Trees) <<https://www.worldagroforestry.org/about/agroforestry>> accessed 15 September 2021.

Often, farmers see themselves as being part of the socio-ecological system and as custodians of the natural environment.⁷⁸ Agroforestry is a form of integrated land management that combines agriculture and forestry on a same unit of land and aims to ‘create environmental, economic, and social benefits’.⁷⁹ Arguably, agroforestry contributes directly to SDGs 1 (no poverty), 2 (zero hunger), 3 (good health and wellbeing), 6 (clean water and sanitation), 7 (affordable and clean energy), 8 (decent work and economic growth), 11 (sustainable cities and communities), 12 (responsible consumption and production), 13 (climate action), and 15 (life on land) and indirectly through implementation approaches to Goals 4 (quality education), 5 (gender equality), 9 (industry, innovation and infrastructure), 10 (reduced inequalities), 14 (life below water), 16 (peace, justice and strong institutions) and 17 (partnerships for the goals).⁸⁰ If well designed and implemented, agroforestry systems can arguably provide the following: their role in rural development as they can improve food sovereignty and contribute to provision of energy for the smallholders; and their environmental functions: contribution to biodiversity conservation, to increased connectivity of fragmented landscapes, and adaptation and mitigation of climate change.⁸¹

5. Conclusion

It has been observed that more than 1.6 billion people all over the world depend on forests for food, medicine and livelihoods, with the forests preserving soil and supporting 80% of the world's biodiversity, and they also produce oxygen and purify the air, making them essential for mitigating climate change as they absorb up to 30% of Green House Gas Emissions.⁸² Thus, forests have increasingly been associated with global sustainability, with them re-taking centre stage in global conversations about sustainability, climate and biodiversity.⁸³ Arguably, there is a need for countries to adopt approaches in combating deforestation which involve public resources and governance reforms if the hard and soft infrastructure for controlling deforestation and the scale required is to work effectively, and these approaches should include observation, monitoring, definition and enforcement of property rights, legal and administrative reform, among others, at the country level.⁸⁴ Indeed, the *COP26 Glasgow Leaders Declaration on Forests and Land Use* acknowledges that there is a need for the empowerment of local communities, including indigenous peoples, which are often negatively affected by the exploitation and degradation of forests.⁸⁵

⁷⁸ Barlagne, C., Bézard, M., Drillet, E., Larade, A., Diman, J.L., Alexandre, G., Vinglassalon, A. and Nijnik, M., ‘Stakeholders’ Engagement Platform to Identify Sustainable Pathways for the Development of Multi-Functional Agroforestry in Guadeloupe, French West Indies’ [2021] Agroforestry Systems.

⁷⁹ Ibid.

⁸⁰ ‘What Is Agroforestry?’ (World Agroforestry | Transforming Lives and Landscapes with Trees) <<https://www.worldagroforestry.org/about/agroforestry>> accessed 15 September 2021.

⁸¹ Montagnini F, ‘Integrating Landscapes: Agroforestry for Biodiversity Conservation and Food Sovereignty’ (2017) 12 *Advances in agroforestry* (ISSN 1875-1199).

⁸² ‘COP26: EU Announces €1 Billion Pledge to Protect Forests’ (European Commission - European Commission) <https://ec.europa.eu/commission/presscorner/detail/en/IP_21_5678> accessed 12 November 2021.

⁸³ Oldekop JA and others, ‘Forest-Linked Livelihoods in a Globalized World’ (2020) 6 *Nature Plants* 1400; ‘World Leaders, Corporations at COP26, Take Major Step to Restore and Protect Forests’ (UN News, 2 November 2021) <<https://news.un.org/en/story/2021/11/1104642>> accessed 12 November 2021.

⁸⁴ Masundire HM, ‘Achieving Sustainable Development and Promoting Development Cooperation—Dialogues at the ECOSOC’ (New York: United Nations, 2008), 28.

⁸⁵ ‘World Leaders, Corporations at COP26, Take Major Step to Restore and Protect Forests’ (UN News, 2 November 2021) <<https://news.un.org/en/story/2021/11/1104642>> accessed 12 November 2021.

Boosting Biodiversity Conservation Through Sustainable Forest Resources Management

There is no meaningful progress that can be made in achieving biodiversity conservation through sustainable forests management if communities are not actively and meaningfully involved in such efforts, through Environmental Democracy.

Addressing the Contemporary Issues in Biodiversity Conservation

Abstract

Biodiversity resources play a huge role in not only meeting the needs of human beings but also sustaining healthy ecosystems for the sake of all living organisms. However, there are increased rates of biodiversity degradation, thus calling for improved measures towards conservation of these biological diversity resources. In acknowledging that biodiversity resources face a myriad of threats, this paper discusses the various issues that affect biodiversity conservation efforts and which issues must thus be addressed as part of conservation measures.

1. Introduction

This paper highlights some of the contemporary issues that arise from biological diversity debates, and ones that are likely to affect how countries respond to the conservation of biodiversity responsibilities as envisaged under the international, regional and national environmental regulatory frameworks. The author argues that unless these issues are strategically addressed, any efforts geared towards biodiversity conservation may not bear much fruits. Biological diversity is a term used to refer to the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part: this includes diversity within species, between species and of ecosystems. These resources play a huge role in not only environmental processes but also in provision of ecosystem resources for all living organisms, including human beings.¹ Arguably, if the world is to achieve the sustainable development goals, then the conservation of these resources must be treated with urgency and it also calls for the concerted efforts of all stakeholders and cooperation from all countries, at least at the international level. The world must address the human activities that have been contributing to the degradation of these resources.²

The need for this cooperation was born out of the fact that ‘the responsibility for biodiversity conservation has traditionally been seen as a function of government and, particularly, of its environment departments and conservation agencies, where Non-governmental organisations, local communities and other interest groups have supported this role by championing specific environmental issues and conversely, business and industry are typically regarded as competitors to environmental causes, needing land and resources for production’.³ This paper acknowledges that biodiversity conservation is a cross-cutting issue which is affected by different but related development and environmental issues that must be considered in any efforts taken by stakeholders in any conservation measures.

2. Contemporary Issues in Biodiversity Conservation

It is now a non-contentious position that ‘biodiversity is considered to be an essential component for sustainable development and human well-being, which underpins the provision of food and

¹ United Nations Development Programme. "The future we want: Biodiversity and ecosystems—driving sustainable development." (2012),1.

² Ibid.

³ Ginsburg, A., Stephens, A., Tau, M., Botts, E., & Holness, S., ‘Biodiversity Mainstreaming in South Africa’s Production Landscapes: Lessons and Achievements’ [2020] International Grassland Congress Proceedings <<https://uknowledge.uky.edu/igc/22/2-15/1>> accessed 24 July 2021.

water; mitigates and provides resilience to climate change; supports human health, and provides jobs in agriculture, fisheries, and forestry, among other sectors.⁴ It is worth pointing out that globally, early environmental conservation and natural resource management initiatives concentrated on improving water and land management, by the 1980s, there had been a shift in country-level's environmental focus to integrate biodiversity conservation into mainstream development processes, with an emphasis on production sector projects, national and sub-national policy and planning, institutional development, and disaster risk reduction.⁵ This section highlights some of the main environmental and development issues that have a bearing on biodiversity conservation efforts.

2.1 Sustainable Trade and Investment Regimes

Kenya's position as a global investment destination has been improving significantly, with the World Bank's latest 'Ease of Doing Business' ratings identifying Kenya as one of the most notably improved countries globally, progressing 24 places in two years from 80th in 2017 to 56th in 2019.⁶ During the said period, the flow of foreign direct investment also saw a significant step up in 2018, increasing by 27 per cent to \$1.6 billion, according to the United Nations Conference on Trade and Development (UNCTAD).⁷ In order to strengthen the private sector which is considered to be crucial to implementing the President's Big Four Agenda, and foreign direct investment which has a key role in increasing private sector activity, the Kenyan Government has been working towards increased foreign direct investment by taking steps to facilitate private enterprise and foreign investment, for instance, through predictable regulatory and tax practices.⁸ The Presidency's *Big Four Agenda* which is a 5-year development plan under 4 key pillars, namely: food security, affordable housing, manufacturing, and affordable healthcare for all.⁹

The *Kenya National Action Plan On Business And Human Rights For the Implementation of the United Nations Guiding Principles on Business and Human Rights*¹⁰ (NAP) was drafted to domesticate the UN Guiding Principles on Business and Human Rights focusing on five thematic issues identified by stakeholders, namely: Land and Natural Resources; labour rights; revenue transparency; environmental protection; and access to remedy.¹¹ The objectives of this NAP are: To guide the State as it fulfils its duty to protect individuals and communities from

⁴ United Nations, "Biodiversity at the Heart of Sustainable Development", Input to the 2018 High-level Political Forum on Sustainable Development (HLPF), Secretariat of the Convention on Biological Diversity (CBD), 27 April 2018, 1.

⁵ United Nations Development Programme, 'The Future We Want: Biodiversity and Ecosystems—Driving Sustainable Development.' (Biodiversity and ecosystems global framework 2012–2020, 2012), 9-10.

⁶ 'What's the Role of an Impact Investor like CDC in Kenya?' (CDC Group) <<https://www.cdcgroup.com/en/news-insight/insight/articles/whats-the-role-of-an-impact-investor-like-cdc-in-kenya>> accessed 23 July 2021.

⁷ Ibid.

⁸ 'What's the Role of an Impact Investor like CDC in Kenya?' (CDC Group) <<https://www.cdcgroup.com/en/news-insight/insight/articles/whats-the-role-of-an-impact-investor-like-cdc-in-kenya>> accessed 23 July 2021.

⁹ 'The Big 4 - Empowering the Nation' <<https://big4.delivery.go.ke/>> accessed 25 December 2020.

¹⁰ Republic of Kenya, Kenya national action plan on business and human rights For the Implementation of the United Nations Guiding Principles on Business and Human Rights, June 2019<https://www.ohchr.org/Documents/Issues/Business/NationalPlans/2019_FINAL_BHR_NAP.PDF> accessed 23 July 2021.

¹¹ Ibid, p. ii.

business-related human rights abuses, consistent with its domestic and international obligations; To guide businesses on the measures they should undertake to meet their responsibility to respect human rights in their operations; To offer a roadmap of strengthening access to State-based judicial and non-judicial remedies for victims of business-related harm and to promote human rights due diligence by businesses, ensuring that they play their role in the attainment of SDGs in a manner that respects human rights; and to form a basis for dialogue between the State, businesses, individuals and communities whose rights are adversely impacted by business operations, and civil society organisations on promoting respect for human rights by businesses.¹²

The NAP outlines policy actions aimed at enhancing State duty to protect human rights as well as those aimed at enhancing and upholding corporate responsibility to respect human rights.¹³ It is a step in the right direction and has the potential to enhance respect for human rights in the country. Notably, businesses must also ensure that their business operations and decisions are friendly and indeed promote biodiversity conservation. In light of this, it has been suggested that for a business to establish whether their actions are contributing to the strategic goals, they must: (a) make a clear commitment to balance or outweigh any negative impacts on biodiversity through mitigation activities (e.g., no net loss or net gain for biodiversity); (b) quantify their impacts on biodiversity, and the biodiversity benefits that are derived from their actions; and (c) determine the net outcome of their biodiversity performance at site, supply chain or organizational level, thus advancing business accountability.¹⁴

There is a need for continued development of a trade and investment regime aimed at enhancing and promoting public participation in development as part of ensuring that there is encouragement and realization of development, transfer, dissemination and diffusion of environmentally sound technologies to developing countries on favourable terms, including on concessional and preferential terms, as mutually agreed, as envisaged under SDG 17, Target 17.7. Notably, the push for economic growth cannot only be driven by Kenya's Government but also by its people, hence the need for a regime that promotes active and meaningful participation of the people in these activities.¹⁵ The Convention on Biological Diversity (CBD) Aichi Target 3 also requires that "by 2020, at the latest, incentives, including subsidies, harmful to biodiversity are eliminated, phased out or reformed in order to minimize or avoid negative impacts, and positive incentives for the conservation and sustainable use of biodiversity are developed and applied, consistent and in harmony with the Convention and other relevant international obligations, taking into account national socio-economic conditions".¹⁶

¹² Ibid, p. 11.

¹³ Ibid, chapter two.

¹⁴ Smith, T., Beagley, L., Bull, J., Milner-Gulland, E.J., Smith, M., Vorhies, F. and Addison, P.F., 'Biodiversity Means Business: Reframing Global Biodiversity Goals for the Private Sector' (2020) 13 Conservation Letters e12690, 7.

¹⁵ 'What's the Role of an Impact Investor like CDC in Kenya?' (CDC Group) <<https://www.cdcgroup.com/en/news-insight/insight/articles/whats-the-role-of-an-impact-investor-like-cdc-in-kenya/>> accessed 23 July 2021.

¹⁶ Unit B, 'Aichi Biodiversity Targets' (18 September 2020) <<https://www.cbd.int/sp/targets/>> accessed 8 September 2021.

In order to achieve the sustainable development goals, the *2015 Addis Ababa Action Agenda on Financing for Development* captured the importance of domestic resource mobilization, noting that the “mobilization and effective use of domestic resources ... are central to our common pursuit of sustainable development.”¹⁷ Notably, it has also been rightly pointed out that the only reliable and sustained sources of government revenue are taxes and some non-tax revenue instruments, such as royalties and resource rents from extractive industries and, to a limited extent, user fees for public services, generally delivered by local governments.¹⁸ However, most African countries have been over relying on foreign aid and loans to fund their ever expanding national budgets, and Kenya is no exception.¹⁹

With the pressure and the 2030 deadline to achieve the sustainable development goals, the need for alternative funding will only grow. As such, there is a need for these countries to not only look for alternative sources of the required financial resources but also the ones that come with less complications and strings attached. It is for this reason that these countries need to focus more on capitalizing on domestic resource mobilization as a source of funding development projects. This is important as Official Development Assistance (ODA) is finite and fluctuates over time, creating uncertainty for recipient countries about planning, budgeting, and expenditures in the public sector.²⁰ External debt burdens have an impact on biodiversity conservation as both climate and biodiversity targets require countries to mobilise resources to meet those ambitions.²¹ Some researchers have even suggested that forgiving developing countries’ debts, such as Kenya’s hefty foreign debt, in exchange for the government devoting those resources to fighting climate change threats and biodiversity loss, could tackle several big problems at once, in what is referred to as debt swaps.²² However, while debt-for-nature and debt-for-climate swaps are a relatively new idea, they hold a potential to tackling biodiversity loss challenges through funding, while promoting sustainable development.²³

¹⁷ Junquera-Varela, R. F., Verhoeven, M., Shukla, G. P., Haven, B., Awasthi, R., & Moreno-Dodson, B., *Strengthening Domestic Resource Mobilization: Moving from Theory to Practice in Low-and Middle-Income Countries* (The World Bank 2017), chapter Two.

¹⁸ *Ibid*, 5.

¹⁹ Kwemo AB, ‘Making Africa Great Again: Reducing Aid Dependency’ (Brookings, 20 April 2017) <<https://www.brookings.edu/blog/africa-in-focus/2017/04/20/making-africa-great-again-reducing-aid-dependency/>> accessed 8 September 2021.

²⁰ Junquera-Varela, R. F., Verhoeven, M., Shukla, G. P., Haven, B., Awasthi, R., & Moreno-Dodson, B., *Strengthening Domestic Resource Mobilization: Moving from Theory to Practice in Low-and Middle-Income Countries* (The World Bank 2017), 6.

²¹ ‘Time for Solutions to Tackle the Twin Sovereign Debt and Nature Crises’ (Green Fiscal Policy Network) <<https://greenfiscalspolicy.org/blog/time-for-solutions-to-tackle-the-twin-sovereign-debt-and-nature-crises/>> accessed 8 September 2021.

²² ‘Debt Swaps Could Free Funds to Tame Climate, Biodiversity and Virus Threats’ Reuters (7 September 2020) <<https://www.reuters.com/article/us-global-debtrenegotiation-nature-clima-idUSKBN25Y26P>> accessed 8 September 2021.

²³ *Ibid*; Yue M and WANG CN, ‘Debt-For-Nature Swaps: A Triple-Win Solution for Debt Sustainability and Biodiversity Finance in the Belt and Road Initiative (BRI)? – Green Belt and Road Initiative Center’ <<https://green-bri.org/debt-for-nature-swaps-in-the-belt-and-road-initiative-bri/>> accessed 8 September 2021; Smith, T., Beagley, L., Bull, J., Milner-Gulland, E.J., Smith, M., Vorhies, F. and Addison, P.F., ‘Biodiversity Means Business: Reframing Global Biodiversity Goals for the Private Sector’ (2020) 13 *Conservation Letters* e12690; Bishop J, *The Economics of Ecosystems and Biodiversity in Business and Enterprise* (Routledge 2013); Arlaud M and others, ‘The Biodiversity Finance Initiative: An Approach to Identify and Implement Biodiversity-Centered Finance Solutions for Sustainable Development’ [2018] *Towards a Sustainable Bioeconomy: Principles, Challenges and Perspectives* 77.

It is documented that when the investment requirements for the Sustainable Development Goals (SDGs) were first assessed in the United Nations Conference on Trade and Development's (UNCTAD's) World Investment Report 2014, at least 10 relevant sectors (encompassing all 17 SDGs) were identified and the report projected an annual investment gap of \$2.5 trillion in developing countries.²⁴ While this projection remains valid today, according to a recent review (UNCTAD, 2020), the SDGs have significant resource implications across developed and developing countries and require a step-change in levels of both public and private investment in the SDGs.²⁵ In line with this, the CBD post-2020 biodiversity framework negotiations have increased attention on opportunities for increased businesses engagement with, and accountability for, their interdependencies.²⁶

The need for enhanced domestic resource mobilization is also more urgent in light of the UNCTAD's observations that the COVID-19 shock has exacerbated existing constraints for the SDGs and could undo the progress made in the last six years in SDG investment and the international private sector investment flows to developing and transition economies in sectors relevant for the SDGs were also expected to fall by about one-third in 2020 because of the COVID-19 pandemic, posing a risk to delivering on the 2030 agenda for sustainable development.²⁷

Thus, as part of laying the groundwork for the achievement of SDGs, there is a need for countries, including Kenya, to review their domestic resource mobilization efforts and work towards enhancing the same, aimed at reducing over-reliance on external debt which may come with conditions and subsequently affect a country's commitment to climate change and biodiversity conservation.

Indeed, at the UN/WTO joint side event to COP26, held in November 2021, whose agenda was 'climate finance and trade to build resilience to climate change', it was agreed that international trade can be an integral part in building resilience and achieving the SDGs through generating the resources needed for investment, simultaneously creating wealth and building resilience of the most vulnerable nations while promoting a systemic shift towards sustainable production and consumption.²⁸ It was also agreed that mobilizing climate finance and investment capital through innovative finance mechanisms, such as climate action-debt swaps and green bonds, can also ensure that solutions are translated into practice and enhance the adaptive capacity and resilience of the most vulnerable.²⁹ The unveiling of the SDGs in 2015 meant that most developing countries would have to step up their efforts to raise domestic resources to finance needed domestic investment as support from development partners and private sector investors would not be

²⁴ Zhan JX and Santos-Paulino AU, 'Investing in the Sustainable Development Goals: Mobilization, Channeling, and Impact' (2021) 4 *Journal of International Business Policy* 166.

²⁵ *Ibid.*

²⁶ Smith, T., Beagley, L., Bull, J., Milner-Gulland, E.J., Smith, M., Vorhies, F. and Addison, P.F., 'Biodiversity Means Business: Reframing Global Biodiversity Goals for the Private Sector' (2020) 13 *Conservation Letters* e12690, 2.

²⁷ Zhan JX and Santos-Paulino AU, 'Investing in the Sustainable Development Goals: Mobilization, Channeling, and Impact' (2021) 4 *Journal of International Business Policy* 166.

²⁸ 'Program COP26 Side Event' <<https://unctad.org/system/files/information-document/ditc-ted-06112021-COP26-sideevent-programme-v1.pdf>> accessed 23 November 2021.

²⁹ *Ibid.*

enough.³⁰ While there are various external mechanisms of funding that are available to countries for exploitation, there is a need for countries such as Kenya to enhance their domestic resources mobilization mechanisms.

Domestic trade and investments that financially and socially empower communities will mean that their over-reliance on environmental resources will decrease and subsequently reduce over-exploitation of these resources, which usually has a great impact on biodiversity. This is protecting, restoring, and managing key ecosystems helps biodiversity and people to adjust to changing climatic conditions.

2.2 Climate Change Mitigation and Biodiversity Conservation

Climate change is one of the factors that affect agricultural production and, therefore, critical in understanding biodiversity mainstreaming and conservation in the agricultural sector. The Convention on Biological Diversity (CBD) Aichi Target 15 obligates States to ensure that “by 2020, ecosystem resilience and the contribution of biodiversity to carbon stocks has been enhanced, through conservation and restoration, including restoration of at least 15 per cent of degraded ecosystems, thereby contributing to climate change mitigation and adaptation and to combating desertification”.³¹ Current reports also indicate that countries need to decrease greenhouse gas emissions by 25% by 2030 compared to 1990 levels to achieve the 2 degrees Celsius (°C) target of the Paris Agreement and 55% to reach the 1.5°C target, and this can arguably be achieved through, *inter alia*, conserving, sustainably managing and restoring ecosystems as plants and soils in terrestrial ecosystems absorb an estimated 9.5 billion tonnes of carbon dioxide equivalent every year.³² This is especially important considering that land-use change and poor management have depleted carbon stocks in terrestrial ecosystems, resulting in large emissions of carbon into the atmosphere, with deforestation and forest degradation accounting for around 12% of global emissions of carbon dioxide (CO₂).³³

The *Climate Change Act 2016* is to be applied for the development, management, implementation and regulation of mechanisms to enhance climate change resilience and low carbon development for the sustainable development of Kenya. The Act is to be applied in all sectors of the economy by the national and county governments to mainstream climate change responses into development planning, decision making and implementation; build resilience and enhance adaptive capacity to the impacts of climate change; formulate programmes and plans to enhance the resilience and adaptive capacity of human and ecological systems to the impacts of climate change; mainstream and reinforce climate change disaster risk reduction into strategies and actions of public and private entities; mainstream intergenerational and gender equity in all aspects of climate change responses and provide incentives and obligations for private sector contribution in achieving low carbon climate resilient development.

³⁰ ‘Heightening Domestic Resource Mobilization in Africa During COVID-19’ (Center for Global Development) <<https://www.cgdev.org/blog/heightening-domestic-resource-mobilization-africa-during-covid-19>> accessed 22 March 2021.

³¹ Unit B, ‘Aichi Biodiversity Targets’ (18 September 2020) <<https://www.cbd.int/sp/targets/>> accessed 8 September 2021.

³² OECD (2019), Biodiversity: Finance and the Economic and Business Case for Action, report prepared for the G7 Environment Ministers’ Meeting, 5-6 May 2019, 31.

³³ *Ibid*, 31.

It is hoped that the commitments made at the COP 26 will renew the hope for funding, especially with the Glasgow Climate Pact, which includes an unprecedented goal for developed countries to double the funding provided to developing countries for adaptation by 2025, taking the annual figure to around US \$40 billion.³⁴ The National Policy for the Sustainable Development of Northern Kenya and other Arid Lands affirms that in Kenya, the ASALs occupy 89% of the country and are home to about 36% of the population, 70% of the national livestock herd and 90% of the wild game that supports the country's tourism industry. The objectives of this policy are to: provide a framework for ASAL development coordination, resource mobilization, research, monitoring and evaluation; strengthen cohesion and integration of ASAL with the rest of the country and address inequality including gender, youth and vulnerable groups; improve the enabling environment for development in the ASALs by establishing the necessary foundations for development and bridge development gaps; develop alternative approaches to service delivery in Pastoral Areas; provide a policy framework for enhancing synergy on ending drought emergencies; promote sustainable utilization of existing land and land based resources to facilitate national economic development; and to provide an enabling environment for sustainable agriculture, livestock, trade and tourism development in the ASALs.

Arguably, climate change adaptation actions that do not consider the role of, and potential impacts on, biodiversity can have adverse effects – increasing rather than reducing climate change vulnerability.³⁵ Thus, an effective climate change response requires consideration of the role of, and potential impacts on, biodiversity and ecosystem services, where biodiversity and ecosystem services support people to adapt to climate change through approaches collectively called ecosystem-based adaptation.³⁶ Ecosystem-Based Adaptation (EBA) has been defined as the adaptation policies and measures that take into account the role of ecosystem services in reducing the vulnerability of society to climate change, in a multi-sectoral and multi-scale approach, where BA involves national and regional governments, local communities, private companies and NGOs in addressing the different pressures on ecosystem services, including land use change and climate change, and managing ecosystems to increase the resilience of people and economic sectors to climate change.³⁷ Arguably, ecosystem based approaches to adaptation harness the capacity of nature to buffer human communities against the adverse impacts of climate change through the sustainable delivery of ecosystem services.³⁸ This is because, deployed with focus on specific ecosystem services with the potential to reduce climate change exposures, the forms used are targeted management, conservation and restoration activities.³⁹

Ecosystems are important to not only important to sustenance of human life but they also deliver services that can help meet adaptation needs across multiple human development sectors

³⁴ 'What Does COP26 Mean for Adaptation?' (UNEP, 17 November 2021) <<http://www.unep.org/news-and-stories/story/what-does-cop26-mean-adaptation>> accessed 23 November 2021.

³⁵ Mant, R., Perry, E., Heath, M., Munroe, R., Väänänen, E., Großheim, C., & Kümper-Schlake, L., 'Addressing Climate Change—Why Biodiversity Matters' [2014] UNEP-WCMC: Cambridge, UK, 3.

³⁶ Ibid, 2.

³⁷ Vignola, R., Locatelli, B., Martinez, C., & Imbach, P., 'Ecosystem-Based Adaptation to Climate Change: What Role for Policy-Makers, Society and Scientists?' (2009) 14 *Mitigation and adaptation strategies for global change* 691, 692.

³⁸ Richard Munang and others, 'Climate Change and Ecosystem-Based Adaptation: A New Pragmatic Approach to Buffering Climate Change Impacts' (2013) 5 *Current Opinion in Environmental Sustainability* 67, 68.

³⁹ Ibid, 68.

including disaster risk reduction (through flood regulation and storm surge protection), food security (from fisheries to agro-forestry), sustainable water management and livelihood diversification (through increasing resource-used options) and can also generate significant multiple benefits such as carbon sequestration and other social, economic and cultural benefits.⁴⁰ *In short, healthy ecosystems and their services provide opportunities for sustainable economic prosperity while providing defence against the negative effects of climate change.*⁴¹ *It has thus been posited that EBA integrates the use of biodiversity and ecosystem services into an overall strategy to help people adapt to the adverse impacts of climate change and it includes the sustainable management, conservation and restoration of ecosystems to provide services that help people adapt to both current climate variability, and climate change, consequently contributing to reducing vulnerability and increasing resilience to both climate and non-climate risks and provides multiple benefits to society and the environment.*⁴² *Notably, COP 26 Glasgow Climate Pact recognized the critical role of “restoring nature and ecosystems in delivering benefits for climate adaptation”, which is basically ‘ecosystem-based adaptation’.*⁴³

Due to the important connection between climate change mitigation and biodiversity conservation, it has been observed that the multiple international agreements and national processes relevant to climate change and biodiversity should be implemented in ways that are coordinated, mutually supportive and enhance synergies.⁴⁴ *It follows that protecting, restoring, and managing key ecosystems helps biodiversity and people to adjust to changing climatic conditions.*⁴⁵ *It has thus been argued that ‘ecosystem-based Adaptation can be embedded into national, regional and local policy and practice by adopting an integrated, participatory and ecosystem-based approach to territorial planning’.*⁴⁶ *Policy makers must, however, be aware of the fact that ‘unlike some adaptation measures, while Ecosystem-based Adaptation can be readily implemented, adopting best practice approaches for the sustainable management of, for example, fisheries, forests, agricultural systems, river catchments, and coastlines, Ecosystem-based Adaptation initiatives still face a range of barriers, which can include a lack of finance, land use conflict and community opposition and knowledge gaps, where there is lack of information about the costs and benefits of EBA measures.*⁴⁷

2.3 Global Partnerships for Biodiversity Conservation and Sustainable Development

The Convention on Biological Diversity (CBD) calls for cooperation among Contracting States in conservation and sustainable use of biological diversity.⁴⁸ The 2030 Agenda for SDGs⁴⁹ and

⁴⁰ Ibid, 68.

⁴¹ Ibid, 68.

⁴² A Colls, Neville Ash and Ninni Ikkala, *Ecosystem-Based Adaptation: A Natural Response to Climate Change*, vol 21 (Iucn Gland 2009), 1.

⁴³ ‘What Does COP26 Mean for Adaptation?’ (UNEP, 17 November 2021) <<http://www.unep.org/news-and-stories/story/what-does-cop26-mean-adaptation>> accessed 23 November 2021.

⁴⁴ Mant, R., Perry, E., Heath, M., Munroe, R., Väänänen, E., Großheim, C., & Kümper-Schlake, L., ‘Addressing Climate Change—Why Biodiversity Matters’ [2014] UNEP-WCMC: Cambridge, UK.

⁴⁵ A Colls, Neville Ash and Ninni Ikkala, *Ecosystem-Based Adaptation: A Natural Response to Climate Change*, vol 21 (Iucn Gland 2009), 2.

⁴⁶ Ibid, 3.

⁴⁷ Ibid, 15.

⁴⁸ Article 5, Convention on Biological Diversity.

⁴⁹ United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, Resolution adopted by the General Assembly on 25 September 2015, A/RES/70/1.

specifically SDG 17 also requires state parties to create partnerships for the Goals and specially to strengthen the means of implementation and revitalize the global partnership for sustainable development.⁵⁰ The United Nations reports that as at 2021, ‘Kenya aimed to attract more than USD 30 billion in manufacturing investments over the next 5 years by focusing on sectors with high growth potential’ by ‘boosting domestic manufacturing which is believed to have huge potential to attract investment, create employment, stimulate growth, and linkages to all other sectors of the economy’.⁵¹

SDG Goal 17 related targets are spread over several target areas namely: finance; technology; Capacity-Building; Trade; and Systemic issues which entail, Policy and institutional coherence, multi-stakeholder partnerships, and Data, monitoring and accountability.⁵²

At 2021 COP 26, it was recognized that climate change poses serious threats to sustainable development, so countries urgently need to integrate efforts to reduce greenhouse gas emissions (GHG), as well as investments in adaptation, in their development strategies.⁵³ It is thus acknowledged that tackling climate change will require major social, economic and technological changes, many of which are costly and will require large investments.⁵⁴ Countries must thus start considering exploring strategic cooperation and partnerships with not only governments but also private sector to enable them achieve some of these adaptation goals.

2.4 Upholding Human Rights and Meaningful Public Participation in Development Projects

The Convention on Biological Diversity (CBD) Aichi Target 2 requires that “by 2020, at the latest, biodiversity values have been integrated into national and local development and poverty reduction strategies and planning processes and are being incorporated into national accounting, as appropriate, and reporting systems”.⁵⁵ This, arguably, combines sustainability in environmental aspirations as well as social sustainability, as part of promoting biodiversity conservation for the achievement of the sustainable development agenda.

Articles 2(5) and (6) of the Constitution of Kenya 2010⁵⁶ provide that the general rules of international law, and any treaty or convention ratified by Kenya, form part of the laws of Kenya, thus binding Kenya to observe its human rights obligations under international bill of human

⁵⁰ SDG 17.

⁵¹ ‘United Nations Supporting Kenya’s Post COVID-19 Industrial Recovery and Growth to Achieve Inclusive and Sustainable Growth | United Nations in Kenya’ <<https://kenya.un.org/en/126013-united-nations-supporting-kenyas-post-covid-19-industrial-recovery-and-growth-achieve>> accessed 23 July 2021.

⁵² ‘SDG 17: Strengthen the Means of Implementation and Revitalize the Global Partnership for Sustainable Development – SDG Compass’ <<https://sdgcompass.org/sdgs/sdg-17/>> accessed 8 July 2021.

⁵³ ‘Country Climate and Development Report (CCDR) | DataBank’ <[https://databank.worldbank.org/source/country-climate-and-development-report-\(ccdr\)](https://databank.worldbank.org/source/country-climate-and-development-report-(ccdr))> accessed 23 November 2021.

⁵⁴ ‘COP26 Climate Change Briefs – Summaries and Downloads’ (World Bank) <<https://www.worldbank.org/en/topic/climatechange/publication/world-bank-group-cop26-climate-briefs>> accessed 23 November 2021.

⁵⁵ Unit B, ‘Aichi Biodiversity Targets’ (18 September 2020) <<https://www.cbd.int/sp/targets/>> accessed 8 September 2021.

⁵⁶ Republic of Kenya, Constitution of Kenya 2010 (Government Printer, Nairobi, 2010).

rights.⁵⁷ In addition, Article 20 of the Constitution of Kenya states that the Bill of Rights binds all state organs and all persons, which persons are defined under Article 260 as including a “company, association or other body of persons whether incorporated or unincorporated.”

Arguably, there is a need for governments together with their development partners to solicit proposals and suggestions from indigenous and local communities about policies, the Constitution, and development strategies to encourage communities to express their views and increase their sense of ownership and responsibility in the future of their country.⁵⁸ While Kenya has been making tremendous steps towards opening up the marginalised parts of the country such as the North Eastern parts of Kenya, there have been concerns about violation of human rights of the locals in these areas.⁵⁹ For instance, there have been reports that while Kenya’s newest mega infrastructure project, the Lamu port, is aimed at integrating marginalised northern Kenya into the Kenyan economy and the nation, the planning and construction of the port have yielded a wide range of concerns and contestations, particularly on land rights, the environment, local livelihoods and security.⁶⁰ There have been documented reports by different rights groups from the residents about compulsory land acquisition with the government being accused of having taken more land than it paid compensation for.⁶¹ If such reports on forceful acquisition of property were to be true, then such actions would be against Article 40 of the Constitution of Kenya 2010.⁶² There have

⁵⁷ See also Treaty Making and Ratification Act, No. 45 of 2012, Laws of Kenya.

⁵⁸ Environmental Research Institute Science Technology and Environment Agency Lao People’s Democratic Republic, “Public Participation in Development Projects in LAO PDR” <http://pdf.wri.org/mekong_governance_mreg_eri.pdf> accessed 21 July 2021.

⁵⁹ Benard Musembi Kilaka and Jan Bachmann, ‘Kenya Launches Lamu Port. But Its Value Remains an Open Question’ (The Conversation) <<http://theconversation.com/kenya-launches-lamu-port-but-its-value-remains-an-open-question-161301>> accessed 24 July 2021.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² 40. Protection of right to property

(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property--

- (a) of any description; and
- (b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person--

- (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
- (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation--

- (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
- (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that--

(i) requires prompt payment in full, of just compensation to the person; and

also been major concern on the environmental impact of the port's construction⁶³, and local protests against the project have been met with harassment by Kenyan security forces.⁶⁴ There were also growing concerns about employment opportunities to residents.⁶⁵ Arguably, such allegations against the government, that is, inadequate meaningful public participation may raise concerns on the government's commitment to protection and promotion of human rights of the affected communities.

The United Nations *Declaration on the Right to Development*⁶⁶ states 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.⁶⁷ The *Declaration* also provides 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 and fundamental freedoms can be fully realized.⁶⁸ The need for public participation is well captured in the following quote:

*"People today have an urge - an impatient urge - to participate in the events and processes that shape their lives. And that impatience brings many dangers and opportunities. It can dissolve into anarchy, ethnic violence or social disintegration. But if properly nurtured in a responsive national and global framework, it can also become a source of tremendous vitality and innovation for the creation of new and more just societies." (UNDP, 1993: 1)*⁶⁹ The international human rights law

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

⁶³ See *Mohamed Ali Baadi and others v Attorney General & 11 others* [2018] eKLR where the Petitioners averred that the LAPSSSET Project was designed and implemented in violation of the Constitution and statutory law; the project would have far reaching consequences on the marine ecosystem of the Lamu region in terms of the destruction of the mangrove forests, discharge of industrial effluents into the environment, and effects of the fish species and marine life; and if the project was to be implemented as designed, it would affect their cultural heritage and way life as well as their livelihoods.

⁶⁴ Benard Musembi Kilaka and Jan Bachmann, 'Kenya Launches Lamu Port. But Its Value Remains an Open Question' (The Conversation) <<http://theconversation.com/kenya-launches-lamu-port-but-its-value-remains-an-open-question-161301>> accessed 24 July 2021.

⁶⁵ *Ibid.*

⁶⁶ UN General Assembly, *Declaration on the Right to Development: resolution / adopted by the General Assembly, 4 December 1986, A/RES/41/128.*

⁶⁷ *Ibid.*, Preamble.

⁶⁸ Article 1.1, *Declaration on the Right to Development: resolution / adopted by the General Assembly, 4 December 1986, A/RES/41/128.*

⁶⁹ 'Human Development Report 1993 | Human Development Reports'

<<http://hdr.undp.org/en/reports/global/hdr1993>> accessed 16 July 2021; Giles Mohan, 'Participatory Development' [2002] *The companion to development studies* 49.

is designed primarily to protect individuals and groups from abusive action by states and state agents.⁷⁰

While it is true that most of the investment projects are financed and carried out by international companies, with Development Financial Institutions (DFIs) and multi-national development banks having long track records of being critical providers of financing in Africa, supplying riskier, longer term investment capital that tends to focus on sustainability⁷¹, some commentators have accused some international and multinational investors of alleged human rights and environmental abuses, including using child labour to clean toxic materials, failing to repair pipeline leakages, and operating in protected indigenous lands without authorization especially in developing countries.⁷² As far as trade agreements are concerned, there have also been worldwide concerns in relation to the lack of transparency of the negotiations as far as citizens are concerned, in contrast with the fundamental role being played by the large multinationals.⁷³ Notably, the negotiations are the result of long-term efforts by ultraliberal circles, politicians and directors of multinationals, working through many common bodies and the treaties are not published until, at best, the negotiations have been concluded.⁷⁴

It has been argued that the international protection of human rights and environmental protection represent two of the fundamental values and aims of modern international society.⁷⁵ It has been opined that ‘the rights to the highest attainable standard of health and to an adequate standard of living depend on a certain degree of environmental quality and in several cases, environmental degradation or destruction has been viewed as a violation of these human rights’.⁷⁶ In addition to this, destruction of the environment through such problems as pollution or global warming can directly interfere with the enjoyment of communities’ fundamental human rights including a wide range of social and cultural right as well.⁷⁷

⁷⁰ Shelton Dinah, ‘Protecting Human Rights in a Globalized World’, Human Rights and Corporations (Routledge 2017).

⁷¹ ‘ESG Investments Will Fuel Africa’s Post-Pandemic Recovery’ (13 July 2021) <<https://www.internationalinvestment.net/opinion/4031186/esg-investments-fuel-africa-post-pandemic-recovery>> accessed 23 July 2021.

⁷² ‘Foreign Investors Gone Wild’ <<https://archive.globalpolicy.org/soecon/develop/democracy/2007/0507wild.htm>> accessed 21 July 2021; ‘What Are the Main Criticisms of the World Bank and the IMF?’ (Bretton Woods Project, 4 June 2019) <<https://www.brettonwoodsproject.org/2019/06/what-are-the-main-criticisms-of-the-world-bank-and-the-imf/>> accessed 24 July 2021; see also ‘Globalization, Tourism, and Indigenous Peoples: What You Should Know About the World’s Largest Industry – Planeta.Com’ <<https://www.planeta.com/globalization-1999/>> accessed 24 July 2021.

⁷³ Robert Joumard, ‘The Free Trade Agreements: Contempt for Citizens, Sovereignty for Multinationals’ (CADTM, 23 July 2021) <<https://www.cadtm.org/The-free-trade-agreements-contempt>> accessed 24 July 2021.

⁷⁴ Ibid; see also Eric Toussaint, ‘The World Bank, the IMF and the Respect of Human Rights’ (CADTM, 23 July 2021) <<https://www.cadtm.org/The-World-Bank-the-IMF-and-the-respect-of-human-rights>> accessed 24 July 2021.

⁷⁵ Dinah Shelton, A Rights-Based Approach to Public Participation and Local Management of Natural Resources (2008), 20 <https://www.iges.or.jp/en/publication_documents/pub/conferenceproceedings/en/739/3ws-26-dinah.pdf> Accessed 16 July 2021.

⁷⁶ Bridget Lewis, ‘Environmental Rights or a Right to the Environment? Exploring the Nexus between Human Rights and Environmental Protection.’ (2012) 8 Macquarie Journal of International and Comparative Environmental Law 36.

⁷⁷ Ibid, 36.

Notably, among the extraordinary achievements of the *Declaration on the Right to Development*⁷⁸ is the advancement of a human rights-based approach to development.⁷⁹ For those who advocate for this approach, ‘development from a human rights perspective embraces as key attributes: Social justice (through inclusion, equality and non-discrimination, taking the human person as the central subject of development and paying special attention to the most deprived and excluded); Participation, accountability and transparency (through free, meaningful and active participation, focusing on empowerment); and international cooperation (as the right to development is a solidarity-based right).⁸⁰

Participatory development, as it is popularly referred to, has been defined as: “development that seeks to give the poor a part in initiatives and projects that are designed by outside organizations in the hopes that these projects will be more sustainable and successful by involving local stakeholders in the projects goals.”⁸¹ Community participation has been defined as the involvement of people in a community in projects to solve their own problems, where people should be given the opportunity where possible to participate as a basic human right and a fundamental principle of democracy.⁸²

The need for public participation and respect for human rights is important for development projects to gain social license to operate.⁸³ This is because as it has been observed, ‘a development process often has four phases: articulation of demand, knowledge generation, dissemination and knowledge utilization where the result of the development cycle is that the solutions are implemented, and the more ownership is felt in all steps of this process, the more applicable the solutions are.⁸⁴ Thus, rapid and sustained economic growth ("development"), popular political participation ("democracy"), and respect for the rights of their citizens ("human rights") are considered to be hegemonic political ideals all around the world.⁸⁵ A Social License to Operate (SLO) refers to the perceptions of local stakeholders that a project, a company, or an industry that

⁷⁸ UN General Assembly, Declaration on the Right to Development: resolution / adopted by the General Assembly, 4 December 1986, A/RES/41/128

⁷⁹ Flávia Piovesan, ‘Active, Free and Meaningful Participation in Development’ (2013) 25 Office of the High Commissioner for Human Rights, Realizing the Right to Development: Essays in Commemoration of, 103 <<https://www.ohchr.org/Documents/Issues/Development/RTDBook/PartIIChapter6.pdf>> Accessed 16 July 2021.

⁸⁰ Flávia Piovesan, ‘Active, Free and Meaningful Participation in Development’ (2013) 25 Office of the High Commissioner for Human Rights, Realizing the Right to Development: Essays in Commemoration of, 104.

⁸¹ ‘Why Is Participatory Development So Important for Your Nonprofit?’ (grassrootscollective) <<https://www.thegrassrootscollective.org/what-is-participatory-development>> accessed 22 July 2021.

⁸² “Chapter 12 Community participation,” Manual., 2005 < https://ec.europa.eu/echo/files/evaluation/watsan2005/annex_files/WEDC/es/ES12CD.pdf> accessed 21 July 2021.

⁸³ Kathleen Wilburn and Ralph Wilburn, ‘Achieving Social License to Operate Using Stakeholder Theory’ (2011) 4 J. Int. Bus. Ethics 3; Emmanuel Raufflet and others, ‘Social License’ in Samuel O Idowu and others (eds), Encyclopedia of Corporate Social Responsibility (Springer 2013) <https://doi.org/10.1007/978-3-642-28036-8_77> accessed 24 July 2021; Lain Dare, Jacki Schirmer and Frank Vanclay, ‘Community Engagement and Social Licence to Operate’ (2014) 32 Impact Assessment and Project Appraisal 188.

⁸⁴ Chris J Koopmans, K van Veluw and FG Wijnands, ‘Participatory Development as a Way to Innovations: Five Key Elements for Success’ (2014) 3 Building Organic Bridges 791, at 792.

⁸⁵ Jack Donnelly, ‘Human Rights, Democracy, and Development’ (1999) 21 Human Rights Quarterly 608.

operates in a given area or region is socially acceptable or legitimate.⁸⁶ Companies can gain the social license through: maintaining positive corporate reputation; understanding culture, customs, language history and history of communities, among others;⁸⁷ educating local stakeholders about project; ensuring open communication amongst all stakeholders;⁸⁸ business partnerships with communities; workforce training; community support and capacity building; and employing innovation and technology.⁸⁹ Arguably, these activities are capable of enhancing respect for human rights. As for communities, for them to grant the social license, they ask themselves the following questions: Do they Respect us? Are they Listening? Do they let us Participate? Do they let us Participate? Are they Transparent with us? Can we Believe what they say? Are they Responsive to our issues? Can we Trust them?⁹⁰ Companies must ensure that the answers to all these questions remain continually affirmative.

It has been argued that ‘democratic governance and human rights are critical components of sustainable development and lasting peace’, where ‘countries with ineffective government institutions, rampant corruption, and weak rule of law are estimated to have a 30-to-45 percent higher risk of civil war and a higher risk of extreme criminal violence than other developing countries’.⁹¹ In addition, public involvement in decision-making processes is not only important for development projects affecting the environment, but is also necessary for identifying the impact projects will have on communities.⁹²

Arguably, development, particularly at the local level, can be made much more effective by active public participation where effective civic action can hold governments accountable⁹³ and ensure that the decisions of government are in line with the needs of citizens and thus potentially solve failures in government that plague most poor countries including; wastage and leakage, unequal access, corruption, and poor coordination.⁹⁴

⁸⁶ Emmanuel Raufflet and others, ‘Social License’ in Samuel O Idowu and others (eds), *Encyclopedia of Corporate Social Responsibility* (Springer 2013) <https://doi.org/10.1007/978-3-642-28036-8_77> accessed 24 July 2021.

⁸⁷ Ian Thomson and Susan Joyce, ‘The Social Licence to Operate: What It Is and Why Does It Seem so Difficult to Obtain?’, *Prospectors and Developers Association of Canada Convention*, Toronto, Ontario, Canada (2008).

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ ‘Democracy, Human Rights and Governance | U.S. Agency for International Development’ (26 March 2021) <<https://www.usaid.gov/democracy>> accessed 21 July 2021.

⁹² Environmental Research Institute Science Technology and Environment Agency Lao People’s Democratic Republic, ‘Public Participation in Development Projects in LAO PDR’ <http://pdf.wri.org/mekong_governance_mreg_eri.pdf> accessed 21 July 2021.

⁹³ ‘How Can Participatory Development Be Improved? | Devex’ <<https://www.devex.com/news/how-can-participatory-development-be-improved-80472>> accessed 24 July 2021; ‘Determinants of Public Participation in Kenya County Governments - Antony Mbithi, Damiana Ndambuki, Fredrick Owino Juma, 2019’ <<https://journals.sagepub.com/doi/full/10.1177/0021909618794028>> accessed 24 July 2021; Berner, M. M., Amos, J. M., & Morse, R. S., “What constitutes effective citizen participation in local government? Views from city stakeholders.” *Public Administration Quarterly* (2011): 128-163; Alessandra Ricciardelli, ‘Governance, Local Communities, and Citizens Participation’ in Ali Farazmand (ed), *Global Encyclopedia of Public Administration, Public Policy, and Governance* (Springer International Publishing 2017) <https://doi.org/10.1007/978-3-319-31816-5_3221-1> accessed 24 July 2021.

⁹⁴ Devex Editor // 11 March 2013, ‘How Can Participatory Development Be Improved?’ (Devex, 11 March 2013) <<https://www.devex.com/news/sponsored/how-can-participatory-development-be-improved-80472>> accessed 21 July 2021.

Communities are mostly impacted upon by investments and development projects through what is popularly known as the impact investing, defined which is “part of the decades-old tradition of corporate social responsibility that holds domestic and international financial institutions and corporations accountable for harmful employment, community, or environmental impacts.”⁹⁵ Impact investments have also defined as “investments made into companies, organizations, and funds with the intention to generate social and environmental impact alongside a financial return.”⁹⁶ As far as impact investment in Kenya is concerned, Kenya has in the recent past been ranked highly compared to its East African counterparts, with Kenya representing nearly half of impact capital disbursed in East Africa—more than USD 650 million by non-development finance institutions (non-DFIs) impact investors and more than USD 3 billion by development finance institutions (DFIs), and more than triple the amount deployed in each of Uganda and Tanzania, the countries with the next highest amounts at around 13% and 12% respectively.⁹⁷

It has been observed that ‘while governments at every level –local, state, national –determine how to meet fundamental needs with constrained resources, impact investing continues to mature into a vehicle for innovative, socially oriented enterprises, where the convergence of these two macro-level developments can create opportunities for stakeholders and communities.’⁹⁸

The success of development activities is thus closely linked with the status of respect for human rights for concerned communities as well as how effectively these communities are involved in the processes leading to the negotiations leading to the seating up and operation of investment and development projects.

2.5 Funding Biodiversity Conservation Efforts

CBD Decision XIII/3 called for Parties to encourage public and private sources of finance to be channelled into practices that improve the sustainability of production while reducing biodiversity loss, and to promote and support the restoration of ecosystems that provide essential services in a way that provides for the needs of indigenous peoples and local communities, does not cause harm to other ecosystems.⁹⁹

The CBD Aichi Target 20 also requires countries to ensure that “by 2020, at the latest, the mobilization of financial resources for effectively implementing the Strategic Plan for Biodiversity 2011-2020 from all sources, and in accordance with the consolidated and agreed

⁹⁵ Ronald Phillips, ‘Impact Investing and Community Development’ (2016) 25 *Maine Policy Review* 63, 63.

⁹⁶ Castano, T., “Preparing for Impact: Five Ideas to Maximize the Potential of Impact Investing”, *New Start New Jersey*, April 2017, 1 < <https://ideas.nsnj.org/wp-content/uploads/2017/08/NSNJ-Preparing-for-Impact.pdf> > accessed 21 July 2021.

⁹⁷ ‘Kenya Tops East Africa Blocs in Impact Investment - Ministry of Industrialization, Trade and Enterprise Development (MoITED)’ <<https://www.industrialization.go.ke/index.php/media-center/blog/240-kenya-tops-east-africa-bloc-in-impact-investment>> accessed 23 July 2021; ‘Kenya: The Country Impact Investors Cannot Afford to Ignore’ (20 January 2020) <<https://www.pioneerspost.com/news-views/20200120/kenya-the-country-impact-investors-cannot-afford-to-ignore>> accessed 23 July 2021; Global Impact Investing Network and Open Capital Advisors, *The Landscape for Impact Investing in East Africa (ETHIOPIA 2015)*.

⁹⁸ Castano, T., “Preparing for Impact: Five Ideas to Maximize the Potential of Impact Investing”, *New Start New Jersey*, April 2017, 1 < <https://ideas.nsnj.org/wp-content/uploads/2017/08/NSNJ-Preparing-for-Impact.pdf> > accessed 21 July 2021.

⁹⁹ CBD Decision XIII/3, para 32.

process in the Strategy for Resource Mobilization, should increase substantially from the current levels. This target will be subject to changes contingent to resource needs assessments to be developed and reported by Parties.

Closer home, the *National Horticulture Policy, 2012* states that: - *horticulture Research will be financed through the Government of Kenya, private sector, development partners, trust funds, royalties and competitive grants. Partnerships with relevant public and private institutions will be promoted to increase funding for germplasm conservation and to protect plant varieties with potential for commercial value.*

The *Kenya Agricultural and Livestock Research Act, 2013* establishes the Kenya Agricultural and Livestock Research Organisation, whose object and function is to— promote, streamline, co-ordinate and regulate research in crops, livestock, genetic resources and biotechnology in Kenya; promote, streamline, co-ordinate and regulate research in crops and animal diseases; and expedite equitable access to research information, resources and technology and promote the application of research findings and technology in the field of agriculture. The unveiling of the Sustainable Development Goals (SDGs) in 2015 meant that most developing countries would have to step up their efforts to raise domestic resources to finance needed domestic investment as support from development partners and private sector investors would not be enough.¹⁰⁰

The SDG Goal 17 acknowledges that the SDGs cannot be realised without the global cooperation amongst countries as well as mobilizing the relevant resources necessary to achieve these goals.¹⁰¹ Target 17.1 seeks to strengthen domestic resource mobilization, including through international support to developing countries, to improve domestic capacity for tax and other revenue collection. Domestic Resource Mobilization remains essential to accelerate economic growth and lift people from extreme poverty, particularly in the low-income countries, an important component of the SDGs.¹⁰² Lower poverty levels means better response to conservation measures by the general public.

In order to achieve the sustainable development goals, the 2015 Addis Ababa Action Agenda on Financing for Development captured the importance of domestic resource mobilization, noting that the “mobilization and effective use of domestic resources ... are central to our common pursuit of sustainable development.”¹⁰³ Notably, it has rightly been pointed out that the only reliable and sustained sources of government revenue are taxes and some non-tax revenue instruments, such as royalties and resource rents from extractive industries and, to a limited extent, user fees for public services, generally delivered by local governments.¹⁰⁴ However, most African countries

¹⁰⁰ ‘Heightening Domestic Resource Mobilization in Africa During COVID-19’ (Center For Global Development) <<https://www.cgdev.org/blog/heightening-domestic-resource-mobilization-africa-during-covid-19>> accessed 22 March 2021.

¹⁰¹ Martin, ‘Global Partnerships’ (United Nations Sustainable Development) <<https://www.un.org/sustainabledevelopment/globalpartnerships/>> accessed 8 July 2021.

¹⁰² Yamada K, ‘Financing Sustainable Development with Enhanced Domestic Resource Mobilization: Transitional Role of International Cooperation’ (2017) 23 *Asia-Pacific Development Journal* 61, at 61.

¹⁰³ Junquera-Varela, R. F., Verhoeven, M., Shukla, G. P., Haven, B., Awasthi, R., & Moreno-Dodson, B., *Strengthening Domestic Resource Mobilization: Moving from Theory to Practice in Low-and Middle-Income Countries* (The World Bank 2017), chapter Two.

¹⁰⁴ *Ibid*, 5.

have been over relying on foreign aid and loans to fund their ever expanding national budgets. Kenya is no exception. With the pressure and the 2030 deadline to achieve the sustainable development goals, the need for alternative funding will only grow. As such, there is a need for these countries to not only look for alternative sources of the required financial resources but also the ones that come with less complications and strings attached.

At COP 26, while indigenous leaders welcomed the United Kingdom's \$1.7 billion pledge to help protect emissions-absorbing forests, the indigenous leaders at COP26 felt that their pleas were starting to be heard, but some still expressed concern that the pledges were too little and worried that the money won't end up where it is needed if they continue to be kept out of the decision-making.¹⁰⁵

It is for this reason that these countries need to focus more on capitalizing on domestic resource mobilization as a source of funding development projects. This is important as Official development assistance (ODA) is finite and fluctuates over time, creating uncertainty for recipient countries about planning, budgeting, and expenditures in the public sector.¹⁰⁶ It is documented that when the investment requirements for the SDGs were first assessed in the United Nations Conference on Trade and Development's (UNCTAD's) World Investment Report 2014, at least 10 relevant sectors (encompassing all 17 SDGs) were identified and the report projected an annual investment gap of \$2.5 trillion in developing countries.¹⁰⁷ While this projection remains valid today according to a recent review (UNCTAD, 2020), the SDGs have significant resource implications across developed and developing countries and require a step-change in levels of both public and private investment in the SDGs.¹⁰⁸

The need for enhanced domestic resource mobilization is also more urgent in light of the UNCTAD's observations that the COVID-19 shock has exacerbated existing constraints for the SDGs and could undo the progress made in the last six years in SDG investment and the international private sector investment flows to developing and transition economies in sectors relevant for the SDGs were also expected to fall by about one-third in 2020 because of the COVID-19 pandemic, posing a risk to delivering on the 2030 agenda for sustainable development.¹⁰⁹ Thus, as part of laying the groundwork for the achievement of SDGs, there is a need for countries, including Kenya, to review their domestic resource mobilization efforts and work towards enhancing the same.

While there are various external mechanisms of funding that are available to countries for exploitation, there is a need for countries such as Kenya to enhance their domestic resources

¹⁰⁵ 'Why It's Not Just about the Money for Indigenous Leaders at COP26' (The New Humanitarian, 10 November 2021) <<https://www.thenewhumanitarian.org/news/2021/11/10/COP26-Indigenous-leaders-welcome-funding-but-demand-more>> accessed 23 November 2021.

¹⁰⁶ Junquera-Varela, R. F., Verhoeven, M., Shukla, G. P., Haven, B., Awasthi, R., & Moreno-Dodson, B., *Strengthening Domestic Resource Mobilization: Moving from Theory to Practice in Low-and Middle-Income Countries* (The World Bank 2017), 6.

¹⁰⁷ Zhan JX and Santos-Paulino AU, 'Investing in the Sustainable Development Goals: Mobilization, Channeling, and Impact' (2021) 4 *Journal of International Business Policy* 166.

¹⁰⁸ *Ibid.*

¹⁰⁹ Zhan JX and Santos-Paulino AU, 'Investing in the Sustainable Development Goals: Mobilization, Channeling, and Impact' (2021) 4 *Journal of International Business Policy* 166.

mobilization mechanisms. Indeed, this is acknowledged by the UNCTAD which points out that ‘strengthening domestic public resource mobilization is crucial for Governments in financing national sustainable development strategies and implementing Agenda 2030 for Sustainable Development and the Addis Ababa Action Agenda.

In addition, the particular role of fiscal revenues in public resource mobilization lies in their greater stability and predictability compared to other sources of long-term finance. According to International Monetary Fund (IMF) estimates, for low-income countries, average domestic taxes would have to increase by about 5 percentage points if they were to meet the SDGs in five key areas (education, health, roads, electricity, and water), with the financing needed in sub-Saharan Africa being larger given their development level.¹¹⁰ It is also worth pointing out that investment in human, social, and physical capital, are at the core of sustainable and inclusive growth and represent an important share of national budgets—specifically, education, health, roads, electricity, and water and sanitation.¹¹¹ IMF estimates that delivering on the SDG agenda will require additional spending in 2030 of US\$0.5 trillion for low-income developing countries and US\$2.1 trillion for emerging market economies.¹¹² To achieve this, IMF points out that countries themselves own the responsibility for achieving the SDGs, especially through reforms to foster sustainable and inclusive growth that will in turn generate the tax revenue needed, and their efforts should focus on strengthening macroeconomic management, combating corruption and improving governance, strengthening transparency and accountability, and fostering enabling business environments.¹¹³

The IMF considers domestic resources as the largest untapped source of financing to fund national development plans.¹¹⁴ Arguably, the Global Goals can only be met if countries work together, where international investments and support is needed to ensure innovative technological development, fair trade and market access, especially for developing countries.¹¹⁵ It has been argued that domestic resource mobilization will be crucial not only to meet the sheer scale of investment needed to implement the 2030 Agenda for Sustainable Development and the Sustainable Development Goals (SDGs), but also because it holds its own broader promise for transformative change.¹¹⁶ Transformative change will give rise to stronger Environmental Democracy, lower poverty levels and more effective biological diversity conservation by all stakeholders.

¹¹⁰ ‘Heightening Domestic Resource Mobilization in Africa During COVID-19’ (Center For Global Development) <<https://www.cgdev.org/blog/heightening-domestic-resource-mobilization-africa-during-covid-19>> accessed 22 March 2021.

¹¹¹ ‘Fiscal Policy and Development: Human, Social, and Physical Investments for the SDGs’ (IMF) <<https://www.imf.org/en/Publications/Staff-Discussion-Notes/Issues/2019/01/18/Fiscal-Policy-and-Development-Human-Social-and-Physical-Investments-for-the-SDGs-46444>> accessed 22 March 2021.

¹¹² *Ibid*, 5.

¹¹³ *Ibid*.

¹¹⁴ ‘Tax Policy for Domestic Resource Mobilization | ADB Knowledge Event Repository’ <<https://events.development.asia/learning-events/tax-policy-domestic-resource-mobilization>> accessed 24 March 2021.

¹¹⁵ ‘Goal 17: Partnerships for the Goals’ (The Global Goals) <<https://www.globalgoals.org/17-partnerships-for-the-goals>> accessed 8 March 2021.

¹¹⁶ ‘Mobilizing Domestic Resources for Sustainable Development: Toward a Progressive Fiscal Contract | United Nations ILibrary’ <<https://www.un-ilibrary.org/content/books/9789210601023c009>> accessed 24 March 2021.

3. Conclusion

This paper has highlighted some of the contemporary issues that either directly or indirectly affect efforts aimed at sustainable biodiversity utilisation and conservation. This is a demonstration that biodiversity conservation should not be treated as an independent issue but a complex one that involves various actions spanning across sectors. The issues touch on environmental, social, political and economic spheres of development. This is why there is a need for adoption of integrated approaches to management of various environmental and biodiversity resources, in order to ensure that the issues raised in this paper have been addressed.

The Race to Zero Emissions from an African Perspective

Abstract

This paper discusses the efforts towards achieving zero carbon emissions in the context of the African continent owing to its unique circumstances. As the rest of the world aims to achieve the race to zero by 2030, the African countries, which are also expected to achieve the same by at least 2040, must work harder against the challenges of poverty, slower development pace and the rapidly increasing population, as a way of overcoming climate change for sustainable development. The paper offers some viable recommendations on some of the most important issues that the African governments must address. The main argument is that countries must strive to build low to zero carbon infrastructure as well as empowering their people to afford them the sustainable alternatives.

1. Introduction

Greenhouse Gases (GHGs) effect emitted by human activities, is considered to be among the greatest contributors to climate change, one of the biggest threats of the 21st century as far as sustainability is concerned.¹ Indeed, climate change has been termed as the ‘biggest threat modern humans have ever faced’.² Economic and industrial activities have adverse carbon impacts on the environment and climate change mitigation activities must focus on such activities too, if these challenges are to be addressed.³ Notably, the principal greenhouse gases whose concentrations have increased over the industrial period are carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), and chlorofluorocarbons CFC-11 (CCl₃F) and CFC-12 (CCl₂F₂).⁴ Arguably, most of these carbon emissions come from development projects as well as burning fuels for energy.⁵ The Race To Zero is a global campaign to rally leadership and support from businesses, cities, regions,

¹ Mora, C., Spirandelli, D., Franklin, E.C., Lynham, J., Kantar, M.B., Miles, W., Smith, C.Z., Freel, K., Moy, J., Louis, L.V. and Barba, E.W., ‘Broad Threat to Humanity from Cumulative Climate Hazards Intensified by Greenhouse Gas Emissions’ (2018) 8 Nature Climate Change 1062.

² ‘Climate Change “Biggest Threat Modern Humans Have Ever Faced”’, World-Renowned Naturalist Tells Security Council, Calls for Greater Global Cooperation | Meetings Coverage and Press Releases’ <<https://www.un.org/press/en/2021/sc14445.doc.htm>> accessed 23 September 2021.

³ Zaman K and Moemen MA, ‘Energy Consumption, Carbon Dioxide Emissions and Economic Development: Evaluating Alternative and Plausible Environmental Hypothesis for Sustainable Growth’ (2017) 74 Renewable and Sustainable Energy Reviews 1119; Mgbemene CA, Nnaji CC and Nwozor C, ‘Industrialization and Its Backlash: Focus on Climate Change and Its Consequences.’ (2016) 9 Journal of Environmental Science and Technology 301.

⁴ Change C and others, ‘Greenhouse Gases and Their Effect on the Earth-Atmosphere Energy Balance’ 1 <<https://ntrs.nasa.gov/api/citations/19990109667/downloads/19990109667.pdf>> accessed 23 September 2021.

⁵ US EPA O, ‘Sources of Greenhouse Gas Emissions’ (29 December 2015) <<https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions>> accessed 15 October 2021; ‘Building Sector Emissions Hit Record High, but Low-Carbon Pandemic Recovery Can Help Transform Sector – UN Report’ (UN Environment, 16 December 2020) <<http://www.unep.org/news-and-stories/press-release/building-sector-emissions-hit-record-high-low-carbon-pandemic>> accessed 15 October 2021; ‘New Report: The Building and Construction Sector Can Reach Net Zero Carbon Emissions by 2050’ (World Green Building Council) <<https://www.worldgbc.org/news-media/WorldGBC-embodied-carbon-report-published>> accessed 15 October 2021; ‘Low-Carbon Infrastructure: An Essential Solution to Climate Change?’ <<https://blogs.worldbank.org/ppps/low-carbon-infrastructure-essential-solution-climate-change>> accessed 15 October 2021.

investors for a healthy, resilient, zero carbon recovery that prevents future threats, creates decent jobs, and unlocks inclusive, sustainable growth.⁶ The Race to Zero was initiated by the adoption of the *Paris Agreement*, a legally binding international treaty on climate change which was adopted by 196 Parties at Conference of Parties (COP) 21 in Paris, on 12 December 2015 and entered into force on 4 November 2016.⁷ The Paris Agreement was adopted with the goal of limiting global warming to well below 2, preferably to 1.5 degrees Celsius, compared to pre-industrial levels whereby to achieve this long-term temperature goal, countries aim to reach global peaking of greenhouse gas emissions as soon as possible to achieve a climate neutral world by mid-century.⁸ This binding agreement is meant to combat climate change and adapt to its effects.⁹

This paper discusses the special circumstances and effects of climate change in the African continent and how these affect the people's and countries' response to the international calls for eliminating GHG emissions. This is in acknowledgement of the fact that the African continent must come up with its own unique custom-tailored responses to these efforts as it has to contend with challenges that may not necessarily be an issue to the rest of the world, and especially the developed world.

2. Greenhouse Gases Emissions and Climate Change: The Link

The World Meteorological Organisation (WMO) attributes the build-up of greenhouse gases in the atmosphere during the 20th century to 'the growing use of energy and expansion of the global economy.'¹⁰ The build-up of greenhouse gases in the atmosphere alters the radiative balance of the atmosphere and the net effect is to warm the Earth's surface and the lower atmosphere because greenhouse gases absorb some of the Earth's outgoing heat radiation and re-radiate it back towards the surface.¹¹ The Greenhouse gases (GHGs) warm the surface and the atmosphere with significant implications for rainfall, retreat of glaciers and sea ice, sea level, among other factors (the greenhouse effect).¹² The greenhouse effect involves:

'infrared (IR) active gases, principally water vapor (H₂O), carbon dioxide (CO₂), and ozone (O₃), naturally present in the Earth's atmosphere, absorb thermal IR radiation emitted by the Earth's surface and atmosphere. The atmosphere is warmed by this mechanism and, in turn, emits IR radiation, with a significant portion of this energy acting to warm the surface and the lower atmosphere. As a consequence, the average surface air temperature of the Earth is about 30° C higher than it would be without atmospheric absorption and re-radiation of IR energy'.¹³

⁶ 'Race To Zero Campaign | UNFCCC' <<https://unfccc.int/climate-action/race-to-zero-campaign>> accessed 23 September 2021.

⁷ 'The Paris Agreement | UNFCCC' <<https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement>> accessed 24 September 2021.

⁸ Ibid.

⁹ Ibid.

¹⁰ UNFCCC, 'Fact Sheet: Climate Change Science-the Status of Climate Change Science Today', United Nations Framework Convention on Climate Change (2011).

¹¹ Ibid.

¹² Ramanathan V and Feng Y, 'Air Pollution, Greenhouse Gases and Climate Change: Global and Regional Perspectives' (2009) 43 Atmospheric environment 37.

¹³ Ledley TS and others, 'Climate Change and Greenhouse Gases' (1999) 80 Eos, Transactions American Geophysical Union 453.

Arguably, continuous emissions of GHGs are simultaneously shifting many elements of Earth's climate beyond thresholds that can impact humanity, whereby these gases affect the balance between incoming solar radiation and outgoing infrared radiation, thus increasing the Earth's energy budget, ultimately leading to warming and also affecting other aspects of the Earth's climate system.¹⁴

Notably, carbon emissions affect the guarantee to a right to Clean and Healthy Environment, and this must be safeguarded considering that the UN Human Rights Council recently recognised the human right to a clean, healthy, and sustainable environment.¹⁵ It is expected that "it will spark constitutional changes and stronger environmental laws, with positive implications for air quality, clean water, healthy soil, sustainably produced food, green energy, climate change, biodiversity and the use of toxic substances."¹⁶ The World Health Organization (WHO) estimates that 24 per cent of all global deaths, roughly 13.7 million deaths a year, are linked to the environment due to risks such as air pollution and chemical exposure.¹⁷ Notably, most of these environmental-related deaths are witnessed in developing countries.¹⁸ This, therefore, informs this paper's call for developing countries in Africa to do towards more to addressing the areas that contribute greatest to GHGs emissions as part of addressing climate change.

3. International Regulatory Framework on Carbon Emissions

This section highlights the main legal and institutional framework on regulation of carbon emissions that guides countries in their efforts towards reduction of carbon emissions.

3.1 Conference of Parties 26 (COP 26)

UNFCCC established Conference of the Parties (COP), as the supreme body of the Convention, and it is empowered to keep under regular review the implementation of the Convention and any related legal instruments that the Conference of the Parties may adopt, and should make, within its mandate, the decisions necessary to promote the effective implementation of the Convention.¹⁹ The Parties to the Convention meet every year (with the exception of 2020 due to Covid-19) at

¹⁴ Mora, C., Spirandelli, D., Franklin, E.C., Lynham, J., Kantar, M.B., Miles, W., Smith, C.Z., Freel, K., Moy, J., Louis, L.V. and Barba, E.W., 'Broad Threat to Humanity from Cumulative Climate Hazards Intensified by Greenhouse Gas Emissions' (2018) 8 *Nature Climate Change* 1062.

¹⁵ 'OHCHR | UN Recognition of Human Right to Healthy Environment Gives Hope for Planet's Future – Human Rights Expert' <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27633&LangID=E>> accessed 17 October 2021.

¹⁶ *Ibid.*

¹⁷ 'Landmark UN Resolution Confirms Healthy Environment Is a Human Right' (UNEP, 14 October 2021) <<http://www.unep.org/news-and-stories/story/landmark-un-resolution-confirms-healthy-environment-human-right>> accessed 17 October 2021.

¹⁸ 'Air Pollution Hurts the Poorest Most' (UNEP, 9 May 2019) <<http://www.unep.org/news-and-stories/story/air-pollution-hurts-poorest-most>> accessed 17 October 2021; 'WHO | Environment and Health in Developing Countries' (WHO) <<https://www.who.int/heli/risks/ehindevcoun/en/>> accessed 17 October 2021; Manisalidis I and others, 'Environmental and Health Impacts of Air Pollution: A Review' (2020) 8 *Frontiers in Public Health* 14; Nations U, 'The Health Effects Of Global Warming: Developing Countries Are The Most Vulnerable' (United Nations) <<https://www.un.org/en/chronicle/article/health-effects-global-warming-developing-countries-are-most-vulnerable>> accessed 17 October 2021.

¹⁹ Article 7.

the Conference of the Parties (COP), the meeting of the UNFCCC in Glasgow in November 2021 being COP26.²⁰

The COP26 Summit is meant to bring parties together to accelerate action towards the goals of the Paris Agreement and the UN Framework Convention on Climate Change.²¹ The goals of COP26 include to: secure global net zero by mid-century and keep 1.5 degrees within reach; adapt to protect communities and natural habitats; mobilise finance; and work together to deliver.²² At COP 26, countries are expected to commit to: come forward with ambitious 2030 emissions reductions targets that align with reaching net zero by the middle of the century, where they will consequently need to: accelerate the phase-out of coal, curtail deforestation, speed up the switch to electric vehicles, and encourage investment in renewables; protect and restore ecosystems and build defences, warning systems and resilient infrastructure and agriculture to avoid loss of homes, livelihoods and even lives; International financial institutions must play their part and we need work towards unleashing the trillions in private and public sector finance required to secure global net zero; and finalise the Paris Rulebook (the detailed rules that make the Paris Agreement operational), and accelerate action to tackle the climate crisis through collaboration between governments, businesses and civil society.²³

3.2 Intergovernmental Panel on Climate Change (IPCC)

The Intergovernmental Panel on Climate Change (IPCC) is the United Nations body for assessing the science related to climate change.²⁴ It was created to provide policymakers with regular scientific assessments on climate change, through comprehensive Assessment Reports about the state of scientific, technical and socio-economic knowledge on climate change, its impacts and future risks, and options for reducing the rate at which climate change is taking place as well as special Reports on topics agreed to by its member governments, and Methodology Reports that provide guidelines for the preparation of greenhouse gas inventories.²⁵ They thus act as an updated source of information for the countries.

3.3 The United Nations Framework Convention on Climate Change 1992

The United Nations Framework on Climate Change Convention (UNFCCC)²⁶ was adopted in 1992, entered into force on 21 March 1994 and its ultimate objective and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.²⁷ Notably, such a level should be achieved within a time-frame sufficient to allow

²⁰ ‘What Is COP26, Who Will Attend It and Why Does It Matter?’ (Energy & Climate Intelligence Unit) <<https://eciu.net/analysis/briefings/international-perspectives/what-is-cop26-who-will-attend-it-and-why-does-it-matter>> accessed 13 October 2021.

²¹ ‘UN Climate Change Conference (COP26) at the SEC – Glasgow 2021’ (UN Climate Change Conference (COP26) at the SEC – Glasgow 2021) <<https://ukcop26.org/>> accessed 13 October 2021.

²² ‘COP26 Goals’ (UN Climate Change Conference (COP26) at the SEC – Glasgow 2021) <<https://ukcop26.org/cop26-goals/>> accessed 15 October 2021.

²³ Ibid.

²⁴ ‘IPCC — Intergovernmental Panel on Climate Change’ <<https://www.ipcc.ch/>> accessed 17 October 2021.

²⁵ Ibid.

²⁶ UN General Assembly, United Nations Framework Convention on Climate Change: resolution / adopted by the General Assembly, 20 January 1994, A/RES/48/189.

²⁷ Ibid, Article 2.

ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.²⁸ In implementing the UNFCCC, the Parties are to be guided, *inter alia*, by the following principles: Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities; specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration; Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects; Parties have a right to, and should, promote sustainable development; and Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change.²⁹

These principles are an acknowledgement that any activities or actions geared towards climate change mitigation including the efforts in the race to zero emissions must take account of the differences between developed countries and developing regions such as Africa. It also follows that African countries must be allowed to come up with tailor made responses to carbon emissions, based on the current challenges and needs. Notably, as they are the source of most past and current greenhouse gas emissions, industrialized countries are expected to do the most to cut emissions on home ground.³⁰

3.4 Vienna Convention for the Protection of the Ozone Layer (1985)

The Vienna Convention is a framework convention that lays out principles agreed upon by many parties which does not, however, require countries to take control actions to protect the ozone layer unlike the Montreal Protocol.³¹ The Convention requires Parties to take appropriate measures in accordance with the provisions of the Convention and of those protocols in force to which they are party to protect human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer.³²

The Convention also requires that the Parties should co-operate, consistent with their national laws, regulations and practices and taking into account in particular the needs of the developing countries, in promoting, directly or through competent international bodies, the development and transfer of technology and knowledge. Such co-operation should be carried out particularly through: Facilitation of the acquisition of alternative technologies by other Parties; Provision of information on alternative technologies and equipment, and supply of special manuals or guides

²⁸ Ibid.

²⁹ Ibid, Article 3.

³⁰ 'What Is the United Nations Framework Convention on Climate Change? | UNFCCC' <<https://unfccc.int/process-and-meetings/the-convention/what-is-the-united-nations-framework-convention-on-climate-change>> accessed 14 October 2021.

³¹ 'The Vienna Convention for the Protection of the Ozone Layer | Ozone Secretariat' <<https://ozone.unep.org/treaties/vienna-convention>> accessed 17 October 2021.

³² Vienna Convention for the Protection of the Ozone Layer, Article 2.1.

to them; The supply of necessary equipment and facilities for research and systematic observations; and appropriate training of scientific and technical personnel.³³

3.5 Montreal Protocol on Substances that Deplete the Ozone Layer, 1987 and the Kigali Amendment of 2016

The 1987 Montreal Protocol is a global agreement to protect the Earth's ozone layer through a phase-out plan which includes both the production and consumption of ozone-depleting substances, which was signed in 1987 and entered into force in 1989.³⁴ The Protocol has been termed as a success especially in reduction and elimination of anthropogenic emissions of ozone-depleting substances (ODS), primarily responsible for stratospheric ozone depletion since around the 1960s.³⁵ The nearly 100 man-made chemicals referred to as ozone-depleting substances (ODS), when released to the atmosphere, damage the stratospheric ozone layer, Earth's protective shield that protects humans and the environment from harmful levels of ultraviolet radiation from the sun.³⁶

In recognition of the special situation of developing countries, the Montreal Protocol provides that 'the Parties undertook to facilitate access to environmentally safe alternative substances and technology for Parties that are developing countries and assist them to make expeditious use of such alternatives'.³⁷ In addition, 'the Parties undertook to facilitate bilaterally or multilaterally the provision of subsidies, aid, credits, guarantees or insurance programmes to Parties that are developing countries for the use of alternative technology and for substitute products'.³⁸

The Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer which was adopted in Kigali, Rwanda on 15 October 2016 and came into force 1st January 2019 (provided it would have been ratified by at least 20 parties)³⁹ at the Twenty-Eighth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, held in Kigali from 10 to 15 October 2016.⁴⁰ The Kigali Amendment to the Montreal Protocol is expected to reduce the projected production and consumption of hydrofluorocarbons (HFCs) by more than 80 per cent over the next 30 years.⁴¹ The Kigali Amendment is also expected to avoid up to 0.4°C of global

³³ Ibid, Article 4.2.

³⁴ 'The Montreal Protocol on Substances That Deplete the Ozone Layer | Ozone Secretariat' <<https://ozone.unep.org/treaties/montreal-protocol>> accessed 14 October 2021.

³⁵ Banerjee A and others, 'A Pause in Southern Hemisphere Circulation Trends Due to the Montreal Protocol' (2020) 579 Nature 544.

³⁶ Environment UN, 'About Montreal Protocol' (Ozonaction, 29 October 2018) <<http://www.unep.org/ozonaction/who-we-are/about-montreal-protocol>> accessed 14 October 2021.

³⁷ Article 5(2).

³⁸ Article 5 (3).

³⁹ 'United Nations Treaty Collection' <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-2-f&chapter=27&clang=_en> accessed 17 October 2021.

⁴⁰ Ibid.

⁴¹ 'World Takes a Stand against Powerful Greenhouse Gases with Implementation of Kigali Amendment' (UN Environment, 3 January 2019) <<http://www.unep.org/news-and-stories/press-release/world-takes-stand-against-powerful-greenhouse-gases-implementation>> accessed 17 October 2021.

Addition of Article 2J

The following Article shall be inserted after Article 2I of the Protocol:

warming this century while continuing to protect the ozone layer, thus substantively contributing to the goals of the Paris Agreement.⁴²

While hydrofluorocarbons (HFCs), given their zero impact on the depletion of the ozone layer, are currently used as replacements of hydrochlorofluorocarbons (HCFCs) and chlorofluorocarbons (CFCs), they are extremely potent greenhouse gases with global warming potentials that can be many times higher than carbon dioxide, hence the need to phase them out in efforts towards climate change mitigation.⁴³ Key elements of the Kigali Amendment include: Innovative and flexible structure; Ambitious phasedown schedule; Incentive for early action; Broad participation; Enforcement and accountability; and Multiple opportunities to increase ambition.⁴⁴

3.6 Kyoto Protocol to the United Nations Framework Convention on Climate Change (1997)

The Kyoto Protocol⁴⁵ was adopted at the third session of the Conference of the Parties (COP 3) to the 1992 United Nations Framework Convention on Climate Change (“the Convention”), held at Kyoto (Japan) from 1 to 11 December 1997.⁴⁶ It applies the principle of common but differentiated responsibilities and sets binding targets for reducing greenhouse gas emissions for industrialized countries, recognizing them as those primarily responsible for the high levels of emissions currently present in the atmosphere.⁴⁷

“Article 2J: Hydrofluorocarbons

1. Each Party shall ensure that for the twelve-month period commencing on 1 January 2019, and in each twelve-month period thereafter, its calculated level of consumption of the controlled substances in Annex F, expressed in CO₂ equivalents, does not exceed the percentage, set out for the respective range of years specified in subparagraphs (a) to (e) below, of the annual average of its calculated levels of consumption of Annex F controlled substances for the years 2011, 2012 and 2013, plus fifteen per cent of its calculated level of consumption of Annex C, Group I, controlled substances as set out in paragraph 1 of Article 2F, expressed in CO₂ equivalents:

- (a) 2019 to 2023: 90 per cent
- (b) 2024 to 2028: 60 per cent
- (c) 2029 to 2033: 30 per cent
- (d) 2034 to 2035: 20 per cent
- (e) 2036 and thereafter: 15 per cent

⁴² Ibid.

⁴³ ‘The Montreal Protocol Evolves to Fight Climate Change | UNIDO’ <<https://www.unido.org/our-focus-safeguarding-environment-implementation-multilateral-environmental-agreements-montreal-protocol/montreal-protocol-evolves-fight-climate-change>> accessed 17 October 2021.

⁴⁴ US EPA O, ‘Recent International Developments under the Montreal Protocol’ (15 July 2015) <<https://www.epa.gov/ozone-layer-protection/recent-international-developments-under-montreal-protocol>> accessed 17 October 2021.

⁴⁵ United Nations, Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, 11 December 1997, United Nations, Treaty Series, vol. 2303, p. 162.

⁴⁶ ‘United Nations Treaty Collection’

<https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-7-a&chapter=27&clang=_en> accessed 17 October 2021.

⁴⁷ ‘Kyoto Protocol [Framework Convention on Climate Change] | Observatory on Principle 10’ <<https://observatoriop10.cepal.org/en/treaties/kyoto-protocol-framework-convention-climate-change>> accessed 17 October 2021.

4. Domestic Regulatory Framework on Carbon Emissions: The Case of Kenya

This section highlights the main regulatory legal instruments that the country can build on in its race towards zero emissions.

4.1 The Constitution of Kenya 2010

Article 10 of the Constitution outlines the principle of sustainability as one of the national values and principles of governance that must bind of policy and law makers.⁴⁸ Article 42 thereof guarantees every person's right to a clean and healthy environment, which includes the right- to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and to have obligations relating to the environment fulfilled under Article 70.⁴⁹ Article 69(1) requires the State to: ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya; encourage public participation in the management, protection and conservation of the environment; establish systems of environmental impact assessment, environmental audit and monitoring of the environment; and eliminate processes and activities that are likely to endanger the environment.⁵⁰

4.2 Sessional Paper No. 3 of 2016 on National Climate Change Framework Policy

Kenya's *Sessional Paper No. 3 of 2016 on National Climate Change Framework Policy*⁵¹ was formulated to enhance adaptive capacity and resilience to climate change, and promote low carbon development for the sustainable development of Kenya.⁵² Its main objectives of this Policy are to: establish and maintain an effective and efficient institutional framework to mainstream climate change responses across relevant sectors and into integrated planning, budgeting, decision-making and implementation, at both the national and county levels; reduce vulnerability to the impacts of climate change by building adaptive capacity, enhancing climate change resilience and strengthening capacities for disaster risk reduction; catalyse Kenya's transition to cleaner, lower emission and less carbon intensive development; incentivize private sector involvement in building climate change resilience and engaging in low carbon development opportunities; facilitate widespread public awareness, participation, ownership and oversight of Kenya's climate change response efforts and Action Plans; provide a framework to mobilise resources for Kenya's climate change response and ensure effective and transparent utilisation of the resources; adopt intergenerational, special needs and gender mainstreaming approaches across all aspects of Kenya's climate change response; provide the policy framework to facilitate effective implementation of regularly updated and scientifically informed Climate Change Action Plans; and enhance research and use of science and technology in policy decisions and sustainable management of resources.⁵³ The implementation of this Policy will be guided by the following principles: Common but differentiated responsibilities and respective capabilities; Right to a clean and healthy environment; Right to Sustainable Development; Partnership; Cooperative

⁴⁸ Article 10, Constitution of Kenya 2010.

⁴⁹ Ibid, Art. 42.

⁵⁰ Ibid, Art.69(1).

⁵¹ Republic of Kenya, Sessional Paper No. 3 of 2016 on National Climate Change Framework Policy.

⁵² Goal 3.1.

⁵³ Goal 3.2.

government; Equity and social inclusion; Special needs and circumstances; Avoiding maladaptation; Integrity and transparency; and cost effectiveness.⁵⁴

The Climate Change Policy 2016 calls for low carbon climate resilient development through a number of actions: Enhancing Climate Resilience and Adaptive Capacity where the Government will: Put in place mechanisms for sustainable utilisation of natural resources to enhance climate resilience and adaptive capacity to protect the natural capital of Kenya; Mainstream climate resilience into national and county government development plans, processes and implementation; Ensure integration of climate change risk and vulnerability assessment in environment impact assessment and strategic environmental assessment; Develop incentives to promote climate resilient actions among public, private and other actors; Identify and implement priority adaptation actions across key social, environmental and economic sectors under the framework of a National Adaptation Plan; Promote public and stakeholder consultation and participation, including with vulnerable groups, to enhance adaptive capacity and climate resilience; and Develop mechanisms to build capacity to mainstream climate change into disaster risk reduction and management programmes;⁵⁵

Towards Low Carbon Growth-although Kenya currently contributes very little to global GHG emissions, a significant number of priority development initiatives outlined in Vision 2030 and regular Medium Term Plans (MTPs) will impact on Kenya's levels of GHG emissions. As such, the Government will: Identify and implement fiscal, taxation and other policy options in priority areas with high GHG emission abatement potential that enhance sustainable development; Mainstream low carbon growth options into the planning processes and functions of the national and county governments; Put in place mechanisms to establish a GHG emissions inventory to achieve efficient and effective collection, recording, sharing and utilisation of GHG emissions data; In view of strategic national interests, consider participating in voluntary emission reduction programmes when they support the country's sustainable development goals and achieve co-benefits; Put in place mechanisms to develop and promote clean technologies in all sectors of economic development; and Promote the creation of green jobs by establishing an enabling policy framework for investment, and creating business friendly regulatory environments in key areas such as renewable energy, efficient transport, clean manufacturing and sustainable agriculture.⁵⁶

4.3 Climate Change Act 2016

The Climate Change Act 2016⁵⁷ 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.⁵⁸ The Act is to be applied for the development, management, implementation and regulation of mechanisms to enhance climate change resilience and low carbon development for the sustainable development of Kenya.⁵⁹ The Act is to be applied in all sectors of the economy by the national and county governments to: mainstream climate change responses into development planning, decision making and implementation; build

⁵⁴ Goal 3.3.

⁵⁵ Goal 4.1.

⁵⁶ Goal 4.2.

⁵⁷ Climate Change Act, No. 11 of 2016, Laws of Kenya.

⁵⁸ *Ibid*, Preamble.

⁵⁹ *Ibid*, sec. 3(1).

resilience and enhance adaptive capacity to the impacts of climate change; formulate programmes and plans to enhance the resilience and adaptive capacity of human and ecological systems to the impacts of climate change; mainstream and reinforce climate change disaster risk reduction into strategies and actions of public and private entities; mainstream intergenerational and gender equity in all aspects of climate change responses; provide incentives and obligations for private sector contribution in achieving low carbon climate resilient development; promote low carbon technologies, improve efficiency and reduce emissions intensity by facilitating approaches and uptake of technologies that support low carbon, and climate resilient development; facilitate capacity development for public participation in climate change responses through awareness creation, consultation, representation and access to information; mobilize and transparently manage public and other financial resources for climate change response; provide mechanisms for, and facilitate climate change research and development, training and capacity building; mainstream the principle of sustainable development into the planning for and decision making on climate change response; and integrate climate change into the exercise of power and functions of all levels of governance, and to enhance cooperative climate change governance between the national government and county governments.⁶⁰

5. The Race to Zero Emissions: The Challenges

In accordance with the Paris Agreement, every country agreed to communicate or update their emissions reduction targets – their Nationally Determined Contribution (NDC) – every five years to reflect their highest possible ambition and a progression over time, where the targets set out how far countries plan to reduce emissions across their entire economy and/or in specific sectors.⁶¹

Kenya's *Sessional Paper No. 3 of 2016 on National Climate Change Framework Policy* identifies the following challenges as far as climate change mitigation is concerned: fossil fuel based electricity generation and consumption, and increases in fossil fuel use in the transportation sector contribute significantly to GHG emissions; agricultural sector is the largest contributor of GHGs emissions in the country mainly from livestock methane emissions and land-use change; deforestation and forest degradation in search for fuel wood, charcoal production and creation of agricultural land; transport sector in Kenya contributes to GHG emissions through the use of more fossil fuel and increases local air pollution, which has serious health implications; and industrial processing in Kenya are some of the main challenges that are likely to affect any efforts towards achieving zero emissions.⁶² Arguably, these challenges are a reflection of what is happening across the African continent. There is thus a need to address these challenges as part of the race towards zero carbon emissions.

5.1 The Race to Zero Emissions from an African Perspective: Way Forward

In line with the principle of common but differentiated responsibilities under the international environmental law, this section offers some recommendations on some viable steps that African States can take to address climate change through reduced carbon emissions.

⁶⁰ Ibid, sec. 3(2).

⁶¹ 'COP26 Goals' (UN Climate Change Conference (COP26) at the SEC – Glasgow 2021) <<https://ukcop26.org/cop26-goals/>> accessed 15 October 2021.

⁶² Sessional Paper No. 3 of 2016 on National Climate Change Framework Policy, Goal 4.2.

5.2 Clean Development Mechanism

Carbon or emissions trading works by limiting the amount of carbon dioxide that entities such as companies, municipalities or countries can release into the atmosphere, creating competition to encourage them to become more energy efficient and adopt cleaner technology whereby companies aiming to reduce their carbon output can sell unused pollution allowances and those that exceed their allocated emissions allowance may have to buy more emissions permits, or be subject to monetary fines.⁶³

African countries should invest in and explore more clean development mechanisms not only as way of raising funds but also climate change mitigation. Kenya should make more use of the Green Bond Programme - Kenya, which aims to promote financial sector innovation by developing a domestic green bond market.⁶⁴

5.3 Transition from Fuel-Based Transport to Electric Vehicles in Africa

It has been observed that ‘today’s transport sector accounts for around a quarter of energy-related CO₂ emissions globally since it is almost completely dependent on fossil fuels and, therefore, decarbonizing the sector is crucial to achieving the temperature goals of the Paris Agreement.⁶⁵ Notably, in Africa and South Asia, the transition to low-carbon vehicles is vital in mitigating climate change.⁶⁶

While improved and expanded physical infrastructure through investment in roads and rail lines is an important and necessary enabler of socio-economic development, countries must start moving towards environmental friendly means of transport such as electric vehicles, through financial incentives as has been witnessed in Rwanda where the country’s leadership has unveiled incentives meant to encourage the citizenry to embrace electric cars.⁶⁷

5.4 Role of the Private Sector in Reducing Emissions

Notably, the Paris Agreement underscores the important role of Non-State Actors (NSAs), particularly the private sector in the implementation of the key provisions the landmark Pact adopted in 2015, such as the Nationally Determined Contributions, adaptation, mitigation and finance.⁶⁸ Arguably, in addition to top-down national or international policy instruments that aim to regulate the amount and flow of global emissions, the private sector is rising as a potent force

⁶³ Amesheva I, ‘The Road to Net-Zero Is Paved with Good Intentions’, 3 <https://www.arabesque.com/wp-content/uploads/2021/09/The-Road-to-Net-Zero_Part-One_FINAL.pdf> Accessed 24 September 2021.

⁶⁴ ‘Kenya Green Bonds Programme’ (greenbondskenya) <<https://www.greenbondskenya.co.ke>> accessed 17 October 2021.

⁶⁵ ‘Advancing Electric Mobility in Africa | UNFCCC’ <<https://unfccc.int/news/advancing-electric-mobility-in-africa>> accessed 13 October 2021.

⁶⁶ Collett, Katherine A., Maximus Byamukama, Constance Crozier, and Malcolm McCulloch. "Energy and Transport in Africa and South Asia." *Energy and Economic Growth* (2020), 2.

⁶⁷ ‘Rwanda Unveils New Incentives to Drive Electric Vehicle Uptake’ (The New Times | Rwanda, 16 April 2021) <<https://www.newtimes.co.rw/news/rwanda-unveils-new-incentives-drive-electric-vehicle-uptake>> accessed 17 October 2021.

⁶⁸ PACJA, ‘The role of the African private sector in the transition to low-emission, climate-resilient, green growth and NDCs implementation,’ 9th Conference On Climate Change and Development in Africa (CCDA-IX), Santa Maria, Sal Island, Cabo Verde, 13-17 September 2021.

for change.⁶⁹ It has been observed that the private sector is a key stakeholder in both urban and economic development, being a major contributor to national income and the principal job creator and employer, where it provides around 90% of employment in the developing world (including formal and informal jobs), delivers critical goods and services and contributes to tax revenues and the efficient flow of capital.⁷⁰ The private sector is considered to be an important player in creating innovative and technological solutions, as well as providing resources to meet our global environmental challenges.⁷¹

It has been suggested that in order able to make private-sector energy solutions affordable for low-income households, ‘private sector financing will be necessary to complement public sector finance in realizing universal energy access in conjunction with renewable energy uptake, which is often prevented by high financing costs as a result of a range of technical, regulatory, financial and informational barriers and their associated investment risks.’⁷² This is against the background of some studies which have concluded that ‘without significant additional investments and dedicated policies, the goal of total rural electrification and universal access to modern cooking fuels and stoves by 2030 is unachievable’.⁷³

5.5 Investing in Affordable Energy Technology Innovation in Reducing Greenhouse Gas Emissions

It is estimated that without new policies, by 2050, more disruptive climate change is likely to be locked in, with global greenhouse gas (GHG) emissions projected to increase by 50%, primarily due to a 70% growth in energy-related CO₂ emissions.⁷⁴ Most rural area residents have relied on biomass fuels for long due to their relatively cheaper accessibility as lack of financial resources is a key barrier to access to energy in rural Africa.⁷⁵ As already highlighted, the combustion of biomass fuels in traditional stoves produces greenhouse gases and aerosols such as black carbon and the extensive use of biomass can also result in forest, land, and soil degradation, leading to net CO₂ emissions.⁷⁶ As a result, it has been pointed out that governments recognise that scaling

⁶⁹ Amesheva I, ‘The Road to Net-Zero Is Paved with Good Intentions’, 6 <https://www.arabesque.com/wp-content/uploads/2021/09/The-Road-to-Net-Zero_Part-One_FINAL.pdf> Accessed 24 September 2021.

⁷⁰ ‘The Role of the Private Sector’ (GSDRC) <<https://gsdrc.org/topic-guides/urban-governance/elements-of-effective-urban-governance/the-role-of-the-private-sector/>> accessed 27 September 2021.

⁷¹ Environment UN, ‘Private Sector Engagement’ (UNEP - UN Environment Programme, 2 June 2021) <<http://www.unep.org/about-un-environment/private-sector-engagement>> accessed 27 September 2021.

⁷² ‘Accelerating SDG 7 Achievement: Policy Briefs in Support of the First SDG 7 Review at the UN High-Level Political Forum 2018 | Environmental Migration Portal’ 2 <<https://environmentalmigration.iom.int/accelerating-sdg-7-achievement-policy-briefs-support-first-sdg-7-review-un-high-level-political>> accessed 12 October 2021.

⁷³ Pachauri, Shonali, Bas J. van Ruijven, Yu Nagai, Keywan Riahi, Detlef P. van Vuuren, Abeeku Brew-Hammond, and Nebojsa Nakicenovic. “Pathways to Achieve Universal Household Access to Modern Energy by 2030.” *Environmental Research Letters* 8, no. 2 (May 2013): 024015. <https://doi.org/10.1088/1748-9326/8/2/024015>.

⁷⁴ ‘Climate Change Chapter of the OECD Environmental Outlook to 2050: The Consequences of Inaction - OECD’ <<https://www.oecd.org/env/indicators-modelling-outlooks/climatechangechapteroftheoecdenvironmentaloutlookto2050theconsequencesofinaction.htm>> accessed 17 October 2021.

⁷⁵ Allet M, ‘Solar Loans through a Partnership Approach: Lessons from Africa’ [2016] *Field Actions Science Reports*. The journal of field actions 128.

⁷⁶ Pachauri, Shonali, Bas J. van Ruijven, Yu Nagai, Keywan Riahi, Detlef P. van Vuuren, Abeeku Brew-Hammond, and Nebojsa Nakicenovic. “Pathways to Achieve Universal Household Access to Modern Energy

up and shifting financial flows to low-emission and resilient infrastructure investments is critical to deliver on climate and sustainable development goals.⁷⁷

As part of reducing GHG emissions, it has been suggested that understanding the influence of energy technology innovation in reducing a country's greenhouse gas emissions requires a systematic review to characterize the existing system.⁷⁸ Arguably, technology Platforms unite stakeholders from industry, the research community, public authorities, the financial community, regulators, consumers and civil society around a specific technological challenge, where the key concepts for the Technology platform are: Development of a shared long-term vision; Creation of a coherent, dynamic strategy to achieve the vision; Implementation of an action plan to deliver agreed programmes of activities; and Leading role of the industry.⁷⁹

There is a need for adoption and promotion of low carbon resilient development initiatives.⁸⁰ Low-carbon resilience is an agenda that tackles reducing carbon emissions while simultaneously building climate resilience and supporting development in a supposed win-win policy agenda.⁸¹

5.6 Poverty Eradication

It has been observed that ‘climate change is the defining issue of our time, and the world’s most vulnerable people are suffering the worst effects of climate change, such as more intense storms, dangerous heat waves, more frequent and longer-lasting droughts, rising seas, while contributing least to the problem’.⁸² In addition, the two-way relationship between the lack of access to adequate and affordable energy services and poverty, in many respects, involves a vicious cycle in which people who lack access to cleaner and affordable energy are often trapped in a re-enforcing cycle of deprivation, lower incomes and the means to improve their living conditions while at the same time using significant amounts of their very limited income on expensive and unhealthy forms of energy that provide poor and/or unsafe services.⁸³

by 2030.” *Environmental Research Letters* 8, no. 2 (May 2013): 024015. <https://doi.org/10.1088/1748-9326/8/2/024015>.

⁷⁷ ‘Achieving Clean Energy Access in Sub-Saharan Africa’ (Green Finance Platform, 8 April 2019) <<https://www.greenfinanceplatform.org/research/achieving-clean-energy-access-sub-saharan-africa>> accessed 12 October 2021.

⁷⁸ Jordaan, S.M., Romo-Rabago, E., McLeary, R., Reidy, L., Nazari, J. and Herremans, I.M., ‘The Role of Energy Technology Innovation in Reducing Greenhouse Gas Emissions: A Case Study of Canada’ (2017) *78 Renewable and Sustainable Energy Reviews* 1397.

⁷⁹ Năstase C and Popescu M, ‘Sustainable Development through the Resource Use-Regional Innovation System.’, *Proceedings of the 3rd IASME/WSEAS International Conference on energy, environment, ecosystems and sustainable development (EEESD’07)*, Agios Nikolaos, Crete Island, Greece, 24-26 July, 2007 (World Scientific and Engineering Academy and Society Press (WSEAS Press) 2007).

⁸⁰ Fisher, S. “Low-Carbon Resilient Development in the Least Developed Countries: Emerging Issues and Areas of Research. IIED,” 2013.

⁸¹ *Ibid*, 3.

⁸² ‘Global Conference Aims to Link Climate Action, Sustainable Development Agendas More Closely | UNFCCC’ <<https://unfccc.int/news/global-conference-aims-to-link-climate-action-sustainable-development-agendas-more-closely>> accessed 12 October 2021.

⁸³ Stephen Karekezi and others, ‘Energy, Poverty, and Development’ in *Global Energy Assessment Writing Team (ed), Global Energy Assessment: Toward a Sustainable Future* (Cambridge University Press 2012) 153 <<https://www.cambridge.org/core/books/global-energy-assessment/energy-poverty-and-development/DC1771AD93DD0A5031A07B057CA3A8C7>> accessed 12 October 2021.

Notably, most people especially in developing world continue to struggle with lack of access to clean energy in what is now commonly referred to as energy poverty. The World Economic Forum 2010 defined energy poverty as *the lack of access to sustainable modern energy services and products*. To be more precise, it is not only a matter of sustainability: energy poverty can be found in all conditions where there is a lack of *adequate, affordable, reliable, quality, safe and environmentally sound energy services to support development*.⁸⁴ Notably, ‘the concept of “energy poverty” includes “fuel poverty” in the developed world, but is most often used in the context of lack of access in the developing world to electricity, and/ or clean cooking fuels or technologies, where it is also estimated that about 1.2 billion people still lack access to electricity and nearly 40 per cent of the people in the world lack access to clean cooking fuels’.⁸⁵

World Health Organization estimates that indoor pollution causes an estimated 1.3 million deaths per annum in low income countries associated with the use of biomass in inadequate cook stoves.⁸⁶ There is a need to continually invest in research and development of newer and cleaner technologies as well as understanding the distribution of current and future energy needs, if the African countries are to overcome energy poverty and also achieve zero emissions from energy sources. It has been observed that ‘on the one hand, lack of access to reliable energy is believed to hamper economic growth in poor economies (energy poverty), and on the other hand, energy consumption met with the current fossil fuel based energy mix leads to emissions of greenhouse gases, which are accumulating in the atmosphere and are the major source of global climate change’.⁸⁷ It has been argued that ‘although energy poverty cannot be delinked from the broader, more complex problem of poverty in general, access to energy infrastructures would avoid its most serious consequences and would help to encourage autonomous development’.⁸⁸ Addressing poverty can go a long way in empowering people to not only embrace but also afford alternative and sustainable sources of energy and transport.

5.7 Investing in Off-Grid and Mini-grid Energy Sources: Renewable Energy for Climate Change Mitigation

Arguably, the most cost-effective way to expand household electricity access varies widely, within and between countries.⁸⁹ It has been observed that ‘in sub-Saharan Africa, two-thirds of the population live in areas that are not linked up with an electrical grid, and arguably, off-grid energy is the only option for these people.’⁹⁰ Off-grid energy options have been hailed as viable

⁸⁴ Habitat for Humanity. “Energy Poverty.” Accessed October 12, 2021.

<https://www.habitat.org/emea/about/what-we-do/residential-energy-efficiency-households/energy-poverty>.

⁸⁵ ‘Accelerating SDG 7 Achievement: Policy Briefs in Support of the First SDG 7 Review at the UN High-Level Political Forum 2018 | Environmental Migration Portal’ 2 <<https://environmentalmigration.iom.int/accelerating-sdg-7-achievement-policy-briefs-support-first-sdg-7-review-un-high-level-political>> accessed 12 October 2021.

⁸⁶ González-Eguino, Mikel. “Energy Poverty: An Overview.” *Renewable and Sustainable Energy Reviews* 47 (July 1, 2015): 377–85. <https://doi.org/10.1016/j.rser.2015.03.013>.

⁸⁷ Shoibal Chakravarty and Massimo Tavoni, ‘Energy Poverty Alleviation and Climate Change Mitigation: Is There a Trade Off?’ (2013) 40 *Energy Economics* S67, S67.

⁸⁸ González-Eguino, Mikel. “Energy Poverty: An Overview.” *Renewable and Sustainable Energy Reviews* 47 (July 1, 2015): 377–85. <https://doi.org/10.1016/j.rser.2015.03.013>.

⁸⁹ Association GO-GL, ‘Providing Energy Access through Off-Grid Solar: Guidance for Governments’ [2015] Utrecht, the Netherlands, 9.

⁹⁰ ‘3 Reasons Off-Grid Solar Energy Isn’t Yet Serving the Poor in Sub-Saharan Africa’ (Sun-Connect-News) <<https://www.sun-connect-news.org/de/articles/market/details/3-reasons-off-grid-solar-energy-isnt-yet-serving-the-poor-in-sub-saharan-africa/>> accessed 12 October 2021.

tools of combating energy poverty especially in Africa. Mini-grids are also considered to be a viable option for those living in the most remote areas, where standalone solar systems operating independently of the grid can meet smaller home electricity needs but may struggle with larger electricity loads such as powering machinery and agricultural equipment, and that is where mini-grids which operate in a space between the two come in; when the population is too small or remote for grid extension and standalone solar systems aren't viable for larger electricity needs.⁹¹ There is a need for continued exploration and investments in this sector to empower people regardless of their distance from the main national power grid.

6. Conclusion

It is now an agreed fact that the most commonly considered indicator of climate change is the surface air temperature, mainly attributable to carbon based emissions.⁹² Notably, of the several anthropogenic greenhouse gases, Carbon Dioxide is considered to be the most important agent of potential future climate warming because of its large current greenhouse forcing, its substantial projected future forcing, and its long persistence in the atmosphere.⁹³ It has been argued that the GHG mitigation actions pledged by countries in the Cancún Agreements at the United Nations Climate Change Conference will not be enough to prevent the global average temperature from exceeding the 2°C threshold, unless very rapid and costly emission reductions are realised after 2020.⁹⁴ It has also been documented that 'if the current rate of greenhouse gas emissions continue, temperatures will rise to 1.5°C above pre-industrial levels by 2040'.⁹⁵ As a result, it has been argued, if this is to be prevented, the greenhouse pollution ought to reduce by 45 percent from 2010 levels by 2030 and completely, that is, by 100 percent, by 2050, where coal use, currently accounting for 40 percent of electrical production, would have to drop to nearly one percent while renewable energy sources, currently supplying 20 percent of electrical production, would have to more than triple.⁹⁶

African countries are already struggling with the current state of energy sector and other areas that contribute to greenhouse gas emissions. If they are to be considered worthy participants in the race to zero emissions, then they must address poverty levels, address pollution, invest in cleaner sources of energy and technologies and involve private sector more, among others. It is time for African countries to ensure that even as they engage in rapid development activities, the same are conscious of Sustainable Development agenda and the race to zero emissions.

⁹¹ ODI: Think change. "How Solar Mini-Grids Can Bring Cheap, Green Electricity to Rural Africa." Accessed October 12, 2021. <https://odi.org/en/insights/how-solar-mini-grids-can-bring-cheap-green-electricity-to-rural-africa/>.

⁹² Ledley TS and others, 'Climate Change and Greenhouse Gases' (1999) 80 *Eos*, Transactions American Geophysical Union 453, 455.

⁹³ *Ibid*, 455.

⁹⁴ 'Climate Change Chapter of the OECD Environmental Outlook to 2050: The Consequences of Inaction - OECD'

<<https://www.oecd.org/env/indicators-modelling-outlooks/climatechangechapteroftheoecdenvironmentaloutlookto2050theconsequencesofinaction.htm>> accessed 17 October 2021.

⁹⁵ 'Climate Change Is The Greatest Threat To Human Health In History | Health Affairs Blog' <<https://www.healthaffairs.org/doi/10.1377/hblog20181218.278288/full/>> accessed 14 October 2021.

⁹⁶ *Ibid*.

The Race to Zero Emissions from an African Perspective

The Race to Zero Emissions is one that can be won, in the fullness of time, within Africa and beyond.

Adopting Holistic Approaches to Biodiversity Conservation and Water Resources Management for Sustainable Development

Abstract

This paper discusses the connection between biodiversity conservation and water resources management as part of efforts towards achieving sustainable development goals. The author argues that unless countries adopt holistic approaches that not only take into consideration water scarcity challenges as a problem affecting only human beings but also as part of a bigger problem associated with climate change and biodiversity loss, efforts to protect water resources will bear minimal success.

1. Introduction

Water and wetlands are fundamental to life, livelihood, food security and sustainable development. Water is required for domestic, agricultural, hydro-power, thermal power, navigation and recreation. It is especially an important factor of production in the agricultural sector.¹ Indeed, it has been argued that "water is the primary medium through which we will feel the effects of climate change", considering that water is one of the most important natural resources for the existence of life – from our day-to-day personal activities such as drinking and washing, to wider societal uses such as in agriculture, industry and manufacturing.²

Kenya is considered a water scarce country hence the need for enhanced conservation of the water resources and wetlands in the country.³ This paper mainly focuses on freshwater resources and wetlands due to their more direct importance to human survival. It is estimated that fresh waters comprise only 0.01% of the water on Earth, with lakes, reservoirs and rivers covering approximately 2.3% (and freshwater wetlands encompassing an estimated 5.4–6.8%) of the global land surface area, excluding large ice sheets.⁴

In the course of the meeting of Governments and United Nations agencies at the COP26 in Glasgow, the United Nations' World Meteorological Organization reported that 'data over the past 20 years shows that the amount of water stored on or near the land surface such as soil

¹ 'Water and Food Security | International Decade for Action "Water for Life" 2005-2015' <https://www.un.org/waterforlifedecade/food_security.shtml> accessed 11 September 2021 Sharifi Moghadam, E., Sadeghi, S.H.R., Zarghami, M. and Delavar, M., 'Water-Energy-Food Nexus as a New Approach for Watershed Resources Management: A Review' (2019) 7 Environmental Resources Research 129.

² websitefeedbacklondon@hsf.com, 'COP26 and Water – Safeguarding a Vital Resource' (Herbert Smith Freehills | Global law firm, 1 November 2021) <<https://www.herbertsmithfreehills.com/language/insight/cop26-and-water-%E2%80%93-safeguarding-a-vital-resource>> accessed 8 November 2021.

³ 'Kenya's Water Crisis - Kenya's Water In 2021' (Water.org) <<https://water.org/our-impact/where-we-work/kenya/>> accessed 11 September 2021.

⁴ Reid AJ and others, 'Emerging Threats and Persistent Conservation Challenges for Freshwater Biodiversity' (2019) 94 Biological Reviews 849, 851.

moisture as well as snow and ice has dropped at a rate of 1 centimetre a year, with huge ramifications for water security.⁵

According to a report launched in October 2021 by the United Nations' World Meteorological Organization dubbed '*The State of Climate Services 2021: Water*', 'climate change is expected to increase water-related hazards such as droughts and floods while the number of people living with water stress is expected to soar due to growing scarcity and population growth'.⁶ This paper critically analyses the connection between biodiversity conservation and water resources management, both important components of efforts towards achieving sustainable development agenda. It offers recommendations on best international practices that can ensure fulfilment of the human right to water and conservation of aquatic biodiversity.

2. Linking Biodiversity Conservation and Water Resources

The *Convention on Biological Diversity (CBD) Aichi Target 14* provides that 'by 2020, ecosystems that provide essential services, including services related to water, and contribute to health, livelihoods and well-being, should have been restored and safeguarded, taking into account the needs of women, indigenous and local communities, and the poor and vulnerable. The *CBD Aichi Target 11* also requires that States should ensure that, "by 2020, at least 17 per cent of terrestrial and inland water, and 10 per cent of coastal and marine areas, especially areas of particular importance for biodiversity and ecosystem services, are conserved through effectively and equitably managed, ecologically representative and well-connected systems of protected areas and other effective area-based conservation measures, and integrated into the wider landscapes and seascapes".⁷

While biodiversity "can be termed as the variations among living biota performing their ecological functions in the terrestrial marine and other freshwater ecosystems and the other ecological complexities where they are living such as intraspecific diversity, interspecific diversity and diverse biota in the ecosystems", aquatic biodiversity is a comprehensive term used to refer to the freshwater ecosystems with lakes, ponds, reservoirs, rivers, streams, groundwater, and wetlands".⁸

Arguably, water resources and aquatic biodiversity are intimately interrelated and interdependent and thus require an integrated management and conservation approach.⁹ The need for their

⁵ Farge E, 'Leaders Link Tackling Water and Climate at COP26 as Crisis Looms' Reuters (2 November 2021) <<https://www.reuters.com/business/environment/leaders-link-tackling-water-climate-cop26-crisis-looms-2021-11-02/>> accessed 8 November 2021.

⁶ Farge E, 'UN Weather Agency Warns of Water Crisis without Urgent Reforms' Reuters (5 October 2021) <<https://www.reuters.com/business/environment/un-weather-agency-warns-water-crisis-without-urgent-reforms-2021-10-05/>> accessed 8 November 2021; Organization (WMO) WM and World Meteorological Organization (WMO), 2021 State of Climate Services (WMO-No. 1278) (WMO 2021).

⁷ Unit B, 'Aichi Biodiversity Targets' (18 September 2020) <<https://www.cbd.int/sp/targets/>> accessed 8 September 2021.

⁸ Irfan S and Alatawi AMM, 'Aquatic Ecosystem and Biodiversity: A Review' (2019) 09 Open Journal of Ecology 1.

⁹ Mary Alkins-Koo, Floyd Lucas, Lorraine Maharaj, Shobha Maharaj, Dawn Phillip, Wayne Rostant and Sharda Surujdeo-Maharaj, 'Water Resources and Aquatic Biodiversity Conservation: A Role for Ecological Assessment of Rivers in Trinidad and Tobago'; Nakano, Shin-ichi. Aquatic Biodiversity Conservation and Ecosystem Services. Springer Berlin Heidelberg, 2016,1.

conservation is informed by the fact that both provide a wide range of functions and have intrinsic value as well as provide for the sustenance of human populations, as a result of which degradation of water quality, depletion of water resources and loss of aquatic biodiversity are prominent features of the environmental landscape requiring urgent attention at global and national scales.¹⁰ The quality of water directly affects the ecosystem health including biotic and non-biotic communities living within the aquatic biodiversity.¹¹ This is because water, as the human's most valuable natural resource, is essential to all basic human needs, including food, drinking water, sanitation, health, energy and shelter and its proper management is the most pressing natural resource challenge of all.¹² As already pointed out, 'water, poverty and environment are intrinsically connected and the poor are the most vulnerable to environmental risk factors such as unsafe water and climate change.'¹³

Arguably, the availability and predictability of water resources can have direct impacts on food and energy systems and vice versa, where the water-energy-food (WEF) nexus is intricately linked to everyday life.¹⁴ It has been observed that aquatic ecosystems (rivers, lakes, groundwater coastal waters, seas) support the delivery of crucial ecosystem services, such as fish production, water provisioning and recreation.¹⁵ In addition, key ecosystem services are also connected to the hydrological cycle in the river basin, for example water purification, water retention and climate regulation, and while most of these water related ecosystem services can be directly appreciated by people and quantified, some, especially regulating and maintenance services, are less evident but all ecosystem services have to be considered for the sustainable use and management of water resources.¹⁶

3. Factors Affecting Water Resource Availability and Use

Water scarcity is considered to be one of the greatest challenges facing mankind in the 21st Century thus calling for more sustainable use.¹⁷ It is estimated that over 1.2 billion people, or almost one-fifth of the world's population, live in areas of physical scarcity, and 500 million

¹⁰ Ibid,1.

¹¹ Kumar A and Jha C, 'Fishes as Environmental Indicators of Riverine Ecosystem' (2020) 17 Life Science Journal.

¹² Secretariat of the Convention on Biological Diversity. 2010. Drinking Water, Biodiversity and Development: A Good Practice Guide. Montreal, 1.

¹³ Bonnardeaux D, 'Linking Biodiversity Conservation and Water, Sanitation, and Hygiene: Experiences from Sub-Saharan Africa' [2012] Washington, DC: Africa Biodiversity Collaborative Group, USAID, 5.

¹⁴ Pradhanang SM, 'Water-Energy-Food Nexus', Water-Energy-Food Nexus (American Geophysical Union (AGU) 2017) <<https://agupubs.onlinelibrary.wiley.com/doi/abs/10.1002/9781119243175.ch13>> accessed 26 August 2021.

¹⁵ Cardoso A, 'Assessing Water Ecosystem Services for Water Resource Management' (2016) 61 Environmental Science & Policy, 194.

¹⁶ Ibid, 194.

¹⁷ 'International Decade for Action "Water for Life" 2005-2015. Focus Areas: Water Scarcity' <<https://www.un.org/waterforlifedecade/scarcity.shtml>> accessed 28 August 2021; La Banque Africaine Ddp And Bankgroup A, 'The Africa Water Vision for 2025: Equitable and Sustainable Use of Water for Socioeconomic Development'; 'Water Shortages Could Affect 5bn People by 2050, UN Report Warns' (the Guardian, 19 March 2018) <<http://www.theguardian.com/environment/2018/mar/19/water-shortages-could-affect-5bn-people-by-2050-un-report-warns>> accessed 28 August 2021; 'Are We Running out of Water?' (the Guardian, 18 June 2018) <<http://www.theguardian.com/news/2018/jun/18/are-we-running-out-of-water>> accessed 28 August 2021.

people are approaching this situation.¹⁸ In addition, it has been documented that about 1.6 billion people, or almost one quarter of the world's population, face economic water shortage (where countries lack the necessary infrastructure to take water from rivers and aquifers).¹⁹ For instance, Kenya is classified as a water-scarce country where it is estimated that the country has a per capita availability below 1000 m³ annually.²⁰ With these figures, it is estimated that out of the population of 50 million, 32 percent of Kenyans rely on unimproved water sources, such as ponds, shallow wells and rivers, while 48 percent of Kenyans lack access to basic sanitation solutions, with these challenges being especially evident in rural areas and urban slums where people are often unable to connect to piped water infrastructure.²¹

The 2018 World Water Development Report documented that humans use about 4,600 cubic km of water every year, of which 70% goes to agriculture, 20% to industry and 10% to households.²² While water is considered to be the most renewable of all the Earth's resources covering nearly three-quarters of the planet's surface by way of oceans, and in the polar ice caps and mountain glaciers²³, water quality deterioration has been attributed to water logging, salinization, groundwater mining, and pollution from industrial waste, poorly treated sewage, and runoff of agricultural chemicals, combined with poor household and community sanitary conditions (which contribute to disease and malnutrition).²⁴ In most developing countries, the situation is aggravated by rapid population growth, economic development and urbanization, all of which affect the stakeholders' ability to provide adequate sanitation services.²⁵

Kenya's *National Spatial Plan 2015-2045*²⁶ highlights some of the challenges facing water bodies which include: *Pollution due to urban and industrial waste disposal, which reduces water quality leading to loss of biodiversity through deaths of aquatic plants and animals.*²⁷ *Notably, most of the affected rivers are those that flow within the commercial and residential areas.*²⁸ *Water bodies also face a constant danger of siltation following increased soil erosion especially during rainy seasons. Uncontrolled sinking of boreholes diminishes underground water.*²⁹ *Diversion of water mainly for agricultural purposes either upstream, or downstream, reduces the flow and level of*

¹⁸ 'International Decade for Action "Water for Life" 2005-2015. Focus Areas: Water Scarcity' <<https://www.un.org/waterforlifedecade/scarcity.shtml>> accessed 28 August 2021.

¹⁹ Ibid.

²⁰ Mulwa F, Li Z and Fangninou FF, 'Water Scarcity in Kenya: Current Status, Challenges and Future Solutions' (2021) 8 Open Access Library Journal 1.

²¹ 'Kenya's Water Crisis - Kenya's Water In 2021' (Water.org) <<https://water.org/our-impact/where-we-work/kenya/>> accessed 28 August 2021.

²² 'Water Shortages Could Affect 5bn People by 2050, UN Report Warns' (the Guardian, 19 March 2018) <<http://www.theguardian.com/environment/2018/mar/19/water-shortages-could-affect-5bn-people-by-2050-un-report-warns>> accessed 28 August 2021.

²³ 'Are We Running out of Water?' (the Guardian, 18 June 2018) <<http://www.theguardian.com/news/2018/jun/18/are-we-running-out-of-water>> accessed 28 August 2021.

²⁴ Rosegrant MW, *Water Resources in the Twenty-First Century: Challenges and Implications for Action*, vol 20 (Intl Food Policy Res Inst 1997), 1.

²⁵ Mulwa F, Li Z and Fangninou F, 'Water Scarcity in Kenya: Current Status, Challenges and Future Solutions' (2021) 08 OALib 1, 2.

²⁶ Republic of Kenya, *The National Spatial Plan 2015-2045*.

²⁷ Ibid, p.98.

²⁸ *The National Spatial Plan 2015-2045*, p.98.

²⁹ Ibid, p.98.

water leading to water use conflict.³⁰ It is imperative to note that water scarcity does not only affect human beings but also biodiversity, especially the aquatic biodiversity.³¹ Considering that water is a key driver of economic and social development while it also has a basic function in maintaining the integrity of the natural environment, and only one of a number of vital natural resources, it is imperative that water issues are not considered in isolation.³²

4. Approaches to Effective Biodiversity Conservation and Water Resources Management

While access to a regular supply of safe water is a basic human right, access to water resources and usage are directly related to the control and management rights.³³ It is worth noting that as far as access to water resources is concerned, the earliest legal frameworks in Kenya were enacted to alienate control of water resources by Africans, and these included the *Water Ordinance of 1929*, which vested all water resources on the Crown, effectively denying the local communities the universal water rights of access and control that they had enjoyed in the pre-colonial period.³⁴ The loss of control rights over natural resources also affected other resources including forests and water.³⁵

In the current world, it is considered best practice in water resources planning to integrate water quantity and quality management for both groundwater and surface water, while incorporating a full understanding of how the natural resources and the people of a basin are impacted by various levels of development or by adopting new resource use policies.³⁶ Subsequently, land use as well as land and vegetation management are thus issues that need to be considered in water resources planning and management, all best done in a highly participative way, involving all the major

³⁰ Ibid, p.98.

³¹ Verones F and others, 'Biodiversity Impacts from Water Consumption on a Global Scale for Use in Life Cycle Assessment' (2017) 22 *The International Journal of Life Cycle Assessment* 1247; Vörösmarty CJ and others, 'Global Threats to Human Water Security and River Biodiversity' (2010) 467 *nature* 555; Johnson N, Revenga C and Echeverria J, 'Managing Water for People and Nature' (2001) 292 *Science* 1071; McLAUGHLIN DW, 'Land, Food, and Biodiversity' (2011) 25 *Conservation Biology* 1117; Sabater S and Barceló D, *Water Scarcity in the Mediterranean: Perspectives under Global Change*, vol 8 (Springer Science & Business Media 2010); Darwall W and others, 'Freshwater Biodiversity: A Hidden Resource under Threat', *Wildlife in a changing world: an analysis of the 2008 IUCN Red List of Threatened Species* (IUCN Gland, Switzerland 2009); Nabi G and others, 'The Crisis of Water Shortage and Pollution in Pakistan: Risk to Public Health, Biodiversity, and Ecosystem' (2019) 26 *Environmental science and pollution research* 10443; Albert JS and others, 'Scientists' Warning to Humanity on the Freshwater Biodiversity Crisis' (2021) 50 *Ambio* 85; García-Vega D and Newbold T, 'Assessing the Effects of Land Use on Biodiversity in the World's Drylands and Mediterranean Environments' (2020) 29 *Biodiversity and Conservation* 393; Daga VS and others, 'Water Diversion in Brazil Threatens Biodiversity' (2020) 49 *Ambio* 165; Seeteram NA and others, 'Conserving Rivers and Their Biodiversity in Tanzania' (2019) 11 *Water* 2612.

³² 'International Decade for Action "Water for Life" 2005-2015. Focus Areas: Integrated Water Resources Management (IWRM)' <<https://www.un.org/waterforlifedecade/iwrm.shtml>> accessed 29 August 2021.

³³ See Rosegrant MW, *Water Resources in the Twenty-First Century: Challenges and Implications for Action*, vol 20 (Intl Food Policy Res Inst 1997).

³⁴ Carpenter S, Baldwin E and Cole DH, 'The Polycentric Turn: A Case Study of Kenya's Evolving Legal Regime for Irrigation Waters' (2017) 57 *Natural Resources Journal* 101; Shurie MM, Mwaniki B and Kameri-Mbote P, 'Water Permit Systems, Policy Reforms and Implications for Equity in Kenya' [2017] Project Country Report. Output from the REACH Programme.

³⁵ Mogaka, H., 'Economic Aspects of Community Involvement in Sustainable Forest Management in Eastern and Southern Africa,' Issue 8 of *Forest and social perspectives in conservation*, IUCN, 2001,74.

³⁶ Millington P, 'Integrated River Basin Management: From Concepts to Good Practice' (The World Bank 2006), 3.

stakeholder groups, and in a way that achieves a balance between the level of economic development and the consequent impact on the natural resource base of a river basin as agreed by the stakeholders.³⁷

The *Water Act, 2016* was enacted to provide for the regulation, management and development of water resources and water and sewerage services in line with the Constitution.³⁸ The Act requires the Cabinet Secretary responsible for water, following public participation, to formulate every five years, a National Water Resource Strategy which should contain, among other things, details of- existing water resources and their defined riparian areas; measures for the protection, conservation, control and management of water resources and approved land use for the riparian area; minimum water reserve levels at national and county levels; institutional capacity for water research and technological development; functional responsibility for national and county governments in relation to water resources management and any other matters the Cabinet Secretary considers necessary.³⁹

The National Policy on Groundwater Development and Management 2013 has the objectives to ensure a planned and coordinated approach in surface and groundwater planning and development including conservation of water for ecosystems maintenance and to develop mitigation measures on the impact of climate change, among others. The National Horticulture Policy, 2012 mandates the government to provide incentives for investments in water conservation, efficient water use and recycling.

The next section discusses participatory approaches that may be adopted as a way of striking a balance between the need to meet the human right to water and conservation of aquatic biodiversity and foster Environmental Democracy in biodiversity conservation matters.

4.1 Ecosystem Services Approaches for Biodiversity Conservation

Arguably, the importance of ecosystem services may help incentivize conservation and sustainable management of lands and waters outside of protected areas.⁴⁰ As a result, ecosystem services are increasingly incorporated into explicit policy targets and can be an effective tool for informing decisions about the use and management of the planet's resources, especially when trade-offs and synergies need to be taken into account.⁴¹ The Millennium Ecosystem Assessment defined ecosystem services as the benefits people obtain from ecosystems and are co-produced by the interactions between ecosystems and societies.⁴²

³⁷ Ibid, 3.

³⁸ S. 3, Water Act, No. 43 of 2016.

³⁹ S. 10, Water Act, No. 43 of 2016.

⁴⁰ Ingram JC, Redford KH and Watson JEM, 'Applying Ecosystem Services Approaches for Biodiversity Conservation: Benefits and Challenges' [2012] S.A.P.I.E.N.S. Surveys and Perspectives Integrating Environment and Society <<https://journals.openedition.org/sapiens/1459>> accessed 23 August 2021.

⁴¹ Balvanera, P., Quijas, S., Karp, D.S., Ash, N., Bennett, E.M., Boumans, R., Brown, C., Chan, K.M., Chaplin-Kramer, R., Halpern, B.S. and Honey-Rosés, J., 'Ecosystem Services', The GEO handbook on biodiversity observation networks (Springer 2017).

⁴² Ibid, 42.

The CBD Aichi Target 14 states that: ‘By 2020, ecosystems that provide essential services, including services related to water, and contribute to health, livelihoods and well-being, are restored and safeguarded, taking into account the needs of women, indigenous and local communities, and the poor and vulnerable’.⁴³

4.2 Payment for Water Ecosystem Services

Payments for Ecosystem Services (PES) is used to refer to a situation where a beneficiary or user of an ecosystem service makes a direct or indirect payment to the provider of that service, with the idea that whoever preserves or maintains an ecosystem service should be paid for doing so.⁴⁴ Ecosystems—forests, mountains, wetlands, agricultural land, freshwater—provide a variety of services that are economically valuable: fresh water supply for human settlements (e.g. by filtering the water from contaminants); irrigation and power generation; or storm protection and pollination.⁴⁵ The provision of such services might require communities living in the proximity of the ecosystem to undertake or not to undertake certain activities. To complete these tasks in the absence of regulatory provision, the communities need a financial incentive and the Payments for Ecosystem Services (PES) is the mechanism that governs these payments. In other words, PES involves a series of payments to land or other natural resource owners in return for a guaranteed flow of ecosystem services or certain actions likely to enhance their provision over and above what would otherwise be provided in the absence of payment.⁴⁶

The Payment for Ecosystem Service (PES) is preferred for its ability to not only incorporate various stakeholders but also its ability to incorporate voluntary economic incentives and market-based instruments which are superior to the conventional command and control approaches of watershed and natural resource management and works on the principle that upstream resource managers are rewarded for good resource stewardship through economic incentives to guarantee sustainable delivery of ecosystem services downstream.⁴⁷ Based on the experiences of other jurisdictions in application of PES in watershed services, it has been suggested that in the implementation of existing and new PES schemes: First, PES schemes need to take into account the institutional and social conditions prevailing in the area. The interventions needed to a more efficient PES usually entail the degree of coordination between stakeholders and strategic allocation of roles and responsibilities among institutions involved; second, it is important to understand the effect of uncertainty due to the limited knowledge about the interaction between ecosystem properties and provision of services in the decision-making process and the design of the PES scheme; and lastly, current experiences need to be constantly revised and improved and new efforts need to be explored in order to sustain the flow of watershed services over time as a basis for sustainable development.⁴⁸ It has also been suggested that implementation of the PES

⁴³ Ibid, 42.

⁴⁴ ‘Payments for Ecosystem Services’
<<https://www.sdfinance.undp.org/content/sdfinance/en/home/solutions/payments-for-ecosystem-services.html>> accessed 29 August 2021.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Langat D, ‘Guidelines for Establishing Payment for Ecosystem Services Schemes in Kenya’ (KEFRI, 2017).

⁴⁸ Cremaschi DG, Lasco RD and Delfino RJP, ‘Payments for Watershed Protection Services: Emerging Lessons from the Philippines’ (2013) 6 Journal of sustainable development 90.

scheme should be done with the development of other complementary activities in different areas: conservation, environmental education, increasing the participation of people living within the forest or at the buffer zones, among others.⁴⁹

While PES transactions are unique, depending on the ecosystem service and the stakeholders involved, they share certain characteristics which include: ability of the economic incentive to influence land use decisions and ecosystem service provision; opportunity for individual ecosystem service providers (sellers) to receive direct or indirect benefits from the beneficiaries of the service (buyers); extent to which the service being provided can be expressed in terms of measurable quality or quantity; transactions are voluntary but legally-binding; ecosystem services are well-defined and valued; and payments are conditional on continued provision of the ecosystem service by the provider.⁵⁰

SDG 6 on clean water and sanitation acknowledges the place of PES in financing clean water and sanitation by providing that the most important funding source for investing in drinking water and sanitation services consists of household contributions, via tariffs paid to service providers and via self-supply (meaning that they arrange for their water and sanitation in the community or at the household level).⁵¹

4.3 Integrated River Basin Management

Arguably, the causal link between Water, Sanitation and Hygiene (WASH) and ecosystem health and integrity is clearer when dealing with freshwater ecosystems, where over-abstractions of freshwater for multiple uses, coupled with non-point source pollution from agriculture and poorly-designed sanitation facilities, or lack thereof, threaten the sustainability of water sources and the ecosystem services the water resource provides.⁵² This calls for management approaches that strike a balance between these uses of freshwater resources, to ensure that while human beings dependent on a particular freshwater body have access to sufficient and quality water for their own consumption and uses, the aquatic biodiversity reliant on the same are not exposed to dangers that affect their existence. Thus, good quality and sufficient quantity of water are essential not just to the human communities' basic and economic needs but also to the riverine ecosystem, and further downstream, to the estuarine and marine ecosystems.⁵³ Human communities should, therefore, reduce anthropogenic activities such as poor land management which can negatively affect the riverine ecosystem, causing unintended consequences to human and wildlife communities alike.⁵⁴ To achieve the foregoing, it is recommended for countries to adopt an

⁴⁹ Espinosa C, 'Payment for Water-Based Environmental Services: Ecuador's Experiences, Lessons Learned and Ways Forward. IUCN Water, Nature and Economics Technical Paper No. 2, IUCN—The World Conservation Union' [2005] Ecosystems and Livelihoods Group Asia, Colombo, 27.

⁵⁰ Langat D, 'Guidelines for Establishing Payment for Ecosystem Services Schemes in Kenya' (KEFRI, 2017), 3.

⁵¹ 'Goal 6: Clean Water and Sanitation'

<<https://www.sdfinance.undp.org/content/sdfinance/en/home/sdg/goal-6--clean-water-and-sanitation.html>> accessed 29 August 2021.

⁵² Reid, A.J., Carlson, A.K., Creed, I.F., Eliason, E.J., Gell, P.A., Johnson, P.T., Kidd, K.A., MacCormack, T.J., Olden, J.D., Ormerod, S.J. and Smol, J.P., 'Emerging Threats and Persistent Conservation Challenges for Freshwater Biodiversity' (2019) 94 *Biological Reviews* 849, 9.

⁵³ *Ibid.*, 9.

⁵⁴ *Ibid.*, 9.

Integrated River Basin Management (IRBM) approach which has been defined to mean coordinated planning, development, management and use of land, water and related natural resources within hydrologic boundaries.⁵⁵

This is similar to the Integrated Water Resource Management (IWRM), an integrated approach whereby river basins/catchments are managed in a holistic manner and it has been defined as ‘a process which promotes the coordinated development and management of water, land and related resources in order to maximize the resultant economic and social welfare in an equitable manner without compromising the sustainability of vital ecosystems’.⁵⁶ Integrated River Basin Management (IRBM) emphasizes cross-disciplinary coordination of water, land and related resources in a river basin, watershed or catchment to achieve long-term sustainability.⁵⁷ IRBM is based on the principle that naturally functioning river basin ecosystems, including accompanying wetlands and groundwater systems, are the source of freshwater and, therefore, management of river basins must include the maintenance of ecosystem functioning as a paramount goal on the one hand, and on the other hand, IRBM includes human interests and managing activities on the basin scale.⁵⁸

Arguably, the success of integrated water management strategies depends on striking a balance between human resource use and ecosystem protection.⁵⁹ Notably, the basic elements of these integrated approaches are a basin-wide planning scope, attention to management of surface and subsurface water and to water quantity, water quality and environmental integrity as an inseparable entity, where there should be an emphasis on the relations between land use and water resources and to the integration of natural limitations, social and economic demands and legal, political and administrative processes.⁶⁰ It has been suggested that effective river basin planning and management can have benefits as wide as poverty alleviation, sustainable development, access to energy, healthy ecosystems, gender equality and thriving livelihoods.⁶¹ In addition, IRBM involves all stakeholders involved in river basin planning and management collaboratively to develop an agreed set of policies and strategies to achieve a balanced approach to land, water, and natural resource management.⁶² It also focuses on adopting best practices to overcome various management challenges from community use to environmental science, economics, urban

⁵⁵ Watson N, ‘Integrated River Basin Management: A Case for Collaboration’ (2004) 2 *International Journal of River Basin Management* 243, 243.

⁵⁶ Bonnardeaux D, ‘Linking Biodiversity Conservation and Water, Sanitation, and Hygiene: Experiences from Sub-Saharan Africa’ [2012] Washington, DC: Africa Biodiversity Collaborative Group, USAID, 6.

⁵⁷ ‘Integrated River Basin Management’ (International RiverFoundation) <<https://riverfoundation.org.au/our-programs/integrated-river-basin-management/>> accessed 29 August 2021.

⁵⁸ Evers M, ‘Integrative River Basin Management: Challenges and Methodologies within the German Planning System’ (2016) 75 *Environmental Earth Sciences* 1085.

⁵⁹ Vörösmarty, C.J., McIntyre, P.B., Gessner, M.O., Dudgeon, D., Prusevich, A., Green, P., Glidden, S., Bunn, S.E., Sullivan, C.A., Liermann, R.C. and Davies, P.M., ‘Rivers in Crisis: Global Water Insecurity for Humans and Biodiversity’ (2010) 467 *Nature* 555, 2.

⁶⁰ Jaspers FG, ‘Institutional Arrangements for Integrated River Basin Management’ (2003) 5 *Water policy* 77, 78.

⁶¹ ‘Integrated River Basin Management’ (International RiverFoundation) <<https://riverfoundation.org.au/our-programs/integrated-river-basin-management/>> accessed 29 August 2021.

⁶² *Ibid.*

planning or business management, while putting the focus back onto achieving healthy river ecosystems with wide-ranging benefits for all communities, economies and biological processes within it.⁶³

It has been suggested that key issues for a comprehensive approach for an IRBM and its successful implementation involve, *inter alia*: the integration of policies, decisions and costs across sectoral interests such as industry, agriculture, urban development, navigation, fishery management and conservation, amongst other things through poverty reduction strategies; a long-term vision for the river basin, agreed to by all the major stakeholders, strategic decision-making at the river basin scale and active participation by all relevant stakeholders in well-informed and transparent planning and decision-making processes; and a solid basis of knowledge of the river basin and the natural and socio-economic forces that influence it.⁶⁴

5. Conclusion

As acknowledged at the 2021 Conference of Parties meeting at Glasgow (COP26), tackling climate change must go hand in hand with addressing water challenges, as water availability not only affects human lives but also biodiversity.⁶⁵ It has been argued that ecosystem health is inherently linked to water management, sanitation and agriculture as these aspects influence water availability and quality, and the loss of biodiversity can reduce the provision of ecosystem services essential for human well-being. Therefore, sustainable sanitation and water management is crucial for a more sustainable ecosystem management in the future.⁶⁶

The availability and quality of water can adversely be affected by a number of environmental factors including land degradation, pollution, over-use and global-warming and in turn, water quality and quantity can affect human health directly, through causing or preventing water-borne diseases and illness, and indirectly, by impacting on productive ecosystems, such as agriculture and fisheries, on which livelihoods depend.⁶⁷

As already pointed out, rivers, water resources and aquatic biodiversity are intimately interrelated and interdependent whereby water quality and habitat quality affect the composition, diversity and, therefore, health of aquatic ecosystems.⁶⁸ There is a need for an integrated approach to biodiversity conservation and water resources management as healthy functional aquatic

⁶³ Ibid.

⁶⁴ Evers M, 'Integrative River Basin Management: Challenges and Methodologies within the German Planning System' (2016) 75 Environmental Earth Sciences 1085.

⁶⁵ Manishka, 'Sanitation and Water for All at COP26' (Sanitation and Water for All (SWA), 2 November 2021) <<https://www.sanitationandwaterforall.org/news/sanitation-and-water-all-cop26>> accessed 8 November 2021.

⁶⁶ Oguh, C.E., Obiwulu, E.N.O., Umezina, O.J., Ameh, S.E., Ugwu, C.V. and Sheshi, I.M., 'Ecosystem and Ecological Services; Need for Biodiversity Conservation-A Critical Review' [2021] Asian Journal of Biology 1.

⁶⁷ BirdLife International, International B, 'An Introduction to Conservation and Human Rights for BirdLife Partners', 6.

⁶⁸ Mary Alkins-Koo, Floyd Lucas, Lorraine Maharaj, Shobha Maharaj, Dawn Phillip, Wayne Rostant and Sharda Surujdeo-Maharaj, 'Water Resources and Aquatic Biodiversity Conservation: A Role for Ecological Assessment of Rivers in Trinidad and Tobago'; Nakano, Shin-ichi. Aquatic Biodiversity Conservation and Ecosystem Services. Springer Berlin Heidelberg, 2016, 6.

Adopting Holistic Approaches to Biodiversity Conservation and Water Resources Management for Sustainable Development

ecosystems can provide benefits in terms of improved water quality as well as water production.⁶⁹ For this reason, the success of integrated water management strategies depends on striking a balance between human resource use and ecosystem protection.⁷⁰

Notably, the benefits of water provision on economic productivity comes with adverse effects on ecosystems and biodiversity, with potentially grave but unquantified costs.⁷¹ As a result, any interventions to reverse these trends to protect aquatic biodiversity and ensure the sustainability of water delivery systems should put in place frameworks to diagnose the primary threats to water security at a range of spatial scales from local to global.⁷²

It has been observed that the mismanagement and degradation of ecosystems is a root cause of water insecurity and as a result, to tackle water insecurity, there is a need for governments to tackle biodiversity loss through ensuring healthy soils, forests, wetlands, grasslands and other ecosystems which provide vital hydrological services that can reduce water-related disaster risks and improve water availability and quality.⁷³ Arguably, conserving or restoring natural ecosystems, or enhancing the creation of natural processes in modified or artificial ecosystems, can be a sustainable solution to water insecurity and may be more cost-effective than grey-infrastructure alternatives.

Adopting holistic approaches to biodiversity conservation and water resources management for Sustainable Development is the way to go.

⁶⁹ Ibid, 6.

⁷⁰ Vörösmarty, C.J., McIntyre, P.B., Gessner, M.O., Dudgeon, D., Prusevich, A., Green, P., Glidden, S., Bunn, S.E., Sullivan, C.A., Liermann, R.C. and Davies, P.M., 'Rivers in Crisis: Global Water Insecurity for Humans and Biodiversity' (2010) 467 Nature 555, 2.

⁷¹ Ibid, 2.

⁷² Ibid, 2.

⁷³ OECD (2019), Biodiversity: Finance and the Economic and Business Case for Action, report prepared for the G7

Environment Ministers' Meeting, 5-6 May 2019, 30.

Upholding Human Rights and Meaningful Public Participation in Development Projects

Abstract

The United Nations 2030 Agenda for Sustainable Development Goals (SDGs) envisages a world where human lives will be improved alongside environmental conservation as much of the resources expected to achieve this are natural resources. However, to achieve this, the SDGs acknowledge that this will also require the concerted efforts of all players including, public, private as well as communities. Trade and investments are also expected to play a huge role in raising revenue as well as generating the relevant resources for development. This, however, comes with cases of these international corporations disregarding human rights law which is expected to bind all persons in Kenya and the rest of the world. Communities are expected to be impacted upon by the development and investment projects and activities but they are often sidelined by these investors where they are either not involved through public participation as provided for under the national laws or they suffer human rights violations. This is arguably counterproductive as far as sustainable development is concerned. This paper argues that if human rights of communities and their right to public participation in development projects as guaranteed under international law regime are not protected, then there is not only the risk of failure of the particular projects but also emergence of conflicts. The paper offers some recommendations on how such eventualities may be avoided.

1. Introduction

The 2030 Agenda for Sustainable Development Goals (SDGs)¹ and specifically SDG 17 requires state parties to create partnerships for the Goals and specially to strengthen the means of implementation and revitalize the global partnership for sustainable development.² The United Nations reports that as at 2021, ‘Kenya aims to attract more than USD 30 billion in manufacturing investments over the next 5 years by focusing on sectors with high growth potential’ by ‘boosting domestic manufacturing which is believed to have huge potential to attract investment, create employment, stimulate growth, and linkages to all other sectors of the economy’.³

It has been observed that the adoption of rights-based approaches in development work – that is, approaches that are informed and guided by the framework of international human rights law, and the values that underpin it – has had a significant impact on the ways in which development agencies operate.⁴ It is possible to have investments in the name of development that do not meet the needs or respect the human rights of poor or marginalised communities where these local communities can be affected both by the lack of consultation and participation and by the negative impact such projects have on the environment and their livelihoods.⁵

¹ United Nations, Transforming our world: the 2030 Agenda for Sustainable Development, Resolution adopted by the General Assembly on 25 September 2015, A/RES/70/1.

² SDG 17.

³ ‘United Nations Supporting Kenya’s Post COVID-19 Industrial Recovery and Growth to Achieve Inclusive and Sustainable Growth | United Nations in Kenya’ <<https://kenya.un.org/en/126013-united-nations-supporting-kenyas-post-covid-19-industrial-recovery-and-growth-achieve>> accessed 23 May 2021.

⁴ ‘Rights-Based Approaches’ (GSDRC) <<https://gsdrc.org/topic-guides/human-rights/rights-based-approaches/>> accessed 22 May 2021.

⁵ ‘Business & Human Rights | Protection International’

While participation means that people are closely involved in the economic, social, cultural and political processes that affect their lives, it may mean complete and direct control over these processes, or, partial or indirect; the most important thing is that people have constant access to decision-making and power.⁶ Article 21(1) of the United Nations Universal Declaration of Human Rights⁷ guarantees that everyone has the right to take part in the government of his country, directly or through freely chosen representatives. Article 22 thereof also guarantees that everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality. The UN Declaration on the Rights of Indigenous Peoples⁸ also provides that indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.⁹

In addition, States are obligated to consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their Free, Prior and Informed Consent (FPIC) before adopting and implementing legislative or administrative measures that may affect them.¹⁰ Indigenous peoples also have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.¹¹ Indigenous peoples also have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.¹²

Arguably, there is a need for governments together with its development partners to solicit proposals and suggestions from indigenous and local communities about policies, the Constitution, and development strategies to encourage communities to express their views and increase their sense of ownership and responsibility in the future of their country.¹³ While Kenya has been making tremendous steps towards opening up the marginalised parts of the country such as the North Eastern parts of Kenya, there have been concerns about violation of human rights of

<<https://www.protectioninternational.org/en/our-work/what/business-human-rights>> accessed 24 May 2021.

⁶ "UNDP. 1993. Human Development Report 1993, 21.

<http://www.hdr.undp.org/en/reports/global/hdr1993>."

⁷ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

⁸ UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295.

⁹ Ibid, Article 18.

¹⁰ Ibid, Article 19.

¹¹ Ibid, Article 21(1).

¹² Ibid, Article 23.

¹³ Environmental Research Institute Science Technology and Environment Agency Lao People's Democratic Republic, "Public Participation in Development Projects in LAO PDR"

< http://pdf.wri.org/mekong_governance_mreg_eri.pdf> accessed 21 May 2021.

the locals in these areas.¹⁴ For instance, there have been reports that while Kenya's newest mega infrastructure project, the Lamu port, is aimed at integrating marginalised northern Kenya into the Kenyan economy and the nation, the planning and construction of the port have yielded a wide range of concerns and contestations, particularly on land rights, the environment, local livelihoods and security.¹⁵ There have been documented reports by different rights groups from the residents about compulsory land acquisition with the government being accused of having taken more land than it paid compensation for.¹⁶ If such reports on forceful acquisition of property were to be true, then such actions would be against Article 40 of the Constitution of Kenya 2010.¹⁷ There have also been major concern on the environmental impact of the port's construction¹⁸, and local

¹⁴ Benard Musembi Kilaka and Jan Bachmann, 'Kenya Launches Lamu Port. But Its Value Remains an Open Question' (The Conversation) <<http://theconversation.com/kenya-launches-lamu-port-but-its-value-remains-an-open-question-161301>> accessed 24 May 2021.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ 40. Protection of right to property

(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property--

- (a) of any description; and
- (b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person--

- (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
- (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation--

- (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
- (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that--

- (i) requires prompt payment in full, of just compensation to the person; and
- (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

¹⁸ See Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR where the Petitioners averred that the LAPSSSET Project was designed and implemented in violation of the Constitution and statutory law; the project would have far reaching consequences on the marine ecosystem of the Lamu region in terms of the destruction of the mangrove forests, discharge of industrial effluents into the environment, and effects of the fish species and marine life; and if the project was to be implemented as designed, it would affect their cultural heritage and way life as well as their livelihoods.

protests against the project have been met with harassment by Kenyan security forces.¹⁹ There were also growing concerns about employment opportunities to residents.²⁰ Arguably, such allegations against the government, that is, inadequate meaningful public participation may raise concerns on the government's commitment to protection and promotion of human rights of the affected communities. This paper critically discusses the place of human rights and meaningful public participation in development projects within the context of Kenya.

2. Human Rights and Meaningful Public Participation in Development Projects: The Connection

The United Nations *Declaration on the Right to Development*²¹ states 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.²² The *Declaration* also provides 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 and fundamental freedoms can be fully realized.²³

"People today have an urge - an impatient urge - to participate in the events and processes that shape their lives. And that impatience brings many dangers and opportunities. It can dissolve into anarchy, ethnic violence or social disintegration. But if properly nurtured in a responsive national and global framework, it can also become a source of tremendous vitality and innovation for the creation of new and more just societies." (UNDP, 1993: 1)²⁴

The international human rights law is designed primarily to protect individuals and groups from abusive action by states and state agents.²⁵ While it is true that most of the investment projects are financed and carried out by international companies, with Development Financial Institutions (DFIs) and multi-national development banks having long track records of being critical providers of financing in Africa, supplying riskier, longer term investment capital that tends to focus on sustainability²⁶, some commentators have accused some international and multinational investors of alleged human rights and environmental abuses, including using child labor to clean toxic materials, failing to repair pipeline leakages, and operating in protected indigenous lands without

¹⁹ Benard Musembi Kilaka and Jan Bachmann, 'Kenya Launches Lamu Port. But Its Value Remains an Open Question' (The Conversation) <<http://theconversation.com/kenya-launches-lamu-port-but-its-value-remains-an-open-question-161301>> accessed 24 May 2021.

²⁰ Ibid.

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

²² Ibid, Preamble.

²³ Article 1.1, Declaration on the Right to Development: resolution / adopted by the General Assembly, 4 December 1986, A/RES/41/128.

²⁴ 'Human Development Report 1993 | Human Development Reports' <<http://hdr.undp.org/en/reports/global/hdr1993>> accessed 16 May 2021; Giles Mohan, 'Participatory Development' [2002] The companion to development studies 49.

²⁵ Shelton Dinah, 'Protecting Human Rights in a Globalized World', Human Rights and Corporations (Routledge 2017).

²⁶ 'ESG Investments Will Fuel Africa's Post-Pandemic Recovery' (13 May 2021) <<https://www.internationalinvestment.net/opinion/4031186/esg-investments-fuel-africa-post-pandemic-recovery>> accessed 23 May 2021.

authorization especially in developing countries.²⁷ As far as trade agreements are concerned, there have also been worldwide concerns in relation to the lack of transparency of the negotiations as far as citizens are concerned, in contrast with the fundamental role being played by the large multinationals.²⁸ Notably, the negotiations are the result of long-term efforts by ultraliberal circles, politicians and directors of multinationals, working through many common bodies and the treaties are not published until, at best, the negotiations have been concluded.²⁹

It has been argued that the international protection of human rights and environmental protection represent two of the fundamental values and aims of modern international society.³⁰ It has been opined that ‘the rights to the highest attainable standard of health and to an adequate standard of living depend on a certain degree of environmental quality and in several cases, environmental degradation or destruction has been viewed as a violation of these human rights’.³¹ In addition to this, destruction of the environment through such problems as pollution or global warming can directly interfere with the enjoyment of communities’ fundamental human rights including a wide range of social and cultural right as well.³²

Notably, among the extraordinary achievements of the *Declaration on the Right to Development*³³ is the advancement of a human rights-based approach to development.³⁴ For those who advocate for this approach, ‘development from a human rights perspective embraces as key attributes: Social justice (through inclusion, equality and non-discrimination, taking the human person as the central subject of development and paying special attention to the most deprived and excluded); Participation, accountability and transparency (through free,

²⁷ ‘Foreign Investors Gone Wild’

<<https://archive.globalpolicy.org/soecon/develop/democracy/2007/0507wild.htm>> accessed 21 May 2021; ‘What Are the Main Criticisms of the World Bank and the IMF?’ (Bretton Woods Project, 4 June 2019) <<https://www.brettonwoodsproject.org/2019/06/what-are-the-main-criticisms-of-the-world-bank-and-the-imf/>> accessed 24 May 2021; see also ‘Globalization, Tourism, and Indigenous Peoples: What You Should Know About the World’s Largest Industry – Planeta.Com’ <<https://www.planeta.com/globalization-1999/>> accessed 24 May 2021.

²⁸ Robert Joumard, ‘The Free Trade Agreements: Contempt for Citizens, Sovereignty for Multinationals’ (CADTM, 23 May 2021) <<https://www.cadtm.org/The-free-trade-agreements-contempt>> accessed 24 May 2021.

²⁹ Ibid; see also Eric Toussaint, ‘The World Bank, the IMF and the Respect of Human Rights’ (CADTM, 23 May 2021) <<https://www.cadtm.org/The-World-Bank-the-IMF-and-the-respect-of-human-rights>> accessed 24 May 2021.

³⁰ Dinah Shelton, A Rights-Based Approach to Public Participation and Local Management of Natural Resources (2008), 20<
<https://www.iges.or.jp/en/publication_documents/pub/conferenceproceedings/en/739/3ws-26-dinah.pdf>
Accessed 16 May 2021.

³¹ Bridget Lewis, ‘Environmental Rights or a Right to the Environment? Exploring the Nexus between Human Rights and Environmental Protection.’ (2012) 8 Macquarie Journal of International and Comparative Environmental Law 36.

³² Ibid, 36.

³³ UN General Assembly, Declaration on the Right to Development: resolution / adopted by the General Assembly, 4 December 1986, A/RES/41/128

³⁴ Flávia Piovesan, ‘Active, Free and Meaningful Participation in Development’ (2013) 25 Office of the High Commissioner for Human Rights, Realizing the Right to Development: Essays in Commemoration of, 103<
<<https://www.ohchr.org/Documents/Issues/Development/RTDBook/PartIIChapter6.pdf>> Accessed 16 May 2021.

meaningful and active participation, focusing on empowerment); and international cooperation (as the right to development is a solidarity-based right).³⁵

Participatory development, as it is popularly referred to, has been defined as: “development that seeks to give the poor a part in initiatives and projects that are designed by outside organizations in the hopes that these projects will be more sustainable and successful by involving local stakeholders in the projects goals.”³⁶ Community participation has been defined as the involvement of people in a community in projects to solve their own problems, where people should be given the opportunity where possible to participate as a basic human right and a fundamental principle of democracy.³⁷

The need for public participation and respect for human rights is important for development projects to gain social license to operate.³⁸ This is because as it has been observed, ‘a development process often has four phases: articulation of demand, knowledge generation, dissemination and knowledge utilization where the result of the development cycle is that the solutions are implemented, and the more ownership is felt in all steps of this process, the more applicable the solutions are.’³⁹ Thus, rapid and sustained economic growth (“development”), popular political participation (“democracy”), and respect for the rights of their citizens (“human rights”) are considered to be hegemonic political ideals all around the world.⁴⁰ A Social License to Operate (SLO) refers to the perceptions of local stakeholders that a project, a company, or an industry that operates in a given area or region is socially acceptable or legitimate.⁴¹ Companies can gain the social license through: maintaining positive corporate reputation; understanding culture, customs, language history and history of communities, among others;⁴² educating local stakeholders about project; ensuring open communication amongst all stakeholders;⁴³ business partnerships with communities; workforce training; community support and capacity building; and employing innovation and technology.⁴⁴ Arguably, these activities are capable of enhancing respect for human rights. As for communities, for them to grant the social license, they ask themselves the

³⁵ Flávia Piovesan, ‘Active, Free and Meaningful Participation in Development’ (2013) 25 Office of the High Commissioner for Human Rights, *Realizing the Right to Development: Essays in Commemoration of*, 104.

³⁶ ‘Why Is Participatory Development So Important for Your Nonprofit?’ (grassrootscollective) <<https://www.thegrassrootscollective.org/what-is-participatory-development>> accessed 22 May 2021.

³⁷ “Chapter 12 Community participation,” Manual., 2005 <https://ec.europa.eu/echo/files/evaluation/watsan2005/annex_files/WEDC/es/ES12CD.pdf> accessed 21 May 2021.

³⁸ Kathleen Wilburn and Ralph Wilburn, ‘Achieving Social License to Operate Using Stakeholder Theory’ (2011) 4 *J. Int. Bus. Ethics* 3; Emmanuel Raufflet and others, ‘Social License’ in Samuel O Idowu and others (eds), *Encyclopedia of Corporate Social Responsibility* (Springer 2013) <https://doi.org/10.1007/978-3-642-28036-8_77> accessed 24 May 2021; Lain Dare, Jacki Schirmer and Frank Vanclay, ‘Community Engagement and Social Licence to Operate’ (2014) 32 *Impact Assessment and Project Appraisal* 188.

³⁹ Chris J Koopmans, K van Veluw and FG Wijnands, ‘Participatory Development as a Way to Innovations: Five Key Elements for Success’ (2014) 3 *Building Organic Bridges* 791, at 792.

⁴⁰ Jack Donnelly, ‘Human Rights, Democracy, and Development’ (1999) 21 *Human Rights Quarterly* 608.

⁴¹ Emmanuel Raufflet and others, ‘Social License’ in Samuel O Idowu and others (eds), *Encyclopedia of Corporate Social Responsibility* (Springer 2013) <https://doi.org/10.1007/978-3-642-28036-8_77> accessed 24 May 2021.

⁴² Ian Thomson and Susan Joyce, ‘The Social Licence to Operate: What It Is and Why Does It Seem so Difficult to Obtain?’, *Prospectors and Developers Association of Canada Convention*, Toronto, Ontario, Canada (2008).

⁴³ *Ibid.*

⁴⁴ *Ibid.*

following questions: Do they Respect us? Are they Listening? Do they let us Participate? Do they let us Participate? Are they Transparent with us? Can we Believe what they say? Are they Responsive to our issues? Can we Trust them?⁴⁵ Companies must ensure that the answers to all these questions remain continually affirmative.

It has been argued that ‘democratic governance and human rights are critical components of sustainable development and lasting peace’, where ‘countries with ineffective government institutions, rampant corruption, and weak rule of law are estimated to have a 30-to-45 percent higher risk of civil war and a higher risk of extreme criminal violence than other developing countries’.⁴⁶ In addition, public involvement in decision-making processes is not only important for development projects affecting the environment, but is also necessary for identifying the impact projects will have on communities.⁴⁷

Arguably, development, particularly at the local level, can be made much more effective by active public participation where effective civic action can hold governments accountable⁴⁸ and ensure that the decisions of government are in line with the needs of citizens and thus potentially solve failures in government that plague most poor countries including; wastage and leakage, unequal access, corruption, and poor coordination.⁴⁹

Communities are mostly impacted upon by investments and development projects through what is popularly known as the impact investing, defined which is “part of the decades-old tradition of corporate social responsibility that holds domestic and international financial institutions and corporations accountable for harmful employment, community, or environmental impacts.”⁵⁰ Impact investments have also defined as “investments made into companies, organizations, and funds with the intention to generate social and environmental impact alongside a financial return.”⁵¹ As far as impact investment in Kenya is concerned, Kenya has in the recent past been ranked highly compared to its East African counterparts, with Kenya representing nearly half of impact capital disbursed in East Africa—more than USD 650 million by non-

⁴⁵ Ibid.

⁴⁶ ‘Democracy, Human Rights and Governance | U.S. Agency for International Development’ (26 March 2021) <<https://www.usaid.gov/democracy>> accessed 21 May 2021.

⁴⁷ Environmental Research Institute Science Technology and Environment Agency Lao People’s Democratic Republic, “Public Participation in Development Projects in LAO PDR” <http://pdf.wri.org/mekong_governance_mreg_eri.pdf> accessed 21 May 2021.

⁴⁸ ‘How Can Participatory Development Be Improved? | Devex’ <<https://www.devex.com/news/how-can-participatory-development-be-improved-80472>> accessed 24 May 2021; ‘Determinants of Public Participation in Kenya County Governments - Antony Mbithi, Damiana Ndambuki, Fredrick Owino Juma, 2019’ <<https://journals.sagepub.com/doi/full/10.1177/0021909618794028>> accessed 24 May 2021; Berner, M. M., Amos, J. M., & Morse, R. S., “What constitutes effective citizen participation in local government? Views from city stakeholders.” *Public Administration Quarterly* (2011): 128-163; Alessandra Ricciardelli, ‘Governance, Local Communities, and Citizens Participation’ in Ali Farazmand (ed), *Global Encyclopedia of Public Administration, Public Policy, and Governance* (Springer International Publishing 2017) <https://doi.org/10.1007/978-3-319-31816-5_3221-1> accessed 24 May 2021.

⁴⁹ Devex Editor // 11 March 2013, ‘How Can Participatory Development Be Improved?’ (Devex, 11 March 2013) <<https://www.devex.com/news/sponsored/how-can-participatory-development-be-improved-80472>> accessed 21 May 2021.

⁵⁰ Ronald Phillips, ‘Impact Investing and Community Development’ (2016) 25 *Maine Policy Review* 63, 63.

⁵¹ Castano, T., “Preparing for Impact: Five Ideas to Maximize the Potential of Impact Investing”, *New Start New Jersey*, April 2017, 1 <<https://ideas.nsnj.org/wp-content/uploads/2017/08/NSNJ-Preparing-for-Impact.pdf>> accessed 21 May 2021.

development finance institutions (non-DFIs) impact investors and more than USD 3 billion by development finance institutions (DFIs), and more than triple the amount deployed in each of Uganda and Tanzania, the countries with the next highest amounts at around 13% and 12% respectively.⁵²

It has been observed that ‘while governments at every level –local, state, national –determine how to meet fundamental needs with constrained resources, impact investing continues to mature into a vehicle for innovative, socially oriented enterprises, where the convergence of these two macro-level developments can create opportunities for stakeholders and communities.’⁵³ The success of development activities is thus closely linked with the status of respect for human rights for concerned communities as well as how effectively these communities are involved in the processes leading to the negotiations leading to the seating up and operation of investment and development projects.

3. Kenya’s Legal and Policy Framework on Meaningful Public Participation in Development Projects: Challenges and Prospects

Kenya’s position as a global investment destination has been improving significantly, with the World Bank’s latest ‘Ease of Doing Business’ ratings identifying Kenya as one of the most notably improved countries globally, progressing 24 places in two years from 80th in 2017 to 56th in 2019.⁵⁴ During the said period, the flow of foreign direct investment also saw a significant step up in 2018, increasing by 27 per cent to \$1.6 billion, according to the United Nations Conference on Trade and Development (UNCTAD).⁵⁵ In order to strengthen the private sector which is considered to be crucial to implementing the President’s Big Four Agenda, and foreign direct investment which has a key role in increasing private sector activity, the Kenyan Government has been working towards increased foreign direct investment by taking steps to facilitate private enterprise and foreign investment, for instance, through predictable regulatory and tax practices.⁵⁶ The Presidency’s *Big Four Agenda* which is a 5-year development plan under 4 key pillars, namely: food security, affordable housing, manufacturing, and affordable healthcare for all.⁵⁷

This section highlights the regulatory framework which should guide the investment and development plans to also ensure that the same positively impacts on the livelihoods of its people.

⁵² ‘Kenya Tops East Africa Blocs in Impact Investment - Ministry of Industrialization, Trade and Enterprise Development (MoITED)’ <<https://www.industrialization.go.ke/index.php/media-center/blog/240-kenya-tops-east-africa-bloc-in-impact-investment>> accessed 23 May 2021; ‘Kenya: The Country Impact Investors Cannot Afford to Ignore’ (20 January 2020) <<https://www.pioneerspost.com/news-views/20200120/kenya-the-country-impact-investors-cannot-afford-ignore>> accessed 23 May 2021; Global Impact Investing Network and Open Capital Advisors, *The Landscape for Impact Investing in East Africa (ETHIOPIA 2015)*.

⁵³ Castano, T., ‘Preparing for Impact: Five Ideas to Maximize the Potential of Impact Investing’, New Start New Jersey, April 2017, 1 <<https://ideas.nsnj.org/wp-content/uploads/2017/08/NSNJ-Preparing-for-Impact.pdf>> accessed 21 May 2021.

⁵⁴ ‘What’s the Role of an Impact Investor like CDC in Kenya?’ (CDC Group) <<https://www.cdcgroup.com/en/news-insight/insight/articles/whats-the-role-of-an-impact-investor-like-cdc-in-kenya/>> accessed 23 May 2021.

⁵⁵ Ibid.

⁵⁶ ‘What’s the Role of an Impact Investor like CDC in Kenya?’ (CDC Group) <<https://www.cdcgroup.com/en/news-insight/insight/articles/whats-the-role-of-an-impact-investor-like-cdc-in-kenya/>> accessed 23 May 2021.

⁵⁷ ‘The Big 4 - Empowering the Nation’ <<https://big4.delivery.go.ke/>> accessed 25 December 2020.

Specifically, it looks at the provisions that are aimed at enhancing and promoting public participation in development as part of ensuring that there is promotion of the development, transfer, dissemination and diffusion of environmentally sound technologies to developing countries on favourable terms, including on concessional and preferential terms, as mutually agreed, as envisaged under SDG 17, Target 17.7. Notably, the push for economic growth cannot only be driven by Kenya's Government but also by its people, hence the need for active and meaningful participation of the people.⁵⁸

a) Constitution of Kenya 2010

Articles 2(5) and (6) of the Constitution of Kenya 2010⁵⁹ provide that the general rules of international law, and any treaty or convention ratified by Kenya, form part of the laws of Kenya, thus binding Kenya to observe its human rights obligations under international bill of human rights.⁶⁰ The Constitution of Kenya 2010 recognises public participation as an important component of governance in Kenya. Article 10 thereof provides for the national values and principles of governance which include the following: (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; (c) good governance, integrity, transparency and accountability; and (d) sustainable development (Emphasis added).⁶¹ These national values and principles of governance are to bind all State organs, State officers, public officers and all persons whenever any of them- (a) applies or interprets this Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions.⁶² Article 20 of the Constitution of Kenya states that the Bill of Rights binds all state organs and all persons, which persons are defined under Article 260 as including a “company, association or other body of persons whether incorporated or unincorporated.”

Regarding public participation, one of the great motivations for the devolved system of governance in the country was to boost public participation, as captured under the Fourth Schedule Part 2 (14) of the Constitution of Kenya which provides that one of the functions of the County governments is ensuring and coordinating the participation of communities and locations in governance at the local level and assisting 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.⁶³ Similarly, Sections 87 to 92 and 115 of the County Governments Act, 2012⁶⁴ outline the principles of public participation and the procedure for facilitating public participation in County government governance and administration matters.

The Constitution also outlines the obligations of the State in respect of the environment which include, *inter alia*: encourage public participation in the management, protection and conservation

⁵⁸ ‘What’s the Role of an Impact Investor like CDC in Kenya?’ (CDC Group) <<https://www.cdcgroup.com/en/news-insight/insight/articles/whats-the-role-of-an-impact-investor-like-cdc-in-kenya/>> accessed 23 May 2021.

⁵⁹ Republic of Kenya, Constitution of Kenya 2010 (Government Printer, Nairobi, 2010).

⁶⁰ See also Treaty Making and Ratification Act, No. 45 of 2012, Laws of Kenya.

⁶¹ Constitution of Kenya 2010, Article 10(2).

⁶² Constitution of Kenya 2010, Article 10(1).

⁶³ Fourth Schedule Part 2 (14), Constitution of Kenya 2010.

⁶⁴ County Governments Act, No. 17 of 2012, Laws of Kenya.

of the environment; and establish systems of environmental impact assessment, environmental audit and monitoring of the environment.⁶⁵ However, it is worth pointing out that ‘every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources’.⁶⁶

The Constitution obligates all State organs and all public officers to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.⁶⁷

b) Environment (Management and Co-ordination) Act, 1999

The *Environmental Management and Co-ordination Act, 1999*⁶⁸ (EMCA) provides for “environmental audit and monitoring”⁶⁹ and “environmental impact assessment”⁷⁰, among others, which are meant to ensure that all persons take care of the environment while carrying out any activities which may adversely affect the environment. Strategic Environmental Assessment (SEA) is defined as the process by which environmental considerations are required to be fully integrated into the preparation of *policies, plans and programmes* and prior to their final adoption (emphasis added).⁷¹ Environmental impact assessment means a systematic examination conducted to determine whether or not a programme, activity or project will have any adverse impacts on the environment.⁷² Environmental audit means the systematic, documented, periodic and objective evaluation of how well environmental organisation, management and equipment are performing in conserving or preserving the environment.⁷³ Strategic Environmental and Social Assessment (SESA) is seen to be a more effective tool since it integrates the social issues that are likely to emerge and not just the environmental considerations.⁷⁴

⁶⁵ Article 69 (1), Constitution of Kenya, 2010.

⁶⁶ Article 69 (2), Constitution of Kenya, 2010.

⁶⁷ Article 21(3), Constitution of Kenya, 2010.

⁶⁸ Environmental Management and Co-ordination Act, No. 8 of 1999, Laws of Kenya.

⁶⁹ Ibid, sec. 68;69.

⁷⁰ Ibid, secs 58-67; see also Environmental Management and Co-ordination (Amendment) Act, 2015 (No. 5 of 2015), sec. 57A (1) provides that “all Policies, Plans and Programmes for implementation shall be subject to Strategic Environmental Assessment”.

⁷¹ Environmental protection Agency, ‘Strategic Environmental Assessment,’ available at <http://www.epa.ie/monitoringassessment/assessment/sea/#.Vi5tmGuJ2CA>. S. 57(2), EMCA, provides that for the avoidance of doubt, the plans, programmes and policies (referred to in the Act) are those that are- (a) subject to preparation or adoption by an authority at regional, national, county or local level, or which are prepared by an authority for adoption through a legislative procedure by Parliament, Government or if regional, by agreements between the governments or regional authorities, as the case may be; (b) determined by the Authority as likely to have significant effects on the environment.

⁷² Environmental Management and Co-Ordination Act, No 8 of 1999 (Government Printer, Nairobi, 1999), s.2.

⁷³ Ibid.

⁷⁴ Notably, the Energy Act, No. 1 of 2019, Laws of Kenya, requires under sec. 107 that a person who intends to construct a facility that produces energy using coal shall, before commencing such construction, apply in writing to the Authority for a permit to do so. Such an application must be accompanied by, inter alia, a Strategic Environment Assessment and Social Impact Assessment licenses. Also notable are the provisions of s. 57A(1) of the Environmental Management Co-ordination (Amendment) Act 2015 which are to the effect that all policies, plans and programmes for implementation shall be subject to Strategic Environmental Assessment.

The implementation of this Act is to be guided by the following principles of Sustainable Development: (a) the principle of public participation in the development of policies, plans and processes for the management of the environment;(b) the cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and are not repugnant to justice and morality or inconsistent with any written law;(c) the principle of international co-operation in the management of environmental resources shared by two or more states;(d) the principles of intergenerational and intragenerational equity;(e) the polluter-pays principle; and (f) the precautionary principle.⁷⁵

EMCA outlines various environmental offences which include offences related to inspection, Environmental Impact Assessment, records and standards and offences related to hazardous wastes.⁷⁶ The Act also prescribes penalties for these offences.⁷⁷

c) Kenya National Action Plan on Business and Human Rights

The *Kenya national action plan on business and human rights For the Implementation of the United Nations Guiding Principles on Business and Human Rights*⁷⁸ (NAP) was drafted to domesticate the UN Guiding Principles on Business and Human Rights focusing on five thematic issues identified by stakeholders, namely: Land and Natural Resources; labour rights; revenue transparency; environmental protection; and access to remedy.⁷⁹ The objectives of this NAP are: To guide the State as it fulfils its duty to protect individuals and communities from business-related human rights abuses, consistent with its domestic and international obligations; To guide businesses on the measures they should undertake to meet their responsibility to respect human rights in their operations; To offer a roadmap of strengthening access to State-based judicial and non-judicial remedies for victims of business-related harm and to promote human rights due diligence by businesses, ensuring that they play their role in the attainment of SDGs in a manner that respects human rights; and to form a basis for dialogue between the State, businesses, individuals and communities whose rights are adversely impacted by business operations, and civil society organisations on promoting respect for human rights by businesses.⁸⁰

The NAP outlines policy actions aimed at enhancing State duty to protect human rights as well as those aimed at enhancing and upholding corporate responsibility to respect human rights.⁸¹ NAP is a step in the right direction and has the potential to enhance respect for human rights in the country. The above national constitutional, policy and statutory instruments are not exhaustive as there are other various government policies, programmes, plans and actions meant to achieve the frameworks outline above.

⁷⁵ Environmental Management and Co-ordination Act, sec. 3(5).

⁷⁶ EMCA, s.137-146.

⁷⁷ Ibid.

⁷⁸ Republic of Kenya, Kenya national action plan on business and human rights For the Implementation of the United Nations Guiding Principles on Business and Human Rights, June 2019<https://www.ohchr.org/Documents/Issues/Business/NationalPlans/2019_FINAL_BHR_NAP.PDF> accessed 23 May 2021.

⁷⁹ Ibid, p. ii.

⁸⁰ Ibid, p. 11.

⁸¹ Ibid, chapter two.

4. Upholding Human Rights and Meaningful Public Participation in Development Projects

Kenya seeks to achieve economic and social development that positively impacts on its people while also seeking to achieve sustainable development, with the Kenya's Vision 2030⁸², the national development initiative, seeking to transform Kenya into an industrialised middle-income country by 2030.⁸³ Notably, President Uhuru Kenyatta's 'Big Four' development agenda which is part of this journey aims to deliver 500,000 affordable homes, achieve universal healthcare coverage, raise the share of manufacturing in the economy from 9 to 15 per cent, and improve food security – all by 2022.⁸⁴

Fundamental rights of citizens are considered to be the bedrock for managing and mitigating conflict, spurring economic growth, and protecting human dignity where countries with democratic freedoms are more just, peaceful, and stable, and citizens can fulfill their potential.⁸⁵ In addition, it has been opined that countries that are democratic, respect the rights of their citizens and observe the rule of law at home and abroad are also safer places to live, work and trade.⁸⁶

4.1 Addressing the Lack of Political Goodwill to enhance Public Participation

It has been suggested that in order to enhance effective public participation, the duty bearers should do the following: ensuring that as duty bearers (leaders) they are accessible to and represent citizens; ensuring existence of forums and opportunities for citizens to participate and engage in matters affecting their lives; providing civic education; developing effective communication channels with citizens; providing timely information to citizens on critical and emerging issues; and providing resources to facilitate public participation.⁸⁷

There is a need for promoting effective and meaningful public participation of communities in development activities in order to ensure that their rights are not only protected but also ensure that they benefit from the targeted development projects in order to improve their livelihoods.⁸⁸ Leaders should work closely with their constituents as a way of not only identifying their challenges but also ensuring that any investment projects within their localities are held accountable as per the law.

⁸² Republic of Kenya, Sessional paper No. 10 of 2012 On Kenya Vision 2030, (Government Printer, 2012).

⁸³ 'What's the Role of an Impact Investor like CDC in Kenya?' (CDC Group) <<https://www.cdcgroup.com/en/news-insight/insight/articles/whats-the-role-of-an-impact-investor-like-cdc-in-kenya/>> accessed 23 May 2021.

⁸⁴ Ibid.

⁸⁵ 'Democracy, Human Rights and Governance | U.S. Agency for International Development' (26 March 2021) <<https://www.usaid.gov/democracy>> accessed 21 May 2021.

⁸⁶ 'The Role of Human Rights, Democracy, and Good Governance in Promoting Sustainable Development' (GSDRC) <<https://gsdrc.org/document-library/the-role-of-human-rights-democracy-and-good-governance-in-promoting-sustainable-development/>> accessed 21 May 2021.

⁸⁷ Uraia, 'What is Public Participation?' <https://uraia.or.ke/wp-content/uploads/2016/11/Citizen-Participation-BOOKLET.pdf> accessed 21 May 2021.

⁸⁸ 'Rural Development ∴ Sustainable Development Knowledge Platform' <<https://sustainabledevelopment.un.org/topics/ruraldevelopment/decisions>> accessed 24 May 2021; 'Making the Case: Effective Public Participation Is Good for Business in the Mekong Region | Pact' <<https://www.pactworld.org/library/making-case-effective-public-participation-good-business-mekong-region>> accessed 24 May 2021.

4.2 Eradicating Illiteracy for Community Empowerment

The United Nations Environmental Assembly (UNEA) asserts that this development path should maintain, enhance and, where necessary, rebuild natural capital as a critical economic asset and source of public benefits, especially for poor people whose livelihoods and security depend strongly on nature.⁸⁹ It is estimated that ‘more than one billion people in the world live in abject poverty on less than \$1.25 per day while the richest 1% people have almost half of the world’s wealth, leading to the conclusion that there is a huge gap and inequality in the distribution of the world economy’.⁹⁰ The high rates of poverty are more pronounced in developing countries mainly in the African continent,⁹¹ despite the fact that Africa as a continent is endowed with immense natural and human resources as well as great cultural, ecological and economic diversity.⁹² Some of the causes of poverty in Africa include, *inter alia*, population growth, war and crises, climate change, illnesses, inadequate agricultural infrastructure, and unjust trade structures.⁹³ SDG Goal 1 seeks to ensure that State Parties end poverty in all its forms everywhere by the year 2030.⁹⁴

⁸⁹ ‘What Is an “Inclusive Green Economy”?’ | UNEP - UN Environment Programme’ <<https://www.unenvironment.org/explore-topics/green-economy/why-does-green-economy-matter/what-inclusive-green-economy>> accessed 24 December 2020.

⁹⁰ ‘Poverty Is a Human Rights Violation | Apolitical’ (17 June 2020) <https://apolitical.co/en/solution_article/poverty-is-a-human-rights-violation> accessed 24 December 2020.

⁹¹ ‘Poverty in Africa Is Now Falling—but Not Fast Enough’ <<https://www.brookings.edu/blog/future-development/2019/03/28/poverty-in-africa-is-now-falling-but-not-fast-enough/>> accessed 25 December 2020; Chandy L, ‘Why Is the Number of Poor People in Africa Increasing When Africa’s Economies Are Growing?’ (Brookings, 30 November 1AD) <<https://www.brookings.edu/blog/africa-in-focus/2015/05/04/why-is-the-number-of-poor-people-in-africa-increasing-when-africas-economies-are-growing/>> accessed 25 December 2020; ‘On the Poorest Continent, the Plight of Children Is Dramatic’ (SOS-US-EN) <<https://www.sos-usa.org/SpecialPages/Africa/Poverty-in-Africa>> accessed 25 December 2020; ‘Poverty and Development in Africa’ <<https://www.globalpolicy.org/social-and-economic-policy/poverty-and-development/poverty-and-development-in-africa.html>> accessed 25 December 2020.

⁹² ‘Poverty and Development in Africa’ <<https://www.globalpolicy.org/social-and-economic-policy/poverty-and-development/poverty-and-development-in-africa.html>> accessed 25 December 2020; Muigua K, Utilizing Africa’s Natural Resources to Fight Poverty (2014) <<http://kmco.co.ke/wp-content/uploads/2019/06/Utilizing-Africas-Natural-Resources-to-Fight-Poverty-26th-March2014.pdf>> accessed 25 December 2020.

⁹³ ‘On the Poorest Continent, the Plight of Children Is Dramatic’ (SOS-US-EN) <<https://www.sos-usa.org/SpecialPages/Africa/Poverty-in-Africa>> accessed 25 December 2020.

⁹⁴ SDG Goal 1, United Nations, Transforming our world: the 2030 Agenda for Sustainable Development, Resolution adopted by the General Assembly on 25 September 2015, A/RES/70/1.

The related targets include:

1.1 By 2030, eradicate extreme poverty for all people everywhere, currently measured as people living on less than \$1.25 a day.

1.2 By 2030, reduce at least by half the proportion of men, women and children of all ages living in poverty in all its dimensions according to national definitions.

1.3 Implement nationally appropriate social protection systems and measures for all, including floors, and by 2030 achieve substantial coverage of the poor and the vulnerable.

1.4 By 2030, ensure that all men and women, in particular the poor and the vulnerable, have equal rights to economic resources, as well as access to basic services, ownership and control over land and other forms of property, inheritance, natural resources, appropriate new technology and financial services, including microfinance.

Human poverty may also be perceived as a denial of human rights as it arguably infringes on, among others, human freedom and destroys human dignity. It is viewed as an intrusion into human dignity.⁹⁵ Basic human rights are an integral part of human rights and their violation has been seen as sabotage of human dignity.⁹⁶ Education is considered to be *a key driver to transform lives*, build peace, eradicate poverty, and drive sustainable development, (Emphasis added)⁹⁷ as education promises to free all citizens from the shackles of ignorance, poverty, and disempowerment, and endow them with the capacity to be architects of their destiny, and catalysts of entrepreneurship, innovation, and global citizenship.⁹⁸

The *World Declaration on Education for All, 1990*⁹⁹ provides that ‘every person – child, youth and adult – shall be able to benefit from educational opportunities designed to meet their basic learning needs. These needs comprise both essential learning tools (such as literacy, oral expression, numeracy, and problem-solving) and the basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in the development, to improve the quality of their lives, to make informed decisions, and to continue learning.’¹⁰⁰

The *General Comment No. 13 on the Right to Education*¹⁰¹ states that ‘as an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from

1.5 By 2030, build the resilience of the poor and those in vulnerable situations and reduce their exposure and vulnerability to climate-related extreme events and other economic, social and environmental shocks and disasters.

1.A Ensure significant mobilization of resources from a variety of sources, including through enhanced development cooperation, in order to provide adequate and predictable means for developing countries, in particular least developed countries, to implement programmes and policies to end poverty in all its dimensions.

1.B Create sound policy frameworks at the national, regional and international levels, based on pro-poor and gender-sensitive development strategies, to support accelerated investment in poverty eradication actions.

⁹⁵ Rukooko, A.B., ‘Poverty and human rights in Africa: historical dynamics and the case for economic social and cultural rights’, *The International Journal of Human Rights*, Vol. 14, Iss. 1, 2010.

⁹⁶ Vienna Declaration and Programme of Action, Article 25, Adopted by the World Conference on Human Rights in Vienna on 25 June 1993.

⁹⁷ ‘Why Africa Needs to Ensure Inclusive and Equitable Quality Education and Lifelong Learning for All | Blog | Global Partnership for Education’ <<https://www.globalpartnership.org/blog/why-africa-needs-ensure-inclusive-and-equitable-quality-education-and-lifelong-learning-all>> accessed 7 December 2020.

⁹⁸ Ibid.

⁹⁹ World Conference on Education for All: Meeting Basic Learning Needs. 1990. World declaration on education for all and framework for action to meet basic learning needs adopted by the World Conference on Education for All: Meeting Basic Learning Needs, Jomtien, Thailand, 5-9 March 1990. New York, N.Y.: Inter-Agency Commission (UNDP, UNESCO, UNICEF, World Bank) for the World Conference on Education for All.

¹⁰⁰ World Declaration on Education for All, 1990, Article 1(1).

¹⁰¹ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 13: The Right to Education (Art. 13 of the Covenant), 8 December 1999, E/C.12/1999/10.

exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth'.¹⁰²

The *International Covenant on Economic, Social, and Cultural Rights (ICESCR)*¹⁰³ states that the 'States Parties to the Covenant agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance, and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace'.¹⁰⁴ By eradicating illiteracy amongst communities, it is possible to empower them to not only participate meaningfully in development projects and decision-making processes but also to be meaningfully employed in the projects.

4.3 Enhancing Corporate Social Responsibility for Human Rights Violations

The UN Guiding Principles on Business and Human Rights were drafted and endorsed in recognition of: States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms; the role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights; and the need for rights and obligations to be matched to appropriate and effective remedies when breached.¹⁰⁵ The 31 principles therein "seek to provide for the first time an authoritative global standard for preventing and addressing the risk of adverse human rights impacts linked to business activity".¹⁰⁶ Notably, the Principles obligate the States to protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.¹⁰⁷

Regarding the corporate responsibility to respect human rights, the Principles require that Business enterprises should respect human rights.¹⁰⁸ This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.¹⁰⁹ Additionally, in order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships. This process should: (a) Draw on internal and/or independent external human rights expertise;(b) Involve *meaningful consultation* (Emphasis added) with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation.¹¹⁰ There is a need for the government of Kenya to effectively enforce

¹⁰² Ibid, para. 1.

¹⁰³ UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

¹⁰⁴ Ibid, Article 13(1).

¹⁰⁵ UN Guiding Principles on Business and Human Rights, Resolution 17/4, 16 June 2011.

¹⁰⁶ Stefanie Ricarda Roos, 'UN Guiding Principles on Business and Human Rights' in Samuel O Idowu and others (eds), *Encyclopedia of Corporate Social Responsibility* (Springer 2013) <https://doi.org/10.1007/978-3-642-28036-8_746> accessed 24 May 2021.

¹⁰⁷ UN Guiding Principles on Business and Human Rights, 3.

¹⁰⁸ UN Guiding Principles on Business and Human Rights, 13-16.

¹⁰⁹ Ibid, 13.

¹¹⁰ Ibid, 19.

the NAP in order to ensure that corporations observe and respect human rights especially those of communities living within the localities where their projects are situated.

4.4 Promoting Meaningful and Effective Impact Assessment Processes

It has been observed that the issues raised in the Lamu Port construction project could have been averted if due process had been followed from the project's inception¹¹¹ including: timely and adequate compensation to everyone affected by the project; proper and robust environmental and social impact assessments; considering qualified residents for employment opportunities; and addressing the perennial problems of land rights in Lamu, all aimed at ensuring that the Lamu residents are treated as direct stakeholders and partners to the project where their voices, concerns and aspirations are taken seriously.¹¹² The government should continually establish efficient systems of Strategic Environmental Assessment (SEA), Environmental Impact Assessment (EIA), Strategic Environmental and Social Assessment (SESA) and Environmental Audit and Monitoring of the environment and Environmental Security Assessment (ESA) and ensure that the same are periodically reviewed to ensure that they remain effective.

There is a need to ensure that these EIA processes are not only carried out as a formality but are also reflective of what is on the ground and there should also be a follow up mechanism to ensure that the companies engage the communities throughout and that they continually carry out their duties as per the law and the assessment reports.¹¹³ There is also a need for the government to follow up on local content provisions such as those provided for under the regime regulating extractives industry in Kenya, namely, *Mining (Dealings in Minerals) Regulations, 2017*; *Mining (Licence and Permit) Regulations, 2017*; *Mining (Work Programmes and Exploration Reports) Guidelines, 2017*; *Mining (State Participation) Regulations, 2017*; *Mining (Use of Local Goods and Services) Regulations, 2017*; *Mining (Employment and Training) Regulations, 2017*; and *Mining (Use Of Assets) Regulations, 2017*.

The *Mining (Use of Local Goods and Services) Regulations, 2017*¹¹⁴ were enacted to- promote job creation through the use of local expertise, goods and services, businesses and financing in the mining industry value chain and their retention in the country; achieve the minimum local level and in-country spend for the provision of the goods and services in the mining industry value chain; increase the capability and international competitiveness of domestic businesses; create mining and mineral related support industries that will provide jobs and sustain economic development; achieve and maintain a degree of participation for Kenyans or companies

¹¹¹ Benard Musembi Kilaka and Jan Bachmann, 'Kenya Launches Lamu Port. But Its Value Remains an Open Question' (The Conversation) <<http://theconversation.com/kenya-launches-lamu-port-but-its-value-remains-an-open-question-161301>> accessed 24 May 2021.

¹¹² Ibid .

¹¹³ 'Chapter 3: EIA Process' <<http://www.fao.org/3/V8350E/v8350e06.htm>> accessed 24 May 2021; '1.7 Overview of the Stages of the EIA Process' <https://www.soas.ac.uk/cedep-demos/000_P507_EA_K3736-Demo/unit1/page_14.htm> accessed 24 May 2021; 'Our Role in Securing Public Participation in the Kenyan Legislative and Policy Reform Process' (Natural Justice, 23 July 2020) <<https://naturaljustice.org/our-role-in-securing-public-participation-in-the-kenyan-legislative-and-policy-reform-process/>> accessed 24 May 2021; 'Accountability, Transparency, Participation, and Inclusion: A New Development Consensus? - Carnegie Endowment for International Peace' <<https://carnegieendowment.org/2014/10/20/accountability-transparency-participation-and-inclusion-new-development-consensus-pub-56968>> accessed 24 May 2021.

¹¹⁴ *Mining (Use of Local Goods and Services) Regulations, 2017*, Legal Notice No. 83 of 2017, Laws of Kenya.

incorporated in Kenya for the supply of goods and the provision of services; and provide for a robust, transparent monitoring and reporting system in relation to the use of goods and services.¹¹⁵

The *Mining (Employment and Training) Regulations, 2017*¹¹⁶ were enacted to- promote job creation through the use of local expertise in the mining industry, the entire mining value chain and to retain the requisite skills within the country; develop local capacities in the mining industry value chain through education, skills and technology transfer, research and development; and achieve the minimum local employment level and in-country spend across the entire mining industry value chain.¹¹⁷

These are some of the regulations that can go a long way in enhancing Public Participation in development projects as well as empowering communities as a way of upholding their human rights through changing their lives and ensuring that they hold both the government and the investors accountable as far as environmental and socio-economic obligations are concerned.

4.5 Addressing Corruption

The various laws and regulations dealing with the investment and development regime in the country, if fully enforced, can be a useful tool in fighting corruption and tax evasion by the investors as they seek to promote accountability and transparency on the income and expenses incurred by these companies.¹¹⁸ These Regulations, alongside other transparency and accountability measures and practices are useful for developing countries such as Kenya, where non-declaration or under declaration of profits by the multinationals has been happening.¹¹⁹ They can however work even better where communities are actively and meaningfully involved in the various stages of the projects. It has been suggested that good institutional governance - specifically, a strong public voice with accountability, strong political stability, good regulations, and powerful anticorruption policies tend to conduce a positive relationship between natural resource richness and economic development.¹²⁰

¹¹⁵ Mining (Use of Local Goods and Services) Regulations, 2017, Regulation 3.

¹¹⁶ Mining (Employment and Training) Regulations, 2017, Legal Notice No. 82, Laws of Kenya.

¹¹⁷ Mining (Employment and Training) Regulations, 2017, Regulation 3.

¹¹⁸ 'Helping Countries Combat Corruption: The Role of the World Bank' <<http://www1.worldbank.org/publicsector/anticorrupt/corruptn/cor02.htm>> accessed 24 May 2021; 'Influencing Governments on Anti-Corruption Using Non-Aid Means' (U4 Anti-Corruption Resource Centre) <<https://www.u4.no/publications/influencing-governments-on-anti-corruption-using-non-aid-means>> accessed 24 May 2021; G Shabbir Cheema and Jean Bonvin, 'Corruption and Integrity Improvement Initiatives in Developing Countries'.

¹¹⁹ 'Accountability, Transparency, Participation, and Inclusion: A New Development Consensus? - Carnegie Endowment for International Peace' <<https://carnegieendowment.org/2014/10/20/accountability-transparency-participation-and-inclusion-new-development-consensus-pub-56968>> accessed 24 May 2021; Susan Rose-Ackerman, 'The Challenge of Poor Governance and Corruption' (2005) 2005 *Revista Direito GV* 207; PMJRO Cheruiyot and others, 'Effect of Public Financial Management Practices on Performance in Kericho County Government, Kenya: A Critical Review' (2017) 5 *International Journal of Education and Research* 211.

¹²⁰ Zeynalov, A., "Do Sufficient Institutions Alter the Relationship between Natural Resources and Economic Growth?" MPRA Paper 46850 (2013), at p. 11. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2413867 [Accessed on 16/1/2020].

4.6 Promoting Civil Education

In the High Court case of *Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR*, the Court rightly pointed out that access to information is a key pillar in the environmental governance scheme in our Constitution because effective Public Participation in decision-making depends on full, accurate and up-to-date information.¹²¹ With enhanced literacy levels, it is possible to carry out civic education regarding various challenges that arise from given projects and also for communities to fully appreciate the merits and demerits of certain projects and also appreciate the compromises that they need to make, if any.¹²²

4.7 Promoting Fair and Equitable International Trade and Investments Regimes

Previous studies on the role of citizens in trade and investment agreements processes have concluded that the declared objectives of the treaties for business freedom differ from their underlying and arguably, the nature, indeed if not clearly negative, of the socio-economic benefits that may be expected show that the objective of the free trade agreements is not growth and jobs, or even to protect investments or promote international trade.¹²³ Their only objective and it is a fundamental one, is to guarantee the priority of the rights of multinationals to do business and make profits.¹²⁴

Some commentators, while pointing out the lopsided North-South trade and investment rules, call for review of the current international investment rules to make them more just and equitable ones which will require cooperation between North and South.¹²⁵ Notably, SDG 17 targets require that states should: enhance North-South, South-South and triangular regional and international cooperation on and access to science, technology and innovation and enhance knowledge sharing on mutually agreed terms, including through improved coordination among existing mechanisms, in particular at the United Nations level, and through a global technology facilitation mechanism;¹²⁶ Enhance international support for implementing effective and targeted capacity-building in developing countries to support national plans to implement all the sustainable development goals, including through North-South, South-South and triangular cooperation;¹²⁷ and Promote a universal, rules-based, open, non-discriminatory and equitable multilateral trading system under the World Trade Organization, including through the conclusion of negotiations under its Doha Development Agenda¹²⁸, among others.

5. Conclusion

It has been argued that since Africa's poverty problems run deep, it is only the long process of building democratic institutions and the civil society needed to make them work will bring meaningful development to Africa, where empowerment of local people will ensure long-term

¹²¹ *Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR*, Petition 22 of 2012.

¹²² 'The Role of Civic Education' <https://civiced.org/papers/articles_role.html> accessed 24 May 2021.

¹²³ Robert Joumard, 'The Free Trade Agreements: Contempt for Citizens, Sovereignty for Multinationals' (CADTM, 23 May 2021) <<https://www.cadtm.org/The-free-trade-agreements-contempt>> accessed 24 May 2021.

¹²⁴ *Ibid.*

¹²⁵ 'Foreign Investors Gone Wild' <<https://archive.globalpolicy.org/soecon/develop/democracy/2007/0507wild.htm>> accessed 21 May 2021.

¹²⁶ SDG 17 Target 17.6.

¹²⁷ SDG 17, Target 17.9.

¹²⁸ SDG 17, Target 17.10.

poverty reduction.¹²⁹ Some authors have suggested several approaches for the promotion and protection of human rights in the era of globalization: (1) emphasizing state responsibility for the actions of non-state actors; (2) imposing international legal obligations directly on non-state actors, including international institutions, multilateral enterprises, and individuals; (3) encouraging private regulation through corporate codes of conduct, product labeling, and other consumer or corporate actions; and (4) involving non-state actors directly in the activities of international organizations to promote and protect human rights.¹³⁰ The United Nations observes that achieving the 2030 Sustainable Development Agenda requires pooling resources and expertise, channeling public and private expertise, encouraging public and private investments together towards high-growth industrial sectors.¹³¹

Corporate Social Responsibility is arguably becoming less and less voluntary around the world.¹³² There is a need for all the relevant stakeholders to work towards upholding human rights and enhancing meaningful Public Participation of communities in development projects as a way of ensuring that communities not only benefit from the said development projects but also guaranteeing that these communities fully appreciate and support the investments.

¹²⁹ ‘Development Requires Local Empowerment’

<<https://archive.globalpolicy.org/soecon/develop/democracy/2006/0927localempowerment.htm>> accessed 21 May 2021.

¹³⁰ Shelton Dinah, ‘Protecting Human Rights in a Globalized World’, Human Rights and Corporations (Routledge 2017).

¹³¹ ‘United Nations Supporting Kenya’s Post COVID-19 Industrial Recovery and Growth to Achieve Inclusive and Sustainable Growth | United Nations in Kenya’ <<https://kenya.un.org/en/126013-united-nations-supporting-kenyas-post-covid-19-industrial-recovery-and-growth-achieve>> accessed 23 May 2021.

¹³² Kathleen Wilburn and Ralph Wilburn, ‘Achieving Social License to Operate Using Stakeholder Theory’ (2011) 4 J. Int. Bus. Ethics 3.

Attaining Effective Peacebuilding and Conflict Management in Kenya

Abstract

Sustainable peace is considered to be an important ingredient of sustainable development and this is also acknowledged under Sustainable Development Goal (SDGs) 16 which calls for promotion of peaceful and inclusive societies. While Kenya has been making some notable steps towards peacebuilding and effective conflict management, the country is still awash with reports of both violent and non-violent conflicts, a hindrance to achievement of sustainable development. This paper critically discusses peacebuilding and conflict management in Kenya. It offers some recommendations on how the country can move closer to achieving sustainable peace for all citizens through effective peacebuilding and conflict management.

1. Introduction

Kenya's Vision 2030¹ is grounded on three development pillars namely: economic, social and political pillars.² The Social Pillar of the Vision 2030 seeks to invest in the people where it has been pointed out that 'Kenya's journey towards widespread prosperity also involves the building of a just and cohesive society that enjoys equitable social development in a clean and secure environment'.³ Notably, the Political pillar of Vision 2030 also envisions "a democratic political system that is issue based, people-centred, result-oriented and accountable to the public" and 'a country with a democratic system reflecting the aspirations and expectations of its people, in which equality is entrenched, irrespective of one's race, ethnicity, religion, gender or socio-economic status; a nation that not only respects but also harnesses the diversity of its people's values, traditions and aspirations for the benefit of all'.⁴

It is worth pointing out the above inspirations are greatly linked to peacebuilding efforts, as also envisaged under United Nations 2030 Agenda for Sustainable Development (SDGs)⁵ which provides in its Preamble that 'the State Parties were "determined to foster peaceful, just and inclusive societies which are free from fear and violence" as "there can be no sustainable development without peace and no peace without sustainable development".⁶ In addition, SDGs provide that "the new Agenda recognizes the need to build peaceful, just and inclusive societies that provide equal access to justice and that are based on respect for human rights (including the right to development), on effective rule of law and good governance at all levels and on transparent, effective and accountable institutions".⁷ In line with the foregoing, SDG 16 is the substantive goal dedicated to peace and it provides that States should 'promote peaceful and

¹ Republic of Kenya, Vision 2030 (Government Printer, Nairobi, 2007) <<http://vision2030.go.ke/>> accessed 1 May 2021.

² 'About Vision 2030 | Kenya Vision 2030' <<http://vision2030.go.ke/about-vision-2030/>> accessed 1 May 2021.

³ 'Social Pillar | Kenya Vision 2030' <<http://vision2030.go.ke/social-pillar/>> accessed 1 May 2021.

⁴ 'Foundation for The Pillars | Kenya Vision 2030' <<https://vision2030.go.ke/enablers-and-macros/>> accessed 1 May 2021.

⁵ UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1.

⁶ Ibid, Preamble.

⁷ Ibid, para. 35.

inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels'.⁸

While Kenya's efforts towards realization of sustainable development Agenda as far as economic development and even some of the social aspirations are concerned are quite commendable,⁹ the same cannot be said about the social pillar, and particularly, peacebuilding efforts. For instance, it has been observed that 'Kenya is a large multi-ethnic country, with over 40 different ethnic groups and many overlapping conflicts which range from high levels of sexual and gender-based violence and of intercommunal violence; low levels of persistent violence; cycles of election-related violence; and increasing numbers of terrorist attacks'.¹⁰ The high levels of violence in Kenya have been attributed to a range of factors including: ethnic intolerance; border conflicts; political party zoning; competition over land and other resources; proliferation of small arms; weak security; and poverty, underdevelopment, and marginalisation.¹¹

Existing literature on causes of conflict has highlighted the fact that there is not a single developmental variable that causes conflict, but many variables that foster violence when combined in specific contexts and this may be in relation to issues such as:

Globalisation and the transformation of societies: The first stage of democratization, when pressure is exerted on authoritarian governments, is often accompanied by violence; Economic growth and income: Economic growth may increase the risk of armed conflict in very poor economies, but decrease this risk in richer economies; Poverty and inequality: A simple link between each of these factors and conflict has been questioned as each context involves specific, complex variables; Resources: Whether environmental conflict becomes violent depends largely on the government's environmental policy. The 'war economy' debate suggests that war may be seen as an alternative way of generating profit, power and protection; and aid: The aid system can inadvertently exacerbate conflict, as it did in Rwanda, where some have gone further to suggest that donors may use aid allocation as a political instrument.¹²

While conflict has been defined variously by different scholars, some of the most comprehensive definitions include: conflict is a struggle over values and claims to scarce status, power and

⁸ Ibid, SDG 16.

⁹ 'Kenya Making Steady Progress towards Attainment of SDGs, President Kenyatta Says | The Presidency' <<https://www.president.go.ke/2019/09/25/kenya-making-steady-progress-towards-attainment-of-sdgs-president-kenyatta-says/>> accessed 1 May 2021; 'Lessons From the South: Towards Sustainable Development a Green Economy in Kenya | Youthpolicy.Org' <<https://www.youthpolicy.org/blog/sustainability/kenya-green-economy-transition/>> accessed 1 May 2021; James Macharia, 'Sustainable Development in Kenya' [2019] Horizons: Journal of International Relations and Sustainable Development 172; 'Sustainable Development in Kenya' (CIRSD) <<http://www.cirsd.org/en/horizons/horizons-winter-2019-issue-no-13/sustainable-development-in-kenya>> accessed 1 May 2021.

¹⁰ 'Conflict Analysis of Kenya' (GSDRC) <<https://gsdrc.org/publications/conflict-analysis-of-kenya/>> accessed 1 May 2021.

¹¹ Ibid.

¹² Thania Paffenholz, '19 Understanding the Conflict-Development Nexus and the Contribution of Development Cooperation to Peacebuilding1' [2008] Handbook of conflict analysis and resolution 272 <<https://gsdrc.org/document-library/understanding-the-conflict-development-nexus-and-the-contribution-of-development-cooperation-to-peacebuilding/>> accessed 3 May 2021.

resources in which the aims of the conflicting parties are to injure or eliminate their rivals; conflict is a particular relationship between states or rival factions within a state which implies subjective hostilities or tension manifested in subjective economic or military hostilities.¹³ While there are two broad categories of conflicts, that is, on the one hand, internal conflicts (or intra- states conflict) as one in which the governmental authorities of a state are opposed by groups within that state seeking to overthrow those authorities with force of arms or one in which armed violence occurs primarily within the borders of a single states, and on the other hand, international conflicts or interstate conflicts which is between two or more nations involving forces of more than one state¹⁴, Kenya has often struggled with internal conflicts mainly relating to ethnic clashes influenced by ethnic diversity and the provision of public goods, natural resources scarcity or abundance as well as political influence,¹⁵ with a few international ones.¹⁶

The conflicts exacerbating situation has also been attributed to ‘weak or non-existent structures and institutions for conflict prevention and response’.¹⁷ This has often dragged the country in achieving its development goals and sustainability in all spheres of life. It is against this background that this paper critically evaluates the peacebuilding efforts and conflict management initiatives in Kenya and makes recommendations on how the country can achieve its sustainable peace goals of “building peaceful, just and inclusive societies that provide equal access to justice and that are based on respect for human rights (including the right to development), on effective rule of law and good governance at all levels and on transparent, effective and accountable institutions”.¹⁸ The paper makes recommendations based on a conflict theory that advocates for non-violent and creative conflict resolution mechanisms.¹⁹

¹³ AJ Olaosebikan, ‘Conflicts in Africa: Meaning, Causes, Impact and Solution’ (2010) 4 *African Research Review* 549, 550-551.

¹⁴ *Ibid*, 551.

¹⁵ Kenya Human Rights Commission, *Maasive Internal Displacements in Kenya Due to Politically Instigated Ethnic Clashes* (Kenya Human Rights Commission 2007); see also Eric Thomas Ogwora, ‘Electoral Bribery and Corruption: A Deterrent and a Game Changer towards Democratic Process and Fair Election in Kenya’ (2017) 1 *Journal of Popular Education in Africa*; Caroline Elkins, ‘What’s Tearing Kenya Apart? History, for One Thing’ [2008] *Washington Post*; Beneah M Mutsotso, ‘The Boundary Shifters of North Western Kenya’; Dominic Burbidge and Nic Cheeseman, ‘Trust, Ethnicity and Integrity in East Africa: Experimental Evidence from Kenya and Tanzania’ (2017) 2 *Journal of Race, Ethnicity and Politics* 88.

¹⁶ ‘Kenya Denies Role in Somalia’s Internal Conflict | Voice of America - English’ <<https://www.voanews.com/africa/kenya-denies-role-somalias-internal-conflict>> accessed 8 May 2021; Deutsche Welle (www.dw.com), ‘Stability at Risk as Somalia and Kenya Spat over Sea Border | DW | 15.03.2021’ (DW.COM) <<https://www.dw.com/en/kenya-somalia-border-dispute-threatens-stability/a-56879109>> accessed 8 May 2021; ‘Summaries | Maritime Delimitation in the Indian Ocean (Somalia v. Kenya) | International Court of Justice’ <<https://www.icj-cij.org/en/case/161/summaries>> accessed 8 May 2021;

¹⁷ Lillian Mworira and J Ndiku, ‘Inter Ethnic Conflict in Kenya: A Case of Tharaka-Tigania Conflict, Causes, Effects and Intervention Strategies’, 163.

¹⁸ see para. 35, UN 2030 Agenda for Sustainable Development Goals.

¹⁹ Veronique Dudouet, ‘Nonviolent Resistance and Conflict Transformation in Power Asymmetries’ [2008] Berghof Center for Constructive Conflict Management; ‘Principles Of Conflict Resolution’ <<https://www.hawaii.edu/powerkills/TJP.CHAP10.HTM>> accessed 8 May 2021; ‘Theories of Conflict Resolution and Their Applicability: To Protracted Ethnic Conflicts on JSTOR’ <<https://www.jstor.org/stable/44481352?seq=1>> accessed 8 May 2021; Tukumbi Lumumba-Kasongo, ‘Contemporary Theories of Conflict and Their Social and Political Implications’ [2017] *Peace, Security and Post-Conflict Reconstruction in the Great lakes Region of Africa*. Oxford: African Book Collective 29.

2. Peacebuilding, Conflict Management and Development

Arguably, ‘development policies should be an integral part of the peacebuilding agenda’.²⁰ In relation to this, it has also been observed that ‘development has multiple dimensions from human rights to environmental sustainability, from economic growth to governance’.²¹ Also notable is the assertion that ‘the concept of security has gradually expanded from state security to human security and now includes a range of military as well as non-military threats that recognize no borders’.²² As already pointed out, the United Nations 2030 Agenda for Sustainable Development (SDGs)²³ provides in its Preamble that ‘the State Parties were “determined to foster peaceful, just and inclusive societies which are free from fear and violence” as “there can be no sustainable development without peace and no peace without sustainable development”’.²⁴

Some scholars have argued that ‘comparative studies show that development and peacebuilding must be integrated (not just linked) at an early stage – for example by including the political context in development policy and practice in conflict-affected fragile states and by addressing the structural causes of conflict’.²⁵ Notably, development and more so, sustainable development, is a multifaceted concept that requires to achieve certain milestones in various sectors, such as social, political, environmental and economic spheres.²⁶ It is for this reason that ‘the heads of state established five fields of critical importance, or the “five Ps” of the 2030 SDG Agenda, which are people, planet, prosperity, *peace* and partnerships (Emphasis added).’²⁷

Reduction in poverty and concrete improvements in basic education, gender equality, and basic health, all underpinned by improved governance and environmental sustainability are seen as important in building sustainably peaceful and inclusive societies.²⁸ It has been argued that development and peacebuilding must be integrated (not just linked) at an early stage – for example by including the political context in development policy and practice in conflict-affected fragile

²⁰ ‘Understanding the Conflict-Development Nexus and the Contribution of Development Cooperation to Peacebuilding’ (GSDRC) <<https://gsdrc.org/document-library/understanding-the-conflict-development-nexus-and-the-contribution-of-development-cooperation-to-peacebuilding/>> accessed 3 May 2021.

²¹ International Peace Academy, ‘The Security-Development Nexus: Research Findings and Policy Implications’ (International Peace Institute 2006), 3 <<https://www.jstor.org/stable/resrep09516>> accessed 3 May 2021.

²² Ibid, 3.

²³ UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1.

²⁴ Ibid, Preamble.

²⁵ Thania Paffenholz, ‘19 Understanding the Conflict-Development Nexus and the Contribution of Development Cooperation to Peacebuilding1’ [2008] Handbook of conflict analysis and resolution 272 <<https://gsdrc.org/document-library/understanding-the-conflict-development-nexus-and-the-contribution-of-development-cooperation-to-peacebuilding/>> accessed 3 May 2021.

²⁶ ‘Social Development for Sustainable Development | DISD’ <<https://www.un.org/development/desa/dspd/2030agenda-sdgs.html/>> accessed 8 May 2021; Rodrigo Goyannes Gusmão Caiado and others, ‘A Literature-Based Review on Potentials and Constraints in the Implementation of the Sustainable Development Goals’ (2018) 198 Journal of cleaner production 1276.

²⁷ Rodrigo Goyannes Gusmão Caiado and others, ‘A Literature-Based Review on Potentials and Constraints in the Implementation of the Sustainable Development Goals’ (2018) 198 Journal of cleaner production 1276, 4.

²⁸ Bernard Wood, ‘Development Dimensions of Conflict Prevention and Peace-Building’ [2001] UNDP. (June).

states and by addressing the structural causes of conflict.²⁹ In addition, it has been acknowledged that strengthening state institutions and enhancing their capacity to provide security and development based on principles of good governance are essential for sound conflict management.³⁰ In the same way, an effective, credible, and accountable security sector can provide a safe and secure environment in which to entrench other programming initiatives, all embedded in a predictable legal environment supported by culturally appropriate rule of law programs.³¹

3. Peacebuilding and Conflict Management in Africa: Continental Status

There have been frequent conflicts across the African continent, which are fueled by various factors, including but not limited to natural resources, fight for political control, poverty, negative ethnicity, religion, environmental causes, and external influence, among others.³² It is also worth noting that some of the frequent ethnic conflicts have been attributed to the former colonial masters where, colonial authorities drew up local and national territorial boundaries in Africa based on a rather simplistic understanding of the nature of ethnic communities, thus forcing into political entity people who lived apart, separating people who lived together undermining the natural process of state creation and nation building.³³ This has arguably been a major source of conflict among communities in some African countries, such as Nigeria.³⁴

The African Union observes that ‘in 2013, during the 50th Anniversary of the OAU/AU, African Heads of State and Government made a Solemn Declaration committing to tackle head-on the scourge of violent conflict in Africa and pronounced their firm determination to achieve the noble goal of a conflict-free Africa, thereby making peace a reality for African people, ridding the continent of wars, violent conflicts, human rights violations, humanitarian crises as well as preventing genocide’.³⁵ African Union’s *Agenda 2063*, Africa's blueprint and master plan for transforming Africa into the global powerhouse of the future³⁶, seeks to achieve a peaceful and

²⁹ Thania Paffenholz, ‘19 Understanding the Conflict–Development Nexus and the Contribution of Development Cooperation to Peacebuilding1’ [2008] Handbook of conflict analysis and resolution 272.

³⁰ Flavius Stan, ‘The Security-Development Nexus: Conflict, Peace and Security in the 21st Century’ (International Peace Institute, 14 October 2004) <<https://www.ipinst.org/2004/10/the-security-development-nexus-conflict-peace-and-security-in-the-21st-century>> accessed 8 May 2021.

³¹ Ibid.

³² ‘The Environmental Challenges in Sub Saharan Africa’

<<http://web.mit.edu/africantech/www/articles/EnvChall.htm>> accessed 8 May 2021; Macartan Humphreys, ‘Natural Resources, Conflict, and Conflict Resolution: Uncovering the Mechanisms’ (2005) 49 Journal of conflict resolution 508; AJ Olaosebikan, ‘Conflicts in Africa: Meaning, Causes, Impact and Solution’ (2010) 4 African Research Review 549; Huma Haider, Conflict analysis of North Eastern Kenya. K4D Emerging Issues Report36. Brighton, UK: Institute of Development Studies, 15 <https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/15570/EIR%2036_Conflict_analysis_of_Northern_Kenya.pdf?sequence=1&isAllowed=y> accessed 8 May 2021.

³³ Lillian Mworja and J Ndiku, ‘Inter Ethnic Conflict in Kenya: A Case of Tharaka-Tigania Conflict, Causes, Effects and Intervention Strategies’, 162.

³⁴ Ibid, 162-163; see also Simone Datzberger, ‘Civil Society as a Postcolonial Project: Challenging Normative Notions in Post-Conflict Sub-Saharan Africa’, Negotiating Normativity (Springer 2016).

³⁵ African Union, ‘Silencing the Guns: Creating Conducive Conditions for Africa’s Development’ (The East African) <<https://www.theeastafrican.co.ke/tea/sponsored/silencing-the-guns-creating-conducive-conditions-for-africa-s-development-1435754>> accessed 8 May 2021.

³⁶ ‘Agenda 2063: The Africa We Want. | African Union’ <<https://au.int/en/agenda2063/overview>> accessed 8 May 2021.

secure Africa.³⁷ It is noteworthy that the continent will not make any tangible progress in peacebuilding unless individual states commit to work towards achieving sustainable peace in their territories.

4. Peacebuilding and Conflict Management in Kenya: Towards Effective Peacebuilding and Conflict Management

4.1 Addressing Poverty, Ethnic and Social stratification

As already pointed, some of the conflicts in Kenya have been attributed to ethnic clashes as well as poverty and marginalisation of some parts of the country by successive governments.³⁸ It has been observed that ‘the politicized nature of ethnicity in Kenya, and the fact that both elections and land tenure are closely associated with ethnic identity, are highlighted as key factors explaining the prevalence of violent communal conflict’, with the four main drivers of conflict being: electoral politics, cattle raiding, local resources, and boundaries and local authority.³⁹ Some conflicts among neighbouring communities in Kenya such as the Turkana and Pokot who have had periodic conflicts have been attributed to scarcity and competition over pasture and water as well as border disputes, and often compounded by the minimum routine interaction and communication between the two communities.⁴⁰

Poverty is a major contributing factor to insecurity and instability especially in the rural areas where communities mainly rely on scarce land based natural resources which are affected by climate change and population growth, among others. It has been observed that ‘rural poverty can be caused by a combination of: living and farming in unfavourable conditions (climate, soils, access to markets, small land holdings); lack of resource access rights, legal protection or recognition; lack of ecosystem services (provisioning, regulating, cultural/spiritual, regenerative); lack of income opportunities (on- or off-farm) in local economies; and lack of investment in the (few) opportunities that exist for market-based ventures.⁴¹

Social stratification in any society may lead to bottled up anger and bitterness which is a recipe for violent and non-violent conflicts.⁴² Despite the constitutional guarantee on freedom from non-

³⁷ African Union, Agenda 2063, 2

< https://au.int/sites/default/files/documents/33126-doc-03_popular_version.pdf> accessed 8 May 2021.

³⁸ Friedrich Elbert Stiftung, ‘Regional Disparities and Marginalisation in Kenya’ [2012] Nairobi: Elite PrePress; Emma Elfversson, ‘Patterns and Drivers of Communal Conflict in Kenya’ in Steven Ratuva (ed), *The Palgrave Handbook of Ethnicity* (Springer 2019) <https://doi.org/10.1007/978-981-13-2898-5_50> accessed 8 May 2021.

³⁹ Emma Elfversson, ‘Patterns and Drivers of Communal Conflict in Kenya’ in Steven Ratuva (ed), *The Palgrave Handbook of Ethnicity* (Springer 2019) <https://doi.org/10.1007/978-981-13-2898-5_50> accessed 8 May 2021; Anne R Gakuria, ‘Natural Resource Based Conflict among Pastoralist Communities in Kenya’ (PhD Thesis, University of Nairobi 2013); Lillian Mworira and J Ndiku, ‘Inter Ethnic Conflict in Kenya: A Case of Tharaka-Tigania Conflict, Causes, Effects and Intervention Strategies’.

⁴⁰ Lillian Mworira and J Ndiku, ‘Inter Ethnic Conflict in Kenya: A Case of Tharaka-Tigania Conflict, Causes, Effects and Intervention Strategies’, 163.

⁴¹ Meine van Noordwijk, ‘Integrated Natural Resource Management as Pathway to Poverty Reduction: Innovating Practices, Institutions and Policies’ (2019) 172 *Agricultural Systems* 60, 61.

⁴² Ben Fine, *Theories of Social Capital: Researchers Behaving Badly* (Pluto press 2010); Philip Arestis, Aurelie Charles and Giuseppe Fontana, ‘Power, Intergroup Conflicts and Social Stratification in the United States: What Has the Global Crisis Taught Us?’ (2015) 73 *Review of Social Economy* 370.

discrimination⁴³, protection of the minority and marginalised groups including women through affirmative action,⁴⁴ it is a documented fact that inequalities are manifest in Kenya's economic, social and political arenas.⁴⁵ It has rightly been observed that 'a degree of equality in social, political, economic and cultural rights is essential for rebuilding the trust between the state and society and among social groups.'⁴⁶ It has also been suggested that there is a correlation between more inclusive and open models of negotiations and a higher likelihood that the outcome agreements will hold and prevent a relapse into conflict.⁴⁷

Under the Constitution of Kenya 2010, the devolved system of governance was meant to, *inter alia*, promote democratic and accountable exercise of power, and foster national unity by recognising diversity; give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions

⁴³ Article 27, Constitution of Kenya 2010.

⁴⁴ Article 11 recognizes culture as the foundation of the nation and obliges the state to promote all forms of cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage. The state is also obliged to recognize the role of indigenous technologies in the development of the nation.

Article 56. Minorities and marginalised groups

The State shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups-

- (a) participate and are represented in governance and other spheres of life;
- (b) are provided special opportunities in educational and economic fields;
- (c) are provided special opportunities for access to employment;
- (d) develop their cultural values, languages and practices; and
- (e) have reasonable access to water, health services and infrastructure.

100. Promotion of representation of marginalised groups

Parliament shall enact legislation to promote the representation in Parliament of—

- (a) women;
- (b) persons with disabilities;
- (c) youth;
- (d) ethnic and other minorities; and
- (e) marginalised communities.

177. Membership of county assembly

- (1) A county assembly consists of—
- (c) the number of members of marginalised groups, including persons with disabilities and the youth, prescribed by an Act of Parliament;

Article 204. Equalisation Fund

- (1) There is established an Equalisation Fund into which shall be paid one half per cent of all the revenue collected by the national government each year calculated on the basis of the most recent audited accounts of revenue received, as approved by the National Assembly.
- (2) The national government shall use the Equalisation Fund only to provide basic services including water, roads, health facilities and electricity to marginalised areas to the extent necessary to bring the quality of those services in those areas to the level generally enjoyed by the rest of the nation, so far as possible.

⁴⁵ Jeremiah Owiti, 'Political Drivers of Inequality in Kenya' (2014) 57 *Development* 547, 548.

⁴⁶ Hanny Cueva Beteta, Colleen Russo and Stephanie Ziebell, *Women's Participation in Peace Negotiations: Connections between Presence and Influence* (New York: UN Women 2010), 3.

⁴⁷ *Ibid*, 3.

affecting them; recognise the right of communities to manage their own affairs and to further their development; facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya, Nairobi; and enhance checks and balances and the separation of powers.⁴⁸ While devolution has achieved commendable steps towards attaining equality and equity within the rural Kenya⁴⁹, the poverty levels and social, political and economic inequalities in the country are still high.⁵⁰ Rampant corruption and misallocation of political and economic resources in Kenya and especially at the county levels of governance may be some of the main factors that may be contributing to the slow pace of poverty alleviation despite the proximity of the rural areas to the devolved governance.⁵¹

There is need for stakeholders to go back to the drawing board on why devolution was introduced by the drafters of the Constitution while also ensuring that the national values and principles of governance are applied and upheld at both levels of governance, and these include: a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; (c) good governance, integrity, transparency and accountability; and (d) sustainable development.⁵² Chapter six of the Constitution on leadership and integrity, Chapter Twelve on Public Finance, Values and principles of public service under Chapter Thirteen of the Constitution on Public service, *Leadership and Integrity Act, 2012*⁵³ should also be strictly enforced to ensure that there is real development at the grassroots in efforts to eradicate abject poverty. This will also potentially address the concerns on ethnic, nepotism and favouritism during employment of devolved governments' staff.⁵⁴

Some commentators have also explored the role of culture in causing ethnic conflicts especially within the North-Western region of Kenya, where cattle rustling between the Nilotic communities

⁴⁸ George Nyabuga, 'Devolved Power: A Critical Interrogation of the Place, Roles and Obligations of the Media at the Grassroots in Kenya' (2017) 42 *Africa Development / Afrique et Développement* 105, 107.

⁴⁹ Michelle D'Arcy, 'Kenya Illustrates Both the Promise as Well as the Pitfalls of Devolution' (The Conversation) <<http://theconversation.com/kenya-illustrates-both-the-promise-as-well-as-the-pitfalls-of-devolution-96729>> accessed 8 May 2021.

⁵⁰ Brendon J Cannon and Jacob Haji Ali, 'Devolution in Kenya Four Years On: A Review of Implementation and Effects in Mandera County' (2018) 8 *African Conflict and Peacebuilding Review* 1.

⁵¹ Brendon J Cannon and Jacob Haji Ali, 'Devolution in Kenya Four Years On: A Review of Implementation and Effects in Mandera County' (2018) 8 *African Conflict and Peacebuilding Review* 1; George Nyabuga, 'Devolved Power: A Critical Interrogation of the Place, Roles and Obligations of the Media at the Grassroots in Kenya' (2017) 42 *Africa Development / Afrique et Développement* 105.

⁵² Article 10, Constitution of Kenya 2010.

⁵³ Leadership and Integrity Act, No 19 of 2012, Laws of Kenya.

⁵⁴ Paul Olendo Ombanda, 'Nepotism and Job Performance in the Private and Public Organizations in Kenya' (2018) 8 *International Journal of Scientific and Research Publications* 474; see also Kefa Ruto Plimo, 'Assessing Determinants of Effective Human Resource Functions Devolution in County Government of West Pokot, Kenya' (PhD Thesis, COHRED-JKUAT 2017); Buagu Musazi Says, 'Ethnic Favouritism in Kenya and Uganda's Public Sector' (Africa at LSE, 1 August 2019)

<<https://blogs.lse.ac.uk/africaatlse/2019/08/01/has-ethnic-favouritism-in-public-sector-hiring-in-kenya-and-uganda-been-exaggerated/>> accessed 8 May 2021; Mr Njagilreri and Wario Guyo, 'The Influence of the County Public Service Board (CPSB), on the Devolved Human Resources Governance in Kenya' (2018) 8 *International Journal of Humanities and Social Science*; Hamun A Jubase, 'Challenges of Human Resource Management in Wajir Public Service Board' (PhD Thesis, University of Nairobi 2018).

is the main cause of conflicts.⁵⁵ For instance, it has been argued that ‘cattle rustling is a cultural aspect of the Pokot founded on their myth of origin and a belief that all cattle belong to them’.⁵⁶ While Article 11 of the Constitution of Kenya 2010 recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation, the practice of such cultural activities should not violate constitutional provisions especially on the Bill of Rights. Arguably, there is a need for the stakeholders in peacebuilding to address this notion through education as an empowerment tool for more people within the community (both formal and informal education) as well as creating opportunities for alternative sources of livelihoods for these communities to supplement their income and hence have a sense of security as far as their livelihoods are concerned.

Notably, Peace Education Programme at primary and secondary schools’ levels of study was introduced in 2008 whose overall goal was to promote peaceful co-existence among members of the school community hence contributing to peace and national cohesion in the country; and enhance the capacity of the education sector to promote peaceful coexistence through conflict sensitive policies and programming.⁵⁷ The specific objectives of the programme include:

To promote conflict sensitive policies and programmes within the education sector; to create awareness among learners on the causes of conflict and how to constructively resolve them in their daily lives; to prepare learners to become good citizens in their communities, nation and the world and to equip them with skills that promote peace and human dignity at all levels of interaction; to use the classroom as a springboard through which global values of positive inter-dependence, social justice and participation in decision-making are learned and practiced; and to foster positive images that lead to respect for diversity to enable young people learn to live peacefully in diverse communities in the world.⁵⁸ This may be a good step towards restoring and achieving lasting and sustainable peace and cohesion among the warring communities and the country in general.

4.2 Joint and Participatory Efforts in Peacebuilding and Conflict Management

Peacebuilding for achievement of sustainable peace as a prerequisite for realising the sustainable development is an imperative that requires the concerted efforts of all groups of people in society.⁵⁹ It is important for State organs to acknowledge that peacebuilding and conflict management is and should be a joint effort involving all stakeholders. As a such, their greatest

⁵⁵ David M Kimaiyo, ‘Women Involvement in Cattle Rustling between the Marakwet and the Pokot Communities of North-Western Kenya’ (Thesis, University of Nairobi 2016) <<http://erepository.uonbi.ac.ke/handle/11295/97405>> accessed 8 May 2021.

⁵⁶ Daniel Nganga, ‘Culture as the Cause of Conflict: A Case Study in West Pokot District, Kenya’ (2012) 6 *Journal of Peace and Justice* 51; see also Mutsotso, B. M., Kimaiyo, D., & Gaciuki, P., "The centrality of cattle in the social organization of the East Pokot pastoralists of North Western Kenya." *European Scientific Journal* 10, no. 8 (2014).

⁵⁷ Kangethe, Mary Wanjiru. "The peace education programme in Kenya." *The Global Campaign for Peace Education* 121 (2015).

⁵⁸ *Ibid.*

⁵⁹ Office for ECOSOC Support and Coordination United Nations, *Achieving Sustainable Development and Promoting Development Cooperation: Dialogues at the Economic and Social Council* (UN 2008); ‘5 – Quest for Sustainable Peace and Development under Militarized Security Approaches’ (2030 Spotlight) <<https://www.2030spotlight.org/en/book/1730/chapter/5-quest-sustainable-peace-and-development-under-militarized-security-approaches>> accessed 9 May 2021.

efforts should be towards empowering the other relevant stakeholders to build capacity for sustainability. Within most indigenous communities, elders still play a vital role in conflict management and should thus be involved in peacebuilding efforts and conflict management. For instance, within Somali people of North Eastern Kenya, it has been observed that ‘traditional elders’ roles include negotiating application of customary law –an important source of conflict management, conflict resolution and enforcement of peace agreements’.⁶⁰ However, elders can and have indeed been used to mobilize communities along ethnic lines and this can be a threat to sustainable peace.⁶¹ As such, it is suggested that the Government should work closely with the elected elders as well as religious leaders and positively empower them to ensure that they are only used as agents of peace and not divisive politics.

While it is widely acknowledged that violent conflict affects men and women in different ways, women and children are arguably the greatest victims in conflict situations.⁶² The disproportional burden borne by women is often attributed to the inequalities that exist between men and women in social, economic and political spheres.⁶³ Notably, Kenya ranks 109 out of 153 countries in the Global Gender Gap Report 2020, with a score of with significant inequalities between males and females in education attainment, health outcomes, representation in parliament, and labour force participation.⁶⁴ Arguably, these factors predispose women to greater losses and suffering during conflicts. They also make them vulnerable to recruitment to armed gangs such as Al-Shabaab which has been attacking Kenya frequently in the last several years. For instance, it has been observed that Al-Shabaab has been actively (and forcibly) recruiting women in Kenya, including through social media, religious indoctrination in schools, marriage, employment incentives, and abduction.⁶⁵ Just like men, their support for the terrorist group is informed by: ideology, grievances over socio-political and economic circumstances, among others, with economic pressures being an especially strong motive for women.⁶⁶

Considering that women have needs just like men which, if not met, may make women be used as tools off propagating violence and hatred, often to their detriment, women are regularly considered and should indeed be among the greatest stakeholders in peacebuilding and conflict management if sustainable peace is to be achieved.⁶⁷ Despite this, statistics from many countries around the globe show that the number of women in decision-making positions remains relatively

⁶⁰ Huma Haider, Conflict analysis of North Eastern Kenya. K4D Emerging Issues Report36. Brighton, UK: Institute of Development Studies, 16.

⁶¹ Ibid, 16.

⁶² ‘Gender in Fragile and Conflict-Affected Environments’ (GSDRC) <<https://gsdrc.org/topic-guides/gender/gender-in-fragile-and-conflict-affected-environments/>> accessed 8 May 2021.

⁶³ Iffat Idris, Gender, countering violent extremism and women, peace and security in Kenya. K4D Factsheet. Brighton, UK: Institute of Development Studies <https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/15832/K4D_Factsheet_Kenya_2.4.pdf?sequence=1&isAllowed=y> accessed 8 May 2021.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Clare Castillejo, ‘Building a State That Works for Women: Integrating Gender in to Post-Conflict State Building’ [2011] Documentos de Trabajo FRIDE 1; ‘Why Women Should Have a Greater Role in Peacebuilding’ (World Economic Forum) <<https://www.weforum.org/agenda/2015/05/why-women-should-have-a-greater-role-in-peacebuilding/>> accessed 8 May 2021.

small.⁶⁸ It has also been observed that the underrepresentation of women at the peace table is much more pronounced compared to other public decision-making roles, where though women are still underrepresented the gap has been steadily narrowing.⁶⁹ Ironically, this persists despite the fact that women have been closing the gap in professions and roles that typically dominate peace talks: politician, lawyer, diplomat and member of a party to armed conflict.⁷⁰

The United Nations Security Council *Resolution 1325* (2000)⁷¹ in its Preamble reaffirms the important role of women in the prevention and resolution of conflicts and in peace-building, and stresses the importance of their equal participation and full involvement in all efforts for the maintenance and promotion of peace and security, and the need to increase their role in decision-making with regard to conflict prevention and resolution.⁷² Kenya's *National Action Plan for the Implementation of United Nations Security Council Resolution 1325 and Related Resolutions*⁷³ (KNAP) was titled 'Kuhusisha Wanawake ni Kudumisha Amani' ('to involve women is to sustain peace') and acknowledges the changing nature of insecurity and incorporates a human security approach whose focus is on the protection of individual citizens. In addition, this broader paradigm of human security was meant to expand the meaning of security to include secure livelihoods, environmental protection, and access to resources.⁷⁴ The *Action Plan* also recognizes that security threats include social, economic, and environmental factors and women's vulnerability is exacerbated by unequal access to resources, services, and opportunities.⁷⁵ The Kenya National Action Plan was to be executed over a three-year period (2016–2018) and was meant to provide a comprehensive approach to the implementation of UNSCR 1325, and also enhance coordination among the relevant actors, raise awareness among stakeholders, and increase accountability among actors responsible for its implementation.⁷⁶ The KNAP also aimed to mainstream UNSCR 1325 into national conflict resolution, conflict prevention, peace promotion, and peacebuilding strategies contained in prior agreements, including the 2008 National Accord and its implementing agreements, the National Peace Policy, and relevant gender policies, among others.⁷⁷ KNAP I mainly focused on equal protection of individual citizens and endeavoured to better understand and *address the root causes of socio-economic and political inequalities around peace and security issues*, designed around four pillars:

⁶⁸ 'Why Women Should Have a Greater Role in Peacebuilding' (World Economic Forum) <<https://www.weforum.org/agenda/2015/05/why-women-should-have-a-greater-role-in-peacebuilding/>> accessed 8 May 2021; 'Facts and Figures: Women's Leadership and Political Participation | What We Do' (UN Women) <<https://www.unwomen.org/en/what-we-do/leadership-and-political-participation/facts-and-figures>> accessed 8 May 2021.

⁶⁹ Hanny Cueva Beteta, Colleen Russo and Stephanie Ziebell, *Women's Participation in Peace Negotiations: Connections between Presence and Influence* (New York: UN Women 2010), 3.

⁷⁰ *Ibid.*, 3.

⁷¹ UN Security Council, Security Council resolution 1325 (2000) [on women and peace and security], 31 October 2000, S/RES/1325 (2000).

⁷² *Ibid.*, Preamble.

⁷³ Republic of Kenya, *National Action Plan for the Implementation of United Nations Security Council Resolution 1325 and Related Resolutions, 2016–2018* <<http://peacewomen.org/sites/default/files/Kenya%20NAP-with-cover-final.pdf>> accessed 8 May 2021.

⁷⁴ *Ibid.*, 11–12.

⁷⁵ *Ibid.*, 12.

⁷⁶ *Ibid.*, 13.

⁷⁷ *Ibid.*, 14.

Participation and Promotion, Prevention, Protection, and Relief and Recovery (Emphasis added).⁷⁸

The second *Kenya National Action Plan for the Advancement of United Nations Security Council Resolution 1325 on Women, Peace and Security 2020–2024*⁷⁹ which was launched in May 2020 focuses on key objectives, priority actions, expected outcomes, and interventions/responsibilities of relevant actors and stakeholders and also provides clear indicators, monitoring and evaluation benchmarks, and projected targets. It is also based on the above 4 pillars.⁸⁰ The KNAP II is a commendable step towards enhancing empowerment and greater participation of women in development and in peace, security, and disaster management.

Women can participate in peace processes as: mediators or as members of mediation teams; delegates of the negotiating parties; all-female negotiating parties representing a women's agenda; signatories; representatives of women's civil society with an observer role; witnesses; in a parallel forum or movement; gender advisers to mediators, facilitators or delegates; or as members of technical committees, or a separate table or working group devoted to gender issues.⁸¹

It has been argued that while the full impact of women's participation on peace and security outcomes remains poorly understood, existing data shows how women's inclusion helps prevent conflict, create peace, and sustain security after war ends.⁸² Women's empowerment and gender equality are also associated with peace and stability in society.⁸³ Women's participation in peace talks is also associated with the following advantages: Women promote dialogue and build trust as conflict parties may see women as less threatening because they are typically acting outside of formal power structures and are not commonly assumed to be mobilizing fighting forces; Women bridge divides and mobilize coalitions; Women raise issues that are vital for peace; and women prioritize gender equality.⁸⁴

It is, therefore, important to ensure that women are empowered and included in peacebuilding and conflict management in Kenya⁸⁵, as a step towards building peaceful, cohesive and inclusive societies as part of the bigger sustainable development agenda.⁸⁶ The civil society as well as the

⁷⁸ Ibid.

⁷⁹ Republic of Kenya, *Kenya National Action Plan for the Advancement of United Nations Security Council Resolution 1325 on Women, Peace and Security 2020–2024* <<http://peacewomen.org/sites/default/files/KNAP-II-digital-30-Apr.pdf>> accessed 8 May 2021.

⁸⁰ Ibid, 14.

⁸¹ Hanny Cueva Beteta, Colleen Russo and Stephanie Ziebell, *Women's Participation in Peace Negotiations: Connections between Presence and Influence* (New York: UN Women 2010), 5-10.

⁸² Marie O'Reilly, 'Why Women?' [2015] *Inclusive Security* 1, 3 <<https://www.almendron.com/tribuna/wp-content/uploads/2019/02/why-women-report-2017.pdf>> accessed 8 May 2021.

⁸³ Ibid, 4.

⁸⁴ Ibid, 7-9.

⁸⁵ 'How Women in Kenya Mobilised for Peace after Surviving Violence - Kenya' (ReliefWeb) <<https://reliefweb.int/report/kenya/how-women-kenya-mobilised-peace-after-surviving-violence>> accessed 8 May 2021.

⁸⁶ Kariuki Muigua, 'Mainstreaming the Role of Women in Peacemaking and Environmental Management in Kenya' (2020) *Journal of cmsd* Volume 4(5) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3834364> accessed 8 May 2021; Katie Zanon, 'Kenyan Girls as Agents of Peace: Enhancing the Capacity of Future Women Peacebuilders' (2017) 12

private sector also have a role to play in peacebuilding and conflict management in Kenya. A past report focusing on the role of the private sector in peacebuilding within the context of Kenya's 2013 election cycle observed that 'the private sector undertook a sustained, systematic, and comprehensive peacebuilding campaign that almost certainly contributed to the peaceful nature of the electoral process', where the 'private-sector engagement influenced key political actors, spread messages of peace across the country, brought together disparate sectors of Kenyan society, prevented incitement, and ensured a return to normalcy as challenges to electoral results worked their way through the courts'.⁸⁷ The report also documented the fact that 'the motivations for business involvement included a desire to never go back to the dark days of 2007–08; a deep concern for the people with whom they did business; an acceptance of their mandate, especially in regard to providing uninterrupted service; the allure of, and pressure to exercise, the formidable power of a united business front; and, the fact that remaining aloof to developments that have an impact on their continued existence is bad for the sector'.⁸⁸

4.3 Addressing the Weak or Non-Existent Structures and Institutions for Peacebuilding, Conflict Prevention and Response

SDG 16 calls on State Parties to promote just, peaceful and inclusive societies. The associated relevant Targets require States to, *inter alia*: promote the rule of law at the national and international levels and ensure equal access to justice for all; by 2030, significantly reduce illicit financial and arms flows, strengthen the recovery and return of stolen assets and combat all forms of organized crime; develop effective, accountable and transparent institutions at all levels; ensure responsive, inclusive, participatory and representative decision-making at all levels; broaden and strengthen the participation of developing countries in the institutions of global governance; ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements; strengthen relevant national institutions, including through international cooperation, for building capacity at all levels, in particular in developing countries, to prevent violence and combat terrorism and crime; and promote and enforce non-discriminatory laws and policies for sustainable development.⁸⁹ SDG 16 is premised on the fact that 'sustainable development cannot be achieved without peace, stability, human rights and effective governance, based on the rule of law'.⁹⁰

It is worth pointing out that while some conflicts call for use of formal systems such as national courts to deal with them, especially where criminal activities are concerned, there is a need to explore and exploit non-violent and/or non-confrontational approaches, in the spirit of the 2010

Research in Comparative and International Education 110; Irene Cherotich Loyatum, 'The Role of Women in Peace Building in Conflicting Society: The Case of West Pokot County, Kenya, 2000-2018' (PhD Thesis, United States International University-Africa 2019); Jeanne Izabiliza, 'The Role of Women in Reconstruction: Experience of Rwanda' [2003] Source unknown.

⁸⁷ Victor Owuor and Scott Wisor, 'The Role of Kenya's Private Sector in Peacebuilding: The Case of the 2013 Election Cycle' [2014] Broomfield, CO: One Earth Future Foundation'ii<<https://www.oefresearch.org/sites/default/files/documents/publications/kenyaprivatesectoreport-digital.pdf>> accessed 3 May 2021.

⁸⁸ Ibid, 26.

⁸⁹ Martin, 'Peace, Justice and Strong Institutions' (United Nations Sustainable Development) <<https://www.un.org/sustainabledevelopment/peace-justice/>> accessed 8 May 2021.

⁹⁰ 'Sustainable Development Goals | United Nations Development Programme' <<https://www.undp.org/sustainable-development-goals#peace-justice-and-strong-institutions>> accessed 8 May 2021.

Constitution of Kenya which ‘encourages of communities to settle land disputes through recognised local community initiatives consistent with this Constitution’⁹¹, and requires that ‘in exercising judicial authority, the courts and tribunals should be guided by, *inter alia*, the principles of alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3)’.⁹²

The drafters of the *National Land Policy 2009*⁹³ as well as the 2010 Constitution of Kenya also acknowledged that to address some of the protracted conflicts that have afflicted some parts of Kenya, there was a need to address what is popularly referred to as present or historical land injustices. The National Land Commission⁹⁴ and the Environment and Land Court⁹⁵ are the two main institutions that are charged with addressing this problem. It is important that land issues are addressed in ways that fully address the underlying issues that have often resulted in conflicts. This is because secure rights to land are important to the development of economic activities, capital accumulation, food security, and a wide variety of other socioeconomic benefits, all important for assurance of peace.⁹⁶

Indeed, in recognition of the important role that these Alternative Dispute Resolution (ADR) and Traditional Dispute Resolution Mechanisms (TDRMs) can play in not only addressing internal conflicts but also doing so in ways that enhance sustainable peace rather than dividing people further as would be the case with adversarial court mechanisms⁹⁷, Kenya’s Judiciary has been making strides towards promoting and encouraging their use in the country, while working closely

⁹¹ See Articles 60(1)(g) & 67(2)(f), Constitution of Kenya 2010.

⁹² Article 159(2) (c) & (3), Constitution of Kenya 2010; 159 (3): Traditional dispute resolution mechanisms shall not be used in a way that—(a) contravenes the Bill of Rights;(b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or (c) is inconsistent with this Constitution or any written law; Nairobi Centre for International Arbitration, Alternative Dispute Resolution Policy, Draft October 2019< <https://www.ncia.or.ke/wp-content/uploads/2019/10/DRAFT-NATIONAL-ADR-POLICY.pdf>> accessed 8 May 2021; Mediation Bill, 2020, Kenya Gazette Supplement No. 92 (National Assembly Bills No. 17).

⁹³ Republic of Kenya, Sessional Paper No. 3 of 2009 on National Land Policy, August, 2009 (Government Printer, Nairobi, 2009), para. 3.6.2.

⁹⁴ Article 67 (2)(e), Constitution of Kenya 2010; see also National Land Commission Act, No. 5 of 2012, Laws of Kenya. Revised Edition 2016 [2015], sec. 15; see also National Land Commission Citation. (Investigation of Historical Land Injustices) Regulations, 2017, Legal Notice No. 258, Kenya Gazette Supplement No. 154, 6th October, 2017, Laws of Kenya.

⁹⁵ Environment and Land Court Act, No. 19 of 2011, Laws of Kenya. Notably, Regulation 29 of the NLC (Investigation of Historical Injustices) Regulations 2017 stipulates as follows:

“A person aggrieved by the decision of the Commission may, within twenty-eight days of the publication of the decisions, appeal to the Court.”

Regulation 3 of the NLC (Investigation of Historical Injustices) Regulations 2017 defines "Court" to mean the Environment and Land Court established under the Environment and Land Court Act, 2011 and includes other courts having jurisdiction on matters relating to land.

⁹⁶ Unruh, Jon. "Land rights and peacebuilding: challenges and responses for the international community." *International Journal of Peace Studies* (2010): 89-125, 89.

⁹⁷ Tanja Chopra, ‘Reconciling Society and the Judiciary in Northern Kenya’ [2008] Justice for the Poor and Legal Resources Foundation Trust Research Report.

with other stakeholders in the sector.⁹⁸ This is because, more often than not, the court process fails to address the underlying real issues that brought the conflict in the first place.⁹⁹ This has been attributed to the fact that since the official law is based on a different understanding of justice, it is rarely effective in creating stability and societies are, therefore, more interested in solving conflicts through informal means - although they may ask the police to trace their cattle and the local administration to help in negotiating peace.¹⁰⁰ Arguably, local leaders prefer to deal with the conflicts of their communities as they are convinced that they have better solutions than the state can provide.¹⁰¹ In *Geoffrey Muthinja Kabiru & 2 Others -vs- Samuel Munga Henry & 1756 Others (2015) eKLR*, the Court of Appeal stated as follows regarding use of ADR and TDRMs:-

"It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts... This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution."...

Use of ADR and TDRM mechanisms in addressing ethnic tensions and other intergroup conflicts in Kenya has a potential to bring the country closer to attaining sustainable peace as a step towards achieving SDG 16.¹⁰² Indeed, the Draft *Alternative Dispute Resolution Policy*, 2019 has acknowledged that 'ADR, through its reconciliatory and non-adversarial nature is a major contributor to peace and cohesion in the country.'¹⁰³ It also acknowledges that 'the rule of law is essential for democracy and economic growth and is the backbone of human rights, peace,

⁹⁸ 'List of MAC Accredited Mediators as at 1st January 2021 – The Judiciary of Kenya' <<https://www.judiciary.go.ke/download/list-of-mac-accredited-mediators-as-at-1st-january-2021/>> accessed 8 May 2021; see also 'State of the Judiciary and the Administration of Justice Annual Report 2019 – 2020 – The Judiciary of Kenya' <<https://www.judiciary.go.ke/download/state-of-the-judiciary-and-the-administration-of-justice-annual-report-2019-2020/>> accessed 8 May 2021; 'Inside the Judiciary Magazine, Edition No. 15 – The Judiciary of Kenya' <<https://www.judiciary.go.ke/download/inside-the-judiciary-magazine-edition-no-15/>> accessed 8 May 2021; 'Court Annexed Mediation Virtual Dispute Resolution – The Judiciary of Kenya' <<https://www.judiciary.go.ke/download/court-annexed-mediation-virtual-dispute-resolution/>> accessed 8 May 2021; 'Judiciary Strategic Plan 2019 -2023 – The Judiciary of Kenya' <<https://www.judiciary.go.ke/download/judiciary-strategic-plan-2019-2023/>> accessed 8 May 2021; Nairobi Centre for International Arbitration, *Alternative Dispute Resolution Policy*, Draft October 2019 <<https://www.ncia.or.ke/wp-content/uploads/2019/10/DRAFT-NATIONAL-ADR-POLICY.pdf>> accessed 8 May 2021; Mediation Bill, 2020, Kenya Gazette Supplement No. 92 (National Assembly Bills No. 17).

⁹⁹ Tanja Chopra, 'Reconciling Society and the Judiciary in Northern Kenya' [2008] Justice for the Poor and Legal Resources Foundation Trust Research Report, 21 <<http://documents1.worldbank.org/curated/en/590971468272735172/pdf/716920ESW0P1110ry0in0Northern0Kenya.pdf>> accessed 8 May 2021.

¹⁰⁰ Ibid, 21.

¹⁰¹ Ibid, 21.

¹⁰² K Muigua, 'Institutionalising Traditional Dispute Resolution Mechanisms and Other Community Justice Systems' [2017] Nairobi: Published online <<http://kmco.co.ke/wp-content/uploads/2018/08/Institutionalising-Traditional-Dispute-Resolution-Mechanisms-and-other-Community-Justice-Systems-25th-April-2017.pdf>> accessed 8 May 2021.

¹⁰³ Nairobi Centre for International Arbitration, *Alternative Dispute Resolution Policy*, Draft October 2019, 4.

security, and development'.¹⁰⁴ The importance of these mechanisms is also acknowledged in Kenya's *National Policy on Peace-building and Conflict Management, 2011*¹⁰⁵ which calls for capacity building through, *inter alia*, training various stakeholders in relevant areas such as alternative conflict resolution mechanisms.¹⁰⁶

It has been argued that where there have been harsh and violent conflicts, there is usually firstly the temporary management of the conflict; which typically involves negotiation, mediation and arbitration, and rests on leaders and elites, although it still requires support by the general population, while secondly, deeper, level involves reconciliation which requires change in the societal repertoire shared by society members.¹⁰⁷ This is because reconciliation involves the formation or restoration of genuine peaceful relationships between societies and that this requires extensive changes in the socio-psychological repertoire of group members in both societies.¹⁰⁸ In addition, reconciliation is associated with socio-psychological processes consisting of changes of motivations, goals, beliefs, attitudes and emotions by the majority of society members.¹⁰⁹ This is the kind of approach that is recommended for such conflicts as the one involving Pokot and Turkana communities, among others. It is, however, acknowledged this should be accompanied with poverty eradication projects by the State since poverty and limited sources of livelihood can aggravate competition for scarce natural resources thereby contributing to instability.¹¹⁰

The State's involvement in addressing natural resources scarcity through climate change mitigation measures as well as adopting a participatory approach to resource management can potentially help in alleviating poverty and consequently address the insecurities that these communities face as far as food security and access to resources are concerned.¹¹¹ County peace committees should be empowered through capacity building because, as some commentators have argued, County governments have better local knowledge and are likely to enjoy greater local legitimacy thus placing them at a better position to address conflicts and promote peace, in partnership with the National Government.¹¹² Based on the foregoing, it is thus important for the

¹⁰⁴ Ibid, 8.

¹⁰⁵ Republic of Kenya, Kenya: National Policy on Peace-building and Conflict Management, 2011, 11 December 2011 < <https://www.refworld.org/pdfid/5a7ad25f4.pdf> > accessed 8 May 2021.

¹⁰⁶ Ibid, see Chapter Five.

¹⁰⁷ Daniel Bar-Tal, 'Reconciliation as a Foundation of Culture of Peace', Handbook on building cultures of peace (Springer 2009), 363.

¹⁰⁸ Ibid, 365.

¹⁰⁹ Ibid, 365.

¹¹⁰ Noro Aina Andrimihaja, Matthias Cinyabuguma and Shanta Devarajan, 'Stop Conflict, Reduce Fragility and End Poverty: Doing Things Differently in Fragile and Conflict-Affected Situations'; Olsson, Lennart, Maggie Opondo, Petra Tschakert, Arun Agrawal, and Siri EH Eriksen. "Livelihoods and poverty." (2014); 'Poverty and Conflict' (GSDRC) <<https://gsdrc.org/professional-dev/poverty-and-conflict/>> accessed 8 May 2021; Jonathan Goodhand, 'Violent Conflict, Poverty and Chronic Poverty' [2001] Chronic Poverty Research Centre Working Paper.

¹¹¹ Meine van Noordwijk, 'Integrated Natural Resource Management as Pathway to Poverty Reduction: Innovating Practices, Institutions and Policies' (2019) 172 Agricultural Systems 60.

¹¹² Huma Haider, Conflict analysis of North Eastern Kenya. K4D Emerging Issues Report36. Brighton, UK: Institute of Development Studies <https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/15570/EIR%2036_Conflict_analysis_of_Northern_Kenya.pdf?sequence=1&isAllowed=y > accessed 8 May 2021.

State to continually promote and strengthen the use of local leadership and community peace groups in efforts to reach sustainable peace solutions in Kenya.¹¹³

5. Conclusion

As already acknowledged, peace and development are interlinked and one may not take place in the absence of the other. As Kenya strives towards achieving sustainable development agenda, this paper has argued that the stakeholders must first work towards building sustainable peace and enhancing conflict management capacity of the various relevant stakeholders in the peace sector. Unless the underlying factors that result in conflicts are fully addressed, the dream of sustainable peace will remain a mirage. Similarly, without peace, realisation of sustainable development goals in the country, alongside other development goals such as the Vision 2030 will arguably remain a pipe dream. Working Towards Effective Peacebuilding and Conflict Management in Kenya is a necessary step in the quest for Sustainable Development.

¹¹³ David Pottebaum and Christopher Lee, 'In Control of Their Future: Community-Led Reconciliation and Recovery', World Bank workshop "Moving out of Poverty in Conflict-Affected Areas", available at (2007); Ervin Staub, 'Reconciliation after Genocide, Mass Killing, or Intractable Conflict: Understanding the Roots of Violence, Psychological Recovery, and Steps toward a General Theory' (2006) 27 *Political psychology* 867; Michael Wessells, 'Community Reconciliation and Post-Conflict Reconstruction for Peace', Handbook on building cultures of peace (Springer 2009); Daniel Bar-Tal, 'Reconciliation as a Foundation of Culture of Peace', Handbook on building cultures of peace (Springer 2009); Nyambura Githaiga, 'When Institutionalisation Threatens Peacebuilding: The Case of Kenya's Infrastructure for Peace' (2020) 15 *Journal of Peacebuilding & Development* 316.

Delivering Clean and Affordable Energy for All

Abstract

Energy is considered to be an important component of social and economic needs of any society. Indeed, the integral role of energy is recognised under Sustainable Development Goal 7 of the United Nations 2030 Agenda for Sustainable Development Goals which seeks to 'ensure access to affordable, reliable, sustainable and modern energy for all'. The United Nations has observed that while 'energy is central to social and economic well-being, 1.1 billion people have no access to electricity, while 2.9 billion have to cook with polluting, inefficient fuels such as firewood'. This is despite the fact that Affordable and Clean Energy is seen as an important means towards achieving many of the SDGs – from poverty eradication via advancements in health, education, water supply, and industrialization to mitigating climate change'. Most of the people without access to affordable and clean energy are within the African continent. These people still rely on non-renewable sources of energy which are not only inefficient but also a danger to their health. This paper explores the ways through which the Government of Kenya can work with other stakeholders to ensure that there is a transition to cleaner and affordable energy sources for all its population, as a step towards achieving sustainable development agenda.

1. Introduction

It has been observed that energy and more precisely, access to energy—represents one of Africa's greatest obstacles to social and economic development.¹ Notably, the Continent is largely divided into three regions namely: North Africa, which is heavily dependent on oil and gas, South Africa, which depends on coal and the rest of Sub-Saharan Africa, which is largely reliant on biomass.² Kenya falls within the Sub-Saharan Africa which also means that most of its citizens especially within the rural regions rely mainly on biomass, (unprocessed wood, charcoal, agricultural residues and animal waste), with adverse effects on their health.³ Thus, while the UN Secretary-General Ban Ki-Moon launched the Sustainable Energy for All Initiative (SE4All) in 2011 where he also declared 2012 the year for sustainable energy for all⁴, this has largely remained a mirage especially for the African region.

The *Kenya Sustainable Energy for All (SE4All) Action Plan*, was launched by the Ministry of Energy and Petroleum as an Action Agenda (AA) with an energy sector-wide long-term vision spanning the period 2015 to 2030, which outlines how Kenya will achieve her SE4All goals of 100% universal access to modern energy services, increase the rate of energy efficiency and increase to 80% the share of renewable energy in her energy mix, by 2030.⁵ In addition, the

¹ Hafner M, Tagliapietra S and de Strasser L, 'The Challenge of Energy Access in Africa' in Manfred Hafner, Simone Tagliapietra and Lucia de Strasser (eds), *Energy in Africa: Challenges and Opportunities* (Springer International Publishing 2018) <https://doi.org/10.1007/978-3-319-92219-5_1> accessed 19 April 2021.

² Karekezi, S., Kithyoma, W., & Energy Initiative, "Renewable energy development." In workshop on African Energy Experts on Operationalizing the NEPAD Energy Initiative, June, pp. 2-4. 2003, 2.

³ See Christine W Njiru and Sammy C Letema, 'Energy Poverty and Its Implication on Standard of Living in Kirinyaga, Kenya' (2018) 2018 *Journal of Energy*.

⁴ Republic of Kenya, *Kenya Sustainable Energy for All (SE4All) Action Plan*, January 2016<https://www.seforall.org/sites/default/files/Kenya_AA_EN_Released.pdf> accessed 18 April 2021.

⁵ *Ibid.*

updated *Least cost power development plan 2017-2037* developed by the Ministry of Energy and Petroleum, which is an update of the 2015-2035 electricity Sector Master plan estimated peak demand for the period 2017-2037 ranges from 1,754MW to 6,638MW in the reference case scenario, 1,754MW to 9,790MW in the high case and between 1754MW in 2017 to 4,763MW in 2037 in the low case scenario.⁶ The energy sources considered in the system expansion plan for the different cases in the report included: Geothermal, nuclear, Wind, Solar, Import, Petrol-thermal plants, Hydropower, Coal and Natural gas.⁷ However, while Kenya has made significant steps towards increasing the power production, sustainability of some of these sources as well as affordability remains a challenge.⁸ The challenges facing Kenya's energy sector have been summarized as including: low electrification rate, reliance on imported fossil fuels, transmission inefficiencies, frequent power outages, high cost of rural electrification, demand for electricity outstripping generation capacity, and inability of the power utility agency to connect all customers who apply for connection to the national grid.⁹

It has been noted that the energy use of human societies has historically been marked by four broad trends: Rising consumption as societies industrialize, gain wealth and shift from traditional sources of energy (mostly biomass-based fuels such as wood, dung and charcoal) to commercial forms of energy (primarily fossil fuels); steady increases in both the power and efficiency of energy-producing and energy-using technologies; de-carbonization and diversification of fuels, especially for the production of electricity, throughout most of the 20th century; and a reduction in the quantities of conventional pollutants associated with energy use.¹⁰ Arguably, Kenya's energy sector is still struggling with problems that hinder the smooth transition through the stated trends, thus exposing its people to poverty and the potential adverse health effects.

This paper explores how Kenya can fast-track its efforts towards ensuring that it achieves sustainable and affordable energy for all its people in line with the United Nations 2030 Agenda for Sustainable Development Goals (SDGs)¹¹ Goal 7 which is based on this. The paper thus mainly focuses on addressing these challenges and offer solutions to promote the uptake, access and use of sustainable and affordable renewable energy for the Kenyan people in line with SDG Goal 7.

2. Place of Clean and Affordable Energy in Sustainable Development Agenda

Right to energy is so important that some authors have argued that 'food and energy are the two essential resources to support the modern and civilized society of the mankind'.¹²

⁶ Republic of Kenya, *Least cost power development plan 2017-2037*, p. xv < <http://gak.co.ke/wp-content/uploads/2019/02/Updated-Least-Cost-Power-Development-Plan-2017-2022-min.pdf>> accessed 18 April 2021.

⁷ *Ibid.*

⁸ See Samoita D and others, 'Barriers and Solutions for Increasing the Integration of Solar Photovoltaic in Kenya's Electricity Mix' (2020) 13 *Energies* 5502.

⁹ Christine W Njiru and Sammy C Letema, 'Energy Poverty and Its Implication on Standard of Living in Kirinyaga, Kenya' (2018) 2018 *Journal of Energy*, 2.

¹⁰ Dilip Ahuja and Marika Tatsutani, 'Sustainable energy for developing countries' [2009] S.A.P.I.E.N.S. Surveys and Perspectives Integrating Environment and Society <<http://journals.openedition.org/sapiens/823>> accessed 24 April 2021.

¹¹ UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

¹² Tomabeche K, 'Energy Resources in the Future' *Energies* 2010, 3, 686-695, 686.

The United Nations 2030 Agenda for Sustainable Development Goals (SDGs) Goal 7 seeks to ‘ensure access to affordable, reliable, sustainable and modern energy for all’. The associated targets that are meant to create action to ensure universal access to sustainable energy include: By 2030, ensure universal access to affordable, reliable and modern energy services; by 2030, increase substantially the share of renewable energy in the global energy mix; by 2030, double the global rate of improvement in energy efficiency; By 2030, enhance international cooperation to facilitate access to clean energy research and technology, including renewable energy, energy efficiency and advanced and cleaner fossil-fuel technology, and promote investment in energy infrastructure and clean energy technology; and by 2030, expand infrastructure and upgrade technology for supplying modern and sustainable energy services for all in developing countries, in particular least developed countries, small island developing States and landlocked developing countries, in accordance with their respective programmes of support.¹³ This goal was informed by the fact that ‘the world has experienced a rapid demand of energy sources, both fossil fuels and renewables’.¹⁴ In addition, ‘as the population continues to grow, so will the demand for cheap energy, and an economy reliant on fossil fuels is creating drastic changes to our climate’.¹⁵ Urbanization and ambitions of economic development will also demand more energy.¹⁶

The United Nations rightly points out that while ‘energy is central to social and economic well-being, 1.1 billion people have no access to electricity, while 2.9 billion have to cook with polluting, inefficient fuels such as firewood’.¹⁷ Some commentators have observed that ‘SDG 7 Affordable and Clean Energy ensures access to affordable, reliable, and sustainable energy and is crucial in achieving many of the SDGs – from poverty eradication via advancements in health, education, water supply, and industrialization to mitigating climate change’.¹⁸ Access to cleaner and affordable energy sources is thus an important part of the journey towards achieving the sustainable development goals.

3. Accessing Clean and Affordable Energy Needs for All: The Kenyan Experience

Most developing countries are struggling with growing population and it is expected that today’s world population will increase 1.26 times to reach 9.7 billion in 2050 with most of the world’s

¹³ ‘Goal 7: Affordable and Clean Energy’ (The Global Goals) <<https://www.globalgoals.org/7-affordable-and-clean-energy>> accessed 18 April 2021.

¹⁴ Franco IB, Power C and Whereat J, ‘SDG 7 Affordable and Clean Energy: EWisely: Exceptional Women in Sustainability Have Energy to Boost—Contribution of the Energy Sector to the Achievement of the SDGs’.

¹⁵ ‘Goal 7: Affordable and Clean Energy’ (UNDP) <<https://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-7-affordable-and-clean-energy.html>> accessed 18 April 2021.

¹⁶ Hafner M, Tagliapietra S and de Strasser L, ‘The Challenge of Energy Access in Africa’ in Manfred Hafner, Simone Tagliapietra and Lucia de Strasser (eds), *Energy in Africa: Challenges and Opportunities* (Springer International Publishing 2018) <https://doi.org/10.1007/978-3-319-92219-5_1> accessed 19 April 2021

¹⁷ Valencia M, ‘Sustainable Energy for All Shifts Gear to Speed Delivery of Affordable, Clean Energy’ (United Nations Sustainable Development) <<https://www.un.org/sustainabledevelopment/blog/2016/06/sustainable-energy-for-all-shifts-gear-to-speed-delivery-of-affordable-clean-energy/>> accessed 18 April 2021.

¹⁸ Franco IB, Power C and Whereat J, ‘SDG 7 Affordable and Clean Energy: EWisely: Exceptional Women in Sustainability Have Energy to Boost—Contribution of the Energy Sector to the Achievement of the SDGs’, 106.

population which include 90% of the population growth belonging to the developing countries.¹⁹ Kenya, just like many other developing countries in Africa, is dealing with the burden of a growing population, environmental pollution, poverty, corruption and legal and policy framework inadequacies, among others, which all affect the achievement of clean and sustainable energy for all.²⁰ In addition, cultural perceptions (including myths about the flavour of food cooked on traditional stoves and the relative safety and cost of clean alternatives) have also been identified as a significant barrier to wider uptake of clean cooking fuels.²¹

These challenges informed the drafting of the sustainable development goals and the related targets. As a result, the environment which is being increasingly polluted because of rapid industrialization and human work is critical in the sustainable development agenda where sustainable development mainly covers the use of renewable energy, energy security, energy pricing, energy policy, renewable energy applications and smart grid technologies.²² The World Health Organization in a 2018 Household Energy Assessment Rapid Tool (HEART) developed in Kenya highlights human health issues from non-renewable energy sources where it points out that ‘household air pollution (HAP) from inefficient fuel combustion is one of the most important global environmental health risks today’ especially in low- and middle income countries such as Kenya, where majority of the population still rely on solid fuels (wood, animal dung, charcoal, crop wastes and coal) burnt in inefficient, highly polluting stoves for cooking and heating.²³ Indeed, this trend is expected to go on for longer if the latest reports are anything to go by. It is reported that Kenyans are expected to pay higher for liquefied petroleum gas from 1st July 2021 following the reinstatement of value-added tax (VAT) on liquefied petroleum gas (LPG) through the Finance Act 2020, but the implementation of the charges was deferred to the second half of 2021 due to the Covid-19 crisis.²⁴ This is a retrogressive move by the Government from the earlier development where ‘Kenyan households had since June 2016 been enjoying low cooking gas prices after the Treasury scrapped the tax on LPG to cut costs and boost uptake among the poor who rely on dirty kerosene and charcoal for cooking’, a move that was in line with the country’s

¹⁹ Salvarli MS and Salvarli H, For Sustainable Development: Future Trends in Renewable Energy and Enabling Technologies (IntechOpen 2020) <<https://www.intechopen.com/books/renewable-energy-resources-challenges-and-applications/for-sustainable-development-future-trends-in-renewable-energy-and-enabling-technologies>> accessed 19 April 2021.

²⁰ Painuly JP, ‘Barriers to Renewable Energy Penetration; a Framework for Analysis’ (2001) 24 *Renewable energy* 73.

²¹ Ngeno G and others, ‘Opportunities for Transition to Clean Household Energy in Kenya: Application of the Household Energy Assessment Rapid Tool (HEART)’, *Opportunities for transition to clean household energy in Kenya: application of the household energy assessment rapid tool (HEART)* (2018), 1.

²² Salvarli MS and Salvarli H, For Sustainable Development: Future Trends in Renewable Energy and Enabling Technologies (IntechOpen 2020) <<https://www.intechopen.com/books/renewable-energy-resources-challenges-and-applications/for-sustainable-development-future-trends-in-renewable-energy-and-enabling-technologies>> accessed 19 April 2021.

²³ Ngeno G and others, ‘Opportunities for Transition to Clean Household Energy in Kenya: Application of the Household Energy Assessment Rapid Tool (HEART)’, *Opportunities for transition to clean household energy in Kenya: application of the household energy assessment rapid tool (HEART)* (2018), vi.

²⁴ April 23 2021 F, ‘Cooking Gas Prices to Rise Sh350 on New Tax’ (Business Daily) <<https://www.businessdailyafrica.com/bd/economy/cooking-gas-prices-rise-sh350-on-new-tax-3373296>> accessed 23 April 2021; Kerubo MJ and B, ‘Higher Gas Costs: What You’ll Pay to Refill Your Cylinders Beginning July’ (The Standard) <<https://www.standardmedia.co.ke/nairobi/article/2001410538/kenyans-to-pay-more-for-cooking-gas-beginning-july>> accessed 23 April 2021.

commitment to achievement of SDG Goal 7.²⁵ With affordability being a key access barrier to clean cooking fuels, such as liquefied petroleum gas (LPG), this move is likely to erode the gains made in transitioning the country to cleaner technologies.²⁶

It has been suggested that while many developing countries have been apparently trying to restructure their energy sectors it is difficult to realize innovations in the energy sector as they struggle with cost, market share and policy as the main barriers for the development of renewable energy.²⁷ This is especially important since the reserves of fossil fuels are naturally expected to come to an end.²⁸ Kenya's major sources of energy for the main economic production are oil, geothermal and hydro resources for electricity production where oil-based electricity generation is environmentally harmful, expensive and a burden to the national trade balance; the rivers for hydropower and their tributaries are found in arid and semi-arid areas with erratic rainfall leading to problems of supply security, and geothermal exploitation has cost and risk issues, amongst others.²⁹

The cost of electricity generation and supply is also affected by the overdependence on Hydroelectric Power (HEP) as the main source of renewable energy, which is weather dependent and the unpredictable weather, due to climate change has made power rationing a common phenomenon in a number of Sub-Saharan Africa countries during the dry seasons.³⁰ It has been observed that while 'Renewable Energy Technologies (RETs) provide attractive environmentally sound technology options for Africa's electricity industry, the success of RETs in the region has been limited by a combination of factors which include: poor institutional framework and infrastructure; inadequate RET planning policies; lack of co-ordination and linkage in the RET programme; pricing distortions which have placed renewable energy at a disadvantage; high initial capital costs; weak dissemination strategies; lack of skilled manpower; poor baseline information; and, weak maintenance service and infrastructure'.³¹

The challenges of energy cost and reliability in Kenya are made worse by the energy transmission and distribution virtual monopoly currently existing in Kenya.³² Kenya Electricity Generating

²⁵ June 11 2020 T, 'Kenyans to Pay Sh300 More for Cooking Gas' (Business Daily) <<https://www.businessdailyafrica.com/bd/economy/kenyans-to-pay-sh300-more-for-cooking-gas-2292630>> accessed 23 April 2021.

²⁶ Shupler M and others, 'Pay-as-You-Go Liquefied Petroleum Gas Supports Sustainable Clean Cooking in Kenyan Informal Urban Settlement during COVID-19 Lockdown' [2021] *Applied Energy* 116769.

²⁷ Salvarli MS and Salvarli H, For Sustainable Development: Future Trends in Renewable Energy and Enabling Technologies (IntechOpen 2020) <<https://www.intechopen.com/books/renewable-energy-resources-challenges-and-applications/for-sustainable-development-future-trends-in-renewable-energy-and-enabling-technologies>> accessed 19 April 2021.

²⁸ Ibid.

²⁹ Samoita D and others, 'Barriers and Solutions for Increasing the Integration of Solar Photovoltaic in Kenya's Electricity Mix' (2020) 13 *Energies* 5502, 1.

³⁰ ISSAfrica.org, 'Monopoly on Electricity Supply Contributes to Deforestation' (ISS Africa, 9 March 2010) <<https://issafrica.org/amp/iss-today/monopoly-on-electricity-supply-contributes-to-deforestation>> accessed 22 April 2021.

³¹ ³¹ Karekezi, S., Kithyoma, W., & Energy Initiative, "Renewable energy development." In workshop on African Energy Experts on Operationalizing the NEPAD Energy Initiative, June, pp. 2-4. 2003, 1.

³² Owiro, D., Poquillon, G., Njonjo, K. S., & Oduor, C., 'Situational Analysis of Energy Industry, Policy and Strategy for Kenya' [2015] Institute of Economic Affairs.

Company (KenGen), generates about 70% of Kenya's electricity.³³ On the same breadth, Kenya Power owns and operates most of the electricity transmission and distribution system in the country and sells electricity to over 8 million as at end of June 2020.³⁴ The Government of Kenya has a controlling stake at 50.1% of shareholding with private investors at 49.9%.³⁵ Lack of competition in the electricity generation and supply sector has been blamed for inefficiency and high costs of energy.³⁶

The *Energy Act, 2019*³⁷ was enacted to consolidate the laws relating to energy, to provide for National and County Government functions in relation to energy, to provide for the establishment, powers and functions of the energy sector entities; promotion of renewable energy; exploration, recovery and commercial utilization of geothermal energy; regulation of midstream and downstream petroleum and coal activities; regulation, production, supply and use of electricity and other energy forms; and for connected purposes.³⁸ While the citizenry was hoping that the enactment of this law would liberalize the energy market in Kenya and eliminate Kenya Power's monopoly in transmission and distribution of electricity in the country through licensing of other companies, the Government seemed to only affirm the same.³⁹ KenGen is among the companies that have been seeking to enter the retail market and sell electricity directly to consumers.⁴⁰ However, to the disappointment of many Kenyans, the Government declined to license other companies, as yet.⁴¹

In summary, therefore, Kenya's energy sector still suffers from consistent power outages especially during dry seasons, high electricity tariffs specially exacerbated by high poverty and employment rates, energy retail sector monopoly, and cultural issues and biases that affect uptake

³³ 'Who We Are' <<https://www.kengen.co.ke/index.php/our-company/who-we-are.html>> accessed 22 April 2021.

³⁴ 'Who We Are | Kplc.Co.Ke' <<https://www.kplc.co.ke/content/item/14/about-kenya-power>> accessed 22 April 2021.

³⁵ Ibid.

³⁶ ISSAfrica.org, 'Monopoly on Electricity Supply Contributes to Deforestation' (ISS Africa, 9 March 2010) <<https://issafrica.org/amp/iss-today/monopoly-on-electricity-supply-contributes-to-deforestation>> accessed 22 April 2021.

³⁷ Energy Act, No. 1 of 2019, Laws of Kenya.

³⁸ Ibid, Preamble.

³⁹ 'Now Government Reaffirms Kenya Power's Monopoly' (The East African) <<https://www.theeastafrican.co.ke/tea/business/now-government-reaffirms-kenya-power-s-monopoly-1408382>> accessed 22 April 2021.

⁴⁰ 'KenGen Moves to End Kenya Power's Monopoly by Selling Electricity Directly to Consumers' (Sun-Connect East Africa News, 26 November 2020) <<https://sun-connect-ea.org/kengen-moves-to-end-kenya-powers-monopoly-by-selling-electricity-directly-to-consumers/>> accessed 22 April 2021; Siele M, 'Kengen to Begin Direct Power Sales Ending KPLC Monopoly - Business Today Kenya' <<https://businesstoday.co.ke/kengen-to-begin-direct-power-sales-ending-kplc-monopoly/>> accessed 22 April 2021;

⁴¹ 'Now Government Reaffirms Kenya Power's Monopoly' (The East African) <<https://www.theeastafrican.co.ke/tea/business/now-government-reaffirms-kenya-power-s-monopoly-1408382>> accessed 22 April 2021.

of cleaner energy technologies, among others.⁴² Notably, as far as the use of clean energy is concerned, it is estimated that two-thirds of Kenya's energy currently comes from bioenergy.⁴³

In addition, as Kenya seeks to move from non-renewable energy sources to renewable energy sources as envisaged under the United Nations 2030 Agenda for Sustainable Development Goals, moving an economy which relies heavily on wood fuel and biomass as its largest energy source, to achieve sustainable energy use through the gradual increase in the use of renewable energy sources that are often expensive due to the technology deployed, in the face of oil and coal discoveries that could be more readily accessible in spite of its known effects on the environment is a great challenge.⁴⁴ This is mainly due to higher poverty levels in many households in developing countries, such as Kenya thus making it nearly impossible to afford the renewable and cleaner energy sources.⁴⁵ This is what is also mainly referred to as energy poverty, which the World Economic Forum in 2010 defined as 'the lack of access to sustainable modern energy services and products'.⁴⁶ Related to this definition is the observation that 'it is not only a matter of sustainability: energy poverty can be found in all conditions where there is a lack of adequate, *affordable*, reliable, quality, safe and environmentally sound energy services to support development.(emphasis added).⁴⁷ The connection between energy poverty and socio-economic development is that 'insufficient energy usually translates into the impossibility to develop agriculture and manufacturing, thus keeping the poorest countries trapped in a vicious circle: they cannot afford the energy that can drive them out of poverty'.⁴⁸ It is, therefore, possible to conclude that as the situation currently stands, majority of Kenyan population are suffering from energy poverty that needs to be addressed.

4. Delivering Clean and Affordable Energy for All: The Global Trends and the Lessons

While it has been argued that there is no "one size fits all" approach to successful clean household energy initiatives, some commentators have observed that a suite of options targeted to different sociocultural environments is likely to have wider acceptance.⁴⁹

4.1 Transition to Cleaner Energy Models

It has been observed that 'one of the biggest limitations to achieving the SDGs is linked to the geography: the population in need is mostly located in rural areas, where there is no grid-

⁴² Avila, N., Carvallo, J. P., Shaw, B., & Kammen, D. M., "The energy challenge in sub-Saharan Africa: A guide for advocates and policy makers." *Generating Energy for Sustainable and Equitable Development*, Part 1 (2017): 1-79.

⁴³ 'Kenya Energy Outlook – Analysis' (IEA) <<https://www.iea.org/articles/kenya-energy-outlook>> accessed 21 September 2020.

⁴⁴ Owiro, D., G. Poquillon, K. S. Njonjo, and C. Oduor. "Situational analysis of energy industry, policy and strategy for Kenya." Institute of Economic Affairs (2015), p. 7.

⁴⁵ Karekezi, S., Kithyoma, W., & Energy Initiative, "Renewable energy development." In workshop on African Energy Experts on Operationalizing the NEPAD Energy Initiative, June, pp. 2-4. 2003; Christine W Njiru and Sammy C Letema, 'Energy Poverty and Its Implication on Standard of Living in Kirinyaga, Kenya' (2018) 2018 Journal of Energy.

⁴⁶ 'Energy Poverty' (Habitat For Humanity) <<https://www.habitat.org/emea/about/what-we-do/residential-energy-efficiency-households/energy-poverty>> accessed 23 April 2021.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ngeno G and others, 'Opportunities for Transition to Clean Household Energy in Kenya: Application of the Household Energy Assessment Rapid Tool (HEART)', Opportunities for transition to clean household energy in Kenya: application of the household energy assessment rapid tool (HEART) (2018), 1.

electricity, and its expansion is often financially and logistically infeasible'.⁵⁰ In light of this, it has been suggested that 'off-grid power has been instrumental in addressing this problem, notably stand-alone solutions, such as solar panels, hydro mini-grids, biogas mini-grids, among others, all of which comes from renewable sources, and which makes it the perfect alternative to obtain a reliable and sustainable energy service, at a considerably low price'.⁵¹ As such, 'off-grid renewables give developing countries the opportunity to erase the electricity gap without passing through a phase of fossil fuels that would be hard to sustain in terms of cost, natural resources, and global environment'.⁵²

There has been calls for 'pro-poor access to electricity measures that will ensure that there is access that provides poor people with energy services enabling poverty reduction, which services include, for example: light, information and communications technologies, mechanical power for productive uses, and refrigeration or water pumping, as their poverty impacts may consist of income generation, female empowerment, or better education and health'.⁵³ This can be achieved in what is referred to as 'energy transition', defined as the global energy sector's shift from fossil-based systems of energy production and consumption — including oil, natural gas and coal — to renewable energy sources like wind and solar, as well as lithium-ion batteries.⁵⁴

Notably, Sweden was listed in 2020 Energy Transition Index (ETI) ranking for the third consecutive year as the country most ready to transition to clean energy, followed by Switzerland and Finland.⁵⁵ The ETI analyzes each country's readiness to adopt clean energy using three criteria: energy access and security; environmental sustainability; and economic development and growth.⁵⁶ Conspicuously, the top ten countries in the ranking were from the developed world, showing their readiness to transition.⁵⁷ Most African countries were ranked lowly or not considered at all, as demonstrated in the map below.

⁵⁰ 'Energy Poverty' (Habitat For Humanity) <<https://www.habitat.org/emea/about/what-we-do/residential-energy-efficiency-households/energy-poverty>> accessed 23 April 2021.

⁵¹ Ibid.

⁵² Ibid.

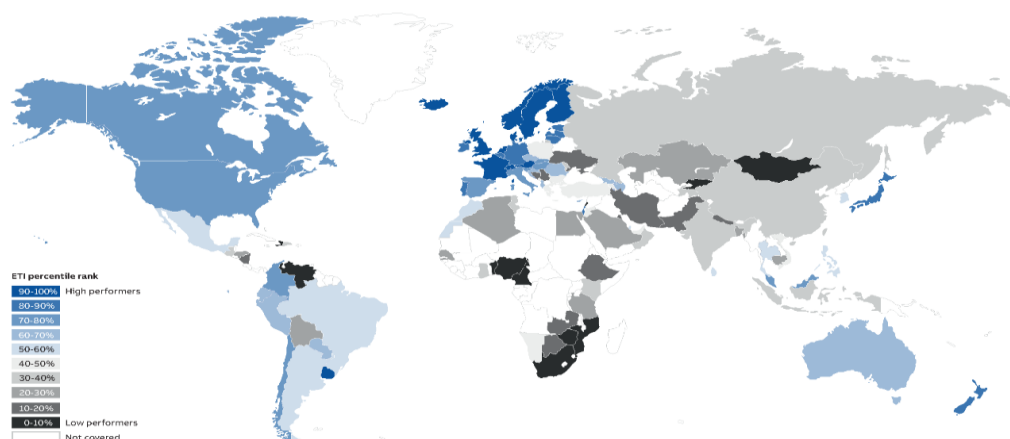
⁵³ Pueyo, A., Pro-poor access to green electricity in Kenya. No. IDS Evidence Report; 135. IDS, 2015, 3.

⁵⁴ 'Global Energy Transition Index, 2020 and Its Highlights – Civilsdaily' <<https://www.civilsdaily.com/news/global-energy-transition-index-2020-and-its-highlights/>> accessed 19 April 2021.

⁵⁵ 'These Countries Are Leading the Transition to Sustainable Energy' (EcoWatch, 14 May 2020) <<https://www.ecowatch.com/sustainable-energy-countries-2645997492.html>> accessed 19 April 2021.

⁵⁶ Ibid.

⁵⁷ Ibid.



Source: World Economic Forum, *Fostering Effective Energy Transition 2020*⁵⁸

Currently, Sweden boasts of about 54% energy that comes from renewable energy sources, with the country having attained the government’s 2020 target of 50 per cent in 2012, while the power sector targeting to get to 100 per cent renewable electricity production by 2040.⁵⁹ Notably, Sweden’s high share of renewable energy is attributed to hydropower (water) and bioenergy which are the top renewable sources in Sweden – hydropower mostly for electricity production and bioenergy for heating.⁶⁰ Sweden’s success has been attributed to, inter alia, its market-based approach to energy policy, which is focused on creating well-functioning and competitive energy markets.⁶¹ The Swedish energy policy agreement of 10 June 2016 set the path for the current success, based on reconciling: ecological sustainability; competitiveness; and security of supply.⁶² In addition, the Policy was meant to create a basis for ensuring that ‘Sweden achieves a robust electricity system with high reliability, low environmental impact and with access to electricity at competitive prices and also create long-term perspectives and clarity for market participants and bring new jobs and investments to Sweden.⁶³ Kenya can learn a lot from the Swedish experience and it is high time that the stakeholders embark on the necessary steps to move the country towards consistent transition towards cleaner renewable energy sources for all.

⁵⁸ ‘Energy Transition Index 2020’ <<https://new.abb.com/news/detail/67960/energy-transition-index-2020>> accessed 19 April 2021.

⁵⁹ ‘Energy Use in Sweden’ (sweden.se, 23 December 2015) <<https://sweden.se/nature/energy-use-in-sweden/>> accessed 19 April 2021.

⁶⁰ Ibid.

⁶¹ International Energy Agency, *Energy Policies of IEA Countries: Sweden 2019 Review* <https://www.connaissancedesenergies.org/sites/default/files/pdf-actualites/Energy_Policies_of_IEA_Countries_Sweden_2019_Review.pdf> accessed 19 April 2021.

⁶² Swedish Nuclear Society and Analysgruppen, *The Swedish energy policy agreement of 10 June 2016 – unofficial English translation* <https://balticbrilliantproject.eu/onewebmedia/Swedish_political_energy_agreement_2016.pdf> accessed 19 April 2021.

⁶³ Ibid.

4.2 Investing in Science, Technology and Innovation for Provision of Sustainable Energy for All

It has been agreed by many commentators that in order to meet the ever escalating energy needs of the growing population, energy solutions should be supported by utilizing renewable energy sources even though currently, the contribution of renewable energy to the world primary energy is not high to meet the primary energy and electricity supplies.⁶⁴ It has been observed that ‘energy markets across the world are in the middle of a revolution, triggered by the pursuit of decarbonization and fueled by innovation’.⁶⁵

Some commentators have pointed out that ‘new enabling technologies related to renewable energies will help to reduce environmental costs, and thus the energy systems will be operated as both securely and economically without environmental problems, making new renewable energy markets a necessity in both the wholesale and retail markets.’⁶⁶ Kenya has been making some commendable steps towards its transition to cleaner energy technologies since June 2016 when the Ministry of Finance zero-rated LPG gas to boost uptake by the poorer households. Notably, this has also seen the introduction of Pay-As-You-Go (PAYG) LPG smart meter technology in Kenya, enabling more Kenyans to embrace and enjoy the use of LPG for cooking and lighting as a cleaner and cheaper energy option.⁶⁷ Notably, across the world digitisation has driven and enabled the transformation of energy systems with many new companies entering the market with innovative products based on digital solutions, and companies from the information and communication sector and other companies from outside the industry increasingly driving the change.⁶⁸

There is also a need for continued investment in fuel efficient cook stoves improvements in developing countries as part of efforts to reduce indoor pollution and improve cooking efficiency.⁶⁹ This calls for a greater role of the Government and private sector to encourage use of energy efficient stoves and other related innovations.⁷⁰

⁶⁴ Salvarli MS and Salvarli H, For Sustainable Development: Future Trends in Renewable Energy and Enabling Technologies (IntechOpen 2020) <<https://www.intechopen.com/books/renewable-energy-resources-challenges-and-applications/for-sustainable-development-future-trends-in-renewable-energy-and-enabling-technologies>> accessed 19 April 2021.

⁶⁵ Woodhouse S and Bradbury S, ‘Chapter 2 - Innovation, Disruption, and the Survival of the Fittest’ in Fereidoon P Sioshansi (ed), Innovation and Disruption at the Grid’s Edge (Academic Press 2017) <<https://www.sciencedirect.com/science/article/pii/B9780128117583000024>> accessed 22 April 2021.

⁶⁶ Salvarli MS and Salvarli H, For Sustainable Development: Future Trends in Renewable Energy and Enabling Technologies (IntechOpen 2020) <<https://www.intechopen.com/books/renewable-energy-resources-challenges-and-applications/for-sustainable-development-future-trends-in-renewable-energy-and-enabling-technologies>> accessed 19 April 2021.

⁶⁷ Shupler M and others, ‘Pay-as-You-Go Liquefied Petroleum Gas Supports Sustainable Clean Cooking in Kenyan Informal Urban Settlement during COVID-19 Lockdown’ [2021] Applied Energy 116769.

⁶⁸ Johannes Giehl and others, ‘Survey and Classification of Business Models for the Energy Transformation’ (2020) 13 Energies 2981, 12.

⁶⁹ Manibog, Fernando R. "Improved cooking stoves in developing countries: problems and opportunities." Annual Review of Energy 9, no. 1 (1984): 199-227.

⁷⁰ ‘The Livelihoods Carbon Fund Doubles Its Investment in an Energy Efficiency Project to Reach 600,000 People in Kenya – Livelihoods Funds’ <<https://livelihoods.eu/the-livelihoods-carbon-fund-doubles-its-investment-in-an-energy-efficiency-project-to-reach-600000-people-in-kenya/>> accessed 24 April 2021; Lucy Stevens and others, ‘Market Mapping for Improved Cookstoves: Barriers and Opportunities in East Africa’ (2020) 30 Development in Practice 37; ‘Improved Cookstoves, Kenya | Natural Capital Partners’

Decarbonisation, decentralisation and digitalisation have been flaunted as part of the future of the global energy sector.⁷¹ Decarbonisation is defined as the reduction of carbon dioxide emissions through the use of low carbon power sources, achieving a lower output of greenhouse gasses into the atmosphere.⁷² Notably, decarbonisation involves increasing the prominence of low-carbon power generation, and a corresponding reduction in the use of fossil fuels which means increased use of renewable energy sources like wind power, solar power, and biomass.⁷³ Decarbonising the power sector is used to mean reducing its carbon intensity: that is, reducing the emissions per unit of electricity generated (often given in grams of carbon dioxide per kilowatt-hour).⁷⁴

It is important to point out that the Paris Agreement was created to hold nations accountable in their efforts to decrease carbon emissions, with the central goal of ensuring that temperatures do not rise 2 degrees Celsius above pre-industrial level.⁷⁵ It has been observed that the growth of renewable sources of power, such as wind turbines, solar panels and coal-to-biomass upgrades as well as other innovations, such as using batteries and allowing homes to generate and share their own power, can also lead to higher rates of decarbonisation.⁷⁶

Arguably, new digital tools can promote sustainability, including satellites to verify greenhouse gas emissions and technologies to track air pollution at the neighbourhood level.⁷⁷ The digitalization of the power sector is associated with greater transparency into operations, which greatly increases efficiency and reliability while decreasing costs and consequently; consumers will not only see the benefits of digitalization through lower monthly utility bills but also reduced outages and faster response times.⁷⁸

It has been observed that ‘the digitalisation of the power sector has already begun, with block chain and smart meters becoming commonplace as well as there being a possibility of virtual power plants replacing traditional ones, interlinking small scale solar and wind with base load to create a reliable power system.’⁷⁹

<https://www.naturalcapitalpartners.com/projects/project/kenya-improved-cookstoves>> accessed 24 April 2021.

⁷¹ ‘Decarbonisation, Decentralisation and Digitalisation: The Big Drivers at PowerGen 2017’ <<https://www.power-technology.com/features/featuredecarbonisation-decentralisation-and-digitalisation-the-big-drivers-at-powergen-2017-5856615/>> accessed 23 April 2021.

⁷² ‘What Is Decarbonisation?’ <<https://www.twi-global.com/technical-knowledge/faqs/what-is-decarbonisation.aspx>> accessed 24 April 2021.

⁷³ Ibid.

⁷⁴ ‘What Is “Decarbonisation” of the Power Sector? Why Do We Need to Decarbonise the Power Sector in the UK?’ (Grantham Research Institute on climate change and the environment) <<https://www.lse.ac.uk/granthaminstitute/explainers/what-is-decarbonisation-of-the-power-sector-why-do-we-need-to-decarbonise-the-power-sector-in-the-uk/>> accessed 24 April 2021.

⁷⁵ ‘What Is Decarbonisation?’ (Drax, 21 August 2020) <<https://www.drax.com/sustainability/what-is-decarbonisation/>> accessed 24 April 2021.

⁷⁶ Ibid.

⁷⁷ ESI Africa, ‘How Digitalisation Is Reshaping the Energy Sector’ (ESI-Africa.com, 30 July 2020) <<https://www.esi-africa.com/smart-grids/how-digitalisation-is-reshaping-the-energy-sector/>> accessed 23 April 2021.

⁷⁸ ‘What Could Digitalization Achieve in the Power Sector?’ (Alliance to Save Energy, 10 December 2020) <<https://www.ase.org/blog/what-could-digitalization-achieve-power-sector>> accessed 23 April 2021.

⁷⁹ ‘Decarbonisation, Decentralisation and Digitalisation: The Big Drivers at PowerGen 2017’ <<https://www.power-technology.com/features/featuredecarbonisation-decentralisation-and-digitalisation-the-big-drivers-at-powergen-2017-5856615/>> accessed 23 April 2021.

The International Energy Agency recommends some policy actions that governments can take to prepare for digitalisation which include: Build digital expertise within their staff; ensure appropriate access to timely, robust, and verifiable data; build flexibility into policies to accommodate new technologies and developments; experiment, including through ‘learning by doing’ pilot projects; participate in broader inter-agency discussions on digitalisation; focus on the broader, overall system benefits; monitor the energy impacts of digitalisation on overall energy demand; incorporate digital resilience by design into research, development and product manufacturing; provide a level playing field to allow a variety of companies to compete and serve consumers better; and learn from others, including both positive case studies along with more cautionary tales.⁸⁰

4.3 Newer Business Models in Energy Sector: Opening Up the Energy Sector

It has been argued that ‘the ongoing energy system transformation across the world, and especially in developed world, and the growth of renewable energies are changing the structure and value creation of the energy industry with adopted business model classes showing that traditional business models are affected by the decarbonisation, decentralisation and digitisation of the energy system in all segments and economic sectors.’⁸¹ There is a need for the stakeholders in the energy sector to adopt business models that ensure that consumers get value, one that encourages consumers to pay for value, and one that converts those payments to profits.⁸² Liberalization and energy system transformation can arguably significantly increase the pace of change and have impact on the business model landscape substantially.⁸³

In many countries around the world, especially in the developed world, there has been a trend of liberalization, unbundling and deregulation of the energy sector in order to improve access to energy.⁸⁴ The liberalization of the energy market is defined to mean the opening of the electricity and gas market to free competition where existing monopolies are broken and the market is opened to more participants.⁸⁵

Liberalization in regard to the energy markets and specifically electricity and gas mainly refers to “the opening up of an industry to more competition, often involving the relaxing of government restrictions to break up existing monopolies and open the market to more participants.”⁸⁶ Liberalization has been characterized as involving the introduction of competition (via structural changes such as the removal of subsidies, vertical unbundling of integrated utilities to facilitate

⁸⁰ ESI Africa, ‘How Digitalisation Is Reshaping the Energy Sector’ (ESI-Africa.com, 30 July 2020) <<https://www.esi-africa.com/smart-grids/how-digitalisation-is-reshaping-the-energy-sector/>> accessed 23 April 2021.

⁸¹ Johannes Giehl and others, ‘Survey and Classification of Business Models for the Energy Transformation’ (2020) 13 *Energies* 2981, 12.

⁸² Fuentes-Bracamontes R, ‘Is Unbundling Electricity Services the Way Forward for the Power Sector?’ (2016) 9 *The Electricity Journal* 16.

⁸³ Giehl J and others, ‘Survey and Classification of Business Models for the Energy Transformation’ (2020) 13 *Energies* 2981.

⁸⁴ Fuentes-Bracamontes R, ‘Is Unbundling Electricity Services the Way Forward for the Power Sector?’ (2016) 29 *The Electricity Journal* 16.

⁸⁵ ‘Liberalization & Unbundling of Energy Markets | Definition’ (25 March 2020) <<https://www.next-kraftwerke.com/knowledge/liberalization-energy-markets>> accessed 22 April 2021.

⁸⁶ ‘GRIN - Liberalisation of Energy Markets. Effects on Gas and Electricity Generation, Distribution and Supply’ <<https://www.grin.com/document/323337>> accessed 23 April 2021.

non-discriminatory access to monopoly networks and horizontal unbundling of incumbents to create viable competitors) and the establishment of independent energy sector regulators.⁸⁷ Expressed differently, in electricity and downstream gas supply, liberalization has often involved privatization (and/or the introduction of new private entrants) and structural reform of national industries to create competitive wholesale and retail markets with regulated non-discriminatory third party access to monopoly transmission and distribution networks.⁸⁸

Where liberalization has been achieved such as the European Union energy markets, it was done to benefit consumers through; raising employment levels, increasing business efficiency and increasing a country's potential economic development and GDP growth.⁸⁹ Thus, “opening up these markets to competition allows consumers to benefit from lower prices and new services...more efficient and consumer-friendly than before” and consumers benefit because a breaking up of a monopoly and introducing competition will help give consumers savings in price but also choice of what service they demand.⁹⁰ It has also been argued that ‘potential economic development and GDP growth is likely to occur as shown by the benefits to consumers, employment and efficiency because of increased employment which will cause more people to spend disposable income; an increase in companies also increases employment but also the reduction in market prices will result in consumers having more disposable income to be spent on other goods and services, and this will lead to economic development in other industries and businesses and is likely to increase GDP.’⁹¹ It has also been observed that ‘the introduction of competition in downstream energy sectors, such as electricity and gas supply, facilitates competition in upstream gas and coal production sectors; while the general increase in energy trading facilitates the introduction of emissions markets’.⁹²

Notably, while Kenya may have attained some milestone as far as unbundling (encouraging private generators of power, and separating generation from distribution) is concerned, the same cannot be said about liberalization (which is visibly missing from the Vision 2030). Notably, the electricity sector is unbundled and generation by independent power producers is permitted by law and is regulated, where as at 2018, it was estimated that the private sector produces 28% of Kenya’s centralised electricity supply.⁹³ This was enabled through Feed-in tariffs (FITs) Regulations which were introduced in 2008 and revised in 2010 and 2012 to enable independent power producers to sell electricity to KPLC at a fixed price for a fixed term of 20 years.⁹⁴ Despite the commendable considerable success of this development, there has been challenges in uptake of this generated power. For instance, it is estimated that Kenya's Lake Turkana wind farm and

⁸⁷ Michael G Pollitt, ‘The Role of Policy in Energy Transitions: Lessons from the Energy Liberalisation Era’ (2012) 50 Energy policy 128.

⁸⁸ Michael G Pollitt, ‘The Role of Policy in Energy Transitions: Lessons from the Energy Liberalisation Era’ (2012) 50 Energy policy 128, 3.

⁸⁹ ‘GRIN - Liberalisation of Energy Markets. Effects on Gas and Electricity Generation, Distribution and Supply’ <<https://www.grin.com/document/323337>> accessed 23 April 2021.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Michael G Pollitt, ‘The Role of Policy in Energy Transitions: Lessons from the Energy Liberalisation Era’ (2012) 50 Energy policy 128, pp. 2-3.

⁹³ Kees Mokveld & Steven von Eije, Final Energy report Kenya, Commissioned by the Netherlands Enterprise Agency 2018, 13 < <https://www.rvo.nl/sites/default/files/2019/01/Final-Energy-report-Kenya.pdf>> accessed 19 April 2021.

⁹⁴ Ibid, 13.

its 365 turbines make for a generating capacity of more than 300MW, creating one of the most productive projects anywhere in the world.⁹⁵ Wind power has become a key contributor to the national grid to the extent that where there is interruption in its production, consumers have ended paying more for electricity in the country.⁹⁶

Notably, the Lake Turkana Wind Power (LTWP) has been allocated a maximum production quota of 210MW, against an installed capacity of 310MW.⁹⁷ While independent power producers have made considerable efforts to produce enough power to run the country, there have been problems with uptake of the same by the Kenya Power and Lighting Company Plc (KPLC). For instance, in the recent times and partly due to the Corona Virus (Covid-19) pandemic, there have been reports that measures to contain the pandemic have led to reduced demand for power especially among the commercial consumers who account for over 65% of the power use in the country.⁹⁸ Reports also indicate that KPLC has prioritized the uptake of geothermal at 39.5 per cent, hydro at 33.9 per cent, wind at 14 per cent, diesel at 9.7 per cent with other sources like solar, imports from Uganda and co-generation accounting for about three per cent.⁹⁹

This has thus left some of the producers with excess power.¹⁰⁰ This shows that Kenya's main consumers of electricity are commercial businesses and when these run into difficulties, the independent power producers are left stranded.¹⁰¹ This happens while there are still reports that there are homes in Kenya still not connected to the grid despite the Government's best efforts to do so.¹⁰² Thus, even as the Government looks for ways to produce cleaner power, there is also a need to address the disconnect between production and distribution of the power possibly through liberalization of the energy sector.¹⁰³ While this has been attributed to the Covid-19 pandemic that afflicted almost the whole world in 2020, it raises a concern as to whether the power producers'

⁹⁵ 'What's Driving Wind Power in Kenya and What Challenges Lie in Wait?' <<https://www.nsenergybusiness.com/features/wind-power-kenya-challenges/>> accessed 24 September 2020.

⁹⁶ 'Consumers Pay the Price as Covid Electricity Cuts Hit Turkana Project - The East African' <<https://www.theeastafrican.co.ke/tea/business/consumers-pay-the-price-as-covid-electricity-cuts-hit-turkana-project-1939124>> accessed 19 April 2021.

⁹⁷ 'Consumers Pay the Price as Covid Electricity Cuts Hit Turkana Project - The East African' <<https://www.theeastafrican.co.ke/tea/business/consumers-pay-the-price-as-covid-electricity-cuts-hit-turkana-project-1939124>> accessed 1 October 2020.

⁹⁸ 'Consumers Pay the Price as Covid Electricity Cuts Hit Turkana Project - The East African' Monday September 14 2020 <<https://www.theeastafrican.co.ke/tea/business/consumers-pay-the-price-as-covid-electricity-cuts-hit-turkana-project-1939124>> accessed 1 October 2020.

⁹⁹ 'Consumers Pay the Price as Covid Electricity Cuts Hit Turkana Project - The East African' Monday September 14 2020 <<https://www.theeastafrican.co.ke/tea/business/consumers-pay-the-price-as-covid-electricity-cuts-hit-turkana-project-1939124>> accessed 1 October 2020.

¹⁰⁰ Ibid.

¹⁰¹ "The Seven Major Threats to Kenya's Power Sector." Energy For Growth, <https://www.energyforgrowth.org/memo/the-seven-major-threats-to-kenyas-power-sector/>. Accessed 24 Apr. 2021; Avila, Nkiruka, Juan Pablo Carvallo, Brittany Shaw, and Daniel M. Kammen. "The energy challenge in sub-Saharan Africa: A guide for advocates and policy makers." *Generating Energy for Sustainable and Equitable Development, Part 1* (2017): 1-79.

¹⁰² Kenya Energy Situation - Energypedia.Info. https://energypedia.info/wiki/Kenya_Energy_Situation. Accessed 24 Apr. 2021.

¹⁰³ 'Liberalization & Unbundling of Energy Markets | Definition' (25 March 2020) <<https://www.nextkraftwerke.com/knowledge/liberalization-energy-markets>> accessed 22 April 2021.

major customers are only the commercial users.¹⁰⁴ This is because, it has already been pointed out that there are households in Kenya that still mainly rely on kerosene and biomass (firewood and charcoal) as their main source of energy for their inability to afford electricity.¹⁰⁵ Thus, even as we vouch for increased transition to renewable energy by way of increased production, this scenario points out the fact that there is more than availability of the renewable energy: the same must not only be made available but must also be made affordable to the local ‘mwananchi’ (citizen). Affordability of energy is key.

While the Energy Ministry had expressed optimism of introducing net metering for customer-sites generation (dependent on the enactment of the energy bill), establish regulations for mini-grids, and had started exploring the idea of local-currency-denominated tariffs in a bid to encourage local commercial banks to participate in energy projects,¹⁰⁶ this was however not achieved after the enactment of the Energy Act, 2019¹⁰⁷. Liberalization of the sector would make all of these easier to actualize, for the benefit of consumers.

Arguably, the current unbundling structure has not achieved a lot for the Kenyan people as the high cost and unreliability of electricity supply in the country are still major issues, as these are greatly affected by state monopoly mainly through Kenya Power, a vertically integrated company.¹⁰⁸ Liberalization would ensure that for all forms of energy - gas, electricity, coal and oil - industrial and domestic consumers would be free to choose their supplier.¹⁰⁹ Kenya needs to borrow a leaf from some of the most successful countries in this sector such as Sweden and Singapore, among others.

In order to improve energy security and affordability, Singapore began to deregulate its electricity market since 2003, with the creation of the National Electricity Market of Singapore (NEMS) allowing for bid-ask offers to be made for the dispatch of electricity supply on the wholesale side and subsequently, the retail market liberalized in tranches, with 80% of electricity consumers currently already given an option to select their electricity retailers since late 2014.¹¹⁰ As result, as at 2018, it was reported that ‘supply competition and the retail liberalization efforts had possibly led to a combinatorial decrease in wholesale electricity prices by up to 9.11%, accounting for the influence of oil prices and volatility components’.¹¹¹ The country has also attracted

¹⁰⁴ The Seven Major Threats to Kenya’s Power Sector.” Energy For Growth, <https://www.energyforgrowth.org/memo/the-seven-major-threats-to-kenyas-power-sector/>. Accessed 24 Apr. 2021.

¹⁰⁵ Kenya Energy Situation - Energypedia.Info. https://energypedia.info/wiki/Kenya_Energy_Situation. Accessed 24 Apr. 2021.

¹⁰⁶ Kees Mokveld & Steven von Eije, Final Energy report Kenya, Commissioned by the Netherlands Enterprise Agency 2018, 13.

¹⁰⁷ Act No. 1 of 2019, Laws of Kenya.

¹⁰⁸ Tarver, Evan. “Horizontal vs. Vertical Integration: What’s the Difference?” Investopedia, <https://www.investopedia.com/ask/answers/051315/what-difference-between-horizontal-integration-and-vertical-integration.asp>. Accessed 24 Apr. 2021.

¹⁰⁹ World Trade Organization, “The Social Effects of Energy Liberalisation: The UK Experience,” Launching a Common European Energy Market, Lisbon 5/6 June 2000, 2 < https://www.wto.org/english/tratop_e/serv_e/symp_mar02_uk_social_effects_energy_lib_e.pdf> accessed 19 April 2021.

¹¹⁰ Loi TSA and Jindal G, ‘Electricity Market Deregulation in Singapore – Initial Assessment of Wholesale Prices’ (2019) 127 Energy Policy 1.

¹¹¹ Ibid.

investors in the sector making it more competitive for the retail consumer as far as choice of energy supplier is concerned.¹¹² Notably, 14 electricity providers participated in the pilot phase, including units of infrastructure companies.¹¹³

Kenya should follow in the footsteps of Singapore and other countries that have liberalized their energy markets in order to address the gap between generation, transmission and distribution of energy and particularly electricity and consequently ensure that all people in the country have access to cleaner, affordable energy.

4.4 Enhancing the Role of Private Sector in Renewable Energy Sector

Notably, *Energy Act, 2019* provides for the establishment of the Rural Electrification and Renewable Energy Corporation which is charged with, *inter alia*, 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.¹¹⁴ The Nuclear Power and Energy Agency is also mandated to, *inter alia*, put in place mechanisms to attract private sector funding in research and human resource development for matters relating to energy.¹¹⁵

With introduction of market liberalization in Kenya's energy sector, a robust carbon credit trading system in Kenya could achieve the twin goals of raising funds and climate change mitigation in the energy sector.¹¹⁶ According to the International Finance Corporation (IFC), the estimated total investment potential for the climate-smart needs of Côte d'Ivoire, Kenya, Nigeria, and South Africa is \$783 billion by 2030.¹¹⁷ Sixteen percent of this potential is for renewable energy generation (\$123 billion), while well over half (\$499 billion) is for the transportation sector.¹¹⁸ Regarding clean energy access in Sub-Saharan Africa, it is estimated that 600 million people in the region have no access to basic electricity services, and this number will increase with a projected 2.3 percent annual population growth, with only seven Sub-Saharan countries presently having electricity-access rates exceeding 50 percent; the rest have an average grid access rate of

¹¹² 'Singapore Electricity Market Deregulation Attracts DBS, StarHub' (Nikkei Asia) <<https://asia.nikkei.com/Business/Markets/Nikkei-Markets/Singapore-electricity-market-deregulation-attracts-DBS-StarHub>> accessed 19 April 2021.

¹¹³ Ibid.

¹¹⁴ Sec. 44(1) (q), Energy Act, No. 1 of 2019, Laws of Kenya.

¹¹⁵ Sec. 55(2) (k), Energy Act, No. 1 of 2019

¹¹⁶ 'Kenians Earn First Ever Carbon Credits From Sustainable Farming' (World Bank) <<https://www.worldbank.org/en/news/press-release/2014/01/21/kenyans-earn-first-ever-carbon-credits-from-sustainable-farming>> accessed 23 April 2021; Yiting Wang and Catherine Corson, 'The Making of a "charismatic" Carbon Credit: Clean Cookstoves and "Uncooperative" Women in Western Kenya' (2014) 0 Environment and Planning A 0; Kioko Nzuki Mwanja, 'Carbon Trading In Kenya: A Critical Review'; Kanyinke Sena, 'Carbon Credit Schemes and Indigenous Peoples in Kenya: A Commentary' (2015) 32 Ariz. J. Int'l & Comp. L. 257.

¹¹⁷ International Finance Corporation, Climate Investment Opportunities in Emerging Markets: An IFC Analysis, 2016, 60.< https://www.ifc.org/wps/wcm/connect/59260145-ec2e-40de-97e6-3aa78b82b3c9/3503-IFC-Climate_Investment_Opportunity-Report-Dec-FINAL.pdf?MOD=AJPERES&CVID=IBLd6Xq> accessed 19 April 2021.

¹¹⁸ International Finance Corporation, Climate Investment Opportunities in Emerging Markets: An IFC Analysis, 2016, 60.< https://www.ifc.org/wps/wcm/connect/59260145-ec2e-40de-97e6-3aa78b82b3c9/3503-IFC-Climate_Investment_Opportunity-Report-Dec-FINAL.pdf?MOD=AJPERES&CVID=IBLd6Xq> accessed 19 April 2021.

just 20 percent.¹¹⁹ In addition, the annual investment in the Sub-Saharan African power system is currently estimated at around \$8 billion per year, or 0.5 percent of GDP while electricity demand in Africa is projected to triple by 2030, representing huge potential for investment in renewable energy.¹²⁰ It is also estimated that Africa's power sector requires investments of \$70 billion per year, on average, between now and 2030, which can be split into about \$45 billion per year for generation capacity and \$25 billion for transmission and distribution, creating a huge opportunity for investments.¹²¹ Kenya would greatly benefit from this opportunity considering that it requires huge investments in the energy sector, especially in the area of renewables considering that Kenya's development blueprint, Vision 2030 which seeks to create "a globally competitive and prosperous country with a high quality of life by 2030" and it aims to transform Kenya into "a newly-industrialising, middle income country providing a high quality of life to all its citizens in a clean and secure environment".¹²²

Notably, one of the foundations for Kenya Vision 2030 upon which the economic, social and political pillars of Kenya Vision 2030 will be anchored on include energy where the 'the Government of Kenya committed to continued institutional reforms in the energy sector, including a strong regulatory framework, encouraging private generators of power, and separating generation from distribution, with new sources of energy will be found through exploitation of geothermal power, coal, renewable energy sources, and connecting Kenya to energy-surplus countries in the region.'¹²³

There is a need for the Government of Kenya to recognise and reach out to the private sector through creating a conducive legal and policy environment for investments in the country's energy sector in order to enable it achieve its objectives in the energy sector for achievement of clean and affordable energy for its people.¹²⁴ This is because, as it has been suggested that 'that effective policies and institutions are the best way to enable developing countries, and the private sector operating in those countries, to attract private finance to drive sustained growth'.¹²⁵ Arguably, 'the private sector is critical to economic growth and poverty reduction, where sustainable and inclusive private sector-led growth can contribute to reducing poverty'.¹²⁶ In addition, 'partnerships between donors, partner governments and the private sector are being used to achieve private sector development objectives which enables governments to access private sector ideas, innovations and business models in search of solutions to intractable development problems'.¹²⁷

¹¹⁹ Ibid, 61.

¹²⁰ Ibid, 61.

¹²¹ Ibid, 61.

¹²² Government of the Republic of Kenya, Kenya Vision 2030: A Globally Competitive and Prosperous Kenya (Government Printer Nairobi 2007).

¹²³ Ibid.

¹²⁴ Tewes-Grادل, Christina, Anna Peters, Karin Vohla, and L. Lütjens-Schilling. "Inclusive Business Policies: How Governments can Engage Companies in Meeting Development Goals." Endeava UG, Berlin (2013).

¹²⁵ Tess ewton Cain, 'The Role of the Private Sector in Promoting Economic Growth and Reducing Poverty in the Indo-Pacific Region', 1.

¹²⁶ Ibid, 1.

¹²⁷ Ibid, 2.

4.5 Promoting Energy Efficiency in Kenya

While availability and affordability of energy is an important step towards attaining energy security for all, there is also a need to put equal emphasis on enhancing energy efficiency in the country.¹²⁸ Arguably, energy-efficiency or ‘demand-side management’ programs can provide a number of benefits in developing countries, including lower costs to customers, a fewer electrical supply problems, greater system reliability and a more moderate growth in demand.¹²⁹ Energy efficiency can be achieved through use of more energy efficient gadgets and appliances as well as employing everyday power saving practices especially in households.¹³⁰

4.6 Addressing Barriers in Renewable Energy Uptake in Kenya

Renewable energy technologies (RETs) have been defined as energy-providing technologies that utilize energy sources in ways that do not deplete the Earth’s natural resources and are as environmentally benign as possible.¹³¹ Some of the earliest barriers to embracing renewable energy technologies have been identified as cost-effectiveness, technical barriers, and market barriers such as inconsistent pricing structures, institutional, political and regulatory barriers, and social and environmental barriers where some may be specific to a technology, while others may be specific to a country or a region.¹³²

Some of the barriers that are relevant to Kenya and ought to be taken up include: highly controlled energy sector where governmental monopoly of energy sector restricts private sector entry; monopoly of energy supplier and/ or distributor, electricity generation, transmission and distribution; controlled and lack of private sector investment.¹³³ There is also the problem of lack of involvement of stakeholders in decision leading to clash of interests where stakeholders’ consultation culture is missing, stakeholders are dispersed, there is difficulty in communication, and there is fear of opposition.¹³⁴ Related to this and relevant to Kenya is the observation that there is also renewable energy technologies competing with conventional energy, leading to them being treated as a threat to utility dominance, threat to utility profit, powerful lobbies against renewable energy technologies, threat of transfer of control over energy, powerful lobbies for conventional energy and decoupling of investor–consumer interests.¹³⁵ It has been documented that while the government of Kenya has a history of welcoming private investment in the energy sector, the nature of the political system presents challenges –not least over corruption and access

¹²⁸ Patterson, Murray G. "What is energy efficiency?: Concepts, indicators and methodological issues." *Energy policy* 24, no. 5 (1996): 377-390.

¹²⁹ Dilip Ahuja and Marika Tatsutani, ‘Sustainable energy for developing countries’ [2009] S.A.P.I.EN.S. *Surveys and Perspectives Integrating Environment and Society* <<http://journals.openedition.org/sapiens/823>> accessed 24 April 2021.

¹³⁰ Attendant, An Automated, et al. *How You Can Help Reduce Greenhouse Gas Emissions at Home - Point Reyes National Seashore* (U.S. National Park Service). https://www.nps.gov/pore/learn/nature/climatechange_action_home.htm. Accessed 24 Apr. 2021.

¹³¹ Jim Watson, Oliver Johnson and Dong Wu, ‘Renewable Energy Technologies for Rural Development’ [2010] UNCTAD *Current Studies on Science, Technology and Innovation*.

¹³² Painuly JP, ‘Barriers to Renewable Energy Penetration; a Framework for Analysis’ (2001) 24 *Renewable energy* 73, 75.

¹³³ *Ibid.*, 83.

¹³⁴ *Ibid.*, 83.

¹³⁵ *Ibid.*, 83.

to land thus making investments carry higher risks for large, on-grid projects than they are for off-grid and micro-grid investments.¹³⁶

While Kenya has made some impressive steps towards investing in renewable energy technologies such as wind power and geothermal, and which has seen electricity tariffs reduce during certain periods,¹³⁷ the reduction in prices has not been consistent.¹³⁸ There is a need for the country to continually invest in renewable sources of energy to boost reliability and hopefully reduce the cost of electricity due to reduction in production costs.¹³⁹ The legal, policy, institutional and technical barriers should be addressed to tap into the benefits of using renewable energy sources.¹⁴⁰ There is also a need for digitalization, liberalization, civic education and deregulation of energy sector, among others in order to address the above mentioned challenges.¹⁴¹

5. Conclusion

The United Nations Development Programme (UNDP) has rightly pointed out that ‘investing in solar, wind and thermal power, improving energy productivity, and ensuring energy for all is vital if we are to achieve SDG 7 by 2030’. In addition, ‘expanding infrastructure and upgrading technology to provide clean and more efficient energy in all countries will encourage growth and help the environment’.¹⁴²

It has also been observed that ‘policy and market design are vital to steering digitally enhanced energy systems onto an efficient, secure, accessible and sustainable path’.¹⁴³ It is time for the

¹³⁶ Gordon E, ‘The Politics of Renewable Energy in East Africa’ (2018), 15<<https://www.oxfordenergy.org/wpcms/wp-content/uploads/2018/08/The-politics-of-renewable-energy-in-East-Africa-EL-29.pdf>> accessed 19 April 2021.

¹³⁷ ‘KENYA: 8% Reduction in Electricity Rates Thanks to Renewable Energies’ (Afrik 21, 30 July 2018) <<https://www.afrik21.africa/en/kenya-8-reduction-in-electricity-rates-thanks-to-renewable-energies/>> accessed 22 April 2021; October 23 2020 F, ‘Uhuru Tariff Cut Dims Kenya Power Revenue by Sh4.8bn’ (Business Daily) <<https://www.businessdailyafrica.com/bd/economy/uhuru-tariff-dims-kenya-power-revenue-by-sh4-8bn-2719632>> accessed 22 April 2021; <https://www.the-star.co.ke/authors/gilbertkoech>. “Kenya Keen to Prioritise Clean, Renewable Energy.” The Star, <https://www.the-star.co.ke/sasa/technology/2020-04-24-kenya-keen-to-prioritise-clean-renewable-energy/>. Accessed 24 Apr. 2021; Mactilda Mbenywe, “Uhuru addresses world forum, commits to mitigate climate change”, Saturday Standard, 24 April 2021. < <https://www.standardmedia.co.ke/kenya/article/2001410702/uhuru-commits-to-renewable-energy>> 24 April 2021.

¹³⁸ November 05 2020 T, ‘Regulator Agrees to Kenya Power 20pc Electricity Bill Increase’ (Business Daily) <<https://www.businessdailyafrica.com/bd/economy/regulator-kenya-power-20pc-electricity-bill-hike-2731164>> accessed 22 April 2021; Theuri P, ‘Rising Electricity Bills Push Manufacturers to the Wall’ (The Standard) <<https://www.standardmedia.co.ke/business/business-news/article/2001385332/rising-electricity-bills-push-manufacturers-to-the-wall>> accessed 22 April 2021;

¹³⁹ June 15, and 2018 Lora Shinn. “Renewable Energy: The Clean Facts.” NRDC, <https://www.nrdc.org/stories/renewable-energy-clean-facts>. Accessed 24 Apr. 2021.

¹⁴⁰ Barriers to Renewable Energy Technologies | Union of Concerned Scientists. <https://ucsusa.org/resources/barriers-renewable-energy-technologies>. Accessed 24 Apr. 2021.

¹⁴¹ “The General Framework for Liberalization and Regulation of Public Utilities in Countries of Ex-Yugoslavia.” Florence School of Regulation, 21 Mar. 2017, <https://fsr.eui.eu/niq19-1-liberalization-ex-yugoslavia/>.

¹⁴² ‘Goal 7: Affordable and Clean Energy’ (UNDP) <<https://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-7-affordable-and-clean-energy.html>> accessed 18 April 2021.

¹⁴³ ESI Africa, ‘How Digitalisation Is Reshaping the Energy Sector’ (ESI-Africa.com, 30 July 2020) <<https://www.esi-africa.com/smart-grids/how-digitalisation-is-reshaping-the-energy-sector/>> accessed 23 April 2021.

Delivering Clean and Affordable Energy for All

stakeholders and especially the Government to consider liberalization of the country's energy sector, especially in electricity generation, transmission and distribution. Liberalization of Kenya's energy sector also calls for 'a strong framework for regulation which is essential together with the benefits of a more efficient, innovative, and customer-focused industry'.¹⁴⁴ There is a need for rethinking the current approaches in energy generation, transmission and distribution if the goal and dream of cleaner and affordable energy sources for all Kenyans are to be achieved as part of realisation of the 2030 Agenda on SDGs as well as Kenya's Vision 2030. Without implementing radical changes in the sector, SDG Goal 7 will remain a mirage.

Delivering Clean and Affordable Energy for all is a noble dream that is achievable.

¹⁴⁴ 'How Strong Regulatory Frameworks Support Development' (NARUC) <<https://www.naruc.org/international/news/how-strong-regulatory-frameworks-support-development/>> accessed 24 April 2021.

Conserving Biodiversity for a Better Future

Abstract

Biological diversity is a term used to refer to the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part: this includes diversity within species, between species and of ecosystems. These resources play a huge role in not only environmental processes but also in provision of ecosystem resources for all living organisms, including human beings. Arguably, if the world is to achieve the sustainable development goals, then the conservation of these resources must be treated with urgency and it also calls for the concerted efforts of all stakeholders and cooperation from all countries, at least at the international level. The world must address the human activities that have been contributing to the degradation of these resources. This paper critically discusses in the context of Kenya some of challenges affecting the environment and offers recommendations on effective conservation of biodiversity for a better future for both the human world and the environment.

1. Introduction

It has rightly been observed that while ‘biodiversity can be greatly enhanced by human activities, it can also be adversely impacted by such activities due to unsustainable use or by more profound causes linked to our development models’.¹ This is despite the fact that biodiversity is considered to be very important for sustenance of all forms of life on earth.² It is worth acknowledging that biodiversity is essential not only to the proper functioning of earth systems; it is also key to the delivery of those ecosystem services that are crucial to human dignity and well-being including: the provision of potable water, food and fibers; soil fertility; maintenance of the ‘genetic library of biodiversity’ – an irreplaceable source of new innovations, pharmaceuticals and chemicals; and climate regulation – among others.³ The concept of ecosystem services was inspired by the desire to give an economic assessment of these functions thus leading to the appearance of the concept of ecosystem services, that is, consideration with regard to their usefulness for humans.⁴

Arguably, ecosystem services are divided into four categories namely: provisioning services refer to natural products that are directly used by humans for food, clothing, medicines, tools, or other uses; cultural services provide recreational opportunities, inspiration for art and music, and

¹ ‘Conserving Biodiversity for Life and Sustainable Development | United Nations Educational, Scientific and Cultural Organization’

<http://www.unesco.org/new/en/media-services/single-view/news/conserving_biodiversity_for_life_and_sustainable_development/> accessed 29 May 2021;

‘Threats to Biodiversity – Biodiversity Clearing House Mechanism’
<<http://meas.nema.go.ke/cbdchm/major-threats/>> accessed 31 May 2021.

² Dmitrii Pavlov and Elena Bukvareva, ‘Biodiversity and Life Support of Humankind’ (2007) 77 *Herald of the Russian Academy of Sciences* 550.

³ ‘Conserving Biodiversity for Life and Sustainable Development | United Nations Educational, Scientific and Cultural Organization’

<http://www.unesco.org/new/en/media-services/single-view/news/conserving_biodiversity_for_life_and_sustainable_development/> accessed 29 May 2021.

⁴ Dmitrii Pavlov and Elena Bukvareva, ‘Biodiversity and Life Support of Humankind’ (2007) 77 *Herald of the Russian Academy of Sciences* 550, 551.

spiritual value; regulating services include pest control and carcass removal; and supporting services, such as pollination, seed dispersal, water purification, and nutrient cycling, provide processes essential for ecological communities and agricultural ecosystems.⁵

It is against this background that this paper discusses the important role of biodiversity in ensuring that the sustainable development agenda is achieved for the sake of current and future generations. The concept of sustainable development seeks to strike a balance between using ecosystem services to improve human lives and the need to ensure that the environment can comfortably replenish itself, that is, based on the ecocentric approaches to conservation against the anthropocentric approaches only.⁶

2. Biodiversity: Definition and Scope

Notably, *Biodiversity*, a contraction of the phrase "biological diversity," can be traced to the first usage by Walter G. Rosen during a planning meeting for the 1986 National Forum on Biodiversity held in Washington, DC, while the first appearance of the word in the print literature likely occurred with the 1988 publication of the proceedings of the said conference.⁷ The Convention on Biological Diversity defines 'biodiversity' to mean "the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part: this includes diversity within species, between species and of ecosystems".⁸

United Nations Educational, Scientific and Cultural Organization (UNESCO) defines 'biodiversity' as the diversity of all living forms at different levels of complexity: genes, species, ecosystems and even landscapes and seascapes.⁹ Biological diversity or biodiversity has also been defined as the variety of the planet's living organisms and their interactions.¹⁰ The term is meant

⁵ Wenny, D.G., Devault, T.L., Johnson, M.D., Kelly, D., Sekercioglu, C.H., Tomback, D.F. and Whelan, C.J., 'The Need to Quantify Ecosystem Services Provided by Birds' (2011) 128 *The Auk* 1.

⁶ Louis J Kotzé and Duncan French, 'The Anthropocentric Ontology of International Environmental Law and the Sustainable Development Goals: Towards an Ecocentric Rule of Law in the Anthropocene' (2018) 7 *Global Journal of Comparative Law* 5; 'Putting Ecosystems into the SDGs' (Water, Land and Ecosystems, 9 October 2015) <<https://wle.cgiar.org/news/putting-ecosystems-sdgs>> accessed 3 June 2021; Bullock, C. H. "Nature's values: From intrinsic to instrumental. A review of values and valuation methodologies in the context of ecosystem services and natural capital." *National Economic and Social Council* 10 (2017); 'Striking a Balance between Conservation and Development' (UNEP, 13 May 2019) <<http://www.unep.org/news-and-stories/story/striking-balance-between-conservation-and-development>> accessed 3 June 2021; McCartney, M., Finlayson, M., de Silva, S., Amerasinghe, P., & Smakhtin, V., 'Sustainable Development and Ecosystem Services' (2014); Rülke, J., Rieckmann, M., Nzau, J. M., & Teucher, M., 'How Ecocentrism and Anthropocentrism Influence Human–Environment Relationships in a Kenyan Biodiversity Hotspot' (2020) 12 *Sustainability* 8213.

⁷ John Creech, 'Biodiversity Web Resources' <<http://www.istl.org/12-fall/internet.html>> accessed 29 May 2021; David L Hawksworth and Royal Society (Great Britain), *Biodiversity: Measurement and Estimation* (Springer Science & Business Media 1995).

⁸ Article 2, Convention on Biological Diversity.

⁹ United Nations Educational, Scientific and Cultural Organization, 'Conserving Biodiversity for Life and Sustainable Development | United Nations Educational, Scientific and Cultural Organization' <http://www.unesco.org/new/en/media-services/single-view/news/conserving_biodiversity_for_life_and_sustainable_development/> accessed 29 May 2021.

¹⁰ Wes Sechrest and Thomas Brooks, 'Biodiversity – Threats' (2002).

to encompass all of life's variation, expressed in genes, individuals, populations, species, communities and ecosystems.¹¹

These definitions are relevant especially in the context of Sustainable Development debate as they reflect the important role that biological diversity can and indeed plays in meeting the essentials of realising Sustainable Development goals such as food security, alleviating poverty, among others.¹² The World Bank argues that while biodiversity provides many instrumental benefits, from food and fuel to recreation, even where biodiversity is not immediately instrumental, it represents global public goods that must be protected, if only for their potential value in the future.¹³

3. Biodiversity Conservation: International and National Regulatory Frameworks

3.1 International and Regional Regulatory framework on Biodiversity Conservation

This section highlights some of the main instruments under the international regulatory framework on conservation of biodiversity.

a) Convention on Biological Diversity

The Convention on Biological Diversity (CBD) is the first global agreement to cover all aspects of biological diversity: the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding,¹⁴ and the same was signed at the Earth Summit in Rio de Janeiro, Brazil, in 1992 and entered into force on 29 December 1993.¹⁵

The main principle that guides the application of CBD is that 'States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.'¹⁶ The CBD calls for cooperation among Contracting States in conservation and sustainable use of biological diversity.¹⁷ As for

¹¹ Ibid, 1; see also Matta, G., Bhadauriya, G., & Singh, V., "Biodiversity and Sustainable Development: A Review." Fecundity of fresh water prawn *Macrobrachium Assamense Penensularae* from Khoh River, India: 72.

¹² Måns Nilsson, 'Biodiversity's Contributions to Sustainable Development' [2019] Nature Sustainability <<https://www.sei.org/publications/biodiversity-contributions-sustainable-development/>> accessed 3 June 2021; Gagan Matta, Gaurav Bhadauriya and Vikas Singh, 'Biodiversity and Sustainable Development: A Review' Fecundity of fresh water prawn *Macrobrachium Assamense Penensularae* from Khoh River, India 72.

¹³ Sobrevila, Claudia; Hickey, Valerie, *The Role of Biodiversity and Ecosystems in Sustainable Development*. 2010 Environment Strategy Analytical Background Papers; World Bank, Washington, DC. © World Bank, 2010. <https://openknowledge.worldbank.org/handle/10986/27584> License: CC BY 3.0 IGO< accessed 29 May 2021.

¹⁴ Article 1, Convention on Biological Diversity.

¹⁵ Biosafety Unit, 'Welcome to the CBD Secretariat' (8 April 2013) <<https://www.cbd.int/secretariat/>> accessed 29 May 2021.

¹⁶ Article 3, Convention on Biological Diversity.

¹⁷ Ibid, Article 5.

individual States, the CBD requires them to develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity or adapt for this purpose existing strategies, plans or programmes which should reflect, *inter alia*, the measures set out in this Convention relevant to the Contracting Party concerned; and integrate, as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies.¹⁸

As for sustainable use of components of biological diversity, CBD requires Contracting States to, as far as possible and as appropriate: integrate consideration of the conservation and sustainable use of biological resources into national decision-making; adopt measures relating to the use of biological resources to avoid or minimize adverse impacts on biological diversity; protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements; support local populations to develop and implement remedial action in degraded areas where biological diversity has been reduced; and encourage cooperation between its governmental authorities and its private sector in developing methods for sustainable use of biological resources.¹⁹

CBD also requires each Contracting Party to, as far as possible and as appropriate, adopt economically and socially sound measures that act as incentives for the conservation and sustainable use of components of biological diversity.²⁰ In order to build capacity through research and training, CBD requires all the Contracting Parties, taking into account the special needs of developing countries, to: establish and maintain programmes for scientific and technical education and training in measures for the identification, conservation and sustainable use of biological diversity and its components and provide support for such education and training for the specific needs of developing countries; promote and encourage research which contributes to the conservation and sustainable use of biological diversity, particularly in developing countries, *inter alia*, in accordance with decisions of the Conference of the Parties taken in consequence of recommendations of the Subsidiary Body on Scientific, Technical and Technological Advice: and in keeping with the provisions of Articles 16, 13 and 20, promote and cooperate in the use of scientific advances in biological diversity research in developing methods for conservation and sustainable use of biological resources.²¹ In addition to this, the Contracting Parties should: promote and encourage understanding of the importance of, and the measures required for, the conservation of biological diversity, as well as its propagation through media, and the inclusion of these topics in educational programmes; and cooperate, as appropriate, with other States and international organizations in developing educational and public awareness programmes, with respect to conservation and sustainable use of biological diversity.²²

In order to reduce or eliminate adverse impacts on biodiversity, CBD requires States to invest in impact assessment measures and/or procedures.²³ Notably, Kenya is a signatory to the Convention

¹⁸ Article 6, Convention on Biological Diversity.

¹⁹ *Ibid*, Article 10.

²⁰ *Ibid*, Article 11.

²¹ *Ibid*, Article 12.

²² Article 13, Convention on Biological Diversity.

²³ Article 14, Convention on Biological Diversity.

on Biological Diversity, and thus obligated to consider as well as adopt the Aichi Targets in its national plans and programs on biological diversity conservation.²⁴

b) International Convention on Protection of New Plant Varieties

The International Convention on Protection of New Plant Varieties²⁵ established the International Union for the Protection of New Varieties of Plants (UPOV) as an intergovernmental organization with headquarters in Geneva (Switzerland), to provide and promote an effective system of plant variety protection, with the aim of encouraging the development of new varieties of plants, for the benefit of society.²⁶ The UPOV Convention encourages and rewards the ingenuity and creativeness of breeders developing new varieties of plants.²⁷ The UPOV system establishes basic legal principles of protection by providing the breeders exclusive rights to their plant invention for a specific period of time, while making available the genetic material to others to use in their breeding programs.²⁸

c) Convention on International Trade in Endangered Species of Wild Fauna and Flora

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)²⁹ was adopted in March 1973 to regulate worldwide commercial trade in wild animal and plant species in order to ensure that international trade does not threaten the survival of any species.³⁰ CITES is a legally binding Convention on state parties to the convention, which are obliged to adopt their own domestic legislation to implement its goals.³¹ CITES assigns each protected species to one of three lists namely; Appendix I lists endangered species that are at risk of extinction and these species require both import and export permits approved by the “management authority and scientific authority” of the nations involved; Appendix II species are those that are not threatened with extinction but that might suffer a serious decline in number if trade is not restricted and their trade is thus regulated by permit; and Appendix III species are protected in at least one country that is a CITES member and that has petitioned others for help in controlling international trade in that species.³²

²⁴ Biosafety Unit, ‘Main Details’ <<https://www.cbd.int/countries/profile/?country=ke>> accessed 3 June 2021; ‘Convention on Biological Diversity | Treaties Database’ <<http://kenyalaw.org/treaties/treaties/87/Convention-on-Biological-Diversity>> accessed 3 June 2021; ‘Ministry of Environment and Forestry » Blog Archive » Statement By Kenya On Strategic Plan For Biodiversity 2011-2020’ <<http://www.environment.go.ke/?p=3091>> accessed 3 June 2021.

²⁵ International Union for the Protection of New Varieties of Plants, International Convention for the Protection of New Varieties of Plants of December 2, 1961, as Revised at Geneva on November 10, 1972, on October 23, 1978, and on March 19, 1991, UPOV Publication no: 221(E).

²⁶ ‘International Union for the Protection of New Varieties of Plants (UPOV)’ <<https://www.upov.int/portal/index.html.en>> accessed 5 June 2021.

²⁷ ‘International Convention for the Protection of New Varieties of Plants (UPOV)’ <<https://www.uspto.gov/ip-policy/patent-policy/international-convention-protection-new-varieties-plants-upov>> accessed 5 June 2021.

²⁸ Ibid.

²⁹ United Nations, Convention on International Trade in Endangered Species of Wild Fauna and Flora, March 3rd, 1973, 993 U.N.T.S. 243.

³⁰ ‘Convention on International Trade in Endangered Species | Description, Members, & Provisions’ (Encyclopedia Britannica) <<https://www.britannica.com/topic/Convention-on-International-Trade-in-Endangered-Species>> accessed 6 June 2021.

³¹ Ibid.

³² Kathryn A Saterson, ‘Government Legislation and Regulations in the United States’ in Simon A Levin (ed), Encyclopedia of Biodiversity (Second Edition) (Academic Press 2013)

The implementation of CITES requires international co-operation due to the international nature of trade in the affected plants and animals.³³

d) World Trade Organization Trade-Related Aspects of Intellectual Property Rights(WTO-TRIPs) Agreement

The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)³⁴ is considered to be the most comprehensive multilateral agreement on intellectual property (IP) which also plays a central role in facilitating trade in knowledge and creativity, in resolving trade disputes over IP, and in assuring WTO members the latitude to achieve their domestic policy objectives.³⁵ TRIPS Agreement provides the minimum standards of protection that WTO members must grant to copyrights, trademarks, geographical indications, industrial designs, and patents held by nationals of fellow WTO members, as well as exceptions to these minimum standards.³⁶

e) International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA)

The International Treaty on Plant Genetic Resources for Food and Agriculture³⁷ was adopted in 2001 with the objectives of conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of the benefits arising out of their use, in harmony with the Convention on Biological Diversity, for sustainable agriculture and food security.³⁸ The sustainable use of plant genetic resources for food and agriculture may include such measures as, *inter alia*: strengthening research which enhances and conserves biological diversity by maximizing intra- and inter-specific variation for the benefit of farmers, especially those who generate and use their own varieties and apply ecological principles in maintaining soil fertility and in combating diseases, weeds and pests; and supporting, as appropriate, the wider use of diversity of varieties and species in on-farm management, conservation and sustainable use of crops and creating strong links to plant breeding and agricultural development in order to reduce crop vulnerability and genetic erosion, and promote increased world food production compatible with sustainable development.³⁹

<<https://www.sciencedirect.com/science/article/pii/B9780123847195001866>> accessed 6 June 2021; 'Convention on International Trade in Endangered Species | Description, Members, & Provisions' (Encyclopedia Britannica) <<https://www.britannica.com/topic/Convention-on-International-Trade-in-Endangered-Species>> accessed 6 June 2021.

³³ 'What Is CITES? | CITES' <<https://cites.org/eng/disc/what.php>> accessed 6 June 2021.

³⁴ World Trade Organization, General Agreement on Trade-Related Aspects of Intellectual Property, 1869 U.N.T.S. 299.

³⁵ '>WTO | Intellectual Property (TRIPS) - Gateway'

<https://www.wto.org/english/tratop_e/trips_e/trips_e.htm> accessed 6 June 2021.

³⁶ 'International: WTO Considers Waiving Certain Intellectual Property Protections for the Prevention, Containment, and Treatment of COVID-19 | Global Legal Monitor' (24 March 2021) <<https://www.loc.gov/law/foreign-news/article/international-wto-considers-waiving-certain-intellectual-property-protections-for-the-prevention-containment-and-treatment-of-covid-19/>> accessed 6 June 2021.

³⁷ United Nations, International Treaty on Plant Genetic Resources for Food and Agriculture, Food and Agriculture Organization of the United Nations 13 December 2006, 2400 (p.303).

³⁸ *Ibid*, Article 1.1.

³⁹ *Ibid*, Article 6.2 (b)(f).

f) COP 10 Decision X/2, Strategic Plan for Biodiversity 2011-2020

The *COP 10 Decision X/2, Strategic Plan for Biodiversity 2011-2020*⁴⁰, with its *Aichi Targets*⁴¹, were adopted by the United Nations where Parties and other Governments, with the support of intergovernmental and other organizations, as appropriate, were urged to implement the Strategic Plan for Biodiversity 2011-2020 whose main mission is to: "take effective and urgent action to halt the loss of biodiversity in order to ensure that by 2020 ecosystems are resilient and continue to provide essential services, thereby securing the planet's variety of life, and contributing to human well-being, and poverty eradication. To ensure this, pressures on biodiversity are reduced, ecosystems are restored, biological resources are sustainably used and benefits arising out of utilization of genetic resources are shared in a fair and equitable manner; adequate financial resources are provided, capacities are enhanced, biodiversity issues and values mainstreamed, appropriate policies are effectively implemented, and decision-making is based on sound science and the precautionary approach."⁴²

The Plan was meant to provide an overarching framework on biodiversity, not only for the biodiversity-related conventions, but for the entire United Nations system and all other partners engaged in biodiversity management and policy development.⁴³

g) COP 8 Decision VIII/28, Impact Assessment: Voluntary Guidelines on Biodiversity-Inclusive Impact Assessment

VIII/28. Impact assessment: Voluntary guidelines on biodiversity-inclusive impact assessment is one chapter as part of the Report of The Eighth Meeting of The Parties to The Convention on Biological Diversity, held in Curitiba, Brazil, 20-31 March 2006.⁴⁴ The Guidelines provide detailed guidance on whether, when, and how to consider biodiversity in both project- and strategic-level impact assessments and are also an elaboration and refinement of guidelines previously adopted by the CBD (Decision VI/7-A), the Ramsar Convention on Wetlands (Resolution VIII.9) and the Convention on Migratory Species (Resolution 7.2).⁴⁵

Notably, Article 14 of the Convention on Biological Diversity (CBD) identifies impact assessment as a key instrument for achieving the conservation, sustainable use and equitable sharing objectives of the Convention. The Voluntary Guidelines call for the Conduct of Cultural, Environmental and Social Impact Assessments regarding Developments Proposed to Take Place

⁴⁰ 'The Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets'

<<https://www.cbd.int/kb/record/decision/12268>> accessed 3 June 2021.

⁴¹ Biosafety Unit, 'Aichi Biodiversity Targets' (18 September 2020) <<https://www.cbd.int/sp/targets/>> accessed 3 June 2021.

⁴² Ibid.

⁴³ Biosafety Unit, 'Strategic Plan for Biodiversity 2011-2020, Including Aichi Biodiversity Targets' (21 January 2020) <<https://www.cbd.int/sp/>> accessed 3 June 2021.

⁴⁴ 'VIII/28. Impact Assessment: Voluntary Guidelines on Biodiversity-Inclusive Impact Assessment Chapter from the Report of the 8th Meeting of The Parties to The Convention on Biological Diversity 2006 - Convention on Biological Diversity Cartagena Documents | Tonga Environment Data Portal' <<https://tonga-data.sprep.org/dataset/convention-biological-diversity-cartagena-documents/resource/7712d75d-1173-4707-84ab>> accessed 6 June 2021.

⁴⁵ 'Biodiversity in Impact Assessment, Background Document to CBD Decision VIII/28: Voluntary Guidelines on Biodiversity-Inclusive Impact Assessment | NBSAP Forum' <<http://www.nbsapforum.net/knowledge-base/resource/biodiversity-impact-assessment-background-document-cbd-decision-viii28-0>> accessed 6 June 2021.

on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or used by Indigenous and Local Communities.⁴⁶ Parties, other Governments and relevant organizations are to apply the voluntary guidelines on biodiversity-inclusive environmental impact assessment as appropriate in the context of their implementation of paragraph 1 (a) of Article 14 of the Convention and of target 5.1 of the provisional framework of goals and targets for assessing progress towards 2010 and to share their experience, *inter alia*, through the clearing-house mechanism and national reporting.⁴⁷

h) United Nations Framework Convention on Climate Change, 1994

The United Nations Framework Convention on Climate Change, 1994⁴⁸ ultimate objective together with any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.⁴⁹

3.2 Kenya's Regulatory Framework on Biodiversity Conservation

This section highlights Kenya's regulatory framework on the conservation of biodiversity and environment in general.

a) Constitution of Kenya 2010

The Constitution of Kenya 2010⁵⁰ took bolder steps than its predecessor to not only incorporate environmental conservation and sustainable development issues as a stand-alone chapter but also notably puts emphasis on a rights-based approaches to conservation which require such conservation measures to also focus on the livelihoods and rights aspects of projects, programmes, and activities.⁵¹ It has been argued that adopting rights-based approaches to conservation serves to ensure that the protection of rights and biodiversity conservation are mutually reinforcing.⁵² These rights are both procedural and substantive.⁵³ The Constitution outlines favourable legislative protection of biodiversity as envisaged in Chapter Five on Land and the Environment, where there is the emphasis on sustainable use of land and other natural resources, including biodiversity as a key principle.⁵⁴

⁴⁶ Para. 1, COP 8 Decision VIII/28, Impact Assessment: Voluntary Guidelines on Biodiversity-Inclusive Impact Assessment.

⁴⁷ *Ibid*, para. 5.

⁴⁸ United Nations Framework Convention on Climate Change, 1994, A/RES/48/189.

⁴⁹ *Ibid*, Article 2.

⁵⁰ The Constitution of Kenya [Government Printer, Nairobi, 27 August 2010].

⁵¹ See Preamble; Article 10; and Chapter Five of the Constitution of Kenya 2010.

⁵² 'Rights-Based Approaches to Conservation' (IUCN, 14 December 2015) <<https://www.iucn.org/theme/governance-and-rights/about/our-work/governance-and-rights-based-approaches/rights-based-approaches-conservation>> accessed 4 June 2021.

⁵³ Joshua Gellers and Chris Jeffords, 'Procedural Environmental Rights and Environmental Justice: Assessing the Impact of Environmental Constitutionalism' [2015] SSRN Electronic Journal; Dinah Shelton, 'Developing Substantive Environmental Rights' (2010) 1 *Journal of Human Rights and the Environment* 89; UN Environment, 'What Are Environmental Rights?' (UNEP - UN Environment Programme, 2 March 2018) <<http://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/advancing-environmental-rights/what>> accessed 7 June 2021.

⁵⁴ The Constitution of Kenya 2010, Article 60, 69.

Article 69 of the Constitution is relevant in the quest for biodiversity conservation especially in relation to the obligations of the State in respect of the environment and natural resources management.⁵⁵ The provisions of Article 69 are notably comprehensive, addressing a number of cross-sectoral biodiversity concerns outlined by the CBD including issues of benefit sharing, traditional knowledge, elimination of activities harmful to biodiversity and the role of the community in conservation and sustainable use of biodiversity.⁵⁶

The Constitution also altered the legal landscape in Kenya by introducing a devolved system of governance in Kenya, with authority, roles and responsibilities split between the national government and the 47 county governments.⁵⁷ Regarding the environment and biodiversity conservation, the National Government is charged with: use of international waters and water resources; 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; agricultural policy; and capacity building and technical assistance to the counties.⁵⁸

As for the county governments, they are charged with: Agriculture, including—(a) crop and animal husbandry; (b) livestock sale yards; (c) county abattoirs; (d) plant and animal disease control; and (e) fisheries; control of air pollution, noise pollution, other public nuisances and outdoor advertising; implementation of specific national government policies on natural resources and environmental conservation, including-- (a) soil and water conservation; and (b) forestry; and ensuring and coordinating the participation of communities and locations in governance at the local level and assisting 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.⁵⁹ However, Counties may perform other functions assigned through an Act of Parliament. Notably, some of the functions related to environmental conservation fall within the shared jurisdiction of both national and county levels of government and should, therefore, be performed in a cooperative way.⁶⁰

b) Kenya's Vision 2030

The Vision 2030⁶¹ was launched in 2008 as a long-term development blue print for the country, with the goal of transforming Kenya into “a newly-industrialised, middle-income country providing a high quality of life to all its citizens in a clean and secure environment”.⁶² The development blueprint acknowledges the environment and all its aspect as an important part of achieving sustainable development and calls for conservation and sustainable use of these

⁵⁵ The Constitution of Kenya 2010, Article 69(1).

⁵⁶ *Ibid.*

⁵⁷ Fourth Schedule to the Constitution of Kenya 2010 on Distribution of functions between National and the county governments.

⁵⁸ Fourth Schedule, Part 1, Constitution of Kenya, 2010.

⁵⁹ Fourth Schedule, Part 2, Constitution of Kenya, 2010 on distribution of functions between National and the county governments; see also Section 5 of the County Governments Act (2012) which outlines the functions of County Governments.

⁶⁰ Article 186, 189, Constitution of Kenya.

⁶¹ Sessional Paper 10 of 2012 on Kenya Vision 2030, Government of Kenya.

⁶² Sessional Paper 10 of 2012 on Kenya Vision 2030, Government of Kenya, Office of the Prime Minister Ministry of State for Planning, National Development and Vision 2030.

resources. The Vision 2030 acknowledges that invasive alien species and lack of a biodiversity inventory and inadequate procedures for access and benefit-sharing for biodiversity resources remain key challenges for the country.⁶³

c) Environment (Management and Coordination) Act 1999

The Environmental Management and Co-ordination Act, 1999⁶⁴ provides that no person should, without prior written approval of the Authority given after an environmental impact assessment, in relation to a river, lake, sea or wetland in Kenya, carry out any of the following activities: erect, reconstruct, place, alter, extend, remove or demolish any structure or part of any structure in, or under the river, lake or wetland; excavate, drill, tunnel or disturb the river, lake or wetland; introduce any animal whether alien or indigenous in a lake, river or wetland; introduce or plant any part of a plant specimen, whether alien or indigenous, dead or alive, in any river, lake or wetland; deposit any substance in a lake, river or wetland or in, on, or under its bed, if that substance would or is likely to have adverse environmental effects on the river, lake or wetland; direct or block any river, lake or wetland from its natural and normal course; drain any lake, river or wetland, any other matter prescribed by the Cabinet Secretary on the advice of the Authority.⁶⁵

Overall, EMCA provides for the establishment of an appropriate legal and institutional framework for the management of the environment and for the matters connected therewith and incidental thereto.⁶⁶ The Environmental Management and Co-ordination (Amendment) Act 2015⁶⁷ was enacted to amend EMCA 1999 and notably introduced further measures on impact assessment and a schedule to outline the development activities that must require impact assessment before they are carried out and to generally align the Act with the current Constitution.⁶⁸ The objects of the devolution of government are—to promote democratic and accountable exercise of power; to foster national unity by recognising diversity; to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them; to recognise the right of communities to manage their own affairs and to further their development; to protect and promote the interests and rights of minorities and marginalised communities; to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya; to ensure equitable sharing of national and local resources throughout Kenya; to facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya; and to enhance checks and balances and the separation of powers.⁶⁹

d) Wildlife Conservation and Management Act 2013

The Wildlife Conservation and Management Act 2013⁷⁰ was enacted to provide for the protection, conservation, sustainable use and management of wildlife in Kenya and for connected purposes.⁷¹

⁶³ Chapter 4.6, Vision 2030.

⁶⁴ Environmental Management and Co-ordination Act, No. 8 of 1999, Laws of Kenya.

⁶⁵ *Ibid*, sec. 42(1); see also Environmental Management and Co-ordination (Amendment) Act, 2015, sec. 28.

⁶⁶ *Ibid*, Preamble.

⁶⁷ Environmental Management and Co-ordination (Amendment) Act, No. 5 of 2015, Laws of Kenya.

⁶⁸ *Ibid*, Second Schedule; Sec. 57A.

⁶⁹ Article 174, Constitution of Kenya 2010.

⁷⁰ Wildlife Conservation and Management Act, No. 47 of 2013, Laws of Kenya.

⁷¹ *Ibid*, Preamble.

The implementation of this Act is to be guided by the following principles: wildlife conservation and management should be devolved, wherever possible and appropriate to those owners and managers of land where wildlife occurs; conservation and management of wildlife should entail effective public participation; wherever possible, the conservation and management of wildlife shall be encouraged using an ecosystem approach; wildlife conservation and management should be encouraged and recognized as a form of land use on public, community and private land; benefits of wildlife conservation should be derived by the land user in order to offset costs and to ensure the value and management of wildlife do not decline; wildlife conservation and management should be exercised in accordance with the principles of sustainable utilization to meet the benefits of present and future generations; benefits accruing from wildlife conservation and management should be enjoyed and equitably shared by the people of Kenya.⁷²

The Act prohibits "bio-piracy", that is, the exploration of biological resources without the knowledge and non-coercive prior consent of the owners of the resources and without fair compensation and benefit sharing as well as illegal "bio-prospecting" which means the exploration of biodiversity for commercially valuable genetic and biochemical resources.⁷³

The related *Wildlife Conservation and Management (Implementation of Treaties) Regulations*⁷⁴ were made by the Cabinet Secretary for Environment and Natural Resources under section 109 of the Wildlife Conservation and Management Act, 2013, and require the Kenya Wildlife Service, as the lead agency, in consultation with stakeholders: meet the requirements of the treaties and the implementation of resolutions and decisions; accomplish the requirements of the treaties and the enforcing resolutions; execute the specific decisions directed to Kenya; budget for and make arrangements for the payment of respective annual convention fees; engage in the negotiation of resolutions and decisions that are beneficial and of interest to Kenya; lobby necessary amendments on treaties, decisions and resolutions in the interest of safeguarding Kenya's wildlife; comply with and monitor compliance with international treaties; implement international treaties; monitor and prevent trade that is inconsistent with international treaties in accordance with the Act and the Regulations made under it; confiscate species traded in contravention with any international treaty that Kenya is party to; and take any other necessary measures for the implementation of and enhancing compliance with international treaties.⁷⁵ Each county is also to ensure that its legislation conforms with wildlife international treaties to which Kenya is a party.⁷⁶

Similarly, the *Wildlife Conservation and Management (Protection of Endangered and Threatened Ecosystems, Habitats and Species) Regulations, 2017*⁷⁷ were made by the Cabinet Secretary for Environment and Natural Resources under section 116 (2) (f) of the Wildlife Conservation and Management Act, 2013, to: implement the classification of ecosystems, habitats and species into the following categories- critically endangered; endangered; vulnerable; protected; and threatened; provide for protection of ecosystems that are threatened or endangered so as to maintain their ecological integrity; provide for the protection of species that are threatened,

⁷² Ibid, sec. 4.

⁷³ Ibid, sec. 22.

⁷⁴ Wildlife Conservation and Management (Implementation of Treaties) Regulations, 2017 (L.N. No. 241 of 2017).

⁷⁵ Ibid, Regulation 3.

⁷⁶ Ibid, Regulation 4.

⁷⁷ Wildlife Conservation and Management (Protection of Endangered and Threatened Ecosystems, Habitats and Species) Regulations, 2017 (L.N. No. 242 of 2017).

endangered, vulnerable, or protected to ensure their survival in the wild; implement Kenya's obligations under international agreements regulating international trade in endangered species; and ensure sustainable management and utilisation of biodiversity.⁷⁸ The Service is required to: identify the agencies that the Service shall permit to deal with fragile ecosystems; identify the officers and offices that shall regulate access to fragile ecosystems; create corridors and buffer zones and take such measures, as the it considers necessary for the protection of fragile ecosystems; regulate the removal or introduction of any species or genetic material into the ecosystem; and take measures to maintain the natural balance in the ecosystem.⁷⁹

The *Wildlife Conservation and Management (Joint Management of Protected Water Towers) Regulations, 2017*⁸⁰ were made by the Cabinet Secretary for Environment and Natural Resources under section 116 of the Wildlife Conservation and Management Act, 2013, makes provision with respect to conservation of protected water towers. The objective of these Regulations is to—ensure conservation of protected water towers; and enhance cooperation between the Service and the lead agencies in management of protected water towers.⁸¹

e) The Forest Policy, 2020

The overall goal of this Policy⁸² is sustainable development, management, utilization and conservation of forest resources and equitable sharing of accrued benefits including the flow of ecosystem services for present and future generations of the people of Kenya. In order to achieve this overall goal, ten per cent of the land area in Kenya should comprise forest cover.⁸³

This policy aims at enhancing management of forest resources for conservation of soil, water biodiversity and environmental stability. Additionally, indigenous knowledge and intellectual property rights embodied in forest biodiversity and genetic resources will be harnessed and protected.⁸⁴

f) The Forest Conservation and Management Act, No. 34 of 2016

The *Forest Conservation and Management Act 2016*⁸⁵ was enacted to give effect to Article 69 of the Constitution with regard to forest resources and to provide for the development and sustainable management, including conservation and rational utilization of all forest resources for the socio-economic development of forest adjacent communities.⁸⁶ The Forest Act 2016 acknowledges community participation in forest governance through establishment of community forest associations with the twin objective of sustainable conservation of forest resources and rural livelihoods.⁸⁷ The *Forest Conservation and Management Act 2016* was enacted to give effect to Article 69 of the Constitution with regard to forest resources; to provide for the development and

⁷⁸ Ibid, Regulation 4.

⁷⁹ Ibid, Regulation 5.

⁸⁰ Wildlife Conservation and Management (Joint Management of Protected Water Towers) Regulations, 2017 (L.N. No. 243 of 2017).

⁸¹ Ibid, Regulation 3.

⁸² Republic of Kenya, Draft National Forest Policy, 2020 (Government Printer, Nairobi, 2020).

⁸³ Ibid, Para. 3.1.

⁸⁴ Ibid, para. 3.2.

⁸⁵ Forest Conservation and Management Act, No. 34 of 2016, Laws of Kenya.

⁸⁶ Preamble, No. 34 of 2016, Laws of Kenya.

⁸⁷ Ibid, see Parts IV and V (Sections 30-52).

sustainable management, including conservation and rational utilization of all forest resources for the socio-economic development of the country.⁸⁸

g) Water Act 2016

Water is the basic ingredient for agriculture and survival of all biodiversity. The Constitution acknowledges access to clean and safe water as a basic human right.⁸⁹ The Water Act 2016⁹⁰ provides for the regulation, management and development of water resources in line with the Constitution. The Act also gives priority to use of abstracted water for domestic purposes over irrigation. The Act provides for establishment of Water Resource User Associations (WRUAs), which are community-based associations for collective management of water resources and resolution of conflicts concerning the use of water resources.⁹¹

The Act requires the Cabinet Secretary responsible for water, following public participation, to formulate every five years, a National Water Resource Strategy which should contain, among other things, details of- existing water resources and their defined riparian areas; measures for the protection, conservation, control and management of water resources and approved land use for the riparian area; minimum water reserve levels at national and county levels; institutional capacity for water research and technological development; functional responsibility for national and county governments in relation to water resources management and any other matters the Cabinet Secretary considers necessary.⁹²

h) Seeds and Plant Varieties Act, Cap 326

This is an Act of Parliament to confer power to regulate transactions in seeds, including provision for the testing and certification of seeds, for the establishment of an index of names of plant varieties, to empower the imposition of restriction on the introduction of new varieties, to control the importation of seeds, to authorize measures to prevent injurious cross-pollination, to provide for the grant of proprietary rights to persons breeding or discovering and developing new varieties, to establish a national centre for plant genetic resources and to establish a Tribunal to hear appeals and other proceedings and for connected purposes.⁹³ This Act establishes a National Plant Genetic Resources Centre which shall be responsible for the conservation and sustainable utilization of plant biodiversity in Kenya.

i) Biosafety Act, 2009

Biosafety Act, 2009⁹⁴ is an Act of Parliament to regulate activities in genetically modified organisms, to establish the National Biosafety Authority, and for connected purposes. The objectives of this Act include to facilitate responsible research into and minimize the risks that may be posed by genetically modified organisms; to ensure an adequate level of protection for the safe transfer, handling and use of genetically modified organisms that may have an adverse effect on the health of the people and the environment and to establish a transparent, science-

⁸⁸ Preamble, No. 34 of 2016, Laws of Kenya.

⁸⁹ Article 43, Constitution of Kenya 2010.

⁹⁰ Water Act, No. 43 of 2016, Laws of Kenya.

⁹¹ Ibid, sec. 29.

⁹² S. 10, Water Act, No. 43 of 2016.

⁹³ Preamble, Seeds and Plant Varieties Act, Cap 326, Laws of Kenya.

⁹⁴ Biosafety Act (No. 2 of 2009), Laws of Kenya.

based and predictable process for reviewing and making decisions on the transfer, handling and use of genetically modified organisms and related activities.⁹⁵

j) Climate Change Act No. 11 of 2016

The Climate Change Act⁹⁶ is to be applied for the development, management, implementation and regulation of mechanisms to enhance climate change resilience and low carbon development for the sustainable development of Kenya.⁹⁷ The Act is also to be applied in all sectors of the economy by the national and county governments to mainstream climate change responses into development planning, decision making and implementation; build resilience and enhance adaptive capacity to the impacts of climate change; formulate programmes and plans to enhance the resilience and adaptive capacity of human and ecological systems to the impacts of climate change; mainstream and reinforce climate change disaster risk reduction into strategies and actions of public and private entities; mainstream intergenerational and gender equity in all aspects of climate change responses and provide incentives and obligations for private sector contribution in achieving low carbon climate resilient development.⁹⁸

k) Environmental Sustainability Guidelines for Ministries, Departments and Agencies (MDAs)

The Environmental Sustainability Guidelines for Ministries, Departments and Agencies (MDAs)⁹⁹ require MDAs in undertaking their mandates, integrate environmental considerations in their operations to fulfil the requirement of a clean, healthy and sustainable environment for all as per article 42 of the Constitution and EMCA through adoption and maintenance of good practices that contribute to the quality of environment on a long-term basis.¹⁰⁰

l) Environmental Management and Co-Ordination (Conservation of Biological Diversity and Resources, And Access to Genetic Resources and Benefits Sharing) Regulations, 2006

The *Environmental Management and Co-Ordination (Conservation of Biological Diversity and Resources, And Access to Genetic Resources and Benefits Sharing) Regulations, 2006*¹⁰¹ are to

⁹⁵ See also United Nations, Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Montreal, 29 January 2000, United Nations, Treaty Series, vol. 2226, p. 208. Article 1 thereof outlines the objective of the Protocol as follows:

In accordance with the precautionary approach contained in Principle 15 of the Rio Declaration on Environment and Development, the objective of this Protocol is to contribute to ensuring an adequate level of protection in the field of the safe transfer, handling and use of living modified organisms resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health, and specifically focusing on transboundary movements.

⁹⁶ Climate Change Act No. 11 of 2016, laws of Kenya.

⁹⁷ Ibid, preamble.

⁹⁸ Ibid, sec. 3.

⁹⁹ 'National Environment Management Authority (NEMA) - Environmental Sustainability Guidelines ForMDAs' <https://www.nema.go.ke/index.php?option=com_content&view=article&id=110&Itemid=124> accessed 3 June 2021.

¹⁰⁰ Ibid.

¹⁰¹ Environmental Management and Co-Ordination (Conservation of Biological Diversity and

apply to access to genetic resources or parts of genetic resources, whether naturally occurring or naturalised, including genetic resources bred for or intended for commercial purposes within Kenya or for export, whether in in-situ conditions or ex-situ conditions.¹⁰² The Regulations shall, however, not apply to- the exchange of genetic resources, their derivative products, or the intangible components associated with them, carried out by members of any local Kenyan community amongst themselves and for their own consumption; access to genetic resources derived from plant breeders in accordance with the Seeds and Plant Varieties Act, Cap 326; human genetic resources; and approved research activities intended for educational purposes within recognized Kenyan academic and research institutions, which are governed by relevant intellectual property laws.¹⁰³

The Regulations require Environmental Impact Assessment for activities that may: have an adverse impact on any ecosystem; lead to the introduction of any exotic species; or lead to unsustainable use of natural resources.¹⁰⁴ The Regulations also require the National Environment Management Authority (NEMA), in consultation with the relevant lead agencies, to impose bans, restrictions or similar measures on the access and use of any threatened species in order to ensure its regeneration and maximum sustainable yield as a way to conserve threatened species.¹⁰⁵ NEMA is also tasked with, in consultation with the relevant lead agencies, to identify and prepare an inventory of biological diversity of Kenya, which should include threatened, endangered, or rare species.¹⁰⁶

m) Environmental Management and Co-Ordination (Wetlands, River Banks, Lake Shores and Sea Shore Management) Regulations, 2009

These Regulations were made under the Environmental Management and Co-ordination Act, 1999, to make provision for the management, conservation and sustainable use of wetlands and wetland resources and the sustainable utilization and conservation of (resources on) river banks, lake shores, and the seashore.¹⁰⁷ The Environmental Management and Co-Ordination (Wetlands, River Banks, Lake Shores and Sea Shore Management) Regulations, 2009¹⁰⁸ seek to achieve the following in relation to management of wetlands and wetland resources: to provide for the conservation and sustainable use of wetlands and their resources in Kenya; to promote the integration of sustainable use of resources in wetlands into the local and national management of natural resources for socio-economic development; to ensure the conservation of water catchments and the control of floods; to ensure the sustainable use of wetlands for ecological and aesthetic purposes for the common good of all citizens; to ensure the protection of wetlands as

Resources, and Access to Genetic Resources and Benefits Sharing) Regulations, Legal Notice No. 160 of 2006, Laws of Kenya.

¹⁰² 'National Environment Management Authority (NEMA) - Biodiversity Regulations' <https://www.nema.go.ke/index.php?option=com_content&view=article&id=30&Itemid=170> accessed 3 June 202.

¹⁰³ Environmental Management and Co-Ordination (Conservation of Biological Diversity and Resources, and Access to Genetic Resources and Benefits Sharing) Regulations, 2006, sec. 3.

¹⁰⁴ Ibid, Regulation 4(1).

¹⁰⁵ Ibid, Regulation 5.

¹⁰⁶ Ibid, Regulation 6.

¹⁰⁷ Preamble, Environmental Management and Co-Ordination (Wetlands, River Banks, Lake Shores and Sea Shore Management) Regulations, Legal Notice No. 19 of 2009, Laws of Kenya.

¹⁰⁸ Environmental Management and Co-Ordination (Wetlands, River Banks, Lake Shores and Sea Shore Management) Regulations, Legal Notice No. 19 of 2009, Laws of Kenya.

habitats for species of fauna and flora; provide a framework for public participation in the management of wetlands; to enhance education research and related activities; and to prevent and control pollution and siltation.¹⁰⁹

As far as management of river banks, lake shores and sea shore are concerned, the Regulations are meant: to facilitate the sustainable utilization and conservation of resources on river banks, lake shores, and on the seashore by and for the benefit of the people and community living in the area; promote the integration of sustainable use of resources in riverbanks lake shores and the seashore into the local and national management of natural resources for socio economic development; enhance education, research and research related activities; and prevent siltation of rivers and lakes and control pollution or and other activities likely to degrade the environment.¹¹⁰

Every owner, occupier or user of land which is adjacent or contiguous to a wetland shall, with advice from the Authority, have a duty to prevent the degradation or destruction of the wetland, and should maintain the ecological and other functions of the wetland.¹¹¹

A developer intending to undertake a project which may have a significant impact on a wetland, river bank, lake shore or the sea shore is required to carry out an environmental impact assessment in accordance with the provisions of the Act.¹¹²

n) The Integrated Coastal Zone Management Policy 2007

The Integrated Coastal Zone Management Policy 2007¹¹³ paper provides for the development of a coastal zone policy in Kenya and it is intended to guide actions and policies related to the use and management of Kenya's coastal zone resources, including their protection and restoration.¹¹⁴ The Paper highlighted the fact that major threats facing coastal forests include encroachment for settlement and farming, illegal logging, human wildlife conflict, deforestation and loss of biodiversity mainly attributed to a reduction of forest cover.¹¹⁵ Thus, the Integrated Coastal Zone Management (ICZM) aims at ensuring that the current and future generations of coastal stakeholders realise their basic needs and improve their quality of life whilst maintaining diverse, healthy and productive coastal ecosystems.¹¹⁶

¹⁰⁹ Environmental Management and Co-Ordination (Wetlands, River Banks, Lake Shores and Sea Shore Management) Regulations, 2009, Regulation 4.

¹¹⁰ Ibid, Regulation, 16.

¹¹¹ Ibid, Regulation 14(1).

¹¹² Ibid, Regulation 21(1).

¹¹³ Republic of Kenya, Integrated Coastal Zone Management Action Plan For Kenya (2007) < <https://www.nema.go.ke/images/Docs/Legislation%20and%20Policies/ICZM%20Draft%20Policy%20.pdf>. Accessed 29 May 2021.

¹¹⁴ Ibid, para. 1.1.

¹¹⁵ Ibid, para. 4.2.

¹¹⁶ Ibid, para. 12.1.

o) Draft National Strategy for Achieving and Maintaining Over 10% Tree Cover By 2022

The Draft National Strategy for Achieving and Maintaining Over 10% Tree Cover By 2022¹¹⁷ is aligned to the National Forest Program, as a cross-sectoral framework that provides for: broad institutional and multi-stakeholder participation in accelerating the achievement of the Constitutional target of 10% tree cover of the national land area as provided under Article 69 (1) (b) of the Constitution of Kenya 2010; implementation of Presidential Directives that the Constitutional target of 10% national tree cover should be achieved by 2022 through among other initiatives the revival of Chief's tree nurseries with technical support of Kenya Forest Service and allocation of 10% Corporate Social Responsibility (CSR) to tree growing; opportunity to achieve national and global commitments with respect to climate change, biodiversity conservation, and land degradation. The government has committed to restore 5.1 million Ha of degraded landscapes as a contribution to the Africa Forest Landscape Initiative (AFR100), 50% reduction of greenhouse gases from the forest sector by 2030 as part of its Nationally Determined Contribution (NDC) to climate change, and to achieve land degradation neutrality by 2030 as a commitment to United Nations Convention to Combat Desertification (UNCCD); shared responsibility towards addressing public concerns with regard to continued deforestation, forest degradation and the need for enhanced protection, conservation and sustainable management of forest resources; enhancing the contribution of the forestry sector towards implementation of the Big 4 Agenda.

The environment and forest sector is the foundation upon which the performance of the key primary sectors of the economy is anchored including, manufacturing, energy, health and agriculture.¹¹⁸ It was estimated that by 2010 the national forest cover stood at 4.18 million Ha, representing 6.99% of the total land area while the gazetted public forests managed by Kenya Forest Service covered 2.59 million Ha.¹¹⁹ In 2015, the forest cover was estimated at 7.2% based on the national projection from the 2010 forest cover data.¹²⁰ This is below the recommended minimum global standard of 10% thus necessitating Kenya's goal of increasing and maintaining the national tree cover to at least 10% by 2022.¹²¹ Most of the forestland in Kenya has been attributed to change of and use over the years thus shrinking the country's forest cover to below the international accepted standards.¹²² This is despite the fact that forests are considered important for the provision of vital ecosystem services to communities living around

¹¹⁷ Republic of Kenya, Draft National Strategy for Achieving and Maintaining Over 10% Tree Cover By 2022, May 2019< <http://www.environment.go.ke/wp-content/uploads/2019/08/revised-Draft-Strategy-for-10-Tree-Cover-23-5-19-FINAL.pdf>> accessed 31 May 2021.

¹¹⁸ Ibid, para. 1.1.

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ <https://www.the-star.co.ke/authors/gilbertkoech>, 'Why State Wants You to Plant Trees on 10% of Your Land' (The Star) <<https://www.the-star.co.ke/news/2021-03-14-why-state-wants-you-to-plant-trees-on-10-of-your-land/>> accessed 3 June 2021; Anyango Otieno and Jeckoniah Otieno, 'Sh48b Needed to Raise Forest Cover to 10 per Cent' (The Standard) <<https://www.standardmedia.co.ke/kenya/article/2001394403/sh48b-needed-to-raise-forest-cover-to-10-per-cent>> accessed 3 June 2021.

¹²² Donald Kipruto Kimutai and Teiji Watanabe, 'Forest-Cover Change and Participatory Forest Management of the Lembus Forest, Kenya' (2016) 3 *Environments* 20; Sylvester Ngome Chisika and Chunho Yeom, 'Enhancing Ecologically Sustainable Management of Deadwood in Kenya's Natural Forests' (2021) 2021 *International Journal of Forestry Research* e6647618; Jebiwott, A., Ogendi, G. M., Makindi, S. M., & Esilaba, M. O., 'Forest Cover Change and Ecosystem Services of Katimok Forest Reserve, Baringo County, Kenya'.

them, contributing immensely to their livelihoods.¹²³ Natural forests also provide many ecosystem services needed for biodiversity conservation and sustainable management.¹²⁴

p) Kenya Plant Health Inspectorate Service Act, 2012

The Kenya Plant Health Inspectorate Service Act¹²⁵ is an Act of Parliament to establish the Kenya Plant Health Inspectorate Service as a regulatory body for the protection of plants, seeds and plant varieties and agricultural produce, to be responsible for administering several other written laws and for matters incidental thereto or connected therewith.

q) The National Spatial Plan (NSP) 2015-2045

The National Spatial Plan aims at creating a spatial planning context that:- enhances economic efficiency and strengthens Kenya's global competitiveness, promotes balanced regional development for national integration and cohesion, optimizes utilization of land and natural resources for sustainable development, creates livable and functional human settlements in both urban and rural areas, secures the natural environment for a high quality of life and establishes an integrated national transportation network and infrastructure system.

The National Spatial Plan 2015-2045 highlights the fact that Kenya's diverse ecosystems and habitats are home to numerous biodiversity which is a result of unique topography, climate, geology, and drainage systems.¹²⁶ Furthermore, the various communities with diverse cultural heritages and livelihoods offer Kenya diversity in socio-economic activities such as crop farming, pastoralism, tourism, mining, fishing, water transport, hydro and geothermal power generation and urban entrepreneurship. This has implications on spatial and economic planning.¹²⁷

The international best practices call for the states to link conservation measures with local land use planning in order to achieve a comprehensive approach to habitat and biodiversity preservation.¹²⁸ Uncontrolled growth or development may lead to land fragmentation and consequently lead to habitat loss or diminished biodiversity.¹²⁹ This calls for connection of land use planning and biodiversity preservation or conservation. There is need for identification of areas that offer particularly high value for conserving biotic resources during planning activities by both county and national governments.¹³⁰

¹²³ Jebiwott, A., Ogendi, G. M., Makindi, S. M., & Esilaba, M. O., 'Forest Cover Change and Ecosystem Services of Katimok Forest Reserve, Baringo County, Kenya'.

¹²⁴ Sylvester Ngome Chisika and Chunho Yeom, 'Enhancing Ecologically Sustainable Management of Deadwood in Kenya's Natural Forests' (2021) 2021 International Journal of Forestry Research, 1.

¹²⁵ Kenya Plant Health Inspectorate Service Act, No. 54 of 2012, Laws of Kenya.

¹²⁶ Republic of Kenya, National Spatial Plan 2015-2045, p.41.

¹²⁷ Ibid, p.41.

¹²⁸ Theobald, David M., Thomas Spies, Jeff Kline, Bruce Maxwell, N. T. Hobbs, and Virginia H. Dale. "Ecological Support for Rural Land-Use Planning," *Ecological Applications*, Vol.15, no. 6 (2005), pp.1906-1914 at p. 1910.

¹²⁹ Fetene, Aramde, Kumlachew Yeshitela, and Hayal Desta. "Approaches to Conservation and Sustainable Use of Biodiversity-A Review." *Nature and Science* 10, no. 12 (2012): 51-62 at p.52.

¹³⁰ See Theobald, David, and N. Thompson Hobbs, "A framework for evaluating land use planning alternatives: protecting biodiversity on private land," *Conservation Ecology*, Vol. 6, No. 1 (2002).

r) Draft National Land Use Policy, 2016

The overall goal of the National Land use Policy 2016¹³¹ is to provide legal, administrative, institutional and technological framework for optimal utilization and productivity of land and land related resources in a sustainable and desirable manner at National, County and local level. The policy particularly offers a framework of recommendations and principles designed to ensure the maintenance of a land use system that will provide for land-use planning, resource allocation and resource management for sustainable development to promote public good and general welfare; environmental management and sustainable production initiatives in the utilization of land resources; coordination and integration of institutional linkages in planning at sectoral and cross-sectoral levels to foster collaboration and decision making among different land users; optimum utilization of land resources to meet governance, social-economic, political and cultural obligations of the people of Kenya; anchoring land development initiatives that will respond positively to the market demands; integrated framework for the preparation of a National Spatial Plan and review of various land use plans; mainstreaming of gender and special interest groups in land use planning and management; a comprehensive, efficient and affordable computer based land use information management system; an appropriate, accountable and democratic institution for land use conflicts resolution and mitigating problems associated with poor land use.¹³²

4. Effective Conservation of Biological Diversity: Prospects and Challenges in Kenya

Biodiversity conservation in developing countries is affected by several challenges which include, *inter alia*, slow economic development, high levels of poverty, unequal land distribution, a highly segmented society, high population increase as well as commercial interests in natural resource extraction.¹³³ Kenya's National Environment Management Authority (NEMA) highlights *drivers of biodiversity loss* as including *both direct and indirect causes* where direct threat includes land use change, habitat destruction, and introduction of invasive alien species, among others, while indirect threats are economic system and policy of the country; unsustainable exploitation of resources and weak management system; gaps in spatial information, and lack of public awareness, to mention but a few (Emphasis added).¹³⁴

This is also highlighted in the country's Sixth national report to the Convention on Biological Diversity¹³⁵ dated January 2021 which points out that 'while the Government of Kenya has been making efforts towards biodiversity conservation, land degradation and ecosystem destruction are still witnessed through increasing siltation of water bodies and rivers, waste management, air and water pollution in most of our urban centers mostly due to rapid population growth and urbanization.¹³⁶ Efforts to improve the management and conservation of environment and natural resources are affected by impacts of climate change, increasing population, as well as expansion

¹³¹ Republic of Kenya, National Land use Policy 2016 (Government Printer, Nairobi, 2016).

¹³² *Ibid*, Chapter Three.

¹³³ Regina Birner and others, 'Prospects and Challenges for Biodiversity Conservation in Guatemala' [2005] Valuation and Conservation of Biodiversity: Interdisciplinary Perspectives on the Convention on Biological Diversity 285.

¹³⁴ NEMA, 'Threats to Biodiversity – Biodiversity Clearing House Mechanism' <<http://meas.nema.go.ke/cbdchm/major-threats/>> accessed 31 May 2021.

¹³⁵ Government of the Republic of Kenya, Kenya Sixth national report to the Convention on Biological Diversity, Ministry of Environment and Forestry, 2020 < www.environment.go.ke/wp-content/uploads/2021/01/FINAL-REPORT-MOEF-CBD-SIXTH-NATIONAL-REPORT-January-2021.docx> accessed 31 May 2021.

¹³⁶ *Ibid*, p. 15.

of agriculture and settlements into fragile and water towers ecosystems.¹³⁷ It is, therefore, arguable that unless these challenges are addressed, any efforts towards sustainable use of environmental resources for biodiversity conservation will remain a mirage.

5. Conserving Biodiversity for a Better Future

It has been argued that the key to sustainable development is achieving a balance between the exploitation of natural resources for economic development and conserving ecosystem services that are critical to everyone's wellbeing and livelihoods.¹³⁸ This section offers some recommendations on how the world and Kenya in particular can achieve sustainable development agenda through enhanced biodiversity conservation which is a prerequisite to not only healthy environment but also important for replenishing the ecosystem services which meet the basic human needs as captured in the United Nations 2030 Agenda for Sustainable Development Agenda.

5.1 Adoption of Sustainable Agricultural Production methods and Diversification of Livelihoods

The agricultural sector in Kenya comprises the following subsectors: industrial crops, food crops, horticulture, livestock, fisheries and forestry—and employs such factors of production as land, water and farmer institutions (cooperatives, associations).¹³⁹ It is estimated that Kenya has an area of about 587,000 km² out of which 11,000 km² is water. Of the remaining 576,000 km² landmass, only about 16 per cent is of high and medium agricultural potential with adequate and reliable rainfall. This potentially arable land is dominated by commercial agriculture with cropland occupying 31 per cent, grazing land 30 per cent, and forests 22 per cent. The rest of the land is used for game parks, urban centres, markets, homesteads and infrastructure.¹⁴⁰

Arguably, the services provided by biodiversity cover a large spectrum of factors contributing to the generation of agricultural income: crop yield and quality, soil fertility, pest control and pollination.¹⁴¹ It is also worth pointing out that agricultural environments and landscapes constitute a reservoir of diversity in terms of the number of species and the number of functions useful for agriculture (pollination, recycling of organic matter, amongst others).¹⁴²

Notably, under Kenya's Vision 2030, agriculture is identified as a key sector to deliver the 10 per cent economic growth rate per annum envisaged under the economic pillar. As a result, the Development Blueprint leans heavily towards promotion of a commercially-oriented, and modern agricultural sector, which it plans to accomplish through institutional reforms in agriculture and livestock, increasing productivity of crops and livestock, introducing land use policies for better utilisation of high and medium potential lands, developing more irrigable areas in arid and semi-

¹³⁷ Ibid, p. 15.

¹³⁸ McCartney, M., Finlayson, M., de Silva, S., Amerasinghe, P., & Smakhtin, V., 'Sustainable Development and Ecosystem Services'. Sustainable development and ecosystem services (No. 612-2016-40661).

¹³⁹ Republic of Kenya, Agricultural Sector Development Strategy 2010–2020, p. 1.

¹⁴⁰ Republic of Kenya, Agricultural Sector Development Strategy, 2010-2020, p. 9. (Government Printer, Nairobi, 2010).

¹⁴¹ Le Roux, X., Barbault, R., Baudry, J., Burel, F., Doussan, I., Garnier, E., Herzog, F., Lavorel, S., Lifran, R., Roger-Estrade, J. and Sarthou, J.P., 'Agriculture and Biodiversity: Benefiting from Synergies' [2008] Multidisciplinary Scientific Assessment. INRA, Paris.

¹⁴² Ibid, 1.

arid lands for both crops and livestock and improving market access for our smallholders through better supply chain management.¹⁴³

While intensification of agricultural production has the potential to lead to an increase in the productivity of cultivated areas, associated with the use of mineral fertilizers and synthetic pesticides and with the "simplification" of agricultural landscapes resulting from a reduction in the diversity of production systems in order to feed the growing world population,¹⁴⁴ the same has also been cited as one of the main drivers of worldwide biodiversity decline.¹⁴⁵ The adverse effect has been on broad ecosystems and environmental aspects such as freshwater ecosystems which have suffered as excess nutrients from agricultural practices enter surface and ground waters and inefficient irrigation systems deplete water sources,¹⁴⁶ while biological control of pests in arable fields which is an important ecosystem service provided by high-diversity landscapes and species-rich enemy communities can be affected by the intensification of agriculture.¹⁴⁷

In addition, use of mineral fertilizers and pesticides can lead to degradation of habitat quality at local-field scales, while transformation of perennial habitats (grassland) to arable fields and destructions of field boundaries and hedges can lead to a loss of semi-natural habitats and simplification at landscape scales, including changes in the distribution and supply of resource for many species and the food webs building on them.¹⁴⁸ Soils may also deteriorate as a result of erosion, compaction, loss of organic matter and contamination with pesticides, and in some areas, heavy metals.¹⁴⁹

Biodiversity is, therefore, important at all levels of the agricultural landscape, from the different soil microbes that help cycle nutrients and decompose organic matter, to wasps and bats that help reduce crop pests, and to birds and insects that pollinate high value crops, biodiversity helps farmers successfully grow food and maintain sustainable farm landscapes.¹⁵⁰ Thus, not only does

¹⁴³ Sessional Paper 10 of 2012 on Kenya Vision 2030, para. 3.3.

¹⁴⁴ Le Roux, X., Barbault, R., Baudry, J., Burel, F., Doussan, I., Garnier, E., Herzog, F., Lavorel, S., Lifran, R., Roger-Estrade, J. and Sarthou, J.P., 'Agriculture and Biodiversity: Benefiting from Synergies', p.2.

¹⁴⁵ Kleijn, D., F. Kohler, A. Báldi, P. Batáry, E. D. Concepción, Y. Clough, M. Díaz et al. "On the relationship between farmland biodiversity and land-use intensity in Europe." *Proceedings of the Royal Society of London B: Biological Sciences* 276, no. 1658 (2009): 903-909, p.903.

¹⁴⁶ Geier, Bernward, Jeffrey A. McNeely, and Sue Stolton. "The relationship between nature conservation, biodiversity and organic agriculture." *Stimulating positive linkages between agriculture and biodiversity. Recommendations for building blocks for the EC-Agricultural Action Plan on Biodiversity.* European Centre for Nature Conservation, ECNC Technical report series, Tilburg, The Netherlands (2000): 101-105 at p. 102.

¹⁴⁷ Thies, Carsten, Sebastian Haenke, Christoph Scherber, Janne Bengtsson, Riccardo Bommarco, Lars W. Clement, Piotr Ceryngier et al., "The relationship between agricultural intensification and biological control: experimental tests across Europe." *Ecological Applications* 21, no. 6 (2011): 2187-2196, p. 2187.

¹⁴⁸ *Ibid*, p. 2187.

¹⁴⁹ Chris Stoate and others, 'Ecological Impacts of Arable Intensification in Europe' (2002) 63 *Journal of Environmental Management* 337.

¹⁵⁰ GRACE Communications Foundation, Biodiversity, available at <http://www.sustainabletable.org/268/biodiversity>; see also Benton, T.G., Bryant, D.M., Cole, L. and Crick, H.Q., 'Linking Agricultural Practice to Insect and Bird Populations: A Historical Study Over Three Decades' (2002) 39 *Journal of applied ecology* 673; Saunders, M.E., Peisley, R.K., Rader, R. and Luck, G.W., 'Pollinators, Pests, and Predators: Recognizing Ecological Trade-Offs in Agroecosystems.' (2016) 45 *AMBIO-A Journal of the Human Environment*; Wenny, D.G., Devault, T.L., Johnson, M.D., Kelly, D., Sekercioglu, C.H., Tomback, D.F. and Whelan, C.J., 'The Need to Quantify Ecosystem Services Provided by Birds' (2011) 128 *The auk* 1.

the maintenance of biodiversity help ensure viable crop production, but many organisms and species have come to rely on particular agricultural landscapes for their very survival. That is, agriculture both supports, and is supported by, the maintenance of biodiversity.¹⁵¹

5.2 Enhancing Environmental Education in School Curricula

Agenda 21 recognises the role of education in achieving sustainable livelihoods and thus calls for “re-orientation” of all education toward sustainability.¹⁵² It states that both formal education and non-formal education are indispensable to changing people's attitudes so that they have the capacity to assess and address their sustainable development concerns as well as achieving environmental and ethical awareness, values and attitudes, skills and behaviour consistent with sustainable development and for effective public participation in decision-making.¹⁵³

Environmental education has been defined as a process that allows individuals to explore environmental issues, engage in problem solving, and take action to improve the environment. As a result, individuals develop a deeper understanding of environmental issues and have the skills to make informed and responsible decisions.¹⁵⁴ Students are expected to be equipped with the following: awareness and sensitivity to the environment and environmental challenges; knowledge and understanding of the environment and environmental challenges; attitudes of concern for the environment and motivation to improve or maintain environmental quality; skills to identify and help resolve environmental challenges; and participation in activities that lead to the resolution of environmental challenges.¹⁵⁵

Notably, while environmental information is important, environmental education is more than that as it goes beyond the citizens' right to giving their opinion to incorporate: increased public awareness and knowledge of environmental issues; building up critical thinking capacity; enhanced individuals' problem-solving and decision-making skills; and it does not advocate a particular viewpoint.¹⁵⁶ Environmental education is thus important for creating awareness and understanding about environmental issues which eventually leads to responsible individual and group actions.¹⁵⁷ As far as the role of education in achieving sustainable development is concerned, education is considered to play an important role in ensuring that human beings acquire knowledge, skills, attitudes, and values necessary to shape a sustainable future.¹⁵⁸ Continued enhanced and effective environmental education in Kenyan school curricula is important if Kenyans are to appreciate from their formative years the need to protect and conserve their environment and biodiversity in particular, as a prerequisite for achieving sustainable development.¹⁵⁹

¹⁵¹ Ibid.

¹⁵² Chapter 36, Agenda 21.

¹⁵³ Ibid, para. 36.3.

¹⁵⁴ OA US EPA, ‘What Is Environmental Education?’ (US EPA, 13 December 2012) <<https://www.epa.gov/education/what-environmental-education>> accessed 3 June 2021.

¹⁵⁵ Ibid.

¹⁵⁶ OA US EPA, ‘What Is Environmental Education?’ (US EPA, 13 December 2012) <<https://www.epa.gov/education/what-environmental-education>> accessed 3 June 2021.

¹⁵⁷ Beatus Mwendwa, ‘Learning for Sustainable Development: Integrating Environmental Education in the Curriculum of Ordinary Secondary Schools in Tanzania.’ [2017] *Journal of Sustainability Education*.

¹⁵⁸ Ibid.

¹⁵⁹ AM Karugu, ‘Aspects of Environmental Education in Kenya’s Preschool Curriculum’ <<https://ir-library.ku.ac.ke/handle/123456789/8020>> accessed 3 June 2021; see also Unger, Suanne, “Environmental

5.3 Adopting Rights-Based Approaches to Biological Diversity Conservation

Rights-based approaches to conservation have been defined to mean “integrating rights norms, standards, and principles into policy, planning, implementation, and outcomes assessment to help ensure that conservation practice respects rights in all cases, and supports their further realisation where possible”.¹⁶⁰

Conservation of ecosystem goods and services is considered important for upholding economic, social and cultural rights, such as the rights to health, an adequate standard of living, freedom from hunger and cultural freedom.¹⁶¹ The discussion on human rights approaches to conservation is usually informed by the procedural rights, such as to participate in decision making, acquire information and access justice; and the substantive rights, such as to life, personal security, health, an adequate standard of living, education, freedom to practice culture and freedom from all forms of discrimination, amongst others.¹⁶²

Notably, many international human rights instruments and multilateral environmental agreements now recognise rights to participation in environmental decision making, the importance of the environment for sustainable development and substantive rights to a clean and healthy environment.¹⁶³ Furthermore, at the national level, many national constitutions, including Kenya’s, explicitly recognise rights to a clean or healthy environment and acknowledge the need for environmental protection and conservation as a prerequisite for the fulfillment of other social and economic rights. For instance, the Constitution of Kenya provides that:

19. (1) The Bill of Rights is an integral part of Kenya’s democratic state and is the framework for social, economic and cultural policies.
(2) The purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.

At the international law level, CBD Decision XII/7 2, encourages Parties to give gender due consideration in their national biodiversity strategies and action plans and to integrate gender into the development of national indicators.¹⁶⁴ Adopting a rights-based approach to biodiversity conservation can go a long way in enhancing the rights of both men and women. These rights

education in Kenya: the need for a community-based biology curriculum in the secondary schools." (1993) Graduate Student Theses, Dissertations, & Professional Papers. 7615 <<https://scholarworks.umt.edu/cgi/viewcontent.cgi?article=8650&context=etd>> accessed 3 June 2021; Matthias Winfried Kleespies and Paul Wilhelm Dierkes, ‘Impact of Biological Education and Gender on Students’ Connection to Nature and Relational Values’ (2020) 15 PLOS ONE e0242004.

¹⁶⁰ ‘Rights-Based Approaches to Conservation’ (IUCN, 14 December 2015) <<https://www.iucn.org/theme/governance-and-rights/about/our-work/governance-and-rights-based-approaches/rights-based-approaches-conservation>> accessed 4 June 2021.

¹⁶¹ Campese, J., Sunderland, T., Greiber, T. and Oviedo, G. (eds.), *Rights-based approaches: Exploring issues and opportunities for conservation*. (CIFOR and IUCN. Bogor, Indonesia, 2009), p.1.

¹⁶² *Ibid*, p. 2.

¹⁶³ *Ibid*, p. 5.

¹⁶⁴ CBD Decision XII/7, para.2.

include both procedural and substantive rights.¹⁶⁵ Procedural rights relate to access to the processes by which people can assert their rights where procedural rights are important in themselves, and also help ensure the realization of substantive rights, including by informing rights-holders and duty-bearers about their respective rights and responsibilities, and giving rights-holders space to make effective claims in systems of mutual accountability.¹⁶⁶ The relevant procedural rights conservation include: Right to information¹⁶⁷; Right to participation¹⁶⁸; and the right to access to justice (including redress)¹⁶⁹. On the other hand, substantive rights are defined as rights to the “substance” of human wellbeing (such as rights to life, housing, water and a healthy environment) and contextually include:¹⁷⁰ Right to life;¹⁷¹ Right to health;¹⁷² Right to an adequate standard of living, including food;¹⁷³ Right to water;¹⁷⁴ Right to development;¹⁷⁵ Right to practice one’s culture;¹⁷⁶ Right to work;¹⁷⁷ Right to property;¹⁷⁸ and the peoples’ right to self-determination, use of natural wealth and resources, and not to be deprived of means of subsistence.¹⁷⁹

¹⁶⁵ UN Environment, ‘What Are Environmental Rights?’ (UNEP - UN Environment Programme, 2 March 2018) <<http://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/advancing-environmental-rights/what>> accessed 7 June 2021.

¹⁶⁶ Jenny Springer, Jessica Campese and M Painter, ‘Conservation and Human Rights: Key Issues and Contexts. Scoping Paper for the Conservation Initiative on Human Rights’ [2011] Unpublished report. Conservation Initiative on Human Rights Working Group, 16-17.

¹⁶⁷ See Article 10 of the Constitution on national values and principles of governance; Article 33 on freedom of expression; Article 35 on access to information; Article 69 on State obligations in respect of the State; Access to Information Act, 2016 (No. 31 of 2016), Laws of Kenya.

¹⁶⁸ See Article 10 of the Constitution on national values and principles of governance; Article 33 on freedom of expression; Article 69;

¹⁶⁹ Article 10 of the Constitution on national values and principles of governance; Article 21 on implementation of rights and fundamental freedoms; Article 22 on enforcement of Bill of rights; Article 23 on authority of Courts to uphold and enforce the Bill of Rights; Article 27 on equality and freedom from discrimination; Article 48 on access to justice; Article 70 on enforcement of environmental rights; and Article 159 on judicial authority.

¹⁷⁰ Jenny Springer, Jessica Campese and M Painter, ‘Conservation and Human Rights: Key Issues and Contexts. Scoping Paper for the Conservation Initiative on Human Rights’ [2011] Unpublished report. Conservation Initiative on Human Rights Working Group.

¹⁷¹ See Article 26 of the Constitution of Kenya 2010 on right to life; see also the case of *Peter K. Waweru v Republic* [2006] eKLR12 where the Court relied on, inter alia, case law from India to equate right to life to the right to clean and healthy environment.

¹⁷² See Article 42 of the Constitution of Kenya on right to clean and healthy environment; see also Article 43(1) (a) on the economic and social rights which include the right- to the highest attainable standard of health, which includes the right to health care services, including reproductive health care.

¹⁷³ See Article 43(1) (b) (c) on the economic and social rights which include the right- (b) to accessible and adequate housing, and to reasonable standards of sanitation; and (c) to be free from hunger, and to have adequate food of acceptable quality.

¹⁷⁴ See Article 43(1) (d) on the economic and social rights which include the right- o clean and safe water in adequate quantities.

¹⁷⁵ See Article 10 of the Constitution on national values and principles of governance; see also Article 27 on the equality and freedom from discrimination; Part 3 of the constitution on the specific application of rights relating to persons with disabilities, youth, minorities and marginalised groups, older members of society and specifically in reference to their right to participate in national development affairs.

¹⁷⁶ See Article 11 of the Constitution of Kenya; Article 32 on freedom of conscience, religion, belief and opinion; and Article 44 on language and culture.

¹⁷⁷ See Article 41 of the Constitution of Kenya on labour relations; Employment Act, 2007, Cap 226; Employment and Labour Relations Court Act, No. 20 of 2011; Labour Relations Act, 2007.

¹⁷⁸ See Article 40 of the Constitution on protection of property rights.

¹⁷⁹ See United Nations. Declaration on the Rights of Indigenous Peoples, 2007; International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171; International

As already pointed out, biodiversity and generally ecosystem services are important in fulfilment of the foregoing substantive rights and hence, any efforts towards conservation of biodiversity should bear this in mind not only for the sake of fulfilling human rights but also to ensure that the benefiting group of persons have the incentive to participate in conservation measures as envisaged under Article 69(2) of the Constitution of Kenya.¹⁸⁰ This is also in line with the Aichi targets of the Convention on Biological Diversity (CBD) which calls upon States to ensure that biodiversity resources are “effectively and equitably managed”, where equity or justice is conceptualized in three areas of concern: (i) distribution of costs and benefits from conservation; (ii) procedure referring to participation in decision making; (iii) recognition of social and cultural difference.¹⁸¹

Thus, building strategies for the protection of ecosystem services into conservation and land-use planning is essentially the promotion of human survival, and not merely a luxury task.¹⁸² The *Natural Resources (Benefit Sharing) Bill, 2018* is meant to establish a system of benefit sharing in resource exploitation between resource exploiters, the national government, county governments and local communities; and for connected purposes.¹⁸³ The legislation is to apply to: sunlight; water resources; forests, biodiversity and genetic resources; wildlife resources; industrial fishing; and wind.¹⁸⁴ Its application is to be guided by the following principles: transparency and inclusivity; revenue maximization and adequacy; efficiency and equity; accountability and participation of the people; rule of law and respect for human rights of the people; and sustainable natural resources management.¹⁸⁵ Once enacted, this legislation has the potential to entrench a rights-based approach to natural resources management in Kenya.

5.4 Effective Pest Control for Biodiversity Conservation

Pests have a negative effect not only on agricultural production but also on biodiversity conservation. It has been observed that the damage caused by pest organisms is one of the most important factors in the reduced productivity of any crop plant species, losses can occur in the field (pre-harvest) and during storage (post-harvest).¹⁸⁶ However, accurate estimates of agricultural losses caused by insects are difficult to obtain because the damage caused by these organisms depends on a number of factors related to environmental conditions, the plant species being cultivated, the socioeconomic conditions of farmers, and the level of technology used.¹⁸⁷ It

Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3; Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

¹⁸⁰ 69. Obligations in respect of the environment:

(2) Every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources;

see also Emily Woodhouse and J Terrence McCabe, ‘Well-Being and Conservation: Diversity and Change in Visions of a Good Life among the Maasai of Northern Tanzania’ (2018) 23 *Ecology and Society*.

¹⁸¹ Emily Woodhouse and J Terrence McCabe, ‘Well-Being and Conservation: Diversity and Change in Visions of a Good Life among the Maasai of Northern Tanzania’ (2018) 23 *Ecology and Society*, 52.

¹⁸² Wenny, D.G., Devault, T.L., Johnson, M.D., Kelly, D., Sekercioglu, C.H., Tomback, D.F. and Whelan, C.J., ‘The Need to Quantify Ecosystem Services Provided by Birds’ (2011) 128 *The Auk* 1.

¹⁸³ Preamble, *Natural Resources (Benefit Sharing) Bill, 2018*.

¹⁸⁴ *Ibid*, clause 3.

¹⁸⁵ *Ibid*, clause 4.

¹⁸⁶ Oliveira, C. M., A. M. Auad, S. M. Mendes, and M. R. Frizzas, "Crop Losses and The Economic Impact of Insect Pests on Brazilian Agriculture," *Crop Protection* 56 (2014), pp. 50-54, p.51.

¹⁸⁷ *Ibid*.

is important to address the problem of pests if food security and biodiversity conservation are to be achieved. Pest control is part of the ecosystem services that improve and sustain human life.¹⁸⁸

One of the possible and effective approaches in pest control for biodiversity conservation is the integrated pest control. Integrated Pest Management (IPM) is an ecosystem approach to crop production and protection that combines different management strategies and practices to grow healthy crops and minimize the use of pesticides.¹⁸⁹ IPM has been developed as a way to control pests without relying solely on pesticides. FAO promotes IPM as the preferred approach to crop protection and regards it as a pillar of both sustainable intensification of crop production and pesticide risk reduction.¹⁹⁰ FAO defines Integrated Pest Management to mean

*'the careful consideration of all available pest control techniques and subsequent integration of appropriate measures that discourage the development of pest populations and keep pesticides and other interventions to levels that are economically justified and reduce or minimize risks to human health and the environment. IPM emphasizes the growth of a healthy crop with the least possible disruption to agro-ecosystems and encourages natural pest control mechanisms.'*¹⁹¹

The Protection of Traditional Knowledge and Cultural Expressions Act, 2016¹⁹² was enacted to provide a framework for the protection and promotion of traditional knowledge and cultural expressions; to give effect to Articles 11, 40 and 69(L) (c) of the Constitution; and for connected purposes. The Act defines "traditional knowledge" to include any knowledge contained in the codified knowledge systems passed on from one generation to another including agricultural, environmental or medical knowledge, knowledge associated with genetic resources or other components of biological diversity, and know-how of traditional architecture, construction technologies, designs, marks and indications.¹⁹³

Similarly, Aichi Target 18 envisages that by 2020, *the traditional knowledge, innovations and practices of indigenous and local communities relevant for the conservation and sustainable use of biodiversity, and their customary use of biological resources, are respected, subject to national legislation and relevant international obligations, and fully integrated and reflected in the implementation of the Convention with the full and effective participation of indigenous and local communities, at all relevant levels.*¹⁹⁴

¹⁸⁸ Philpott Stacy M., Biodiversity and Pest Control Services. In: Levin S.A. (ed.), Encyclopedia of Biodiversity, second edition, Waltham, MA: Academic Press, 2013, Volume 1, pp. 373-385.

¹⁸⁹ FAO, 'AGP - Integrated Pest Management,' available at <http://www.fao.org/agriculture/crops/core-themes/theme/pests/ipm/en/>.

¹⁹⁰ Ibid.

¹⁹¹ 'Plant Production and Protection Division: Integrated Pest Management'

<<http://www.fao.org/agriculture/crops/thematic-sitemap/theme/pests/ipm/en/>> accessed 7 June 2021.

¹⁹² Protection of Traditional Knowledge and Cultural Expressions Act, No. 33 of 2016, Laws of Kenya.

¹⁹³ Protection of Traditional Knowledge and Cultural Expressions Act, s.2.

¹⁹⁴ 'Target 18 – Traditional Knowledge and Customary Sustainable Use – Local Biodiversity Outlooks' <<https://localbiodiversityoutlooks.net/targets/target-18-traditional-knowledge-and-customary-sustainable-use/>> accessed 7 June 2021.

Farmers should be encouraged to use the least harmful approaches to pest control, including applying indigenous methods of pest control.¹⁹⁵

5.5 Biodiversity Mainstreaming for Food and Nutrition Security

Biodiversity for food and agriculture includes the variability among living organisms contributing to food and agriculture, including also the forestry and fisheries sectors.¹⁹⁶ The sustainable use of genetic resources for food and agriculture will be the foundation for many of the adaptation strategies required in food and agriculture. Arguably, in order to adapt to climate change, plants and animals important for food security will need to adjust to abiotic changes such as heat, drought, floods and salinity.¹⁹⁷

Genetic resources are generally seen as the living material that local communities, breeders and researchers use to adapt to changing socio-economic needs and ecological challenges. Maintaining and using a wide basket of genetic diversity at a time of climate change is considered an essential insurance policy for the food and agriculture sectors.¹⁹⁸ Crop genetic diversity is considered a source of continuing advances in yield, pest resistance and quality improvement, and it is widely accepted that greater varietal and species diversity would enable agricultural systems to maintain productivity over a wide range of conditions.¹⁹⁹ It has been argued that maintaining and enhancing the diversity of crop genetic resources is of increasing importance to ensure the resilience of food crop production particularly in light of climate change challenges.²⁰⁰

One of the ways of promoting food security in the face of climate change is adoption of climate smart agriculture. FAO defines Climate-Smart Agriculture (CSA) as an approach that helps to guide actions needed to transform and reorient agricultural systems to effectively support development and ensure food security in a changing climate.²⁰¹ CSA aims to tackle three main objectives: sustainably increasing agricultural productivity and incomes; adapting and building resilience to climate change; and reducing and/or removing greenhouse gas emissions, where possible. CSA is an approach for developing agricultural strategies to secure sustainable food security under climate change. CSA provides the means to help stakeholders from local to national and international levels identify agricultural strategies suitable to their local conditions.²⁰²

Pollinators are part of the food production chain and must therefore be taken care of. Experts have warned that climate change will profoundly impact insects, including their physiology (how they live and reproduce), their behaviour and physical features, as well as relationships with other

¹⁹⁵ D Grzywacz and others, 'The Use of Indigenous Ecological Resources for Pest Control in Africa' (2014) 6 Food Security 71; 'Cultural Methods of Pest, Primarily Insect, Control' <<https://eap.mcgill.ca/publications/eap58.htm>> accessed 6 June 2021.

¹⁹⁶ FAO, 'Climate Change and Biodiversity for Food and Agriculture,' Technical Background Document From The Expert Consultation Held on 13 to 14 February 2008, p.1. Available at http://www.fao.org/uploads/media/FAO_2008a_climate_change_and_biodiversity_02.pdf

¹⁹⁷ Ibid.

¹⁹⁸ Ibid, p.3.

¹⁹⁹ Carpenter, Janet E., "Impact of GM crops on biodiversity," GM crops 2, no. 1 (2011): 7-23, p.7.

²⁰⁰ Ibid, P.7.

²⁰¹ 'Climate-Smart Agriculture | Food and Agriculture Organization of the United Nations' <<http://www.fao.org/climate-smart-agriculture/en/>> accessed 7 June 2021.

²⁰² FAO, "Climate-Smart Agriculture," available at <http://www.fao.org/climate-smart-agriculture/en/>

species (like host plants and natural enemies).²⁰³ As a result, immense shifts are predicted in population dynamics, abundance and geographical spread of insects. In turn, these alterations will have positive and negative outcomes for people, livestock and crops, in terms of vulnerability to insect-transmitted diseases, and availability of essential services provided by insects such as pollination and pest regulation.²⁰⁴ Thus, this must form part of the wider debate in the quest for food and nutrition security.

6. Conclusion

This paper has offered a critical discussion on effective conservation of biodiversity as a way of securing the future both for the sake of human beings as well as all other living organisms. As discussed in the paper, biodiversity is an important part of the efforts towards achieving sustainable development agenda as it is the source of all life and all raw materials required to meet human needs. Any efforts to secure human life for both the present and future generations must, therefore, include conservation of biodiversity as a matter of necessity. Conserving Biodiversity for a Better Future is thus an idea that we must deeply reflect on as a matter of urgency.

²⁰³ ‘Insects and Climate Change | Icipe - International Centre of Insect Physiology and Ecology’ <<http://www.icipe.org/news/insects-and-climate-change>> accessed 7 June 2021.

²⁰⁴ International Centre of Insect Physiology and Ecology (icipe), ‘Insects and Climate Change,’ available at <http://www.icipe.org/news/insects-and-climate-change> Accessed on 6/06/2021.

Embracing Science and Technology in Legal Education for Efficiency and Enhanced Access to Justice

Abstract

The COVID-19 pandemic has destabilized the traditional ways through which many professions operated. As a way of ensuring that the World Health Organization's directives on social distancing are observed, many professions as well as learning institutions have had to resort to virtual platforms for either learning or working remotely from home. One of the sectors that have seen rapid changes than it has ever experienced before is the legal profession where the use of technology in accessing justice has been embraced as a matter of necessity. This notably affects the provision of legal services as well as provision of legal education. This may also arguably mark the beginning of a trend worldwide where businesses and learning institutions will embrace science and technology in their activities, a trend that may be taken up at a faster rate even post the pandemic. Technology is revolutionizing the way businesses and various sectors operate and although it comes with its advantages and disadvantages, this paper argues that the legal profession, both in provision of services and legal education, has more to gain if they can embrace science and technology. It explores the various ways in which the legal sector can utilise technology to not only enhance access to justice but also improve the efficiency in the legal sector. Arguably, law schools, law firms, and even the Judiciary must embrace science and technology in the face of globalization, in order to achieve efficiency and enhanced access to justice.

1. Introduction

The Coronavirus Disease (COVID-19) pandemic effect has not only been felt on the global economy but also in many professions which have had to adapt to stay afloat during the pandemic.¹ Due to the preventive measures recommended by the World Health Organisation which include social distancing among others, it has become almost impossible for professionals to operate from their traditional physical offices.² The legal profession has not been spared either. The legal practice in many parts of the world including the African continent has been by way of physical attendance in courtrooms where the judges and magistrates, advocates and witnesses physically present their cases.³ The physical presence of employees in law firms has also become

¹ See United Nations Conference on Trade and Development, *Impact Of The Covid-19 Pandemic On Trade And Development: Transitioning to a New Normal*. (United Nations 2021); Lenzen, M., Li, M., Malik, A., Pomponi, F., Sun, Y. Y., & Wiedmann, T., 'Global Socio-Economic Losses and Environmental Gains from the Coronavirus Pandemic' (2020) 15 PLoS ONE e0235654; Barua S, 'Understanding Coronanomics: The Economic Implications of the Coronavirus (COVID-19) Pandemic'; Siddiqui K, 'The Impact of Covid-19 on the Global Economy' [2020] World; Nicola M and others, 'The Socio-Economic Implications of the Coronavirus and COVID-19 Pandemic: A Review' [2020] International journal of surgery.

² 'Advice for the Public' <<https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public>> accessed 4 April 2021.

³ 'Could the Pandemic Be Grinding Justice to a Halt?' (ALN Kenya)

<<https://www.africalegalnetwork.com/kenya/news/coronavirus-pandemic-grinding-justice-halt/>> accessed 4 April 2021; 'IBA - The Global Impact of the Covid-19 Pandemic on Commercial Dispute Resolution in the First Seven Months'

<<https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=bd404ce3-3886-48a8-98f6-38eaaccd5f53>> accessed 4 April 2021.

difficult.⁴ Court hearings are being conducted virtually via online platforms. Arguably, this has disrupted the profession in a way never experienced before.⁵ Apart from effects of the pandemic, the changes in the legal sector have also been largely attributed to the ascendancy of information technology, the globalization of economic activity, the blurring of differences between professions and sectors, and the increasing integration of knowledge.⁶ Technology has greatly impacted the way law and law firms are operating in this era as far as enhancing efficiency is concerned.⁷ This paper offers a critical discussion on how science and technology can be used in not only enhancing provision of legal education in Kenya but also improving service delivery in legal practice.

In this paper, ‘legal technology’ (Legal Tech) is used to mean the use of technology and software to provide and aid legal services.⁸ Legal Technology applies technology and software to assist Law Firms in practice management, billing, big data, e-discoveries, predictive analytics, knowledge management and document storage.⁹

⁴ Meganne Tillay | February 28 and 2020 at 03:39 AM, ‘Baker McKenzie Shuts down London Office Following Coronavirus Scare’ (Law.com International) <<https://www.law.com/international-edition/2020/02/28/baker-mckenzie-shuts-down-london-office-following-coronavirus-scare/>> accessed 3 June 2020.

⁵ Journal ABA, ‘Courts Attempt to Balance Innovation with Access in Remote Proceedings’ (ABA Journal) <<https://www.abajournal.com/magazine/article/courts-attempt-to-balance-innovation-with-access-in-remote-proceedings>> accessed 4 April 2021; Puddister K and Small TA, ‘Trial by Zoom? The Response to COVID-19 by Canada’s Courts’ (2020) 53 Canadian Journal of Political Science/Revue canadienne de science politique 373; Chandra G, Gupta R and Agarwal N, ‘Role of Artificial Intelligence in Transforming the Justice Delivery System in Covid-19 Pandemic’ [2020] Chandra, G., Gupta, R. and Agarwal 344; Rossner M, Tait D and McCurdy M, ‘Justice Reimagined: Challenges and Opportunities with Implementing Virtual Courts’ [2021] Current Issues in Criminal Justice 1; Legg M, ‘The COVID-19 Pandemic, the Courts and Online Hearings: Maintaining Open Justice, Procedural Fairness and Impartiality’ (Social Science Research Network 2021) SSRN Scholarly Paper ID 3681165 <<https://papers.ssrn.com/abstract=3681165>> accessed 4 April 2021.

⁶ Kellogg Sarah, ‘Cover Story: The Transformation of Legal Education’ From Washington Lawyer, May 2011 <<https://www.dcb.org/bar-resources/publications/washington-lawyer/articles/may-2011-legal-education.cfm>> accessed 4 June 2020.

⁷ Abigail Hess, ‘Experts Say 23% of Lawyers’ Work Can Be Automated—Law Schools Are Trying to Stay Ahead of the Curve’ (CNBC, 7 February 2020) <<https://www.cnb.com/2020/02/06/technology-is-changing-the-legal-profession-and-law-schools.html>> accessed 5 June 2020; Alej, ro Miyar | February 06 and 2020 at 09:46 AM, ‘Technology Trends That Will Affect the Legal Profession in 2020’ (Daily Business Review) <<https://www.law.com/dailybusinessreview/2020/02/06/technology-trends-that-will-affect-the-legal-profession-in-2020/>> accessed 5 June 2020; Singapore Academy of Law, ‘Deep Thinking: The Future Of The Legal Profession In An Age Of Technology’ (Medium, 19 July 2019) <<https://medium.com/@singaporeacademyoflaw/deep-thinking-the-future-of-the-legal-profession-in-an-age-of-technology-6b77e9ddb1e9>> accessed 5 June 2020; ‘Disruptive Technology in the Legal Profession’ (Deloitte United Kingdom) <<https://www2.deloitte.com/uk/en/pages/financial-advisory/articles/the-case-for-disruptive-technology-in-the-legal-profession.html>> accessed 5 June 2020; ‘New Technologies and the Legal Profession’ (nyujlb) <<https://www.nyujlb.org/single-post/2019/04/08/New-Technologies-and-the-Legal-Profession>> accessed 5 June 2020; Tanya Du Plessis, ‘Competitive Legal Professionals’ Use of Technology in Legal Practice and Legal Research’ (2008) 11 Potchefstroom Electronic Law Journal.

⁸ ‘What Is Legal Technology And How Is It Changing Our Industry?’ (The Lawyer Portal, 29 January 2019) <<https://www.thelawyerportal.com/blog/what-is-legal-tech-and-how-is-it-changing-industry/>> accessed 3 June 2020.

⁹ ‘Business Models for Law Firms - p.Xel Marketing Agency’ <<https://www.p-xel.co/business-models-for-digital-disruption-in-the-legal-industry/>> accessed 5 June 2020.

While Legal Tech is meant to enable the bigger firms improve overall efficiency in order to adapt to a progressively popular agile working environment, it also allows smaller firms and sole practitioners to compete with the leading names in the field, giving them access to powerful research tools.¹⁰ This paper discusses these new developments and proceeds on the hypothesis that even though the profession may resume its normal traditional mode of operation, it is now time for the legal practitioners to consider adopting this way of doing things.

The paper specifically looks at legal practice in Kenya and explores recommendations on how best the legal practitioners in the country as well as the Judiciary can tap into technology to sustain virtual attendance of courts albeit alongside the traditional court attendance. The paper however approaches the subject of legal practice generally and does not make any attempt to look at the various disciplines of practice. It adopts a generalized approach to the term 'legal practice'.

2. Growth and Development of Legal Education and Training in Kenya: Looking into the Future

Most legal systems as well as legal education and training frameworks in Africa were influenced by their colonial masters. Kenya was a British colony from around 1895 when it was declared British Protectorate until its independence in 1963.¹¹ It has been documented that higher education, which included formal legal education, had hardly been introduced in many parts of the British colonial Empire by the end of the first part of the twentieth century.¹² In most of the earliest jurisdictions around the world such as the United States of America, law students in law schools during the first century of legal education received a very broad education based on the understanding that legal education in an academic setting should be broad based, including study of government generally in order to be of importance to students not intending to be lawyers as well as to future practitioners.¹³ This was well captured in an 1870 report in the *American Law Review* which quoted the President of Northwestern University in a letter to his Board of Trustees as follows:

*The object of a law department is not precisely and only to educate young men [and women] to be practicing lawyers, though it will be largely used for that purpose. It is to furnish all students who desire it the same facilities to investigate the science of human law, theoretically, historically, and thoroughly, as they have to investigate mathematics, natural sciences, or any other branch of thought.*¹⁴

It is thus arguable that the development of legal education and legal profession in general across the world was informed by not only the desire to meet the day-to-day needs for access to justice in a particular society but also the need to ensure that the legal experts can adopt and solve the problems of tomorrow. It is for this reason that legal education becomes an important pillar in

¹⁰ 'What Is Legal Technology And How Is It Changing Our Industry?'

<<https://www.thelawyerportal.com/blog/what-is-legal-tech-and-how-is-it-changing-industry/>> accessed 5 June 2020.

¹¹ Larsen L, 'Re-Placing Imperial Landscapes: Colonial Monuments and the Transition to Independence in Kenya' (2012) 38 *Journal of Historical Geography* 45.

¹² Likhovski A, 'Colonialism, Nationalism and Legal Education: The Case of Mandatory Palestine' (1917) 1967 *The History of Law in a Multicultural Society: Israel* 75, 76.

¹³ Stein RA, 'The Future of Legal Education' (1991) 75 *Minnesota Law Review* 945, 947.

¹⁴ *Ibid*, 948.

building a legal profession that will be dynamic and alive to the current needs of the society that it seeks to serve. To buttress the importance of legal and education and law in general in any society, it has been pointed out that ‘as a foundation of the society or a nation law is considered to be the means for social progress and economic growth.¹⁵ This is because, ‘law education is considered as a multidisciplinary subject, which involves basic knowledge of science, philosophy, arts, humanities and social sciences’ thus making it an important component of many sectors in any given society.¹⁶ Indeed, some of the earliest commentators on the subject of legal education in Kenya and Africa in general have pointed out “that the very future of the law in Africa depends on a proper system of legal education being established”.¹⁷

It has been pointed out that ‘due to the unique immunity of the legal industry, the impact of previous industrial and scientific and technological revolutions on the legal profession has always been relatively small whether on training of lawyers, selection of judges or the mode of operation of the legal profession system is still almost the same as that before modern times, especially in western countries.¹⁸ However, the modern legal system and legal training must be alive to the developments and challenges of the 21st Century. One of the most important developments of this century is science and technology which has impacted on almost all spheres of everyday life and all professions, including the legal profession and training. As pointed out by some authors, ‘technological changes have profound impact on all the existing system and surroundings where digitalization has brought the transformation in all the routine activities and the way to earn, learn, shop and play thus changing in a collective way production and contours of work, vis a vis social and political actions, in the forms of rules, regulations and policies, are determined to unfold the future’.¹⁹ In other words, the legal profession and training of lawyers must take care of ‘the needs of new brands of legal consumer’ if it is to remain relevant.²⁰

3. Embracing Science and Technology in Legal Profession for Efficiency and Enhanced Access to Justice

3.1. Use of Legal Technology within the Legal Profession in Kenya: Progressive or Conservative Profession?

A broad approach to the term “Legal profession” may be used to refer to all those who are in some capacity engaged in the working of the legal system, including judges, advocates, government lawyers, prosecutors, academics, paralegals and law reformers.²¹ All these persons play a crucial role in administration of justice and offering legal training for capacity building in the sector.

¹⁵ Raizada S and Mittal JK, ‘Structural Transformation and Learning Paradigms-Global Strategic Approach in Clinical Legal Education’ (2020) 20 *Medico Legal Update* 188, 189.

¹⁶ *Ibid*, 189.

¹⁷ Lord Denning (1960) (as quoted in Ojwang JB and Salter DR, ‘Legal Education in Kenya’ [1989] *Journal of African Law* 78, 78.)

¹⁸ Hu T and Lu H, ‘Study on the Influence of Artificial Intelligence on Legal Profession’, 5th International Conference on Economics, Management, Law and Education (EMLE 2019) (Atlantis Press 2020), 964.

¹⁹ Raizada S and Mittal JK, ‘Structural Transformation and Learning Paradigms-Global Strategic Approach in Clinical Legal Education’ (2020) 20 *Medico Legal Update* 188, 188.

²⁰ *Ibid*, 188.

²¹ Ghai, Y.P. and Cottrell, J. eds., *The legal profession and the new constitutional order in Kenya*. Strathmore University Press, 2014 <https://www.kas.de/c/document_library/get_file?uuid=56ba9291-7c05-98d5-96b1-8161785ff854&groupId=252038> 30 May 2020, p. 16.

They are therefore all relevant in the context of this paper as it deals with how all the stakeholders in the legal sector can embrace technology as a tool for enhancing accessing to justice for all.

With the Colonial incursion in Africa came the introduction of the formal justice systems that before then were non-existent and even unknown.²² In Kenya especially, this was necessitated by the emergence of private ownership of property by the colonialists particularly the settlers, and there arose the need for protection of their rights to the property and also enforcing the same against others, especially the Africans who had been rendered landless.²³ However, even after the colonialists left, there was no turning back as far as formal justice system was concerned.

The Government of Kenya continued to invest, albeit at an unsatisfactory pace, in ensuring that courts were put up across the country as the main system of access to justice. The legal profession has since played a major role in facilitating access to justice. However, it is not always easy for Kenyans to access justice due to a myriad of challenges. Some of the documented challenges facing access to justice over the years include but are not limited to: legal, institutional and structural challenges; Institutional and procedural obstacles; Social barriers; and Practical and economic challenges.²⁴ Closely related to these are high court fees, geographical location, complexity of rules and procedure and the use of legalese.²⁵ These are challenges that directly impact on the general public's ability to seek and access justice.

These domestic challenges are compounded by economic turbulence due to societal and economic changes; adaption to new technology; compliance and ethical issues; and continuing professional development which directly impact on the legal profession especially the lawyers.²⁶ The changing times and the above listed challenges have made clients to continue to demand efficiency and responsiveness from their lawyers for less cost. Clients expect their lawyers to focus more on the outcome and less on time spent on a legal matter.²⁷ The legal profession is also facing competitive pressures from accountants, realtors, financial advisors, and others – enabled by the Internet which is making it easier for them to compete.²⁸ The lawyers also face competition from global legal service providers, as the doors to transnational practice by lawyers widen by the World Trade Organization's General Agreement on Trade in Services (GATS) and regional integration.²⁹

²² See Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers, Nairobi, 2015, p.61.

²³ *Ibid*, p.61.

²⁴ Access to Justice–Concept Note for Half Day General Discussion Endorsed by the Committee on the Elimination of Discrimination against Women at its 53rd Session, p. 9. Available at <http://www.ohchr.org/Documents/HRBodies/CEDAW/AccessToJustice/ConceptNoteAccessToJustice.pdf> > 30 May 2020.

²⁵ Strengthening Judicial Reform in Kenya: Public Perceptions and Proposals on the Judiciary in the new Constitution, ICJ Kenya, Vol. III, May, 2002; See also Kariuki Muigua, *Avoiding Litigation through the Employment of Alternative Dispute Resolution*, pp 6-7, a Paper presented by the author at the In-House Legal Counsel, Marcus Evans Conference at the Tribe Village Market Hotel, Kenya on 8th & 9th March, 2012. Available at <http://www.chuitech.com/kmco/attachments/article/101/Avoiding.pdf> > 30 May 2020.

²⁶ Mboya, Apollo, 'The Bar: Challenges and Opportunities', in Ghai, Y.P. and Cottrell, J. eds., *The legal profession and the new constitutional order in Kenya*. Strathmore University Press, 2014, p. 242.

²⁷ *Ibid*, p. 242.

²⁸ *Ibid*, p. 242.

²⁹ *Ibid*, p. 242.

While lawyers have long been characterized as technology antagonists who are slow to change and wary of innovation³⁰, law practice has slowly but surely moved from an era of using desktop phones, filing cabinets, and yellow legal pads to a period when all these have been replaced by laptops, tablets, cell phones, and other mobile devices and often virtual or cloud-based platforms.³¹ In addition, majority of clients' documents are stored on hard drives or in the cloud, while layers of difficult-to-access "metadata" contain hidden information that could influence lawyers' decisions.³² This development in technology has come with tremendous improvement in not only efficiency but has also enhanced the security of clients' data. While this has been the trend worldwide, it is not difficult to find Kenyan law firms still struggling with the 'outdated' way of doing things around the office. Indeed, it is only recently that digital signatures and service of pleadings started taking root in the country.

It is still a concern on whether the Kenyan lawyers are ready to embrace technology to enhance efficiency and cut down on costs of doing business for the general public. In 2018³³, the Law Society of Kenya (LSK) went to court to oppose a decision by the Ministry of Lands and Physical Planning to digitize the land transactions processes at the land registry through the National Land Information Management System (NLIMS) arguing that the ministry had failed to consult the relevant stakeholders as required.³⁴ The LSK also argued that the regulations establishing the legal framework for electronic conveyancing are pending before Parliament.³⁵ In addition, The LSK further argued that rural Kenya still faces huge electricity and power challenges and that many Kenyans with no access to internet and online portal and risk being dispossessed of their lands.³⁶ While these arguments are certainly valid, and ones that may not be strictly interpreted to mean that LSK is opposed to the process, LSK must realise that the future of practice lies in embracing technology. The general public has been advocating for the digitization of land records to cut costs and for efficiency purposes.³⁷ The need for digitization has been demonstrated by the COVID-19 pandemic which at one point necessitated the closure of all registries following an

³⁰ 'Ready or not: artificial intelligence and corporate legal departments' <<https://legal.thomsonreuters.com/en/insights/articles/artificial-intelligence-ai-report>> accessed 5 June 2020.

³¹ Gaffney Nick, 'Law Practice Management: Transforming a Law Practice with Technology' <https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2017/september-october/law-practice-management-transforming-law-practice-technology/> accessed 3 June 2020.

³² Ibid.

³³ Sunday, March 18 and 2018 15:36, 'Land Ministry in Fresh Bid to Digitise Records' (Business Daily) <<https://www.businessdailyafrica.com/economy/Land-ministry-in-fresh-bid-to-digitise-records/3946234-4347056-go3sg/index.html>> accessed 3 June 2020.

³⁴ 'Lands Ministry Wants Orders Stopping Digitisation Lifted' (Daily Nation) <<https://www.nation.co.kehttps://www.nation.co.ke/dailynation/news/lands-ministry-wants-orders-stopping-digitisation-lifted--38664>> accessed 3 June 2020; Kamau Muthoni, 'LSK Sues Ministry over Online Land Transactions' (The Standard) <<https://www.standardmedia.co.ke/article/2001277226/lsk-sues-ministry-over-online-land-transactions>> accessed 3 June 2020.

³⁵ Ibid.

³⁶ Wednesday, April 18 and 2018 10:25, 'Lawyers Reject Automation of Land Deals in Court Suit' (Business Daily) <<https://www.businessdailyafrica.com/economy/Lawyers-reject-automation-of-land-deals-in-court-suit/3946234-4421556-p3kd3g/index.html>> accessed 3 June 2020.

³⁷ Monday, March 19 and 2018 18:19, 'EDITORIAL: Fulfil Digitisation Promise' (Business Daily) <<https://www.businessdailyafrica.com/analysis/editorials/Fulfil-digitisation-promise/4259378-4348512-ayf632z/index.html>> accessed 3 June 2020.

advisory by the National Emergency Response Committee on the management of Covid-19.³⁸ The continued closure of registries negatively affected businesses with pending and anticipated land transactions.³⁹ With the use of technology, such challenges may be overcome. Rwanda is considered to be one of the few African nations that have managed to move all their land records online and is considering introducing blockchain.⁴⁰ In the sections below, this paper explores the various technological developments that the legal profession in Kenya can embrace and use to not only enhance access to justice but also enhance efficiency and productivity for increased business opportunities.

3.2. Legal Practice in the 21st Century: Challenges and Prospects

The COVID-19 pandemic has notably created an unprecedented state of affairs where lawyers and other law firm staff have left their offices and forced to work from their homes, where they now juggle their legal work with child care, household management and plenty of other obligations.⁴¹ This has not only changed the way lawyers view their approach to legal work but has also created an opportunity for them to weigh and reconsider how law firms will operate in the near future.

Some commentators in the legal field have reported that as law firms embrace the idea of working remotely due to the COVID-19 pandemic, there has been a growing likelihood that physical offices will look very different in the future compared to what they are now.⁴² These are some of the expected and unexpected effects of the COVID-19 pandemic on law firms where remote working is expected to take off as never before and firms will operate with more prudent and flexible financial models.⁴³ It has been observed that young lawyers are the set of lawyers that came into practice within the 21st century, so they face a unique set of challenges which older lawyers of the earlier generations never had to face.⁴⁴ Some of the highlighted challenges facing them include: lack of job opportunities; lack of mentorship from older lawyers; lack of funding; lack of a firm structure; location; personal branding; exposure; career projectory; resources; difficulty in getting new work; and limited networking.⁴⁵ Despite this, the 21st century lawyer is considered as one with ‘staggering prospects which has the potential to pay off mightily’.⁴⁶ It has

³⁸ ‘Lands CS Karoney Extends Land Registries Lockdown’ (People Daily, 15 April 2020) <<https://www.pd.co.ke/business/economy-and-policy/lands-cs-karoney-extends-land-registries-lockdown-32930/>> accessed 3 June 2020.

³⁹ Ibid.

⁴⁰ ‘Kenyan Lawyers Wrangle with Government over Land Registry Digitization’ Reuters (7 May 2018) <<https://www.reuters.com/article/us-kenya-landrights-idUSKBN1I81K1>> accessed 3 June 2020.

⁴¹ Samantha Stokes | April 27 and 2020 at 06:59 PM | The original version of this story was published on The American Lawyer, ‘The Coronavirus Will Change the Legal Industry’s Approach to Remote Work—But How?’ (Law.com International) <<https://www.law.com/international-edition/2020/04/27/the-coronavirus-will-change-the-legal-industrys-approach-to-remote-work-but-how-378-140355/>> accessed 3 June 2020.

⁴² Paul Hodkinson | May 05 and 2020 at 01:00 AM | The original version of this story was published on The American Lawyer, ‘Welcome to the Law Firm Office of the Future: Smaller, Higher-Tech and One-Way’ (Law.com International) <<https://www.law.com/international-edition/2020/05/05/smaller-higher-tech-and-one-way-welcome-to-the-law-firm-office-of-the-future/>> accessed 3 June 2020.

⁴³ Ibid.

⁴⁴ Kingsley Ugochukwu Ani, ‘The 21st Century Lawyer: Challenges and Prospects’ (Social Science Research Network 2018) SSRN Scholarly Paper ID 3270279 <<https://papers.ssrn.com/abstract=3270279>> accessed 5 June 2020.

⁴⁵ Ibid.

⁴⁶ Ibid, p. 9.

been argued that the strength of the 21st century young lawyer lies in the understanding and use of Technology as a practice tool and area of core competence.⁴⁷

This is because, it has been acknowledged, the current world has become tech-driven and information-powered, such that the entire spectrum of communications is available at the click of a button.⁴⁸ The world is becoming more interconnected and smaller with the click of a button, and as such, the 21st century lawyer who is analytical savvy and business-smart enough to navigate through the technology maze is considered lucky as they have the capacity to cast their law practice net across a huge spread of the population.⁴⁹ With increased knowledge and specialization as a result of the many areas that come with the growth and development of technology, the 21st century lawyer can use all this to shape the course of their practice. Client demands have become primary drivers of change within the legal profession.⁵⁰ The next section looks at some of these opportunities and how modern lawyers can exploit them to their advantage in order to remain relevant in a fast changing world.

4. Enhancing Access to Justice through Embracing Technology in the Legal Practice and Legal Education and Training

4.1 Artificial Intelligence for Enhanced Productivity and Outreach

While the dream of Artificial Intelligence (AI) has been around for several decades, it has been pointed out that it is only recently that AI been commercialized and industrialized at scale where it affects many sectors of human lives, because arguably, fusing statistics, computer science and cognitive psychology, these complex digital systems, whether physical robots or software-enabled services, can reproduce and often surpass human-level intelligence in areas like reasoning, visual processing, pattern recognition and autonomous action.⁵¹ It has also been rightly pointed out that ‘as technology is fast growing, tasks that conventionally have been going to professionals would be transferring to computers and in future case might be resolved by computers working with logarithms so that outcomes may be predicted through artificial intelligence, creating the need for legal professionals to upgrade their knowledge and to develop skills to be able to match and to redefine professional ethics’.⁵² Law schools are expected to step

⁴⁷Ibid, p.9; See also ‘Tech Competence a Must | Canadian Lawyer’

<<https://www.canadianlawyermag.com/news/opinion/tech-competence-a-must/274463>> accessed 5 June 2020; ‘Shaping the 21st-Century Lawyer - IE Law Hub’ <<https://lawahead.ie.edu/shaping-the-21st-century-lawyer/>> accessed 5 June 2020; Alyson Carrel, ‘Legal Intelligence Through Artificial Intelligence Requires Emotional Intelligence: A New Competency Model for the 21st Century Legal Professional’ (2019) 35.

⁴⁸ Ibid, p.10; See also ‘Eight Ways Technology Is Changing Business’ <<https://www.gomodus.com/blog/eight-ways-technology-changing-business>> accessed 5 June 2020.

⁴⁹ Ibid, p. 10; See also Moore, Thomas R. "The Upgraded Lawyer: Modern Technology and Its Impact on the Legal Profession." UDC/DCSL L. Rev. 21 (2019): 27; Anyim, Wisdom Okereke. "E-Lawyering and Virtual Law Practice: A Paradigm Shift for Law Library System." Library Philosophy and Practice (2019): 0_1-16.

⁵⁰ ‘Future Law Office 2020: Redefining the Practice of Law | Robert Half’ <<https://www.roberthalf.com/research-and-insights/workplace-research/future-law-office-2020-redefining-the-practice-of-law>> accessed 5 June 2020.

⁵¹ ‘AI and the Law’ (University of Birmingham)

<<https://www.birmingham.ac.uk/research/quest/emerging-frontiers/ai-and-the-law.aspx>> accessed 7 April 2021; Turner J, Robot Rules: Regulating Artificial Intelligence (Springer 2018).

⁵² Raizada S and Mittal JK, ‘Structural Transformation and Learning Paradigms-Global Strategic Approach in Clinical Legal Education’ (2020) 20 Medico Legal Update 188, 190.

in and contribute to ensuring that students are well prepared for the tasks and challenges that will arise in future.⁵³ Artificial intelligence (AI) defined as “the science and engineering of making intelligent machines” that employ “cognitive computing” (enabling computers to learn, reason, perceive, infer, communicate, and make decisions like humans do), and it encompasses many branches such as machine learning (ML) including deep learning and predictive analytics, and natural language processing (NLP).⁵⁴

It has been observed that while AI has made a transformative impact on every industry and profession, its potential for use in the legal profession has not been tapped adequately.⁵⁵ This is because the legal services market remains ‘profoundly under digitized, tradition-bound, and slow to embrace novel technologies and tools’.⁵⁶ However, Artificial Intelligence (AI) companies have continually developed and used technology that helps manage laborious tasks in different industries for better speed and accuracy, and the legal profession is no different as AI has already found its way into supporting lawyers and clients alike.⁵⁷ Basically, AI can and has indeed been used to: perform due diligence – litigators carry out due diligence with the help of AI tools to uncover background information; prediction technology – An AI software generates results that forecast litigation outcome; legal analytics – lawyers can use data points from past case law, win/loss rates and a judge’s history to be used for trends and patterns; document automation – law firms use software templates to create filled out documents based on data input; intellectual property – AI tools guide lawyers in analyzing large Intellectual Property (IP) portfolios and drawing insights from the content; and electronic billing – lawyers’ billable hours are computed automatically.⁵⁸ In addition to the foregoing, AI can and has been applied to save lawyers enormous amount of time while achieving efficiency in legal contracts review.⁵⁹ These are just examples of where AI technology may be used in enhancing legal practice in modern times going forward.

As a result of these developments, ‘clients may expect and actually demand from their Lawyers the predictions of the outcome of the case and to assess the success rate, probability of the witness’s truthfulness and certainly of case judgment, and if lawyers are not yet trained to

⁵³ Ibid, 190.

⁵⁴ Duggal Vishal, ‘Role of AI in Legal Practice’ (Engineers Garage, 23 January 2020) <<https://www.engineersgarage.com/featured/role-of-ai-in-legal-practice/>> accessed 5 June 2020.

⁵⁵ Brooks C, Gherhes C and Vorley T, ‘Artificial Intelligence in the Legal Sector: Pressures and Challenges of Transformation’ (2020) 13 Cambridge Journal of Regions, Economy and Society 135.

⁵⁶ Duggal Vishal, ‘Role of AI in Legal Practice’ (Engineers Garage, 23 January 2020) <<https://www.engineersgarage.com/featured/role-of-ai-in-legal-practice/>> accessed 5 June 2020.

⁵⁷ Daniel Faggella, ‘AI in Law and Legal Practice – A Comprehensive View of 35 Current Applications’ (Emerj) <<https://emerj.com/ai-sector-overviews/ai-in-law-legal-practice-current-applications/>> accessed 5 June 2020.

⁵⁸ Daniel Faggella, ‘AI in Law and Legal Practice – A Comprehensive View of 35 Current Applications’ (Emerj) <<https://emerj.com/ai-sector-overviews/ai-in-law-legal-practice-current-applications/>> accessed 5 June 2020; Law Technology Today, ‘Three Ways Law Firms Can Use Artificial Intelligence’ (Law Technology Today, 19 February 2019) <<https://www.lawtechnologytoday.org/2019/02/three-ways-law-firms-can-use-artificial-intelligence/>> accessed 5 June 2020; Duggal Vishal, ‘Role of AI in Legal Practice’ (Engineers Garage, 23 January 2020) <<https://www.engineersgarage.com/featured/role-of-ai-in-legal-practice/>> accessed 5 June 2020.

⁵⁹ Raghav Bharadwaj, ‘Applying AI to Legal Contracts – What’s Possible Now’ (Emerj) <<https://emerj.com/ai-podcast-interviews/applying-ai-legal-contracts-whats-possible-now/>> accessed 5 June 2020.

calculate these complex and multidiscipline components and the aspects of legal dispensaries, lawyers will run into problems with their clients who expect much more from them'.⁶⁰ As a result, 'lawyers must learn to use the technological power well with the application based knowledge of technology, and as such, legal education should be provided in such manner which covers all disciplines, all nations and all geographic boundaries to enable students evaluated problems from multiple and sometimes incompatible perspectives.⁶¹

The legal profession needs to embrace AI, as it has a lot of potential to benefit from this technology in order to work more productively and spend less time on monotonous tasks, thus achieving convenience, freedom from mundane work, and saving more time for other aspects of the job such as analyses, counseling, negotiations, and court visits.⁶² There is a need for law schools to work with experts and professionals in the areas of Artificial Intelligence in order to equip their students with AI certifications at the law school level as a first step towards preparing them for the future. Deloitte predicts at least 100,000 legal roles will be automated by 2036 and law firms will start using new talent strategies by 2020, a prediction that is already taking shape.⁶³

As for practicing lawyers, it has been argued that 'the ever-evolving nature of AI technology implies multiple waves of restructuring of legal services workflows and thus, re-skilling is a continuous process, impacting on work organisation and job design, and generating needs for both new entrants and existing workers.⁶⁴ The initial cost of investment in infrastructure may be very high but it may be worth it to make the learning institutions relevant and competitive. While experts and stakeholders in this area continue to explore the benefits and shortcomings of use of AI in the legal profession and ways of overcoming the same, lawyers will need to get ready to embrace the idea since it has already started being used and this will only increase with time.

Just like any new technology, AIs have flaws, vulnerabilities and unintended effects⁶⁵, and as a result some of the structural challenges that have been identified that can hamper the development of a healthy AI ecosystem in Africa which any profession or country must address, include, *inter alia*: quick adaptation and creation of new frameworks for workers and citizens to develop the

⁶⁰ Raizada S and Mittal JK, 'Structural Transformation and Learning Paradigms-Global Strategic Approach in Clinical Legal Education' (2020) 20 *Medico Legal Update* 188, 190.

⁶¹ *Ibid*, 190.

⁶² Law Technology Today, 'Three Ways Law Firms Can Use Artificial Intelligence' (Law Technology Today, 19 February 2019) <<https://www.lawtechnologytoday.org/2019/02/three-ways-law-firms-can-use-artificial-intelligence/>> accessed 5 June 2020.

⁶³ Law Technology Today, 'Three Ways Law Firms Can Use Artificial Intelligence' (Law Technology Today, 19 February 2019) <<https://www.lawtechnologytoday.org/2019/02/three-ways-law-firms-can-use-artificial-intelligence/>> accessed 5 June 2020; Duggal Vishal, 'Role of AI in Legal Practice' (Engineers Garage, 23 January 2020) <<https://www.engineersgarage.com/featured/role-of-ai-in-legal-practice/>> accessed 5 June 2020; Lexology-Victoria Arnold, 'How Your Legal Department Can Benefit from AI Contract Management | Lexology' <<https://www.lexology.com/library/detail.aspx?g=7fcc7e37-301d-4828-bffd-e525960e0cbb>> accessed 5 June 2020.

⁶⁴ 'AI for English Law - Work Package Five - Law and Technology Education' (Oxford Law Faculty, 21 December 2018) <<https://www.law.ox.ac.uk/research-and-subject-groups/ai-english-law-work-package-five>> accessed 7 April 2021.

⁶⁵ 'AI and the Law' (University of Birmingham)

<<https://www.birmingham.ac.uk/research/quest/emerging-frontiers/ai-and-the-law.aspx>> accessed 7 April 2021; see also Bryson JJ, Diamantis ME and Grant TD, 'Of, for, and by the People: The Legal Lacuna of Synthetic Persons' (2017) 25 *Artificial Intelligence and Law* 273.

skills they need to thrive within the education systems; rapid expansion of broadband coverage—specifically in rural areas for all citizens and businesses to reap the benefits of AI; addressing ethical implications regarding the fair, secure, and inclusive use of AI applications through collaboration and engagement to ensure AI systems earn trust.; and ensuring a deeper, broader, and more accessible pool of data is available to enable researchers, developers, and users to drive AI, among others.⁶⁶

It has been suggested that for African governments to reap the potential benefits of AI and address any and/or all challenges, they should create clear roadmaps to guide the adoption of this technology by, *inter alia*, recalibrating their laws and legal frameworks to support data-driven technologies and innovation-driven growth; strengthening the supporting infrastructure for development; and setting the tone of a collaborative approach that allows all stakeholders to share their expertise, insights, and build trust.⁶⁷ Notably, some of the aspects of AI may violate constitutionally guaranteed rights such as the right to privacy.⁶⁸ This must, therefore, be fully addressed before the roll out of use of AI in the legal profession in order to ensure that the collection and processing of personal data respects fundamental rights to data protection.⁶⁹

As for adoption of AI in United Kingdom's (UK) legal system, it has been argued that 'successful implementation of AI by lawyers requires complementary changes in their education and skills since practice is also rapidly moving toward the position where such skills may become necessary to meet professional standards.⁷⁰ In the UK, the progress in uptake of AI has been much faster especially with the adoption of non-human/robot lawyers such as the DoNotPay which is the world's first robot lawyer.⁷¹ DoNotPay, as a legal advisor is an interactive tool initially aimed at helping members of the general public to appeal parking tickets but the scope of its application has since grown immensely to support 14 different uses cases, including fighting unfair bank, credit card and overdraft fees, getting refunds from Uber and Lyft when a driver takes a wrong turn, and claiming refunds for late package deliveries.⁷² This is an indication that 'in the high-level application field, artificial intelligence for complex scenes is capable of assisting or even replacing part of the work of legal professionals, through formation of a new human-computer collaborative case processing mode'.⁷³

According to a United Kingdom White Paper on "Regulation for the Fourth Industrial Revolution" presented to UK Parliament by the Secretary of State for Business, Energy and

⁶⁶ Access Partnership, 'Artificial Intelligence for Africa: An Opportunity for Growth, Development, and Democratisation,' <https://pic.strathmore.edu/wp-content/uploads/2019/03/PIC_AI_for_Africa_Whitepaper.pdf> accessed on 6 April, 2021, 2.

⁶⁷ *Ibid*, 2.

⁶⁸ See Article 31 of the Constitution of Kenya 2010.

⁶⁹ See 'AI and the Law' (University of Birmingham)

<<https://www.birmingham.ac.uk/research/quest/emerging-frontiers/ai-and-the-law.aspx>> accessed 7 April 2021.

⁷⁰ 'AI for English Law - Work Package Five - Law and Technology Education' (Oxford Law Faculty, 21 December 2018) <<https://www.law.ox.ac.uk/research-and-subject-groups/ai-english-law-work-package-five>> accessed 7 April 2021.

⁷¹ 'Save Time and Money with DoNotPay!' <<https://join.donotpay.com>> accessed 7 April 2021.

⁷² Dale R, 'Law and Word Order: NLP in Legal Tech' (2019) 25 *Natural Language Engineering* 211.

⁷³ Press A, 'Advances in Economics, Business and Management Research', 966.

Industrial Strategy by Command of Her Majesty and dated June 2019, ‘technological breakthroughs in areas from artificial intelligence to biotechnologies are now heralding a Fourth Industrial Revolution, with the power to reshape almost every sector in every country’.⁷⁴ The United Kingdom generally seeks to, *inter alia*, accelerate ethical AI-powered innovations, with a focus on legal services for small businesses and consumers where AI and automation can have transformative impact.⁷⁵ There is a need for the East African legal sector players to borrow a leaf from the other pioneer world players such as the UK in this sector to enhance its effectiveness while ensuring that it responds to the unique needs of the East Africans.

4.2 Investing in Virtual Hearings Infrastructure

With the emergence of the COVID-19 pandemic, courts in many countries around the world were forced to rethink their approach to administration of justice both quickly and efficiently in order to ensure that, where possible, hearings can proceed.⁷⁶ This has led them to adopt virtual hearings – conducting hearings remotely in order to minimise the risk of transmission of COVID-19 and ensure the health of all parties in attendance is maintained.⁷⁷ While the pandemic will certainly pass, there is a need for both courts and law practitioners to think about investing in virtual hearings post COVID-19. It is commendable that the Judiciary recently embarked on enhancing the use of technology in judicial proceedings in all courts, especially during the COVID-19 pandemic period, including the use of: (a) e-filing; (b) e-service of documents; (c) digital display devices; (d) real time transcript devices; (e) video and audio conferencing; (f) digital import devices; and (g) computers in the court.⁷⁸ All that is required now is for continued use of the same post COVID-19 pandemic period as well as infrastructural investment to ensure that the processes run smoothly and efficiently. This may also call for equipping the courts and all registries with the relevant infrastructure through setting up some permanent virtual courts and tribunals.

This technology will come in handy in not only saving time but also resources, which in many countries especially in Africa, are still limited. As for law firms, investing in virtual hearings infrastructure in their practice may lead to better administration of justice and also help reach out to a wider class of clients both within the country and across borders. It will also work for the benefit of their employees since it offers them the much needed work-life balance. It has been suggested that while spending more time outside the office may become commonplace as law firms and legal departments adopt collaborative technologies and reduce real estate costs, easier-to-use video technologies similar to FaceTime may actually promote efficiency and job satisfaction by putting the human element back in business communications.⁷⁹

⁷⁴ Great Britain and Energy & Industrial Strategy Department for Business, Regulation for the Fourth Industrial Revolution (2019), 6.

⁷⁵ *Ibid*, 20.

⁷⁶ ‘Virtual Hearings: The Way Forward in the UK in Uncertain Times’ <<https://www.dentons.com/en/insights/alerts/2020/march/29/virtual-hearings-the-way-forward-in-the-uk-in-uncertain-times>> accessed 5 June 2020.

⁷⁷ *Ibid*,

⁷⁸ ‘Kenya Law: Electronic Case Management Practice Directions, 2020’ <<http://kenyalaw.org/kl/index.php?id=10211>> accessed 5 June 2020, Rule 6.

⁷⁹ Zach Warren | January 15 and 2020 at 03:30 PM | The original version of this story was published on Legaltech News, ‘The Future of Legal Tech Is About Transformation, Not Automation’ (The American Lawyer) <<https://www.law.com/americanlawyer/2020/01/15/the-future-of-legal-tech-is-about-transformation-not-automation/>> accessed 3 June 2020.

With increased globalisation, lawyers can tap into this infrastructure to serve clients from the comfort of their homes or offices regardless of the geographical location or distance. Lawyers can use the technology to tap into the ever growing international Alternative modes of Dispute Resolution such as international arbitration, mediation and Online Disputes Resolution (ODR) especially in the face of rapidly growing networking and borderless legal practice, with the introduction of diverse social media platforms that allow interconnectivity beyond the national boundaries and enabling cross-border relationships between clients and their lawyers and law firms amongst themselves.⁸⁰ They should tap into the tremendous growth of international trade, interstate deals, bilateral and multilateral treaties, where legal practice is increasingly becoming global and smart practitioners must therefore up their game with international best practices as with the advent of internet, telecommunication systems, clients are no longer limited to lawyers in their regions nor are they limited to the need for legal services within their jurisdiction.⁸¹

As it has rightly been pointed out, ‘the COVID-19 pandemic may prove a catalyst for Courts to embrace technology and reduce their reliance on in-person hearings and hard copy documents, particularly for case management purposes, even after the pandemic. As such, developing good virtual hearing practices now is likely to pay significant dividends in the future’.⁸²

4.3 Safeguarding the Privacy of Data: Transfer, Processing and Storage of Data

Most modern businesses including law firms have increasingly found themselves bound by data privacy laws at the national and international levels, requiring companies to know where they are storing Personally Identifiable Information (PII) and Personal Health Information (PHI) and wrap tight controls around the processing, use, and transfer of such PII and PHI.⁸³ The effect of this will become even more clearer as firms embrace technology due to the high risks and challenges posed by technology as far as such data is concerned.⁸⁴ The challenge is especially great when it comes to legal processes that require extraordinary care in the identification and handling of PII and PHI on very tight turnaround times: data breach notification workflows, Data Subject Access Requests (DSARs), and cross-border e-discovery projects.⁸⁵ Notably, law firms have started cross broader practice where firms in different jurisdictions collaborate either directly or through legal organisations to enable them serve clients in different countries.⁸⁶ Data protection laws in one

⁸⁰ Emmanuel Oluwafemi Olowononi and Ogechukwu Jennifer Ikwuanusi, ‘Recent Developments in 21st Century Global Legal Practice: Emerging Markets, Prospects, Challenges and Solutions for African Lawyers’ (2019) 5 KIU Journal of Social Sciences 31; Samuel Omotoso, ‘Law, Lawyers And The Social Media In The 21st Century: Challenges And Prospects’ Law, Lawyers And The Social Media In The 21st Century: Challenges And Prospects

<https://www.academia.edu/40663364/LAW_LAWYERS_AND_THE_SOCIAL_MEDIA_IN_THE_21ST_CENTURY_CHALLENGES_AND_PROSPECTS> accessed 5 June 2020.

⁸¹ Ibid, p. 34.

⁸² ‘The Remote Courtroom: Tips and Tricks for Online Hearings’ <<https://www.ashurst.com/en/news-and-insights/legal-updates/the-remote-courtroom-tips-and-tricks-for-online-hearings/>> accessed 5 June 2020.

⁸³ Katharine Perekslis, ‘Four Strategies to Navigate Data Privacy Obligations for Compliance, Litigation, and E-Discovery Professionals’ (Law.com)

<<https://www.law.com/native/?mvi=7bd540437dde4b60991f35c257adc521>> accessed 3 June 2020.

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ International Bar Association, ‘What model for cross-border joint practice?’ A handbook for bar associations, <www.ibanet.org> Document > Default> 5 June 2020; ‘Global Law Firms: Globalization and

country may not be necessarily as advanced as those in another country hence the need for firms to invest heavily in this area to not only win the trust of clients and partners in another country but also to avoid the legal hurdles that may come with breach of such data privacy.⁸⁷

Lawyers have been called upon to play a greater role in ensuring the safety and accountability of advanced data and analytics technologies.⁸⁸ There is a need for local firms to make a conscious decision to invest in data protection infrastructure that will enable them to work efficiently and protect their clients' data regardless of the status of the local data protection laws. As law firms and corporate legal departments look for cost-effective ways to enhance the delivery of legal services, they should seek paralegals and legal assistants with expertise in technology-driven systems who can help the firm operate more efficiently in order to not only facilitate efficiency but also guarantee privacy of data.⁸⁹ There may be a need for the policymakers to work closely with other stakeholders to relook into the existing laws on data protection in order to enhance their effectiveness.

Relevant law firm, Judiciary staff and students should also be equipped with the necessary skills and knowledge regarding data protection. Such skills and knowledge mainly include Information security management, which is a set of policies and procedural controls that Information Technology (IT) and business organizations implement to secure their informational assets against threats and vulnerabilities-information security.⁹⁰ Such trained personnel would be responsible for managing an institution/firm's Information Security Management System (ISMS). ISMS is necessary for ensuring that any data is guaranteed confidentiality, integrity and it is easily available when required. Notably, whether the data collected is maintained in digital or physical format, the discipline of Information Security Management is still critical to protecting the data from unauthorized access or theft.⁹¹ This is because every technology-driven business process is

Organizational Spaces of Cross-Border Legal Work by Jonathan Beaverstock, Daniel Muzio, Peter J. Taylor, James Faulconbridge :: SSRN'

<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1155048> accessed 5 June 2020.

⁸⁷ United Nations Conference On Trade And Development, 'Data protection regulations and international data flows: Implications for trade and development,' UNCTAD/WEB/DTL/STICT/2016/1/iPub, United Nations, 2016 <https://unctad.org/en/PublicationsLibrary/dtlstict2016d1_en.pdf >5 June 2020; 'How Organizations Can Stay Ahead of Changing Privacy Laws' (Digital Guardian, 22 August 2019) <<https://digitalguardian.com/blog/how-organizations-can-stay-ahead-changing-privacy-laws>> accessed 5 June 2020.

⁸⁸ 'AI and the Law' (University of Birmingham)

<<https://www.birmingham.ac.uk/research/quest/emerging-frontiers/ai-and-the-law.aspx>> accessed 7 April 2021.

⁸⁹ 'Future Law Office 2020: Redefining the Practice of Law | Robert Half' <<https://www.roberthalf.com/research-and-insights/workplace-research/future-law-office-2020-redefining-the-practice-of-law>> accessed 5 June 2020.

⁹⁰ 'What Is Information Security Management?' (Sumo Logic)

<<https://www.sumologic.com/glossary/information-security-management/>> accessed 5 June 2020.

⁹¹ Ibid.

exposed to security and privacy threats and the legal profession is no different.⁹² The security controls can follow common security standards or be more focused on the industry.⁹³

4.4 Rolling out E-literacy Trainings/Education

In order to meet the needs of the modern legal consumer, it has rightly been pointed out that ‘with the emerging concepts of artificial intelligence, Blok chain, Education 4.0, along with digital technology, capabilities and potential must develop and efforts are to be made at school and university level for upgrading the digital skills, running special basic and advanced skill based programs’.⁹⁴ The world of technology is changing really fast and if lawyers are to remain relevant and on top of their game, then law schools must step in to bridge the knowledge and skills gap. In fact, it has rightly been pointed out that ‘the competition in the field of law has also increased manifold where it is now a global platform and every student who steps into the shoes of a lawyer is expected to handle different fields’.⁹⁵

As for practicing lawyers, with the expected increase in the uptake and use of technology within the legal profession, there is a need for sustained and enhanced e-literacy training on not only efficient use of technology but also the potential challenges that may come along and how to overcome them. The training should target lawyers, facilitated by LSK, as well as judges and magistrates and all their support staff, facilitated by the Judiciary, in collaboration with the experts and professionals in ICT and other related areas. As for lawyer students, law schools should come up with relevant courses to be included in their curricula in order to arm them with relevant skills.

In order to equip the general public, there is a need for the Government, through the Ministry of Information Communication Technology in collaboration with the other relevant stakeholders to make it easy for the public to acquire the relevant skills in technology through tailored courses at all levels of the school curriculum as well as through other simplified courses available to those already out of school and not likely to benefit from job related trainings in the area. This will also make it easier for the public to interact meaningfully with the justice sector. This is especially important considering that the Judiciary is on course to incorporate the use of technology in dispensation of justice. Empowering the disseminators/facilitators of justice while leaving out the consumers of justice will defeat the need for embracing justice-to facilitate efficient access to justice for all. Leaving them out will instead promote digital apartheid- systematic exclusion of certain communities from digital access and experience through political and business policies and practices.⁹⁶ With the increased digitization of government services through such initiatives as the *Huduma Center service delivery model*- a Government of Kenya initiative aimed at advancing citizen-centred public service delivery through a variety of channels, including deploying

⁹² ‘Introduction to Information Security Management Systems (ISMS) – BMC Blogs’ <<https://www.bmc.com/blogs/introduction-to-information-security-management-systems-isms/>> accessed 5 June 2020.

⁹³ Luke Irwin, ‘ISO 27001: The 14 Control Sets of Annex A Explained’ (IT Governance UK Blog, 18 March 2019) <<https://www.itgovernance.co.uk/blog/iso-27001-the-14-control-sets-of-annex-a-explained>> accessed 5 June 2020.

⁹⁴ Raizada S and Mittal JK, ‘Structural Transformation and Learning Paradigms-Global Strategic Approach in Clinical Legal Education’ (2020) 20 *Medico Legal Update* 188, 189.

⁹⁵ *Ibid*, 189.

⁹⁶ Paula Barnard-Ashton and others, ‘Digital Apartheid and the Effect of Mobile Technology during Rural Fieldwork’ (2018) 48 *South African Journal of Occupational Therapy* 20.

digital technology and establishing citizen service centres across the country⁹⁷, there is an urgent need to tackle digital illiteracy in order to enhance access by all. Virtual access to justice will benefit in the process. The Government can work with the Judiciary arm to set up Digital Villages Projects kind of structure across the country to ease access to services related to justice.⁹⁸ However, such centres would focus on offering digital trainings and education specifically related to access to justice.

In addition, the Government should liaise with tech firms both national and international to roll out internet access services across the country for ease of access to all. They should also work with the local mobile service providers to ensure that mobile data is affordable for the majority of Kenyans. Furthermore, electricity should also be made more affordable for all. It is commendable that the Government of Kenya is already striving to ensure that all Kenyans have access to electricity through the *Last Mile Electricity Connectivity Project*.⁹⁹

4.5 Training, Regulation and Capacity Building: Embracing Science and Technology in Legal Education and Training Institutions

It has rightly been pointed out that ‘the quality of an institute depends upon the incorporation of current changing dynamics and challenges of environment, and if institutions fail to keep pace with these changes, they will be perceived as progressively irrelevant thus failing to add value to the society and shaping and grooming the future leaders who can contribute in accelerating sustainable economic development in creative ways.’¹⁰⁰ Legal institutions charged with education and training of lawyers are expected to cultivate competency in the students to make them effective, ethical and responsible in their profession.¹⁰¹ The recent amendments/enactments to enhance the use of technology in judicial proceedings in Kenyan courts are a step in the right direction.¹⁰² There is a need to ensure that even as we seek to invest in the physical infrastructure

⁹⁷ Sarah aru and Moses Wafula, ‘Factors Influencing the Choice of Huduma Centers’ Services (A Case Study of Mombasa Huduma Centre)’ (2015) 5 International Journal of Scientific and Research Publications; Amir Ghalib Abdalla and others, ‘Effect of Huduma Centers (One Stop Shops) in Service Delivery – A Case Study of Mombasa Huduma Centre’ (2015) 5 International Journal of Academic Research in Business and Social Sciences 102; ‘Study Heaps Praise on Revolutionary Huduma Centres’ (Daily Nation) <<https://www.nation.co.kehttps://www.nation.co.ke/dailynation/news/study-heaps-praise-on-revolutionary-huduma-centres-89030>> accessed 5 June 2020.

⁹⁸ ‘Broadband in Kenya | Broadband Strategies Toolkit’ <<http://ddtoolkits.worldbankgroup.org/broadband-strategies/case-studies/broadband-kenya>> accessed 5 June 2020.

⁹⁹ ‘Last Mile Connectivity Program Kenya - Inclusive Infrastructure’ <<https://inclusiveinfra.github.org/case-studies/last-mile-connectivity-program-kenya/>> accessed 5 June 2020; ‘Kenya - Last Mile Connectivity Project II’ <<https://projectsportal.afdb.org/dataportal/VProject/show/P-KE-FA0-013>> accessed 5 June 2020; African Development Bank, ‘Kenya - Last Mile Connectivity Project - Project Appraisal Report’ (African Development Bank - Building today, a better Africa tomorrow, 24 January 2020) <<https://www.afdb.org/en/documents/kenya-last-mile-connectivity-project-project-appraisal-report>> accessed 5 June 2020; ‘Last Mile Project – Ministry of Energy’ <<https://energy.go.ke/?p=914>> accessed 5 June 2020.

¹⁰⁰ Raizada S and Mittal JK, ‘Structural Transformation and Learning Paradigms-Global Strategic Approach in Clinical Legal Education’ (2020) 20 Medico Legal Update 188, 189.

¹⁰¹ Ibid, 189.

¹⁰² Civil Procedure (Amendment) Rules, 2020 (26 February 2020); Electronic Case Management Practice Directions, 2020. The Law of Contract Act, Cap 23 of the Laws of Kenya was recently amended vide the Business Laws (Amendment) Act, No. 1 of 2020, (18 March 2020) to recognize use of advanced electronic signatures. Notably, Electronic signatures are not a new concept to Kenyan law, as they are already provided for under the Kenya Information and Communication Act No. 2 of 1998, as amended. The new amendments however sought to align the same with particular laws.

to enhance the use of technology in the administration of justice, legal and institutional frameworks are also put in place to not only facilitate the uptake of technological developments but also to ensure that there is an effective regulatory framework to deal with the myriad of issues that will arise therefrom.

There have been calls for the Kenyan law schools to ensure that in their curriculum they also take into account the changing dynamics in the legal world and design programmes that equip the future lawyers to deal with the changes.¹⁰³ The modern lawyer ought to be well endowed with basic technological knowledge to enable them build on the same to fit in a fast growing globalized world where geographical boundaries and physical offices may no longer matter. After qualification, lawyers should continually be subjected to technological knowledge and skills through the Continuing Professional Development (CPD) trainings which must be re-looked at to make them more receptive and richer. The CPD committee of the Law Society of Kenya should consider working closely with Information communication technology and other relevant experts and professionals who may not necessarily be lawyers and invite them to CPD events in order to deliver more practical skills and knowledge on the area. It is not enough for lawyers to get theoretical talks on the area from fellow lawyers who are techno-legal savvy; the real professionals in the field must be involved as a way of impacting practical knowledge and skills. There is a need to actively involve the tech firms in and out of the country alongside other stakeholders.

Law schools in the future, like the legal profession itself, have been called to be more collaborative, diverse, international, technologically friendly, and entrepreneurial than they are today.¹⁰⁴ In addition, tomorrow's law school curriculum has been challenged to be more entrepreneurial to respond to the financial pressures on the legal profession and the opportunities wrought by innovation and globalization.¹⁰⁵ This is because, as it has been pointed out by some scholars, 'advancements of technology and impact of globalization have increased the importance of legal studies and law is dealt and connected with other disciplines so it cannot be taught in isolation in order to ensure that the law schools develop and nurture students in such manner as to make them socially sensitized leaders inculcating in them the intellectual, entrepreneurial and ethical values that can give them enough courage to confront the challenges thrown up by an increasingly industrialized and complex milieu in the society'.¹⁰⁶ Embracing technology will also enable law schools to widen their scope of students since students from abroad can either enroll for legal education in Kenya without the need to travel all the way or even have exchange programs and this would be beneficial to both students and the institutions.

Notably, traditional lectures are still considered the most popular instructional method in the universities and especially in medical and law schools where Socratic Method of teaching is also

¹⁰³ Mboya, Apollo, 'The Bar: Challenges and Opportunities', in Ghai, Y.P. and Cottrell, J. eds., *The legal profession and the new constitutional order in Kenya*. Strathmore University Press, 2014, p. 245.

¹⁰⁴ Kellogg Sarah, 'Cover Story: The Transformation of Legal Education' *From Washington Lawyer*, May 2011 <<https://www.dcbark.org/bar-resources/publications/washington-lawyer/articles/may-2011-legal-education.cfm>> accessed 4 June 2020.

¹⁰⁵ *Ibid.*

¹⁰⁶ Raizada S and Mittal JK, 'Structural Transformation and Learning Paradigms-Global Strategic Approach in Clinical Legal Education' (2020) 20 *Medico Legal Update* 188, 189.

very popular.¹⁰⁷ However, the covid-19 pandemic which has made it impossible for physical lectures and meetings to go on calls for changes in approaches to teaching. In addition, even before the pandemic, some commentators were already challenging the Socratic method of teaching in law schools in favour of modern and more collaborative approaches, arguing that the former is archaic while the latter ones are more democratic and participatory, core values of modern society.¹⁰⁸ Some commentators, arguing within the context of the American legal system, have pointed out that ‘instead of the Socratic approach, some schools are offering more apprentice-style learning in legal clinics and more courses that train students for their multiple future roles as advocates and counselors, negotiators and deal-shapers, and problem-solvers’.¹⁰⁹ In addition, ‘with new legal issues arising from the use of computers in business and government to manage information, some schools have introduced teaching studies on software code as well as legal code to solve systemwide problems in order to equip their law students adequately.’¹¹⁰

While the Socratic or case method has been hailed as capable of helping students especially those in their first year of study to sharpen their analytical and critical reading skills and begin to understand the contingent nature of much legal reasoning¹¹¹, this approach has also been criticized for ‘its over-reliance on excerpts of appellate cases, the tendency of many of its purveyors to give short shrift to issues of fairness and justice, its fostering of passivity on the part of those students not involved in the dialogue, and its privileging of the professor as the sage on the stage’.¹¹² Those against the approach have argued that ‘Socratic teaching should be supplemented by experiential pedagogies, including simulations, role-plays, small-group brainstorming, the problem method and live-client clinical legal education’ in order to ‘facilitate the law student’s ability to learn how to solve legal problems, understand the different real-world contexts in which legal problems arise (including non-adversarial and transactional settings), explore the nature of various lawyer-client relationships, consider social justice implications of law and legal relationships, and develop self-reflectiveness and the ability to learn from experience’.¹¹³ Arguably, due to the cost implications of such alternatives, law schools should consider embracing science and technology at a deeper level for ease of simulating and recreating the above approaches and desired end results as well as enabling students interact more with their law lecturers. This can be achieved through what some commentators have referred to as ‘flipped-classroom model’ defined as ‘any class that

¹⁰⁷ Adib-Hajbaghery M and Aghajani M, ‘Traditional Lectures, Socratic Method And Student Lectures: Which One Do The Students Prefer?’ <<http://www.webmedcentral.com/>> accessed 9 April 2021; Sorvatzioti D, ‘The Socratic Method of Teaching in a Multidisciplinary Educational Setting’ (2012) *International Journal of Arts & Sciences* 61.

¹⁰⁸ ‘“Socratic” Teaching Is a Thing of the Past’ <<https://www.nytimes.com/roomfordebate/2011/12/15/rethinking-how-the-law-is-taught/socratic-teaching-is-a-thing-of-the-past>> accessed 9 April 2021.

¹⁰⁹ ‘Opinion | Legal Education Reform’ *The New York Times* (26 November 2011) <<https://www.nytimes.com/2011/11/26/opinion/legal-education-reform.html>> accessed 9 April 2021.

¹¹⁰ *Ibid.*

¹¹¹ See Sorvatzioti D, ‘The Socratic Method of Teaching in A Multidisciplinary Educational Setting’ (2012) *International Journal of Arts & Sciences* 61; ‘The Socratic Method Keeps the Student Thinking’ <<https://www.nytimes.com/roomfordebate/2011/12/15/rethinking-how-the-law-is-taught/the-socratic-method-keeps-the-student-thinking>> accessed 9 April 2021.

¹¹² ‘There Are Limitations to the Socratic Method’ <<https://www.nytimes.com/roomfordebate/2011/12/15/rethinking-how-the-law-is-taught/there-are-limitations-to-the-socratic-method>> accessed 9 April 2021.

¹¹³ *Ibid.*

assigned any online content (videos, podcasts, PowerPoint presentations and exercises) for students to experience outside the classroom'.¹¹⁴

Arguably, 'flipping is considered innovative because outside learning expands in-class time thus freeing law professors to work with law students on developing the practice skills they're expected to have when they graduate from law school'.¹¹⁵ The flipped or inverted classroom has also been referred to as 'a new and popular instructional model, in which activities traditionally conducted in the classroom (e.g., content presentation) become home activities, and activities normally constituting homework become classroom activities'.¹¹⁶ In addition, in this approach 'the teacher helps the students instead of merely delivering information, while the students become responsible for their own learning process and must govern their own learning pace'.¹¹⁷ Thus, 'unlike traditional teacher-centered instruction, in which students are treated as empty vessels that passively absorb information, flipped classrooms are centered on the students—not the teacher'.¹¹⁸

Thus, flipping a classroom is associated with two essential components: Prerecording a class lecture in its entirety for students to listen to before they attend class; and in-class activity and discussion, which takes place during normal class meeting times.¹¹⁹ Arguably, the approach allows students to work on group projects during class so that instructors can address any difficulties and questions in person and also allows more time for discussion and debate; students contribute to the conversation instead of listening passively.¹²⁰ It is perhaps the high time that the Kenyan law schools as well as other tertiary institutions offering legal training adopt and implement some changes to enhance or abandon their traditional approaches to students' instruction for efficiency and keeping up with developments in science and technology.

4.6 Enhanced e-filing and service of Court Pleadings and Documents

The law amendments that allowed for e-filing and service of documents in Kenya could not have come at a better time.¹²¹ As has become the norm during the COVID-19 pandemic period, Kenyan courts should consider fully adopting and shifting to electronic systems for filing documents. This

¹¹⁴ 'Flipped Classrooms in Law School: A Bright Future - LexTalk'

<https://www.lextalk.com/b/lextalk_blog/archive/2017/04/06/flipped-classrooms-in-law-school-a-bright-future.aspx> accessed 9 April 2021.

¹¹⁵ Ibid.

¹¹⁶ Akçayır G and Akçayır M, 'The Flipped Classroom: A Review of Its Advantages and Challenges' (2018) 126 *Computers & Education* 334, 334.

¹¹⁷ Ibid, 334.

¹¹⁸ Ibid, 335.

¹¹⁹ design JTJT is the manager of instructional technology at PUS of LS specializes in instructional and others, 'Flipping the Law Classroom to Ease Student Anxiety' (Technology Solutions That Drive Education) <<https://edtechmagazine.com/higher/article/2013/12/flipping-law-classroom-ease-student-anxiety>> accessed 9 April 2021.

¹²⁰ Ibid.

¹²¹ 'Kenya Law: Electronic Case Management Practice Directions, 2020' Gazette Notice No. 2357 <<http://kenyalaw.org/kl/index.php?id=10211>> accessed 5 June 2020.

The objectives of the Electronic Case Management Practice Directions are to guide the integration of Information Communication Technology (ICT) in judicial proceedings and in particular to provide for —(a) electronic filing and electronic service of court documents; (b) electronic case search; (c) electronic diary; (d) electronic case tracking system; (e) electronic payment and receipting; (f) electronic signature and electronic stamping; (g) exchange of electronic documents, including pleadings and statements; and (h) use of technology in case registration and digital recording of proceedings for expeditious resolution of cases.

would save both law firms and courts enormous resources in terms of finances and storage facilities for the hardcopy documents. It would also enhance efficiency in terms of accessibility and review of the documents as both sides can access the documents from anywhere. All that is required is enhancing the security of such data to safeguard privacy. This can be achieved through investing in modern infrastructure as well as offering information management training to the staff charged with such.

4.7 Amendment of Remuneration order to guide on Legal fees payment by clients

It has been argued that one of the biggest differences is how lawyers will practice in the future—how lawyers value and price what they sell.¹²² It is suggested that there is a need to implore members of the Bar to transition away from the traditional billable time and services system to alternative billing strategies by understanding that apart from “legal services” and “time”, lawyers are also selling knowledge, which may include fixed, results based, hourly, graduated, or any such combination.¹²³ This would all be facilitated by technology which allows one to serve clients without physically meeting clients or even attending court physically. This therefore creates a need to reconsider amending/revising the current Remuneration Order so as to accommodate these new possibilities.

4.8 Licensing and Regulation of virtual law firms

Some scholars have rightly argued that competition to the Kenyan firms by global law firms requires a reconsideration of traditional organizational structures of law firms, ethical rules and regulation mechanisms for the legal profession and restructuring of how legal services are delivered.¹²⁴ The argument is that in order for the profession to stay relevant and thrive, lawyers must examine who can invest in firms, models for publicly traded firms, and lawyer partnerships with other professionals.¹²⁵ There is need for the law firms licensing stakeholders in Kenya to consider the idea of allowing virtual law firms, which will largely be conducting technology driven business. As a result of the COVID-19 which has forced many law firms across the world to permit employees to work from home, some firms abroad have already started reporting final decisions to close their physical offices and turning to virtual firms where their employees will permanently work from home.¹²⁶ Slater and Gordon, a London-based law firm is set to have its staff working from home permanently from September 2020 onwards, after almost three months of working remotely under the COVID-19 lockdown.¹²⁷ All its 200 London employees will work from home most of the time—though the firm is hoping to find a smaller office space which will be used to host meetings.

¹²² Mboya, Apollo, ‘The Bar: Challenges and Opportunities’, in Ghai, Y.P. and Cottrell, J. eds., *The legal profession and the new constitutional order in Kenya*. Strathmore University Press, 2014, p. 247.

¹²³ *Ibid*, p. 247.

¹²⁴ Mboya, Apollo, ‘The Bar: Challenges and Opportunities’, in Ghai, Y.P. and Cottrell, J. eds., *The legal profession and the new constitutional order in Kenya*. Strathmore University Press, 2014, p. 243.

¹²⁵ *Ibid*, p. 243.

¹²⁶ Meganne Tillay | May 27 and 2020 at 10:13 AM, ‘Slater & Gordon to Close London Office, Staff to Work From Home Permanently’ (Law.com International) <https://www.law.com/international-edition/2020/05/27/slater-and-gordon-to-close-london-office-staff-to-work-from-home-permanently/?cmp_share> accessed 3 June 2020; Meganne Tillay, Simon Lock | May 29 and 2020 at 08:38 AM, ‘Slater & Gordon Working From Home: How Will It Work?’ (Law.com International) <<https://www.law.com/international-edition/2020/05/29/slater-gordon-working-from-home-how-will-it-work/>> accessed 3 June 2020.

¹²⁷ *Ibid*.

The Staff are to be provided with multiple screens if they are needed and homes fitted with comfortable office equipment.¹²⁸ The firm's management rightly argued that this approach would improve the well-being and work life balance of their staff and provide flexibility to their customers.¹²⁹ Other United Kingdom based firms such as Baker McKenzie and DLA Piper have also been toying with the idea.¹³⁰ The growth of virtual law firms will inevitably come with the challenge of regulation. The regulators of provision of legal services should adequately prepare to respond to the impact of technology on law practice and lawyer regulation, including the growth in cloud computing, virtual law offices, and outsourcing of legal services.¹³¹

4.9 A Possibility of Online Courts?

The Covid-19 pandemic has unintentionally fast-tracked courts' adoption of technology since courts around the world have been forced to replace face-to-face hearings with video hearings, using phonelinks and platforms such as Zoom, Teams and Skype.¹³² Kenyan Judiciary has not been left behind in these latest developments.¹³³

Kenya still suffers from the challenge of physical accessibility to law courts due to geographical distance since some of the farthest regions still do not have physical court buildings. As a result, advocates and witnesses travel long distances in search of justice.¹³⁴ While the Judiciary continues to invest in physical infrastructure, the stakeholders in the justice sector may also consider the idea of embracing online courts to deal with the problem. Considering that even where the Judiciary puts up courts, lawyers may still be unavailable to the litigants either due to costs or general shortage, some scholars have argued that putting online courts may come in handy in overcoming some of the challenges faced by litigants who represent themselves, *Pro Se Litigation*.¹³⁵ They argue that in most jurisdictions, including the United States of America, to date, the use of online technology to support legal self-representation has been confined primarily to the provision of educational and informational materials, such as "how-to" websites and downloadable legal forms, available mostly in the pre-filing stage.¹³⁶ Arguably, the Judiciary can go further in embracing technology through instituting "online courts; judicial online dispute resolution systems, can improve the ability of self-represented litigants to effectively participate in proceedings, as well as the ability of courts to administer them fairly and efficiently.¹³⁷

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ Hannah Roberts | May 07 and 2020 at 05:16 AM, 'Baker McKenzie Surveys Staff over London Office Return as DLA Also Mulls Reopening Base' (Law.com International) <<https://www.law.com/international-edition/2020/05/07/baker-mckenzie-surveys-staff-over-london-office-return-as-dla-also-mulls-reopening-base/>> accessed 3 June 2020.

¹³¹ Laurel S Terry, Steve Mark and Tahlia Gordon, 'Trends and Challenges in Lawyer Regulation: The Impact of Globalization and Technology' (2011) 80 Fordham L. Rev. 2661, p. 2662.

¹³² Jane Croft, 'Courts Test Their Online Future, from Dress-down Lawyers to Witness Appearance' (23 April 2020) <<https://www.ft.com/content/936e04b6-7a8c-11ea-bd25-7fd923850377>> accessed 5 June 2020; 'Remote Courts' <<https://remotecourts.org/>> accessed 5 June 2020.

¹³³ A experiência dos tribunais mundo afora durante a p and Emia Says, 'Kenyan Courts Are Using Video Calls To Keep Wheels of Justice Spinning' (Gadgets Africa, 31 March 2020) <<https://gadgets-africa.com/2020/03/31/kenya-courts-video-call-covid-19/>> accessed 5 June 2020.

¹³⁴ Republic of Kenya, State of the Judiciary and the Administration of Justice Annual Report, 2017 – 2018, The Judiciary, <<https://www.judiciary.go.ke/wp-content/uploads/sojar20172018.pdf>> 4 June, 2020.

¹³⁵ Ayelet Sela, 'Streamlining Justice: How Online Courts Can Resolve the Challenges of Pro Se Litigation' (2016) 26 Cornell JL & Pub. Pol'y 331.

¹³⁶ Ibid, p. 333.

¹³⁷ Ibid, p. 333.

Where parties are in far-flung areas and they do not have access to legal representation, it has been suggested that they can benefit from self-representation in online courts where they can handle all procedural and substantive aspects of their legal matters, including court appearances, without representation by counsel.¹³⁸ This is because lay people who self-represent in judicial processes typically lack knowledge of legal procedure and substance, an inherent limitation which is consistently found to impede their access to justice and the legal system's ability to deliver justice.¹³⁹ This is a viable idea since representation through legal aid or pro bono programs may not always suffice. While video-conference hearings may require documents to be filed physically and sometimes require physical presence of witnesses or parties, online courts would have every part of the process facilitated through some web-based platform from filing, payments and hearings without requiring any physical presence.¹⁴⁰

The system may be akin to the United Kingdom's Money Claim Online system, which is the online portal for starting simple court claims, allowing individuals and organizations to file online specified money claims for sums of up to GBP £100,000.¹⁴¹ It is a web-based service for issuing money claims and resolving fixed money disputes introduced in the judiciary of England and Wales in February 2002.¹⁴² The Canadian District of British Columbia also set up the Civil Resolution Tribunal which started working in 2016 and it allows the public to resolve their condominium property and small claims disputes up to \$5,000 fairly, quickly, and affordably where participants use all of negotiation, facilitation and, if necessary, adjudication services from a computer or mobile device at a time that is convenient for them, and for those who are unable or unwilling to use technology to resolve their dispute, the tribunal provides paper-based or telephone-based services.¹⁴³

It has been observed that over 90 percent of parties in British Columbia's Small Claims Court are self-represented, and even if they could finance legal fees, many British Columbians in remote communities must travel great distances to a courthouse, burdening them with further costs. In addition, no matter where you live or who you are, navigating the civil justice system, even Small

¹³⁸ Ibid, p. 133; See also Schäfer, Saskia. "New practices of self-representation: The use of online media by Ahmadiyya and Shia communities in Indonesia and Malaysia." In *New media configurations and socio-cultural dynamics in Asia and the Arab world*, pp. 174-197. Nomos Verlagsgesellschaft mbH & Co. KG, 2015.

¹³⁹ Ibid, p. 333.

¹⁴⁰ Legg, Michael. "The future of dispute resolution: online ADR and online courts." *Forthcoming—Australasian Dispute Resolution Journal* (2016); Dame Hazel Genn, 'Birkenhead Lecture 2017: Online Courts and the Future of Justice Gray's Inn,' 16 October 2017 <https://www.ucl.ac.uk/laws/sites/laws/files/birkenhead_lecture_2017_professor_dame_hazel_genn_final_version.pdf> 5 June 2020.

¹⁴¹ admin, 'Money Claim Online - Learn What It Is, Where It Is And How To Use It' (Small Claims Court Genie. Free hints, tips and news) <<https://www.smallclaimscourtgenie.co.uk/money-claim-online/>> accessed 5 June 2020.

¹⁴² Jannis Kallinikos, 'Institutional Complexity and Functional Simplification: The Case of Money Claim Online Service in England and Wales' in Francesco Contini and Giovan Francesco Lanzara (eds), *ICT and Innovation in the Public Sector: European Studies in the Making of E-Government* (Palgrave Macmillan UK 2009) <https://doi.org/10.1057/9780230227293_8> accessed 5 June 2020.

¹⁴³ Shannon Salter, 'Online Dispute Resolution and Justice System Integration: British Columbia's Civil Resolution Tribunal' (2017) 34 *Windsor Yearbook of Access to Justice/Recueil annuel de Windsor d'accès à la justice* 112, p. 114; Office of Housing and Construction Standards, 'The Civil Resolution Tribunal and Strata Disputes - Province of British Columbia' <<https://www2.gov.bc.ca/gov/content/housing-tenancy/strata-housing/resolving-disputes/the-civil-resolution-tribunal>> accessed 5 June 2020.

Claims Court, can be stressful and overwhelming, and there is little support available to help with the process.¹⁴⁴ Thus, the online tribunal system comes in handy. Effective July 15, 2019, British Columbia's Civil Resolution Tribunal (CRT) expanded its jurisdiction to include claims against societies incorporated under the *Societies Act* (British Columbia), changing the forum for dispute resolution for many types of claims made against a society or its directors.¹⁴⁵

Therefore, even though Kenya is in the process of putting up small claims courts¹⁴⁶, they may suffer the same setbacks. As a result, in future, Kenya may need to benchmark with the above countries, noting the strengths and weaknesses of this system and consider adopting the same. All the Government needs to do to facilitate is to Fast-track internet access across the country and promote setting up advanced computer centres where less fortunate members of the society can access internet. It is also encouraging that the use of smartphones is fast spreading in the country, a development that may enhance the use of online courts. Initially, the Judiciary may begin with smaller claims whose value may not be economically viable to travel long distances, spend too much or even wait in courts due to the huge backlog currently experienced in our courts.

As for the fear of coaching of witnesses, the system can incorporate measures similar to proctoring programs for ensuring witnesses do not get coached, among other quality assurance software and measures. However, where possible, courts may also consider taking written submissions and evidence in proceedings, particularly in courts where affidavit evidence is not the ordinary procedure.¹⁴⁷

4.10 Addressing the Disconnect Between Skills Acquired in Law Schools and Market Needs

Some scholars have rightly pointed out that 'liberalization and globalization of the world economy has led to the transformation in political economy of the countries, resulting in a major shift in trends and culture which in turn has had major impact on the legal system and through a demand for new laws, new regulations and new skills to interface with the broader global economic and political environments and social needs'.¹⁴⁸ Arguably, changes in methods of instruction of law students as well as adoption of legal tech in law schools and training centres as discussed in this paper will go a long way in addressing the gaps in skills acquired in law schools and market needs, thus enabling these students to address the societal challenges ably using law as a means to an end and not the end in itself.

¹⁴⁴ Ibid, p. 119.

¹⁴⁵ Millman, Bryan, 'Society Disputes May Now Be Settled by BC Civil Resolution Tribunal' (<https://www.nortonrosefulbright.com/443/en-za/knowledge/publications/2019>) <<https://www.nortonrosefulbright.com/en-za/knowledge/publications/303e1394/society-disputes-may-now-be-settled-by-bc-civil-resolution-tribunal>> accessed 5 June 2020.

¹⁴⁶ Small Claims Court Act, No. 2 of 2016, Laws of Kenya.

¹⁴⁷ 'The Remote Courtroom: Tips and Tricks for Online Hearings' <<https://www.ashurst.com/en/news-and-insights/legal-updates/the-remote-courtroom-tips-and-tricks-for-online-hearings/>> accessed 5 June 2020.

¹⁴⁸ Raizada S and Mittal JK, 'Structural Transformation and Learning Paradigms-Global Strategic Approach in Clinical Legal Education' (2020) 20 *Medico Legal Update* 188, 189.

4.11 Enhanced collaboration Between International Law Firms and Local Firms/ Globalization of Legal Services

Notably, some Kenyan firms are already ahead in this area by collaborating with East African law firms and some with even international firms beyond the region.¹⁴⁹ Bowmans, a firm with nine offices (Cape Town, Dar es Salaam, Durban, Lilongwe, Lusaka, Johannesburg, Kampala, Moka and Nairobi) in seven African countries and over 400 specialist lawyers, for instance, has been extending its reach across the African continent.¹⁵⁰ In all these countries (Kenya, Malawi, Mauritius, South Africa, Tanzania, Uganda and Zambia), they have alliance firms with which they work closely. They are representatives of Lex Mundi, a global association with more than 160 independent law firms in all the major centres across the globe, which gives them access to firms in each jurisdiction represented.¹⁵¹ There is a need for more local firms to consider the idea and possibly join the bandwagon as it may give them access to a wider clientele.

5. Conclusion

It has rightly been pointed out that ‘with the growing economy, boundaries in knowledge are disappearing where legal education is becoming more innovative, flexible and responsive to the business and corporate world in the 21st century by the dictates of the changing environment’.¹⁵² The COVID-19 has laid bare the direction that legal practice and legal education sector is headed. There is a need for lawyers to reconsider the issues of *law firm structure and billing, law firm marketing, work-life balance and technology vis-à-vis the practice of law, cross border legal practice, educating and training new adaptable lawyers* (Emphasis added).¹⁵³ Law schools and the LSK should take this opportunity to equip lawyers with the requisite skills in order to prepare them for the fast changing legal practice the world over. Law firms should also invest in technological developments if they hope to remain relevant in the face of technological innovations and developments and globalisation. The Judiciary also needs to take up the challenge of adopting technology to facilitate remote access to justice for all.

We are moving into an era where many lawyers may find themselves working from home due to the desire to cut costs using technological investments and following clients’ needs which will lead firms to embrace technology.¹⁵⁴ This is the time for them to invest wisely in these new technological areas and acquire the relevant skills and knowledge to enable them remain relevant. Arguably, automation technologies can make legal services more affordable and easily accessible to their clients. Additionally, law firms can leverage these technologies to develop and add

¹⁴⁹ Karangizi, S., ‘Future Proofing the Legal Profession in East Africa | ALSF’ <<https://www.afslf.org/director-article/future-proofing-legal-profession-east-africa>> accessed 30 May 2020.

¹⁵⁰ ‘Company Profile’ (Bowmans) <<https://www.bowmanslaw.com/our-firm/company-profile/>> accessed 3 June 2020.

¹⁵¹ ‘Our African Footprint’ (Bowmans) <<https://www.bowmanslaw.com/our-firm/our-african-footprint/>> accessed 3 June 2020.

¹⁵² Raizada S and Mittal JK, ‘Structural Transformation and Learning Paradigms-Global Strategic Approach in Clinical Legal Education’ (2020) 20 *Medico Legal Update* 188, 189.

¹⁵³ Mboya, Apollo, ‘The Bar: Challenges and Opportunities’, in Ghai, Y.P. and Cottrell, J. eds., *The legal profession and the new constitutional order in Kenya*. Strathmore University Press, 2014, p. 252.

¹⁵⁴ Zach Warren | January 15 and 2020 at 03:30 PM | The original version of this story was published on Legaltech News, ‘The Future of Legal Tech Is About Transformation, Not Automation’ (The American Lawyer) <<https://www.law.com/americanlawyer/2020/01/15/the-future-of-legal-tech-is-about-transformation-not-automation/>> accessed 3 June 2020.

Embracing Science and Technology in Legal Education for Efficiency and Enhanced Access to Justice

alternative services, while reducing overheads and workload.¹⁵⁵ While clients are putting law firms under intense pressure to deliver a higher level of service by making use of the latest technological advancements, all at a reduced cost, it has been argued that this generational shift in consumer expectation is an opportunity for legal service providers to implement *innovative digital products* that meet next-generation clients' demands while increasing productivity within their own staff.¹⁵⁶

The future of legal practice and legal education is in embracing technology and the Kenyan legal practitioners and players in the justice sector must take up the challenge or be rendered irrelevant since legal practice is likely to become increasingly virtual. The journey into the future has already begun and there is no turning back. The legal fraternity must venture into new frontiers: Embracing Science and Technology in legal education for Efficiency and Enhanced Access to Justice is an idea whose time has come.

¹⁵⁵ 'Business Models for Law Firms - p.Xel Marketing Agency' <<https://www.p-xel.co/business-models-for-digital-disruption-in-the-legal-industry/>> accessed 5 June 2020.

¹⁵⁶ Ibid.

Recognising a Human Right to Safe, Healthy and Sustainable Environment

Abstract

While the international legal instruments on human rights and environmental protection acknowledge the connection between protection and enjoyment of human rights and the need for conservation and protection of environment, there is yet to be reached a consensus by the main stakeholders at the global level to convince the United Nations to crystalize the human right to a safe, healthy and sustainable environment as an independent right. It is currently treated as a means to an end necessary for the realisation of other human rights instead of being treated as an end in itself. This has continually created enforcement challenges as well as making it difficult to demand accountability from states that violate environmental principles, at the international level as well as in those countries where there is no domestic recognition of the right to clean and healthy environment. This paper makes a case for the need to recognise the human right to safe, healthy and sustainable environment as an independent right capable of being enforced without necessarily making reference to the other human rights, as part of laying the ground for achieving the Sustainable Development agenda.

1. Introduction

Over the years, human activities have posed a major threat to the earth's natural processes which have been strained beyond limits, causing a major environmental crisis.¹ It is worth pointing out that when humans damage the environment, they diminish the quality of life-most immediately for those directly affected, and in the long term, for everyone.² As such, environmental protection and human rights are believed to be interrelated, interconnected, and mutually responsive as both of them are directed towards securing the well-being of humanity, with safe and healthy environment being the pre-condition for the enjoyment of fundamental human rights.³

The 1992 United Nations Conference on Development and the Environment was one of the first international efforts towards acknowledging development and environmental protection as complementary objectives.⁴ Article 12(2) (b) of the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*⁵ requires states parties to improve 'all aspects of environmental and industrial hygiene'. Article 24 of the *African Charter on Human and Peoples' Rights*⁶ provides that 'all peoples shall have the right to a general satisfactory environment favourable to their development.' These are just some of the few international and regional legal instruments on human rights that make reference to the need for a clean and healthy environment as a requisite for the achievement of the other human rights. A new imperative of Sustainable Development

¹ McClymonds JT, 'Human Right to a Healthy Environment: An International Legal Perspective, The' (1992) 37 New York Law School Law Review 583.

² Popovic NA, 'In Pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment' (1995) 27 Colum. Hum. Rts. L. Rev. 487.

³ Pathak P, 'Human Rights Approach to Environmental Protection' (Social Science Research Network 2014) SSRN Scholarly Paper ID 2397197 <<https://papers.ssrn.com/abstract=2397197>> accessed 31 March 2021.

⁴ Mink SD, 'Poverty, Population, and the Environment' [1993] World Bank discussion papers (USA).

⁵ UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

⁶ Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

demands that environmental considerations become fully integrated into the mainstream of economic decision-making.⁷

Over the years, many countries around the world have recognised the right to clean and healthy environment in their national constitutions.⁸ Kenya's Constitution recognises this right under Article 42 which provides that 'every person has the right to a clean and healthy environment, which includes the right—to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and to have obligations relating to the environment fulfilled under Article 70'.⁹ The constitutionalisation of human right to a clean and healthy environment and the principle of sustainable development under the 2010 Constitution of Kenya has been hailed as an important development in environmental law in Kenya, representing environmental constitutionalism and sustainability constitutionalism, respectively.¹⁰

The proponents of constitutionalisation of environmental rights argue that the potential benefits of constitutional environmental rights include: stronger environmental laws and policies; improved implementation and enforcement; greater citizen participation in environmental decision-making; increased accountability; reduction in environmental injustices; a level playing field with social and economic rights; and better environmental performance.¹¹ On the other hand, those against the approach argue that constitutional environmental rights are: too vague to be useful; redundant because of existing human rights and environmental laws; a threat to democracy because they shift power from elected legislators to judges; not enforceable; likely to cause a flood of litigation; and likely to be ineffective.¹² Thus, the question is yet to be settled although an impressive number of countries have opted for this approach to environmental rights. It is estimated that since the right's first mention in the Stockholm Declaration in 1972 – a result of the first major environmental conference- more than 100 constitutions across the world have adopted a human right to a healthy environment, often serving as a powerful tool to protect the natural world.¹³

⁷ Mink SD, 'Poverty, Population, and the Environment' [1993] World Bank discussion papers (USA).

⁸ Boyd DR, 'The Effectiveness of Constitutional Environmental Rights', Paper for Yale UNITAR Workshop, on April (2013);

⁹ Article 42, Constitution of Kenya 2010.

¹⁰ Mwanza R, 'The Relationship between the Principle of Sustainable Development and the Human Right to a Clean and Healthy Environment in Kenya's Legal Context: An Appraisal' (2020) 22 Environmental Law Review 184.

¹¹ Boyd DR, 'The Effectiveness of Constitutional Environmental Rights', Paper for Yale UNITAR Workshop, on April (2013), 5.

¹² Ibid.

¹³ Zimmer K, 'The Human Right That Benefits Nature' <<https://www.bbc.com/future/article/20210316-how-the-human-right-to-a-healthy-environment-helps-nature>> accessed 31 March 2021; Katarina Zimmer, 'The Human Right That Benefits Nature' <<https://www.bbc.com/future/article/20210316-how-the-human-right-to-a-healthy-environment-helps-nature>> accessed 31 March 2021.

Despite this initiative by several countries, there is still the contention over the actual status of the right to clean and healthy environment under the international legal framework on human rights.¹⁴ Indeed, few international agreements explicitly refer to environmental human rights.¹⁵

The lack of explicit language on environmental rights in any international and/or national legal instrument has been associated with possible environmental degradation and lack of accountability as it may create a legal vacuum which allows the State to engage in a variety of forms of environmental mismanagement within a legal context that lack effective avenues for legal recourse.¹⁶ This paper makes a case for the need for express recognition of the human right to a safe, healthy and sustainable environment as an independent right under the international law, without necessarily tying anchoring it to the rest of the human rights, for ease of enforcement and demanding accountability from states for both international community as well as citizens.

2. Safe, Healthy and Sustainable Environment: The Elements

A safe, clean, healthy and sustainable environment is considered to be integral to the full enjoyment of a wide range of human rights, including the rights to life, health, food, water and sanitation.¹⁷ Arguably, the human right to a healthy environment – encompassing clean and balanced ecosystems, rich biodiversity and a stable climate – recognises that nature is a keystone of a dignified human existence, in line with a wealth of scientific evidence linking human welfare and the natural world.¹⁸ Thriving ecosystems are important for provision of clean water and air, yield seafood and pollinators, and soaking up greenhouse gases.¹⁹ The procedural elements of the right to clean, safe and healthy environment are access to information, public participation, and access to justice/effective remedies²⁰ while the substantive elements include clean air, a safe climate, access to safe water and adequate sanitation, healthy and sustainably produced food, non-toxic environments in which to live, work, study and play, and healthy biodiversity and ecosystems.²¹

The right to clean and healthy environment which is often classified as part of third-generation “solidarity” rights is seen as an important right for protecting people individually-a characteristic shared by all human rights- by imposing more effective obligations on governments and by

¹⁴ ‘Legal Analysis: The Right to a Healthy Environment in Australia’ (Environmental Defenders Office, 8 January 2020) <<https://www.edo.org.au/2020/01/09/right-to-healthy-environment-in-australia/>> accessed 31 March 2021.

¹⁵ ‘Appalachia Puts Environmental Human Rights to the Test’ (YES! Magazine) <<https://www.yesmagazine.org/environment/2018/01/17/appalachia-puts-environmental-human-rights-to-the-test>> accessed 31 March 2021.

¹⁶ Mwanza R, ‘The Relationship between the Principle of Sustainable Development and the Human Right to a Clean and Healthy Environment in Kenya’s Legal Context: An Appraisal’ (2020) 22 *Environmental Law Review* 184.

¹⁷ ‘Dr. David R. Boyd’ (UN Special Rapporteur on Human Rights and the Environment) <<http://srenvironment.org/node/556>> accessed 30 March 2021.

¹⁸ Zimmer K, ‘The Human Right That Benefits Nature’ <<https://www.bbc.com/future/article/20210316-how-the-human-right-to-a-healthy-environment-helps-nature>> accessed 31 March 2021.

¹⁹ *Ibid.*

²⁰ Knox JH, ‘Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Biodiversity Report’ [2017] United Nations Human Rights Council, A/HRC/34/49.

²¹ *Ibid.*

providing individual remedies for environmental deprivations.²² Collectively, just like all other 'third-generation' rights- the right to clean and healthy environment calls for collective action and cooperation from all persons in taking care of the environment.²³

The right to a healthy environment has been hailed by some scholars as capable of acting as a crucial legal pathway to protecting the natural world, both by encouraging governments to pass stronger environmental laws and allowing courts to hold violators accountable and this is especially so when installed into constitutions, where such rights are taken seriously by many judicial systems and become hard to undo, creating an enduring force counteracting the interests against protecting nature.²⁴ Notably, the right to a healthy environment requires governments to carry out the following obligations: to refrain from interfering directly or indirectly with the enjoyment of the right to a healthy environment; to prevent third parties such as corporations from interfering in any way with the enjoyment of the right to a healthy environment; and, to adopt the necessary measures to achieve the full realisation of the human right to a safe and healthy environment.²⁵

3. Place of Safe, Healthy and Sustainable Environment in the Sustainable Development Agenda

Arguably, human rights and the environment are intertwined; human rights cannot be enjoyed without a safe, clean and healthy environment; and sustainable environmental governance cannot exist without the establishment of and respect for human rights.²⁶ It has rightly been pointed out that nearly 92 percent of pollution-related deaths occur in low-income and middle-income countries where children face the highest risks because small exposures to chemicals in utero and in early childhood can result in lifelong disease, disability, premature death, as well as reduced learning and earning potential.²⁷

Notably, environmental rule of law is indispensable for ensuring just and sustainable development outcomes, and guaranteeing fundamental rights to a healthy environment, where the concept of environmental law includes the following elements: adequate and implementable laws, access to justice and information, inclusion and equity in public participation, accountability, transparency and liability for environmental damage, fair and just enforcement, and human rights.²⁸

²² McClymonds JT, 'Human Right to a Healthy Environment: An International Legal Perspective, The' (1992) 37 New York Law School Law Review 583.

²³ Ibid, 583.

²⁴ Katarina Zimmer, 'The Human Right That Benefits Nature' <<https://www.bbc.com/future/article/20210316-how-the-human-right-to-a-healthy-environment-helps-nature>> accessed 31 March 2021.

²⁵ Ruppel, Oliver C., "Third-generation human rights and the protection of the environment in Namibia." Human rights and the rule of law in Namibia. Windhoek: Macmillan Education Namibia (2008): 101-120, 103.

²⁶ Environment UN, 'What Are Environmental Rights?' (UNEP - UN Environment Programme, 2 March 2018) <<http://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/advancing-environmental-rights/what>> accessed 30 March 2021.

²⁷ 'Dr. David R. Boyd' (UN Special Rapporteur on Human Rights and the Environment) <<http://srenvironment.org/node/556>> accessed 30 March 2021.

²⁸ 'Climate Change - A Comparative Overview of the Rights Based Approach in the Americas | InforMEA' <<https://www.informea.org/en/literature/climate-change-comparative-overview-rights-based-approach-americas>> accessed 1 April 2021.

The *United Nations Sustainable Development Goals (SDGs)*²⁹ are a set of 17 goals with 169 targets that all UN Member States have agreed to work towards achieving by the year 2030.³⁰ These goals and targets are all designed around ensuring that the environment is not only well protected but also that the resultant ecosystem services are used in meeting the economic and social needs of the human beings, both current and future generations.³¹ As such, a safe, healthy and sustainable environment is a central element of the sustainable development agenda. The SDGs framework consists of 17 goals for environmental sustainability, social inclusion, economic development, peace, justice, good governance and partnership.³² As such, sustainable development is seen as one of the most important aspects and methods used to conserve natural resources, as it recognizes that growth must be both inclusive and environmentally sound to reduce poverty and also build prosperity for the present population in addition to meeting the needs of future generations.³³

4. Human Right to Safe, Healthy and Sustainable Environment: Prospects and Challenges

The human right to safe, healthy and sustainable environment is generally considered to be part of the environmental rights. Notably, environmental impacts on health are uneven across age and mostly affect the poor.³⁴ It has rightly been pointed out that although there is clear scientific consensus on the benefits of nature to people, the evolution of nature as a human right has been remarkably patchy around the world with many Latin American countries forging ahead while Europe and North America lag somewhat behind.³⁵

Worth pointing out is the observation that the elements of the right to a healthy environment, such as a safe climate and healthy biodiversity and ecosystems, are facing complex and systemic challenges that affect all people and living beings.³⁶ While there is no doubt on the important role played by the environment in supporting all life on the earth, progress towards recognising the human right to safe, healthy and sustainable development as a fully-fledged right under the international law has been slow and instead has been replaced with the ‘greening’ of human rights, such as the right to life and right to property, as people increasingly recognise how environmental degradation affects the ability to enjoy these rights.³⁷ As things

²⁹ UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1.

³⁰ ‘Sustainable Development Goals’ <<https://www.who.int/westernpacific/health-topics/sustainable-development-goals>> accessed 1 April 2021.

³¹ Ibid.

³² ‘Sustainable Development - an Overview | ScienceDirect Topics’

<<https://www.sciencedirect.com/topics/earth-and-planetary-sciences/sustainable-development>> accessed 1 April 2021.

³³ Muralikrishna IV and Manickam V, ‘Chapter Two - Sustainable Development’ in Iyyanki V Muralikrishna and Valli Manickam (eds), *Environmental Management* (Butterworth-Heinemann 2017) <<https://www.sciencedirect.com/science/article/pii/B9780128119891000026>> accessed 1 April 2021.

³⁴ Mink SD, ‘Poverty, Population, and the Environment’ [1993] World Bank discussion papers (USA).

³⁵ Katarina Zimmer, ‘The Human Right That Benefits Nature’

<<https://www.bbc.com/future/article/20210316-how-the-human-right-to-a-healthy-environment-helps-nature>> accessed 31 March 2021.

³⁶ Ituarte-Lima C, ‘I Thriving in the Anthropocene: Why the Human Right to a Healthy Environment’, 20 <<https://elearning.rwi.or.id/storage/app/media/uploaded-files/i-ituarte-lima-c-thriving-in-the-anthropocene-why-the-human-right-to-a-healthy-environment-2020.pdf>> 30 March 2021.

³⁷ Ituarte-Lima C, ‘I Thriving in the Anthropocene: Why the Human Right to a Healthy Environment’, 27 <<https://elearning.rwi.or.id/storage/app/media/uploaded-files/i-ituarte-lima-c-thriving-in-the-anthropocene-why-the-human-right-to-a-healthy-environment-2020.pdf>> 30 March 2021.

currently stand, the Office of the High Commissioner on Human Rights emphasizes that “while the universal human rights treaties do not refer to a specific right to a safe and healthy environment, the United Nations human rights treaty bodies all recognize the intrinsic link between the environment and the realization of a range of human rights, such as the right to life, to health, to food, to water, and to housing.”³⁸

The main contention between those in support and those against the full recognition of the right to safe and healthy environment as an independent human right lies between anthropocentrism and ecocentrism approaches to conservation, where anthropocentrism means that the whole universe revolves around the interests of human-kind and that all human activities are human-centred, while ecocentrism is a collection of views that is theoretically in contrast with anthropocentrism.³⁹ The debate between the two groups is informed by three approaches in relation to the relationship between human rights and environmental protection which are as follows: the first approach is one where environmental protection is seen as a possible means of fulfilling human rights standards, that is, the end is fulfilling human rights, and the route is through environmental law; the second approach states that ‘the legal protection of human rights is an effective means to achieving the ends of conservation and environmental protection (greening of existing human rights); and the third approach to the question of ‘human rights and the environment’ is to deny the existence of any formal connection between the two at all, that is, with the growth and development of international environmental law as well as internationalization of domestic environments of states, it is unnecessary to have a separate human right to a decent environment.⁴⁰

Thus, the debate is about either ‘greening’ of existing human rights law or the addition of new rights to existing treaties.⁴¹ Some scholars, however, believe that environmental law, in absence of hard law documents, appears to be lagging in dealing with emerging environmental problems.⁴² It is worth pointing out that while there are a number of international legal instruments that recognise the need for clean and healthy environment as a prerequisite for enjoyment of other rights, these references relating to the environment are attached to a particular issue and do not recognise the human right to a quality environment as an independent right.⁴³ This lack of consensus among the different stakeholders thus means that the world might have to wait a little longer to attain consensus and move the United Nations to finally recognise the right to a safe, healthy and sustainable environment as an independent right capable of being enforced without necessarily treating its importance as inherently linked to the realisation of other rights. That is, recognising the right would move it from being treated as a means to an end to an end in itself.

³⁸ Boyle, Alan, "Human rights and international environmental law: Some current problems," Электронный ресурс].–Режим доступа: <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/WorkingGroups/08-03-Human Rights. pdf> (дата обращения: 10.04. 2014 г.) (2011).

³⁹ Leib LH, ‘Historical and Philosophical Underpinnings of the Environmental Movement’, *Human Rights and the Environment* (Brill 2011), 12 <<https://www.jstor.org/stable/10.1163/j.ctt1w8h1t2.5>> accessed 1 April 2021.

⁴⁰ Pathak P, ‘Human Rights Approach to Environmental Protection’ (Social Science Research Network 2014) SSRN Scholarly Paper ID 2397197, 18-19<<https://papers.ssrn.com/abstract=2397197>> accessed 1 April 2021.

⁴¹ *Ibid*, 19.

⁴² *Ibid*, 19.

⁴³ *Ibid*, 20.

5. Recognising a Human Right to Safe, Healthy and Sustainable Environment

A safe, clean, healthy and sustainable environment is now treated as an integral element to the full enjoyment of a wide range of human rights, including the rights to life, health, food, water and sanitation.⁴⁴ As already pointed out, while countries around the world have continually acknowledged and entrenched environmental rights into their national constitutions, there are few international legal instruments that expressly recognise the right to clean and healthy environment. As a result, there have been a strong call for the recognition of the right to a healthy environment in a global instrument such as a resolution by the General Assembly by various actors including current UN Special Rapporteur on Human Rights and Environment, although this is yet to be acted upon.⁴⁵

In order to ensure that the victims of environmental degradation are protected by the laws and mechanisms established to address human rights abuses, it has been suggested that efforts aimed at natural resource preservation should also incorporate measures aimed at addressing human impacts of environmental abuse.⁴⁶ In addition, it has been argued that linking human rights with the environment creates a rights-based approach to environmental protection that places the people harmed by environmental degradation at its centre.⁴⁷ Furthermore, it has been suggested that articulating the fundamental rights of peoples with respect to the environment creates the opportunity to secure those rights through human rights bodies in an international forum as well as the national tribunals.⁴⁸ Kenya has notably made steps in the right direction as far as recognising the justiciable nature of the right to clean and healthy environment is concerned.⁴⁹ For now, it seems that the only way to ensure that the right to safe and healthy environment is justiciable is through domestic initiatives, where governments include the right to clean and healthy environment under in their countries' constitutions.⁵⁰ There is a need for stakeholders to continually engage and encourage countries to adopt as a human right a safe, healthy and sustainable environment in their constitutions and/or statutes, as a step towards achieving global consensus on the same for the ultimate goal of an international legal instrument on the same.

⁴⁴ 'Dr. David R. Boyd' (UN Special Rapporteur on Human Rights and the Environment) <<http://srenvironment.org/node/556>> accessed 31 March 2021.

⁴⁵ 'OHCHR | Right to a Healthy and Sustainable Environment' <<https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/HealthySustainable.aspx>> accessed 1 April 2021.

⁴⁶ Pathak P, 'Human Rights Approach to Environmental Protection' (Social Science Research Network 2014) SSRN Scholarly Paper ID 2397197, 17 <<https://papers.ssrn.com/abstract=2397197>> accessed 31 March 2021.

⁴⁷ Ibid, 17.

⁴⁸ Ibid, 17.

⁴⁹ See Peter K. Waweru v Republic [2006] eKLR, Mis.Civl Appli.No. 118 OF 2004; Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR, Petition 22 of 2012; Save Lamu & 5 others v National Environmental Management Authority (NEMA) & Another, Tribunal Appeal No. NET 196 of 2016, (2019) eKLR.

⁵⁰ Mwanza R, 'The Relationship between the Principle of Sustainable Development and the Human Right to a Clean and Healthy Environment in Kenya's Legal Context: An Appraisal' (2020) 22 Environmental Law Review 184; Schiel R, Langford M and Wilson B, 'Does It Matter? Constitutionalisation, Democratic Governance, and the Right to Water' (2020) 12 Water 350; Boyd DR, 'The Status of Constitutional Protection for the Environment in Other Nations' [2014] David Suzuki Foundation 4.

6. Conclusion

Arguably, recognising the human right to a healthy environment will go a long way in protecting people and nature, as well as ensuring that there are conducive conditions for continued Sustainable Development and prosperity, leaving no one behind.⁵¹ While many countries including Kenya, have made impressive steps towards the recognition and enforcement of the human right to a safe, healthy and sustainable environment, there is still no global consensus on the need to recognise it as an independent right without necessarily anchoring it on the other basic human rights. Such recognition will achieve the dual goal of protecting the environment through ecocentric approaches as well as ensuring that enforcement and accountability of governments and private persons are guaranteed. Time is ripe for the global environmental community to consider taking this bold step as part of moving towards achieving the SDGs. Recognising the Human Right to a Clean, Healthy and Sustainable Environment is something that should happen now for the sake of the present and future generations.

⁵¹ Ituarte-Lima C, 'I Thriving in the Anthropocene: Why the Human Right to a Healthy Environment', 18 <<https://elearning.rwi.or.id/storage/app/media/uploaded-files/i-ituarte-lima-c-thriving-in-the-anthropocene-why-the-human-right-to-a-healthy-environment-2020.pdf>> 30 March 2021.

Resource Mobilization for Sustainable Development in Kenya

Abstract

The Covid-19 pandemic has exposed how many developing countries especially in Africa have fragile economies which are over-reliant on foreign financial resources. This is especially so within the African continent which, ironically has so much natural resources which if well utilized, would otherwise make the continent self-sustaining. Kenya falls within these countries, and this paper thus explores some of the ways that the country can work towards achieving the true independence of financing its own economy, with little or no need for the foreign aid by increasing its efforts towards domestic resource mobilization as a step towards achieving the sustainable development goals as laid out in the 2030 Agenda for Sustainable Development Goals as well as the country's Vision 2030 Development Blueprint.

1. Introduction

This paper is mainly inspired by 2030 Agenda for Sustainable Development Goals (SDGs)¹ goal 17 which seeks to strengthen the means of implementation and revitalize the global partnership for sustainable development. The SDG Goal 17 acknowledges that the SDGs cannot be realised without the global cooperation amongst countries as well as mobilizing the relevant resources necessary to achieve these goals.² Target 17.1 seeks to strengthen domestic resource mobilization, including through international support to developing countries, to improve domestic capacity for tax and other revenue collection. Domestic Resource Mobilization remains essential to accelerate economic growth and lift people from extreme poverty, particularly in the low-income countries, an important component of the SDGs.³

2. Sustainable Development: Laying the Groundwork

SDG Goal 17 requires global actors to 'strengthen the means of implementation and revitalize the global partnership for sustainable development'.⁴ The related targets and indicators include to: strengthen domestic resource mobilization, including through international support to developing countries to improve domestic capacity for tax and other revenue collection; Developed countries to implement fully their official development assistance commitments, including the commitment by many developed countries to achieve the target of 0.7 per cent of Official development assistance (ODA)⁵/ Gross national income (GNI)⁶ to developing countries and 0.15 to 0.20 per

¹ UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1.

² Martin, 'Global Partnerships' (United Nations Sustainable Development) <<https://www.un.org/sustainabledevelopment/globalpartnerships/>> accessed 8 March 2021.

³ Yamada K, 'Financing Sustainable Development with Enhanced Domestic Resource Mobilization: Transitional Role of International Cooperation' (2017) 23 Asia-Pacific Development Journal 61, at 61.

⁴ SDG Goal 17.

⁵ Official development assistance (ODA) is defined as government aid designed to promote the economic development and welfare of developing countries. 'Official Development Assistance (ODA) - Net ODA - OECD Data' (the OECD) <<http://data.oecd.org/oda/net-oda.htm>> accessed 24 March 2021.

⁶ Gross national income (GNI) is defined as gross domestic product, plus net receipts from abroad of compensation of employees, property income and net taxes less subsidies on production. ('National Income - Gross National Income - OECD Data' (the OECD) <<http://data.oecd.org/natincome/gross-national-income.htm>> accessed 24 March 2021.)

cent of ODA/GNI to least developed countries ODA providers are encouraged to consider setting a target to provide at least 0.20 per cent of ODA/GNI to least developed countries; Mobilize additional financial resources for developing countries from multiple sources; Assist developing countries in attaining long-term debt sustainability through coordinated policies aimed at fostering debt financing, debt relief and debt restructuring, as appropriate, and address the external debt of highly indebted poor countries to reduce debt distress; Adopt and implement investment promotion regimes for least developed countries; Enhance North-South, South-South and triangular regional and international cooperation on and access to science, technology and innovation and enhance knowledge sharing on mutually agreed terms, including through improved coordination among existing mechanisms, in particular at the United Nations level, and through a global technology facilitation mechanism; Promote the development, transfer, dissemination and diffusion of environmentally sound technologies to developing countries on favourable terms, including on concessional and preferential terms, as mutually agreed; Fully operationalize the technology bank and science, technology and innovation capacity-building mechanism for least developed countries by 2017 and enhance the use of enabling technology, in particular information and communications technology; Enhance international support for implementing effective and targeted capacity-building in developing countries to support national plans to implement all the sustainable development goals, including through North-South, South-South and triangular cooperation; Promote a universal, rules-based, open, non-discriminatory and equitable multilateral trading system under the World Trade Organization, including through the conclusion of negotiations under its Doha Development Agenda; Significantly increase the exports of developing countries, in particular with a view to doubling the least developed countries' share of global exports by 2020; Realize timely implementation of duty-free and quota-free market access on a lasting basis for all least developed countries, consistent with World Trade Organization decisions, including by ensuring that preferential rules of origin applicable to imports from least developed countries are transparent and simple, and contribute to facilitating market access; Enhance global macroeconomic stability, including through policy coordination and policy coherence; Enhance policy coherence for sustainable development; Respect each country's policy space and leadership to establish and implement policies for poverty eradication and sustainable development; Enhance the global partnership for sustainable development, complemented by multi-stakeholder partnerships that mobilize and share knowledge, expertise, technology and financial resources, to support the achievement of the sustainable development goals in all countries, in particular developing countries; Encourage and promote effective public, public-private and civil society partnerships, building on the experience and resourcing strategies of partnerships; by 2020, enhance capacity-building support to developing countries, including for least developed countries and small island developing States, to increase significantly the availability of high-quality, timely and reliable data disaggregated by income, gender, age, race, ethnicity, migratory status, disability, geographic location and other characteristics relevant in national contexts; and by 2030, build on existing initiatives to develop measurements of progress on sustainable development that complement gross domestic product, and support statistical capacity-building in developing countries.⁷

⁷ 'SDG 17: Strengthen the Means of Implementation and Revitalize the Global Partnership for Sustainable Development – SDG Compass' <<https://sdgcompass.org/sdgs/sdg-17/>> accessed 8 March 2021.

These targets are spread over several target areas namely: finance; technology; Capacity-Building; Trade; and Systemic issues which entail, Policy and institutional coherence, Multi-stakeholder partnerships, and Data, monitoring and accountability.⁸

In order to achieve the sustainable development goals, the 2015 Addis Ababa Action Agenda on Financing for Development captured the importance of domestic resource mobilization, noting that the “mobilization and effective use of domestic resources ... are central to our common pursuit of sustainable development.”⁹ Notably, it has rightly been pointed out that the only reliable and sustained sources of government revenue are taxes and some non-tax revenue instruments, such as royalties and resource rents from extractive industries and, to a limited extent, user fees for public services, generally delivered by local governments.¹⁰

However, most African countries have been over relying on foreign aid and loans to fund their ever expanding national budgets. Kenya is no exception. With the pressure and the 2030 deadline to achieve the sustainable development goals, the need for alternative funding will only grow. As such, there is a need for these countries to not only look for alternative sources of the required financial resources but also ones that come with less complications and strings attached. It is for this reason that these countries need to focus more on capitalizing on domestic resource mobilization as a source of funding development projects. This is important as Official development assistance (ODA) is finite and fluctuates over time, creating uncertainty for recipient countries about planning, budgeting, and expenditures in the public sector.¹¹

It is documented that when the investment requirements for the Sustainable Development Goals (SDGs) were first assessed in UNCTAD’s World Investment Report 2014, at least 10 relevant sectors (encompassing all 17 SDGs) were identified and the report projected an annual investment gap of \$2.5 trillion in developing countries.¹² While this projection remains valid today according to a recent review (UNCTAD, 2020), the SDGs have significant resource implications across developed and developing countries and require a step-change in levels of both public and private investment in the SDGs.¹³

The need for enhanced domestic resource mobilization is also more urgent in light of the UNCTAD’s observations that the COVID-19 shock has exacerbated existing constraints for the SDGs and could undo the progress made in the last six years in SDG investment and the international private sector investment flows to developing and transition economies in sectors relevant for the SDGs were also expected to fall by about one-third in 2020 because of the COVID-19 pandemic, posing a risk to delivering on the 2030 agenda for sustainable development.¹⁴ Thus, as part of laying the groundwork for the achievement of SDGs, there is a

⁸ Ibid.

⁹ Junquera-Varela, R. F., Verhoeven, M., Shukla, G. P., Haven, B., Awasthi, R., & Moreno-Dodson, B., *Strengthening Domestic Resource Mobilization: Moving from Theory to Practice in Low-and Middle-Income Countries* (The World Bank 2017), chapter Two.

¹⁰ Ibid, 5.

¹¹ Ibid, 6.

¹² Zhan JX and Santos-Paulino AU, ‘Investing in the Sustainable Development Goals: Mobilization, Channeling, and Impact’ (2021) 4 *Journal of International Business Policy* 166.

¹³ Ibid.

¹⁴ Zhan JX and Santos-Paulino AU, ‘Investing in the Sustainable Development Goals: Mobilization, Channeling, and Impact’ (2021) 4 *Journal of International Business Policy* 166.

need for countries, including Kenya, to review their domestic resource mobilization efforts and work towards enhancing the same.

3. Domestic Resource Mobilization in Kenya: Challenges and Prospects

a) Corruption

Transparency International defines ‘corruption’ as simply the abuse of entrusted power for private gain.¹⁵ Kenya’s *Anti-Corruption and Economic Crimes Act, 2003*¹⁶ defines “corruption” to include: bribery; fraud; embezzlement or misappropriation of public funds; abuse of office; breach of trust; or an offence involving dishonesty — (i) in connection with any tax, rate or impost levied under any Act; or (ii) under any written law relating to the elections of persons to public office.¹⁷ These are just some of the activities that may be termed as corruption together with many forms of their derivatives. Corruption can be classified as grand, petty and political, depending on the amount of money lost and the sector where it occurs, where: grand corruption consists of acts committed at a high level of government that distort policies or the central functioning of the state, enabling leaders to benefit at the expense of the public good; petty corruption refers to everyday abuse of entrusted power by low and mid-level public officials in their interactions with ordinary citizens, who often are trying to access basic goods or services in places like hospitals, schools, police departments, and other agencies; and, political corruption is a manipulation of policies, institutions and rules of procedure in the allocation of resources and financing by political decision makers, who abuse their position to sustain their power, status and wealth.¹⁸

The *United Nations Convention against Corruption*¹⁹, the only legally binding universal anti-corruption instrument, captures in its preamble the State Parties’ concern about the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law.²⁰

Corruption is considered to be rampant in many developing and poor countries, making them struggle with putting in place anti-corruption measures as part of their development strategy.²¹ Notably, corruption leads governments to intervene where they need not, and it undermines their ability to enact and implement policies in areas in which government intervention is clearly needed—whether environmental regulation, health and safety regulation, social safety nets, macroeconomic stabilization, or contract enforcement.²² The World Bank rightly points out that

¹⁵ ‘What Is Corruption?’ (Transparency.org) <<https://www.transparency.org/en/what-is-corruption>> accessed 21 March 2021.

¹⁶ Anti-Corruption and Economic Crimes Act, No. 3 of 2003, Laws of Kenya.

¹⁷ Ibid, sec. 2.

¹⁸ ‘The Fight against Corruption in Kenya...Yet another Chapter’ <<https://cytonn.com/topicals/the-fight-against-corruption-in-kenyayet-another-chapter>> accessed 21 March 2021.

¹⁹ UN General Assembly, United Nations Convention Against Corruption, 31 October 2003, A/58/422.

²⁰ Ibid, Preamble.

²¹ Banerjee A, Mullainathan S and Hanna R, ‘Corruption’ (National Bureau of economic research 2012).

²² ‘Helping Countries Combat Corruption: The Role of the World Bank’ <<http://www1.worldbank.org/publicsector/anticorrupt/corruptn/cor02.htm>> accessed 21 March 2021.

corruption is a complex phenomenon whose roots lie deep in bureaucratic and political institutions, and its effect on development varies with country conditions.²³

While the Constitution of Kenya 2010 captures the national values and principles of governance under Article 10 as well as the principles of leadership and integrity as captured under Chapter Six thereof, corruption is still widespread in Kenya. It has been pointed out in other studies that Kenya's competitiveness is held back by high corruption levels that penetrate every sector of the economy, which is evidenced by: a weak judicial system and frequent demands for bribes by public officials leading to increased business costs for foreign investors; widespread tax evasion hindering Kenya's long-term economic growth; and rampant fraud in public procurement.²⁴ This is despite the fact that corruption, active and passive bribery, abuse of office and bribing a foreign public official are criminalized under the Anti-Corruption and Economic Crimes Act 2003, in addition to the Bribery Act of 2016 which seeks to strengthen the fight against the supply-side of corruption.²⁵

Arguably, the main problem lies with the inadequate enforcement of Kenya's anti-corruption framework which is an issue as a result of weak and corrupt public institutions.²⁶ According to the Transparency International Corruption Perception Index 2020 Report, Kenya was ranked position 124 out of 180, with a score of 31 out of possible 100.²⁷ The lowest average regional score was Sub-Saharan Africa which had 32 out of 100, against Western Europe & European Union which scored 66 out of 100.²⁸ Notably, Kenya has only gained a score of +4 since the year 2012.²⁹ Indeed, in the past, President Uhuru Kenyatta has acknowledged corruption has reached levels that threaten national security.³⁰

There have been widespread reports on recurrence of grand corruption scandals at the national level, ranging from pilfering public funds to scandals surrounding grand schemes and artificial inflation of the prices of large public projects, like the standard-gauge railway, to procurement-related fraud that shook central government departments like the National Youth Service and State Department of Health.³¹ Transparency International rightly observes that corruption erodes trust, weakens democracy, hampers economic development and further exacerbates inequality, poverty, social division and the environmental crisis.³² It is worth pointing that these are the key

²³ 'Helping Countries Combat Corruption: The Role of the World Bank'

<<http://www1.worldbank.org/publicsector/anticorrupt/corruptn/cor02.htm>> accessed 21 March 2021.

²⁴ 'Kenya Corruption Report' (GAN Integrity) <<https://www.ganintegrity.com/portal/country-profiles/kenya/>> accessed 21 March 2021.

²⁵ Ibid.

²⁶ Ibid.

²⁷ 'Corruption Perceptions Index 2020 for Kenya' (Transparency.org) <<https://www.transparency.org/en/cpi/2020>> accessed 21 March 2021.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Miriri D, 'Third of Kenyan Budget Lost to Corruption: Anti-Graft Chief' Reuters (10 March 2016) <<https://www.reuters.com/article/us-kenya-corruption-idUSKCN0WC1H8>> accessed 21 March 2021.

³¹ 'BTI 2020 Kenya Country Report' (BTI Blog) <[en/reports/country-report-KEN-2020.html](https://www.transparency.org/en/reports/country-report-KEN-2020.html)> accessed 21 March 2021.

³² 'What Is Corruption?' (Transparency.org) <<https://www.transparency.org/en/what-is-corruption>> accessed 21 March 2021.

elements of sustainable development agenda without which it remains a mirage.³³ It is estimated that Kenya loses a third of its state budget - the equivalent of about \$6 billion - to corruption every year.³⁴

b) Huge Public Wage Bill in Kenya

While the devolved system of governance in Kenya came with its advantages, it also came with a lot of disadvantages as far as public wage bill is concerned, due to the expanded workforce for both the national and the county governments.³⁵ For instance, while the county-level development projects, including roads and clinics, are increasingly visible and have spurred economic growth across sectors within Kenya's counties, criticism continues to grow regarding the localization of ethnic politics, inefficiency, the size of the country's wage bill and the "devolution" of corruption.³⁶ Governors have been accused of spending huge amounts of allocated funds on salaries as opposed to development leading to slowed growth in the devolved units.³⁷

The ballooning wage bill affects allocation to the key sectors of the economy which would go directly towards ensuring that Kenya makes positive steps towards achieving the sustainable development goals. Salaries and Remuneration Commission has in the past pointed out that a wage bill that does not match economic and revenue growth puts pressure on development and investment share of fiscal budget meaning that there is less money to devote to development projects and provision of social services such as medical care and education.³⁸ While the wage bill has reduced from 57.33% of revenue in 2013/2014 to 48.1% in 2018/2019 as a result of revenue growth and initiatives by the Salaries and Remuneration Commission in collaboration with stakeholders, the same remains a problem in the country especially in light of the ever increasing external public borrowing by the government to meet the budgetary deficits.³⁹ It has also been documented in an economic survey 2020 indicating that there was an overall growth in public sector employment of about 2.6% in 2019 compared to 1.2% in 2018, where counties are the third-largest employer in the public sector after the Teachers Service Commission, and Ministries and other extra-budgetary institutions. Counties' employment level rose from 131.9 thousand jobs in 2013 to 190 thousand jobs in 2019 translating to the highest employment rate of

³³ Omar M, 'The Implications of Corruption on Kenya's Sustainable Development and Economic Growth' (PhD Thesis, University of Nairobi 2020).

³⁴ Miriri D, 'Third of Kenyan Budget Lost to Corruption: Anti-Graft Chief' Reuters (10 March 2016) <<https://www.reuters.com/article/us-kenya-corruption-idUSKCN0WC1H8>> accessed 21 March 2021.

³⁵ August 01 2017 T, 'Public Wage Bill Rises by Sh90bn in Nine Months' (Business Daily) <<https://www.businessdailyafrica.com/bd/economy/public-wage-bill-rises-by-sh90bn-in-nine-months--2163328>> accessed 21 March 2021; April 20 2017 T, 'Counties Wage Bill to Hit Sh116bn by June This Year' (Business Daily)

<<https://www.businessdailyafrica.comhttps://www.businessdailyafrica.com/bd/economy/counties-wage-bill-to-hit-sh116bn-by-june-this-year-2148440>> accessed 21 March 2021.

³⁶ 'BTI 2020 Kenya Country Report' (BTI Blog) <[/en/reports/country-report-KEN-2020.html](https://www.bti.org/en/reports/country-report-KEN-2020.html)> accessed 21 March 2021.

³⁷ April 20 2017 T, 'Counties Wage Bill to Hit Sh116bn by June This Year' (Business Daily) <<https://www.businessdailyafrica.comhttps://www.businessdailyafrica.com/bd/economy/counties-wage-bill-to-hit-sh116bn-by-june-this-year-2148440>> accessed 21 March 2021.

³⁸ Salaries and Remuneration Commission, "Press Statement: National Wage Bill Conference On Transforming Kenya's Economy Through A Fiscally Sustainable Public Wage Bill" <https://src.go.ke/wp-content/uploads/2019/11/National-Wage-Bill-Conference19_11_2019.pdf> accessed 21 March 2021.

³⁹ Ibid; 'Kenya Finance Minister Arrest Shines Light on Infrastructure Debt' (The Africa Report.com, 23 July 2019) <<https://www.theafricareport.com/15545/kenya-finance-minister-arrest-shines-light-on-infrastructure-debt/>> accessed 21 March 2021.

7.63%.⁴⁰ The effect of this is reduced socio-economic development despite the massive financial allocations to county governments. This ultimately affects the country's ability to achieve sustainable development goals by the projected year 2030.

c) Ethnic and Divisive Politics in Kenya

While before 2007-2008, Kenya was among the few African countries that for a long period of time had enjoyed significant stability and peace, this changed after the elections and there has been some efforts meant to secure this stability again.⁴¹ Sustainable development goals seek to, among other things, build peaceful societies for all, hence making peace an important ingredient of development.⁴² It has rightly been observed that the perception that access to power by ethnic groups in Africa comes with perceived privileges that go hand in hand with political power provides an incentive for individuals and ethnic groups to seek control of the state, resulting in ethnic and divisive politics.⁴³

Ethnic politics also makes it difficult or impossible to bring to book those suspected of corrupt practices as they always hide behind the phrase that 'it is their tribe that is being targeted'.⁴⁴ County governments have also been accused of ethnicity and nepotism in awarding job opportunities as well as tenders.⁴⁵ This is despite the fact that the Constitution of 2010 was supposed to mark the end of a dark past and open up a new chapter of Kenya's social, economic and political history.⁴⁶

Notably, the instrumentalization of ethnicity as the primary means of political mobilization has become an inescapable fact of political life in Kenya, negatively affecting peace and development.⁴⁷

d) Illicit Financial Flows

The *United Nations General Assembly resolution 71/213 on Promotion of international cooperation to combat illicit financial flows in order to foster sustainable development*⁴⁸ reiterated

⁴⁰ 'Taming the Rising County Wage Bill | Expertise Global Consulting' <<http://expertise.co.ke/2020/08/11/taming-the-rising-county-wage-bill/>> accessed 21 March 2021.

⁴¹ Kisaka MO and Nyadera IN, 'Ethnicity and Politics in Kenya's Turbulent Path to Democracy and Development' [2019] *Sosyal Siyaset Konferansları Dergisi* 159.

⁴² SDG Goal 16.

⁴³ Kisaka MO and Nyadera IN, 'Ethnicity and Politics in Kenya's Turbulent Path to Democracy and Development' [2019] *Sosyal Siyaset Konferansları Dergisi* 159, 163.

⁴⁴ *Ibid*, 173.

⁴⁵ Says BM, 'Ethnic Favouritism in Kenya and Uganda's Public Sector' (Africa at LSE, 1 August 2019) <<https://blogs.lse.ac.uk/africaatlse/2019/08/01/has-ethnic-favouritism-in-public-sector-hiring-in-kenya-and-uganda-been-exaggerated/>> accessed 22 March 2021; Waweru M, 'Tribalism, Nepotism and Graft Rife in Public Jobs Recruitment' Capital News' (Capital News, 3 October 2016) <<https://www.capitalfm.co.ke/news/2016/10/tribalism-nepotism-graft-rife-public-jobs-recruitment/>> accessed 22 March 2021; Stiftung FE, 'Regional Disparities and Marginalisation in Kenya' [2012] Nairobi: Elite PrePress;

⁴⁶ Stiftung FE, 'Regional Disparities and Marginalisation in Kenya' [2012] Nairobi: Elite PrePress.

⁴⁷ Kenya Human Rights Commission, *Ethnicity And Politicization In Kenya*, May 2018, ISBN: 978-9966-100-39-9, 3 < <https://www.khrc.or.ke/publications/183-ethnicity-and-politicization-in-kenya/file.html>> accessed 22 March 2021.

⁴⁸ United Nations General Assembly resolution 71/213, Promotion of international cooperation to combat illicit financial flows in order to foster sustainable development, Resolution adopted by the General Assembly on 21 December 2016 [on the report of the Second Committee (A/71/461)], Seventy-first session, Agenda item 17.

State Parties' concern about the impact of Illicit Financial Flows (IFFs), in particular those caused by tax evasion and corruption, on the economic, social and political stability and development of societies.⁴⁹ The United Nations rightly observes that the socio-economic cost of corruption and illicit financial flows are massive and continues to stunt the development of all affected countries where besides draining foreign exchange reserves, reducing domestic resource mobilisation, preventing the flow of foreign direct investment, exacerbating insecurity and worsening poverty and economic inequality, IFFs also undermine the rule of law, stifle trade and worsen macro-economic conditions in the affected countries.⁵⁰ In addition, illicit financial flows also negatively impact lives as they reduce financial resources available for investment in health, education, housing, infrastructure and other critical sectors that would improve the well-being of peoples and societies; and encourage illegal activities around the world since offshore havens provide storage and access to ill-gotten wealth at short notice, thereby contributing to the erosion of trust in democratic institutions, and hampering free enterprise and fair competition.⁵¹

According to the United Nations Conference on Trade and Development (UNCTAD)'s Report titled "*Economic Development in Africa Report 2020: Tackling Illicit Financial Flows for Sustainable Development in Africa*", curbing illicit financial flows is part of achieving SDG target 16.4 in support of peace, justice and strong institutions.⁵² UNCTAD estimates that every year, an estimated \$88.6 billion, equivalent to 3.7% of Africa's GDP, leaves the continent as illicit capital flight.⁵³ UNCTAD observes that these outflows are nearly as much as the combined total annual inflows of official development assistance, valued at \$48 billion, and yearly foreign direct investment, pegged at \$54 billion, received by African countries – the average for 2013 to 2015.⁵⁴ It is estimated that while between 1980 and 2018, sub-Saharan Africa received nearly \$2 trillion in foreign direct investment (FDI) and official development assistance (ODA), it emitted over \$1 trillion in illicit financial flows, continually posing a development challenge to the region, as they remove domestic resources that are crucial for the continent's development.⁵⁵ IFFs thus drain capital and revenues from Africa, undermining productive capacity and Africa's prospects for achieving the Sustainable Development Goals (SDGs).⁵⁶

⁴⁹ Ibid, Preamble.

⁵⁰ 'Promotion of International Cooperation to Combat Illicit Financial Flows' (Africa Renewal, 7 October 2019) <<https://www.un.org/africarenewal/news/promotion-international-cooperation-combat-illicit-financial-flows>> accessed 22 March 2021.

⁵¹ Ibid.

⁵² Slany A, 'Economic Development in Africa Report 2020 Tackling Illicit Financial Flows for Sustainable Development in Africa', 14 < https://unctad.org/system/files/official-document/aldcafrica2020_en.pdf> accessed 22 March 2021.

⁵³ 'Africa Could Gain \$89 Billion Annually by Curbing Illicit Financial Flows | UNCTAD' <<https://unctad.org/news/africa-could-gain-89-billion-annually-curbing-illicit-financial-flows>> accessed 22 March 2021.

⁵⁴ Ibid.

⁵⁵ Madden P, 'New Trends in Illicit Financial Flows from Africa' (Brookings, 2 March 2020) <<https://www.brookings.edu/blog/africa-in-focus/2020/03/02/new-trends-in-illicit-financial-flows-from-africa/>> accessed 22 March 2021.

⁵⁶ Africa Could Gain \$89 Billion Annually by Curbing Illicit Financial Flows | UNCTAD' <<https://unctad.org/news/africa-could-gain-89-billion-annually-curbing-illicit-financial-flows>> accessed 22 March 2021.

Notably, Kenya is also not immune to illicit financial flows just like the rest of the African Continent.⁵⁷ Illicit financial flows from Kenya have been attributed to, inter alia, an increase in arbitrary executive powers as well as debt fueled illicit capital outflows, and government spending fueled illicit capital outflows, where part of Kenya's debt was used to finance illicit financial outflows by the ruling elites.⁵⁸

e) Over-Reliance on Foreign Debts

While it has been argued that a dramatic change in the global landscape of development finance has occurred since the turn of the century, with domestic public revenues rising rapidly to about \$5.5 trillion to become the largest source of finance, while domestic private resources have quadrupled to reach about \$4 trillion,⁵⁹ for most African countries, there seems to a growing over-reliance on foreign development loans from China and elsewhere,⁶⁰ also called Official Development Assistance(ODA) as aid given by governments and development agencies to support the social, economic, environmental and political development of developing countries.⁶¹ Kenya has not been left behind and indeed it is rated among African countries with the highest recorded foreign debts to China and other countries.⁶² As at November 2020, Kenya's domestic debt stood at Kshs. 3,482,653.56/= Million while the external debt stood at Kshs. 3,771,808.47 Million, both totaling to Kshs. 7,254,462.03 Million.⁶³

There is a need to review the government policies on foreign debts as these are likely to be counterproductive as far as the long-term development goals of the country are concerned.

⁵⁷ ENACTAfrica.org, 'Is Kenya Really Tackling Illicit Financial Flows?' (ENACT Africa, 25 April 2019) <<https://enactafrica.org/research/trend-reports/is-kenya-really-tackling-illicit-financial-flows>> accessed 22 March 2021; Institute of Economic Affairs, 'Why Reduction of Illicit Financial Flows that Fuels South Sudan's War Economy is in Kenya and Uganda's Interest', IEA Kenya, April, 2019<<https://www.ieakenya.or.ke/publications/bulletins/why-reduction-of-illicit-financial-flows-that-fuels-south-sudana-s-war-economy-is-in-kenya-and-ugandaa-s-interest>> accessed 22 March 2021; Barasa T, 'Illicit Financial Flows in Kenya: Mapping of the Literature and Synthesis of the Evidence'.

⁵⁸ Bank AD, 'Working Paper 275 - Illicit Financial Flows and Political Institutions in Kenya' (Banque africaine de développement - Bâtir aujourd'hui, une meilleure Afrique demain, 17 May 2019) <<https://www.afdb.org/fr/documents/document/working-paper-275-illicit-financial-flows-and-political-institutions-in-kenya-97151>> accessed 22 March 2021.

⁵⁹ Yamada K, 'Financing Sustainable Development with Enhanced Domestic Resource Mobilization: Transitional Role of International Cooperation' (2017) 23 Asia-Pacific Development Journal 61, at 63.

⁶⁰ Dahir AL, 'Chinese Lending to African Countries Jumped Tenfold in the Last Five Years' (Quartz) <<https://qz.com/africa/1463948/chinese-lending-to-african-countries-jumped-tenfold-in-the-last-five-years/>> accessed 9 March 2021; Sun Y, 'China's Aid to Africa: Monster or Messiah?' (Brookings, 30 November 1AD) <<https://www.brookings.edu/opinions/chinas-aid-to-africa-monster-or-messiah/>> accessed 9 March 2021; Sun Y, 'China and Africa's Debt: Yes to Relief, No to Blanket Forgiveness' (Brookings, 20 April 2020) <<https://www.brookings.edu/blog/africa-in-focus/2020/04/20/china-and-africas-debt-yes-to-relief-no-to-blanket-forgiveness/>> accessed 9 March 2021.

⁶¹ Chongo G, Mwansa S and Mulenga C, 'Resource Mobilization for Sustainable Development: Best Practices', <<https://core.ac.uk/download/pdf/335024745.pdf>> accessed 9 March 2021.

⁶² 'Africa Needs More than G20 Offers to Address Looming Debt Crisis | Business and Economy News | Al Jazeera' <<https://www.aljazeera.com/economy/2020/11/19/africa-faces-debt-crisis-needs-more-help-than-what-g20-offers>> accessed 9 March 2021; 'China and Kenya in Talks about Debt Challenges' (The Africa Report.com, 22 January 2021) <<https://www.theafricareport.com/60569/china-and-kenya-in-talks-about-debt-challenges/>> accessed 9 March 2021;

⁶³ 'Public Debt | CBK' <<https://www.centralbank.go.ke/public-debt/>> accessed 9 March 2021.

4. Strengthening Domestic Resource Mobilization for Sustainable Development in Kenya: Way Forward

The unveiling of the Sustainable Development Goals (SDGs) in 2015 meant that most developing countries would have to step up their efforts to raise domestic resources to finance needed domestic investment as support from development partners and private sector investors would not be enough.⁶⁴ While there are various external mechanisms of funding that are available to countries for exploitation, there is a need for countries such as Kenya to enhance their domestic resources mobilization mechanisms. Indeed, this is acknowledged by the United Nations Conference on Trade and Development which points out that ‘strengthening domestic public resource mobilization is crucial for Governments in financing national sustainable development strategies and implementing Agenda 2030 for Sustainable Development and the Addis Ababa Action Agenda. In addition, the particular role of fiscal revenues in public resource mobilization lies in their greater stability and predictability compared to other sources of long-term finance. According to International Monetary Fund (IMF) estimates, for low-income countries, average domestic taxes would have to increase by about 5 percentage points if they were to meet the SDGs in five key areas (education, health, roads, electricity, and water), with the financing needed in sub-Saharan Africa being larger given their development level.’⁶⁵

It is also worth pointing out that investment in human, social, and physical capital, are at the core of sustainable and inclusive growth and represent an important share of national budgets—specifically, education, health, roads, electricity, and water and sanitation.⁶⁶ IMF estimates that delivering on the SDG agenda will require additional spending in 2030 of US\$0.5 trillion for low-income developing countries and US\$2.1 trillion for emerging market economies.⁶⁷ To achieve this, IMF points out that countries themselves own the responsibility for achieving the SDGs, especially through reforms to foster sustainable and inclusive growth that will in turn generate the tax revenue needed, and their efforts should focus on strengthening macroeconomic management, combating corruption and improving governance, strengthening transparency and accountability, and fostering enabling business environments.⁶⁸

a) Combating Corruption

Arguably, domestic revenues can lead to improved development only if they are translated into productive and beneficial public expenditure.⁶⁹ Thus, it is not only revenue collection that is important but also revenue expenditure. There is a need to strengthen institutions charged with combating corruption as well as strengthening the oversight measures across all sectors in order

⁶⁴ ‘Heightening Domestic Resource Mobilization in Africa During COVID-19’ (Center For Global Development) <<https://www.cgdev.org/blog/heightening-domestic-resource-mobilization-africa-during-covid-19>> accessed 22 March 2021.

⁶⁵ ‘Heightening Domestic Resource Mobilization in Africa During COVID-19’ (Center For Global Development) <<https://www.cgdev.org/blog/heightening-domestic-resource-mobilization-africa-during-covid-19>> accessed 22 March 2021.

⁶⁶ ‘Fiscal Policy and Development: Human, Social, and Physical Investments for the SDGs’ (IMF) <<https://www.imf.org/en/Publications/Staff-Discussion-Notes/Issues/2019/01/18/Fiscal-Policy-and-Development-Human-Social-and-Physical-Investments-for-the-SDGs-46444>> accessed 22 March 2021.

⁶⁷ *Ibid*, 5.

⁶⁸ *Ibid*.

⁶⁹ Junquera-Varela RF and others, *Strengthening Domestic Resource Mobilization: Moving from Theory to Practice in Low-and Middle-Income Countries* (The World Bank 2017), 1.

to prevent corruption.⁷⁰ This is because corruption elimination cannot be a one-institution affair. It must involve all stakeholders of good will as well as political good will from all governance institutions in both public and private sectors. This is the only way to not only ensure that revenues or development resources are raised but are also well utilized towards achieving development goals and empowering citizens to be productive and meaningful participants in the development agenda.

b) Capacity-Building in Revenue Collection and Management

It has been argued that increasing tax revenues in low-income countries is essential to address future development finance requirements.⁷¹ It has been argued that under different conditions, the policies and reforms associated with aid may increase revenue, through promoting growth, encouraging more efficient tax structures, or supporting reforms to tax administration.⁷² Some of the ways through which the World Bank Group is seeking to help developing countries in Sub-Saharan Africa mobilize domestic resources fairly and efficiently include: focusing on administering value-added taxes, removing cost-ineffective tax expenditures, increasing excise taxation, improving property taxation, and closing international tax loopholes for multinationals and wealthy individuals.⁷³ This is because Sub-Saharan Africa remains the region with the largest number of economies below the minimum desirable tax-to-GDP ratio of 15%.⁷⁴

Mobilizing tax revenue is considered to be key if developing countries are to finance the investments in human capital, health and infrastructure necessary to achieve the World Bank Group's goals of ending extreme poverty and boosting shared prosperity by 2030.⁷⁵

The World Bank observes that relatively low tax collections in the Sub-Saharan Africa region reflect weaknesses in revenue management, including widespread tax exemptions, corruption, and shortfalls in the capacity of tax and customs administrations.⁷⁶ It proposes that most African economies can mobilize more in taxes through: better tax administration (including value-added taxes); broadening the tax base by removing cost-ineffective tax expenditures; increasing excise taxes (including on alcohol, tobacco, and soft drinks); introducing efficient carbon-pricing policies and effective property taxation while and closing international tax loopholes that permit

⁷⁰ Bank W, *Helping Countries Combat Corruption: The Role of the World Bank* (World Bank Washington, DC 1997).

⁷¹ Oliver Morrissey, 'Aid and Domestic Resource Mobilization with a Focus on Sub-Saharan Africa' (2015) 31 *Oxford Review of Economic Policy* 447.

⁷² *Ibid.*

⁷³ 'Mobilizing Tax Resources to Boost Growth and Prosperity in Sub-Saharan Africa' (World Bank) <<https://www.worldbank.org/en/results/2019/09/09/mobilizing-tax-resources-to-boost-growth-and-prosperity-in-sub-saharan-africa>> accessed 22 March 2021.

⁷⁴ *Ibid.*; 'Why Tax Collection Remains a Challenge in Sub-Saharan Africa' <https://www.ey.com/en_gl/tax/why-tax-collection-remains-a-challenge-in-sub-saharan-africa> accessed 24 March 2021.

⁷⁵ 'Mobilizing Tax Resources to Boost Growth and Prosperity in Sub-Saharan Africa' (World Bank) <<https://www.worldbank.org/en/results/2019/09/09/mobilizing-tax-resources-to-boost-growth-and-prosperity-in-sub-saharan-africa>> accessed 22 March 2021; 'Do Sub-Saharan African Countries Need a Home-Grown Tax System?' <<https://blogs.worldbank.org/africacan/do-sub-saharan-african-countries-need-home-grown-tax-system>> accessed 24 March 2021.

⁷⁶ 'Mobilizing Tax Resources to Boost Growth and Prosperity in Sub-Saharan Africa' (World Bank) <<https://www.worldbank.org/en/results/2019/09/09/mobilizing-tax-resources-to-boost-growth-and-prosperity-in-sub-saharan-africa>> accessed 22 March 2021.

aggressive tax avoidance and evasion by multinationals and wealthy individuals; and reducing structural bottlenecks to improve revenue outcomes; improving taxpayers' trust; and by moving tax administrations to the digital frontier.⁷⁷

Kenya has been taking some steps towards moving tax administration to the digital frontier through such steps as the i-tax platform as well as the introduction of the Digital Service Tax (DST) (that is, Digital Service Tax and Value Added Tax on Digital Marketplace Supply), tax payable on income (gross transaction value) derived or accrued in Kenya from services offered through a digital marketplace.⁷⁸ While some key issues have been raised in relation to such measures as the digital service tax,⁷⁹ it is a commendable step towards increasing domestic resource mobilization which will hopefully move the country towards reducing its over-reliance on external debts to finance the budget. Notably, the introduction of digital services tax in Kenya follows in the footsteps of such countries as France, India, Singapore, United Kingdom, among others.

The Tax authorities may also need to work more towards looping in the informal economy into the tax payment bracket in order to increase its annual collection. However, tax measures ought to take into account the rising cost of living and the government should thus make efforts towards ensuring that tax on basic commodities does not affect the poor so much but also continually work towards creating job opportunities for the sake of raising purchasing power as well as having a bigger number of citizens affording and paying taxes.⁸⁰

c) Trade and Investment for Domestic Resource Mobilization

The 2030 Agenda for Sustainable Development acknowledges that international trade is an engine for inclusive economic growth and poverty reduction, and an important means to achieve the Sustainable Development Goals (SDGs).⁸¹ There is a need for increases in long-term and high-quality investments which United Nations argue that will lead to a sustainable rise in economic growth, with additional public and private investment and financing required to meet the large investment needs associated with the SDGs, particularly in infrastructure.⁸²

⁷⁷ 'Mobilizing Tax Resources to Boost Growth and Prosperity in Sub-Saharan Africa' (World Bank) <<https://www.worldbank.org/en/results/2019/09/09/mobilizing-tax-resources-to-boost-growth-and-prosperity-in-sub-saharan-africa>> accessed 22 March 2021.

⁷⁸ 'Digital Service Tax (DST) - KRA' <<https://kra.go.ke/en/helping-tax-payers/faqs/digital-service-tax-dst>> accessed 22 March 2021; see also Value-Added Tax (Digital Marketplace Supply) Regulations, 2020, Legal Notice No 207; Finance Act 2020, Laws of Kenya.

⁷⁹ November 23 2020 M, 'How the New Digital Tax Will Affect Business' (Business Daily) <<https://www.businessdailyafrica.com/bd/lifestyle/personal-finance/how-the-new-digital-tax-will-affect-business--3206500>> accessed 22 March 2021.

⁸⁰ See 'A Taxing Problem: How to Ensure the Poor and Vulnerable Don't Shoulder the Cost of the COVID-19 Crisis' (UN News, 12 July 2020) <<https://news.un.org/en/story/2020/07/1068111>> accessed 22 March 2021.

⁸¹ 'Trade and the Sustainable Development Goals (SDGs) | UNCTAD' <<https://unctad.org/topic/trade-analysis/trade-and-sdgs>> accessed 22 March 2021; 'Addis Ababa Action Agenda: Sustainable Development Knowledge Platform' <<https://sustainabledevelopment.un.org/index.php?page=view&type=400&nr=2051&menu=35>> accessed 22 March 2021.

⁸² United Nations, 'Financing For development: Progress And Prospects', Report of the Inter-agency Task Force on Financing for Development 2017, United Nations publication Sales no. E.17.I.5 ISBN 978 -92-1-101363 - 4 <https://developmentfinance.un.org/sites/developmentfinance.un.org/files/Report_IATF-2017.pdf> accessed 8 March 2021.

d) Cooperation between National and County Governments

It is worth pointing out that the role of subnational governments in mobilizing revenue as well as in spending on service provision should be part of the broad domestic resource mobilization agenda.⁸³ The Constitution of Kenya, 2010 provides for a system of devolved government wherein each of the 47 county governments is required to work closely with the National Government in resource mobilization and service provision.

There is need to address the corruption issues, huge wage bill as well as working with the private sector in growing the investments portfolio to create job opportunities and put the allocated funds to proper use. The *Public Private Partnerships Act, 2013*⁸⁴ which was enacted to provide for the participation of the private sector in the financing, construction, development, operation, or maintenance of infrastructure or development projects of the Government through concession or other contractual arrangements; the establishment of the institutions to regulate, monitor and supervise the implementation of project agreements on infrastructure or development projects and for connected purposes together with other Government initiatives and measures such as the Government Support Measures Policy Document 2018⁸⁵ can go a long way in creating the necessary framework in boosting active participation of the private sector in domestic resource mobilization for the realization of the sustainable development goals and Kenya's Vision 2030 blueprint.⁸⁶ While the public sector remains the dominant funding and financing source of social investment, there is potential for additional private capital flows into SDG sectors, provided there is greater clarity on invested assets and project incentives.⁸⁷

5. Conclusion

The need for mobilization of domestic resources (both human and material) especially in developing countries has been made more important by the increasing difficulty in accessing foreign resources due to the global financial crisis.⁸⁸ However, it has also been observed that the global financial crisis will affect the capacity of the public sector to mobilize tax revenues if it affects the incomes of residents or has an impact on trade with outsiders which will affect trade taxes.⁸⁹ Notably, SDG 17.1 captures the common agreement that domestic resource mobilization

⁸³ Junquera-Varela RF and others, *Strengthening Domestic Resource Mobilization: Moving from Theory to Practice in Low-and Middle-Income Countries* (The World Bank 2017), 2.

⁸⁴ Public Private Partnerships Act, No. 15 of 2013, Laws of Kenya.

⁸⁵ Republic of Kenya, Policy on the Issuance of Government Support Measures In Support Of Investment Programmes, October, 2018

<<http://ntnt.treasury.go.ke/wp-content/uploads/2021/03/Government-Support-Measures-Policy-Final.pdf>> accessed 8 March 2021.

⁸⁶ Jomo, K. S., Chowdhury, A., Sharma, K., & Platz, D., 'Public-Private Partnerships and the 2030 Agenda for Sustainable Development: Fit for Purpose?' DESA Working Paper No. 148ST/ESA/2016/DWP/148, February 2016; 'The Growing Trend of Public Private Partnerships in Kenya | Primerus' <<https://www.primerus.com/business-law-articles/the-growing-trend-of-public-private-partnerships-in-kenya090814.htm>> accessed 24 March 2021.

⁸⁷ Zhan JX and Santos-Paulino AU, 'Investing in the Sustainable Development Goals: Mobilization, Channeling, and Impact' (2021) 4 *Journal of International Business Policy* 166.

⁸⁸ Aryeetey E, 'The Global Financial Crisis and Domestic Resource Mobilization in Africa' [2009] Organization for Economic Co-operation and Development.

⁸⁹ *Ibid*, 2.

is essential to steering the economy toward those goals and to generating the necessary resources to meet them.⁹⁰

The IMF considers domestic resources as the largest untapped source of financing to fund national development plans.⁹¹ Arguably, the Global Goals can only be met if countries work together, where international investments and support is needed to ensure innovative technological development, fair trade and market access, especially for developing countries.⁹² It has been argued that domestic resource mobilization will be crucial not only to meet the sheer scale of investment needed to implement the 2030 Agenda for Sustainable Development and the Sustainable Development Goals (SDGs), but also because it holds its own broader promise for transformative change.⁹³

It is imperative that Kenya moves towards raising its development resources internally and minimize its reliance on foreign financing of its economy, if it is to truly achieve its development goals towards realisation of the SDGs. While this may take time and may require international support as envisaged under SDG Goal 17, there is a need for the country to actively work towards achieving real financial freedom through domestic resource mobilization.

⁹⁰ UNCTAD, 'UNCTAD DGFF2016 SDG Goal 17.1 - Domestic Resource Mobilization' (UNCTAD DGFF 2016) <https://stats.unctad.org/Dgff2016/partnership/goal17/target_17_1.html> accessed 24 March 2021; '17.1 Strengthen Domestic Resource Mobilization, Including through International Support to Developing Countries to Improve Domestic Capacity for Tax and Other Revenue Collection – Indicators and a Monitoring Framework' <<https://indicators.report/targets/17-1/>> accessed 24 March 2021;

⁹¹ 'Tax Policy for Domestic Resource Mobilization | ADB Knowledge Event Repository' <<https://events.development.asia/learning-events/tax-policy-domestic-resource-mobilization>> accessed 24 March 2021.

⁹² 'Goal 17: Partnerships for the Goals' (The Global Goals) <<https://www.globalgoals.org/17-partnerships-for-the-goals>> accessed 8 March 2021.

⁹³ 'Mobilizing Domestic Resources for Sustainable Development: Toward a Progressive Fiscal Contract | United Nations ILibrary' <<https://www.un-ilibrary.org/content/books/9789210601023c009>> accessed 24 March 2021.

Sustainable Development Goals and Social Justice in Kenya

Abstract

While the sustainable development goals are concerned with striking a balance between economic development, environmental protection and conservation, on the other hand, it is also concerned with achievement of human rights and improving the social well-being of all groups of people. This is where the social justice concept comes in; it is only through promoting social, economic and environmental sustainability that the 2030 Agenda on Sustainable Development Goals (SDGs) will truly be achieved. This paper makes a case for promotion of social justice in Kenya as a step towards achieving the sustainable development agenda.

1. Introduction

The three-pillar conception of (social, economic and environmental) sustainability, commonly represented by three intersecting circles with overall sustainability at the centre, is arguably one of the best demonstrations of the place of social justice in the realisation of an all-inclusive sustainable development agenda.¹ However, it has been argued that:

The historical but artificial separation of the human rights domain from the economic and social domains led to undesired development outcomes and therefore requires focus of priority policy action on addressing inequity and inequality. Consequently:

“To support the concept of social justice is to argue for a reconciliation of these priorities within the context of a broader social perspective in which individuals endowed with rights and freedoms operate within the framework of the duties and responsibilities attached to living in society.” (United Nations, 2006, p. 13)²

It is thus worth pointing out that all the three dimensions of sustainability must be addressed together to attain the most sustainable outcome possible.³ Kenya, like many other countries around the world has committed itself to work towards achieving sustainable development goals and in the process transform the lives of its people.⁴

The desire of a socially just society in Kenya was well captured in the Supreme Court case of *In the Matter of the Speaker of the Senate & another [2013] eKLR*,⁵ where the Court stated as follows:

¹ Ben Purvis, Yong Mao and Darren Robinson, ‘Three Pillars of Sustainability: In Search of Conceptual Origins’ (2019) 14 Sustainability Science 681.

² Sumpf D, ‘A Review of the Relationship Between Corruption and Social Justice’ (Social Science Research Network 2015) SSRN Scholarly Paper ID 2744590 <<https://papers.ssrn.com/abstract=2744590>> accessed 6 February 2021, 2.

³ ‘What Is Social Sustainability? | Definition of Social Sustainability | ADEC ESG Solutions’ <<https://www.esg.adec-innovations.com/about-us/faqs/what-is-social-sustainability/>> accessed 5 February 2021.

⁴ ‘Sustainable Development Goals | UNDP in Kenya’ (UNDP) <<https://www.ke.undp.org/content/kenya/en/home/sustainable-development-goals.html>> accessed 6 February 2021.

⁵ *In the Matter of the Speaker of the Senate & another [2013] eKLR*, Advisory Opinion Reference 2 of 2013.

[51] Kenya's Constitution of 2010 is a transformative charter. Unlike the conventional "liberal" Constitutions of the earlier decades which essentially sought the control and legitimization of public power, the avowed goal of today's Constitution is to institute social change and reform, through values such as social justice, equality, devolution, human rights, rule of law, freedom and democracy. This is clear right from the preambular clause which premises the new Constitution on –

"RECOGNISING the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law." And the principle is fleshed out in Article 10 of the Constitution, which specifies the "national values and principles of governance", and more particularly in Chapter Four (Articles 19-59) on the Bill of Rights, and Chapter Eleven (Articles 174-200) on devolved government. Similarly, in *Centre for Rights Education & Awareness (CREAW) v Attorney General & another* [2015] eKLR⁶, the High Court of Kenya at Nairobi observed that:

1. The Constitution of Kenya has been described as one of the most progressive in the world. It envisions a society based on the rule of law, non-discrimination and social justice. (Emphasis added) At its core is the belief that there can only be real progress in society if all citizens participate fully in their governance, and that all, male and female, persons with disabilities and all hitherto marginalized and excluded groups get a chance at the table.

Despite such pronouncements by courts, strong constitutional and statutory provisions as well as positive steps taken by the State in creating a socially just society in Kenya, the country is arguably still very far from achieving the ideals of social justice, namely, inter alia: equality, equity, inclusiveness and fairness, among others.

1.1 Social Justice: Meaning and Concepts

Social justice has been defined as an aspect of distributive justice that seeks to achieve fair distribution of benefits among the members of various associations.⁷ Notably, while some authors consider social justice equivalent to 'distributive justice', others differentiate it from both general justice and distributive justice where social justice is seen as a unique type of justice characterized by a focus on the 'common good' and the individual's obligation and right to make a contribution to that (hence, sometimes called 'contributive' justice) while acknowledging the role of the state and civil society to remove barriers that prevent individuals from so doing.⁸

While advocating for social justice, some of the earliest scholars commenting on the subject have asserted that:

'Society should treat all equally well who have deserved equally well of it, that is, who have deserved equally well absolutely. This is the highest abstract standard of social and

⁶ Centre for Rights Education & Awareness (CREAW) v Attorney General & another [2015] eKLR, Petition 182 of 2015.

⁷ David Miller, 'Distributive Justice: What the People Think' (1992) 102 Ethics 555.

⁸ Weigert KM, 'Social Justice: Historical and Theoretical Considerations' in James D Wright (ed), International Encyclopedia of the Social & Behavioral Sciences (Second Edition) (Elsevier 2015) <<https://www.sciencedirect.com/science/article/pii/B9780080970868320815>> accessed 6 February 2021.

distributive justice; towards which all institutions, and the efforts of all virtuous citizens, should be made in the utmost degree to converge'.⁹ [Emphasis added]

Social justice is based on several principles including equality and fairness. It has been argued that social justice should be based on three biologically-grounded fairness principles which, must be combined and balanced in order to achieve a society that is fair to everyone. The three fairness principles are *equality, equity, and reciprocity*, derived from the emerging, multi-disciplinary science of human nature and the mounting evidence that a sense of fairness is an evolved and distinctively human behavioral trait.¹⁰

For instance, in the case of *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] eKLR*¹¹, the Supreme Court of Kenya, while rendering its advisory opinion on the one-third gender rule, stated, *inter alia*:

1.6 I believe the immediate implementation of the two-thirds gender principle is reinforced by values of patriotism, equity, social justice, human rights, inclusiveness, equality and protection of the marginalized (Emphasis added). Such values would be subverted by an interpretation of the provisions that accepts progressive realization of this principle.

The United Nations has defined social Justice as “the fair and compassionate distribution of the fruits of economic growth.”¹²

Social justice is also viewed as the extension of principles, enshrined in [our] Constitution, of human dignity, equity, and freedom to participate in all of the political, socio-economic and cultural spheres of society.¹³ Indeed, it has also been argued that the legal needs of low-income persons are basic to their survival and ability to thrive. As such, fundamental legal rights need to be forced as they relate to such basic necessities as nutrition, health, shelter, income, education, and protection from violent physical abuse, to uphold the foundational tenets of social justice.¹⁴

According to the Center for Economic and Social Justice, “Social justice encompasses economic justice. Social justice is the virtue which guides us in creating those organized human interactions we call institutions. In turn, social institutions, when justly organized, provide us with access to what is good for the person, both individually and in our associations with others. Social justice also imposes on each of us a personal responsibility to work with others to design and continually

⁹ ‘Utilitarianism by John Stuart Mill’ <<https://www.utilitarianism.com/mill5.htm>> accessed 6 February 2021.

¹⁰ Corning P, ‘Equality, Equity, and Reciprocity: The Three Pillars of Social Justice | Institute for the Study of Complex Systems’ <<https://complexsystems.org/publications/equality-equity-and-reciprocity-the-three-pillars-of-social-justice/>> accessed 6 February 2021.

¹¹ *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] eKLR*, Advisory Opinions Application 2 of 2012.

¹² Sumpf D, ‘A Review of the Relationship between Corruption and Social Justice’ (Social Science Research Network 2015) SSRN Scholarly Paper ID 2744590 <<https://papers.ssrn.com/abstract=2744590>> accessed 6 February 2021.

¹³ Dexter, P. "Social cohesion and social justice in South Africa." Report prepared for the Department of Arts and Culture by the Human Sciences Research Council (2004), i.

¹⁴ Tyner A, ‘Planting People, Growing Justice: The Three Pillars of New Social Justice Lawyering’ (2013) 10 *Hastings Race and Poverty Law Journal* 219, 220.

perfect our institutions as tools for personal and social development.”¹⁵ It has been observed that while formal definitions for social justice vary in wording, they all encompass: Equal rights; Equal opportunity; and Equal treatment.¹⁶

Also worth pointing is the assertion that the principles of social justice are of three general types: procedural, redistributive/compensatory, and distributive whereby principles pertaining to procedural justice concern the fairness of the process for determining what is just, independent of the outcome; principles pertaining to redistributive/compensatory justice are concerned with the determination of punishment and compensation for wrongs, injuries, and losses; and the principles that are concerned with the just allocation of limited benefits and resources pertain to distributive justice.¹⁷

While the discussion in this paper is mainly concerned with the procedural justice and distributive justice, as these two have a closer relationship with the Sustainable Development Goals (SDGs), all the three aspects certainly have a bearing on SDGS, as captured under SDG Goal 16 which seeks to: *Promote Peaceful And Inclusive Societies For Sustainable Development, Provide Access To Justice For All And Build Effective, Accountable And Inclusive Institutions At All Levels*; SDG Goal 6 seeks to: *Ensure Availability And Sustainable Management Of Water And Sanitation For All*; SDG Goal 7 seeks to: *Ensure Access To Affordable, Reliable, Sustainable And Modern Energy For All*; and SDG Goal 10 seeks to *Reduce Inequality Within And Among Countries*, among others.

Form the foregoing meaning and concepts of ‘social justice’, sustainable development debates should be informed by the desire to ensure the creation of a just and conducive living environment where all persons get to satisfy all their basic needs but also get to fulfil their self-actualization dreams.

2. Social Justice and the Law: International and National Legal Frameworks

2.1 International and Regional Legal Frameworks on Social Justice

Justice is a universally accepted principle that has been enshrined in various international legal instruments including the Charter of the United Nations which seeks among other things ‘to establish conditions under which justice and respect for obligations arising under international law can be maintained.’¹⁸

Further, the *Universal Declaration of Human Rights* recognises the inherent dignity and the equal and inalienable rights of all members of the human family as the foundation of freedom, *justice*

¹⁵ ‘Defining Economic Justice and Social Justice | Center for Economic & Social Justice’ (28 May 2012) <<https://www.cesj.org/learn/definitions/defining-economic-justice-and-social-justice/>> accessed 6 February 2021.

¹⁶ TSDF, ‘What Is Social Justice?’ (The San Diego Foundation, 24 March 2016) <<https://www.sdfoundation.org/news-events/sdf-news/what-is-social-justice/>> accessed 26 January 2021.

¹⁷ Almgren G, ‘A Primer on Theories of Social Justice and Defining the Problem of Health Care’, *Health Care Politics, Policy, and Services* (Springer Publishing Company 2017) <<https://connect.springerpub.com/content/book/978-0-8261-6898-6/chapter/ch01>>, 2.

¹⁸ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

and peace in the world.¹⁹ The *International Covenant on Economic, Social and Cultural Rights*²⁰ recognises in its preamble that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.

The *International Covenant on Civil and Political Rights*²¹ recognizes in its preamble that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights.

The *African Charter on Human and Peoples' Rights*²² (Banjul Charter) reaffirms in its preamble the pledge African States members of the African Union solemnly made in Article 2 of the said Charter to eradicate all forms of colonialism from Africa, to coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa and to promote international cooperation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights.

3. Domestic Legal Frameworks: Kenya

The Preamble to the Constitution of Kenya 2010 recognises the aspirations of all Kenyans for a government based on the essential values of human rights, equality, democracy, *social justice* and the rule of law (Emphasis added).

Article 4(2) of the Constitution provides that the Republic of Kenya is *a multi-party democratic State founded on the national values and principles of governance referred to in Article 10*. These values and principles of governance include; (a) *patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people*; (b) *human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized* (Emphasis added).

The Constitution of Kenya 2010 also provides that the national values and principles of governance which include the rule of law, human dignity, equity, *social justice*, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised are binding on all State organs, State officers, public officers and all persons whenever any of them applies, or interprets, the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions²³ (Emphasis added).

¹⁹ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

²⁰ United Nations, International Covenant on Economic, Social and Cultural Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, in accordance with article 27.

²¹ UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

²² Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

²³ Article 10, Constitution of Kenya 2010.

Also notable is Article 19 (2) of the Constitution which provides that the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of the individuals and communities and to promote social justice and the realization of the potential of all human beings.

Further, article 48 of the Constitution enshrines the right of access to justice and mandates the state to ensure access to justice for all persons in Kenya.²⁴

4. Sustainable Development Goals (SDGs) and Social Justice

Sustainable Development Goals (SDGs) were adopted by all United Nations Member States in 2015 as a universal call to action to end poverty, protect the planet and ensure that all people enjoy peace and prosperity by 2030.²⁵ The 17 SDGs are integrated and interconnected and acknowledge that action in one area will affect outcomes in others, and that development must balance social, economic and environmental sustainability.²⁶ The SDGs represent a global vision for development which necessitate members to undertake necessary legislative, political, economic, technological, social and environmental interventions towards their attainment.²⁷

Most of the SDGs are geared towards social justice and seek to achieve the following: end extreme poverty (SDG No.1); end hunger and achieve food security (SDG No.2); ensure healthy lives and promote well-being for all (SDG No.3); ensure quality education (SDG No.4); achieve gender equality (SDG No.5); ensure availability of clean water and sanitation (SDG No.6); ensure access to affordable and clean energy (SDG No.7); decent work for all and economic growth (SDG No.8); reduce inequalities within and among countries (SDG No.10); ensure responsible consumption and production (SDG No.12), combat climate change (SDG No.13) and achieve peace, justice and strong institutions (SDG No.16).²⁸

5. Achieving Social Justice in Kenya: Challenges

Despite the ambitious plan set forward by the SDGs, the situation in Kenya is still wanting. Social injustices are still widespread. Economic disparities between the poor and the rich mean that one class of people can afford all the luxuries life has to offer while the other struggles to meet even

²⁴ In the case of *Thomas Alugha Ndegwa v Republic* [2016] eKLR, Criminal Appeal (Application) 2 of 2014, the Court of Appeal at Nairobi elaborated on the content of social justice as provided under Article 10 as follows:

3. While these two provisions, and more so Article 50(2)(h), are specific on legal aid, there are many other provisions of the Constitution that are relevant to the concept of legal aid. These include the value of social justice under Article 10; provisions on equality before the law under Article 27; provisions on protection of marginalised and vulnerable persons and the requirement under Article 159 that justice shall be done to all irrespective of status. The overarching notion to be derived from these provisions is that it is difficult to achieve justice where one party has to compete with the elaborate machinery and resources available to the opposite party.

²⁵ UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

²⁶ 'Sustainable Development Goals' (UNDP) <<https://www.undp.org/content/oslo-governance-centre/en/home/sustainable-development-goals.html>> accessed 6 February 2021.

²⁷ *Ibid.*

²⁸ UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

the basic human needs.²⁹ Consequently, as a result of extreme poverty a good population of Kenya cannot access quality and adequate food; health services; quality education; clean water and sanitation and affordable and clean energy.³⁰ There has been an increasing inequality gap in Kenya despite the reports on any economic development in the country, implying that the ‘fruits’ of such development do not impact everyone in the same way, with the poor becoming poorer, devoid of access to basic resources and inability to meaningfully participate in national development agenda.³¹

Further, gender disparities are still evident especially in the political and economic arena and despite the attempt by framers of the constitution to cure this ill, the country’s attempts towards gender equality has been futile.³² In addition, social injustices are evident in the employment sector where most youths and persons with disabilities in Kenya are often overlooked in employment opportunities.³³ Environmental pollution is still widespread as evidenced by pollution of water sources, poor solid waste management and industrial pollution which creates climate change concerns.³⁴

In summary, the World Bank notes that while Kenya has made significant political, structural and economic reforms that have largely driven sustained economic growth, social development and political gains over the past decade, its key development challenges still include poverty, inequality, climate change, continued weak private sector investment and the vulnerability of the economy to internal and external shocks.³⁵ This state of affairs has resulted in social injustices in Kenya and does not fit within the ideal of the Sustainable Development Goals to end poverty, protect the planet and ensure that all people enjoy peace and prosperity by 2030.

²⁹ ‘Kenya: Extreme Inequality in Numbers | Oxfam International’ <<https://www.oxfam.org/en/kenya-extreme-inequality-numbers>> accessed 6 February 2021.

³⁰ ‘Water, Sanitation and Hygiene | UNICEF Kenya’ <<https://www.unicef.org/kenya/water-sanitation-and-hygiene>> accessed 6 February 2021.

³¹ ‘Kenya: Extreme Inequality in Numbers | Oxfam International’ <<https://www.oxfam.org/en/kenya-extreme-inequality-numbers>> accessed 6 February 2021.

³² Cf. Hydrant (<http://www.hydrant.co.uk>) S designed and built by, ‘Blog: Kenya’s Milestones in Accelerating Gender Equality and Women’s Empowerment’ (The Commonwealth, 20 September 2019) <<https://thecommonwealth.org/media/news/opinion-kenya-milestones-accelerating-gender-equality-and-womens-empowerment>> accessed 6 February 2021; ‘Progress towards Gender Equality under Threat, World Leaders Warn as General Assembly Marks Twenty-Fifth Anniversary of Landmark Women’s Rights Conference - World’ (ReliefWeb) <<https://reliefweb.int/report/world/progress-towards-gender-equality-under-threat-world-leaders-warn-general-assembly-marks>> accessed 6 February 2021; ‘Has COVID-19 Pushed Women in Politics off Kenya’s Agenda?’ | Inter Press Service’ <<http://www.ipsnews.net/2020/07/has-covid-19-pushed-women-in-politics-off-kenyas-agenda/>> accessed 6 February 2021; ‘Virus Exacerbating Global Inequality, Hunger - FN Arena’ <<https://www.fnarena.com/index.php/2020/10/26/virus-exacerbating-global-inequality-hunger/>> accessed 6 February 2021.

³³ Opoku MP and others, ‘Access to Employment in Kenya: The Voices of Persons with Disabilities’ (2017) 16 *International Journal on Disability and Human Development* 77; ‘Youth With Disabilities | United Nations For Youth’ (8 June 2015) <<https://www.un.org/development/desa/youth/youth-with-disabilities.html/>> accessed 6 February 2021.

³⁴ Ferronato N and Torretta V, ‘Waste Mismanagement in Developing Countries: A Review of Global Issues’ (2019) 16 *International Journal of Environmental Research and Public Health* <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6466021/>> accessed 6 February 2021.

³⁵ ‘Overview’ (World Bank) <<https://www.worldbank.org/en/country/kenya/overview>> accessed 6 February 2021; ‘World Report 2018: Rights Trends in Kenya’ (Human Rights Watch, 21 December 2017) <<https://www.hrw.org/world-report/2018/country-chapters/kenya>> accessed 6 February 2021.

6. Attaining Sustainable Development Goals for Social Justice in Kenya

There is need for political, economic, legal, social and technological interventions in order to hasten achievement of SDGs in Kenya whilst promoting social justice. Some of these interventions can include:

a) Integrating the SDGs into Kenya's vision and plans.³⁶

The Agenda 2030 on Sustainable Development Goals covers many aspects of development and as such, Kenya should continually review and align its development plans with the SDGs agenda in order to ensure that it is not left behind by the rest of the world.

b) Sound planning and resource allocation by the government to key sectors such as education, health, energy and agriculture.³⁷

The available resources should be strategically distributed in order to win the fight against poverty, inequality, bad governance, the skills gap between market requirements and the education curriculum, climate change, and low investment and low firm productivity, among others.³⁸

c) Financial accountability and transparency in government to prevent wastage of resources which can be channeled towards social justice programmes.³⁹

It has been argued that 'as the notions of fairness and trust permeate procedural rules (for example, democracy), their administration (for instance, no bias) and income distribution (such as, unskewed and relatively equal), corruption evidently undermines justice, as it is neither functional for economic efficiency nor human development due to the negative externalities corrupt

³⁶ Republic of Kenya, Implementation of the Agenda 2030 For Sustainable Development in Kenya, June, 2017, < <https://sustainabledevelopment.un.org/content/documents/15689Kenya.pdf>> accessed 6 February 2021; 'Kenya: Sustainable Development Knowledge Platform'

<<https://sustainabledevelopment.un.org/memberstates/kenya>> accessed 6 February 2021.

³⁷ Republic of Kenya, Sessional paper No. 10 of 2012 On Kenya Vision 2030, < <https://espas.secure.europarl.europa.eu/orbis/sites/default/files/generated/document/en/KENYA2030.pdf>> accessed 6 February 2021; United Nations, Sustainable Development in Kenya: Stocktaking in the run up to Rio+20, Nairobi Kenya, 2012< <https://sustainabledevelopment.un.org/content/documents/985kenya.pdf>> accessed 6 February 2021.

³⁸ Arias, Omar, David K. Evans, and Indhira Santos. The skills balancing act in Sub-Saharan Africa: Investing in skills for productivity, inclusivity, and adaptability. World Bank Publications, 2019 <<http://documents1.worldbank.org/curated/en/558991560840574354/pdf/The-Skills-Balancing-Act-in-Sub-Saharan-Africa-Investing-in-Skills-for-Productivity-Inclusivity-and-Adaptability.pdf>> accessed 6 February 2021; 'How to Fix Economic Inequality?' (PIIE, 17 November 2020) <<https://www.piie.com/microsites/how-fix-economic-inequality>> accessed 6 February 2021; 'Nine strategies to reduce inequality' (A-id, 8 November 2016) <<https://www.a-id.org/2016/11/08/nine-strategies-to-reduce-inequality/>> accessed 6 February 2021; Nam, Chang Woon. "World Economic Outlook for 2020 and 2021." In CESifo Forum, vol. 21, no. 02, pp. 58-59. München: ifo Institut-Leibniz-Institut für Wirtschaftsforschung an der Universität München, 2020.

³⁹ 'Combating Corruption' <<https://www.worldbank.org/en/topic/governance/brief/anti-corruption>> accessed 6 February 2021; Adams, Dawda, Kweku Adams, Subhan Ullah, and Farid Ullah. "Globalisation, governance, accountability and the natural resource 'curse': Implications for socio-economic growth of oil-rich developing countries." Resources Policy 61 (2019): 128-140; Read 'Democratization in Africa: African Views, African Voices' at NAP.Edu <<https://www.nap.edu/read/2041/chapter/5>> accessed 6 February 2021; Brechenmacher TC Saskia and Brechenmacher TC Saskia, 'Accountability, Transparency, Participation, and Inclusion: A New Development Consensus?' (Carnegie Endowment for International Peace) <<https://carnegieendowment.org/2014/10/20/accountability-transparency-participation-and-inclusion-new-development-consensus-pub-56968>> accessed 6 February 2021.

practices create.⁴⁰ In addition, in an uncertain institutional environment of the public sector, private actors (firms, individuals, non-state actors, etc.) might take-over functions of the state and control access to services where their distribution may not be based on fairness or equity, but on group-membership or any deliberate criteria to differentiate.⁴¹ As a result, social justice outcomes over time will be negative.⁴² As such, there is a need for the government to remain steadfast in not only provision of basic services but also fighting corruption.⁴³ This is especially important considering that the country has been borrowing heavily and these funds should be made to count as far as transforming the citizens' lives is concerned.⁴⁴

d) Empowering the youth, persons with disabilities and other marginalised groups through equal opportunities in employment and other sectors of the economy.⁴⁵

It has rightly been pointed out that poverty and inequality are exacerbated by unemployment.⁴⁶ Poverty also creates a barrier to accessing the legal system and to exercising political power.⁴⁷ Unless these groups of persons are empowered to through giving them stable sources of income, addressing poverty in the country will remain a mirage.

e) Creating a conducive economic environment that will encourage entrepreneurship and job creation through measures such as tax waivers and financial support for startups, youth and women economic groups.⁴⁸

There is a need for economic empowerment programs for empowering women and marginalised individuals to overcome social injustice through economic capacity building.⁴⁹ The government should put in place incentives that will encourage women and marginalised individuals to set up and flourish in business thus creating job opportunities for many more individuals.

⁴⁰ SumpfD, 'A Review of the Relationship between Corruption and Social Justice' (Social Science Research Network 2015) SSRN Scholarly Paper ID 2744590 <<https://papers.ssrn.com/abstract=2744590>> accessed 6 February 2021, 3.

⁴¹ Ibid, 3.

⁴² Ibid, 9.

⁴³ 'The Fight Against Corruption in Kenya...Yet Another Chapter' <<https://cytonn.com/topicals/the-fight-against-corruption-in-kenyayet-another-chapter>> accessed 6 February 2021; 'Role of Parliaments in Fighting Corruption' <<https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=8861&lang=EN>> accessed 6 February 2021; Alfada, Anisah. "The destructive effect of corruption on economic growth in Indonesia: A threshold model." *Heliyon* 5, no. 10 (2019): e02649.

⁴⁴ 'China Says Its Ready to Help Kenya Deal with Its Debt Challenges' <<https://finance.yahoo.com/news/china-says-ready-help-kenya-155118368.html>> accessed 6 February 2021.

⁴⁵ Ver Medalla, Donie, and Bella Marie Medalla. "Empowering persons with disabilities through training and employment: A case study." In *International Forum Journal*, vol. 21, no. 1, pp. 150-172. 2018; Rua, Gustavo. "Helping Families: One Step at a Time." (2020); Ramely, Aslinda, Yarina Ahmad, and Nor Hafizah Mohamed Harith. "Social Inclusion Of Malaysian Elderly In Labour Market: The Enthusiasm Culture To Be Productive Or Just Desperate For Money?." (2035).

⁴⁶ Jayanathan Govender and Jayanathan Govender, 'Social Justice in South Africa' (2016) 16 *Civitas - Revista de Ciências Sociais* 237.

⁴⁷ Tyner A, 'Planting People, Growing Justice: The Three Pillars of New Social Justice Lawyering' (2013) 10 *Hastings Race and Poverty Law Journal* 219, 220.

⁴⁸ Oladimeji, Moruff Sanjo, Augusta Thereza Ebodaghe, and Peter Babatunde Shobayo. "Effect of globalization on small and medium enterprises (smes) performance in Nigeria." *International Journal of Entrepreneurial Knowledge* 5, no. 2 (2017): 56-65.

⁴⁹ 'Social Justice and Peace for Marginalized Women in Kenya | ASEC-SLDI News' (ASEC-SLDI) <<http://asec-sldi.org/news/success/social-justice-peace-kenya/>> accessed 6 February 2021.

f) Improving the representation of youths, women and persons with disabilities in political positions through necessary legal and policy measures.⁵⁰

The social disparities especially between men and women was greatly exposed by the Covid-19 pandemic where it was reported that in 13 out of 17 countries surveyed since the outbreak, women reported more emotional stress and mental health challenges compared to men, including higher gender-based violence, fewer sexual and reproductive services, greater economic impact and increased household burdens. Notably, the 17 countries surveyed were France, Germany, the UK, US, Canada, Japan, Australia, New Zealand, India, Mexico, China, Colombia, Switzerland, South Africa, Argentina, *Kenya* and Tunisia.⁵¹

There is a need for the state to continually adopt and put in place measures that will address the social inequalities and inequities that exist among the different groups for inclusive social development.

g) Fast tracking the country's journey towards renewable energy and electrification programme towards promoting access to clean and affordable energy.⁵²

In order to reduce the cost of energy and also move closer towards combating climate change, there is a need for the government to encourage investment in cleaner and affordable alternative sources of energy in the country.⁵³

h) Working together with the global community towards achieving common goals such as combating climate change and reducing inequality among countries.⁵⁴

It is acknowledged that Kenya cannot achieve some of the SDGs without working closely with other international players either due to funding challenges or simply lack of expertise in certain

⁵⁰ 'Realising the Inclusion of Youth with Disabilities in Political and Public Life in Kenya [2016] ADY 3' <<http://www.saflii.org/za/journals/ADRY/2016/3.html>> accessed 6 February 2021; Editor, 'Political Participation of Women with Disabilities' (International Knowledge Network of Women in Politics, 13 June 2019) <<https://www.iknowpolitics.org/en/discuss/e-discussions/political-participation-women-disabilities>> accessed 6 February 2021.

⁵¹ 'Aiming for a Gender-Equal World' (Cosmos Magazine, 29 January 2021) <<https://cosmosmagazine.com/people/society/aiming-for-a-gender-equal-world/>> accessed 6 February 2021; see also 'The Changes and Challenges to Justice in the Time of COVID-19' (UNDP) <<https://www.undp.org/content/undp/en/home/blog/2020/the-changes-and-challenges-to-justice-in-the-time-of-covid-19.html>> accessed 6 February 2021.

⁵² Energy Sector Management Assistance Program. "The State of Access to Modern Energy Cooking Services." (2020); Herrero, Carmen, José Pineda, Antonio Villar, and Eduardo Zambrano. "Tracking progress towards accessible, green and efficient energy: The Inclusive Green Energy index." *Applied Energy* 279 (2020): 115691.

⁵³ 'Goal 7: Affordable and Clean Energy | UNDP' <<https://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-7-affordable-and-clean-energy.html>> accessed 6 February 2021; July 26 and Alum 2016 Noah Long Kevin Steinberger-, 'Renewable Energy Is Key to Fighting Climate Change' (NRDC) <<https://www.nrdc.org/experts/noah-long/renewable-energy-key-fighting-climate-change>> accessed 6 February 2021; Environment UN, 'GOAL 7: Affordable and Clean Energy' (UNEP - UN Environment Programme, 2 October 2017) <<http://www.unenvironment.org/explore-topics/sustainable-development-goals/why-do-sustainable-development-goals-matter/goal-7>> accessed 6 February 2021; Owusu PA and Asumadu-Sarkodie S, 'A Review of Renewable Energy Sources, Sustainability Issues and Climate Change Mitigation' (2016) 3 *Cogent Engineering* 1167990; 'Bill Gates: This Is What We Need to Do to Tackle Climate Change' (World Economic Forum) <<https://www.weforum.org/agenda/2019/05/a-critical-step-to-reduce-climate-change/>> accessed 6 February 2021.

⁵⁴ Martin, 'Reduce Inequality within and among Countries' (United Nations Sustainable Development) <<https://www.un.org/sustainabledevelopment/inequality/>> accessed 6 February 2021.

areas, hence the need to strategically pick cooperation partners in its efforts towards achieving sustainable development goals.⁵⁵

i) Strengthening and Supporting Institutions Such as the Judiciary in Order to Achieve the Right of Access to Justice.⁵⁶

Article 20(4) (a) of the Constitution of Kenya provides that the court, in interpreting the Bill of Rights, should promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom. In addition, Article 21 (3) requires the court to address the needs of the vulnerable groups within the society, including women, older members of society, persons with disability, children, youth, members of minority or marginalized communities, and members of particular ethnic, religious or cultural communities.

In ensuring equality and non-discrimination, Article 27 (6) obligates the State to give full effect to the realization of the right to equality and freedom from discrimination by taking legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination. Kenyan courts have also clearly expressed themselves on the place of social justice and access to justice generally. For instance, in the case of *Kenya Bus Service Ltd & Another V Minister For Transport & 2 others [2012] eKLR*⁵⁷, the Court stated as follows:

7. By incorporating the right of access to justice, the Constitution requires us to look beyond the dry letter of the law. *The right of access to justice is a reaction to and a protection against legal formalism and dogmatism. (See “Law and Practical Programme for Reforms” (1992) 109 SALJ 22) Article 48 must be located within the Constitutional imperative that recognises as the Bill of Rights as the framework for social, economic and cultural policies. Without access to justice the objects of the Constitution which is to build a society founded upon the rule of law, dignity, social justice and democracy cannot be realised for it is within the legal processes that the rights and fundamental freedoms are realised.* Article 48 therefore invites the court to consider the conditions which clog and fetter the right of persons to seek the assistance of courts of law. (Emphasis added)

Lawyers have also been challenged- that in order to accomplish meaningful social change, they must also move beyond their traditional role as mediaries between clients and the justice system and work collaboratively with marginalized communities.⁵⁸ To this end, lawyers should stand as leaders to help underprivileged people obtain the basic necessities of life and dignity through three pillars of new social justice lawyering: social justice lawyering, leadership, and public policy

⁵⁵ ‘Universality and the SDGs: A Business Perspective’ (Sustainable Development Goals Fund, 7 November 2016) <<https://www.sdgfund.org/universality-and-sdgs>> accessed 6 February 2021; ‘Kenya ∴ Sustainable Development Knowledge Platform’ <<https://sustainabledevelopment.un.org/memberstates/kenya>> accessed 6 February 2021; ‘Sustainable Development Goals | UNDP in Kenya’ (UNDP) <<https://www.ke.undp.org/content/kenya/en/home/sustainable-development-goals.html>> accessed 6 February 2021.

⁵⁶ ‘Access to Justice - United Nations and the Rule of Law’ <<https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/>> accessed 6 February 2021.

⁵⁷ *Kenya Bus Service Ltd & another V Minister For Transport & 2 others [2012] eKLR*, Civil Suit 504 of 2008.

⁵⁸ Gonzalez, Thalia. "Root to rise: mindful lawyering for social justice." *NYU Rev. L. & Soc. Change* 41 (2017): 91.

advocacy.⁵⁹ This is because lawyers in particular are trained with the tools needed to critically analyze law and policies, problem solve around complex social issues, and use writing as a form of advocacy.⁶⁰ These social justice lawyering roles and pillars are summarized as follows:

The first pillar, social justice lawyering, focuses on using the law as a tool to dismantle systems of oppression and create equal access to justice. The second pillar challenges lawyers to develop their leadership skills and strengthen the leadership capacity of others. Within the leadership capacity, lawyers can aid in empowering others. This moves beyond serving a particular client to acknowledging that each person can serve as an invaluable contributor in the process of social change. Lawyers are challenged to explore the question: "Do you grow the people whom you lead?" Finally, the third pillar is the foundation of systems change and policy reform. Public policy advocacy focuses on working with communities to organize and mobilize around social justice issues impacting their daily lives. This type of advocacy cultivates the transformational power of collective engagement with the goal in mind of fostering equitable policies. By applying the principles of "new social justice lawyering" lawyers can collaborate with marginalized communities to realize a vision of justice and equity.⁶¹

j) Meaningful Participation of the Media and Learning Institutions in combating Social Injustice⁶²

While learning institutions play an important role in providing education which is a very relevant tool in economic, social and political empowerment of communities through future job opportunities, alleviating poverty and enabling public participation in governance, they can also be very useful in changing attitudes in the society.⁶³ This is however not to say that other members of the society and institutions should sit back; the country's transformation agenda should be a concerted effort from all.⁶⁴ It has rightly been pointed out that the active and meaningful participation of citizens in public affairs is the distinguishing feature of democratic societies,

⁵⁹ Tyner A, 'Planting People, Growing Justice: The Three Pillars of New Social Justice Lawyering' (2013) 10 Hastings Race and Poverty Law Journal 219.

⁶⁰ Ibid, 219.

⁶¹ Ibid, 263-264.

⁶² Jansen SC, 'Introduction: Media, Democracy, Human Rights, and Social Justice' in Sue Curry Jansen, Jefferson Pooley and Lora Taub-Pervizpour (eds), Media and Social Justice (Palgrave Macmillan US 2011) <https://doi.org/10.1057/9780230119796_1> accessed 6 February 2021; Wilson-Strydom M, 'University Access and Theories of Social Justice: Contributions of the Capabilities Approach' (2015) 69 Higher Education 143; '(PDF) Civic Engagement, Social Justice, and Media Literacy' <https://www.researchgate.net/publication/339692611_Civic_Engagement_Social_Justice_and_Media_Literacy> accessed 6 February 2021.

⁶³ 'Opinion | Social Justice, Austerity, and the Humanities Death Spiral' (CHE, 2 February 2021) <<https://www.chronicle.com/article/social-justice-austerity-and-the-humanities-death-spiral>> accessed 6 February 2021.

⁶⁴ Mutunga W, 'WILLY MUTUNGA - Memo to Upper Deck People: Fight for the 2010 Constitution or Perish | The Elephant' (5 February 2021) <<https://www.theelephant.info/op-eds/2021/02/05/memo-to-upper-deck-people-support-the-constitution-or-perish/>> accessed 6 February 2021; '7 African Musicians Whose Music Stands Up Against Injustice & Inequality' (Global Citizen) <<https://www.globalcitizen.org/en/content/african-musicians-music-fight-inequality-injustice/>> accessed 6 February 2021; Knight B, 'African Radicals Must Realise the Importance of Pan-Africanism' <<https://www.aljazeera.com/opinions/2021/2/2/african-radicals-must-realise-the-importance-of-pan-africanism>> accessed 6 February 2021.

which are judged by the extent to which governments open up to citizen involvement in public affairs and the space they give for citizens to hold the government accountable.⁶⁵

k) Supporting county governments through adequate budgetary allocation and timely release of funds to enable them discharge their mandate under the Constitution.⁶⁶

There is a need for timely release of adequate funds to the concerned organs and departments in both the national and county governments' level in order to support the fulfilment of the state obligations towards realisation of socio-economic rights in the country.

In *John Kabui Mwai & 3 Others V Kenya National Examination Council & 2 Others [2011] eKLR*⁶⁷, a Three-Judge High Court Bench stated as follows:

In our view, the inclusion of economic, social and cultural rights in the Constitution is aimed at advancing the socio-economic needs of the people of Kenya, including those who are poor, in order to uplift their human dignity. The protection of these rights is an indication of the fact that the Constitution's transformative agenda looks beyond merely guaranteeing abstract equality. There is a commitment to transform Kenya from a society based on socio-economic deprivation to one based on equal and equitable distribution of resources. This is borne out by Articles 6(3) and 10 (2) (b).

The realisation of socio-economic rights means the realization of the conditions of the poor and less advantaged and the beginning of a generation that is free from socio-economic need. One of the obstacles to the realisation of this objective, however, is limited financial resources on the part of the Government. The available resources are not adequate to facilitate the immediate provision of socio-economic goods and services to everyone on demand as individual rights. There has to be a holistic approach to providing socio-economic goods and services that focus beyond the individual.

Socio-economic rights are by their very nature ideologically loaded. The realisation of these rights involves the making of ideological challenges which, among others, impact on the nature of the country's economic system. This is because these rights engender positive obligations and have budgetary implications which require making political choices. In our view, a public body should be given appropriate leeway in determining the best way of meeting its constitutional obligations (Emphasis added).

Through these and many other measures, Kenya will fast-track the attainment of Sustainable Development Goals and achieve the ideal of a society that is just and founded on the principles of equality and fairness.

⁶⁵ 'Kenya: Democracy and Political Participation'

<<https://www.opensocietyfoundations.org/publications/kenya-democracy-and-political-participation>> accessed 6 February 2021.

⁶⁶ County Assembly of Machakos v Governor, Machakos County & 4 others [2019] eKLR, Petition 17 of 2017; Mohamed, Mohamed Musa. "Resource allocation: experiences and challenges in County Governments." PhD diss., Strathmore University, 2018.

⁶⁷ John Kabui Mwai & 3 Others v Kenya National Examination Council & 2 Others [2011] eKLR, Petition 15 of 2011.

7. Conclusion

Some scholars have rightly pointed out that social justice in theory and practice is part of the general evolution of justice in human civilizations, which is a part of the ongoing struggles against the repression of any people and on behalf of the liberation of all people.⁶⁸ It has been observed that the aspiration for social justice, through which every working man and woman can claim freely and on the basis of equality of opportunity their fair share of the wealth that they have helped to generate, has always been great.⁶⁹ Notably, while the term social justice has many uses and interpretations, but in its most basic and universal sense, social justice is a philosophical construct—in essence, a political theory or system of thought used to determine what mutual obligations flow between the individual and society.⁷⁰ While discussed in the context of sustainable development goals, the 2030 Agenda on Sustainable Development Goals spells out obligations for states but also requires the meaningful participation of citizens in meeting the goals thereof.⁷¹ The concept of social justice requires that the citizens should not only be treated equally and equitably in access and use of resources but also getting affair opportunity to play their part in development agenda.

The stakeholders in Kenya should ensure that even as they strive towards realisation of the SDGs, social justice as envisaged in the Constitution of Kenya should actively be pursued as a means towards an end-achieving sustainable development goals.

⁶⁸ Barak G, 'Social Justice and Social Inequalities' in James D Wright (ed), *International Encyclopedia of the Social & Behavioral Sciences* (Second Edition) (Elsevier 2015) <<https://www.sciencedirect.com/science/article/pii/B9780080970868450853>> accessed 6 February 2021.

⁶⁹ 'The Need for Social Justice' <<https://www.ilo.org/global/standards/introduction-to-international-labour-standards/need-for-social-justice/lang--en/index.htm>> accessed 6 February 2021.

⁷⁰ Almgren G, 'A Primer on Theories of Social Justice and Defining the Problem of Health Care', *Health Care Politics, Policy, and Services* (Springer Publishing Company 2017) <<https://connect.springerpub.com/content/book/978-0-8261-6898-6/chapter/ch01>>

⁷¹ See SDG Goal which seeks to Promote Peaceful and Inclusive Societies for Sustainable Development, Provide Access to Justice for All and Build Effective, Accountable and Inclusive Institutions At All Levels.

Combating Climate Change in Kenya for Sustainable Development

Abstract

Climate change is considered one of the major global challenges that countries have to contend with in their efforts towards achievement of the sustainable development agenda. Climate change affects not only national and global economy but also has a direct effect on the livelihoods of communities. It is for this reason that there have been global calls on governments and all other stakeholders to put in place climate change mitigation measures and ensure that their economies become resilient. Indeed, climate change is one of the main environmental goals under the United Nation's 2030 Agenda for Sustainable Development Goals as captured under Sustainable Development Goal 13 meant to help countries achieve resilience and build adaptive capacity. However, due to their development activities and approaches, both developed and developing countries have not managed to curb climate change. It is also acknowledged that due to their differing economies and unique challenges, developing countries have far much been affected by climate change compared to the developed countries. Kenya is no exception especially considering that its economy is considered to be agricultural based and much of its rural population is still highly dependent on agriculture and environment to meet their livelihood needs. This has resulted in environmental degradation due to pollution and indiscriminate use of available environmental and natural resources. This paper adds to the existing literature in this area on how the country can successfully combat climate change in its bid to achieve sustainable development. The major argument is that for the country to combat climate change, there is a need for an integrated approach that meaningfully involves all the stakeholders. The Government alone cannot possibly achieve this task. Climate change mitigation is an important step towards achieving sustainability in the country, without which the realisation of both the country's Vision 2030 and the United Nation's 2030 Agenda for Sustainable Development will remain a mirage.

1. Introduction

Climate change remains one of the main global challenges that has affected both developed and developing countries in their efforts towards achievement of the sustainable development agenda although it is arguable that the developing countries have been affected in greater ways.¹ This is because, since the environment remains the main source of raw materials for national development and a source of livelihoods for many communities especially those living within the rural settings, and climate change affects the ability of the environment to supply these needs, climate change has a direct effect on the livelihoods of communities as well as countries' ability to achieve growth and development. The year 2020 indeed proved how harsh climate change can be and Corona Virus pandemic (COVID-19) did not make things any better. It has been observed that from wildfires in California and locust attacks in Ethiopia and Kenya to job losses caused by pandemic lockdowns across the world, climate change and COVID-19 disrupted food production and tipped millions more people into hunger in 2020.² In addition, Oxfam has estimated that more

¹ 'Unprecedented Impacts of Climate Change Disproportionately Burdening Developing Countries, Delegate Stresses, as Second Committee Concludes General Debate | Meetings Coverage and Press Releases' <<https://www.un.org/press/en/2019/gaef3516.doc.htm>> accessed 23 January 2021; 'Untitled' <<https://unfccc.int/news/impacts-of-climate-change-on-sustainable-development-goals-highlighted-at-high-level-political-forum>> accessed 23 January 2021.

than 50 million people in East and Central Africa require emergency food aid – and those numbers are set to rise as the region braces for a harsh drought linked to the La Nina climate pattern, as well as more locust swarms.³ Indeed, commentators have expressed their fears that the situation could worsen from the current year 2021 as both the coronavirus crisis and wild weather exacerbate fragile conditions linked to conflicts and poverty in many parts of the globe, with the head of the U.N. World Food Program (WFP) warning that “even before COVID-19 hit, 135 million people were marching towards the brink of starvation; this could double to 270 million within a few short months”.⁴

Climate change thus remains a challenge to many because, as the United Nations Environment Programme observes, climate change is increasing the frequency and intensity of extreme weather events such as heat waves, droughts, floods and tropical cyclones, aggravating water management problems, reducing agricultural production and food security, increasing health risks, damaging critical infrastructure and interrupting the provision of basic services such water and sanitation, education, energy and transport.⁵

It is for this reason that there have been global calls on governments and all other stakeholders to put in place climate change mitigation measures and ensure that their economies become resilient. Climate change is one of the main environmental goals under the United Nation’s *2030 Agenda for Sustainable Development Goals*⁶ (SDGs) as captured under Sustainable Development Goal 13 meant to help countries achieve resilience and build adaptive capacity. SDG Goal 13 calls on countries to take urgent action to combat climate change and its impacts.⁷ SDG Goal 13 targets require countries to: strengthen resilience and adaptive capacity to climate-related hazards and natural disasters in all countries;⁸ integrate climate change measures into national policies, strategies and planning;⁹ improve education, awareness-raising and human and institutional capacity on climate change mitigation, adaptation, impact reduction and early warning;¹⁰ implement the commitment undertaken by developed-country parties to the United Nations Framework Convention on Climate Change to a goal of mobilizing jointly \$100 billion annually by 2020 from all sources to address the needs of developing countries in the context of meaningful mitigation actions and transparency on implementation and fully operationalize the Green Climate Fund through its capitalization as soon as possible;¹¹ and promote mechanisms for raising capacity for effective climate change-related planning and management in least developed

² ‘COVID-19 Caused Food Insecurity to Soar, But Climate Change Will Be Much Worse – Homeland Security Today’ <<https://www.hstoday.us/subject-matter-areas/emergency-preparedness/covid-19-caused-food-insecurity-to-soar-but-climate-change-will-be-much-worse/>> accessed 17 January 2021.

³ Ibid.

⁴ Ibid; ‘WFP Chief Warns of Hunger Pandemic as COVID-19 Spreads (Statement to UN Security Council) | World Food Programme’ <<https://www.wfp.org/news/wfp-chief-warns-hunger-pandemic-covid-19-spreads-statement-un-security-council>> accessed 17 January 2021.

⁵ Environment UN, ‘GOAL 13: Climate Action’ (UNEP - UN Environment Programme, 2 October 2017) <<http://www.unenvironment.org/explore-topics/sustainable-development-goals/why-do-sustainable-development-goals-matter/goal-13>> accessed 17 January 2021.

⁶ UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1.

⁷ Sustainable Development Goal 13.

⁸ Target 13.1, SDG Goal 13.

⁹ Target 13.2, SDG Goal 13.

¹⁰ Target 13.3, SDG Goal 13.

¹¹ Target 13.a, SDG Goal 13.

countries and small island developing States, including focusing on women, youth and local and marginalized communities¹². Notably, the 2030 Agenda acknowledges that the United Nations Framework Convention on Climate Change is the primary international intergovernmental forum for negotiating the global response to climate change.¹³

The above goals and targets are commendable and are meant to help countries come up with climate change mitigation and adaptation mechanisms to combat the challenge of climate change. However, due to their development activities and approaches, both developed and developing countries have not managed to combat climate change. Indeed, it has been observed that despite the growing amount of climate change concern, mitigation efforts, legislation, and international agreements that have reduced emissions in some places, the continued economic growth of the less developed world has increased global greenhouse gases emission, with the time between 2000 and 2010 experiencing the largest increases since 1970.¹⁴ According to scientific reports, the Earth's mean surface temperature in 2020 was 1.25°C above the global average between 1850 and 1900, largely attributable to greenhouse gases from human activities.¹⁵ It has also been reported that human activities are estimated to have caused approximately 1.0°C of global warming above pre-industrial levels, with a likely range of 0.8°C to 1.2°C and global warming is likely to reach 1.5°C between 2030 and 2052 if it continues to increase at the current rate.¹⁶

It must also be acknowledged that due to their differing economies and unique challenges, developing countries have far more been affected by climate change compared to the developed countries.¹⁷ Kenya is no exception especially considering that its economy is considered to be agricultural based and much of its rural population is still highly dependent on agriculture and environment to meet their livelihood needs.¹⁸ This has resulted in environmental degradation due to pollution and indiscriminate use of available environmental and natural resources.¹⁹ This paper

¹² Target 13.b, SDG Goal 13.

¹³ See DGS Goal 13 (asterisk).

¹⁴ '15.5: Anthropogenic Causes of Climate Change' (Geosciences LibreTexts, 4 November 2019) <[https://geo.libretexts.org/Bookshelves/Geology/Book%3A_An_Introduction_to_Geology_\(Johnson_Affolter_Inkenbrandt_and_Mosher\)/15%3A_Global_Climate_Change/15.05%3A_Anthropogenic_Causes_of_Climate_Change](https://geo.libretexts.org/Bookshelves/Geology/Book%3A_An_Introduction_to_Geology_(Johnson_Affolter_Inkenbrandt_and_Mosher)/15%3A_Global_Climate_Change/15.05%3A_Anthropogenic_Causes_of_Climate_Change)> accessed 17 January 2021.

¹⁵ Wilby R, 'Climate Change: What Would 4°C of Global Warming Feel Like?' (The Conversation) <<http://theconversation.com/climate-change-what-would-4-c-of-global-warming-feel-like-152625>> accessed 17 January 2021.

¹⁶ 'Summary for Policymakers — Global Warming of 1.5 °C' <<https://www.ipcc.ch/sr15/chapter/spm/>> accessed 17 January 2021.

¹⁷ 'Unprecedented Impacts of Climate Change Disproportionately Burdening Developing Countries, Delegate Stresses, as Second Committee Concludes General Debate | Meetings Coverage and Press Releases' <<https://www.un.org/press/en/2019/gaef3516.doc.htm>> accessed 23 January 2021.

¹⁸ Alila, Patrick O., and Rosemary Atieno. "Agricultural policy in Kenya: Issues and processes." Nairobi: Institute of Development Studies (2006); Faling, Marijn. "Framing agriculture and climate in Kenyan policies: A longitudinal perspective." *Environmental Science & Policy* 106 (2020): 228-239; Faling, Marijn, and Robbert Biesbroek. "Cross-boundary policy entrepreneurship for climate-smart agriculture in Kenya." *Policy Sciences* 52, no. 4 (2019): 525-547; Haradhan Kumar Mohajan, 'Food and Nutrition Scenario of Kenya' (2014) 2 *American Journal of Food and Nutrition* 28.

¹⁹ Abioye O Fayiga, Mabel O Ipinmoroti and Tait Chirenje, 'Environmental Pollution in Africa' (2018) 20 *Environment, Development and Sustainability* 41.; '(PDF) Environmental Degradation: Causes, Impacts and Mitigation' (ResearchGate) <https://www.researchgate.net/publication/279201881_Environmental_Degradation_Causes_Impacts_and_Mitigation> accessed 23 January 2021.

adds to the existing literature in this area on how the country can successfully combat climate change in its bid to achieve sustainable development. It is imperative that countries combat climate change urgently considering that it is estimated that without action, by 2050, 68% of humanity may live in urban areas and populations in the tropics will be most exposed to extreme humid heat.²⁰ The World has been struggling with COVID-19 pandemic since March 2020 and the negative effect on economies and livelihoods has been enormous. Despite this, some commentators have argued that climate change could be more devastating than Covid-19.²¹

2. Climate Change: Definition and Causes

Climate is defined as the temperature and precipitation patterns and range of variability averaged over the long-term for a particular region.²² On the other hand, climate change has been defined as 'a long-term shift in the average weather conditions of a region, such as its typical temperature, rainfall, and windiness'.²³ The *United Nations Framework Convention on Climate Change*²⁴(UNFCCC) defines "climate change" to mean a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.²⁵

It has been pointed out that while prehistoric changes in climate have been very slow since climate changes typically occur slowly over many millions of years, the climate changes observed today are rapid and largely human-caused.²⁶ According to the available scientific data, anthropogenic climate change, or, human-caused climate change is believed to be causing rapid changes to the climate, which will cause severe environmental damage.²⁷ This is mainly attributed to anthropogenic greenhouse gases emissions, mostly carbon dioxide (CO₂), from fossil fuel combustion and industrial processes and the following economic sectors: electricity and heat production; agriculture, forestry, and land use; industry; transportation including automobiles; other energy production; and buildings.²⁸

²⁰Wilby R, 'Climate Change: What Would 4°C of Global Warming Feel Like?' (The Conversation) <<http://theconversation.com/climate-change-what-would-4-c-of-global-warming-feel-like-152625>> accessed 17 January 2021.

²¹Clifford C, 'Bill Gates: Climate Change Could Be More Devastating than Covid-19 Pandemic—This Is What the US Must Do to Prepare' (CNBC, 8 January 2021) <<https://www.cnbc.com/2021/01/08/bill-gates-climate-change-could-be-worse-than-covid-19.html>> accessed 17 January 2021.

²² '15.1: Global Climate Change' (Geosciences LibreTexts, 26 December 2019) <[https://geo.libretexts.org/Bookshelves/Geology/Book%3A_An_Introduction_to_Geology_\(Johnson_Affolter_Inkenbrandt_and_Mosher\)/15%3A_Global_Climate_Change/15.01%3A_Global_Climate_Change](https://geo.libretexts.org/Bookshelves/Geology/Book%3A_An_Introduction_to_Geology_(Johnson_Affolter_Inkenbrandt_and_Mosher)/15%3A_Global_Climate_Change/15.01%3A_Global_Climate_Change)> accessed 17 January 2021.

²³ Canada E and CC, 'Climate Change Concepts' (aem, 26 September 2018) <<https://www.canada.ca/en/environment-climate-change/services/climate-change/canadian-centre-climate-services/basics/concepts.html>> accessed 17 January 2021.

²⁴ UN General Assembly, United Nations Framework Convention on Climate Change: resolution / adopted by the General Assembly, 20 January 1994, A/RES/48/189.

²⁵ Ibid, Article 1(2).

²⁶ '15.5: Anthropogenic Causes of Climate Change' (Geosciences LibreTexts, 4 November 2019) <[https://geo.libretexts.org/Bookshelves/Geology/Book%3A_An_Introduction_to_Geology_\(Johnson_Affolter_Inkenbrandt_and_Mosher\)/15%3A_Global_Climate_Change/15.05%3A_Anthropogenic_Causes_of_Climate_Change](https://geo.libretexts.org/Bookshelves/Geology/Book%3A_An_Introduction_to_Geology_(Johnson_Affolter_Inkenbrandt_and_Mosher)/15%3A_Global_Climate_Change/15.05%3A_Anthropogenic_Causes_of_Climate_Change)> accessed 17 January 2021.

²⁷Ibid.

²⁸ '15.5: Anthropogenic Causes of Climate Change' (Geosciences LibreTexts, 4 November 2019) <[https://geo.libretexts.org/Bookshelves/Geology/Book%3A_An_Introduction_to_Geology_\(Johnson_Affolter_Inkenbrandt_and_Mosher\)/15%3A_Global_Climate_Change/15.05%3A_Anthropogenic_Causes_of](https://geo.libretexts.org/Bookshelves/Geology/Book%3A_An_Introduction_to_Geology_(Johnson_Affolter_Inkenbrandt_and_Mosher)/15%3A_Global_Climate_Change/15.05%3A_Anthropogenic_Causes_of)>

3. The Legal Framework on Climate Change Mitigation and Adaptation

Climate change mitigation has been defined as a human-mediated reduction of the anthropogenic forcing of the climate system that includes strategies to reduce GHG sources and emissions and enhancing GHG sinks.²⁹ At the global scene, there exist a number of related environmental legal instruments, plans and programmes aimed at combating climate change.

4. International Legal Framework on Climate Change Mitigation and Adaptation

4.1 Montreal Protocol on Substances the Deplete the Ozone Layer

The *Montreal Protocol on Substances the Deplete the Ozone Layer* was signed in 1987 and entered into force in 1989 as a global agreement to protect the Earth's ozone layer by phasing out the chemicals that deplete it, a plan that includes both the production and consumption of ozone-depleting substances.³⁰ The Protocol is believed to have successfully met its objectives thus far as it continues to safeguard the ozone layer today.³¹

4.2 Vienna Convention for the Protection of the Ozone Layer

The Vienna Convention for the Protection of the Ozone Layer was the first convention of any kind to be signed by every country involved, taking effect in 1988 and reaching universal ratification in 2009.³² The Vienna Convention obligates the Parties to take appropriate measures in accordance with the provisions of this Convention and of those protocols in force to which they are party to protect human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer.³³

4.3 The Kyoto Protocol

The *Kyoto Protocol* was adopted on 11 December 1997 and entered into force on 16 February 2005, currently with 192 Parties.³⁴ The Kyoto protocol was the first agreement between nations to mandate country-by-country reductions in greenhouse-gas emissions. Kyoto emerged from the UN Framework Convention on Climate Change (UNFCCC), which was signed by nearly all nations at the 1992 Earth Summit.³⁵ The Kyoto Protocol operationalizes the United Nations Framework Convention on Climate Change by committing industrialized countries and economies in transition to limit and reduce greenhouse gases (GHG) emissions in accordance

Climate_Change> accessed 17 January 2021; 'How We Know Today's Climate Change Is Not Natural' (State of the Planet, 4 April 2017) <<https://blogs.ei.columbia.edu/2017/04/04/how-we-know-climate-change-is-not-natural/>> accessed 17 January 2021; 'The Science of Carbon Dioxide and Climate' (State of the Planet, 10 March 2017) <<https://blogs.ei.columbia.edu/2017/03/10/the-science-of-carbon-dioxide-and-climate/>> accessed 17 January 2021.

²⁹ Rinku Singh and GS Singh, 'Traditional Agriculture: A Climate-Smart Approach for Sustainable Food Production' (2017) 2 Energy, Ecology and Environment 296.

³⁰ 'The Montreal Protocol on Substances That Deplete the Ozone Layer | Ozone Secretariat' <<https://ozone.unep.org/treaties/montreal-protocol/montreal-protocol-substances-deplete-ozone-layer>> accessed 21 January 2021.

³¹ Ibid.

³² 'The Vienna Convention for the Protection of the Ozone Layer | Ozone Secretariat' <<https://ozone.unep.org/treaties/vienna-convention>> accessed 21 January 2021.

³³ Vienna Convention for the Protection of the Ozone Layer, Article 2(1).

³⁴ 'Untitled' <https://unfccc.int/kyoto_protocol> accessed 21 January 2021.

³⁵ Extract from The Rough Guide to Climate Change, 'What Is the Kyoto Protocol and Has It Made Any Difference?' (the Guardian, 11 March 2011)

<<http://www.theguardian.com/environment/2011/mar/11/kyoto-protocol>> accessed 21 January 2021.

with agreed individual targets,³⁶ whereas the Convention itself only asks those countries to adopt policies and measures on mitigation and to report periodically.³⁷ Notably, the Kyoto Protocol only binds developed countries, and places a heavier burden on them under the principle of “common but differentiated responsibility and respective capabilities”, because it recognizes that they are largely responsible for the current high levels of GHG emissions in the atmosphere.³⁸ While industrialized nations pledged to cut their yearly emissions of carbon, as measured in six greenhouse gases, by varying amounts, averaging 5.2%, by 2012 as compared to 1990, some almost achieved these targets while others like China and United States exceeded the targets by producing more carbon to the point of cancelling the progress made by all other states.³⁹ In addition, some countries such as India and China were never in the list of the original 37 developed countries bound by the Protocol yet China and India together account for approximately 35% of total carbon emissions, as of 2020, while the developed nations of the UK, France, and Germany combined, only account for 4% of the world’s carbon emissions.⁴⁰

5. The Kyoto Protocol was essentially replaced by the Paris Climate Accord in 2015.⁴¹

5.1 Doha Amendment to the Kyoto Protocol

Parties to the Kyoto Protocol adopted an amendment to the Kyoto Protocol by decision 1/CMP.8 in accordance with Articles 20 and 21 of the Kyoto Protocol, at the eighth session of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP) held in Doha, Qatar, on 8 December 2012.⁴² As of **28 October 2020, 147 Parties** had deposited their instrument of acceptance, therefore, the threshold for entry into force of the Doha Amendment had been met.⁴³ The Doha Amendment refers to the changes made to the Kyoto Protocol in 2012, after the First Commitment Period of the Kyoto Protocol concluded. The Amendment adds new emission reduction targets for Second Commitment Period (2012-2020) for participating countries.⁴⁴

5.2 Paris Climate Accord, 2015

The Paris Agreement is a **legally binding international treaty on climate change**, adopted by 196 Parties at COP 21 in Paris, on 12 December 2015 and entered into force on 4 November 2016.⁴⁵ Its goal is to **limit global warming** to well below 2, **preferably to 1.5 degrees Celsius**,

³⁶ ‘Untitled’ <https://unfccc.int/kyoto_protocol> accessed 21 January 2021.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Extract from The Rough Guide to Climate Change, ‘What Is the Kyoto Protocol and Has It Made Any Difference?’ (the Guardian, 11 March 2011)

<<http://www.theguardian.com/environment/2011/mar/11/kyoto-protocol>> accessed 21 January 2021.

⁴⁰ ‘Kyoto Protocol - Overview, Components, Current State’ (Corporate Finance Institute) <<https://corporatefinanceinstitute.com/resources/knowledge/other/kyoto-protocol/>> accessed 21 January 2021.

⁴¹ Ibid.

⁴² ‘Untitled’ <<https://unfccc.int/process/the-kyoto-protocol/the-doha-amendment>> accessed 21 January 2021.

⁴³ Ibid.

⁴⁴ ‘Doha Amendment to the Kyoto Protocol (2012)’ (COP23) <<https://cop23.com.fj/knowledge/doha-amendment-kyoto-protocol-2012/>> accessed 21 January 2021.

⁴⁵ ‘Untitled’ <<https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement>> accessed 21 January 2021.

compared to pre-industrial levels.⁴⁶ Unlike the Kyoto Protocol, the Paris Agreement is a **landmark** in the multilateral climate change process because, for the first time, a binding agreement brings all nations into a common cause to undertake ambitious efforts to combat climate change and adapt to its effects.⁴⁷

The 26th UN Climate Change Conference of the Parties (COP26) will be held in Glasgow from 1st to 12th November 2021.⁴⁸ The COP26 summit is expected to bring parties together to accelerate action towards the goals of the Paris Agreement and the UN Framework Convention on Climate Change.⁴⁹

5.3 United Nations Convention to Combat Desertification

The objective of the *United Nations Convention to Combat Desertification*⁵⁰ is to combat desertification and mitigate the effects of drought in countries experiencing serious drought and/or desertification, particularly in Africa, through effective action at all levels, supported by international cooperation and partnership arrangements, in the framework of an integrated approach which is consistent with Agenda 21, with a view to contributing to the achievement of sustainable development in affected areas.⁵¹ This is to be achieved through long-term integrated strategies that focus simultaneously, in affected areas, on improved productivity of land, and the rehabilitation, conservation and sustainable management of land and water resources, leading to improved living conditions, in particular at the community level.⁵²

5.4 Agenda 21

Agenda 21 is a comprehensive plan of action to be taken globally, nationally and locally by organizations of the United Nations System, Governments, and Major Groups in every area in which human impacts on the environment.⁵³

5.5 United Nations Framework Convention on Climate Change (UNFCCC)

The *United Nations Framework Convention on Climate Change*⁵⁴ was passed to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere, at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.⁵⁵

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ 'UN Climate Change Conference (COP26) at the SEC – Glasgow 2021' (UN Climate Change Conference (COP26) at the SEC – Glasgow 2021) <<https://ukcop26.org/>> accessed 17 January 2021.

⁴⁹ Ibid.

⁵⁰ United Nations Convention to Combat Desertification (1994).

⁵¹ Article 2(1).

⁵² Article 2(2).

⁵³ 'Agenda 21 .. Sustainable Development Knowledge Platform'

<<https://sustainabledevelopment.un.org/outcomedocuments/agenda21>> accessed 21 January 2021.

⁵⁴ UN General Assembly, United Nations Framework Convention on Climate Change: resolution / adopted by the General Assembly, 20 January 1994, A/RES/48/189.

⁵⁵ Ibid, Article 2.

In their actions to achieve the objective of the Convention and to implement its provisions, the Parties are to be guided, *inter alia*, by the following principles: the Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof;⁵⁶ the specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration;⁵⁷ the Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost. To achieve this, such policies and measures should take into account different socio-economic contexts, be comprehensive, cover all relevant sources, sinks and reservoirs of greenhouse gases and adaptation, and comprise all economic sectors. Efforts to address climate change may be carried out cooperatively by interested Parties;⁵⁸ the Parties have a right to, and should, promote sustainable development. Policies and measures to protect the climate system against human-induced change should be appropriate for the specific conditions of each Party and should be integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change;⁵⁹ the Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change. Measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.⁶⁰

5.6 Intergovernmental Panel on Climate Change (IPCC)

The Intergovernmental Panel on Climate Change (IPCC) is the United Nations body established in 1988 for assessing the science related to climate change.⁶¹ The Intergovernmental Panel on Climate Change (IPCC) collects, reviews, and summarizes the best information on climate change and its impacts, and puts forward possible solutions.⁶² IPCC often discharges its work through scientific reports, summarizing current and relevant findings in the field and written for policymakers and scientists, but they are available to everyone.⁶³

⁵⁶ United Nations Framework Convention on Climate Change, Article 3(1).

⁵⁷ United Nations Framework Convention on Climate Change, Article 3(2).

⁵⁸ United Nations Framework Convention on Climate Change, Article 3(3).

⁵⁹ *Ibid*, Article 3(4).

⁶⁰ *Ibid*, Article 3(5).

⁶¹ 'IPCC — Intergovernmental Panel on Climate Change' <<https://www.ipcc.ch/>> accessed 21 January 2021.

⁶² 'The Intergovernmental Panel on Climate Change' (MIT Climate Portal)

<<https://climate.mit.edu/explainers/intergovernmental-panel-climate-change>> accessed 21 January 2021.

⁶³ *Ibid*.

6. Kenya's Legal Framework on Climate Change Mitigation

6.1 Environmental Management and Co-ordination Act, 1999

The *Environmental Management and Co-ordination Act, 1999*⁶⁴ (EMCA) mandates the Cabinet Secretary in charge of environmental matters in consultation with the National Environment Management Authority, to undertake or commission other persons to undertake national studies and give due recognition to developments in scientific knowledge relating to substances, activities and practices that deplete the ozone layer to the detriment of public health and the environment.⁶⁵ The Cabinet Secretary in consultation with the Authority, is then required to issue guidelines and institute programmes concerning the: elimination of substances that deplete the stratospheric ozone layer; controlling of activities and practices likely to lead to the degradation of the ozone layer and the stratosphere; reduction and minimisation of risks to human health created by the degradation of the ozone layer and the stratosphere; and formulate strategies, prepare and evaluate programmes for phasing out ozone depleting substances.⁶⁶

The Act also mandates the Cabinet Secretary, in consultation with relevant lead agencies, to issue guidelines and prescribe measures on climate change.⁶⁷ EMCA also provides for fiscal incentives that are designed to promote climate change mitigation. It empowers the Cabinet Secretary responsible for Finance, on the recommendation of the National Council of Public benefit organizations, to propose to Government tax and other fiscal 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.⁶⁸ 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, re-cycling 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 behaviour 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.⁶⁹

EMCA also provides for Strategic Environmental Assessments⁷⁰; Environmental Impact Assessment⁷¹; Environmental Audit⁷²; and Environmental Monitoring⁷³, all of which are meant to protect the environment from environmentally degrading human activities.

⁶⁴ Environmental Management and Co-ordination Act, No. 8 of 1999, Laws of Kenya.

⁶⁵ Ibid, sec. 56(1).

⁶⁶ Ibid, sec. 56(2).

⁶⁷ Ibid, sec. 56A.

⁶⁸ Environmental Management and Co-ordination Act, sec. 57(1).

⁶⁹ Ibid, sec. 57(2).

⁷⁰ Ibid, sec. 57A.

⁷¹ Ibid, sec. 58.

⁷² Ibid, sec. 68.

⁷³ Ibid, sec. 69.

6.2 Climate Change Action Plan 2018–2022

The Climate Change Action Plan 2018–2022⁷⁴ aims to further Kenya's development goals by providing mechanisms and measures that achieve low carbon climate resilient development. NCCAP 2018-2022 builds on the first action plan (2013-2017), sets out actions to implement the Climate Change Act (2016), and provides a framework for Kenya to deliver on its Nationally Determined Contribution (NDC) to the Paris Agreement.⁷⁵

6.3 Climate Change Act, 2016

The Climate Change Act 2016⁷⁶ 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.⁷⁷ The Act is to be applied for the development, management, implementation and regulation of mechanisms to enhance climate change resilience and low carbon development for the sustainable development of Kenya.⁷⁸

6.4 Climate Change Mitigation in Kenya: Challenges and Prospects

Africa is classified as one of the continents highly vulnerable to climate change due to several reasons: high poverty level, high dependence on rain-fed agriculture, poor management of natural resources, capacity/technology limitations, weak infrastructure, and less efficient governance/institutional setup.⁷⁹ Arguably, Kenya's challenges as far as combating climate change is concerned are not any different from the ones identified above. Climate change impacts and the associated socio-economic losses on Kenya have been exacerbated by the country's high dependence on climate sensitive natural resources.⁸⁰ The main climate hazards include droughts and floods which cause economic losses estimated at 3% of the country's Gross Domestic Product (GDP) while Kenya's total greenhouse gas (GHG) emissions are relatively low, out of which 75% are from the land use, land-use change and forestry and agriculture sectors.⁸¹ Kenya's Vision 2030 which seeks to convert the country into a newly industrialized middle income country by 2030 is expected to increase emissions from the energy sector.⁸²

Kenya's agricultural sector has been greatly affected by climate change and has also seen growth in use of farming chemicals. The growing population in Kenya coupled with dwindling rainfall and shrinking land parcels have all led to the adoption of modern commercial approaches to agricultural production to achieve food security which has coincidentally greatly contributed to environmental degradation and climate change.⁸³

⁷⁴ Government of the Republic of Kenya (2018). National Climate Change Action Plan 2018-2022. Ministry of Environment and Forestry, Nairobi.

⁷⁵ National Climate Change Action Plan: 2018-2022, p.4.

⁷⁶ Climate Change Act, No. 11 of 2016, Laws of Kenya.

⁷⁷ Ibid, Preamble.

⁷⁸ Ibid, sec. 3(1).

⁷⁹ Kimaro, Didas N., Alfred N. Gichu, Hezron Mogaka, Brian E. Isabirye, and Kifle Woldearegay. "Climate Change Mitigation and Adaptation in ECA/SADC/COMESA region: Opportunities and Challenges." <https://www.researchgate.net/publication/346628199_Climate_Change_Mitigation_and_Adaptation_in_ECASADCCOMESA_region_Opportunities_and_Challenges> accessed 17 January 2021.

⁸⁰ GoK, I. N. D. C. "Kenya's Intended Nationally Determined Contribution." (2015).

⁸¹ Ibid.

⁸² Ibid.

⁸³ Kioko, John, and Moses M. Okello. "Land use cover and environmental changes in a semi-arid rangeland, Southern Kenya." *Journal of Geography and Regional Planning* 3, no. 11 (2010): 322-326.

As opposed to the highly commercialized agricultural practices, indigenous agriculture systems are believed to be diverse, adaptable, nature friendly and productive through such approaches as mixed cropping which not only decreases the risk of crop failure, pest and disease but also diversifies the food supply and the higher vegetation diversity in the form of crops and trees escalates the conversion of CO₂ to organic form, thus reducing global warming.⁸⁴

Kenya submitted its Intended Nationally Determined Contribution (INDC) in 2015 as part of its obligations as a signatory and party to the United Nations Framework Convention on Climate Change (UNFCCC).⁸⁵ Their implementation is to begin in this year 2021. Some of the challenges identified are related to technical capacity and financial resource gaps.⁸⁶

Kenya's updated Nationally Determined Contribution (NDC) to the United Nations Framework Convention on Climate Change (UNFCCC) submitted on 28th December 2020 sets out two important developments from its first NDC, which was submitted in December 2016. As compared to the first NDC target of 30% GHG emission reduction, the updated NDC commits to lower GHG emissions by 32% by 2030 relative to the business as usual (BAU) scenario.⁸⁷ In addition, while the first NDC was fully conditional to international support, the updated NDC intends to mobilize domestic resources to meet 13% of the estimated USD 62 Billion NDC implementation costs.⁸⁸

7. Combating Climate Change for Sustainable Development: Way Forward

7.1 International Cooperation on Climate Change Mitigation

The World Food Programme has in the recent past observed that the coronavirus crisis has shown how faster international action and better cooperation in areas like science and technology could help tackle the problem (food shortage and climate change).⁸⁹

There is a need for Kenya to work closely with other countries and stakeholders at the global level to combat climate change.

The Paris Agreement provides a framework for financial, technical and capacity building support to those countries that need it.⁹⁰ The Paris Agreement reaffirms that developed countries should take the lead in providing financial assistance to countries that are less endowed and more vulnerable, while for the first time also encouraging voluntary contributions by other Parties, as

⁸⁴ Rinku Singh and GS Singh, 'Traditional Agriculture: A Climate-Smart Approach for Sustainable Food Production' (2017) 2 *Energy, Ecology and Environment* 296.

⁸⁵ SusWatch Kenya, 'Nationally Determined Contributions (NDCs) Implementation: The Kenyan Scenario,' Policy Brief, December 2019, 1
<https://www.inforse.org/africa/pdfs/PolicyBrief_Kenya_CS0_view_on_NDCs_Dec_2019.pdf> accessed 17 January 2021.

⁸⁶ Ibid.

⁸⁷ 'NDC Update Kenya: Enhanced Reduction Target' (Changing Transport, 13 January 2021)
<<https://www.changing-transport.org/ndc-update-kenya-enhanced-reduction-target/>> accessed 21 January 2021.

⁸⁸ Ibid.

⁸⁹ 'COVID-19 Caused Food Insecurity to Soar, But Climate Change Will Be Much Worse – Homeland Security Today' <<https://www.hstoday.us/subject-matter-areas/emergency-preparedness/covid-19-caused-food-insecurity-to-soar-but-climate-change-will-be-much-worse/>> accessed 17 January 2021.

⁹⁰ 'Untitled' <<https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement>> accessed 21 January 2021.

climate finance is needed **for mitigation** and adaptation.⁹¹The Paris Agreement also encourages **technology development and transfer** for both improving resilience to climate change and reducing GHG emissions, by establishing a **technology framework** to provide overarching guidance to the well-functioning Technology Mechanism.⁹² Also, in recognition of the fact that not all developing countries have sufficient capacities to deal with many of the challenges brought by climate change, the Paris Agreement places **great emphasis on climate-related capacity-building** for developing countries and requests all developed countries to enhance support for capacity-building actions in developing countries.⁹³

Kenya's Government should also continually work closely with the UNEP in design and execution of climate change mitigation plans. UNEP assists countries all over the world in their efforts to create National Adaptation Plans (NAPs), which process seeks to identify medium- and long-term adaptation needs, informed by the latest climate science.⁹⁴ NAPs are meant to: reduce vulnerability to the impacts of climate change by building adaptive capacity and resilience; and integrate adaptation into new and existing policies and programmes, especially development strategies.⁹⁵

7.2 Integrated Approach to Reduction of Greenhouse Gases Emission

It has been argued that the Paris Agreement's goal of staying under 2° Celsius and aiming for 1.5°C global warming, as compared to pre-industrial average global temperature, scientifically translates to limiting emissions of greenhouse gases within a finite global carbon budget.⁹⁶ As already pointed out, greenhouse gas emissions account for the largest causes of anthropogenic climate change. It has been reported that globally, the economic slowdown during the coronavirus pandemic was expected to slash emissions by 4-7% in 2020, bringing them close to where global emissions were in 2010.⁹⁷ However, concentrations of greenhouse gases are still rising rapidly in the atmosphere.⁹⁸ Cutting down greenhouse gas emissions can potentially reduce the impacts and costs associated with climate change.⁹⁹

⁹¹ Ibid; see also UN General Assembly, United Nations Framework Convention on Climate Change, Article 11.

⁹² Ibid.

⁹³ Ibid; 'Untitled' <<https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement/key-aspects-of-the-paris-agreement>> accessed 21 January 2021.

⁹⁴ UN Environment, 'National Adaptation Plans' (UNEP - UN Environment Programme, 14 September 2017) <<http://www.unenvironment.org/explore-topics/climate-change/what-we-do/climate-adaptation/national-adaptation-plans>> accessed 21 January 2021.

⁹⁵ Ibid.

⁹⁶ 'Nature-Based Solutions for Better Climate Resilience: The Need to Scale up Ambition and Action | NDC Partnership' <<https://ndcpartnership.org/nature-based-solutions-better-climate-resilience-need-scale-ambition-and-action>> accessed 21 January 2021.

⁹⁷ Raymond C and Matthews T, 'Global Warming Now Pushing Heat into Territory Humans Cannot Tolerate' (The Conversation) <<http://theconversation.com/global-warming-now-pushing-heat-into-territory-humans-cannot-tolerate-138343>> accessed 17 January 2021.

⁹⁸ Ibid.

⁹⁹ UN Environment, 'Adaptation Gap Report 2020' (UNEP - UN Environment Programme, 9 January 2021) <<http://www.unenvironment.org/resources/adaptation-gap-report-2020>> accessed 20 January 2021; 'How to Boost Resilience to Climate Change - Adaptation Gap Report 2020 - YouTube' <<https://www.youtube.com/watch?v=KhZ16QPv2c&feature=youtu.be>> accessed 20 January 2021.

With the outbreak of COVID-19 pandemic, major cities around the world have reported an increase in the numbers of people cycling and walking in public spaces.¹⁰⁰ Cities such as Bogota, Berlin, Vancouver, New York, Paris and Berlin are reported to have expanded bike lanes and public paths to accommodate the extra cycling traffic, with Australia's New South Wales government also encouraging councils to follow suit.¹⁰¹ The result has been a decline in global daily emissions, with the fall in road traffic being the main driver of the global emissions decline.¹⁰² It is estimated that daily global CO₂ emissions decreased by –17% by early April 2020 compared with the mean 2019 levels, just under half from changes in surface transport.¹⁰³

The National and County Governments in Kenya could learn from these global trends and encourage more people to embrace cycling to and from work especially around major towns and the cities in Kenya by creating room for bike lanes and public paths as well as improving security in public places and enhancing road safety. This can potentially improve the country's chances of achieving climate mitigation due to the reduced daily emissions from traffic. It has been suggested that encouraging cycling and working from home to continue beyond the current pandemic is likely to help countries in meeting their climate goals.¹⁰⁴ There is also a need for the country to embrace vehicle technology that emits less greenhouse gases such as electric vehicles and trains. While this will certainly require massive amount of investments and time, the investment will be worth it in the long run as far as reduction of greenhouse gas emissions is concerned.

The country has however shown some intended positive steps towards this. Notably, the transport sector makes up the biggest share of petroleum consumption in Kenya; as such about 67% of Kenya's energy-related CO₂ emissions and 11.3% of Kenya's total GHG emissions in 2015 came from transport-related activities (GHG inventory report, 2019).¹⁰⁵ Kenya thus seeks to implement low carbon and efficient transportation systems in its December 2020 updated NDC. These are: Upscaling the construction of roads to systematically harvest water and reduce flooding; Enhancing institutional capacities on climate proofing vulnerable road infrastructure through vulnerability assessments; and Promoting use of appropriate designs and building materials to enhance resilience of at least 4500 km of roads to climate risks.¹⁰⁶ Key actions for the transport sector include: Developing an affordable, safe and efficient public transport system, including a Bus Rapid Transit System in Nairobi and non-motorised transport facilities; Reducing fuel consumption and fuel overhead costs, including electrification of the Standard Gauge Railway; Encouraging low-carbon technologies in the aviation and maritime sectors; Climate proofing transport infrastructure; Encouraging technologies such as development of electric modes of transport and research on renewable energy for powering different modes of transport; Creating

¹⁰⁰Quéré CL and others, 'Coronavirus Is a "sliding Doors" Moment. What We Do Now Could Change Earth's Trajectory' (The Conversation) <<http://theconversation.com/coronavirus-is-a-sliding-doors-moment-what-we-do-now-could-change-earths-trajectory-137838>> accessed 17 January 2021.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Le Quéré C and others, 'Temporary Reduction in Daily Global CO₂ Emissions during the COVID-19 Forced Confinement' (2020) 10 Nature Climate Change 647.

¹⁰⁴Quéré CL and others, 'Coronavirus Is a "sliding Doors" Moment. What We Do Now Could Change Earth's Trajectory' (The Conversation).

¹⁰⁵ 'NDC Update Kenya: Enhanced Reduction Target' (Changing Transport, 13 January 2021) <<https://www.changing-transport.org/ndc-update-kenya-enhanced-reduction-target/>> accessed 21 January 2021.

¹⁰⁶ Ibid.

awareness on issues such as fuel economy and electric mobility options; Putting enabling policies and regulations in place to facilitate implementation of the mitigation and adaptation actions.¹⁰⁷

There is also a need for the country to continually invest in renewable sources of energy such as solar, wind power, biogas, among others.¹⁰⁸ The reduction of GHG emissions can also be done through, inter alia, involving the communities in nature-based solutions to reduce the emissions gap such as improved land use and management which may include low-emissions agriculture, agro-forestry, and ecosystem conservation and restoration all of which could achieve this task if properly implemented.¹⁰⁹ Nature-based solutions combine climate change mitigation, adaptation, disaster risk reduction, biodiversity conservation, and sustainable resource management.¹¹⁰

Reducing Emissions from Deforestation and Forest Degradation (REDD) is a mechanism that has been under negotiation by the United Nations Framework Convention on Climate Change (UNFCCC) since 2005, with the objective of mitigating climate change through reducing net emissions of greenhouse gases through enhanced forest management, mostly in the developing countries.¹¹¹ Forests play an important role in reducing GHG emissions. The Constitution of Kenya 2010 obligates the State to ensure that the country achieves a land surface tree cover of at least 10 per cent.¹¹² It has been observed that past attempts to increase forest cover and address the problem of deforestation and forest degradation in the country have not been very successful due to a number of reasons: increasing demand for land for agriculture, settlement and other developments, high energy demand and inadequate funding to support investments in the forestry sector.¹¹³ In order to overcome these challenges, Kenya's participation in REDD+ is premised on the conviction that the process holds great potential in supporting: realization of vision 2030 objectives of increasing forest cover to a minimum of 10%; access to international climate finance to support investments in the forestry sector; Government efforts in designing policies and measures to protect and improve its remaining forest resources in ways that improve local livelihoods and conserve biodiversity; realization of the National Climate Change Response Strategy (NCCRS) goals; and contribution to global climate change mitigation and adaptation efforts.¹¹⁴

¹⁰⁷ Ibid.

¹⁰⁸ Muigua, K., Exploring Alternative Sources of Energy in Kenya, *Journal of Conflict Management and Sustainable Development*, Volume 5, No 2, (October, 2020); Muigua, K., Towards Energy Justice in Kenya, February 2020, available at <http://kmco.co.ke/wp-content/uploads/2020/01/Towards-Energy-Justice-in-Kenya.pdf>; Muigua, K., Access to Energy as a Constitutional Right in Kenya, available at <http://www.kmco.co.ke/attachments/article/118/Access%20to%20Energy%20as%20a%20Constitutional%20Right%20in%20Kenya-%20NOVEMBER%202013.pdf>.

¹⁰⁹ 'Nature-Based Solutions for Better Climate Resilience: The Need to Scale up Ambition and Action | NDC Partnership' <<https://ndcpartnership.org/nature-based-solutions-better-climate-resilience-need-scale-ambition-and-action>> accessed 21 January 2021.

¹¹⁰ Ibid.

¹¹¹ Kimaro, Didas N., Alfred N. Gichu, Hezron Mogaka, Brian E. Isabirye, and Kifle Woldearegay. "Climate Change Mitigation and Adaptation in ECA/SADC/COMESA region: Opportunities and Challenges," 4.

¹¹² Article 69 (1), Constitution of Kenya 2010.

¹¹³ Kimaro, Didas N., Alfred N. Gichu, Hezron Mogaka, Brian E. Isabirye, and Kifle Woldearegay. "Climate Change Mitigation and Adaptation in ECA/SADC/COMESA region: Opportunities and Challenges," 16.

¹¹⁴ Ibid.

These efforts coupled with lifestyle changes and investments in cleaner technologies can potentially reduce greenhouse gases emission in Kenya thus enabling the country to meet and even exceed its global country targets.

7.3 Inclusion of Communities in Climate Change Impact Reduction and Early Warning Systems

The United Nations describes early warning system as an adaptive measure for climate change, using integrated communication systems to help communities prepare for hazardous climate-related events.¹¹⁵ Such systems are meant to save lives and jobs, land and infrastructures and supports long-term sustainability, as well as assisting public officials and administrators in their planning, saving money in the long run and protecting economies.¹¹⁶

The United Nations, working in diverse partnerships, has been putting in place a number of innovative early warning systems initiatives in vulnerable areas around the world, such as the Strengthening Climate Information and Early Warning Systems (SCIEWS) project, which is a comprehensive programme operating across Africa, Asia and the Pacific, meant to ensure preparedness and rapid response to natural disasters, using a model that integrates the components of risk knowledge, monitoring and predicting, dissemination of information and response to warnings.¹¹⁷

Such systems should actively and meaningfully involve local communities, because as it has been observed, indigenous people are good observers of changes in weather and climate and acclimatize through several adaptive and mitigation strategies.¹¹⁸

7.4 Environmental Education and Creating Awareness on Climate Change Mitigation and Resilience

It has been argued that it is critically important to be aware of the geologic context of climate change processes if we are to understand the anthropogenic (human-caused) climate change because, firstly, this awareness increases the understanding of how and why our activities are causing present-day climate change, and secondly, it allows us to distinguish between natural and anthropogenic processes in the climate record in the past.¹¹⁹

Resilience has been defined as the ability to deal with shocks and stress without crossing tipping points and applies to human and environmental systems, from individual households to financial systems, ecosystems, and the biosphere as a whole. Resilience also includes the capacity to adapt to the change, that is, to deal with change without crossing a threshold, and the ability to transform

¹¹⁵ United Nations, 'Early Warning Systems' (United Nations) <<https://www.un.org/en/climatechange/climate-solutions/early-warning-systems>> accessed 20 January 2021.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Rinku Singh and GS Singh, 'Traditional Agriculture: A Climate-Smart Approach for Sustainable Food Production' (2017) 2 Energy, Ecology and Environment 296.

¹¹⁹ '15.1: Global Climate Change' (Geosciences LibreTexts, 26 December 2019) <[https://geo.libretexts.org/Bookshelves/Geology/Book%3A_An_Introduction_to_Geology_\(Johnson_Affolter_Inkenbrandt_and_Mosher\)/15%3A_Global_Climate_Change/15.01%3A_Global_Climate_Change](https://geo.libretexts.org/Bookshelves/Geology/Book%3A_An_Introduction_to_Geology_(Johnson_Affolter_Inkenbrandt_and_Mosher)/15%3A_Global_Climate_Change/15.01%3A_Global_Climate_Change)> accessed 17 January 2021.

in situations of crises – essentially, the capacity to rebuild livelihoods or functioning ecosystems after crossing a tipping point.¹²⁰

For mitigation planning, the primary goal is to reduce current and future direct and indirect GHG emissions, particularly from energy production, land use, waste, industry, the built environment infrastructure, and transportation.¹²¹ The primary goal of adaptation is to adjust the built, social, and eco-logical environment to minimize the negative impacts of both slow-onset and extreme events caused by climate change, such as sea-level rise, floods, droughts, storms, and heat waves.¹²²

Arguably, conservation, restoration, and the management of ecosystems play a crucial role in climate change mitigation (for instance, through land use forms that maintain carbon stocks, carbon sequestration and the reduction of greenhouse gas emissions), which practices can be important for climate change adaptation, buffering societies from the impacts of climate change and reducing disaster risk.¹²³

There is a need for government bodies in charge of various but relevant sectors to work closely with communities as a way of creating awareness on how their day to day activities are likely to affect the environment and the climatic conditions in general. Dissemination of environmental knowledge as well as creating opportunities for collaborative approaches to combating climate change can go a long way in not only mitigation and adaptation measures but also creating resilient economies and livelihoods. Arguably, in many decision-making processes, perceptions matter more than facts because how we feel about a risk (subjective perceptions of risk) influences what we pay attention to in complicated situations and how we approach and solve problems. Failure to acknowledge this may create and widen the gap between what experts perceive as risk and what the public perceives as risk.¹²⁴

Climate change knowledge should also be incorporated into the primary, secondary and all tertiary level curricula in order to inculcate a sense of environmental ethics in all people from an early age and to ensure that the knowledge acquired will go a long way in combating climate change. These efforts should be guided by, inter alia, Article 6 of UNFCCC which states that: in carrying out their commitments under Article 4, paragraph 1 (i), the Parties shall: Promote and

¹²⁰ ‘Nature-Based Solutions for Better Climate Resilience: The Need to Scale up Ambition and Action | NDC Partnership’ <<https://ndcpartnership.org/nature-based-solutions-better-climate-resilience-need-scale-ambition-and-action>> accessed 21 January 2021.

¹²¹ Grafakos, S., Pachteau, C., Delgado, M., Landauer, M., Lucon, O., and Driscoll, P. (2018). Integrating mitigation and adaptation: Opportunities and challenges. In Rosenzweig, C., W. Solecki, P. Romero-Lankao, S. Mehrotra, S. Dhakal, and S. Ali Ibrahim (eds.), *Climate Change and Cities: Second Assessment Report of the Urban Climate Change Research Network*. Cambridge University Press. New York. 101–138, 103 <https://uccrn.ei.columbia.edu/sites/default/files/content/pubs/ARC3.2-PDF-Chapter-4-Mitigation-and-Adaptation-wecompress.com_.pdf> accessed 17 January 2021.

¹²² Ibid.

¹²³ ‘Nature-Based Solutions for Better Climate Resilience: The Need to Scale up Ambition and Action | NDC Partnership’ <<https://ndcpartnership.org/nature-based-solutions-better-climate-resilience-need-scale-ambition-and-action>> accessed 21 January 2021.

¹²⁴ Grafakos, S., Pachteau, C., Delgado, M., Landauer, M., Lucon, O., and Driscoll, P. (2018). Integrating mitigation and adaptation: Opportunities and challenges. In Rosenzweig, C., W. Solecki, P. Romero-Lankao, S. Mehrotra, S. Dhakal, and S. Ali Ibrahim (eds.), *Climate Change and Cities: Second Assessment Report of the Urban Climate Change Research Network*. Cambridge University Press. New York. 101–138, 133.

facilitate at the national and, as appropriate, subregional and regional levels, and in accordance with national laws and regulations, and within their respective capacities: (i) the development and implementation of educational and public awareness programmes on climate change and its effects; (ii) public access to information on climate change and its effects; (iii) public participation in addressing climate change and its effects and developing adequate responses; and (iv) training of scientific, technical and managerial personnel; Cooperate in and promote, at the international level, and, where appropriate, using existing bodies: (i) the development and exchange of educational and public awareness material on climate change and its effects; and (ii) the development and implementation of education and training programmes, including the strengthening of national institutions and the exchange or secondment of personnel to train experts in this field, in particular for developing countries.¹²⁵

7.5 Integrating Traditional Knowledge with Mainstream Scientific Knowledge for Climate Mitigation and Adaptation

The Organisation for Economic Co-operation and Development (OECD), countries can use technological change to address climate change without compromising economic growth through ensuring that their climate and innovation policies provide the right incentives for the development and diffusion of “climate-friendly” technologies.¹²⁶ OECD recommends that this can be achieved through, *inter alia*: providing predictable and long-term policy signals in order to give potential innovators and adopters of climate-friendly technologies the confidence to undertake the necessary investments; using flexible policy measures to give potential innovators incentives to identify the best way to meet climate objectives, and to avoid locking-in technologies that may become inefficient in future; putting a price on Green House Gas (GHG) emissions, for example through taxes or tradable permits, in order to provide incentives across all stages of the innovation cycle; providing an appropriate mix and sequencing of complementary policy measures in order to overcome barriers to development and diffusion of breakthrough technologies; balancing the benefits of technology-neutral policies with the need to direct technological change toward climate-saving trajectories, by diversifying the portfolio of technologies for which support is provided and identifying general purpose technologies with environmental benefits; since the sources of innovation are widely-dispersed, supporting research and development in a broad portfolio of complementary fields, and not just energy, “climate-friendly” or ‘environmental’ Research and development (R&D); ensuring that international policy efforts maximise the potential for sharing of knowledge and technologies of mutual benefit, for example through international research-sharing agreements; and supporting international technology-oriented agreements as an important complement to other international efforts (e.g. emissions-based agreements).¹²⁷

Kenya should review and align her science and technological innovation policies to the above recommendations from the OECD in order to ensure their maximum effectiveness in promoting innovation as a tool for combating climate change in the country. Indeed, the starting point should be the Constitution of Kenya. The Constitution of Kenya 2010 obligates the State to, *inter alia*:

¹²⁵ UN General Assembly, United Nations Framework Convention on Climate Change, Article 6.

¹²⁶ OECD, ‘Promoting Technological Innovation to Address Climate Change,’ (November 2011), 1 <<http://www.oecd.org/env/cc/49076220.pdf>> accessed 17 January 2021.

¹²⁷ *Ibid*, 1.

promote science and recognise the role of science and indigenous technologies in the development of the nation; and promote the intellectual property rights of the people of Kenya.¹²⁸

The *Environmental Management and Co-ordination Act, 1999*¹²⁹ calls for integration of traditional knowledge for the conservation of biological diversity with mainstream scientific knowledge in conservation of biological resources *in situ*.¹³⁰ Investments in incentivized mitigation programmes, especially in agriculture and forestry, can offer mitigation benefits, increased productivity, improved livelihoods, biodiversity conservation and increased resilience to climate change.¹³¹

The *Science, Technology and Innovation Act, 2013*¹³² was enacted to facilitate the promotion, co-ordination and regulation of the progress of science, technology and innovation of the country; to assign priority to the development of science, technology and innovation; to entrench science, technology and innovation into the national production system and for connected purposes.¹³³ The Act acknowledges that reference to “innovation” under the Act includes ‘indigenous or traditional knowledge by community of beneficial properties of land, natural resources, including plant and animal resources and the environment’, where “traditional knowledge” means the wisdom developed over generations of holistic traditional scientific utilization of the lands, natural resources, and environment.¹³⁴

The Act establishes the National Commission for Science, Technology and Innovation (NACOSTI)¹³⁵ whose objective is to regulate and assure quality in the science, technology and innovation sector and advise the Government in matters related thereto.¹³⁶ The Government,

¹²⁸ Article 11(2), Constitution of Kenya, 2010.

¹²⁹ Environmental Management and Co-ordination Act, No. 8 of 1999, Laws of Kenya.

¹³⁰ Ibid, sec. 51(f).

¹³¹ Kimaro, Didas N., Alfred N. Gichu, Hezron Mogaka, Brian E. Isabirye, and Kifle Woldearegay. "Climate Change Mitigation and Adaptation in ECA/SADC/COMESA region: Opportunities and Challenges," 4.

¹³² Science, Technology and Innovation Act, No. 28 of 2013, Laws of Kenya.

¹³³ Ibid, Preamble.

¹³⁴ Ibid, sec. 2; see also Protection of Traditional Knowledge and Cultural Expressions Act, No. 33 of 2016, Laws of Kenya.

¹³⁵ Ibid, sec. 3.

¹³⁶ Ibid. sec. 4. The functions of the Commission as set out under section 6 thereof are to: develop, in consultation with stakeholders, the priorities in scientific, technological and innovation activities in Kenya in relation to the economic and social policies of the Government, and the country's international commitments; lead inter-agency efforts to implement sound policies and budgets, working in collaboration with the county governments, and organisations involved in science and technology and innovation within Kenya and outside Kenya; advise the national and county governments on the science, technology and innovation policy, including general planning and assessment of the necessary financial resources; liaise with the National Innovation Agency and the National Research Fund to ensure funding and implementation of prioritized research programmes; ensure co-ordination and co-operation between the various agencies involved in science, technology and innovation; accredit research institutes and approve all Scientific research in Kenya; assure relevance and quality of science, technology and innovation programmes in research institutes; advise on science education and innovation at both basic and advanced levels; in consultation with the National Research Fund Trustees, sponsor national scientific and academic conferences it considers appropriate; advise the Government on policies and any issue relating to scientific research systems; promote increased awareness, knowledge and information of research system; co-ordinate, monitor and evaluate, as appropriate, activities relating to scientific research and technology development; promote and encourage private sector involvement in scientific research and innovation and development; annually, review the progress in scientific research systems and submit a report of its findings and recommendations

through NACOSTI should work closely with all learning institutions as well as stakeholders in the informal sector to not only tap into the innovations but to also identify the challenges that are affecting the growth and development of this sector. Science and technological innovation should be encouraged through adequate funding as well as fiscal incentives and ensuring that there is a ready market for the same. If the Government can work with the locals, they will not only promote the development of science but will also create an opportunity to utilize the local innovations and ideas especially in environmental areas to combat climate change. NACOSTI should also closely work with the Kenya Institute for Public Policy Research and Analysis whose main functions include: identifying and undertaking independent and objective programmes of research and analysis, including macroeconomic, inter-disciplinary and sectoral studies on topics affecting public policy in areas such as human resource development, social welfare, environment and natural resources, agriculture and rural development, trade and industry, public finance, money and finance, macroeconomic and microeconomic modelling.¹³⁷ While coming up with approaches for reducing the country's climate risk and exposure to the main types of climate hazard, their design, implementation and management may and should indeed draw on local and traditional, as well as expert knowledge. Arguably, nature-based solutions – locally appropriate actions that address societal challenges, such as climate change, and provide human well-being and biodiversity benefits by protecting, sustainably managing and restoring natural or modified ecosystems – must become a priority when the government is coming up with solutions to the climate change challenges, with youth, women, indigenous peoples and local communities being key stakeholders.¹³⁸

It has rightly been pointed out that traditional knowledge is holistic in nature due to its multitude applications in diverse fields such as agriculture, climate, soils, hydrology, plants, animals, forests and human health.¹³⁹ The above listed recommendations by the OECD should provide cue when it comes to creating a conducive policy and legal environment for science and innovation.

7.6 Diversification of Economic Activities for Poverty Eradication and Climate Change Mitigation and Adaptation

The World Bank observed in December 2020 that, considering that “the pandemic and global recession may cause over 1.4% of the world's population to fall into extreme poverty, in order to reverse this serious setback to development progress and poverty reduction, countries will need to prepare for a different economy post-COVID, by allowing capital, labour, skills, and innovation to move into new businesses and sectors.”¹⁴⁰

to the Cabinet Secretary; promote the adoption and application of scientific and technological knowledge and information necessary in attaining national development goals; develop and enforce codes, guidelines and regulations in accordance with the policy determined under this Act for the governance, management and maintenance of standards and quality in research systems; and undertake, or cause to be undertaken, regular inspections, monitoring and evaluation of research institutions to ensure compliance with set standards and guidelines.

¹³⁷ Kenya Institute for Public Policy Research and Analysis Act, No. 15 of 2006, Laws of Kenya, sec. 6(b).

¹³⁸ UN Environment, ‘Adaptation Gap Report 2020’ (UNEP - UN Environment Programme, 9 January 2021) <<http://www.unenvironment.org/resources/adaptation-gap-report-2020>> accessed 20 January 2021.

¹³⁹ Rinku Singh and GS Singh, ‘Traditional Agriculture: A Climate-Smart Approach for Sustainable Food Production’ (2017) 2 Energy, Ecology and Environment 296.

¹⁴⁰ ‘COVID-19 to Add as Many as 150 Million Extreme Poor by 2021’ (World Bank) <<https://www.worldbank.org/en/news/press-release/2020/10/07/covid-19-to-add-as-many-as-150-million-extreme-poor-by-2021>> accessed 17 January 2021.

A chief scientist at the U.N. Food and Agriculture Organization (FAO) was recorded in 2020 affirming that farmers and poor urban residents have so far borne the brunt of the COVID-19 pandemic, meaning inequality between and within countries could deepen further in 2021.¹⁴¹ This was mainly attributed to the fact that cut off from markets and with a plunge in customer demand, farmers struggled to sell their produce while informal workers in urban areas, living hand to mouth, found themselves jobless as lockdowns were imposed.¹⁴² While the United Nations Sustainable Development Goals set to end hunger by 2030, the World Bank has observed that the COVID-19 pandemic is estimated to have pushed an additional 88 million to 115 million people into extreme poverty in the year 2020, with the total rising to as many as 150 million by 2021, depending on the severity of the economic contraction.¹⁴³

There is a need for countries, including Kenya, to create a conducive environment that will allow their citizens to invest and explore new and emerging sectors such as information technology, science and technology, among others. This should target both urban and rural dwellers. This is because the World Bank has estimated that with the effects of COVID-19 expected to continue, increasing numbers of urban dwellers are expected to fall into extreme poverty, which has traditionally affected people in rural areas.¹⁴⁴

7.7 Embracing Climate Resilient Agricultural Production Methods for Climate Change Mitigation and Poverty Reduction

It has rightly been pointed out that sustainable food production poses one of the major challenges of the twenty-first century in the era of global environmental problems such as climate change, increasing population and natural resource degradation including soil degradation and biodiversity loss, with climate change being among the greatest threats to agricultural systems.¹⁴⁵

The adverse effect of agriculture on the environment and climate change (contributors of global warming through a share of about 10–12% increase in total anthropogenic GHG emission) has largely been attributed to the Green Revolution which though multiplied agricultural production several folds jeopardized the ecological integrity of agro ecosystems by intensive use of fossil fuels, natural resources, agrochemicals and machinery and subsequently threatened the age-old traditional agricultural practices.¹⁴⁶

Arguably, achieving the goals of eradicating hunger and poverty by 2030 while addressing the climate change impacts need a climate-smart approach in agriculture, an approach based on the objectives of sustainably enhancing food production, climate adaptation and resilience and reduction in GHGs emission.¹⁴⁷

¹⁴¹ 'COVID-19 Caused Food Insecurity to Soar, But Climate Change Will Be Much Worse – Homeland Security Today' <<https://www.hstoday.us/subject-matter-areas/emergency-preparedness/covid-19-caused-food-insecurity-to-soar-but-climate-change-will-be-much-worse/>> accessed 17 January 2021.

¹⁴² Ibid .

¹⁴³ 'COVID-19 to Add as Many as 150 Million Extreme Poor by 2021' (World Bank) <<https://www.worldbank.org/en/news/press-release/2020/10/07/covid-19-to-add-as-many-as-150-million-extreme-poor-by-2021>> accessed 17 January 2021.

¹⁴⁴ Ibid.

¹⁴⁵ Rinku Singh and GS Singh, 'Traditional Agriculture: A Climate-Smart Approach for Sustainable Food Production' (2017) 2 *Energy, Ecology and Environment* 296.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

Arguably, the negative impacts of climate change on production, incomes and well-being can be avoided or ameliorated through adaptation, which includes changes in agricultural practices as well as broader measures such as improved weather and early warning systems and risk management approaches.¹⁴⁸ Climate smart agriculture is described as an approach that provides a conceptual basis for assessing the effectiveness of agricultural practice change to support food security under climate change, with particular attention to sustainable land management.¹⁴⁹

It has also been suggested that traditional practices like agro forestry, intercropping, crop rotation, cover cropping, traditional organic composting and integrated crop-animal farming all have potentials for enhancing crop productivity and mitigating climate change considering that indigenous farmers and local people perceive climate change in their own ways and prepare for it through various adaptation practices.¹⁵⁰ The Government and other stakeholders should work closely with farmers to identify and explore the available opportunities for farmers to engage in sustainable farming practices, informed by both science and indigenous knowledge.

8. Conclusion

It has been observed that responding to climate change, reducing rural poverty and achieving global food and nutrition security are three urgent and interlinked problems facing the global community today.¹⁵¹ **The biggest threat to the 2030 Agenda is climate change, where the Sustainable Development Goals, from poverty eradication and ending hunger to conserving biodiversity and peace, will be unattainable if climate change is not urgently addressed.**¹⁵² **Before the outbreak of Corona Virus pandemic, SDG Goal 13** aimed to mobilize US\$100 billion annually by 2020 to address the needs of developing countries to both adapt to climate change and invest in low-carbon development.¹⁵³ **However, as things stand currently, countries also have to contend with the Covid-19 pandemic, further complicating the situation.**

This paper has put across the argument is that for the country to combat climate change, there is a need for an integrated approach that meaningfully involves all the stakeholders. While it has been acknowledged that efforts to mitigate climate change require political action¹⁵⁴, Governments alone cannot possibly achieve this task. Climate change mitigation is an important step towards achieving sustainability in the country, without which the realisation of both the country's Vision 2030 and the United Nation's 2030 Agenda for Sustainable Development will remain a mirage. There is a need to adopt mitigation and adaptation approaches to address climate

¹⁴⁸ McCarthy, N., Brubaker, J. 2014, Climate-Smart Agriculture and resource tenure in Sub-Saharan Africa: a conceptual framework, Rome, FAO, 6.

¹⁴⁹ Ibid, 6.

¹⁵⁰ Rinku Singh and GS Singh, 'Traditional Agriculture: A Climate-Smart Approach for Sustainable Food Production' (2017) 2 Energy, Ecology and Environment 296.

¹⁵¹ McCarthy, N., Brubaker, J. 2014, Climate-Smart Agriculture and resource tenure in Sub-Saharan Africa: a conceptual framework, Rome, FAO, 6

<https://www.researchgate.net/publication/279912013_Climate_Smart_Agriculture_and_Resource_Tenure_in_sub-Saharan_Africa_A_Conceptual_Framework> accessed 17 January 2021.

¹⁵² 'Aligning SDG and Climate Action' (Sustainable Goals, 18 June 2019) <<https://www.sustainablegoals.org.uk/aligning-sdg-and-climate-action/>> accessed 21 January 2021.

¹⁵³ 'Goal 13: Climate Action' (UNDP) <<https://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-13-climate-action.html>> accessed 21 January 2021.

¹⁵⁴ '15.5: Anthropogenic Causes of Climate Change' (Geosciences LibreTexts, 4 November 2019) <[https://geo.libretexts.org/Bookshelves/Geology/Book%3A_An_Introduction_to_Geology_\(Johnson_Affolter_Inkenbrandt_and_Mosher\)/15%3A_Global_Climate_Change/15.05%3A_Anthropogenic_Causes_of_Climate_Change](https://geo.libretexts.org/Bookshelves/Geology/Book%3A_An_Introduction_to_Geology_(Johnson_Affolter_Inkenbrandt_and_Mosher)/15%3A_Global_Climate_Change/15.05%3A_Anthropogenic_Causes_of_Climate_Change)> accessed 17 January 2021.

Combating Climate Change in Kenya for Sustainable Development

change. While mitigation and adaptation policies have different goals and opportunities for implementation, many drivers of mitigation and adaptation are common, and solutions can be interrelated.¹⁵⁵

According to the **IPCC Fifth Assessment Report**:¹⁵⁶

“[T]he more human activities disrupt the climate, the greater the risks of severe, pervasive and irreversible impacts for people and ecosystems... [W]e have the means to limit climate change and its risks, with many solutions that allow for continued economic and human development. However, stabilizing temperature increase to below 2°C relative to pre-industrial levels will require an urgent and fundamental departure from business as usual.”

Combating climate for Sustainable Development in Kenya is indeed a goal that is achievable.

¹⁵⁵Grafakos, S., Pacteau, C., Delgado, M., Landauer, M., Lucon, O., and Driscoll, P. (2018). Integrating mitigation and adaptation: Opportunities and challenges. In Rosenzweig, C., W. Solecki, P. Romero-Lankao, S. Mehrotra, S. Dhakal, and S. Ali Ibrahim (eds.), *Climate Change and Cities: Second Assessment Report of the Urban Climate Change Research Network*. Cambridge University Press. New York. 101–138, 102 <https://uccrn.ei.columbia.edu/sites/default/files/content/pubs/ARC3.2-PDF-Chapter-4-Mitigation-and-Adaptation-wecompress.com_.pdf> accessed 17 January 2021.

¹⁵⁶ ‘The Intergovernmental Panel on Climate Change’ (MIT Climate Portal) <<https://climate.mit.edu/explainers/intergovernmental-panel-climate-change>> accessed 21 January 2021.

Promoting Peaceful and Inclusive Societies for Sustainable Development in Kenya

Abstract

Peace is considered an important element of sustainable development and has even been given attention under the 2030 Agenda on Sustainable Development Goals. Kenya seeks to become a middle-income country by 2030 and this, arguably, cannot be achieved if the factors that threaten the peaceful coexistence of all communities are not adequately addressed. This paper, largely informed by the Sustainable Development Goal 16, focuses on Kenya and offers some recommendations on how the country can successfully move towards the realization of peaceful and inclusive societies.

1. Introduction

Sustainable Development Goal (SDG) 16 requires all countries to ‘promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels’.¹

The UN explains: “Goal 16 of the Sustainable Development Goals is dedicated to the promotion of peaceful and inclusive societies for sustainable development, the provision of access to justice for all, and building effective, accountable institutions at all levels. This aims to promote peaceful societies at national levels, as well as the role of cooperation at the international level”.² This is also captured in the *Addis Ababa Action Agenda*³ which commits to promote peaceful and inclusive societies and to build effective, accountable and inclusive institutions at all levels to enable the effective, efficient and transparent mobilization and use of resources.⁴

It has rightly been pointed out that we cannot hope for sustainable development without peace, stability, human rights and effective governance, based on the rule of law.⁵

2. Peace: meaning and Scope

While it is difficult to define the term ‘peace’ using particular words or phrases, many societies often link it to harmony, tranquillity, cooperation, alliance, well-being, and agreement.⁶ It is

¹ SDG 16, UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1.

² ‘Goal 16: Peace, Justice and Strong Institutions - SDG Tracker’ (Our World in Data) <<https://sdg-tracker.org/peace-justice>> accessed 26 November 2020

³ United Nations, Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda), adopted at the Third International Conference on Financing for Development (Addis Ababa, Ethiopia, 13–16 July 2015) and endorsed by the General Assembly in its resolution 69/313 of 27 July 2015.

⁴ United Nations Inter-Agency Task Force on Financing for Development, ‘Promoting peaceful and inclusive societies’ <<https://developmentfinance.un.org/promoting-peaceful-and-inclusive-societies>> accessed 26 November 2020.

⁵ ‘Goal 16: Peace, Justice and Strong Institutions | UNDP’ <<https://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-16-peace-justice-and-strong-institutions.html>> accessed 26 November 2020.

⁶ Spring Ú.O. (2008) Peace and Environment: Towards a Sustainable Peace as Seen From the South. In: Brauch H.G. et al. (eds) Globalization and Environmental Challenges. Hexagon Series on Human and

however worth pointing out that ‘peace is not just the absence of violence, it is much more.’⁷ Thus, every culture may have a unique but related understanding of what peace entails. Besides, peace may be classified into positive peace or negative peace, where negative peace is defined as the absence of violence or the fear of violence while positive peace is the attitudes, institutions and structures, that when strengthened, lead to peaceful societies.⁸

In this respect, positive peace is often seen as a true, lasting, and sustainable peace built on justice for all peoples, a concept that may have informed the drafting of SDG 16. The concept of positive peace is frequently associated with the elimination of the root causes of war, violence, and injustice and the conscious attempt to build a society that reflects these commitments. Positive peace assumes an interconnectedness of all life.⁹ On the other hand, in a negative peace situation, while there may not be witnessed conflict out in the open, the tension is usually boiling just beneath the surface because the conflict was never reconciled and thus negative peace seeks to address immediate symptoms, the conditions of war, and the use and effects of force and weapons.¹⁰ In Kenya, both situations may be existing in different parts of the country, depending on the political and socio-economic conditions of the group of people in question.

This is because conflict is grounded in social, structural, cultural, political and economic factors since depreciation in one increases the chances of conflict in a particular society.¹¹ This paper mainly focuses on the ways through which Kenya can promote peacebuilding measures that will ensure the realization of the dream of a peaceful and inclusive society. Peacebuilding approaches and methods are geared towards ensuring people are safe from harm, have access to law and justice, are included in the political decisions that affect them, have access to better economic opportunities, and enjoy better livelihoods.¹²

3. Peace efforts in Kenya: Challenges and Prospects

The Government of Kenya has undertaken various measures to foster national unity and patriotism. For instance, it adopted Sessional Paper No. 9 of 2013 on National Cohesion and

Environmental Security and Peace, vol 3. Springer, Berlin, Heidelberg, 113-126<https://link.springer.com/chapter/10.1007/978-3-540-75977-5_5> accessed 26 November 2020.

⁷ Galtung, J., "Violence, peace, and peace research," *Journal of peace research*, Vol. 6, no. 3 (1969): 167-191.

⁸ Herath, O., "A critical analysis of Positive and Negative Peace," (2016), p.106. Available at <http://repository.kln.ac.lk/bitstream/handle/123456789/12056/journal1%20%281%29.104-107.pdf?sequence=1&isAllowed=y> accessed 26 November 2020.

⁹ Herath, O., "A critical analysis of Positive and Negative Peace," (2016), p.106.

¹⁰ *Ibid*, pp.106-107.

¹¹ Maiese, M., ‘Social Structural Change,’ in G. Burgess & H. Burgess (eds), *Beyond Intractability*, (Conflict Information Consortium, University of Colorado, Boulder, July 2003), available at <http://www.beyondintractability.org/essay/social-structural-changes> accessed 26 November 2020; See also Maiese, M., ‘Causes of Disputes and Conflicts,’ in G. Burgess & H. Burgess (eds), *Beyond Intractability*, (Conflict Information Consortium, University of Colorado, Boulder, October, 2003), available at <http://www.beyondintractability.org/essay/underlying-causes> accessed 26 November 2020.

¹² The Institute for Economics and Peace (IEP), ‘Pillars of Peace - Understanding the Key Attitudes and Institutions That Underpin Peaceful Societies - International Security Sector Advisory Team (ISSAT)’, p. 2 <<https://issat.dcaf.ch/ser/Learn/Resource-Library/Policy-and-Research-Papers/Pillars-of-Peace-Understanding-the-key-attitudes-and-institutions-that-underpin-peaceful-societies>> accessed 26 November 2020.

Integration (NCI), Sessional Paper No. 3 of 2014 on National Policy and Action Plan on Human Rights and the Sessional Paper No. 5 of 2014 on Peacebuilding and Conflict Management.¹³ These efforts have been informed by the fact that Kenya has grappled with historical land injustices that not only violate a raft of economic, social and cultural rights but also posed a threat to national unity due to marginalisation and dispossession of community land.¹⁴ Despite these efforts, Kenya is far from boasting of a peaceful and inclusive society as it still experiences widespread poverty, huge gaps between the rich and the poor and conflicts among and between communities. Indeed, this state of affairs may have informed the National ‘Building Bridges Initiative’¹⁵ which has been pushed by the Jubilee Government and its allies and hailed as capable of promoting peace, security and unity in Kenya. The resultant report is still undergoing political deliberations.

The bottom line is that Kenya is still experiencing social, economic and political injustices which in turn lead to conflicts and marginalization of various communities and groups of people. This is despite the constitutional and statutory provisions which seek to promote equality, peace and inclusive development in the country.

4. Promoting Sustainable Peace and Inclusive Societies for Sustainable Development in Kenya

Kenya has been making efforts geared towards peacebuilding as opposed to peacemaking only.¹⁶ Peacebuilding efforts aim at addressing the reasons that lead to fights and/or conflicts and seek to support societies to manage their differences and conflicts without resorting to violence.¹⁷ It, therefore, involves a broad range of measures, either focusing on before, during and/or after conflict. These are meant to prevent the outbreak, escalation, continuation and recurrence of

¹³ Realisation of the National Values and Principles of Governance and Fulfilment of Kenya’s International Obligations for the Period 2013-2017: Jubilee Government Score Card (Kenya National Commission on Human Rights 2017), 10

<<https://www.knchr.org/Portals/0/GeneralReports/Jubilee%20Government%20Scorecard.pdf?ver=2018-06-06-193327-647>> accessed 26 November 2020.

¹⁴ Realisation of the National Values and Principles of Governance and Fulfilment of Kenya’s International Obligations for the Period 2013-2017: Jubilee Government Score Card (Kenya National Commission on Human Rights 2017), 11.

¹⁵ Republic of Kenya, ‘Report of the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report,’ Building Bridges to a United Kenya: from a nation of blood ties to a nation of ideals, October, 2020< https://e4abc214-6079-4128-bc62-d6e0d196f772.filesusr.com/ugd/00daf8_bedbb584077f4a9586a25c60e4ebd68a.pdf > accessed 26 November 2020.

¹⁶ ‘Sustainable Peacebuilding Strategies : Peacebuilding Operations in Nakuru County, Kenya : Contribution to the Catholic Justice and Peace Commission (CJPC)

’ <<https://repository.globethics.net/handle/20.500.12424/3863583>> accessed 26 November 2020; ‘Peacebuilding Networks and Alliances in Kenya: A Retrospective Look at Collective Peacebuilding Effectiveness - Kenya’ (ReliefWeb) <<https://reliefweb.int/report/kenya/peacebuilding-networks-and-alliances-kenya-retrospective-look-collective-peacebuilding>> accessed 26 November 2020; Rono EC, ‘The Role of Women in Post Violence Peace Building in Kenya: A Case Study of Nakuru County in 2007-2008 Post Election Violence’ (PhD Thesis, University of Nairobi 2013); Mutahi P and Ruteere M, ‘Violence, Security and the Policing of Kenya’s 2017 Elections’ (2019) 13 Journal of Eastern African Studies 253.

¹⁷ Muigua, K., Nurturing Our Environment for Sustainable Development, Glenwood Publishers, Nairobi – (2016),

conflict.¹⁸ These efforts can also be geared towards either ‘positive’ or ‘negative’ peace.¹⁹ This section offers some diverse recommendations that, if explored, may assist the country in moving closer to achieving sustainable peace and building an inclusive society as part of efforts geared towards realizing the sustainable development agenda in Kenya.

5. Securing Sustainable Community Livelihoods for Peace: Sustainable Development Planning and Capacity Development

It has been suggested that food security and a healthy agricultural sector can play a critical role in preventing conflict and distress migration, and in building peace. This is because, in many countries, disasters or political instability have resulted in protracted crises and food shortages.²⁰ Also, rural populations continue to be the most affected in conflicts; attacks on farming communities undermine livelihoods and may result in forced migration. As such, any peacebuilding efforts should include ensuring food security as part of addressing the root causes of conflict since peace and food security are often mutually reinforcing.²¹ Economically and socially empowered people are likely to participate more in governance matters and less likely to be influenced politically as they may not follow their political leaders blindly.²² This is because politicians often exploit the people’s social vulnerability, marginalization and poverty to cause conflicts and divisions for their selfish interests.²³

5.1 Addressing Gender Equality and Equity for Sustainable Peace and Inclusive Society

Notably, inequalities in wealth and income lead to a cascade of consequential social inequalities in a range of areas such as housing, work, energy, connectivity, health care, education, and related social benefits.²⁴ It has been acknowledged that where conflict strikes, men are more likely to die on battlefields, but a disproportionate share of women will be targeted for sexual violence, among

¹⁸ International Alert, “What is Peace Building?” Available at [https://www.international-alert.org/what-we-](https://www.international-alert.org/what-we-do/what-is-peacebuilding)

[do/what-is-peacebuilding](https://www.international-alert.org/what-we-do/what-is-peacebuilding) accessed 26 November 2020.

¹⁹ Ibid.

²⁰ ‘SDG 16. Peace, Justice and Strong Institution | Sustainable Development Goals | Food and Agriculture Organization of the United Nations’ <<http://www.fao.org/sustainable-development-goals/goals/goal-16/en/>> accessed 26 November 2020.

²¹ Ibid.

²² ‘Promoting Empowerment of People in Achieving Poverty Eradication, Social Integration and Full Employment and Decent Work for All’: <<https://digitallibrary.un.org/record/777727?ln=en>> accessed 26 November 2020; ‘Political Empowerment’ (GSDRC) <<https://gsdrc.org/topic-guides/voice-empowerment-and-accountability/supplements/political-empowerment/>> accessed 26 November 2020; ‘Social and Economic Empowerment’ (GSDRC) <<https://gsdrc.org/topic-guides/voice-empowerment-and-accountability/supplements/social-and-economic-empowerment/>> accessed 26 November 2020.

²³ ‘Exclusion as a Cause and Consequence of Violent Conflict’ (GSDRC) <<https://gsdrc.org/topic-guides/social-exclusion/dynamics/exclusion-as-a-cause-and-consequence-of-violent-conflict/>> accessed 26 November 2020; Nantulya, Paul. "Exclusion, Identity and Armed Conflict: A historical survey of the politics of confrontation in Uganda with Specific Reference to the Independence Era." In *Politics of Identity and Exclusion in Africa: From Violent Confrontation to Peaceful Cooperation*, conference proceedings, Senate Hall, University of Pretoria, pp. 81-92. 2001; Nduku E, *Corruption in Africa: A Threat to Justice and Sustainable Peace* (Globethics net 2015).

²⁴ ‘Expert Group Meeting on “Tackling Global Challenges to Equality and Inclusion through the Gender-Responsive Implementation of the 2030 Agenda for Sustainable Development: Spotlight on SDGs 10, 13 and 16”: Report and Recommendations | UN Women – Headquarters’, 7 <<https://www.unwomen.org/en/digital-library/publications/2019/06/egm-tackling-global-challenges-to-equality-and-inclusion>> accessed 26 November 2020.

other violations, and homicide rates among women typically rise.²⁵ It has also been documented that more broadly, whether in global, regional or national governance, women tend to be underrepresented in the governance of institutions. This is discriminatory, but it also entrenches gender disparities, during times of war and peace, as women's voices go unheard in decision-making.²⁶

Some of the recommendations from the United Nations work on gender equality and equity focus on strengthening good governance, inclusive rule of law, and access to justice; removing structural barriers to women's participation in decision-making and promoting inclusive and sustainable economic growth and social development that achieves gender equality and empowers all women and girls; investing in national statistical capacities to promote evidence-based policy-making, planning, and budgeting, and ensure better monitoring of progress and accountability for results; and increasing financing for the gender-responsive implementation of the 2030 Agenda through domestic resource mobilization policies and global action to address the systemic imbalances in domestic and international tax, trade, and investment arrangements.²⁷

It has been asserted that realizing SDG 16 on peaceful, just, and inclusive societies requires a power shift that re-centres work on equality, development and peace around the voices, human security and rights of women and those most marginalized. This requires not just technical fixes, but the structural transformation that moves from institutionalizing a form of governance that enables domination and violence to institutionalize a form of governance that enables equality and peace for people and planet (emphasis added).²⁸

In some countries such as Colombia, women have been at the forefront of peacebuilding efforts.²⁹ There is thus a need to promote gender equality and equity as a way of promoting peaceful and inclusive societies for sustainable development. The human rights of both men and women and indeed all groups in society should be respected, protected and implemented for the realization of just, inclusive and peaceful societies. The UN Conference on Environment and Development, Agenda 21³⁰ under section 23 calls for full public participation by all social groups, including

²⁵ 'Sustainable Development Goal 16: Peace, Justice and Strong Institutions' (UN Women | Europe and Central Asia)

<<https://eca.unwomen.org/en/news/in-focus/women-and-the-sdgs/sdg-16-peace-justice-strong-institutions>> accessed 26 November 2020.

²⁶ Ibid.

²⁷ 'Expert Group Meeting on "Tackling Global Challenges to Equality and Inclusion through the Gender-Responsive Implementation of the 2030 Agenda for Sustainable Development: Spotlight on SDGs 10, 13 and 16": Report and Recommendations | UN Women – Headquarters', 7 <<https://www.unwomen.org/en/digital-library/publications/2019/06/egm-tackling-global-challenges-to-equality-and-inclusion>> accessed 26 November 2020.

²⁸ By Abigail Ruane, Women's International League for Peace and Freedom (WILPF) (as quoted in 'SDG 16 – Governing for Gender Equality and Peace? Or Perpetual Violence and Conflict?' <<https://www.2030spotlight.org/en/book/1883/chapter/sdg-16-governing-gender-equality-and-peace-or-perpetual-violence-and-conflict>> accessed 26 November 2020).

²⁹ Newsroom, 'Women the "Driving Force" for Peacebuilding in Colombia' (Modern Diplomacy, 31 October 2020) <<https://moderndiplomacy.eu/2020/10/31/women-the-driving-force-for-peacebuilding-in-colombia/>> accessed 26 November 2020.

³⁰ United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992.

women, youth, indigenous people and local communities in policy-making and decision-making.³¹

5.2 Streamlining Environmental and Natural Resources Governance and Climate Change Mitigation

The 2030 SDGs Agenda acknowledges that while the causes of conflict vary widely, the effects of climate change only aggravate them.³² Climate-related events such as drought threaten food and water supplies, increase competition for these and other natural resources and create civil unrest, potentially adding fuel to the already-disastrous consequences of conflict.³³ Thus, investing in good governance, improving the living conditions of people, reducing inequality and strengthening the capacities of communities can help build resilience to the threat of conflict and maintain peace in the event of a violent shock or long-term stressor.³⁴

Article 69(1) of the Constitution of Kenya outlines the obligations of State in respect of the environment as follows: The State should: ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya; protect and enhance the intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities; encourage public participation in the management, protection and conservation of the environment; protect genetic resources and biological diversity; establish systems of environmental impact assessment, environmental audit and monitoring of the environment; eliminate processes and activities that are likely to endanger the environment, and utilise the environment and natural resources for the benefit of the people of Kenya. Besides, every person must cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.³⁵

The Government should work closely with all the relevant stakeholders to meet these obligations as a way of ensuring that communities benefit from such resources for empowerment as this will go a long way in promoting peaceful and inclusive societies for sustainable development. This is due to the likely effect of reduced poverty levels.

5.3 Building Accountable and Inclusive Institutions for Peaceful and Inclusive Society

Putting in place accountable and inclusive institutions governed by the rule of law may promote and ensure participatory decision-making and responsive public policies that leave no one behind, ensuring citizens have unfettered justice and rule of law, without which there can be no sustainable development.³⁶

³¹ See also Article 10, Constitution of Kenya 2010 on national values and principles of governance.

³² SDG Goal 13.

³³ Muigua, K., Securing Our Destiny Through Effective Management of the Environment, *Journal of Conflict Management and Sustainable Development*, Volume 4, No 3, (May, 2020).

³⁴ United Nations, *The Sustainable Development Goals Report, 2018*, p.15. Available at <https://unstats.un.org/sdgs/files/report/2018/TheSustainableDevelopmentGoalsReport2018-EN.pdf> [Accessed on 22/01/2020]; Muigua, K., Securing Our Destiny Through Effective Management of the Environment, *Journal of Conflict Management and Sustainable Development*, Volume 4, No 3, (May, 2020).

³⁵ Article 69(2), Constitution of Kenya, 2010.

³⁶ 'SDG 16 as an Accelerator for the 2030 Agenda' (UNDP)

The law can be useful in contributing to the change in institutional norms as well as shaping the changes in attitudes and behaviour.³⁷ The rule of law provides a viable framework for the peaceful management of conflicts due to its defining features: establishing the operating rules of society and therefore providing reliability, justice and stability in the society; norms defining appropriate societal behaviour; institutions able to resolve conflicts, enforce laws, and regulate the political and judicial system; laws and mechanisms protecting citizens' rights.³⁸

The role of law and the above features are exemplified in the Constitution which provides that 'the national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets this Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.³⁹ The national values and principles of governance include- patriotism, 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.⁴⁰ All these values and principles are not only meant to promote good governance but also build a peaceful and inclusive society for the people of Kenya. There is a need for active promotion and implementation of these national values and principles of governance as part of the peacebuilding efforts in Kenya. Ensuring that all governance institutions abide by these values and principles will also strengthen these institutions and ensure that they discharge their constitutional and statutory mandates effectively for the eventual realization of the sustainable development agenda in Kenya.

6. Conclusion

Some commentators have asserted that achieving SDG 16 — and the SDGs in general — requires partnerships, integrated solutions, and for countries and member states to take charge and lead in reshaping the institutional and social landscape, preparing grounds for important reforms that help build sustainable peace.⁴¹ This is because it is crucial to have an inclusive and participatory approach to development to counteract the potentially destabilizing impact of marginalization and exclusion.⁴²

<<https://www.undp.org/content/undp/en/home/blog/2019/sdg-16-as-an-accelerator-for-the-2030-agenda.html>> accessed 26 November 2020.

³⁷ Muigua, K., *Securing Our Destiny Through Effective Management of the Environment*, Journal of Conflict Management and Sustainable Development, Volume 4, No 3, (May, 2020).

³⁸ Peace Building Initiative, "Introduction: Justice, Rule of Law & Peacebuilding Processes, 2009" <<http://www.peacebuildinginitiative.org/indexe33f.html?pageId=1844>> accessed 26 November 2020.

³⁹ Article 10(1), Constitution of Kenya 2010.

⁴⁰ Article 10(2), Constitution of Kenya 2010.

⁴¹ 'SDG 16 as an Accelerator for the 2030 Agenda' (UNDP)

<<https://www.undp.org/content/undp/en/home/blog/2019/sdg-16-as-an-accelerator-for-the-2030-agenda.html>> accessed 26 November 2020.

⁴² 'SDG 16 as an Accelerator for the 2030 Agenda' (UNDP)

<<https://www.undp.org/content/undp/en/home/blog/2019/sdg-16-as-an-accelerator-for-the-2030-agenda.html>> accessed 26 November 2020.

Promoting Peaceful and Inclusive Societies for Sustainable Development in Kenya

Peaceful societies have enjoyed better business environments, higher per capita income, higher educational attainment and stronger social cohesion.⁴³ Better community relationships tend to encourage greater levels of peace, by discouraging the formation of tensions and reducing chances of tensions devolving into conflict.⁴⁴

Peacebuilding is done collaboratively, at local, national, regional and international levels. Individuals, communities, civil society organisations, governments, regional bodies and the private sector all play a role in building peace. Peacebuilding is also a long-term process, as it involves changes in attitudes and behaviour and institutional norms.⁴⁵

Kenya cannot achieve peaceful and inclusive societies through investing in security alone; it must address the various underlying factors such as poverty, marginalization, environmental degradation and corruption, among others. In the absence of measures to deal with these, peace will only be short-lived or even impossible to achieve. Peace is the outcome of concerted efforts geared towards building self-sustaining societies where all people can meet their socio-economic needs. Promoting peaceful and inclusive societies for sustainable development in Kenya is a goal that is clearly attainable, in the fullness of time.

⁴³ The Institute for Economics and Peace (IEP), 'Pillars of Peace - Understanding the Key Attitudes and Institutions That Underpin Peaceful Societies - International Security Sector Advisory Team (ISSAT)', p. 2 <<https://issat.dcaf.ch/ser/Learn/Resource-Library/Policy-and-Research-Papers/Pillars-of-Peace-Understanding-the-key-attitudes-and-institutions-that-underpin-peaceful-societies>> accessed 26 November 2020.

⁴⁴The Institute for Economics and Peace (IEP), 'Pillars of Peace - Understanding the Key Attitudes and Institutions That Underpin Peaceful Societies - International Security Sector Advisory Team (ISSAT)', p. 6.

⁴⁵ International Alert, "What is Peace Building?" <<https://www.international-alert.org/what-we-do/what-is-peacebuilding>> Accessed 26 November 2020.

Fulfilling the Right to Water as a Socio-economic Right for the People of Kenya

Abstract

Water is considered to be a basic human right both under international and national laws. In fact, the right to water is considered as part of the socioeconomic rights. As such, all states the world over are expected to work towards ensuring that their citizens have access to clean and adequate amounts of water. However, for most states, including Kenya, this remains a challenge. This is attributable to climatic, political, economic and social reasons. This paper critically discusses these challenges that have hindered the realization of this right in Kenya and offers some recommendations on how the same can be overcome as part of realization of the constitutionally guaranteed socioeconomic rights in Kenya.

1. Introduction

Water is a basic human right which is recognized as such both under international and national laws.¹ It is one of the socioeconomic rights recognized under Article 43(1) of the Constitution of Kenya 2010.² The international legal instruments especially those on human rights obligate all states the world over to work towards ensuring that their citizens have access to clean and adequate amounts of water.³ However, for most States, including Kenya, this remains a challenge mostly attributable to climatic, political, economic and social reasons.⁴ Indeed, it has been argued that water is a key medium through which climate change impacts on human populations, society and ecosystems, particularly due to predicted changes in its quality and quantity.⁵ Water is also considered to be at the core of sustainable development agenda and is critical for socio-economic development, energy and food production, healthy ecosystems and for human survival itself.⁶ It is also said to be at the heart of adaptation to climate change, serving as the crucial link

¹ McGraw, George S. "Defining and defending the right to water and its minimum core: legal construction and the role of national jurisprudence." *Loy. U. Chi. Int'l L. Rev.* 8 (2010): 127.

² 43. Economic and social rights

(1) Every person has the right--

(a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;

(b) to accessible and adequate housing, and to reasonable standards of sanitation;

(c) to be free from hunger, and to have adequate food of acceptable quality;

(d) to clean and safe water in adequate quantities;

(e) to social security; and

(f) to education.

³ Kiefer, Th, I. Winkler, and S. Cacciaguidi-Fahy, "Legal Resources for the Right to Water and Sanitation. International and National Standards." *International and National Standards – 2nd Edition* (2008).

⁴ "There Is No Time Left." Human Rights Watch, 2 Jan. 2019, www.hrw.org/report/2015/10/15/there-no-time-left/climate-change-environmental-threats-and-human-rights-turkana; Albuquerque, Catarina de, "Climate Change and the Human Rights to Water and Sanitation." (2010)

<https://www2.ohchr.org/english/issues/water/iexpert/docs/ClimateChange_HRtWS.pdf> Accessed 27 October 2020; S Dos Santos and others, 'Urban Growth and Water Access in Sub-Saharan Africa: Progress, Challenges, and Emerging Research Directions' (2017) 607–608 *Science of The Total Environment* 497.

⁵ Albuquerque, Catarina de, "Climate Change and the Human Rights to Water and Sanitation." (2010) <https://www2.ohchr.org/english/issues/water/iexpert/docs/ClimateChange_HRtWS.pdf> Accessed 27 October 2020.

⁶ 'Water' (21 December 2015) <<https://www.un.org/en/sections/issues-depth/water/>> accessed 28 October 2020.

between society and the environment.⁷ Despite this important role of water, it is estimated that as at 2020, 2.2 billion people currently do not have access to safely managed drinking water, and 4.2 billion, or 55% of the world's population, are without safely managed sanitation.⁸ Recent studies have shown that the Corona Virus (Covid-19) global pandemic has not only made things worse as far as access to safe drinking water is concerned but has in fact served to expose how dire the situation is and how there are many people from the poor sections of the society who have no access to clean and safe drinking water.⁹ The World Health Organization has already affirmed that the provision of safe water, sanitation and hygienic conditions is essential for protecting human health during all infectious disease outbreaks, including of Corona Virus Disease 2019 (COVID-19).¹⁰

This paper critically discusses these challenges that have hindered the realization of this right in Kenya and offers some recommendations on how the same can be overcome as part of realization of the constitutionally guaranteed socioeconomic rights in Kenya.

2. Right to Water as a Socioeconomic Right: International legal framework

It has been observed that international recognition of socio-economic rights dates from the early-20th century, and after the World War II, international treaties and conventions increasingly began to incorporate socio-economic rights, including, the Universal Declaration of Human Rights, 1948, the International Covenant on Economic, Social and Cultural Rights, 1966, International Convention on the Elimination of All Forms of Racial Discrimination, 1965 and the Convention on the Rights of the Child (1989), among others.¹¹

Economic, social, and cultural rights are defined to include the human right to work, the right to an adequate standard of living, including food, clothing, and housing, the right to physical and mental health, the right to social security, the right to a healthy environment, and the right to education.¹²

⁷ Ibid.

⁸ UN-Water, 'UN World Water Development Report 2020 "Water and Climate Change"' (UN-Water, 21 March 2020) <<https://www.unwater.org/world-water-development-report-2020-water-and-climate-change/>> accessed 28 October 2020.

⁹ Alan Nicol, 'The Pandemic Is Laying Bare a Global Water Crisis' (Foreign Policy) <<https://foreignpolicy.com/2020/05/12/coronavirus-pandemic-global-water-crisis/>> accessed 28 October 2020; The Lancet Global Health, 'Water and Sanitation in a Post-COVID World' (2020) 8 The Lancet Global Health e1101; Ling San Lau and others, 'COVID-19 in Humanitarian Settings and Lessons Learned from Past Epidemics' (2020) 26 Nature Medicine 647; World Health Organization. Water, sanitation, hygiene, and waste management for the COVID-19 virus: interim guidance, 23 April 2020. No. WHO/2019-nCoV/IPC_WASH/2020.3. World Health Organization, 2020.

¹⁰ World Health Organization. Water, sanitation, hygiene, and waste management for the COVID-19 virus: interim guidance, 23 April 2020. No. WHO/2019-nCoV/IPC_WASH/2020.3. World Health Organization, 2020.

¹¹ Dawood Ahmed and Elliot Bulmer, 'Social and Economic Rights,' International IDEA Constitution-Building Primer 9, International Institute for Democracy and Electoral Assistance (International IDEA), Second edition, 2017. <<https://www.idea.int/sites/default/files/publications/social-and-economic-rights-primer.pdf>> accessed 20 October, 2020.

¹² 'What Are Economic, Social and Cultural Rights?' (CESR, 3 December 2008) <<https://www.cesr.org/what-are-economic-social-and-cultural-rights>> accessed 29 October 2020.

Fulfilling the Right to Water as a Socio-economic Right for the People of Kenya

While water is not explicitly mentioned as a human right under the 1948 Universal Declaration of Human Rights, the 1966 International Covenant on Economic, Social and Cultural Rights, and the 1966 International Covenant on Civil and Political Rights, it was, however, implied through other human rights, such as the right to life, right to an adequate standard of living, and the right to health.¹³ The realization of these rights is highly dependent on access to safe and adequate water.¹⁴

The first efforts to officially recognize water as a human right were crystallized under the *Dublin Statement on Water and Sustainable Development*¹⁵ which came as a result of the International Conference on Water and the Environment (ICWE) in Dublin, Ireland, on 26 to 31 January 1992. The Statement acknowledges that ‘scarcity and misuse of fresh water pose a serious and growing threat to sustainable development and protection of the environment. Human health and welfare, food security, industrial development and the ecosystems on which they depend, are all at risk, unless water and land resources are managed more effectively in the present decade and beyond than they have been in the past.’¹⁶ The Conference participants called for “fundamental new approaches to the assessment, development and management of freshwater resources, which can only be brought about through political commitment and involvement from the highest levels of government to the smallest communities.” They also observed that commitment will need to be backed by substantial and immediate investments, public awareness campaigns, legislative and institutional changes, technology development, and capacity building programmes as well as a greater recognition of the interdependence of all peoples, and of their place in the natural world.¹⁷ The *Dublin Statement* thus called for concerted action to reverse the present trends of overconsumption, pollution, and rising threats from drought and floods.¹⁸

In 2002, the United Nations officially adopted water as a human right through the *General Comment 15*, of the International Covenant on Economic, Social and Cultural Rights which states as follows: “The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.”¹⁹ *General Comment 15* was meant to interpret the 1966 Convention on Economic, Social and Cultural Rights confirming the right to water in international law.²⁰

¹³ ‘Human Rights’ (Safe Drinking Water Foundation) <<https://www.safewater.org/fact-sheets-1/2017/1/23/human-rights>> accessed 28 October 2020.

¹⁴ United Nations, CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), Adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000 (Contained in Document E/C.12/2000/4); Centre on Housing Rights and Evictions and others (eds), *Manual on the Right to Water and Sanitation: A Tool to Assist Policy Makers and Practitioners Develop Strategies for Implementing the Human Right to Water and Sanitation* (Centre on Housing Rights and Evictions 2007);

¹⁵ ‘The Dublin Statement on Water and Sustainable Development’ (1992) 10 *Waterlines* 4.

¹⁶ *Ibid*, Introduction.

¹⁷ *Dublin Statement on Water and Sustainable Development’* (1992), Introduction.

¹⁸ *Ibid*.

¹⁹ ‘Human Rights’ (Safe Drinking Water Foundation) <<https://www.safewater.org/fact-sheets-1/2017/1/23/human-rights>> accessed 28 October 2020.

²⁰ General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), Adopted at the Twenty-ninth Session of the Committee on Economic, Social and Cultural Rights, on 20 January 2003 (Contained in Document E/C.12/2002/11)

On 28 July 2010, through *Resolution 64/292*²¹, the United Nations General Assembly recognized the human right to clean drinking water and as essential to the realization of all human rights.²² The right to water is thus now internationally considered to be a human right with obligations to States to ensure that their subjects have access to clean and safe drinking water and sanitation.²³ The prominence of this right to water received a boosting under Goal 6 of the United Nations *2030 Agenda for Sustainable Development Goals*²⁴ which is dedicated to ensuring availability and sustainable management of water and sanitation for all. It requires all States to ensure that by 2030, they achieve universal and equitable access to safe and affordable drinking water for all.²⁵

3. National Legal and Institutional Framework on Access to Water

The Constitution of Kenya 2010 guarantees under Article 43 the right of every person to access clean and safe water in adequate amounts.²⁶ The Water Act 2016²⁷ 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.²⁸ Section 63 thereof also provides that every person in Kenya has the right to clean and safe water in adequate quantities and to reasonable standards of sanitation as stipulated in Article 43 of the Constitution. Section 37(1) provides that a permit is not required- for the abstraction or use of water, without the employment of works, from any water resource for domestic purposes by any person having lawful access to the water resource; for the abstraction of water in a spring which is situated wholly within the boundaries of the land owned by any one landholder and does not naturally discharge into a watercourse abutting on or extending beyond the boundaries of that land; or for the storage of water in, or the abstraction of water from a reservoir constructed for the purpose of such storage and which does not constitute a water course for the purposes of this Act.

All water resources in Kenya are vested in the State where the Ministry of Water and Irrigation is responsible for overseeing the institutions created to manage water resources and provide water services.²⁹ The Water Act 2016 provides that every water resource is vested in and held by the national government in trust for the people of Kenya.³⁰ The Water Resources Authority established in Section 11(1) of the Water Act 2016 is to serve as an agent of the national government and regulate the management and use of water resources.³¹ Section 64(1) of the Water Act 2016 provides that the Cabinet Secretary should, within one year of the commencement of this Act and every five years thereafter, following public participation, formulate a Water Services

²¹ UN General Assembly, The human right to water and sanitation: resolution / adopted by the General Assembly, 3 August 2010, A/RES/64/292.

²² 'International Decade for Action "Water for Life" 2005-2015. Focus Areas: The Human Right to Water and Sanitation' <https://www.un.org/waterforlifedecade/human_right_to_water.shtml> accessed 21 October 2020.

²³ Ibid.

²⁴ UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1.

²⁵ Goal 6.1, Transforming our world: the 2030 Agenda for Sustainable Development.

²⁶ Article 43 (1)(d), Constitution of Kenya 2010.

²⁷ Water Act, No. 43 of 2016, Laws of Kenya.

²⁸ S. 9, No.43 of 2016, Laws of Kenya.

²⁹ Water Act, 2016, Part II.

³⁰ Ibid, s.5.

³¹ Ibid, s.6.

Strategy. The object of the Water Strategy shall be to provide the Government's plans and programs for the progressive realization of the right of every person in Kenya to water.³²

4. Challenges Hindering Access to Water in Kenya

The provision of water services for all Kenyans still remains a challenge despite the recognition of the right to clean, safe and adequate amounts of water for all Kenyans. This may be attributed to a number of factors which are discussed below but are in no way exhaustive.

4.1 Climate Change and Access to Clean, Safe and Adequate Water

Climate change is expected to continually and negatively affect the quality of water. This is because increasing water temperatures, higher or lower groundwater levels, floods and droughts raise the threat of heightened micro-organisms, chemical substances and radiological hazards in drinking water.³³ Thus, as far as climate change is concerned, it generally affects water supply through some of the following ways: damage to infrastructure from flooding, loss of water sources due to declining rainfall and increasing demand, and changes in the water quality of water sources and within distribution of water.³⁴

4.2 Legal and Institutional Challenges

It has been argued that while the related pressures of anthropogenic climate change and population growth will continue to make essential natural resources scarce globally, domestic and international policy has been slow to adapt to this threat.³⁵ The water sector is mainly governed by the Water Act, 2016³⁶, which was enacted to provide for the regulation, management and development of *water* resources, *water* and sewerage services; and for other connected purposes. The Act was also meant to align the water sector with the Constitution's primary objective of devolution where the Act acknowledges that water related functions are a shared responsibility between the national government and the county government. One of the characteristics of privatization and commercialization of water resources is the need for operational permits for various uses of water. Section 36 of the Water Act 2016 provides that a permit is required for any of the following purposes- any use of water from a water resource, except as provided by section 37; the drainage of any swamp or other land; the discharge of a pollutant into any water resource; and any other purpose, to be carried out in or in relation to a water resource, which is prescribed by Regulations made under this Act to be a purpose for which a permit is required.

While the 2016 Water Act introduced the shared water management system as per the Constitution between the national and county governments, the main management structure and decision making powers were mostly left with the national government's organs.³⁷ This has often created tension between the two levels of government, each seeking to control the sector. This may have at times affected provision of water services. This is especially so where the national

³² Ibid, S. 64(2).

³³ Albuquerque, Catarina de. "Climate Change and the Human Rights to Water and Sanitation." (2010).

³⁴ Guy Howard and others, 'Climate Change and Water and Sanitation: Likely Impacts and Emerging Trends for Action' (2016) 41 Annual Review of Environment and Resources 253.

³⁵ 'Water Provision in Kenya: Problems and Challenges in Managing Finite Resources | Navarra Center for International Development' <<http://ncid.unav.edu/en/news/water-provision-kenya-problems-and-challenges-managing-finite-resources>> accessed 28 October 2020.

³⁶ Water Act, No. 43 of 2016, Laws of Kenya.

³⁷ See Muigua, Kariuki. "Streamlining Water Governance in Kenya for Sustainable Development." (2017).

Government institutions such as the Water Resources Management Authority and the Water Services Regulation Authority may claim power to license and issue permits relating to water use and access while at the same time county governments may seek to control water bodies within their territories, resulting in conflicts.

4.3 Poverty

Poverty levels among the Kenyan communities and especially among the urban informal settlements play a huge role in hindering access to water services considering that private water vendors who are the main suppliers of water in such areas are in business. Lack of purchasing power thus drive the households to use unsafe, dirty and inadequate amounts of water for their domestic needs.³⁸

4.4 Population Growth and Rural-Urban Migration

While the Government's efforts have always been to ensure that both the urban and the rural areas of the country all have access to clean and adequate water, past studies have showed that the rampant population growth coupled with high rates of rural-urban migration has always left the Government struggling to meet the resultant high water demands in the urban areas due to water shortage and the pressure on the infrastructure.³⁹

4.5 Gender Inequality and Realization of Right to Water

Gender is used to refer to the different roles, rights, and responsibilities of men and women and the relations between them, that is to say, gender does not simply refer to women or men, but to the way their qualities, behaviours, and identities are determined through the process of socialization.⁴⁰ It has rightly been argued that women and girls are disproportionately affected by the lack of access to basic water, sanitation and hygiene facilities, due to their needs during periods of increased vulnerability to infection around menstruation and reproduction as well as the fact that women and girls also have a larger role relative to men in water, sanitation and hygiene activities, including in agriculture and domestic labour.⁴¹ Specifically, it has been noted that women and girls are responsible for fetching water in most households, a practice that has implications for women's health in the form of spinal injury, neck pain, spontaneous abortion from heavy and awkward workloads, and caloric expenditure.⁴² In addition, it has rightly been argued that water-fetching responsibilities by women and girls also add to the burden of unpaid

³⁸ 'The Water Crisis: Poverty and Water Scarcity in Africa' (The Water Project)

<<https://thewaterproject.org/why-water/poverty>> accessed 1 November 2020; Anindita Sarkar, 'Informal Water Vendors and the Urban Poor: Evidence from a Nairobi Slum' (2020) 45 *Water International* 443.

³⁹ Chemeril Chepyegon and Daisuke Kamiya, 'Challenges Faced by the Kenya Water Sector Management in Improving Water Supply Coverage' (2018) 10 *Journal of Water Resource and Protection* 85; 'Nairobi Water: What's behind Severe Shortages?' BBC News (2 November 2019) <<https://www.bbc.com/news/world-africa-50253189>> accessed 1 November 2020; 'Kenya – Water & Sanitation for the Urban Poor' <<https://www.wsup.com/where-we-work/kenya/>> accessed 1 November 2020.

⁴⁰ 'International Decade for Action "Water for Life" 2005-2015. Focus Areas: Gender and Water' <<https://www.un.org/waterforlifedecade/gender.shtml>> accessed 31 October 2020.

⁴¹ 'WHO | Water, Sanitation and Hygiene: Measuring Gender Equality and Empowerment' (WHO) <<http://www.who.int/bulletin/volumes/97/6/18-223305/en/>> accessed 31 October 2020; 'International Decade for Action "Water for Life" 2005-2015. Focus Areas: Gender and Water' <<https://www.un.org/waterforlifedecade/gender.shtml>> accessed 1 November 2020.

⁴² *Ibid.*

domestic work, decrease time towards other income-generating activities and affect the time for leisure and nonessential activities.⁴³

5. Fulfilling the Right to Water as a Socioeconomic Right for the People of Kenya

5.1 Public Participation and Consultation in Decision-Making

Principle No. 2 of the *Dublin Statement on Water and Sustainable Development* (1992) recommends that water development and management should be based on a participatory approach, involving users, planners and policy-makers at all levels.⁴⁴ It goes on to state that ‘the participatory approach involves raising awareness of the importance of water among policy-makers and the general public. It means that decisions are taken at the lowest appropriate level, with full public consultation and involvement of users in the planning and implementation of water projects.’⁴⁵

There is a need for the Government and other stakeholders to involve communities in decision-making processes relating to water management not only as a way of ensuring that the constitutional thresholds are met but also as a way of ensuring that they appreciate the challenges that face the sector and use the available water efficiently.

5.2 Addressing Poverty for Fulfilling the Right to Water

In a Resolution on the Right to Development adopted on 19 December 2016, the United Nations General Assembly expressed their concern that the majority of indigenous peoples in the world live in conditions of poverty, and recognized the critical need to address the negative impact of poverty and inequity on indigenous peoples by ensuring their full and effective inclusion in development and poverty eradication programmes.⁴⁶ Considering that there is continued privatization and commercialization of provision of water services in the country, there is a need to address poverty levels in the country in order to ensure that people are economically empowered to afford safe, clean and adequate amounts of water for their own use.⁴⁷

5.3 Addressing Gender Inequality in Water Services

It has rightly been argued that since women have an increased need for water for hydration, sanitation and hygiene during menstruation, pregnancy, the postnatal period and while caring for sick family members or young children, when these basic needs are not met, women and girls are unable to participate equally in society.⁴⁸ This is especially more pronounced in Kenya and Africa

⁴³ Ibid.

⁴⁴ Principle 2, H Tessoroff, *Dublin Statement on Water and Sustainable Development: Aqua AQUAAA*, Vol. 41, No. 3, p 129-135, June 1992.

⁴⁵ Ibid.

⁴⁶ Preamble, UN General Assembly, *The Right to Development: Resolution adopted by the General Assembly, 19 December 2016* [on the report of the Third Committee (A/71/484/Add.2)] 71/192. This was a follow up to the Declaration on the Right to Development, adopted by the General Assembly in its resolution 41/128 of 4 December 1986, which confirmed that the right to development is an inalienable human right and that equality of opportunity for development is a prerogative both of nations and of individuals who make up nations, and that the individual is the central subject and beneficiary of development.

⁴⁷ ‘Water Has More to Do with Poverty than You Think’ (ONE, 20 March 2020) <<https://www.one.org/international/blog/water-access-poverty-health/>> accessed 1 November 2020.

⁴⁸ ‘WHO | Water, Sanitation and Hygiene: Measuring Gender Equality and Empowerment’ (WHO) <<http://www.who.int/bulletin/volumes/97/6/18-223305/en/>> accessed 31 October 2020.

where gender roles in society are still greatly affected by cultural beliefs.⁴⁹ As modernity and campaigns towards promotion of gender equality continue to address these cultural notions, there is a need for the government and water providers to ensure that women and girls have access to adequate and safe water for domestic and agricultural use for as long as they still bear the burden of being caregivers and nurturing families.⁵⁰ While the 2010 Constitution of Kenya acknowledges access to clean and safe water as a basic human right falling under social economic rights and assigns the responsibility for water supply and sanitation service provision to county governments⁵¹, for a huge population of the Kenyan people, this remains a mirage.⁵²

As things currently stand, water was commercialized as evidenced under the current water laws in Kenya and water has continually become expensive and women and girls' access to the same is further hindered by their reduced purchasing power, especially in the urban informal settlements. It is estimated that only about 20% of the population in Kenya's urban informal settlements have access to safe drinking water.⁵³ While in the major restructuring of Kenya's urban water delivery system towards commercialization and privatization where private vendors are being regularized for better service delivery in terms of regulation of prices and quality of water,⁵⁴ women and the urban poor continue to be disadvantaged. There is thus a need for continued empowerment of women and girls as a way of ensuring that they are economically, socially and politically empowered in order for them to have not only a say in water management decisions but also have the economic means to access the same.⁵⁵

⁴⁹ Ngubane, Siegfried Johan. "Gender roles in the African culture: implications for the spread of HIV/AIDS." PhD diss., Stellenbosch: University of Stellenbosch, 2010; Burgess, Norma J. "Gender roles revisited: The development of the "woman's place" among African American women in the United States." *Journal of Black Studies* 24, no. 4 (1994): 391-401; Okrah, Kwadwo. "The dynamics of gender roles and cultural determinants of African women's desire to participate in modern politics." *Global Engagement and Transformation* 2, no. 1 (2017); Fingleton-Smith, Edwina. "The lights are on but no (men) are home. The effect of traditional gender roles on perceptions of energy in Kenya." *Energy research & social science* 40 (2018): 211-219; Ng'umbi, Yunusy Castory. "Re-imagining family and gender roles in Aminatta Forna's *Ancestor Stones*." *Tydskrif vir letterkunde* 54, no. 2 (2017): 86-99; Tshweneyagae, Duduetsang. "Balancing the Roles: Societal/Cultural Gender Expectations and Roles Conflict Among African Working Women."

⁵⁰ 'WHO | Water, Sanitation and Hygiene: Measuring Gender Equality and Empowerment' (WHO) <<http://www.who.int/bulletin/volumes/97/6/18-223305/en/>> accessed 1 November 2020.

⁵¹ Fourth Schedule, Constitution of Kenya 2010.

⁵² 'OHCHR | Kenyans Have Rights to Safe Water and Sanitation on Paper – Now It's Time to Make Them a Reality' <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14913&LangID=E>> accessed 1 November 2020.

⁵³ Anindita Sarkar, 'Informal Water Vendors and the Urban Poor: Evidence from a Nairobi Slum' (2020) 45 *Water International* 443; See also 'Nairobi Water: What's behind Severe Shortages?' BBC News (2 November 2019) <<https://www.bbc.com/news/world-africa-50253189>> accessed 1 November 2020.

⁵⁴ Ibid.

⁵⁵ Jabeen, Farhat, and Musarat Jabeen. "Women empowerment and socio-economic development: a case study of Pakistan." *European Journal of Business and Social Sciences* 1, no. 10 (2013): 113-116; Liliane, Uwantege Kayumba, and Peter Mbabazi. "The impact of women economic empowerment projects on their socio-economic development in Rwanda: The case of Agaseke project." *European Journal of Business and Social Sciences* 4, no. 6 (2015): 59-87; Meraj, Muhammad, and Mahpara Begum Sadaqat. "Gender equality and socio-economic development through women's empowerment in Pakistan." *Ritsumeikan Journal of Asia Pacific Studies*= *Ritsumeikan Journal of Asia Pacific Studies* 34 (2016): 124-140.

5.4 Combating Climate Change for Safeguarding Water Resources

Considering that climate change poses a great threat to water sources and supply, there is a need for the stakeholders in water sector to work closely with other stakeholders in order to combat climate change through such means as sound management policies for water, using climate resilient technologies, among other means.⁵⁶ Some authors have also argued that since water and sanitation services contribute to greenhouse gas emissions, choice of wastewater treatment technologies, improved pumping efficiency, use of renewable sources of energy, and within-system generation of energy also offer potential for reducing emissions.⁵⁷

5.5 Financing of Water Projects

Under the Water Act 2016, there is also established a water sector financing institution to be known as the Water Sector Trust Fund.⁵⁸ The object of the Fund is to provide conditional and unconditional grants to counties, in addition to the Equalisation Fund and to assist in financing the development and management of water services in marginalized areas or any area which is considered by the Board of Trustees to be underserved including- community level initiatives for the sustainable management of water resources; development of water services in rural areas considered not to be commercially viable for provision of water services by licensees; development of water services in the under-served poor urban areas; and research activities in the area of water resources management and water services, sewerage and sanitation.⁵⁹ This fund should be utilized towards ensuring that all persons get to enjoy the right to clean, safe and adequate amounts of water as a socio-economic right. The fund should be used to improve water supply for both urban and rural populations.

5.6 A Human Rights Approach to Water Services Provision

It has been argued that the human right to water implies that water supply must be accessible within, or in the immediate vicinity of, each household, educational institution, workplace and public place.⁶⁰ The right to water is now seen as an implicit component of the right to an adequate standard of living and the right to health.⁶¹ Indeed, in the Kenya case of *Isaac Kipyego Cherop v State Ministry of Water & 142 others [2017] eKLR*, the Court went further and affirmed that the right to clean water is intertwined with the right to clean and healthy environment. It has rightly been pointed out that even though the right to water and sanitation is now anchored in international human rights law, there are still serious lags in implementation at the regional and national level. States, policymakers, international development partners and civil society groups working in the

⁵⁶ Burman, RR, RN Padaria, JP Sharma, Eldho Varghese, Bidisha Chakrabarti, and Sreenath Dixit. "Impact of climate resilient technologies in rainfed agro-ecosystem." *Indian Journal of Agricultural Sciences* 87, no. 6 (2017): 816-24.

⁵⁷ Guy Howard and others, 'Climate Change and Water and Sanitation: Likely Impacts and Emerging Trends for Action' (2016) 41 *Annual Review of Environment and Resources* 253.

⁵⁸ Water Act 2016, S. 113(1).

⁵⁹ Water Act 2016, S. 114.

⁶⁰ Levin, Thomas, M. Nierenköther, and N. Odenwälder. "The human right to water and sanitation: Translating theory into practice." Eschenborn, Germany: Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH (2009).

⁶¹ United Nations, General Comment No. 15.

Fulfilling the Right to Water as a Socio-economic Right for the People of Kenya

water and sanitation sector have often proved slow to act when it comes to making the right to drinking water and sanitation a reality.⁶²

While commercialization and privatization of water sector may have its own benefits as far as efficiency is concerned, there is a need for the government to continue implementing pro-poor strategies aimed at ensuring that the poor and marginalized groups in society also have access to clean and safe water for use. This would be treated as part of human rights-based approach to water and sanitation for all. This is the only way that the progressive realization of socio-economic rights in Kenya would be realized for all. In *Mitubell Welfare Society vs. The Attorney General & 2 Others Petition No. 164 of 2011*, Mumbi Ngugi, J held that;

"The argument that socio-economic rights cannot be claimed at this point two years after the promulgation of the Constitution ignores the fact that no provisions of the Constitution is intended to wait until the state feels it is ready to meet its constitutional obligations. Article 21 and 43 require that there should be "progressive realization" of socio-economic rights, implying that the state must be seen to be taking steps, and I must add be seen to take steps towards realization of these rights.....Granted also that these rights are progressive in nature, but there is a constitutional obligation on the state, when confronted with a matter such as this, to go beyond the standard objection....Its obligation requires that it assists the court by showing if, and how, it is addressing or intends to address the rights of citizens to the attainment of the socio-economic rights, and what policies, if any it has put in place to ensure that the rights are realized progressively and how the Petitioners in this case fit into its policies and plans."

The progressive realization of the right to clean water by the State was also affirmed in the case of *Isaac Kipyego Cherop v State Ministry of Water & 142 others [2017] eKLR* where the Court stated as follows:

I do find that though the Petitioner has right to clean and safe water in adequate quantities which the State is to endeavor to render progressively. I do agree with the 2nd respondent that the realization of the right to clean and safe water in adequate quantities require huge financial commitments and therefore, the same can be achieved progressively.

.....
I do find that the right to clean and safe water in adequate quantities under Article 43 of the Constitution is subject to progressive realization. Rights under Article 43 of the Constitution can only be realized progressively. The State cannot realize this right for every Kenyan in one investment. The right to clean and safe water in adequate quantities is not a final product for direct dispensation but is aspirational.

The Government is thus expected to take tangible steps towards ensuring that these rights are fulfilled for all persons. The Constitution also gives every person to pursue their human rights

⁶² Levin, Thomas, M. Nierenköther, and N. Odenwälder. "The human right to water and sanitation: Translating theory into practice." Eschenborn, Germany: Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH (2009).

before courts of law where the same are violated or are at the risk of being violated.⁶³ To this end, courts have also held that the Environment and land court has the jurisdiction to hear and determine a dispute under Article 43 (d) thus touching on the right to clean and safe water in adequate quantities, as was decided in *Isaac Kipyego Cherop v State Ministry of Water & 142 others [2017] eKLR*.

It is not until the Government fully treats the provision of water services to its people as a critical human right that they will spire to ensure that all its citizens have access to clean, safe and adequate amounts of water. In cases of extreme poverty, the Government may provide water for basic needs for free while ensuring that for the bigger populace, the water is affordable by reigning in on unscrupulous water dealers while also ensuring that service provision complies with the human rights standards.⁶⁴

6. Conclusion

Seeing that water is now considered to be a human right issue, and as the global population grows, there is an increasing need to balance all of the competing commercial demands on water resources so that communities have enough for their needs.⁶⁵ The State obligation to fulfil its human rights obligations includes the obligations to facilitate and promote. The obligation to facilitate requires the State to take specific measures within its available resources to assist individuals and communities to enjoy the right. The obligation to promote requests the State to take targeted steps. To this end, the State should adopt a national water strategy and a plan of action, as well as appropriate financing and pricing policies.⁶⁶

While it is acknowledged that the fulfilment of the right to water as a socio-economic right is progressive, the Government should continually work with non-state actors, private investors, NGOs and other stakeholders to ensure that the same is fulfilled for Kenyan citizens and especially the most vulnerable and marginalized groups.⁶⁷ The Government should continually work towards coming up with ways of ensuring that water is affordable for all. However, considering that water is a scarce commodity, there is also need for public education and creating awareness on the need to use water efficiently in order to minimize wastage of the same. Water is an integral part of the socio-economic rights and the Government cannot ably fulfill its obligations on Article 43 of the Constitution of Kenya without working towards fulfilling its obligations on provision of water for all citizens. Fulfilling the right to water as a prerequisite for

⁶³ Article 70, Constitution of Kenya 2010.

⁶⁴ Levin, Thomas, M. Nierenköther, and N. Odenwälder. "The human right to water and sanitation: Translating theory into practice." Eschenborn, Germany: Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH (2009).

⁶⁵ 'Water' (21 December 2015) <<https://www.un.org/en/sections/issues-depth/water/>> accessed 28 October 2020.

⁶⁶ Levin, Thomas, M. Nierenköther, and N. Odenwälder. "The human right to water and sanitation: Translating theory into practice." Eschenborn, Germany: Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH (2009); CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12).

⁶⁷ 'Providing Sustainable Sanitation and Water Services to Low-Income Communities in Nairobi' (World Bank) <<https://www.worldbank.org/en/news/feature/2020/02/19/providing-sustainable-sanitation-and-water-services-to-low-income-communities-in-nairobi>> accessed 1 November 2020; 'Review of Drivers and Barriers of Water and Sanitation Policies for Urban Informal Settlements in Low-Income and Middle-Income Countries' (2019) 60 Utilities Policy 100957.

Fulfilling the Right to Water as a Socio-economic Right for the People of Kenya

realization of other socio-economic rights for the people of Kenya is indeed necessary and possible.

Actualising the National Policy on Gender and Development in Kenya

Abstract

Kenya and the African continent have for a long time struggled with the issue of gender equality and equity across societies especially with regard to economic, social and political spheres, with the women sometimes bearing the biggest brunt of this inequality and equity and occasionally men in some areas. The global community has always come up with international and regional legal instruments meant to offer guidelines to countries on the measures to be taken to streamline gender issues in all areas of their people's lives and development agenda. It is in line with this that Kenya, in order to show its commitment not only to the international and regional instruments but also the Constitution of Kenya, has already come up with National Policy on Gender and Development. This is a commendable step towards addressing the gender concerns at play. As a result, this paper offers brief review of the Gender Policy with the aim of identifying any gaps therein as well as the opportunities that the Policy presents in making gender equality and equity a reality in Kenya.

1. Introduction

This paper offers a critical review of the gender issues in development agenda and specifically looks at the 2019 National Policy on Gender and Development¹ with the aim of highlighting its strengths and weaknesses, if any. The paper offers a brief background on the gender debates in Kenya, identifying the current challenges as well as the looking at the plausible solutions offered by the National Policy, and their possibility to address these issues once and for all.

The author also offers a general overview of current legal and institutional framework meant to streamline gender concerns in the national development agenda and all other areas of the Kenyan communities. The *National Gender and Equality Commission Act, 2011*² defines “gender” to mean the social definition of women and men among different communities and cultures, classes, ages and during different periods in history.³

Gender mainstreaming has been defined as: “...the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels. It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality and equity.”⁴

On the other hand, the Act defines “gender mainstreaming” to mean ensuring that the concerns of women and men form an integral dimension of the design of all policies, laws and administrative procedures including budgeting and budget implementation, and the monitoring

¹ Republic of Kenya, Sessional Paper No. 02 of 2019 on National Policy on Gender and Development, October 2020 < <http://psyg.go.ke/wp-content/uploads/2019/12/NATIONAL-POLICY-ON-GENDER-AND-DEVELOPMENT.pdf> > Accessed 9 October 2020.

² National Gender and Equality Commission Act, No.15 of 2011, Laws of Kenya.

³ National Gender and Equality Commission Act, sec. 2.

⁴ United Nations. Gender Mainstreaming an Overview. Office of the Special Adviser on Gender Issues, 2002 < <https://www.un.org/womenwatch/osagi/pdf/e65237.pdf> > Accessed 9 October 2020.

and evaluation of programmes implementing such policies, laws and administrative procedures in all political, economic and societal spheres; so as to ensure that women and men benefit equally, and that inequality is not perpetuated.⁵

Indeed, it has been observed that while mainstreaming is clearly essential for securing human rights and social justice for women as well as men, it also increasingly recognized that incorporating gender perspectives in different areas of development ensures the effective achievement of other social and economic goals.⁶ Past studies have revealed that most Kenyans are still lagging behind as far as understanding of their human rights is concerned. Many still think that different rights apply to men and women. For instance, in 2018, a survey carried out by IPSOS revealed that about 53 per cent of Kenyans were unable identify any human rights violations in their home areas.⁷

The 2019 National Policy on Gender and Development which is seen as a step towards mainstreaming of gender issues in Kenya was recently drafted in an effort to offer the guidelines on drafting of a national gender law. It is therefore imperative to review the Policy in order to identify any prospects as well as weakness of the Policy.

The United Nations 2030 Agenda for Sustainable Development Goals (SDGs)⁸ recognises the place of gender equality and equity in development. SDG Target 20 states that: “Realizing gender equality and the empowerment of women and girls will make a crucial contribution to progress across all the Goals and targets. The achievement of full human potential and of sustainable development is not possible if one half of humanity continues to be denied its full human rights and opportunities. Women and girls must enjoy equal access to quality education, economic resources and political participation as well as equal opportunities with men and boys for employment, leadership and decision-making at all levels”. Goal 5 of the SDGs seeks to achieve gender equality and empower all women and girls. UN Women acts to empower women and girls across all its programmes and advocacy.⁹

2. The Policy, Legal and Institutional Framework on Gender Issues in Kenya

2.1 International and Regional Legal Instruments Relating to Gender Equality and Mainstreaming

Article 2(5) and (6) of the Constitution of Kenya 2010 provides that ‘the general rules of international law shall form part of the law of Kenya’ and that ‘any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution’ respectively.¹⁰ In *Re The Matter of Zipporah Wambui Mathara [2010] eKLR* the High Court held that by virtue of the

⁵ National Gender and Equality Commission Act, sec. 2.

⁶ United Nations. Gender Mainstreaming an Overview. Office of the Special Adviser on Gender Issues, 2002.

⁷ Hillary Orinde, ‘Survey Reveals How Kenyans Are Ignorant of Their Human Rights’ (The Standard) <<https://www.standardmedia.co.ke/kenya/article/2001276119/kenyans-in-the-dark-about-their-rights>> accessed 14 October 2020.

⁸ UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1.

⁹ ‘Sustainable Development Goal 5: Gender Equality’ (UN Women) <<https://www.unwomen.org/news/in-focus/women-and-the-sdgs/sdg-5-gender-equality>> accessed 15 October 2020.

¹⁰ See also Treaty-Making and Ratification Act, No. 45 of 2012, Laws of Kenya.

provisions of Section 2 (6) of the Constitution of Kenya 2010, International Treaties, and Conventions that Kenya has ratified, were imported as part of the sources of the Kenyan Law and thus the provisions of the International Covenant on Civil and Political Rights (ICCPR) which Kenya ratified on 1st May 1972 were part of the Kenyan law. The court went on to hold that the provisions of the ICCPR superseded those contained in the Banking Act.¹¹

It is in line with the country's international obligations on human rights and gender issues that Article 59 (2) (g) of the Constitution of Kenya provides that one of the functions of the Kenya National Human Rights and Equality Commission is to act as the principal organ of the State in ensuring compliance with obligations under treaties and conventions relating to human rights. It is however noteworthy that the National Gender and Equality Commission Act, 2011 has since established the National Gender and Equality Commission as the successor in title to the Kenya National Human Rights and Equality Commission established by Article 59 of the Constitution, pursuant to clauses (4) and (5) of that Article.¹² Its functions however remain the same.

It is in line with the Commission's mandate on international treaties and conventions that the *Sessional Paper No. 02 of 2019 on National Policy on Gender and Development* outlines the national agenda for gender equality and how Kenya intends to realise these ideals; details the overarching principles, which will be adopted and integrated into the National and County Government sectoral policies, practices and programmes and by all state and non-state actors; and it specifically takes cognizance of, inter alia: international and regional treaties on gender equality that Kenya has ratified such as the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) and the Maputo Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.¹³

2.1.1 Universal Declaration of Human Rights

The *Universal Declaration of Human Rights*¹⁴ guarantees that all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.¹⁵ It also provides that each individual is entitled to enjoy their rights and freedoms '...without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.¹⁶ Article 7 therein also guarantees that 'all persons are equal before the law and are entitled without any discrimination to equal protection of the law'.

¹¹ See also *David Njoroge Macharia v Republic* [2011] eKLR, Criminal Appeal 497 of 2007; see also *Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 Others* Sup. Ct. Application No. 2 of 2011; [2012] eKLR.

¹² National Gender and Equality Commission Act, 2011, sec. 3(1) (2).

¹³ Republic of Kenya, *Sessional Paper No. 02 of 2019 on National Policy on Gender and Development*, Chapter one, para. 1.1.

¹⁴ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

¹⁵ *Universal Declaration of Human Rights*, Article 1.

¹⁶ *Universal Declaration of Human Rights*, Article 2.

2.1.2 Convention on the Elimination of all forms of Discrimination against Women

The *Convention on the Elimination of All Forms of Discrimination against Women*¹⁷ (CEDAW) defines the term "discrimination against women" to mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.¹⁸

CEDAW also provides that States Parties should condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: to embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle; to adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women; to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination; to refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation; to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise; to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women; and to repeal all national penal provisions which constitute discrimination against women.¹⁹

CEDAW also obligates States Parties to take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.²⁰ CEDAW also provides that States Parties should take all appropriate measures: to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.²¹

CEDAW also provides that States Parties should take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right: to participate in the elaboration and implementation of development planning at all levels; to have access to adequate health care facilities, including information, counselling and services in family planning; to benefit directly from social security programmes; to obtain all types of training and education, formal and non-formal, including that relating to

¹⁷ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13.

¹⁸ *Ibid*, Article 1.

¹⁹ *Convention on the Elimination of All Forms of Discrimination against Women*, Article 2.

²⁰ *Convention on the Elimination of All Forms of Discrimination against Women*, Article 3.

²¹ *Convention on the Elimination of All Forms of Discrimination against Women*, Article 5.

functional literacy, as well as, inter alia, the benefit of all community and extension services, in order to increase their technical proficiency; to organize self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self-employment; to participate in all community activities; to have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes; and to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.²²

Thus, the CEDAW covers civil rights, the legal status of women, the dimension of human reproduction and the impact of cultural factors on gender relations. Unlike other legal instruments, it acknowledges that different factors affect the relationships and interactions between men and women and thus outlines some obligations for State Parties to address all these factors.

2.1.3 International Covenant on Civil and Political Rights

The *International Covenant on Civil and Political Rights*²³ (ICCPR) guarantees that 'all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'.²⁴ ICCPR also provides that each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.²⁵

In addition, ICCPR provides that the States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.²⁶ Article 26 of the *ICCPR* further provides that 'all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

2.1.4 Nairobi Forward looking Strategies for the Advancement of Women

The *Nairobi Forward looking Strategies for the Advancement of Women*²⁷ captured the concern that the resources available to the programme on the advancement of women of the Secretariat were insufficient to ensure adequate support to the Committee on the Elimination of Discrimination against Women and effective implementation of other aspects of the programme, especially the preparations for the Fourth World Conference on Women, held in 1995.²⁸ The delegation that called again upon Member States to give priority to policies and programmes relating to the subtheme "Employment, health and education", in particular to literacy, for the

²² Convention on the Elimination of All Forms of Discrimination against Women, Article 14(2).

²³ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

²⁴ *International Covenant on Civil and Political Rights*, Article 1.

²⁵ *International Covenant on Civil and Political Rights*, Article 2 (1).

²⁶ *International Covenant on Civil and Political Rights*, Article 3.

²⁷ UN General Assembly, *Implementation of the Nairobi Forward-looking Strategies for the Advancement of Women: resolution / adopted by the General Assembly, 16 December 1991, A/RES/46/98.*

²⁸ *Implementation of the Nairobi Forward-looking Strategies for the Advancement of Women, Preamble.*

empowerment of women, especially those in the rural areas, to meet their own needs through self-reliance and the mobilization of indigenous resources, as well as to issues relating to the role of women in economic and political decision-making, population, the environment and information.²⁹

The delegates also emphasized, in the framework of the Forward-looking Strategies, the importance of the total integration of women in the development process, bearing in mind the specific and urgent needs of the developing countries, and calls upon Member States to establish specific targets at each level in order to increase the participation of women in professional, management and decision-making positions in their countries.³⁰

2.1.5 Fourth World Conference on Women, Beijing Declaration and Platform for Action

The Fourth World Conference on Women met in Beijing, China, from 4 to 15 September 1995 where delegates discussed and adopted the *Beijing Declaration and Platform for Action*³¹. The objective of the Beijing conference was to review the achievement of the goals of equality, development and peace, as outlined in the Nairobi Forward Looking Strategies for the Advancement of Women to the Year 2000 in 1985, and to establish a strategy for removing the remaining obstacles to the achievement of these goals.³²

The Declaration recognized that the status of women had advanced but that inequalities and obstacles remained. It reaffirmed commitments to: equal rights in a number of existing agreements; ensuring full implementation of human rights of women and the girl child; and empowerment and advancement of women, including the right to freedom of thought, conscience, religion and belief.³³ Delegates also stated their conviction that: women's empowerment and full participation are fundamental to equality, development and peace; equal rights and responsibilities are critical to families; women's involvement is required to eradicate poverty; peace is linked to the advancement of women; and gender-sensitive policies are essential to foster women's empowerment and advancement.³⁴ Governments also affirmed their determination to: intensify efforts to achieve goals from the Nairobi strategies; ensure the full enjoyment by women and the girl child of human rights; eliminate discrimination and remove obstacles to equality; encourage men to participate in actions towards equality; promote women's economic independence; promote sustainable development and education; prevent and eliminate violence

²⁹ Implementation of the Nairobi Forward-looking Strategies for the Advancement of Women, Para. 4.

³⁰ Implementation of the Nairobi Forward-looking Strategies for the Advancement of Women, Para. 15.

³¹ United Nations, Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women, , A/CONF.177/20 and A/CONF.177/20/Add.1 Date of adoption: 15 September 1995.

³² Organisation for Economic Co-operation and Development, "The Implications Of The Fourth World Conference On Women for Bilateral Development Co-Operation: Report From The DAC Expert Group On Women In Development Seminar, Held In Paris On 25-26 January 1996, Working Party on Gender Equality, DCD/DAC/WID(99)4

<[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DCD/DAC/WID\(99\)4&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DCD/DAC/WID(99)4&docLanguage=En)> Accessed 13 October 2020.

³³ Doran, P., V. Hulme, L. Wagner, W. Yang, and S. Wise. "Summary of the Fourth World Conference on Women: 4-15 September 1995." Earth Negotiations Bulletin 14, no. 21 (1995): 1 <<https://enb.iisd.org/download/pdf/enb1421e.pdf>> Accessed 13 October 2020.

³⁴ Doran, P., V. Hulme, L. Wagner, W. Yang, and S. Wise. "Summary of the Fourth World Conference on Women: 4-15 September 1995." Earth Negotiations Bulletin 14, no. 21 (1995): 1.

against women and girls; ensure full participation; and ensure equal access to economic resources.³⁵

2.1.6 United Nations Declaration on the Elimination of Violence against Women

The United Nations *Declaration on the Elimination of Violence against Women*³⁶ (DEVAW) provides that women are entitled to the equal enjoyment and protection of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. These rights include, inter alia: the right to life; the right to equality; the right to liberty and security of person; the right to equal protection under the law; the right to be free from all forms of discrimination; the right to the highest standard attainable of physical and mental health; the right to just and favourable conditions of work; the right not to be subjected to torture, or other cruel, inhuman or degrading treatment or punishment.³⁷ DEVAW also obligates States to condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination.³⁸

2.1.7 African Charter on Human and Peoples Rights (Banjul Charter)

The *African Charter on Human and Peoples' Rights* (also known as the *Banjul Charter*)³⁹ is an international (African region) human rights instrument that is intended to promote and protect *human rights* and basic freedoms in the *African* continent.⁴⁰ The Banjul Charter obligates the Member States of the Organization of African Unity parties to the present Charter to recognize the rights, duties and freedoms enshrined in this Chapter and that they should undertake to adopt legislative or other measures to give effect to them.⁴¹

The Charter also guarantees that every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.⁴²

Some authors have however questioned the commitment of African states in upholding human rights or even the effectiveness of the Charter itself in achieving protection of human rights. For instance, it has been observed that while the African Charter is defined as an application of the UN Declaration of Human Rights to the African perspective, and a legal instrument 'written by Africans for Africans', it is evident that African governments are less than willing to condemn human rights violations in their own states as demonstrated not only by the emphasis on

³⁵ Doran, P., V. Hulme, L. Wagner, W. Yang, and S. Wise. "Summary of the Fourth World Conference on Women: 4-15 September 1995." *Earth Negotiations Bulletin* 14, no. 21 (1995): 1.

³⁶ UN General Assembly, *Declaration on the Elimination of Violence against Women*, 20 December 1993, A/RES/48/104.

³⁷ *Ibid*, Article 3.

³⁸ *Ibid*, Article 4.

³⁹ Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights* ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

⁴⁰ 'African Commission on Human and Peoples' Rights Legal instruments' <<https://www.achpr.org/legalinstruments/detail?id=49>> accessed 15 October 2020.

⁴¹ *African Charter on Human and Peoples' Rights*, Article 1.

⁴² *African Charter on Human and Peoples' Rights*, Article 2.

development and political stability at the expense of human rights but also in the drafting of the African Charter itself.⁴³

2.1.8 Southern African Development Community (SADC), 1997 Declaration on Gender and Development and 2008 Protocol on Gender and Development

The Southern African Development Community (SADC) Declaration on Gender and Development was made in 1997 on the basis that SADC Member States undertook, in the SADC Treaty Article 6(2), not to discriminate against any person on the grounds of inter alia, sex or gender. In addition, SADC Member States committed to mainstream gender into the SADC Programme of Action and Community Building initiatives as a prerequisite for sustainable development.⁴⁴

SADC Member States acknowledged gender equality as a fundamental human right and therefore signed the Declaration on Gender and Development on 8th September 1997 to promote closer regional cooperation and collective action as a means of fostering gender equality and as a reaffirmation of SADC's commitment to eliminating gender discrimination and mainstreaming gender issues in Southern Africa.⁴⁵

SADC Heads of State and Government signed and adopted the *SADC Protocol on Gender and Development* in August 2008 with the exception of Botswana and Mauritius. The Objectives of the Protocol are among others to provide for the empowerment of women, to eliminate discrimination and to achieve gender equality and equity through the development and implementation of gender responsive legislation, policies, programmes and projects. It also seeks to harmonise the various international, continental and regional gender equality instruments that SADC Member States have subscribed to.⁴⁶

Generally, the principle objectives of the gender-mainstreaming programme in SADC are to: put in place the necessary institutional mechanisms, operational guidelines and to promote a culture that will facilitate gender mainstreaming in the Secretariat; build the capacity of the staff of the Secretariat and SADC Member States to systematically develop, implement and sustain gender mainstreamed plans, strategies and programmes on an ongoing basis; ensure that the necessary human and financial resources for gender mainstreaming are mobilized for training; capacity building and programme implementation; and ensure that the commitments of the integration and development objectives to gender equality and women's empowerment are effectively implemented at the Member State level.⁴⁷

⁴³ 'The African Charter on Human and Peoples' Rights: how effective is this legal instrument in shaping a continental human rights culture in Africa?' (Le petit juriste, 21 December 2014) <<https://www.lepetitjuriste.fr/the-african-charter-on-human-and-peoples-rights-how-effective-is-this-legal-instrument-in-shaping-a-continental-human-rights-culture-in-africa/>> accessed 15 October 2020.

⁴⁴ 'Southern African Development Community: Gender' <<https://www.sadc.int/issues/gender/>> accessed 15 October 2020.

⁴⁵ 'Southern African Development Community: Show' <https://www.sadc.int/documents-publications/show/Declaration_on_Gender_Development_1997.pdf> accessed 15 October 2020.

⁴⁶ 'Southern African Development Community: Show' <https://www.sadc.int/documents-publications/show/Declaration_on_Gender_Development_1997.pdf> accessed 15 October 2020.

⁴⁷ 'Southern African Development Community: Gender Mainstreaming' <<https://www.sadc.int/issues/gender/gender-mainstreaming/>> accessed 15 October 2020.

While Kenya is not a Member State of SADC, the above objectives though not fully implemented by the members offer some guiding principles for Kenya to consider.

2.1.9 African Union (AU), Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa

The *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*⁴⁸ requires that States Parties should combat all forms of discrimination against women through appropriate legislative, institutional and other measures. In this regard the Protocol requires State Parties to: include in their national constitutions and other legislative instruments, if not already done, the principle of equality between women and men and ensure its effective application; enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women; integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life; take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist; and support the local, national, regional and continental initiatives directed at eradicating all forms of discrimination against women.⁴⁹

States Parties are also obligated to commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.⁵⁰

2.1.10 African Union Solemn Declaration of Gender Equality in Africa, 2004

The *African Union Solemn Declaration on Gender Equality in Africa*⁵¹ was a Member State's reaffirmation of their commitment to the principle of gender equality as enshrined in Article 4 (1) of the Constitutive Act of the African Union, as well as other existing commitments, principles, goals and actions set out in the various regional, continental and international instruments on human and women's rights, including the Dakar Platform for Action (1994), the Beijing Platform for Action (1995), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW -1979), the African Plan of Action to Accelerate the Implementation of the Dakar and Beijing Platforms for Action for the Advancement of Women (1999); the Outcome Document of the Twenty-third Special Session of the United Nations General Assembly Special Session on the Implementation of the Beijing Platform for Action (2000); UN Resolution 1325 (2000) on Women, Peace and Security; and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003).⁵² The Members agreed to ensure the

⁴⁸ African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 11 July 2003.

⁴⁹ Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, Article 2(1).

⁵⁰ Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, Article 2(2).

⁵¹ African Union, Solemn Declaration on Gender Equality in Africa, adopted by the AU Assembly in 2004.

⁵² Solemn Declaration on Gender Equality in Africa, Preamble.

active promotion and protection of all human rights for women and girls including the right to development by raising awareness or by legislation where necessary.⁵³

2.1.11 African Union Gender Policy, 2009

The overall goal of the African Union Gender Policy⁵⁴ is to adopt a rights based approach to development through evidence-based decision-making and the use of sex-disaggregated data and performance indicators for the achievement of gender equality and women's empowerment in Africa. It seeks to promote a gender responsive environment and practices and undertake commitments linked to the realisation of gender equality and women's empowerment in Member States, and at the international, continental, regional and national levels.⁵⁵

2.2 National Legal Instruments and Institutions Relating to Gender Equality and Mainstreaming in Kenya

Kenya has been on a journey towards achieving gender equality and equity, a goal that has remained elusive over the years. There have been policies aimed at promoting the same and they have always been reviewed or replaced by new ones in a bid to improve on the framework and address any gaps. There have been positive steps that have been realized along the way such as recognition of equality of men and women rights to own property or inherit property and fair labour practices, among others. Despite this, Kenya cannot boast of an impressive track record as gender inequality is still manifest.⁵⁶

2.2.1 National Policy on Gender and Development, 2000

Notably, the first National Policy on Gender and Development was adopted in 2000 and was meant to provide a legitimate point of reference for addressing gender inequalities at all levels of government and by all stakeholders, and further provided an avenue for gender mainstreaming across all sectors in order to generate efficient and equitable development outcomes for all Kenyans.⁵⁷

The National Policy on Gender and Development of 2000 has since been reviewed in order to align it to the new legal framework including the Constitution of Kenya.⁵⁸ This was superseded by the Sessional Paper No. 2 of 2006 on Gender Equality and Development which was meant to promote women empowerment and mainstreaming the needs of women, men, girls and boys in

⁵³ Solemn Declaration on Gender Equality in Africa, Para. 6.

⁵⁴ African Union Gender Policy, Rev 2/Feb 10, 2009.

⁵⁵ Ibid, p.10.

⁵⁶ Njogu, Kimani, and Elizabeth Orchardson-Mazrui. "Gender inequality and women's rights in the Great Lakes: Can culture contribute to women's empowerment." New York: UNICEF (2013); Jagoe, Kirstie, Madeleine Rossanese, Dana Charron, Jonathan Rouse, Francis Waweru, MaryAnne Waruguru, Samantha Delapena, Ricardo Piedrahita, Kavanaugh Livingston, and Julie Ipe. "Sharing the burden: Shifts in family time use, agency and gender dynamics after introduction of new cookstoves in rural Kenya." *Energy Research & Social Science* 64 (2020): 101413; Flowe, Heather D., Sarah Rockowitz, James Rockey, Wangu Kanja, CATHERINE KAMAU, Melissa Colloff, Jasmin Kauldar, Jessica Woodhams, and Kari Davies. "Sexual and Other Forms of Violence During the COVID-19 Pandemic Emergency in Kenya." (2020).

⁵⁷ Republic of Kenya, Sessional Paper No. 02 of 2019 on National Policy on Gender and Development, October 2019, p. 9.

⁵⁸ Republic of Kenya, Sessional Paper No. 02 of 2019 on National Policy on Gender and Development, October 2019, p. 10.

all sectors of development in Kenya so that they can participate and benefit equally from development initiatives.⁵⁹

2.2.2 National Policy for Prevention and Response to Gender Based Violence, 2014

The National Policy for Prevention and Response to Gender Based Violence's main purpose was to put in place a framework to accelerate implementation of laws, policies and programmes for prevention and response to Gender Based Violence (GBV) by state and non – state actors for the realization of a society where men, women, boys and girls are free from all forms violence.⁶⁰ This Policy sought to achieve the following objectives: to facilitate a coordinated approach in addressing GBV and to ensure effective programming; to improve enforcement of laws and policies towards GBV prevention and response; to increase access to quality and comprehensive support services across sectors; and to improve sustainability of GBV prevention and response interventions.⁶¹

The Policy also acknowledged that while it is women and girls who suffer the greatest share of GBV in the country, men and boys also experience the same.⁶² Land Laws such as the Land Act and Land Registration Act acknowledge the right of women to acquire, inherit and hold or dispose land. However, the reality on the ground is that women and girls are still being dispossessed of property especially when it comes to inheritance.

2.2.3 Constitution of Kenya 2010

The Constitution of Kenya 2010 was the culmination of the recognition of the need to streamline gender issues in the country's development agenda. It not only guarantees equality and non-discrimination of all persons regardless of gender, but also has outlined some remedial measures to address the existing inequality in the country. It forms the basis of all other efforts since the year 2010.

2.2.4 National Gender and Equality Commission

The National Gender and Equality Commission is established under the National Gender and Equality Commission Act, 2011⁶³ which was enacted to establish the National Gender and Equality Commission as a successor to the Kenya National Human Rights and Equality Commission pursuant to Article 59(4) of the Constitution; to provide for the membership, powers and functions of the Commission, and for connected purposes.⁶⁴ The functions of the Commission are, inter alia, to: promote gender equality and freedom from discrimination in accordance with Article 27 of the Constitution; monitor, facilitate and advise on the integration of the principles of equality and freedom from discrimination in all national and county policies, laws, and administrative regulations in all public and private institutions;

⁵⁹ Ibid, p. 12.

⁶⁰ Republic of Kenya, National Policy for Prevention and Response to Gender Based Violence, November, 2014, p. 12

<<http://psyg.go.ke/docs/National%20Policy%20on%20prevention%20and%20Response%20to%20Gender%20Based%20Violence.pdf>> accessed 10 October 2020.

⁶¹ Republic of Kenya, National Policy for Prevention and Response to Gender Based Violence, November, 2014, pp. 12-13.

⁶² Ibid, p. 11.

⁶³ National Gender and Equality Commission Act, 2011, Laws of Kenya, Sec. 3(1).

⁶⁴ Ibid, Preamble.

act as the principal organ of the State in ensuring compliance with all treaties and conventions ratified by Kenya relating to equality and freedom from discrimination and relating to special interest groups including minorities and marginalized persons, women, persons with disabilities, and children; and co-ordinate and facilitate mainstreaming of issues of gender, persons with disability and other marginalised groups in national development and to advise the Government on all aspects thereof.⁶⁵

2.2.5 State Department for Gender Affairs

The State Department for Gender Affairs falls under the Ministry of Public Service, Youth and Gender Affairs. The Ministry of Public Service and Gender was created under the re-organization of the National Government in November 2015.⁶⁶ The mandate of the State Department of Gender is hinged on the Constitution of Kenya and Executive Order of June, 2018. It is responsible for: Gender Policy Management; Special Programmes for Women Empowerment; Gender Mainstreaming in Ministries, Departments and Agencies (MDAs); Community Mobilization; Domestication of International Treaties and Conventions on Gender; and Policy and Programmes on Gender Violence.⁶⁷

3. Gender and Development in Kenya: The Challenges

The 2014 National Policy for Prevention and Response to Gender Based Violence identified the following as the greatest contributing factors to GBV in Kenya: unequal power relations between men and women; socio-cultural norms that normalize GBV, discriminatory practices and changing gender roles; poverty; illiteracy; breakdown of the family unit and support systems; insecurity; alcohol and substance abuse; uncensored media content; and conflict; political instability as well as poor enforcement of laws and policies.⁶⁸

While it is worthy pointing out that the 2014 Policy was geared towards dealing with GBV, the above factors contribute to much more than just GBV; they hamper the equal participation of both men and women in development matters in the country. Indeed, one of the guiding principles of the 2014 Policy was recognition of the importance of gender equity and gender equality in national development.⁶⁹

In the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012]eKLR⁷⁰, the advisory opinion related to two discrete elements in respect of which the Attorney-General thus moved the Court: “The Advisory Opinion of the Court is sought on the following issues:

⁶⁵ Ibid, sec. 8.

⁶⁶ ‘Background’ (Ministry of Public Service And Gender) <http://www.psyg.go.ke/?page_id=241> accessed 10 October 2020.

⁶⁷ Republic of Kenya, Sessional Paper No. 02 of 2019 on National Policy on Gender and Development, October 2020, pp. 12-13.

⁶⁸ Republic of Kenya, National Policy for Prevention and Response to Gender Based Violence, November, 2014, p. 14.

⁶⁹ Republic of Kenya, National Policy for Prevention and Response to Gender Based Violence, November, 2014, p. 13.

⁷⁰ *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012]eKLR*, Advisory Opinions Application 2 of 2012.

Actualising the National Policy on Gender and Development in Kenya

A. Whether Article 81(b) as read with Article 27(4), Article 27(6), Article 27(8), Article 96, Article 97, Article 98, Article 177(1) (b), Article 116 and Article 125 of the Constitution of the Republic of Kenya require progressive realization of the enforcement of the one-third gender rule or requires the same to be implemented during the general elections scheduled for 4th March, 2013?

B. Whether an unsuccessful candidate in the first round of Presidential election under Article 136 of the Constitution or any other person is entitled to petition the Supreme Court to challenge the outcome of the first round of the said election under Article 140 or any other provision of the Constitution?”

Regarding the one-third gender rule, the Attorney-General moved the Supreme Court seeking an opinion as to whether the terms of Article 81(b) apply in respect of the very next general elections, to be held on 4 March 2013, or on the contrary, apply *progressively* over an extended period of time.

The Supreme Court observed as follows:

[47] This Court is fully cognisant of the distinct social imperfection which led to the adoption of Articles 27(8) and 81(b) of the Constitution: that in elective or other public bodies, the participation of women has, for decades, been held at bare nominal levels, on account of discriminatory practices, or gender-indifferent laws, policies and regulations. This presents itself as a manifestation of historically unequal power relations between men and women in Kenyan society. Learned counsel Ms. Thongori aptly referred to this phenomenon as “the socialization of patriarchy”; and its resultant diminution of women’s participation in public affairs has had a major negative impact on the social terrain as a whole. Thus, the Constitution sets out to redress such aberrations, not just through affirmative action provisions such as those in Articles 27 and 81, but also by way of a detailed and robust Bill of Rights, as well as a set of “national values and principles of governance” [Article 10].

While there was no unanimous decision on whether implementation of the one-third Two-thirds gender rule was to be realised immediately or progressively, Kenya is still grappling with the question of gender representation in the elective posts in Kenya, with the recent advisory opinion from the Chief Justice directed to the President on the need to dissolve Parliament for failure to uphold the gender equity constitutional requirements complicating the debate even further.⁷¹ The Deputy Chief Justice has since appointed a special bench of judges to decide on the constitutional status of the advisory opinion as issued by the Chief justice.⁷²

⁷¹ ‘Chief Justice’s Advice to the President on Dissolution of Parliament for Failure to Enact the Gender Rule | Kenya Law’ <<http://kenyalaw.org/kenyalawblog/chief-justices-advice-to-the-president-on-dissolution-of-parliament/>> accessed 15 October 2020.

⁷² Japheth Ogila, ‘DCJ Mwilu Forms Five-Judge Bench to Hear Maraga’s Parliament Dissolution Advice’ (The Standard) <<https://www.standardmedia.co.ke/nairobi/article/2001390110/mwilu-forms-judge-bench-to-hear-cjs-parliament-dissolution-advice>> accessed 15 October 2020; ‘Fate of Parliament Lies in the Hands of Five Judges’ (People Daily, 14 October 2020) <<https://www.pd.co.ke/news/fate-of-parliament-lies-in-the-hands-of-five-judges-55560/>> accessed 15 October 2020; John Osoro, ‘5 Judges Appointed to Hear Petitions on CJ Advise to Uhuru to Dissolve Parliament’ (Capital News’ (Capital News, 14 October 2020)

The upshot of the above is that despite Kenya's progressive constitutional and statutory framework on achieving gender mainstreaming, the country is far from enjoying gender equality and equity especially in relation to women's position in leadership and national development roles, with representation of women in Kenya's Parliament remaining minimal over the years despite the promulgation of the current Constitution of Kenya in 2010.⁷³ Indeed, despite its leading economic position in the East African region, Kenya ranks the lowest among the East African countries when it comes to the place of women in leadership positions.⁷⁴ For instance, in 2016, it was reported that women held 64 percent of seats in the lower house of Rwanda's national legislature, the largest share of any country.⁷⁵ However, despite this commendable state of affairs in Rwanda, there are conflicting reports on the status of women rights in everyday life, with some reporters saying that the political state of affairs is very different from every day community life of women in Rwanda.⁷⁶

It is therefore possible to have a politically empowered group of men and women but without guaranteeing them enjoyment of other fundamental rights. As things stand, it is therefore safe to argue that the problem of gender inequality and inequity in Kenya goes beyond availability of statutory and constitutional framework. It is for this reason that the 2019 National Policy on Gender and Development was drafted in order to enable the stakeholders take practical steps towards addressing the existing challenges.

4. 2019 National Policy on Gender and Development: Overview

The National Policy on Gender and Development seeks to create a just, fair and transformed society free from gender based discrimination in all spheres of life practices. The National Policy highlights the fact that the patriarchal social order supported by statutory, religious and customary laws and practices; and the administrative and procedural mechanisms for accessing rights have continued to hamper the goal of attaining gender equality and women's empowerment.⁷⁷ The Gender Policy was informed by the observation that although the Kenyan law and the Constitution contain progressive provisions that were expected to address gender inequality, they have not delivered gender equality in practice, thus raising the need to develop a policy that addresses the variety of manifestations of gender discrimination and inequality.⁷⁸ The 2019 Policy builds on the National Policy for Gender and Development of 2000, and Sessional Paper No. 2 of 2006 on

<https://www.capitalfm.co.ke/news/2020/10/5-judges-appointed-to-hear-petitions-on-cj-advise-to-uhuru-to-dissolve-parliament/> accessed 15 October 2020.

⁷³ 'Actualization and Implementation of the "Two-Thirds Gender Principle" in Kenya | Wwww.Sidint.Net' <https://www.sidint.net/content/actualization-and-implementation-two-thirds-gender-principle-kenya> accessed 15 October 2020.

⁷⁴ Ibid.

⁷⁵ 'It's The No. 1 Country for Women in Politics — But Not In Daily Life' (NPR.org)

<https://www.npr.org/sections/goatsandsoda/2016/07/29/487360094/invisibilia-no-one-thought-this-all-womans-debate-team-could-crush-it> accessed 15 October 2020.

⁷⁶ Ibid; Azad Essa, 'The Mixed Tale of Women's Empowerment in Rwanda'

<https://www.aljazeera.com/features/2018/9/20/the-mixed-tale-of-womens-empowerment-in-rwanda> accessed 15 October 2020; 'How Women Are Stepping up to Remake Rwanda' (Culture, 15 October 2019) <https://www.nationalgeographic.com/culture/2019/10/how-women-are-remaking-rwanda-feature/> accessed 15 October 2020.

⁷⁷ Republic of Kenya, Sessional Paper No. 02 of 2019 on National Policy on Gender and Development, October 2019, p. 9.

⁷⁸ Republic of Kenya, Sessional Paper No. 02 of 2019 on National Policy on Gender and Development, October 2019, pp. 9-10.

Gender Equality and Development which were meant to promote women empowerment and mainstreaming the needs of women, men, girls and boys in all sectors of development in Kenya so that they can participate and benefit equally from development initiatives.⁷⁹

The 2019 Policy rightly points out that while there has been emphasis by the Kenyan Government on promoting gender equality in all aspects of its activities, evaluations point to clear gaps in promoting gender equality such as disparities in education and economic opportunities, representation, participation, and adequate access to health, all of which present new opportunities and challenges in the pursuit of gender equality and women's empowerment.⁸⁰ As a result, the Policy has been designed to guide and ensure that all planning, programming, budgeting and implementation of development programmes include a gender perspective both at National and County levels.⁸¹

The Policy has promised the following focus areas: improved livelihoods, promotion and protection of human rights, participation in decision-making and governance, recognition of gender and promotion of women empowerment in macro-economic management among others.⁸² The Scope of the National Gender and Development Policy application is specifically and directly to all Government Ministries, Independent Bodies, Quasi-autonomous entities, and Departments and Agencies both at the national and county levels of government. It is also expected that the principles, strategies and approaches in the policy shall also apply to the, private sector and civil society.⁸³

The Policy also aims at achieving equality of opportunity and outcomes with respect to access to and control of national and county resources and services; and equality of treatment that meets the specific and distinct needs of different categories of women and men.⁸⁴

However, while the Policy is concerned with all categories and aspects of gender, it has put a special focus on the empowerment of women who are currently considered the marginalized gender.⁸⁵ The Policy has identified a set of factors that will act as indicators for measuring the implementation and effectiveness of the gender and development agenda.⁸⁶ In addition, the Policy points out that if concerted efforts are made and adequate resources are allocated to the processes of institutionalizing gender equality and the empowerment of women as proposed in this policy, the result will be a fairer and transformed society in which women and men will benefit in the following ways: Equality of treatment and Freedom from Discrimination as provided for under Article 27 of the Constitution; Equality in the political, social, economic and cultural development spheres for women and men; Respect for the human rights of women, men, boys and girls; Respect

⁷⁹ Republic of Kenya, Sessional Paper No. 02 of 2019 on National Policy on Gender and Development, October 2019, p. 12.

⁸⁰ Republic of Kenya, Sessional Paper No. 02 of 2019 on National Policy on Gender and Development, October 2019, p. 13.

⁸¹ Ibid, p. 13.

⁸² Ibid, p.13.

⁸³ Republic of Kenya, Sessional Paper No. 02 of 2019 on National Policy on Gender and Development, October 2019, p. 13.

⁸⁴ Republic of Kenya, Sessional Paper No. 02 of 2019 on National Policy on Gender and Development, October 2019, p. 13.

⁸⁵ Ibid, p. 13.

⁸⁶ Ibid, p. 13.

for provisions on equality in the Bill of Rights in civil, administrative and judicial regulations and procedures and customary, cultural and religious practices; Enforcement of statutory, religious and customary laws within the framework of this policy and the Constitution; and Duty bearers at the National and County levels of Government will be equipped with relevant gender responsive requirements for planning, budgeting and implementing development programmes.⁸⁷

Chapter Two of the Policy dwells on situational analysis and key aspects which impact on Kenya's progress towards gender equality.⁸⁸ The Chapter highlights the following as the major challenges that affect realization of gender equality in Kenya: Poverty; Access to Labour and the Economy; Access to Education; Access to Health Care; Land, Housing and Agriculture; Access to Environment and Natural Resources; Peace and Security; Governance, Power and Decision-Making; Information and Communications Technologies (ICT); Respect of Human Rights for All; Sexual and Gender Based Violence (SGBV); Access to Justice; Discrimination between the Girl Child and Boy Child; Intersectional Discrimination; Media Influence; and Institutional Mechanisms for the advancement of Gender Equality and Empowerment of Women.⁸⁹

Chapter Two highlights the specific concerns that arise under each of the foregoing thematic areas affecting the gender debate in Kenya.

Chapter three of the Policy document captures that Policy goal, principle and objectives, which are all aimed at ensuring gender equality and women empowerment in the social, economic, political and cultural spheres as envisaged in the Constitution. The framework also seeks to establish and strengthen Affirmative Action efforts aimed at reducing gender inequalities and geographical disparities in the distribution of natural resources and access to productive resources such as land, labour, finances, information and technology.⁹⁰ The overall goal of this policy is to achieve gender equality by creating a just society where women, men, boys and girls have equal access to opportunities in the political, economic, cultural and social spheres of life.⁹¹

The objectives of the Policy are to: Facilitate implementation of the Constitution and domesticate the international and regional obligations and commitments that promote gender equality and freedom from discrimination; Provide a framework to integrate and mainstream gender into the National and County Government development planning and budgeting as well as resultant policies, programmes and plans including those of non-state actors; Promote and support the rights-based approach when dealing with gender related matters; and, Define institutional framework and performance indicators for effective tracking, monitoring, evaluation and reporting implementation of gender equality and women empowerment.⁹²

⁸⁷ Ibid, pp. 13-14.

⁸⁸ Ibid, p. 14.

⁸⁹ Republic of Kenya, Sessional Paper No. 02 of 2019 on National Policy on Gender and Development, October 2019, Chapter Two.

⁹⁰ Republic of Kenya, Sessional Paper No. 02 of 2019 on National Policy on Gender and Development, October 2019, Chapter Three, p. 28.

⁹¹ Republic of Kenya, Sessional Paper No. 02 of 2019 on National Policy on Gender and Development, October 2019, Chapter Three, para. 3.2.

⁹² Republic of Kenya, Sessional Paper No. 02 of 2019 on National Policy on Gender and Development, October 2019, Chapter Three, para. 3.3.

In order to achieve the foregoing, the following approaches will be used: Gender mainstreaming and integration in all planned interventions; Affirmative Action to ensure that temporary special measures are used to address past gender inequalities and injustices; Empowerment of women, men, boys and girls to facilitate equality, equity and non-discrimination; Involvement of men in addressing gender issues; Institutional and human capacity building; Gender responsive development planning budgeting; and, Generating data and indicators that are disaggregated by sex, age and disability.⁹³

The 2019 Policy anticipates to achieve the following outcomes: Equality and economic empowerment will be achieved; Diversity of all Kenyans will be acknowledged and respected; Women men, boys and girls will have equal rights and access to education, health, housing, employment, and other services and resources; Women and men will have equality of opportunity to participate in decision making and to contribute to the political, social, economic and cultural development agenda; Promotion of equal rights at the time of, during and on the dissolution of the marriage for spouses; and, Sexual and Gender based Violence will abate and men, women, boys and girls will live with dignity.⁹⁴

Chapter four of the Policy outlines the policy priority areas the Ministry in charge of Gender Affairs will oversee and implement through the institutional arrangements discussed chapter five thereof.⁹⁵ Chapter four offers recommendations on the challenges identified in chapter two of the Policy document.

Chapter five of the Policy document presents the institutional and implementation framework for implementing the National Gender and Development Policy, where the institutions identified will facilitate integration and mainstreaming of gender concerns as part of their mandates in implementing the policy. According to the Policy document, therefore, implementation of the policy will thus take a multi-sectoral approach cutting across both the state and non-state actors at all levels. The Ministry in charge of Gender Affairs will however take the leading role of coordinating all the other players in the country so as to enhance harmony and avoid duplication.⁹⁶

The Policy document points out that different aspects of the policy will be implemented by various actors including Ministries, Counties, Departments and Agencies, Constitutional Commissions and Independent Offices in collaboration with the private sector, Civil Society Organizations, Faith Based Organizations, among other key actors.⁹⁷

Chapter six on monitoring and evaluation envisages that Monitoring and evaluation shall be an essential strategy in the implementation of the Policy in order to ensure that results frameworks

⁹³ Republic of Kenya, Sessional Paper No. 02 of 2019 on National Policy on Gender and Development, October 2019, Chapter Three, para. 3.5.

⁹⁴ Republic of Kenya, Sessional Paper No. 02 of 2019 on National Policy on Gender and Development, October 2019, Chapter Three, para. 3.6.

⁹⁵ Republic of Kenya, Sessional Paper No. 02 of 2019 on National Policy on Gender and Development, October 2019, Chapter Four, para. 4.1.

⁹⁶ Republic of Kenya, Sessional Paper No. 02 of 2019 on National Policy on Gender and Development, October 2019, Chapter Five, para. 5.1.

⁹⁷ Ibid, para. 5.2.

on each policy action detailing outputs, outcomes, impacts and key actors shall be developed to facilitate annual plans and development planning processes in all sector at all levels.⁹⁸

5. Actualising the National Policy on Gender and Development in Kenya: Prospects

The 2019 National Policy on Gender and Development is a commendable document that is quite detailed in not only identifying the challenges but also offering solutions as well as an oversight framework. It is however noteworthy that there is still the challenge of drafting the actual Act in a way that ensures that the spirit of the Policy and the approaches envisaged will be possible to implement. The institutional framework will be critical in realization of the same. However, there is a need to work very closely with communities in order to ensure that there is a continued change of practices and behaviour especially those related to gender roles in the society.⁹⁹

The Constitution of Kenya 2010 recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.¹⁰⁰ It also guarantees the right of every person to use the language, and to participate in the cultural life, of the person's choice.¹⁰¹ However, the Constitution also provides that no person shall be compelled by another person to perform, observe or undergo any cultural practice or rite.¹⁰² It is also noteworthy the Constitution provides for equality of all persons and non-discrimination. It prohibits discrimination by either state or any other person directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.¹⁰³

While some traditions have been instrumental in preserving the heritage of the people of Kenya, there are others that are admittedly discriminative especially against women and are also used to hamper their progress in all spheres of life.¹⁰⁴ There is a need for a sustained debate aimed at changing communities' mentality on the culturally-specific gendered roles and responsibilities since these tend to affect how men and women interact both at household level as well as professionally.¹⁰⁵

⁹⁸ Republic of Kenya, Sessional Paper No. 02 of 2019 on National Policy on Gender and Development, October 2019, Chapter six, para. 6.1.

⁹⁹ Koburtay, Tamer, Jawad Syed, and Radi Haloub. "Implications of religion, culture, and legislation for gender equality at work: Qualitative insights from Jordan." *Journal of Business Ethics* 164, no. 3 (2020): 421-436; Glas, Saskia, Niels Spierings, and Peer Scheepers. "Re-understanding religion and support for gender equality in Arab countries." *Gender & Society* 32, no. 5 (2018): 686-712; Wood, Hannelie J. "Gender inequality: The problem of harmful, patriarchal, traditional and cultural gender practices in the church." *HTS Theological Studies* 75, no. 1 (2019): 1-8.

¹⁰⁰ Constitution of Kenya 2010, Article 11(1).

¹⁰¹ Constitution of Kenya 2010, Article 44 (1).

¹⁰² Constitution of Kenya 2010, Article 44 (3).

¹⁰³ Constitution of Kenya 2010, Article 27 (4) (5).

¹⁰⁴ Rivière, François, ed. *Investing in cultural diversity and intercultural dialogue*. Vol. 2. Unesco, 2009; Martin Wamalwa, 'Culture And Women Empowerment In Kenya: A Philosophical Analysis' (2007); Nozomi Kawarazuka, Catherine Locke and Janet Seeley, 'Women Bargaining with Patriarchy in Coastal Kenya: Contradictions, Creative Agency and Food Provisioning' (2019) 26 *Gender, Place & Culture* 384; Ongong'a, Jude J. "African traditional cultural conundrums which make women prone to hiv/aids infections: a case of the Maasai of Kenya." *International Journal of Education and Research*, Vol. 1 No. 8 August 2013 (2013) < <https://www.ijern.com/journal/August-2013/18.pdf> > Accessed 10 October 2020.

¹⁰⁵ Nozomi Kawarazuka, Catherine Locke and Janet Seeley, 'Women Bargaining with Patriarchy in Coastal Kenya: Contradictions, Creative Agency and Food Provisioning' (2019) 26 *Gender, Place & Culture* 384.

For as long as the deep-seated culturally inspired mentality on the supposed role of men and women, formal legal, policy and institutional frameworks may not do much in terms of transformation.¹⁰⁶ However, these frameworks alongside public awareness on the importance of acknowledging that both men and women should be afforded equal opportunities to contribute to the national development debate.¹⁰⁷ For instance, the UN Women Report (A/75/274), *Intensification of efforts to eliminate all forms of violence against women: Report of the Secretary-General (2020)*, submitted pursuant to UN General Assembly resolution 73/148¹⁰⁸, provides information on measures taken by Member States and activities carried out within the United Nations system to eliminate violence against women and girls in the context of COVID-19 as well as reporting on advances in eliminating sexual harassment.¹⁰⁹

This Report is evidence of the heavy burden that women and girls still have to bear in society even as at 2020. It has been reported that while everyone is facing unprecedented challenges, women are bearing the brunt of the economic and social fallout of COVID-19. Women who are poor and marginalized face an even higher risk of COVID-19 transmission and fatalities, loss of livelihood, and increased violence.¹¹⁰ Gender equality and equity awareness should be inculcated into children, both boys and girls from an early age in order to foster positive change. Both men and women need to start appreciating the need for gender equality and equity from an early age for sustained transformation of the society.¹¹¹

6. Conclusion

The National Policy on Gender and development, 2019 is a great leap towards addressing the challenges affecting achievement of gender equality and equity in the country. It has detailed and plausible recommendations on how to move forward. However, its actualization requires the effort of every person and all ages. If the Policy's spirit and recommendations can be captured in

¹⁰⁶ Eisend, Martin. "Gender roles." *Journal of Advertising* 48, no. 1 (2019): 72-80; Olsson, Maria, and Sarah E. Martiny. "Does exposure to counterstereotypical role models influence girls' and women's gender stereotypes and career choices? A review of social psychological research." *Frontiers in psychology* 9 (2018): 2264; Couprie, Hélène, Elisabeth Cudeville, and Catherine Sofer. "Efficiency versus gender roles and stereotypes: an experiment in domestic production." *Experimental Economics* 23, no. 1 (2020): 181-211; Godsil, Rachel D., Linda R. Tropp, Phillip Atiba Goff, J. A. Powell, and J. MacFarlane. "The effects of gender roles, implicit bias, and stereotype threat on the lives of women and girls." *The Science of Equality* 2, no. 1 (2016): 14-15; Ellemers, Naomi. "Gender stereotypes." *Annual review of psychology* 69 (2018): 275-298.

¹⁰⁷ Ibid.

¹⁰⁸ Resolution adopted by the General Assembly on 17December2018 [on the report of the Third Committee (A/73/582)] 73/148: Intensification of efforts to prevent and eliminate all forms of violence against women and girls: sexual harassment.

¹⁰⁹ 'Intensification of Efforts to Eliminate All Forms of Violence against Women: Report of the Secretary-General (2020) | Digital Library: Publications' (UN Women) <<https://www.unwomen.org/digital-library/publications/2020/07/a-75-274-sg-report-ending-violence-against-women-and-girls>> accessed 15 October 2020.

¹¹⁰ 'COVID-19 and Its Economic Toll on Women: The Story behind the Numbers' (UN Women) <<https://www.unwomen.org/news/stories/2020/9/feature-covid-19-economic-impacts-on-women>> accessed 15 October 2020.; see also 'The COVID-19 Shadow Pandemic: Domestic Violence in the World of Work - A Call to Action for the Private Sector | WEPS' <<https://www.weps.org/resource/covid-19-shadow-pandemic-domestic-violence-world-work-call-action-private-sector>> accessed 15 October 2020.

¹¹¹ Blum, Robert Wm, Jo Boyden, Annabel Erulkar, Caroline Kabiru, and Siswanto Wilopo. "Achieving Gender Equality Requires Placing Adolescents at the Center." *Journal of Adolescent Health* 64, no. 6 (2019): 691-693; Aturu, J. O. "Gender Equality, Education and Sustainable Development in Nigeria: An Assessment." *International Journal of Education and Evaluation* 4, no. 1 (2018): 70-77.

an Act of Parliament, followed by concerted efforts and campaign by every member of the society to bring a wind of change, then Kenya will not struggle with achieving the one-third/two-third gender rule since both men and women will be able to compete fairly for economic, political and social opportunities.¹¹² The gender debate should not be treated as an isolated question because as it has been demonstrated in the Policy document, achieving gender equality and equity will require the stakeholders to address different challenges: Gender equality and equity will look like just a by-product of developing society.¹¹³ It is indeed possible to achieve gender equality and equity if the Policy document of 2019 can be implemented and supported by good will from all groups of persons and all levels of government. If Kenya is to achieve the sustainable development goals as well as its national development plans such as the Vision 2030, then gender equality and equity must be addressed as a matter of priority since development requires concerted efforts of both men and women. Actualising the National Policy on Gender and Development in Kenya is indeed possible.

¹¹² United Nations Department of Economic and Social Affairs Division for Social Policy and Development, 'ONLINE SURVEY ON Promoting Empowerment of People in achieving poverty eradication, social integration and full employment integration and full employment and decent work for all.' <<https://www.un.org/esa/socdev/publications/FullSurveyEmpowerment.pdf>> Accessed 14 October 2020; In the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012]eKLR, Advisory Opinions Application 2 of 2012.

¹¹³ Dugarova, Esuna. Gender equality as an accelerator for achieving the Sustainable Development Goals. Discussion Paper, UNDP & UN Women, 2018; Beatrice Akala, 'Gender Inequality in Education Is Still an Issue in Kenya and South Africa' (The Conversation) <<http://theconversation.com/gender-inequality-in-education-is-still-an-issue-in-kenya-and-south-africa-125747>> accessed 15 October 2020; North, Amy, and Helen Longlands. "Gender, Poverty and Educational Equality." *The SAGE Handbook of Inclusion and Diversity in Education* (2019): 103; Fredman, Sandra, Jaakko Kuosmanen, and Meghan Campbell. "Transformative equality: Making the sustainable development goals work for women." *Ethics & International Affairs* 30, no. 2 (2016): 177-187; Nurhaeni, I. D. A., and Y. Kurniawan. "Developing training and vocational education for achieving gender equality." (2017): 97.

Exploring Alternative Sources of Energy in Kenya

Abstract

The Kenyan Government has been preparing to set up nuclear reactors in the country as an alternative source of energy to add to the national grid as part of the plans to meet the country's development blueprint, Vision 2030 and the Big Four Agenda. Nuclear energy, while a plausible source of energy, comes with its good share of challenges. This paper critically evaluates the viability of different sources of energy including nuclear energy by drawing lessons from other countries where these sources have been explored and either succeeded or failed. The paper also offers recommendations on the possible sources of energy that are worth exploring in the Kenyan context.

1. Introduction

With the ever growing population, advanced technological developments and climate change, the world continues to face challenges as far as energy needs are concerned.¹ In order to meet its energy requirements, the Government of Kenya set out to install nuclear energy reactors as an alternative source of renewable energy in addition to hydropower, wind and geothermal power, among others, in the country.² The country's energy needs are expected to rise due to population increase as well as the country's development blueprint, Vision 2030 and the Big Four Agenda.³ Kenya expects peak demand to top 22,000 megawatts by 2031, partly due to industrial expansion, a component in Kenya's Big Four Agenda.⁴

Currently, it is estimated that hydropower accounts for 35 percent of Kenya's electricity generation, with the rest coming from geothermal, wind and diesel powered plants.⁵ Notably, Kenya is not the only African country that is on the journey towards establishing their first nuclear plant, as way of diversifying the countries' energy mix to improve their electricity generation capacity.⁶ However, while Kenya is at an advanced stage with the nuclear power plant establishment, there have been serious concerns relating to the technical issues associated with storage, transportation and the disposal of radioactive material and waste.⁷ This is in view of the nuclear disasters that have occurred in the past and recently across the globe.⁸ There is a need for

¹ David Bodansky, 'Nuclear Energy : Principles, Practices, and Prospects' (CERN Document Server, 2008) <<https://cds.cern.ch/record/1109377>> accessed 19 August 2020.

² Republic of Kenya, National Energy Policy, October, 2018 <https://kplc.co.ke/img/full/BL4PdOqKtxFT_National%20Energy%20Policy%20October%20%202018.pdf> accessed 30 September 2020.

³ Kiprop, Eliud, Kenichi Matsui, and Nicholas Maundu. "Can Kenya supply energy with 100% renewable sources?." In 5th International Conference on Environment and Renewable Energy, pp. 18-19. 2017 <https://www.researchgate.net/publication/328925970_Can_Kenya_Supply_Energy_With_100_Renewable_Sources> accessed 30 September 2020.

⁴ 'Kenya on Course for \$5 Billion Nuclear Plant to Power Industry' Bloomberg.com (4 August 2020) <<https://www.bloomberg.com/news/articles/2020-08-04/kenya-on-course-for-5-billion-nuclear-plant-to-power-industry>> accessed 19 August 2020.

⁵ Republic of Kenya, National Energy Policy, October, 2018.

⁶ 'A Case for Nuclear Energy in Kenya' (The Star) <<https://www.the-star.co.ke/opinion/columnists/2019-04-05-a-case-for-nuclear-energy-in-kenya/>> accessed 19 August 2020.

⁷ 'A Case for Nuclear Energy in Kenya' (The Star) <<https://www.the-star.co.ke/opinion/columnists/2019-04-05-a-case-for-nuclear-energy-in-kenya/>> accessed 19 August 2020.

⁸ 'A Brief History of Nuclear Accidents Worldwide | Union of Concerned Scientists'

the Government of Kenya and other stakeholders to be wary of the same even as the country ventures into nuclear energy production.

2. Energy Sources in Kenya: the Challenges

The Ministry of Energy observes that energy is one of the key enablers of Kenya's Vision 2030 and the Big 4 Agenda development programs and thus, Kenya treats energy security as a matter of national priority.⁹ This is based on the fact that the Third Medium Plan 2017-2022 identifies energy as the country's driver into "a newly-industrializing, middle-income economy, providing a high quality of life to all its citizens in a clean and secure environment," and as a result, Kenya considers access to competitively-priced, reliable, quality, safe and sustainable energy as an essential ingredient for the country's social –economic development.¹⁰

It has rightly been pointed out that in the past decade the country has grappled with the challenge of unreliable, expensive and unsustainable energy use supporting a stagnating industrial and manufacturing base. This is due to aging energy infrastructure that can no longer meet the modern day requirements as envisaged in the country's economic blueprint, the Kenya Vision 2030.¹¹

As Kenya seeks to realize the national blueprint for development and the sustainable development agenda as far as energy generation is concerned, there has been efforts to diversify energy sources in the country. It has been observed that Kenya is moving towards procuring more of its additional power from wind and solar and with the substantial growth in hydro, wind and solar energy in the recent years, this has led to a decline in generation from oil, gas and coal sources and electricity imports.¹²

<<https://www.ucsusa.org/resources/brief-history-nuclear-accidents-worldwide>> accessed 6 October 2020; Daniel Bukszpan, '11 Nuclear Meltdowns and Disasters' (CNBC, 16 March 2011) *<<https://www.cnbc.com/2011/03/16/11-Nuclear-Meltdowns-and-Disasters.html>>* accessed 6 October 2020; 'Nuclear Reactor Accidents - History and Legacies' (Atomic Heritage Foundation) *<<https://www.atomicheritage.org/history/nuclear-reactor-accidents-history-and-legacies>>* accessed 6 October 2020; 'Chernobyl Was the World's Worst Nuclear Power Plant Accident. Here's How It Compares to Fukushima and Three Mile Island.' (Business Insider Africa, 12:20 200AD) *<<https://africa.businessinsider.com/tech/chernobyl-was-the-worlds-worst-nuclear-power-plant-accident-heres-how-it-compares-to/1x12t91>>* accessed 6 October 2020.

⁹ kawi, 'Background' (Ministry of Energy) *<https://energy.go.ke/?page_id=439>* accessed 28 September 2020.

¹⁰ Ibid.

¹¹ Owiro, D., G. Poquillon, K. S. Njonjo, and C. Oduor. "Situational analysis of energy industry, policy and strategy for Kenya." Institute of Economic Affairs (2015) *<https://media.africaportal.org/documents/Situational-Analysis-of-Energy-Industry-Policy-and--Strategy-for-Kenya_1.pdf>* accessed 28 September 2020, p.5.

¹² Research and Markets, 'Insights on the Energy Requirements of Kenya to 2050 - Moving Towards Procuring More Power from Wind and Solar' (GlobeNewswire News Room, 11 September 2020) *<<http://www.globenewswire.com/news-release/2020/09/11/2092394/0/en/Insights-on-the-Energy-Requirements-of-Kenya-to-2050-Moving-Towards-Procuring-more-Power-from-Wind-and-Solar.html>>* accessed 24 September 2020.

Indeed, Kenya is considered the world's 8th largest geothermal power producer, has the continent's largest wind farm, a vibrant off grid energy market, and an aggressive last mile campaign to connect every citizen.¹³

As at 2015, it was estimated that the energy sector relies on three main sources of energy, biomass, petroleum and electricity, at 68%, 21% and 9% of total energy consumption in Kenya, with biomass constituting the largest source of energy consumed in Kenya in the form of wood fuel and charcoal, extensively used in the rural areas by mostly poor households for cooking and heating purposes, as well as small business, principally kiosks and restaurants within urban centres.¹⁴

Some reports show that Kenya has had one of the fastest increases in electrification rates within sub-Saharan Africa since 2013: by 2018, 75% of the population had access, with the Government aiming to reach full access by 2022.¹⁵ Notably, Government's Kenya Vision 2030 aspires to transform Kenya from low income status into a middle-income country and a key element to this vision is a lower cost of power reaching more broadly across the population.¹⁶ As the African Continent seeks to invest in infrastructural development, including the power sector, Kenya is touted as one of the countries that have made notable progress. For instance, it is noted that the Programme for Infrastructure Development in Africa is forecasting an additional 140,000 MW of power over for the East African Power Pool where Kenya's share of this is 13,852 MW of planned peak demand by 2038 or an increase of just over 11,000 MW over this 20-year period.¹⁷

Despite this positive report, Kenya's energy sector is faced by a myriad of challenges. As far as the use of clean energy is concerned, it is estimated that two-thirds of Kenya's energy currently comes from bioenergy.¹⁸ It has been observed that as Kenya seeks to move from non-renewable energy sources to renewable energy sources, moving an economy which relies heavily on wood fuel and biomass as its largest energy source, to achieve sustainable energy use through the gradual increase in the use of renewable energy sources that are often expensive due to the technology deployed, in the face of oil and coal discoveries that could be more readily accessible in spite of its known effects on the environment is a great challenge.¹⁹

¹³ 'Our Latest Thoughts on Kenya's Power Sector Challenges' (Energy For Growth) <<https://www.energyforgrowth.org/blog/our-latest-thoughts-on-kenyas-power-sector-challenges/>> accessed 21 September 2020.

¹⁴ Owiro, D., G. Poquillon, K. S. Njonjo, and C. Oduor. "Situational analysis of energy industry, policy and strategy for Kenya." Institute of Economic Affairs (2015), p.7.

¹⁵ 'Kenya Energy Outlook – Analysis' (IEA) <<https://www.iea.org/articles/kenya-energy-outlook>> accessed 21 September 2020.

¹⁶ Research and Markets ltd, 'Kenyan Energy Requirements Forecasted to 2050 - Research and Markets' <<https://www.researchandmarkets.com/reports/5136031/kenyan-energy-requirements-forecasted-to-2050>> accessed 24 September 2020.

¹⁷ Research and Markets, 'Insights on the Energy Requirements of Kenya to 2050 - Moving Towards Procuring More Power from Wind and Solar' (GlobeNewswire News Room, 11 September 2020) <<http://www.globenewswire.com/news-release/2020/09/11/2092394/0/en/Insights-on-the-Energy-Requirements-of-Kenya-to-2050-Moving-Towards-Procuring-more-Power-from-Wind-and-Solar.html>> accessed 24 September 2020.

¹⁸ 'Kenya Energy Outlook – Analysis' (IEA) <<https://www.iea.org/articles/kenya-energy-outlook>> accessed 21 September 2020.

¹⁹ Owiro, D., G. Poquillon, K. S. Njonjo, and C. Oduor. "Situational analysis of energy industry, policy and strategy for Kenya." Institute of Economic Affairs (2015), p. 7.

While independent power producers have made considerable efforts to produce enough power to run the country, there have been challenges with uptake of the same by the Kenya Power and Lighting Company Plc (KPLC). For instance, in the recent times and partly due to the Corona Virus (Covid-19) pandemic, there have been reports that measures to contain the pandemic have led to reduced demand for power especially among the commercial consumers who account for over 65% of the power use in the country.²⁰ Reports also indicate that KPLC has prioritized the uptake of geothermal at 39.5 per cent, hydro at 33.9 per cent, wind at 14 per cent, diesel at 9.7 per cent with other sources like solar, imports from Uganda and co-generation accounting for about three per cent.²¹ This has thus left some of the producers with excess power.²² This shows that Kenya's main consumers of electricity are commercial businesses and when these run into problems, the independent power producers are left stranded. This happens while there are still reports that there are homes still not connected to the grid despite the Government's best efforts to do so. Thus, even as the Government looks for ways to produce cleaner power, there is also a need to address the disconnect between production and take up of the power.

It is estimated that Kenya's Lake Turkana wind farm and its 365 turbines make for a generating capacity of more than 300MW, creating one of the most productive projects anywhere in the world.²³ Wind power has become a key contributor to the national grid to the extent that where there is interruption in its production, consumers have ended paying more for electricity in the country.²⁴

Notably, the Lake Turkana Wind Power (LTWP) has been allocated a maximum production quota of 210MW, against an installed capacity of 310MW.²⁵ While this has been attributed to the Covid-19 pandemic that afflicted almost the whole world in 2020, it raises a concern as to whether the power producers' major customers are only the commercial users. This is because, it has already been pointed out that there are households that still mainly rely on kerosene and biomass as their main source of energy for their inability to afford electricity. Thus, even as we vouch for increased transition to renewable energy by way of increased production, this scenario points out the fact that there is more than availability of the renewable energy: the same must not only be made available but must also be made affordable to the local 'mwananchi' (citizen).

²⁰ 'Consumers Pay the Price as Covid Electricity Cuts Hit Turkana Project - The East African' Monday September 14 2020 <<https://www.theeastafrican.co.ke/tea/business/consumers-pay-the-price-as-covid-electricity-cuts-hit-turkana-project-1939124>> accessed 1 October 2020.

²¹ 'Consumers Pay the Price as Covid Electricity Cuts Hit Turkana Project - The East African' Monday September 14 2020 <<https://www.theeastafrican.co.ke/tea/business/consumers-pay-the-price-as-covid-electricity-cuts-hit-turkana-project-1939124>> accessed 1 October 2020.

²² Ibid.

²³ 'What's Driving Wind Power in Kenya and What Challenges Lie in Wait?' <<https://www.nsenenergybusiness.com/features/wind-power-kenya-challenges/>> accessed 24 September 2020.

²⁴ 'Consumers Pay the Price as Covid Electricity Cuts Hit Turkana Project - The East African' <<https://www.theeastafrican.co.ke/tea/business/consumers-pay-the-price-as-covid-electricity-cuts-hit-turkana-project-1939124>> accessed 1 October 2020.

²⁵ 'Consumers Pay the Price as Covid Electricity Cuts Hit Turkana Project - The East African' <<https://www.theeastafrican.co.ke/tea/business/consumers-pay-the-price-as-covid-electricity-cuts-hit-turkana-project-1939124>> accessed 1 October 2020.

3. Nuclear Power as a Substitute for Fossil Fuels

It has been noted that many countries are reconsidering the role of nuclear energy in their energy mix, as a means to alleviate the concerns over climate change, security of energy supply and the price and price volatility of fossil fuels.²⁶ Thus, the need for alternative sources of energy has been fueled by the combination of climate change fears and a continued growth in energy demand as a way of moving away from the global fossil fuel addiction.²⁷ Currently, it is estimated that nuclear fission as one such alternative accounts for 14% of global electricity generation and has the potential to generate significantly more.²⁸ The proponents of use of nuclear energy argue that it has the potential to reduce pollution, cut greenhouse gas emissions, and help countries attain more energy independence.²⁹

The global legal framework on production and use of nuclear energy governs key issues relating to the use and safety of nuclear energy and all countries venturing into this territory are expected to abide by the same. Specifically, the existing international nuclear liability regime is based on the Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960, as amended by the Additional Protocol of 28 January 1964 and by the Protocol of 16 November 1982 (1960 Paris Convention) and the Vienna Convention on Civil Liability for Nuclear Damage (1963 Vienna Convention), which set forth the basic principles of nuclear liability law.³⁰ These principles include: the operator of a nuclear installation is exclusively liable for nuclear damage; strict (no fault) liability is imposed on the operator; exclusive jurisdiction is granted to the courts of one State, to the exclusion of the courts in other States; and liability may be limited in amount and in time.³¹ The International Atomic Energy Agency is the main institution that oversees the implementation of these legal instruments among other functions.³² Countries such as France have been using nuclear energy as their biggest contributor to domestic electricity needs.³³ However, it should be noted that even such countries as France and Germany that have far much advanced technology and regulatory frameworks in place for nuclear energy

²⁶ Gordelier, Stan, and Ron Cameron. "Comparing nuclear accident risks with those from other energy sources." *Nucl Dev* (2010): 33-40, p.9; Strupczewski, A. "Accident risks in nuclear-power plants." *Applied Energy* 75 (2003): 79-86.

²⁷ 'Nuclear Power: The Good, the Bad and the Ugly' <<https://sites.google.com/site/asaksdfuyhlaku/>> accessed 8 September 2020.

²⁸ *Ibid.*

²⁹ 'International Politics - Nuclear Energy' <<https://sites.google.com/a/ncsu.edu/nuclear-energy/politics/foreign>> accessed 8 September 2020.

³⁰ Gioia, Andrea, "The 1997 Vienna Convention on Civil Liability for Nuclear Damage and the 1997 Convention on Supplementary Compensation. Explanatory Texts." (2007): 5-99 < https://www-pub.iaea.org/MTCD/Publications/PDF/P1768_web.pdf> accessed 8 September 2020.

³¹ *Ibid.*, pp. 1-2.

³² 'International Atomic Energy Agency | Nuclear Energy for Peaceful Uses | NTI' <<https://www.nti.org/learn/treaties-and-regimes/international-atomic-energy-agency/>> accessed 6 October 2020; See also Convention on Third Party Liability in the Field of Nuclear Energy and the Vienna Convention on Civil Liability for Nuclear Damage and the 1997 Vienna Convention on Civil Liability for Nuclear Damage and the 1997 Convention on Supplementary Compensation for Nuclear Damage.

³³ 'Nuclear Power in France | French Nuclear Energy - World Nuclear Association' <<https://www.world-nuclear.org/information-library/country-profiles/countries-a-f/france.aspx>> accessed 6 October 2020; Velasquez, Carlos E., Fidéllis BGL e Estanislau, Antonella L. Costa, and Cláudia Pereira. "Assessment of the French nuclear energy system—A case study." *Energy Strategy Reviews* 30 (2020): 100513.

are also cutting down on their use of nuclear energy for its potential negative effects if not well handled.³⁴

4. Nuclear Energy in Kenya: Legal and Institutional Framework

The preferred site for the nuclear plant in the country is Tana River County, near the Kenyan coast which was preferred after studies across three regions. The plant will be developed with a concessionaire under a build, operate and transfer model.³⁵ It is noteworthy that Kenya is still at a nascent stage in its plans to set up nuclear reactors, especially as far as regulatory frameworks are concerned.

4.1 Nuclear Power and Energy Agency (NuPEA)

The Nuclear Power and Energy Agency, formerly Kenya Nuclear Electricity Board (KNEB), is a State Corporation established under the Energy Act 2019. The Agency is charged with, inter alia: being the nuclear energy programme implementing organization and promoting the development of nuclear electricity generation in Kenya; and carrying out research, development and dissemination activities in the energy and nuclear power sector.³⁶ The Agency is therefore expected to work closely with the other stakeholders in the energy sector to oversee the setting up and successful running of nuclear energy production projects in the country.

4.2 Nuclear Regulatory Act 2019

The Nuclear Regulatory Bill 2018 was first published by Parliament on November 19, 2018.³⁷ The Bill has since been enacted as law under *Nuclear Regulatory Act, 2019*³⁸ which was enacted to provide for a comprehensive framework for the regulation of safe, secure and peaceful utilization of atomic energy and nuclear technology; the production and use of radiation sources and the management of radioactive waste; the repeal of the Radiation Protection Act and for connected purposes.³⁹ While the Act is quite comprehensive, there will be need for constant review as the stakeholders identify what works and what challenges arise in the course of its implementation.

5. Nuclear Energy in Kenya: Getting it Right

Some commentators on the issue have highlighted some of the issues that have made the general public uncomfortable with the idea of Kenya turning to nuclear energy including: lack of properly trained manpower, the overall cost of the project, suitability of the sites where nuclear plants are to be built and nuclear disaster management.⁴⁰ However, even as the Government proceeds with the project, there is a need to consider and continually address the issues discussed hereunder to

³⁴Nuclear Reactors: Permanent Shutdowns by Country Worldwide 2020 | Statista' <<https://www.statista.com/statistics/513639/number-of-permanent-nuclear-reactor-shutdowns-worldwide/>> accessed 6 October 2020.

³⁵ 'Kenya on Course for \$5 Billion Nuclear Plant to Power Industry' Bloomberg.com (4 August 2020) <<https://www.bloomberg.com/news/articles/2020-08-04/kenya-on-course-for-5-billion-nuclear-plant-to-power-industry>> accessed 19 August 2020.

³⁶ Sec. 56, Energy Act, No. 1 of 2019, Laws of Kenya.

³⁷ Nuclear Regulatory Bill 2018, Kenya Gazette Supplement No.143 (National Assembly Bills No.27).

³⁸ Nuclear Regulatory Act, No. 29 of 2019, Laws of Kenya.

³⁹ Ibid, Preamble.

⁴⁰ 'A Case for Nuclear Energy in Kenya' (The Star)

<<https://www.the-star.co.ke/opinion/columnists/2019-04-05-a-case-for-nuclear-energy-in-kenya/>> accessed 19 August 2020.

minimize the risk of coming face to face with the potential ugly consequences of mishandling the nuclear reactors.

5.1 Capacity Building

Considering that there are hardly any nuclear engineers currently working for the Nuclear Power and Energy Agency, and despite it doing a lot to ensure the existing engineers are trained and mentored abroad, the Government of Kenya through the agency has been rolling out annual training programmes targeting Kenyans in various fields to build adequate capacity for the country's nuclear power programme.⁴¹ The training mostly comprises of short and long term programmes in partnership with local and international institutions.⁴² In the long run, the Government needs to invest in local institutions to enhance their capacity for training.

5.2 Public Awareness

Considering that nuclear energy is a completely new concept among the Kenyan people, there is a need for authorities to sensitise the public on the same. It is commendable that there have been efforts by the relevant authorities to not only organise public forums but also organise primary and secondary schools' writing competitions on nuclear energy.⁴³ This should continue in order to address any concerns that the public may have and also for ensuring that there is clear communication among all stakeholders. A well informed public can process and appreciate any information that is disseminated and it also makes it easier for the Government to tap into any potential talents out their seeking to pursue knowledge and expertise in the area of nuclear energy production.

6. Lessons from Elsewhere: Making the Best of Nuclear Power

It is estimated that currently, over thirty countries produce and use nuclear energy, with some, like France, producing large portions of their electricity from nuclear power, and others like Brazil and the Netherlands producing small percentages of electricity by nuclear power.⁴⁴ Notably, some countries like China are investing heavily into construction of new plants and others like Germany have long term plans to phase out their plants.⁴⁵ However, a few of the major players as highlighted below demonstrate that even as Kenya seeks to start nuclear power project, the Government should consider moving more towards other sources of renewable energy. Kenya is already hailed as one of the notable producers of renewable energy such as wind power and geothermal power. There is a need to explore these at a higher scale because while they are not cheap to produce, nuclear energy may even prove more expensive and complicated to run due to the potential risks.

⁴¹ 'A Case for Nuclear Energy in Kenya' (The Star)
<<https://www.the-star.co.ke/opinion/columnists/2019-04-05-a-case-for-nuclear-energy-in-kenya/>> accessed 19 August 2020.

⁴² 'A Case for Nuclear Energy in Kenya' (The Star)
<<https://www.the-star.co.ke/opinion/columnists/2019-04-05-a-case-for-nuclear-energy-in-kenya/>> accessed 19 August 2020.

⁴³ 'NuPEA 2020 Essay Contest'
<<https://nuclear.co.ke/index.php/en/nupea-2020-essay-contest>> accessed 20 August 2020; 'Library'
<<https://nuclear.co.ke/index.php/en/library>> accessed 20 August 2020.

⁴⁴ 'International Politics - Nuclear Energy'
<<https://sites.google.com/a/ncsu.edu/nuclear-energy/politics/foreign>> accessed 8 September 2020.

⁴⁵ Ibid.

6.1 Lessons from Other Jurisdictions

6.1.1 France

As at September 2020, it was estimated that France derives about 75% of its electricity from nuclear energy, due to a long-standing policy based on energy security, making France one of the world's largest net exporter of electricity due to its very low cost of generation, and gains over €3 billion per year from this.⁴⁶ In addition, the country has been very active in developing nuclear technology such as reactors and especially fuel products and services have been a significant export.⁴⁷ According to the available data, the total country's electricity generation in 2017 was 562 TWh broken down as follows: nuclear 398TWh (71%); hydro 55.1 TWh (10%); natural gas 40.4 TWh (7%); wind 24.7 TWh (4%); coal 15.1 TWh (3%); biofuels & waste 10.2 TWh; (2%); solar 10.2 TWh (2%); oil 7.4 TWh (1%).⁴⁸ Despite this success in generation of nuclear power, reports from as recent as January 2020 indicate that the Government of France policy is to reduce reliance on nuclear energy from 75% to 50% of the country's electricity by 2035 by bringing in more renewable power.⁴⁹ In addition, some of the challenges that have led to the closure of some of the reactors include but are not limited to safety-related issues reported at some plants over the past several years, including non-lethal radioactive contamination of workers, electrical fault, cracks in a reactor cover, a chemistry error, water pollution, and a fuel leak.⁵⁰ France has also been reacting to pressure from its neighbours including Germany which has been arguing that "nuclear power is not a climate savior. It is risky, expensive and leaves behind radioactive waste for thousands of generations."⁵¹ Kenya should therefore anticipate and address similar concerns in time and periodic review of the country's performance is critical.

6.2 Germany

Germany itself currently has six nuclear power plants operating all of which are all scheduled to be shut down by the end of 2022.⁵² The 2011 Fukushima nuclear disaster in Japan led to

⁴⁶ 'Nuclear Power in France | French Nuclear Energy - World Nuclear Association' <<https://www.world-nuclear.org/information-library/country-profiles/countries-a-f/france.aspx>> accessed 4 October 2020.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ 'France to Cut Nuclear Energy Reliance by 2035: Minister | Reuters' <<https://www.reuters.com/article/us-france-nuclearpower/france-to-cut-nuclear-energy-reliance-by-2035-minister-idUSKCN1NN0OK>> accessed 4 October 2020; Darrell Proctor, 'Last Reactor at Oldest French Nuclear Plant Going Offline' (POWER Magazine, 28 June 2020) <<https://www.powermag.com/last-reactor-at-oldest-french-nuclear-plant-going-offline/>> accessed 4 October 2020; Jake Stones, 'French Strategy Boasts Largest 2030 Electrolyser Hydrogen Capacity' (ICIS Explore) <<https://www.icis.com/explore/resources/news/2020/09/11/10551839/french-strategy-boasts-largest-2030-electrolyser-hydrogen-capacity>> accessed 4 October 2020.

⁵⁰ Darrell Proctor, 'Last Reactor at Oldest French Nuclear Plant Going Offline' (POWER Magazine, 28 June 2020) <<https://www.powermag.com/last-reactor-at-oldest-french-nuclear-plant-going-offline/>> accessed 4 October 2020.

⁵¹ Deutsche Welle (www.dw.com), 'France Shuts down First Reactor of Fessenheim Nuclear Plant near German Border | DW | 22.02.2020' (DW.COM) <<https://www.dw.com/en/france-shuts-down-first-reactor-of-fessenheim-nuclear-plant-near-german-border/a-52466064>> accessed 4 October 2020.

⁵² Deutsche Welle (www.dw.com), 'France Shuts down First Reactor of Fessenheim Nuclear Plant near German Border | DW | 22.02.2020' (DW.COM) <<https://www.dw.com/en/france-shuts-down-first-reactor-of-fessenheim-nuclear-plant-near-german-border/a-52466064>> accessed 4 October 2020; 'Germany Shuts down Atomic Plant as Nuclear Phase-out Enters Final Stretch | News | DW | 31.12.2019' <<https://www.dw.com/en/germany-shuts-down-atomic-plant-as-nuclear-phase-out-enters-final-stretch/a-51845616>> accessed 4 October 2020.

widespread anti-atomic-power protests across Germany after which it is reported that German Chancellor Angela Merkel announced that all plants would be closed over the next decade, making Germany the second country after Italy to shut down all of its atomic energy stations.⁵³ This is a pointer that nuclear energy may not always be the answer and there is a need to tap into more renewable sources of energy in the country.

6.3 Sweden

The construction of Sweden's first commercial nuclear power plant started on 1 August 1966 and grid connection was carried out on 19 August 1971, namely Oskarshamn-1, which was retired in 2017 after an estimated generation of total of 110 TWh over its lifetime.⁵⁴ The shutdown of O1 left eight reactors operating in Sweden, one at Oskarshamn (O3), four at Ringhals and three at Forsmark where Ringhals-2 was scheduled to shut down in 2019, with Ringhals-1 to follow in 2020.⁵⁵ The closure decision was taken for commercial reasons, and although the price of electricity has recovered since 2015, the assessment was that it would not be possible to continue operation of either of the two reactors, for both economic and practical reasons.⁵⁶

7. Realizing the Right to Clean and Sustainable Energy for all

It has been argued that since energy cannot be created or destroyed, one of the best ways of ensuring that all Kenyans have access to clean energy is promoting energy efficiency.⁵⁷ Goal 7 of the Sustainable Development Goals (SDGs) seeks to ensure that there is access to affordable, reliable, sustainable and modern energy for all.⁵⁸ Particularly, countries are expected to ensure that by 2030, there is universal access to affordable, reliable and modern energy services; substantial increase in the share of renewable energy in the global energy mix and doubling the global rate of improvement in energy efficiency.⁵⁹ Thus, away from nuclear energy, the Government of Kenya needs to put in place other measures to enhance the efficiency of the available sources of renewable energy as well nonrenewable sources while minimizing any negative effects that these may have on the environment or the public's health.

⁵³ Deutsche Welle (www.dw.com), 'Germany Shuts down Atomic Plant as Nuclear Phase-out Enters Final Stretch | DW | 31.12.2019' (DW.COM) <<https://www.dw.com/en/germany-shuts-down-atomic-plant-as-nuclear-phase-out-enters-final-stretch/a-51845616>> accessed 4 October 2020; 'Germany Demolishes Cooling Tower of Former Nuclear Power Plant | News | DW | 09.08.2019' <<https://www.dw.com/en/germany-demolishes-cooling-tower-of-former-nuclear-power-plant/a-49967279>> accessed 4 October 2020.

⁵⁴ Ihdete and ihedate, 'Sweden Retires First Commercial Nuclear Reactor (Oskarshamn-1)' (World Nuclear Industry Status Report, 20 June 2017) <<https://www.worldnuclearreport.org/Sweden-Retires-First-Commercial-Nuclear-Reactor-Oskarshamn-1.html>> accessed 5 October 2020.

⁵⁵ Ibid; 'Ringhals 2 Nuclear Plant Shuts Down' (Vattenfall) <<https://group.vattenfall.com/press-and-media/news--press-releases/newsroom/2019/ringhals-2-nuclear-plant-shuts-down>> accessed 5 October 2020; 'Ringhals 2 Enters Retirement: Corporate - World Nuclear News' <<https://world-nuclear-news.org/Articles/Ringhals-2-enters-retirement>> accessed 5 October 2020; 'Sweden Closes Nuclear Reactor after over 40 Yrs of Operation' (AP NEWS, 30 December 2019) <<https://apnews.com/article/a08facfe81523e85083e21ffe1ded681>> accessed 5 October 2020.

⁵⁶ 'Ringhals 2 Nuclear Plant Shuts Down' (Vattenfall) <<https://group.vattenfall.com/press-and-media/news--press-releases/newsroom/2019/ringhals-2-nuclear-plant-shuts-down>> accessed 5 October 2020.

⁵⁷ Munene, Martin Brown, Janes Ouma Odongo, and Anne Nyambane. "Energy Efficiency in Kenya." (2019). Available at < https://ke.boell.org/sites/default/files/energy_efficiency_in_kenya_study_.pdf> Accessed on 1 September 2020.

⁵⁸UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1, SDG Goal 7.

⁵⁹ Ibid.

7.1 Expanding infrastructure and upgrading technology for supplying modern and sustainable energy services

SDG Goal 7.b seeks to ensure that by 2030, countries expand infrastructure and upgrade technology for supplying modern and sustainable energy services for all especially in developing countries, in particular least developed countries, Small Island developing States and landlocked developing countries, in accordance with their respective programmes of support. In line with the ‘Last Mile Project’, there is a need for the Government of Kenya to continually invest in infrastructure as well as upgrading energy technology to ensure that all Kenyans have access to modern and sustainable energy. As things stand, there is a huge number of Kenyans who still rely of non-renewable energy such as kerosene, wood and charcoal (biomass), thus making it difficult to achieve the minimum 10% tree cover as provided for under Article 69 of the Constitution of Kenya 2010.⁶⁰

Under Kenya’s Vision 2030 and specifically the National Renewable Energy Master Plan, the Government of Kenya hopes to ‘promote development of renewable energy as an alternative source of energy which will include generation of energy from solar, wind, biogas, development of bio-energy including bio-ethanol and diesel value chains and promotion of the use of improved cooking stoves and charcoal kilns, and re-forestation of water towers.’⁶¹

While these aspirations come with social, economic and political challenges, if achieved, they can go a long way in achieving the right to affordable and sustainable energy for all.

7.2 Mainstreaming Gender Issues in Energy and Addressing Poverty

Some authors have argued that if the right to energy for all Kenyans is to be realized, then gender issues ought to be tackled. This is because of the important role that women play when it comes to meeting the energy needs of families especially in the rural setting.⁶² Facilitating access to clean energy for women not only contributes to strengthening families and their health but also creates business opportunities for them.⁶³

There is also a need to address poverty levels in the country. An economically empowered household is likely to have more choices when it comes to energy use for their domestic needs. Enhancing energy production in the country without addressing the socioeconomic factors that make energy unavailable to most households in the first place may not achieve much as far as adoption of cleaner sources of energy is concerned.

7.3 Promoting Energy Efficiency in Kenya

A number of studies have been carried out on factors that affect energy efficiency practices and how the stakeholders in the Kenyan energy sector can enhance energy efficiency in the country.

⁶⁰ ‘How Kenya Can Transform the Charcoal Sector and Create New Opportunities for Low-Carbon Rural Development on JSTOR’

<https://www.jstor.org/stable/resrep02811?seq=1#metadata_info_tab_contents> accessed 21 September 2020.

⁶¹ ‘Development of New and Renewable Sources of Energy | Kenya Vision 2030’ <<https://vision2030.go.ke/project/development-of-new-and-renewable-sources-of-energy/>> accessed 30 September 2020.

⁶² ‘Women in Energy Means More Clean Energy for All across Africa’ <<https://www.esi-africa.com/industry-sectors/future-energy/women-in-energy-means-more-clean-energy-for-all-across-africa/>> accessed 28 September 2020.

⁶³ Ibid.

Some of the energy demand and consumption aspects that influence the adoption of energy efficiency practices in the country that have been identified include: the different types of energy being used domestically in the household level; the respondents' knowledge of energy efficiency; household energy consumption monitoring/tracking trends; respondents' perception of energy efficiency; knowledge on the potential energy efficiency practices; benefits associated with energy efficiency; and their knowledge regarding climate change dynamics and how these compare with domestic energy use.⁶⁴

Promoting energy efficiency practices has been hailed not only as a way to ensure that there is enough energy for all but also as a climate mitigation measure.⁶⁵ As a result, Kenya's Climate Change Action Plan 2018–2022 has prioritized enhancement of energy efficiency as one of the priority actions to mitigate climate change in the country.⁶⁶ It is important to point out that producing power without promoting efficient consumption of the same will mean that it may be counterproductive as it may never be enough for everyone. There is need for continued promotion of diverse methods of enhancing efficiency across use of all sources of energy and in all sectors such as through ensuring that energy efficient appliances are not only available but also affordable, there is a wider use of efficient technology to take advantage of the available sources of energy such as biomass to come up with the most efficient and less polluting forms of the same and even use of biogas in villages for lighting and cooking. As already pointed out, biomass provides about 69% of the country's overall energy requirements while petroleum accounts for about 22% and electricity about 9% and as at June, 2017, 65.6% of the electricity component was generated using renewable energy sources with fossil fuels providing the balance of 34.4%.⁶⁷ There is a need to expand the use of these sources to generate more electricity. Private persons may also be considered for funding to come up with larger scale biogas production projects to light villages.⁶⁸ This will not only create employment for more people but will also promote cleaner energy technologies and climate change mitigation.

7.4 Capacity Building for Adoption of Nuclear Power

It is commendable that the Government of Kenya already put in place the Nuclear Power and Energy Agency as envisaged under the Energy Act, 2019 and also enacted the Nuclear Regulatory

⁶⁴ Munene, Martin Brown, Janes Ouma Odongo, And Anne Nyambane, 'Energy Efficiency in Kenya: Public Awareness, Strategies, Challenges & Opportunities | Heinrich Böll Stiftung | Nairobi Office Kenya, Uganda, Tanzania, Somalia/Somaliland' (Heinrich-Böll-Stiftung) <<https://ke.boell.org/en/2019/09/16/energy-efficiency-kenya-public-awareness-strategies-challenges-opportunities>> accessed 3 October 2020; Zaharia, Alina, Maria Claudia Diaconeasa, Laura Brad, Georgiana-Raluca Lădaru, and Corina Ioanăș. "Factors Influencing Energy Consumption in the Context of Sustainable Development." *Sustainability* 11, no. 15 (2019): 4147; Temiz Dinç, Dilek, and Ece C. Akdoğan. "Renewable energy production, energy consumption and sustainable economic growth in Turkey: A VECM Approach." *Sustainability* 11, no. 5 (2019): 1273; Jian, Jianhui, Xiaojie Fan, Pinglin He, Hao Xiong, and Huayu Shen. "The effects of energy consumption, economic growth and financial development on CO2 emissions in China: A VECM Approach." *Sustainability* 11, no. 18 (2019): 4850.

⁶⁵ 'Promoting Energy Efficiency as a Climate Change Mitigation Action in Kenya | UNDP in Kenya' (UNDP) <<https://www.ke.undp.org/content/kenya/en/home/stories/2019/lecrd-promoting-energy-efficiency.html>> accessed 4 October 2020.

⁶⁶ Ibid.

⁶⁷ Republic of Kenya, National Energy Policy, October, 2018, para. 3.

⁶⁸ Huber, Sebastian. "Small-scale biogas production from organic waste and application in mid-income countries—a case study of a Lebanese community." (2019) < <http://www.diva-portal.org/smash/get/diva2:1334609/FULLTEXT01.pdf>> accessed 4 October 2020.

Act 2019. However, it is true that the Agency requires to work closely with other stakeholders across the board. While the Government has shown some efforts towards training of personnel to create expertise in nuclear power, there is a need for sustained and long term efforts for capacity building through training of engineers in industry and consultants as well as developing localized university and polytechnic level training in the country.

8. Conclusion

Some of the existing studies have concluded that although the government of Kenya has done so much to turn around energy use practices in the country, and the take up of these is increasing, most citizens still use crude energy sources basically wood, charcoal and crude fuels.⁶⁹ There also seems to be a disconnect between the reported government efforts and achievements vis-à-vis actual public energy use practices pointing to both a communication gap and inability of the citizens to quickly take up these projects.⁷⁰ Thus, while this paper supports the government's efforts to diversify the available sources of renewable energy in Kenya, there is also a need for continued public awareness campaigns to sensitize the public on the need for practicing energy efficiency regardless of the energy source in question. It is not just about affordability and availability of energy but also how efficiently the same is utilized.

Such energy sources as nuclear power, while viable in the country require continued consultations, creating public awareness and immense investment in radioactive waste handling and disposal for the sake of public health and environmental protection. Indeed, some commentators have argued that African countries looking to invest in nuclear energy as a source of clean electricity should consider Europe's struggles with disposing of radioactive waste.⁷¹ It is therefore important that the Government expands its choices while trying to meet the current and future energy needs of the country by investing more in the already available renewable sources of energy, enhance efficiency and also ensure affordability by a wider group. Exploring alternative sources of energy is a worthwhile exercise in line with Kenya's quest for Sustainable Development.

⁶⁹ Munene, Martin Brown, Janes Ouma Odongo, And Anne Nyambane, 'Energy Efficiency in Kenya: Public Awareness, Strategies, Challenges & Opportunities | Heinrich Böll Stiftung | Nairobi Office Kenya, Uganda, Tanzania, Somalia/Somaliland' (Heinrich-Böll-Stiftung) <<https://ke.boell.org/en/2019/09/16/energy-efficiency-kenya-public-awareness-strategies-challenges-opportunities>> accessed 3 October 2020.

⁷⁰ Ibid.

⁷¹ Deutsche Welle (www.dw.com), 'What Happens to Nuclear Waste from Power Plants? | DW | 13.11.2019' (DW.COM) <<https://www.dw.com/en/what-happens-to-nuclear-waste-from-power-plants/a-51216359>> accessed 4 October 2020.

Adopting the Singapore Convention in Kenya: Insight and Analysis

Abstract

The paper offers insight on adopting the United Nations Convention on International Settlement Agreements Resulting from Mediation ‘Singapore Convention’ and the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation ‘Model Law’. The two legal instruments are aimed at strengthening the practice of international commercial mediation whose development and uptake has been curtailed by numerous challenges including the absence of an elaborate enforcement mechanism. The paper critically analyses the salient provisions of both the Singapore Convention and the Model Law. It then discusses the applicability of the two legal instruments in Kenya and proposes the best approach in their adoption in order to enhance the practice of international commercial mediation in Kenya.

1. Introduction

The United Nations Convention on International Settlement Agreements Resulting from Mediation ‘*Singapore Convention*’ is an international legal instrument that recognizes the value of mediation as a method of amicably settling disputes arising in the context of international commercial relations and which provides a legal framework for enforcement of settlement agreements resulting from mediation.¹ This Convention was opened for signature in Singapore on 7th August 2019 and it came into force on the 12th September 2020, in accordance with its article 14 (1) which stipulates that it shall enter into force six months after deposit of the third instrument of ratification, acceptance, approval or accession. As of 15th September 2020, this Convention had 53 signatories including the United States of America, Ghana, Uganda, Rwanda and Nigeria. Among them, six countries including Singapore, Belarus and Ecuador had ratified it.² Kenya is yet to sign and ratify this Convention.

This Convention calls upon governments and regional integration organizations that wish to strengthen their legal frameworks on international dispute settlement *to consider becoming parties to the convention* (emphasis added).³ Adoption of the Convention is thus voluntary.⁴ The development of this Convention was necessitated by challenges facing the practice of international commercial mediation where the trend has been that the outcome of a mediation is treated as a contractual agreement enforced as such and not as an award as in the case of arbitration.⁵ This has always been a problem in many states in that one party may pull out of such

¹ United Nations Convention on International Settlement Agreements Resulting from Mediation, United Nations, New York, 2019, ‘Singapore Convention’ (adopted on December 20, 2018, came into force on September 12, 2020).

² United Nations Treaty Collection site, available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=_en (accessed on September 15, 2020).

³ Preamble, Singapore Convention.

⁴ Schnabel T., ‘The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements’ 19 Pepp. Disp. Resol. L.J. 1 (2019).

⁵ Muigua, K., ‘The Singapore Convention on International Settlement Agreements Resulting from Mediation: Challenges and Prospects for African States’ available at <http://kmco.co.ke/wp-content/uploads/2019/12/The-Singapore-Convention-on-International-Settlement-Agreements-Resulting-from-Mediation-Kariuki-Muigua-December-2019.pdf> (accessed on August 24, 2020).

an agreement and seek court intervention as if the mediation never took place.⁶ The Convention aims at enhancing the practice of international commercial mediation by building a bridge that would enable acceptability of international settlement agreements across states with different legal, social and economic systems.⁷

The Singapore Convention is consistent with the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 which amends the UNCITRAL Model Law on International Commercial Conciliation, 2002. The Model Law deals with procedural aspects of mediation. This paper discusses the best approach in adopting these legal instruments in Kenya in order to create a conducive legal environment for the practice of international commercial mediation.

2. Scope and Application of the Singapore Convention

The Singapore Convention applies to an *agreement resulting from mediation and concluded in writing* by parties to *resolve a commercial dispute* (“settlement agreement”) which, at the time of its conclusion, is *international*.⁸ This is aimed at encouraging cross border mediation and provides parties with an alternative to arbitration which has hitherto been the main dispute resolution mechanism for international commercial disputes.⁹ Besides, this Convention does not apply to personal or family disputes.¹⁰

A party which relies on a settlement agreement under the Singapore Convention is required to supply to the competent authority of the party to the convention where relief is sought certain information which include inter alia the *settlement agreement signed by the parties; a document signed by the mediator evidencing that the mediation was conducted* and an *attestation by the institution which administered the mediation*.¹¹

Grant of relief under this Convention is not absolute and the competent authority of the party to the Singapore Convention where relief is sought may refuse to grant such relief upon proof that a party to the agreement was under some incapacity; the settlement agreement is null and void, inoperative or incapable of being performed; the settlement agreement is not binding or is not final; there is a serious breach by the mediator of standards applicable to the mediator or the mediation and public policy considerations.¹²

The Singapore Convention is expected to have similar benefits for mediation as an international dispute resolution mechanism as the New York Convention has had for arbitration.¹³ The New York Convention was formulated for purposes of providing a legal framework for the recognition and enforcement of foreign arbitral awards and has had tremendous impact and success on the

⁶ Ibid.

⁷ Singapore Convention, Preamble.

⁸ Singapore Convention, Article 1(1).

⁹ IK. Zafar, ‘The Singapore Mediation Convention, 2019’, available at https://www.academia.edu/40289206/The_Singapore_Mediation_Convention (accessed on August 25, 2020).

¹⁰ Singapore Convention, Article 1(2) (a).

¹¹ Ibid, Article 4.

¹² Ibid, Article 5.

¹³ IK. Zafar, ‘The Singapore Mediation Convention, 2019’, Op Cit.

practice of international commercial arbitration.¹⁴ The Singapore Convention has the potential of having such an impact on the practice of international commercial mediation.¹⁵ One of the key benefits of this Convention is that it provides a process for the direct enforcement of cross-border settlement agreement between parties resulting from mediation. Consequently, it stipulates that each party to this Convention shall enforce a settlement agreement in accordance with its rules of procedure.¹⁶ This provision allows parties to formulate their own rules of procedure suitable to national or local circumstances for purposes of effective enforcement of this Convention. Such procedural rules can include the requirement for the settlement agreement to be in an official language of the party to the Convention where relief is sought as envisaged under the Convention.¹⁷

The Singapore Convention is consistent with the *UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (Model Law)*.¹⁸ This provides parties with the flexibility to adopt either the *Singapore Convention* or the *Model Law* as stand-alone legal instruments or both as complementary instruments in order to facilitate a comprehensive legal framework on mediation.¹⁹ Whereas the Singapore Convention governs the substantive aspects of mediation, the Model Law deals with the procedural aspects. However, the substantive aspects of the two legal instruments are a mirror image of each other in order to provide consistency in the practice of international commercial mediation. Article 1 of the Singapore Convention which provides for its scope and application is similar to article 3 of the Model Law. Both provide that the conventions apply to international commercial mediation.²⁰ Section 3 of the Model Law also captures the substantive aspects stipulated under the Singapore Convention including the requirements for reliance on settlement agreements and grounds for refusing to grant a relief.²¹

3. UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002)

In addition to the substantive aspects discussed above, the Model Law governs the procedural aspects of international commercial mediation and international settlement agreements. It governs aspects such as commencement of mediation proceedings; number and appointment of mediators; conduct of mediation; communication between mediator and parties; disclosure of information; confidentiality; admissibility of evidence; termination of mediation proceedings and resort to arbitral or judicial proceedings.²² On the conduct of mediation, the Model Law gives effect to the principle of party autonomy which is one of the hallmarks of mediation and provides that parties

¹⁴ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), available at www.newyorkconvention.org/english (accessed on August 26, 2020).

¹⁵ IK. Zafar, 'The Singapore Mediation Convention, 2019', Op Cit.

¹⁶ Singapore Convention, Article 3 (1).

¹⁷ Ibid, Article 4 (3).

¹⁸ UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002).

¹⁹ Muigua. K., 'The Singapore Convention on International Settlement Agreements Resulting from Mediation: Challenges and Prospects for African States' Op Cit.

²⁰ Singapore Convention, Article 1; See also Model Law, Article 3.

²¹ Model Law, Articles 18 and 19; See also the Singapore Convention, Articles 4 and 5.

²² Ibid.

are free to agree, by reference to a set of rules or otherwise, on the manner in which the mediation is to be conducted.²³ Where parties fail to agree on the manner in which the mediation is to be conducted, the Model Law allows the mediator to conduct the mediation in a manner he/she considers appropriate taking into account the circumstances of the case, wishes of the parties and the need for expeditious dispute resolution.²⁴ The Model Law also enshrines the principle of confidentiality and provides that unless otherwise agreed by the parties, all information relating to the mediation proceedings shall be kept confidential.²⁵ Disclosure is only permissible pursuant to legal requirements or for purposes of implementation or enforcement of a settlement agreement.²⁶

Further, in order to safeguard the sanctity of the mediation proceedings, the Model Law prevents admissibility of evidence by a party to the mediation proceedings, the mediator and any third person in arbitral, judicial or similar proceedings regarding matters such as an invitation to engage in mediation proceedings; views expressed by a party in the mediation in respect of a possible settlement of the dispute; statements or admissions made by a party in the course of the proceedings; proposals by the mediator and documents made solely for purpose of the mediation proceedings.²⁷

To guard against possible conflict of interest, the Model Law precludes the mediator from acting as an arbitrator in respect of a dispute that is subject to the mediation proceedings or a dispute that has arisen from the same contract or legal relationship.²⁸ This is due to the likelihood of bias owing to the arbitrator's knowledge of the parties and the dispute. The arbitrator is likely to have formed an opinion on the relative strength or weakness of the case based on the analysis of the facts and evidence from the mediation proceedings which could be prejudicial in neutral settlement of the dispute. A settlement agreement concluded under the Model Law is binding and enforceable according to the rules of procedure of the state where enforcement is sought.²⁹

4. Application of the Singapore Convention and the Model Law in Kenya

Unlike international commercial arbitration, international commercial mediation is yet to take root in Kenya. Kenya has quite an elaborate legal and institutional framework that has facilitated the use of arbitration in managing international commercial disputes. These include the Arbitration Act,³⁰ the Nairobi Centre for International Arbitration Act³¹ and institutions such as the Chartered Institute of Arbitrators-Kenya, the Nairobi Centre for International Arbitration and the International Chamber of Commerce that have facilitated the uptake of international commercial arbitration. Kenya is also a signatory to the New York convention that provides a framework for the enforcement of international arbitral awards. This is not the case for international commercial mediation at the moment. However, Kenya is continuing to develop its domestic mediation framework and this offers promise for international commercial mediation.

²³ Model Law, Article 7.

²⁴ Ibid, Article 7 (2).

²⁵ Ibid, Article 10.

²⁶ Ibid.

²⁷ Ibid, Article 11.

²⁸ Ibid, Article 13.

²⁹ Ibid, Article 15.

³⁰ Arbitration Act, No. 4 of 1995, Government Printer, Nairobi.

³¹ Nairobi Centre for International Arbitration Act, No. 26 of 2013, Government Printer, Nairobi.

The Constitution of Kenya enshrines the right of access to justice and provides that the state shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.³² In actualising the right of access to justice, the Constitution mandates courts and tribunals while exercising judicial authority to give effect to alternative forms of dispute resolution including *reconciliation, mediation, arbitration and traditional dispute resolution mechanisms*.³³

Mediation is one of the forms of Alternative Dispute Resolution and flows from negotiation.³⁴ It arises where parties to a dispute have attempted negotiations but have reached a deadlock. As a result, parties agree to involve a third party to assist them continue with the negotiation process with the aim of breaking the deadlock.³⁵ Mediation has been practiced in the country since time immemorial. Indigenous African communities adhered to the values of harmony and togetherness and whenever a dispute arose between two parties, they would attempt to amicably resolve the dispute through negotiation.³⁶ In case of a deadlock, other parties and institutions such as the council of elders would come in and assist parties arrive at a solution.³⁷

Following Constitutional recognition of mediation and other ADR mechanisms vide article 159 (2) (c), measures have been taken towards mainstreaming mediation in the justice system. The Civil Procedure Act³⁸ was amended to introduce Court Annexed Mediation. This Act establishes the Mediation Accreditation Committee appointed by the Chief Justice whose functions include inter alia determining the criteria for certification of mediators; maintaining a register of qualified mediators and enforcing a code of ethics for mediators as may be prescribed.³⁹ This Act further allows courts to refer cases to mediation on the request of the parties concerned; where it is deemed appropriate to do so and where the law requires.⁴⁰ Vide the *Mediation (Pilot Project) Rules, 2015*, the court-annexed mediation was introduced in the commercial and family divisions of the High Court at Milimani Law Courts, Nairobi and has since spread to other divisions and court stations outside Nairobi. The Court-Annexed mediation has had its impact and success with the annual State of the Judiciary & Administration of Justice Reports highlighting the role it plays in enhancing access to justice in Kenya.⁴¹

However, Court-Annexed Mediation has also been criticised for its inherent weaknesses. It has been argued that the process is formal contrary to the attributes of mediation such flexibility and ability to be conducted in informal settings.⁴² Further, the process to a large extent goes against

³² Constitution of Kenya, 2010, Article 48, Government Printer, Nairobi.

³³ *Ibid*, Article 159 (2) (c).

³⁴ Muigua. K., *Resolving Conflicts Through Mediation in Kenya*, Glenwood Publishers, 2nd Ed., 2017, pg 3.

³⁵ *Ibid*.

³⁶ Mwangi, M., 'Conflict in Africa; Theory, Processes and Institutions of Management' Centre for Conflict Research, Nairobi, 2006.

³⁷ *Ibid*.

³⁸ Civil Procedure Act, Cap 21, Government Printer, Nairobi.

³⁹ *Ibid*, Section 59A.

⁴⁰ *Ibid*, Section 59B.

⁴¹ Judiciary, State of the Judiciary and Administration of Justice Annual Reports, available at <https://www.judiciary.go.ke/resources/reports/> (accessed on August 24, 2020).

⁴² Muigua. K., 'Court Sanctioned Mediation in Kenya-An Appraisal' available at <http://kmco.co.ke/wp-content/uploads/2018/08/Court-Sanctioned-Mediation-in-Kenya-An-Appraisal-By-Kariuki-Muigua.pdf> (accessed on August 24, 2020).

the principle of voluntariness which is one of the hallmarks of mediation since parties are forced to mediate.⁴³ It has also been asserted that court-annexed mediation is contrary to the attribute of privacy since court documents become public once filed and can be accessed by any person.⁴⁴

Attempts have been made towards addressing some of the challenges arising from the current practice of mediation in Kenya. The *Alternative Dispute Resolution Policy*⁴⁵ is one such endeavour. The purpose of this draft policy is to strengthen, guide and support the growth of Alternative Dispute Resolution (ADR) in the Country in order to achieve optimal delivery of access to justice for all Kenyans.⁴⁶ The policy is intended to create a *well-coordinated, well capacitated and cohesive ADR system* that is strategically linked to the formal system, while at the same time maintaining *its autonomy as an informal system* and providing quality justice services to Kenyans across the country.⁴⁷

The Policy identifies several challenges that undermine the full realization of the goals of ADR mechanisms including mediation. These include unclear scope of ADR, jurisdictional challenges, question of justiciability, inadequate implementation of existing laws and lack of framework legislation. The policy also identifies some of the challenges facing mediation in particular such as the existence of numerous institutions with each developing their own different rules, curricula and training programs.⁴⁸ This has resulted in duplication, disparate standards and a disjointed practice of mediation in Kenya.

The policy proposes several recommendations aimed at enhancing the practice of ADR in Kenya which include strengthening the legal and institutional framework for ADR; enhancing the quality and efficacy of ADR services; regulation and governance; promoting quality and standards of practice in ADR; capacity building; increasing availability, accessibility and uptake of ADR services and developing a framework for efficient recognition, adoption and enforcement of ADR decisions.⁴⁹ Promoting quality and standards of practice of mediation as envisaged by the ADR policy will also be essential in facilitating international commercial mediation since it will boost confidence within the business community of the country's capability as an ideal mediation forum.

While Kenya continues to strengthen its domestic legal and institutional framework on mediation, it is also important to create an enabling environment that would facilitate the uptake of international commercial mediation. Mediation is increasingly being used in international and domestic commercial practice as an alternative to litigation and arbitration due to its significant benefits, such as preserving commercial relationships, facilitating the administration of international transactions by commercial parties and producing savings in the administration of

⁴³ Ibid; See also Wazir.MS, 'An Analysis of Mandatory Mediation' available at <https://suplus.strathmore.edu/handle/11071/4817> (accessed on August 27, 2020).

⁴⁴ Ibid.

⁴⁵ Alternative Dispute Resolution Policy (zero Draft), available at https://www.ncia.or.ke/wp-content/uploads/2019/08/ZERO-DRAFT-NATIONAL-ADR-POLICY_P.pdf (accessed on August 24, 2020).

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

justice by States.⁵⁰ As part of the international business community Kenya should not be left behind. The country should join the noble course towards creating an enabling legal and institutional environment to facilitate international commercial mediation. Adopting the Singapore Convention and the Model Law represents a good starting point in the quest towards enhancing the scope of international commercial mediation in Kenya.

5. Adopting the Singapore Convention in Kenya

The foregoing discussion highlights some of the challenges facing the practice of mediation in Kenya such as inadequate legal framework; duplication, disparate standards and a disjointed practice of mediation and enforceability challenges with the exception of the Court-Annexed Mediation. These challenges do not create an enabling environment for the practice of international commercial mediation. *The Singapore Convention* and *Model Law* can cure these challenges by providing an elaborate procedural framework for the conduct of international commercial mediation and enforcement of mediation settlement agreements.

Kenya can thus strengthen its legal framework on mediation by adopting the two legal instruments. Since conflict is culture specific,⁵¹ Kenya can adopt the two legal instruments with necessary modifications that reflect her local circumstances. Indeed, both the Singapore Convention and the Model Law provide for their adoption with necessary modifications to suit local circumstances. The Singapore Convention recognises the different levels of experience with mediation in different jurisdictions and allows reservations whereby a party may declare application of the convention only to the extent that the parties to the settlement agreement have agreed.⁵² The Model Law also allows adjustments to be made to relevant articles according to the needs of party states.⁵³

In adopting the two legal instruments, Kenya can consider revising them appropriately to allow for the conduct of mediation proceedings in Kiswahili which is one of the official languages in the country.⁵⁴ This will be important in facilitating commercial relationships between Kenya and its neighbouring countries such as Tanzania which is a key trading partner. Now that article 12 of the Singapore Convention allows participation by regional economic integration organizations, the Convention can be adopted within the context of the East African Community in addition to adoption by individual member states. This will be critical in promoting the pillars of East African Community integration and in particular the customs union and the common market aimed at accelerating economic growth and development within the region.⁵⁵ It will also facilitate building of a legal bridge to promote uniform application of the Convention within the East African Community region considering that some of the countries are Anglophone (Kenya, Uganda and Tanzania) whereas some are Francophone (Rwanda and Burundi).

⁵⁰ Singapore Convention, Preamble.

⁵¹ LeBaron. M., 'Bridging Cultural Conflicts: A New Approach for a Changing World' Jossey-Bass, San Francisco, CA, 2003.

⁵² Singapore Convention, Article 8.

⁵³ Model Law, Article 16.

⁵⁴ The Constitution of Kenya 2010, Laws of Kenya, Article 7.

⁵⁵ East African Community, Pillars of EAC Regional Integration, available at <https://www.eac.int/integration-pillars> (accessed on August 26, 2020).

Adopting the Singapore Convention in Kenya: Insight and Analysis

Further, in order to facilitate adoption and application of the Singapore Convention and the Model Law, Kenya should strengthen its institutional framework on mediation. Both the Singapore Convention and the Model Law envisage the role of an institution on matters such as appointment or replacement of a mediator.⁵⁶ The country may consider establishing a national mediation institute to facilitate such matters. The country should also strengthen its legal framework on mediation which should provide for the procedure for crucial matters such recognition and enforcement of mediation settlement agreements or setting aside of mediation settlement agreements. The Arbitration Act clearly provides for such procedures and this has led to the growth of arbitration as the preferred mode of commercial dispute resolution in the country.⁵⁷ In developing a national legal framework on mediation, drafters should ensure that the legislation captures these issues in order to give effect to the Singapore Convention and the Model Law.

*The Mediation Bill*⁵⁸ in Parliament represents a good starting point. However, the ideals of the ADR Policy need to be reflected in the Mediation law in order to enhance the uptake of mediation in the country. The Bill should go through adequate public participation to incorporate the views of all stakeholders in the country. There is a need to rally the support from the business community and collaborate with institutions such as the Kenya National Chamber of Commerce and Industry (KNCCI), Kenya Private Sector Alliance (KEPSA) among others in developing a national framework on mediation in order to promote commercial mediation in the country. Public awareness and participation in developing a national legal and institutional framework on mediation is important in ensuring acceptability and uptake of mediation in the country.

The Singapore Convention represents an idea whose time has come. It can work to advance international commercial mediation as a facilitator of trade and business relations and boost commerce in the country. Kenya should adopt the convention in order to enhance its international commercial mediation environment.

⁵⁶ Model Law, Article 6.

⁵⁷ Section 35 of the Arbitration Act, No. 4 of 1995 provides for setting aside of arbitral awards while section 36 provides for recognition and enforcement of awards.

⁵⁸ Mediation Bill, 2020, Government Printer, Nairobi.

The Place of Human Rights in Environmental and Natural Resources Conflicts Management in Kenya

Abstract

Article 19 of the Constitution of Kenya 2010 provides that Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies. It further states that the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings. The Constitution also outlines the principles of national security as including the protection against internal and external threats to Kenya's territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity, and other national interests. In addition to these, the Constitution provides for and envisages the enjoyment of the right to clean and healthy environment and other environmental rights therein, realisation of sustainable development and outlines national values and principles of governance which are geared towards protection of the human rights of all persons, environmental protection and the creation of a peaceful society. This paper argues that it is possible, in the application of some of the environmental conflict management mechanisms, to achieve undesired results that violate or fail to protect the rights of the target groups in a given conflict. The author offers insight on how the conflicts may be addressed in a way that upholds the various rights of groups in a conflict. The paper argues for adoption of a rights-based approach to environmental protection and conflict management.

1. Introduction

International concerns with human rights have expanded considerably in the past several decades.¹ Universal human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law, with the international human rights law laying down obligations of Governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups.²

In the same breadth, over the years, the environment has secured a special place in the international law discourse. This has been evidenced by various legal instruments that are meant to provide directions and guidelines to the key players and the states in coming up with domestic environmental protection and conservation laws.³ The debate is however informed by two major approaches namely, anthropocentric and ecocentric approaches. While the ecocentric approach is mainly concerned with the moral concern for nature in its own right as deserving protection and conservation, the anthropocentric approach, places humans as the central concern in environmental conservation and protection while the environment is considered secondary.⁴ Thus,

¹ D Shelton, Human Rights. Health & Environmental Protection: Linkages in Law & Practice; 2002 <https://www.who.int/hhr/Series_1%20%20Sheltonpaper_rev1.pdf> Accessed 10 August 2020, p. 3.

² 'OHCHR | What Are Human Rights' <<https://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx>> accessed 10 August 2020.

³ Ibid.

⁴ Helen Kopnina and others, 'Anthropocentrism: More than Just a Misunderstood Problem' (2018) 31 Journal of Agricultural and Environmental Ethics 109.

ecocentrism is nature-centered, while anthropocentrism is human-centered. International legal instruments on environmental conservation and protection are divided between the two approaches, with some adopting the ecocentrism while others are based on anthropocentrism.⁵

A dual rights-based approach, where the intrinsic value of humans and nature co-exist in an interconnected manner can pool the benefits of both approaches. Both approaches are important and all that is needed is to strike a balance.⁶ Notably, while the sustainable development agenda debates accommodate both approaches, they lean more towards the anthropocentrism. The *2030 Agenda on Sustainable Development Goals*⁷ (SDGs) define sustainable development broadly to cover issues such as poverty, inequality, gender equality, health, education, governance, climate change and environmental protection.⁸ The SDGs rest on three core elements of sustainability which include:⁹ Economic: An economically sustainable system that must be able to produce goods and services on a continuing basis, to maintain manageable levels of government and external debt, and to avoid extreme sectoral imbalances which damage agricultural or industrial production; Environmental: An environmentally sustainable system which must maintain a stable resource base, avoiding over-exploitation of renewable resource systems or environmental sink functions, and depleting non-renewable resources only to the extent that investment is made in adequate substitutes.

This includes maintenance of biodiversity, atmospheric stability, and other ecosystem functions not ordinarily classed as economic resources; and Social: A socially sustainable system which must achieve distributional equity, adequate provision of social services including health and education, gender equity, and political accountability and participation.¹⁰

Environmental resources access, use and control are central to meeting human needs.¹¹ That is why environmental conflicts emerge, both nationally and internationally, when one group of

⁵ Vito De Lucia, 'The Ecosystem Approach between Anthropocentrism and Ecocentrism' (2015); Louis Kotzé and Duncan French, 'The Anthropocentric Ontology of International Environmental Law and the Sustainable Development Goals: Towards an Ecocentric Rule of Law in the Anthropocene' (2018) 7 *Global Journal of Comparative Law* 5; Vito De Lucia, 'Competing Narratives and Complex Genealogies: The Ecosystem Approach in International Environmental Law' (2015) 27 *Journal of Environmental Law* 91; Marie-Catherine Petersmann, 'Narcissus' Reflection in the Lake: Untold Narratives in Environmental Law Beyond the Anthropocentric Frame' (2018) 30 *Journal of Environmental Law* 235; Mohamed El-Kamel Bakari, 'Mapping the "Anthropocentric-Ecocentric" Dualism in the History of American Presidency: The Good, the Bad, and the Ambivalent' [2017] *Consilience* 1; Abadir Ibrahim, 'A Human Rights Approach to Environmental Protection: The Case of Ethiopia' (2009) 1 *Contemporary Legal Institutions*; Louis J Kotzé, 'Human Rights and the Environment in the Anthropocene': [2014] *The Anthropocene Review* <<https://journals.sagepub.com/doi/10.1177/2053019614547741>> accessed 11 August 2020.

⁶ See generally, K. Muigua, *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi, 2016.

⁷ D Shelton, *Human Rights. Health & Environmental Protection: Linkages in Law & Practice*; 2002 <https://www.who.int/hhr/Series_1%20%20Sheltonpaper_rev1.pdf> Accessed 10 August 2020, p. 3.

⁸ See United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, Resolution adopted by the General Assembly on 25 September 2015.

⁹ Jonathan M Harris, 'Basic Principles of Sustainable Development' [2000] *Dimensions of Sustainable Development* 21, Global Development and Environment Institute, Tufts University, Working Paper 00-04, June 2000

< http://www.buyteknet.info/fileshare/data/ambides_lect/Harris_PrinSD.pdf> Accessed 10 August 2020, pp.5-6.

¹⁰ *Ibid*, p.6.

¹¹ 'Our Planet, Our Health' <<http://ciesin.org/docs/001-232/chpt1.html>> accessed 11 August 2020; Jean-Louis Martin, Virginie Maris and Daniel S Simberloff, 'The Need to Respect Nature and Its Limits

persons feel that their rights in this respect are threatened. This is because historically, as the United Nations has observed, environmental resources have often been an indicator of the wealth of those being in a position to utilize them.¹²

Various mechanisms are therefore employed in managing these conflicts and while some sufficiently address the human rights issues that emerge, others may not necessarily achieve as much. This paper critically evaluates the various approaches to environmental conflicts management with a view to recommend the most suitable ones in ensuring that human rights, which mainly inform the anthropocentric approach, are secured. The paper vouches for a rights-based approach to environmental issues and the related conflicts as a way of securing human rights while managing environmental conflicts.

2. Linking Human Rights and the Environment

Human rights may be defined as universal, inalienable rights inherent to all human beings, which they are entitled to without discrimination.¹³ The *Universal Declaration of Human Rights of 1948*¹⁴ (UDHR) set the stage for the recognition, protection and promotion of human rights the world over. UDHR places an obligation on all states to employ progressive measures to ensure recognition of human rights provided therein. Notably, the Declaration recognises the need for mobilization of resources by States so as to ensure realization of these rights. Art. 22 thereof provides that everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

The UDHR created a basis for the formulation of *International Covenant on Civil and Political Rights*, (ICCPR) 1966¹⁵ and *International Covenant on Economic, Social and Cultural Rights* (ICESCR) 1966.¹⁶ ICCPR provides under Article 47 thereof that nothing in that Covenant should be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources. Further, ICESCR, under Article 1.2, provides that all peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of

Challenges Society and Conservation Science' (2016) 113 Proceedings of the National Academy of Sciences 6105; Steven C Rockefeller, 'Principles of Environmental Conservation and Sustainable Development: Summary and Survey' [1996] unpublished paper prepared for the Earth Charter Project; 'Global Conservation: Balancing Nature and Human Needs' <<https://www.macfound.org/press/publications/global-conservation-balancing-nature-and-human-needs/>> accessed 11 August 2020.

¹² Daniel Schwartz and Ashbindu Singh, *Environmental Conditions, Resources, and Conflicts: An Introductory Overview and Data Collection* (United Nations Environment Programme 1999) <<https://na.unep.net/siouxfalls/publications/Conflicts.pdf>> Accessed 10 August 2020.

¹³ 'OHCHR | What Are Human Rights'

<<https://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx>> accessed 10 August 2020.

¹⁴ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

¹⁵ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

¹⁶ *International Covenant on Economic, Social and Cultural Rights*; adopted 16 Dec. 1966, 993 U.N.T.S. 3, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966) (entered into force 3 Jan. 1976).

mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

Principle 1 of the *Stockholm Declaration*¹⁷ is however credited as the first international legal instrument which expressly formed a foundation for linking human rights, health, and environmental protection, declaring that: Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being.¹⁸ However, while the language of Article 1 of both the *Stockholm Declaration* and the *Rio Declaration*¹⁹ seem to connote a human rights approach to the environmental conservation, during the conferences, various proposals for a direct and thus unambiguous reference to an environmental human right were rejected²⁰. It is arguable that the conferences created an oxymoronic circumstance, in denying what would only be in the nature of ‘the right to adequate conditions of life in an environment of a quality that permits a life of dignity and well-being’.²¹

Draft Principles on Human Rights and the Environment of 1994,²² (1994 Draft Principles) is an international instrument that comprehensively addresses the linkage between human rights and the environment. The *1994 Draft Principles* provide for the interdependence between human rights, peace, environment and development. Principle 1 thereof declares that human rights, an ecologically sound environment, sustainable development and peace are interdependent and indivisible.

In the first human rights-based approach to environmental protection, environmental protection is seen as a pre-condition to the enjoyment of internationally-guaranteed human rights, especially the rights to life and health, making it an essential instrument in the effort to secure the effective universal enjoyment of human rights.²³ Indeed, some domestic statutes and constitutions, such as the Constitution of Kenya 2010, have expressly recognised the right to a clean and healthy environment as a justiciable right.²⁴ The place of a clean and healthy environment in realisation of other human rights was well captured in the following words:

Human rights cannot be secured in a degraded or polluted environment. The fundamental right to life is threatened by soil degradation and deforestation and by exposures to toxic chemicals, hazardous wastes and contaminated drinking water. Environmental

¹⁷ UN General Assembly, United Nations Conference on the Human Environment, 15 December 1972, A/RES/2994.

¹⁸ D Shelton, Human Rights. Health & Environmental Protection: Linkages in Law & Practice; 2002 <https://www.who.int/hhr/Series_1%20%20Sheltonpaper_rev1.pdf> Accessed 10 August 2020, p. 3.

¹⁹ Rio Declaration on Environment and Development, A/CONF.151/26, vol. I, 1992.

²⁰ Handl, G., ‘Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), 1972 and the Rio Declaration on Environment and Development, 1992’ (United Nations Audiovisual Library of International Law, 2012).

²¹ 1972 Stockholm Declaration Principle 1. It reads in full: “Man has the fundamental right to freedom, equality and adequate conditions of life in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations”.

²² Draft Principles On Human Rights And The Environment, E/CN.4/Sub.2/1994/9, Annex I (1994).

²³ D Shelton, Human Rights. Health & Environmental Protection: Linkages in Law & Practice; 2002 <https://www.who.int/hhr/Series_1%20%20Sheltonpaper_rev1.pdf> Accessed 10 August 2020, p. 3.

²⁴ Constitution of Kenya 2010, Art. 42.

*conditions clearly help to determine the extent to which people enjoy their basic rights to life, health, adequate food and housing, and traditional livelihood and culture. It is time to recognize that those who pollute or destroy the natural environment are not just committing a crime against nature, but are violating human rights as well.*²⁵

The second rights-based approach to environmental protection views environmental protection not as an essential element of human rights, but instead it views certain human rights as essential elements to achieving environmental protection, which has as a principal aim the protection of human health, as illustrated by the Rio Declaration on Environment and Development.²⁶

The third approach views the links as indivisible and inseparable and thus posits the right to a safe and healthy environment as an independent substantive human right.²⁷ Recognition of the relationship between abuse of human rights of various vulnerable communities and related damage to their environment is found in the concept of environmental justice. Environmental justice theory recognizes how discrimination and marginalization involves expropriating resources from vulnerable groups and exposing these communities to the ecological harms that result from use of those resources. Environmental justice is based on the human right to a healthy and safe environment, a fair share to natural resources, the right not to suffer disproportionately from environmental policies, regulations or laws, and reasonable access to environmental information, alongside fair opportunities to participate in environmental decision-making.²⁸

Thus, environmental protection should and has in the recent years been treated as a human rights issue because a human rights perspective directly addresses environmental impacts on the life, health, private life, and property of individual humans, thereby serving to secure higher standards of environmental quality, based on the obligation of states to take measures to control pollution affecting health and private life.²⁹ There is, thus, a direct co-relation between the environment and the right to life³⁰, human dignity³¹, right to reasonable standards of sanitation³², the right to food³³, and, the right to clean and safe water in adequate quantities.³⁴

The linkage of human rights and the environment is the entire basis upon which the sustainable development debate rests.³⁵ Sustainable development has been defined as a combination of

²⁵ D Shelton, Human Rights. Health & Environmental Protection: Linkages in Law & Practice; 2002 < https://www.who.int/hhr/Series_1%20%20Sheltonpaper_rev1.pdf> Accessed 10 August 2020, p. 4.

²⁶ Ibid, p. 4; Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 European Journal of International Law 613.

²⁷ Ibid, p.4; Bridget Lewis, 'Environmental Rights or a Right to the Environment: Exploring the Nexus between Human Rights and Environmental Protection' (2012) 8 Macquarie J. Int'l & Comp. Env'tl. L. 36.

²⁸ Scottish Executive Social Research, Sustainable Development: A Review of International Literature, (Scottish Executive Social Research, 2006) < <http://www.gov.scot/resource/doc/123822/0029776.pdf> > Accessed 10 August 2020, p.8.

²⁹ Boyle, A., 'Human Rights and the Environment: Where Next?' The European Journal of International Law, Vol.23, No. 3, 2012.

³⁰ See Constitution of Kenya 2010, Art. 26.

³¹ Ibid, Art. 28.

³² Ibid, Art. 43(b).

³³ Ibid, Art. 43(c).

³⁴ Ibid, Art. 43(d).

³⁵ Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 European Journal of International Law 613; Dias, Ayesha. "Human rights, environment and development: With special emphasis

elements, such as environmental protection, economic development, and most importantly social issues.³⁶ Human rights are inextricable from sustainable development, since human beings are at the centre of concerns for sustainable development.³⁷

The human rights-based approaches to environmental issues provide a powerful framework of analysis and basis for action to understand and guide development, as they draw attention to the common root causes of social and ecological injustice.³⁸ Human rights standards and principles then guide development to more sustainable outcomes by recognizing the links between ecological and social marginalization, stressing that all rights are embedded in complex ecological systems, and emphasizing provision for need over wealth accumulation.³⁹ Internationally, there are two major approaches to human rights and the environment, which are the greening of already existing human rights and the introduction of a third generation of human rights.⁴⁰ While this paper does not delve into this debate and the debate is still ongoing on the proper place of human environmental rights⁴¹, what is not deniable is the fact that there is an important link between human rights and the protection and conservation of the environment.

3. Environmental and Natural Resources Conflicts: Overview of Conflict Management Mechanisms

It is worth pointing out that there exist various mechanisms which may be used in dealing with certain types of conflicts. For instance, Article 33 of the *Charter of the United Nations* provides that the parties to any dispute should, first of all seek a solution by *negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice* (emphasis added).⁴²

on corporate accountability." Human Development Report (2000); Geiser, Hans. Sustainable development from a human rights perspective and the challenges it represents for the Caribbean SIDS (a discussion paper). ECLAC, 2010; 'Human Rights Council (HRC) .. Sustainable Development Knowledge Platform' <<https://sustainabledevelopment.un.org/index.php?page=view&type=30022&nr=225&menu=3170>> accessed 11 August 2020; 'Human Rights and Development' (Icelandic Human Rights Centre) <<http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/human-rights-in-relation-to-other-topics/human-rights-and-development>> accessed 11 August 2020; 'Human Rights and the Environment' (Icelandic Human Rights Centre) <<http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/human-rights-in-relation-to-other-topics/human-rights-and-the-environment>> accessed 11 August 2020.

³⁶ Salustiano del Campo Momoh Tomoko Hamada ,Giancarlo Barbiroli,Saskia Sassen, Eleonora Barbieri-Masini, Paul Nchoji Nkwi, Owen Sichone, Abubakar (eds), Social And Economic Development – Volume VIII (EOLSS Publications 2010).

³⁷ 1992 Rio Declaration, Principle 1, which reads in full: "Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature."

³⁸ Aled Dilwyn Fisher, 'A Human Rights-Based Approach to the Environment and Climate Change' [2014] Practitioner Guide for The Global Initiative for Economic, Social and Cultural Rights, March 2014.

³⁹ Ibid.

⁴⁰ Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 *European Journal of International Law* 613; Boyle, Alan. "Human rights or environmental rights? A reassessment." *Fordham Environmental Law Review* (2007): 471-511; West, Thomas Ernest Riversdale Barker. "Human and nonhuman rights approaches to environmental protection." PhD diss., University of Nottingham, 2017; Horn, Laura S. "Reframing human rights in sustainable development." *Journal of The Australasian Law Teachers Association* (2013): 1-15.

⁴¹ Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 *European Journal of International Law* 613.

⁴² United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

Conflict may be defined as a struggle over values or claims to status and resources, in which the aim of the conflicting parties is not only the desired values but also neutralize, injure or eliminate their rivals.⁴³ There are many factors that determine the emergence, persistence, and even management of conflicts ranging from internal to relational and contextual factors.⁴⁴ Social conflicts, like all other kinds of conflicts, are inevitable in human interactions and if left unmanaged, they tend to degenerate into disputes that ruin the relations between persons or communities and yield undesired costs.⁴⁵ Conflict is also regarded as undesirable in many societies since, in its violent form, it claims the lives of many people, destroy property, and diverts human as well as financial resources away from development.⁴⁶

Natural resource conflicts may be defined as social conflicts (violent or non-violent) that primarily revolve around how individuals, households, communities and states control or gain access to resources within specific economic and political frameworks.⁴⁷ They are the contests that exist as a result of the various competing interests over access to and use of natural resources such as land, water, minerals and forests. Natural resource conflicts mainly have to do with the interaction between the use of and access to natural resources and factors of human development factors such as population growth and socio-economic advancement.⁴⁸ Natural resource conflicts are sensitive considering that they arise from the need for people to satisfy their basic needs.⁴⁹

Conflict management may be defined as the practice of identifying and handling conflicts in a sensible, fair and efficient manner that prevents them from escalating out of control and becoming violent.⁵⁰ Conflict management is seen as a multidisciplinary field of research and action that addresses how people can make better decisions collaboratively.⁵¹ Thus, the roots of conflict are addressed by building upon shared interests and finding points of agreement.⁵²

⁴³ Mengesha, Abebe Demewoz, Samson Seid Yesuf, and Tessema Gebre, "Indigenous Conflict Resolution Mechanisms among the Kembata Society." *American Journal of Educational Research*, 2015, Vol. 3, No. 2, pp. 225-242 at pp. 225-226.

⁴⁴ L Kriesberg, *Factors Shaping the Course of Intractable Conflict. Beyond Intractability* (Electronic source [200705 04] 2003).

⁴⁵ Adan, Mohamud, and Ruto Pkalya. "Conflict Management in Kenya-Towards Policy and Strategy Formulation." (2006); Muigua, Kariuki. "Managing Environmental Conflicts through Participatory Mechanisms for Sustainable Development in Kenya." (2018).

⁴⁶ Mengesha, Abebe Demewoz, Samson Seid Yesuf, and Tessema Gebre, "Indigenous Conflict Resolution Mechanisms among the Kembata Society." *American Journal of Educational Research*, 2015, Vol. 3, No. 2, pp. 225-242 at p.227.

⁴⁷ Mikkel Funder, Signe Marie Cold-Ravnkilde and Ida Peters Ginsborg, *Addressing Climate Change and Conflict in Development Cooperation: Experiences from Natural Resource Management* (DIIS Report 2012)

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https://www.researchgate.net/profile/Mikkel_Funder/publication/259324612_Addressing_Climate_Change_and_Conflict_in_Development_Cooperation_Experiences_from_Natural_Resource_Management/links/0046352b01b1a81862000000/Addressing-Climate-Change-and-Conflict-in-Development-Cooperation-Experiences-from-Natural-Resource-Management.pdf> Accessed 10 August 2020, p. 17.

⁴⁸ Toepfer, K., "Forward", in Schwartz, D. & Singh, A., *Environmental conditions, resources and conflicts: An introductory overview and data collection* (UNEP, New York, 1999). p.4

⁴⁹ Alfonso Peter Castro and Antonia Engel, *Negotiation and Mediation Techniques for Natural Resource Management. Case Studies and Lessons Learned* (Food & Agriculture Org 2007) (e-book).

⁵⁰ Ibid.

⁵¹ Anderson, J., et al, 'Addressing Natural Resource Conflicts through Community Forestry: Setting the Stage,' < <http://www.fao.org/docrep/005/ac697e/ac697e13.htm#TopOfPage> > Accessed 10 August 2020.

⁵² Ibid.

The conflicts under review in this paper are those associated with environmental and natural resources. The environment-conflict nexus is a subset of “environmental security” — a field of inquiry that seeks to determine whether or not traditional notions of security (which emphasize countering military threats with military power) should be adapted to include threats posed by population growth and diminishing quantity and quality of environmental goods and services.⁵³

Majority of cases of resource conflicts, often revolve around the following: conflict over resource ownership; conflict over resource access; conflict over decision making associated with resource management; and conflict over distribution of resource revenues as well as other benefits and burdens.⁵⁴ The structure of relations between parties to the conflict and the way parties interpret the same may affect the course of the conflict and its management.⁵⁵ The relation factors include differences in sizes (group conflicts), economic endowment (resources), coerciveness between the parties, and cultural patterns of conduct.⁵⁶ They also include the nature and degree of integration between adversaries in economic, social, and cultural domains.⁵⁷ Thus, if any of the mechanisms used to address these conflicts is to be considered successful, it must deal with one or more of these factors.⁵⁸

Conflicts ought to be managed effectively and a number of mechanisms are used in achieving this, each with its own distinct merits and demerits. This section offers an overview of the various mechanisms used in management of environmental conflicts. Notably, conflict management mechanisms mostly used take either the form of conflict settlement or conflict resolution.⁵⁹ Conflict settlement deals with all the strategies that are oriented towards producing an outcome in the form of an agreement among the conflict parties that might enable them to end an armed conflict, without necessarily addressing the underlying conflict causes.⁶⁰ Settlement is an

⁵³ Daniel Schwartz and Ashbindu Singh, *Environmental Conditions, Resources, and Conflicts: An Introductory Overview and Data Collection* (United Nations Environment Programme 1999) <<https://na.unep.net/siouxfalls/publications/Conflicts.pdf>> Accessed 10 August 2020, p.6.

⁵⁴ The United Nations Department of Political Affairs and United Nations Environment Programme, *Natural Resources and Conflict: A Guide for Mediation Practitioners*, (2015, UN DPA and UNEP), p. 11.

⁵⁵ ‘The Structure of International Conflict Management: An Analysis of the Effects of Interactability and Mediation - Jacob Bercovitch, Patrick M. Regan; *The International Journal for Peace Studies*’ <https://www.gmu.edu/programs/icar/ijps/vol4_1/bercovitch.htm> accessed 11 August 2020; Swanström, Niklas LP, and Mikael S. Weissmann. "Conflict, conflict prevention, conflict management and beyond: A conceptual exploration. Concept paper." *Central Asia-Caucasus Institute and Silk Road Studies Program*, Johns Hopkins University-SAIS and Uppsala University (2005).

⁵⁶ Muigua, Kariuki. "Managing natural resource conflicts in Kenya through negotiation and mediation." (2016); Alao, Abiodun. *Natural resources and conflict in Africa: the tragedy of endowment*. Vol. 29. University Rochester Press, 2007; Bavinck, Maarten, Lorenzo Pellegrini, and Erik Mostert, eds. *Conflicts over natural resources in the Global South: conceptual approaches*. CRC Press, 2014.

⁵⁷ Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi, 2016.

⁵⁸ Bercovitch, Jacob. "Conflict and conflict management in organizations: A framework for analysis." *Hong Kong Journal of Public Administration* 5, no. 2 (1983): 104-123; Jin Lim and AsscProfDr Rashad Yazdanifard, ‘The Difference of Conflict Management Styles and Conflict Resolution in Workplace’ (2012) *1 Business & Entrepreneurship Journal* 141.

⁵⁹ Bloomfield, David. "Towards complementarity in conflict management: Resolution and settlement in Northern Ireland." *Journal of Peace Research* 32, no. 2 (1995): 151-164.

⁶⁰ Alfonso Peter Castro and Antonia Engel, *Negotiation and Mediation Techniques for Natural Resource Management. Case Studies and Lessons Learned* (Food & Agriculture Org 2007) (e-book).

agreement over the issues(s) of the conflict which often involves a compromise.⁶¹ Parties have to come to accommodations which they are forced to live with due to the anarchical nature of society and the role of power in the relationship. Basically, power is the defining factor for both the process and the outcome.⁶² As such, settlement mechanisms may not necessarily address the human rights issues relevant to the emergence and management of the conflict.

On the other hand, conflict resolution deals with process-oriented activities that aim to address and resolve the deep-rooted and underlying causes of a conflict.⁶³ Conflict resolution mechanisms include negotiation, mediation and problem solving facilitation.⁶⁴ This is in recognition of the fact that the view of what is just and what is unjust are not universally shared, and as such, divergent views of justice often cause social conflicts.⁶⁵ This is attributed to the fact that frequently, the parties involved in conflicts are convinced that their own view is the solely valid one.⁶⁶ It is, thus, suggested that since there is no access to an objective truth about justice, conflicts may be reconciled by the judgement of an authority accepted by all parties or by a negotiated agreement between the parties: agreements are just when the parties are equally free in their decision and equally informed about all relevant facts and possible outcomes.⁶⁷ A resolution approach to management of environmental conflicts is therefore more desirable since it gives the groups involved a chance to participate in environmental decision-making as well as expressing their ideas, thus creating an opportunity to address their needs and rights.⁶⁸

The institutional framework in Kenya on environmental management and conflict management includes: the Environment and Land Court⁶⁹, the National Environmental Management Authority,⁷⁰ National Environmental Complaints Committee⁷¹, National Environment Tribunal

⁶¹ Bloomfield, D., "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", *Journal of Peace Research*, Vol. 32, No. 2(May, 1995), p.152; Mwagiru Makumi, 'Conflict in Africa: Theory Processes and Institutions of Management' [2006] Nairobi: Centre for Conflict Research 115.

⁶² Baylis, C., and Carroll, R., "Power Issues in Mediation", *ADR Bulletin*, Vol. 1, No.8 [2005], Art.1, p.135.

⁶³ 'Negotiation and Mediation Techniques for Natural Resource Management'

<<http://www.fao.org/3/a0032e/a0032e03.htm>> accessed 11 August 2020.

⁶⁴ Udezo, Benson OS. "Concepts and methods of conflict resolution and Peace-Building: Imperatives for religious leaders in Nigeria." *Journal of Religion and Human Relations* 1, no. 2 (2009); Fisher, Ron. "Sources of conflict and methods of conflict resolution." *International Peace and Conflict Resolution*, School of International Service, The American University (2000).

⁶⁵ corissajoy, 'Principles of Justice and Fairness' (Beyond Intractability, 29 June 2016) <https://www.beyondintractability.org/essay/principles_of_justice> accessed 11 August 2020; Scott D Campbell, 'Sustainable Development and Social Justice: Conflicting Urgencies and the Search for Common Ground in Urban and Regional Planning' (2013) 1 *Michigan Journal of Sustainability* <<http://hdl.handle.net/2027/spo.12333712.0001.007>>.

⁶⁶ 'Learning to See Things from Another's Perspective, Opinion News & Top Stories - The Straits Times' <<https://www.straitstimes.com/opinion/learning-to-see-things-from-anothers-perspective>> accessed 11 August 2020.

⁶⁷ Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi, 2016.

⁶⁸ 'Environmental Conflicts' (ACCORD) <<https://www.accord.org.za/ajcr-issues/environmental-conflicts/>> accessed 11 August 2020; 'Negotiation and Mediation Techniques for Natural Resource Management' <<http://www.fao.org/3/a0032e/a0032e04.htm>> accessed 11 August 2020.

⁶⁹ Established under the Constitution of Kenya 2010 and Environment and Land Court Act, 2011.

⁷⁰ Established under S.7 of the EMCA (Cap 8 of 1999).

⁷¹ Environment Management and Co-ordination Act, Act. No. 8 of 1999; Environment Management and Co-ordination (Amendment) Act, 2015 (No. 5 of 2015).

and other various informal community based resource governance bodies.⁷² The existing legal mechanism for managing natural resource conflicts as enshrined in the environmental law statutes include the courts of law both under civil and criminal law,⁷³ statutory tribunals set up under various laws (such as the Land Adjudication Boards)⁷⁴ and customary law systems of conflict management.⁷⁵

4. Human Rights Protection in Environmental and Natural Resources Conflicts: Prospects and Challenges

Some authors rightly pointed out over 25 years ago that ‘political and strategic impact of surging populations, spreading disease, deforestation and soil erosion, water depletion, air pollution, and possibly, rising sea levels — developments that will prompt mass migration and, in turn, incite group conflicts — will be the core foreign-policy challenge in the twenty-first century’.⁷⁶ Predictably, all these issues and more have continued to inform the international debates on development and environmental conservation and protection. Nothing captures this better than the *United Nations 2030 Agenda on Sustainable Development*⁷⁷ which includes a set of 17 Sustainable Development Goals (SDGs) to end poverty, fight inequality and injustice, and tackle climate change by the year 2030.⁷⁸ The *2030 Agenda for Sustainable Development*⁷⁹ is a plan of action for people, planet and prosperity. It also seeks to strengthen universal peace in larger freedom and was formulated in recognition that eradicating poverty in all its forms and dimensions, including extreme poverty, which is seen as the greatest global challenge and an indispensable requirement for sustainable development.⁸⁰

The participants resolved, between 2015 and 2030, to end poverty and hunger everywhere; to combat inequalities within and among countries; to build peaceful, just and inclusive societies; to protect human rights and promote gender equality and the empowerment of women and girls; and to ensure the lasting protection of the planet and its natural resources. They resolved also to create conditions for sustainable, inclusive and sustained economic growth, shared prosperity and decent work for all, taking into account different levels of national development and capacities.⁸¹

⁷² Some communities like the Meru, Maasai, Giriama, etc, have councils of elders who sit and resolve small scale disputes that erupt within their respective communities.

⁷³ Environment Management and Co-ordination Act, Act. No. 8 of 1999, Part XIII Ss. 137-146

⁷⁴ Established under Land Adjudication Act, Cap. 284, Laws of Kenya.

⁷⁵ Mbote, P.K., ‘Towards greater Access to Justice in Environmental Disputes in Kenya: Opportunities for Intervention,’ IELRC Working 2005-1.<<http://www.ielrc.org/content/w0501.pdf> > Accessed 10 August 2020.

⁷⁶ Daniel Schwartz and Ashbindu Singh, *Environmental Conditions, Resources, and Conflicts: An Introductory Overview and Data Collection* (United Nations Environment Programme 1999) <<https://na.unep.net/siouxfalls/publications/Conflicts.pdf>> Accessed 10 August 2020.

⁷⁷ Transforming our world: the 2030 Agenda for Sustainable Development, Resolution adopted by the General Assembly on 25 September 2015, [without reference to a Main Committee (A/70/L.1)], Seventieth session, Agenda items 15 and 116, 21 October 2015.

⁷⁸ United Nations Development Programme, ‘Sustainable Development Goals (SDGs),’ <http://www.undp.org/content/undp/en/home/mdgoverview/post-2015-development_agenda.html> Accessed 10 August 2020.

⁷⁹ Transforming our world: the 2030 Agenda for Sustainable Development, Resolution adopted by the General Assembly on 25 September 2015, [without reference to a Main Committee (A/70/L.1)], Seventieth session, Agenda items 15 and 116, 21 October 2015.

⁸⁰ Ibid, Preamble.

⁸¹ Ibid, Agenda No. 3.

Notably, in order to build peaceful, just and inclusive societies, management of environmental and natural resource-based conflicts is paramount. However, for the world states to also ensure that they protect human rights and promote gender equality and the empowerment of women and girls, the conflict management mechanisms employed must be used in a way that does not result in a conflict between the two goals.

This section highlights some of the challenges that are likely to arise in select environmental and natural resource-based conflict management mechanisms used internationally and nationally as far as securing human rights is concerned.

a) Human Rights and Environmental Litigation

National legal systems governing natural resource management are mostly based on legislation and policy statements that are administered through regulatory and judicial institutions, where adjudication and arbitration are the main strategies for addressing conflicts, with decision-making vested in judges and officials who possess the authority to impose a settlement on disputants.⁸² Further, decisions are more likely to be based on national legal norms applied in a standardized or rigid manner, with all-or-nothing outcomes. Thus, contesting parties often have very limited control over the process and outcomes of conflict management.⁸³ The judicial systems mostly employ the conflict settlement approach, with all its associated advantages and disadvantages.⁸⁴ Litigation does not afford the affected parties a reasonable and fair opportunity to participate in finding a lasting solution because, apart from the coercive nature of the process, litigation is also subject to other procedural technicalities which may affect its effectiveness.⁸⁵

While it is true that the Constitution of Kenya vests the courts with the authority to uphold and enforce the Bill of Rights,⁸⁶ some environmental conflicts require active participation in decision-making with full disclosure of the relevant information. However, the nature of the representative leadership in the country may not always allow this to happen. Political leaders may purport to speak and make decisions on behalf of a certain group, with minimal or no participation and access to information by the group in question and the same may unfortunately be treated as a reflection of the group's position on the issues in question.⁸⁷

As such, some of their rights and/or needs may not be adequately protected or realised. It is also possible that power relations and lack of access to courts may come in the way of accessing justice for a marginalised or a disadvantaged group of persons.⁸⁸ It is thus arguable that the court may

⁸² Alfonso Peter Castro and Antonia Engel, *Negotiation and Mediation Techniques for Natural Resource Management. Case Studies and Lessons Learned* (Food & Agriculture Org 2007) (e-book).

⁸³ *Ibid.*

⁸⁴ See Muigua, K., *Settling Disputes through Arbitration in Kenya*, 3rd Ed., Glenwood Publishers, Nairobi – 2017; Abdualla Mohamed Hamza, Miomir Todorovic and Knez Mihaljeva Street, 'Peaceful Settlement Of Disputes' 7 G.J.C.M.P., Vol.6(1):11-17.

⁸⁵ Ojwang, J.B., "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 Kenya Law Review Journal 19 (2007), pp. 19-29, p. 29.

⁸⁶ Constitution of Kenya, Article 23; See also Article 70.

⁸⁷ Jacobsen, Dag Ingvar. "Are the relations between politicians and administrators at the local level determined by the degree of central government regulations?." In ECPR, Joint Sessions Workshops, no. 21. 2001; Kanyinga, Karuti. "Kenya: Democracy and political participation." (2014).

⁸⁸ Magdalena Sepulveda Carmona and Kate Donald, 'Access to Justice for Persons Living in Poverty: A Human Rights Approach' (Social Science Research Network 2014) SSRN Scholarly Paper ID 2437808

not always deliver what the particular group needs or deserves. Thus while such approaches as litigation or arbitration may be the most appropriate in some reliefs such as: a declaration of rights; an injunction; a conservatory order; a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24; an order for compensation; and/or an order of judicial review,⁸⁹ they may fail to address the deep rooted causes of a conflict.⁹⁰ Procedural rights are limited by technicalities thus denying the group of persons in question an opportunity to actively and meaningfully participate in decision-making processes.⁹¹

b) Alternative Dispute Resolution Mechanisms and Human Rights in Environmental Matters

The phrase Alternative Dispute Resolution (ADR) refers to all those decision-making processes other than litigation including but not limited to negotiation, enquiry, mediation, conciliation, expert determination, arbitration and others.⁹² However, while arbitration is considered as part of ADR mechanisms, due to its coercive nature and great similarity to litigation, for purposes of this discussion, arbitration is grouped together with litigation. As such, the use of the term ADR in this paper should be construed to refer to mediation, conciliation, negotiation and traditional/community based dispute management mechanisms.

ADR methods have been associated with the advantages of being cost effective, expeditious, informal and participatory.⁹³ As a result, parties retain a degree of control and relationships can be preserved. Conflict management mechanisms such as mediation encourages “win-win” situations, parties find their own solutions, they pursue interests rather than strict legal rights, are informal, flexible and attempts to bring all parties on board.⁹⁴ ADR mechanisms allow public participation in enhancing access to justice as they bring in an element of efficiency, effectiveness, flexibility, cost-effectiveness, autonomy, speed and voluntariness in conflict management.⁹⁵

<<https://papers.ssrn.com/abstract=2437808>> accessed 11 August 2020; ‘Law and Justice Foundation - Access to Justice and Legal Needs. Stage 1: Public Consultations’ <<http://www.lawfoundation.net.au/report/consultations>> accessed 11 August 2020.

⁸⁹ See Constitution of Kenya 2010, Article 23 (3).

⁹⁰ Mwangi Makumi, ‘Conflict in Africa: Theory Processes and Institutions of Management’ [2006] Nairobi: Centre for Conflict Research 115.

⁹¹ Benjamin Richardson and Jona Razzaque, ‘Public Participation in Environmental Decision Making’; OITA US EPA, ‘Public Participation Guide: Introduction to Public Participation’ (US EPA, 24 February 2014) <<https://www.epa.gov/international-cooperation/public-participation-guide-introduction-public-participation>> accessed 11 August 2020; Canberra corporateName=Commonwealth Parliament; address=Parliament House, ‘Citizens’ Engagement in Policymaking and the Design of Public Services’ <https://www.aph.gov.au/about_parliament/parliamentary_departments/parliamentary_library/pubs/rp/rp1112/12rp01> accessed 11 August 2020; NU CEPAL, ‘International Human Rights Standards Applicable to Access to Information, Public Participation and Access to Justice. Executive Summary (Preliminary Version)’.

⁹² Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi, 2016.

⁹³ *Ibid*; Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers, Nairobi, 2015; Muigua, K., *Resolving Conflicts through Mediation in Kenya*, Glenwood Publishers, Nairobi, 2013.

⁹⁴ Fenn, P., “Introduction to Civil and Commercial Mediation”, in Chartered Institute of Arbitrators, *Workbook on Mediation*, (CI Arb, London, 2002), p.10.

⁹⁵ Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi, 2016.

Traditional Dispute Resolution Mechanisms (TDRMs) include informal mediation, negotiation, problem-solving workshop, council of elders, consensus approaches among others.⁹⁶ It has been observed that where traditional community leadership is strong and legitimate it has positive impacts in promoting local people's priorities in natural resource management.⁹⁷ The traditional and customary systems for managing conflict are associated with: encouraging participation by community members, and respect local values and customs; are more accessible because of their low cost, their flexibility in scheduling and procedures, and their use of the local language; they encourage decision-making based on collaboration, with consensus emerging from wide-ranging discussions, often fostering local reconciliation; they contribute to processes of community empowerment; informal and even formal leaders may serve as conciliators, mediators, negotiators or arbitrators; and finally, long-held public legitimacy provides a sense of local ownership of both the process and its outcomes.⁹⁸

ADR and TDRM processes are therefore more likely to afford communities or disgruntled groups procedural rights, and in effect, help in achievement of environmental justice and environmental democracy.⁹⁹ They would provide a viable platform for access to justice which is essential as it affords the means by which the public challenge application of and implementation of environmental laws and policies.¹⁰⁰

While ADR and TDR mechanisms may suffer from the unenforceability of their outcomes and potential gender bias,¹⁰¹ they may provide a good platform for the realisation of procedural rights and the ability to recognise and address deep rooted causes of conflicts while coercive mechanisms such as litigation may come in handy in realisation of substantive rights.¹⁰²

⁹⁶ Muigua, Kariuki. "Institutionalising Traditional Dispute Resolution Mechanisms and other Community Justice Systems." *Alternative Dispute Resolution* (2017): 1-80; Dahal, Dev Raj, and Chandra Dev Bhatta. "The relevance of local conflict resolution mechanisms for systemic conflict transformation in Nepal." Berghof Foundation for Peace Support (2008).

⁹⁷ Shackleton, S., et al, 'Devolution And Community-Based Natural Resource Management: Creating Space for Local People to participate and Benefit?' Overseas Development Institute Natural Resource Perspectives, No. 76, March 2002, p.4.

⁹⁸ Alfonso Peter Castro and Antonia Engel, *Negotiation and Mediation Techniques for Natural Resource Management. Case Studies and Lessons Learned* (Food & Agriculture Org 2007) (e-book).

⁹⁹ Ilaria Beretta, 'Some Highlights on the Concept of Environmental Justice and Its Use' [2012] e-cadernos CES <<http://journals.openedition.org/eces/1135>> accessed 11 August 2020; Alma L Lowry, 'Achieving Justice through Public Participation: Measuring the Effectiveness of New York's Enhanced Public Participation Plan for Environmental Justice Communities'; 'Environmental Democracy? Does Anyone Really Care?' (E-International Relations, 26 October 2012) <<https://www.e-ir.info/2012/10/26/environmental-democracy-does-anyone-really-care/>> accessed 11 August 2020.

¹⁰⁰ Alfonso Peter Castro and Antonia Engel, *Negotiation and Mediation Techniques for Natural Resource Management. Case Studies and Lessons Learned* (Food & Agriculture Org 2007) (e-book).

¹⁰¹ Muigua, Kariuki. "Institutionalising Traditional Dispute Resolution Mechanisms and other Community Justice Systems." *Alternative Dispute Resolution* (2017): 1-80; Deborah R Hensler, 'Does Alternative Dispute Resolution Facilitate Prejudice and Bias? We Still Don't Know' <<https://core.ac.uk/reader/147643940>> accessed 11 August 2020; Todd B Carver and Albert A Vondra, 'Alternative Dispute Resolution: Why It Doesn't Work and Why It Does' [1994] *Harvard Business Review* <<https://hbr.org/1994/05/alternative-dispute-resolution-why-it-doesnt-work-and-why-it-does>> accessed 11 August 2020; Lorna McGregor, 'Alternative Dispute Resolution and Human Rights: Developing a Rights-Based Approach through the ECHR' (2015) 26 *European Journal of International Law* 607.

¹⁰² Tom Tyler and Rebecca Hollander-Blumoff, 'Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution' [2011] Faculty Scholarship Series <https://digitalcommons.law.yale.edu/fss_papers/4992>.

5. Securing Human Rights in Environmental and Natural Resources Conflict Management

While there are other regulatory approaches to achieving environmental protection and addressing or avoiding environmental conflicts that are not rights-based such as economic incentives and disincentives, criminal law, and private liability regimes¹⁰³, a human rights based approach is arguably the most effective one that ensures that conflicts and all or most of their root causes are effectively addressed thus limiting any chances of reemergence of these conflicts.¹⁰⁴ While the emphasis on responsibilities rather than rights may still have its place in environmental protection and management of environmental conflicts, recognising the rights of conflicting groups and upholding them could be more effective.¹⁰⁵ The two approaches should therefore be used but with a rights-based one getting significant recognition. For instance, the Constitution of Kenya 2010 provides for environmental rights which include the right to clean and healthy environment for every person¹⁰⁶ but also spells out the duty of 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.¹⁰⁷

Where conflict cannot be contained in a functional way, it can erupt in violence, war, and destruction, loss of life, displacements, long-term injuries, psychological effects as a result of trauma suffered especially in case of violent conflicts, and deep fear, distrust, depression, and sense of hopelessness.¹⁰⁸ All these raise significant but diverse human rights issues. However, while failure to address conflicts is likely to give rise to the listed adverse effects on human life, use of the inappropriate mechanism(s) to deal with the conflicts may address the problem for one group of persons while plunging the other one into deeper problems.¹⁰⁹ Scholars have argued that deep-rooted conflicts are caused by the absence of the fundamental needs of security, identity, respect, safety, and control which many find non-negotiable.¹¹⁰

It has also been argued that deep-rooted conflicts are caused by the absence of the fundamental needs of security, identity, respect, safety, and control which many find non-negotiable.¹¹¹ The clash of interests can take many forms. It could be over resources such as land, food, territory,

¹⁰³ D Shelton, *Human Rights, Health & Environmental Protection: Linkages in Law & Practice*; 2002 <https://www.who.int/hhr/Series_1%20%20Sheltonpaper_rev1.pdf> Accessed 10 August 2020, p. 4.

¹⁰⁴ 'What Is HRBAP? | Human Rights-Based Approach to Programming' (UNICEF) <https://www.unicef.org/policyanalysis/rights/index_62012.html> accessed 11 August 2020; 'A Human Rights Approach to Conflict Resolution' (Ethics & International Affairs, 9 September 2019) <<https://www.ethicsandinternationalaffairs.org/2019/a-human-rights-approach-to-conflict-resolution/>> accessed 11 August 2020.

¹⁰⁵ 'A Human Rights Approach to Conflict Resolution' (Ethics & International Affairs, 9 September 2019) <<https://www.ethicsandinternationalaffairs.org/2019/a-human-rights-approach-to-conflict-resolution/>> accessed 11 August 2020.

¹⁰⁶ Constitution of Kenya 2010, Article 42.

¹⁰⁷ Constitution of Kenya 2010, Article 69 (2).

¹⁰⁸ See K Annan, G Machel and B Mkapa, 'Back from the Brink: The 2008 Mediation Process and Reforms in Kenya' [2014] Nairobi: African Union Commission.

¹⁰⁹ Blondel, Alice. "Climate change fuelling resource-based conflicts in the Asia-Pacific." *Asia-Pacific Human Development Report Background Papers Series 12* (2012).

¹¹⁰ Burton, J., *Conflict: Human Needs Theory* (New York: St. Martin's Press), 1990; Kelman, H., *International Behavior: A Social Psychological Analysis* (New York: Holt, Rinehart and Winston), 1965.

¹¹¹ *Ibid.*

water, energy sources, and natural resources.¹¹² Conflict could also be associated with power and control of the resources.¹¹³ Conflicts could also be over identity,¹¹⁴ namely cultural, social and political identities to which people feel tied. Conflicts over status may arise, relating to whether people feel treated with respect and dignity and whether their traditions and social position are respected.¹¹⁵ Conflicts could be caused by differences of values, particularly those embodied in systems of government, religion, or ideology.¹¹⁶ Further, conflicts have been associated with the changing norms, values, and world views about property rights within formerly subsistence-based (or pastoralist) communities.¹¹⁷ These types of conflicts may be deep seated and the formal approaches to conflict management such as courts may not necessarily address all the issues arising.¹¹⁸ They require participatory approaches that take into account the concerns and rights of the target groups. Empowering these communities through such means as ensuring that they have access to all the information required in decision making and negotiating with them on what trade-offs may be necessary can potentially achieve environmental protection while at the same time ensuring that the human rights of these groups are protected.¹¹⁹ This is because, conflicts do not occur in vacuum and to a large extent, they are dependent on the context.¹²⁰ As such, the needs of target groups differ and must be treated as such.

The *1992 Conference of Rio de Janeiro on Environment and Development* formulates a link between human rights and environmental protection largely in procedural terms, declaring in Principle 10 that access to information, public participation and access to effective judicial and administrative proceedings, including redress and remedy, should be guaranteed because

¹¹² Buckles, D. & Rusnak, D., 'Conflict and collaboration in natural resource management,' (International Development Research Centre, 2005), p. 2.

¹¹³ Ibid, p. 2.

¹¹⁴ See Rothman, J., *Resolving Identity-Based Conflict: In Nations, Organizations, and Communities*. (San Francisco: Jossey-Bass Publishers, 1997).

¹¹⁵ EAIM, 'Peace and Stability Are Prelude to Economic Development and Prosperity,' <http://www.togoruba.org/togoruba1964/mainTogorubamap/mainMap/headingMap/English/2006/Art.sFeb-2006/1802EAIM06-06EA.html> Accessed 10 August 2020.

¹¹⁶ Adamu, A & Ben, A., 'Migration and Violent Conflict in Divided Societies: Non-Boko Haram violence against Christians in the Middle Belt region of Nigeria,' Nigeria Conflict Security Analysis Network (NCSAN) Working Paper No. 1, (World Watch Research, Abuja, Nigeria, March 2015).

¹¹⁷ Armitage, D., 'Adaptive Capacity and Community-Based Natural Resource Management,' *Environmental Management*, Vol. 35, No. 6, pp. 703–715, p. 710.

¹¹⁸ Philip Onguny and Taylor Gillies, 'Land Conflict in Kenya: A Comprehensive Overview of Literature' [2019] *Les Cahiers d'Afrique de l'Est / The East African Review* <<http://journals.openedition.org/eastafrica/879>> accessed 11 August 2020; Muigua, Kariuki. "Conflict Management Mechanisms for Effective Environmental Governance in Kenya." (2018); Young, Laura A., and Korir Sing'Oei. *Land, livelihoods and identities: Inter-community conflicts in East Africa*. Minority Rights Group International, 2011; N Rass, 'Policies and Strategies to Address the Vulnerability of Pastoralists in Sub-Saharan Africa'; PY Le Meur and others, 'Conflict over Access to Land & Water Resources within Sub-Saharan Dry Lands: Underlying Factors, Conflict Dynamics and Settlement Processes' [2006] Final report, GRET, Paris.

¹¹⁹ Machingura, Fortunata, and Seven Lally. "The Sustainable Development Goals and their trade-offs." London: ODI (2017); Balbo, Marcello, and Giulia Guadagnoli. "United Nations Trust Fund for Human Security Projects implemented by UN-Habitat in Afghanistan, Cambodia and Sri Lanka."

¹²⁰ T Belay, 'Conflicts, Conflict Resolution Practices and Impacts of the War in South Sudan' (2015) 2 *International Journal of School and Cognitive Psychology* S 013.

environmental issues are best handled with the participation of all concerned citizens, at the relevant level.¹²¹

The Sustainable Development Goals (SDGs) acknowledge that sustainable development cannot be realized without peace and security; and peace and security will be at risk without sustainable development.¹²² The SDGs recognize the need to build peaceful, just and inclusive societies that provide equal access to justice and that are based on respect for human rights, on effective rule of law and good governance at all levels and on transparent, effective and accountable institutions.¹²³

A human rights-based approach to environmental protection is therefore capable of not only addressing the conflict but also ensures that all other relevant rights in such scenarios are observed and upheld.¹²⁴ The choice of mechanism to be used is thus equally important.

Considering that conflicts between biodiversity conservation and other human activities are intensifying as a result of growing pressure on natural resources and associated demands by some for greater conservation,¹²⁵ approaches to reducing conflicts are increasingly focusing on engaging stakeholders in processes that are perceived as fair, that is, independent and where stakeholders have influence, and which in turn can generate trust between stakeholders.¹²⁶ Increased trust through fair participatory processes makes conflict resolution more likely.¹²⁷ Participatory approaches are defined as institutional settings where stakeholders of different types are brought together to participate more or less directly, and more or less formally, in some stage of the decision-making process.¹²⁸

There is a need for taking local communities into confidence and having confidence in them; engaging with their ideas, experiences, values, and capabilities and working with them, not on their behalf, to achieve resource-conservation objectives and community benefits.¹²⁹ In such approaches, environmental protection is achieved while at the same time, the communities' rights are protected.¹³⁰

It is recommended that conflict resolution mechanisms such as negotiation and mediation should be utilised more in management of environmental and natural resource-based conflicts as they can afford the parties an opportunity to negotiate and reach a compromise agreement, where all

¹²¹ D Shelton, *Human Rights, Health & Environmental Protection: Linkages in Law & Practice*; 2002 < https://www.who.int/hhr/Series_1%20%20Sheltonpaper_rev1.pdf> Accessed 10 August 2020, p. 4.

¹²² United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, para. 35.

¹²³ *Ibid.*

¹²⁴ Campese, Jessica. *Rights-based approaches: Exploring issues and opportunities for conservation*. CIFOR, 2009 < http://www.cifor.org/publications/pdf_files/Books/BSunderland0901.pdf> Accessed 11 August 2020.

¹²⁵ Young, J.C., et al, 'The role of trust in the resolution of conservation conflicts,' *Biological Conservation*, Vol. 195, March 2016, pp. 196–202.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ Hove, SVD, 'Between consensus and compromise: acknowledging the negotiation dimension in participatory approaches,' *Land Use Policy*, Vol. 23, Issue 1, January 2006, pp. 10–17.

¹²⁹ Young, J.C., et al, 'The role of trust in the resolution of conservation conflicts,' *Biological Conservation*, Vol. 195, March 2016, pp. 196–202.

¹³⁰ *Ibid.*

sides get satisfactory outcome.¹³¹ This is particularly important in ensuring that there will be no future flare-up of conflict due to unaddressed underlying issues.¹³² It is arguable that resolution mechanisms have better chances of achieving parties' satisfaction and protecting their rights when compared to settlement mechanisms.¹³³ Settlement mechanisms may first be used to quell any violence after which resolution mechanisms should be employed to address the deep rooted issues which mostly touch on human rights on such issues as dignity, culture and participation among others, since conflict management processes are not mutually exclusive and one can lead to the other.¹³⁴

Notably, the 2010 Constitution of Kenya created an opportunity for exploring the use of ADR mechanisms and TDRMs in managing natural resource conflicts.¹³⁵ ADR and Traditional dispute resolution mechanisms, especially negotiation and mediation, should be utilised in addressing the complex issues in environmental conflicts that may not be resolved through the formal methods such as courts.¹³⁶ This is because some mechanisms such as mediation and negotiation can potentially bring about inclusiveness and public participation of all members of the community in decision-making. They are relevant in enjoyment of procedural rights in environmental matters.

6. Conclusion

Human rights fall under substantive and procedural rights. Environmental law is one of the branches of law where procedural rights play a vital role in addressing environmental concerns. This paper has argued that while the formal approaches to environmental protection are important in securing substantive environmental rights, they may not be as effective in achieving procedural rights. It is for this reason that stakeholders should consider and promote active utilisation of other informal approaches such as ADR and TDR in ensuring that all the rights of communities are protected. There is a need to strike a balance between conservation measures and access to resources by communities, through employing approaches that help in understanding the needs of the particular people and responding appropriately and consequently building trust within communities, and between communities and the national government.¹³⁷ In addition, for conflict management to be successful there is a need to employ participatory approaches so that the major issues can be identified, analysed and properly addressed.¹³⁸

¹³¹ Warner, M., 'Conflict Management in Community-Based Natural Resource Projects: Experiences from Fiji and Papua New Guinea,' Working Paper No. 135, (Overseas Development Institute, April, 2000), p. 16.

¹³² Mwangi Makumi, 'Conflict in Africa: Theory Processes and Institutions of Management' [2006] Nairobi: Centre for Conflict Research 115.

¹³³ Muigua, K., *Resolving Conflicts through Mediation in Kenya*, Glenwood Publishers, Nairobi, 2013.

¹³⁴ Chidhakwa, Z., 'Managing conflict around contested natural resources: a case study of Rusitu Valley area, Chimanimani, Zimbabwe,' *Natural Resource Conflict Management Case Studies: An Analysis of Power, Participation and Protected Areas*, (Southern Alliance for Indigenous Resources).

¹³⁵ Constitution of Kenya 2010, Art. 60; 67; 159(2) (c).

¹³⁶ Muigua, Kariuki, and Kariuki Francis. "alternative Dispute resolution, access to Justice and Development in Kenya." *Strathmore LJ* 1 (2015): 1; Sandford, R. A. "Environmental dispute resolution: mediation, an effective alternative to litigation?." PhD diss., University of Tasmania, 1990.

¹³⁷ Office for ECOSOC Support and Coordination United Nations. *Achieving sustainable development and promoting development cooperation: dialogues at the Economic and Social Council*. UN, 2008; Muigua, Kariuki. "Managing natural resource conflicts in Kenya through negotiation and mediation." (2016).

¹³⁸ Chidhakwa, Z., 'Managing conflict around contested natural resources: a case study of Rusitu Valley area, Chimanimani, Zimbabwe,' *Natural Resource Conflict Management Case Studies: An Analysis of Power, Participation and Protected Areas*, (Southern Alliance for Indigenous Resources).

A bottom-top approach to natural resource management, including conflict management, creates an opportunity to involve the local people who may have insiders' grasp of the issues at hand.¹³⁹ While conflicts cannot be avoided, there is a need to effectively manage them so as to ensure harmony amongst people and to prevent violence and the potential loss of lives and property. Management of natural resource conflicts also ensures security in terms of a guarantee of continued access to and use of the environmental resources necessary for to survival from generation to generation. Human rights are an integral part of any democracy and should therefore not be sacrificed; the place of human rights in Environmental and Natural resources Conflict management in Kenya is thus central and should remain so.

¹³⁹ Muigua, Kariuki. "Conflict Management Mechanisms for Effective Environmental Governance in Kenya." (2018); 'Negotiation and Mediation Techniques for Natural Resource Management' <<http://www.fao.org/3/a0032e/a0032e04.htm>> accessed 11 August 2020; Hartter, Joel, and Sadie J. Ryan. "Top-down or bottom-up?: Decentralization, natural resource management, and usufruct rights in the forests and wetlands of western Uganda." *Land Use Policy* 27, no. 3 (2010): 815-826; Mark Reed and Julian sidoli del ceno, 'Mediation and Conservation Conflicts: From Top-down to Bottom-Up' (2015).

Mainstreaming the Role of Women in Peacemaking and Environmental Management in Kenya

Abstract

This paper examines and discusses ways in which women can meaningfully participate in peacemaking efforts and environmental management as far as addressing environmental related conflicts in Kenya is concerned. The paper is based on the hypothesis that societal gendered division of labour makes women interact more with the environment as the caretakers of families and this places them at a better position to be included in managing environmental resources. Any adverse effects of conflict also affect their lives as they are left in charge of their homes and children. The paper argues that there is a need to promote a more participatory role of women in not only preventing emergence of conflict but also in quelling the same where it arises and also to enhance their role in environmental management.

1. Introduction

Peace is considered to be an important part of any society as self-determination is not possible without peace. Where conflict arises, it is often grounded in social, structural, cultural, political and economic factors, and deprivation in one increases chances of conflict in a particular society.¹ This paper focuses on environmental and natural resource related conflicts and how these types of conflict affect efforts towards achieving peace in any given society. In discussing this, the author also offers suggestions on the role that women can play in peacemaking efforts and environmental management. Natural resources are an important source of livelihoods of many households in especially in rural areas.² In addition, it has been observed that conflicts over natural resources can be useful in making needs and rights clear and helping to solve injustices or inequities in resource distribution. However, some conflicts have the potential for becoming obstacles to livelihoods and sustainable resource management if they are not addressed.³ It has also been rightly pointed out that women play a critical role in managing natural resources on family and community levels and are most affected by environmental degradation.⁴ In addition, world's women are seen as the key to sustainable development, peace and security.⁵ It is for these reasons that this paper argues that women must and should be included in not only any

¹ Maiese, M., 'Social Structural Change,' in G. Burgess & H. Burgess (eds), *Beyond Intractability*, (Conflict Information Consortium, University of Colorado, Boulder, July 2003), available at <http://www.beyondintractability.org/essay/social-structural-changes>> Accessed on 28 June 2020; See also Maiese, M., 'Causes of Disputes and Conflicts,' in G. Burgess & H. Burgess (eds), *Beyond Intractability*, (Conflict Information Consortium, University of Colorado, Boulder, October, 2003), available at <http://www.beyondintractability.org/essay/underlying-causes> Accessed on 28 June 2020.

² 'Negotiation and Mediation Techniques for Natural Resource Management' <<http://www.fao.org/3/a0032e/a0032e04.htm>> accessed 4 July 2020.

³ Ibid.

⁴ Bureau of International Information Programs and United States Department of State, 'Chapter 11: Women and the Environment', *Global Women's Issues: Women in the World Today*, extended version (Bureau of International Information Programs, United States Department of State 2012) <<https://opentextbc.ca/womenintheworld/chapter/chapter-11-women-and-the-environment/>> accessed 8 July 2020.

⁵ Ibid.

peacemaking efforts where environmental related conflicts arise, but also in environmental management as a way of preventing any future conflicts from arising.

There are as many approaches to peace efforts as there are players. The three main approaches to peace include: peacekeeping, peacebuilding and peacemaking.⁶ The three approaches are applied to different scenarios and stages in a conflict situation. This paper is mainly concerned with peacemaking approach to peace efforts. As already pointed out, there are different players in a conflict situation. This paper is concerned with women as key players in conflict situations. Women's roles are closely tied up to satisfying the basic needs of the extended family, among which are the global economic, and social needs and hence the need to include them in environmental management.⁷

The scope and context of the paper is limited to discussing the connection between the role of women and peacemaking approaches in environmental-related conflict situations. Arguably, both men and women are affected differently by environmental-related conflicts. It has rightly been pointed out that the role of women in the exploitation of natural resources during the war is rarely acknowledged.⁸ As such, this discourse calls for a more inclusive role of women in environmental management.

2. Peacemaking and Environmental Management: The Linkage

Conflicts are issues about values which are non-negotiable. These needs and values are shared by the parties. Needs or values are inherent in all human beings and go to the root of the conflict while interests and issues are superficial and do not go to the root of the conflict.⁹ They are infinite. Conflicts, therefore, arise out of the non-fulfillment of these non-negotiable needs or values of the conflicting parties in the society. Accordingly, if all needs are met, the result is non-zero-sum which produces integrative and creative solutions and not a zero-sum solution.¹⁰

A conflict involves at least two parties disagreeing over the distribution of material or symbolic resources or perceives their underlying cultural values and beliefs to be different or incompatible. It has also been argued that conflicts could also originate from the social and political make-up and structure of society.¹¹ This supports the perspective that conflict has to be dealt with at the psychological level to get past 'blocks' to positive communication and at an ontological level to

⁶ Johan, Galtung, Three approaches to peace: Peacekeeping, peacemaking and peacebuilding. 1976 <https://www.galtunginstitutt.de/wpcontent/uploads/2016/06/galtung_1976_three_approaches_to_peace.pdf> Accessed on 28 June 2020.

⁷ Emmanuel Ngwa Nebasina, 'The Role of Women in Environmental Management: An Overview of the Rural Cameroonian Situation' (1995) 35 *GeoJournal* 516.

⁸ 'Understanding Gender, Conflict and the Environment' (CEOBS, 5 June 2017) <<https://ceobs.org/understanding-gender-conflict-and-the-environment/>> accessed 4 July 2020.

⁹ Bloomfield, D., "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", *Journal of Peace Research*, Vol.32, No. 2 (May, 1995), pp.152-153.

¹⁰ Fetherston, A.B., "From Conflict Resolution to Transformative Peacebuilding: Reflections from Croatia", Centre for Conflict Resolution-Department of Peace Studies: Working Paper 4 (April, 2000), pp. 2-4.

¹¹ See Serge, L, et al, "Conflict Management Processes for Land-related conflict", A Consultancy Report by the Pacific Islands Forum Secretariat, available at www.forumsec.org, [Accessed on 4/7/2020].

uncover the 'real' causes of the conflict.¹² Thus, peacemaking efforts work towards stopping active conflicts (whether armed or not).¹³ The term peace is related to the well-being of any person and is also linked to harmony, tranquility, cooperation, alliance, well-being, and agreement.¹⁴ Peace is considered to be more than just the absence of violence.¹⁵ As such, peace may be classified into positive peace or negative peace. Negative peace is the absence of violence or the fear of violence while positive peace is the attitudes, institutions and structures, that when strengthened, lead to peaceful societies.¹⁶

Positive peace is considered as a true, lasting, and sustainable peace built on justice for all peoples. The concept of positive peace involves the elimination of the root causes of war, violence, and injustice and the conscious attempt to build a society that reflects these commitments. Positive peace assumes an interconnectedness of all life.¹⁷ In a negative peace situation, it may not see conflict out in the open, but the tension is boiling just beneath the surface because the conflict was never reconciled. The concept of negative peace addresses immediate symptoms, the conditions of war, and the use and effects of force and weapons.¹⁸

Peacemaking generally includes measures to address conflicts in progress and usually involves diplomatic action to bring hostile parties to a negotiated agreement.¹⁹ In most African setups, the traditional conflict resolution mechanisms have been employed, for example, in resolving environmental conflicts where the council of elders, provincial administration, peace committees, land adjudication committees and local environmental committees play a pivotal role in managing conflicts.²⁰

Peace and the environment are closely related as affirmed in the sustainable development discourse.²¹ The United Nations *2030 Agenda for Sustainable Development*²² (SDGs) provides a global blueprint for dignity, peace and prosperity for people and the planet, now and in the future. SDG Goal 16 focuses on promoting peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all

¹² Fetherston, A.B., "From Conflict Resolution to Transformative Peacebuilding: Reflections from Croatia", op.cit.

¹³ International Alert, "What is Peace Building?" Available at <https://www.international-alert.org/what-we-do/what-is-peacebuilding> [27/6/2020].

¹⁴ Spring, Ú.O., "Peace and Environment: Towards a Sustainable Peace as Seen from the South." In *Globalization and Environmental Challenges*, Springer, Berlin, Heidelberg, 2008, pp. 113-126.

¹⁵ Galtung, J., "Violence, peace, and peace research," *Journal of peace research*, Vol. 6, no. 3 (1969): 167-191.

¹⁶ Herath, O., "A critical analysis of Positive and Negative Peace," (2016), p.106. Available at <http://repository.kln.ac.lk/bitstream/handle/123456789/12056/journal1%20%281%29.104-107.pdf?sequence=1&isAllowed=y> [Accessed on 26/6/2020].

¹⁷ Herath, O., "A critical analysis of Positive and Negative Peace," (2016), p.106.

¹⁸ *Ibid.*, pp.106-107.

¹⁹ 'Terminology' (United Nations Peacekeeping) <<https://peacekeeping.un.org/en/terminology>> accessed 4 July 2020.

²⁰ Muigua, K., *Resolving Conflicts through Mediation in Kenya*, 2nd Ed., Glenwood Publishers, Nairobi – 2017.

²¹ UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1, Target 35.

²² UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

levels.²³ Some scholars have argued that environmental peacemaking fundamentally utilizes cooperative efforts to manage environmental resources as a way to transform insecurities and create more peaceful relations between parties in dispute.²⁴ In addition, environmental management may help overcome political tensions by promoting interaction, confidence building, and technical cooperation.²⁵

An environmental conflict has been described as a particular social conflict characterised by: the qualitative or quantitative reduction of available environmental resources (water, biodiversity, arable land, raw materials and other finite common goods) due to the imposition of profitable projects by multinational companies and/or inappropriate policies by Governments, International financial organisations; and the escalation of protests by local residents and/or larger opposition movements in civil society, in an effort to protect the environment, common goods and people's rights.²⁶

In Northern Kenya, the resource based conflicts have been worsened by diminishing pasture and water resources, the proliferation of small arms and light weapons, disputes over land and ethnic boundaries, the absence of adequate state security, and the commercialization of cattle rustling.²⁷

Environmental conflicts have been perceived as a symptomatic manifestation of global model of economic development based on the exploitation of natural resources, disregard for people's rights and lack of social justice.²⁸ Furthermore, it has been suggested that there are about four key factors that contribute in the creation of environmental conflict: poverty, vulnerable livelihoods, migration and weak state institutions – all problems that are present at the local level.²⁹ It is also argued that environmental factors often interact with the visible drivers of ethnic tensions, political marginalisation and poor governance to create a causal framework that allows degradation to affect livelihoods, interests and capital – which, in turn, lead to conflict.³⁰

²³ Goal 16, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1.

²⁴ Ken Conca and Geoffrey D Dabelko, 'Environmental Peacemaking /' (Olin College Library Catalog) <<http://olin.tind.io/record/126690>> accessed 28 June 2020.

²⁵ Ken Conca and Geoffrey D Dabelko, 'Environmental Peacemaking /' (Olin College Library Catalog) <<http://olin.tind.io/record/126690>> accessed 28 June 2020.

²⁶ CDCA, 'Why environmental conflicts?' Available at <<http://cdca.it/en/perche-i-conflitti-ambientali>> accessed 5 July 2020.

²⁷ 'Peace by All Means: Women Crusaders in Northern Kenya Make the Search for Peace Personal | International Organization for Migration - Nairobi' </article/peace-all-means-women-crusaders-northern-kenya-make-search-peace-personal> accessed 5 July 2020.

²⁸ CDCA, 'Why environmental conflicts?' Available at <http://cdca.it/en/perche-i-conflitti-ambientali> accessed 5 July 2020.

²⁹ Barnett, J., & Adger, W. N., 'Climate change, human security and violent conflict,' *Political Geography*, Vol.26, 2007, pp. 639-655, at p.643 (As quoted in Akins, E., "Environmental Conflict: A Misnomer?" *Environment, Climate Change and International Relations*: 99, available at <http://www.e-ir.info/2016/05/12/environmental-conflict-a-misnomer/>).

³⁰ Akins, E., "Environmental Conflict: A Misnomer?" *Environment, Climate Change and International Relations*: 99, available at <http://www.e-ir.info/2016/05/12/environmental-conflict-a-misnomer/> [Accessed on 5/5/2020]; See also Sosa-Nunez, G. & Atkins, E., *Environment, Climate Change and International Relations*, (E-International Relations, 2016). Available at <http://www.e-ir.info/wp-content/uploads/2016/05/Environment-Climate-Change-and-International-Relations-E-IR.pdf> [Accessed on 5/7/2020].

It is thus clear that if communities are guaranteed environmental security, where they are able to meet all their resource needs, peace becomes easier to achieve. Where there are threats to sources of livelihoods especially in communities that mainly rely on environmental resources it means increased chances of conflict.

3. Role of Women in Peacemaking: Challenges and Prospects

It has been observed that natural resource based conflicts can, arguably, involve three broad themes: actors (or stakeholders, groups of people, government structures and private entities), resource (land, forests, rights, access, use and ownership) and stakes (economic, political, environmental and socio-cultural).³¹ As a result, it is contended that conflicts can be addressed with the actor-oriented approach, resource-oriented approach, stake-oriented approach or a combination of the three.³² Despite this, there are key principles such as, inter alia, participatory approaches³³, equitable representation, capacity building, context of the conflict and increased access and dissemination of information, that must always be considered.³⁴ Natural resource based conflicts are sensitive considering that they arise from the need for people to satisfy their basic needs.³⁵

It is for this reason that this paper advocates for inclusion of women in peacemaking efforts and environmental management as important actors and stakeholders in tackling environmental and natural resource related conflicts. While the inclusion of women in making processes has gained momentum in policy discussions over the last 15 years, the number of women in decision-making positions remains relatively small.³⁶ Peacemaking efforts have relatively remained a man's affair, the same group of people who largely participate in conflicts.³⁷

Some authors have rightly pointed out that 'peace processes increasingly go beyond outlining cease-fires and dividing territory to incorporate elements that lay the foundations for peace and shape the structures of society'.³⁸ It is for this reason that some authors have argued for the

³¹ Anderson, J., et al, 'Addressing Natural Resource Conflicts through Community Forestry: Setting the Stage,' Annex C - Summary of Discussion Papers, (FAO), available at <http://www.fao.org/docrep/005/ac697e/ac697e13.htm#TopOfPage> [Accessed on 5/7/2020].

³² Ibid.

³³ Participatory approaches are defined as institutional settings where stakeholders of different types are brought together to participate more or less directly, and more or less formally, in some stage of the decision-making process. (Hove, SVD, 'Between consensus and compromise: acknowledging the negotiation dimension in participatory approaches,' Land Use Policy, Vol. 23, Issue 1, January 2006, pp. 10–17.

³⁴ Anderson, J., et al, 'Addressing Natural Resource Conflicts through Community Forestry: Setting the Stage,' op cit.

³⁵ FAO, 'Negotiation and mediation techniques for natural resource management,' available at <http://www.fao.org/3/a-a0032e/a0032e05.htm> [Accessed on 5/7/2020].

³⁶ 'Why Women Should Have a Greater Role in Peacebuilding' (World Economic Forum) <<https://www.weforum.org/agenda/2015/05/why-women-should-have-a-greater-role-in-peacebuilding/>> accessed 5 July 2020.

³⁷ 'African Approaches to Building Peace and Social Solidarity' (ACCORD) <<https://www.accord.org.za/ajcr-issues/african-approaches-to-building-peace-and-social-solidarity/>> accessed 5 July 2020.

³⁸ Marie O'Reilly and Thania Paffenholz, 'Reimagining Peacemaking: Women's Roles in Peace Processes' (International Peace Institute (IPI): The Graduate Institute of International ... 2015) < https://cve-kenya.org/media/library/Reilly_et_al_2015_Reimagining_Peacemaking_Womens_Roles_in_Peace_Processes.pdf> Accessed 28 June 2020.

inclusion of all groups in society in peacemaking efforts. Some commentators have argued that the participation of women in peace talks is important as they are more likely to raise day-to-day issues such as human rights, citizen security, employment, and health care, which make peace and security plans more relevant and more durable.³⁹

Women are seen as ‘more peaceful’ compared to men and argument used to call for their greater participation in peace efforts. Indeed, some authors have gone as far as arguing that ‘men are more likely to engage in aggression and war; in contrast “a world run by women” would be “less aggressive, adventurous, competitive, and violent”, and “less prone to conflict and more conciliatory and cooperative than the one we inhabit now”’.⁴⁰ Others argue that conflict “accentuates existing differences of power and access to resources, weakening the position of those who are already without power, whether they are men, women or children”.⁴¹ While the former suggestion that women may be more peaceful is highly contentious, the latter argument solidifies the argument that women also have much to lose where there is conflict and hence creates the need to include them in peace processes.

Some authors have authoritatively explored women's participation in five important areas of international peace and security namely: (1) conflict prevention, (2) peace negotiations, (3) post-conflict disarmament, demobilization, and reintegration, (4) governance, and (5) transitional justice.⁴² Arguably, active inclusion of women in environmental management as part of the peacemaking efforts would go a long way in achieving lasting peace in any society. Some scholars have observed that a key challenge to greater inclusion of women's issues and concerns in peace agreements and in peacemaking [and statebuilding] efforts is that women are not seen as central to ‘making or breaking’ a peace agreement and other forms of identity, such as ethnicity, are considered to be a more fundamental fault line for conflict.⁴³

According to some commentators, the trauma of the conflict experience may provide an opportunity for women to come together with a common agenda. In some contexts, these changes have led women to become activists, advocating for peace and long-term transformation in their societies.⁴⁴ In some parts of Northern Kenya especially among the pastoralist communities, women have been as agents of both conflicts and peace. For instance, it has been observed that among the communities of Nawuiyapong in West Pokot County and Lorengippi in Turkana County, Northern Kenya, women have now taken an initiative to attend meetings between the

³⁹ ‘Women on the Frontlines of Peace and Security’

<<https://ndupress.ndu.edu/Publications/Books/Women-on-the-Frontlines-of-Peace-and-Security/>> accessed 5 July 2020.

⁴⁰ See Hilary Charlesworth, ‘Are Women Peaceful? Reflections on the Role of Women in Peace-Building’ (2008) 16 *Feminist Legal Studies* 347.

⁴¹ See Hilary Charlesworth, ‘Are Women Peaceful? Reflections on the Role of Women in Peace-Building’ (2008) 16 *Feminist Legal Studies* 347, at 358.

⁴² Donna Ramsey-Marshall, ‘Review of Women Building Peace: What They Do, Why It Matters’ (2008) 25 *International Journal on World Peace* 112.

⁴³ ‘Gender-Sensitive Peacebuilding and Statebuilding’ (GSDRC) <<https://gsdrc.org/topic-guides/gender-and-conflict/approaches-tools-and-interventions/gender-sensitive-peacebuilding-and-statebuilding/>> accessed 4 July 2020.

⁴⁴ Julie Arostegui, ‘Gender, Conflict, and Peace-Building: How Conflict Can Catalyse Positive Change for Women’ (2013) 21 *Gender & Development* 533.

community elders, so as to exert pressure on the elders towards making peaceful resolutions. Furthermore, in contrast to the practice among pastoralist communities where women have in the past motivated young men to participate in raids, the women crusaders are now acting as change agents and discouraging their young men from such activities.⁴⁵ In these two communities, there are a group of women popularly referred to as the women crusaders, and they have been instrumental in pushing men (elders and youth-warriors) into committing themselves to resolutions reached during peace dialogues.⁴⁶

The inclusion of women in peace efforts is not alien to Africa as women elders in traditional African societies often played a key role in resolving conflicts.⁴⁷ For instance, it is said that among the traditional Igbo society in Eastern Nigeria, women are the sustainers and healers of human relationships.⁴⁸ Chinua Achebe buttresses this point further in his renowned novel, *Things Fall Part*, where he asserts as follows:

“...when a father beats his child, it seeks sympathy in its mother’s hut. A man belongs to his father when things are good and life is sweet. But when there is sorrow and bitterness, he finds refuge in his motherland. Your mother is there to protect you”.⁴⁹

This is true in virtually all the other African communities. The role of the Luo women, for instance, is also well documented in various stages of peace processes in their community. They could directly or indirectly intervene through elders and women networks within the warring factions to bring peace.⁵⁰

Despite this, a critical look at the cultures of most of the other African communities reveals that the role of women as compared to men in conflict management activities was and is still negligible.⁵¹ For instance, among the Pokot and the Marakwet, women traditionally act as reference resource people but cannot challenge or influence decisions adopted by the male-dominated council of elders, the *Kokwo*. Among the Samburu, women are supposed to merely

⁴⁵ ‘Peace by All Means: Women Crusaders in Northern Kenya Make the Search for Peace Personal | International Organization for Migration - Nairobi’ </article/peace-all-means-women-crusaders-northern-kenya-make-search-peace-personal> accessed 5 July 2020.

⁴⁶ Ibid.

⁴⁷ See generally, Boege, V., Potential and limits of traditional approaches in peacebuilding. Berghof Handbook II: Advancing Conflict Transformation, 2011, pp.431-457.

⁴⁸ Brock-Utne, B., "Indigenous conflict resolution in Africa," In A draft presented to week-end seminar on Indigenous Solutions to Conflicts held at the University of Oslo, Institute of Educational Research, 2001, p. 13.

⁴⁹ Achebe, C., *Things Fall Apart*, (William Heinemann Ltd, London, 1958) (As quoted in Brock-Utne, B., "Indigenous conflict resolution in Africa," op cit., p.13).

⁵⁰ Brock-Utne, B., *Indigenous Conflict Resolution in Africa*, op cit.

⁵¹ See Alaga, E., Challenges for women in peacebuilding in West Africa, (Africa Institute of South Africa (AISA), 2010); Cf. Ibewuiké, V. O., *African Women and Religious Change: A study of the Western Igbo of Nigeria with a special focus on Asaba town*, (Uppsala, 2006). Available at <https://uu.diva-portal.org/smash/get/diva2:167448/FULLTEXT01.pdf> [Accessed on 5/7/2020].

convey their suggestions through their male relatives. Such information may or may not be conveyed at all to the council of elders.⁵²

Consequently, traditions, cultural norms and practices that may be considered repugnant and contrary to written laws and that hinder the participation of women in conflict management, should be discarded. Women empowerment is essential to enable them participate in the various conflict resolution fora as they are the majority of the victims of conflicts.

Their role as carriers of life and agents of peace has not changed in modern society. As such their participation in conflict resolution activities should not be curtailed by the adoption of formal dispute resolution mechanisms or adherence to traditions hindering their role on the same. Women have the capacity to negotiate and bring about peace, either directly or through creation of peace networks, among warring communities.⁵³ Their participation in conflict resolution should thus be enhanced.

As already pointed out, peace building generally goes beyond conflict management measures, as it involves developing institutional capacities that alter the situations that lead to violent conflicts.⁵⁴ In traditional African societies, people engaged in activities that promoted peace through the various activities they engaged in. Resort to courts searching for justice when peace is what is needed may thus destroy relationships rather than build and foster them in the Kenyan case. In such cases, reconciliation, negotiation, mediation and other traditional mechanisms would be the better option.⁵⁵ There is a need to ensure that these processes include women as active players. Thus, women are still subjugated when it comes to peacemaking efforts due to poverty, discriminatory cultural norms and traditions and lack of education. This is despite the ongoing national and international efforts geared towards empowering women.

4. Role of Women in Environmental Management

The role of most women at the household level is not unique to Kenya as in many other African countries, they are charged with fresh water collection and use, the tedious search and use of

⁵² See generally, Rabar, B. & Karimi, M. (Eds), *Indigenous Democracy: Traditional Conflict Resolution Mechanisms: The Case of Pokot, Turkana, Samburu and Marakwet communities*, (ITDG, Nairobi, 2004), p.96.

⁵³ See generally, De la Rey, C., & McKay, S., *Peacebuilding as a gendered process*. *Journal of Social Issues*, Vol.62, No.1, 2006, pp.141-153; See also Paffenholz, T., et al, "Making Women Count - Not Just Counting Women: Assessing Women's Inclusion and Influence on Peace Negotiations," (Geneva: Inclusive Peace and Transition Initiative (The Graduate Institute of International and Development Studies) and UN Women, April 2016). Available at <http://www.inclusivepeace.org/sites/default/files/IPTI-UN-Women-Report-Making-Women-Count-60-Pages.pdf> [Accessed on 5/7/2020].

⁵⁴ See Maiese, M., 'Peacebuilding,' September 2003. Available at <http://www.beyondintractability.org/essay/peacebuilding> [Accessed on 5/7/2020].

⁵⁵ See generally, Huyse, L., "Tradition-based Justice and Reconciliation after Violent Conflict: Learning from African Experiences." (2008). Available at 174.129.218.71/resources/analysis/upload/paper_060208_bis.pdf [Accessed on 5/7/2020]; See also Bar-Tal, D., "From Intractable Conflict through Conflict Resolution to Reconciliation: Psychological Analysis." *Political Psychology*, Vol.21, No. 2 (2000); see also Bloomfield, D., et al, (eds.), *Reconciliation after violent conflict: A handbook*, (International Idea, 2003).

energy resources, land use and its security, the marketing of farm produce, domestic chores and other household undertakings which they carry out so as to sustain each individual in the household.⁵⁶ Despite this, these women have no rights over the land on which they perform, hence no access to credit facilities for desired farm inputs and other farm improvement facilities, receive inadequate education and training, due some times to culture and religious factors, and they are thus forced by such circumstances to negotiate for or rent and cultivate small isolated patches of land which in most cases are separated by considerable distances.⁵⁷ The indirect effect of this scenario on the environment is that these women become frustrated and have no incentive for long term investments to upkeep positively the rural environmental management.⁵⁸

In her acceptance speech, Nobel Laureate, the late Prof. Wangari Maathai, summarised the importance of environmental resources to livelihood sustenance and the central role that citizenry can play in solving environmental problems, especially women, by stating that:

“.....So, together, we have planted over 30 million trees that provide fuel, food, shelter, and income to support their children's education and household needs. The activity also creates employment and improves soils and watersheds. Through their involvement, women gain some degree of power over their lives, especially their social and economic position and relevance in the family....Initially, the work was difficult because historically our people have been persuaded to believe that because they are poor, they lack not only capital, but also knowledge and skills to address their challenges. Instead they are conditioned to believe that solutions to their problems must come from 'outside'. Further, women did not realize that meeting their needs depended on their environment being healthy and well managed. They were also unaware that a degraded environment leads to a scramble for scarce resources and may culminate in poverty and even conflict....In order to assist communities to understand these linkages, we developed a citizen education program, during which people identify their problems, the causes and possible solutions. They then make connections between their own personal actions and the problems they witness in the environment and in society.... (Emphasis added).”⁵⁹

This speech aptly captures the place of women in environmental management and the need to include them in achieving effective environmental management for elimination of environmental based conflicts to achieve lasting peace.

5. Mainstreaming the Role of Women in Peacemaking and Effective Environmental Management in Kenya

Kenya has on several occasions witnessed violence erupting in the Rift valley as a result of pastoralists and farmers competing over the same land use or for vastly different uses.⁶⁰

⁵⁶ Emmanuel Ngwa Nebasina, 'The Role of Women in Environmental Management: An Overview of the Rural Cameroonian Situation' (1995) 35 GeoJournal 515.

⁵⁷ Ibid, p. 515.

⁵⁸ Ibid, p.515.

⁵⁹ The Norwegian Nobel Institute, 'Wangari Maathai: The Nobel Lecture (Oslo, December 10, 2004),' available at http://nobelpeaceprize.org/en_GB/laureates/laureates-2004/maathai-lecture/ [Accessed on 26/06/2020].

⁶⁰ Ibid, p. 10.

Increasingly, stakeholders and leaders world over have agreed that ‘women’s participation in peace negotiations contributes to the quality and durability of peace after civil war’.⁶¹ This assertion holds true especially in relation to environmental and natural resource related conflicts. This is because of the important role that women play as far as nurturing and providing for their families is concerned.

The women, peace, and security agenda first gained a foothold in 1995 at the Fourth World Conference on Women in Beijing.⁶² In the year 2000, the United Nations Security Council adopted *Resolution 1325 on Women, peace and Security*⁶³ where they *inter alia* urged Member States to ensure increased representation of women at all decision-making levels in national, regional and international institutions and mechanisms for the prevention, management, and resolution of conflict.⁶⁴ The Council also called on all actors involved, when negotiating and implementing peace agreements, to adopt a gender perspective, including, *inter alia*: (a) the special needs of women and girls during repatriation and resettlement and for rehabilitation, reintegration and post-conflict reconstruction; (b) Measures that support local women’s peace initiatives and indigenous processes for conflict resolution, and that involve women in all of the implementation mechanisms of the peace agreements; (c) Measures that ensure the protection of and respect for human rights of women and girls, particularly as they relate to the constitution, the electoral system, the police and the judiciary.⁶⁵

It has however been observed that despite the adoption of UN Security Council Resolution 1325, which called for strengthening women and girls’ protection from conflict-related sexual violence and women’s equal participation in all stages of the prevention and resolution of conflict, women’s participation in peace negotiations with voice and influence remains exceptional rather than the norm.⁶⁶ Women’s traditional societal role as caretakers and mothers of family leaves them at a precarious position when natural resource related conflicts arise.⁶⁷

Peacemaking is done collaboratively, at local, national, regional and international levels. Individuals, communities, civil society organisations, governments, regional bodies and the private sector all play a role in making peace. Peacemaking is also a long-term process, as it involves changes in attitudes and behaviour, and institutional norms.⁶⁸ It has been observed that shared natural resources can provide the basis for dialogue between warring parties, as can

⁶¹ Jana Krause, Werner Krause and Piia Bränfors, ‘Women’s Participation in Peace Negotiations and the Durability of Peace’ (2018) 44 *International Interactions* 985.

⁶² Princeton Lyman, ‘Women’s Role in Bringing Peace to Sudan and South Sudan’ [2013] unpublished article submitted to State Department.

⁶³ Adopted by the Security Council at its 4213th meeting, on 31 October 2000, S/RES/1325 (2000).

⁶⁴ *Ibid*, para. 1.

⁶⁵ *Ibid*, para. 8.

⁶⁶ Jana Krause, Werner Krause and Piia Bränfors, ‘Women’s Participation in Peace Negotiations and the Durability of Peace’ (2018) 44 *International Interactions* 985.

⁶⁷ ‘Roles Of Women, Families, And Communities In Preventing Illnesses And Providing Health Services In Developing Countries | The Epidemiological Transition: Policy and Planning Implications for Developing Countries | The National Academies Press’ <<https://www.nap.edu/read/2225/chapter/14>> accessed 5 July 2020.

⁶⁸ International Alert, “What is Peace Building?” Available at <https://www.international-alert.org/what-we-do/what-is-peacebuilding> [27/6/2020].

common environmental threats that extend across human boundaries and borders.⁶⁹ Failure to promote such sharing of available natural resources for harmonious existence is a recipe for resource fueled environmental conflicts.⁷⁰ Indeed, it has been documented that the current of wealth from the world's abundant natural resources is too often diverted away from populations in need, instead feeding conflicts and corruption, and leading to human rights abuses and environmental damage.⁷¹

Some authors have observed that the pervasiveness of women's responsibility for environmental management hinges on a gendered division of labour, in which women are often disproportionately responsible for providing 'subsistence' products such as food, water and fuel.⁷² For instance, women's roles mean that the well-being of whole households and communities frequently depends on their ability to access resources, including during conflict. In addition, even where daily life is disrupted by armed conflict, women's responsibilities tend to remain the same in spite of additional environmental pressures which may include degradation directly and indirectly connected to armed conflict.⁷³ The roles of women are said to alter and expand during conflict as they participate in the struggles and take on more economic responsibilities and duties as heads of households.⁷⁴

The place of women in peacemaking as far as environmental resources are concerned has been rightly summarized as follows:

*"....Harnessing these positive environmental dividends requires policymakers to think about gender and the way social roles shape everyday interactions with the environment in conflict affected areas. Where women are identified as the primary managers of local resources, effective management and reform will remain incomplete and ineffective if a gendered lens is not considered...."*⁷⁵

Some authors have argued that the linkages between women signatories and women civil society groups explain the observed positive impact of women's direct participation in peace negotiations. In addition, collaboration and knowledge building among diverse women groups contributes to better content of peace agreements and higher implementation rates of agreement provisions.⁷⁶

⁶⁹ 'How Does War Damage the Environment?' (CEOBS, 4 June 2020) <<https://ceobs.org/how-does-war-damage-the-environment/>> accessed 2 July 2020.

⁷⁰ 'Natural Resource Wealth Fails to Translate into "Equivalent" Benefits for People, Fuelling Conflict, Instability, Deputy Secretary-General Tells Security Council | Meetings Coverage and Press Releases' <<https://www.un.org/press/en/2013/sc11037.doc.htm>> accessed 2 July 2020.

⁷¹ 'Natural Resource Wealth Fails to Translate into "Equivalent" Benefits for People, Fuelling Conflict, Instability, Deputy Secretary-General Tells Security Council | Meetings Coverage and Press Releases' <<https://www.un.org/press/en/2013/sc11037.doc.htm>> accessed 2 July 2020.

⁷² 'Understanding Gender, Conflict and the Environment' (CEOBS, 5 June 2017) <<https://ceobs.org/understanding-gender-conflict-and-the-environment/>> accessed 2 July 2020.

⁷³ Ibid.

⁷⁴ Julie Arostegui, 'Gender, Conflict, and Peace-Building: How Conflict Can Catalyse Positive Change for Women' (2013) 21 Gender & Development 533.

⁷⁵ 'Understanding Gender, Conflict and the Environment' (CEOBS, 5 June 2017) <<https://ceobs.org/understanding-gender-conflict-and-the-environment/>> accessed 4 July 2020.

⁷⁶ Jana Krause, Werner Krause and Pii Bränfors, 'Women's Participation in Peace Negotiations and the Durability of Peace' (2018) 44 International Interactions 985.

The participatory processes such as negotiation, mediation and conciliation should also include women as they may better understand the underlying issues in the conflict due to their close interactions with the natural resources. It has been noted that women have generally been under-represented in peace negotiations, both in numbers and status (where they often constitute ‘informal’ participants).⁷⁷ There is a need for the stakeholders involved in peacemaking to acknowledge the important role that women can and should play in not only management of environmental and natural resources but also ensuring that they actively participate in peacemaking efforts.

Women should also be included in dispute management committees, both formal and informal, as a way of not only ensuring that they actively participate but also as a way of encouraging attitude change among communities that women can and should indeed participate in brokering peace within their communities. The participation of women in peace processes improves their outcome, leading to more stable communities that are less likely to revert into conflict.⁷⁸

5.1 Empowerment of Women through Elimination of Poverty

One of the ways of addressing poverty is focusing on human development which empowers people, both men and women, to contribute positively towards eradication of poverty without solely relying on the Government to do so. It has been observed that the view that poverty is a shortage of income ought to be changed to one that perceives poverty as ‘unfreedoms’ of various sorts: the lack of freedom to achieve even minimally satisfactory living conditions. Low income can contribute to that, but other factors such as the lack of schooling facilities, absence of health facilities, unavailability of medicines, the suppression of women, hazardous environmental features and lack of jobs do also play a major role. He opines that poverty can be reduced through addressing all these issues.⁷⁹

It has been observed that poverty and the urgent desire to satisfy the basic needs of growing human populations are some of the root causes of the extensive exploitation and inherent depletion of natural resources especially within rural environment.⁸⁰ Thus, poverty exerts undue pressure on environmental resources leading to environmental degradation. When women, who are the main caregivers in the Kenyan society especially within the rural communities, cannot comfortably meet the needs of their families, they turn to the environment to exert pressure on the small parcels of agricultural land as well as engaging in economic activities such as charcoal burning and timber harvesting to meet their needs. The unsustainable means of agricultural production adversely

⁷⁷ ‘Gender-Sensitive Peacebuilding and Statebuilding’ (GSDRC) <<https://gsdrc.org/topic-guides/gender-and-conflict/approaches-tools-and-interventions/gender-sensitive-peacebuilding-and-statebuilding/>> accessed 4 July 2020.

⁷⁸ ‘United Nations Gender Equality Chief, Briefing Security Council, Points Out “Systemic Failure” to Integrate Women in Peacekeeping, Mediation | Meetings Coverage and Press Releases’ <<https://www.un.org/press/en/2018/sc13554.doc.htm>> accessed 5 July 2020.

⁷⁹ Green, D., *From Poverty to Power: How active citizens and effective states can change the world*, (2nd ed., 2012), pg. IX (Foreword by Amartya Sen), Rugby, UK: Practical Action Publishing and Oxford: Oxfam International, Available at http://www.oxfamamerica.org/static/media/files/From_Poverty_to_Power_2nd_Edition.pdf [Accessed on 4/7/2020].

⁸⁰ Emmanuel Ngwa Nebasina, ‘The Role of Women in Environmental Management: An Overview of the Rural Cameroonian Situation’ (1995) 35 *GeoJournal* 520.

affects the environment.⁸¹ Economic empowerment of women would enable them diversify their sources of livelihood thus easing the pressure on the environment. The United Nations observe that Women's economic empowerment includes women's ability to participate equally in existing markets; their access to and control over productive resources, access to decent work, control over their own time, lives and bodies; and increased voice, agency and meaningful participation in economic decision-making at all levels from the household to international institutions.⁸² As far as realisation of sustainable development goals is concerned, the United Nations observes that 'empowering women in the economy and closing gender gaps in the world of work are key to achieving the 2030 Agenda for Sustainable Development and achieving the Sustainable Development Goals, particularly Goal 5, to achieve gender equality, and Goal 8, to promote full and productive employment and decent work for all; also Goal 1 on ending poverty, Goal 2 on food security, Goal 3 on ensuring health and Goal 10 on reducing inequalities'.⁸³

As already pointed out, most natural resource related conflicts emanate from competition for access and control of natural resources. Economically empowered women can objectively engage in negotiations geared towards achieving peace or avoiding conflicts without them being disadvantaged.⁸⁴ They can also contribute to the empowerment of households through ensuring that children go to school. For instance, it has been observed that youths from Northern Kenyan communities partake in cattle raids against neighboring communities, which vice has been attributed to various factors such as lack of education, unemployment and the cultural obligation for young men to partake in the cattle raids. Acquiring cattle during such raids has for long been considered a sure way of enhancing the young men's status in society.⁸⁵ Women would not only be able to take their children to school but would also discourage these youths from engaging in cattle raids.⁸⁶

5.2 Formal and Non-Formal Education for Meaningful Participation of Women

It has been observed that promoting women's capacities to participate in peace processes is crucial for their advancement and ability to contribute to peace, development and security.⁸⁷ One way of building such capacity is through empowering women and girls through education. Education is seen as a key enabler of economic growth and indeed a part of sustainable development discourse. As such, increasing women's and girls' educational attainment contributes to women's economic empowerment and more inclusive economic growth.⁸⁸ This is because education is critical for

⁸¹ Elizabeth Rodriguez, Ryan Sultan and Amy Hilliker, 'Negative Effects of Agriculture on Our Environment' (2004) 3 Ef. Agric. Trap.

⁸² 'Facts and Figures: Economic Empowerment' (UN Women) <<https://www.unwomen.org/what-we-do/economic-empowerment/facts-and-figures>> accessed 5 July 2020.

⁸³ Ibid.

⁸⁴ 'United Nations Gender Equality Chief, Briefing Security Council, Points Out "Systemic Failure" to Integrate Women in Peacekeeping, Mediation | Meetings Coverage and Press Releases' <<https://www.un.org/press/en/2018/sc13554.doc.htm>> accessed 5 July 2020.

⁸⁵ 'Peace by All Means: Women Crusaders in Northern Kenya Make the Search for Peace Personal | International Organization for Migration - Nairobi' <[article/peace-all-means-women-crusaders-northern-kenya-make-search-peace-personal](https://www.iom.int/article/peace-all-means-women-crusaders-northern-kenya-make-search-peace-personal)> accessed 5 July 2020.

⁸⁶ Ibid.

⁸⁷ 'Mediating Peace in Africa' (ACCORD) <<https://www.accord.org.za/publication/mediating-peace-in-africa/>> accessed 5 July 2020.

⁸⁸ 'Facts and Figures: Economic Empowerment' (UN Women) <<https://www.unwomen.org/what-we-do/economic-empowerment/facts-and-figures>> accessed 5 July 2020.

women's and girl's health and wellbeing, as well as their income-generation opportunities and participation in the formal labour market.⁸⁹ Education will not only enable them diversify their sources of income and ease pressure on the environment but will also give them the voice to meaningfully participate in negotiations geared towards management of conflicts.

Empowering women and girls through education is important in ensuring that they actively and meaningfully participate in community peace efforts. It is noteworthy that adopting a community-based approach to empowerment of women does not automatically translate into greater participation and inclusion. This is because some of the traditional practices have negative impacts such as discrimination of women and disabled persons.⁹⁰ In fact, it is against this fact that the Constitution retains the test of non-repugnancy while applying traditional justice systems.⁹¹ This is where the Courts come in as the legal guardians of the Bill of human rights as envisaged in the Constitution.⁹²

5.3 Encouraging Active Participation of Women in Peace Negotiation and Mediation Processes

Under Article 31 of the *RIO+20 Report*, state parties emphasized that sustainable development must be inclusive and people-centred, benefiting and involving all people, including youth and children. They also recognized that gender equality and women's empowerment are important for sustainable development and our common future. They therefore reaffirmed their commitments to ensure women's equal rights, access and opportunities for participation and leadership in the economy, society and political decision-making.

Although the need to engage women in peace processes is widely acknowledged, it has been observed that in many parts of the world especially where conflicts persist, most mediation teams do not include or encourage the voices and representation of women.⁹³ This is despite evidence that women have demonstrated that they can be adept at mobilising diverse groups for a common purpose, working across ethnic, religious, political and cultural divides to promote peace.⁹⁴

⁸⁹ 'Facts and Figures: Economic Empowerment' (UN Women) <<https://www.unwomen.org/what-we-do/economic-empowerment/facts-and-figures>> accessed 5 July 2020.

⁹⁰ See generally, Muigua, K., —Securing the Realization of Environmental and Social Rights for Persons with Disabilities in Kenya. Available at <http://www.kmco.co.ke/attachments/article/117/Securing%20the%20Realization%20of%20Environmental%20and%20Social%20Rights%20for%20Persons%20with%20Disabilities%20in%20Kenya.pdf>; See also generally Human Rights Watch, World Report 2013, available at http://www.hrw.org/sites/default/files/wr2013_web.pdf < accessed 5 July 2020.

⁹¹ Constitution of Kenya 2010, Art. 159(3).

⁹² Constitution of Kenya 2010, Art.23. Article 23 of Constitution of Kenya deals with Authority of courts to uphold and enforce the Bill of Rights.

(1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

⁹³ 'Mediating Peace in Africa' (ACCORD) <<https://www.accord.org.za/publication/mediating-peace-in-africa/>> accessed 5 July 2020.

⁹⁴ Ibid; see also Helen Kezie-Nwoha and Juliet Were, 'Women's Informal Peace Efforts: Grassroots Activism in South Sudan' (2018) 2018 CMI Brief; Esther Soma, 'Our Search for Peace: Women in South Sudan's National Peace Processes, 2005–2018'.

The role of women in negotiation and mediation of conflicts should be institutionalized. The place of women in our society puts them in the most proximate contact with the wellbeing of communities. Conflicts affect them and they should therefore be involved in any efforts geared towards reaching lasting peace solutions. Women traditionally played a primary role in resolving conflicts as negotiators, albeit informally. Conflict negotiation and mediation systems should require specifically that gender issues are given adequate weight and should include some requirement for inclusion of female negotiators and mediators when appropriate, like when land rights are involved.⁹⁵ The constitution now requires gender parity in almost all commissions or organs of government.⁹⁶

Elimination of social injustices entails promoting gender equity as a way of ensuring that both men and women get fair opportunities for the realisation of their right to self-determination and contribution towards national development. The *UN Conference on Environment and Development, Agenda 21*⁹⁷ under chapter 23 calls for full public participation by all social groups, including women, youth, indigenous people and local communities in policy-making and decision-making.

6. Conclusion

It has been contended that a gendered approach can improve not only the lives of men and women in conflict and post-conflict situations, but it can also reap significant environmental dividends.⁹⁸ Specifically, women's participation in peace negotiations is believed to increase the durability and the quality of peace.⁹⁹ There is a need to ensure that peacemaking efforts take into consideration the gender aspect and an acknowledgement that both men and women are affected differently by natural resource based conflicts and there is therefore a need to ensure that both are included if Kenya is to not only ensure peace across the country but also achieve effective environmental management.

The Sustainable Development Goals (SDGs) acknowledge the link between peace and development and thus provide that sustainable development cannot be realized without peace and security; and peace and security will be at risk without sustainable development.¹⁰⁰ The SDGs

⁹⁵ Fitzpatrick, D., "Dispute Resolution; Mediating Land Conflict in East Timor", in AusAID's Making Land Work Vol 2; Case Studies on Customary Land and Development in the Pacific, (2008), Case Study No. 9, p. 196. <<http://www.ausaid.gov.au/publications/pdf>> accessed 5 July 2020.

⁹⁶ See Articles 97 (1)(b); 98 (1)(b); 98(1)(c) of the Constitution.

The Constitution of Kenya readily recognizes women by way of creation of special seats for women that resulted in the election of forty-seven (47) women into the National Assembly, nomination of sixteen women by political parties and one woman representing the youth and persons with disabilities into the Senate and County Governments and appointment of women into other decision-making bodies. ('Actualization and Implementation of the "Two-Thirds Gender Principle" in Kenya | [Www.Sidint.Net](http://www.Sidint.Net)' <<https://www.sidint.net/content/actualization-and-implementation-two-thirds-gender-principle-kenya>> accessed 5 July 2020.).

⁹⁷ United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992.

⁹⁸ 'Understanding Gender, Conflict and the Environment' (CEOBS, 5 June 2017) <<https://ceobs.org/understanding-gender-conflict-and-the-environment/>> accessed 4 July 2020.

⁹⁹ Jana Krause, Werner Krause and Piia Bränfors, 'Women's Participation in Peace Negotiations and the Durability of Peace' (2018) 44 *International Interactions* 985.

¹⁰⁰ United Nations, Transforming our world: the 2030 Agenda for Sustainable Development, A/RES/70/1, para. 35.

Mainstreaming the Role of Women in Peacemaking and Environmental Management in Kenya

Agenda also recognizes the need to build peaceful, just and inclusive societies that provide equal access to justice and that are based on respect for human rights (including the right of women to participate in community affairs), on effective rule of law and good governance at all levels and on transparent, effective and accountable institutions. Factors which give rise to violence, insecurity and injustice, such as inequality, corruption, poor governance and illicit financial and arms flows, are addressed in the Agenda. The aim is to redouble the efforts to resolve or prevent conflict and to support post-conflict countries, including through ensuring that women have a role in peace building and state building.¹⁰¹ The significant daily interaction of women with environmental resources makes them critical players in peacemaking efforts especially where natural resource based conflicts arise. 'Mainstreaming the role of women in peacemaking efforts during environmental and natural resource related conflicts is a necessary step that should be taken; and the time to do is now.

United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992.

¹⁰¹ Ibid.

Nurturing Our Environment for Sustainable Development

Abstract

The central themes in this paper revolve around environmental resources management with the aim of achieving sustainable development. It is based on the idea that environment and its natural resources are a heritage that should be managed, conserved and protected not only for the sake of the current generation, but also for future generations. Environment affects all the life on earth in various ways, be it directly or indirectly. The environment and the resources therein must be carefully nurtured to ensure that their health is not sacrificed at the altar of national development.

The argument is that there should be a paradigm shift from over-reliance on natural resources to curb environmental degradation and resource depletion. This may be achieved through such ways as scientific innovation and creativity, amongst other means of supporting community livelihood, which should be encouraged. Easing the pressure on the environment through diversification of livelihood means is essential to facilitate protection, conservation and replenishment of the environment and the resources therein. Kenya has already launched a roadmap to guide the process of achieving the sustainable development goals.¹ The discourse is therefore relevant both in the broader arena and the Kenyan context.

1. Introduction

This paper argues that the environment should be nurtured while human beings pursue development. Development should therefore be sustainable, taking care of ecological and anthropocentric concerns. Some of the running themes that are informed by the anthropocentric approach to environmental management include Poverty Eradication, Food Security, Environmental Democracy, Environmental Justice, Environmental Security, Public Participation, Gender Equity, Access To Information, Conflicts Management, amongst others. All these themes are discussed within the broader theme of human rights, while emphasising the special relationship between human rights and the environment. Ecocentric arguments inform the discussion on themes such as combating climate change, impact of resource extraction, environmental health, and environmental conservation for the sake of the Mother Nature. However, promoting such rights as the right to a clean and healthy environment has both anthropocentric and ecocentric benefits and should therefore be pursued.

While the paper highlights the role of law in facilitating environmental protection, there is also an emphasis on the need to move beyond the law in looking for answers to the challenges facing sustainable environmental management.

¹ Expogroup, 'Kenya to Set Out Roadmap for Achieving SDGs,' Wednesday , 14th September 2016, available at http://expogr.com/detail_news.php?newsid=3596&pageid=2&t=Kenya%20to%20Set%20Out%20Roadmap%20for%20Achieving%20SDGs [Accessed on 20/09/2016].

2. Environment and Sustainable Development

The term 'environment' is defined as all the physical, chemical and biological factors external to a person, and all the related behaviour.² The *Draft International Covenant on Environment and Development*³ defines environment to mean "the totality of nature and natural resources, including the cultural heritage and infrastructure essential for social-economic activities."⁴ Environment has also been defined as "...the whole complex of climatic, adaptive and biotic factors that act upon an organism or an ecological community and ultimately determine its form or survival; the aggregate of social and cultural conditions that influence the life of an individual or a community..."⁵ The European Commission also proffered a definition of 'environment' as 'the combination of elements whose complex inter-relationships make up the settings, the surroundings and the conditions of life of the individual and of society as they are and as they are felt'.⁶ Close to home, the *Environmental Management and Coordination Act (EMCA)*⁷, defines "environment" to include; the physical factors of the surroundings of human beings including land, water, atmosphere, climate, sound, odour, taste, the biological factors of animals and plants and the social factor of aesthetics and includes both the natural and the built environment.⁸

Development has several dimensions which include: Economic development, that is, improvement of the way endowments and goods and services are used within (or by) the system to generate new goods and services in order to provide additional consumption and/or investment possibilities to the members of the system; Human development, that is, people-centred development, where the focus is put on the improvement of the various dimensions affecting the well-being of individuals and their relationships with the society (health, education, entitlements, capabilities, empowerment etc.); Sustainable development, that is, development which considers the long term perspectives of the socio-economic system, to ensure that improvements occurring in the short term will not be detrimental to the future status or development potential of the system. In other words, development will be "sustainable" on environmental, social, financial and other grounds; and Territorial development, that is, development of a specific region (space) achievable by exploiting the specific socio-economic, environmental and institutional potential of the area, and its relationships with external subjects.⁹

² World Health Organization, "Preventing disease through healthy environments," (World Health Organization, Geneva, 2006).

³ International Union for Conservation of Nature and Natural Resources Environmental Policy and Law, Draft of the Joint Working Group convened by the Commission on Environmental Law (CEL) of the World Conservation Union (IUCN) and the International Council on Environmental Law (ICEL), Paper No. 31 Rev. 3, 4th Ed., 2010.

⁴ Draft of the Joint Working Group convened by the Commission on Environmental Law (CEL) of the World Conservation Union (IUCN) and the International Council on Environmental Law (ICEL), 1991; See also Environment and Land Court Act, 2011, No 19 of 2011, Laws of Kenya, s.2.

⁵ Webster's New World Dictionary 3rd ed (Cleveland College, Cleveland, 1998), p.454; See also Birnie, P. et al, *International Law & the Environment*, (3rd ed., Oxford University Press, Oxford, 2009), p. 3.

⁶ Council Regulation (EEC) No. 1872/84 on Action by the Community Relating to the Environment, OJL 176 (1984) 1. (As quoted in Birnie, P. et al, *International Law & the Environment*, (3rd ed., Oxford University Press, Oxford, 2009), p. 5).

⁷ Environmental Management and Coordination Act (EMCA), Act No. 8 of 1999, Laws of Kenya; See also Environmental Management and Coordination (Amendment) Act, 2015).

⁸ *Ibid*, s.2.

⁹ Bellù, L.G., 'Development and Development Paradigms: A (Reasoned) Review of Prevailing Visions,' (Food and Agriculture Organization of the United Nations, May 2011), p.3. Available at

Notably, the relationship between development and environment gave birth to the sustainable development concept, whose central idea is that global ecosystems and humanity itself can be threatened by neglecting the environment.¹⁰ Scholars have observed that since environmental economists are concerned that the long-term neglect of the environmental assets is likely to jeopardize the durability of economic growth, and sustainable development therefore “involves maximizing the net benefits of economic development, subject to maintaining the services and quality of natural resources over time”.¹¹ Its concern is about balancing the objectives of economic growth and attending to environmental considerations. Sustainable development aims to improve the quality of life in a comprehensive manner, including economic prosperity, social equity and environmental protection. Economic, social, environmental and cultural aspects must be integrated in a harmonious manner to enhance the intergenerational well-being.¹²

The *World Charter for Nature*¹³, was partly informed by the conviction that the benefits which could be obtained from nature depends on the maintenance of natural processes and on the diversity of life forms and that those benefits are jeopardized by the excessive exploitation and the destruction of natural habitats.¹⁴

Considering that each state has exclusive jurisdiction within its territory and people and permanent sovereignty over the natural resources therein, as far as international law is concerned, sustainable management and governance of world resources can only be achieved through the concerted efforts of each state taking care of the environmental resources falling within the confines of their sovereign territory.

3. Environmental Sustainability and Sustainable Development: The Framework

There are a number of international and regional legal and regulatory instruments within international environmental law that are geared towards promoting environmental sustainability, and sustainable development, in general. Some of the major ones have been highlighted in this section.¹⁵

The *Ramsar Convention (1973)*¹⁶ is an intergovernmental treaty whose mission is the conservation and wise use of all wetlands through local, regional and national actions and international cooperation, as a contribution towards achieving sustainable development

http://www.fao.org/docs/up/easypol/882/defining_development_paradigms_102EN.pdf [Accessed on 02/09/2016].

¹⁰ ‘Theories of Economic Development,’ p. 14. Available at www.springer.com/cda/content/document/cda_downloaddocument/9789812872470-c2.pdf?SGWID=0-0-45-1483317-p177033406 [Accessed on 02/09/2016].

¹¹ Ibid.

¹² Ibid; See also generally, Chambers, R., *Sustainable Livelihoods, Environment and Development: Putting Poor Rural People First*, IDS Discussion Paper 240, Brighton: IDS, 1987. Available at <https://opendocs.ids.ac.uk/opendocs/bitstream/handle/123456789/875/rc279.pdf?sequence=1&isAllowed=y>

¹³ UN General Assembly, *World Charter for Nature*, 28 October 1982, A/RES/37/7.

¹⁴ Ibid, Preamble.

¹⁵ See Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016), Chapter one for full discussion.

¹⁶ *Convention on Wetlands of International Importance especially as Waterfowl Habitat*, 996 UNTS 245; TIAS 11084; 11 ILM 963 (1972).

throughout the world.¹⁷ It is the overarching international legal instrument that should inform state parties' legal framework on wetlands conservation and use. Wetlands play an important role in ensuring environmental stability and health and thus, this Convention is important in helping countries come up with measures on how to counter impending threats to these resources. As reservoirs for water and nutrients, wetlands serve the human beings, animals and plants. It therefore, follows that improved health of the wetland resources is necessary in achieving environmental health and security for both anthropocentric and ecocentric reasons. Member States have obligations under the Ramsar Convention relating to promotion of sustainable management and utilisation of wetlands resources.

Another important international instrument on environment is the 1992 *Rio Declaration on Environment and Development*.¹⁸ This Declaration sought to balance the interests of states in exploiting their natural resources for development and environmental conservation with the aim of achieving sustainable development.¹⁹ The *Rio Declaration* sought to promote the usage of natural resources for development but within the practices that promote sustainable development.

*Agenda 21*²⁰ was adopted in 1992 with the aim of combating the problems of poverty, hunger, ill health and illiteracy, and the continuing deterioration of the ecosystems on which the human race depend for their well-being. Further, it sought to deal with the integration of environment and development concerns and greater attention to them which would lead to the fulfillment of basic needs, improved living standards for all, better protected and managed ecosystems and a safer, more prosperous future.²¹ The aim was to achieve a global consensus and political commitment at the highest level on development and environment cooperation.

The *Convention on Biological Diversity*²² was negotiated with the objective of promoting the conservation of biodiversity, the sustainable use of its components, and the fair and equitable sharing of benefits arising out of the utilization of genetic resources.²³ The provisions of this Convention should generally inform domestic laws on genetic resources conservation and benefit sharing framework on the accruing benefits in the member states, with the aim of ensuring that communities participate in conservation measures but also benefit from such resources.²⁴

¹⁷ Ramsar Convention Secretariat, 2013. *The Ramsar Convention Manual: a guide to the Convention on Wetlands* (Ramsar, Iran, 1971), 6th ed. Ramsar Convention Secretariat, Gland, Switzerland.

¹⁸ UN Doc. A/CONF.151/26 (vol. I) / 31 ILM 874 (1992).

¹⁹ Principle 2 thereof recognises that states have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. Principle 3 is to the effect that the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.

²⁰ (A/CONF.151/26, vol.II), United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992, Agenda 21.

²¹ *Ibid*, Preamble.

²² 1992 Convention on Biological Diversity, [1993] ATS 32 / 1760 UNTS 79 / 31 ILM 818 (1992).

²³ Article 1.

²⁴ Article 6 of the Convention on Biological Diversity provides that each Contracting Party should, in accordance with its particular conditions and capabilities: develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity or adapt for this purpose existing strategies, plans or programmes which should reflect, inter alia, the measures set out in the Convention relevant to the

The *United Nations Conference on Sustainable Development* ("Rio+20")²⁵ which took place in Rio de Janeiro, Brazil in June 2012, saw governments *inter alia* 'renew their commitment to sustainable development and to ensure the promotion of an economically, socially and environmentally sustainable future for the planet and for present and future generations. This would involve eradicating poverty which they recognised as the greatest global challenge facing the world today and an indispensable requirement for sustainable development. In this regard they therefore, committed themselves to freeing humanity from poverty and hunger as a matter of urgency.²⁶

The *Convention on the Non-Navigational Use of Watercourses*²⁷ applies to uses of international watercourses and of their waters for purposes other than navigation and to measures of protection, preservation and management related to the uses of those watercourses and their waters.²⁸ There is an obligation under the Convention for the Watercourse States to, in utilizing an international

Contracting Party concerned; and integrate, as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies. An integrated approach to conservation and sustainable use of biological diversity holds a key to ensuring that all the relevant stakeholders in member states get to work together to achieve biological resource conservation and restoration. With such guidelines as provided by the Convention, it is possible for the international community to collaborate in biological diversity conservation and use, especially in the case of transboundary resources.

Article 7 thereof also states that each Contracting Party should identify components of biological diversity important for its conservation and sustainable use, and monitor those components, particularly those requiring urgent conservation measures and those which offer the greatest potential for sustainable use. They should also identify and monitor processes and activities likely to have significant adverse impacts on the conservation and sustainable use of biological diversity, and maintain and organise data derived from monitoring. In identifying such components, states are able to ensure the conservation and sustainable use of those resources. However, for them to do so, they ought to bring on board all the relevant stakeholders, namely, communities, scientists, and regulators, amongst others to make the work easier and comprehensive. International cooperation in such projects is also important for purposes of sharing scientific knowledge and research outcome. The net effect would be enhanced environmental security, not only for the good of the concerned people but also for improved environmental health.

²⁵ United Nations, Report of the United Nations Conference on Sustainable Development, Rio de Janeiro, Brazil 20–22 June 2012, A/CONF.216/16.

²⁶ *Ibid*, Article 1.2. Under Article 1.6, the Rio+20 Report reiterated that people are at the centre of sustainable development and in this regard, it urges state parties strive for a world that is just, equitable and inclusive. They also committed to work together to promote sustained and inclusive economic growth, social development and environmental protection and thereby to benefit all. Further, under Article 1.8 thereof, State parties also reaffirmed the importance of freedom, peace and security, respect for all human rights, including the right to development and the right to an adequate standard of living, including the right to food, the rule of law, gender equality, women's empowerment and the overall commitment to just and democratic societies for development. The two main themes at the Conference were: how to build a green economy to achieve sustainable development and lift people out of poverty; and how to improve international coordination for sustainable development.

The implication of the foregoing assertions is that sustainable development agenda may not be achieved as long as states approach the same in a disintegrated manner, especially by creating governmental departments that do not work together. The discussion is one that transcends sectoral approach to issues and requires issues of development and environmental conservation be treated as mutually inclusive.

²⁷ Convention on the Non-Navigational Use of Watercourses, Adopted by the General Assembly of the United Nations on 21 May 1997. Entered into force on 17 August 2014. See General Assembly resolution 51/229, annex, Official Records of the General Assembly, Fifty-first Session, Supplement No. 49 (A/51/49).

²⁸ Convention on the Non-Navigational Use of Watercourses, Article 1.1.

watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse States.²⁹ There is also a general obligation for the Watercourse States to cooperate on the basis of sovereign equality, territorial integrity, mutual benefit and good faith in order to attain optimal utilisation and adequate protection of an international watercourse.³⁰

It is important to recognise the need for joint efforts in conserving and protecting international watercourses since any negative effects would also be transnational and would affect different states. Although the Convention does not have binding effect on the parties, it provides a good framework within which parties can collaborate in ensuring environmental health of the international watercourses for the sake of both present and future generations.

The *Forest Principles*³¹ state in the preamble that the subject of forests is related to the entire range of environmental and development issues and opportunities, including the right to socio-economic development on a sustainable basis. The guiding objective of these principles is to contribute to the management, conservation and sustainable development of forests and to provide for their multiple and complementary functions and uses.³² According to these principles, forestry issues and opportunities should be examined in a holistic and balanced manner within the overall context of environment and development, taking into consideration the multiple functions and uses of forests, including traditional uses, and the likely economic and social stress when these uses are constrained or restricted, as well as the potential for development that sustainable forest management can offer.³³

The *Forests Principles*, though non-legally binding, provide minimum guidelines on the efficient management, conservation and sustainable utilisation of forest resources for the current and future generations. Owing to their many uses, forest conservation and protection is important for the realisation of a healthy environment and eradication of poverty.³⁴ At the United Nations

²⁹ Ibid, Article 7.1.

³⁰ Ibid, Article 8.1.

³¹ United Nations, The Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests (Forest Principles) A/CONF.151/26 (Vol. III).

³² Ibid, Preamble.

³³ Preamble.

³⁴ The Principles require countries to ensure that forest resources and forest lands are sustainably managed to meet the social, economic, ecological, cultural and spiritual needs of present and future generations. These needs are for forest products and services, such as wood and wood products, water, food, fodder, medicine, fuel, shelter, employment, recreation, habitats for wildlife, landscape diversity, carbon sinks and reservoirs, and for other forest products. As a result, appropriate measures should be taken to protect forests against harmful effects of pollution, including air-borne pollution, fires, pests and diseases, in order to maintain their full multiple value (Principle 2 (b)).

Notably, the Principles state that the vital role of all types of forests in maintaining the ecological processes and balance at the local, national, regional and global levels through, inter alia, their role in protecting fragile ecosystems, watersheds and freshwater resources and as rich storehouses of biodiversity and biological resources and sources of genetic material for biotechnology products, as well as photosynthesis, should be recognised (Principle 4).

The Principles also provide that national forest policies should recognize and duly support the identity, culture and the rights of indigenous people, their communities and other communities and forest dwellers.

Sustainable Development Summit on 25 September 2015, world leaders adopted *the 2030 Agenda for Sustainable Development*, which includes a set of 17 Sustainable Development Goals (SDGs) to end poverty, fight inequality and injustice, and tackle climate change by the year 2030.³⁵ The 2030 Agenda for Sustainable Development³⁶ is a plan of action for people, planet and prosperity. It also seeks to strengthen universal peace in larger freedom and was formulated in recognition that eradicating poverty in all its forms and dimensions, including extreme poverty, is the greatest global challenge and an indispensable requirement for sustainable development.³⁷

The Sustainable Development Goals, otherwise known as the Global Goals, are to build on the Millennium Development Goals (MDGs), eight anti-poverty targets that the world committed to achieving by 2015.³⁸ The MDGs, adopted in 2000, aimed at an array of issues that included slashing poverty, hunger, disease, gender inequality, and access to water and sanitation. The new SDGs, and the broader sustainability agenda, go much further than the MDGs, addressing the root causes of poverty and the universal need for development that works for all people.³⁹

The *2030 Agenda for Sustainable Development* provide that by 2030, countries should ensure sustainable food production systems and implement resilient agricultural practices that increase productivity and production, that help maintain ecosystems, that strengthen capacity for adaptation to climate change, extreme weather, drought, flooding and other disasters and that progressively improve land and soil quality.⁴⁰ Further, by 2020, countries are to maintain the genetic diversity of seeds, cultivated plants and farmed and domesticated animals and their related wild species, including through soundly managed and diversified seed and plant banks at the national, regional and international levels, and promote access to and fair and equitable sharing of benefits arising from the utilisation of genetic resources and associated traditional knowledge, as internationally agreed.⁴¹

Further, appropriate conditions should be promoted for these groups to enable them to have an economic stake in forest use, perform economic activities, and achieve and maintain cultural identity and social organization, as well as adequate levels of livelihood and well-being through, inter alia, land tenure arrangements which serve as incentives for the sustainable management of forests (Principle 5 (a)).

³⁵ United Nations Development Programme, 'Sustainable Development Goals (SDGs),' available at <http://www.undp.org/content/undp/en/home/mdgoverview/post-2015-development-agenda.html> [Accessed on 24/10/2015].

³⁶ Transforming our world: the 2030 Agenda for Sustainable Development, Resolution adopted by the General Assembly on 25 September 2015, [without reference to a Main Committee (A/70/L.1)], Seventieth session, Agenda items 15 and 116, 21 October 2015.

³⁷ Ibid, Preamble.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Goal 2.4. The Agenda envisages a world in which every country enjoys sustained, inclusive and sustainable economic growth and decent work for all. To this end, it seeks to promote realisation of a world in which consumption and production patterns and use of all natural resources – from air to land, from rivers, lakes and aquifers to oceans and seas – are sustainable. Further, state parties committed to create a world in which democracy, good governance and the rule of law, as well as an enabling environment at the national and international levels, is essential for sustainable development, including sustained and inclusive economic growth, social development, environmental protection and the eradication of poverty and hunger. They also committed to realize a world in which development and the application of technology are climate-sensitive, respect biodiversity and are resilient. This is one in which humanity lives in harmony with nature and in which wildlife and other living species are protected (Agenda No. 9).

⁴¹ Goal 2.5.

As far as natural resources and environmental governance within the African region is concerned, there is the *African Convention on the Conservation of Nature and Natural Resources*⁴² which seeks: to enhance environmental protection; to foster the conservation and sustainable use of natural resources; and to harmonize and coordinate policies in these fields-with a view to achieving ecologically rational, economically sound and socially acceptable development policies and programmes.⁴³

There is also the *Bamako Convention*⁴⁴ which is an African region Convention aimed at preventing environmental pollution by hazardous wastes. The Convention obligates its member Parties to take appropriate legal, administrative and other measures, within the area under their jurisdiction, to prohibit the import of all hazardous wastes, for any reason, into Africa from non-Contracting Parties.⁴⁵ This is a Convention that is meant to ensure that even as African countries engage in development projects and international trade with countries outside the region, they do not engage in activities that adversely affect the environment.⁴⁶

Chapter nineteen (Articles 111⁴⁷, 112⁴⁸ and 114⁴⁹) of the *East Africa Community Treaty*⁵⁰ calls for co-operation in environment and natural resources. The East Africa Community Treaty (EAC)

⁴² African Union, *African Convention on the Conservation of Nature and Natural Resources*, OAU, 1001 UNTS 3.

⁴³ *Ibid*, Article I.

⁴⁴ African Union, *Bamako Convention on the ban on the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa*, 1991. Available at <http://www.jus.uio.no/lm/hazardous.waste.ban.afrian.import.bamako.convention.1991/portrait.pdf>

⁴⁵ *Ibid*, Article 4(1).

⁴⁶ Generally, the Convention's purpose is to: prohibit the import of all hazardous and radioactive wastes into the African continent for any reason; minimize and control transboundary movements of hazardous wastes within the African continent; prohibit all ocean and inland water dumping or incineration of hazardous wastes; ensure that disposal of wastes is conducted in an "environmentally sound manner"; promote cleaner production over the pursuit of a permissible emissions approach based on assimilative capacity assumptions; and establish the precautionary principle (UNEP, 'First Conference Of Parties To The Bamako Convention,' available at <http://www.unep.org/delc/BamakoConvention> [Accessed on 31/08/2016]).

⁴⁷ Article 111: Environmental Issues and Natural Resources

'The Partner States recognise that development activities may have negative impacts on the environment leading to the degradation of the environment and depletion of natural resources and that a clean and healthy environment is a prerequisite for sustainable development.'

⁴⁸ Article 112: Management of the Environment. 1. 'For purposes of Article 111 of this Treaty, the Partner States undertake to cooperate in the management of the environment and agree to: (a) develop a common environmental management policy that would sustain the eco-systems of the Partner States, prevent, arrest and reverse the effects of environmental degradation; (b) develop special environmental management strategies to manage fragile ecosystems, terrestrial and marine resources, noxious emissions and toxic and hazardous chemicals; (c) take measures to control trans-boundary air, land and water pollution arising from developmental activities; (d) take necessary disaster preparedness, management, protection and mitigation measures especially for the control of natural and man-made disasters. These include oil spills, bio-hazards, floods, earthquakes, marine accidents, drought and bush fires; and (e) integrate environmental management and conservation measures in all developmental activities such as trade, transport, agriculture, industrial development, mining and tourism in the Community.'

⁴⁹ Article 114: Management of Natural Resources. 1. For purposes of Article 111 of this Treaty, the Partner States agree to take concerted measures to foster co-operation in the joint and efficient management and the sustainable utilisation of natural resources within the Community for the mutual benefit of the Partner States.'

⁵⁰ East African Community, the Treaty for the Establishment of the East African Community, Arusha. EAC: 2002 xiv, 111p: 230mm (EAC Publication, No.1) ISBN: 9987 - 666-01-9 (amended 2006).

Partner States are to take joint effort to co-operate in efficient management of these resources, with key priorities of the sector including climate change adaptation and mitigation, natural resource management and biodiversity conservation, disaster risk reduction and management, and pollution control and waste management.⁵¹

The foregoing legal instruments are meant to guide states in their efforts to achieve environmental sustainability, for the realisation of the bigger goal of attaining sustainable development. However, it is important to point out that these are just a few of the many legal and regulatory instruments, which are mostly sectoral, selected for illustration purposes.

4. National Obligations on Environment and Sustainable Development

As already pointed out, it is noteworthy that most of the main international and regional legal and regulatory instruments on environment have spelt out mandatory obligations as well as non-binding guidelines on the international best practices in environmental matters. While some of these obligations and guidelines are meant to be applied directly, especially in relation to international environmental relations, others are meant to be incorporated into the domestic laws on environment or at least offer guidelines on the substantive and procedural contents of the domestic laws.

This can be exemplified using the Constitution of Kenya 2010, which provides that the general rules of international law should form part of the law of Kenya.⁵² It also provides that any treaty or convention ratified by Kenya should form part of the law of Kenya under this Constitution.⁵³ In light of this, it is noteworthy that Kenya is a signatory to a number of international and regional legal and regulatory instruments on environment. The international community thus expects Kenyan authorities and people in general, to promote and implement the internationally agreed best practices in environmental governance. These are the same expectations and obligations placed on other countries around the world, the only differences being special frameworks put in place for particular types of natural resources and environmental conditions.

Agenda 21 tasks governments to do all that is necessary in giving communities a large measure of participation in the quest for sustainable management and protection of the local natural resources, in order to enhance their productive capacity.⁵⁴ Governments, with the assistance of and in cooperation with appropriate international, nongovernmental and local community organizations, are obligated to establish measures that will directly or indirectly, *inter alia*, rehabilitate degraded resources, to the extent practicable, and introduce policy measures to promote sustainable use of resources for basic human needs.⁵⁵

⁵¹ EAC, 'Environment and Natural Resources,' EAC's Environment Agenda: A Healthy Natural Environment for Present and Future Generations.

Available at <http://www.eac.int/sectors/environment-and-natural-resources> [Accessed on 31/08/2016].

⁵² Constitution of Kenya, 2010, Article 2(5).

⁵³ *Ibid*, Article 2(6); See also the Treaty Making and Ratification Act, No. 45 of 2012, which is an Act of Parliament to give effect to the provisions of Article 2(6) of the Constitution and to provide the procedure for the making and ratification of treaties and connected purposes. Notably, This Act applies to—(a) multilateral treaties; (b) bilateral treaties which deal with, *inter alia*, the environment and natural resources (s. 3(2)).

⁵⁴ Agenda 21, Clause 3.7(d).

⁵⁵ Agenda 21, Clause 3.8.

The SDGs ought to inform the efforts of member states in achieving sustainable development, poverty eradication, and environmental conservation and protection. They offer an integrated approach, which is environmentally conscious, to combating the various problems that affect the human society as well as the environmental resources. It is expected that states efforts will be informed by the SDGs in the economic, social, political and environmental decisions. The Goals also provide an elaborate standard for holding countries accountable in their development activities. This way, environmental health is not likely to be sacrificed at the altar of economic development but will be part of the development agenda.

Article VIII of the *African Convention on the Conservation of Nature and Natural Resources* is to the effect that the Parties should take all necessary measures for the protection, conservation, sustainable use and rehabilitation of vegetation cover through *inter alia*: adopting scientifically-based and sound traditional conservation, utilization and management plans for forests, woodlands, rangelands, wetlands and other areas with vegetation cover, *taking into account the social and economic needs of the peoples concerned* (emphasis added), the importance of the vegetation cover for the maintenance of the water balance of an area, the productivity of soils and the habitat requirements of species.⁵⁶

This section alludes to the role of law in facilitating environmental protection especially at the global level, the impact of globalisation and trade development in international environmental law and sustainable development.⁵⁷ While the various instruments may vary in their applicability depending on the region, types of resources or environmental and climatic conditions, the bottom line is that countries are supposed to promote and ensure sustainable utilisation of the available resources for present and future generations, within the framework of sustainable development. To appreciate the differences that may exist due to varying group interests, different players, different types of resources, sustainable development agenda is informed and driven through a number of basic principles. These principles underlie and guide the formulation of the various international, legal and regulatory instruments on environmental matters, especially in relation to the substantive and procedural aspects therein.

5. Definition and Elements of Sustainable Development

5.1 Definition of Sustainable Development

It has been observed that the structures of imperial and colonial power which dominated the world in the nineteenth and early twentieth centuries made little provision for economic and social advance in what is now called the developing world.⁵⁸ This is because colonial regions functioned

⁵⁶ Further, Article XX thereof which deals with capacity building, education and training, is to the effect that the Parties should, *inter alia*, promote environmental education, training and awareness creation at all levels in order to enhance their peoples' appreciation of their close dependence on natural resources and their understanding of the reasons and rules for the sustainable use of these resources.

⁵⁷ See Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, (Glenwood Publishers, Nairobi – 2015), Chapter one for full discussion on the role of law in natural resources management.

⁵⁸ Harris, J.M., *Basic Principles of Sustainable Development*, Global Development and Environment Institute, Working Paper 00-04, June 2000, p.1. Available at http://www.ase.tufts.edu/gdae/publications/working_papers/Sustainable%20Development.PDF [Accessed on 25/08/2016]

primarily to supply imperial powers with raw materials and cheap labour – including slave labour as late as the mid-nineteenth century.

However, by the end of the Second World War, perceptions and policy had changed drastically where economic and social improvement for the majority had become a major preoccupation of governments, and with the crumbling of colonial power relations this goal was extended to the poorer nations of the world.⁵⁹ Thus, economic development, human development, amongst other forms of development gained popularity the world over.

Sustainable development is believed to be one of a series of innovative concepts—following such antecedents as human development, equitable development, or appropriate development—that seek to broaden the scope of development theory from its narrow focus on economic growth.⁶⁰ It has been documented that the idea of “sustainable development” was born in 1713 when Carlowitz, while editing the first book on forest sciences, argued that timber would be “as important as our daily bread” and that it should be “used with caution in a way, that there is a balance between timber growth and lumbering”. This would allow forever a continuous, perpetual use.⁶¹ The concept is also attributed to the International Union for Conservation of Nature and Natural Resources (IUCN) in 1980.⁶²

The concept of sustainable development however, received increased international attention after the release of the *Report of the World Commission on Environment and Development: Our Common Future*.⁶³ The World Commission defined sustainable development as ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs’.⁶⁴ It has been observed that the definition by the Commission is anthropocentric (the “needs” refer to human needs not ecological needs), a stance that was reaffirmed in the Rio Declaration of the United Nations Conference on Environment and Development (UNCED; 1992) which stated that “human beings are the centre of concerns for sustainable development”.⁶⁵ This is mainly an anthropocentric approach to sustainable development.

⁵⁹ Ibid, p.2.

⁶⁰ Working Group III (WGIII) of the Intergovernmental Panel on Climate Change (IPCC), ‘Setting the Stage: Climate Change and Sustainable Development,’ (IPCC, 2001). Available at <http://www.ipcc.ch/ipccreports/tar/wg3/index.php?idp=60> [Accessed on 25/08/2016].

⁶¹ Keiner, M., ‘History, Definition(s) and Models of “Sustainable Development”’, p. 1. Available at <http://e-collection.library.ethz.ch/eserv/eth:27943/eth-27943-01.pdf> [Accessed on 25/08/2016].

⁶² See ‘Chapter: 2 History of Sustainability, in Sustainability and the U.S. EPA (The National Academies Press, 2011), available at <http://www.nap.edu/read/13152/chapter/4> [Accessed on 25/08/2016]; See also Schwass, R.D., Introduction To Sustainable Development – World Conservation Strategy of the International Union for the Conservation of Nature and Natural Resources (IUCN), (UNESCO – Encyclopedia of Life Support Systems (EOLSS), p.2. Available at <http://www.eolss.net/sample-chapters/c13/e1-45-02-05.pdf> [Accessed on 25/08/2016].

⁶³ World Commission on Environment and Development, *Our common future*. Oxford, (Oxford University Press, 1987).

⁶⁴ Ibid, para. 27.

⁶⁵ Principle 1, 1992 Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (vol. I) / 31 ILM 874 (1992). Adopted at the United Nations Conference on Environment and Development in Rio de Janeiro, Brazil from 3-14 June, 1992.

There is also another definition, which emphasizes the ecological dimensions of sustainability: Sustainability as a relationship between human economic systems and larger dynamic, but normally slower-changing ecological systems, in which (1) human life can continue indefinitely, (2) human individuals can flourish, and (3) human cultures can develop; but in which effects of human activities remain within bounds, so as not to destroy the diversity, complexity and function of the ecological life support system.⁶⁶

It has correctly been observed that sustainability concerns manifest as resource depletion or absence, resource degradation, the deliberate or accidental damage of resources for short term gain, or as a misunderstanding of the complex interrelationships between resources.⁶⁷ Indeed, the need for sustainable development was well captured in the assertion that sustainable development is primarily a social justice project focusing on equitable development to meet human needs while still recognizing that the preservation of natural resources is necessary to fulfill these needs.⁶⁸ It is, therefore, arguable that the best approaches to sustainable development should establish a connection between the anthropocentric and ecocentric approaches in environmental matters. The 2002 World Summit on Sustainable Development in Johannesburg adopted a plan of implementation reiterating the Rio principles and establishing poverty eradication, sustainable consumption and production patterns and protection of the natural resource base for economic and social development as the three prime objectives (Johannesburg Plan).⁶⁹ It has been contended that human needs cannot be sufficiently met just by providing an ecologically stable and healthy environment, but that - if a society is indeed committed to sustainability - the equally legitimate social and cultural needs ought to be taken care of as well.⁷⁰ Economic, social, and cultural conditions, efforts, and values are deemed to be resources that also need to be preserved for future generations.⁷¹

Sustainable development, as defined in the *Brundtland Commission Report*, includes human development.⁷² One of the ways of addressing poverty is focusing on human development which empowers people, both men and women, to contribute positively towards eradication of poverty without solely relying on the Government to do so. This World Summit, thus, helped in establishing the link between sustainable development and social development and showing that they must be mutually inclusive if development is to be considered effective.

⁶⁶ Faucheux, S., *Principles of Sustainable Development - Vol. III – ‘Summary Principles for Sustainable Development,’* p.2.

Available at <http://www.eolss.net/Sample-Chapters/C13/E1-46-06.pdf> [Accessed on 27/08/2016].

⁶⁷ Thatcher, A., ‘Theoretical definitions and models of sustainable development that apply to human factors and ergonomics,’ in Broberg, N. O., et al, (eds), *Human Factors In Organizational Design And Management – Xi, Nordic Ergonomics Society Annual Conference – 46, 2014*, pp. 747-752 at p. 747.

⁶⁸ *Ibid*, p. 747.

⁶⁹ World Summit on Sustainable Development, *Johannesburg Declaration on Sustainable Development, A/CONF.199/20, Annex: Plan of Implementation of the World Summit on Sustainable Development.*

⁷⁰ Littig, B. & Grießler, E., ‘Social sustainability: a catchword between political pragmatism and social theory,’ *Int. J. Sustainable Development*, Vol. 8, Nos. 1/2, 2005, pp. 65-79 at p.67.

⁷¹ *Ibid*, p.67.

⁷² Costantini, V. & Monni, S., “Measuring Human and Sustainable Development: an integrated approach for European Countries,” Working paper No. 41, 2004. p. 8.

Available at <http://host.uniroma3.it/dipartimenti/economia/pdf/WP41.pdf> [Accessed on 15/04/2015].

It is also important to point out that poverty affects males and females in varying ways and as such, any efforts geared towards its eradication should bring on board all the affected parties in order to come up with effective mechanisms that will not only reflect and address the needs of all sections of the society, but will also facilitate participation of all. This is also important as it helps generate social acceptance of the government's policies while are geared towards addressing the real issues affecting its people.

At the Rio+20 Conference, world leaders, participants from governments, the private sector, NGOs and other groups, deliberated on how they can reduce poverty, advance social equity and ensure environmental protection.⁷³ According to the Rio+20 outcome document,⁷⁴ member States agreed that sustainable development goals (SDGs) must *inter alia*: be based on *Agenda 21* and the Johannesburg Plan of Implementation; fully respect all the Rio Principles; contribute to the full implementation of the outcomes of all major summits in the economic, social and environmental fields; focus on priority areas for the achievement of sustainable development, being guided by the outcome document; address and incorporate in a balanced way all three dimensions of sustainable development and their inter-linkages; be coherent with and integrated into the United Nations development agenda beyond 2015; not to divert focus or effort from the achievement of the Millennium Development Goals; and include active involvement of all relevant stakeholders, as appropriate, in the process.⁷⁵

It has been asserted that people are at the centre of sustainable development and, in this regard, Rio+20 delegates promised to strive for a world that is just, equitable and inclusive, and committed to work together to promote sustained and inclusive economic growth, social development and environmental protection and thereby benefit all, in particular the children of the world, youth and future generations of the world without distinction of any kind such as age, sex, disability, culture, race, ethnicity, origin, migratory status, religion, economic or other status.⁷⁶ This is an all-inclusive approach that does not create any distinction between male and female but focuses on humanity as a whole.

It is worth noting that one of the main outcomes of the Rio+20 Conference was the agreement by member States to launch a process to develop a set of Sustainable Development Goals (SDGs), which would build upon the Millennium Development Goals and converge with the post 2015 development agenda.⁷⁷ The sustainable development goals focus on inequalities, economic growth, decent jobs, cities and human settlements, industrialization, energy, climate change, sustainable consumption and production, peace, justice and institutions.⁷⁸

⁷³ United Nations Conference on Sustainable Development, available at <http://www.uncsd2012.org/about.html> [Accessed on 17/05/2015].

⁷⁴ The Rio+20 Outcome Document, *The Future We Want* (Resolution 66/288, July 2012).

⁷⁵ United Nations Department of Economic and Social Affairs, Division for Sustainable Development.

⁷⁶ United Nations, 'Open Working Group proposal for Sustainable Development Goals,' *op cit*.

⁷⁷ United Nations Department of Economic and Social Affairs, "Sustainable development goals," available at

<https://sustainabledevelopment.un.org/topics/sustainabledevelopmentgoals> [Accessed on 20/05/2015].

⁷⁸ United Nations General Assembly, "The Road to Dignity By 2030: Ending Poverty, Transforming All Lives and Protecting the Planet," Synthesis report of the Secretary-General on the post-2015 Sustainable development agenda. A/69/700. para.45.

The *Sustainable Development Goals, Agenda 2030* (SDGs) define sustainable development broadly to cover issues such as poverty, inequality, gender equality, health, education, governance, climate change and environmental protection.⁷⁹ In this regard, much of the global debate on sustainable development has identified three core elements of sustainability which include:⁸⁰ Economic: An economically sustainable system must be able to produce goods and services on a continuing basis, to maintain manageable levels of government and external debt, and to avoid extreme sectoral imbalances which damage agricultural or industrial production; Environmental: An environmentally sustainable system must maintain a stable resource base, avoiding over-exploitation of renewable resource systems or environmental sink functions, and depleting non-renewable resources only to the extent that investment is made in adequate substitutes. This includes maintenance of biodiversity, atmospheric stability, and other ecosystem functions not ordinarily classed as economic resources; and Social: A socially sustainable system must achieve distributional equity, adequate provision of social services including health and education, gender equity, and political accountability and participation.⁸¹

In broad terms, the concept of sustainable development is an attempt to combine growing concerns about a range of environmental issues, socio-economic issues to do with poverty and inequality and concerns about a healthy future for humanity. It strongly links environmental and socio-economic issues.⁸² The key principle of sustainable development underlying all others is the integration of environmental, social, and economic concerns into all aspects of decision making.⁸³

5.2 Basic Principles of Sustainable Development

The Rio Declaration on Environment and Development lists the main principles of sustainability as far as environment is concerned. However, it has been acknowledged that there exists diversity of interpretations of the main principles of sustainable development in terms of indicators, of decision-making processes and of models of sustainable development policies, and this has partly been attributed to the variability of scientific knowledge across different problem domains.⁸⁴ Therefore, the discussion in this section is not and cannot be purported to be exhaustive on these principles. The discussion is limited to just a number of these principles, which are relevant to the discourse in this paper.⁸⁵

⁷⁹ See United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, Resolution adopted by the General Assembly on 25 September 2015.

⁸⁰ Harris, J.M., *Basic Principles of Sustainable Development*, Global Development and Environment Institute, Working Paper 00-04, June 2000, op cit., pp.5-6.

⁸¹ Ibid, p.6.

⁸² Hopwood, B., et al, "Sustainable development: mapping different approaches," *Sustainable Development*, Vol. 13, Issue 1, February 2005, pp.38–52,p.39.

⁸³ Emas, R., 'The Concept of Sustainable Development: Definition and Defining Principles,' Brief for GSDR 2015, p.3. Available at https://sustainabledevelopment.un.org/content/documents/5839GSDR%202015_SD_concept_definiton_rev.pdf [Accessed on 2/06/2016].

⁸⁴ Faucheux, S., *Principles of Sustainable Development - Vol. III – 'Summary Principles for Sustainable Development'*, p.2. Available at <http://www.colss.net/Sample-Chapters/C13/E1-46-06.pdf> [Accessed on 27/08/2016].

⁸⁵ See Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016), chapter Two, for more details on the highlighted principles.

a) Sovereign Right to Exploit Natural Resources

Principle 2 of the *Rio Declaration on Environment and Development* provides that States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

International law prohibits states from conducting or permitting activities within their territories, or in common spaces, without regard for the rights of other states or for the protection of the global environment.⁸⁶ It comes with the obligation to take appropriate measures to prevent or minimise as far as possible the risk of significant harm, not merely a basis for reparation after the event.⁸⁷

b) The User Pays Principle

The "*User Pays Principle*" centres around the idea that the user of a public facility, or consumer of a public good, pays for the environmental good or service or the damages which may arise from that use.⁸⁸ The OECD observes that the User Pays Principle is part of the overall internalisation of environmental costs, which involves consumers paying directly for use of environmental assets as well as having producer costs passed through product prices.⁸⁹

This principle is in recognition of the need for concerted efforts by all persons and states in nurturing the environment, for the sake of the present as well as future generations. It is meant to ensure that someone or a state is held liable for any loss attributable to their negative actions that affect the environment especially where the goods in question fall within common heritage of mankind by way of having incentives or disincentives.

c) Principle of International Co-operation in the Management of Shared Environmental Resources

Principle 7 of the *Rio Declaration on Environment and Development* provides that States should cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. Furthermore, in view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The *Declaration* further states that developed countries also acknowledge the responsibility that they bear in the international pursuit to sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.

The principle of cooperation is also captured under principle 5 of the *Rio Declaration* which states that all States and all people should cooperate in the essential task of eradicating poverty

⁸⁶ Birnie, P., et al, *International Law and the Environment*, (3rd ed., Oxford University Press, New York, 2009), p. 137.

⁸⁷ *Ibid*, p. 143.

⁸⁸ OECD, *Environmental Principles and Concepts*, (Organisation For Economic Co-Operation And Development, Paris, 1995), op cit., Para. 42.

⁸⁹ *Ibid*.

as an indispensable requirement for sustainable development, in order to decrease the disparities in standards of living and better meet the needs of the majority of the people of the world.

The concept of "*common but differentiated responsibilities*" is defined to refer to the shared responsibilities of countries for the protection of shared resources, with the caveat that these responsibilities may be different depending on the contribution of the country to the environmental problem and its capability for addressing the environmental problem.⁹⁰ This is based on differing contribution to environmental degradation and probability of greater financial and technical resources.⁹¹

d) The Principles of Intergenerational and Intragenerational Equity

These principles may have been informed by Principle 1 of *Declaration of the United Nations Conference on the Human Environment* (Stockholm Declaration) which states that 'man bears a solemn responsibility to protect and improve the environment for present and future generations.'⁹² Further, Principle 3 of the *Rio Declaration on Environment and Development* provides that the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations. It is also noteworthy that one of the guiding principles of the *1992 United Nations Framework on Climate Change*⁹³ is that the Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities.⁹⁴

The United Nations has defined intergenerational equity as the issue of sustainable development referring, within the environmental context, to fairness in the intertemporal distribution of the endowment with natural assets or of the rights to their exploitation.⁹⁵ It has gone further to describe intergenerational justice as a related but broader concept that involves, apart from distributive dimensions, procedural, restorative and retributive dimensions.⁹⁶

It has been contended that sustainable development is inherently an intergenerational as well as an intragenerational question, which relies on a commitment to equity with future generations.⁹⁷ This, it is postulated, is both an ethical and philosophical commitment which acts as a constraint

⁹⁰ OECD, *Environmental Principles and Concepts*, (Organisation For Economic Co-Operation And Development, Paris, 1995), Para. 16. OCDE/GD (95)124.

Available at <http://www.oecd.org/trade/envtrade/39918312.pdf> [Accessed on 26/08/2016].

⁹¹ Ibid.

⁹² Principle 2 thereof also categorically states that the natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.

⁹³ UN General Assembly, *United Nations Framework Convention on Climate Change: resolution / adopted by the General Assembly, 20 January 1994, A/RES/48/189.*

⁹⁴ 1992 United Nations Framework on Climate Change, Article 3(1).

⁹⁵ United Nations, *Intergenerational Solidarity and the needs of future generations- Report of the Secretary-General, A/68/322, Sixty-eighth session, Item 19 (a) of the provisional agenda, para. 10.*

⁹⁶ Ibid.

⁹⁷ Weiss, E.B., "In Fairness to Future Generations and Sustainable Development," *American University International Law Review*, Vol. 8, No. 1, 1992, pp. 19-26 at p. 19.

on a natural inclination to take advantage of our temporary control over the earth's resources, and to use them only for our own benefit without careful regard for what we leave to our children and their descendants.⁹⁸

The United Nations has already declared that fairness between generations is embedded in the concept of sustainable development; satisfying the needs of the present generation should not come at the expense of generations to come. That is, generally, the pursuit of welfare by the present generation should not diminish the opportunities of succeeding generations for pursuing a good and decent life.⁹⁹ The theory of intergenerational equity states that we, the human species, hold the natural environment of our planet in common with other species, other people, and with past, present and future generations.¹⁰⁰ The concept of intragenerational equity is believed to be as a result of the recognition that the lessening of economic inequality in the current generation must be seen as a primary goal of development rather than as a secondary or separate process.¹⁰¹

There has been proffered three normative principles of intergenerational equity namely: Each generation must conserve options, which means conserving the diversity of the natural and cultural resource base, so that each generation does not unduly restrict the options available to future generations in solving their problems and satisfying their own values; each generation should be required to maintain the quality of the planet so that it is passed on in a condition no worse than that in which it was received; and finally, each generation should provide its members with equitable rights of access to the legacy of past generations and conserve this access for future generations.¹⁰²

It has rightly been argued that what makes intragenerational equity a key principle of sustainable development is that inequities are a cause of environmental degradation. This is because poverty deprives people of the choice about whether or not to be environmentally sound in their activities.¹⁰³ This was also well articulated in the *1987 Brundtland Commission Report* which stated: 'Those who are poor and hungry will often destroy their immediate environment in order to survive: They will cut down forests; their livestock will overgraze grasslands; they will overuse marginal land; and in growing numbers they will crowd into congested cities. The cumulative effect of these changes is so far-reaching as to make poverty itself a major global scourge.'¹⁰⁴

⁹⁸ Ibid, p. 19.

⁹⁹ United Nations, Intergenerational Solidarity and the needs of future generations- Report of the Secretary-General, A/68/322, Sixty-eighth session, Item 19 (a) of the provisional agenda, para. 10.

¹⁰⁰ Weiss, E.B., "In Fairness to Future Generations and Sustainable Development," op cit., p. 20.

¹⁰¹ OECD, Environmental Principles and Concepts, (Organisation For Economic Co-Operation And Development, Paris, 1995), Para. 15. OCDE/GD (95)124. Available at <http://www.oecd.org/trade/envtrade/39918312.pdf> [Accessed on 26/08/2016].

¹⁰² Weiss, E.B., "In Fairness to Future Generations and Sustainable Development," op cit., pp. 22-23.

¹⁰³ Beder, S, 'Costing the Earth: Equity, Sustainable Development and Environmental Economics,' *New Zealand Journal of Environmental Law*, Vol. 4, 2000, pp.227-243 at p.230; See also generally, Emas, R., 'The Concept of Sustainable Development: Definition and Defining Principles,' Brief for GSDR 2015, p3. Available at

https://sustainabledevelopment.un.org/content/documents/5839GSDR%202015_SD_concept_definiton_rev.pdf [Accessed on 26/08/2016].

¹⁰⁴ 1987 Brundtland Commission Report, op cit. (As quoted in Beder, S, 'Costing the Earth: Equity, Sustainable Development and Environmental Economics,' op cit. at p.230).

e) The Polluter-Pays Principle

Principle 16 of the *Rio Declaration on Environment and Development* states that national authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.

The "*Polluter Pays Principle*", essentially believed to be a principle of economic policy rather than a legal principle, states that the polluter should bear the expenses of carrying out pollution prevention measures or paying for damage caused by pollution.¹⁰⁵ This was also captured in the *1972 OECD Guiding Principles on the International Economic Aspects of Environmental Policies*, which state: "The principle to be used for allocating costs of pollution prevention and control measures to encourage rational use of scarce environmental resources and to avoid distortions in international trade and investment is the so-called 'Polluter Pays Principle.' This principle means that the polluter should bear the expenses of carrying out the above mentioned measures decided by public authorities to ensure that the environment is in an acceptable state. In other words, the costs of these measures should be reflected in the cost of goods and services which cause pollution in production and/or consumption. Such measures should not be accompanied by subsidies that would create significant distortions in international trade and investment."¹⁰⁶

In the *Trail Smelter Arbitration (United States v. Canada)*,¹⁰⁷ the Tribunal held that it is the responsibility of the State to protect other states against harmful acts by individuals from within its jurisdiction at all times. No state has the right to use or permit the use of the territory in a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein as stipulated under the United States (Plaintiff) laws and the principles of international law.

These principles were also the subject of Case concerning *the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, *Judgment of 25 September 1997*¹⁰⁸ where the International Court of Justice concluded that both Parties committed internationally wrongful acts, and that those acts gave rise

¹⁰⁵ OECD, *Environmental Principles and Concepts*, (Organisation For Economic Co-Operation And Development, Paris, 1995), op cit., Para. 37.

¹⁰⁶ 1972 OECD Guiding Principles on the International Economic Aspects of Environmental Policies, OECD, C (72)128 (As quoted in OECD, *Environmental Principles and Concepts*, (Organisation For Economic Co-Operation And Development, Paris, 1995), op cit., Para. 33).

¹⁰⁷ Arbitral Trib., 3 U.N. Rep. Int'l Arb. Awards 1905 (1941). The Trail Smelter located in British Columbia since 1906, was owned and operated by a Canadian corporation. The resultant effect of air pollution from the sulfur dioxide from Trail Smelter resulted in the damage of the state of Washington between 1925 and 1937. This led to the United States (P) suit against the Canada (D) with an injunction against further air pollution by Trail Smelter. The decision made by the Tribunal established the concept of Trans Boundary Harm and the principle of the "polluter pays" to ensure sovereignty. (Prunella, C., 'An International Environmental Law case study: The Trail Smelter Arbitration,' December, 2014. Available at <http://intlpollution.commons.gc.cuny.edu/an-international-environmental-law-case-study-the-trail-smelter-arbitration/> [Accessed on 27/08/2016]

¹⁰⁸ International Court of Justice, Communiqué (unofficial) No. 97/10 bis of 25 September 1997 and Judgement. Both available from the ICJ Internet Home Page (<http://www.icj-cij.org/docket/files/92/7375.pdf> [Accessed on 27/08/2016]

to the damage sustained by the Parties; consequently, Hungary and Slovakia were both under an obligation to pay compensation and were both entitled to obtain compensation.

The OECD Council's *Recommendation on Guiding Principles Concerning International Economic Aspects of Environmental Policies* is believed to have been the first formulation of the Polluter-Pays Principle at the international level, and it sought to encourage sound environmental management and to harmonise methods for allocating the cost of pollution to avoid distortions in prices for products entering international trade.¹⁰⁹

While the Polluter-Pays Principle was adopted by the OECD Council in 1972 as an economic principle for allocating the costs of pollution control, it has been observed that it may already have developed into a legal principle, also although not yet been codified because its contents have been changing and continue to change.¹¹⁰ The Polluter-Pays Principle is also seen not as a principle of equity; rather than to punish polluters, it is designed to introduce appropriate signals in the economic system so as to incorporate environmental costs in the decision-making process and, consequently, to arrive at sustainable, environment-friendly development.¹¹¹ The aim is to avoid wasting natural resources and to put an end to the cost-free use of the environment as a receptacle for pollution.¹¹²

f) Principle of Reasonable Use and Equitable Utilisation of Natural Resources

This principle is mainly used in relation to international or transboundary water resources. In this regard, the UN Watercourses Convention User's Guide points out that the principle of equitable and reasonable utilisation is the cornerstone of the UN Watercourses Convention¹¹³ and the fundamental doctrine guiding water-sharing for international watercourses. It entitles a watercourse State to an equitable and reasonable share of the uses and benefits of the particular

¹⁰⁹ Vicha, O, *The Polluter-Pays Principle In OECD Recommendations And Its Application In International And EC/EU Law*, Czech Yearbook of Public & Private International Law, Vol. 2, 2011, pp. 57-67. Available at

files.cyil.eu/200000043-87d4c88ce6/%C4%8CSMP_2011_05_vicha.pdf [Accessed on 27/08/2016]

¹¹⁰ Ibid, p. 67; See also OECD, *Recommendation of the Council concerning the Application of the Polluter-Pays Principle to Accidental Pollution*, 7 July 1989 - C(89)88/FINAL.

¹¹¹ Ibid, p. 67; See also Nicoleta, D.D., 'The Polluter-Pays Principle- -Expression Of Tort Liability For Environmental Protection,' *Analele Universității din Oradea, Fascicula Protecția Mediului* Vol. XVIII, 2012, pp. 295-302 at p. 301. Available at http://protmed.uoradea.ro/facultate/anale/protectia_mediului/2012A/im/11.%20Dascalu%20Diana.pdf [Accessed on 27/08/2016].

¹¹² Ibid, p. 67.

¹¹³ Convention on the Law of the Non-navigational Uses of International Watercourses, 1997 Adopted by the General Assembly of the United Nations on 21 May 1997. Entered into force on 17 August 2014. See General Assembly resolution 51/229, annex, Official Records of the General Assembly, Fifty-first Session, Supplement No. 49 (A/51/49). Article 5-Equitable and reasonable utilisation and participation.

1. Watercourse States shall in their respective territories utilise an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimal and sustainable utilisation thereof and benefits therefrom, taking into account the interests of the watercourse States concerned, consistent with adequate protection of the watercourse. 2. Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilise the watercourse and the duty to co-operate in the protection and development thereof, as provided in the present Convention.

watercourse, and also creates the reciprocal obligation not to deprive other States of their respective rights in this regard.¹¹⁴

Scholars observe that this is the most widely recognised and practiced principle in the resolution of water related problems, a principle based on equity, fairness and norms of distributive justice in which the interests of every contestant country are taken into consideration.¹¹⁵

g) Precautionary Principle

Principle 15 of the *Rio Declaration on Environment and Development*¹¹⁶ states that in order to protect the environment, the precautionary approach should be widely applied by States according to their capabilities. Further, it states that where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

The precautionary principle is believed to provide guidance for governance and management in responding to uncertainty.¹¹⁷ It also provides for action to avert risks of serious or irreversible harm to the environment or human health in the absence of scientific certainty about that harm and it is now widely and increasingly accepted in sustainable development and environmental policy at multilateral and national levels.¹¹⁸

The emergence of the precautionary principle marked a shift from post-damage control (civil liability as a curative tool) to the level of a pre-damage control (anticipatory measures) of risks.¹¹⁹ It originated in environmental risk management to provide regulatory authority to stop specific environmental contaminations without waiting for conclusive evidence of harm to

¹¹⁴ Equitable and Reasonable Utilisation, UN Watercourses Convention User's Guide Fact Sheet Series: Number 4, p.1. Available at <http://www.unwatercoursesconvention.org/documents/UNWC-Fact-Sheet-4-Equitable-and-Reasonable-Utilisation.pdf> [Accessed on 27/08/2016].

¹¹⁵ 'Chapter- Three: Equitable Utilisation' p. 108 (International Water Law). Available at <http://www.internationalwaterlaw.org/bibliography/Articles/general/Part-%203.pdf> [Accessed on 27/08/2016]; See also HE, Y., "On the Performance of the Principle of Equitable and Reasonable Utilization in the Practice of the Utilization of Transboundary Water Resources," *iBusiness*, Vol. 1 No. 1, 2009, pp. 40-45. Available at http://file.scirp.org/pdf/IB20090100013_63621513.pdf [Accessed on 27/08/2016]; See also United Nations, Environmental Law Guidelines and Principles on Shared Natural Resources, Principle 1. Available at http://www.unep.org/training/programmes/Instructor%20Version/Part_2/Activities/Interest_Groups/Decision-Making/Supplemental/Enviro_Law_Guidelines_Principles_rev2.pdf [Accessed on 27/08/2016].

¹¹⁶ Principle 15, 1992 Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (vol. I) / 31 ILM 874 (1992). Adopted at the United Nations Conference on Environment and Development in Rio de Janeiro, Brazil from 3-14 June 1992.

¹¹⁷ Cooney, R., *The Precautionary Principle in Biodiversity Conservation and Natural Resource Management: An issues paper for policy-makers, researchers and practitioners*, (IUCN, Gland, Switzerland and Cambridge, 2004), UK. xi + 51pp at p. 1. Available at <http://www.sehn.org/pdf/PrecautionaryPrincipleissuespaper.pdf> [Accessed on 27/08/2016].

¹¹⁸ *Ibid*, p.1.

¹¹⁹ World Commission on the Ethics of Scientific Knowledge and Technology (COMEST), *The Precautionary Principle*, (United Nations Educational, Scientific and Cultural Organization, Paris, 2005), p.7. Available at <http://www.eubios.info/UNESCO/precprin.pdf> [Accessed on 27/08/2016]

the environment (i.e., while there was still “uncertainty” about the evidence).¹²⁰ It has been suggested that the precautionary principle might be described both in terms of the level of uncertainty that triggers a regulatory response and in terms of the tool that will be chosen in the face of uncertainty (as in the case of technological requirements or prohibitions).¹²¹

h) Principle of Public Participation

Principle 1 of the *Rio Declaration on Environment and Development* affirms that human beings are at the centre of concerns for sustainable development and are as such entitled to a healthy and productive life in harmony with nature. This means that apart from addressing the human needs, human beings must actively participate in the sustainable development agenda, if the same is to be meaningfully achieved. It is noteworthy that Principle 1 does not discriminate against men or women as it contemplates a society where both gender participate in the sustainable development efforts for a healthy and sustainable environment for everyone.¹²²

Principle 10 of the *Rio Declaration* states that environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual should have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States are to facilitate and encourage public awareness and participation by making information widely available. It also provides that effective access to judicial and administrative proceedings, including redress and remedy, should be provided.

The *Declaration on the Right to Development*¹²³ in its preamble partly states 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 *Declaration* also states that 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 and fundamental freedoms can be fully realized.¹²⁴

¹²⁰ Hathcock, J.N., ‘The Precautionary Principle—An Impossible Burden Of Proof for New Products,’ *AgBioForum*, Vol. 3, No. 4, 2000, pp. 255-258, p.255.

¹²¹ Sunstein, C.R., ‘Beyond the Precautionary Principle,’ *University of Chicago Public Law and Legal Theory Working Paper No. 38*, January 2003, p.11. Available at http://www.law.uchicago.edu/files/files/38.crs_.precautionary.pl-lt.pdf [Accessed on 27/08/2016].

¹²² This is affirmed in Principle 20 of the *Rio Declaration on Environment and Development* which states that women have a vital role in environmental management and development and their full participation is, therefore, essential to achieve sustainable development. The youth also form part of the community and Principle 21 advocates for their participation by providing that the creativity, ideals and courage of the youth of the world should be mobilized to forge a global partnership in order to achieve sustainable development and ensure a better future for all. These Principles, thus, advocate for the equal and meaningful participation of all persons in promotion of sustainable development agenda.

¹²³ United Nations, *Declaration on the Right to Development*, A/RES/41/128.

¹²⁴ *Ibid*, Article 1.

It is also noteworthy that the foregoing *Declaration* does not discriminate against women or men and it envisages equal, active and meaningful participation of *all individuals* (emphasis added). The Declaration is particular about equality of all and requires that States should undertake, at the national level, all necessary measures for the realization of the right to development and should ensure, *inter alia*, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Specifically, it states that effective measures should be undertaken to ensure that women have an active role in the development process. As such, it advocates for appropriate economic and social reforms to be carried out with a view to eradicating all social injustices.¹²⁵

Elimination of social injustices entails promoting gender equity as a way of ensuring that both men and women get fair opportunities for the realisation of their right to self-determination and contribution towards national development. The *UN Conference on Environment and Development, Agenda 21*¹²⁶ under chapter 23 calls for full public participation by all social groups, including women, youth, indigenous people and local communities in policy-making and decision-making. It is in recognition of the fact that unless all these groups are equitably and meaningfully involved in the decision making policies, especially those on sustainable development, then the Government efforts would either fail or prove inadequate. This recognition creates a chance for the government to appreciate and address the particular needs of these groups, considering that, needs as envisaged in the Brundtland Commission Report may vary from society to society.

i) Cultural Issues in Sustainable Development

Principle 22 of the *1992 Rio Declaration on Environment and Development* states 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. In light of this, States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.

It has been argued that many, if not all of the planet's environmental problems and certainly all of its social and economic problems, have cultural activity and decisions – people and human actions – at their roots.¹²⁷ As such, solutions are likely to be also culturally-based, and the existing models of sustainable development forged from economic or environmental concern are unlikely to be successful without cultural considerations.¹²⁸ Culture in this context, has been defined as: culture as the general process of intellectual, spiritual or aesthetic development; culture as a particular way of life, whether of people, period or group; and culture as works and intellectual artistic activity.¹²⁹

¹²⁵ Article 8(1).

¹²⁶ United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992.

¹²⁷ Dessein, J. et al (ed), 'Culture in, for and as Sustainable Development: Conclusions from the COST Action IS1007 Investigating Cultural Sustainability,' (University of Jyväskylä, Finland, 2015), p. 14. Available at <http://www.culturalsustainability.eu/conclusions.pdf> [Accessed on 27/08/2016].

¹²⁸ *Ibid*, p.14.

¹²⁹ *Ibid*, p. 21.

The United Nations Educational, Scientific and Cultural Organization (UNESCO) asserts that ‘culture is who we are and what shapes our identity. No development can be sustainable without including culture.’¹³⁰ The Agenda 2030 for Sustainable Development captures the states’ pledge to foster intercultural understanding, tolerance, mutual respect and an ethic of global citizenship and shared responsibility, and their acknowledgement of the natural and cultural diversity of the world and recognition that all cultures and civilizations can contribute to, and are crucial enablers of, sustainable development.¹³¹

African States and other stakeholders, in the *Ngorongoro Declaration*¹³² have acknowledged that Sustainable development can ensure that appropriate efforts are deployed to protect and conserve the cultural and natural resources of a region faced with the challenges of climate change, natural and human-made disasters, population growth, rapid urbanization, destruction of heritage, and environmental degradation for present and future generations.¹³³ As such, they declared that on the one hand, African heritage is central to preserving and promoting African cultures thereby uplifting identity and dignity for present and future generations in an increasingly globalised world, and on the other hand, heritage, including World Heritage properties, is a driver of sustainable development and critical for achieving regional socio-economic benefits, environmental protection, sustainable urbanization, social cohesion and peace.¹³⁴

The Constitution of Kenya 2010 states that it recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.¹³⁵ In light of this, it obligates the State to, inter alia, promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage; and recognise the role of science and indigenous technologies in the development of the nation.

These are some of the initiatives that highlight the existing relationship between culture and sustainable development, thus affirming the fact that cultural issues cannot be wished away in the discussion and efforts towards achieving sustainable development in Kenya and the world over. This paper has dedicated a section on the place of indigenous knowledge, being a cultural issue, in the quest for sustainable development.¹³⁶

6. General Approaches to Sustainability and Sustainable Development Debate

It is noteworthy that various groups define sustainability differently, where some restrict it to environmental sustainability and others include broader issues affecting human life. However, it has been observed that while definitions slightly differ, the most common one sees sustainability

¹³⁰ United Nations Educational, Scientific and Cultural Organization (UNESCO), ‘Culture for Sustainable Development,’ available at <http://en.unesco.org/themes/culture-sustainable-development> [Accessed on 27/08/2016]

¹³¹ United Nations, Transforming our world: the 2030 Agenda for Sustainable Development, A/RES/70/1, Resolution adopted by the General Assembly on 25 September 2015, para. 36.

¹³² The Ngorongoro Declaration on Safeguarding African World Heritage as a Driver of Sustainable Development, adopted in Ngorongoro, Tanzania on 4 June 2016

¹³³ Ibid, p.2.

¹³⁴ Ibid, p. 3.

¹³⁵ Article 11 (1), Constitution of Kenya, 2010.

¹³⁶ See also Muigwa, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016), chapter Eleven, for the full discussion.

as the requirement to maintain the capacity to provide non-declining well-being over time.¹³⁷ There are generally two approaches to sustainability namely: weak and strong sustainability.

Strong sustainability regards natural capital as providing some functions that are not substitutable by man-made capital.¹³⁸ These functions, labeled ‘critical natural capital’, are stressed by defining sustainability as leaving the future generations a stock of natural capital not smaller than the one enjoyed by the present generation.¹³⁹ Weak sustainability has been described as involving the replacement of natural resources and environmental assets—that are currently freely available to everyone—with human-made resources that have to be bought and may only be accessible to some people in the future.¹⁴⁰ The argument is that the depletion of natural capital can lead to irreversible losses such as species and habitats, which once lost cannot be recreated through man-made capital.¹⁴¹ As such, intergenerational equity is not compatible with the concept of weak sustainability, a concept that assumes that future generations will not suffer from environmental losses as long as it is compensated for this loss by wealth creation.¹⁴²

The very weak sustainability approach asserts that natural and manufactured capital can substitute perfectly for one another, where the substitutability of different types of capital implies that the preservation of an aggregate level of natural plus manufactured capital, rather than the preservation of natural capital in particular, is crucial.¹⁴³ The sustainability of ecological systems is viewed as important only as far as required for the sustainability of the human component.¹⁴⁴ The fundamental debate regarding sustainable development is, therefore, whether to adopt a strong or a weak conception of sustainability.¹⁴⁵

¹³⁷ Neumayer, E., ‘Sustainability and Well-being Indicators,’ Research Paper No. 2004/XX, (UNU World Institute for Development Economics Research (UNU-WIDER), March 2004, p.1. Available at <http://www.lse.ac.uk/geographyAndEnvironment/whosWho/profiles/neumayer/pdf/SustainabilitywellbeingArticle.pdf> [Accessed on 27/08/2016].

¹³⁸ Gutes, M.C., ‘Commentary: The concept of weak sustainability,’ *Ecological Economics* Vol. 17, 1996, pp.147-156 at p.147.

¹³⁹ *Ibid*, p. 147.

¹⁴⁰ Beder, S, ‘Costing the Earth: Equity, Sustainable Development and Environmental Economics,’ *op cit*, p.230.

¹⁴¹ *Ibid*, p. 229; See also Humphrey, M., "Three conceptions of irreversibility and environmental ethics: some problems," *Environmental Politics*, Vol.10, No. 1, 2001, pp. 138-154; See also generally, Spash, C.L. & Clayton, A.M.H., ‘The Maintenance of Natural Capital: Motivations and Methods,’ in Light, A. & Smith, J.M. (eds), *Place and Environmental Ethics, Series Philosophy and Geography*, Vol. 1 (Lanham: Rowman & Littlefield Pub. Inc., 1997) pp. 143-173). Available at http://www.clivespash.org/wp-content/uploads/2015/04/1997-Spash_Clayton-Natural-Capital-Maintenance.pdf [Accessed on 27/08/2016].

¹⁴² *Ibid*, p. 230; See also Padilla, E., "Intergenerational equity and sustainability." *Ecological Economics* Vol.41, 2002, pp. 69-83; See also Hediger, W., (1999) "Reconciling “weak” and “strong” sustainability", *International Journal of Social Economics*, Vol. 26 Iss: 7/8/9, pp.1120 – 1144; See also Beckerman, W., "How Would you Like your 'Sustainability', Sir? Weak or Strong? A Reply to my Critics." *Environmental Values*, Vol.4, No. 2, (1995), pp.169-179.

¹⁴³ Gallopín, G., ‘A systems approach to sustainability and sustainable development,’ United Nations Sustainable Development and Human Settlements Division ECLAC/ Government of the Netherlands Project NET/00/063 “Sustainability Assessment in Latin America and the Caribbean” Santiago, Chile, March, 2003, p.13. Available at http://repositorio.cepal.org/bitstream/handle/11362/5759/1/S033119_en.pdf [Accessed on 27/08/2016].

¹⁴⁴ *Ibid*, p.13.

¹⁴⁵ Pelenc, J., ‘Weak versus Strong Sustainability,’ Technical Report · March 2015, Brief for GSDR 2015, p.1. Available at

It has rightly been argued that despite continuing disagreement about the meaning of ‘sustainable development’, what is referred to as the triple-bottom-line trajectory – which would see economic advancement being achieved alongside social equity and environmental security – is viewed as one of the promises for future progress regionally, nationally and globally.¹⁴⁶ The concept of sustainable development represents an attempt to go beyond the simple assertion of physical limits to economic-growth, and to explore how, in what terms, and to what extent, the socioeconomic objectives traditionally linked to growth can be reconciled with the concern for environmental quality and inter-temporal equity.¹⁴⁷

The sustainable management of the environment is also seen as a way to enhance the long term economic, social and environmental wellbeing of people and communities by: promoting social justice and equality of opportunity; and enhancing the natural and cultural environment.¹⁴⁸ It is, therefore, suggested that the key principle of sustainable development underlying all others is the integration of environmental, social, and economic concerns into all aspects of decision making.¹⁴⁹ That is to say, in practice, sustainable development requires the integration of economic, environmental, and social objectives across sectors, territories, and generations. It requires the elimination of fragmentation; that is, environmental, social, and economic concerns must be integrated throughout decision making processes in order to move towards development that is truly sustainable.¹⁵⁰

The quest for sustainability and sustainable development requires integrating economic, social, cultural, political, and ecological factors.¹⁵¹ It has been argued that sustainability is a property of a system open to interactions with its external world and not a fixed state of constancy, but a dynamic preservation of the essential identity of the system amidst permanent change.¹⁵² On the

https://www.researchgate.net/publication/280979919_Weak_versus_Strong_Sustainability [Accessed on 27/08/2016].

¹⁴⁶ Lawrence, G., ‘Promoting Sustainable Development: The Question of Governance,’ in Buttel, F.H. & McMichael, P. (ed.), *New Directions in the Sociology of Global Development*, (Research in Rural Sociology and Development, Volume 11) Emerald Group Publishing Limited, 2006, pp.145 – 174. Available at [http://www.emeraldinsight.com/doi/abs/10.1016/S1057-1922\(05\)11006-3](http://www.emeraldinsight.com/doi/abs/10.1016/S1057-1922(05)11006-3) [Accessed on 27/08/2016]

¹⁴⁷ Faucheux, S., *Principles of Sustainable Development - Vol. III – ‘Summary Principles for Sustainable Development,’* op cit, p.4.

¹⁴⁸ Environmental Advisory Council, ‘Principles of Sustainable Development,’ March 2013, p. 2. Available at

https://www.princeedwardisland.ca/sites/default/files/publications/principles_of_sustainable_development.pdf [Accessed on 27/08/2016]

¹⁴⁹ Emas, R., ‘The Concept of Sustainable Development: Definition and Defining Principles,’ Brief for GSDR 2015, op cit., p3.

¹⁵⁰ Ibid, p. 3.

¹⁵¹ Gallopín, G., ‘A systems approach to sustainability and sustainable development,’ op cit., p.7; See also Goodland, R., ‘The Concept of Environmental Sustainability,’ *Annual review of ecology and systematics*, Vol. 26, 1995, pp.1-24, at p. 4.

¹⁵² Ibid, p. 35; See also Hattingh, J.P., "Conceptualizing Ecological Sustainability and Ecologically Sustainable Development in Ethical Terms: Issues and Challenges," (2011). Available At <http://s3.amazonaws.com/academia.edu.documents/44180384/Hattingh.pdf?AWSAccessKeyId=AKIAJ56TQJRTWSMTNPEA&Expires=1472743455&Signature=dRj4ImH1mI5nltIgC4YSfWhKJZU%3D&response-content-disposition=inline%3B%20filename%3DHattingh.pdf> [Accessed on 31/08/2016].

other hand, sustainable development is not a property but a process of directional change by which a system improves through time in a sustainable way.¹⁵³

While there may be differences between sustainability and sustainable development, it is clear from the discussion that there are resources and players that are constant in both. For instance, human beings have been placed within the context of both processes, considering that development is meant to improve the quality of human life (be it at the expense of the environment or while ensuring environmental sustainability) while sustainability is mainly concerned with the continued availability and supply of the resources that are meant to facilitate such development. The issues of strong or weak sustainability as well as anthropocentrism or ecocentrism approaches to sustainable development narrow down to striking the balance between meeting human needs (present and future generations) and environmental sustainability.

The principles highlighted in this section inform these discussions, the only differences being that while some of the principles are anthropocentric others are ecocentric in their approach. It has rightly been pointed out that principles provide flexible and context-specific guidance: they may be of variable importance in different contexts, can be in conflict with other principles, and they allow discretion for decision-makers to balance them and be guided by those they find to be most important.¹⁵⁴ With this in mind, it is noteworthy that the principles of sustainable development are meant to offer guidelines to states on policy formulation.

A key feature of sustainable development is that it comprises three elements: Environment, Society and Economy.¹⁵⁵ There are different approaches to sustainability and sustainable development which include environmental sustainability, economic sustainability, and social sustainability. The *1987 Brundtland Commission Report* observed in the foreword that “what is needed now is a new era of economic growth – growth that is forceful and at the same time socially and environmentally sustainable.” The implication of this is that even as sustainable development efforts focus on economic development, regard has to be had on the aspects of environment and social development so as to ensure that economic development is not achieved at the expense of all these.

However, when these principles are incorporated into domestic law, then more often than not they become binding and obligatory on state organs and all persons. For instance, in Kenya’s domestic

¹⁵³ Ibid, p.35; See also *Our Common Future*, Chapter 2: Towards Sustainable Development, From A/42/427. *Our Common Future: Report of the World Commission on Environment and Development*; See also Hjorth, P. & Ali, B., "Navigating towards sustainable development: A system dynamics approach," *Futures*, Vol.38, No. 1, 2006, pp. 74-92; See also Berke, P.R., "Does Sustainable Development Offer a New Direction for Planning? Challenges for the Twenty-First Century." *Journal of Planning Literature*, Vol. 17, No. 1, 2002; See also Kemp, R., et al, "Transition management as a model for managing processes of co-evolution towards sustainable development." *Perspectives on Radical Changes to Sustainable Consumption and Production (SCP)* Vol.20, 2006, p. 387.

¹⁵⁴ Cooney, R., *The Precautionary Principle in Biodiversity Conservation and Natural Resource Management: An issues paper for policy-makers, researchers and practitioners*, op cit, p5.

¹⁵⁵ Shell Livewire, "Elements of Sustainable Development: Environment, Society and Economy," available at <http://shell-livewire.org/business-library/employing-people/management/sustainable-development/Sustainable-development/> [Accessed on 3/04/2015].

laws, these principles have been incorporated and in an obligatory manner and are binding on state organs, law makers, interpreters and implementers.¹⁵⁶

7. Human Rights, Sustainable Development and the Environment

Over the last three decades or so, the debate on the relationship between human rights and environmental protection has raged on, especially in environmentalist circles and among generalist international lawyers.¹⁵⁷ The Constitution of Kenya 2010 expressly outlines that every person has a right to a clean and healthy environment, lending the thought that the Kenyan legal regime recognizes the relationship between the environment and human rights.¹⁵⁸ The question then arises as to the nature of the relationship between the environment and human rights. This section discusses the special relationship between the environment, human rights and the sustainable development debate. The section addresses such questions as whether environmental rights are human rights; whether it is human rights that informed the formal recognition of environmental rights or are the latter justiciable on their own. It also discusses the place of such rights as the right to a clean and healthy environment and what informs environmental rights-anthropocentric or ecocentric approaches to environmental protection and conservation.¹⁵⁹

7.1 Environmental Protection and Human Rights

Human rights have been defined as universal, inalienable rights inherent to all human beings, which they are entitled to without discrimination.¹⁶⁰ Environmental protection should be treated as a human rights issue because a human rights perspective directly addresses environmental impacts on the life, health, private life, and property of individual humans, thereby serving to secure higher standards of environmental quality, based on the obligation of states to take measures to control pollution affecting health and private life.¹⁶¹

The environment and its states affect a wide (if not the whole) spectrum of human life, which is protected by human rights. There is, thus, a direct co-relation between the environment and the

¹⁵⁶ See Article 10, Constitution of Kenya 2010. (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them— (a) applies or interprets this Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions. (2) The national values and principles of governance include— (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; (c) good governance, integrity, transparency and accountability; and (d) sustainable development.

¹⁵⁷ Boyle, A., 'Human Rights and the Environment: Where Next?' *The European Journal of International Law*, Vol.23, No. 3 (Oxford University Press, 2012); See also Anton, D. & Shelton, D., *Environmental Protection and Human Rights* (2011); Francioni, 'International Human Rights in an Environmental Horizon', 21 *EJIL* (2010) 41; D. Bodansky, J. Brunnée, and E. Hey (eds), *The Oxford Handbook of International Environmental Law* (2007), at chs 28 and 29; Boyle, 'Human Rights or Environmental Rights? A Reassessment', 18 *Fordham Environmental L Rev* (2007) 471; A.E. Boyle and M.R. Anderson (eds), *Human Rights Approaches to Environmental Protection* (1996).

¹⁵⁸ The Constitution of Kenya 2010, Article 42.

¹⁵⁹ See Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016), chapter Three, for the full discussion.

¹⁶⁰ www.ohchr.org/EN/Issues/pages/WhatareHumanRights.aspx [Accessed 10/08/2016].

¹⁶¹ Boyle, A., 'Human Rights and the Environment: Where Next?' *The European Journal of International Law*, Vol.23, No. 3, 2012.

right to life¹⁶², human dignity¹⁶³, the right to reasonable standards of sanitation¹⁶⁴, the right to food¹⁶⁵ and the right to clean and safe water in adequate quantities.¹⁶⁶ The Constitution of Kenya 2010 goes further to expressly state the right to a clean and healthy environment, which effectively lays to rest the question of the question of the environment and human rights in Kenya. On an international plane, however, there is no recognised right to a healthy environment. Human rights are inextricable from sustainable development, since human beings are at the centre of concerns for sustainable development.¹⁶⁷ Human rights depend upon having a liveable planet. The right to life as espoused in Article 26 of the Constitution would not be fully enjoyed without due consideration being paid to the planet on which such a right is to be enjoyed.

Certain rights such as the right to water and food and sanitation show the link between environment protection and sustainable development, as they are necessary for these rights to be achieved.¹⁶⁸ The right to water, for example, is necessary for poverty eradication, empowerment of women and maintenance of human health (which in turn, is an indicator of sustainable development). It is, thus, logical for human rights to be integrated into sustainable development.

The human rights-based approaches provide a powerful framework of analysis and basis for action to understand and guide development, as they draw attention to the common root causes of social and ecological injustice.¹⁶⁹ Human rights standards and principles then guide development to more sustainable outcomes by recognizing the links between ecological and social marginalization, stressing that all rights are embedded in complex ecological systems, and emphasizing provision for need over wealth accumulation.¹⁷⁰

The *Universal Declaration of Human Rights of 1948*¹⁷¹ (UDHR) set the stage for the recognition, protection and promotion of human rights the world over. The *Declaration* places an obligation on all states to employ progressive measures to ensure recognition of human rights provided therein. Notably, the Declaration recognises the need for mobilization of resources by States so as to ensure realization of these rights.¹⁷²

¹⁶² Constitution of Kenya 2010, Article 26.

¹⁶³ *Ibid*, Article 28.

¹⁶⁴ *Ibid*, Article 43(b).

¹⁶⁵ *Ibid*, Article 43(c).

¹⁶⁶ *Ibid*, Article 43(d).

¹⁶⁷ 1992 Rio Declaration, Principle 1, which reads in full: “Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.”

¹⁶⁸ Horn, L., ‘Reframing Human Rights in Sustainable Development’ Journal of the Australasian Law Teachers Association, 2013.

¹⁶⁹ Fisher, A.D., ‘A Human Rights Based Approach to the Environment and Climate Change’ A GI-ESCR Practitioner’s Guide, March 2014.

¹⁷⁰ *Ibid*.

¹⁷¹ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html> [Accessed 10/08/2016].

¹⁷² Article 22 thereof provides that everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

The UDHR created a basis for the formulation of *International Covenant on Civil and Political Rights*, (ICCPR) 1966¹⁷³ and *International Covenant on Economic, Social and Cultural Rights* (ICESCR) 1966.¹⁷⁴ The *Draft Principles on Human Rights and the Environment of 1994*¹⁷⁵ (1994 Draft Principles) comprehensively addresses the linkage between human rights and the environment, and provide for the interdependence between human rights, peace, environment and development.¹⁷⁶ The *World Summit for Social Development*, held 6-12 March 1995 in Copenhagen, Denmark, saw world Governments adopt a Declaration and Programme of Action which focused on the consensus on the need to put people at the centre of development. The world leaders pledged to make the conquest of poverty, the goal of full employment and the fostering of stable, safe and just societies their overriding objectives.¹⁷⁷ There is a multiplicity of international instruments on environment protection, dating as far back as the Stockholm Declaration of 1972. While the language of Article 1 of both the Stockholm Declaration and the Rio Declaration seem to connote a human right approach to the environmental conservation, during the conferences, various proposals for a direct and thus unambiguous reference to an environmental human right were rejected¹⁷⁸. It is arguable that the conferences created an oxymoronic circumstance, in denying what would only be in the nature of ‘the right to adequate conditions of life in an environment of a quality that permits a life of dignity and well-being’.¹⁷⁹

From the foregoing, it is noteworthy that the main objective of all the major international legal instruments on human rights is the alleviation of human suffering and to promote the total

¹⁷³ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171. ICCPR on its part provides under Article 47 that nothing in that Covenant should be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

¹⁷⁴ *International Covenant on Economic, Social and Cultural Rights*; adopted 16 Dec. 1966, 993 U.N.T.S. 3, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966) (entered into force 3 Jan. 1976). ICESCR under Article 1.2 provides that all peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

¹⁷⁵ *Draft Principles On Human Rights And The Environment*, E/CN.4/Sub.2/1994/9, Annex I (1994).

¹⁷⁶ Principle 1 thereof declares that human rights, an ecologically sound environment, sustainable development and peace are interdependent and indivisible.

¹⁷⁷ *World Summit on Social Development, Copenhagen 1995: A Brief Description*, Gateway to Social Policy and Development, Available at <http://www.un.org/esa/socdev/wssd.htm> [Accessed on 15/02/2014]. The world's leaders agreed on what are commonly referred to as the ten commitments and these include to inter alia: eradicate absolute poverty by a target date to be set by each country; support full employment as a basic policy goal; promote social integration based on the enhancement and protection of all human rights; achieve equality and equity between women and men; accelerate the development of Africa and the least developed countries; ensure that structural adjustment programmes include social development goals; increase resources allocated to social development; create "an economic, political, social, cultural and legal environment that will enable people to achieve social development"; attain universal and equitable access to education and primary health care; and strengthen cooperation for social development through the United Nations.

¹⁷⁸ Handl, G., ‘Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), 1972 and the Rio Declaration on Environment and Development, 1992’ (United Nations Audiovisual Library of International Law, 2012).

¹⁷⁹ 1972 Stockholm Declaration Principle 1. It reads in full: “Man has the fundamental right to freedom, equality and adequate conditions of life in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations”.

wellbeing of all. The absence of such wellbeing is usually perceived to be poverty. Although at times it is viewed in a narrow manner, poverty can be conceptualized in a broad manner and indeed it has been posited as the recognition that it is not limited to lack of income only, but comprises of deprivations in areas of health, education, participation and security.¹⁸⁰ Further, human poverty has been said to be a denial of human rights as it arguably infringes on, *inter alia*, human freedom and destroys human dignity. It is viewed as an intrusion into human dignity.¹⁸¹ Basic human rights are an integral part of human rights and their violation has been seen as sabotage of human dignity.¹⁸²

Since the aforementioned international legal instruments place the human rights implementation obligations on the states, it therefore follows that they are also under the obligation to use their state resources in ensuring the protection and promotion of such human rights and ultimately eradicating poverty amongst their peoples. Poverty eradication is at the heart of achieving sustainable development in the world, and unless it is dealt with, then attaining sustainable development remains a mirage.

7.2 Greening of Human Rights versus Third Generation Rights

There have generally been two types of approaches to human rights and the environment, which are the greening of already existing human rights and the introduction of a third generation of human rights.

a) Greening of Human Rights

This is a popular approach, whereby the right to a healthy environment is ‘gleaned’ from the already existing body of human rights, rather than the addition of new rights to existing treaties. This is taking place in the European Human Rights Court related to Article 8 Right to privacy and home¹⁸³, in the Interamerican Commission on Human Rights (*Yanomani Indians v Brazil* (Life and health)) and in the African Commission on Human Rights (*Ogoniland v Nigeria (Article 24 and several others)*). This also seems to be the stance adopted by the United Nations¹⁸⁴ as indicated by a 2009 report for the Office of the High Commissioner on Human Rights (OHCHR) that ‘while the universal human rights treaties do not refer to a specific right to a safe and healthy environment, the United Nations human rights treaty bodies all recognize the intrinsic link

¹⁸⁰ Gordon, D., Chapter 1, ‘Definitions of Concepts for the Perceptions of Poverty and Social Exclusion’ www.bris.ac.uk/poverty/downloads/.../pse/99-Pilot/99-Pilot_1.doc [Accessed 15/02/ 2014].

¹⁸¹ Rukooko, A.B., ‘Poverty and human rights in Africa: historical dynamics and the case for economic social and cultural rights’, *The International Journal of Human Rights*, Vol. 14, Iss. 1, 2010.

¹⁸² Vienna Declaration and Programme of Action, Article 25, Adopted by the World Conference on Human Rights in Vienna on 25 June 1993.

¹⁸³ Kravchenko, S. & Bonine, J.E., ‘Interpretation of Human Rights for the Protection of the Environment in the European Court of Human Rights’ op cit: This is seen in the decisions rendered by the European Commission on Human Rights. Cases such as *Guerra*, *Lopez Ostra*, *Öneryildiz*, *Taskin*, *Fadeyeva*, *Budayeva*, and *Tatar* show how the right to private life, or the right to life, can be used to compel governments to regulate environmental risks, enforce environmental laws, or disclose environmental information.

¹⁸⁴ UNHRC Resolution 2005/60 (2005) also recognized the link between human rights, environmental protection, and sustainable development.

between the environment and the realization of a range of human rights, such as the rights to life, to health, to food, to water, and to housing'.¹⁸⁵

While the relationship between certain human rights and the environment has been clearly illustrated, acknowledged and accepted, there are certain disadvantages to having these rights being the vehicles to protect the environment. For one part, environmental rights do not fit neatly into one generation of human rights. Existing civil and political rights can be used to give individuals the right to environmental information and judicial processes, which is a role of facilitating participation in decision making and forcing the government to meet minimum standards for protection of life and property from environmental harm.¹⁸⁶

This approach is however anthropocentric, as humans are considered the central concern while the environment is considered secondary.¹⁸⁷ This is unlikely to provide adequate protection to the environment, as the intrinsic value of the environment is not recognized. Instead it is viewed as instrumental to the intrinsic value of human beings. It is suggested that the domination of the anthropocentric approach has resulted to the lack of success in protecting the environment.

On the other end of the spectrum is the ecocentric approach, whereby there is a moral concern for nature. Through it, there is the adoption of a new land ethic, where a thing is right when it intends to preserve the integrity, stability and beauty of the biotic community, and is wrong if it intends to otherwise.¹⁸⁸ A dual rights-based approach, where the intrinsic value of humans and nature co-exist in an interconnected manner is hoped to pool the benefits of both approaches. A clean environment may also be regarded as a social and economic right, giving it such status as rights to development and would be largely programmatic, with weak implementation mechanisms.¹⁸⁹

b) Third Generation Classification of Human Rights

Human rights proponents have been particularly reluctant to recognize a third generation of human rights. Third-generation rights are described as solidarity rights that, and are attributed as group rights or collective rights¹⁹⁰. It has been argued that these rights devalue the concept of human rights, and divert attention from the need to implement existing civil, political, economic and social rights fully.¹⁹¹ On the flip side, rights herein include the right to development, the right to peace, the right to a healthy environment and the right to intergenerational equity.¹⁹²

Recognition of the relationship between abuse of human rights of various vulnerable communities and related damage to their environment is found in the concept of environmental justice.

¹⁸⁵ Ibid; UN HRC, Report of the OHCHR on the Relationship Between Climate Change and Human Rights , UN Doc. A/HRC/10/61, 15 Jan. 2009, at para. 18.

¹⁸⁶ Alan Boyle, 'Human Rights and the Environment: A reassessment' First Preparatory Meeting of the World Congress on Justice, Governance and Law for Environmental Sustainability (12 - 13 October 2011 - Kuala Lumpur, Malaysia).

¹⁸⁷ Horn, L., 'Reframing Human Rights in Sustainable Development' op cit.

¹⁸⁸ Barouskaya I., 'Anthropocentrism & Ecocentrism: Finding Balance for Environment Protection' A presentation at the University of Limerick.

¹⁸⁹ Boyle, A., 'Human Rights and the Environment: A reassessment' op cit.

¹⁹⁰ Horn, L., 'Reframing Human Rights in Sustainable Development' op cit.

¹⁹¹ Boyle, A., 'Human Rights and the Environment: A reassessment' op cit.

¹⁹² Ruppel, O.C., 'Third Generation Human Rights and the Protection of the Environment in Namibia.

Environmental justice theory recognizes how discrimination and marginalization involves expropriating resources from vulnerable groups and exposing these communities to the ecological harms that result from use of those resources. Environmental justice is based on the human right to a healthy and safe environment, a fair share to natural resources, the right not to suffer disproportionately from environmental policies, regulations or laws, and reasonable access to environmental information, alongside fair opportunities to participate in environmental decision-making.¹⁹³

Some human rights lawyers opine that the recognition of third generation rights will devalue the concept of human rights and divert attention from the already recognised first and second-generation rights.¹⁹⁴ The right to a clean and healthy environment, as is with all environmental rights, has for a long time been grouped under the ‘third generation rights’ or ‘solidarity rights’. However, the right to clean and healthy environment is not a ‘third generation right’ but a *fundamental right*; (emphasis added) a prerequisite for full enjoyment of all the other rights. It is a right, crucial for the realisation of the so-called first and second generation rights. Indeed, it has been rightly argued that when people must struggle to obtain the basic necessities of life, political freedoms and human rights may appear meaningless to them.¹⁹⁵ This is because the destruction of life-sustaining ecosystems, the pollution of the world's water, land, and air, the inability to control the world's wastes, and other related environmental problems prevent people from securing the minimum requisites for health and survival, thereby impeding and even prohibiting the effective exercise and enjoyment of human rights for much of the world's population.¹⁹⁶

It is against this background that there emerged recognition of the right to a clean and healthy environment, as a distinct right, owing to the importance of the environment for the realisation of the other human rights especially the socio-economic rights. There is need to redefine the right to clean and healthy environment as a fundamental right, and classify it with the other basic rights as opposed to the existing notion that it is a third generation right. This is because the right to a clean and healthy environment can be equated to the right to life.

8. Environment and Sustainable Development in Kenya

Kenya's approach to environmental governance has largely been sectoral. The international best practices in sustainable development envisage an integrated approach to economic, social and economic dimensions of development.¹⁹⁷

¹⁹³ Scottish Executive Social Research, *Sustainable Development: A Review of International Literature*, (Scottish Executive Social Research, 2006), p.8.

Available at <http://www.gov.scot/resource/doc/123822/0029776.pdf> [Accessed on 15/08/2016].

¹⁹⁴ See Olenasha, W.T., ‘The Enforcement Of Environmental Rights: A Case Study Of The New South African Constitutional Dispensation,’ Thesis (LLM (Human Rights and Democratisation in Africa) (University of Pretoria, 2001), available at http://repository.up.ac.za/bitstream/handle/2263/969/olenasha_wt_1.pdf?sequence=1&isAllowed=y [Accessed on 28/08/2015].

¹⁹⁵ Downs, J.A., ‘A Healthy and Ecologically Balanced Environment: An Argument for A Third Generation Right,’ *Duke Journal of Comparative & International Law*, Vol. 3, 1993, pp. 351-385 at p. 351.

¹⁹⁶ *Ibid.*

¹⁹⁷ See Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016), chapter Four, for the full discussion.

8.1 Domesticating Principles of Sustainable Development

As already pointed, sustainable development contains both substantive and procedural elements, where substantive elements include the integration of environmental protection and economic development; the right to development; the sustainable utilisation of natural resources; the equitable allocation of resources both within the present generation and between present and future generations, while procedural elements include public participation in decision making; access to information; and environmental impact assessment.¹⁹⁸

It has been suggested that the most potentially far-reaching aspect of sustainable development is that for the first time it makes a state's management of its own domestic environment a matter of international concern in a systematic way.¹⁹⁹ Nonetheless, it is still a contentious issue as to whether states should be held internationally accountable for achieving sustainability, whether globally or nationally, and also the specific formula to be used in deciding the 'acceptable standard of sustainable development.'²⁰⁰ Thus, states retain substantial discretion in interpreting and giving effect to sustainable development.²⁰¹

While acknowledging the foregoing dilemma, it is arguable that national requirements to meet the needs of their people may be an incentive for such countries to uphold the principles of sustainable development and even set standards for the same. This is well evidenced in the laws and the jurisprudence emanating from Kenyan courts.²⁰² The Constitution stipulates that sustainable development is one of the national values and principles of governance that must bind all State organs, State officers, public officers and all persons whenever any of them—applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.²⁰³ The implication of these constitutional provisions is that both national and

¹⁹⁸ Birnie, P. et al, *International Law & the Environment*, op cit, p. 116.

¹⁹⁹ Ibid, p. 124.

²⁰⁰ Ibid, pp. 125-126.

²⁰¹ Ibid, p. 126.

²⁰² In the Kenyan case of *Peter K. Waweru v Republic* ([2006] eKLR, Misc. Civil Application No. 118 of 2004) the High Court had to deal with a contention by the applicants that they could comply with the health requirements concerning the waste water and that the cost of having treatment works in their respective plots would be out of reach of the individual property owners – and that the costs would be prohibitive. The court rejected the argument firstly because sustainable development has a cost element which must be met by the developers and secondly because they had not stated that they had thought of other alternatives which could be more environmentally friendly to deal with the problem [para. 4]. The Court went on to state as follows:

...As regards the township itself this court is concerned on whether or not in the circumstances described the development is ecologically sustainable.... We are also concerned that the situation described to us could be the position in many other towns in Kenya especially as regards uncoordinated approval of development and the absence of sewerage treatment works. As a Court we cannot therefore escape from touching on the law of sustainable development although counsel from both sides chose not to touch on it although it goes to the heart of the matter before us.... Section 3 of EMCA demands that courts take into account certain universal principles when determining environmental cases. Apart from the EMCA it is our view that the principles set out in s 3 do constitute part of international customary law and the courts ought to take cognizance of them in all the relevant situations [p.7].

²⁰³ Constitution of Kenya, Article 10(2) (d).

county levels of government are tasked with promoting sustainable development especially with regard to natural resources and environmental management.²⁰⁴

The foregoing statutory and constitutional provisions as well as the case law cited confirm Kenya's position as far as recognition, promotion and implementation of the principles of sustainable development are concerned. Thus, the debate as to whether the various stakeholders may be held accountable for violation of the elements of sustainable development in the course of their duties seems to have been settled in Kenya and may safely be answered in the affirmative.

It is arguable that some of the current laws on natural resources management in Kenya still adopt approaches that defeat any efforts aimed at achieving sustainable development.

8.2 Legal and Regulatory Framework on Environmental Governance and Sustainable Development in Kenya

Constitutionalisation of environmental rights is now one of the universally accepted approaches to environmental conservation and management.²⁰⁵ It has become the norm worldwide for the duties of the state in respect of the environmental management and conservation to be spelt out in the Constitution.

It is against this background that the Constitution of Kenya 2010 outlines the obligations of the State in respect of the environment as including the duty to: ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources²⁰⁶, and ensure the equitable sharing of the accruing benefits; work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya; protect and enhance intellectual property in, and indigenous knowledge of, biodiversity²⁰⁷ and the genetic resources of the communities; encourage

²⁰⁴ Further, the EMCA provides that in exercising the jurisdiction conferred upon it under subsection (3), the High Court of Kenya should be guided by the following principles of sustainable development: the principle of public participation in the development of policies, plans and processes for the management of the environment; the cultural and social principle traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and are not repugnant to justice and morality or inconsistent with any written law; the principle of international co-operation in the management of environmental resources shared by two or more states; the principles of intergenerational and intragenerational equity; the polluter-pays principle; and the pre-cautionary principle.

²⁰⁵ See generally, Boyd, D.R., 'The Effectiveness of Constitutional Environmental Rights,' Yale UNITAR Workshop, April 26/27, 2013, available at <https://environment.yale.edu/content/documents/00003438/Boyd-Effectiveness-of-Constitutional-Environmental-Rights.docx?1389969747> [Accessed on 23/07/2016]; See also Daly, E. & May, J.R., 'Comparative environmental constitutionalism,' *Jindal Global Law Review*, April 2015, Volume 6, Issue 1, pp 9–30; See also, Mwenda, A. & Kibutu, T.N., 'Implications of the New Constitution on Environmental Management in Kenya,' *Law, Environment and Development Journal*, Vol. 8, No. 1, 2012, p. 78.

²⁰⁶ The Constitution interprets "natural resources" to mean the physical non-human factors and components, whether renewable or non-renewable, including—sunlight; surface and groundwater; forests, biodiversity and genetic resources; and rocks, minerals, fossil fuels and other sources of energy (Article 260).

²⁰⁷ Generally, biodiversity is defined to include the variability among living organisms, from all sources including terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems (Article 2, United Nations Environment Programme, 1760 UNTS 79; 31 ILM 818 (1992); The Convention on Biological Diversity, adopted during the Earth Summit in Rio de Janeiro, promotes biodiversity, sustainable use, and the sharing

public participation in the management, protection and conservation of the environment; protect genetic resources and biological diversity²⁰⁸; establish systems of environmental impact assessment, environmental audit and monitoring of the environment; eliminate processes and activities that are likely to endanger the environment; and utilise the environment and natural resources for the benefit of the people of Kenya.²⁰⁹

The Preamble to the Constitution of Kenya captures the need for concerted efforts of all, in the duty to conserve and sustainably manage the environment, since the same does not only lie against the State but also every individual person.²¹⁰ In relation to the foregoing obligations, 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.²¹¹ Article 69(2) of the Constitution of Kenya 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.

The Constitution goes a step further to provide for active involvement of communities in sustainable environmental and natural resources matters through seeking court's intervention. Citizenry have a right of ensuring that their rights in relation to the environment are not violated, by way of litigation.²¹² This is also captured in the various statutes such as the *Environmental*

of benefits arising out of the utilization of genetic resources. The Convention provides for national reporting of efforts to implement the provisions of the Convention).

²⁰⁸ The Convention on Biological Diversity (CBD) adopted at the Earth Summit in Rio de Janeiro, Brazil, is a global convention which aims to achieve three objectives: the conservation of biological diversity; the sustainable use of its components; and the fair and equitable sharing of benefits from the use of genetic resources. Kenya is a signatory to this Convention and it is therefore bound by its provisions in promoting the realisation of the three objectives.

²⁰⁹ Constitution of Kenya, Article 69(1).

²¹⁰ We, the people of Kenya—.....Respectful of the environment, which is our heritage, and determined to sustain it for the benefit of future generations...Committed to nurturing and protecting the well-being of the individual, the family, communities and the nation:....

²¹¹ Constitution of Kenya, Article 69(2).

²¹² 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; Article 70(1) provides that if a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter. Furthermore, on application under clause (1), the court may make any order, or give any directions, it considers appropriate— to prevent, stop or discontinue any act or omission that is harmful to the environment; to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or to provide compensation for any victim of a violation of the right to a clean and healthy environment (Article 70(2)). For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury (Article 70(3)). The right to seek legal redress is also guaranteed under s. 3(3) of the Environmental Management and Co-ordination Act, No. 8 of 1999.

*Management and Co-ordination Act.*²¹³ The Constitution also recognises the right of every person to a clean and healthy environment.²¹⁴

As already observed, active participation of citizens makes them appreciate and support government efforts and also take part in conservation measures. However, there has not been meaningful participation of the public in environmental and natural resource management matters, since majority of the sectoral laws only provide for public participation as a mere formality, and not as an empowerment tool as envisaged in international human rights instruments.²¹⁵

Considering that the Constitution is the supreme law of the land, all the other sectoral laws on environment and natural resources management ought to be aligned to the constitutional provisions. The reality however, is that some of the laws are yet to be aligned and thus making it difficult to achieve the constitutional objectives on environment and natural resources governance. A good example is the *Environmental Management and Co-ordination Act 1999* (EMCA), which is the environmental framework law, meant to provide for the establishment of an appropriate legal and institutional framework for the management of the environment and for the matters connected therewith and incidental thereto.

An interpretation of the current wording of EMCA shows that where the framework law provides for consultations, the same are only meant to be between the state agencies charged with environmental governance. Even where a decision is likely to affect the interests of communities, the Act only provides for unilateral decision by the Cabinet Secretary in charge to ensure that such welfare is well taken care of.²¹⁶ Thus, it is possible to have a scenario where the protectionist approaches adopted in most of these sectoral laws end up undermining efforts towards achieving sustainable development instead of boosting the same.

²¹³ No. 8 of 1999, Laws of Kenya, s. 3(3); See also Environmental Management and Co-ordination (Amendment) Act, 2015 which expands the provisions to include the right to clean and healthy environment and also the right of a person to file suit on his behalf or on behalf of a group or class of persons, members of an association or in the public interest (s. 3).

²¹⁴ Article 42. This right includes the right—to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and to have obligations relating to the environment fulfilled under Article 70

²¹⁵ See Principle 10 of the Rio Declaration, which affirms that environmental issues are best handled with participation of all concerned citizens, at the relevant level. The Aarhus Convention also establishes a number of rights of the public (individuals and their associations) with regard to the environment. The Convention provides for inter alia: the right of everyone to receive environmental information that is held by public authorities ("access to environmental information"); the right to participate in environmental decision-making ("public participation in environmental decision-making"); and the right to review procedures to challenge public decisions that have been made without respecting the two aforementioned rights or environmental law in general ("access to justice") (Aarhus Convention, Article 4, 5, 6 & 9 respectively. Although the Aarhus Convention is a European region legal instrument, its provisions have gained international recognition and approval especially considering the fact that it reflects Principle 10 of the Rio Declaration on Environment and Development); See also Access to Information Act, 2016 which deals with disclosure of information including information on dangers of public health, safety and the environment.

²¹⁶ See also the Environmental (Impact Assessment and Audit) Regulations, 2003, Legal Notice 101 of 2003, Regulation 17 which provides for public participation albeit inadequately.

8.2.1 Equitable Benefit Sharing for Social Sustainability

The proposed legislation *Natural Resources (Benefit Sharing Bill)*²¹⁷ seeks to establish a system of benefit sharing in resource exploitation between resource exploiters, the national government, county governments and local communities, to establish the natural resources benefit sharing authority and for connected purposes. The law is to apply with respect to petroleum and natural gas, among other natural resources. It also provides for guiding principles which include transparency and inclusivity, revenue maximization and adequacy, efficiency and equity and accountability.²¹⁸

There is need to actively involve communities in the implementation of this law, if enacted, to ensure that they are not left out as far as benefit sharing is concerned. The approach should be one that ensures that communities feel part of the resource management strategies and not mere spectators where they are not consulted even on the best approaches to benefit sharing.

The *Community Land Act, 2016*²¹⁹ gives effect to Article 63 (5) of the Constitution; provides for the recognition, protection and registration of community land rights; management and administration of community land; and provides for the role of county governments in relation to unregistered community land.²²⁰ The Act provides that subject to any other law, natural resources found in community land should be used and managed—sustainably and productively; for the benefit of the whole community including future generations; with transparency and accountability; and on the basis of equitable sharing of accruing benefits.²²¹ This provision thus requires all those charged with administration of such jointly owned resources to not only ensure equitable sharing of accruing benefits but also sustainable and productive use and management of the same. The requirement for transparency and accountability is meant to give the community channels of ensuring that the resources are not wasted or mismanaged.

Where need for concessions arise, the Act provides that an agreement relating to investment in community land should be made after a free, open consultative process and should contain provisions on the following aspects — an *environmental, social, cultural and economic impact assessment* (emphasis added); stakeholder consultations and involvement of the community; continuous monitoring and evaluation of the impact of the investment to the community; payment of compensation and royalties; requirement to re-habilitate the land upon completion or abandonment of the project; measures to be put in place to mitigate any negative effects of the investment; capacity building of the community and transfer technology to the community; and any other matters necessary for determining how local communities will benefit from investments in their land.²²²

It is important to point out that if the concerned communities are to benefit through the ways contemplated above, they must be willing to take up opportunities that would be brought their

²¹⁷ *Natural Resources (Benefit Sharing Bill)*, 2015 (Government Printer, Nairobi, 2015).

²¹⁸ *Ibid*, clause 4.

²¹⁹ Act No. 27 of 2016, Laws of Kenya.

²²⁰ Preamble, *Community Land Act, No. 27 of 2016* (Government Printer, Nairobi, 2016).

²²¹ *Ibid*, s. 36.

²²² *Ibid*, s. 37.

way. They must be made to understand that the expected benefits will not only come in monetary terms and must be made aware of the various non-monetary forms that benefits may accrue to them, for instance, such as those envisaged under the *Nagoya Protocol*.²²³ The various means of accessing benefit sharing are also captured under the *Legal Notice 160 of 2006 on the Environmental Management and Co-ordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations, 2006* which makes provisions for benefit sharing on genetic resources.²²⁴ These Regulations may therefore offer useful guidelines on how to ensure that genetic resources are conserved and also benefit concerned groups of people, as envisaged under the Constitution. Some of the forms of benefits would only be made possible through concerted efforts from both sides, that is, the concerned community and the investor and possibly with assistance from the county or national governments.²²⁵

²²³ Annex to the Nagoya Protocol provides for both monetary and non-monetary forms of benefits. It envisages monetary benefits which may include, but not be limited to: access fees/fee per sample collected or otherwise acquired; up-front payments; milestone payments; payment of royalties; licence fees in case of commercialization; special fees to be paid to trust funds supporting conservation and sustainable use of biodiversity; salaries and preferential terms where mutually agreed; research funding; joint ventures; and joint ownership of relevant intellectual property rights (Annex to the Nagoya Protocol on Access and Benefit-sharing).

²²⁴ Regulation 20 (1) without prejudice to the generality of the foregoing, the holder of an access permit shall facilitate an active involvement of Kenyan citizens and institutions in the execution of the activities under the permit. (2) The facilitation by the holder of an access permit shall include enjoyment of both monetary and non-monetary benefits arising from the right of access granted and the use of genetic resources. (3) Monetary benefits include – (a) access fees or fee per sample collected or acquired; (b) up-front payments; (c) milestone payments; (d) payment of royalties; (e) license fees in case genetic resources are to be utilized for commercial

purposes; (f) fees to be paid to trust funds supporting conservation and sustainable use of biodiversity; (g) salaries and preferential terms where mutually agreed; (h) research funding; (i) joint ventures; (j) joint ownership of relevant intellectual property rights; (4) Non-monetary benefits include – (a) sharing of research and development results; (b) collaboration, co-operation and contribution in scientific research and development programmes, particularly biotechnological research activities; (c) participation in product development; (d) admittance to ex situ facilities of genetic resources and to databases by participating institutions; (e) transfer to Kenya of genetic resources of knowledge and technology under fair and most favourable terms, including concessional and preferential terms where agreed, in particular, knowledge and technology that make use of genetic resources, including biotechnology, or that are relevant to the conservation and sustainable utilization of biological diversity;

(f) strengthening capacities for technology transfer to Kenya; (g) institutional capacity building; (h) human and material resources to strengthen the capacities for the administration and enforcement of access regulations; (i) training related to genetic resources with the full participation of Kenya and where possible, in Kenya; (j) access to scientific information relevant to conservation and sustainable use of biological diversity, including biological inventories and taxonomic studies; (k) institutional and professional relationships that can arise from access and benefit sharing agreements and subsequent collaborative activities; (l) joint ownership of relevant intellectual property rights.

²²⁵ The Genetic Resources Research Institute (GeRRI), under the Kenya Agricultural and Livestock Research Act of 2013, a semi-autonomous research Institute, is responsible for conserving plant genetic resources, animal and microbial genetic resources. Genetic resources are essential basic building blocks utilized in research to develop improved technologies for enhanced agricultural production. This Institution should work closely with communities and other stakeholders in order to promote effective conservation and use of resources for food security assurance, agricultural resilience and economic growth, besides achieving sustainable development.

The International Finance Corporation (IFC) suggests practical processes for sharing benefits with communities.²²⁶ One of the ways that this can be achieved is through maintaining active relationships built on trust with communities through appropriate and effective communication. This implies that genuine consultations and participation in decision-making will happen whenever possible and that perceptions and expectations are closely aligned with reality. They also propose carrying out comprehensive, participatory baseline studies of the community's socioeconomic, cultural heritage, and socio-environmental context before project development, agreeing to joint objectives for the project's community programs, monitoring outcomes (including community feedback), and responding as needed. This, according to IFC, helps address misconceptions, manage expectations, and assuage fears or concerns.²²⁷

There is also the suggestion on establishing robust grievance mechanisms that are understood, accessible and linked directly to project performance measures. Where justified, third party mediation may be required.²²⁸ Foundations and other long-term approaches may also be good vehicles to achieve community development objectives if they ensure broader stakeholder participation and helping identify areas of focus and consistency of priorities across actors, such as company, governments, donors, and communities. Finally, integrating project development and community development plans as effectively as practicable with local and national government planning to support development aspirations and balance the expectations and demands of different communities may be useful.²²⁹

There is a need to ensure that the any model that is put in place guarantees a fair and equitable benefit-sharing, with the terms and provisions which clearly spell out the model to be used in determining the accruing benefits and the associated costs, in order to determine the investments (and compromises) from all parties and stakeholders involved.²³⁰

²²⁶ Lohde, L.A., *The Art and Science of Benefit Sharing in the Natural Resource Sector*, (International Finance Corporation, February 2015), p. 61. Available at http://www.ifc.org/wps/wcm/connect/8e29cb00475956019385972fbd86d19b/IFC_Art+and+Science+of+Benefits+Sharing_Final.pdf?MOD=AJPERES&CACHEID=8e29cb00475956019385972fbd86d19b [Accessed on 13/07/2016].

²²⁷ *Ibid*, p. 61.

²²⁸ Article 47(1) of the Constitution of Kenya guarantees that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair (See also Fair Administrative Action Act, No. 4 of 2015). Further, Article 48 obligates the State to ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice. Article 60(1) (g) provides that one of the principles of land policy in Kenya is encouragement of communities to settle land disputes through recognised local community initiatives consistent with this Constitution. Furthermore, one of the functions of the National Land Commission include to encourage the application of traditional dispute resolution mechanisms in land conflicts (Article 67(2) (f). Also relevant is Article 159(2)(c) which requires that in exercising judicial authority, the courts and tribunals should be guided by the principles which include, inter alia—promotion of alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms, subject to clause (3). The foregoing provisions provide a good platform upon which communities and other stakeholders can enjoy grievance mechanisms that are easily understood, accessible and linked directly to project performance measures.

²²⁹ Lohde, L.A., *The Art and Science of Benefit Sharing in the Natural Resource Sector*, (International Finance Corporation, February 2015), op cit. p. 61.

²³⁰ See generally, Jonge, B.D., 'What is Fair and Equitable Benefit-sharing?' *Journal of Agricultural and Environmental Ethics*, Vol. 24, 2011, pp.127–146.

8.2.2 Devolution and Sustainable Development in Kenya: Challenges and Prospects

The United Nations Development Programme (UNDP) recommends adoption of decentralised governance of natural resources, which concerns the ownership and control of, access to and use of resources, and involves decision making and the exercise of the powers over others.²³¹ It entails the process of transferring some of the decision-making powers and responsibilities (fiscal, administrative, legal and technical) to sub-national institutions at the grassroots' levels.²³² According to UNDP, decentralised governance of natural resources is considered one of the key strategies for promoting sustainable management, equitable decision-making, promoting efficiency, participatory governance and equitable sharing of benefits accrued from exploitation of natural resources at the local levels.²³³

The Constitution provides for the role of devolved governance system in the management of natural resources and the environment. The Fourth Schedule to the Constitution²³⁴ provides for the distribution of functions between the National Government and the County Governments. With regard to the environment and natural resources, the National Government obligations include 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.²³⁵ On the other hand, the functions and powers of the county are, inter alia: implementation of specific national government policies on natural resources and environmental conservation, including— soil and water conservation; and forestry; and ensuring and coordinating the participation of communities and locations in governance at the local level and assisting 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.²³⁶

It has rightly been observed that Governments in many developing countries have discovered the need for a decentralised approach to human development.²³⁷ This is usually achieved through ceding a certain degree of authority, by way of devolution, on the local and regional levels in order to address the common difficulty in responding to local needs which may arise due to lack of information as well as bureaucratic incapacity.²³⁸ This is well captured in the constitutional obligation of County Governments to ensure and coordinate the participation of communities and locations in governance at the local level, and assisting them to develop the administrative capacity for the effective exercise of the functions and powers and participation in governance.²³⁹

²³¹ United Nations Development Programme, Decentralized Governance of Natural Resources, available at <http://web.undp.org/drylands/decentralized-governance.html> [Accessed on 14/07/2016].

²³² Ibid.

²³³ Ibid.

²³⁴ (Article 185 (2), 186 (1) and 187 (2)), Constitution of Kenya.

²³⁵ Constitution of Kenya 2010, Fourth Schedule, Clause 22.

²³⁶ Constitution of Kenya 2010, Fourth Schedule, clauses 10 & 14.

²³⁷ Alaedini, P. & Namazi, S., 'Decentralization and Sustainable Human Development: An Analysis of Local and Municipal Councils in Iran,' Encyclopedia of Life Support Systems (EOLSS), p. 1. Available at www.eolss.net/Eolss-sampleAllChapter.aspx { Accessed on 10/07/2016 }

²³⁸ Ibid.

²³⁹ See Constitution of Kenya, Schedule four (Article 185 (2), 186 (1) and 187 (2)), Part 2.

a) State Department of Devolution

According to the Ministry's mandate as stipulated in Executive Order no. 2 of 2013²⁴⁰, the Ministry of Devolution and Planning is now organized into two State Departments. These are State Department of Planning and State Department of Devolution. The State Department for Planning is to play the role of formulating and coordinating national development, mainstreaming youth into development and empowering them, building fairer gender equality, and tracking of development results in the economy to ensure the Ministry and the government as a whole achieve their strategic objective.²⁴¹

The State Department of Devolution, on the other hand, is responsible for overall coordination of implementation of devolution policies, sustainable development policy for Northern Kenya and other Arid Lands (ASALs) and implementation of programmes and projects to provide relief to the vulnerable groups and communities in our arid and semi-arid lands.²⁴² To enable Kenya to meet the SGDs, the Strategic Plan requires the Government to set up a Sustainable Development Goals Planning Department in order to ensure alignment of the SDGs with the national development plans and to support accelerated implementation of the goals.²⁴³

b) National Drought Management Authority

It has been documented that in Kenya, the ASAL occupy 89% of the country and are home to about 36% of the population, 70% of the national livestock herd and 90% of the wild game that supports the country's tourism industry.²⁴⁴ The National Drought Management Authority (NDMA) is a public body established by the National Drought Management Authority (NDMA) Act, 2016.²⁴⁵ It is an agency of the Government of Kenya mandated to establish mechanisms which ensure that drought does not result in emergencies and that the impacts of climate change are sufficiently mitigated.

The Act gives the NDMA the mandate to exercise overall coordination over all matters relating to drought management including implementation of policies and programmes relating to drought management.²⁴⁶ The NDMA provides a platform for long-term planning and action, as well as a mechanism for solid coordination across Government and with all other stakeholders. The Authority has established offices in 23 ASAL counties considered vulnerable to drought.²⁴⁷

²⁴⁰ Republic of Kenya, Executive Order No 2 of 2013 on the Organization of Government of Kenya, (Government Printer, 2013, Nairobi).

²⁴¹ Republic of Kenya, Ministry of Devolution and Planning Strategic Plan 2013/14-2017/18, (Government Printer, 2014, Nairobi), p. viii-ix.

²⁴² Ibid, p.30.

²⁴³ Ibid, p. 32.

²⁴⁴ Para. 1.1, Draft National Policy for the Sustainable Development of Northern Kenya and other Arid Lands 2015: Unlocking Our Full Potential for Realization of the Kenya Vision 2030, (Government Printer, Nairobi, July 2015).

²⁴⁵ See National Drought Management Authority Website. Available at <http://www.ndma.go.ke/index.php/features/about-ndma>. It previously operated under the State Corporations Act (Cap 446) of the Laws of Kenya by Legal Notice Number 171 of November 24, 2011.

²⁴⁶ S. 5, National Drought Management Authority (NDMA) Act, No. 4 of 2016.

²⁴⁷ See National Drought Management Authority Website.

The NDMA has been supporting Disaster Risk Reduction (DRR) initiatives in arid and semi-arid counties mainly based on community participatory approaches. For instance, NDMA has been implementing, with the support of the Kenya Rural Development Programme (KRDP), ASAL Drought Management project, whose main focus has been on building capacity of community planning structures to allow mainstreaming of drought risk reduction strategies in the local planning process through a Community Managed Disaster Risk Reduction (CMDRR) approach.²⁴⁸ The CMDRR approach is meant to bring together a community to enable it to collectively address a common disaster risk and pursue disaster risk reduction measures. It includes implementation of Participatory Disaster Risk Assessment (PDRA) and development of local disaster risk reduction and response plans.²⁴⁹

The approach allows communities to analyse the impact of droughts on their livelihoods, identify possible preparedness and response activities to enhance resilience, and mainstream disaster risk reduction into long-term development plans.²⁵⁰ Furthermore, the NDMA provides investment resources to implement some of the strategic DRR projects identified and prioritised by communities to enhance local resilience to drought. These projects may include, inter alia, livestock restocking and dairy goats for breed improvement.²⁵¹

8.2.3 National Courts and Sustainable Development

It has rightly been argued that there are other regulatory approaches to achieving environmental protection and public health that are not rights-based. These include economic incentives and disincentives, criminal law, and private liability regimes which have all formed part of the framework of international and national environmental law and health law.²⁵² For instance, the *Environmental Management and Co-ordination (Amendment) Act, 2015*²⁵³ amends section 48 of EMCA by inserting subsection (3) to the effect that where a forested area is declared to be a protected area under section 54(1), the Cabinet Secretary may cause to be ascertained, any individual, community or government interests in the land and forests and should *provide incentives to promote community conservation* (emphasis added).²⁵⁴ Such an approach can boost the State's efforts in sustainable development.

²⁴⁸ CMDRR: Investing in participatory approaches to community empowerment, available at <http://www.ndma.go.ke/index.php/success-stories/93-cmdrr-investing-in-participatory-approaches-to-community-empowerment> [Accessed on 09/09/2016]; See also Agenda 2030 for Sustainable Development Goals, Goal 11.b which requires that by 2020, countries should have substantially increased the number of cities and human settlements adopting and implementing integrated policies and plans towards inclusion, resource efficiency, mitigation and adaptation to climate change, resilience to disasters, and develop and implement, in line with the Sendai Framework for Disaster Risk Reduction 2015–2030, holistic disaster risk management at all levels.

²⁴⁹ Ibid.

²⁵⁰ Ibid.

²⁵¹ Ibid.

²⁵² Shelton, D., 'Human Rights, Health and Environmental Protection: Linkages in Law and Practice: A Background Paper for the WHO,' p. 3. Available at http://www.who.int/hhr/information/Human_Rights_Health_and_Environmental_Protection.pdf [Accessed on 20/07/2016].

²⁵³ Environmental Management and Co-ordination (Amendment) Act, No. 5 of 2015, Laws of Kenya.

²⁵⁴ S. 31, Environmental Management and Co-ordination (Amendment) Act, 2015.

In *Peter K. Waweru v Republic*,²⁵⁵ the Court observed that ‘...environmental crimes under the Water Act, Public Health Act and EMCA cover the entire range of liability including strict liability and absolute liability and ought to be severely punished because the challenge of the restoration of the environment has to be tackled from all sides and by every man and woman...’ It went further to state, —...In the name of environmental justice water was given to us by the Creator and in whatever form it should never ever be the privilege of a few – the same applies to the right to a clean environment.²⁵⁶ The Court also affirmed the broad scope of the right to clean and healthy environment by stating, *inter alia*, that ‘the right of life is not just a matter of keeping body and soul together because in this modern age that right could be threatened by many things, including the environment. The right to a clean environment is primary to all creatures including man; it is inherent from the act of creation, the recent restatement in the Statutes and the Constitutions of the world notwithstanding.’²⁵⁷

Kenyan Courts’ position in the foregoing case is also reflected in the practice by Indian Courts. The Supreme Court of India held in *Subhash Kumar v. State of Bihar*,²⁵⁸ that the “right to life guaranteed by Article 21 of the Constitution includes the right of enjoyment of pollution-free water and air for full enjoyment of life.” Further, in the case of *Dr. Mohiuddin Farooque v. Bangladesh, represented by the Secretary, Ministry of Irrigation, Water Resources and Flood Control and Others*²⁵⁹, the Supreme Court interpreted the right to life to include the protection and preservation of the environment and ecological balance free from pollution of air and water. In another Indian case of *K. Ramakrishnan and Others v State of Kerala and Others* (smoking case), the Court stated that “*The word ‘life’ in the Constitution has not been used in a limited manner. A wide meaning should be given to the expression ‘life’ to enable a man not only to sustain life but also to enjoy it in a full measure. The sweep of right to life conferred by Article 21 of the Constitution is wide and far-reaching so as to bring within its scope the right to pollution free air and the “right to decent environment.”* (Emphasis added)²⁶⁰

Therefore, in the enforcement of other Constitutional rights such as economic and social rights and the right to life under the Constitution, courts should accord such provisions broad interpretations so as to address any environmental factors that impede access to the resources necessary for enjoyment of the right in question. These include *inter alia*, right 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; and to clean and safe water in adequate quantities.²⁶¹

In addition to the active role taken up by national courts, India also has the National Green Tribunal, commonly referred to as green courts, established in October 2010 under the *National*

²⁵⁵ [2006] eKLR, Misc. Civ. Applic. No. 118 of 2004.

²⁵⁶ p.14.

²⁵⁷ *Ibid*, p.8.

²⁵⁸ AIR 1991 SC 420, 1991 (1) SCC 598.

²⁵⁹ 48 DLR 1996 (SC Bangladesh, 1996).

²⁶⁰ AIR 1999 Ker 385, p.11.

²⁶¹ Constitution of Kenya, Article 43(1).

Green Tribunal Act 2010,²⁶² for effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property and for matters connected therewith or incidental thereto.²⁶³ It is a specialised body equipped with the necessary expertise to handle environmental disputes involving multi-disciplinary issues.²⁶⁴

The advantage with the green tribunal of India is that it is administered by persons with specialised knowledge and experience in environmental matters and they may not necessarily be judicial officers. It thus combines expert members with judicial officers. This is arguably a better approach than the Kenyan one where the Environment and Land Court comprises exclusively judicial officers, albeit with judicial training.²⁶⁵ Having on board non-judicial members with specialised knowledge in environmental matters may help come up with better approaches to environmental and natural resource management. Access to environmental justice also becomes easier.²⁶⁶ They can work more closely with mainstream courts to promote sustainable development.

The Court should step in and protect the environment without necessarily looking for immediate proof of likely violation of the right to a clean and healthy environment. To facilitate the same, the Constitution gives courts the power to make any order, or give any directions, it considers appropriate – to prevent, stop or discontinue any act or omission that is harmful to the environment, or to any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment, or to provide compensation for any victim of a violation of the right to a clean and healthy environment.²⁶⁷ An applicant seeking such orders from courts does not have to demonstrate that any person has incurred loss or suffered injury. The Constitution provides that an applicant does not have to demonstrate that any person has incurred loss or suffered injury.²⁶⁸ However, to succeed in their plea one must demonstrate that their Right under Article 42 has been or is likely to be denied, violated, infringed or threatened.²⁶⁹

The *suo moto powers* of the Court in environmental matters is also reflected under provisions of the *Environment and Land Act*.²⁷⁰ It is also important to point out that the Courts are under a

²⁶² No. 19 of 2010, Laws of India.

²⁶³ National Green Tribunal, available at <http://www.greentribunal.gov.in/> [Accessed on 28/07/2016].

²⁶⁴ Ibid; Pradeep, B. & Madhur, Y., 'New Judicial Roles and Green Courts in India,' available at http://inece.org/conference/9/papers/Bakshi_India_Final.pdf [Accessed on 28/07/2016].

²⁶⁵ Persons with specialised training can only appear as witnesses or to furnish in writing or otherwise, and to confirm on oath or affirmation, such expert opinion as may be relevant to any of the issues in the proceedings. (S. 19(4), Environment and Land Court Act, 2011).

²⁶⁶ Desai, B.H. & Sidhu, B., 'On the Quest for Green Courts in India,' *Journal of Court Innovation*, Vol.3, No. 1, 2010, pp. 79-111.

²⁶⁷ Constitution of Kenya, 2010, Article 70(2).

²⁶⁸ Constitution of Kenya, 2010, Article 70(3); See also s. 3(1) of Environment (Management and Conservation) Act, 1999 (EMCA)

²⁶⁹ *Joseph Owino Muchesia & another v Joseph Owino Muchesia & another* [2014] eKLR, para. 34.

²⁷⁰ No 19 of 2011, Laws of Kenya. S. 20(1)-Nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion, with the agreement of or at the request of the parties, any other appropriate means of alternative dispute resolution including conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2) (c) of the Constitution.

constitutional obligation under Article 10 to uphold the principles of sustainable development. This includes protecting the environment for the sake of future generations. The Court should, like in the case of *Peter K. Waweru (supra)*, be proactive in promoting environmental protection and conservation for sustainable development. Courts can take proactive measures to ensure conservation and protection of the environment for sustainable development. They can ensure that communities and other private persons enjoy environmental democracy especially where such communities approach courts seeking justice and access to environmental information, and demand enforcement of environmental laws or compensation for damage. Courts can work closely with such local bodies to adequately and peaceably address conflict or disputes. Where state decision makers or such local bodies or tribunals attempt to bypass the legal requirements on public participation in decision-making in matters that greatly affect the livelihoods of a particular group of people, courts can use its constitutional powers to enforce and uphold the law.

8.2.4 Community Empowerment for Sustainable Use and Management of Natural Resources

Empowerment of the citizenry is important to enable them carry out their duties towards environmental management effectively. The fact that the Constitution of Kenya²⁷¹ and EMCA²⁷² have already dispensed with the need to prove locus standi in environmental matters litigation presents a good opportunity for the citizenry, through relevant support, to hold government and private entities accountable as far as management of environmental resources is concerned.

In the case of *Joseph Leboo & 2 others v Director Kenya Forest Services & another*²⁷³ the Learned Judge observed that "...in my view, any person is free to raise an issue that touches on the conservation and management of the environment, and it is not necessary for such person to demonstrate, that the issues being raised, concern him personally, or indeed, demonstrate that he stands to suffer individually. Any interference with the environment affects every person in his individual capacity, but even if there cannot be demonstration of personal injury, such person is not precluded from raising a matter touching on the management and conservation of the environment...Any person, without the need of demonstrating personal injury, has the freedom and capacity to institute an action aimed at protecting the environment. The plaintiffs have filed this suit as representatives of the local community and also in their own capacity. The community, of course, has an interest in the preservation and sustainable use of forests. Their very livelihoods depend on the proper management of the forests. Even if they had not demonstrated such interest that would not have been important, as any person *who alleges a violation of any law touching on the environment is free to commence litigation to ensure the protection of such environment...*"²⁷⁴ (emphasis added)

(2) Where alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court shall stay proceedings until such condition is fulfilled.

²⁷¹ For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury (Article 70(3)).

²⁷² S.3 (4) A person proceeding under subs. (3) of this s. shall have the capacity to bring an action notwithstanding that such a person cannot show that the defendant's act or omission has caused or is likely to cause him any personal loss or injury provided that such action – (a) is not frivolous or vexatious; or (b) is not an abuse of the court process.

²⁷³ [2013] eKLR, Environment and Land No. 273 of 2013.

²⁷⁴ *Ibid*, Paras 25 & 28.

However, such suits require that the particular persons be first empowered through the relevant information, acquired either through formal, informal or non-formal education or general awareness on the relevant matters. The right to information must therefore be realized to facilitate enjoyment of environmental rights. This can be achieved through implementation of Article 35 of the Constitution, and other enabling laws, which guarantee the right to information.²⁷⁵

It has rightly been argued that citizens are one of a nation's greatest resources for enforcing environmental laws and regulations. This is because they know the country's land and natural attributes more intimately than a government ever will.²⁷⁶ Further, their number makes them more pervasive than the largest government agency, and because citizens work, play, and travel in the environment, each has a personal stake in its beauty, health, and permanence.²⁷⁷ Agenda 21 also tasks the Government to do all that is necessary in giving communities a large measure of participation in the sustainable management and protection of the local natural resources in order to enhance their productive capacity.²⁷⁸

Thus, it is important to ensure that the principle of public participation is well captured in the policy and legal framework to facilitate sustainable management and conservation of environmental resources through approaches that are inclusive, participatory and deliberative as contemplated under the international environmental law. The need for involvement of citizens in the environmental enforcement process has been recommended for several reasons. First, citizen participation in environmental enforcement taps the direct, immediate connection between individuals and their environment. This is because citizens are uniquely knowledgeable about their own communities. Their day-to-day observations give them access to information about environmental conditions that the government could never obtain. Involving citizens in environmental enforcement encourages productive use of this information.²⁷⁹ Second, the injection of varied, non-institutional perspectives and information sources into the enforcement process may improve the quality of enforcement decisions. Allowing and encouraging views from different groups to affect the outcome, may increase compliance, deter violations, and contribute to a more realistic and responsive environmental enforcement strategy.²⁸⁰

Finally, public involvement in enforcement is believed to be a logical next step for democratic political systems that have encouraged public participation in the creation of environmental

²⁷⁵ Article 35(1) states that every citizen has the right of access to—(a) information held by the State; and (b) information held by another person and required for the exercise or protection of any right or fundamental freedom. Also relevant is the Access to Information Act, 2015, which is intended to give effect to Article 35 of the Constitution; to confer on the Commission on Administrative Justice the oversight and enforcement functions and powers and for connected purposes. It classifies environmental information as part of the information that falls under information affecting public interest.

²⁷⁶ Roberts E. & Dobbins J., 'The Role of the Citizen in Environmental Enforcement,' (Environmental Law Institute. 1616 P Street. N.W. Washington. DC 20036, USA).

Available at <http://www.inece.org/2ndvol1/roberts.htm> [Accessed on 21/07/2016]

²⁷⁷ Ibid.

²⁷⁸ Agenda 21, clause 3.7(d).

²⁷⁹ Roberts E. & Dobbins J., 'The Role of the Citizen in Environmental Enforcement,' op cit.

²⁸⁰ Ibid.

statutes and regulations.²⁸¹ Allowing citizens to have a concrete role in implementing the regime they helped to design strengthens public support for and awareness of environmental goals.²⁸² If citizens are denied a role in enforcement, or if they are not educated about and encouraged to assume a permitted role, even the most sophisticated system of environmental protection laws may exist only on paper. As such, developing and nurturing a role for the citizens in enforcement efforts could provide the missing ingredient necessary to make countries' environmental protection goals a reality.²⁸³

In her acceptance speech, Nobel Laureate, the late Prof. Wangari Maathai, summarised the importance of environmental resources to livelihood sustenance and the central role that citizenry can play in solving environmental problems by stating that:

“.....So, together, we have planted over 30 million trees that provide fuel, food, shelter, and income to support their children's education and household needs. The activity also creates employment and improves soils and watersheds. Through their involvement, women gain some degree of power over their lives, especially their social and economic position and relevance in the family....Initially, the work was difficult because historically our people have been persuaded to believe that because they are poor, they lack not only capital, but also knowledge and skills to address their challenges. Instead they are conditioned to believe that solutions to their problems must come from 'outside'. Further, women did not realize that meeting their needs depended on their environment being healthy and well managed. They were also unaware that a degraded environment leads to a scramble for scarce resources and may culminate in poverty and even conflict....In order to assist communities to understand these linkages, we developed a citizen education program, during which people identify their problems, the causes and possible solutions. They then make connections between their own personal actions and the problems they witness in the environment and in society.... (Emphasis added).”²⁸⁴

To facilitate more equitable distribution of accruing benefits among local, often subsistence, and indigenous peoples, there are those who advocate for approaches incorporating community based natural resource management (CBNRM) and other approaches that protect the interests of the local people. The CBNRM approach is built upon three assumptions: management responsibility over the local natural resources that is devolved to community level will encourage communities to use these resources up to sustainable levels; the “community” represents the interests of all its members; and communities are keen to accept management responsibility because they see the

²⁸¹ Ibid; See also generally Rondinelli, D.A. (ed.), ‘Public Administration And Democratic Governance: Governments Serving Citizens,’ 7th Global Forum on Reinventing Government Building Trust in Government 26-29 June 2007, Vienna, Austria, (United Nations, ST/ESA/PAD/SER.E/, United States of America, 2006).

²⁸² Ibid; See also Casey-Lefkowitz, n et al, ‘The Evolving Role Of Citizens In Environmental Enforcement,’ Fourth International Conference On Environmental Compliance And Enforcement, available at <http://www.inece.org/4thvo11/futrell.pdf> [Accessed on 16/07/2016]

²⁸³ Ibid.

²⁸⁴ The Norwegian Nobel Institute, ‘Wangari Maathai: The Nobel Lecture (Oslo, December 10, 2004),’ available at http://nobelpeaceprize.org/en_GB/laureates/laureates-2004/maathai-lecture/ [Accessed on 16/07/2016].

(long-term) economic benefits of sustainable utilisation, and they are willing to invest time and resources in natural resource management.²⁸⁵

Decisions on policies and programs for resource management need to be based on broad citizen participation and the engagement of rural communities that have often been disenfranchised or marginalized.²⁸⁶ Some of the main features of the revised policy framework for forest conservation and sustainable management include, inter alia: the devolution of community forest conservation and management, implementation of national forest policies and strategies, deepening the community participation in forest management through elaborate strategies of 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, the vulnerable and marginalized groups, and user rights that 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.²⁸⁷

8.2.5 Environmental Impact Assessment, Environmental Audit and Monitoring of the Environment

The Constitution of Kenya requires the State to establish systems of environmental impact assessment, environmental audit and monitoring of the environment.²⁸⁸ The *Environment (Management and Coordination) Act (EMCA)*²⁸⁹ tasks National Environmental Management Authority (NEMA) with the responsibility of carrying out Environmental Audit of all activities that are likely to have significant effect on the environment. While Environmental Impact Assessment is conducted before commencement of any new development to minimise negative environmental impacts, for ongoing activities, an Environmental Audit ascertains if the activities in question have significant environmental effects.²⁹⁰

In Kenya, an environmental impact assessment study preparation is generally required to take into account environmental, social, cultural, economic, and legal considerations, and should— identify the anticipated environmental impacts of the project and the scale of the impacts; identify and analyze alternatives to the proposed project; propose mitigation measures to be taken during and after the implementation of the project; and develop an environmental management plan with mechanisms for monitoring and evaluating the compliance and environmental performance which should include the cost of mitigation measures and the time frame of implementing the measures.²⁹¹

²⁸⁵ Shackelton, S. & Campbell, B. (eds), 'Empowering Communities to Manage Natural Resources: Case Studies from Southern Africa,' Center for International Forestry Research, March 2000, p. 10. Available at http://www.cifor.org/publications/pdf_files/Books/Empowering.pdf [Accessed on 20/07/2016].

²⁸⁶ InterAction, Environment & Climate: Overview-Our Work, available at <https://www.interaction.org/project/environment/overview> [Accessed on 6/07/2016].

²⁸⁷ Draft National Forest Policy, 2015, pp. i-ii.

²⁸⁸ Constitution of Kenya, 2010, Article 69(1) (f).

²⁸⁹ No. 8 of 1999, Laws of Kenya (Government Printer, Nairobi, 1999), s.68.

²⁹⁰ FAO, 'Environmental Impact Assessment (EIA) and Environmental Auditing (EA),' available at <http://www.fao.org/docrep/005/v9933e/v9933e02.htm> [Accessed on 20/07/2016].

²⁹¹ Regulation 16, Environmental (Impact Assessment and Audit) Regulations, 2003, Legal Notice 101 of 2003.

Principle 17 of the *Rio Declaration on Environment and Development*, states that environmental impact assessment, as a national instrument, should 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 authority. Effective Environmental Impact Assessment (EIA) has been described as ‘a process for identifying and considering the impacts of an action’. It is ‘not about rejecting development; rather it is about making sure that development proceeds with full knowledge of the environmental consequences’.²⁹² EIA may provide an opportunity for public scrutiny and participation in decision-making; introduce elements of independence and impartiality; and facilitate better informed judgments when balancing environmental and developmental needs.²⁹³ Public participation is believed to be an integral part of the environmental impact assessment process as it creates an opportunity for concerned citizens to express their views on natural resource development.²⁹⁴ Public participation is also encouraged under EIA because, after stakeholders have had the opportunity to express their opinions, they may be more inclined to accept the final outcome decided by the regulators, as they have had the opportunity to express their views.²⁹⁵

The mandatory requirements for Environmental Impact Assessment, Strategic Environmental Assessment²⁹⁶ and Strategic Environmental and Social Assessment (SESA) also present viable channels through which communities can actively participate in sustainable development agenda in the country.²⁹⁷ They can participate in averting environmental degradation or help stop development projects that are likely to water down efforts towards achieving sustainable development. Section 115 of the *County Government Act 2012*²⁹⁸ provides that Public participation in the county planning processes should be mandatory and should be facilitated through—mechanisms provided for in Part VIII²⁹⁹ of the Act; and provision to the public of clear and unambiguous information on any matter under consideration in the planning process, including—clear *strategic environmental assessments* (emphasis added); clear environmental

²⁹² Ingelson, A., et al, ‘Philippine Environmental Impact Assessment, Mining and Genuine Development,’ *Law, Environment and Development Journal*, Vol. 5, No. 1, 2009, p. 7.

²⁹³ Birnie, P. & Boyle, A., “*International Law and the Environment*”, (2nd ed. Oxford University Press, 2002), p.131-132; See also Muigua, K., ‘Environmental Impact Assessment (EIA) in Kenya,’ available at <http://www.kmco.co.ke/attachments/Article/109/A%20Paper%20on%20Environmental%20impact%20assessment.pdf>

²⁹⁴ Ingelson, A., et al, ‘Philippine Environmental Impact Assessment, Mining and Genuine Development,’ op cit, p. 6; See also Okello, N., et al, ‘The doing and un-doing of public participation during environmental impact assessments in Kenya,’ *Impact Assessment and Project Appraisal*, Vol. 27, No.3, 2009, pp.217-226.

²⁹⁵ Ibid, p. 6.

²⁹⁶ "strategic environmental assessment" means a formal and systematic process to analyse and address the environmental effects of policies, plans, programmes and other strategic initiatives (s.2, Environmental Management and Co-ordination (Amendment) Act, No. 5 of 2015); S. 57A, EMCA, No. 8 of 1999; See also the Environmental (Impact Assessment and Audit) Regulations, 2003, Legal Notice 101 of 2003, Regulations 42 & 43.

²⁹⁷ One of the Policy Statements in the National Environment Policy 2013 is that the Government will ensure Strategic Environmental Assessment (SEA), Environmental Impact Assessment, Social Impact Assessment and Public participation in the planning and approval of infrastructural projects (para. 5.6).

²⁹⁸ An Act of Parliament to give effect to Chapter Eleven of the Constitution; to provide for county governments’ powers, functions and responsibilities to deliver services and for connected purposes.

²⁹⁹ Ibid, Ss. 87-92.

impact assessment reports; expected development outcomes; and development options and their cost implications.

Involving communities in identifying and eliminating processes and activities that are likely to endanger the environment is recommended since communities are conscious of such activities that can compromise their livelihoods. This may be informed by the *principle of subsidiarity*, where, arguably, the local communities are the best placed to address the burning environmental issues such as pollution, degradation and over-utilisation (emphasis added).³⁰⁰ They only need technical support from the Government and through collaboration, they can come up with lasting solutions. Where they are not well informed, public awareness through civic education and agricultural field trainings can help them identify the issues. Where funds are allocated for environmental protection, the local people should adequately be represented in deciding the most urgent issues that ought to be addressed. The various sectoral laws, including wildlife, water, forests and wetlands have come up with special kitty to facilitate conservation and effective management of resources. Communities ought to be evidently and adequately represented in committees dealing with such kitty to curb corruption and improve management.

There is also need to establish efficient systems of Strategic Environmental Assessment (SEA), Environmental Impact Assessment (EIA), Strategic Environmental and Social Assessment (SESA) and Environmental Audit and Monitoring of the environment and Environmental Security Assessment (ESA). Strategic Environmental Assessment (SEA) is defined as the process by which environmental considerations are required to be fully integrated into the preparation of *policies, plans and programmes* and prior to their final adoption (emphasis added).³⁰¹ The objectives of the SEA process are to provide for a high level of protection of the environment and to promote sustainable development by contributing to the integration of environmental considerations into the preparation and adoption of specified policies, plans and programmes.³⁰² Environmental impact assessment means a systematic examination conducted to determine whether or not a programme, activity or project will have any adverse impacts on the environment.³⁰³ Environmental audit means the systematic, documented, periodic and objective evaluation of how well environmental organisation, management and equipment are performing

³⁰⁰ See the East African Community Protocol on Environment and Natural Resources Management, 2005. Article 4 (2) (p). One of the principles of environment and natural resources management is: the principle of subsidiarity in the management of the environment and natural resources; See also generally, Protocol (No 2) on the application of the principles of subsidiarity and proportionality, annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union by the Treaty of Lisbon of 13 December, 2007; See also Article 5 of the Treaty on European Union, C 326/1.

³⁰¹ Environmental protection Agency, 'Strategic Environmental Assessment,' Available at <http://www.epa.ie/monitoringassessment/assessment/sea/#.Vi5tmGuJ2CA>. S. 57(2), EMCA, provides that for the avoidance of doubt, the plans, programmes and policies (referred to in the Act) are those that are- (a) subject to preparation or adoption by an authority at regional, national, county or local level, or which are prepared by an authority for adoption through a legislative procedure by Parliament, Government or if regional, by agreements between the governments or regional authorities, as the case may be; (b) determined by the Authority as likely to have significant effects on the environment.

³⁰² Ibid; See also the Environmental (Impact Assessment and Audit) Regulations, 2003, Legal Notice 101 of 2003, Regulations 42 & 43.

³⁰³ Environmental Management and Co-Ordination Act, No 8 of 1999 (Government Printer, Nairobi, 1999), s.2.

in conserving or preserving the environment.³⁰⁴ Strategic Environmental and Social Assessment (SESA) is a more effective tool since it integrates the social issues that are likely to emerge and not just the environmental considerations.³⁰⁵

These exercises should not be just a matter of formality and paper work.³⁰⁶ The affected communities should be afforded an opportunity to meaningfully participate and give feedback on the likely effects on social, economic and environmental aspects of the community.

8.2.6 Addressing Climate Change for Sustainable Development

The Bali Principles of Climate Justice of 2002 (Bali Principles)³⁰⁷ acknowledge that if consumption of fossil fuels, deforestation and other ecological devastation continues at current rates, it is certain that climate change will result in increased temperatures, sea level rise, changes in agricultural patterns, increased frequency and magnitude of "natural" disasters such as floods, droughts, loss of biodiversity, intense storms and epidemics. Further, deforestation contributes to climate change, while having a negative impact on a broad array of local communities.

The Bali Principles also affirm the fact that the impacts of climate change are disproportionately felt by small island states, women, youth, coastal peoples, local communities, indigenous peoples, fisherfolk, poor people and the elderly. Also noteworthy is the assertion that the local communities, affected people and indigenous peoples have been kept out of the global processes to address climate change. The Principles also acknowledge that unsustainable production and consumption practices are at the root of this and other global environmental problems. The impacts of climate change also threaten food sovereignty and the security of livelihoods of natural resource-based local economies. They can also threaten the health of communities around the

³⁰⁴ Ibid.

³⁰⁵ Notably, the proposed law, Energy Bill, 2015, requires under clause 135 (1) (2)(d) that a person who intends to construct a facility that produces energy using coal should, before commencing such construction, apply in writing to the Authority for a permit to do so. Such an application must be accompanied by, inter alia, a Strategic Environment Assessment and Social Impact Assessment licenses. Also notable are the provisions of s. 57A(1) of the Environmental Management Co-ordination (Amendment) Act 2015 which are to the effect that all policies, plans and programmes for implementation shall be subject to Strategic Environmental Assessment.

³⁰⁶ See generally, United Nations, *Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach*, (UNEP, 2004). Available at <http://www.unep.ch/etu/publications/textONUbr.pdf> [Accessed on 20/07/2016]; See also The World Bank, 'Strategic Environmental Assessment,' September 10, 2013. Available at <http://www.worldbank.org/en/topic/environment/brief/strategic-environmental-assessment> [Accessed on 26/10/2015]. The World Bank argues that policy makers in are subject to a number of political pressures that originate in vested interests. The weaker the institutional and governance framework in which sector reform is formulated and implemented, the greater the risk of regulatory capture. The World Bank observes that in situations such as these, the recommendations of environmental assessment are often of little relevance unless there are constituencies that support them, and with sufficient political power to make their voices heard in the policy process. While strong constituencies are important during the design of sector reform, they are even more important during implementation. It follows that effective environmental assessment in sector reform requires strong constituencies backing up recommendations, a system to hold policy makers accountable for their decisions, and institutions that can balance competing and, sometimes, conflicting interests. The World Bank thus affirms its recognition of the strategic environmental assessment (SEA) as a key means of integrating environmental and social considerations into policies, plans and programs, particularly in sector decision-making and reform.

³⁰⁷ Available at <http://www.ejnet.org/ej/bali.pdf> [Accessed on 28/07/2016].

world-especially those who are vulnerable and marginalized, in particular children and elderly people. More importantly, the *Bali Principles* acknowledge in the preamble that combating climate change must entail profound shifts from unsustainable production, consumption and lifestyles, with industrialized countries taking the lead.³⁰⁸

It has rightly been argued that forest and landscape restoration is about more than just trees. It goes beyond afforestation, reforestation, and ecological restoration to improve both human livelihoods and ecological integrity. Key characteristics include the following: Local stakeholders are actively engaged in decision making, collaboration, and implementation; whole landscapes are restored, not just individual sites, so that trade-offs among conflicting interests can be made and minimized within a wider context; landscapes are restored and managed to provide for an agreed, balanced combination of ecosystem services and goods, not only for increased forest cover; a wide range of restoration strategies are considered, from managed natural regeneration to tree planting; and continuous monitoring, learning, and adaptation are central.³⁰⁹

Further, a restored landscape can accommodate a mosaic of land uses such as agriculture, protected reserves, ecological corridors, regenerating forests, well-managed plantations, agroforestry systems, and riparian plantings to protect waterways. Restoration must complement and enhance food production and not cause natural forests to be converted into plantations.³¹⁰

Principle 8(a) of the *Forest Principles of the United Nations Conference on Environment and Development* (UNCED)³¹¹ affirm that efforts should be undertaken towards the greening of the world. Thus, all countries, including developed countries, should take positive and transparent action towards reforestation, afforestation and forest conservation, as appropriate.³¹²

*Draft National Forest Policy, 2015*³¹³ provides for 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.³¹⁴ The overall goal of the Policy is sustainable development,

³⁰⁸ Though non-binding, the Bali Principles give some recommendations that can boost efforts to achieve sustainable development.

³⁰⁹ World Resources Institute, 'Atlas of Forest and Landscape Restoration Opportunities,' available at <http://www.wri.org/resources/maps/atlas-forest-and-landscape-restoration-opportunities> [Accessed on 13/07/2016].

³¹⁰ Ibid.

³¹¹ Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests, Report Of The United Nations Conference On Environment And Development (Rio De Janeiro, 3-14 June 1992), Annex III: Non-Legally Binding Authoritative Statement Of Principles For A Global Consensus on The Management, Conservation and Sustainable Development of All Types of Forests, A/CONF.151/26 (Vol. III).

³¹² Furthermore, Principle 8(b) provides that efforts to maintain and increase forest cover and forest productivity should be undertaken in ecologically, economically and socially sound ways through the rehabilitation, reforestation and re-establishment of trees and forests on unproductive, degraded and deforested lands, as well as through the management of existing forest resources.

³¹³ Forest Policy, 2015 (Government Printer, Nairobi, 2015).

³¹⁴ Ibid, para. 1.1.9.

management, utilisation and conservation of forest resources and equitable sharing of accrued benefits for the present and future generations of the people of Kenya.³¹⁵

The *Draft National Forest Policy, 2015* acknowledges that to achieve the national forest cover target of 10% of land area, the major afforestation effort will have to be in community and private lands. It also states that at present, tree cover on farms is increasing, especially in more densely populated with higher agricultural potential areas. This, according to the Policy, demonstrates that farmers recognize the benefits of tree growing in improving land productivity.³¹⁶ The Policy thus also recommends that the Government should, inter alia, promote partnerships with land owners to increase on-farm tree cover and to reduce pressure on reserved forests.³¹⁷

Further, the Policy emphasizes that participatory forest management and sound conservation practice has potential to improve forest protection, management and growth by involving relevant non-state actors and local communities in planning and implementation.³¹⁸ The *Draft National Land Use Policy 2016* requires that to address the low vegetation cover with other competing land uses, the government should: carry out an inventory of all land cover classifications; establish mechanisms to ensure protection and improvement of vegetation cover over time; incorporate multi stake holder participation in a forestation programmes and initiatives; develop a framework for incentives to encourage maintenance of forest cover; promote the use of alternatives and efficient production methods to reduce demand on forest products; and ensure public participation in stakeholder forums in the determination of planning zones.³¹⁹

It has been asserted that land users require long-term secure rights to use and harvest a piece of land before they will invest time and effort in sustaining its long-term productivity.³²⁰ As a result of past land alienation policies, a significant portion of much of the developing world's forest lands now falls within the public domain, and has become a de facto open access resource.³²¹ If the people using these resources have no enforceable legal or customary rights (to cultivate, graze or collect forest products) they have no incentive to conserve the productive potential of the resources (soil, water, vegetation and animals). Tenurial systems are therefore important in any aspect of natural resource management.³²² Therefore, in many countries it is unlikely that any real progress can be made toward sustainable forest management or forest landscape restoration until tenure issues are addressed and resolved. Arguably, resolution will only come by engaging key

³¹⁵ Para. 3.1.

³¹⁶ Para. 4.5.

³¹⁷ Ibid.

³¹⁸ Para. 8.2.

³¹⁹ Draft National Land Use Policy 2016, para. 3.8.3.

³²⁰ Lamb, D. & Gilmour, D., *Rehabilitation and Restoration of Degraded Forests*. IUCN, Gland, Switzerland and Cambridge, UK and WWF, Gland, Switzerland, 2003. x +110 pp. at p. 66. Available at http://cmsdata.iucn.org/downloads/rehabilitation_and_restoration_of_degraded_forests.pdf [Accessed on 13/07/2016].

³²¹ Ibid.

³²² Ibid; see generally, *Rethinking Forest Partnerships and Benefit Sharing: Insights on Factors and Context that Make Collaborative Arrangements Work for Communities and Landowners*, Report No. 51575-GLB, (The International Bank for Reconstruction and Development / The World Bank, Washington, DC, 2009).

interest groups in a participatory and constructive dialogue with a commitment to an equitable outcome.³²³

In a bid to deal with some of the highlighted challenges, the *Forest Conservation and Management Act, 2016*³²⁴ was enacted to give effect to Article 69 of the Constitution with regard to forest resources; to make provision for the conservation and management of forests; and for connected purposes. The Act applies to all forests on public, community and private lands.³²⁵ The guiding principles of the law include: public participation and community involvement in the management of forests; and consultation and co-operation between the national and county governments. The Act also requires the Cabinet Secretary, in consultation with the relevant stakeholders, develop a national forest management policy for the sustainable use of forests and forest resources, and which must be reviewed at least once in every five years.³²⁶

While the Act has attempted to create opportunities for community participation, the same falls short of constitutional threshold of active community participation in decision making. It also largely adopts the protectionist approach of its predecessors, where communities are only to receive instructions from the state organs and also receive some of the forest resources as mere incentives and not benefits adequate to make them appreciate conservation agenda of the state. Unilateral efforts to achieve at least ten percent tree cover may not bear much fruits since communities may feel used by the State organs without necessarily benefiting from the same.

Deforestation contributes to climate change and thus, it must be tackled as one of the means of achieving the sustainable development agenda. Kenya's efforts towards climate change mitigation are commendable. In March 2012, NEMA obtained accreditation as a National Implementing Entity (NIE) by the Adaptation Fund Board of the United Nations Framework Convention on Climate Change (UNFCCC)³²⁷. This accreditation gave NEMA the mandate to offer vetting, approval and supervision of projects financed by the Adaptation Fund.³²⁸ Later on, NEMA submitted the Kenya Climate Change Adaptation Programme (KCCAP) Proposal to the AF Board for its consideration. The Proposal was approved and NEMA received approximately Ksh.1 Billion for its implementation. The National Environment Management Authority launched a Sh1 billion climate change programme in January 2016, titled 'Integrated Programme to Build Resilience to Climate Change and Adaptive Capacity of Vulnerable Communities in Kenya' that

³²³ Ibid, pp. 66-7.

³²⁴ No. 34 of 2016 (Government printer, Nairobi, 2016).

³²⁵ Ibid, s.3.

³²⁶ Ibid, s.5.

³²⁷ The ultimate objective of the Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner. (UN General Assembly, United Nations Framework Convention on Climate Change : resolution / adopted by the General Assembly, 20 January 1994, A/RES/48/189, Article 2)

³²⁸ National Environment Management Authority, 'Adaptation Fund and GCF programmes,' available at http://www.nema.go.ke/index.php?option=com_content&view=Article&id=229&Itemid=461 [Accessed on 28/07/2016].

will be implemented in 14 counties. The programme is to be implemented in conjunction with three executing entities namely Coast Development Authority, Kenya Forestry Research Institute and Tana and Athi River Development Authority and eight other Sub Executing Entities.³²⁹ The Green Climate Fund (GCF) is a finance mechanism established under the UNFCCC.

Furthermore, the Green Climate Fund (GCF)³³⁰ accepted the application of National Environment Management Authority (NEMA) based on its eligibility to be accredited as an Implementing Entity (IE) under the Green Climate Fund. The decision was made during the twelfth meeting of the GCF Board, held from 8th to 10th March 2016, in Songdo, Korea.³³¹ NEMA is thus the national implementing entity for Adaptation Fund project pipeline in Kenya. Following the GCF accreditation, NEMA has become the first government institution in Kenya, accredited to have direct access for GCF funding of up to USD 10 million, having submitted its application in May 2015.³³²

In addition to the foregoing, the *National Climate Change Response Strategy 2010* (NCCRS)³³³, has identified the forestry sector as a strong vehicle for undertaking both mitigation and adaptation efforts and intends to exploit incentives provided within the framework of UNFCCC, especially the Reducing Emissions from Deforestation and Forest Degradation (REDD) mechanism, to implement sustainable forest management approaches.³³⁴

Kenya is also an observer country to the UN-REDD Programme and it is a participant country to the Forest Carbon Partnership Facility (FCPF).³³⁵ As part of its FCPF programme, Kenya is well on its way to developing its National REDD+ Strategy and implementation framework, in addition to establishing a Forest Reference Level/Reference Emission Level and a National Forest Monitoring System.³³⁶ Kenya has already put in place the *Climate Change Act*³³⁷ to provide for a regulatory framework for enhanced response to climate change; to provide for mechanisms and measures to achieve low carbon climate development, and for connected purposes. The Act notably establishes the National Climate Change Council to coordinate the country's climate

³²⁹ Ibid.

³³⁰ This fund is established to fund climate change adaptation and mitigation projects in developing countries. The Fund is a unique global initiative to respond to climate change by investing into low-emission and climate-resilient development. GCF is accountable to the United Nations. It is guided by the principles and provisions of the UN Framework Convention on Climate Change (UNFCCC). It is governed by a Board of 24 members, comprising an equal number of members from developing and developed countries. The Green Climate Fund is the only stand-alone multilateral financing entity whose sole mandate is to serve the Convention and that aims to deliver equal amounts of funding to mitigation and adaptation.

³³¹ National Environment Management Authority, 'Adaptation Fund and GCF programmes,' op cit.

³³² Ibid.

³³³ See para. 4.2.5.2, *National Climate Change Response Strategy 2010*, Government of Kenya, 2010.

³³⁴ The REDD Desk, *REDD in Kenya*, available at <http://theredddesk.org/countries/kenya> [Accessed on 28/07/2016].

³³⁵ Ibid.

³³⁶ Ibid; See also Gichu, A. & Chapman, S., *Overview of REDD+ in Kenya, REDD+ Law Project -Briefing Paper*, July 2014. Available at

[http://www.4cmr.group.cam.ac.uk/filecab/redd-law-](http://www.4cmr.group.cam.ac.uk/filecab/redd-law-project/20140821%20BP%20Overview%20of%20REDD-%20in%20Kenya.pdf)

[project/20140821%20BP%20Overview%20of%20REDD-%20in%20Kenya.pdf](http://www.4cmr.group.cam.ac.uk/filecab/redd-law-project/20140821%20BP%20Overview%20of%20REDD-%20in%20Kenya.pdf) [Accessed on 28/07/2016].

³³⁷ *Climate Change Act*, No. 11 of 2016.

change efforts.³³⁸ These efforts and initiatives should be supported as they demonstrate Kenya's commitment to climate change mitigation, a positive step towards attaining sustainable development.

8.2.7 Sustainable and Inclusive Approaches to Environmental Resources Management

The now repealed *Forest Act, 2005*³³⁹ was enacted, as an attempt to provide for involvement of local communities living around any forest in the management of those forests.³⁴⁰ The Act provided for Community Forest Associations, where local communities come together and form an association, through which they can manage forest resources around them and benefit from the sustainable utilization of forest produce.³⁴¹ The Forests Act (2005) introduced participatory forest management, through the engagement of local communities, and the promotion of the private sector investment in gazetted forest reserves, accompanied by associated institutional and organisation change, notably the establishment of the Kenya Forest Service (KFS)³⁴², and the formation of Community Forest Associations (CFAs).³⁴³

One of the functions of a forest conservation committee in respect of each forest conservancy area under the Act is, in consultation with the Board, to assist local communities to benefit from royalties and other rights derived from flora or fauna traditionally used or newly discovered by such communities.³⁴⁴ However, one of the most glaring shortcomings in this provision is the exclusion of communities in such deliberations. This is because, although the Act provided that such a committee will include four persons knowledgeable in forestry matters nominated by forest associations operating in the conservancy area, it is noteworthy that such associations are optional and an area may not necessarily have such associations.³⁴⁵

It is also worth mentioning that the associations, as envisaged in the structure under the Act, only target formally educated people and locks out those who may possess traditional ecological knowledge but not necessarily formal environmental law knowledge.³⁴⁶ In such an instance, the interests of the affected community may not be fully represented since they may have been locked out. As such, their participation may be limited and only exist as a formality and legal requirement, without necessarily benefitting the communities in question.

The Constitution of Kenya recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.³⁴⁷ Further, the Constitution obligates the State to,

³³⁸ Ibid, s. 5.

³³⁹ No. 7 of 2005, Laws of Kenya. The Act has since been repealed by the Forest Conservation and Management Act, No. 34 of 2016.

³⁴⁰ Part IV, SS. 45-48.

³⁴¹ S.2: "forest community" means a group of persons who- a) have a traditional association with forest for purposes of livelihood, culture or religion; b) are registered as an association or other organization engaged in forest conservation.

³⁴² S.4, No. 7 of 2005.

³⁴³ No. 7 of 2005, S. 45.

³⁴⁴ Ibid, s. 13(3) (e).

³⁴⁵ Ibid, s. 13(4).

³⁴⁶ S. 45(3) of the Forest Act 2005 (Repealed) outlines the formal requirements of such an association, before registration.

³⁴⁷ Article 11(1), Constitution of Kenya 2010.

inter alia—promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage; recognise the role of science and indigenous technologies in the development of the nation; and promote the intellectual property rights of the people of Kenya.³⁴⁸

The important role of communities in resource management has recently been acknowledged and this is commendable. For instance, the National Land Commission Chairman was recently quoted as saying that resettling traditional forest-dwelling communities in their natural habitats can play an important role in restoring the country's forest cover.³⁴⁹ He added that such people have the traditional skills needed to help the Government conserve the forests.³⁵⁰ He also affirmed the importance of a rights based approach to environmental conservation, where he asserted that securing the tenure rights of forest communities is the best way to protect their human rights while securing the forests for the nation.³⁵¹ If the Commission adopts such an approach, they are likely to boost chances of succeeding in environmental conservation and enhancing meaningful and active participation of communities in natural resources and environmental conservation, especially with regard to forests.

It is also arguable that the Act did not specifically spell out how communities are to be involved in decision-making processes. Where CFAs are formed, it is noteworthy that the Act does not have substantive provisions on how such associations can participate in decision-making processes. They are portrayed as recipients of instructions from the KFS so that they can even be deregistered where it deems fit to the Director of KFS to do so.³⁵² Thus, this Act seems to have adopted both incentives based and protectionist approaches to management, both of which have not had any major success. Even where CFAs have been formed, the same cannot be said to have been very successful due to a number of reasons. Considering that CFAs involve a limited number of people, they may not be said to be representative of the majority and therefore even where they receive benefits, the same may not flow to the rest of population.

Secondly, CFAs are registered by few people who are interested in doing so and the same are not necessarily representatives of the majority of the people. This means, therefore, that even where they make decisions regarding formulation and implementation of forest programmes consistent with the traditional forest user rights of the community concerned, the same cannot be said to be a representative voice of the majority. Community, in this context and as defined in the Act, does not necessarily mean the whole community.

The forest Policy acknowledges that the promulgation of the Constitution brought new requirements for natural resource management such as public participation, community and gender rights, equity in benefit sharing, devolution and the need to achieve 10% forest cover among others.³⁵³ Therefore, the need to enact supporting legislation following the promulgation

³⁴⁸ Article 11(2), Constitution of Kenya 2010.

³⁴⁹ Kibet L., 'Swazuri reveals plans to recognise forest settlers,' *The Standard*, Thursday, July 28, 2016 (The Standard Group, Nairobi, 2016), p. 2.

³⁵⁰ *Ibid.*

³⁵¹ *Ibid.*

³⁵² S. 48, Forest Act 2005 (repealed).

³⁵³ *Ibid.*, para. 2.1.1.

of the constitution is required 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.³⁵⁴

With regard to wildlife and biodiversity, it has been observed that many of the regions with abundant and diverse wildlife communities remaining in East Africa are occupied by pastoralists.³⁵⁵ Further, it has also been documented that recent studies show that the majority of the local people around protected areas have negative feelings about state policies and conservation programmes. The alienation of grazing land for the exclusive use of wildlife and tourists has a very direct impact upon the pastoralist communities, and prompts them to raise questions about African wildlife policy – as if it leads to a ‘people versus animals’ conflict.³⁵⁶ The local communities continue to incur wildlife-related losses and insecurity rather than benefits, while the government and foreign investors continue to draw large amounts of foreign income from parks through the lucrative tourism industry.³⁵⁷

The National Wildlife Conservation and Management Policy, 2012 (Wildlife Policy 2012) observes that since Kenya is rich in natural resources, including a vast array of wildlife, and due to its species’ richness, endemism and ecosystem diversity, under the Convention on Biological Diversity Kenya is categorized as a mega-diverse country.³⁵⁸ Accordingly, the Policy affirms the need for different conservation priorities and measures, for each of the ecosystems. This is accredited to a combined set of attributes which include: variability in climate, topography, diversity in ecosystems and habitats ranging from mountain ranges to semi-arid and arid areas to marine and freshwater.³⁵⁹

Wildlife is required to contribute directly and indirectly to the local and national economy through revenue generation and wealth creation.³⁶⁰ Notably, the Policy observes that Kenya’s wildlife is increasingly under threat and consequently opportunities are being lost for it to positively contribute to economic growth, wealth creation and increased employment. Much of this wildlife occurs outside the protected areas on lands owned by communities and other different organizations/persons. Communities consider the presence of wildlife on their land as a burden rather than an opportunity for gaining benefits.³⁶¹

From the Policy, it is also worth noting the acknowledgement that Kenyan communities have lived amongst, and used, wildlife resources since time immemorial without formal policy and legislation. These communities ensured conservation of the wildlife resource through cultural and

³⁵⁴ Ibid, para. 2.1.2.

³⁵⁵ Okech, R.N., ‘Wildlife-community conflicts in conservation areas in Kenya,’ African Journals Online, p. 65. Available at <http://www.ajol.info/index.php/ajcr/Article/download/63311/51194> [Accessed on 22/07/2016].

³⁵⁶ Ibid.

³⁵⁷ Ibid, p. 74.

³⁵⁸ Republic of Kenya: Ministry of Forestry and Wildlife, National Wildlife Conservation and Management Policy, 2012, p. 1.

³⁵⁹ Ibid.

³⁶⁰ Ibid.

³⁶¹ Ibid.

social bonds, and traditional practices. Sacred beliefs centred on certain wildlife species ensured that conservation principles became part of their way of life.³⁶² It has been observed that when colonial governments were established in Africa, they placed the control and management of all wildlife and the lands on which it existed under state ownership. Local communities were, in all except a few cases, forcibly relocated and alienated from the resources they, or their chiefs, formerly had the right to own and control. The argument for this was that they did not have the knowledge, the will, or the training to manage the wildlife in a sustainable way.³⁶³ Communities around these protected areas were seen as the principal threat to wildlife, and the governments, wildlife authorities in particular, focused their attention on barring members of the community from disturbing the areas and the wildlife therein, and this continued even with post-colonial governments.³⁶⁴

The *Wildlife Conservation and Management Act, 2013*³⁶⁵ was enacted, as a result of the Wildlife Policy 2012, to provide for the protection, conservation, sustainable use and management of wildlife in Kenya and for connected purposes.³⁶⁶ The Act affirms that benefits of wildlife conservation should be derived by the land user in order to offset costs and to ensure the value and management of wildlife do not decline; wildlife conservation and management should be exercised in accordance with the principles of sustainable utilization to meet the benefits of present and future generations; and benefits accruing from wildlife conservation and management should be enjoyed and equitably shared by the people of Kenya.³⁶⁷

The functions of the Kenya Wildlife Service, under the Act, include, collecting revenue and charges due to the national government from wildlife and, as appropriate, develop mechanisms for benefit sharing with communities living in wildlife areas, and developing mechanisms for benefit sharing with communities living in wildlife areas.³⁶⁸ The Act further establishes the County Wildlife Conservation and Compensation Committee whose functions include: overseeing the preparation and implementation of management plans on community and private land under the provisions of this Act; ensuring that benefits derived from the use of wildlife resources are distributed in accordance with the provisions of this Act; and bringing together all relevant stakeholders within the county to actively harness their participation in the planning and implementation of projects and programmes related to the protection, conservation and management of wildlife resources in the county.³⁶⁹

With regard to forests, it has been observed that the management regimes of public forests (and arguably even other natural resources in Kenya), whether they are protectionist oriented or

³⁶² Ibid, p.2.

³⁶³ Songorwa, A.N., et al, 'Community-Based Wildlife Management in Africa: A Critical Assessment of the Literature,' *Natural Resources Journal*, vol. 40, summer, 2000, pp. 603-643 at pp. 603-604.

³⁶⁴ Ibid, p. 604.

³⁶⁵ The Wildlife Conservation and Management Act, No. 47 of 2013.

³⁶⁶ Ibid, Preamble.

³⁶⁷ Ibid, s.4.

³⁶⁸ Ibid, s.7 (e) (f).

³⁶⁹ Ibid, s. 19(b) (c) (d).

incentive-based are important in determining outcomes of conservation and sustainable use.³⁷⁰ Kenya has historically adopted a protectionist model, where conservation strategies have been dominated by attempts to fence off or reserve areas for nature and exclude people from the reserved areas, and also involved the creation of protected areas (national parks, game reserves and national forest reserves), the exclusion of people as residents, prevention of consumptive use, and minimisation of other forms of human impact.³⁷¹ Broadly, this approach viewed development objectives of local communities as being in direct conflict with the objectives of biodiversity conservation.³⁷²

As far as wildlife biodiversity is concerned, it has been contended that the involvement and support of local communities in wildlife conservation is a prerequisite to effective and long-term conservation of wildlife and wildlands as part of the terrestrial biodiversity.³⁷³ To this extent, it is argued that as a resource, wildlife must be of value to humans and contribute to human development. In other words, it must directly benefit the people who have the option to use the wildlands for other purposes.³⁷⁴ Consequently, in spite of any existing controversies between the purely protectionist approach to wildlife management and the conservation approach, it is argued that it is the local communities who are to determine whether wildlife conservation is a priority form of land use.³⁷⁵

It has been recommended that involving local communities in sustainable natural resource use and conservation must be encouraged. Arguably, no rural-based education about the use of such resources will succeed if local community needs and opinions are not met and incorporated in conservation practice and policies. If they do not benefit from biodiversity resources, and are not compensated for opportunity costs and wildlife-induced losses, they will not support the conservation of biodiversity.³⁷⁶ Lastly, it has been suggested that a national land use plan can also help and will put into perspective land use practices that are compatible with the socio-economic needs, natural resource endowment, and ecological and climatic constraints within different regions of the country.³⁷⁷ There is hope for Kenya after the recently developed Draft National

³⁷⁰ Guthiga, P.M., 'Understanding Local Communities' Perceptions Of Existing Forest Management Regimes of A Kenyan Rainforest,' *International Journal of Social Forestry (IJSF)*, 2008, Vol. 1, No.2, pp.145-166 at p. 146.

³⁷¹ *Ibid*, p. 146.

³⁷² *Ibid*.

³⁷³ Sibanda, B.M.C. & Omwega, A.S., 'Some Reflections on Conservation, Sustainable Development And Equitable Sharing of Benefits From Wildlife in Africa: The Case of Kenya and Zimbabwe,' *South African Journal Of Wildlife Research*, Vol. 26, No. 4, 1996, pp. 175-181 at p 175.

³⁷⁴ *Ibid*.

³⁷⁵ *Ibid*; see generally Grossman, E. (ed), 'Integrating Land Use Planning & Biodiversity,' (Defenders of Wildlife, Washington, D.C., 2003). Available at http://www.defenders.org/publications/integrating_land_use_planning_and_biodiversity.pdf [Accessed on 27/07/2016]; See also Kiss, A., 'Making Biodiversity Conservation A Land Use Priority,' available at <http://www2.gsu.edu/~wwwceec/special/AgiBookChapter2002.pdf> [Accessed on 27/07/2016]

³⁷⁶ Okech, R.N., 'Wildlife-community conflicts in conservation areas in Kenya,' *African Journals Online*, op cit at p.78.

³⁷⁷ *Ibid*, p. 78; See also generally, Wehrmann, B. (ed), 'Land Use Planning: Concept, Tools and Applications,' (Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, Eschborn, 2012). Available at <https://www.giz.de/fachexpertise/downloads/Fachexpertise/giz2012-en-land-use-planning-manual.pdf> [Accessed on 27/07/2016]

Land Use Policy 2016³⁷⁸ whose overall goal is to provide legal, administrative, institutional and technological framework for optimal utilization and productivity of land and land related resources in a sustainable and desirable manner at National, County and local level.³⁷⁹

With regard to natural resources and the equitable sharing of the accruing benefits, the International Finance Corporation, a member of the World Bank Group (WBG), argues that Governments face competing priorities when designing policies that determine when, how, and by whom the natural resources will be developed.³⁸⁰ From a benefit-sharing perspective, such policies need to embrace the interests of current and future generations and the rights, interests, and needs of different levels of government, communities, and other stakeholders.³⁸¹ Further, with specific reference to extractives industry, the role of government in establishing a framework to manage and invest revenues derived from oil, gas, and mining projects is crucial to ensure that the sector contributes positively to sustainable development.³⁸²

Sustainable exploitation, utilisation, management and conservation of the environment and natural resources and equitable sharing of the accruing benefits are key in fighting poverty and consequently, empowering communities for overall national development. Indeed, this is reflected in the *2030 Agenda for Sustainable Development*,³⁸³ which recognises that eradicating poverty in all its forms and dimensions, including extreme poverty, is the greatest global challenge

³⁷⁸ Developed by the Ministry of Lands and Physical Planning, Kenya, May 2016.

³⁷⁹ Ibid, para. 1.4. Specifically the policy shall offer a framework of recommendations and principles designed to ensure the maintenance of a land use system that will provide for:

- a) Land-use planning, resource allocation and resource management for sustainable development to promote public good and general welfare;
- b) environmental management and sustainable production initiatives in the utilization of land resources
- c) Coordination and integration of institutional linkages in planning at sectoral and cross-sectoral levels to foster collaboration and decision making among different land users.
- d) Optimum utilization of land resources to meet governance, social-economic, political and cultural obligations of the people of Kenya.
- e) Anchoring land development initiatives that will respond positively to the market demands.
- f) Integrated framework for the preparation of a National Spatial Plan and review of various land use plans.
- g) Mainstreaming of gender and special interest groups in land use planning and management.
- h) A comprehensive, efficient and affordable computer based land use information management system.
- i) An appropriate, accountable and democratic institution for land use conflicts resolution.
- j) Mitigating problems associated with poor land use;

³⁸⁰ International Finance Corporation, 'The Art and Science of Benefit Sharing in the Natural Resource Sector,' Discussion Paper, February 2015, p. 7. Available at http://www.ifc.org/wps/wcm/connect/8e29cb00475956019385972fbd86d19b/IFC_Art+and+Science+of+Benefits+Sharing_Final.pdf?MOD=AJPERES&CACHEID=8e29cb00475956019385972fbd86d19b [Accessed on 13/07/2016].

³⁸¹ Ibid.

³⁸² Ibid, p. 11.

³⁸³ United Nations, Transforming our world: the 2030 Agenda for Sustainable Development, Resolution adopted by the General Assembly on 25 September 2015, A/RES/70/1; See also United Nations General Assembly, "The road to dignity by 2030: ending poverty, transforming all lives and protecting the planet," Synthesis Report of the Secretary-General on the post-2015 Sustainable development agenda. A/69/700. para.45.

and an indispensable requirement for sustainable development. Some of the Agenda's key principles include sustainability and inclusivity.³⁸⁴

The existing policies, legal and regulatory frameworks, as highlighted in select statutes, appear to suggest that the sustainable management of resources agenda is one to be driven by the State, especially in terms of decision-making, and not in collaboration with the local community. The Constitution envisages a collaborative approach between communities and the State. Decision making processes still seem to be largely top-down in nature and communities are only afforded opportunities to apply for resource user rights, with little or no consultations regarding management.

*Agenda 21*³⁸⁵ provides that while managing resources sustainably, an environmental policy that focuses mainly on the conservation and protection of resources must take due account of those who depend on the resources for their livelihoods. Otherwise, it could have an adverse impact both on poverty and on chances for long-term success in resource and environmental conservation.³⁸⁶

The overall agenda is to promote conservation and sustainable use of oceans and seas, freshwater resources, as well as forests, mountains and drylands and to protect biodiversity, ecosystems and wildlife while at the same time using these resources to address human needs.³⁸⁷ The Constitution of Kenya creates an opportunity where, through devolution, communities are supposed to be empowered by devolving power from the state to local institutions of decision-making as a way of empowering local communities to manage natural resources and environmental matters. There is also a need to put in place a framework that clearly defines the role of various stakeholders. The State should also consult widely when coming up with the methods of benefit sharing especially with regard to the local community.

It is only through mobilizing the efforts of all the relevant stakeholders that the constitutional provisions on the environment and natural resources can effectively be implemented and make it possible to achieve sustainable development. The various sectoral laws and policies must be designed in a way that protects the environment from degradation, and also involves communities through measures that encourage active participation in benefit sharing or decision-making processes, whether through incentives or otherwise.

There is a clear need to nurture the environment for sustainable development in Kenya.

9. Natural Resources Exploitation and Sustainable Development

Easing the pressure on the environment through diversification of livelihood means is essential to facilitate protection, conservation and replenishment of the environment and the resources

³⁸⁴ Ibid.

³⁸⁵ (A/CONF.151/26, vol.II), United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992, Agenda 21.

³⁸⁶ Ibid, Clause 3.2.

³⁸⁷ Para. 33, United Nations, Transforming our world: the 2030 Agenda for Sustainable Development, Resolution adopted by the General Assembly on 25 September 2015, A/RES/70/1. Goal 15 thereof also requires Member States to protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss.

therein. Africa is well-endowed with natural resource wealth and as a result, there are many exploration and exploitation activities going on all over the continent.³⁸⁸ Most African countries depend on agriculture for food and exports. Agricultural products from Africa are exported to the global market but fetch relatively low prices since there is little or no value addition done in Africa. Economic talks about African economy observe that Africa's resources have fueled economic growth but most Africans have not benefited.³⁸⁹

Governments bear the primary responsibility for equitably managing resources for the benefit of their people. Any act of derogation or violation of this right is greatly condemned under the various international and regional legal instruments on human rights.³⁹⁰ The resources are first and foremost to be used for improving livelihoods and empowering the people in all aspects of their lives including, political, social and economic. The overall wellbeing of the people must be balanced with that of the environment in the discussion for sustainable use and management of natural resources, for sustainable development.

It has been observed that the view that poverty is a shortage of income ought to be changed to one that perceives poverty as 'unfreedoms' of various sorts: the lack of freedom to achieve even minimally satisfactory living conditions.³⁹¹ Low income can contribute to that, but other factors such as the lack of schooling facilities, absence of health facilities, unavailability of medicines, the suppression of women, hazardous environmental features and lack of jobs do also play a major role. Therefore, poverty can be reduced through addressing all these issues.³⁹² Addressing these issues requires mobilization of resources by the state. This mobilization depends on a number of factors which include but are not limited to sound institutional and legal frameworks, streamlining the governance system, empowering the citizenry to participate in the governance matters, amongst other measures.

In exercising permanent sovereignty over natural resources, States must as a matter of obligation use the resources for national development and the well-being of the people and ensure conservation and preservation of the same.³⁹³ Indeed, this is echoed under the Constitution of Kenya 2010, Article 69(1), which lay out the state obligations toward environment.

To reduce poverty in Africa and steer the continent to its full potential, value addition model is the best alternative rather than a commodity export model. By this model, Africans would use the

³⁸⁸ Rajaram, A., "Rich Countries, Poor People; Will Africa's Commodity Boom Benefit the Poor", available on <http://blogs.worldbank.org/africacan/rich-countries-poor-people-will-africa-s-commodity-boom-benefit-poor> [Accessed on 7/01/ 2014].

³⁸⁹ Robb, C.K., Executive Director of Africa Progress Panel "How Africa's resources can Lift Millions out of Poverty." Available at www.cnn.com/2013/07/25/opinion/africas-natural-resources-millions-overty/ [Accessed on 15/01/ 2014].

³⁹⁰ See Article 30, UDHR; Article 5, ICESCR; and Article 21.2, Banjul Charter.

³⁹¹ Green, D., *From Poverty to Power: How active citizens and effective states can change the world*, (2nd ed., 2012), p. IX (Foreword by Amartya Sen), Rugby, UK: Practical Action Publishing and Oxford: Oxfam International, Available at http://www.oxfamamerica.org/static/media/files/From_Poverty_to_Power_2nd_Edition.pdf [Accessed on 24/02/2014].

³⁹² *Ibid.*

³⁹³ UN Res. 1803/XVII, 1962.

resources they have as anchors for regional growth clusters and then ensure that they attract value-addition industries.³⁹⁴ Locally produced food and other potential income earners natural resources could undergo local value addition and be exported either within African region markets or out of Africa. This would have a positive effect on the economic wellbeing of all persons starting from the grassroots levels. Exporting fully processed goods instead of raw commodities is said to result in a much higher percentage of their value staying in African countries and many more opportunities for families to gain livelihoods and exit poverty.³⁹⁵

Even if Africa were to improve on resource utilisation without creating jobs for the people, the revenue from resources would be inadequate to cater for the needs of the people. Thus, there is a need to create jobs for the rapidly growing population. This would of course import the need to provide good education to equip people with skills and knowledge suitable for the job market. For effective job creation, Africa must also invest in its people through quality education. The money generated from the natural resources should also be invested in the education sector so as to empower the people. Education and job opportunities will empower the poor. It is generally accepted that effective poverty reduction cannot be achieved without the empowerment of the poor.³⁹⁶

10. Climate Change and Sustainable Development

The United Nations Framework Convention on Climate Change (UNFCCC)³⁹⁷ defines climate change as a “*change of climate that is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and that is in addition to natural climate variability observed over comparable time periods*”.³⁹⁸ It is noteworthy that while the foregoing definition attributes climate change to human activity in a generalized manner, Kenya’s *Climate Change Act, 2016*³⁹⁹ defines climate change to mean a change in the climate system which is caused by significant changes in the concentration of greenhouse gases as a consequence of human activities and which is in addition to natural climate change that has been observed during a considerable period.⁴⁰⁰

The *Agenda 2030 on Sustainable Development* calls on countries to take urgent action to combat climate change and its impacts.⁴⁰¹ It has been argued that some of the most adverse effects of climate change will be in developing countries, where populations are most vulnerable and least likely to easily adapt to climate change, and that climate change will affect the potential for

³⁹⁴ Ngwenya, S., “Africa has to Shed off the Resource Curse Stigma” op. cit.

³⁹⁵ Value Added in Africa, Available at <http://www.ideaonline.ie/content/value-added-africa> [Accessed on 24/02/2014].

³⁹⁶ United Nations High Commissioner for Human Rights, Principles And Guidelines For A Human Rights Approach To Poverty Reduction Strategies, HR/PUB/06/12, p. 9.

³⁹⁷ United Nations Framework Convention on Climate Change (United Nations, 1992), Article 1(2).

³⁹⁸ UN General Assembly, United Nations Framework Convention on Climate Change: resolution / adopted by the General Assembly, 20 January 1994, 1771 UNTS 107; S. Treaty Doc No. 102-38; U.N. Doc. A/AC.237/18 (Part II)/Add.1; 31 ILM 849 (1992).

³⁹⁹ No. 11 of 2016, Laws of Kenya.

⁴⁰⁰ S. 2, No. 11 of 2016, Laws of Kenya.

⁴⁰¹ United Nations, Transforming our world: the 2030 Agenda for Sustainable Development, Goal 13.

development in these countries.⁴⁰² This vulnerability has been attributed to their reliance on agriculture, their lower tolerance to coastal and water resource changes, and lower financial, technical, and institutional capacity to adapt.⁴⁰³

While the foregoing assertion may bear some truth in it, it is also true that climate change has had a global impact to a point where the international community has already come together to put in place measures aimed at addressing the scourge.⁴⁰⁴ Climate change has been associated with direct economic impacts, crop failure due to climate change which could also increase unemployment, destabilised food security, further increasing competition for scarce resources and increase social inequity, and in addition, risks associated with sea-level rise in some of the world's poorest regions, such as displacement.⁴⁰⁵ As such, climate change is relevant to priority development objectives such as combating poverty, food security, access to basic services such as clean water, sanitary living conditions and energy, and education.⁴⁰⁶

11. Environmental Security and Sustainable Development

The importance of the environment cannot be overstated since it ensures survival of all forms of life. The enjoyment of the right to life depends on a clean and healthy environment.⁴⁰⁷ A secure environment makes possible the exercise of the right to life certain by ensuring that any threats to life are neutralized. Although there have been widespread calls for a more secure environment, backed with conventions and global agreements on the present problem of an environment that is under threat, the uptake of actions to curb the same has been dismal and insufficient, to say the least. State and governmental efforts have not been satisfactory to effect the agreed upon principles and mechanisms.

Environmental security is defined as environmental viability for life support, with three sub-elements; preventing or repairing military damage to the environment, preventing or responding to environmentally caused conflicts, and protecting the environment due to its inherent moral value.⁴⁰⁸ It has also been defined as the process of peacefully reducing human vulnerability to human-induced environmental degradation by addressing the root causes of environmental degradation and human insecurity.⁴⁰⁹

⁴⁰² Beg, N., 'Linkages between climate change and sustainable development,' *Climate Policy*, Vol. 2, 2002, pp.129–144 at p. 129.

⁴⁰³ *Ibid*, p.133.

⁴⁰⁴ See Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016), chapter Six, for the full discussion.

⁴⁰⁵ Beg, N., 'Linkages between climate change and sustainable development,' *Climate Policy*, Vol. 2, 2002, p. 133.

⁴⁰⁶ *Ibid*, p. 134.

⁴⁰⁷ See generally, Stock, A., *The Right to a Healthy Environment: How to use international legal mechanism for the protection of our environment and our health – A Manual*, (Women in Europe for a Common Future, Utrecht/Munich, September 2007).

⁴⁰⁸ Ayeni, A.O. & Olorunfemi, F.B., 'Reflections on Environmental Security, Indigenous Knowledge and the Implications for Sustainable Development in Nigeria,' *Jorind*, Vol. 12, No. 1, June, 2014, pp. 46-57 at p. 51.

⁴⁰⁹ Rita, F., "The Environmental Security Debate and Its Significance for Climate Change," *The*

International Spectator: Italian Journal of International Affairs, Vol. 43, Issue 3, 2008, pp.51-65 at p. 56.

Competition for scarce resources may lead to a ‘survival of the fittest’ situation.⁴¹⁰ In such circumstances, environmental degradation poses a higher potential for conflict, as every group fights for their survival.⁴¹¹ Even where resources are abundant, conflicts can arise when one group controls a disproportionate portion of the same (“Resource capture”). Resource capture occurs when the supply of a resource decreases due to either depletion or degradation and/or demand increases (due to population and/or economic growth).⁴¹² This encourages the more powerful groups in a society to exercise more control and even ownership of the scarce resource, thereby enhancing their wealth and power.⁴¹³ For instance, land has been an emotive issue in Kenya as it is in the hands of a few people in the country, and this has often led to tribal clashes.⁴¹⁴ Environmental security is not only concerned with sustainable management of natural resources for the sake of achieving sustainable development but also incorporates the moralistic duty to conserve the environment for the sake of the other forms of life namely animals and plants. The quest for sustainable development should not only be informed by the human desire to secure their future but should also include the duty to safeguard the environment for its own sake.

It is imperative that all the relevant stakeholders join hands in their efforts to conserve and protect the environment for a better, healthy and secure environment that will guarantee better lives for the human race, animals and plants. Achieving environmental security in Kenya is possible. It is an ideal that is attainable, for the sake of the environment and the people of Kenya.⁴¹⁵

12. Food Security and Environmental Sustainability in Kenya

Food security has been described as a multifaceted sustainable development topic, linked to health through malnutrition, but also to sustainable economic development, environment, and trade.⁴¹⁶ It is noteworthy that small-scale farmers dominate the agricultural sector in Kenya and derive their livelihoods from agriculture which is mainly reliant on rainfall. These farmers, it has been noted, face the challenges of land degradation, poor soil fertility management, and continuous cropping.⁴¹⁷ The agricultural sector in Kenya is said to be highly exposed to climate change and

⁴¹⁰ See generally, “Chapter 5: Survival at Stake: Violent Land Conflict in Africa,” Small Arms Survey 2013, available at <http://www.smallarmssurvey.org/fileadmin/docs/A-Yearbook/2013/en/Small-Arms-Survey-2013-Chapter-5-EN.pdf> [Accessed on 12/10/2015].

⁴¹¹ See Bowman, K., et al, “Chapter 1: Environment for Development,” (United Nations), available at http://www.unep.org/geo/geo4/report/01_Environment_for_Development.pdf [Accessed on 12/10/2015].

⁴¹² Khagram, S., et al, “From the Environment and Human Security to Sustainable Security and Development,” *Journal of Human Development*, Vol. 4, No. 2, July 2003, pp. 289-313, p. 295.

⁴¹³ *Ibid.*

⁴¹⁴ See the Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya', (the 'Akiwumi Commission'), (Government Printer, Nairobi, 1999).

⁴¹⁵ See Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016), chapter Seven, for the full discussion.

⁴¹⁶ World Health Organisation, ‘Trade, foreign policy, diplomacy and health’, *Food Security*, available at <http://www.who.int/trade/glossary/story028/en/> [Accessed on 17/07/2014].

⁴¹⁷ United Nations Economic Commission for Africa, ‘An Assessment of Agricultural Sector Policies and Climate Change in Kenya: Nexus between Climate Change Related Policies, Research and Practice: Final Report’ December, 2013, p.1. Available at http://www.climdevafrica.org/sites/default/files/DocumentAttachments/ACPC_KIPPRA_Kenya_Policy_Research_Practice%20%26%20Climate%20Change_12.12.2013_Final.pdf [Accessed on 17/07/2014].

climate variability, as farming activities directly depend on climatic conditions.⁴¹⁸ This has adverse effects on both food security and environmental sustainability in the country.

A population that is food insecure and poorly equipped concerning agriculture production is desperate to survive and this is often at the expense of environmental sustainability since they engage in unsustainable agricultural practices. It is noteworthy that unsustainable agricultural practices as well as unsustainable economic activities such as charcoal burning, timber harvesting or logging are likely to endanger the environment. Unless the food insecurity problem is adequately addressed, any efforts to achieve environmental protection and sustainability in the country will be futile.⁴¹⁹

The human right to adequate food is of crucial importance for the enjoyment of all rights.⁴²⁰ The right to adequate food is indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfillment of other human rights enshrined in the International Bill of Human Rights.⁴²¹ It is also inseparable from social justice, requiring the adoption of appropriate economic, environmental and social policies, at both the national and international levels, oriented to the eradication of poverty and the fulfillment of all human rights for all.⁴²² Alleviation of hunger and poverty is therefore, in the long-run interest of the human development.⁴²³

13. Promoting the Right to Clean and Healthy Environment for Sustainable Development

a) Defining the Right to Clean and Healthy Environment

It has been argued that the problem in declaring a *right to a clean and healthy environment* (emphasis added) as is found in various documents is that there is yet no clear definition of this right nor is its content clearly demarcated.⁴²⁴ Pertinent questions abound: what is the measure for a clean and healthy environment? At what point can one say this right has been violated - is it after a single oil spill, or continuously with or without an immediate clean up or after a refusal to return the contaminated environment to status quo ante?⁴²⁵ For instance, in the Kenyan case of *Pastor James Jessie Gitahi & 202 others v Attorney General*,⁴²⁶ the Court observed that "...prevention of noise and vibration pollution is now recognised as a component of a clean and healthy environment. Noise pollution covers sound which can result in hearing impairment while vibrations pollution covers vibration transmitted to the human body through solid structures. Both excessive noise and vibration can cause injury to the body hence the need to regulate the level of

⁴¹⁸ Ibid, p. 2.

⁴¹⁹ See Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016), chapter Eight, for the full discussion on food security.

⁴²⁰ UN Committee on Economic, Social and Cultural Rights.

⁴²¹ Ibid.

⁴²² General Comment No. 12: The Right to Adequate Food, op. cit.

⁴²³ Ananda, D., Chapter - II, 'Food Security: the Concept and the Issue', op. cit. p. 2.

⁴²⁴ See Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016), chapter Nine, for the full discussion.

⁴²⁵ Okpara, C. I., 'Right to a Clean and Healthy Environment: The Panacea to the Niger Delta Struggle,' *Journal of Politics and Law*, Vol. 5, No. 1; March 2012, pp. 3-8, p.6.

⁴²⁶ [2013] eKLR, Petition No. 683 of 2009.

noise through the Regulations.⁴²⁷ The Court also stated that “Part II of the *Regulations*⁴²⁸ has a general prohibition against, “loud, unreasonable, unnecessary or unusual noise which annoys, disturbs, injures or endangers the comfort, repose, health or safety of others and the environment.” In determining whether the noise is loud several factors are considered including the time of the day, the proximity to a residential neighbourhood, whether the noise is recurrent intermittent or constant, the level or intensity of the noise, whether the noise has been enhanced by any electronic or mechanical means or whether the noise can be controlled without effort or expense to the person making the noise. According to the Court, a violation of the general prohibition is an offence and attracts a penalty under the Act and the Regulations.”

The right to a clean environment openly became an international concern first in 1968 when the UN General Assembly passed a resolution identifying the relationship between the quality of the environment and the enjoyment of basic rights.⁴²⁹ It was not until the Stockholm conference in 1972 that the right to a healthy environment was explicitly recognized in an international environmental law document (Stockholm Declaration, 1972)⁴³⁰. It declared that *man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations* (Emphasis added).⁴³¹ It is noteworthy that the Declaration did not just recognise the right to a good quality environment but also placed a responsibility on human beings to protect and improve the environment for present and future generations. This position of rights and responsibility towards the environment is now widely accepted and it goes to the core of the sustainable development discourse.⁴³²

b) Scope of the Right to Clean and Healthy Environment

The right to a clean and healthy environment is so interwoven with the realisation and enjoyment of other fundamental rights that any attempt to classify it as an inferior right sabotages the realisation of all the other basic rights, including life, health, livelihood and well-being, amongst others.⁴³³ This right advocates for a healthy human habitat, including clean water, air and soil that are free from toxins or hazards that threaten human health.⁴³⁴

It is no longer in dispute, at least in Kenya, that there exists a human right to a clean and healthy environment recognised even by the Constitution. Ensuring full enjoyment of a clean and healthy environment, through effective environmental management, will provide multiple benefits to

⁴²⁷ Para. 28.

⁴²⁸ Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulation, 2009, Legal Notice No. 61 of 2009.

⁴²⁹ United Nations General Assembly, Problems of the Human Environment, UNGA Res 2398(XXII) 3 December 1968.

⁴³⁰ Declaration of the United Nations Conference on the Human Environment Stockholm, 16 June 1972, UN Doc.A/CONF.48/14/Rev.1.

⁴³¹ *Ibid*, Principle 1.

⁴³² For instance, see Article 69, Constitution of Kenya, 2010 (Government Printer, Nairobi).

⁴³³ See generally Lador, Y., ‘The challenges of human environmental rights,’ in *Human Rights and the Environment: Proceedings of a Geneva Environment Network roundtable*, (United Nations Environment Programme for the Geneva Environment Network, 2004).

⁴³⁴ Okpara, C. I., ‘Right to a Clean and Healthy Environment: The Panacea to the Niger Delta Struggle,’ *op cit*, p. 5.

society and the economy.⁴³⁵This calls for a holistic, comprehensive and integrated approach to health and environment to protect both the environment and public health.⁴³⁶

The environment should be accorded some right, independent of the human beings. Indeed, the Constitution of Kenya elevates the environment as worthy of protection by stating in the preamble that the People of Kenya are respectful of the environment, which is their heritage, and are determined to sustain it for the benefit of future generations. The constitutional recognition of this position in Kenya should give the law makers, courts and other stakeholders an incentive and clear authority to take strong action to protect the environment.

The right to a clean and healthy environment can be equated to the right to life. This is the bold declaration that must be made and captured in our legal framework so as to make it a reality.

14. Environment, Trade and Sustainable Development

The United Nations observes that the global understanding of development has changed over the years, and countries now have agreed that sustainable development—development that promotes prosperity and economic opportunity, greater social well-being, and protection of the environment—offers the best path forward for improving the lives of people everywhere.⁴³⁷ Much of the global environmental damage has been attributed to the increased scale of global economic activity, where international trade constitutes a growing portion of global economic activity, making it an increasingly important driver of environmental change.⁴³⁸ This is justified on the fact that, at the most basic level, all economic activity is based on the environment. Natural resources such as metals and minerals, soil, forests, and fisheries are basic inputs to production of any goods, and also provide the energy needed to process them.⁴³⁹

The Report of the World Commission on Environment and Development, *Our Common Future*, asserts that economic growth always brings risk of environmental damage, as it puts increased pressure on environmental resources.⁴⁴⁰ Thus, policy makers guided by the concept of sustainable development should necessarily work to assure that growing economies remain firmly attached to their ecological roots and that these roots are protected and nurtured so that they may support growth over the long term.⁴⁴¹ This is due to the fact that environmental protection is inherent in

⁴³⁵ United Nations Environmental Programme, “Human Health and the Environment,” UNEP Post 2015 Note No. 3, available at <http://www.unep.org/roap/Portals/96/UNEP-Post-2015-Note-3.pdf> [Accessed on 2/09/2015].

⁴³⁶ Narain, J.P., “The challenge of health & environment: Profiling risks & strategic priorities for now & the future,” *Indian Journal of Medical Research*, Vol. 136, No.2, August, 2012, pp. 185–191 at p. 186.

⁴³⁷ United Nations, ‘What We Do: Promote Sustainable Development,’ available at <http://www.un.org/en/s.s/what-we-do/promote-sustainable-development/index.html> [Accessed on 4/09/2016].

⁴³⁸ International Institute for Sustainable Development & United Nations Environment Programme, *Trade and Green Economy: A Handbook* (International Institute for Sustainable Development, Geneva, 2014), p.3. Available at <http://www.unep.org/roe/Portals/139/documents/trade-green-economy-handbook-third-edition-en.pdf> [Accessed on 4/09/2016].

⁴³⁹ *Ibid.*

⁴⁴⁰ Report of the World Commission on Environment and Development, *Our Common Future*, op cit., para. 50.

⁴⁴¹ *Ibid.*, para. 50.

the concept of sustainable development, as is a focus on the sources of environmental problems rather than the symptoms.⁴⁴²

Trade is considered as one of the driving forces of economic development for all countries, usually aimed at development and the eradication of poverty.⁴⁴³ On the one hand, environmental law, both national and international, and environmental policies—such as promotion of renewable energy, environmental taxation and conservation measures—help define how countries will structure their economic activities.⁴⁴⁴ On the other hand, trade law affects the way in which countries design their laws and policies in areas—such as subsidies, technical regulations, investment policy and taxes—that are integral to environmental policy.⁴⁴⁵

It has been argued that the main link between trade and sustainable development is the use of non-renewable raw materials to earn foreign exchange.⁴⁴⁶ This, it has been suggested, is a result of a scenario where the dependence of the developed market economies on other mineral imports from the developing countries has also grown, and non-renewable resources like fuels and minerals, as well as manufactured goods, are now far more important than tropical products and other agricultural materials in the flow of primary products from developing to industrial countries.⁴⁴⁷

This has been such a serious problem which has continually affected third world countries that the Agenda 2030 for Sustainable Development aims at ensuring that there is significant increase in the exports of developing countries, in particular with a view to doubling the least developed countries' share of global exports by 2020.⁴⁴⁸ The Agenda 2030 also affirms that international trade is an engine for inclusive economic growth and poverty reduction, and contributes to the promotion of sustainable development.⁴⁴⁹ As such, it seeks to continue to promote a universal,

⁴⁴² Ibid, para. 50.

⁴⁴³ 'The Link between Trade and Development: What Role for the EU Trade Policy?' AIF Conference, Christiansborg, 12 September 2000; See also Preamble, World Trade Organization. "Marrakesh Agreement Establishing the World Trade Organization. Annex 1A: Multilateral Agreements on Trade in Goods-Agreement on Trade-Related Investment Measures", The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts (World Trade Organization, Geneva, 1995), pp. 163-167.

⁴⁴⁴ International Institute for Sustainable Development & United Nations Environment Programme, *Trade and Green Economy: A Handbook*, op cit, pp. 3-4.

⁴⁴⁵ Ibid, pp. 3-4.

⁴⁴⁶ Report of the World Commission on Environment and Development, *Our Common Future*, op cit., para. 41. However, this is not to say that it is the only link. There are other links between trade and sustainable development; if protectionism raises barriers against manufactured exports, for example, developing nations have less scope for diversifying away from traditional commodities. And unsustainable development may arise not only from overuse of certain commodities but from manufactured goods that are potentially polluting. The Commission also observed that the increase in protectionism in industrial countries stifles export growth and prevents diversification from traditional exports. Consequently, if developing countries are to reconcile a need for rapid export growth with a need to conserve the resource base, it is imperative that they enjoy access to industrial country markets for non-traditional exports where they enjoy a comparative advantage. (para. 51).

⁴⁴⁷ Ibid, para. 40.

⁴⁴⁸ United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, op cit., para. 17.11.

⁴⁴⁹ Ibid, para. 68. This is a restatement of para. 281 of the Rio+20 Conference outcome document (*The Future We Want*) which reaffirmed that international trade is an engine for development and sustained economic growth, and also reaffirmed the critical role that a universal, rules-based, open, non-discriminatory and

rules-based, open, transparent, predictable, inclusive, non-discriminatory and equitable multilateral trading system under the World Trade Organization, as well as meaningful trade liberalisation. It also calls upon all members of the World Trade Organization to redouble their efforts to promptly conclude the negotiations on the Doha Development Agenda.⁴⁵⁰

It has been suggested that equitable international trade can enable countries to achieve food security, generate decent employment opportunities for the poor, promote technology transfer⁴⁵¹, ensure national economic security and support infrastructure development, not only for moving goods to and from ports, but also for basic services such as health, education, water, sanitation and energy.⁴⁵² As such, it is suggested that equitable trade may be more effectively harnessed in delivering sustainable development when integrated into the SDG framework as an SDG enabler, where it would serve as a promoter for potential goals such as poverty eradication, job creation, universal healthcare and education, and a healthy environment.⁴⁵³

It has also been acknowledged that trade can have negative, as well as positive, impacts on economic, environmental, and social systems. Economic activities supporting rapidly expanded trade can result in serious environmental degradation when complementary environmental policies are not in place; pollution of air, water, and soil, and unrestrained natural resource exploitation causing desertification, deforestation, sea level rise and fisheries depletion may grow to levels that jeopardize sustainable development efforts; and unmanaged, trade liberalisation can also have negative social impacts including brain-drain and cultural erosion.⁴⁵⁴

Linking development and environment is the central idea behind sustainable development. In practice, this implies opening environmental debates to the development dimension and vice versa, and seeking ways to better integrate them.⁴⁵⁵ The relationship between trade and sustainable development is manifested in the impact of trade on the environment and the effect of environmental policies on international trade. The impact of trade on the environment is indirect, mediated by its effects on consumption and production, rigour and suitability of environmental

equitable multilateral trading system, as well as meaningful trade liberalisation, can play in stimulating economic growth and development worldwide, thereby benefiting all countries at all stages of development as they advance towards sustainable development. In this context, the participants in the conference expressed their focus on achieving progress in addressing a set of important issues, such as, inter alia, trade-distorting subsidies and trade in environmental goods and services.

⁴⁵⁰ Ibid, para. 68.

⁴⁵¹ Article 7 of the TRIPS states that: “The protection and enforcement of intellectual property should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.”

⁴⁵² Galmés, G.V., ‘Trade as an enabler of sustainable development and poverty eradication,’ in United Nations, *The Road from Rio+20: Towards Sustainable Development Goals*, Issue 4, September 2014, p. 10. UNCTAD/DITC/TED/2014/1 Available at

http://unctad.org/en/PublicationsLibrary/ditcted2014d1_en.pdf [Accessed on 05/09/2016].

⁴⁵³ Ibid, p.10.

⁴⁵⁴ Ibid, p.10.

⁴⁵⁵ *The World Trade Organization and Sustainable Development: An Independent Assessment. A Report by the International Institute for Sustainable Development*, 1996.

policy.⁴⁵⁶ The impact of environment policies on trade depends on the amount and frequency of the transaction, conditioned by the degree of trade liberalisation.⁴⁵⁷

Some of the positive impacts of trade on the environment include the facilitation of international transfer of 'green' technologies, convergence of environmental standards of products and processes to the highest levels in the world, encouraging the development of organic products markets, elimination of subsidies and distorted prices in closed economies including the alignment of world prices, encouragement of international cooperation regarding the environmental protection, amongst others.⁴⁵⁸

The World Commission on Environment and Development recommended that in order to achieve sustainable development, changes are required in the attitudes and procedures of both public and private-sector enterprises. Moreover, environmental regulation must move beyond the usual menu of safety regulations, zoning laws, and pollution control enactments; environmental objectives must be built into taxation, prior approval procedures for investment and technology choice, foreign trade incentives, and all components of development policy.⁴⁵⁹

Trade is now considered one of the tools to implement sustainable development. There is, thus, the move towards integration of environmental and poverty alleviation goals into macro-economic policies, including trade policies.⁴⁶⁰ Environment, trade and development are clearly linked. An integrated approach that fully incorporates environmental concerns, fair trade and sustainable development is desirable.⁴⁶¹

15. Indigenous Knowledge and Sustainable Development

The CBD may be the only international treaty that specifically acknowledges the role of traditional knowledge, innovations, and practices in biodiversity conservation and sustainable development, as well as the need to guarantee their protection, whether through intellectual property rights (IPRs) or other means.⁴⁶² The resilience of indigenous peoples and local

⁴⁵⁶ Timbur, M. & Pralea, S., 'International Trade – Environment' Relationship in the Context of Sustainable Development,' CES Working Papers.

⁴⁵⁷ Ibid.

⁴⁵⁸ Ibid.

⁴⁵⁹ Report of the World Commission on Environment and Development, *Our Common Future*, op cit., chapter 2, para. 79.

⁴⁶⁰ 'Enhancing Capacity Building for Environment, Trade and Sustainable Development,' Draft Working Paper. Capacity Building Meeting on Environment, Trade and Sustainable Development for the Latin American and Caribbean Region, Mexico City, Mexico, 27th -28th March 2003.

⁴⁶¹ See Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016), chapter Ten, for the full discussion.

⁴⁶² Dutfield, G., 'TRIPS-Related Aspects of Traditional Knowledge,' *Case Western Reserve Journal of International Law*, Vol. 33, Iss. 2, 2001, pp. 233-275 at pp. 261-261. The 1992 Convention on Biological Diversity, [1993] ATS 32 / 1760 UNTS 79 / 31 ILM 818 (1992). under Article 8 (j), dealing with traditional knowledge, provides that each contracting party shall, as far as possible and appropriate: "Subject to national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices." Further, Article 10(c) of the UN Convention on Biological Diversity (CBD) provides that each Contracting Party shall, as far as possible and as appropriate

communities, as sustained by their cultural systems which have adapted to local ecological niches over long timeframes, and the detailed and broad knowledge they have of adaptation, is affected negatively by the loss of land, ecosystem capacity, and alienation of culturally significant places, migration and losses in livelihoods.⁴⁶³ The element of traditional knowledge includes moral and ethical statements about the environment and about the relationships between humans, animals, and the environment; the “right way” to do things.⁴⁶⁴

It has correctly been observed that ecological knowledge does not function in isolation but it is, instead, embedded in institutions and local social norms.⁴⁶⁵ Further, the structure and dynamics of institutions are critical for implementation of management practices based on ecological understanding in any society.⁴⁶⁶ The coordination of appropriate resource use practices is often entrusted with traditional leaders.⁴⁶⁷ It has been asserted that while local people possess a great store of knowledge which they can draw upon to manage their environments, often with great success, such knowledge should not be seen as an unchanging set of rules for conduct.⁴⁶⁸ Indigenous knowledge-whether about farming or settling disputes, does not provide a set formula for community decision-making. It is simply a repertoire of ideas and actions from which individuals and communities faced with specific problems can draw, depending on their own level of knowledge, their preferences, and their ability and motivation to act.⁴⁶⁹

Indigenous or traditional knowledge (TK) is used at the local level by communities as the basis for making decisions pertaining to food security, human and animal health, education, natural resource management and other vital activities.⁴⁷⁰ Exploring the community’s knowledge and knowledge of people dealing with agriculture, is deemed crucial to determine their norms, values,

protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.

⁴⁶³ Crawhall, N., ‘Indigenous knowledge in adaptation: conflict prevention and resilience-building,’ *Conflict-sensitive Adaptation: Use Human Rights to Build Social and Environmental Resilience*, Brief 10. (Indigenous Peoples of Africa Co-ordinating Committee and IUCN Commission on Environmental, Economic and Social Policy, 2014), p. 2. Available at http://cmsdata.iucn.org/downloads/tecs_csa_10_indigenous_knowledge_in_adaptation_crawhall.pdf [Accessed on 10/04/2016].

⁴⁶⁴ Mackenzie Valley Environmental Impact Review Board, *Guidelines for Incorporating Traditional Knowledge in Environmental Impact Assessment*, July 2005, p. 6. Available at http://www.reviewboard.ca/upload/ref_library/1247177561_MVReviewBoard_Traditional_Knowledge_Guidelines.pdf [Accessed on 10/04/2016].

⁴⁶⁵ Berkes, F., et. al., ‘Rediscovery of Traditional Ecological Knowledge as Adaptive Management,’ *op cit.* p. 1258.

⁴⁶⁶ *Ibid.*, p. 1258.

⁴⁶⁷ *Ibid.*, p. 1258.

⁴⁶⁸ Castro, A.P. & Ettenger, K., ‘Indigenous Knowledge and Conflict Management: Exploring Local Perspectives and Mechanisms for Dealing with Community Forestry Disputes,’ *op cit.*

⁴⁶⁹ *Ibid.*

⁴⁷⁰ Gorjestani, N., ‘Indigenous Knowledge for Development: Opportunities and Challenges,’ in Twarog, S. & Kapoor, P. (eds), ‘Protecting and Promoting Traditional Knowledge: Systems, National Experiences and International Dimensions,’ (United Nations Conference on Trade and Development, 2004), UNCTAD/DITC/TED/10, pp. 265-272 at p. 265. Available at http://unctad.org/en/docs/ditcted10_en.pdf [Accessed on 10/04/2016].

and belief in regards to their activities, particularly in the area of water and land management.⁴⁷¹ The way how people develop such knowledge by understanding their environment through observation and experiences determine the specific group of people's knowledge. All knowledge including traditional knowledge, traditional ecological knowledge and indigenous knowledge should be utilised in a bid to address environmental problems in Kenya. The sustainable development agenda calls for an integrated approach to natural resources governance and management to ensure that all groups and stakeholders are brought on board.

16. Attaining Gender Equity for Sustainable Development

The role of gender in the national development discourse and particularly sustainable development in Kenya is pertinent. The current Constitution of Kenya 2010 places great emphasis on the equality of both gender and their participation in the country's development agenda.⁴⁷² However, gender equity is an ideal that is yet to be fully realized owing to various factors that are discussed in this chapter. The author herein examines the legal and institutional framework on gender equity and human rights with a view to making a case for the practical empowerment of both gender for national development.⁴⁷³

Efforts to introduce gender-sensitive approaches to national development have not been quite successful because even as legislative measures are put in place, they fail to address the underlying norms and customs that define gender relations and power dynamics in the society. The power imbalance that defines gender relations influences women's access to and control over resources, their visibility and participation in social and political affairs, and their ability to realize their fundamental human rights.⁴⁷⁴

The Constitution envisions a situation where women and men participate equally and competitively in national development. It is important to note that the national values and

⁴⁷¹ Retnowati, A., et al, 'Environmental Ethics in Local Knowledge Responding to Climate Change: An Understanding of Seasonal Traditional Calendar Pranoto Mongso and Its Phenology in Karst Area of Gunung Kidul, Yogyakarta, Indonesia,' *Procedia Environmental Sciences*, Vol. 20, 2014, pp. 785 – 794 at p. 787.

⁴⁷² Article 1 of the Constitution emphasizes that all sovereign power belongs to the people while Article 10 sets out democracy and participation of the people and inclusiveness as some of the national values and principles of governance in Kenya; Article 27 prohibits either the State or any person from discriminating against any person on any of these grounds including: race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth; Article 59 thereof establishes the Kenya National Human Rights and Equality Commission whose functions include inter alia promoting gender equality and equity generally and to coordinate and facilitate gender mainstreaming in national development. Article 69(2) also obligates 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 175 (c) provides that one of the principles of principles of devolved government is that no more than two-thirds of the members of representative bodies in each county government should be of the same gender; See also Article 197.

⁴⁷³ See Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016), chapter Twelve, for the full discussion.

⁴⁷⁴ Strickland, R. & Duvvury, N., "Gender Equity and Peacebuilding," *From Rhetoric to Reality: Finding the Way*, International Center for Research on Women Discussion Paper, 2003. p. 5. Prepared for the Gender Equity and Peacebuilding Workshop with a grant from the International Development Research Centre (IDRC), Ottawa, Canada. Available at <http://www.icrw.org/files/publications/Gender-Equity-and-Peacebuilding-From-Rhetoric-to-Reality.pdf> [Accessed on 16/05/2015].

principles of governance as envisaged in the current Constitution of Kenya bind all State organs, State officers, public officers and all persons whenever any of them—applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.⁴⁷⁵ The most significant of these values and principles are participation of the people, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised.⁴⁷⁶ Indeed, some of these are captured in the Preamble to the Constitution which provides that one of the pillars of the current Constitution is the recognition of the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.

Gender equality is seen as a shared vision of social justice and human rights and one that requires concerted efforts from all to achieve.⁴⁷⁷ The effect of this is that the foregoing values and principles ought to inform any development deliberations and move towards achievement of gender equality in Kenya. It has been observed that Gender equality, centered in human rights, is both a development goal on its own and a vital tool to accelerating sustainable development and unless women and girls are able to fully realize their rights in all spheres of life, an all-inclusive human development will not be advanced.⁴⁷⁸

The social dimension of sustainable development is a neglected area in such analyses and often, this places women at a disadvantage, since the social dimension affects gender-based rights and social position, which are key factors in determining women's access to resources, decision-making and the like.⁴⁷⁹ For instance, gender equality is considered a critical element in achieving decent work for all women and men, in order to effect social and institutional change that leads to sustainable development with equity and growth.⁴⁸⁰ As such, *gender equity, which goes beyond equality*, is necessary (emphasis added).

It is noteworthy that the term 'development' is perceived differently by different people and countries and thus defined differently. That is probably the reason why there exists the 'developed' and 'developing' countries classification. There is therefore no single agreed definition of the concept of development. However, development has various angles to it and may be classified as economic development, human development, *inter alia*. However, development is not an exclusively economic phenomenon but encompasses financial as well as reorganization and reorientation of entire economic and social systems. It has been argued that in addition to improvements in incomes and output, it typically involves radical changes in institutional, social,

⁴⁷⁵ Ibid, Article 10 (1).

⁴⁷⁶ Ibid, Article 10(2) (b) (c).

⁴⁷⁷ See generally, Beijing Declaration and Plat form for Action Beijing+5 Political Declaration and Outcome, United Nations 1995.

⁴⁷⁸ UNDP, Gender equality, available at <http://www.africa.undp.org/content/undp/en/home/ourwork/gender-equality/overview.html> [Accessed on 02/04/2015].

⁴⁷⁹ Ibid.

⁴⁸⁰ International Labour Organisation, Gender and Development, available at

<http://www.ilo.org/global/topics/economic-and-social-development/gender-and-development/lang--en/index.htm> [Accessed on 02/04/2015].

and administrative structures as well as in popular attitudes and, in many cases, even customs and beliefs.⁴⁸¹

The goal of gender equity is considered to be moving beyond equality of opportunity by requiring transformative change with the recognition that women and men have different needs, preferences, and interests and that equality of outcomes may necessitate different treatment of men and women.⁴⁸² An equity approach implies that all development policies and interventions need to be scrutinised for their impact on gender relations and potential advantages or otherwise on men or women.⁴⁸³ The development of a nation should be carried out in partnership with the women and men and no one gender should be seen as either the senior or junior partner in the relationship.⁴⁸⁴ Gender equality is an essential component of sustainable economic growth and poverty reduction.⁴⁸⁵

Equitable gender participation in sustainable development efforts calls for empowerment of both gender which should include participation by people in decisions and processes shaping their lives; participating in the market economy; challenging inequality and oppression; the liberation of both men and women; and empowerment as bottom-up process which cannot be bestowed from the top-down.⁴⁸⁶ Arguably, social sustainability will not be achieved in a society where one gender is treated as superior to the other. It is, therefore, important to promote social justice and gender equity so as to achieve an inclusive and socially sustainable development.

17. Managing Natural Resource Conflicts for Sustainable Development

Social conflicts, like all other kinds of conflicts, are inevitable in human interactions and if left unmanaged, they tend to degenerate into disputes that ruin the relations between persons or communities and yield undesired costs. It has rightly been observed that in any society, conflict is one of the major factors negatively affecting development as it diverts resources that could have otherwise been used productively.⁴⁸⁷ Conflict is also regarded as undesirable in many societies since, in its violent form, it claims the lives of many people, destroy property, and diverts human

⁴⁸¹ M. Todaro, 'Economic Development' chapter 3, op cit.

⁴⁸² Reeves, H. & Baden, S., "Gender and Development: Concepts and Definitions," op cit, p.10.

⁴⁸³ Ibid.

⁴⁸⁴ General Ibrahim Badamati Babangida, President of the Federal Republic of Nigeria, 'Extracts From the Opening Speeches,' Abuja Declaration on Participatory Development: The Role of Women in Africa in the 1990, United Nations Economic Commission for Africa. P.3. Adopted by the African Regional Conference on the Integration of Women in Development, Abuja, Nigeria, 6-10 November 1990 (4th meeting).

⁴⁸⁵ Food and Agricultural Organization of the United Nations, et al, "Gender dimensions of agricultural and rural employment: Differentiated pathways out of poverty," Rome, 2010. p. x.

Available at <http://www.fao.org/docrep/013/i1638e/i1638e.pdf> [Accessed on 13/5/2015].

⁴⁸⁶ Chapter 2: Development, Empowerment, and Participation, available at

[http://www.google.com/search?ie=ISO-8859-](http://www.google.com/search?ie=ISO-8859-1&q=Chapter=2%3A=development%2C=empowerment=and=participation=&btnG=Search)

[1&q=Chapter=2%3A=development%2C=empowerment=and=participation=&btnG=Search](http://www.google.com/search?ie=ISO-8859-1&q=Chapter=2%3A=development%2C=empowerment=and=participation=&btnG=Search) [Accessed on 15/05/2015].

⁴⁸⁷ See Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016), chapter Thirteen, for the full discussion; See also Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, (Glenwood Publishers, Nairobi – 2015), Chapter sixteen which examines the various approaches to the management of natural resource based conflicts.

as well as financial resources away from development.⁴⁸⁸ Thus, conflicts ought to be managed effectively.

Natural resource conflicts continue to negatively affect Kenyans owing to the many weaknesses of the present legal and institutional framework. It is noteworthy that most of the sectoral laws mainly provide for conflict management through the national court system. National legal systems governing natural resource management are based on legislation and policy statements that are administered through regulatory and judicial institutions, where adjudication and arbitration are the main strategies for addressing conflicts, with decision-making vested in judges and officials who possess the authority to impose a settlement on disputants.⁴⁸⁹ Further, decisions are more likely to be based on national legal norms applied in a standardized or rigid manner, with all-or-nothing outcomes. Thus, contesting parties often have very limited control over the process and outcomes of conflict management.⁴⁹⁰

There are many factors that determine the emergence, persistence, and even management of conflicts. The understanding of these factors is essential in developing policies that effectively limit and manage conflict. The factors range from internal to relational and contextual factors.⁴⁹¹

It has rightly been observed that in the majority of cases of resource conflicts, one or more of the following drivers are usually at play: conflict over resource ownership; conflict over resource access; conflict over decision making associated with resource management; and conflict over distribution of resource revenues as well as other benefits and burdens.⁴⁹² These conflict drivers have contributed to most of the natural resource conflicts in Kenya and should therefore be adequately addressed in managing the conflicts.⁴⁹³

It has been argued that conflicts associated with natural resources are often due to different perceptions regarding who should benefit from the conflicts, and are an indicator of resource availability, evolution of tenure rights and systems, accessibility and control over the resource.⁴⁹⁴ They are believed to result from an imbalance in the power structure, where these power imbalances can exhibit themselves through unequal distribution of natural resource use and tenure

⁴⁸⁸ Mengesha, A.D., et al., "Indigenous Conflict Resolution Mechanisms among the Kembata Society." *American Journal of Educational Research*, 2015, Vol. 3, No. 2, pp. 225-242 at p.227.

⁴⁸⁹ FAO, 'Negotiation and mediation techniques for natural resource management,' op cit.

⁴⁹⁰ Ibid.

⁴⁹¹ Louis, K., "Factors Shaping the Course of Intractable Conflict." *Beyond Intractability*. Eds. Guy Burgess and Heidi Burgess. Conflict Research Consortium, University of Colorado, Boulder. Posted: October 2003. Available at <http://www.beyondintractability.org/essay/factors_shaping_intractable_conflict/> [Accessed on 17/01/2016].

⁴⁹² The United Nations Department of Political Affairs and United Nations Environment Programme, *Natural Resources and Conflict: A Guide for Mediation Practitioners*, (2015, UN DPA and UNEP), p. 11.

⁴⁹³ Campbell, D.J., et al, 'Land use conflict in Kajiado District, Kenya,' *Land Use Policy*, Vol.17, Issue 4, October 2000, pp. 337-348; Yamano, T, et al, 'Land Conflicts in Kenya: Causes, Impacts, and Resolutions,' *FASID Discussion Paper 2005-12-002*, available at [www3.grips.ac.jp/~yamanota/Land Conflicts in Kenya \(FASID DP\).pdf](http://www3.grips.ac.jp/~yamanota/Land Conflicts in Kenya (FASID DP).pdf) [Accessed on 17/01/2016].

⁴⁹⁴ Traore, S. & Lo, H., 'Natural Resource Conflicts and Community Forestry: A West African Perspective,' in FAO, Annex C - Summary of Discussion Papers, available at <http://www.fao.org/docrep/005/ac697e/ac697e13.htm#TopOfPage> [Accessed on 2/01/2016].

rights.⁴⁹⁵ Where conflict cannot be contained in a functional way, it can erupt in violence, war, and destruction, loss of life, displacements, long-term injuries, psychological effects as a result of trauma suffered especially in case of violent conflicts, and deep fear, distrust, depression, and sense of hopelessness.⁴⁹⁶ Conflict also often produces significant environmental degradation.⁴⁹⁷ It is difficult to justify environmental protection when other more immediate concerns exist as a result of the conflict. Therefore, environmental damage from accelerated resource extraction may be severe.

The Sustainable Development Goals (SDGs) recognise this connection and provide that sustainable development cannot be realized without peace and security; and peace and security will be at risk without sustainable development.⁴⁹⁸ The SDGs go ahead to state that the new Agenda recognizes the need to build peaceful, just and inclusive societies that provide equal access to justice and that are based on respect for human rights (including the right to development), on effective rule of law and good governance at all levels and on transparent, effective and accountable institutions. Factors which give rise to violence, insecurity and injustice, such as inequality, corruption, poor governance and illicit financial and arms flows, are addressed in the Agenda.

The aim is to redouble the efforts to resolve or prevent conflict and to support post-conflict countries, including through ensuring that women have a role in peacebuilding and State building.⁴⁹⁹ They also call for further effective measures and actions to be taken, in conformity with international law, to remove the obstacles to the full realization of the right of self-determination of peoples living under colonial and foreign occupation, which continue to adversely affect their economic and social development as well as their environment.⁵⁰⁰ Thus, conflicts management should be one of the key issues that should be addressed in the quest for sustainable development.

It is, therefore, arguable that one of the way of stemming natural resource conflicts would be striking a balance between conservation measures and access to resources by communities, through employing approaches that help in understanding the needs of the particular people and responding appropriately and consequently building trust within communities and between communities and the national government. It has also been argued that for conflict management to be successful there is need to conduct a historical analysis (with the participation of local people) so that the major issues can be identified, analysed and discussed.⁵⁰¹

⁴⁹⁵ Ibid.

⁴⁹⁶ See Machel, G. & Mkapa, B., *Back from the Brink: the 2008 mediation process and reforms in Kenya*, (African Union Commission, 2014).

⁴⁹⁷ Ballet, J., et al, 'Social Capital and Natural Resource Management: A Critical Perspective,' *The Journal of Environment & Development*, Vol. 16, No. 4, December 2007, pp. 355-374, p. 367.

⁴⁹⁸ United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, para. 35.

⁴⁹⁹ Ibid.

⁵⁰⁰ Ibid.

⁵⁰¹ Chidhakwa, Z., 'Managing conflict around contested natural resources: a case study of Rusitu Valley area, Chimanimani, Zimbabwe,' *Natural Resource Conflict Management Case Studies: An Analysis of Power, Participation and Protected Areas*, (Southern Alliance for Indigenous Resources).

While conflicts cannot be avoided, there is a need to effectively manage them so as to ensure harmony amongst people and to prevent violence and the potential loss of lives and property. Management of natural resource conflicts also ensures security in terms of a guarantee of continued access to and use of the environmental resources necessary for to survival from generation to generation.

Natural resource conflicts are sensitive considering that they arise from the need for people to satisfy their basic needs.⁵⁰² To them, justice would mean affording them an opportunity to get what they feel entitled to and anything less, means that they resort to other means of possessing the same. This way, conflicts become inevitable. Conflict resolution mechanisms such as negotiation and mediation affords the parties an opportunity to negotiate and reach a compromise agreement, where all sides get satisfactory outcome.⁵⁰³ This is particularly important in ensuring that there will be no future flare-up of conflict due to unaddressed underlying issues.⁵⁰⁴

18. Moving beyond the Law: Sustainable Development as a Way of Life

This sections offers recommendations on some of the ways that sustainable development can be achieved through nurturing the environment. However, the discussion is not exhaustive and there are more ways in which the same can be achieved, depending on the locality, amongst other factors.⁵⁰⁵

18.1 Poverty Eradication for Sustainable development

It has rightly been pointed out that at the heart of the concept of sustainable development is the fulfilment of the basic needs of the world's poor without compromising the capacity of the environment to provide similar benefits for future generations.⁵⁰⁶

18.2 Use of Science, Technology and Innovation for Sustainable Development

It has rightly been asserted that all utilisation of the renewable natural resources must be carried out on a sustained-yield basis; and all disposal of wastes (gaseous, liquid and solid) must be carried out on a sustained-discard basis, that is, at disposal rates not in excess of decomposition rates.⁵⁰⁷ While it is difficult to establish such rates, the solution may lie in moving away from the increased use of synthetic waste and other non-decomposing wastes to the easily decomposing technology waste. For instance, in agriculture, it is imperative that the country adopts methods

⁵⁰² FAO, 'Negotiation and mediation techniques for natural resource management,' available at <http://www.fao.org/3/a-a0032e/a0032e05.htm> [Accessed on 07/02/2016].

⁵⁰³ Warner, M., 'Conflict Management in Community-Based Natural Resource Projects: Experiences from Fiji and Papua New Guinea,' Working Paper No. 135, (Overseas Development Institute, April, 2000), p. 16.

⁵⁰⁴ See generally Mwagiru, M., *Conflict in Africa: Theory, Processes and Institutions of Management*, op. cit.

⁵⁰⁵ See Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016), chapter Fourteen, for the full discussion.

⁵⁰⁶ Mbote, P.K. & Cullet, P., 'Environmental Justice and Sustainable Development: Integrating Local Communities in Environmental Management,' ELRC Working Paper 1996 – 1, (International Environmental Law Research Centre, 1996), p. 7.

Available at <http://www.ielrc.org/content/w9601.pdf> [Accessed on 12/09/2016].

⁵⁰⁷ Westing, A.H., "Environmental Security and Its Relation to Ethiopia and Sudan," *Ambio*, Vol. 20, No. 5, Environmental Security (Aug., 1991), pp. 168-171, p. 168.

and technology that is friendlier to green economy practices as opposed to the polluting and dangerous chemicals.⁵⁰⁸

The need for technology transfer and innovation is well captured in *Maafikiano*, outcome document of the Nairobi UNCTAD 14th Conference, which states that ‘technology, including information and communications technology and innovation, plays a critical role in trade and development, including through its essential contribution to structural transformation, productive capacities, competitiveness and the diversification of production and exports as well as to advancing food security. It is thus a key means of implementation and a component of achieving the Sustainable Development Goals. It is also one of the most important levers of change for achieving inclusive and sustainable development. The development, transfer, dissemination and diffusion of environmentally sound technology to developing countries on favourable terms, including on concessional and preferential terms, as mutually agreed, is a means to implement the 2030 Agenda.

18.3 The Green Economy Approach

According to UNEP (now UNEA), a green economy is one whose growth in income and employment is driven by public and private investments that reduce carbon emissions and pollution, enhance energy and resource efficiency, and prevent the loss of biodiversity and ecosystem services.⁵⁰⁹ Arguably, green economies are not based on the demand for sacrifice, but on the idea of qualitative growth, where low-carbon and environmentally friendly technologies, as well as international cooperation in this area play a key role.⁵¹⁰ The UNEA maintains that this development path should maintain, enhance and, where necessary, rebuild natural capital as a critical economic asset and source of public benefits, especially for poor people whose livelihoods and security depend strongly on nature.⁵¹¹

The transition to green economy needs careful management and engagement by government, business, communities and citizens to ensure its success in achieving a truly sustainable future that promotes social equity, poverty eradication and human well-being.⁵¹²

18.4 Embracing Environmental Ethics for Sustainable Development

It has rightly been pointed out that with the increasing deterioration of ecological systems on which human beings rely and the aggravation of the environmental crisis, human beings cannot rely on economic and judicial methods alone to solve the problems of environmental pollution and ecological imbalances; we must also appeal to human beings’ limitless internal ethical resources.⁵¹³ Only after adoption of an appropriate attitude towards nature and establishment of a

⁵⁰⁸ See Republic of Kenya, Kenya Green Economy Strategy and Implementation Plan (GESIP), Maanzoni-1 Draft, May 2015.

⁵⁰⁹ Ibid.

⁵¹⁰ Friedrich-Ebert-Stiftung, ‘Green Economy - A Sustainable Concept?’ Available at <http://www.fes-sustainability.org/en/discussions/green-economy-sustainable-concept> [Accessed on 11/09/2016].

⁵¹¹ UNEP, ‘What is an "Inclusive Green Economy"?’ op cit.

⁵¹² Ten B.P., et al, Nature and its Role in the Transition to a Green Economy, (United Nations Environment Programme, 2012), p. 48. Available at <http://www.teebweb.org/wp-content/uploads/2013/04/Nature-Green-Economy-Full-Report.pdf> [Accessed on 11/09/2016].

⁵¹³ Yang, T., ‘Towards an Egalitarian Global Environmental Ethics,’ Environmental Ethics and International Policy, (ISBN 978-92-3-104039-9, UNESCO, 2006), p.23. Available at <http://publishing.unesco.org/chapters/978-92-3-104039-9.pdf> [Accessed on 11/09/2016].

new ethical relationship between human beings and nature will we be able to love and respect nature automatically as well as conscientiously; and only with the guidance of such love and respect can we successfully deal with the issues of environmental pollution and ecological imbalances.⁵¹⁴

It is important that the country integrates both anthropocentric and ecocentric approaches to environmental conservation and protection. This will ensure that the environment is not only secure for the sake of satisfying human needs, but also ensuring that it is healthy for the animals and plants.⁵¹⁵

18.5 Education for Environmental Sustainability and Sustainable Development

There is a close link between environmental degradation, lack of environmental justice and democracy, poverty and low levels of education among the citizenry, and provision of education is the crucial first step towards their elimination.⁵¹⁶ One way of empowering people is through education to give them alternative means of making a living for social sustainability⁵¹⁷ as opposed to relying on environment only, as well as enabling them make informed decisions that would contribute positively to environmental sustainability. Education is important for promoting sustainable development and improving the capacity of people to address environment and development issues.⁵¹⁸

If empowered through education, people are able to make their own decisions especially in matters relating to exploitation of natural resources, Environmental Impact Assessment (EIA) and other matters that touch on development but have a bearing on the environment and the livelihoods of the people. The local communities would be able to actively engage potential investors in ensuring environmental sustainability. Principles of public participation in governance and environmental democracy as envisaged in the current Constitution of Kenya become easier to implement.

18.6 Promoting Environmental Justice for Sustainable Development

There is also need to achieve environmental justice for all. Environmental justice is touted as the minimum ethical stance of environmental ethics, with two dimensions: distributive environmental

⁵¹⁴ Ibid, p. 23.

⁵¹⁵ See generally, Oksanen M, 'Should Trees Have Standing? Law, Morality, and the Environment' 174.

⁵¹⁶ See generally UNESCO, 'Educating for a Sustainable Future: A Transdisciplinary Vision for Concerted Action', EPD-97/CONF.401/CLD.1.November 1997.

⁵¹⁷ Social sustainability has been defined as concerning how individuals, communities and societies live with each other and set out to achieve the objectives of development models which they have chosen for themselves, also taking into account the physical boundaries of their places and planet earth as a whole. (Colantonio, A. & Dixon, T., 'Measuring Socially Sustainable Urban Regeneration in Europe,' (Oxford Brookes University: Oxford Institute for Sustainable Development (OISD), 2009) (As quoted in Woodcraft, S., et. al., 'Design for Social Sustainability: A framework for creating thriving new communities', Social Life, 2012, p.16. Available at http://www.futurecommunities.net/files/images/Design_for_Social_Sustainability_0.pdf [Accessed on 12/09/2016].

⁵¹⁸ UNESCO, 1992, para. 36.3, p. 2 (as quoted in Tilbury, D., 'Environmental Education for Sustainability: Defining the New focus of Environmental Education in the 1990's', Environmental Education Research, Vol. 1, No. 2, 1995, 195-212 at p.198.

justice and procedural/participatory environmental justice.⁵¹⁹ Distributive environmental justice concerns the equal distribution of environmental benefits and burdens, whereas participatory environmental justice focuses on opportunities to participate in decision-making.⁵²⁰

It has been suggested that to achieve environmental justice, there are four broad areas where changes in policy and practice are needed: (a) Rights and responsibilities: ensuring a right to a healthy environment is an overarching aim of policy, which must be supported by placing responsibilities on individuals and organisations to ensure this right is achieved; (b) Assessment: projects and policies need to be assessed for their distributional impacts; (c) Participation and capacity: decision-making should involve those affected, and those groups or individuals enduring environmental injustices need support in order to increase their control over decisions which affect them; and (d) Integration: of social and environmental policy aims.⁵²¹ Communities, with support from the Government, can come up with localized yet effective means of improving production, environmental conservation and reversing the effects of climate change, for enhanced environmental security and poverty eradication.

It has been suggested that translating any vision into action requires changing the way people work so that: sustainable development is the core principle underpinning the decision making process; critical issues are identified through discussion with key stakeholders; people and communities are at the centre of sustainable development planning; policies and programmes are integrated so that they are mutually reinforcing; funding and grant schemes compliment policy design and planning objectives; spending plans and budget agendas are aimed at achieving key sustainable development outcomes with realistic planning horizons; short term decisions are not contradictory to long-term objectives; the needs and opportunities of all are identified; the root causes and consequences of problems are addressed and the risks of inaction are recognized; successful examples of sustainable development are made mainstream as soon as possible; sustainable development is integrated into education and training programmes, and public understanding and awareness of the meaning of sustainable development and its day-to-day implications is increased.⁵²²

There is a need to take more action directed at addressing the challenges facing realisation of environmental security in the country. Although the international framework on environmental law has comprehensive and well-meaning provisions and principles that may help countries address environmental insecurity, most of them are merely prescriptive in nature without any force of law. As such they heavily rely on the countries' political goodwill.⁵²³ It is undeniable that Kenya has done a lot to domesticate the provisions of the international legal instruments but more still needs to be done by way of implementing the same. The response to climate change in Kenya

⁵¹⁹ Yang, T., 'Towards an Egalitarian Global Environmental Ethics,' *Environmental Ethics and International Policy*, op cit., p. 32.

⁵²⁰ Ibid, p. 32.

⁵²¹ ESRC Global Environmental Change Programme, 'Environmental Justice: Rights and Means to a Healthy Environment for All,' op cit., p. 11.

⁵²² Environmental Advisory Council, 'Principles of Sustainable Development,' March 2013, op cit., p. 5.

⁵²³ See generally, Lang W, 'UN-Principles and International Environmental Law' (1999) 163 *Max Planck UNYB* 157.

Nurturing Our Environment for Sustainable Development

must adhere to the constitutional governance framework and commitment to sustainable development, while addressing the goal of attaining low carbon climate resilient development.

The country needs to closely work with communities, private sector and various stakeholders to promote and ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources. Indeed, a recent announcement by the Environment cabinet Secretary, who called for new stakeholder partnerships to address challenges facing the community based natural resources management, is to be lauded. The cabinet Secretary noted that over-exploitation of natural resources, limited access to markets; poverty and weak policies were rampant in areas endowed with community resources posing challenges in their exploitation. According to the Secretary, the Ministry was committed to support community-based environmental initiatives that recognize equity, fair-trade and benefits sharing of natural resource management.⁵²⁴

Society must decide how best to use its total capital stock today to increase current economic activities and welfare. Society must also decide how much it needs to save or accumulate for tomorrow, and ultimately, for the well-being of future generations.⁵²⁵ There is a need to move beyond the law and adopt other measures aimed at ensuring meaningful development. In conclusion, it is necessary that all stakeholders cooperate in nurturing the environment for the achievement of sustainable development, a prosperous and secure future for all.

⁵²⁴ Ministry of Environment and Natural Resources, 'Ministry to Support Community Initiatives,' available at <http://www.environment.go.ke/?p=1467> [Accessed on 25/10/2015].

⁵²⁵ UNEP, 'What is an "Inclusive Green Economy"?' op cit., p. 17.

Institutionalizing Traditional Dispute Resolution Mechanisms and other Community Justice Systems

1. Introduction

This paper contains the findings and analysis of the outcomes of the research and field study undertaken for TDRs and other community justice systems in Kenya. This includes: an analysis of the status of TDRs, ADR and other community justice systems; a status analysis of the existing policies, legislation and administrative procedures designed to facilitate the promotion and support of TDRs and other informal community justice systems; the gaps that require immediate intervention; recommendations for policy formulation towards the implementation of Article 159(2) and (3) of the Constitution of Kenya 2010; and legislative proposals to address gaps in legislation and regulations to implement Article 159(2) (c) and (3) of the Constitution. In addition, the paper contains the presentations made during the stakeholder forums and workshops as well as the study tools used for data collection.

The Constitution of Kenya, 2010 recognizes application of TDRs and ADR mechanisms in dispute resolution for efficient dispensation of justice.¹ The Constitution establishes a strong elaborate human rights framework embodying the fundamental rights and freedoms entitled to the citizens. To achieve this, the Constitution dedicates an entire Chapter on human rights, that is, Chapter Four which embodies the Bill of Rights. However, the fundamental rights and freedoms cannot be enjoyed in the absence of an enabling framework for their enforcement.² To this end, the Constitution provides for the right of access to justice under Article 48 and enjoins the state to ensure access to justice for all persons and stipulates that if any fee is required, the same shall be reasonable and not impede access to justice. The Constitution contemplates 'justice in many rooms' and promotes access to justice through informal systems such as TDRs and ADR mechanisms in addition to the court process.³ Indeed, a high percentage of disputes in Kenya are resolved outside courts or before they reach courts by use of TDRs or ADR mechanisms.⁴ TDRs and other community justice mechanisms are widely used by communities to resolve conflicts owing to their legitimacy and accessibility.

Access to justice is critical in the enforcement of human rights. Undoubtedly, traditional dispute resolution mechanisms guarantee access to justice at the community level especially for those who feel alienated from the formal processes in terms of the cost for justice and technical procedures. Certainly, a robust legal system based on a hybrid of formal and informal justice systems strengthens the capacity of citizens to access justice. This is because the two justice systems complement each other and citizens are at liberty to choose the most appropriate and

¹ See Article 159 (2) (c) of the Constitution of Kenya 2010.

² See generally, Eide, A., "Making Human Rights Universal: Achievements and Prospects," *Human Rights in Development: Yearbook 2000* (1999).

³ See generally, Galanter, M., "Justice in many rooms: Courts, private ordering, and indigenous law," *The Journal of Legal Pluralism and Unofficial Law*, Vol.13, No. 19 (1981), pp. 1-47.

⁴ See generally, Wily, L. & Mbaya, S., "Land, People, and Forests in Eastern and Southern Africa at the Beginning of the 21st Century: The Impact of Land Relations on the Role of Communities in Forest Future," *Community involvement in forest management in Eastern and Southern Africa: Issue 7 of Forest and social perspectives in conservation*, (IUCN, 2001).

affordable system for themselves. The hybrid system should be coherent and articulate specifying the nature of each system, the advantages and disadvantages and setting out a clear interface between formal and informal systems.

In order to guarantee access to justice for Kenyans, the Constitution embraces dynamism in justice systems by encouraging the utilization of formal and informal justice systems. In this regard, Article 159 recognizes the use of TDRs and ADR mechanisms in addition to the court process. Article 159 (2) envisages the underlying principles for the exercise of judicial authority in Kenya. It stipulates that in exercising judicial authority, the courts and tribunals shall be guided by the following principles; (a) justice shall be done to all, irrespective of status, (b) justice shall not be delayed and (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted subject to clause 3. Clause 3 thereof provides that TDRs shall not be used in a way that (a) contravenes the Bill of Rights, (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice and morality, or (c) is inconsistent with the Constitution or any written law.

The role of TDRs in implementing access to justice cannot be gainsaid. In Kenya as well as many other African countries, it is trite that TDRs constitute the most basic and fundamental dispute resolution process. From time immemorial, even before the transplantation of the English legal system in Kenya, communities used to resolve a myriad of disputes through traditional justice systems.⁵ In most African communities, TDRs derive their validity from the customs and traditions and are deemed to be the primary pillar of the justice system in an African context.⁶

1.1 Background

Article 159(2) (c) of the Constitution of Kenya 2010 recognizes the use of other justice mechanisms in dispute resolution other than the court process. This Article envisages that judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under the Constitution. Further, courts and tribunals are enjoined, in exercising judicial authority, to be guided by principles that: (a) justice shall be done to all, irrespective of status; (b) justice shall not be delayed; and (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause(3). Drawing from 159 2(c) Clause 3 provides that traditional dispute resolution mechanisms shall not be used in a way that (a) contravenes the Bill of Rights; (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or (c) is inconsistent with the Constitution or any written law.

The Constitution envisages the overriding objective of the justice system in Article 48 on the right of access to justice and Article 159 that sets out the guiding principles. Thus, the goal of Article 159 is to ensure that every Kenyan can access justice without any impediment. Indeed, Article

⁵ Mkangi K, "Indigenous Social Mechanism of Conflict Resolution in Kenya: A Contextualized Paradigm for Examining Conflict in Africa," available at www.payson.tulane.edu. [Accessed on 20/04/2017]; See also Joireman, S.F., "Inherited legal systems and effective rule of law: Africa and the colonial legacy," *The Journal of Modern African Studies* Vol.39, No. 04, 2001, pp. 571-596; See also Fullerton J.S., "The evolution of the common law: Legal development in Kenya and India," *Commonwealth & Comparative Politics* Vol.44, No. 2 (2006), pp. 190-210.

⁶ *Ibid.*

159 as read together with Article 27 embodies the principle of rule of law which guarantees every citizen equal treatment, protection and benefits of the law. By strengthening access to justice, citizens are empowered to readily and affordably access the justice system to seek redress for violation of rights.⁷

Moreover, the constitutional guarantees on access to justice are designed to protect the rights of the economically disadvantaged as well as the vulnerable and marginalized groups.⁸ Undoubtedly, TDR and other community based mechanisms are critical in promoting access to justice among many communities in Kenya.⁹ Indeed, a great percentage of disputes in Kenya are resolved at the community level through the use of community elders and other persons mandated to keep peace and order.¹⁰

Despite formal recognition coupled with a constitutional mandate for their promotion in appropriate dispute resolution strategies, TDRs and other community justice systems have to date attracted inadequate attention in the ongoing judicial reforms. Recent studies carried out by civil society organisations indicate that TDRs and informal justice systems play a critical role in guaranteeing social order in many communities. They take the form of community council of elders, chieftains, peace committees and other indigenous community-based dispute resolution mechanisms. However, there has not been adequate attempt to give meaningful recognition, promotion and support for these invaluable strategies. There exists no policy or legislative framework to guide the promotion and use of these mechanisms despite their constitutional recognition and limitations prescribed in Article 159(2) and (3). Consequently, these systems remain untapped with a view to effectively support and complement the conventional justice system that presently spreads too thin over a wide geographical expanse despite the ever-pressing need for accessible and effective judicial services.

⁷ United Nations Development programme, "Access to Justice: Practical Note," 9/3/2004, p.3. Available at http://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dg-publications-for-website/access-to-justice-practice-note/Justice_PN_En.pdf.

⁸ See generally, United Nations General Assembly, 'Report of the Special Rapporteur on Extreme Poverty and Human Rights,' Sixty-seventh session, Item 70 (C) Of the Provisional Agenda (A/67/150), Promotion and Protection of Human Rights: Human Rights Situations and Reports of Special Rapporteurs and Representatives, A/67/278, 9 August 2012; See also generally, Inter-American Commission on Human Rights, "Access To Justice As A Guarantee Of Economic, Social, And Cultural Rights: A Review of the Standards Adopted By the Inter-American System of Human Rights," OEA/Ser.L/V/II.129 Doc. 4, 7 September 2007. Available at <http://www.cidh.org/pdf%20files/ACCESS%20TO%20JUSTICE%20DESC.pdf>

⁹ See generally, Wojkowska, E., *Doing Justice: How Informal Justice Systems Can Contribute*, (United Nations Development Programme – Oslo Governance Centre, December 2006). Available at <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/EwaWojkowska.pdf>

¹⁰ See Muigua, K., "Empowering the Kenyan People through Alternative Dispute Resolution Mechanisms," Paper Presented at the CI Arb Africa Region Centenary Conference 2015, held on 15-17, July 2015. Available at

https://profiles.uonbi.ac.ke/kariuki_muigua/files/empowering_the_kenyan_people_through_alternative_dispute_resolution_mechanisms_-_21st_docx.pdf ; See also generally, Kariuki, F., "Community, Customary and Traditional Justice Systems in Kenya: Reflecting on and Exploring the Appropriate Terminology," available at

<http://www.strathmore.edu/sdrc/uploads/documents/books-andarticles/Paper%20on%20Traditional%20justice%20terminology.pdf>

The constitutional guarantees in regard to access to justice call for appropriate policy, statutory and administrative interventions to ensure the efficacy of both conventional and alternative dispute resolution mechanisms (ADR) including traditional dispute resolution strategies and community-based justice systems. To this end, research was undertaken and its outcomes form the substance of this paper. The paper explores appropriate policy, statutory and administrative intervention designed to ensure that: (a) TDR strategies and other informal justice systems find their rightful place in the conventional judicial system; (b) the requirements of Article 159(2) and (3) of the 2010 Constitution are meaningfully implemented; and (c) all traditional and informal justice systems observe the minimum standards prescribed in Article 159(3) of the Constitution.

1.2 Methodology and Research Design

The research adopted a hybrid approach comprising of desk research and a field study where the Meru and Luo communities were sampled for field interviews. The research was guided by the constitutional provisions on application of TDRs and ADR. This is mainly Article 159 (2) (c) and (3). Overall, the research adopted a social-legal approach by conducting a study on community justice systems and the analysis of the legal, policy and administrative structures that promote or impact on TDR processes in Kenya. Firstly, the desk research was undertaken on the status of TDRs and other community justice systems, the legal and policy framework impacting on TDRs and their adequacy while identifying gaps and barriers that need to be filled to strengthen application of TDRs. To this end, the research revealed that the legal and policy framework fall short of the constitutional threshold for TDRs and ADR. These gaps have been pointed out in this paper and recommendations suggested to align the legal and policy framework with the Constitution.

Secondly, a field study was conducted in a few selected communities on the status of the TDRs and other community justice systems. For background information, the researcher reviewed and analyzed reports of studies conducted by several civil society organisations as well as academic commentaries on the subject. Moreover, the writer undertook a survey of TDR practice in other jurisdictions in Africa and beyond. Drawing from lessons of best practices in other jurisdictions, the report makes recommendations for harnessing TDRs in dispute resolution. The paper points out the key weaknesses of TDR systems and makes recommendations for addressing the same in order to mainstream the application of TDRs in line with Article 159 (2) (c) and (3) of the Constitution.

1.3 Stakeholder Consultative Forums

The stakeholder consultations were conducted in form of field interviews in various communities where TDRs are used in dispute resolution. The study focused on the nature and structure of various TDR mechanisms, their jurisdiction and the extent to which they satisfy the requirements of Article 159(2) and (3) of the Constitution. Six local communities where TDR mechanisms have been used to manage conflicts and resolve civil disputes were identified. These included the Digo, Meru, Kikuyu, Somali, Luhya and the Luo communities; where council of elders (*Kaya elders among the Digo community, the Njuri Ncheke of Meru, the Kiama of the Kikuyu community and Ker among the Luo community*) are community gate keepers. In addition, Court User Committees (CUCs) and Local Administrators (Chiefs) were identified as respondents. Due to logistical reasons, actual interviews were conducted in two communities: Luo and Meru. The findings po

int to the use of TDR mechanisms in managing conflicts and resolve civil disputes and will contribute to the development of policy on Article 159(2) and (3) of the Constitution

1.4 Limitations

The researcher was able to undertake research on the legal, policy and institutional framework relating to TDRs and other community justice systems. In the analysis, it was established that there is no distinct legal, policy or institutional framework for TDRs but there are various laws that promote the use of TDRs and other community justice systems in dispute resolution.

The writer undertook a comparative analysis of TDRs and other community justice systems in Africa and beyond and identified key best practices that Kenya can emulate. Moreover, it was established that most TDRs in Africa and beyond face almost identical challenges for instance failure to meet constitutional human right threshold, poor documentation, undefined jurisdiction and subjection to formal laws.

The main challenge that the author faced was in respect of the field interview. Out of the targeted 342 respondents drawn from six local communities (Digo, Meru, Kikuyu, Somali, Luhya and Luo), Court User Committees and Local Administrators (Chiefs) only 81 respondents from two communities (the Luo community (Kisumu, Siaya and Homabay counties) and the Meru community of Tharaka Nithi County), the Local Administration and Court User Committee members were involved in the study. The study outcome is based on information from respondents drawn from six local communities and does not fully represent the diversity of the Kenyan community.

1.5 Recommendations

The overall objective of the project was to undertake a status analysis of Traditional Dispute Resolution Mechanisms and informal community justice systems and to make recommendations and provide guidelines for formulation of policies and legislation to support TDR strategies. The recommendations are contained in section 5 of this paper.

PART II

2. Status of TDRs and ADR in Kenya

This section presents the findings of the research and field study conducted on the status of TDRs, ADR and other community based justice systems in Kenya. The research and field study focused on the nature and structure of various TDR mechanisms, their jurisdiction and the extent to which they satisfy the requirements of Article 159(2) and (3) of the Constitution. Further, the research examined the advantages and disadvantages of TDRs and the challenges in their application. In addition, the research explored the historical basis of TDRs in Kenya vis-a-vis the formal court process and how the two have been applied by Kenyan courts. A comparative survey of TDRs in other jurisdictions in Africa and beyond was undertaken. The findings of the field study were used to verify the research outcomes and finalize the report.

For the field study, six local communities where TDR mechanisms have been used to manage conflicts and resolve civil disputes were identified. These included the Digo, Meru, Kikuyu, Somali, Luhya and the Luo communities; where council of elders (*Kaya elders among the Digo community, the Njuri Ncheke of Meru, the Kiama of the Kikuyu community and Ker among the*

Luo community) are community gate keepers. In addition, Court User Committees (CUCs) and Local Administrators (Chiefs) were identified as respondents. Due to logistical reasons, actual interviews were conducted in two communities: Luo and Meru.

Overall, the field study attracted a total of 81 respondents, 80% male and 20% female who were interviewed from four (4) counties: Kisumu, Siaya and Homabay for the Luo community and the Tharaka Nithi County for the Meru Community (Fig. 1). The respondents comprised of members of the Council of Elders (Luo and Meru) forming 26% of the respondents, local administration (22% of the respondents) and the Court User Committee members (49% of respondents).

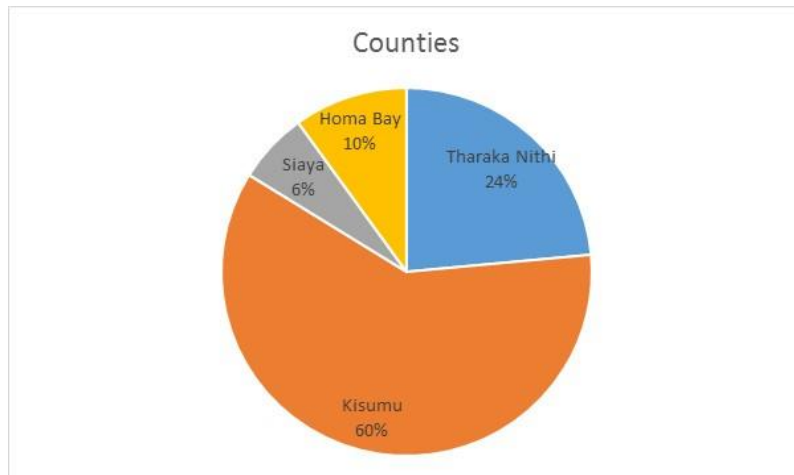


Figure 1: Respondents by County

2.1 Overview of TDRs and ADR in Kenya

The recognition of ADR and TDRs under Article 159 of the Constitution is a restatement of the customary jurisprudence of Kenya.¹¹ This is because TDRs existed from time immemorial and are therefore derived from the customs and traditions of the communities in which they operate.¹² In most African communities, TDRs existed even before the other alternative dispute resolution mechanisms were invented. The key guiding principles for successful application of TDRs among traditional African communities was that the tribunal (chiefs, councils of elders, priests or kings) should be properly constituted. The disputants ought to have confidence in them and submit to their jurisdiction.¹³

¹¹ See Muigua, K., "Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010," p. 2. Available at <http://www.chuitech.com/kmco/attachments/article/111/Paper%20on%20Article%20159%20Traditional%20Dispute%20Resolution%20Mechanisms%20FINAL.pdf>; See also Oraegbunam, I. K. E. "The Principles and Practice of Justice in Traditional Igbo Jurisprudence," *OGIRISI: a New Journal of African Studies* 6, no. 1 (2009): 53-85, p.53.

¹² See Brock-Utne, B., "Indigenous conflict resolution in Africa," In weekend seminar on indigenous solutions to conflicts, 2001, pp. 23-24; see also Ntuli, P.P., "Indigenous knowledge systems and the African renaissance." *Indigenous knowledge and the integration of knowledge systems: Towards a philosophy of articulation* (2002): 53-66.

¹³ Anjayi, A.T., "Methods of Conflict Resolution in African Traditional Society," *An International Multidisciplinary Journal, Ethiopia*, Vol. (8) Serial No.33, April, 2014, p.142.

The main aspects of TDRs and other ADR mechanisms which make them unique and community oriented is that they focus on the interests and needs of the parties to the conflict as opposed to positions, which is emphasized by formal common law and statutory regimes.¹⁴ The main objective of TDRs in African societies is to resolve emerging disputes and foster harmony and cohesion among the people.¹⁵ TDRs derive their validity from customs and traditions of the community in which they operate. The diversities notwithstanding, the overall objective of all TDRs is to foster peace, cohesion and resolve disputes in the community. The practice of TDRs is not recorded in any form of documentation or record keeping but the rules are handed down from one generation to the next.¹⁶

Historically, the use of TDRs and other ADR mechanisms in dispute resolution existed even before the introduction of a formal legal system. Conflict resolution among the traditional African societies was anchored on the ability of the people to negotiate. However, with the introduction of colonial legal systems, western notions of justice such as the principles of the common law of England were introduced in Kenya. The formal courts, being adversarial in nature, greatly eroded the traditional conflict resolution mechanisms.¹⁷

The use of TDRs in access to justice and conflict management in Africa is still relevant especially due to the fact that they are closer to the people, flexible, expeditious, foster relationships, voluntary-based and cost-effective.¹⁸ For this reason, most communities in Africa still hold onto customary laws under which the application of traditional dispute resolution mechanisms is common.¹⁹ The use of TDRs fosters societal harmony over individual interests and humanness expressed in terms such as *Ubuntu* in South Africa and *Utu* in East Africa.²⁰ Such values have

¹⁴ See Muigua, K., 'Effective Justice for Kenyans: Is ADR Really Alternative?' pp. 12-13. Available at <http://www.kmco.co.ke/attachments/article/125/Alternative%20Dispute%20Resolution%20or%20Appropriate%20Dispute%20Resolution.pdf>; see also Shamir, Y. and Kutner, R., *Alternative dispute resolution approaches and their application*, Unesco, 2003. Available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.468.2176&rep=rep1&type=pdf> [Accessed on 20/04/2017]

¹⁵ Hwedie, K.O. and Rankopo, M.J., Chapter 3: *Indigenous Conflict Resolution in Africa: The Case of Ghana and Botswana*, p. 33, University of Botswana. Available at http://ir.lib.hiroshima-u.ac.jp/files/public/33654/20141016194149348069/ipshu_en_29_33.pdf [Accessed on 20/04/2017]

¹⁶ See generally, Biobaku, S.O., "The problem of traditional history with special reference to Yoruba traditions," *Journal of the Historical Society of Nigeria* Vol.1, No. 1, 1956, pp.43-47.

¹⁷ See generally, Mac Ginty, R., "Indigenous peace-making versus the liberal peace." *Cooperation and conflict*, Vol.43, No. 2 (2008), pp.139-163.

¹⁸ See generally, Singer, L. R., "Non-judicial Dispute Resolution Mechanisms-The Effects on Justice for the Poor." *Clearinghouse Review* Dated : (1979), pp. 569-583; Osi, C., "Understanding Indigenous Dispute Resolution Processes and Western Alternative Dispute Resolution, Cultivating Culturally Appropriate Methods in Lieu of Litigation," *Cardozo J. Conflict Resol.*, Vol.10, 2008, p.163.

¹⁹ See Justice, D., "How informal justice systems can contribute." Oslo, United Nations (2006); Bamikole, L., "An Indigenous Yoruba Socio-political Model of Conflict Resolution," *Philosophy Study* Vol.3, No. 2 (2013), p.144; Edossa, D.C., et al, "Indigenous systems of conflict resolution in Oromia, Ethiopia," *Community-Based Water Law and Water Resource Management Reform in Developing Countries* (2007), p.146; Murithi, T., "African approaches to building peace and social solidarity," *African Journal on Conflict Resolution* Vol.6, No. 2 (2006), pp. 9-33; Akinwale, A.A., "Integrating the traditional and the modern conflict management strategies in Nigeria," *African Journal on Conflict Resolution*, Vol.10, No. 3, 2010.

²⁰ Muigua, K. and Kariuki, F., "ADR, access to justice and development in Kenya," Paper presented, at the Strathmore Annual Law Conference 2014 held on 3rd and 4th July, 2014 at Strathmore University Law School, Nairobi. Available at <http://www.kmco.co.ke/index.php/publications/138-adr-access-to-justice-and-development-in-kenya-kariuki-muigua-kariuki-francis> [Accessed on 21/04/2017].

contributed to social harmony in African societies and have been innovatively incorporated into formal justice systems in the resolution of conflicts. Unlike the court process which delivers retributive justice, TDRs encourage resolution of disputes through restorative justice remedies.²¹

2.1.1 The Repugnancy Test

The transplantation of the English legal system in Kenya overhauled the hitherto African traditional dispute resolution systems and subjected them to a foreign legal system. The various TDRs were deemed to be backward, uncouth and uncivilized. The exclusion of customary law posed a big challenge to the formal courts in determining disputes emanating from customs and traditions of Kenyan Africans. Evidently, most judgments resulted in great injustice since African disputes which could have been better resolved by application of customary law were determined on the basis of notions and jurisprudence of a foreign law. This led to resistance and contempt by Africans against the colonial courts which prompted the colonial administration to integrate customary laws within the formal legal system but they were subordinated to English laws. In this regard, customary law was deemed valid as long as it did not contradict the common law or any written law. This was the origin of the repugnancy clause encapsulated in section 3(2) of the Judicature Act²².

The policy behind subjection of customary law to the repugnancy test was founded on the contention that there are certain aspects of customary laws that do not augur well with human rights standards.²³ This has resulted in continued subjection of customary laws to the repugnancy clause by courts hence undermining the efficacy of traditional justice systems.

However, there is an ongoing debate in academia with scholars positing that there is need for customary laws to be recognized at the same pedestal with formal laws as their usefulness in certain social and cultural aspects is now settled bearing in mind international human rights standards.²⁴ Besides, it is argued that the repugnancy clause suffers from a grievous misconception of 'justice and morality' because it imposes the Western moral codes on African societies who have their own conceptions of justice and morality.²⁵ Redefining the repugnancy

²¹ Mkangi, K., "Indigenous Social Mechanism of Conflict Resolution in Kenya: A Contextualised Paradigm for Examining Conflict in Africa," *op cit*.

²² Judicature Act, Cap 8, Laws of Kenya.

²³ See Merry, S.E., "Human rights law and the demonization of culture (and anthropology along the way)," *Polar: Political and Legal Anthropology Review* Vol.26, No. 1, 2003, pp.55-76.

²⁴ See generally, Donnelly, J., "Cultural relativism and universal human rights," *Human Rights Quarterly*, Vol. 6, No. 4, 1984, pp. 400-419; See also Cerna, C.M., "Universality of human rights and cultural diversity: implementation of human rights in different socio-cultural contexts," *Human rights quarterly*, Vol. 16, No. 4, 1994, pp.740-752; See also Cobbah, J.A.M, "African values and the human rights debate: an African perspective," *Human Rights Quarterly*, 1987, pp.309-331.

²⁵ See Donnelly, J., "Human rights and human dignity: An analytic critique of non-Western conceptions of human rights," *American Political Science Review*, Vol. 76, No. 02, 1982, pp.303-316; See also generally, Heard, A., "Human rights: Chimeras in sheep's clothing." *Simon Fraser University* (1997). Available at <https://www.sfu.ca/~aheard/intro.html> [Accessed on 20/04/2017]; See also Donnelly, J., "The relative universality of human rights," *Human rights quarterly*, Vol. 29, No. 2, 2007, pp. 281-306; See also Cerna, C.M., "Universality of human rights and cultural diversity: implementation of human rights in different socio-cultural contexts," *Human rights quarterly*, Vol. 16, No. 4, 1994, pp.740-752; Harris, B., "Indigenous Law in South Africa-Lessons for Australia," *James Cook UL Rev.* Vol.5,1998, p.70.

clause would call for a change of attitude by the courts and reforms on the formal legal systems to elevate the position of customary laws.²⁶

2.1.2 Conflict Resolution versus Dispute Settlement

Conflict resolution mechanisms are those that address disputes with finality and produce mutually satisfying solutions. Resolution of conflicts prescribes an outcome based on mutual problem-sharing in which the conflicting parties cooperate in order to redefine their conflict and their relationship.²⁷ Since resolution is non-power based and non-coercive, it follows then that conflict resolution entails the mutual satisfaction of needs and does not rely on the power relationships between the parties.²⁸ The outcome of conflict resolution is enduring, non-coercive, mutually satisfying, addresses the root cause of the conflict and rejects power based out-comes.²⁹ A resolution digs deeper in ascertaining the root causes of the conflict between the parties by aiming at a post-conflict relationship not founded on power.³⁰

On the other hand, dispute settlement mechanisms only address the issues raised by disputants and aims at resolving the issues without venturing into the root causes of the dispute.³¹ Examples of dispute settlement mechanisms are arbitration and adjudication. Traditional justice systems are dispute resolution mechanisms. This is because TDRs utilize resolution mechanisms such as negotiation, mediation and conciliation to ensure that the root causes of the dispute are addressed and assist the parties to explore mutually satisfying and durable solutions. Where these mechanisms have been employed they have been effective in managing conflicts and their declarations and resolutions have been recognized by the formal institutions.³² For instance, in passing the Modogashe Declaration the people of Garissa, Mandera and Wajir districts agreed to resolve the problems of banditry, trafficking of arms, livestock movements, socio-economic problems, identifying role of peace committees among others.³³ It also outlined decisions made by the community around the issues affecting the community especially unauthorized grazing, cattle rustling, trafficking of arms, control of livestock diseases and trade, highway banditry, identity cards by non-Kenyans and others.³⁴

²⁶ See Juma, L., "Reconciling African Customary Law and Human Rights in Kenya: Making a Case for Institutional Reformation and Revitalization of Customary Adjudication Processes," *Thomas L. Rev.*, Vol.14, 2001, p.459.

²⁷ Bloomfield, D., "Complementarity in Conflict Management Theory: Resolution and Settlement Approaches7," In *Peacemaking Strategies in Northern Ireland*, pp. 67-95. Palgrave Macmillan UK, 1997.

²⁸ Cloke, K., "The Culture of Mediation: Settlement versus Resolution," *The Conflict Resolution Information Source*, Version IV, December 2005.

²⁹ *Ibid.*

³⁰ *Ibid*; Bloomfield, D., "Towards complementarity in conflict management: Resolution and settlement in Northern Ireland," *Journal of Peace Research*, Vol.32, No.2, 1995, pp.151-164.

³¹ *Ibid*; See also Mwangi, M., *The Water's Edge: Mediation of Violent Electoral Conflict in Kenya*, (Institute of Diplomacy and International Studies, July 2008), pp. 36-38.

³² See generally, Ertel, D., "How to design a conflict management procedure that fits your dispute." *MIT Sloan Management Review*, Vol. 32, No. 4, 1991, p.29.

³³ See generally, Biko, A.S., *The role of informal peace agreements in conflict management: modogashe declaration and its implementation in North Eastern, Kenya* (Doctoral dissertation, University of Nairobi, 2011).

³⁴ See National Cohesion and Integration Commission, "Review of Modogashe Declaration," available at <http://www.cohesion.or.ke/index.php/programmes/review-of-modogashe-declaration> [Accessed on 20/04/2017]

2.2 Findings and Analysis

The research conducted on TDRs and other community justice systems indicate that they are distinct from other justice processes and are the most preferred mode of conflict resolution by communities. The main characteristics of TDRs are: they do not adhere to a prescribed or written set of rules; they draw from customs and traditions of the community in which they operate; easily accessible to all people and use local language which is widely understood by people; proceedings are oral and usually there is no record keeping; Veracity of customs and values/rules depends on the memory of the mediators; mostly fail to adhere to the Bill of Rights; remedies are couched on restorative justice; wide and undefined jurisdiction; TDRs practitioners need no formal education and training.

2.2.1 Advantages of TDRs and Other Community Based Justice Systems

The study assessed the advantages of TDRs and other community based justice systems and found out that; traditional values are part of the heritage of the people hence people subscribe to its principles; promotes social cohesion, peace and harmony; proximity to the people/accessibility and use of language that the people understand; the mechanisms are affordable; TDRs are resolution mechanisms; are cost effective since parties can easily represent themselves in such forums; proceedings undertaken are confidential; TDRs and ADR mechanisms are flexible since they do not adhere to strict rules of procedure or evidence and they yield durable solutions. The majority of the respondents (91%) interviewed do consider community justice systems as valuable. (See Fig. 2 below)

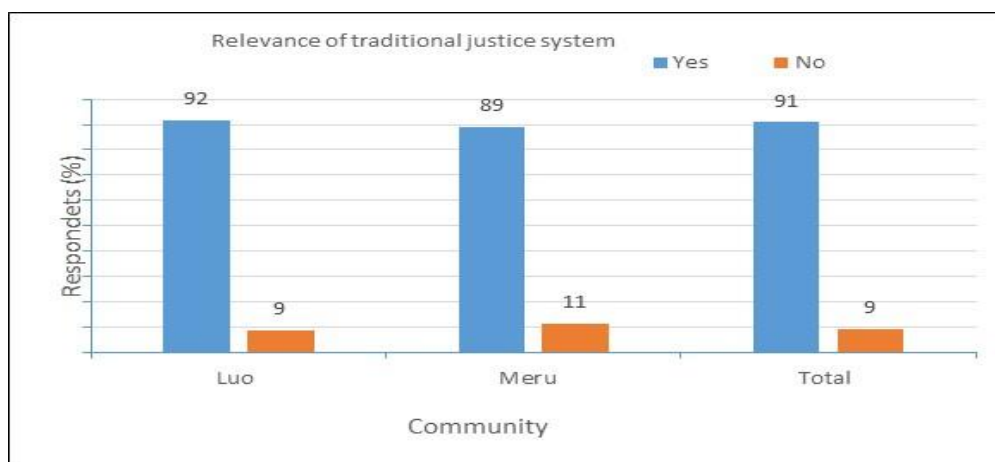


Figure 2: Relevance of Traditional Justice Systems

Further, the respondents were of the view that TDR mechanisms are valuable because: they decongest the courts and prisons, respect the traditional cultures and traditions, decisions emanating from such mechanisms are easily acceptable to communities, they promote peace, harmony, co-existence among communities and security, they are expeditious and most cases are resolved by elders who have background knowledge and understanding of cases and the people hence allow for handling matters discreetly for quick resolution, they are less costly and easy accessible to the poor, resolve disputes at grass-root level and enhance access to justice, they also provide local solutions which are more acceptable to people and they are agents of change and promote economic development, foster love, cohesion, integrity and promote respect for each other. (See table 1 below on the perceptions on relevance of TDRs)

Reasons	Number of respondents	
	Yes	No
Decongest courts and prison	18	0
Respect traditions of communities	17	0
Promotes peace, harmony and coexistence among communities and security	16	0
Expeditious and most cases are resolved- Allow for handling matters discretely to allow resolution	16	0
Less costly and Easy access by poor	17	0
Resolve disputes at grass-root level and enhances access to justice	10	0
Local solution/more acceptable to people	8	0
Elders understand history of the case and people and have experience	6	0
Agent of change and promotes economic development	9	0
Foster love, cohesion and integrity and promotes respect for each other	7	0
mediate political issues and advise leadership on how to conduct themselves	2	0
Inclusiveness and non-discriminatory	2	0
Lack of framework and policies to enforce and not legally binding	0	2
little involvement of women and there is need for inclusion	0	2
Ignorance of legal knowledge	0	2
Lack of resources and limited financial ability	0	1
Communities have evolved and integrated a lot and sets of common laws do not exist	0	1
Disrespect of resolutions of TDR by many	0	1
Favoritism /biasness at times	0	1

Table 1: Perception on relevance of TDR in community

2.2.2 Disadvantages of TDRs and Other Community Based Systems

However, TDRs were found to have various disadvantages such as: disregard for basic human rights (For example where women as discriminated against or where corporal punishment is meted out); application of abstract rules and procedure/lack of a legal framework; lack of documentation/record-keeping; limited resources and financial inability of the systems; evolution of communities and mixing up of different cultures thereby eroding traditions; negative attitudes towards the systems and bias at times; the jurisdiction is vague/undefined and wide; and lack of consistency in the decisions made.

Further, the study conducted indicates that there was some form of documentation of TDRs although it is poorly done. Documentation of cases and outcomes creates a historical data for reference. In the traditional setting, documentation was majorly by memorization. The research established that 77% of the respondents said their proceedings are recorded. The recordings are recorded to provide future references in case of need, during appeals and for forwarding the cases to the next level, whether in the same line of the TDR or to the courts of law. (See Fig. 3 below).

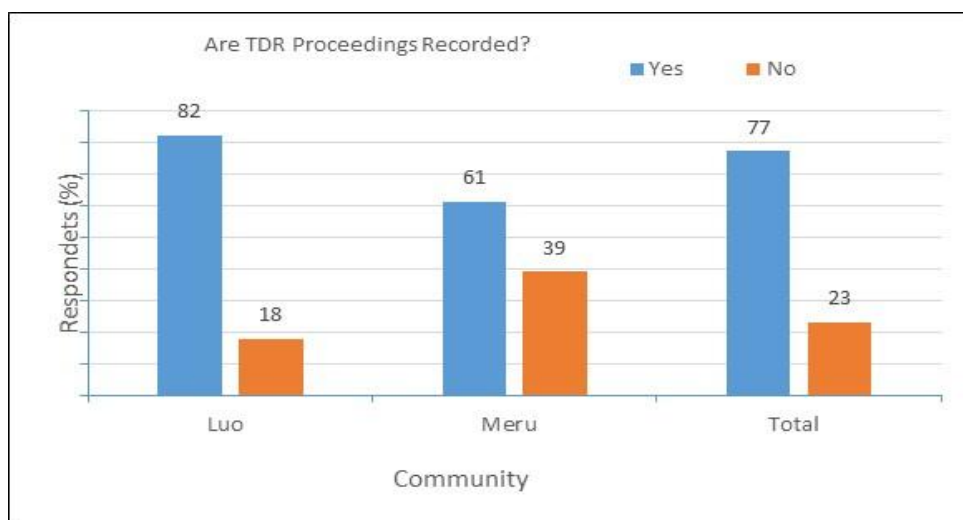


Figure 3: Recording of TDR proceedings in writing

The main challenges reported from the field study include: inadequate resources to finance the meetings and facilitation of the elders to participate actively in the meetings in form of transport. The services are usually voluntary and as such are dependent on the income level of the elders. Some of the meetings fail to take off, as indicated elsewhere in this paper, due to lack of quorums or non-availability of the elders mainly because of lack of transport. Other challenges include lack of recognition and empowerment of elders both legally and by the government, inadequate security and protection and negative attitudes towards elders by the community, illiteracy and lack of modern technology, gender imbalance in the composition of the committees and lack of awareness by the public on the TDRs and general rights, among others. (See Table 2 below)

Challenge	Number of respondents		
	Luo	Meru	Total
Limited resources and lack of funds and lack of transport facilities	33	6	39
Inadequate recognition and empowerment of elders -through protection and security, identification, negative attitudes towards elders	24	2	26
Not recognized by law and lack of enforcement mechanism	13	4	17
Non-compliance to rules	9	2	11
Illiteracy and lack of modern technology- illiterate clerks leading to inaccurate records, no records of how resolutions are arrived at	5	6	11
Gender imbalance and lack of representation and bias	10	0	10
Lack of exposure and capacity building	9	0	8
Vested interests in subject matter and lack on honesty with some elders looking at task as gainful employment and not service	5	0	5
No laid down standards/ framework for filing complaints and resolving disputes, how to behave as an elder	2	2	4
Lack of infrastructure and stationery-office space and furniture, buildings for holding courts	0	3	3
Political interference	2	0	2

Challenge	Number of respondents		
	Luo	Meru	Total
Lack of quorum and reducing number of elders	2	0	2
Lack of awareness on rights and freedoms of public	4	1	5
Multiplicity of hearings and apathy	2	0	2

Table 2: Challenges facing traditional dispute resolution processes in the community

2.2.3 Disputes Resolved By Use of TDRs

These are anti-communal acts that require resolution through the traditional dispute resolution mechanisms without being referred to courts. The disputes could range from the criminal to the anti-social behavior such as violent acts, disputes over resources, and social misconduct such as murder, theft, sexual misbehavior, etc. The five main disputes, according to the study, requiring resolution under the TDR mechanisms in the communities include land disputes, marriage, gender violence, family cases including inheritance, clan disputes, and welfare issues such as nuisance, child welfare and neglect of elderly in that order.

(See figure 4 below).

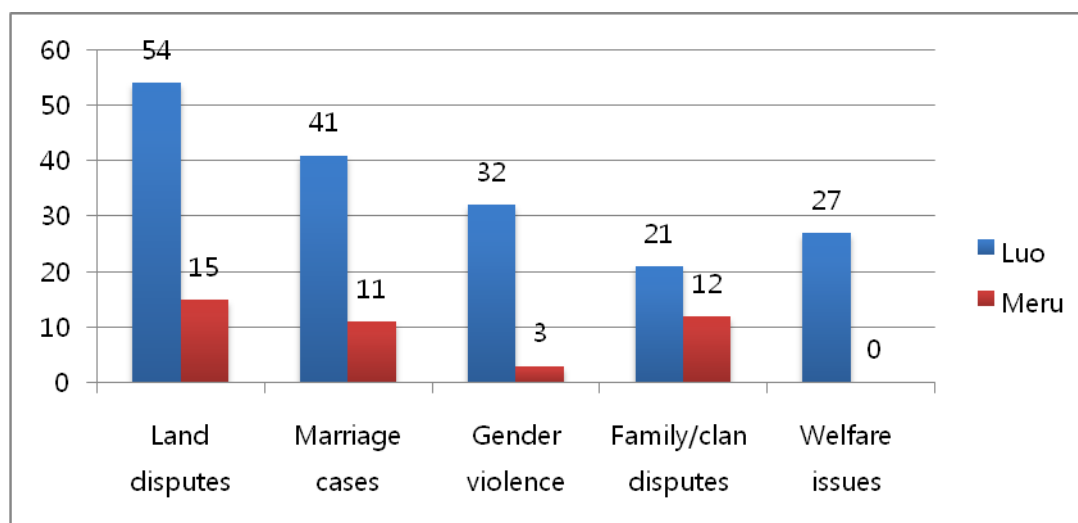


Figure 4: Five main disputes requiring resolution under the TDR mechanisms in the two communities

The Respondents reported that other disputes which required resolution using TDR mechanisms include cattle rustling, debt recovery, crop damages, overall community conflicts and resolution of political disputes in the community. (See table 3 below).

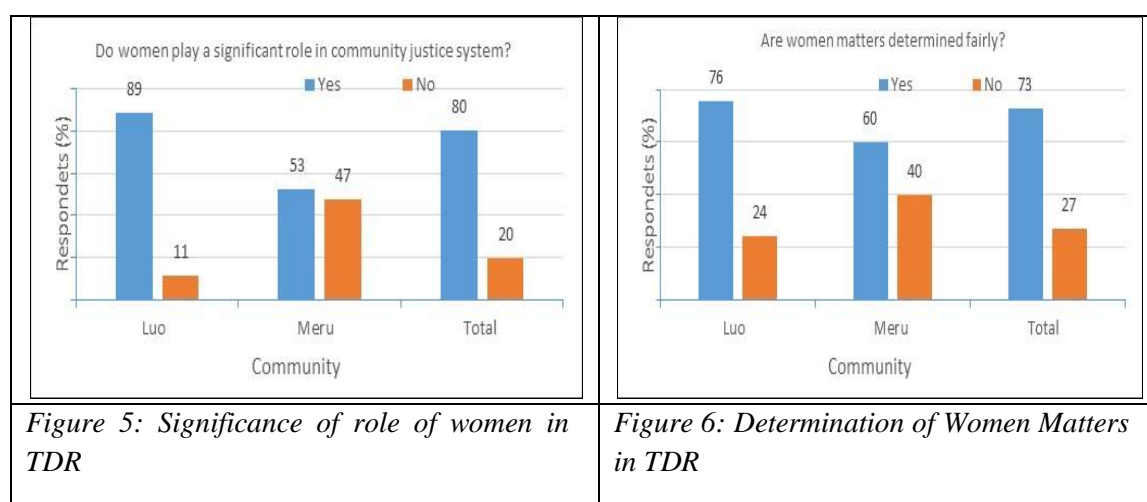
Nature of Dispute	Number of respondents		
	Luo	Meru	Total
Inheritance cases	23	2	25
Theft including cattle rustling	20	4	24
Resource scarcity	11	4	15
Debt recovery	12	3	15
Crop damage	10	0	10
Witchcraft cases	0	2	2
Political dispute	3	0	3
Assault	6	3	9

Table 3: Disputes requiring resolution under TDR

Basically majority of respondents indicated that many cases are resolvable through TDRs except for serious criminal offences that require the intervention of the courts. The offences suitable for trial in the court of law in addition to compensation under the traditional dispute resolution mechanism were reported as murder, manslaughter, sexual offences, grievous harm and stock theft.

2.2.4 Role of Women in the Community Justice System

Most TDRs are dominated by men. Women do not hold any substantive stake in TDR proceedings. The literature available on TDRs indicates that they mostly discriminate against women on matters where their rights are involved. This is because TDRs are based on customary law which discriminates against women. However, the study undertaken indicates that women play a significant role in the community justice system. Similarly, there is overall perceived fairness in the determination of women matters (73%). However, the perceived significance of women’s role in the TDR mechanisms and fairness in the determination of matters affecting them varied between the communities with more respondents (89%) reporting significant roles in the Luo community compared to 53% in the Meru community. (See figures 5 and 6 below).



Some of the reasons offered to show that there is fair determination of disputes include the fact that elders are always concerned with the lives of the women and the children and are more keen on promoting their (women and children) welfare (25%), women are represented in most of the

tribunals (38%), and that there is always room for fair hearing and appeals. Other reasons given were that women have the opportunity to appeal where not satisfied (19%) and tribunals are meticulous in conducting investigations to establish the truth (19%) before any determination. In addition, it was reported that most members of the tribunals have a good understanding of the community and yield fair and just determinations. Finally, councils of elders operate under an oath to do justice and they observe this responsibility without fear or favor. (See figure 7 below).

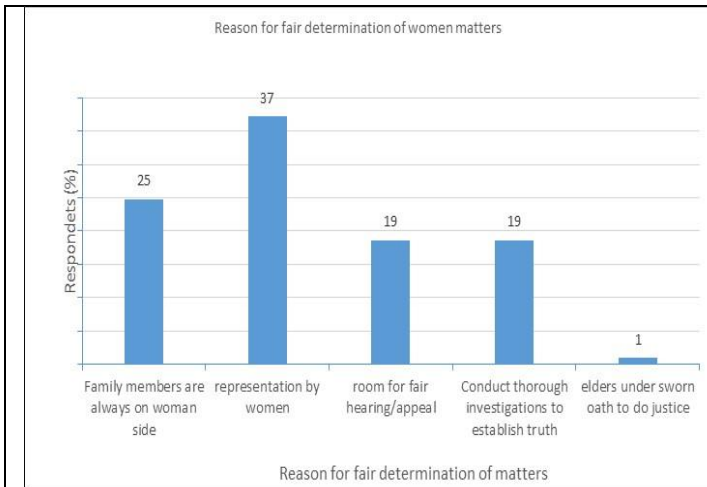


Figure 7: Reason for Fair Determination of Women Matters in TDR

However, some respondents felt that women matters are not (always) determined fairly. The reasons given include limited representation in terms of numbers, negative attitudes towards women by members, limited influence of tribunal outcomes by the women members, inability of women to communicate well and unfair and biased cultural practices and traditions. (See figure 8 below).

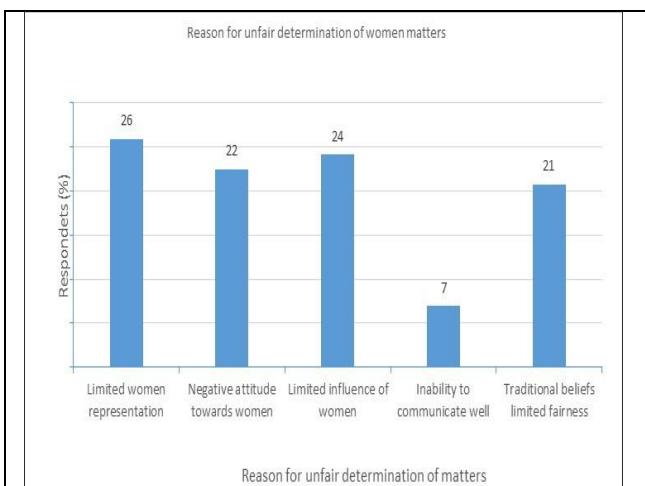


Figure 8: Reason for unfair determination of women matters

2.2.5 TDR Tribunal Proceedings

At the community level, dispute resolution through TDRs involves an informal hearing before a council of elders, local administration such as chiefs and assistant chiefs or highly respected and knowledgeable village elders. TDRs differ from the formal system in that whereas the formal system is a codification of written laws and common law, TDRs draw from communal customary law which is drawn from a community's culture and traditions. The formal system is characterised by retribution, hierarchy, defined jurisdiction and is highly adversarial. On the other hand, TDRs are inconsistent, uncoordinated, scattered and the jurisdiction is abstract. Whereas the formal legal system is individual-oriented, the TDRs are communal-based. Further, the focus of formal law is allocation of rights hence retributive and punitive in nature while the primary goal of TDRs is reconciliation, restoration and peaceful co-existence in the community.

Traditional dispute resolution proceedings are conducted in the open according to majority of the respondents (84%). The open sessions allow for free and open participation and contribute to fairness in the determination of disputes. (See figure 9 below).

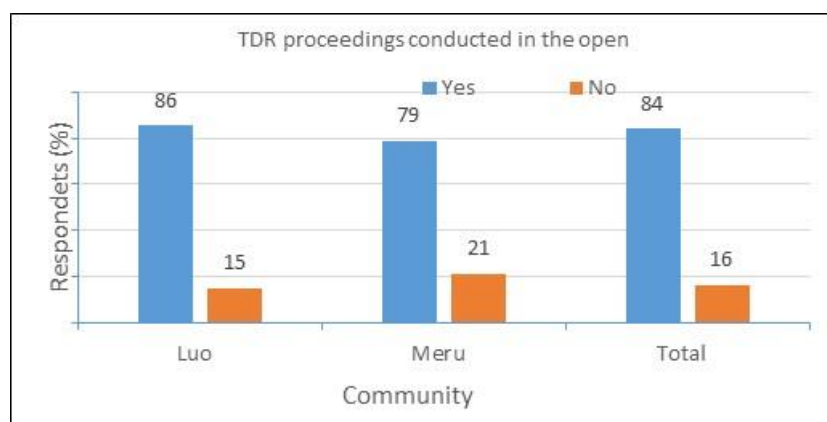


Figure 9: TDR proceedings conducted openly for members of the community to attend

In terms of compensation of council of elders or members of the alternative dispute resolution committees for their work, it was found that the council of elders in the Meru community is usually compensated. For the Luo community payment is mainly made to the committees or tribunals by the local administration including clan elders, village elders, and assistant chiefs. But no payment is made to the committee of the council of elders.

Where payments are made to the committees, the rates were reported to be largely fair, reasonable and affordable to majority of the people (79%). Such payments are usually agreed on between the disputants and can take any of two forms, in kind (in terms of animals or farm produce) or cash. Each of the disputants has to pay similar amounts to avoid any feeling of perceived biasness. The negotiated rates take into consideration the income levels of the disputants and are often made as a token. Sometimes the compensation takes the traditional form of slaughtering animals (goats) for the elders.

2.2.5.1 Composition of TDR Tribunals

The common traditional dispute resolution (tribunals/council of elders) committees mentioned are the Council of elders (Council of elders for the Luo and the Njuri Ncheke for the Meru community), the Local administration (Nyumba Kumi initiative, clan/village elders, Assistant chiefs and Chiefs' barazas), church elders and the children's departments. The councils of elders are mainly composed of men while in the local administration TDR mechanisms include women in the committees. Where both men and women are involved, the majority are men (the average being at 74 %) with women forming only 26% of the membership. However the composition is slightly higher in the Luo community with 74% compared to the Ameru's 67% proportion of men to women. (See figure 10 below).

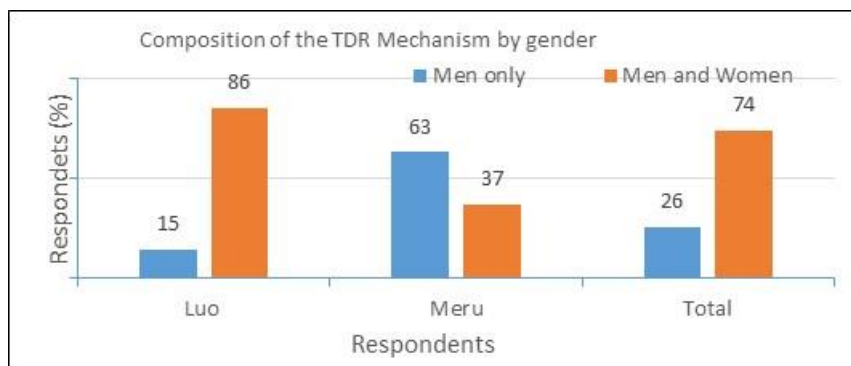


Figure 10: Composition of panels in TDR Mechanisms by Gender

In the Meru community, the membership of the council of elders is predominantly men with women being common mostly in the committees constituted to resolve certain specific issues under the local administration (mostly under the Chief and Assistant Chief's offices). The Luo community has women in both local administration and the council of elders. However participation of women in the Luo council of elders and to some extent in the committees is rather low due to the fact that elders engage in volunteer and free jobs which are not compensated and as such do not attract more women. It was also reported that women are mostly busy in household chores and therefore have limited time to engage in traditional committees.

It was established that a person's age is an important determinant factor in a person's membership to TDR tribunals/committees and especially with respect to membership in the council of elders. Most Councils of elders are constituted by persons who are above 50 years according to majority (79%) of the respondents, with the younger elders (51-50 years) being mostly clan/village elders under the local administration. In the Luo community, to be a member of the Council of Elders one has to be at-least 55 years for women and at least 65 years for men. The Meru have an age limit of over 50 years for one to be a member of the Njuri Ncheke. (See figure 11 below).

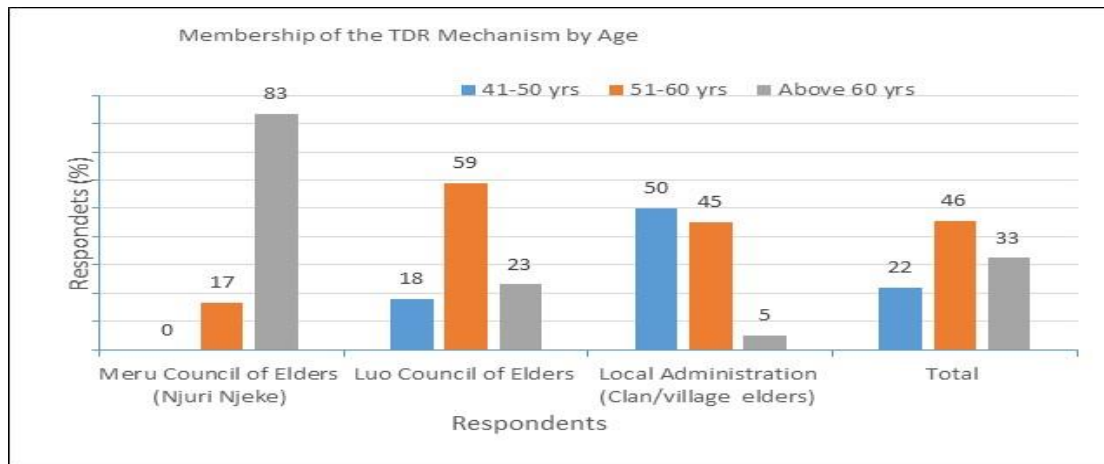


Figure 11: Age of the Members in TDR Tribunals/Committees

Other considerations for membership into these committees include gender, experience, knowledge and understanding of the traditions. Others are the overall status in the community including the social standing, integrity and commitment, maturity and family status such as marital status and success in raising a family. Special considerations among the communities include the residency status, clan representation, desire to volunteer, ability to keep matters confidential, foresight and readiness for the Luo and religious background among the Meru.

2.2.5.2 Accessibility of Traditional Dispute Resolution Mechanisms

Any dispute resolution mechanism should ensure access to justice for all persons and should be fair and affordable. The overall results from the field study indicate that majority of the respondents (84%) perceived TDR mechanisms as being accessible to all in the community. Among the Luo and Meru communities 85% and 83% of the respondents respectively, reported that TDR mechanisms are accessible. In cases where respondents felt some members of the community did not have equal opportunity to access traditional dispute resolution mechanisms, that was attributed to factors such as age, the status in the community, health/sanity, a person's character/behaviour with errant members of the community being dismissed, awareness of the TDRs with many people not being aware of the existence of the TDRs, lack of harmony between the TDRs and the statutes, conflict of interest, gender, high fees for some communities, knowledge of meeting venues and time, and proximity to the office.

The length of time taken to resolve most of the disputes in the two communities was found to be relatively short. According to 69% of respondents, disputes take less than 1 month to resolve, while 20% thought cases take 1-2 months. In the Meru community, majority of respondents (47%) said that cases take 1-2 months to resolve while 35% think cases take less than 1 month. In the Luo community, according to majority of respondents (79%), cases take less than 1 month to resolve, with only 12% expressing the view that cases take 1-2 months to resolve. (See figure 12 below).

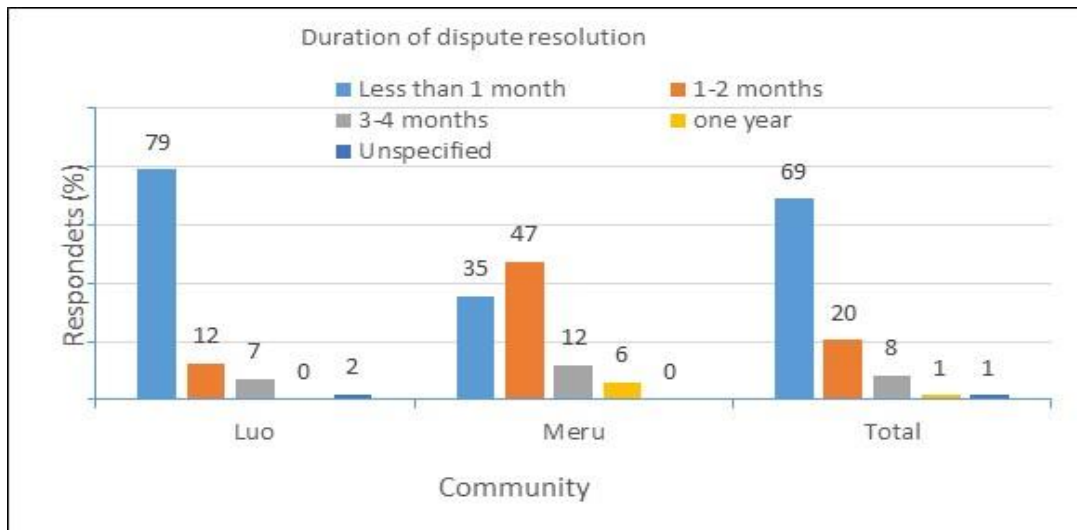


Figure 12: Duration of dispute resolution using the TDR mechanism

The period taken to resolve a dispute is heavily dependent on a number of factors including; the nature of the dispute with complex disputes involving land, communities and clans taking longer to resolve. Other determinants include the types of parties with the inter-clan and community disputes taking longer, the availability of the elders with cases being postponed severally due to lack of quorum or where the elders fail to turn up owing to lack of resources. The availability and number of witnesses and compliance of parties to the agreements is also crucial with longer periods taken where witnesses are many and do not comply with requirements. Accessibility of records and availability of adequate information about the issue under dispute is also important in determining the duration with longer durations taken to resolve cases which require time for further investigations and consolidation of background information. In some instances, the disputants appeal to the elders to take a longer period to resolve the dispute.

2.2.5.3 Outcomes of Traditional Dispute Resolutions

Traditional dispute resolution processes often take various forms including arbitration, mediation or conciliation. The main forms in the communities include agreements facilitated by reconciliation (64%), mediated agreements (63%) and arbitral awards of the council of elders (35%). Other forms specific to the Luo community include peace building, cohesion and friendship (6%), advisory opinions and counseling (1%) and compensation of aggrieved parties (1%).

Usually the expected outcomes of traditional dispute resolution processes are transformation and overall behavior change, compensation of the complainant (restorative) and retribution or punishment of the offender for the offence. Other results common to the Luo community include reconciliation and maintenance of peace, security and harmony, enhanced development and self-sustenance, overall reduction of poverty, cohesion, integrity and avoidance of recurrence of the dispute.

2.2.5.4 Enforcement of Traditional Dispute Resolutions

The success of a mechanism depends on the enforceability of its resolutions. The field study found that parties are always willing to comply with resolutions and that court assistance may not be

e necessary to enforce the outcomes. However, in some complex cases, TDR Tribunals will require enforcement by courts of law. (See figures 13 and 14 below).

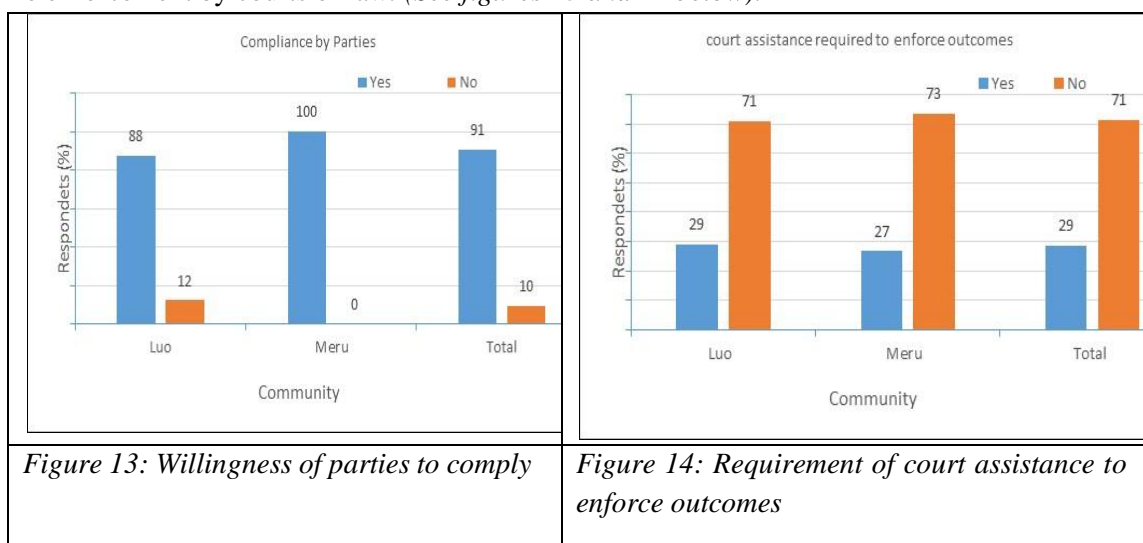


Figure 13: Willingness of parties to comply

Figure 14: Requirement of court assistance to enforce outcomes

Awards emanating from traditional dispute resolution mechanisms are enforced through the elders and the communities who make follow-ups and observations to take note of the compliance, behavioral changes and existence of peace. There is also self-enforcing or individual persuasion where individuals opt to comply with the agreements made for fear of curses from the elders and the community. Parties are also required to report back to the committees and community on the compliance status after specified periods.

Other enforcement mechanisms include symbolism and oath taking by parties, which increase compliance for fear of curses, award of penalties with double fines awarded in case of non-compliance. Parties are forced to make formal decrees of compliance through signed agreements and involvement of government officers including the chiefs, ministry of agriculture officials in case of crop damage, among others. (See table 4 below)

Enforcement	Number of Respondents		
	Luo	Meru	Total
By Elders and community- through follow-ups and observance of the changes in a person's behavior, compliance and existence of peace	26	4	30
Self-enforcing -Individual persuasion since parties agree and that people fear curses from elders	5	8	13
Parties report back at specified period	12	0	12
Symbolism and oath taking- people fear curses from elders	6	2	8
Penalties and fines-Offenders forced to give according to verdict and fine is doubled in case of failure	2	4	6
Signature of decree/formal decrees	5	1	6
Involvement of government officials (local administration)	4	0	4

Enforcement	Number of Respondents		
	Luo	Meru	Total
Compensation and awards done in public	4	0	4
Unleashing of threats	3	0	3
Appeal system	1	0	1

Table 4: Enforcement of the decisions/awards of the TDR mechanisms

Non-compliance to resolutions/decisions of the TDR Tribunals has various consequences. The main consequences include review of the resolutions through an appeal mechanism to establish if they are reasonable, forwarding of cases to the courts or disputants advised to appeal to a higher level. There is also provision for forceful enforcement by authorities including the chiefs, police and the elders. This could be through forceful payment of awards and confiscation of properties to pay the awards. Other consequences include heavy punishments and penalties, performance of rituals and invocation of curses on the party, unleashing of threats of excommunication from the community or being outlawed and sanctioned by the community.

2.2.5.5 Appeal Mechanisms in TDR

The field study found the existence of appeal mechanisms in Traditional Dispute Resolution mechanisms among the Luo and Meru communities. Overall, 70% of respondents indicated that the community dispute resolution process has appeal mechanisms through which unsatisfied disputants can lodge their complaints. The purpose of the existence of appeal mechanisms is to guarantee the disputants quality assurance in the decisions rendered by TDR Tribunals at all times. (See figure 15 below)

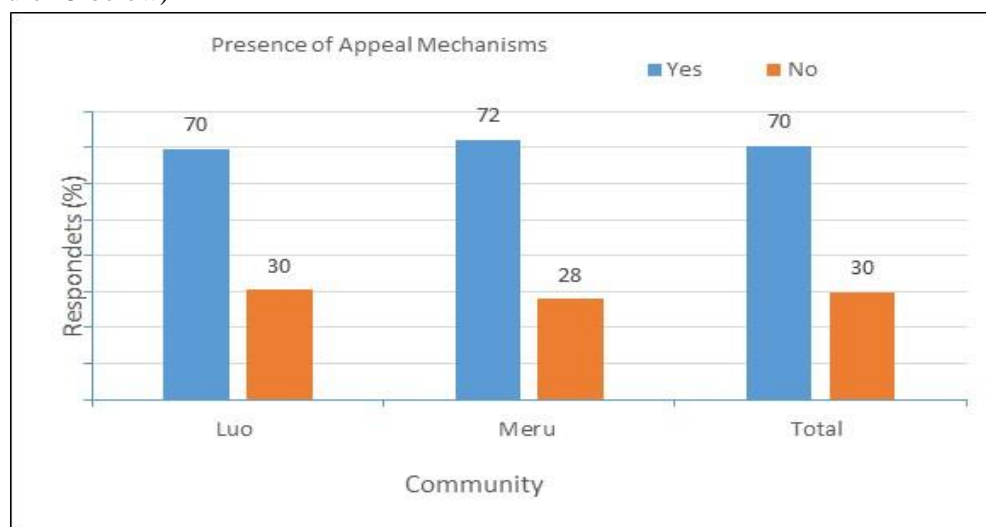


Figure 15: Presence of Appeal Mechanisms

The place to lodge an appeal is dependent on the nature and level of the dispute. Overall the disputants can either appeal at the same level in which case a new committee will be constituted to look into the case or at a higher level. Where disputes are handled by the local administration, the

Nyumba Kumi groups are the first to consider the dispute. In the event a resolution is not reached, the dispute can then be referred to the Assistant Chief, then to the Chief. If the dispute is not resolved by the latter, it is referred to the Assistant County Commissioner and finally to the Deputy County Commissioner. Cases that cannot be resolved at that level are then referred to a court of law.

Where a dispute is heard by a Council of Elders, an unsatisfied disputant can appeal to the same committee of the council of elders, in which case a new committee chaired by a different council of elders will be formed to look into the case. The dispute can then proceed to the next level from village to location, to sub-county, to county, to president of the council of elders. Unsatisfied disputants at this level are then advised to go to court. It is noteworthy that the Luo council of elders is organized into counties and sub-counties in line with the Constitution.

2.3 Other Field Studies

The Federation of Women Lawyers conducted a study on Traditional Justice Systems among communities in the coast province of Kenya. The main objective of the field research was to study traditional justice systems in the selected communities and come up with recommendations for legal reform that would result in the mainstreaming of traditional justice institutions into the Kenyan justice system, with a view to promoting access to justice by vulnerable groups, particularly women.³⁵

³⁵ The study found that there is a hierarchy of Traditional Justice Systems (TJS) from village, locational, divisional and district levels. TJS members are predominantly elders drawn from the community, except for the Council of Imams and Preachers of Kenya (CIPK) in Mombasa which is composed of Imams and religious leaders. TJS members are mostly elected by community members, but in some cases they are appointed by the chiefs.

With regard to the composition of the Traditional Justice Systems in the communities, the study found that in most TJS, the members are men only, although there are a few TJS made up of both men and women with men comprising the majority. Two exceptional TJS exist among Had Gasa of the Orma community and the Kijo of the Pokomo community, whose TJS is made up of women only. TJS members are older, married, residents of the area, knowledgeable and respected in the community. Many male TJS members are religious leaders or knowledgeable in religious matters, for example Islam or Christianity.

The study found that Traditional Justice Systems are employed to resolve particular disputes at certain levels. At the village or locational level, TJS is used to resolve family and neighbourhood disputes while at the divisional and district levels they deal with issues such as security, livestock theft, grazing patterns, land disputes etc. Serious offences such as homicides and robberies are referred to the police. Women-only TJS deal with matters related to women's sexuality, for example rape or defilement, as well as social issues such as HIV/AIDS and FGM.

As regards the procedure during the proceedings, once a complaint is made the Respondent is summoned either orally or in writing and a date for the hearing of the dispute is set. On the date of the hearing each party presents their side of the case and call witnesses. Thereafter, the TJS members deliberate and either reach a decision on the same day or a decision is communicated at a later date.

If a disputant is dissatisfied with the decision made he/she may appeal to the next level of the TJS. Where a TJS decision is not complied with, the matter may be referred to the chief. Enforcement of decisions by a TJS consists of social sanctions, for example shunning, ostracism and in some cases banishment from the community. Enforcement may also take a spiritual form such as cursing. In the women-only Had Gasa punishment may be meted out in the form of beating but the Chief has to be notified of such punishments.

The study found that men and women generally consider TJS accessible, affordable and fair. However, as far as outcomes are concerned many women perceive TJS, particularly men-only ones, to be biased against women due to the TJS negative perceptions of women. The invocation of traditional beliefs often operates to deny women's claims, for example to land. TJS are also vulnerable to vested interests of the community. Women's lower socio-economic position relative to men may sometimes result in detrimental outcomes, particularly for poor women or widows.

The International Commission of Jurists also published a report on the interface between the formal and informal justice systems in Kenya. The report examines and analyses the different forms of TJS and ADR using the integrity ‘lenses’ and elucidates on them. The research makes a concise comparison between the formal and informal justice systems drawing key lessons which can be used to integrate an efficient and responsive justice system in the country. The research also explores the existing efforts to mainstream the use of IJS as an alternative to the court administered justice, the successes, challenges and way forward. It also assessed the adequacy of existing legal, legislative and policy framework on the same and suggests amendments.³⁶

The Chartered Institute of Arbitrators also organized a forum for ADR stakeholders in Kenya which was held on 22-23rd October 2014 at the Windsor Golf Hotel. The forum observed that Traditional Dispute Resolution is the oldest system of dispute resolution with clear foundations and acceptance by its users. It therefore does not require legitimization from the state. The fact that communities have differing practices with regard to traditional dispute resolution, poses a significant challenge in the development of rules and standardization of practice for traditional dispute resolution.

2.4 Alternative Dispute Resolution Mechanisms (ADR)

Alternative Dispute Resolution (ADR) mechanisms refer to the set of mechanisms a society utilizes to resolve disputes without resort to costly adversarial litigation. All African communities had their own defined dispute resolution mechanisms. Similarly, each African community had/has a council of elders that oversees the affairs of the community, including ensuring that there is social order and justice in the community. These were known by various names in different communities and their membership had specific characteristics /qualifications. The most commonly used ADR mechanisms by traditional Kenyan communities include mediation, arbitration, negotiation, reconciliation and adjudication.

a) Negotiation

Negotiation is an informal process and one of the most fundamental methods of dispute resolution, offering parties maximum control over the process. It involves the parties meeting to identify and discuss the issues at hand to arrive at a mutually acceptable solution without the help of a third party. It has also been described as a process involving two or more people of either equal or

³⁶ The report finds that many Kenyans are frustrated and dissatisfied with the court process hence the tendency to trust alternative means of accessing justice. TJS are viewed as being accessible, impartial and affordable. It is also incorruptible, proceedings and language are familiar, accessible at all times, affordable, utilizes local resources, decisions are based on consensus, and seek to heal and unite disputing parties. This is unlike the formal system that is seen as breeding hatred.

The TJS hardly differentiates between criminal and civil cases. Land matters, family disputes, domestic violence, theft, marriage and divorce are some of the cases that are dealt with by TJS. Cases which cannot be resolved through the chiefs are often referred to the courts. There is a tendency to confuse ‘referral’ and ‘appeal’. Since the formal justice system does not expressly recognize TJS the cases which are ‘appealed’ to the law courts have to start afresh.

The report finds that the TJS is trusted by communities because it is close to the people, it exhausts the issues between the parties, it is less expensive and is less time consuming due to the absence of elaborate procedures. Traditional Justice Systems though widely accepted and used possess some negative traits which include their anarchical nature as a result of the laws and procedures being unwritten, inconsistency with the constitution and rule of law, infrequency and lack of structure, lack of defined jurisdictions, systemic biasness and lack of adequate mechanisms to enforce decisions.

unequal power meeting to discuss shared and/or opposed interests in relation to a particular area of mutual concern.³⁷ The focus of negotiations is the common interests of the parties rather than their relative power or position. The goal is to avoid the overemphasis of how the dispute arose but to create options that satisfy both mutual and individual interests. The aim in negotiations is to arrive at "win-win" solutions to the dispute at hand.

The negotiation phase is the one during which the parties hammer out an agreement, or even agree to disagree and it is during this stage that the core issues of the conflict are negotiated or bargained.³⁸ The aim of negotiation is to harmonize the interests of the parties concerned amicably. This mechanism involves the parties themselves exploring options for resolution of the dispute without involving a third party. In this process, there is a lot of back and forth communication between the parties in which offers for settlement are made by either party. If agreed upon by the other party, the dispute is deemed to have been resolved amicably.

b) Mediation

It has been said that negotiation leads to mediation in the sense that the need for mediation arises after the conflicting parties have attempted negotiation, but have reached a deadlock.³⁹ In the TDR process through mediation, a third party called the mediator sits down with the two disputing sides and facilitates a discussion between them in order to reach a solution. The mediator usually endeavours that peace and harmony reign supreme in the society at whatever level of mediation. In mediation, there is no victor nor vanquished.⁴⁰

Often the mediators are the respected elders of the communities of the disputants. Elders are trustworthy mediators owing to their accumulated experience and wisdom. The role of elders in a TDR hearing include, urging parties to consider available options for resolution of the dispute, making recommendations, making assessments, conveying suggestions on behalf of the parties, emphasizing relevant norms and rules and assisting the parties to reach an agreement.

c) Adjudication

In adjudication, the elders, Kings or Councils of Elders would summon the disputing parties to appear before them and orders would be made for settlement of the dispute.⁴¹ These were in form of fines or other appropriate remedies. The end product of adjudication is reconciliation, where after the disputants have been persuaded to end the dispute, peace is restored.⁴²

³⁷ See generally, "Negotiations in Debt and Financial Management", United Nations Institute of Training and Research, (UNITAR), (December 1994).

³⁸ Mwangi, M., *Conflict in Africa: Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), p. 115.

³⁹ Ibid.

⁴⁰ Stein, D., "Community mediation and social harmony in Nepal," (2013). Available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.844.1074&rep=rep1&type=pdf>

⁴¹ Ajayi, A.T and Buhari, L.O., "Methods of Conflict Resolution in African Traditional Society," op cit at p. 150.

⁴² Ibid, p.150; See generally also, Simiyu, V.G., "The democratic myth in the African traditional societies," Walter Oyugi et. al (1988), pp. 49-70.

d) Reconciliation

Once a dispute was heard before the Council of Elders, the parties would be bound to undertake certain obligations towards settlement.⁴³ These were mainly through payment of fines by the party found to be on the wrong. Once this obligation is discharged, there was reconciliation which would result in restoration of harmony and mending relationships of the parties.⁴⁴

e) Problem-Solving Workshop

The focus of this method is to create and maintain an environment where the parties can analyze their situations and create solutions for themselves. The workshop provides an opportunity for the parties to understand the root causes of the conflict and explore the available options for settlement.⁴⁵ For instance, in pastoral communities such as the Somali and Borana, the community leaders would arrange the problem solving meetings in which members drawn from each community come together to brainstorm on the most appropriate ways to resolve disputes over grazing lands and watering points.⁴⁶

3. Analysis of the Legal, Policy and Administrative Framework for TDRs and Other Community Based Justice Systems

3.1 Legal Framework

Currently, there is no single statute on traditional dispute resolution in Kenya. In communities where traditional dispute resolution process is utilized in conflict management, the rules and procedure used is derived from customs and traditions of the community. The customs and traditions are handed down from one generation to the next. In addition, there is no sort of documentation for TDRs in most Kenyan communities. Consequently, there is a danger of distortion or neutralization of customs and traditions in the context of modern notions of Western civilization. To safeguard this, a few communities have introduced record keeping for agreements made at the conclusion of the TDR process. However, the problem persists due to illiteracy among traditional leaders and lack of formal training in record keeping.

3.1.1 The Constitution, 2010

An attempt to bring TDRs within the ambit of formal law has been achieved through the promulgation of the Constitution in 2010. In this regard, Article 159 (2) (c) and (3) envisages the substantive constitutional provisions for TDRs. Article 159 (1) provides that judicial authority is derived from the people and vests in and shall be exercised by courts and tribunals established by or under the Constitution. In exercise of judicial authority courts and tribunals shall be guided by principles, *inter alia*, that:

⁴³ See generally, Kenyatta, J., *Facing Mount Kenya, The Tribal Life of the Kikuyu*, (Vintage Books Edition, October 1965).

⁴⁴ *Ibid*.

⁴⁵ See generally, Organization for Security and Co-operation in Europe (OSCE), "Perspectives of the UN & Regional Organizations on Preventive and Quiet Diplomacy, Dialogue Facilitation and Mediation: Common Challenges and Good Practices," February 2011. Available at http://peacemaker.un.org/sites/peacemaker.un.org/files/PerspectivesonPreventiveandQuietDiplomacy_OSC E2011_0.pdf

⁴⁶ See generally, Walton, R.E., "A problem-solving workshop on border conflicts in Eastern Africa," *The Journal of Applied Behavioral Science* Vol.6, No. 4, 1970, pp. 453-489.

Institutionalizing Traditional Dispute Resolution Mechanisms and other Community Justice Systems

- (a) Justice shall be done to all, irrespective of status;*
- (b) Justice shall not be delayed;*
- (c) Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);*
- (d) Justice shall be administered without undue regard to procedural technicalities; and*
- (e) The purpose and principles of this Constitution shall be protected and promoted.*

By stipulating that Justice shall be done to all, irrespective of status, Article 159 echoes the right of all persons to have access to justice as guaranteed by Article 48 of the Constitution. Undoubtedly, access to justice is the overall goal of traditional justice systems in most communities. Article 159 also mirrors the spirit of Article 27(1) which provides that every person is equal before the law and has the right to equal protection and equal benefit of the law.

Article 48 envisages the right of access to justice and provides that the State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice. The rationale of the constitutional recognition of TDRs is to validate alternative forums and processes that provide justice to Kenyans. Technically, the Constitution contemplates “access to justice in many rooms” such that people can seek redress for violations of their rights in other forums of their choice rather than the formal courts.

3.1.2 Civil Procedure Act and Rules, Cap 21

The Civil Procedure Act and rules embodies the procedural law and practice in civil courts in Kenya. These include the High Court and Subordinate Courts. An analysis of the Act and Rules shows that the Act and Rules envisage enabling provisions within which TDRs can be supported. To start with, *Section 1A (1)* of the Civil Procedure Act encapsulates the overriding objective of the Act which is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act. The judiciary is enjoined to exercise its powers and interpretation of the civil procedure to give effect to the overriding objective.⁴⁷ Within this framework, the court has inherent power to explore dispute resolution options that further the overriding objectives. TDRs are definitely part of such options. The wording of Section 1A is as follows:

- (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.*
- (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).*
- (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.*

⁴⁷Section 1A (2). The overriding objective has been viewed as the gate keeper to the just practice of litigation and the cornerstone upon which the Civil Procedure Rules are built.

Institutionalizing Traditional Dispute Resolution Mechanisms and other Community Justice Systems

Section 1B provides that the aims of ensuring a just, expeditious, proportionate and affordable resolution of civil disputes include the just determination of proceedings, efficient disposal of Court business, efficient use of judicial and administrative resources, timely disposal of proceedings, affordable costs and use of appropriate technology. In most civil matters emanating from customary law such as family disputes (marriage, divorce and matrimonial property), succession and inheritance often turn to customs and traditions of the communities of the parties. Thus, use of traditional processes in such cases facilitates achievement of the overriding objective.

Pursuant to the inherent powers of the court under *Section 3A* which empowers courts to make orders that may be necessary for the ends of justice; the court can promote the use of TDRs. In this regard, where a matter has been referred to TDRs, the Court ought to have powers to extend limitations set under the Limitation of Actions Act. Section 3A read together with Article 159 of the Constitution ought to be instrumental in extending time limitations on a case by case basis. Similarly, in reliance to the inherent powers, the courts can enforce any agreement, orders or fines imposed in TDR proceedings.

Mediation is one of the key dispute resolution mechanisms in traditional justice systems. *Section 59A* establishes the Mediation Accreditation Committee (MAC). The Committee's role is to determine the criteria for certification of mediators and propose rules for the certification of mediators. The Chief Justice has since appointed Members to the Committee and had them gazetted.⁴⁸ The *Mediation (Pilot Project) Rules, 2015* have also been gazetted.⁴⁹ These rules are to apply to all civil actions filed in the Commercial and Family Divisions of the High Court of Kenya at Milimani Law Courts, Nairobi, during the Pilot Project.⁵⁰ The *Mediation (Pilot Project) Rules, 2015* provide for:

- (a) Training of mediators
- (b) Accreditation of mediators
- (c) Registration of mediators
- (d) Conduct of mediators
- (e) Confidentiality
- (f) Evidence in mediation
- (g) Immunity of mediators
- (h) Code of Ethics for mediators
- (i) Disciplinary action against mediators; and
- (j) Court annexed mediation

The pilot project is ongoing on trial basis in Nairobi Milimani Court and its success rate will determine if and how the same will be rolled out to the rest of the stations in the country. Further, the use of TDRs in resolution of civil disputes can be promoted under *Order 46 rule 20* of the Civil Procedure Rules which provides as follows;

⁴⁸ Kenya Gazette, Vol. CXVII-No. 17, Gazette Notice No. 1088, Nairobi, 20th February, 2015, p. 348.

⁴⁹ Legal Notice No. 197 of 2015, Kenya Gazette Supplement No. 170, 9th October, 2015, pp. 1283-1291 (Government Printer, Nairobi, 2015).

⁵⁰ Rule 2: "Pilot project" means the mediation program conducted by the court under these Rules. (R. 3).

“Nothing under this Order may be construed as precluding the court from adopting and implementing, of its own motion or at the request of the parties, any other appropriate means of dispute resolution (including mediation) for the attainment of the overriding objective envisaged under sections 1A and 1B of the Act.”

Order 46 Rule 20 read together with Sections 1A and 1B of the Civil Procedure Act therefore obligates the court to employ ADR and TDRs or any other appropriate mechanisms to facilitate the just, expeditious, proportionate and affordable resolution of all civil disputes governed by the Act. There is a need therefore to introduce court-annexed TDRMs and ADR as it will go a long way in tackling the problem relating to backlog of cases, enhance access to justice, encourage expeditious resolution of disputes and lower costs of accessing justice.

Under Order 46 rule 20 (2), a court may adopt any ADR mechanism for the settlement of the dispute and may issue appropriate orders or directions to facilitate the use of that mechanism. Judges will thus need to be thoroughly trained on ADR mechanisms so as to be in a position to issue directions and orders in relation to the particular mechanism that will lead to the attainment of the overriding objectives under sections 1A and 1B of the Act. Nonetheless, Order 46 Rule 20 needs to be reviewed to put it into conformity with Article 159 of the Constitution which provides for the use of traditional dispute resolution mechanisms in appropriate cases.

3.1.3 Evidence Act, Cap 80

The application of TDRs in dispute resolution can be promoted under this Act by introducing amendments to relax the rules of evidence in informal hearings such as rules relating to character evidence, statements by persons who cannot be called as witnesses (Part I of the Act), competency of witnesses and rules as to examination of witnesses.

The strict rules of evidence have caused substantial injustice for many litigants. Even lawyers find difficulties in following these rules strictly. There is therefore a need to simplify these evidential rules to cover situations where informal systems of dispute resolution are being used. Indeed, Article 159 (2) (d) of the Constitution puts emphasizes on substantive justice rather than strict adherence to rules of procedure. In Kenya, adherence to the strict rules of evidence under the Act has resulted in substantial injustices to many litigants. Thus, the entire Act should be reviewed with a view of promoting substantive justice.

3.1.4 Judicature Act, 1967

The Judicature Act makes provisions to govern the jurisdiction of the High Court, the Court of Appeal and subordinate courts and the judges and officers of courts. Section 3 of the Act provides for the sources of law in Kenya and stipulates that the jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with;

- (a) the Constitution;*
- (b) subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule;*
- (c) subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in*

force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date.

Notably, a proviso has been introduced into this section to enable courts consider circumstances of Kenya when applying English Law. The proviso reads that the common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.

Section 3(2) encapsulates the repugnancy clause and states *that the High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.*

In effect, Section 3(2) of the Act ranks African customary law at the bottom of the hierarchy of laws that are to guide courts in civil cases. This Act should be reviewed in view of the recognition that culture and traditional dispute resolution mechanisms are now recognized under the Constitution. The rider in section 3 (2) of the Act on the application of customary law may thus not be applicable in view of Articles 11 on culture and 159 of the Constitution which recognize the use of traditional dispute resolution mechanisms in the interest of enhancing access to justice.

3.1.5 Limitation of Actions Act, Cap 22

This Act sets down the statutory period after the expiry of which a cause of action lapses. For instance, Section 4 of the Act provides that actions based on contract may not be brought after the end of six years from the date on which the cause of action arose and actions founded on tort may not be brought after the end of three years from the date on which the cause of action arose. An action for an account may not be brought in respect of any matter which arose more than six years before the commencement of the action. Section 22 which provides for extension of the limitation period in cases of disability should be reviewed to provide other instances where a suit may be brought in the interest of justice notwithstanding the lapse of time.

To promote TDRs in dispute resolution, Parliament should amend this Act such that matters that are the subject of traditional dispute resolution proceedings can still be taken to court if no agreement is reached at the conclusion of the TDR process.

3.1.6 Kadhis' Courts Act, Cap 11

The Kadhis' Courts Act provides for the law and procedure to be adhered to in matters before the Kadhi Courts. Section 5 of the Kadhis' Courts Act provides that a Kadhi's Court shall have and exercise jurisdiction in matters involving the determination of Muslim Law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion. Muslim/Islamic law is derived from the customs and traditions of persons who profess Islamic faith.

There are very few Kadhis' courts and Kadhis to meet the justice needs of the Kenyan Muslim population. Although the Kadhis' Courts Act requires the Chief Justice to make rules of practice and procedure for these courts, this has not been done to date. For these courts to fulfill their mandate, the Chief Justice needs to make these rules so that they can use the correct Islamic law procedures, practice and evidence. The Act needs further review to make provision for the appointment of women kadhis. Rules of procedure of Kadhi Courts should be developed and enacted to standardize the procedures and practices of these courts in line with the constitutional right to enhance access to justice for all.

3.1.7 Appellate Jurisdiction Act, Cap 9

The Appellate Jurisdiction Act governs the procedure for appeals from the High Court to the Court of Appeal. Just like the Civil Procedure Act, Section 3A of the Appellate Jurisdiction Act embodies the overriding objective which is to facilitate the just, expeditious, proportionate and affordable resolution of the appeals governed by the Act. Pursuant to the overriding objective, the Court of Appeal is enjoined to give effect to the overriding objective during the exercise of its powers under the Act or the interpretation of any of its provisions. In the same way, advocates in an appeal to the Court of Appeal are under a duty to assist the Court to further the overriding objective and, to that effect, to participate in the processes of the Court and to comply with directions and orders of the Court. The application of TDRs in the appellate process can further the achievement of the overriding objective where the matter in dispute emanates from customary law.

Moreover, section 3B specifies the duty of the Court in furtherance of the overriding objective in appeals. To this end, courts are enjoined to handle all matters presented before them for the purpose of attaining the just determination of the proceedings, the efficient use of the available judicial and administrative resources, the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties and through the use of suitable technology.

3.1.8 Land Act, 2012

The Land Act is the substantive regime for matters pertaining to land in Kenya. It was enacted with a view to harmonize land regimes which were scattered in different pieces of legislation. The procedural law on land matters is embodied in the Land Registration Act 2012. Section 4 of the Land Act lays down the guiding values and principles of land management and administration. These include:

- (a) equitable access to land;
- (b) security of land rights;
- (c) sustainable and productive management of land resources;
- (d) transparent and cost effective administration of land;
- (e) conservation and protection of ecologically sensitive areas;
- (f) elimination of gender discrimination in law, customs and practices related to land and property in land;
- (g) encouragement of communities to settle land disputes through recognized local community initiatives;

- (h) participation, accountability and democratic decision making within communities, the public and the Government;
- (i) technical and financial sustainability;
- (j) affording equal opportunities to members of all ethnic groups;
- (k) non-discrimination and protection of the marginalized;
- (l) democracy, inclusiveness and participation of the people; and
- (m) *alternative dispute resolution mechanisms in land dispute handling and management.*

This Section promotes the application of ADR mechanisms which in this case include traditional dispute resolution mechanisms. Thus, TDRMs can effectively be utilized within the framework of providing access to justice. In particular, disputes involving communal land can be better resolved through application of TDRMs.

3.1.9 Marriage Act, 2014

The Marriage Act 2014 is the current marriage regime in Kenya. This Act repealed pre-existing legislation on various types of marriages.⁵¹ Under section 3 of the Act, a marriage is defined as a voluntary union of a man and a woman whether in a monogamous or polygamous union and registered in accordance with the Act. Parties to a marriage have equal rights and obligations at the time of the marriage, during the marriage and at the dissolution of the marriage. All marriages registered under the Act have the same legal status. The Act recognizes the following marriages; Christian marriages, Civil marriages, customary marriages, Islamic marriages and Hindu marriages.

Part V deals with customary marriages and envisages rules to govern customary marriages. These include rules pertaining to notification of marriage, celebration of marriage and payment of dowry. Part X of the Act provides for resolution of matrimonial disputes and specifies the relevant laws to be applied depending on the type of marriage. Section 68 provides for mediation of disputes in customary marriages. It stipulates that parties to a customary marriage may undergo a process of conciliation or customary dispute resolution before the court may determine a petition for the dissolution of marriage. The process of mediation or traditional dispute resolution should conform to the principles of the Constitution.

3.1.10 Matrimonial Property Act, 2013

Section 11 of this Act stipulates that during the division of matrimonial property between and among spouses, the customary law of the communities in question shall, subject to the values and principles of the Constitution, be taken into account including (a) the customary law relating to divorce or dissolution of marriage; (b) the principle of protection of rights of future generations to community and ancestral land as provided for under Article 63 of the Constitution; and (c) the principles relating to access and utilization of ancestral land and the cultural home by a wife/wives.

⁵¹ The Marriage Act, cap 150, the African Christian Marriage and Divorce Act. Cap 151, the Matrimonial Causes Act. Cap 152, the Subordinate Court (Separation and Maintenance) Act. Cap 153, the Man Marriage and Divorce Registration Act. Cap 155, the Mohammedan Marriage Divorce and Succession Act. Cap 156, the Hindu Marriage and Divorce Act. Cap 157

3.1.11 Industrial Courts Act, 2011

The Industrial Courts Act governs the procedure to be used in Industrial Courts (now known as the Employment and Labour Relations Court)⁵² while adjudicating on labour and employment related disputes. Under section 15, the Act empowers the court to adopt alternative dispute resolution mechanisms in dispensation of justice. Section 15 reads:

Nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion or at the request of the parties, any other appropriate means of dispute resolution, including internal methods, conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2)(c) of the Constitution.

To strengthen the utilization of ADR and TDR mechanisms in resolution of labour and employment disputes, this section mandates the court to avoid determining any dispute, other than an appeal or review before the Court, if the Court is satisfied that there has been no attempt to effect a settlement through ADR or TDRs.

Further, the Act empowers the courts to refer a dispute to conciliation at any stage of the proceedings if it becomes apparent that the dispute ought to have been referred for conciliation or mediation. In this case, the Court is required to stay the proceedings and refer the dispute for conciliation, mediation or arbitration.

The Industrial Courts Act also embodies the concept of access to justice as envisaged in section 29. This section states that the Court shall ensure reasonable, equitable and progressive access to the judicial services in all counties. Pursuant to the need for access to justice, the Chief Justice is empowered to designate a Judge in a county as a Judge to determine labour or employment disputes in the particular county. This may be done by notice in the *Gazette* pursuant to which the CJ appoints certain magistrates to preside over cases involving employment and labour relations for a particular area.

3.1.12 Commission on Administrative Justice Act, 2011

Section 3 establishes the Commission and confers it with the mandate under section 8 to perform various functions. Under section 8 (f), the Commission is mandated to work with various public institutions to promote alternative dispute resolution methods in the resolution of complaints relating to public administration. In the last five years, the Commission on Administrative Justice has received complaints with the numbers increasing annually since the promulgation of the Constitution in 2010.⁵³ The largest percentage of these complaints emanates from Police service, Judiciary land related issues, to mention but a few.⁵⁴ In this regard, the utilization of ADR and TDR mechanisms enables the Commission to explore the root causes of the disputes and the most appropriate options for resolution.⁵⁵

⁵² Statute Law (Miscellaneous Amendments) Act No. 18 of 2014.

⁵³ The Commission on Administrative Justice (The Office of The Ombudsman), Annual Report 2015, No. 29/2016, ISBN: 978-9966-1735-5-3, pp. 8-10.

⁵⁴ Ibid, p.10.

⁵⁵ See Amollo, O., "Constitutional and Statutory Regime of Alternative Dispute Resolution in Kenya," *Alternative Dispute Resolution*, Vol. 2, No.1, 2014, pp. 92-105 at pp.101-105.

3.1.13 The National Land Commission Act, 2012

Under section 3, the object of the Act is to provide for the management and administration of land in accordance with the principles of national land policy and the Constitution of Kenya. It also provides for the operation, powers, responsibilities and additional functions of the Commission pursuant to Article 67(3) of the Constitution; a legal framework for the identification and appointment of the chairperson, members and the secretary of the Commission pursuant to Article 250(2) and (12) (a) of the Constitution; and for a linkage between the Commission, county governments and other institutions dealing with land and land related resources.

Under section 5 (f)⁵⁶ the Commission is mandated to encourage the application of traditional dispute resolution mechanisms in land conflicts. Further, under sub-section 2(f), the Commission is mandated to develop and encourage alternative dispute resolution mechanisms in land dispute handling and management. Section 6 provides for the powers of the Commission and subsection 3 thereof provides, *inter alia*, that in the exercise of its powers and the discharge of its functions the Commission is not bound by strict rules of evidence.

There is need to amend section 17 on consultations to the effect that the Commission can consult or seek assistance from community leaders on matters pertaining to land. Section 18 provides for the establishment of County Land Management Boards tasked with managing public land. It is imperative that the section be amended in terms of the composition of the Boards so as to include community leaders.

3.1.14 National Cohesion and Integration Act, 2008

Section 49 provides for conciliation to be conducted by the National Cohesion and Integration Commission in appropriate cases. Under this section, if the Commission considers it reasonably possible that a complaint may be conciliated successfully, the Commission shall refer the complaint to the Secretary. Section 50 provides for the procedure to be used in cases where conciliation is inappropriate. In accordance to this section, if the Commission does not consider it reasonably possible that a complaint may be conciliated successfully, it shall notify the complainant and the respondent in writing. Within sixty days after receiving the Commission's notice under subsection (1), the complainant, by written notice, may require the Commission to set the complaint down for hearing and the Commission shall comply with such notice.

Section 51 mandates the Commission to conduct conciliation. It provides that the Commission shall make all reasonable endeavours to conciliate a complaint referred to it under section 49 and may, by written notice, require any person to attend before the Commission for the purpose of discussing the subject matter of the complaint or produce any documents specified in the notice.

Section 52 provides for conciliation agreements where the parties to the complaint reach an agreement with respect to the subject matter of the complaint. The Secretary is required to record the agreement and the parties to be bound to comply with such agreement as if it were an order of the Commission.

⁵⁶ National Land Commission Act, No. 5 of 2012, Laws of Kenya.

3.1.15 Supreme Court Act No.7 of 2011

This Act provides for the jurisdiction of the Supreme Court of Kenya and provides the procedure to be followed by the court. Section 3 stipulates the objects of the Act which include:

- (a) asserting the supremacy of the Constitution and the sovereignty of the people of Kenya;
- (b) provide authoritative and impartial interpretation of the Constitution;
- (c) *develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth;*
- (d) enable important constitutional and other legal matters, including matters relating to the transition from the former to the present constitutional dispensation, to be determined having due regard to the circumstances, history and cultures of the people of Kenya;
- (e) improve access to justice; and
- (f) provide for the administration of the Supreme Court and related matters.

Rule 54 of the Supreme Court Rules 2012 provides for the attendance of Amicus curiae, experts or advocates assisting the court in determining technical matters. It states:

The Court may;

- (a) *in any matter allow an amicus curiae;*
- (b) *appoint a legal expert to assist the Court in legal submissions; or*
- (c) *at the request of a party or on its own initiative, appoint an independent expert to assist the Court on any technical matter.*

This section should be accorded a wide interpretation and application to provide an opportunity for community leaders to assist the court in matters pertaining to customary law.

3.1.16 Environment and Land Court Act, 2011

Under section 3, the objective of the Act is stated as to enable the court to facilitate the just, expeditious, proportionate and accessible resolution of disputes governed by the Act and that the parties and their representatives shall assist the court in furthering the overriding objectives. Section 4 establishes the Environment and Land court which is a superior court of record with the status of the High Court. Section 13 specifies the jurisdiction of the Court and states that:

The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of the Act or any other written law relating to environment and land.

Pursuant to subsection 2, the court is empowered to hear and determine disputes relating to environment and land including disputes:

1. Relating to environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rent, valuations, mining, minerals and other natural resources;
2. Relating to compulsory acquisition of land;
3. Relating to land administration and management;
4. Relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

5. Any other dispute relating to environment and land.

Section 18 embodies the guiding principles to guide the court and they include the principle of sustainable development including the cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and not inconsistent with any written law. Section 20 provides for the application of ADR and empowers the court to adopt and implement on its own motion with the agreement of or request of the parties any appropriate mechanism such as mediation, conciliation and TDR mechanisms in accordance with Article 159(2) (c) of the Constitution. Further, the Act provides that in cases where ADR is a condition precedent to any proceeding before the Court, the court stays proceedings until such condition is fulfilled. Section 26 provides for the right of access to justice and provides that the court shall ensure reasonable and equitable access to justice to its services in all counties.

3.1.17 The Legal Aid Act, 2016

The Legal Aid Act is meant to give effect to Articles 19 (2), 48, 50 (2) (g) and (h) of the Constitution to facilitate access to justice and social justice; to establish the National Legal Aid Service; to provide for legal aid, and for the funding of legal aid and for connected purposes. The Act is relevant in the mainstreaming of TDR and ADR mechanisms as it defines "legal aid" to include:⁵⁷

- (a) legal advice;
- (b) legal representation;
- (c) assistance in —
 - (i) resolving disputes by alternative dispute resolution;
 - (ii) drafting of relevant documents and effecting service incidental to any legal proceedings; and
 - (iii) reaching or giving effect to any out-of-court settlement;
- (d) creating awareness through the provision of legal information and law-related education; and
- (e) recommending law reform and undertaking advocacy work on behalf of the community.

Section 3 thereof provides that the object of the Act is to establish a legal and institutional framework to promote access to justice by —

- (a) providing affordable, accessible, sustainable, credible and accountable legal aid services to indigent persons in Kenya in accordance with the Constitution;
- (b) providing a legal aid scheme to assist indigent persons to access legal aid;
- (c) promoting legal awareness;
- (d) supporting community legal services by funding justice advisory centers, education, and research; and
- (e) promoting alternative dispute resolution methods that enhance access to justice in accordance with the Constitution.

⁵⁷ S.2., The Legal Aid Act, No. 6 of 2016, Laws of Kenya.

Section 5 (1) establishes the National Legal Aid Service, whose one of the functions include to, inter alia: establish and administer a national legal aid scheme that is affordable, accessible, sustainable, credible and accountable; encourage and facilitate the settlement of disputes through alternative dispute resolution; undertake and promote research in the field of legal aid, and access to justice with special reference to the need for legal aid services among indigent persons and marginalized groups; promote the use of alternative dispute resolution methods; and take appropriate measures to promote legal literacy and legal awareness among the public and in particular, educate vulnerable sections of the society on their rights and duties under the Constitution and other laws.⁵⁸

3.1.18 Community Land Act, 2016

The Community Land Act, 2016⁵⁹ encourages the use of TDR and ADR in management of community land disputes. Section 39(1) provides that a registered community may use alternative methods of dispute resolution mechanisms including traditional dispute and conflict resolution mechanisms where it is appropriate to do so, for purposes of settling disputes and conflicts involving community land. Section 40(1) provides that where a dispute relating to community land arises, the parties to the dispute may agree to refer the dispute to mediation. Section 41(1) provides that where a dispute relating to community land arises, the parties to the dispute may agree to refer the dispute to arbitration.

3.1.19 The High Court (Organization and Administration) Act, 2015

The High Court (Organization and Administration) Act⁶⁰ was enacted to give effect to Article 165(1) (a) and (b) of the Constitution; to provide for the organization and administration of the High Court of Kenya and for connected purposes.

Section 3(1) provides that in exercise of its judicial authority, the Court shall —

- (a) be guided by the national values and principles set out in Article 10 of the Constitution;
- (b) be guided by the principles of judicial authority set out in Article 159 of the Constitution;
- (c) be guided by the values and principles of public service set out in Article 232(1)(c), (e) and (f) of the Constitution;
- (d) be independent and subject only to the Constitution and the law which they must apply impartially without fear, favour or prejudice; and
- (e) uphold the Constitution and administer the law without fear, favour or prejudice.

Section 3(2) provides that the Court shall develop jurisprudence that respects the Constitution and responds to Kenya's social, economic and political needs.

With regard to ADR, section 26(1) provides that ‘in civil proceedings before the Court, the Court may promote reconciliation amongst the parties thereto and shall encourage and permit the amicable settlement of any dispute.’

⁵⁸ S.7 (1), The Legal Aid Act, No. 6 of 2016, Laws of Kenya.

⁵⁹ Community Land Act, 2016, No. 27 of 2016, Laws of Kenya.

⁶⁰ The High Court (Organization and Administration) Act, No. 27 of 2015, Laws of Kenya.

Section 26(2) provides that ‘the Court shall, in relation to alternative dispute resolution be guided by the Rules developed for that purpose.’

Section 26(3) provides that ‘nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion, with the agreement of or at the request of the parties, any other appropriate means of alternative dispute resolution including conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2) (c) of the Constitution.’

Section 26 (4) provides that ‘where an alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court shall by order, stay the proceedings until the condition is fulfilled.’

3.1.20 The Court of Appeal (Organization and Administration) Act, 2015

The Court of Appeal (Organization and Administration) Act, 2015⁶¹ was enacted to give effect to Article 164 (1) (a) and (b) of the Constitution; to provide for the organization and administration of the Court of Appeal and for connected purposes. Section 3(1) provides that in exercise of its judicial authority, the Court shall —

- (a) be guided by the national values and principles set out in Article 10 of the Constitution;
- (b) be guided by the principles of judicial authority set out in Article 159 of the Constitution;
- (c) be guided by the values and principles of public service set out in Article 232(1)(c), (e) and (f) of the Constitution;
- (d) be independent and subject only to the Constitution and the law, which it shall apply impartially without fear, favour or prejudice;
- (e) not be subject to any person or authority; and
- (f) uphold the Constitution and administer the law without fear, favour or prejudice.

Section 3(2) provides that the Court shall develop jurisprudence that respects the Constitution and responds to Kenya's social, economic and political needs.

Section 36(1) provides that the Court shall ensure reasonable access to its services in all parts of the Republic.

3.2 Policy Framework

Currently there is no policy on TDRs and other community based justice systems in Kenya. Thus, dispute resolution through TDRs and other community justice systems is communal based. The rules governing the TDRs processes differ from one community to another depending on the customs and traditions of the communities. In this regard, there is a gap owing to the absence of a comprehensive policy to guide dispute resolution through TDRs. The lack of a TDRs policy is an unfortunate situation since TDRs are widely used to resolve both interpersonal and inter-communal conflicts hence restoring peace and harmony amongst communities. The aim of a TDRs policy framework should be to recognize and affirm the importance of TDRs in the

⁶¹ The Court of Appeal (Organization and Administration) Act, No. 28 of 2015, Laws of Kenya.

administration of justice and establish a clear interface between TDRs and the formal processes. The policy should be targeted at promoting access to justice while preserving customs and traditions of the people of Kenya. The policy framework should be designed in a way that harmonizes traditional systems with the core principles of the Constitution and international law.

3.2.1 Objectives of the policy framework

1. To harmonize and align TDRMs with the Constitution.
2. To establish a basis for an overarching legislation to align TDRMs with the Constitution.
3. To strengthen TDRMs as alternative justice framework in Kenya.
4. To determine/define the jurisdiction of TDRMs.
5. To recognize, protect and perpetuate positive cultures and traditions of the people of Kenya.
6. To establish/provide for a clear interface between TDRMs and formal justice systems.

The traditional justice systems policy framework should promote and preserve the African values of justice, which are based on reconciliation and restorative justice. The role of traditional justice systems in access to justice goes beyond dispute resolution. For instance, TDRs promote social cohesion, coexistence, peace and harmony besides the reactive role of dispute resolution.

The essence of the traditional justice system lies in the participation of communities in resolving their disputes. This differs from the formal judicial system where disputes are referred to the courts to be adjudicated by judicial officers who pass arbitrary judgments. The traditional methods of dispute resolution were not litigious in the courts as they are understood in the Western concept of justice. National policy on ADR and TDRs should affirm the traditional institutions or forums sitting as traditional courts at which councils of elders or community leaders exercise their role and functions relating to the administration of justice. The policy should be designed in a way that promotes coordination between courts and traditional dispute resolution institutions.

3.2.2 Policy Proposals

a) Provide minimum qualifications of TDRMs practitioners

Just like the Constitution provides for qualifications of judges for various courts, there is need to have a policy framework setting out the qualifications or designations of persons to preside over dispute resolution through TDRMs. For instance, the policy may require that the council of elders, traditional leaders or community leaders be knowledgeable and respected in the community, possess high integrity and impartiality.

b) Accountability of TDRMs practitioners

Mechanisms should be put in place to ensure that TDRMs practitioners exercise their role and functions in line with culture and traditions of the community. These safeguards should be designed to prevent deviation from the applicable rules of the community. There should be mechanisms to ensure adherence to due process by the community and observance of the principles of natural justice.

c) Continuous training of TDRMs practitioners

In order to link TDRMs to formal justice systems, there is a need to train TDRMs practitioners on the minimum requirements of formal law such as constitutional requirements as to the Bill of Rights and best practices regarding TDRMs. Such curriculum should include themes such as human rights, restorative justice and social cohesion. Further, an enactment on TDRMs is necessary to provide for training programmes designed to promote efficient functioning of TDRMs.

d) Defining the jurisdiction of TDRMs

In most Kenyan communities, traditional dispute resolution systems have a wide and undefined jurisdiction comprising of both civil and criminal matters. There is no clear line as to which matters should be subjected to the TDR process and which matters should be taken to court. In defining jurisdiction, matters that emanate from customary law such as disputes involving land, marriage and inheritance, succession and property can be better resolved through TDRs. Similarly, some criminal matters such as petty thefts and trespass can be resolved through TDRs while felony offences like murder, robbery with violence, etc should be subjected to the court process.

e) Defining sanctions/remedies to be imposed in TDRs

The sanctions imposed in TDR processes should not contravene the Bill of Rights. For instance, the sanctions should not be discriminatory or of such a nature as to infringe on fundamental rights of the individuals. For instance, sanctions such as corporal punishment, banishment from the community and cursing are unconstitutional. It is highly recommended that remedies in TDRs be of a restorative nature.

The essence of restorative sanctions is expressed as follows: If a person realizes that he is wrong, or it is apparent to him that his fellow lineage members deem him so, he may impose a fine of a sheep, goat or even a beast on himself to indicate his contrition and to wash away his offence. It is an expression of an admission of guilt and an indication to the court of the sincerity of repentance. The sanctions may be individual sanctions or communal sanctions depending on the nature of the dispute.

f) Provision for procedure in TDR processes

The policy framework should outline minimum procedural requirements in TDR proceedings in order to entrench due process and rules of natural justice. These include requirements as to submitting a dispute, service of processes and whether or not there needs to be representation, the hearing, among others.

g) Provisions for Review and Appeal

The policy framework should clearly provide for recourse of any party who is aggrieved with a decision delivered in TDR processes. This is in line with the Constitution and due process for a fair hearing and access to justice. These mechanisms include review or appeal. The formal courts should be expressly conferred with jurisdiction to review decisions made in TDR proceedings.

h) A clear referral system

There should be a clear interface between TDR processes and formal courts and tribunals. To this end, there is a need to formulate a clear referral system indicating how disputes from TDR proceedings can be referred to court and vice versa. The framework should be clear on the stage of the dispute process at which a referral may or may not be done.

i) Provision for record keeping

It is fundamentally prudent to keep records in a dispute resolution process whether formal or informal. The framework should provide for record keeping in TDR processes for instance through notes taking, videos, filming etc. To achieve this, there is need to embrace information technology in TDR processes. The government should provide resources to equip these processes with record keeping equipment and skills.

j) Entrenchment of the Bill of Rights

The practice of TDRs should adhere to human rights standard. In this regard, the mechanisms used and the proceedings should be conducted in a way that does not violate fundamental rights and freedoms stipulated in the Bill of Rights. This can be achieved through sensitizing TDR practitioners about human rights such as gender equality and non-discrimination, fair hearing, public participation, access to justice, etc.

3.3 Administrative /Institutional Framework

3.3.1 Courts and Tribunals

Article 159 (2) (c) of the Constitutions requires courts and tribunals in the exercise of judicial authority promote the application of TDRs and ADR. In addition, the Civil Procedure Act under sections 1A provides that the overriding objective of the Act is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act. The judiciary is enjoined to exercise its powers and interpretation of the civil procedure to give effect to the overriding objective.⁶² Within this framework, the court has inherent power to explore dispute resolution options that further the overriding objectives.

3.3.2 Independent Commissions

The Constitution 2010 created Independent Commissions to exercise oversight over other public bodies and mode of service delivery in various sectors. Some of the Commissions are involved in access to justice programmes for example human rights, land matters, public complaints and investigations, etc. Each Commission has an establishing Act which also provides for their constitution, mandate and powers. From the foregoing discussion on the legal framework for TDRs, it will be noted that some of the Acts establishing the Independent Commissions envisage provisions for promoting ADR and other appropriate dispute resolution mechanisms such as TDRs. These include the National Land Commission Act 2012, the National Integration and Cohesion Act 2008, Commission on Administrative Justice Act 2011 and the Kenya National Human Rights Act 2011.

⁶²Section 1A (2)

3.3.3 Rules Committee of the Judiciary

The Rules Committee is established under section 81 of the Civil Procedure Act and tasked with enacting rules of practice for efficient dispensation of justice by the civil courts. Section 81(2) enlists matters for which such rules may be enacted. Paragraph (ff) provides for enactment of rules for the selection of mediators and hearing of matters referred to mediation pursuant to court mandated mediation under the Act.

3.3.4 County Governments

Kenya has 47 counties each with a county government formed under Chapter Eleven of the Constitution which Article 176 provides that there shall be a county government for each county consisting of a county assembly and a county executive. Although most government services have been devolved, the justice system is not devolved. However, there are courts of law in most counties in Kenya. Article 174 envisages the objects of devolution which include, inter alia, to foster national unity by recognizing diversity, promoting public participation in decision making and to recognize the rights of communities to manage their own affairs and further development. Notably, county governments are proximate to the communities and are best placed to promote dispute resolution by TDRs and ADR.

3.3.5 Civil Society Organizations

Kenya has many civil society organizations which undertake advocacy and community programmes on areas of public interest such as human rights, land and environment. Most civil society organizations conduct peaceful campaigns and encourage communities to resolve dispute through mediation and reconciliation. The leading civil society organizations in Kenya are religious based organizations such as National Council of Churches of Kenya and the Council of Imams and Preachers of Kenya (CIPK). Others include Maendeleo ya Wanawake, FIDA Kenya, Kenya Human Rights Commission, Muslims for Human Rights, Kituo Cha Sheria, etc.

3.3.6 Councils of Elders

In most Kenyan Communities, the institution of Council of Elders remains a strong regulatory institution. Most disputes are submitted to the elders for resolution before parties consider the court process. The Councils of Elders exercise jurisdiction over both interpersonal disputes relating to land, marriage and inheritance and minor crimes such as assaults as well as inter-community disputes such as conflicts over pastures and water points. These include the *Kaya elders among the Digo community, the Njuri Ncheke of Meru, the Kiama of the Kikuyu community and Ker among the Luo community.*

3.3.7 Local Administration

The local authority plays a fundamental role in the justice system. The local chiefs and headmen resolve minor personal and community based disputes. Chiefs have statutory powers to summon people within their jurisdiction and conduct hearings involving minor conflicts such as family feuds, inheritance/succession and breach of peace. The chief works closely with community leaders and elders to promote peace and harmony in the community.

4. A Survey of TDRMs from Other Jurisdictions

In traditional African societies, the emergence of conflict was inevitable as long as people interacted in various activities for instance in market places, cultural festivals, livestock

grazing/watering, etc. In most communities, conflict resolution was conducted by council of elders, king's courts, chiefs and other open place assemblies and through use of other intermediaries.⁶³ The disputes were diverse and would differ from community to community. Thus, there is no uniform definition of a dispute in an African perspective. Some of the disputes in traditional African societies manifested themselves in the form of disagreements, family and market brawls, skirmishes and wars.

Once a conflict emerged, each community had its own approaches towards the resolution of the same. The essence of dispute settlement and conflict resolution in traditional African societies include: to remove the root-causes of the conflict; reconcile the conflicting parties genuinely; to preserve and ensure harmony, make each disputant happy and be at peace with each other again which required getting at the truth; to set the right atmosphere for societal production and development; to promote good governance, law and order, to provide security of lives and property and to achieve collective well-being.⁶⁴

In this section, the paper discusses the traditional dispute resolution in selected countries in Africa and beyond. These countries include Nigeria, South Africa, Rwanda, Botswana, Ghana, Malawi and Australia.

i. Nigeria-Yoruba Community

The Yoruba community derives their traditional justice rules from customs and traditions which have been practised over a long period of time.⁶⁵ The Yoruba traditions, like in most African communities were unwritten.⁶⁶ Memory and verbal art were paramount since the veracity of a tradition largely depended on the memory and knowledge of the forbearers who were regarded as wise men and women.⁶⁷ To maintain the traditions and safeguard them against distortion, the Yoruba people would arrange performances in which the traditions were dramatised and any inconsistency would be pointed out and rectified.⁶⁸ Whenever a dispute arose, the disputant would submit it to a council of elders who would sit under a tree and ventilate the dispute and explore the most appropriate option to address the matter.⁶⁹ The talks were conducted with absolute

⁶³ See generally, Murithi, T., "African approaches to building peace and social solidarity," *African Journal on Conflict Resolution*, Vol. 6, No. 2, 2006, pp.9-33; See also Aredo, D. and Yigremew, A., "Indigenous institutions and good governance in Ethiopia: Case studies," *Good Governance and Civil Society Participation in Africa* (2008), p.141.

⁶⁴ See generally, Golwa, JHP, "Overview of Traditional Methods of Dispute Resolution (TMDR) In Nigeria," *Perspectives on Traditional African & Chinese Methods of Conflict Resolution* (2013), pp. 14-43.

⁶⁵ Idowu, W., "Law, morality and the African cultural heritage: the jurisprudential significance of the Ogboni institution," *Nordic Journal of African Studies*, Vol.14, No. 2, 2005, pp.175-192; see also Ademowo, A.J. and Adekunle, A., "Law in Traditional Yoruba Philosophy: A Critical Appraisal," *Caribbean Journal of Philosophy*, Vol. 2, No. 1, 2013, pp.345-354.

⁶⁶ Asiwaju, A. I., "Political Motivation and Oral Historical Traditions in Africa: The Case of Yoruba Crowns, 1900-1960," *Africa: Journal of the International African Institute*, Vol. 46, No. 2, 1976, pp. 113-127; See also Law, R., "How Truly Traditional Is Our Traditional History? The Case of Samuel Johnson and the Recording of Yoruba Oral Tradition," *History in Africa*, Vol.11, 1984, pp.195-221.

⁶⁷ See generally, Biobaku, S.O., "The problem of traditional history with special reference to Yoruba traditions," *op cit*.

⁶⁸ See Biobaku, S.O., "The problem of traditional history with special reference to Yoruba traditions," *Journal of the Historical Society of Nigeria* Vol.1, No. 1, 1956, pp.43-47 at p.44.

⁶⁹ See generally, Bamikole, L., "An Indigenous Yoruba Socio-political Model of Conflict Resolution," *Philosophy Study* 3, No. 2, 2013, p.144.

decorum and solemnity. The principle of truth reigned in the dispute resolution process especially because the elders invoked the spirits of their ancestors and would warn parties of the aftermath of failure to tell the truth.⁷⁰ Oaths were administered at the commencement of the conflict resolution talks to subject the parties to the jurisdiction of the elders and commit them to tell the truth.⁷¹

Among the Yoruba, conflict resolution process had a hierarchy. Dispute resolution would be done at the family level (*Idile*-nuclear family), extended family level (*Ebi*) and village or town level. These levels comprised the political organisation of the Yoruba.⁷² Disputes resolved at the family level were mainly family disputes such as conflicts between co-wives and sibling disagreements. These disputes would be easily resolved by scolding and warning the guilty party and appeasing the victim.⁷³

During the hearings, women were supposed to be on their knees unless the Chief or King asked them to stand or sit. In criminal cases, the Chief-in-Council had jurisdiction to hear criminal cases and even pass a death sentence.⁷⁴ In terms of remedies available to the innocent party, the Yoruba mediators rarely awarded damages in civil matters. To them, restoration of peace and harmony was of paramount importance than awarding damages.⁷⁵ This notwithstanding, the mediators would award damages in some cases as a way of deterring the re-occurrence of a particular anti-social behaviour.⁷⁶

ii. South Africa

In South Africa, there are traditional courts which operate parallel to the formal courts system.⁷⁷ The traditional courts have jurisdiction on matters emanating from the customary laws of the various communities.⁷⁸ In addition, some communities have their own internal dispute resolution structures. For instance, in the Pondo community, there were institutions of *Mat association* which presided over the distribution of foods at social gatherings.⁷⁹ Disputes would be heard at a higher level involving at least two *Mat associations*. The Mats applied mediation and reconciliation in dispute settlement. The court of headmen had powers to compel parties to

⁷⁰ Ibid, p.147.

⁷¹ See generally, Golwa, JHP, "Overview of Traditional Methods of Dispute Resolution (TMDR) In Nigeria," op cit.

⁷² Ibid, p.148; See also Ojigbo, A.O., "Conflict Resolution in the Traditional Yoruba Political System (La résolution des conflits dans le système politique traditionnel des Yoruba)," Cahiers d'études africaines (1973), pp. 275-292.

⁷³ Ajayi, A.T. and Buhari, L.O., "Methods of conflict resolution in African traditional society," African research review, Vol.8, No.2, 2014, pp.138-157, at pp.143-144.

⁷⁴ Ibid, p.144.

⁷⁵ Ibid, p.148; See also generally, Oko E.O., et al, "Restoring justice (ubuntu): an African perspective," International Criminal Justice Review, Vol.20, No. 1, 2010, pp.73-85.

⁷⁶ Ibid, pp.144-145; See also generally, Gbenda, J.S., "Age-long land conflicts in Nigeria: a case for traditional peacemaking mechanisms," Ubuntu: Journal of Conflict Transformation Vol.1, No. 1_2 (2012), pp. 156-176.

⁷⁷ Chirayath, L., et al, M., "Customary law and policy reform: Engaging with the plurality of justice systems," Background paper for the WDR, 2006, at pp.20-25. Available at <http://documents.worldbank.org/curated/en/675681468178176738/pdf/336550Customary1Law01WDR060bkgd0paper1.pdf> [Accessed on 22/04/2017].

⁷⁸ Ibid, pp.20-25.

⁷⁹ Ajayi, A.T. and Buhari, L.O., "Methods of conflict resolution in African traditional society, op cit, at p.148.

comply with orders made for resolution of the dispute. Appeals from the lower courts (Mat associations) would go to the higher court, the chief's court.⁸⁰ The proceedings before the chief's court were formal and examined the decisions of the headman in light of the proven testimony and the sanctions imposed.⁸¹

iii. Botswana

Botswana is a country well known for preservation of its cultural heritage.⁸² In Botswana, there is a well-organized system of traditional courts. The Botswanan justice system is dualistic comprising of formal courts and customary courts.⁸³ The customary courts are established by the Minister pursuant to the Customary Courts Act of 1974. The customary court structure comprises of the Customary Court Commissioner, Customary Court of Appeal and the Customary Courts.⁸⁴ The dispute resolution process commences at the family level where the father as the head of the family presides over disputes between family members.⁸⁵ The next level is the family group level which comprises of a number of families which are closely related. After the family group level, there is the ward level which comprises of many family groups. The wards are headed by a headman in some tribes as well as headman and sub-chiefs in other tribes.⁸⁶

The customary courts are headed by presidents appointed by a Minister.⁸⁷ Customary courts handle minor disputes mostly involving land matters, marriage and property disputes.⁸⁸ Notably, there is no legal representation in customary courts and the rules of evidence are relaxed. Judges are tribal, appointed by a community or tribal leader.⁸⁹ The sentences passed by judges may be appealed in a formal court system. The jurisdiction of customary courts is stipulated under the Customary Courts Act in respect of the causes of action as well as the geographical limits. The Act also prescribes the constitution of the court, the order of precedence among its members and the powers and duties of any persons who may be appointed to act as assessors.

⁸⁰ Ibid, p.149.

⁸¹ Ibid, p.149.

⁸² See generally, Mnjama, N., "Preservation and Management of Audiovisual Archives in Botswana," *African Journal of Library, Archives & Information Science* Vol.20, No. 2 (2010); See also Denbow, J.R. and Thebe, P.C., *Culture and customs of Botswana* (Greenwood Publishing Group, 2006).

⁸³ Sharma, K.C., "Role of Traditional Structures in Local Governance for Local Development: The Case of Botswana," (Washington DC: World Bank, 2005); See also Sklar, R.L., *The significance of mixed government in Southern African Studies: A preliminary assessment*, (University of the Witwatersrand, 1994); See also generally, Sanders, A.J.G.M., "The Internal Conflict of Laws in Botswana," *Botswana Notes and Records*, Vol.17, 1985, pp.77-88.

⁸⁴ Fombad, C.M., "Customary courts and traditional justice in Botswana: present challenges and future perspectives," *Stellenbosch Law Review= Stellenbosch Regstydskrif*, Vol.15, No. 1, 2004, p-166.

⁸⁵ See generally, Moumakwa, P.C., *The Botswana Kgotla system: a mechanism for traditional conflict resolution in modern Botswana: case study of the Kanye Kgotla* (Master's thesis, Universitetet i Tromsø, 2011); See also Adamolekun, L. and Morgan, P., "Pragmatic institutional design in Botswana--Salient features and an assessment," *International Journal of Public Sector Management*, Vol. 12, No. 7, 1999, pp.584-603.

⁸⁶ See generally, Nyati-Ramahobo, L., *Minority tribes in Botswana: The politics of recognition*, (London, Minority Rights Group International, 2008); See also Proctor, J.H., "The House of Chiefs and the political development of Botswana," *The Journal of Modern African Studies*, Vol.6, No. 01, 1968, pp.59-79.

⁸⁷ S.41 (3), Customary Courts Act of 1974, Laws of Botswana.

⁸⁸ Ss 11, 12 &13, Customary Courts Act of 1974, Laws of Botswana.

⁸⁹ U.S. Department of State, *Botswana Human Rights Practices, 1995*, Available at http://dosfan.lib.uic.edu/ERC/democracy/1995_hrp_report/95hrp_report_africa/Botswana.html [Accessed on 23/2017].

iv. Ghana

The institution of chieftaincy is guaranteed by Article 270 of the Constitution of the Republic of Ghana, 1992.⁹⁰ The Chieftaincy Act of 1970 (Act 370) regulates chieftaincy in Ghana and sets up the traditional councils, as well as regional and national Houses of Chiefs.⁹¹ The National House of Chiefs, the Regional Houses of Chiefs, and the traditional councils each have judicial committees with the authority to decide and resolve disputes affecting chieftaincy.⁹² Despite the recognition of chieftaincy, traditional courts ceased to exist after independence.⁹³ The institution of chieftaincy does not have any legislative, administrative or judicial functions.⁹⁴ Nevertheless, chiefs still exert considerable authority, respect and influence at the local level, and fulfill quasi-judicial roles. Chiefs and their traditional councils have extended their jurisdiction beyond strictly chieftaincy-related matters to family and property matters, including divorce, child custody and land disputes.⁹⁵ The essentials of the traditional justice system are well articulated in the case law in Ghana, and customary law is also enforced in the district and other courts, depending on the nature of the dispute.⁹⁶

Moreover, the use of TDR in conflict resolution was successfully applied in Ghana to resolve a long-standing conflict between the Alavanyo and Nkonya communities who occupy the Volta region of Ghana. These communities lived as neighbours in the 19th century but there was a perpetual conflict over the decades. In 2006, a peace initiative was commenced involving a mediation committee, consultative committee and community pacesetters from the two communities.⁹⁷

v. Australia

Australia is the home of the famous indigenous Aboriginal community. In South Australia, the Aboriginal Courts were established as pilots in 1999 and conferred with jurisdiction over matters

⁹⁰ See Constitution of the Republic of Ghana, Chapter Twenty-Two: Chieftaincy <http://www.ghanaweb.com/GhanaHomePage/republic/constitution.php?id=Gconst22.html> [Accessed on 21/04/2017].

⁹¹ Ghana Legal, <http://laws.ghanalegal.com/acts/id/81/chieftaincy-act>[Accessed on 21/04/2017].

⁹² S.1., Chieftaincy Act of 1970 (Act 370), Laws of Ghana.

⁹³ See generally, Rathbone, R., "Native courts, local courts, chieftaincy and the CPP in Ghana in the 1950s," *Journal of African Cultural Studies* Vol.13, No. 1, 2000, pp. 125-139; See also Kumado, C. E. K., "Chieftaincy and the law in modern Ghana," *U. Ghana LJ* Vol.18,1990, p.194.

⁹⁴ See generally, Dzivenu, S., "The politics of inclusion and exclusion of traditional authorities in Africa: Chiefs and justice administration in Botswana and Ghana," *Political Perspectives*, Vol.2, No. 1, 2008, pp.1-30; See also Kumado, C. E. K., "Chieftaincy and the law in modern Ghana," *U. Ghana LJ* Vol.18, 1990, p.194.

⁹⁵ See generally, Ray, D.I., "Chiefs in their millennium sandals: traditional authority in Ghana—relevance, challenges and prospects," *Critical Perspectives in Political and Socioeconomic Development in Ghana. African Social Studies Series*, Vol. 6, 2003, pp. 241-271.

⁹⁶ See generally, Woodman, G., "Customary law, state courts, and the notion of institutionalization of norms in Ghana and Nigeria," *People's Law and the State* (1985), pp. 143-163; See also Sutton, I., "Law, Chieftaincy and Conflict in Colonial Ghana:The Ada Case." *African Affairs*, Vol.83, No. 330, 1984, pp. 41-62.

⁹⁷ Perpertia, F.M. and Imoro, R.J., "Assessing the Effectiveness of the Alternative Dispute Resolution Mechanism in the Alavanyo-Nkonya Conflict in the Volta region of Ghana" *Institute of Development Studies; Department of Sociology University of Cape Coast, Ghana*, 2011.

involving the Aboriginal community.⁹⁸ However, the Aboriginal people felt that as litigants they had limited input into the trial process and in sentencing.⁹⁹ In their view, the courts were culturally alienating, isolative, and unwelcoming to them and their families.¹⁰⁰ To address these concerns, reforms were introduced to address the fears raised by the Aboriginal community. These reforms include the magistrates sitting at the same level and in close proximity to each other to facilitate direct communication and inclusion of a member of the Aboriginal community to sit with magistrates to advise the court on issues involving the Aboriginal customs and traditions.¹⁰¹

vi. Rwanda

There are other cultures around Africa where TDR based systems have worked relatively well. The establishment of the Gacaca courts was meant to transform Rwanda from the colonial ideology of power dominance and redefine relations between the state and the society.¹⁰² They would also re-unite the Rwandan people by eradicating the disunity ideology and encouraging reconciliation.¹⁰³ Through the framework of the Gacaca courts, home-grown traditions derived from Rwandan society replaced the divisive foreign ideologies.¹⁰⁴ The Gacaca are meant to build a democratic culture and provide a policy of creating a true post-colonial state and restoring unity.¹⁰⁵ The choice and installation of the Gacaca courts fit perfectly into this vision. They are a home-grown, almost pre-colonial resource. The courts are meant to fight genocide and eradicate the culture of impunity and have a mandate of reconciling Rwandans by re-enforcing unity.¹⁰⁶

vii. Malawi

The Malawian justice system has undergone remarkable reforms over the last decade and now has justice forums described as customary justice forums.¹⁰⁷ The forums operate under approximately 217 court centers presided over by magistrates.¹⁰⁸ They are estimated to handle

⁹⁸ See generally, Harris, M., "From Australian courts to aboriginal courts in Australia-bridging the gap," *Current Issues Crim. Just.* Vol.16, 2004, p.26; Freiberg, A., "Problem-oriented courts: Innovative solutions to intractable problems?" *Journal of judicial administration*, Vol.11, No. 1, 2001, pp.8-27.

⁹⁹ See generally, Burgess, S., "Aboriginals in the courtroom: recognising cultural differences," *Bulletin (Law Society of South Australia)* Vol. 32, No. 11, 2010, p.12; See also Marchetti, E. and Kathleen, D., "Indigenous sentencing courts: towards a theoretical and jurisprudential model," *Sydney Law Review*, The, Vol.29, No. 3, 2007, p. 415.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² See generally, Meyerstein, A., "Between law and culture: Rwanda's Gacaca and postcolonial legality," *Law & social inquiry*, Vol.32, No. 2, 2007, pp.467-508.

¹⁰³ Raper, J., "The Gacaca Experiment: Rwanda's Restorative Dispute Resolution Response to the 1994 Genocide," *Pepperdine Dispute Resolution Law Journal*, Vol.5, No., 2012, p.1.

¹⁰⁴ *Ibid.*, pp.5-7; Rettig, M., "Gacaca: truth, justice, and reconciliation in post conflict Rwanda?" *African Studies Review*, Vol.51, No. 03, 2008, pp.25-50.

¹⁰⁵ *Ibid.*

¹⁰⁶ International Institute for Democracy and Electoral Assistance, "the Gacaca Courts in Rwanda", 2008, extracted from *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences*, 32.

¹⁰⁷ See generally, Schärf, W., et al., "Access to Justice for the Poor of Malawi? An Appraisal of Access to Justice Provided to the Poor of Malawi by the Lower Subordinate Courts and the Customary Justice Forums." (2011). Available at

<http://www.eldis.org/vfile/upload/1/document/1110/Access%20to%20justice%20for%20the%20poor%20of%20Malawi.pdf> [Accessed on 22/04/2017].

¹⁰⁸ See generally, Forsyth, M., "A typology of relationships between state and non-state justice systems," *The Journal of Legal Pluralism and Unofficial Law*, Vol. 39, No. 56, 2007, pp.67-112.

about 90% of disputes in Malawi. They have jurisdiction over matters whose subject matter involves land, marriage, inheritance and property.¹⁰⁹

5. Summary of Recommendations

5.1 General Recommendations

1. It is critical to identify the aspects of Traditional Dispute Resolution Mechanisms that contravene morality and are repugnant to the constitution and the law with a view to modifying them or have them eliminated.
2. There is a need to raise awareness on customary and religious laws and how they impact on women's rights. In particular, any customary practices that encourage or promote gender discrimination ought to be abandoned.
3. In order to eliminate the perception of bias and discrimination, Traditional Dispute Resolution Mechanisms ought to be restructured to ensure inclusiveness by involving women, youth and people with disabilities through policies and legislation.
4. More effort is needed in creating awareness to the public and the formal justice system on the existence, role and effectiveness of Traditional Dispute Resolution Mechanisms. This can be achieved through having clear provisions in law that promote the use of Traditional Dispute Resolution Mechanisms.
5. There is a need to train everyone involved in Traditional Dispute Resolution Mechanisms and especially the decision-makers in TDRMs on the constitutional provisions and the need to ensure that their decisions and the procedures they use to arrive at their decisions is in conformity with the constitution. Such training should especially ensure that the decision-makers are aware of the Bill of Rights.
6. Introduction of technology in TDRs practice would greatly help in documentation and record keeping in TDR processes.

5.2 Legal and Policy Framework Recommendations

5.2.1 Policy Framework Recommendations

There is need to formulate an enabling Policy framework for ADR and TDRs. The framework to be enacted ought to address the following issues:

- i) Define and clarify the jurisdiction of TDRs and ADR. The matters that can be dealt with through TDRs and those which ought to be subjected to the formal court process need to be clearly prescribed;

¹⁰⁹ See DeGabriele, J., and Jeff, H., "Justice for the people: strengthening primary justice in Malawi," *African Human Rights Law Journal*, Vol. 5, No. 1, 2005, pp.148-170.

Institutionalizing Traditional Dispute Resolution Mechanisms and other Community Justice Systems

- ii) Provide a framework for development of programmes, plans and actions for creation of awareness and the establishment of institutional mechanisms for promotion of TDR practice in all the applicable sectors of society;
- iii) The operationalization of Article 159 (2)(c) and (3)(a)-(c) of the Constitution and the development of a comprehensive regulatory and institutional framework to govern TDRMs;
- iv) Regulation and training of the various players involved in TDRMs;
- v) Restructuring of the TDRMs to ensure inclusiveness in the composition of TDRs;
- vi) Documentation of TDR proceedings;
- vii) Maintain informality in the TDR proceedings;
- viii) Identification of the most suitable system to be employed with respect to TDRMs in the formal legal systems;
- ix) Mapping of TDR and stakeholders Remuneration of TDRMs practitioners;
- x) Enforcement of outcomes of TDR processes;
- xi) Development of a multi-sectoral policy implementation forum comprising of key stakeholders drawn from the justice sector;
- xii) Ethical framework for TDRM and ADR practitioners;
- xiii) Setting ethical standards for TDR practice; and
- xiv) Protection of TDRMs and ADR consumers from unconstitutional or unlawful outcomes.

In formulating the policy framework for TDRMs the following guidelines should be taken into account:

TDRMs need to meet the constitutional threshold set out under Article 159 of the constitution;

- i. The composition of TDRs needs to be all inclusive;
- ii. The outcomes of TDRMs and their enforcement need to be streamlined with
- iii. constitutional requirements;
- iv. TDRMs need to be kept as informal as possible;
- v. Introduction of record-keeping and clear references for purposes of accountability and pursuit of justice through TDRs appeal mechanisms and the formal justice system;
- vi. Remuneration of TDRMs practitioners and the necessary resources to run TDRs;
- vii. Creation of awareness about TDRMs and their effectiveness in resolving disputes; and
- viii. Uniformity of TDRs procedures throughout the country to ensure that the process of

arriving at outcomes is fair.

A continuous monitoring and evaluation programme should be undertaken to appraise the implementation of the policy framework on TDRMs.

5.2.2 Legal Framework Recommendations

1. In order to foster an effective working relationship between the formal justice system and TDRMs, there is need to introduce court-annexed TDRMs and ADR. This would tackle the problem of backlog of cases, enhance access to justice, encourage expeditious disposal of disputes and lower costs of accessing justice;
2. In order to ensure a smooth interaction between TDRMS and the formal justice systems, laws providing for strict and convoluted procedures need to be reviewed with a view to simplifying the rules and procedures. In particular, the following laws need to be reviewed and amended in order to accommodate TDRMs in their application:
 - (i) The Civil Procedure Act and Rules, Cap 21- Order 46 Rule 20 needs to be reviewed to put it into conformity with Article 159 of the Constitution which provides for the use of traditional dispute resolution mechanisms in appropriate cases;
 - (ii) The Evidence Act, Cap 80 should be reviewed so as to simplify the evidential rules to cover situations where informal systems of dispute resolution are being used. Simplified procedures should be introduced to ensure that courts and tribunals focus on substantive rather than procedural justice as contemplated under Article 159(2) (d);
 - (iii) The Judicature Act, 1967 should be reviewed in view of the recognition that culture and traditional dispute resolution mechanisms are now recognized under the Constitution (Articles 11 and 44).
 - (iv) Parliament should amend the Limitation of Actions Act, Cap 22 such that matters that are the subject of traditional dispute resolution proceedings can still be taken to court if no agreement is reached at the conclusion of the TDR process.
 - (v) Kadhis' Courts Act, Cap 11 should be reviewed to make provision for the appointment of women Kadhis.
 - (vi) The Appellate Jurisdiction Act should be amended to provide for application of TDRs in the appellate process where the matter in dispute involves customary law.
 - (vii) Land Act, 2012, should be reviewed to ensure clear and substantive provisions that ensure: elimination of gender discrimination in law, customs and practices

related to land and property in land especially in conflict management; encouragement of communities to settle land disputes through recognized local community initiatives; 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; democracy, inclusiveness and participation of the people; and the active utilisation of alternative dispute resolution mechanisms, especially TDRMs, in land dispute handling and management.

- (viii) Marriage Act, 2014, should be reviewed to ensure that mediation of disputes in customary marriages and the customary dispute resolution mechanisms provided for in the Act conform to the principles of the Constitution.
 - (ix) Matrimonial Property Act, should be reviewed to ensure that Section 11 of the Act which stipulates that during the division of matrimonial property between and among spouses, the customary law of the communities in question shall, subject to the values and principles of the Constitution, be taken into account including (a) the customary law relating to divorce or dissolution of marriage; (b) the principle of protection of rights of future generations to community and ancestral land as provided for under Article 63 of the Constitution; and (c) the principles relating to access and utilization of ancestral land and the cultural home by a wife/wives is expanded to provide guidelines/rules that ensure that the same is smoothly implemented.
 - (x) Section 17 of the National Land Commission Act should be amended with a view to incorporating a requirement on the part of the Commission to consult or seek assistance from community leaders on matters pertaining to land. Section 18 which provides for the establishment of County Land Management Boards needs to be amended in terms of the composition of the Boards so as to include community leaders.
 - (xi) Rule 54 of the Supreme Court Rules 2012 which provides for the attendance of Amicus curiae, experts or advocates assisting the court in determining technical matters should be accorded a wide interpretation and application to provide an opportunity for community leaders to assist the court in matters pertaining to customary law.
3. There is need to formulate an enabling legal framework for ADR and TDRMs.
4. It is proposed to have a law to be known as ADR and TDR Mechanisms Act enacted to provide for the operationalization of Article 159 (2)(c) and (3)(a)-(c) of the constitution and to provide for the regulatory and institutional framework to govern the practice of ADR and TDRMs. The formulation of the said legislation should be informed by the following guidelines:

Institutionalizing Traditional Dispute Resolution Mechanisms and other Community Justice Systems

- a. The need to ensure that TDRMs meet the Constitutional threshold under Article 159(3) of the Constitution and the Bill of Rights;
 - b. The need to establish an efficient referral system for matters from courts of law to TDRs and vice versa depending on the nature of the dispute and steps taken by the disputants;
 - c. Provide for a clear review and appeal system in TDR and ADR;
 - d. Legal mechanisms for the formal recognition and enforcement of decisions made in TDR and ADR processes ought to be set up to make TDRMs more efficient;
 - e. The legislation should maintain informality of TDRMs;
 - f. Defining the jurisdiction of TDRMs;
 - g. Establishment of an efficient institutional framework for implementation and enforcement framework of TDRM Policies ;
 - h. Provide for enforcement mechanisms of TDRMs outcomes;
 - i. Abolish unconstitutional and/or unlawful TDRs and their outcomes; and
 - j. Establish collaboration between the National Government and the Devolved Governments to ensure that TDRMs are promoted and accessible to every person.
 - k. Collaboration between the National Government and the devolved units of governance to ensure that TDRMs are promoted in the counties and that every person has access to the mechanisms.
5. Kenya needs to adopt tested best practices in comparable jurisdictions with regard to TDRMs.

6. Conclusion

The Constitution of Kenya 2010 specifies the fundamental rights and freedoms to which every Kenyan is entitled. It empowers courts to enforce human rights and interpret the law in a way that gives effect to a right of a fundamental freedom. To ensure full enjoyment of rights, the Constitution guarantees the right of access to justice under Article 48. Further, the Constitution widens the doors of access to justice by promoting the access through formal and informal processes. To this end, Article 159 (2) (c) and (3) brings on board other justice mechanisms such as ADR and TDR to ensure wide access to justice. For TDRs to be applicable, they must not be inconsistent with the Constitution, justice or morality or any other written law.

Although the Constitution guarantees the right of access to justice and goes further to recognize ADR and TDRs, there is no elaborate legal or policy framework for their effective application. This is the situation, despite the fact that a great percentage of disputes in Kenya are resolved through mediation, conciliation, negotiation and traditional processes. Currently, the legal framework does not provide for linkage of TDRs with the formal court process. In most instances,

Institutionalizing Traditional Dispute Resolution Mechanisms and other Community Justice Systems

courts have undermined the awards reached through TDRs terming them as informal and not founded on any law. This has further frustrated the utilization of TDRs in Kenya.

From the findings of the research and study conducted, there is a need for enactment of a sound legal and policy framework for effective utilization of TDRMs and ADR to ensure full access to justice for Kenyans. The study revealed that TDRMs are widely used by communities to resolve a myriad of disputes and therefore cannot be wished away. Therefore, it is imperative that the TDRs be anchored in the legal and policy framework. The framework should harness the recommendations made in this paper for effective incorporation of TDRs and other community based process into the justice system. Institutionalising Traditional Dispute Resolution Mechanisms and other Community Justice Systems is an idea that calls for attention, and effective implementation.

Actualising Socio-Economic Rights for Sustainable Development in Kenya

Abstract

This paper argues that social and economic rights are an important part of the sustainable development agenda and as such, there is need for increased efforts and investment in the quest for socio-economic development as a prerequisite for the realisation of sustainable development in Kenya. It calls for empowerment of the people in line with the constitutionally guaranteed social and economic rights which must be actualised through the concerted efforts of all stakeholders.

1. Introduction

The last decade and a half has seen successive governments mostly seeking to improve the national economic status through major infrastructural investments which are geared towards impacting on the lives of their people. Such governments thus put in place measures, programmes and plans that are geared towards meeting their election promises. What has however been consistent with each successive government is the limited investments on socio-economic development and investment on the ordinary people, perhaps with attempts directed at education and health. However, even in these two sectors, the investment has not been sufficient. Despite the laudable development in terms of infrastructures, poverty levels have not been reducing at acceptable rates. If anything, it has increased for certain classes of people in society.¹ This paper discusses some of the ways in which the actualisation of social economic rights for sustainable development can be fast tracked through the combined efforts of all the relevant stakeholders.

2. Socio-Economic Development as Part of Sustainable Development

Socio-economic rights are considered to be a central feature of the sustainable development agenda as evidenced by Agenda 2030 for sustainable development agenda as well as other derivative instruments. It is meant to give the sustainable development agenda an anthropocentric perspective.²

The Constitution of Kenya, 2010 also provides for sustainable development as one of the national values and principles of governance.³ Sustainable development is linked to the right to development, human rights and good governance, when it is described as sustainable human development. Sustainable human development focuses on material factors such as meeting basic needs and non-material factors such as rights and participation.⁴ It also seeks to achieve a number of goals to wit, poverty reduction, promotion of human rights, promotion of equitable opportunities, environmental conservation and assessment of the impacts of development

¹ Kenya National Bureau of Statistics, Economic Survey 2018, available at <http://www.knbs.or.ke/download/economic-survey-2018/> [Accessed on 31/1/2019].

² United Nations, Transforming our world: the 2030 Agenda for Sustainable Development, Resolution adopted by the General Assembly on 25 September 2015, [without reference to a Main Committee (A/70/L.1)], Seventieth session, Agenda items 15 and 116, 21 October 2015; See also generally, Muigua, K., Nurturing Our Environment for Sustainable Development, Glenwood Publishers, Nairobi, 2016.

³ Art. 10(2)(d), Constitution of Kenya.

⁴ United Nations, Transforming our world: the 2030 Agenda for Sustainable Development, Resolution adopted by the General Assembly on 25 September 2015, [without reference to a Main Committee (A/70/L.1)], Seventieth session, Agenda items 15 and 116, 21 October 2015.

activities.⁵ Vision 2030 adopts sustainable human development as it seeks to address the economic, social and political pillars. It thus fosters both material factors and non-material factors.⁶ Sustainable human development is, therefore, inextricably linked to people's livelihoods, and is thus requisite in moving towards environmental justice.

Regional economic development is one of the major goals of devolution under the Constitution of Kenya. Greater control over one's own livelihood is a key factor to development, empowerment and poverty alleviation.⁷ Local democratic control over natural resources can improve local livelihood and have positive ecological effects as well.⁸ Development comes with associated problems of soil degradation and waterways, altered landscape and destroyed biodiversity and habitat.⁹ 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.

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.¹⁰

3. Socio-Economic Rights in Kenya: The Scope

Kenya seeks to build a society that is based on the following national values and principles of governance: patriotism, 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.¹¹ These principles are to bind all State organs, State officers, public officers and all persons whenever any of them applies, or interprets, the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.¹²

Article 19 of the Constitution of Kenya affirms that: the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies;¹³ and

⁵ See generally Amartya S., *Development as Freedom* (Anchor Books, New York, 1999), pp.35-53; See also UNDP, *Human Development Report 2011, The Real Wealth of Nations: Pathways to Human Development*, (Palgrave Macmillan Houndmills, Basingtoke, Hampshire, 2011), p. (i)-12. This report defines sustainable human development as the expansion of the substantive freedoms of people today while making reasonable efforts to avoid seriously compromising those of future generations.

⁶ Kenya Vision 2030, Government of Kenya, 2007.

⁷ Larson, A.M., "Decentralisation and Forest Management in Latin America: Towards a Working Model," *Public Admin. Dev.*, Vol. 23, 2003, pp. 211–226, p. 212.

⁸ *Ibid.*

⁹ '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_EI_A_part5.pdf [Accessed on 29/1/2019].

¹⁰ Sessional paper on Environment and Development [Government Printer, Nairobi, 1999].

¹¹ Art. 10(2), Constitution of Kenya.

¹² Art. 10(1), Constitution of Kenya.

¹³ Art. 19(1), Constitution of Kenya.

that the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.¹⁴

Notably, the Constitution obligates the State to ensure protection and implementation of these rights by requiring that in applying any right under Article 43, if the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles: it is the responsibility of the State to show that the resources are not available; in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and the court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion.¹⁵

In implementing rights and fundamental freedoms, the Constitution requires that: the State should take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43;¹⁶ and all State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.¹⁷

These obligations have been canvassed in various cases in Kenya including the case of *Mitu-Bell Welfare Society v Attorney General & 2 others*, Nairobi¹⁸ where the Court observed that: “*the argument that social economic rights cannot be claimed at this point, two years after the promulgation of the Constitution, also ignores the fact that no provision of the Constitution is intended to wait until the state feels it is ready to meet its constitutional obligations. Article 21 and 43 require that there should be ‘progressive realization’ of social economic rights, implying that the state must begin to take steps, and be seen to take steps, towards realization of these rights.*¹⁹ *The Court also observed that these rights are progressive in nature, but there is a constitutional obligation on the state, when confronted with a matter such as this, to go beyond the standard objection.... Its obligation requires that it assists the court by showing if, and how, it is addressing or intends to address the rights of citizens to the attainment of the social economic rights, and what policies, if any, it has put in place to ensure that the rights are realized progressively, and how the petitioners in this case fit into its policies and plans.*”²⁰

¹⁴ Art. 19(2), Constitution of Kenya.

¹⁵ Article 20, Constitution of Kenya.

¹⁶ Article 21(2), Constitution of Kenya.

¹⁷ Article 21(3), Constitution of Kenya.

¹⁸ Petition No. 164 of 2011 (Unreported).

¹⁹ Para. 53, *Mitu-Bell Welfare Society v Attorney General & 2 others*.

²⁰ Para. 78, *Mitu-Bell Welfare Society v Attorney General & 2 others*; See also the jurisprudence from the Constitutional Court of South Africa, such as: *Government of the Republic of South Africa v Grootboom & Others* 2001 (1) SA 46 (CC); *Minister of Health and Others v Treatment Action Campaign and Others* (No 1) (CCT9/02) 2002 (5) SA 703 (5 July 2002).

*The issue of socio-economic rights was also canvassed in the case of John Kabui Mwai and 3 Others v Kenya National Examinations Council & Others, Nairobi*²¹ where the High Court was to determine whether a government policy restricting the number of pupils from private primary schools who could join national high schools was discriminatory and in violation of the right to education. The court observed that: *the inclusion of economic, social and cultural rights in the Constitution is aimed at advancing the socio-economic needs of the people of Kenya, including those who are poor, in order to uplift their human dignity. The protection of these rights is an indication of the fact that the Constitution's transformative agenda looks beyond merely guaranteeing abstract equality. There is a commitment to transform Kenya from a society based on socio-economic deprivation to one based on equal and equitable distribution of resources. This is borne out by Articles 6(3) and 10 (2) (b).*²²

In addition, the Court in *John Kabui Mwai* case observed that: *the realisation of socio-economic rights means the realization of the conditions of the poor and less advantaged and the beginning of a generation that is free from socio-economic need. One of the obstacles to the realisation of this objective, however, is limited financial resources on the part of the Government. The available resources are not adequate to facilitate the immediate provision of socioeconomic goods and services to everyone on demand as individual rights. There has to be a holistic approach to providing socio-economic goods and services that focus beyond the individual.*²³

In addition to the foregoing, the Court stated that: *Socio-economic rights are by their very nature ideologically loaded. The realisation of these rights involves the making of ideological challenges which, among others, impact on the nature of the country's economic system. This is because these rights engender positive obligations and have budgetary implications which require making political choices. In our view, a public body should be given appropriate leeway in determining the best way of meeting its constitutional obligations.*²⁴

In *Mathew Okwanda v Minister of Health and Medical Services & 3 others [2013] eKLR*²⁵ the Court also convincingly argued that: *even where rights are to be progressively achieved, the State has an obligation to show that at least it has taken some concrete measures or is taking conscious steps to actualize and protect the rights in question....It must be recalled that the right guaranteed under Article 43(1) (a) is premised on establishment of a "standard." This standard must be judged in a holistic manner.*²⁶

Anyone seeking to enforce social and economic rights in Kenya does not have to only rely on the constitutional provisions on these rights since Article 2(6) of the Constitution provides that treaties and conventions ratified by Kenya shall form part of the law of Kenya²⁷. This thus means that there are other relevant instruments which include the *International Covenant on Civil and*

²¹ *John Kabui Mwai and 3 Others v Kenya National Examinations Council & Others*, Petition No. 15 of 2011 [2011]eKLR.

²² *John Kabui Mwai and 3 Others v Kenya National Examinations Council & Others*, p.6.

²³ *Ibid*, p.6.

²⁴ *John Kabui Mwai and 3 Others v Kenya National Examinations Council & Others*, p.6.

²⁵ *Mathew Okwanda v Minister of Health and Medical Services & 3 others [2013] eKLR*, Petition No. 94 of 2012.

²⁶ *Ibid*, paras 16 & 21.

²⁷ See also Treaty Making and Ratification Act, No. 45 of 2012, Laws of Kenya.

Political Rights (ICCPR)²⁸, the *International Covenant on Economic and Social Rights* (ICESR)²⁹; *Universal Declaration of Human Rights* (UDHR)³⁰; and *Africa Charter on Human and People's Rights* (ACHPR)³¹, amongst others.

The State is expected to take into account their international obligations when coming up with their development agenda and their implementation frameworks. These development frameworks are usually pegged on policy, legal and institutional frameworks. There are also constitutional principles of governance in place that the government of the day must follow while executing its plans and mandate. The 2010 Constitution outlines national values and principles of governance which must bind all State organs, State officers, public officers and all persons whenever any of them: applies or interprets this Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.³² Some of the relevant national values and principles of governance include: human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; and sustainable development.³³ These values and principles form a firm basis for pursuing socio-economic development for the Kenya people. This is further reinforced by Article 43 of the Constitution on economic and social rights, which guarantees that: every person has the right- 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 adequate quantities; to social security; and to education.³⁴

The Constitution of Kenya provides that the objects of devolved government are, *inter alia*, to promote democratic and accountable exercise of power; to foster national unity by recognising diversity; 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; to recognise the right of communities to manage their own affairs and to further their development; to protect and promote the interests and rights of minorities and marginalised communities; to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya; to ensure equitable sharing of national and local resources throughout Kenya; and to facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya.³⁵ The Constitution provides for participation of persons with disabilities,³⁶ youth,³⁷ minorities and marginalized groups,³⁸ and older members of society,³⁹ in governance and all other

²⁸ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

²⁹ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

³⁰ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

³¹ Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights* ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

³² Constitution of Kenya 2010, Art. 10(1).

³³ Constitution of Kenya 2010, Art. 10(2).

³⁴ Constitution of Kenya 2010, Art. 43(1).

³⁵ Art. 174, Constitution of Kenya 2010.

³⁶ Art. 54.

³⁷ Art. 55

³⁸ Art. 56

³⁹ Art. 57.

spheres of life. It is within the foregoing framework that social and economic development of the people of Kenya can be pursued in Kenya.

4. Realising Socio-Economic Rights in Kenya: Are We Yet There?

While successive governments in Kenya have put in place varying efforts geared towards achieving ‘development’ in the country, results have often been skewed with most of these efforts concentrating mainly on infrastructural development and inadequate resources being directed at the social economic empowerment of the citizenry.⁴⁰ The right of every person to self-determination as envisaged under the international bill of rights allows them to freely determine their political status and freely pursue their economic, social and cultural development.⁴¹ This paper is not concerned with the political aspect of this right but the pursuit of economic and social development. However, it is acknowledged that achieving this kind of development for the citizenry is not completely devoid of political influence as, it has been argued, social and political structures may shape government policy toward the welfare state.⁴²

The founding father of the nation, President Jomo Kenyatta in his agenda listed following as the greatest enemies of the country and which required to be addressed urgently: *Ugonjwa* (disease), *Umaskini* (poverty), *Ufisadi* (corruption) and *Ujinga* (ignorance and illiteracy).⁴³ While there may be evidence of economic development in the country, it is arguable that such economic growth has only benefited small numbers of people, with great disparities of wealth leading most Kenyans continue to suffer under very low living standards.⁴⁴

The recent move by the Government of Kenya to pursue its ‘Big Four Agenda’ which targets: enhancing manufacturing; food security and nutrition; universal health care; and affordable housing, is a step in the right direction. These pillars could be deemed to be part of the government’s efforts towards fulfilling its constitutional obligations on the ‘progressive realisation of social economic rights’.⁴⁵

⁴⁰ Miriam Omolo, D., Wanja, R. and Jairo, S., "Comparative Study of Kenya, US, EU and China Trade and Investment Relations," (Institute of Economic Affairs (IEA Kenya), 2016). Available at <https://www.africaportal.org/publications/comparative-study-kenya-us-eu-and-china-trade-and-investment-relations/> [Accessed on 2/2/2019].

⁴¹ Article I of the Charter of the United Nations; African Charter of Human and Peoples' Rights of 1981; See also International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

⁴² Gilens, M., *Why Americans hate welfare: Race, media, and the politics of antipoverty policy*, University of Chicago Press, 2009.

⁴³ Wekesa, E., ‘Jomo Kenyatta’s agenda still big enough to guide us today,’ *Daily Nation*, Friday February 23 2018. Available at <https://www.nation.co.ke/oped/letters/Jomo-Kenyatta-s-agenda-440806-4317322-wt715v/index.html> [Accessed on 31/1/2019].

⁴⁴ The World Bank, “Poverty Incidence in Kenya Declined Significantly, but Unlikely to be Eradicated by 2030,” April 2018. Available at <https://www.worldbank.org/en/country/kenya/publication/kenya-economic-update-poverty-incidence-in-kenya-declined-significantly-but-unlikely-to-be-eradicated-by-2030> [Accessed on 31/1/2019]; Kondo, V., “World bank report says poverty still high in Kenya at 29.2 percent,”

Standard Digital, 18th October, 2018. Available at <https://www.standardmedia.co.ke/article/2001299505/world-bank-report-says-poverty-still-high-in-kenya-at-29-2-percent> [Accessed on 31/1/2019]; Kenya National Bureau of Statistics, *Economic Survey 2018*, available at <http://www.knbs.or.ke/download/economic-survey-2018/> [Accessed on 31/1/2019].

⁴⁵ See Constitution of Kenya, articles 20; 21.

5. Actualising Socio-Economic Rights under the Constitution of Kenya for Sustainable Development

This section offers suggestions on some of the ways that policy makers and other stakeholders can ensure inclusive, meaningful and impactful socio-economic development as an ingredient for realisation of sustainable development agenda in the country. It is however worth mentioning that this cannot be achieved through unilateral efforts and must be done through the concerted efforts of all stakeholders.

5.1 Addressing Unemployment and Low Incomes for Poverty reduction and Empowerment

The United Nations *2030 Agenda for Sustainable Development*⁴⁶ includes a set of 17 Sustainable Development Goals (SDGs) to end poverty, fight inequality and injustice, and tackle climate change by the year 2030.⁴⁷ The *2030 Agenda for Sustainable Development* also seeks to strengthen universal peace in larger freedom and was formulated in recognition that eradicating poverty in all its forms and dimensions, including extreme poverty, is the greatest global challenge and an indispensable requirement for sustainable development.⁴⁸

SDG Goal 8 seeks to promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all. One of the ways that is to be achieved will be promotion of development-oriented policies that support productive activities, decent job creation, entrepreneurship, creativity and innovation, and encourage the formalization and growth of micro-, small- and medium-sized enterprises, including through access to financial services.⁴⁹ Such policies are a good foundation for the empowerment of the poor in the Kenyan society.

Empowering the poor sections of the population in any is the first steps towards building a sustainable economic growth and development. A society that seeks to empower its men and women both socially and economically can have reasonable expectations as far as poverty reduction or even elimination is concerned.⁵⁰

It has been argued that any given growth scenario can generate different poverty outcomes—for a given rate of growth, the extent of poverty reduction depends on how the distribution of income changes with changes in growth, and on initial inequalities in income, assets and access to opportunities to allow the poor to share in growth.⁵¹ Equi-proportional growth leaves income distribution intact, whereas by improving the position of some at the lower scale of distribution,

⁴⁶ UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, Resolution adopted by the General Assembly on 25 September 2015, [without reference to a Main Committee (A/70/L.1)], Seventieth session, Agenda items 15 and 116, 21 October 2015.

⁴⁷ United Nations Development Programme, 'Sustainable Development Goals (SDGs),' available at <http://www.undp.org/content/undp/en/home/mdgoverview/post-2015-development-agenda.html> [Accessed on 31/1/2019].

⁴⁸ Agenda 2030 for Sustainable Development Goals, Preamble.

⁴⁹ Target 8.3.

⁵⁰ See 2030 Agenda on Sustainable Development.

⁵¹ Quartey, P., "Financial sector development, savings mobilization and poverty reduction in Ghana," In Financial development, institutions, growth and poverty reduction, pp. 87-119. Palgrave Macmillan, London, 2008, p.11. Available at https://link.springer.com/chapter/10.1057/9780230594029_5 [Accessed on 29/01/2019].

it reduces poverty. Pro-poor growth and development policies, however, will by definition improve the status of the poor and affect income distribution.⁵²

This supports the argument that unless any perceived or real economic growth reported in a country is as a result of economic policies, plans and programmes that take into account the interests of the poor, then it cannot rightly be used as a measure of how well the citizenry is doing.⁵³

Investing in pro-poor development projects is one of the best ways that poverty can be addressed in the country, instead of short-term projects.⁵⁴ Economic empowerment of the various groups in Kenya can go a long way in improving the lives of families and addressing the ever rising levels of poverty in the country.

Empowerment is defined as a process through which individuals or organised groups increase their power and autonomy to achieve certain outcomes they need and desire.⁵⁵ Empowerment focuses on supporting disadvantaged people to gain power and exert greater influence over those who control access to key resources.⁵⁶

Social empowerment on the other hand may be defined as the process of developing a sense of autonomy and self-confidence, and acting individually and collectively to change social relationships and the institutions and discourses that exclude poor people and keep them in poverty.⁵⁷ Poor people's empowerment, and their ability to hold others to account, is strongly influenced by their individual assets (such as land, housing, livestock, savings) and capabilities of all types: human (such as good health and education), social (such as social belonging, a sense of identity, leadership relations) and psychological (self-esteem, self-confidence, the ability to imagine and aspire to a better future). Also important are people's collective assets and capabilities, such as voice, organisation, representation and identity.⁵⁸

Reduction of crime rates and other social ills can arguably be achieved through addressing social inequalities in the society. Some scholars have argued that there exists a link between unemployment and crime, incarceration and family breakup.⁵⁹ Empowering the different groups

⁵² Quartey, P., "Financial sector development, savings mobilization and poverty reduction in Ghana," op. cit., p.11.

⁵³ See generally, World Commission on Environment and Development, *Our Common Future*, Oxford: Oxford University Press, 1987.

⁵⁴ An example of such short-term projects is the clean-up programme launched in Kibera by President Uhuru Kenyatta in 2014 in partnership with National Youth Service, which, although well meaning, may actually have been knee-jerk reactions to deeper problems in society.

⁵⁵ Combaz, E. & McLoughlin, C., *Voice, Empowerment and Accountability: Topic Guide*, Birmingham, UK: GSDRC, University of Birmingham, 2014, p.4.

Available at https://gsdrc.org/wp-content/uploads/2015/07/GSDRC_VEA_topic_guide.pdf [Accessed on 29/01/2019].

⁵⁶ *Ibid*, p.4.

⁵⁷ *Ibid*.

⁵⁸ *Ibid*.

⁵⁹ Reid, C., "Addressing the challenges of unemployment in low-income communities," *Community Investments Spr* (2009): 3-7 at p. 4.

in society can help them take charge of their economic and social lives thus effectively participating economic development and realisation of sustainable development agenda.

It has been observed that empowerment of those living in poverty is both a critical driver and an important measure of poverty reduction.⁶⁰ This is because the decisions and actions of poor people themselves can bring about sustainable improvements in their lives and livelihoods.⁶¹ The need for empowerment of the poor is justified on the fact that sustainable poverty reduction needs poor people to be both the agents and beneficiaries of economic growth - to directly participate in, contribute to and benefit from growth processes.⁶² Strengthening poor people's organizations, providing them with more control over assets and promoting their influence in economic governance will improve the terms on which they engage in markets.⁶³ Thus, economic empowerment combined with political and social empowerment will make growth much more effective in reducing poverty.⁶⁴

5.2 Enhanced and Diverse Education Opportunities

Some scholars have rightly argued that certain kinds of education such as vocational training and higher education, equip a man to perform certain jobs or functions, or enable a man to perform a given function more effectively.⁶⁵ This is justified on the theory that education enhances one's ability to receive, decode, and understand information, and that information processing, and interpretation is important for performing or learning to perform many jobs.⁶⁶ Thus, the process of education can be viewed as an act of investment in people; that educated people are bearers of human capital.⁶⁷ However, it must be pointed out that such education must be capable of empowering the citizenry not just any foreign narrative packaged as education and meant to brainwash the recipients.

In the local Kenyan scene, it has been argued that some of the so-called foreign investors source the bulk of their investment money from local and foreign banks domiciled in these developing countries. Technology transfer is equally elusive because these investors demand and are allowed

Available at https://www.frbsf.org/community-development/files/Reid_Carolina_CI_Spring_2009.pdf [Accessed on 29/01/2019]; Mehlum, H., Miguel, E. and Torvik, R., "Poverty and crime in 19th century Germany," *Journal of Urban Economics* 59, no. 3 (2006): 370-388;

⁶⁰ OECD, *Poverty Reduction and Pro-Poor Growth: The Role of Empowerment*, OECD Publishing, Paris, 2012. Available at <https://doi.org/10.1787/9789264168350-en> [Accessed on 29/01/2019].

⁶¹ OECD, *Poverty Reduction and Pro-Poor Growth: The Role of Empowerment*, OECD Publishing, Paris, 2012, op. cit.; "As he thinks, so he is; as he continues to think, so he remains."— James Allen, *As a Man Thinketh*.

⁶² OECD, *Poverty Reduction and Pro-Poor Growth: The Role of Empowerment*, OECD Publishing, Paris, 2012, op.cit.

⁶³ OECD, *Poverty Reduction and Pro-Poor Growth: The Role of Empowerment*, OECD Publishing, Paris, 2012, op. cit.

⁶⁴ OECD, *Poverty Reduction and Pro-Poor Growth: The Role of Empowerment*, OECD Publishing, Paris, 2012, op.cit.

⁶⁵ Nelson, R.R. and Phelps, E.S., "Investment in humans, technological diffusion, and economic growth," *The American economic review* 56, no. 1/2 (1966): 69-75 at p.69.

⁶⁶ *Ibid*, at p.69.

⁶⁷ Nelson, R.R. and Phelps, E.S., "Investment in humans, technological diffusion, and economic growth," *The American economic review* 56, no. 1/2 (1966): 69-75 at p.75.

to bring in their own key staff.⁶⁸ It has convincingly been argued that in order to develop the knowledgeable and skilled people, first, the people need to be educated to very high levels, university, preferably, and second, the individuals who have had advanced education are trained in the workplace.⁶⁹ This is justified on the belief that education develops the mind and character and equips the individual with the ability to think and provide theoretical solutions to present and future problems while training equips the individual with practical skills.⁷⁰ Acquiring both theoretical knowledge and practical skills is the only way to produce a versatile and productive workforce need for real development.⁷¹

Proper equipment of educational institutions should therefore form part of the strategies employed in not only achieving practical and tangible development of a country but should also be considered important for empowering individuals and in turn help realise socio-economic development through tackling unemployment and poverty crisis. Some scholars have specifically recommended that developing nations, African nations in particular, need to set up a framework for training university graduates in a curriculum-based scheme for 3 – 4 years, so as to acquire the skills for modernizing their traditional activities and for studying, servicing, maintaining, and duplicating, and eventually improving upon the things they import today.⁷² Thus, even as the government seeks to attract more foreign direct investments projects in the country, there is a need to review the investment policies in the country as well as equipping the Kenyan people with relevant skills and education as a way to build capacity for effective technology transfer.

The various legal provisions on incorporation of local content as a prerequisite to the approval of foreign investments in Kenya are also a laudable step to empowering the locals both socially and economically in order to build capacity for sustainable individual and national growth.⁷³

5.3 Role of Businesses in Socio-Economic Development

The Agenda 2030 on SDGs recognises the role of businesses in improving the lives of people and acknowledges that private business activity, investment and innovation are major drivers of productivity, inclusive economic growth and job creation.⁷⁴ The Agenda also calls upon all businesses to apply their creativity and innovation to solving sustainable development challenges. The goal is to foster a dynamic and well-functioning business sector, while protecting labour rights and environmental and health standards in accordance with relevant international standards and agreements and other ongoing initiatives in this regard.⁷⁵ Businesses can go a long way in

⁶⁸ Mbatawa wa Ngai, 'This is how to tackle the poverty gap,' Standard Digital, Posted on: 29th Jan 2019 10:07:19 GMT +0300. Available at <https://www.standardmedia.co.ke/business/article/2001311195/tackling-widening-rich-poverty-gap> [Accessed on 29/01/2019].

⁶⁹ Ogbimi, F.E., "Promoting sustainable economic growth and industrialisation: solution to mass unemployment and poverty", African journal of traditional, complementary, and alternative medicines: AJTCAM, vol. 4, No. 4, 2007, pp. 541-52, at p.549.

⁷⁰ Ibid, p.549.

⁷¹ Ibid, p.549.

⁷² Ogbimi, F.E., "Promoting sustainable economic growth and industrialisation: solution to mass unemployment and poverty", op. cit., at p.549.

⁷³ See Petroleum (Exploration, Development and Production) Bill, 2015 (provisions on local content); Mining Act, 2016; Community Land Act, 2016.

⁷⁴ Target 67, 2030 Agenda on Sustainable Development Goals.

⁷⁵ Target 67, 2030 Agenda on Sustainable Development Goals.

improving the lives of local communities where they operate through corporate social responsibility activities as well as local sourcing of materials and labour thus directly empowering these communities.

5.4 Tackling Corruption in Governance Matters

Although Kenya dropped one point in the 2018 global Corruption Perceptions Index (CPI) released by Transparency International on 29th January 2019, there are still rampant cases of corruption in the country.⁷⁶ This is despite the national values and principles of governance which demands for a system of governance that is based on, inter alia: patriotism, 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.⁷⁷

This is complemented by the *Leadership and Integrity Act, 2012*⁷⁸ which was enacted to give effect to, and establish procedures and mechanisms for the effective administration of Chapter Six of the Constitution and for connected purposes.⁷⁹ The primary purpose of this Act is to ensure that State officers respect the values, principles and requirements of the Constitution, including the national values and principles provided for under Article 10 of the Constitution.⁸⁰

There is need for a sustained onslaught on corruption in the country for long-term improvement of the state of governance in the country and ensure that all the funds meant for development projects and any benefits accruing from investments meant to improve the socio-economic status of the average citizen have a trickledown effect that reaches all.

5.5 Investing in Science and Technological Development for Socio-Economic Empowerment

Investment in educational institutions to produce highly educated and skilled population sets the foundation for embracement of the scientific and technological development. The Constitution of Kenya obligates the State to: promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage; recognise the role of science and indigenous technologies in the development of the nation; and promote the intellectual property rights of the people of Kenya.⁸¹ The Constitution also guarantees the right of every person to freedom of expression, which includes, inter alia: freedom to seek, receive or impart information or ideas; freedom of artistic creativity; and academic freedom and freedom of scientific research.⁸²

These constitutional provisions are also complemented by the *Science, Technology and Innovation Act, 2013*⁸³ which was enacted to facilitate the promotion, co-ordination and regulation

⁷⁶ Ibrahim Oruko and Francis Mureithi, 'Rwanda, Tanzania outperform Kenya in TI corruption index,' Daily Nation, Tuesday, January 29 2019. Available at <https://www.nation.co.ke/news/Kenya-drops-in-graft-index-despite-govt-crackdown/1056-4956238-156tulz/index.html> [Accessed on 29/01/2019].

⁷⁷ Article 10, Constitution of Kenya.

⁷⁸ Leadership and Integrity Act, No. 19 of 2012, Laws of Kenya.

⁷⁹ Ibid, Preamble.

⁸⁰ Ibid, sec. 3.

⁸¹ Article 11, Constitution of Kenya.

⁸² Article 33, Constitution of Kenya.

⁸³ Science, Technology and Innovation Act, No. 28 of 2013, Laws of Kenya.

of the progress of science, technology and innovation of the country; to assign priority to the development of science, technology and innovation; to entrench science, technology and innovation into the national production system and for connected purposes.⁸⁴ Notably, the Act defines “technology” to mean the application of knowledge to meet the goals, goods and services for sustainable development.⁸⁵ The Act establishes the National Commission for Science, Technology and Innovation⁸⁶ which is mandated to regulate and assure quality in the science, technology and innovation sector and advise the Government in related matters⁸⁷. The Act also spells out the specific functions of the Commission.⁸⁸ This commission can work closely with other stakeholders including communities to facilitate penetration and use of science, technology and innovation in various sectors, as envisaged within its mandate under the Act.

The 2030 Agenda on SDGs also recognise the role of Science, technology and innovation in realisation of the sustainable development agenda. It acknowledges that the spread of information and communications technology and global interconnectedness has great potential to accelerate human progress, to bridge the digital divide and to develop knowledge societies, as does scientific and technological innovation across areas as diverse as medicine and energy.⁸⁹

5.6 Duties of Citizens towards securing Socio-Economic Empowerment

While it is acknowledged that the State and other stakeholders have a major role to play in securing the social and economic rights for all, citizens also have a role to play towards the same also. Even as the State seeks to empower its citizenry through education and creating a conducive environment for business and self actualisation, the target citizens should also cultivate the right attitude and spend their time towards bettering their lives and acquire the necessary skills.⁹⁰ They must work closely with the State in actualising the social and economic rights as guaranteed under the Constitution. A lazy citizenry will not achieve social economic development. The duty to work should be built into the national legal framework as it is currently missing from the existing labour laws⁹¹. There is a need for the Kenyans to improve on their work ethics; effective use of time for self actualisation, as is the case in Japan.⁹² Prayers alone will not get us there; people must work.⁹³

⁸⁴ Ibid, Preamble.

⁸⁵ Ibid, Sec. 2.

⁸⁶ Ibid, Sec. 3.

⁸⁷ Ibid, Sec. 4.

⁸⁸ Ibid, Sec. 6.

⁸⁹ Target 15, 2030 Agenda on Sustainable Development Goals.

⁹⁰ Muigua, K., Utilising Time as a Natural Resource, and Innovation for Development in Kenya, available at <http://kmco.co.ke/wp-content/uploads/2018/08/Utilising-Time-as-a-Natural-Resource-and-Innovation-for-Development-in-Kenya-PAPER-6th-OCTOBER-2015.pdf> [Accessed on 2/02/2019].

⁹¹ Art. 41, Constitution of Kenya; labour laws of 2007 (Employment Act, Labour Relations Act, Occupational Safety and Health Act and Work Injury Benefits Act).

⁹² Muigua, K., Utilising Time as a Natural Resource, and Innovation for Development in Kenya, op cit.

⁹³ The Holy Bible, 2 Thessalonians 3:10-“For even when we were with you, we gave you this rule: ‘The one who is unwilling to work shall not eat.’”; Man will not get anything unless he works hard” (Surah al-Najm, 53:39) Al- Quran; Bhagavad Gita - Chapter 3 - Verse 8 | Srimad Bhagavad Gita-“You should perform your prescribed duties, since action is better than inaction. You cannot maintain your existence without action.”

7. Conclusion

Actualising social economic rights for sustainable development requires the concerted efforts of all the stakeholders who include the government (National and County governments), the populace, Non-Governmental Organisations and global partners, amongst others. It is a prerequisite for the realisation of the sustainable development agenda. Kenya can sustainably develop economically and socially until it is a first world economy. Actualising social economic rights for sustainable development in Kenya is a goal that can be achieved. It is possible.

Promoting Community Based Approaches in Environmental and Natural Resources Management in Kenya: A Reality or Mere Formality?

Abstract

Exploitation of environmental and natural resources forms the source of livelihoods for many communities across the world and particularly Kenya. However, for assured flow of such benefits for the current and future generations, the Sustainable Development agenda calls for a balance between conservation and fulfilment of human needs. It also calls for active and meaningful participation of all stakeholders, including communities in the management of such resources. This paper discusses the place of community based natural resource management approach in Kenya and makes a case for enhanced use of the same in management of various resources in the country, as way of enhancing conservation measures as well as eradication of poverty among various communities.

1. Introduction

Natural Resource Management (NRM) is used to refer to the sustainable utilization of major natural resources, such as land, water, air, minerals, forests, fisheries, and wild flora and fauna.¹ Environmental and natural resources form the main source of livelihoods for majority of Kenyan communities. It is in recognition of this relationship that the Constitution of Kenya 2010 and the statutes on natural resources provide for co-management of these resources. This is not only meant to ensure that the communities are assured of food and maybe a source of income but also gives them a chance to participate in the conservation and management of these resources for the realisation of sustainable development agenda. This paper offers a critical discussion on the place of Community Based Natural Resource Management (CBNRM) in Kenya and whether the State has effectively implemented the provisions on the same.

2. Approaches to Environmental and Natural Resources Management

Notably, natural resources provide fundamental life support, in the form of both consumptive and public-good services while ecological processes maintain soil productivity, nutrient recycling, the cleansing of air and water, and climatic cycles.² In a bid to strike a balance between the consumptive and public-good services on the one hand and ecological processes on the other hand, different approaches to resource management have been adopted.

Policymakers often adopt one or a combination of these approaches when legislating on protection of the environment and natural resources.³ These approaches include command and control,

¹ Iyyanki V Muralikrishna and Valli Manickam, 'Chapter Three - Natural Resource Management and Biodiversity Conservation' in Iyyanki V Muralikrishna and Valli Manickam (eds), Environmental Management (Butterworth-Heinemann 2017)

<http://www.sciencedirect.com/science/article/pii/B9780128119891000038> accessed 10 July 2020.

² Iyyanki V Muralikrishna and Valli Manickam, 'Chapter Three - Natural Resource Management and Biodiversity Conservation' in Iyyanki V Muralikrishna and Valli Manickam (eds), Environmental Management (Butterworth-Heinemann 2017)

<http://www.sciencedirect.com/science/article/pii/B9780128119891000038> accessed 10 July 2020.

³ Gunningham, N. & Sinclair, D., 'Designing Smart Regulation,' in Bridget M. Hutter (ed), A Reader in Environmental Law (Oxford University Press, 1999), p.305; Muigua, K., Kariuki, F., Wamukoya, D.,

market-based approaches, incentives (taxation and subsidies); Community based natural resource management (CBNRM) and traditional resource management institutions⁴; Ecosystem-based approaches such as integrated water resources management (IWRM) or River basin management, integrated coastal zone management (ICZM) and integrated management of land⁵.

While the different approaches to environmental and natural resources management as listed above are to be applied as complementary tools in natural resource management and not mutually exclusive as they overlap with one another in their application⁶, this paper is mainly concerned with Community-based natural resource management approach.

2.1 Community Based Approaches in Environmental and Natural Resources Management

Community-based natural resource management (CBNRM) has been defined in different ways by different authors. One of the definitions that stand out is CBNRM as ‘a people-centered approach to the integration of conservation of the natural resource base (water, soil, trees and local biodiversity) and development to overcome poverty, hunger and disease’.⁷

Community based approaches in environmental and natural resources management come in various forms which include: social and community forestry, community wildlife management, cooperative or co-management, buffer zone management, participatory multipurpose community projects, communal area management for indigenous resources, among others.⁸

Despite often important differences, all these expressions of CBNRM are associated with certain characteristics, including: a commitment to involve community members and local institutions in the management and conservation of natural resources; an interest in devolving power and authority from central and/or state government to more local and often indigenous institutions and peoples; a desire to link and reconcile the objectives of socioeconomic development and environmental conservation and protection; a tendency to defend and legitimize local and/or indigenous resource and property rights; and a belief in the desirability of including traditional values and ecological knowledge in modern resource management.⁹

Natural Resources and Environmental Justice in Kenya, Glenwood Publishers, Nairobi – 2015, Chapter Three.

⁴ See generally, Measham, T.G. & Lumbasi, J., “Success factors for Community Based Natural Resource Management (CBNRM): lessons from Kenya and Australia.” *Environmental Management*, Vol. 52 (3), 2013, pp. 649-659.

⁵ See Feeney, C. & Gustafson, P., “Integrating Catchment and Coastal Management-A Survey of Local and International Best Practice,” Prepared by Organisation for Auckland Regional Council, Auckland Regional Council Technical Report 2009/092, 2010.

⁶ Blanco, E. & Razzaque, J., *Globalisation and Natural Resources Law: Challenges, Key Issues and Perspectives*, (Edward Elgar Publishing Limited, 2011), p. 106; See also Miller, B. W. & Morissette, J. T., “Integrating research tools to support the management of social-ecological systems under climate change,” *Ecology and Society*, Vol. 19, No. 3, 2014, Art. 41.

⁷ ‘Community Based Natural Resources Management’ (World Neighbors) <<https://www.wn.org/what-we-do/community-based-natural-resources-management/>> accessed 8 July 2020.

⁸ Stephen R Kellert and others, ‘Community Natural Resource Management: Promise, Rhetoric, and Reality’ (2000) 13 *Society & Natural Resources* 705, at pp. 705-706.

⁹ *Ibid*, at p. 706.

CBNRM approaches have been associated with the following key elements: multi-stakeholder collaboration that involves all participants, from communities, to government, to NGOs, and promotes coordination among them; conflict management mechanisms – support processes to manage natural resource conflicts among stakeholders; participatory action research – collaborative fact-finding and analysis generates a mutually agreed upon perspective for action; strong local organizations, such as forest-farmer groups and inter-village networks built from the bottom-up; livelihood improvement and environmental services; policy support and law enforcement are essential to curbing illegal encroachment leading to ecosystem degradation; collaborative management plans– shared responsibilities and decision-making among all stakeholders through joint management plans of natural resources; participatory monitoring and evaluation – promote learning, trust and accountability through monitoring of the natural resource base and application of the management plan; and gender and social justice in access to, and control of, natural resources as the ultimate measure of the sustainability of community-based natural resource management efforts.¹⁰

The next section offers an overview of Kenya’s regulatory framework on the adoption and implementation of CBNRM approach as far as management of environmental and natural resources in the country are concerned. It also critically discusses the effectiveness of Kenyan Government’s efforts and commitment in adoption and application of Community-based natural resource management approach as per the statutory provisions.

3. Regulatory Framework on Community Based Approaches in Environmental and Natural Resources Management in Kenya: Challenges and Prospects

The regulatory framework on management of environmental and natural resources in Kenya consists of the Constitution and various sectoral laws and policies. This section highlights some of these provisions with a bias on those that provide for the use of community based environmental and natural resources management.

To begin with, the national values and principles of governance such as sharing and devolution of power; democracy and participation of the people and sustainable development provide a basis for CBNRM.¹¹ The Constitution obligates the State to protect and enhance indigenous knowledge of biodiversity of the communities.¹² The State is also obligated to encourage public participation in the management, protection and conservation of the environment.¹³ In settling land disputes, communities are encouraged to apply recognized local community initiatives consistent with the Constitution.¹⁴ This is meant to enhance community involvement in natural resource management since these provisions encourage in one way or the other the participation of local communities

¹⁰ ‘Community Based Natural Resources Management’ (World Neighbors) <<https://www.wn.org/what-we-do/community-based-natural-resources-management/>> accessed 10 July 2020.

¹¹ Constitution of Kenya 2010, Art.10.

¹² Ibid, Art. 69(1) (c).

¹³ Ibid, Art. (1) (d).

¹⁴ Ibid, Art.60 (1) (g) and Art.67 (2) (f).

Promoting Community Based Approaches in Environmental and Natural Resources Management in Kenya: A Reality or Mere Formality?

in the management, use or ownership of natural resources.¹⁵ Notably, the 2010 Constitution of Kenya envisages community land which is classified as land that is lawfully held, managed or used by specific communities as community forests, grazing areas or shrines.¹⁶ It envisages a scenario where there is land management by communities.¹⁷

The Constitution also provides for community forests.¹⁸ The protection of community land and by extension forests is guaranteed in the Constitution in the sense that all unregistered land should be held in trust by the county governments on behalf of the communities.¹⁹ It is also provided that community land should not be disposed of or otherwise used in a manner that contravenes the rights of the members of that particular community.²⁰

Also worth mentioning is the paradigm shift towards the use of incentives to encourage community participation in wildlife management in Kenya.²¹ If private land owners and communities are given incentives to keep wildlife on their land, then they will perceive wildlife as an economic good and protect the wildlife in the same manner they protect their private property. This is important because command and control approaches to wildlife management have failed to curb loss of wildlife.

In forests management, the *Forest Conservation and Management Act 2016*²² provides for "community forest association" which means a group of local persons who have registered as an association or other organization established to engage in forest management and conservation.²³

Where a community forest association has been granted permission to participate in the management or conservation of a forest in accordance with the provisions of the Act, that association has obligations to: protect, conserve and manage the forest or part of the forest in accordance with an approved management agreement entered into with the Service and the provisions of the management plan for the forest; formulate and implement sustainable forest programmes that shall be consistent with the traditional forest user rights of the relevant forest community; protect sacred groves and protected trees; assist the Service or any other relevant authority in enforcing the provisions of the Act including in relation to illegal harvesting of forest products; with the approval of the Service enter into partnerships with other persons for the

¹⁵ Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, Glenwood Publishers, Nairobi – 2015, Chapter Three.

¹⁶ Constitution of Kenya 2010, Art.63(d).

¹⁷ Ibid.

¹⁸ Kibugi, R. *Governing Land Use in Kenya: From Sectoral Fragmentation to Sustainable Integration of Law and Policy*. Thesis submitted to the Faculty of Graduate and Postdoctoral Studies in partial fulfillment for the Doctors of Laws (LL.D) degree, University of Ottawa (2011), p. 443.

¹⁹ Art.63(3) of the Constitution.

²⁰ Ibid, Art.63 (4).

²¹ One of the objectives of the National Wildlife Conservation and Management Policy, 2012 is to promote partnerships, incentives and benefit sharing to enhance wildlife conservation and management. The Policy further proposes that the Government should provide economic incentives to induce or promote sustainable wildlife conservation and management; See also the Wildlife Conservation and Management Act, 2013, No. 47 of 2013, s.5.

²² Forest Conservation and Management Act, No. 34 of 2016, Laws of Kenya.

²³ Ibid, Sec. 48.

Promoting Community Based Approaches in Environmental and Natural Resources Management in Kenya: A Reality or Mere Formality?

purposes of ensuring the efficient and sustainable conservation and management of the forest; inform the Service of any developments, changes and occurrences within the forest which are critical for the conservation of biodiversity; help in firefighting; and do any other act that is necessary for the efficient conservation and management of the forest.²⁴

On the other hand, the management agreement between the Service and the community forest association confers on the association all or any of the following forest user rights: collection of medicinal herbs; harvesting of honey; harvesting of timber or fuel wood; grass harvesting and grazing; collection of forest produce for community based industries; ecotourism and recreational activities; scientific and education activities; plantation establishment through non-resident cultivation; contracts to assist in carrying out specified forestry operations; development of community wood and non-wood forest based industries; and other benefits which may from time to time be agreed upon between an association and the Service.²⁵

This is meant to motivate communities to invest in sustainable forestry management. Participation of communities in forests management is informed by the fact that exclusion of local communities in management and conservation of natural resources tends to escalate degradation rather than conservation.²⁶ The sense of ownership by communities facilitates gainful benefits to the local communities as well as encouraging community eco-governance.²⁷

While it is commendable that the Act recognizes the constitutional provisions on public participation by incorporating participatory and collaborative management of forests, where the public can actively and meaningfully be more involved in the conservation and management of forests, it appears like the drafters only envisaged a non-residential kind of cooperation, where any person who wishes to participate in the form of Community Forests Association must first apply for a permit and then must also do so while living within the area surrounding the forest in question and not inside the forest. The question that arises in such situations is what happens when the State is dealing with communities that have traditionally resided in such forests. Notably, The *Forest Conservation and Management Act 2016* recognises that community forests include forests on ancestral lands and lands traditionally occupied by hunter-gatherer communities.²⁸ How the State treats such scenarios raises a number of issues. It is not clear whether the State should allocate alternative settlement for such communities in order to achieve the non-resident approach to co-management or the Government should simply evict such communities as it has been the case in the recent past.²⁹

²⁴ Ibid, sec. 49 (1).

²⁵ Ibid, sec. 49 (2).

²⁶ See Vyamana, V.G., et al, 'Participatory Forest Management in the Eastern Arc Mountain area of Tanzania: Who is benefiting?' Available at http://iasc2008.glos.ac.uk/conference%20papers/papers/V/Vyamana_134501.pdf [Accessed on 8/07/2020].

²⁷ 'Eco-social sustainability in the Murray-Darling Basin,' Case study: regional sustainability efforts in the Murray-Darling Basin, (Hawke Research Institute, University of South Australia, 2010).

Available at <http://w3.unisa.edu.au/hawkeinstitute/research/ecosocial/eco-case-study.asp#top> [Accessed on 8/07/2020].

²⁸ Forest Conservation and Management Act, No. 34 of 2016, Sec. 30 (3) (e).

²⁹ 'Imminent Eviction of Ogiek from Homeland'

Promoting Community Based Approaches in Environmental and Natural Resources Management in Kenya: A Reality or Mere Formality?

The laws governing water resources in the country also envisage community involvement in the management of these resources. The *Water Act 2016*³⁰ provides that 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.³¹ A water resource users association shall be a community based association for collaborative management of water resources and resolution of conflicts concerning the use of water resources.³² Notably, the basin water resources committees may contract water resource users associations as agents to perform certain duties in water resource management.³³

As one of the strategies for co-management, the *Water Act 2016* provides for the designation of a defined area from which rain water flows into a watercourse to be a basin area for the purposes of the Act.³⁴ In addition, the Cabinet Secretary is, by notice published in the Gazette, to establish a basin water resources committee for each respective basin area provided for under section 24.³⁵ Such a basin water resources committee shall be responsible for the management of the water resources within a respective basin area.³⁶ In appointing members of the basin water resources committee, the Authority must ensure that such persons are residents of the respective basin area and shall include: a representative of a ministry responsible for matters relating to water resources; a representative of farmers or pastoralists within the basin area concerned; a representative of a public benefits organisation engaged in water resources management programmes within the basin area concerned; and a representative of the business community operating within the basin area concerned.³⁷

The powers and functions of the basin water resources committee shall be to advise the Authority and county governments, at the respective regional office, concerning: conservation, use and apportionment of water resources; the grant, adjustment, cancellation or variation of any permit; protection of water resources and increasing the availability of water; annual reporting to the users of its services and the public on water issues and their performance within the basin area; collection of data, analyzing and managing the information system on water resources; review of

<<https://www.culturalsurvival.org/news/imminent-eviction-ogiek-homeland>> accessed 11 July 2020; 'Mau Forest Evictions Leave Ogiek Homeless' <<https://www.culturalsurvival.org/news/mau-forest-evictions-leave-ogiek-homeless>> accessed 11 July 2020; 'Press Release: Kenya's Mau Ogiek Remain Excluded from Ancestral Forest Three Years after Landmark Land Rights Win | Forest Peoples Programme' <<https://www.forestpeoples.org/en/Kenya-Ogiek-still-excluded-from-forest-three-years-after-land-rights-win>> accessed 11 July 2020; 'Two Years on, Kenya Has yet to Implement Judgment in Ogiek Case – MRG Statement' (Minority Rights Group, 5 June 2019) <<https://minorityrights.org/2019/06/05/two-years-on-kenya-has-yet-to-implement-judgment-in-ogiek-case-mrg-statement/>> accessed 11 July 2020; 'Ogiek: We Support Eviction of Illegal Settlers from Mau Forest' (Daily Nation) <<https://www.nation.co.ke/kenya/counties/nakuru/ogiek-we-support-eviction-of-illegal-settlers-from-mau-forest-85436>> accessed 11 July 2020.

³⁰ Water Act, No. 43 of 2016, Laws of Kenya.

³¹ Ibid, sec. 29 (1).

³² Ibid, sec. 29 (2).

³³ Ibid, sec. 29 (4).

³⁴ Ibid, sec. 24 (1).

³⁵ Ibid, sec. 24 (2).

³⁶ Ibid, sec. 24 (3).

³⁷ Ibid, sec. 26 (3).

the basin area water resources management strategy; facilitation of the establishment and operations of water resource user associations; flood mitigation activities; information sharing between the basin area and the Authority; the equitable water sharing within the basin area through water allocation plans; and any other matter related to the proper management of water resources.³⁸

The Water Act 2016 requires that every county government must 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.³⁹ These measures shall include the development of point sources, small scale piped systems and stand pipes which meet the standards set by the Regulatory Board and which may be managed by the community associations, public benefits organizations or a private person under a contract with the county government.⁴⁰

Notably, the role of the user bodies established or appointed under the Water Act 2016 is merely to advise the Water Resources Management Authority, which is not obliged to take the advice. This was the same case in the pre-2010 constitutional era where the Water Act 2002 had similar provisions.⁴¹ The National Water Policy 1999 and the Water Act 2002, provided for a new institutional set-up for water resources management and water services provision at national and basin level. For participation of users/consumers and their empowerment, the Water Resources Users Associations (WRUAs) and Water Consumer Groups (WCGs) were established. In addition, Water Services Boards (WSBs) were established to promote asset development.⁴² Despite all these provisions in both pre and post 2010 constitutional statutes, there is little evidence that decentralized co-management approaches to water management in the country have been well utilised to ensure that all people enjoy their right to clean water while ensuring sustainable management of the water resources in the country.

The *Wildlife Conservation and Management Act, 2013*⁴³ envisages community participation in wildlife resources management through community wildlife associations and wildlife managers.⁴⁴ These are to be established by communities, landowners, groups of landowners and existing representative organizations. The object and purpose for which an association is established is to facilitate conflict resolution and cooperative management of wildlife within a specified geographic region or sub-region.⁴⁵ An association or wildlife manager approved by the Cabinet Secretary on the recommendation of the Kenya Wildlife Service in consultation with the county wildlife conservation committees shall: ensure that the association membership or the wildlife manager protects, conserves and manages wildlife conservancies and sanctuaries under their jurisdictions pursuant to their respective approved management plans; assist the service in

³⁸ Ibid, sec. 27.

³⁹ Ibid, sec. 94 (2).

⁴⁰ Ibid, sec. 94 (3).

⁴¹ See generally, Akech M., "Governing Water and Sanitation in Kenya," in Okidi, C.O., et al, (eds) *Environmental Governance in Kenya: Implementing the Framework Law*, (EAEPL, 2008), p.324.

⁴² Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, Glenwood Publishers, Nairobi, 2015, Chapter Three.

⁴³ *Wildlife Conservation and Management Act, No. 47 of 2013, Laws of Kenya.*

⁴⁴ Ibid, sec. 40 (1).

⁴⁵ Ibid, sec. 40 (2).

combating illegal activities, including poaching and bush meat trade; keep the regional wildlife conservation area committee informed of any development changes and occurrences within their area that may adversely affect wildlife; assist in problem animal control through community wildlife scouts drawn from among their membership or employees; and do any other act that is necessary to enhance community participation in wildlife protection, conservation and management.⁴⁶

The provisions for co-management of wildlife resources are meant to address the perennial human-wildlife conflict Kenya.⁴⁷ However, the same has had little success in curbing the problem if the recent statistics are anything to go by.⁴⁸ Some authors have even argued for the adoption of collaborative management in wildlife sector on grounds that both the state-based and community-based models of managing wildlife and other natural resources have failed to successfully fulfil goals of conservation and meet the socio-economic needs of the local communities.⁴⁹ To them, the co-management approach (also sometimes referred to as joint management, multi-stakeholder management, or management in partnership) seeks to create negotiated agreements between the protected areas' managers and local resource users and, therefore, offers a possibility to overcome conflicting interests over resource exploitation.⁵⁰ The *Wildlife Conservation and Management Act 2013* also envisages this co-management approach and the same should be explored.

In addition to the foregoing sectoral statutes, cultural and social principles applied traditionally by communities in management of environmental and natural resources are recognized under EMCA in so far as they are not inconsistent and repugnant to justice and morality or any other written law.⁵¹ Despite the statutory and constitutional provisions encouraging CBNRM approach in Kenya, there is overwhelming evidence that the State has done little if anything to implement the same. Indeed, the opposite may be said to be true if some of the State actions are anything to go by.

In this context, the Ogiek and the Endorois communities in Kenya are the main reference point. The reason for this is that they are forest dwellers and there has been an issue as to whether they should manage the forests in which they live in or it should be left to state institutions such as the

⁴⁶ Ibid, sec. 41.

⁴⁷ Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, Glenwood Publishers, Nairobi, 2015, Chapter Nine.

⁴⁸ '77 People Killed in Human-Wildlife Conflicts in 2018: Balala' (Daily Nation) <<https://www.nation.co.ke/kenya/news/77-people-killed-in-human-wildlife-conflicts-in-2018-balala-182650>> accessed 11 July 2020; 'Human-Wildlife Conflicts and Compensation for Losses in Kenya' (AfricanBioServices) <<https://africanbioservices.eu/human-wildlife-conflicts-and-compensation-for-losses-in-kenya/>> accessed 11 July 2020; Joseph M Mukeka and others, 'Human-Wildlife Conflicts and Their Correlates in Narok County, Kenya' (2019) 18 *Global Ecology and Conservation* e00620.

⁴⁹ John Mburu and Regina Birner, 'Wildlife Co-Management in Kenya: An Empirical Analysis of Landowners' Incentives for Participation'. *Deutscher Tropentag 2002* Witzenhausen, October 9-11, 2002 Conference on International Agricultural Research for Development < <https://pdfs.semanticscholar.org/8fa7/f0de16651abdf88ee91491a2c58a244c2f05.pdf>> accessed 11 July 2020.

⁵⁰ Ibid, pp. 1-2.

⁵¹ S. 5(b) of the Environmental Management and Co-ordination Act, 1999.

Kenya Forestry Service. The Ogiek are a forest dwelling people who live in the Mau forest in Nakuru. The Endorois, on the other hand, live near the Lake Bogoria reserve. The claim of the two communities has been tenure rights within the forest and wildlife protected areas.⁵² The issue has been a subject of litigation at the African Commission on Human and Peoples Rights.⁵³ It can, therefore, be argued that the two communities have their rightful place in the forests according to the Constitution and since they manage the forests, they are part of the community-based organizations that should be meaningfully included in the management of natural resources.

4. Walking the Talk: Making Community Based Approaches in Environmental and Natural Resources Management Work in Kenya

Some commentators have argued that due to the ‘interdependence of community well-being and ecosystem health, there is a need to strengthen the capacity of communities to have a voice in decisions about planning and design of conservation initiatives affecting them’.⁵⁴ This is because ‘the natural environment plays a huge role in the health and welfare of people who rely on it as their sole source of income and food’.⁵⁵ CBNRM approach not only gives communities a voice in management of natural resources within their locality but also allows them to benefit from them and also avert any adverse effects of environmental degradation, in recognition of the right to clean and healthy environment⁵⁶. It allows them to enjoy environmental democracy. Environmental democracy entails the principle of equal rights for all including the public, community groups, advocates, industrial leaders, workers, governments, academics and other professionals to be involved in environmental governance.⁵⁷ It connotes the right of all whose daily lives are affected by the quality of the environment to participate in environmental decision-making as freely as they do in other public interest matters such as education, health care, finance and government.⁵⁸ Access to environmental information and justice for all those who choose to participate in such decision-making is integral to the concept of environmental democracy.⁵⁹ In addition, Principle 10 of the *Rio Declaration*⁶⁰ provides that environmental issues are best handled with the participation of all concerned citizens, at the relevant level. It further provides for access to information by the public. At the national level, each individual must have appropriate access

⁵² ‘Defending Our Future: Overcoming the Challenges of Returning the Ogiek Home’ (Minority Rights Group, 27 May 2020) <<https://minorityrights.org/2020/05/27/defending-our-future-overcoming-the-challenges-of-returning-the-ogiek-home/>> accessed 11 July 2020.

⁵³ 276 / 2003 – Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya; Application No. 006/2012 – African Commission on Human and Peoples’ Rights v. The Republic of Kenya (The Ogiek case arose from Communication No. 381/09 – Centre for Minority Rights Development – Kenya and Minority Rights Group International (on behalf of the Ogiek Community of the Mau Forest) v Kenya, which was before the African Commission on Human and Peoples’ Rights (the Commission), and later referred to the Court.)

⁵⁴ ‘Community Based Natural Resources Management’ (World Neighbors) <<https://www.wn.org/what-we-do/community-based-natural-resources-management/>> accessed 10 July 2020.

⁵⁵ Ibid.

⁵⁶ See Article 42, Constitution of Kenya, 2010.

⁵⁷ Hazen, S., Environmental Democracy, (1998). Available at

<<http://www.ourplanet.com>> [Accessed on 12/7/2020]; Muigua, K., Nurturing Our Environment for Sustainable Development, Glenwood Publishers, Nairobi – 2016), Chapter Five.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ United Nations, Rio Declaration of 1992, UN Doc. A/CONF.151/26 (Vol. I).

Promoting Community Based Approaches in Environmental and Natural Resources Management in Kenya: A Reality or Mere Formality?

to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States must facilitate and encourage public awareness and participation by making information widely available.⁶¹

It has rightly been pointed out that ‘many indigenous peoples are still heavily dependent on natural resources for their survival, and have, over time, developed social and cultural mechanisms that reflect the very real dynamics of natural systems’.⁶²

CBNRM approach is informed by the view that sustainable management of natural resources is most likely to be achieved where local communities are able to manage and derive benefits from natural resources.⁶³ The approach calls for a commitment to involve community members and local institutions in management of natural resources, devolution of power and authority to the grass roots, a desire to reconcile the objectives of socio-economic development and environmental conservation, the tendency to defend and legitimize local and indigenous property rights and a desire to include traditional values in modern management of natural resources.⁶⁴

It is for these reasons that the Government of Kenya and other stakeholders in the management of environment and natural resources should reconsider and address the laxity experienced in the implementation of CBNRM approach in Kenya.

Kenya can learn from other countries within and beyond Africa. For instance, in Malawi, Lake Chilwa, a tropical lake without an outlet, and the second largest lake in Malawi, is a home to large populations of breeding waterfowls and an estimated 100 bird catchers are rely economically on the birds.⁶⁵ It is worth noting that the Lake is listed as a Ramsar site. The fertile Lake Chilwa Wetland also has a lot of agricultural activities with two main crops grown, maize and rice, and sustains thousands of people through rice farming and cultivation of a variety of vegetables.⁶⁶ A number of Community-Based Natural Resources Management (CBNRM) groups have been formed to manage different resources like fish, waterfowls, soil and trees.⁶⁷ While these groups

⁶¹ Report of the United Nations Conference on Environment and Development (Rio De Janeiro, 3-14 June 1992).

⁶² Jay Mistry, ‘Indigenous Knowledges’ In Kitchin R, Thrift N (eds) International Encyclopedia of Human Geography, Volume 5, pp. 371–376. Oxford: Elsevier. <https://www.academia.edu/940129/Indigenous_knowledges> accessed 10 July 2020.

⁶³ Muigua, K., Kariuki, F., Wamukoya, D., Natural Resources and Environmental Justice in Kenya, Glenwood Publishers, Nairobi – 2015, Chapter Three.

⁶⁴ Nelson F. & Agrawal, A., “Patronage or Participation? Community-based Natural Resource Management Reform in Sub-Saharan Africa,” Journal of Development and Change, vol. 39, No.4, 2008, pp.557-585; See also Kellert, S.R., et al, “Community Natural Resource Management: Promise, Rhetoric and Reality,” Society and Natural Resources: An International Journal, Vol.13 (8), p.706; Muigua, K., Kariuki, F., Wamukoya, D., Natural Resources and Environmental Justice in Kenya, Glenwood Publishers, Nairobi – 2015, Chapter Three.

⁶⁵ ‘Community-Based Natural Resources Management - the Case of Lake Chilwa Wetland, Malawi | Ramsar’ <<https://www.ramsar.org/news/community-based-natural-resources-management-the-case-of-lake-chilwa-wetland-malawi>> accessed 12 July 2020.

⁶⁶ Ibid.

⁶⁷ Ibid.

Promoting Community Based Approaches in Environmental and Natural Resources Management in Kenya: A Reality or Mere Formality?

are yet to receive user rights and legal tenure, Kenya can borrow a leaf especially around swampy areas and Lake Victoria which is currently choked by the invasive water hyacinth. The community living around the lake should be allowed to work closely with the Government to not only manage fish resources but also to keep the water resource clean. Kenya can also borrow a leaf from the management of the Okavango Delta System (a Ramsar site) in Botswana. The Okavango Delta is divided into Wildlife Management Areas (WMAs). These have been further divided into: Controlled Hunting Areas (CHAs); Commercial Wildlife Utilization; Community Managed Wildlife Utilization; Community Based Natural Resources Management Programme; and Non-Consumptive/Photographic.⁶⁸

Zimbabwe's Communal Areas Management Programme for Indigenous Resources (CAMPFIRE) also offers valuable example to Kenya. CAMPFIRE, started in the late 1980s in Zimbabwe, and subsequently widely emulated elsewhere in southern Africa, involves the sale by rural authorities of the rights to access wildlife to entrepreneurs who in turn market safaris to hunters and ecotourists.⁶⁹ CAMPFIRE was developed largely around the concept of managing wildlife and wildlife habitat in the communal lands of Zimbabwe for the benefit of the people living in these areas.⁷⁰

The Bigodi Wetland Sanctuary in Uganda is also another example where the local community has been running a successful community-based natural resource management programme (CBNRM) for the wetland for over a decade, with external visitors to the wetland providing ecotourism revenues and majority of households collecting a wide variety of plant and fish resources and water from the wetland for household use and livestock.⁷¹

Australia's Indigenous land and sea management projects, a funding program by the Australian Federal Government in recognition of the ecological value of Indigenous land management can also offer valuable lessons. Notably, the Australian programs provide funds to Indigenous people to support Indigenous land management activities) and are also known to generate social and economic benefits in addition to the ecological ones.⁷² They are thus considered as important economic vehicles for elimination of poverty in Northern Australia.⁷³ Notably, Australia was

⁶⁸ JobeManga and Gertrude Matswiri, 'Expert Meeting: Transboundary Cooperation For Protecting The Cubango-Okavango River Basin & Improving The Integrity Of The Okavango Delta World Heritage Property,' 3-4 June, Cresta Hotel, Maun, Botswana Okavango Delta World Heritage Property –History, Governance & Current Conservation Issues< whc.unesco.org > document> 12 July 2020.

⁶⁹ Peter GH Frost and Ivan Bond, 'The CAMPFIRE Programme in Zimbabwe: Payments for Wildlife Services' (2008) 65 *Ecological economics* 776.

⁷⁰ Ibid.

⁷¹ A Gosling, Charlie M Shackleton and J Gambiza, 'Community-Based Natural Resource Use and Management of Bigodi Wetland Sanctuary, Uganda, for Livelihood Benefits' (2017) 25 *Wetlands Ecology and Management* 717.

⁷² Diane Jarvis and others, 'Indigenous Land and Sea Management Programs: Can They Promote Regional Development and Help "Close the (Income) Gap"?' (2018) 53 *Australian Journal of Social Issues* 283.

⁷³ Ibid, p. 299; See also Diane Jarvis and others, 'Are Indigenous Land and Sea Management Programs a Pathway to Indigenous Economic Independence?' [2018] *The Rangeland Journal*.

emerging from a tradition of oppression of the indigenous peoples' rights to exploitation of natural resources.⁷⁴

While Kenya's legal framework on natural resource management may have provisions that envisage similar establishments, the implementation of the same has largely remained a challenge. Even where established, the same receive little, if any, support from the state agencies. Their establishment may therefore be argued to be a mere formality, with little involvement in the actual management of resources.

There is a need for the various state organs to work closely with stakeholders in the various natural resource sectors to establish the legal and institutional frameworks provided for under the statutes to ensure effective CBNRM. As things stand now, the statutes make provisions for the use of CBNRM but the actual implementation of these provisions is yet to be witnessed.

If water scarcity issues, logging problems, environmental degradation, poverty, human-wildlife conflicts and other social ills facing the natural resources sector in the country are to be eliminated, there is a need to revisit the above provisions and come up with ways on how best the same can be implemented. It is worth pointing out that the implementation of specific approaches under CBNRM may differ based on other factors, but the end result should be achieving conservation, poverty eradication and achievement of the sustainable development agenda. CBNRM is an important approach in the achievement of Sustainable Development Goals (SDGs). This is because it seeks to achieve several of the SDGs at a go. It seeks to achieve environmental conservation, economic and social empowerment through encouraging participation of communities in management of environmental and natural resources. This gives such a community a source of livelihood thus eliminating poverty while at the same time achieving conservation goals: all key goals of the sustainable development agenda as envisaged under the United Nations *2030 Agenda for Sustainable Development*⁷⁵.

5. Conclusion

CBNRM approach is not only considered as a response to the challenges of a decentralized management system which occasions natural resources degradation but also as a modern attempt to revive traditional mechanisms for the conservation of natural resources.⁷⁶ Giving local communities the rights to manage, use or own resources, creates incentives for them to collectively invest in natural resources management.⁷⁷ It is against this background that this paper advocates for renewed efforts in the full implementation of CBNRM in Kenya as a step towards eradication of poverty and enhancing community participation in environmental and natural resources management as a means to an end, that is, for the achievement of sustainable development agenda

⁷⁴ See *Mabo v. Queensland (No. 1)* (1988) 166 CLR 186 F.C. 88/062; *Mabo and others v. Queensland (No. 2)* [1992] HCA 23; (1992) 175 CLR 1 F.C. 92/014 (3 June 1992).

⁷⁵ UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

⁷⁶ Nelson F. & Agrawal, A., "Patronage or Participation? Community-based Natural Resource Management Reform in Sub-Saharan Africa," *Journal of Development and Change*, vol. 39, No.4, 2008, p.558.

⁷⁷ *Ibid*, p.558.

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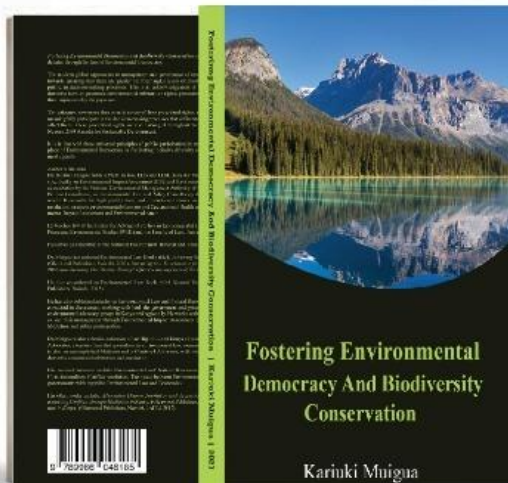
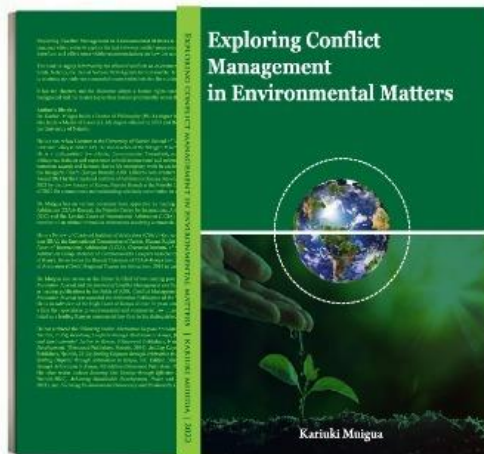
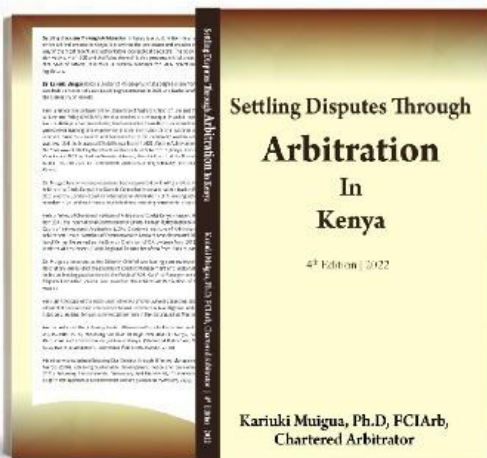
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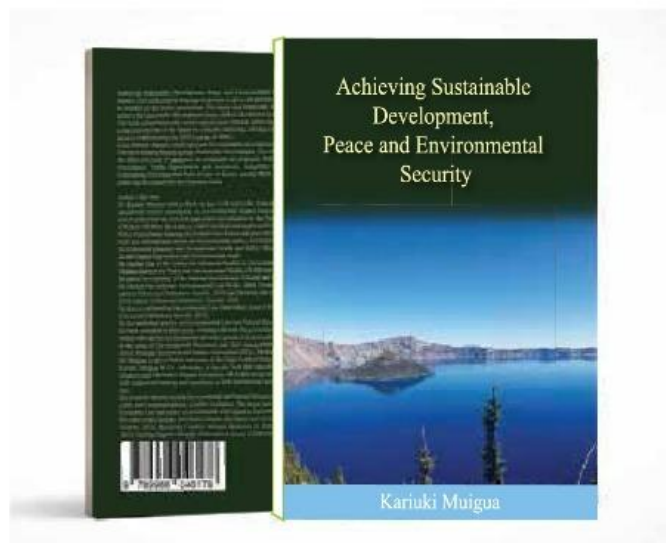
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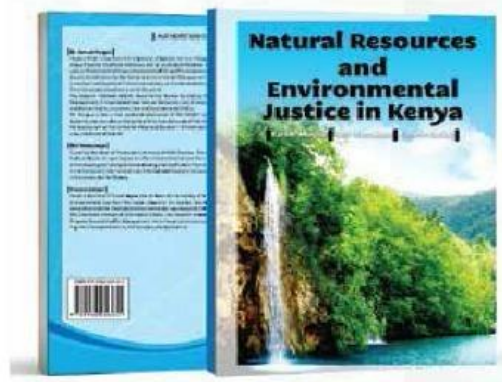
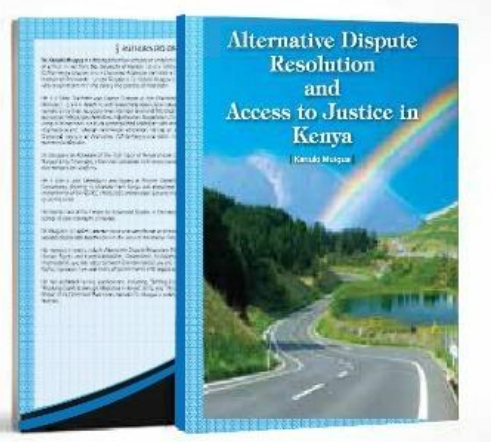
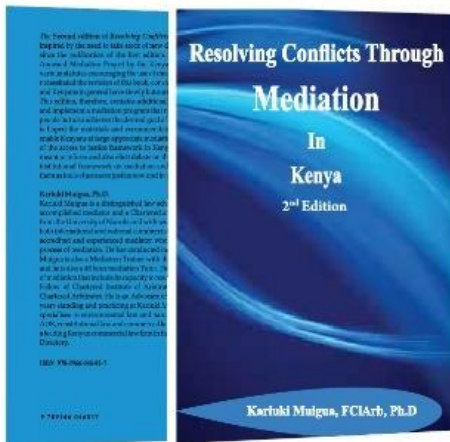
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Attaining Environmental Justice for Posterity is a book that entails a collection of papers on Environmental Justice in Kenya, Africa and the whole world. Some of the papers have been published in peer-reviewed Journals and book chapters.

This book was necessitated by the desire to merge the author's work in Environmental Justice. The papers address some of the salient and pertinent concerns facing the attainment of Environmental Justice in Kenya and Africa. They further cover the author's reflections and recommendations towards Attaining Environmental Justice for Posterity.

The book also addresses emerging concerns such as the COVID-19 pandemic and the concept of Environmental, Social and Justice (ESG) and their place in the Environmental Justice discourse.

Author's Bio-data

Dr. Kariuki Muigua holds a Doctor of Philosophy (Ph.D.) degree in law from the University of Nairobi attained in 2011. He also holds a Master of Laws (LL.M) degree attained in 2005 and Bachelor of Laws (LL.B) degree attained in 1988 both from the University of Nairobi.

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He is the winner of ADR Practitioner of the Year Award at the AfAA Awards 2022. He is also the winner of the African Arbitrator of the Year 2022 award at the 3rd African Arbitration Awards held at Kigali Rwanda beating other competitors from Egypt, Mauritius, Ethiopia, Nigeria and Kenya. He was awarded the Inaugural CIARB (Kenya Branch) ADR Lifetime Achievement Award 2021 as well as the ADR Publication of the Year Award 2021 by the Chartered Institute of Arbitrators (Kenya Branch). He also received the ADR Practitioner of the Year Award 2021 by the Law Society of Kenya, Nairobi Branch at the Nairobi Legal Awards. He is a recipient of the 8th C.B. Madan Prize of 2020 for commitment and outstanding scholarly contribution to constitutionalism and the rule of law in Kenya.

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His other works include *Securing Our Destiny through Effective Management of the Environment*, (Glenwood Publishers, Nairobi-2020); *Achieving Sustainable Development, Peace and Environmental Security* (Glenwood Publishers, Nairobi, 2021); and *Fostering Environmental Democracy and Biodiversity Conservation*, (Glenwood Publishers 2021); *Exploring Conflict Management in Environmental Matters* (Glenwood Publishers 2022).

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